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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Grace Knie, Circuit Court Judge

Appellate Case No. 2025-001716

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

v.

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

INITIAL BRIEF OF APPELLANT CHI HUN LIM, M.D.

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STATEMENT OF ISSUES ON APPEAL

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

II. Whether Defendant Lim is entitled to a new trial where the Circuit Court prejudicially erred in denying the Defendants' Motion to Amend their Answer to include an independent/intervening/superseding-cause affirmative defense when Defendants moved to add such defense more than a month before trial, Plaintiff failed to show any prejudice resulting from such amendment, and the evidence supported such an amendment.

III. Whether Defendant Lim is entitled to a new trial or, at a minimum, remittitur where the Circuit 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.

IV. Whether the Circuit 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 serve CONA PA, the actual employer of Defendants Lim and Nicholas.

STATEMENT OF THE CASE

This action arises out of the July 28, 2018, death of Albert Jefferies from a pulmonary embolism ("PE") while he was at Peachtree Centre Skilled Nursing Facility ("Peachtree"), an inpatient rehabilitation facility. From July 18, 2018 to July 26, 2018, Jefferies was at Spartanburg Regional Medical Center ("Spartanburg Regional") following spinal surgery performed by Defendant Chi Hun Lim, M.D. Post-surgery, Defendants Lim and Megan Nicholas attended to Jefferies' post-surgery needs. Spartanburg Medical hospital staff and hospitalists managed his non-surgical medical needs, including making the determination of when he was medically ready for discharge.

While under Defendant Lim's care at Spartanburg Regional, Defendants Lim and Nicholas ordered prophylaxis – both mechanical and chemical – to prevent deep vein thrombosis ("DVT") and

PE. When he was discharged to Peachtree's care, Spartanburg Regional was responsible for transferring the treatment records and notes from Mr. Jefferies' stay at Spartanburg Regional – a routine practice performed by the hospital. Upon arrival at Peachtree, Peachtree's admitting physician and medical director Dr. Alfred Ezman waited nearly twenty-four hours before assessing Mr. Jefferies and, when he did, he did not prescribe any prophylaxis for DVT or PE. When Mr. Jefferies began exhibiting signs of a PE, Dr. Ezman did not perform the requisite test to diagnose the PE. Mr. Jefferies was found unresponsive at around 4:30 a.m. on July 28, 2018.

Despite the undisputed fact that Defendant Lim properly treated Mr. Jefferies with DVT and PE prophylaxis during his stay at Spartanburg Regional and that his notes accurately reflected that treatment, Plaintiff sued Defendants Lim and Nicholas alleging they should have continued Jefferies' chemical prophylaxis post-discharge – something Defendant Lim and his testifying expert, with a combined experience of over 41 years and 48,000 patients, confirmed they had never done – and that they should have ensured the treatment notes made it to Peachtree – even though the hospital was the entity responsible for delivering medical records to Peachtree.

Plaintiff originally included the hospital, Peachtree and Dr. Ezman as defendants, but she dropped them prior to trial, at which point – more than a month before trial – Defendants Lim and Nicholas sought leave to amend their answer to assert Dr. Ezman's intervening negligence. Even though Plaintiff expressly pled Dr. Ezman's negligence in her Complaint, the Circuit Court denied that motion. As a result, the jury was never charged on intervening negligence. The jury found against Defendants Lim and Nicholas. Additionally, although the only plaintiff in the case is Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies, the Circuit Court approved a verdict form that had separate damages lines for Plaintiff and for one of the statutory beneficiaries. Faced with two damages lines, the jury purported to award $3 million to the Plaintiff and $3 million

to the statutory beneficiary – an apparent double recovery.

Finally, Plaintiff made a joint offer of judgment to three defendants. Plaintiff did not obtain a verdict or judgment against all three recipients of the offer of judgment. Nonetheless, the Circuit Court awarded prejudgment interest based on the offer of judgment. This timely appeal followed.

FACTUAL AND PROCEDURAL BACKGROUND

I. Mr. Jefferies' Medical Care at Spartanburg Regional

On July 18, 2018, Albert Jefferies underwent a successful revision lumbar fusion surgery at Spartanburg Regional. (Second Am. Compl. ¶¶ 9, 23). The surgical team consisted of Dr. Chi Hun Lim, PA Rebecca Lehman, and PA Megan Nicholas. Dr. Lim is an orthopedic surgeon and partner of Carolina Orthopaedic and Neurosurgical Associates, P.A. ("CONA PA"), and PA Lehman and PA Nicholas are physician assistants employed by CONA PA. (Lim Dep. 7:22–8:6; 19:9–20:8); (Trial Tr. 93:19-24; 316:23–318:8). Dr. Lim performed the surgery, assisted by PA Lehman. (*Id.*). There were no complications during surgery. (Lim Dep. 19:9–20:8).

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). PA Nicholas was not directly involved in Mr. Jefferies's surgery but instead in his postoperative care. (*Id.* at 8:15–9:7).

A. Mr. Jefferies' 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, restrictions on ambulation and therapy, DVT prophylaxis, and determining 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). 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 (Dr. Gudger and Dr. Botts). (*Id.*); (Trial Tr. 94:4–94:15; 391:24–392:25; 455:24–456:21; 466:11–467:1; 469:2–22).

Throughout Mr. Jefferies' hospital stay, Dr. Lim's team addressed the surgery and its immediate after effects, while the hospitalists handled broader medical issues such as oxygenation, electrolyte abnormalities, heart issues, diabetes, etc. (Lim Dep. 24:21–25:9); (Nicholas Dep. 13:1–15:5); (Trial Tr. 375:24–376:15; 391:24–392:25). Both Dr. Lim and the hospitalists had to clear Mr. Jefferies for discharge before he could be discharged from the hospital. (*Id.*).

B. All parties handling Mr. Jefferies' care in the hospital documented their care of him in progress notes, which were completed daily.

During Mr. Jefferies' hospitalization, Dr. Lim and his physician assistants discussed patient care daily. (Lim Dep. 22:7–9; 37:19–38:8; 45:1–7). 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. (Trial Tr. 322:7–322:21; 333:4–334:23); (Nicholas Dep. 12:6–17; 24:17–20; 32:16–17; 36:19–21; 38:14–15; 43:17–21; 44:13–16). Progress notes were completed daily for Mr. Jefferies' stay at the hospital and were all complete before Mr. Jefferies' discharge. (Nicholas Dep. 12:11-17); (Trial Tr. 354:9-12); (Spartanburg Regional Medical records).

In addition to the surgical team, the hospitalists, physical therapists, nurses, and other providers also made notes in the daily progress notes. This is how the different groups overseeing Mr. Jefferies' care communicated with each other. Per her usual practice, PA Nicholas reviewed the most recent hospitalist, therapy, nursing, and other provider notes so the surgical team could continue caring for the patient with the most up-to-date information. (Nicholas Dep. 15:11–17:4). 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).

C. The daily progress notes demonstrate how the surgical team responded to Mr. Jefferies' limited ambulation while he remained in their care.

Post-surgery, Mr. Jefferies was not ambulatory and was at risk for DVT and PE. (Nicholas Dep. 20:3–14); (Trial Tr. 139:13–25; 160:13–161:9; 164:7–165:22, 166:13–24; 376:22–377:21). On July 18-21, Dr. Lim and his team initially treated these risks with prophylactic mechanical sequential compression devices ("SCD"). (Nicholas Dep. 17:7–18:19, 36:5–6). These are devices on the legs that compress the legs to increase blood flow. (*Id.*).

On July 22, 2018, Mr. Jefferies was still not ambulating well. As is reflected in the July 22, 2028 daily progress notes, Dr. Lim and PA Nicholas decided to prescribe heparin, a chemical anticoagulant medication that assists with preventing blood clots. They prescribed heparin in addition to continuing treatment with the mechanical SCDs. (Trial Tr. 120:23–121:9); (Nicholas Dep. 19:25–20:19, 36:5–8, 53:7–20). 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).

