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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Honorable Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2025-001716

Civil Action No. 2020-CP-42-02169

Andrea Allen, as the Personal Representative of the Estate of Albert Charles Jefferies, deceased,................................ Respondent,

v.

Chi Hun Lim, M.D., Megan Nicholas, P.A., and Carolina Orthopaedic and Neurosurgical Associates, PA .... Appellants.

INITIAL BRIEF OF APPELLANT MEGAN NICHOLAS, P.A.

C. Mitchell Brown
William C. Wood
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Megan Nicholas, P.A.

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STATEMENT OF ISSUES ON APPEAL

I. Whether Defendant Megan Nicholas, P.A. is entitled to judgment notwithstanding the verdict because Plaintiff failed to prove the requisite standard of care for an orthopedic surgeon or physician assistant, failed to prove breach of any standard of care, and failed to prove proximate cause between any breach by PA Nicholas and the injuries sustained by Decedent, or whether, at a minimum, Plaintiff failed to present reasonable evidence that PA Nicholas was grossly negligent.

II. Whether Defendant Nicholas is entitled to a new trial or, failing that, remittitur where the trial court erroneously listed a statutory beneficiary on the verdict form, permitting the jury to award damages to the beneficiary, which resulted in double recovery for the estate.

III. Whether Defendant Nicholas is entitled to a new trial where the trial court prejudicially erred in denying Defendants' motion for leave to add the affirmative defense of independent, intervening, and superseding causes, which Defendants made approximately one month before trial and where the amendment would not have caused prejudice to Plaintiff, and which defense was supported by evidence.

IV. Whether the trial court's order awarding Plaintiff prejudgment interest should be vacated because Plaintiff failed to satisfy the requirements of Rule 68, SCRCP, by making a "joint" offer to Defendants and failing to make the offer to CONA, PA.

STATEMENT OF THE CASE

This is an appeal of a medical malpractice verdict and judgment in favor of Plaintiff against Appellants Dr. Chi Hun Lim, Megan Nicholas, P.A., and Carolina Orthopedic and Neurosurgical Associates, P.A. ("CONA, PA"), and of the trial court's subsequent order awarding prejudgment interest to Plaintiff.

Plaintiff Andrea Allen, personal representative of the estate of decedent Mr. Jefferies, initiated this action on July 9, 2020, initially naming only the hospital system as defendants. Plaintiff later filed an amended complaint to add the rehabilitation facility and its treating physician, and then filed a second amended complaint on June 29, 2021, adding Chi Hun Lim, M.D., Megan Nicholas, PA, and Carolina Orthopedic and Neurological Associates ASC, LLC ("CONA ASC, LLC") as defendants.

The case proceeded through discovery and by April 2025, Plaintiff had settled with or otherwise dismissed all the defendants except Dr. Lim, PA Nicholas, and CONA ASC, LLC. About a month before trial, in April 2025, Dr. Lim, PA Nicholas, and CONA ASC, LLC moved to amend their answer to add an affirmative defense of independent, intervening, and superseding causes, which the trial court denied. The case proceeded to jury trial, held over five days, June 2-6, 2025.

Before closing, the parties submitted proposed jury instructions and verdict forms to the court. Plaintiff requested that both of the decedent's daughters—personal representative Andrea Allen and statutory beneficiary Michelle Hemphill—be listed on the verdict form so that the jury could award damages to each. Defendants objected on the ground that under the wrongful-death statute only the personal representative should go on the verdict form. The court overruled Defendants' objection and listed both daughters individually on the verdict form.

The jury returned a verdict in favor of Plaintiff and awarded damages in the amount of $3,000,000 to Ms. Allen, and $3,000,000 to Ms. Hemphill. The jury determined that both Dr. Lim and PA Nicholas were negligent and grossly negligent in their care and treatment of Mr. Jefferies. The trial court entered a Form 4 judgment on June 10, 2025.

The parties thereafter submitted timely post-trial briefing. As relevant here, the trial court ultimately issued several orders, including: (1) awarding Plaintiff prejudgment interest in the amount of $540,489.66; (2) ordering setoff in the amount of $470,000; (3) substituting CONA, PA in the case caption for CONA ASC, LLC; (4) denying Defendants' JNOV motions; (5) and denying Defendants' motions for new trial. *See* July 3, 2025 Orders; July 28, 2025 Order; September 16, 2025 Form 4 Order and September 19, 2025 Order.

Defendants timely appealed.

STATEMENT OF THE FACTS

A. Mr. Jefferies underwent lumbar fusion surgery without complication.

On July 18, 2018, Albert Jefferies underwent a successful revision lumbar fusion surgery at Spartanburg Regional Medical Center. (Lim Dep. 19:9–20:8; R. __.) The surgical team consisted of Dr. Chi Hun Lim, Ms. Rebecca Lehman, and Ms. Megan Nicholas; Dr. Lim is an orthopedic surgeon and partner of CONA, PA, and PA Lehman and PA Nicholas are physician assistants employed by CONA, PA. (*Id.* at 7:22–8:6, 19:9–20:8; Trial Tr. ["Tr.] 93:1–25; Tr. 316:23–318:8; R. __.) Dr. Lim performed the surgery, assisted by PA Lehman; there were no complications during surgery. (*Id.* at 19:9–20:8; R. __.)

PA Nicholas and PA Lehman worked in weekly rotation: for one week PA Lehman would handle surgery and hospital rounding while PA Nicholas handled office work, and the next week they would switch roles. (Nicholas Dep. 8:15–9:7, 10:13–20; R. __.) PA Nicholas was not directly involved in Mr. Jefferies's surgery but instead in his postoperative care. (*Id.* at 8:15–9:7; R. __.)

B. Mr. Jefferies's surgical team managed the surgical course, while the hospitalists managed the non-surgical medical issues.

After surgery, Dr. Lim and his team's role was to manage the surgical aspects of recovery, including the wound, pain control, ambulation, therapy, and DVT prophylaxis, and to determine whether the patient was surgically stable to leave the hospital. (Lim Dep. 14:13–16:3, 24:21–25:9, 60:21–62:1; Nicholas Dep. 13:1–15:5; R. __.) By contrast, consistent with the ordinary division of responsibility between orthopedic surgical teams and hospitalists, non-surgical medical issues, including medical clearance for discharge and discharge medication reconciliation, were handled by Spartanburg Regional's hospitalists. *Id.*; Tr. 93:19–94:15, 391:24–392:25; 455:24–456:21, 466:11–467:1, 469:2–22; R. __.) That division of labor remained consistent throughout the admission: Dr. Lim's team addressed the surgery and its immediate aftermath, while the

hospitalists handled broader medical issues such as oxygenation, electrolyte abnormalities, and medical readiness for discharge. Lim Dep. 24:21–25:9; Nicholas Dep. 13:1–15:5 (Apr. 30, 2024); Tr. 375:24–376:15, 391:24–392:25; R. __.)

C. Daily progress notes reflect the surgical team's monitoring of and adjustments for Mr. Jefferies.

During Mr. Jefferies's hospitalization, Dr. Lim and his physician assistants discussed patient care daily. (Lim Dep. 22:7–9, 37:19–38:8, 45:1–7; R. __.) PA Lehman completed progress notes for Mr. Jefferies for July 19 and 20, while PA Nicholas completed progress notes for Mr. Jefferies for July 21–26. (Tr. 322:7–322:25, 333:4–334:23; Nicholas Dep. 12:6–17, 24:17–20, 32:16–17, 36:19–21, 38:14–15, 43:17–20, 44:13–15; R. __.)

Per her usual practice, PA Nicholas reviewed the most recent hospitalist, therapy, nursing, and other provider notes so that the surgical team could continue caring for the patient with the most up-to-date information in the chart. (Nicholas Dep. 15:11–17:4; R. __.) She also testified that she generally completed her daily progress notes on the same day she saw the patient, although at times she entered or filed them later in the day after rounds rather than simultaneously. (*Id.* at 12:9–17; R. __.) Dr. Lim likewise testified that, in his usual practice, he reviewed and co-signed each physician assistant's notes if he agreed with them and would personally edit a note if he disagreed with its contents. (Lim Dep. 22:7–9, 38:3–12, 45:1–7, 48:21–49:1; R. __.) For Mr. Jefferies, Dr. Lim co-signed the physician assistants' notes on the same day they were written on July 19, then signed the notes from July 21–24 on the morning of July 24, and then signed the notes from July 25–26 on August 1. (*Id.* at 11–41:25, 43:2–44:25, 46:1–49:13; R. __.) Dr. Lim explained that he likely read the notes individually in the chart and then used the electronic inbox to co-sign them from a list, and he ordinarily reviewed his patient's chart daily even if the signing occurred later. (*Id.* at 47:23–48:13; Tr. 426:20–427:5; R. __.)

D. The surgical team responded to Mr. Jefferies's limited ambulation while he remained under their care.

As the hospitalization progressed, on July 21, PA Nicholas had begun discharge planning for rehabilitation, documenting "Rehab likely on Monday" and noting case-management involvement in arranging post-hospital placement. (Nicholas Dep. 30:24–31:14, 42:14–23; R. __.) Post-surgery, Mr. Jefferies was not ambulatory and was thus at risk for deep vein thrombosis ("DVT") and pulmonary embolism ("PE"). (*Id.* at 20:3–14; Tr. 139:13–25, 143:7–10, 160:13–161:9, 164:8–165:22, 166:13–24, 376:23–377:21; R. __.) Dr. Lim and his team initially treated these risks with prophylactic mechanical sequential compression devices ("SCD"). (*Id.* at 17:7–18:19, 36:5–6; R. __.) On July 21 and 22, 2018, Mr. Jefferies was still not ambulating well, and on July 22, Dr. Lim and PA Nicholas added a prescription for heparin, a chemical anticoagulant medication that assists with preventing blood clots; the heparin dose was in addition to the existing treatment with mechanical SCDs. (Tr. 120:23–121:6; Nicholas Dep. 19:25–20:19, 36:5–8, 53:7–20; R. __.) Dr. Lim decided to add heparin because Mr. Jefferies "wasn't as mobile as we'd like him" to be, and the surgical team could continue to monitor him in the hospital for any adverse effects from the heparin. (Lim Dep. 12:19–13:4; R. __.)

E. By July 26, Mr. Jefferies remained limited in mobility; meanwhile, Spartanburg Regional determined he was ready for discharge and rehabilitation.