All parties agree that Dr. Lim's treatment of Mr. Jefferies with SCDs and heparin while in the hospital was appropriate. (Trial Tr. 247:9-248:12).

D. By July 26, Mr. Jefferies remained limited in his mobility; however, Spartanburg Regional determined he was ready for discharge to a rehabilitation facility.

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. 51:1–52:24). 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. (Trial Tr. 167:3–10); (Nicholas Dep. 37:18–25; 41:3–6; 44:21–45:3). Mr. Jefferies received his last hospital dose of heparin at 10:09 a.m. on July

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

It was common for Dr. Lim to discharge his surgery patients to a rehab facility even if they were not yet ambulating well because the rehabilitation facility should provide more aggressive physical therapy. (Trial Tr. 343:24–345:2); (Nicholas Dep. 47:10–19). 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. (Trial Tr. 386:23–387:16; 461:18–463:5; 487:1–5); (Nicholas Dep. 49:12–50:25; 78:1–80:20). 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).

E. Spartanburg Regional's case-management process, not the surgical team, handled Mr. Jefferies' 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); (Trial Tr. 341:1–342:25, 355:14–16; 469:2–22). 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 daily progress notes transmitted to the receiving facility. (Nicholas Dep. 82:17–83:10); (Trial Tr. 341:1–342:25). 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. (Trial Tr. 403:18–404:15). Further, the surgical team did not personally instruct case management to send the records because that was part of the ordinary, everyday process whereby hospital case managers handled placement and record transmission automatically. (Trial Tr. 345:3–346:17; 352:24–353:17; 355:14–16).

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); (Trial Tr. 341:1–342:25; 403:18–404:15; 470:4–472:17; 477:7–21). 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. (Trial Tr. 354:9–14).

II. Mr. Jefferies' Medical Care at Peachtree

A. Peachtree received a referral packet from Spartanburg Regional, but the packet did not include Mr. Jefferies' 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); (Trial Tr. 249:22–252:24). The transport documents listed heparin among his medications. (*Id.*). Peachtree's admitting physician and medical director Dr. Ezman did not assess Mr. Jefferies until the following day approximately 24 hours after he was admitted. (Ezman Dep. 7:23–8:10; 17:14–16; 25:13–22).

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. (*Id.* at 11:8–13:8). 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. (*Id.* at 11:22–14:13). 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. At the time, the surgical team, including Dr. Lim and PA Nicholas, were not aware of the omission of these records. (Trial Tr. 341:24–342:10); (Nicholas Dep. 83:7–10). 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).

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' heparin treatment. (Trial Tr. 225:16–25); (Nicholas Dep. 36:5–8; 37:18–21; 44:21–45:3). There was no evidence anyone at Peachtree attempted to obtain the additional six days of missing hospital notes. (Trial Tr. 402:16–404:15). Despite the missing records, Dr. Ezman himself could have prescribed heparin for Mr. Jefferies at Peachtree and could have obtained SCDs for Mr. Jefferies if he had deemed them appropriate. (Ezman Dep. 23:1–24:24).

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

On July 27, 2018, Mr. Jefferies experienced shortness of breath and low oxygen saturations of 81%. This caused Dr. Ezman to examine Mr. Jefferies for the first time. After examining Mr.

Jefferies, Dr. Ezman ordered a chest x-ray because of the 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). If a PE were suspected, the appropriate workup would have been a computed tomography angiography ("CTA") – a specialized imaging test that visualizes blood vessels – and if PE were confirmed, then heparin should have been prescribed. (Trial Tr. 473:3–474:24). 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. (Trial Tr. 473:3–474:24); (Ezman Dep. 23:1–24:20; 27:13–29:23).

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); (Trial Tr. 475:1–18); (Trial Joint Ex. 2 and 3).

III. Plaintiff's Allegations and Discovery Concerning Peachtree's and Dr. Ezman's Negligence

On July 9, 2020, Plaintiff Andrea Allen, Mr. Jefferies' 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.). On September 30, 2020, the Plaintiff filed an Amended Complaint, naming for the first time Dr. Ezman and Peachtree as defendants. (Am. Compl.). On June 29, 2021, the Plaintiff filed a Second Amended Complaint, naming for the first time Chi Hun Lim, M.D., Megan Nicholas, PA, and Carolina Orthopedic and Neurological Associates ASC, LLC ("CONA ASC") as defendants. (Second Am. Compl.).[1] The Second Amended Complaint continued to name Dr. Ezman

[1] In post-trial motions, an issue regarding whether Plaintiff had named and served the correct legal entity arose. Carolina Orthopaedic and Neurosurgical Associates, P.A. is the entity that employed

and Peachtree as defendants. (*Id.*).

In the Second Amended Complaint, the Plaintiff alleges that Dr. Ezman is at fault for Mr. Jefferies' death. (*Id.* at ¶¶ 51, 58). Plaintiff alleges that Dr. Ezman was "negligent and deviated from acceptable standards of care in the following particulars:"

a. in failing to recognize high risk for DVT/PE development in Mr. Jefferies;
b. in failing to use adequate DVT/PE prophylaxis;
c. in failing to properly and timely diagnose DVT/PE;
d. in such other and further particulars as discovery may disclose.

(*Id.* at ¶ 51). The Complaint alleges that the acts and omissions of Dr. Ezman and Peachtree were direct and proximate causes of Mr. Jefferies' death. (*Id.* at 56).

Plaintiff's Amended Complaint and Second Amended Complaint attached an expert affidavit stating that post-operatively at Spartanburg Medical Mr. Jefferies "received deep vein thrombosis (DVT) prophylaxis with Sequential Compression Device (SCD), which is a mechanical method of DVT prevention that improves blood flow in the legs." (Sheyner Aff. ¶ 3). It states that after discharge to Peachtree, Dr. Ezman evaluated Mr. Jefferies and was notified of his back pain and low oxygen levels but did not prescribe or administer DVT prophylaxis (a blood thinner) or the mechanical SCD method. (*Id.*). Mr. Jefferies' autopsy revealed blood clots in both of his main pulmonary arteries. (*Id.*).

The expert affidavit provides in pertinent part:

> As it pertains to the Peach tree Center and Dr. Ezman, the standard of care requires an accurate assessment of risk factors for the development of deep venous thrombosis and pulmonary embolism in every patient. Specifically, when Mr. Jefferies was admitted to the Peach Tree Center on 07/26/18 his high risk factors for development of deep venous thrombosis and pulmonary embolism such as recent surgery, decreased mobility, age, obesity and ongoing treatment with testosterone should have been considered in order to start prophylactic treatment for deep venous thrombosis

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Dr. Lim and PA Nicholas. Carolina Orthopedic and Neurosurgical Associates ASC, LLC, is a separate and distinct legal entity. However, Plaintiff named "Carolina Orthopedic and Neurological Associates ASC, LLC" as the entity Defendant. For ease of reference, this Brief will refer to Carolina Orthopedic and Neurological Associates ASC, LLC as "CONA ASC" and Carolina Orthopaedic and Neurosurgical Associates, P.A. as "CONA P.A."

> with administration of a blood thinner such as heparin or enoxaparin.
>
> It is very clear from the records that Peach Tree Center staff and Dr. Ezman staff had clear knowledge about Mr. Jefferies numerous risk factors for the development of deep venous thrombosis and pulmonary embolism, ... The standard of care was breached by the Peach Tree Center staff's and Dr. Ezman's failure to timely initiate prophylactic treatment for deep venous thrombosis with administration of a blood thinner such as heparin or enoxaparin. Failure of the Peach tree Center staff and Dr. Ezman to timely and appropriately initiate preventative measures resulted in the critical pulmonary embolism and cardiopulmonary arrests in Mr. Jefferies ….
>
> ….As stated above, it is more likely than not, Mr. Jefferies' cardiopulmonary arrest resulted from bilateral critical pulmonary embolism, caused by the Peach Tree Center staff's, including Dr. Ezman's failure to implement prophylactic treatment for deep venous thrombosis with administration of a blood thinner such as heparin or enoxaparin. Had proper precautions been taken and the standards of care complied with, pulmonary embolism and cardiopulmonary arrest more likely than not would have been avoided in Mr. Jefferies.
>
> It is my opinion that the breaches by the Peach Tree Center staff and Dr. Ezman in the standards of care described was a proximate cause of Mr. Jefferies' death on 07/28/18.

(*Id.* at ¶¶ 4-7). Thus, Plaintiff's expert opined that Peachtree's and Dr. Ezman's failure to timely initiate prophylactic treatment for deep venous thrombosis resulted in Mr. Jefferies' death and that had they complied with the standard of care his pulmonary embolism and cardiopulmonary arrest more likely than not would have been avoided.

Plaintiff aggressively pursued her claims against Peachtree and Dr. Ezman during discovery. She took numerous depositions of witnesses and experts with respect to her allegations regarding Peachtree's and Dr. Ezman's negligence. *See, e.g.,* (Defs.' Mot. to Amend, p. 2 (discussing deposition testimony of Plaintiff's expert Dr. Inna Sheyner); (Ezman Dep.). When deposed, Plaintiff's expert witness opined that Dr. Ezman deviated from the standard of care as described in her prior affidavit and that these deviations resulted in Mr. Jefferies' critical pulmonary embolism and cardiopulmonary arrest. (Defs.' Mot. to Amend, p. 2).

Several years later, Plaintiff used these allegations against Dr. Ezman and the discovery

Plaintiff developed against him to extract a compromise from Peachtree and Dr. Ezman. *See* (Pl.'s Mot. in Limine, p. 2). However, Plaintiff did so without any settlement agreement and without any record of dismissing Dr. Ezman from the case. *See* (July 3, 2025 Form 4 Order (stating that Plaintiff informed the Court that "no settlement agreements exist")); (Public Index).

IV. Defendants' Answer and Motion to Amend

On August 30, 2021, Dr. Lim, PA Nicholas, and CONA ASC filed an Answer to the Second Amended Complaint. (Lim Answer). In their Answer, they asserted, among other defenses, the defense of lack of proximate cause. (Lim Answer ¶ 52). In addition, they reserved the right to amend their Answer to add "any additional defense which may be discovered and revealed as proper and appropriate during the course of discovery in connection with this action." (*Id.* at ¶ 55). At that time, Dr. Ezman and Peachtree were defendants in the case.

The Plaintiff alleges that following a mediation in 2024 "Plaintiff and Dr. Ezman reached a compromise and he and Peachtree Operating Group, LLC were dismissed from the case." (Pl.'s Mot. in Limine, p. 2). However, this purported dismissal of Dr. Ezman is not part of the record in this action. *See* (Public Index). On January 17, 2024, the Plaintiff filed a "Stipulation of Dismissal Only as to Defendant Peachtree Operating Group, LLC D/B/A Peachtree Centre SNF." (January 17, 2024 Stipulation of Dismissal). The Stipulation of Dismissal did not include Dr. Ezman. (*Id.*). In fact, the Stipulation states: "This matter is not dismissed as to any other named defendant…." (*Id.*). The Plaintiff never filed a stipulation of dismissal with respect to Dr. Ezman. Despite the foregoing, Dr. Ezman did not appear as a Defendant on the verdict form. *See* (Public Index); (Verdict Form).

After finding out that the Plaintiff had settled with Dr. Ezman, Dr. Lim and other defendants filed a Motion to Amend their Answer to include an additional affirmative defense. (Mot. to Amend). They filed the Motion on April 17, 2025. (*Id.*). The additional affirmative defense these Defendants

sought to add is as follows:

> These Defendants allege and would show that the 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. Any alleged action or alleged omission on the part of these Defendants was not the proximate cause of any alleged damages.

(Proposed Amended Answer ¶ 62). As Plaintiff's Response in Opposition acknowledged: "Defendants' motion makes clear that they seek to be permitted to assert that Dr. Ezman, a former co-defendant, was responsible for the injuries at issue in this action." (Pl.'s Resp. in Opp., p. 2). Plaintiff's only argument regarding prejudice was a single sentence in their Response – "[t]here is no time left to conduct discovery on Defendants' new defense." (*Id.* at p. 4). Nowhere in her Response did Plaintiff set forth what additional discovery she would need to defend against this defense. *See* (Pl.'s Resp. in Opp.).

On May 8, 2025, the Circuit Court held a hearing on the Motion to Amend. *See* (May 8, 2025 Hearing Tr.). Counsel for Defendant Lim 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 and 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) (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. (*Id.*

at 8:18-22).

The Circuit Court denied the Motion by a Form 4 Order. (May 9, 2025 Order). Parroting Plaintiff's Response, the Circuit Court held that allowing the amendment would prejudice the Plaintiff because the Plaintiff would not have adequate time to conduct any additional discovery needed regarding this defense. (*Id.*). The Court made no finding as to any additional discovery Plaintiff would allegedly need to conduct to defend against this defense. (*Id.*).

Thereafter, on May 22, 2025, the Plaintiff filed a Motion in Limine to prevent the Defendants from "using, referencing, or offering into evidence any portion of the deposition testimony of Plaintiff's expert witnesses, Inna Sheyner, M.D. ("Dr. Sheyner"), Gary L. Schmidt, M.D. ("Dr. Schmidt"), and Jeffrey Ellington, M.D. ("Dr. Ellington")…for the purposes of asserting liability against any former co-defendant." (Pl.'s Mot. in Limine). Thus, Plaintiff acknowledged that she had previously obtained deposition testimony from her own experts that would support a claim that Dr. Ezman was responsible for the injuries in this action. Despite spending years blaming Peachtree and Dr Ezman for Mr. Jefferies' death – and extracting a settlement from them based on this blame, Plaintiff wanted to prevent these Defendants from blaming Dr. Ezman and Peachtree at trial.

V. The Jury Trial and Verdict

On June 2-6, 2025, the case was tried before The Honorable Grace Knie with a jury duly empaneled. (Trial Tr.). Plaintiff's theory of liability against Dr. Lim was twofold, arguing that he 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' medical record information to Peachtree. In support of this theory, Plaintiff offered the expert testimony of Christopher Erb, M.D, a pulmonology and critical-care expert.

Dr. Erb testified that DVT and PE are recognized postoperative risks, and he opined that, 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. (Trial Tr. 133:19–137:25; 138:18–144:2; 160:15–161:20). 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). 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).

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. (*Id.* at 441:22–25; 444:9–24; 457:20–461:25; 464:9–468:21; 469:2–472:18; 476:12–478:15). In support of that defense, Defendants offered the expert testimony of Steven Poletti, M.D., an orthopedic spine surgeon. (*Id.* at 441:22–25).

Dr. Poletti testified that Dr. Lim and his team met the standard of care and that this case involved an unusual 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). 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). 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 CONA. (*Id.* at 455:19–457:22; 463:6–467:1; 469:25–472:18; 477:7–21).

A. The jury awarded $3 million in damages to Plaintiff Andrea Allen and $3 million in damages to non-party, statutory beneficiary Michelle Hemphill.