As of July 25, 2018, physical therapy notes reflected that Mr. Jefferies could stand for only about fifteen seconds with two-person assistance, could not weight-shift to take steps, experienced oxygen desaturation with exertion, and had "very limited mobility." (Lim Dep. 50:16–52:24; R. __.) On the morning of July 26, 2018, Mr. Jefferies remained immobile and was still being treated with heparin and SCDs to protect against DVT and PE. (Tr. 167:3–5; Nicholas Dep. 37:17–25, 41:3–6, 44:21–44:3; R. __.) Mr. Jefferies received his last hospital dose of heparin at 10:09 a.m.

on July 26, 2018. Tr. 425:7–8; R. __.) If he had remained at Spartanburg Regional, he would have received another dose twelve hours later (i.e., 10:09 p.m.) and would have stayed on heparin and SCDs until the surgical team decided that they were no longer necessary. (Tr. 424:24–425:24; Nicholas Dep. 81:23–82:6; R. __.) Meanwhile, Spartanburg Regional's hospitalist service, through Dr. Jeffrey Grudger, medically cleared Mr. Jefferies for discharge to rehabilitation facility Peachtree Centre. (Tr. 391:24–392:25; Lim Dep. 14:13–16:3; R. __.) From a surgical standpoint, Mr. Jefferies was stable for discharge. *Id.*

It was common for Dr. Lim to discharge his surgery patients to a rehabilitation facility even if they were not yet ambulating well in order to receive more aggressive physical therapy. (Tr. 343:24–345:2; Nicholas Dep. 47:10–19; R. __.) Dr. Lim did not continue to prescribe heparin for Mr. Jefferies post-discharge because he expected that the receiving physician at the rehab facility would independently assess him and determine what medications or prophylaxis were appropriate under the care they were to provide. (Tr. 386:23–387:13, 461:18–462:4, 487:1–5; Nicholas Dep. 49:12–50:25, 78:1–80:20; R. __.) Further, Dr. Lim expected that the most important and relevant prophylaxis treatment at the rehab center would be increased mobility. (Lim Dep. 29:15–32:3; R. __.)

F. Spartanburg Regional's case-management process, not the surgical team, handled Mr. Jefferies's transfer records and discharge coordination.

Transfer of records to the receiving facility was described as part of the hospital case-management process, not a task handled personally by the surgical team. Spartanburg Regional's hospitalists ordinarily performed the discharge medication reconciliation, and the surgical team relied on hospital case managers to ensure that records and information were sent with the patient to the receiving facility. (Nicholas Dep. 47:20–48:14; Tr. 341:1–342:25, 355:14–16, 469:2–22; R. __.)

The surgical team deferred to Spartanburg Regional with respect to transmitting records or instructions to the receiving facility because coordination between the hospital and the facility was handled through the hospital's case-management process, the surgical team had never been tasked with personally sending such records, and everything the surgical team had done would have been reflected in the notes provided to the receiving facility. (Nicholas Dep. 82:17–83:10; Tr. 341:1–342:25; R. __.) Spartanburg Regional's protocols and HIPAA requirements likewise required those records to be transmitted through case management or medical records, not by the surgeon's office. (Tr. 403:18–404:15; R. __.) Further, the surgical team did not personally instruct case management to send the records because that was part of the ordinary, everyday process whereby case managers handled placement and record transmission automatically. (Tr. 345:3–346:17, 352:24–353:17, 355:14–16; R. __.)

Multiple witnesses testified that the hospital through its case managers had the responsibility of sending hospital records to the receiving facility. (Nicholas Dep. 82:21–24; Tr. 341:1–342:25, 403:18–404:15, 470:4–472:17, 477:7–21; R. __.) Regarding the care and treatment of Mr. Jefferies, at the time of discharge, the surgical team's progress notes, hospitalist notes, therapy notes, and nursing notes were all completed; however, the discharge summary itself had not yet been completed. (Tr. 354:9–14; R. __.)

G. Peachtree received a referral packet from Spartanburg Regional, but the packet did not include Mr. Jefferies's records for July 21–26.

On the afternoon of July 26, 2018, Spartanburg Regional discharged Mr. Jefferies, and he was transported to Peachtree. (Nicholas Dep. 46:25–47:5, 59:3–24; Tr. 249:22–252:24; R. __.) The EMS ambulance transport documents listed heparin among his medications. *Id.* Mr. Jefferies was not assessed by Dr. Alfred Ezman, Peachtree's admitting physician and medical director, until

the following day approximately 24 hours after he was admitted, as part of Dr. Ezman's routine new-patient visit. (Ezman Dep. 7:23–25, 8:1–10, 17:14–16, 25:13–22; R. __.)

Prior to his initial assessment, Dr. Ezman typically reviewed referral reports from transferring facilities in order to obtain information the patient might not otherwise provide, and to assess the patient's hospitalization course, medical history, and medications. (Ezman Dep. 11:8–13:8; R. __.) Peachtree received a 27-page Skilled Nursing Facility Referral Report from Spartanburg Regional for Mr. Jefferies, and Dr. Ezman testified that such a report was a typical hospital referral document used to summarize the hospitalization course and provide the receiving facility with the patient's history and medications. (Ezman Dep. 11:22–14:13; R. __.) However, despite the fact that notes from Dr. Lim's team were available through the date of discharge, the Referral Report only included notes through July 20; and at the time, the surgical team, including Dr. Lim and PA Nicholas, were not aware of the omission of these records. (Tr. 341:24–342:10; Nicholas Dep. 83:7–10; R. __.) Because the final six days of notes were missing, the "Inpatient Medicines" section of the Referral Report did not reflect anticoagulants, pharmacologic VTE prophylaxis, or any indication that Mr. Jefferies had been on heparin injections during his hospitalization. (Ezman Dep. 13:19–16:1; R. __.)

If the surgical team's daily progress notes from July 22 through 26 had been included in the Referral Report, it would have documented Mr. Jefferies's heparin treatment. (Tr. 225:16–25; Nicholas Dep. 36:4–8, 37:17–20, 44:22–45:3; R. __.) There was no evidence that anyone at Peachtree attempted to obtain the additional six days of missing hospital notes. (Tr. 402:16–404:15; R. __.) Despite the missing records, Dr. Ezman himself could have prescribed heparin for Mr. Jefferies at Peachtree, Peachtree could have obtained heparin through its contract pharmacy,

and Dr. Ezman could have obtained SCDs for Mr. Jefferies if he had deemed them appropriate. (Ezman Dep. 23:1–24:24; R. __.)

H. After transfer, Peachtree did not continue prophylaxis or undertake a PE workup before Mr. Jefferies's death.

After examining Mr. Jefferies on July 27, Dr. Ezman ordered a chest x-ray because of shortness of breath and decreased oxygen saturation, but the x-ray did not explain the low oxygen saturations or shortness of breath. (Ezman Dep. 27:13–29:23; R. __.) If a PE were suspected, the appropriate workup would have been a computed tomography angiography ("CTA")—a specialized imaging test that visualizes blood vessels using CT technology and contrast dye—and if PE were confirmed, then heparin. (Tr. 473:3–474:24; R. __.) But there is no evidence that Peachtree continued Mr. Jefferies's prophylaxis treatment, including heparin and SCDs, ordered new prophylaxis, or pursued a CTA for Mr. Jefferies. (Tr. 473:3–474:24; Ezman Dep. 23:1–24:20, 27:13–29:23; R. __.)

Early in the morning of July 28 around 4:30 a.m., Mr. Jefferies was found unresponsive; he was pronounced dead at approximately 5:14 a.m., Peachtree noted "possible PE" as part of the suspected cause of death, and an autopsy confirmed that Mr. Jefferies died from acute pulmonary thromboembolism. (Ezman Dep. 37:24–39:2; Tr. 475:1–18; Tr. Joint Ex. 1-B at pp. 160–161 and 1-C at pp. 1 and 7; R. __.)

I. The Personal Representative files suit and the case progresses through pre-trial proceedings.

On July 9, 2020, Plaintiff Andrea Allen, Mr. Jefferies's daughter, initiated this action as the personal representative of her father's estate, naming only Spartanburg Regional Health Services District, Inc., d/b/a Spartanburg Regional Healthcare System, d/b/a Spartanburg Medical Center as a defendant. (Compl.; R. __.) Plaintiff later filed an amended complaint to add Alfred Ezman, M.D., and Peachtree Operating Group, LLC, d/b/a Peachtree Centre SNF, and then filed a

second amended complaint on June 29, 2021, adding Chi Hun Lim, M.D., Megan Nicholas, PA, and Carolina Orthopedic and Neurological Associates ASC, LLC[1] as defendants. (Am. Compl. & Sec. Am. Compl.; R. __.) Dr. Lim, PA Nicholas, and CONA ASC, LLC filed their answer on August 30, 2021, asserting, among other defenses, the defense of lack of proximate cause. (Answer to Sec. Am. Compl. ¶ 52; R. __.)

The case proceeded through discovery and by April 2025, Plaintiff had settled with or otherwise dismissed all the defendants except Dr. Lim, PA Nicholas, and CONA ASC, LLC. On April 17, 2025, Dr. Lim, PA Nicholas, and CONA ASC, LLC moved to amend their answer to add an affirmative defense. (Motion to Amend Answer; R. __.) Specifically, they sought leave to add the affirmative defense of "independent, intervening, and superseding causes," claiming that Dr. Ezman's and Peachtree's negligence were independent, intervening, and superseding causes that broke the causal chain between any negligence (which was denied) committed by Dr. Lim, PA Nicholas, or CONA ASC, LLC and Mr. Jefferies's injuries. (*Id.*; *see also* Proposed Amended Answer ¶ 62; R. __.)

Plaintiff filed a written opposition to the motion to amend on May 5, 2025, arguing that Rule 15, SCRCP provides that leave to amend should only be freely given when the amendment "does not prejudice any other party." (Plaintiff's Opp. to Defendants' Mot. to Amend Answer at 2 (quoting Rule 15, SCRCP); R. __.) Plaintiff claimed that "[a]llowing Defendants to amend their Answer on the eve of trial to assert a new affirmative defense is clearly prejudicial." (*Id.*; R. __.)

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[1] In post-trial motions, an issue regarding whether Plaintiffs had named and served the correct legal entity arose. Carolina Orthopaedic and Neurosurgical Associates, P.A. is the entity that employed Dr. Lim and PA Nicholas. Carolina Orthopedic and Neurological Associates ASC, LLC, is a separate and distinct legal entity. For ease of reference, this brief will refer to Carolina Orthopedic and Neurological Associates ASC, LLC as "CONA ASC, LLC" and Carolina Orthopaedic and Neurosurgical Associates, P.A. as "CONA, PA"

Plaintiff further reasoned that Defendants were required to justify the delay in raising the defense, and because they had not shown any justification for the approximate three-and-a-half-year delay in moving to amend, their motion should be denied. (*Id.*; R. __.)

The trial court heard Defendants' motion on May 8, 2025. (*See* May 8, 2025 Transcript; R. __.) Counsel for PA Nicholas argued that Plaintiff had not established prejudice because Plaintiff herself had long alleged that Dr. Ezman and Peachtree were negligent in their care and treatment of Mr. Jefferies, and had submitted expert testimony in support of their theory of negligence against Dr. Ezman and Peachtree:

> There are abundant facts and opinions both from Dr. Ezman in his deposition, Dr. Sheynor in the plaintiff-expert's deposition that Dr. Ezman fell below the standard of care, was negligent in that he did not do a proper assessment of Mr. Jefferies in light of his current condition, including immobility, recent surgery, on testosterone, and did not institute any D.V.T. prophylactic measures such as to question S.C.D.'s sequential compression devices and/or subq heparin which he was on by my clients in the hospital. ***There are no facts that are new in order to support this motion. … [T]here will be no additional factual revelations. There'll be no additional factual evidence that we intend to call up and present. It's all been there since June of 2020.***

(*Id.* at 7:16–8:2; R. __.) (emphasis added).

Plaintiff's counsel responded by again attempting to push the burden on Defendants to show why they delayed in amending to add the affirmative defense given that trial was scheduled to begin in approximately one month and the case had been pending for close to four years. (*Id.* at 8:18-22; R. __.)

By order filed May 9, 2025, the trial court denied the motion to amend, reasoning that "allowing the amendment of Defendants' Answer to assert an additional defense would not permit Plaintiff adequate time to conduct any additional discovery needed regarding the new defense and would serve to prejudice Plaintiff." (May 9, 2025 Order; R. __.)

J. **The jury awards $3 million in damages to Plaintiff Andrea Allen, and $3 million in damages to statutory beneficiary Michelle Hemphill**.

The case proceeded to a jury trial over five days, June 2-6, 2025. Plaintiff's theory of liability against Dr. Lim and PA Nicholas was twofold, arguing that they breached the standard of care by (1) not continuing Mr. Jefferies on SCDs and/or heparin post discharge, and (2) not communicating Mr. Jefferies's medical needs to Peachtree. In support of this theory, Plaintiff offered the expert testimony of Christopher Erb, M.D, pulmonology and critical-care expert.

Dr. Erb testified that DVT and PE are recognized postoperative risks, and in his view, Mr. Jefferies remained a high-risk, immobile patient after surgery because of his major lumbar procedure, obesity, age, cardiac history, and lack of ambulation. (Tr. 133:19–137:25, 138:18–144:2, 160:15–161:20; R. __.) He further testified that the surgical team initially used mechanical prophylaxis and later added heparin on July 22 because Mr. Jefferies still was not ambulating, and that, because Mr. Jefferies never became ambulatory during the hospitalization, the same clot protection should have continued at discharge. (*Id*. at 161:12–161:24, 163:15–168:19; R. __.) Dr. Erb also testified that the standard of care required Dr. Lim and his team to communicate the ongoing clot-protection plan, medication history, and relevant progress notes to Peachtree through a timely discharge summary, complete records, or direct physician-to-physician communication, and he opined that the failure to continue prophylaxis and communicate that plan more likely than not led to the fatal pulmonary embolism. (*Id*. at 168:24–170:24, 175:20–181:20, 184:19–188:8; R. __.) After Plaintiff rested on June 4, 2025, Defendants moved for a directed verdict on both negligence and gross negligence, which the trial court denied. (Tr. 307:13–309:1; R. __.)

Defendants answered Plaintiff's theory with a contrary standard-of-care narrative, contending that Dr. Lim and his team acted reasonably in managing postoperative clot prophylaxis, that discontinuing SCDs and heparin at transfer to rehab did not violate the standard of care, and

that responsibility for transmitting the complete hospital chart to Peachtree rested with the hospital discharge process rather than with the surgical team. (Tr. 441:22–25, 444:9–24, 457:20–461:25, 464:9–468:21, 469:2–472:18, 476:12–478:15; R. __.) In support of that defense, Defendants offered the expert testimony of Steven Poletti, M.D., an orthopedic spine surgeon. (*Id*. at 441:22–25; R. __.)

Dr. Poletti testified that Dr. Lim and his team met the standard of care and that this case involved an unusually extensive posterior lumbar surgery presenting a significant bleeding and epidural-hematoma risk, making anticoagulation a matter of surgical judgment rather than a fixed rule. (*Id*. at 443:13–448:23; R. __.) He further testified that the use of SCDs through discharge and the later addition of prophylactic heparin on July 22 were both reasonable, and he opined that discontinuing those measures at transfer to rehab likewise remained within the standard of care because there were no clinical signs of DVT from the surgical team's perspective and the hospitalist had documented that Mr. Jefferies's respiratory issues had resolved and that he was medically cleared for discharge. (*Id*. at 452:3–455:23, 459:16–460:14, 464:9–469:1, 477:7–21; R. __.) Dr. Poletti also testified that orthopedic spine surgeons ordinarily defer to hospitalists on cardiopulmonary and anticoagulation-related medical issues and that, in his view, responsibility for transmitting the complete chart to Peachtree rested with the hospital discharge process rather than with Dr. Lim or PA Nicholas. (*Id*. at 455:19–457:22, 463:6–467:1, 469:25–472:18, 477:7–21; R. __.)

On June 6, 2025, after the submission of all the evidence, Defendants renewed their motion for a directed verdict on both negligence and gross negligence, which the court again denied. (Tr. 489:1–490:7; R. __.)

Prior to closing arguments, the court held a charge conference outside the presence of the jury and the court reporter. (Tr. 490:15–492:2; R. __.) The parties submitted proposed verdict forms. (Defendants' Proposed Verdict Form; R. __.) The verdict form proposed by Defendants listed only Plaintiff (Andrea Allen, Personal Representative of the Estate of Charles Jefferies) as a person potentially entitled to recover damages. (*Id.*; R. __.) Plaintiff's proposed verdict form listed two people potentially entitled to recover damages: Plaintiff Andrea Allen, and Mr. Jefferies's other daughter, statutory beneficiary Michelle Hemphill. Defendants objected to Ms. Hemphill being included on the verdict form because only the personal representative should be on the verdict form per the wrongful-death statute, but the trial court chose Plaintiff's verdict form, which listed Ms. Allen and Ms. Hemphill on the verdict form, with separate line-items for each person.

The parties stipulated that "Dr. Lim and Megan Nicholas, P.A. are employees of CONA" and that therefore "CONA is vicariously liable for any negligence found against either Dr. Lim or Megan Nicholas, P.A." (Tr. 496:10-15; R. __.)

The jury returned a verdict for Plaintiff finding that both Dr. Lim and PA Nicholas were negligent and grossly negligent in their treatment of Mr. Jefferies. (Tr. 598:2-20 R. __.) The jury awarded Plaintiff Andrea Allen $3 million in damages and separately, statutory beneficiary Michelle Hemphill $3 million in damages. (Tr. 598:13-15; Verdict Form; R. __.)

K. Defendants file post-trial motions, which the trial court denies.

Defendants Dr. Lim, PA Nicholas, and CONA ASC, LLC timely filed multiple post-trial motions including for judgment notwithstanding the verdict ("JNOV"), for a new trial, or alternatively for remittitur of damages, and to alter or amend the judgment. Specifically, Defendants argued as relevant here that:

- CONA ASC, LLC cannot be responsible for any part of the $6,000,000 judgment on the theory of respondeat superior because it has no employees, conducts no

business, and was not involved in any way with the medical care provided to Mr. Jefferies (June 17, 2025 Motion to Alter or Amend the Judgment; R. __.);

- Defendants were entitled to JNOV because Plaintiff failed to prove the elements of negligence and gross negligence (June 17, 2025 Motion for JNOV; R. __.);
- Defendants were entitled to a new trial because the verdict form erroneously listed statutory beneficiary Michelle Hemphill to receive a verdict (June 17, 2025 Motion for New Trial; R. __.);
- Defendants were entitled to a new trial because the court prejudicially erred by denying Defendants leave to amend their affirmative defense to add an independent/intervening/superseding case defense (June 17, 2025 Motion for New Trial; R. __.);
- The non-economic damages cap applied because Plaintiff failed to prove any Defendants were grossly negligent (June 17, 2025 Motion to Apply Noneconomic Damages Cap; R. __.);

Plaintiff moved for assessment of prejudgment interest under Rule 68, SCRCP and S.C. Code § 15-35-400 against Defendants on the ground that Plaintiff had filed an Offer of Judgment on Defendants Chi Hun Lim, M.D., Megan Nicholas, P.A., and Carolina Orthopaedic and Neurological Associates ASC, LLC in the amount of $500,000.00 on April 25, 2024, which Defendants rejected. (April 25, 2024 Offer of Judgment; June 16, 2026 Plaintiff's Motion for Prejudgment Interest; R. __.).

On July 28, 2025, the court granted Plaintiff's motion for assessment of prejudgment interest and denied Defendants' post-trial motions. (July 28, 2025 Order; R. __.) Defendants timely moved to alter or amend the award of prejudgment interest on the ground that the offer of judgment failed to comply with Rule 68, SCRCP because it was a joint offer directed at the wrong party—CONA ASC, LLC. (August 7, 2025 Motion to Alter or Amend; R. __.). The court denied the motion. (September 25, 2025 Order; R. __.)

STANDARD OF REVIEW

I. JNOV.

"When reviewing the trial court's ruling on a motion for directed verdict or a JNOV, this Court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). The plaintiff bears the burden to produce affirmative evidence—not mere speculation or the absence of evidence—to support each element of the claim. *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 389, 701 S.E.2d 776, 779 (Ct. App. 2010). If the plaintiff's evidence is insufficient to support the jury's verdict, the trial court should grant JNOV for the defendant. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013). Moreover, the court must grant JNOV "if no reasonable jury could have reached the challenged verdict." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016). A trial court's failure to direct a verdict or grant JNOV is reversible error. *Richardson v. Piggly Wiggly Cent., Inc.*, 404 S.C. 231, 743 S.E.2d 858 (Ct. App. 2013).

II. New trial.

This Court reviews a denial of a new trial motion for an abuse of discretion. *Kunst v. Loree*, 424 S.C. 24, 38, 817 S.E.2d 295, 302 (Ct. App. 2018). A trial court abuses its discretion if its "findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (Ct. App. 1996).

Interpretation of statutes and the South Carolina Rules of Civil Procedure is a question of law that is reviewed by this Court de novo. *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, 437 S.C. 640, 642, 880 S.E.2d 476, 477 (2022) (statutes); *Garrison v. Target Corp.*, 435 S.C. 566, 577, 869 S.E.2d 797, 803 (2022) (rules of civil procedure).