After both the presentation of the Plaintiff's case and the presentation of the Defendants' case, the Defendants moved for a directed verdict as to both negligence and gross negligence, which was denied. (*Id.* at 307:13-308:4; 490:3-11). Prior to closing arguments, the court held a charge conference outside the presence of the jury and the court reporter. (*Id.* at 490:15–492:2). The parties submitted proposed verdict forms. Defendants' proposed verdict form listed only Plaintiff (Andrea Allen, Personal Representative of the Estate of Charles Jefferies) as a person potentially entitled to recover damages. (Defs.' Proposed Verdict Form). Plaintiff's proposed verdict form listed two people potentially entitled to recover damages: Plaintiff Andrea Allen, and Mr. Jefferies' other daughter, non-party Michelle Hemphill. Defendants objected to Ms. Hemphill being included on the verdict form on the ground that only the personal representative should be on the verdict form per the wrongful-death statute, but the trial court placed both Ms. Allen and Ms. Hemphill on the verdict form, with separate line-items for each person. (Trial Tr. 490:15-491:5).

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.” (*Id.* at 496:10-15).

The jury returned a verdict in favor of the Plaintiff on her claims for medical negligence and gross negligence against Dr. Lim and PA Nicholas. (*Id.* at 598:2-20). The jury awarded $3 million in damages to Plaintiff Andrea Allen, and another $3 million in damages to non-party, statutory beneficiary Michelle Hemphill. (Verdict Form); (June 10, 2025 Form 4 Order).

B. The Defendants filed several post-trial motions, which the Circuit Court denied.

On June 16, 2025, the Defendants filed six 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 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;
- Defendants were entitled to JNOV because Plaintiff failed to prove the elements of negligence and gross negligence;
- Defendants were entitled to a new trial because the verdict form erroneously listed statutory beneficiary Michelle Hemphill on the verdict form;
- 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;
- The non-economic damages cap applied because Plaintiff failed to prove any Defendants were grossly negligent.

(Defs.’ Motion to Alter or Amend the Judgment); (Defs.’ Motion for JNOV); (Defs.’ Mot. for New Trial) (Defs.’ Mot. to Apply Noneconomic Damages Cap).[2]

Plaintiff moved for assessment of prejudgment interest under Rule 68, SCRCP and S.C.

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[2] The Court’s Docket originally reflected a June 17, 2025 filing date for the Defendants’ post-trial Motions. The Defendants moved to correct the Docket to reflect a filing date of June 16, 2025. All counsel agreed to the relief requested, and the Court ordered the correction. (September 16, 2025 Form 4 Order); (September 19, 2025 Order).

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 CONA ASC in the amount of $500,000.00 on April 25, 2024, which Defendants rejected. (June 16, 2025 Motion); (April 25, 2024 Offer of Judgment).

On July 28, 2025, the Circuit Court denied Defendant's post-trial Motions and granted Plaintiff's Motion for assessment of prejudgment interest. (July 28, 2025 Order). CONA ASC 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. (August 7, 2025 Motion to Alter or Amend). Dr. Lim joined such Motion for the limited purpose of asserting that prejudgment interest was improper if CONA ASC was the wrong party at which to direct such offer of judgment. (September 12, 2025 Hearing Tr. 7:8-8:8); (Defs.' Joinder in Mot.). The Circuit Court denied the Motion. (September 25, 2025 Order).

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. *See, e.g., Richardson, supra*.

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 are questions of law that are 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 under an abuse of discretion standard. *Parker v. Spartanburg Sanit. Sewer Dist.*, 362 S.C. 276, 287, 607 S.E.2d 711, 717 (Ct. App. 2005). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). 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. Defendants are entitled to JNOV because Plaintiff failed to prove one or more of the required elements of her medical negligence and gross negligence claims.

To establish a medical malpractice claim, a plaintiff must prove the following facts by a preponderance of the evidence: (1) the presence of a doctor-patient relationship between the parties; (2) "[r]ecognized and generally accepted standards, practices, and procedures which are

exercised by competent physicians in the same branch of medicine under similar circumstances"; (3) "[t]he medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures"; (4) "[s]uch 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)). Plaintiff failed to prove by the preponderance of the evidence the following elements of her claim – the standard of care, breach of the standard of care, and proximate cause. Therefore, Dr. Lim is 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 "under similar circumstances" and subsequently, any breach of those standards necessary to support the jury's verdict. *See Brouwer*, 409 S.C. at 521, 763 S.E.2d at 203.

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 sending all of Mr. Jefferies' medical record information to Peachtree. 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).

With respect to the first alleged standard of care – continuing Mr. Jefferies on SCDs and/or heparin post discharge, Plaintiff failed to establish the standard of care as to a reasonably prudent orthopedic spine surgeon practicing under the same or similar circumstances as here. Plaintiff's expert witness, Christopher Erb, M.D., was appropriately qualified as an expert witness in pulmonology and related fields, in which he is board certified and credentialed, but he failed to opine as to the standard of care as it relates to the specific branch of medicine in which Dr. Lim practices. Dr. Erb testified as to DVT prophylaxis, which admittedly overlaps with many fields of medicine, but his testimony lacked any foundation or opinion, to a reasonable degree of medical certainty, as to orthopedic spine surgery, specifically the spine surgery performed in this case. His testimony failed to address the risks associated with DVT prophylaxis in the postoperative setting of an orthopedic spine patient who has undergone this particular type of spine surgery, the risk-benefit analysis for the use of heparin after this surgery, and the standard of care relating to an orthopedic spine surgeon's duty (or lack thereof) to continue a patient on heparin post-discharge where the surgeon is no longer with the patient to monitor for these risks. Because Dr. Erb testified only to the standard of care of a physician generally, but not specifically to an orthopedic spine surgeon, the testimony failed to establish the standard of care in the relevant field of medicine.

With respect to the second alleged standard of care – sending Mr. Jefferies' medical records to Peachtree, 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 communications: the discharge summary, progress notes, or a phone call. Nonetheless, Dr. Erb failed to testify as to any failure incumbent upon the Defendants under the same or similar circumstances as here. The record is replete with uncontroverted evidence that necessary medical records and progress notes were completed by discharge. Further, the record is replete with uncontroverted evidence that: (1) Spartanburg Regional requires its hospital case management system to send medical records to the discharge facility and does not permit surgical teams to do so directly; and (2) it is the responsibility of the Peachtree staff to ensure receipt of said medical records. The record is also clear that neither Dr. Lim nor his physician assistant Nicholas had any duty under any standard of care attributed to them to personally send medical records to the Peachtree. Thus, as the Defendants argued in their Motion for Directed Verdict, the Plaintiff failed to adequately present evidence of the standard of care or any related breach by the Defendants as it relates to either alleged theory of negligence.

It is true that expert testimony in a medical malpractice case need not 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, "[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 orthopedic 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. Although this Court acknowledged that plaintiff's witness was an expert in orthopedic surgery, it found he lacked expertise on "the standards of good podiatric practice." *Id.* at 587, 320 S.E.2d at 65. 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. Therefore, this Court affirmed the Circuit Court's grant of summary judgment in favor of the defendant. *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 physician assistants, particularly with respect to the post-operative period after the spine surgery at issue. 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 under the same or similar circumstances as here. Therefore, Dr. Lim is entitled to judgment notwithstanding the verdict.

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 personally send Mr. Jefferies' medical records to the discharge rehab

facility and/or call the facility.