The denial of a motion to amend is reviewed for abuse of discretion. *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005). In the absence of a

proper reason, a denial of leave to amend is an abuse of discretion. *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

ARGUMENT

I. Plaintiff failed to prove the necessary elements of negligence and gross negligence.

To establish a medical malpractice claim, the plaintiff must prove: (1) The presence of a doctor-patient relationship between the parties; (2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances; (3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures; (4) Such negligence being a proximate cause of the plaintiff's injury; and (5) An injury to the plaintiff. *Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014).

Moreover, "'[a] plaintiff in a medical malpractice case must establish by expert testimony both the standard of care and the defendant's failure to conform to the required standard, unless the subject matter is of common knowledge or experience so that no special learning is needed to evaluate the defendant's conduct.'" *Jamison v. Hilton*, 413 S.C. 133, 141, 775 S.E.2d 58, 62 (Ct.

App. 2015) (quoting *Carver v. Med. Soc. of S.C.*, 286 S.C. 347, 350, 334 S.E.2d 125, 127 (Ct. App. 1985)).

Plaintiffs failed to prove by reasonable evidence the standard of care, breach of the standard of care, and proximate cause. PA Nicholas is therefore entitled to judgment notwithstanding the verdict.

A. Lack of proof of standard of care

Plaintiff failed to put forth adequate evidence, to a reasonable degree of medical certainty, to support generally accepted standards of orthopedic spine surgery and subsequently, any breach of those standards necessary to support the jury's verdict.

Plaintiff's theory of liability against Defendants was twofold, arguing that Defendants breached the standard of care by (1) not continuing Mr. Jefferies on SCDs and/or heparin post discharge, and (2) allegedly not calling or sending all of Mr. Jefferies's medical record to the discharge rehabilitation facility, Peachtree Centre. Under South Carolina law, Plaintiff was required to establish the specific standard of care for Defendants' field of medicine—orthopedic spine surgery. *See, e.g.*, *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 254, 487 S.E.2d 596, 599 (1997) (to establish the standard of care in a medical malpractice action, "the plaintiff must present evidence of the generally recognized practice and procedures that would be exercised by competent practitioners in a ***defendant doctor's field of medicine*** under the same or similar circumstances"); *Chalfant v. Carolinas Dermatology Grp., P.A.*, 439 S.C. 372, 387, 887 S.E.2d 1, 8 (Ct. App. 2023) (same).

Plaintiff failed to establish the standard of care as to a reasonably prudent orthopedic spine surgeon and his physician's assistant practicing under the same or similar circumstances as this case. Although Christopher Erb, M.D., was appropriately qualified as Plaintiff's expert witness in

pulmonology and related fields, in which he is board certified and credentialed, those are not the specialties in which Dr. Lim and PA Nicholas practiced, and Dr. Erb failed to opine as to the standard of care as it relates to orthopedic surgery or the guidelines followed by orthopedic surgeons. (*Compare* Tr. 133:20–134:25, *with* Lim Dep. 59:10–60:16; R. __.) Consequently, Dr. Erb's opinions addressed clot prophylaxis only at a level of general medical practice, not the orthopedic-spine-specific standard of care at issue in this case. For example, Dr. Erb testified about DVT prophylaxis, a subject that may overlap with multiple fields of medicine, but he did not ground his opinions, to a reasonable degree of medical certainty, in orthopedic spine surgery, the postoperative risks associated with DVT prophylaxis in an orthopedic spine patient, or the standard of care governing whether an orthopedic spine surgeon should continue heparin after discharge. (*Compare* Tr. 160:13–160:24, 163:15–166:2, 187:24–188:13, 201:22–203:20, *with* Tr. 375:1–380:60, 386:23–387:13, Tr. 461:18–462:4, 487:1–5; Nicholas Dep. 49:12–50:25, 78:1–80:20; R. __.) Dr. Erb did not establish the standard of care addressing whether an orthopedic spine surgery team has the duty to ensure that the receiving facility[2] actually received the relevant medical records. (*See* Tr. 187:8–23, 230:3–232:8; R. __.) Because Dr. Erb testified only to the standard of care of a physician *generally*, but not *specifically* the standard of care applicable to an orthopedic spine surgeon and his physician's assistant, his testimony failed to establish the standard of care in the relevant field of medicine.

However, Dr. Erb did opine that it was within the standard of care for physicians to communicate with one another, and between facilities, through three types of communication: the discharge summary, progress notes, or a phone call. (Tr. 170:2–171:9; R. __.) Dr. Erb conceded

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[2] Even if PA Nicholas, for example, could have properly personally FedEx'd all of her records to the rehabilitation facility, even that would not "ensure" the receipt of the records.

that some form of hospital records was presumably sent with the patient, even though, in his view, the communication was unclear and incomplete. (Tr. 199:14–21; R. __.) He further conceded he, as a receiving physician, would have wanted the available hospital records. (*Id*. at 226:16–228:11; R. __.) It was uncontroverted that the relevant medical records and daily progress notes had been completed by the time of discharge. (Tr. 225:16–25, 354:9–14; Nicholas Dep. 36:4–8, 37:17–20, 44:22–45:3; R. __.) The record supports that neither Dr. Lim nor his assistant PA Nicholas had any duty under any standard of care attributed to them to send medical records to the Peachtree Centre staff. (Nicholas Dep. 82:17–83:10; Tr. 341:1–342:25, 345:3–346:17, 352:24–353:17, 355:14–16, 403:18–404:15; R. __.) Indeed, the testimony reflects that Peachtree could have readily realized six days of notes were missing and obtained any additional records it believed were needed upon that realization, yet no one at Peachtree appears to have reached out to request the missing records. (Ezman Dep. 12:20–13:8, 46:11–47:–4; Tr. 254:17–255:14, 402:16–404:15; 471:18–23; R. __.) Accordingly, as Defendants argued in moving for a directed verdict, Plaintiff failed to present sufficient evidence establishing either the governing standard of care or a breach by Defendants as to either alleged theory of negligence.

It is true that expert testimony in a medical malpractice case need not always come from a specialist in the same field as the defendant, *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598 ("There was no requirement that Gooding's expert witness be an anesthesiologist in order to testify about intubation procedures"); *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("A doctor need not practice in the particular area of medicine as the defendant doctor to be qualified to testify as an expert."). But still, "[r]egardless of the area in which the prospective expert witness practices, he must set forth the applicable standard of care for the medical procedure

under scrutiny and he must demonstrate to the court that he is familiar with the standard of care." *Id.* at 250, 626 S.E.2d at 5. Plaintiff's expert failed to do so here.

Botehlo v. Bycura is instructive. 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984). There, this Court addressed whether an orthopaedic surgeon could testify as an expert regarding the standard of care to be observed by a podiatrist. *Id.* at 584, 320 S.E.2d at 63. This Court held he could not, reasoning that "[t]he standard of care in podiatry must be established by the testimony of one knowledgeable or skilled in podiatric practice." *Id.* at 585, 320 S.E.2d at 64. But plaintiff's expert lacked expertise on "the standards of good podiatric practice." *Id.* at 587, 320 S.E.2d at 65. True, he was an expert in orthopaedic surgery. But because he lacked knowledge, experience, and expertise regarding the standards of professional care generally observed by podiatrists, the expert could not opine—and plaintiff was therefore unable to establish—the relevant standard of care for a podiatrist. Summary judgment in favor of defendant was therefore appropriate. *Id.* at 587, 320 S.E.2d at 65.

Like the expert in *Botehlo*, Dr. Erb lacked knowledge, experience, and expertise regarding the standards of professional care generally observed by orthopedic spine surgeons or their assistants. His opinions about the standard of care, generally, regarding medication management post-discharge and transmission of medical records were not tailored to the facts of this case, because he did not opine as to the relevant duties and standard of care of an orthopedic spine surgeon and his physician's assistant under the same or similar circumstances as here.

B. Lack of proof of breach of any standard of care

There were essentially two issues pertinent for the determination as to whether the Defendants met the standard of care: (1) whether the standard of care required the Defendants to continue Mr. Jefferies on SCDs and/or heparin post discharge, and (2) whether the standard of care

required the Defendants to ensure Peachtree Centre received all of Mr. Jefferies's post-surgical medical records.

As to the first issue, while Mr. Jefferies remained under Defendants' care, Defendants provided medically adequate treatment. Trial Tr. 444:9–24 (June 6, 2025, pt. 01). However, Defendants' role did not extend to furnishing treatment at a separate rehabilitation facility after transfer. (Tr. 460:19–462:4, 465:1–467:3, 469:2–473:2; Lim Dep. 29:13–32:9; Nicholas Dep. 49:12–50:25, 78:1–80:3; R. __.) Accordingly, when Mr. Jefferies was discharged to rehab, the surgical team's inpatient treatment ended and post-transfer decisions belonged to Peachtree Centre. (*Id.*; R. __.) That is why the surgical team expected Dr. Ezman and Peachtree Centre to perform their own evaluation of Mr. Jefferies and to determine what treatment, prophylaxis, or medications were appropriate there. (*Id.*; R. __.)

The surgical team's expectation that a rehabilitation facility would determine appropriate treatment upon Mr. Jefferies's transfer is supported by the testimony and combined experience of Dr. Lim and Defendants' orthopedic spine surgeon expert, Dr. Poletti. (Tr. 460:19–462:4, 465:1–467:3, 469:2–473:2; Lim Dep. 29:13–32:6; R. __.) Dr. Lim does not continue heparin post-discharge, does not prescribe heparin or SCDs outside the inpatient setting, and has not sent a patient to Peachtree on heparin or SCDs during his years in practice. (Lim Dep. 8:3–4, 31:23–32:9; R. __.) Dr. Poletti described the same longstanding practice: over more than 30 years and more than 40,000 discharged spine patients, his practice had never sent a patient home or to rehabilitation on SCDs or subcutaneous heparin. (Tr. 439:6–9; 460:15–462:24; R. __.) Taken together, their testimony shows a settled and consistent approach: once a patient is discharged to rehabilitation, the receiving rehabilitation physician, not the surgical team, determines whether continued anticoagulation or mechanical prophylaxis is appropriate. (Tr. 460:15–462:24, 477:22–

478:4, 486:24–487:5; Lim Dep. 29:13–32:9; R. __.) Consequently, Dr. Lim and his assistant were not responsible for making Dr. Ezman or Peachtree Centre exercise that independent medical judgment nor to order medicine to be administered at Peachtree. (Ezman Dep. 23:1–24:20; Lim Dep. 29:13–32:9; R. __.) Instead, Dr. Ezman and Peachtree Centre retained the authority to evaluate Mr. Jefferies, prescribe heparin if indicated, obtain SCDs if indicated, and otherwise manage his care at the rehab facility. (Ezman Dep. 23:1–24:20; Lim Dep. 29:13–32:9; R. __.) In short, the record is replete with evidence that the standard in the practice of orthopedic surgeons is to discontinue heparin outside the inpatient setting and to leave any post-transfer decision about prophylaxis or medications to the receiving physician at the rehabilitation facility. (Tr. 460:15–462:24, 477:22–478:4, 486:24–487:5; Lim Dep. 29:13–32:9; Nicholas Dep. 49:12–50:25, 78:1–80:3; R. __.)