First, Dr. Lim and PA Nicholas had no responsibility for providing treatment at a different facility. In fact, Dr Lim and PA Nicholas had no ability to provide treatment at this different facility. There is no dispute that they provided medically adequate treatment to Mr. Jefferies, including prescribing heparin, while he was under their care. When Mr. Jefferies was discharged to the rehab facility, Defendants discontinued their treatment. This is consistent with the standard of care. Otherwise, chaos would ensue. One independent medical facility or treatment provider is not and cannot be expected to control and dictate the treatment rendered at a separate, independent facility that provides future treatment to the patient.[3] Further, their expectations were that Dr. Ezman and Peachtree would independently assess and treat Mr. Jefferies. Between the Defendants' orthopedic spine surgeon expert witness, Dr. Steven Poletti, and Defendants' orthopedic spine surgeon, Dr. Lim, they testified that across more than 30 years of experience and over 40,000 patients (Dr. Poletti) and over 11 years of experience and over 8,000 patients (Dr. Lim), respectively, they have *never* discharged a patient to a rehab facility with the requirement that the discharge facility continue the patient on SCDs and/or heparin. (Trial Tr. 358:14-16; 343:1-3; 385:20-25; 398:6-16; 439:18-22; 461:13-19); (Lim Dep. 29:16-20; 31:23-32:9). The expectation is that the rehab facility will continue the prophylaxis treatment, if it is deemed necessary in the independent judgment of the rehab doctor who is in the best position to assess the patient's current risk factors and continued need for such treatment. It is always their standard to discontinue such treatment when a patient leaves for the next facility.

[3] Plaintiff's own expert admitted that Dr. Lim and his staff could not require the rehab facility to continue Mr. Jefferies on heparin and SCDs. *See* (Trial Tr. 168:20-170:20) (noting that this would be a mere "recommendation" because subsequent providers "take over his [Mr. Jefferies'] care at the rehab facility").

Plaintiff failed to provide any evidence, either anecdotally or generally, 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 this case. The affirmative testimony by the Defendants’ witnesses and the absence of specific evidence to the contrary overwhelmingly dictated not only the standard of care with regards to the evidence in this case, but also that the Defendants met the standard of care with regards to post-operative DVT prophylaxis. Further, testimony at trial of Dr. Botts, a hospitalist/internist who rendered care to Mr. Jefferies following the surgery, and testimony of the reviewed deposition of Dr. Gudger who also rendered care to Mr. Jeffries and did the “med. rec.” at discharge, another hospitalist/internist, clearly established from their perspective that they have never discharged a post-op spine surgery patient to a rehab facility on heparin. (Botts Dep. 38:22-39:13).

Secondly, both the Plaintiff’s expert and all the witnesses for the Defendants noted physicians communicate through medical records and notes. Further, the Defendants provided uncontroverted evidence that it was the duty and responsibility of Peachtree Centre staff to ensure receipt of medical records that facilitated proper communication between facilities under the circumstances of this case. The Plaintiff failed to elicit any testimony or evidence to the contrary.

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. Jeffries “from the hospital” but inexplicably, did nothing to make any attempt to have them sent. Testimony was uncontroverted that it would have taken but minutes to have those updated records sent, or if they had been sent, re-sent to Peachtree. Dr. Ezman admitted neither he nor anyone at Peachtree ever made any attempt to contact others, including Defendants, regarding updated patient information. Considering Plaintiff

bore the burden of proof in establishing the Defendants' actions fell below the standard of care, Plaintiff failed to meet this burden. Simply put, there was no duty for Defendants to call, contact, or send medical records to Peachtree and/or Dr. Ezman, but there was a duty on Peachtree and Dr. Ezman to obtain and review Mr. Jefferies' immediate prior medical records, which only they knew they did not possess. Therefore, Dr. Lim is entitled to judgment notwithstanding the verdict.

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 hospital's failure to transmit medical records to Peachtree, and the negligence of Dr. Ezman/Peachtree in failing to ensure receipt of the medical records and their 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*, 324 S.C. at 400, 477 S.E.2d at 721. 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)). As explained below, the cause of Mr. Jefferies' death is attributable to Peachtree's, Dr. Ezman's, and Spartanburg Regional's acts or omissions, which were not reasonably foreseeable to Dr. Lim. Therefore, Dr. Lim is entitled to judgment notwithstanding the verdict.

The Plaintiff's lack of proof on any one of these required elements of her claim entitles Dr. Lim to judgment notwithstanding the verdict. As shown above, Plaintiff failed to present adequate evidence on several of the required elements of her medical negligence claim.

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. *See* S.C. Code § 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 care and treatment of a particular patient. *See, e.g.*, *David*, 367 S.C. at 247–48, 626 S.E. 2d at 3–4. 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*, 282 S.C. at 583, 320 S.E.2d at 62 ("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 Dr. Lim was grossly negligent in his treatment of Mr. Jefferies which proximately caused his 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 statutory limitations for charitable organizations. 362 S.C. 239, 245, 608 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 lumbar surgery 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, but it never rose to the level of an *intentional* or *conscious* failure or an allegation that the requisite knowledge for that to be the case existed. Thus, because Plaintiff failed to prove gross negligence as a matter of law, the medical malpractice statutory caps on damages are applicable. Dr. Lim and his staff completed the daily progress notes for Mr. Jefferies before his discharge, and the only evidence was that they reasonably relied on the hospital to provide such notes and documentation (which would have included heparin) to the rehabilitation facility. There was no gross negligence.

The distinction between ordinary negligence and gross negligence turns on whether the failure was inadvertent or conscious. The element distinguishing actionable negligence from willful tort is inadvertence. Dr. Lim's conduct did not rise to the level of gross negligence because there was no conscious failure to do something which was incumbent upon him to do. Notably, Dr. Lim did not know: (1) that the full medical records were not sent to Peachtree; or (2) that Dr. Ezman would fail to conduct a workup of Mr. Jefferies' risk factors upon admission to Peachtree. The evidence at trial supports only one reasonable inference: Dr. Lim did not know that the medical records received by Peachtree were missing several days and thus did not show heparin treatment, and he did not know that Dr. Ezman would fail to do his own assessment and workup of Mr. Jefferies until it was too late.

Etheredge, *supra* and *Pratt v. Amisub of SC, Inc.*, 445 S.C. 199, 912 S.E.2d 268 (Ct. App.

2025),[4] 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). The Court of Appeals 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. 341 S.C. at 311–12, 534 S.E.2d at 277–78. 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 the 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. This 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

[4] R*eh'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).

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 *Pratt* decision illustrates the pivotal distinction between the doctor's actions in *Pratt* and the school's actions in *Etheredge*: it was not the mere failure to communicate that crossed the threshold into gross negligence – it was the ***conscious*** choice to withhold critical information while knowing the treating physician had made a patient care decision (discharge) based on incomplete data. Knowledge is key.

The case here is like *Etheredge*, not *Pratt*. Dr. Lim (and PA Nicholas) did not make a conscious choice to withhold critical information from Peachtree and Dr. Ezman. In fact, the testimony was they expected such critical information was communicated. Plaintiff's evidence that they could have done more does not support a 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. In the alternative, the Circuit Court's denial of the Defendants' Motion to Amend is reversible error entitling the Defendants to a new trial.

A. The Plaintiff failed to make the required showing of prejudice and, consequently, the Circuit Court erred in denying Defendants' Motion to Amend.

Amendments of pleadings are controlled by Rule 15, which provides in pertinent part:

> **15(a). Amendments**. . . . a party may amend his pleading only by leave of court or by written consent of the adverse party; and ***leave shall be freely given when justice so requires and does not prejudice any other party***.

Rule 15(a), SCRCP (emphasis added). "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker*, 362 S.C. at 286, 607 S.E.2d at 717. The Rule's

"freely given" provision is "a 'mandate' that 'is to be heeded.'" *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962)).

Although decisions on a motion to amend are reviewed under an abuse of discretion standard, a court errs when it denies a motion to amend for some reason other than the criteria for amendment set forth in Rule 15(a) – i.e. "justice so requires and does not prejudice any other party." *See Patton*, 420 S.C. at 490–91, 804 S.E.2d at 262; Rule 15(a), SCRCP. Rule 15 evinces a bias in favor of granting amendments, and unless there is a substantial reason to deny leave to amend, the discretion of the trial court "is not broad enough to permit denial." *Forrester*, 295 S.C. at 507, 369 S.E.2d at 158.