Plaintiff failed to provide any evidence that this practice is inconsistent with the standard of care as to orthopedic spine surgeons regarding the post-operative care of a spine surgery patient under the "same or similar circumstances" as here. In contrast, the affirmative testimony by Defendants' witnesses and the absence of specific evidence to the contrary overwhelmingly dictated the standard of care with regards to post-operative DVT prophylaxis as well as the standard of care as to whether to discontinue prophylaxis or medications at the time of transferring patients to rehabilitation facilities. (Tr. 445:1–448:23, 460:15–462:24, 477:22–478:4, 486:24–487:5; Lim Dep. 29:13–32:9; Nicholas Dep. 49:12–50:25, 78:1–80:3; R. __.) Further, Dr. Botts, who treated Mr. Jefferies, testified that he assesses all patients for DVT risk, that DVT prophylaxis is the orthopedist's responsibility, and that he personally had never discharged patients with DVT prophylaxis, while the trial record further showed that Dr. Gudger performed the medication reconciliation at discharge. (Botts Dep. 17:4–19:15, 39:3–13; Tr. 469:2–22; R. __.) Thus, the

record affirmatively supports Defendants' position via both orthopedic-spine and hospitalist testimony showing that Defendants' management of postoperative DVT prophylaxis complied with the governing standard of care under the circumstances presented.

Turning to the second issue, while there was no direct evidence that the case manager at the hospital in any way failed to send updated records to Peachtree, it was admitted by Dr. Ezman, without qualification, that Peachtree did not have any updated records of Mr. Jefferies "from the hospital" but inexplicably, did nothing to make any attempt to have them sent. (*See* Tr. 470:18–473:2; Ezman Dep. 12:5–13:12, 23:1–24:24; R. __.) Testimony was uncontroverted that it would have taken mere minutes to have any missing records sent. (Tr. 471:18–23; R. __.) Dr. Ezman testified that if he felt the need to consult the sending surgeons about a postoperative rehab patient, he was free to do so and had done so in other situations; however, he did not do that for Mr. Jeffries. (Ezman Dep. 46:11–47:4; R. __.) Peachtree and Dr. Ezman were not mere passive recipients of care information; the record shows that a receiving physician would expect and seek missing transfer records, that Dr. Ezman reviewed referral materials and could contact prior providers if needed, and that no one at Peachtree ever did so despite the absence of the final six days of Mr. Jefferies's hospital records. (Tr. 226:16–228:11, 470:18–473:2; Ezman Dep. 12:5–13:12, 23:1–24:24, 46:11–47:4; R. __.) Considering Plaintiff bore the burden of proof in establishing Defendants' actions fell below the standard of care, Plaintiff failed to meet this burden. Plaintiffs merely showed that Peachtree received incomplete transfer records and did not affirmatively seek the remaining records, and Defendants established that the orthopedic-spine standard of care did not require Dr. Lim or his team to personally transfer hospital records or call the receiving rehab physician. (Tr. 226:16–228:11, 470:18–473:2, 476:12–478:15; R. __.)

C. Lack of proof of proximate cause

Consistent with Defendants' Fifth Defense in their Answer, there was abundant and unchallenged evidence that Defendants' alleged negligence, if any, was not the proximate cause of the unfortunate death of Mr. Jefferies. Instead, the negligence of Spartanburg Regional in failing to transmit medical records to Peachtree, and the negligence of Dr. Ezman/Peachtree in failing to ensure receipt of the medical records, and subsequent failure to timely assess Mr. Jefferies's need for heparin were the proximate causes of Mr. Jefferies injuries and death and were not reasonably foreseeable.

"Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." *Hanselmann v. McCardle*, 275 S.C. 46, 48, 267 S.E.2d 531, 533 (1980). "Proximate cause is the efficient or direct cause; the thing that brings about the complained of injuries." *McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 386–87, 684 S.E.2d 566, 569 (Ct. App. 2009). "Proximate cause requires proof of (1) causation in fact and (2) legal cause." *Bramlette v. Charter–Medical–Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation in fact requires "but for" causation, whereas to establish legal causation the plaintiff must prove that the injury was foreseeable. *McKnight.*, 385 S.C. at 386–87, 684 S.E.2d at 569.

Courts look to the natural and probable consequences of the complained of act to determine foreseeability. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). A plaintiff proves legal cause by establishing the injury occurred as a natural and probable consequence of the defendant's negligence. *Id.* "When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability." *McKnight.*, 385 S.C. at 386–87, 684 S.E.2d at 569 (quotation omitted). "When the cause of a plaintiff's injury may be as reasonably

attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing the defendant's conduct proximately caused his injuries." *Id.* (quoting *Mellen v. Lane*, 377 S.C. 261, 280, 659 S.E.2d 236, 246 (Ct. App. 2008)).

For the transfer of records and discharge information, the record establishes that was in the hands of Spartanburg Regional's case-management process, not in the hands of the orthopedic surgical team. PA Nicholas testified she did not personally send instructions or records to Peachtree because that coordination was handled through the hospital, and Ms. Rebecca Lehman likewise testified that sending records to rehab was the case manager's responsibility, not a task assigned to Dr. Lim or other members of the surgical team. (Nicholas Dep. 82:17–83:10; Tr. 340:21–342:25; R. __.) Further, Dr. Lim testified that hospital records had to be transmitted through the hospital's own protocols and HIPAA-compliant release process, not by the surgeon's office. (Tr. 402:23–404:15, 468:21–469:12; R. __.) Thus, Peachtree's incomplete records on Mr. Jefferies were a result of lapses in the hospital's discharge process or Peachtree's own failure to follow up with Spartanburg Regional for the records, not through any personal act or omission by the orthopedic surgical team.

Dr. Ezman and Peachtree never made any attempt to retrieve the "missing" six days of progress notes that clearly spelled out that Mr. Jefferies had been placed on a prophylactic dose of heparin on July 22, 2018.. (Tr. 454:25–455:18, 470:18–473:2; Ezman Dep. 46:11–47:4; R. __.) The only progress notes received by Peachtree were for July 18, 19, and 20. (Tr. 470:18–471:11; R. __.) Mr. Jefferies was discharged to Peachtree on July 26. (Ezman Dep. 25:13–18; R. __.) Dr. Ezman testified that despite not knowing that his patient had been on heparin in the hospital, he admitted that he not only has the ability and opportunity to assess his patient and order a

prophylactic dose of heparin if he felt it was indicated, but he could also have ordered SCDs. (Ezman Dep. 15:20–16:1, 23:1–24:24, 37:16–23; R. __.)

Dr. Ezman did not perform his own physical exam until the next day after Mr. Jefferies was admitted to Peachtree, when he experienced a significant drop in his oxygen saturation to 81%, the lowest recorded in his post-op period. (Ezman Dep. 25:13–22, 31:11–23; Tr. 232:9–13; R. __.) Dr. Ezman ordered a chest x-ray that did not, as he admitted, answer why it had been so low, or why Mr. Jefferies had been short of breath. (Ezman Dep. 27:13–15, 29:10–23; R. __.) Both Plaintiff's and Defendants' experts opined that a chest x-ray will never diagnose a PE. (Tr. 473:10–474:13; R. __.) They further agreed that to rule out PE, one must perform a CTA, and if a PE is diagnosed, some type of anticoagulation, such as *therapeutic* heparin, should be considered. (*Id.*; R. __.) Thus, the record contains substantial evidence that the efficient, direct proximate cause of the damages claimed fell finally and only on someone over whom Defendants had no control. Further, it was reasonable for not only Defendants, but the treating hospitalists and defense expert, to expect that a rehab MD would do their own independent assessment and work up of their patient and order the appropriate testing, prophylactic measures or anything else the rehab doctor deemed indicated and necessary. (Tr. 386:23–387:13, 461:18–462:4, 469:2–22, 487:1–5; Lim Dep. 29:13–32:9; Nicholas Dep. 49:12–50:25, 78:1–80:20; Botts Dep. 17:4–19:15, 39:3–13; R. __.) Dr. Ezman had a responsibility to assess Mr. Jefferies's blood-clot risk while at Peachtree and the authority to order heparin and SCDs if he thought they were appropriate. (Ezman Dep. 23:1–24:24, 37:12–23; R. __.) Yet, Dr. Ezman did none of that, and a mere 17 hours after the oxygen desaturation of 81%, the lowest recorded during the post-operative period, Mr. Jefferies was found deceased in his room at Peachtree. (Ezman Dep. 25:13–22, 31:11–23, 38:2–18; Tr. 232:9–13; R. __.) The proximate cause of Dr. Jefferies's death was Dr. Ezman's failure to assess and properly treat Mr.

Jefferies after being admitted to Peachtree, not any act or omission by PA Nicholas. The trial court should have entered judgment in Defendants' favor.

D. Lack of proof of gross negligence.

Even if Plaintiff presented reasonable evidence of negligence, the medical malpractice statutory caps apply because Plaintiff did not do so with regard to gross negligence. S.C. Code Ann. § 15-32-220(A)-(E). Gross negligence "is the failure to exercise even the slightest care." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 331, 566 S.E.2d 536, 544 (2002) (quoting *Richardson v. Hambright*, 296 S.C. 504, 506, 374 S.E.2d 296, 298 (1988)).

Just as expert testimony is required to determine whether a defendant's conduct departed from the standard of care, it is also required to demonstrate that a defendant was grossly negligent in his or her care and treatment of a particular patient. *See, e.g.*, *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247–48, 626 S.E. 2d 1, 3–4 (2006). The common knowledge exception exists only when "the common knowledge or experience of laymen is extensive enough for them to be able to recognize or infer negligence on the part of the doctor." *Pederson v. Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986).