"[T]he party opposing the motion has the burden of establishing prejudice." *Pruitt v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998); *Maybank 2754, LLC v. Zurlo*, 444 S.C. 47, 83, 906 S.E.2d 94, 113 (Ct. App. 2024), *reh'g denied* (Sept. 17, 2024), *cert. denied* (Apr. 22, 2025 (same). "The burden is not on the movant, but on the party opposing the motion to show how it is prejudiced." *Stanley v. Kirkpatrick*, 357 S.C. 169, 175, 592 S.E.2d 296, 298 (2004). Arguing that the moving party could have done something differently "betrays a misunderstanding of prejudice under Rule 15." *See Patton*, 420 S.C. at 491, 804 S.E.2d at 262; *see also Forrester*, 295 S.C. at 508, 369 S.E.2d at 159 ("Delay in seeking leave to amend pleadings, regardless of the length of the delay, will not ordinarily be held to bar an amendment in the absence of a finding of prejudice.") "The prejudice contemplated in Rule 15 is not that the non-moving party is forced to defend the merits of a valid claim." *Id.* Rather, "'[t]he prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.'" *Tanner v. Florence Cnty. Treasurer*, 336 S.C. 552, 559, 521 S.E.2d 153, 156 (1999) (quoting *Pool v. Pool*, 329 S.C. 324, 494 S.E.2d 820 (1998)). Here, the Plaintiff did not show and could not show lack of notice that the issue of Dr. Ezman's negligence would be tried or that she lacked an opportunity to refute such claim.

In her Response in Opposition to the Motion to Amend, the Plaintiff attacked the timing of the Motion but did not articulate any specific prejudice that would result to her from the proposed amendment – other than a conclusory statement about lack of "time to conduct discovery on Defendants' new defense." (Pl.'s Resp. in Opp.). Nowhere in her Response did Plaintiff set forth any additional discovery she would allegedly need to respond to this defense. *See* (*id.*). According to this Court in *Forrester*, this type of allegation does not constitute the showing of legal prejudice required by Rule 15:

> In addition to Forrester's delay in making application to amend, the City also claims prejudice because it will be required to file additional pleadings, engage in additional discovery, and incur additional costs. It also argues the amendment will prolong the litigation. Although several federal courts have found prejudice where motions were made to amend after extensive discovery, ***we have not been shown the extent of additional discovery the City claims in this case or how it will prejudice the City***. The fact the City will be "obliged to go to some additional time and expense in order to answer the amended complaint does not constitute such prejudice as will preclude the amendment." 35A C.J.S. Federal Civil Procedure Section 330, at 500 (1960). In *Thomas v. Medesco, Inc., Division of Harvard Industries, Inc*, 67 F.R.D. 129 (E.D.Pa.1974), the court permitted an amendment to add punitive damages in the face of the defendant's assertion the amendment would require it to file new pleadings, engage in new discovery, join new parties, and generally reopen the entire pretrial process. The court found the plaintiff was not introducing new facts and held "we will follow the spirit of Rule 15 and grant plaintiff's motion." *Thomas*, 67 F.R.D. at 131. ***These reasons, we hold, do not constitute legal prejudice***.

295 S.C. at 509–10, 369 S.E.2d at 159–60 (holding trial court abused its discretion in denying motion to amend) (emphasis added).[5]

Likewise, the trial judge did not articulate any finding of prejudice beyond a conclusory statement about lack of "time to conduct any additional discovery needed regarding the new defense."

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[5] In the hearing on the Motion to Amend, Plaintiff's counsel mentioned that he might consider deposing two persons Dr. Ezman named. (Hearing Tr. 10:24-11:9). This was the only potential additional discovery mentioned at the hearing. *See* (Hearing Tr.). However, Plaintiff's counsel gave no explanation for why these two depositions could not happen in the forty-five (45) days between the April 17, 2025 Motion to Amend and the June 2, 2026 trial.

(May 9, 2025 Form 4 Order). The events giving rise to the defense are not different from the facts that gave rise to Plaintiff's claim *against* Dr. Ezman, and, consequently, depositions would not have to be retaken. *See Stanley*, 357 S.C. at 175, 592 S.E.2d at 298 (holding non-moving party's argument of prejudice based on additional discovery was "without merit" where events giving rise to proposed amended claims were not different from facts that gave rise to prior claim asserted). Moreover, Plaintiff's pleadings and years of discovery regarding Dr. Ezman's negligence indicate that Plaintiff would not be prejudiced by the Defendants' request to amend. With respect to the issue of Dr. Ezman's negligence proximately causing Mr. Jefferies death, the Plaintiff had been preparing for years. *See Armstrong v. Collins*, 366 S.C. 204, 230, 621 S.E.2d 368, 381 (Ct. App. 2005) ("In considering potential prejudice, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being formally raised.").

Further, the Defendants' request was not a surprise to Plaintiff. Plaintiff specifically pled the negligence of Dr. Ezman/Peachtree in her Complaint, completed extensive discovery regarding their negligence, and obtained a resolution from them. Concomitantly, she was not surprised by the Defendants' allegation that Dr. Ezman's negligence caused Mr. Jefferies' death. The circumstances surrounding the Defendants' request to amend were such that justice would be furthered by allowing them to amend their Answer, and Plaintiff would not be prejudiced as a result of the amendment.

In a similar case, *Parker, supra*, the trial court denied the defendant's motion to amend its answer to assert the affirmative defense of the Tort Claims Act limitation. 362 S.C. at 286, 607 S.E.2d at 717. The defendant moved to amend its answer to assert this affirmative defense during the trial of the case. *Id.* at 279–80, 607 S.E.2d at 713. In her complaint, the plaintiff asserted her claim against this defendant pursuant to the Tort Claims Act. *Id.* at 279, 607 S.E.2d at 713. "The trial judge did not articulate any finding of prejudice with regard to [the plaintiff] in denying the [defendant's] motion

to amend." *Id.* at 286, 607 S.E.2d at 717. As this Court explained:

> [T]he Sewer Districts request was not a surprise to Parker. Parker specifically pled the application of the Tort Claims Act in her complaint. Concomitantly, she was not surprised by the Sewer Districts request to limit her amount of recovery pursuant to the Act. The circumstances surrounding the Sewer Districts requests to amend were such that justice would be furthered by allowing it to amend its answer and Parker would not be prejudiced as a result of the amendment. The trial judge abused his discretion in denying the Sewer Districts motion to amend its answer.

Id. at 287, 607 S.E.2d at 717. What this Court essentially recognized in *Parker* is that what is good for the goose (plaintiff) is also good for the gander (defendant). *See id.* A plaintiff cannot allege something in its complaint and then make a credible showing of prejudice when the defendant wants to amend its pleading to argue the same thing the plaintiff alleged, but now as an affirmative defense. Here, the Plaintiff's Complaint alleged that Dr. Ezman's and Peachtree's negligence proximately caused Mr. Jefferies' death. (Second Am. Compl. ¶¶ 51-52, 56). Consequently, Plaintiff could not show the prejudice required by Rule 15 when the Defendants wanted to allege as an affirmative defense that Dr. Ezman's and Peachtree's negligence proximately caused Mr. Jefferies' death.

Therefore, Plaintiff did not satisfy her burden of establishing prejudice. On the contrary, Plaintiff's Complaint and her discovery demonstrated just the opposite – that she was fully aware of the issue of Dr. Ezman's negligence and intended to litigate it herself before the settlement. Because the record contains no basis for a conclusion the Plaintiff would have been prejudiced by allowing the Defendants to amend their Answer, the Circuit Court abused its discretion by not allowing the amendment.