In this case, it is not common for an ordinary juror to know whether Dr. Lim's and PA Nicholas's alleged breach of the standard of care in discontinuing Mr. Jefferies on heparin post-discharge and not communicating directly with the rehabilitation facility rises to the level of gross negligence. Thus, expert testimony was necessary. *See Botehlo v. Bycura*, 282 S.C. 578, 583, 320 S.E.2d 59, 62 (Ct. App. 1984) ("The reason for requiring expert testimony is that matters of proper diagnosis and treatment ordinarily involve technical knowledge beyond the ken of laymen."). Plaintiff, however, failed to present any expert testimony to support her claim that PA Nicholas

was grossly negligent in her treatment of Mr. Jefferies which proximately caused her injuries and death.

"Normally, the question of what activity constitutes gross negligence is a mixed question of law and fact. However, 'when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.'" *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 571, 780 S.E.2d 252, 258–59 (2015) (quoting *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275, 277 (2000)).

In *Pack v. Associated Marine Insts., Inc.*, this Court affirmed the trial court's grant of summary judgment for individual employees on wrongful death and survival claims, holding the plaintiff failed to create a genuine issue of material fact as to whether the employees acted with gross negligence rendering them personally liable under the CFA. 362 S.C. 239, 245, 609 S.E.2d 134, 138 (Ct. App. 2004). This Court agreed the employees exercised "at least slight care" such that summary judgment was appropriate. *Id.* at 246, S.E.2d at 138.

As in *Pack*, Plaintiff failed to put forth adequate evidence, to a reasonable degree of medical certainty, to support a finding of gross negligence. Plaintiff's expert witness, Dr. Erb, opined that the revision laminectomy and post-operative care throughout Mr. Jefferies's hospital stay was very appropriate. He agreed that SCDs and heparin were both appropriate and timely in their use and administration. Further, Dr. Erb never indicated that at any point the Defendants *intentionally* or *consciously* failed to do something which was incumbent upon them to do. At most, he testified that they should have done something different or additional. Thus, because Plaintiff failed to prove gross negligence as a matter of law, the medical malpractice statutory caps on damages are applicable. PA Nicholas kept her notes and documentation, and the only evidence was that she reasonably relied on the hospital to provide such notes and documentation (which

would have included heparin) to the rehabilitation facility, and she reasonably would have expected the rehabilitation facility to request any missing notes or reports. There was no gross negligence.

Notably, PA Nicholas and Dr. Lim did not know that: (1) the full medical records were not sent to Peachtree, or (2) Dr. Ezman at Peachtree would not conduct a workup of Mr. Jefferies upon admission. The evidence at trial supports only one reasonable inference: PA Nicholas did not know that the medical records received by Peachtree were missing several days and thus did not show heparin treatment, and she did not know that Dr. Ezman would not do his own assessment and workup of Mr. Jefferies, nor request missing records, until it was too late.

Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 311–12, 534 S.E.2d 275, 277–78 (2000) and *Pratt v. Amisub of SC, Inc.*, 445 S.C. 199, 216, 912 S.E.2d 268, 278 (Ct. App. 2025), reh'g denied (Feb. 19, 2025), cert. granted (Aug. 14, 2025), cert. dismissed as improvidently granted, No. 2025-000563, 2026 WL 601997 (S.C. Mar. 4, 2026), are instructive. *Etheredge* involved a claim against a school district for alleged gross negligence in failing to prevent a fatal fight in the school. The trial court granted summary judgment for the school, finding that the affidavits submitted by the plaintiff failed to create an issue of material fact as to gross negligence (to overcome the immunity statute). This court reversed, and the Supreme Court reinstated the grant of summary judgment, holding there was no issue of material fact. Importantly, the supreme court reasoned that the school had “no direct knowledge or notice” of the animosity between the two students. *Id.* The Court reasoned that at the very least the school district exercised slight care to ensure the safety of its students by monitoring the hallways, communicating with one another by walkie talkies, and locking certain doors to ease the flow of student traffic. *Id.*

Plaintiff's evidence that the district "might have done more does not negate the fact that it exercised 'slight care.'" *Id.*

In contrast, in *Pratt*, this Court reached the opposite result, concluding in a medical malpractice case that plaintiff had offered sufficient evidence of gross negligence to create a jury question. *Pratt* involves a radiologist's failure to communicate critical diagnostic findings. A radiologist (Dr. Gilleland) discovered that nine rib fractures had been missed on an initial scan interpretation but made a ***conscious*** decision not to call this critical discrepancy to the attention of the emergency room physician—even though he knew the patient had already been discharged without the correct information. The court affirmed the jury's finding of gross negligence and recklessness, emphasizing the radiologist's own testimony that he knew "the E.R. doctor had already discharged the patient without having that knowledge" and that he "absolutely" knew the ER physician would remain unaware of the discrepancy unless Dr. Gilleland communicated it. *Pratt*, 445 S.C. at 216, 912 S.E.2d at 278. The court found "ample evidence that Dr. Gilleland acted with conscious indifference." *Id.*

The case here is like *Etheredge*, not *Pratt*. PA Nicholas (and Dr. Lim) did not make a conscious choice to withhold critical information from Peachtree and Dr. Ezman with knowledge they were missing information. Plaintiff's evidence that they could have done more does not support the finding of gross negligence. The jury's finding of gross negligence should be reversed because there is no record evidence to support the finding. Therefore, the non-economic damages caps, at minimum, should have been applied by the lower court.

II. The trial court erred by listing a statutory beneficiary on the verdict form and permitting the jury to award a verdict to the beneficiary.

Defendants are entitled to a new trial based on an erroneous verdict form. Over Defendants' objection, the verdict form improperly listed statutory beneficiary Michelle Hemphill and

permitted the jury to award damages to her. This was error, that has resulted in a duplicative recovery to the Estate of Albert Jefferies. Defendants are, therefore, entitled to (1) a new trial absolute, or at minimum (2) a reduction of that part of the verdict awarded improperly to a non-party, which alternatively could be construed as an improper double recovery.

In South Carolina an action for wrongful death may be maintained only by an executor or administrator of the decedent's estate. S.C. Code Ann. § 15–51–20 ("Every such action shall be brought by or in the name of the executor or administrator of such person.); *Lester v. McFaddon*, 415 F.2d 1101, 1103 (4th Cir. 1969). Every claim for wrongful death "shall be for the benefit of the wife or husband and child or children of the person whose death shall have been so caused[.]" *Id.* A wrongful-death claim "inheres in the personal representative, and the statutory beneficiaries *cannot proceed* in their own names." *Lester*, 415 F.2d at 1103 (emphasis added). If the estate recovers in a wrongful-death action, any recovery "does not go into the decedent's general estate but is payable, upon receipt by the personal representative, directly to the statutory beneficiaries." *Id.* In other words, only the estate is awarded a verdict, and then the verdict—if any—"so recovered s***hall be divided among the before-mentioned parties*** [i.e., the beneficiaries] ***in those shares*** as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate." S.C. Code Ann. § 15–51–40 (emphasis added).

A jury considering a wrongful death claim "may give damages, … as they may think proportioned to the injury resulting from the death ***to the parties respectively for whom and for whose benefit such action shall be brought***." S.C. Code Ann. § 15–51–40 (emphasis added). Under the plain terms of § 15–51–20, the jury can only award damages to the **party** for whose benefit the action was brought. A "party" is "[o]ne by or against whom a lawsuit is brought … For

purposes of res judicate, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit[.]" Black's Law Dictionary (12th ed. 2024). "Those persons who institute actions for the recovery of their rights, or the redress of their wrongs, and those against whom the actions are instituted, are ***the parties to the actions***. The former are, in actions at common law, called plaintiffs, and the latter, defendants." *Id.* (quoting Oliver L. Barbour, *A Summary of the Law of Parties to Actions at Law and Suits in Equity* 18 (1864)) (emphasis added). Under the plain and well understood meaning of *party*, the court erred in listing both of decedent's daughters on the verdict form. There is only one plaintiff party here: Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies. Thus, there should have been only **one party** listed on the verdict form: Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies. The Court violated the wrongful-death statute by listing both daughters—Andrea Allen and Michelle Hemphill—even though only Andrea Allen as personal representative was a plaintiff, and therefore only Andrea Allen was a **party**.

Ballard v. Ballard is consistent with this argument. 314 S.C. 40, 42, 443 S.E.2d 802, 803 (1994). In *Ballard*, Stacy Ballard died at the age of 18, after her parents had divorced. *Id.* at 41, 443 S.E.2d at 803. Her mother commenced a wrongful death action in her capacity as personal representative to recover for damages resulting from Stacy's death. *Id.* The mother ultimately settled the action for $300,000, so there was never precisely the question asked of the court whether both the mother and the father should go on the verdict form. *Id.* On appeal, the mother argued that under section 15–51–40 "each statutory beneficiary's recovery for wrongful death should [] be '***proportioned to the injury***' of that individual." *Id.* at 42, 443 S.E.2d at 803 (quoting mother's argument) (emphasis added). The court disagreed, holding that the distribution of damages among statutory beneficiaries "is controlled strictly by the share each would take as an heir in intestacy

regardless of the proportion of damages suffered by each." *Id. Ballard* is, therefore, entirely consistent with Defendants' argument that Michelle Hemphill should not have been listed on the verdict form. Just as there was only one settlement amount in *Ballard* (for $300,000) that was split equally by the two statutory beneficiaries (mother and father), here there should have only been one damages line on the verdict form and whatever amount was filled in there should be split equally between the two statutory beneficiaries (here, Andrea Allen and Michelle Hemphill).

The plain language of the wrongful-death statute dictates the result argued by Defendants. It is also consistent with *Branham v. Ford Motor Co.*, 390 S.C. 203, 236, 701 S.E.2d 5, 22 (2010). In that products liability case, plaintiffs sued two alleged joint tortfeasors, Ford and Hale. Over Ford's objection, the court asked the jury by way of a special verdict form question to apportion fault between Ford and Hale. *Id.* The South Carolina Supreme Court held this was error, because South Carolina's "comparative system for allocating liability between a plaintiff and a defendant is in no manner implicated where fault lies, if at all, among multiple defendants." *Id.* at 236, 701 S.E.2d at 22–23. Accordingly, "[a]llocating fault between Ford and Hale served no legitimate purpose." *Id.* at 236, 701 S.E.2d at 22. On the other hand, allocating fault had the very real possibility of prejudicing Ford as a "proper verdict form would have avoided the confusion caused by having the jury apportion blame between jointly and severally liable defendants" and "would have avoided the very real risk that the jury (unaware of joint and several liability principles) would take the cue from the apportionment question and inflate the actual damage award to ensure Branham received a full recovery from the one deep-pocket defendant (Ford)." *Id.* at 237, 701 S.E.2d at 23. *Branham* may not be dispositive of the issue here, but it is relevant and analogous. The trial court's verdict form caused confusion and created the very real likelihood of an inflated damages award.