B. The Circuit Court's denial of Defendants' Motion to Amend was not harmless error.

Plaintiff's theory of liability against these Defendants was twofold, arguing at trial that they 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' medical record information to

Peachtree. As set forth above, Defendants strongly dispute these claims and have submitted extensive evidence and testimony rebutting them. But even assuming *arguendo* a breach of a relevant standard of care, Defendants were improperly denied the ability to amend and assert the defense of the intervening/superseding actions of Peachtree and Dr. Ezman, whose actions broke the causal chain.

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)). 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, there was ample evidence for the jury to find that Peachtree's and Dr. Ezman's independent, intervening, and superseding negligent acts broke the causal chain, relieving these Defendants of liability. However, the Circuit Court precluded Defendants from raising the affirmative defense of independent/intervening/superseding cause. Because of the Circuit Court's refusal to permit the amendment of Defendants' Answer to include the defense, the jury was never instructed

on the nature of the defense. The jury was not informed that even if they found these Defendants were negligent (or even grossly negligent), nonetheless they should reach a defense verdict if Peachtree's and/or Dr. Ezman's negligent acts were not reasonably foreseeable and broke the causal connection.

(i) Dr. Ezman and Peachtree acted negligently when they failed to ensure they had all of their patient's prior medical records.

Defendants provided uncontroverted evidence that it was the duty and responsibility of Peachtree staff to ensure receipt of medical records that facilitated proper communication between facilities under the circumstances of this case.

On July 20th, the hospital case manager began arranging Mr. Jefferies' transfer to Peachtree. (Trial Tr. 225:5-15; 330:7-17; 394:6-17; 395:17-396:5); (Spartanburg Regional Medical records). At that time, the hospital case manager sent Peachtree the patient's daily progress notes from July 18th through 20th. (Trial Tr. 179:11-15; 223:18-23; 401:21-25). However, Mr. Jefferies was actually discharged to Peachtree several days later on July 26th. (Trial Tr. 173:4-8; 391:24-392:4; 394:14-17; 353:18-20). Progress notes were completed daily for every day of Mr. Jefferies' stay at the hospital and were all complete before Mr. Jefferies' discharge. (Nicholas Dep. 12:11-17); (Trial Tr. 354:9-12). At Spartanburg Regional, the hospital case manager is responsible for sending the patient records to the rehab facility. (Trial Tr. 342:11-25; 345:3-8; 346:1-14; 403:18-404:15). As Dr. Lim testified:

> There's specific protocols in the hospital. I cannot willy nilly print up medical records and send them wherever I want. There is a case manager that has to go through to be HIPPA compliant to send the medical records. That is their hospital employee and that is their function.
>
> ***
>
> Those hospital records are not our records. We can not share those; they're owned by the hospital….There's protocols in place. They have to go through case management or medical records to request those records.

(Trial Tr. 403:24-404:15); (Trial Tr. 471:4-17; 472:2-18 (Defendants' expert, Dr. Steven Poletti, concurring that it is a hospital staff employee's job to send the medical records to the rehab facility

and that Dr. Lim and his staff did not have any responsibility to send those records to Peachtree)).

There is uncontroverted testimony that Peachtree never received the other six (6) daily progress notes from Spartanburg Regional – i.e. the records from the 21st, 22nd, 23rd, 24th, 25th, and 26th. (Trial Tr. 182:11-17; 223:18-224:6; 401:21-402:18; 471:4-11); (Peachtree Center Records). Plaintiff's expert, Dr. Christopher Erb, testified: "It's critical for any subsequent provider to know what's come before….Without that, the subsequent providers are basically flying blind in terms of knowing what's the right thing to do for that patient." (Trial Tr. 171:14-22). He further testified that not having the records from those six days puts Peachtree and Dr. Ezman "in a really tough position when they're trying to decide how to care for him going forward." (Trial Tr. 224:6-8).

There was uncontroverted testimony that it would have taken mere minutes to have those records sent, or if they had already been sent, resent to Peachtree. (Trial Tr. 345:5-12; 404:16-19; 471:18-23); *see also* (Trial Tr. 224:9-14; 254:17-23 (Dr. Erb agreeing that it would not have taken Peachtree long to request the records)). There is no evidence that Dr. Ezman or anyone at Peachtree ever made any attempt to request the missing records from Dr. Lim or anyone else. *See* (Trial Tr. 227:7-13; 255:7-14 (Plaintiff's expert, Dr. Erb, testifying that there is no indication anyone from Peachtree reached out for these missing records)); (Peachtree Center Records). Those "missing" six days of progress notes clearly spelled out that Mr. Jefferies had been placed on a prophylactic dose of heparin on July 22, 2018, two days after the medical records received by Peachtree were dated. *See* (Trial Tr. 225:20-25 (Dr. Erb testifying that these records spelled out that Mr. Jefferies had been on heparin)); (Spartanburg Regional Medical records). Defendants' expert, Dr. Poletti, testified that it was "almost astonishing" that no one from Peachtree reached out to request the missing records. (Trial Tr. 472:19-473:2).

It was not reasonably foreseeable to the Defendants that the hospital's case manager would

not send all of the daily progress notes to Peachtree. It was also not reasonably foreseeable to the Defendants that Dr. Ezman/Peachtree would not promptly obtain and review their patient's recent medical records. *See* (Trial Tr. 228:8-11; 344:23-345:2; 354:1-8; 402:12-403:10).

(ii) Peachtree/Dr. Ezman were also negligent in failing to properly evaluate their patient's risk factors for blood clots and begin any treatment necessitated by such evaluation.

Dr. Ezman testified that despite not knowing that his patient had been on heparin in the hospital, he admitted 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. 23:1-24); *see also* (Trial Tr. 231:3-17 (Plaintiff's expert testifying that when Mr. Jefferies came to them Peachtree and Dr. Ezman had the opportunity to assess him and issue any appropriate orders)); (Sheyner Aff. ¶¶ 4-6 (Plaintiff's expert testifying that Peachtree and Dr. Ezman were responsible for performing their own assessment of their patient and ordering any necessary treatment)). Nevertheless, Dr. Ezman did not perform his own physical exam until noon on July 27, nearly 24 hours after Mr. Jefferies was admitted to Peachtree, and only after he was notified that his patient had experienced a significant drop in his oxygen saturation to 81%, the lowest recorded in his post-op period. (Ezman Dep. 25:13-22; 26:11-28:17; 31:11-19).

According to Plaintiff's expert, Dr. Erb, "81 is abnormally low" and classified as hypoxemia. (Trial Tr. 237:1-5). Plaintiff's expert testified that Dr. Ezman should have been thinking about a potential pulmonary embolism ("PE"). (*Id.* at 244:6-12). Defendant's expert, Dr. Steven Poletti, also testified that if a doctor sees "hypoxia – that's decreased blood oxygenation – in a post-operative patient, that pulmonary embolism should be in [his] differential diagnosis." (*Id.* at 458:4-16). In fact, immediately after Mr. Jefferies' death – before the autopsy, Dr. Ezman suspected PE as the cause of Mr. Jefferies' death. (Ezman Dep. 38:2-18). Unfortunately, there is no indication he considered PE

before Mr. Jefferies' death. *See* (Peachtree Center Records).

When notified of the 81% oxygen saturation, Dr. Ezman ordered a chest x-ray. As he admitted, the chest x-ray did not answer why the oxygen saturation rate had been so low, or why Mr. Jefferies had been short of breath. (Ezman Dep. 29:10-23). Plaintiff's expert testified that a chest x-ray will never diagnose a PE. (Trial Tr. 233:8-13; 242:7-243:11); *see also* (Trial Tr. 406:16-19 (Dr. Lim concurring that a "[c]hest x-ray never diagnoses pulmonary embolism")).

Plaintiff's expert testified that to rule out PE, one must perform a CTA, and if a PE is diagnosed, the patient should be treated with therapeutic heparin. (*Id.* at 240:3-241:10). According to Plaintiff's expert, patients can survive a pulmonary embolism when treated properly. (*Id.* at 241:9-10). Dr. Poletti, Defendants' expert, also opined that a CTA is needed to rule out PE. (*Id.* at 458:13-16; 464:464:16-24). Dr. Lim concurred that "[i]n light of a normal x-ray, a CT scan is definitely warranted to make sure a pulmonary embolism is not present." (*Id.* at 407:18). However, Dr. Ezman never ordered a CTA, and approximately 17 hours later Mr. Jefferies was dead from a pulmonary embolism. *See* (Peachtree Center Records).

Dr. Ezman testified he had a duty to assess Mr. Jefferies' risk of blood clots when he examined Mr. Jefferies, and Peachtree had a duty to assess Mr. Jefferies' risk of blood clots while he was a resident there. (Ezman Dep. 37:16-23). Plaintiff's own expert Dr. Erb testified the standard of care with respect to the clot protection for at-risk patients is the same across all medical specialties and the standard of care requires clot protection to be provided during the duration of a patient's increased risk for developing blood clots in the post-operative period. (Trial Tr. 151:12-152:4). Dr. Ezman admitted Mr. Jefferies had multiple risk factors for DVT and PE, including reduced mobility, recent surgery, obesity, and age – all of which put him at an increased risk for developing blood clots. (Ezman Dep. 33:8-34:9); *see* (Trial Tr. 160:15-161:4 (Dr. Erb agreeing that these were risk factors

for bold clots)). Dr. Ezman knew Mr. Jefferies had not started ambulating since being at Peachtree. *See* (Peachtree Center Records). He also knew Mr. Jefferies had a significant drop in his oxygen saturation while at Peachtree and shortness of breath. (*Id.*). However, Dr. Ezman did nothing to rule in or rule out a PE and did not order any clot protection measures for his patient. *See* (Ezman Dep. 34:4-37:23); (Trial Tr. 408:2-9 (Dr. Lim testifying that there is no evidence Dr. Ezman considered a CT, SCDs, or heparin after the low oxygen saturation event).

It was not reasonably foreseeable that a rehab medical doctor would fail to timely do his own independent assessment and work up of his patient and order the appropriate testing, prophylactic measures or anything else the rehab doctor deemed indicated and necessary. Indeed, Dr. Ezman himself testified that assessing for blood clots that may become pulmonary embolisms (venous thromboembolism) is usually "a specific assessment that is done on any regular basis during a patient's stay at Peachtree Centre". (Ezman Dep. 21:10-22:2). However, Peachtree's records did not indicate that such an assessment was done for Mr. Jefferies. (Peachtree Center Records); *see* (Sheyner Aff. ¶ 4 (Plaintiff's expert testifying that the standard of care required Dr. Ezman to perform an "accurate assessment of risk factors for development of deep venous thrombosis and pulmonary embolism in every patient"). Plaintiff's own expert opined in her affidavit that Dr. Ezman deviated from the standard of care when he failed to appropriately assess Mr. Jefferies' numerous risk factors for the development of DVT and PE and timely initiate prophylactic treatment. (Sheyner Aff. ¶¶ 4-6). It was also not reasonably foreseeable that Dr. Ezman would fail to order the appropriate testing to determine the cause of his patient's hypoxemia event and shortness of breath.

In short, neither Dr. Ezman's/Peachtree's negligent care nor their failure to request information was reasonably foreseeable to these Defendants. Consequently, they had a valid and supported independent/intervening/superseding-cause affirmative defense, which should have been

charged to the jury. But the intervening cause defense was never permitted to be heard and considered by the jury, due to the denial of the Motion to Amend, which was error. 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).

Moreover, 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* (Trial Tr. 578:8-580:23). 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 580:20-23). But the jury was not told about the effect of an independent, intervening, or superseding cause. *See* (Trial Tr.). Although two causes can be concurring causes, they may not be when the intervening cause defense is charged and proven. Therefore, the Circuit Court erred in denying the Defendants' Motion to Amend. 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").

As a result of the Circuit Court's prejudicial error in denying the Motion to Amend, Dr. Lim is entitled to a new trial.

III. Defendant Lim is entitled to a new trial or, at a minimum, remittitur 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.

The Defendants are entitled to a new trial based on the 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, and it resulted in a duplicative recovery for 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 only an executor or administrator of the decedent's estate may bring an action for wrongful death may. S.C. Code § 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[.]" S.C. Code § 15–51–20. 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). 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 § 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 § 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 of the Estate, 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 (Andrea Allen and Michelle Hemphill).

The plain language of the wrongful-death statute dictates this result. 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. There is significant evidence favoring one child, but none for the other. Writing down a "zero" for the unfavorable sibling might seem like a harsh result to the jury, pressuring them to award that sibling some monetary damages. But the jury would never know that they are inflating their damages award unnecessarily (like the jury in *Branham*), because of the equal-distribution portion of the statute. Defendants' statutory-interpretation argument eliminates this issue.

Consistent with the statutory scheme, the representative of the Estate of Albert Jefferies – Andrea Allen, one of Mr. Jefferies' daughters – sued for wrongful death on behalf of the Estate. But inconsistent with the statutory scheme, the Circuit Court, over Defendants' objections, listed non-party and statutory beneficiary Michelle Hemphill as a person to whom the jury could 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's 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. Dr. Lim respectfully requests that this Court adopt the Montana Supreme Court's reasoning and conclusion and hold either that Defendants are entitled to a new trial absolute or, at a minimum, a remittitur of $3,000,000.

IV. The Circuit 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. Plaintiff further concedes that she had notice as early as August 30, 2021 – when Defendants Dr. Lim, PA Nicholas, and "Carolina Orthopaedic and Neurosurgical Associates, P.A." – filed their Answer to Plaintiff's Amended Complaint – that she had sued the wrong entity. Specifically, Defendants informed Plaintiff in their Answer that Dr. Lim and PA Nicholas were employed by **CONA, PA** and were acting within the scope of their employment with **CONA, PA** during the relevant time frame of the lawsuit. *See* (Lim Answer ¶¶ 4-5).

Ultimately, by Order dated July 3, 2025, the Circuit Court amended the case caption, listing "Carolina Orthopaedic and Neurological Associates, PA" as a defendant in the case caption, and removing CONA, ASC as a defendant. (July 3, 2025 Order). However, CONA ASC and CONA

PA are separate and distinct legal entities.

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 so 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** invalid as to CONA PA, it is also necessarily invalid as to Dr. Lim and PA Nicholas.[6] A Rule 68 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 applicable 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

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[6] 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 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.

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 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, P.A. *See 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 result, Plaintiff's Offer of Judgment named and thus was sent to an entity she admits is not a correct "Opposing Party," and was ***not*** sent to an entity which Plaintiff claims is a proper "Opposing Party." As a consequence, the Circuit Court's Order giving efficacy and directing the payment of interest based on the defective Offer of Judgment must be vacated.

CONCLUSION

As set forth above, Defendant Lim is entitled to JNOV because Plaintiff failed to prove one or more required elements of her medical negligence claim. Specifically, Plaintiff failed to provide adequate evidence of a standard of care for an orthopedic surgeon under the same or similar circumstances, breach of such standard of care, and such breach proximately causing Mr. Jefferies' death.

In the alternative, Defendant Lim is entitled to a new trial because the Circuit Court's denial of the Defendants' Motion to Amend is reversible error. Defendant Lim is also entitled to a new trial or, at a minimum, remittitur 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.

In the event the Court does not grant JNOV or a new trial, the Circuit Court's Order awarding Plaintiff prejudgment interest should be vacated because Plaintiff failed to satisfy the requirements of Rule 68, SCRCP. Therefore, Dr. Lim respectfully requests that the Court reverse the orders below and grant the relief requested herein.

Respectfully submitted,

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