Furthermore, Defendants' argument prevents the following scenario. Suppose there are two statutory beneficiaries, both siblings. Assume there is significant evidence favoring one child's loss, but little or none for the other. Writing down a "zero" or *de minimus* amount for the unfavorable sibling might seem unpalatable to the jury, who may prefer to award equal amounts to the siblings (as was done here). But the jury would never know in such an instance that they are improperly inflating the wrongful death damages award (like the jury in *Branham*), because of the post-award equal-distribution portion of the statute. Defendants' statutory argument eliminates this issue.

Consistent with the statutory scheme, the representative of the Estate of Albert Jefferies—Andrea Allen, one of Mr. Jefferies's daughters—sued for wrongful death on behalf of the estate. But inconsistent with the statutory scheme, the trial court, over Defendants' objections, listed daughter and statutory beneficiary Michelle Hemphill as a person to whom the jury would award damages. This was error and thus warrants a new trial absolute. Failing that, at minimum the improper verdict form has led to an impermissible double recovery for the estate, which must be remedied by vacating the damages awarded to Hemphill.

The Montana Supreme Court's decision in *Hern v. Safeco Ins. Co. of Illinois* is instructive. 125 P.3d 597, 606 (Mont. 2005). Becky Hern, the daughter of Ardell and Robert Hern, was killed in a motorcycle accident. Ardell was named as the personal representative of Becky's estate and brought a wrongful death action. Like the South Carolina statute, Montana wrongful-death statute states that "*only one* wrongful death action arising out of a wrongful death may be brought and the decedent's personal representative is the only person who may bring such an action." *Id.* (emphasis in original). The personal representative subsequently holds the proceeds of any damage award for the heirs of the decedent and the award does not become part of the decedent's estate. *Id.* The

trial court listed both Ardell (the mother and personal representative) and Robert (the father) on the jury verdict form, and the verdict entered a wrongful-death verdict and damages in the amount of $500,000 for Robert, and $650,000 for Ardell. The Montana Supreme Court vacated the $500,000 award to Robert, because "Robert was not the personal representative of Becky's estate and, therefore, it was error for the District Court to instruct the jury that it could award damages of any kind to Robert personally, in the wrongful death claim." *Id.*; *cf. Castillo v. Exclusive Builders, Inc.*, 733 N.W.2d 62, 65 (Mich. App. 2007) ("plaintiff could not state a claim under the wrongful death act in her individual capacity as a matter of law. Accordingly, no individual claim was submitted to the jury; the verdict form lists only damages recoverable by a personal representative under the act").

Hern is analogous and directly on point. This Court should apply its reasoning and conclusion and conclude either that Appellants are entitled to a new trial absolute, or at a minimum a remittitur of $3,000,000.

III. The trial court prejudicially erred in denying Defendants' motion for leave to amend their affirmative defenses.

The intervening negligence of a third-party is an affirmative defense that, if proven, breaks the chain of causation and can be a complete defense to liability. *Small v. Pioneer Mach., Inc.*, 316 S.C. 479, 489, 450 S.E.2d 609, 615 (Ct. App. 1994). Appellants here had a viable defense that the negligence of Dr. Ezman was an independent, intervening, and superseding cause that broke the causal chain between any negligence on the part of Appellants and Mr. Jefferies's injuries, but the jury never heard an instruction on the defense because the trial court precluded

Appellants from amending their answer to assert the affirmative defense. The trial court's ruling constitutes reversible error.

On April 17, 2025, over a month before trial, Appellants moved to amend their answer to include the following affirmative defense: "Plaintiff's damages or Plaintiff's Decedent's damages, if any, may have been the result of independent, intervening, and superseding causes over which these Defendants had no control." Defendants made clear in their motion that the independent, intervening, and superseding cause that they wished to offer at trial in defense of the claims against them was Dr. Ezman's negligent care of Mr. Jefferies after he was discharged to Peachtree. Plaintiff objected, arguing that "allowing Defendants to Amend their Answer on the eve of trial to assert a new defense is clearly prejudicial" and improperly implying that Defendants must "attempt to justify their delay." (Pl.'s Opp'n to Defs.' Mot. to Amend Answer at 2; R. __.)

Although a motion to amend is addressed to the discretion of the trial court, "[l]eave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005). The prejudice contemplated by Rule 15—which the *opponent* has the burden of proving—"is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." *Id.* (citing *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153 (1999)). The rule "strongly favors amendments and the court is encouraged to freely grant leave to amend." *Id.* Importantly, the burden was on *Plaintiff* to establish that prejudice would result from the amendment, not on *Defendants* to justify the timing of their request. *See Myat v. Tuomey Reg'l Med. Ctr.,* 427 S.C. 601, 609, 832 S.E.2d 306, 310 (Ct. App. 2019). Plaintiff failed to establish prejudice.

Instead of analyzing what prejudice would be caused by allowing the amendment, Plaintiff's arguments against the amendment and the trial court's denial of the amendment emphasized the *timing* of the motion. *Myat* is instructive in that regard. 427 S.C. 601, 832 S.E.2d 306. In *Myat*, the Court of Appeals found the trial court did not err in granting the defendant's motion to amend its answer to add a defense, which was made 10 days prior to the final hearing and over two years after the initial answer, because the plaintiff did not satisfy his burden of establishing prejudice and the complaint coupled with an affidavit from the defendant's counsel showed the plaintiff was on notice of the defense and had ample opportunity to refute it. *Id.* at 609, 832 S.E.2d at 310.

Notably, the trial court's order denying the amendment states, "allowing the amendment of Defendants' Answer to assert an additional defense would not permit Plaintiff adequate time to conduct any additional discovery needed regarding the new defense and would serve to prejudice Plaintiff." (May 9, 2025 Order; R. __.) But the court's reasoning ignored the fact that Plaintiff would not be prejudiced because Plaintiff had sued Dr. Ezman, a Peachtree physician, alleging that his care was negligent and that such failure was the direct and proximate cause of the death of Mr. Jefferies. (Motion to Amend Answer at 2; R. __.)[3] Further, Defendants argued that Plaintiff's own expert opined that Dr. Ezman deviated from the standard of care when he failed to appropriately assess Mr. Jefferies's numerous risk factors for the development of DVT and PE and timely initiate prophylactic treatment, and that this negligence resulted in Mr. Jefferies's critical PE and cardiopulmonary arrest. In other words, the issue of intervening/superseding cause that Defendants sought to assert in the amended pleading—namely, Dr. Ezman's negligence—was

[3] Both defendants Peachtree and Dr Ezman were dismissed by Plaintiffs prior to trial.

actually raised and fully known by Plaintiff and in fact argued and developed in discovery for several years prior to Defendants' Motion.

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) illustrates that even a last-minute motion on the first day of trial does not automatically justify denial. In that case, the sewer district sought to amend its answer on the morning of trial to add a Tort Claims Act damages-cap defense. The circuit court denied the motion, but the Court of Appeals reversed, finding the trial judge abused his discretion because: (i) the trial judge made no finding of prejudice; (ii) the plaintiff's own complaint had invoked the Tort Claims Act; and (iii) the plaintiff's attorney had stated on the record he did not have any problem with the amendment. *Id.* at 286–87, 607 S.E.2d at 717. The court emphasized that Parker—the party opposing the amendment—failed to satisfy her burden of establishing prejudice.

Because Plaintiff had notice of the issue to be tried and had spent several years in discovery advancing the causation-argument herself (and thus had a full and fair opportunity to introduce testimony to refute it), Defendants' proposed amendment to their answer would not have risen to the level of prejudice contemplated by Rule 15. But on the flip side, precluding the amendment prejudiced Defendants, cutting off a strong and viable defense that was supported by the deposition and discovery evidence, and made with sufficient time (approximately one month) for both Defendants and Plaintiff to prepare for trial.

An independent, intervening, or superseding cause can break the causal connection between an alleged tortfeasor's actions and a plaintiff's claimed damages. *Gause v. Smithers*, 403 S.C. 140, 150, 742 S.E.2d 644, 649 (2013) ("To exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged.") (quoting *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E.2d

321, 325 (1962)). In order for an independent, intervening, or superseding cause to relieve a defendant of liability, the "superseding act must so intervene as to exclude the negligence of the defendant as one of the proximate causes of the injury." *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978). An alleged act or series of acts breaks the causal chain when such acts are not reasonably foreseeable. *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct.App.1997) ("For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated."); *Stone v. Bethea*, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968) ("The law requires only reasonable foresight, and when the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability.")

Here, the record contained ample evidence from which a jury could find that Spartanburg Regional's, Peachtree Centre's, or Dr. Ezman's independent, intervening, and superseding negligence broke the causal chain and relieved Defendants of liability. But because the trial court barred Defendants from asserting that affirmative defense by denying leave to amend the Answer, the jury was never instructed on the doctrine or its legal effect. As a result, the jury was not told that even if it found Defendants negligent or grossly negligent, it was required to return a defense verdict if Spartanburg Regional's, Peachtree Centre's, or Dr. Ezman's unforeseeable negligence intervened and severed proximate causation.

Defendants presented evidence that responsibility for transmitting Mr. Jefferies's medical records to the receiving physician or facility rested with Spartanburg Regional's discharge planner, not with Dr. Lim, Megan Nicholas, or CONA, PA. (Tr. 471:4–473:2; R. __.) Spartanburg Regional's hospitalists ordinarily performed the discharge medication reconciliation, and the surgical team relied on hospital case managers to ensure that records and information were sent

with the patient to the receiving facility. (Nicholas Dep. 47:20–48:14; Tr. 469:2–22; 341:1–342:25, 355:14–16, 403:18–404:15; R. __.) Consistent with that process, Dr. Ezman testified that the 27-page Skilled Nursing Facility Referral Report he reviewed originated from Spartanburg Regional and was the type of referral documentation Peachtree typically received from hospitals for new admissions. (Ezman Dep. 11:22–12:14; R. __.) Dr. Ezman further acknowledged that, if additional information was needed, he was free to contact the treating surgeons regarding a postoperative patient. (*Id.* at 46:11–47:4. Yet, no evidence was presented that anyone from Peachtree called, e-mailed, or texted to request the last six days of progress notes which included documentation of Mr. Jefferies's heparin prophylaxis. (Tr. 472:4–473:3; R. __.) However, the testimony established, without contradiction, that it would have taken only minutes to transmit, or retransmit, the updated records had Peachtree requested them. (Tr. 471:4–23; R. __.) Given this evidence, it was not reasonably foreseeable to Defendants that Spartanburg Regional would fail to send over updated progress notes and that Peachtree and Dr. Ezman would fail to promptly review Mr. Jefferies's recent medical records and obtain any additional information as needed.

Further, Mr. Jefferies arrived at Peachtree on the afternoon of July 26, having accepted a bed at the facility two days earlier. (Tr. 220:20–222:12; R. __.) Dr. Ezman testified that he had the ability to prescribe and obtain injectable heparin and SCDs for patients at Peachtree if he thought they were appropriate, and he admitted to having a responsibility to assess Mr. Jefferies's blood-clot risk. (Ezman Dep. 23:1–24:24, 37:12–23; R. __.) Nevertheless, Dr. Ezman did not conduct a physical examination until nearly twenty-four hours after admission, at noon on July 27, and only after Mr. Jefferies experienced a significant oxygen desaturation to 81%. (*Id.* at 25:13–22, 28:3–17, 31:11–19; R. __.) Dr. Ezman ordered a chest x-ray, which he acknowledged did not explain the hypoxia or Mr. Jefferies's shortness of breath. (*Id.* at 27:13–15, 29:10–23; R. __.) Plaintiff's

expert testified that a chest x-ray does not show a PE, that if he suspected a PE he would consider ordering a CT angiogram, and that therapeutic anticoagulation can be used when PE is diagnosed. (Tr. 240:3–243:11; R. __.) As such, the record reflects Dr. Ezman undertook no testing that would rule in or rule out a PE.

It was reasonable not only for Defendants, but also for the treating hospitalists and Defendants' expert, to expect that a rehabilitation physician would timely conduct an independent assessment of the patient and order any appropriate testing, prophylactic measures, or other treatment deemed necessary. (Tr. 386:23–387:13, 461:18–462:4, 469:2–22, 487:1–5; Lim Dep. 29:13–32:9; Nicholas Dep. 49:12–50:25, 78:1–80:20; Botts Dep. 17:4–19:15, 39:3–13; R. __.) Plaintiff's own expert acknowledged that Dr. Ezman had the opportunity, in his independent judgment, to issue orders on admission and that PE should have been on Dr. Ezman's 'thinking mind' when Mr. Jefferies later developed an oxygen saturation of 81 percent." (Tr. 230:14–231:17, 243:25–244:21; R. __.) Yet, it was not, and a mere 17 hours after the oxygen desaturation of 81%, Mr. Jefferies was found deceased in his room at Peachtree. (Ezman Dep. 38:2–18; R. __.)

It was not reasonably foreseeable to Defendants that Peachtree and Dr. Ezman would fail to timely assess and treat their patient, would forgo performing a CTA, would not initiate heparin or apply SCDs, and would otherwise provide negligent care. Those failures were wholly independent of Defendants' conduct, unforeseeable to them, and constituted a superseding and intervening cause that severed proximate causation as a matter of law. Because the negligent care provided by Dr. Ezman and Peachtree was not reasonably foreseeable, Defendants possessed a valid and compelling independent, intervening, and superseding-cause affirmative defense.

Because there was sufficient evidence of an intervening/superseding cause, the jury should have been instructed on that defense. *Bethea v. Pedro Land, Inc.*, 290 S.C. 341, 347, 350 S.E.2d

392, 396 (Ct. App. 1986) (holding that issue of concurrent and intervening causes were "raised by the evidence" and "therefore became a jury question whether the June accident was a concurring proximate cause of the injuries and disability, or whether the November accident was the sole proximate intervening cause of the injuries and disability").

But the intervening cause defense was never permitted to be heard and considered by the jury, due to the erroneous denial of the motion to amend. Importantly, "[w]hether an intervening act breaks the causal connection is a question for the fact finder." *Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995). Here, the fact finder was never asked to determine whether Dr. Ezman's and Peachtree's actions broke the causal connection between Defendants' actions and Plaintiff's claimed damages. Defendants were prejudiced by the trial court's denial of their timely motion for leave to amend to add this affirmative defense and are therefore entitled to a new trial absolute.

Further, the prejudice to Defendants was not cured by the court's jury instructions. The Court instructed the jury about, among other things, proximate cause and concurring cause. (*See* Jury Instructions at 28-36). Notably, the jury was told that the "plaintiff is required only to prove that negligence on the part of the defendant was at least one of the proximate, concurring causes of Plaintiffs' [sic] injuries or loss." (*Id.* at 36.) But the jury was not told about the effect of an independent, intervening, or superseding cause that is not foreseeable. In other words, the jury was never told that, even if it finds that Defendants breached the standard of care and would otherwise be a proximate cause, such does not entitle Plaintiff to recover damages if an independent, intervening, or superseding cause breaks the causal chain. Thus, the instructions were incomplete. Although two causes *can be* concurring causes, they may not be when the intervening cause

defense is charged and proven. Therefore, the Court erred in denying Defendants' motion to amend.

The denial of Defendants' motion to amend was an abuse of discretion. Defendants are therefore entitled to a new trial.

IV. The trial court's order awarding Plaintiff prejudgment interest should be vacated because Plaintiff failed to satisfy the requirements of Rule 68, SCRCP.

Plaintiff argues that CONA, PA should be held vicariously liable for the judgment against Dr. Lim and PA Nicholas. But Plaintiff did not direct the Offer of Judgment to CONA, PA. Tr. Prejudment Interest letter, R. ____

Ultimately the circuit court amended the case caption by Order dated July 3, 2025, listing CONA, PA in the case caption, and removing CONA ASC, LLC. CONA ASC, LLC and CONA, PA are separate and distinct legal entities. The amendment of the case caption, however, does not correct the errors in the Offer of Judgment.

Plaintiff directed her Offer of Judgment to Dr. Lim, PA Nicholas, and CONA ASC, LLC, not CONA, PA. For an Offer of Judgment to be valid, it must be "**directed** to the opposing **party**." Rule 68, SCRCP (emphasis added). Plaintiff claims the correct opposing corporate party was CONA, PA. And the circuit court ordered the caption changed to reflect that. But Plaintiff never **directed** the Offer of Judgment to CONA, PA, and the Offer of Judgment says what it says, and cannot be edited in retroactive fashion by the circuit court, nor was it.

Furthermore, because the Offer of Judgment was a **joint offer**, and because the offer is invalid as to CONA, PA, it is also necessarily invalid as to Dr. Lim and PA Nicholas.[4] A Rule 68

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[4] Dr. Lim and PA Nicholas initiated a limited joinder in CONA, PA's motion to alter or amend order regarding prejudgment interest. Joinder in Motion and Motion to Alter or Amend Judgment Regarding Pre-Judgment Interest; September 9, 2025 Hearing Transcript at 7–8. Thus, any relief awarded to CONA, PA regarding prejudgment issue should also be awarded to Dr. Lim and PA

Offer of Judgment is construed "according to ordinary contract principles." *Steiner v. Lewmar, Inc.*, 816 F.3d 26, 31 (2d Cir. 2016); *Wells v. Vetech, LLC*, 437 S.C. 428, 431, 879 S.E.2d 6, 7 (Ct. App. 2022) ("interpreting offers made under Rule 68 involves construing a contract and a court rule"); *Bosley v. Mineral Cty. Comm'n*, 650 F.3d 408, 414 (4th Cir. 2011) ("Because the Rule 68 offeree does not have the luxury of refusing the offer to assure that she has not bound herself to any terms that may later become unfavorable, she may construe the offer's terms strictly, and ambiguities in the offer are to be resolved against the offeror.") (internal citations omitted). Even if CONA, PA and CONA ASC, LLC are corporate affiliates of one another, nonetheless, the Offer of Judgment is not made to CONA, PA. *See Arrow Elecs., Inc. v. Hecmma, Inc.*, 500 F. Supp. 2d 648, 652 (W.D. Tex. 2005) (finding Offer of Judgment unambiguously only applied to the corporate entity, not to its corporate officers and directors and was therefore not applicable to them).

Other courts have found, in analogous circumstances, that a Rule 68 Offer of Judgment is void or can be invalidated if application of the Rule would be inequitable. For example, in *Tocwish v. Jablon*, 183 F.R.D. 239, 240–42 (N.D. Ill. 1998) the court invalidated an Offer of Judgment from a defendant to multiple plaintiffs conditioned on unanimous acceptance of the offer. The court reasoned that because less than all the plaintiffs had accepted the offer, the offer was technically "rejected," and thus could be interpreted to trigger the penalty provision of Rule 68. But the court declined to apply the penalty provision because of the "tactical inequity" that would result. *Id.* The Florida Supreme Court came to the same result in *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So. 3d 646, 647 (Fla. 2010) ("We hold that this type of joint offer is invalid and

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Nicholas. Because the offer was a *joint* offer, invalidity of the offer as to CONA, PA means the offer was likewise invalid as to Dr. Lim and PA Nicholas.

unenforceable because it is conditioned such that neither offeree can independently evaluate or settle his or her respective claim by accepting the proposal.").

Just as an Offer of Judgment conditioned on acceptance by **all** opposing parties is invalid (because the opposing parties cannot independently evaluate the claims and settle their respective claim by accepting the proposal), so too is a joint Offer of Judgment invalid when it is **not directed** at one of the entities against whom the plaintiff seeks to apply the penalty provision.

Plaintiff has responded that her Offer of Judgment was valid as to CONA, PA because "Plaintiff served an Offer of Judgment on the attorneys who represented the medical practice that does business as CONA." However, again, the Offer of Judgment itself was directed to a specific corporation, and that corporation was not CONA, PA. *Giambrone v. Meritplan Ins. Co.*, 117 F. Supp. 3d 259, 269 (E.D.N.Y. 2015) ("A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.") (citations omitted) (cleaned up).

As a consequence, the trial court's order giving efficacy and directing the payment of interest based on the defective Offer of Judgment must be vacated.

CONCLUSION

PA Nicholas respectfully asks this Court to reverse and order the trial court to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial absolute.

In the event the Court does not grant JNOV or a new trial, the Court should, at a minimum, grant remittitur of $3,000,000 because the circuit court erroneously listed a statutory beneficiary on the verdict form, thereby permitting a double recovery for the Estate when the jury awarded

damages to the beneficiary and the Personal Representative. Further, the award of prejudgment interest should be vacated because Plaintiff failed to satisfy the requirements of Rule 68, SCRCP.

Therefore, PA Nicholas respectfully requests that the Court grant the relief requested herein.

Respectfully submitted,

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: s/ C. Mitchell Brown
C. Mitchell Brown (S.C. Bar 012872)
mitch.brown@nelsonmullins.com
William C. Wood (S.C. Bar 15111)
bill.wood@nelsonmullins.com
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 799-2000

Attorneys for Appellant Megan Nicholas, P.A.

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