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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Durham Cole, Jr., Circuit Court Judge
The Honorable Grace Knie, Circuit Court Judge

Case No. 2020-CP-42-02169
Appellate Case No. 2025-001716

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

v.

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

**INITIAL BRIEF OF RESPONDENT TO
BRIEF OF CAROLINA ORTHOPEDIC AND
NEUROSURGICAL ASSOCIATES, P.A.**

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TABLE OF CONTENTS

Table of Authorities	ii
Counter-Statement of the Issues on Appeal	1
Counter-Statement of the Case	2
Standard of Review	5
Facts	6
Arguments	7
I. The Trial Court (Judge Knie) Did Not Err in Amending the Caption of this Case to Correct the Name of Carolina Orthopedic and Neurosurgical Associates, PA (CONA) When There Was No Objection to the Correction and CONA's Counsel Stipulated to the Correction	7
II. The Trial Court (Judge Knie) Did Not Err in Not Permitting CONA to Intervene when CONA, PA was Already a Party to the Suit	15
III. The Trial Court (Judge Knie) Correctly Assessed Pre-Judgment Interest Against CONA	20
IV. The Trial Court (Judge Knie) Used a Proper Verdict Form Without Objection	23
V. The Circuit Court (Judge Cole) Exercised Appropriate Discretion in Denying CONA's Motion to Amend the Answer to Assert Independent, Intervening and/or Superseding Causation	29
Conclusion	37

TABLE OF AUTHORITIES

Cases

<i>Atl. Coast Builders & Contractors, LLC v. Lewis</i> , 398 S.C. 323, 730 S.E.2d 282 (2012)	28
<i>Beasley v. Kerr-McGee Chem. Corp.</i> , 273 S.C. 523, 257 S.E.2d 726 (1979)	13
<i>Berry v. McLeod</i> , 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)	30
<i>Bethea v. Western Union Telegraph</i> , 97 S.C. 385, 81 S.E. 675 (1914)	26
<i>Bishop v. S.C. Dep't of Mental Health</i> , 331 S.C. 79, 502 S.E.2d 78 (1998)	32
<i>Black v. Hodge</i> , 306 S.C. 196, 410 S.E.2d 595 (Ct. App.1991)	19
<i>Carson v. South Carolina Dept. of Nat'l Resources</i> , 371 S.C. 114, 638 S.E.2d 45 (2002)	26
<i>Duncan v CRS Sirrine Engineers</i> , 337 S.C. 537, 524 S.E.2d 115 (Ct. App. 1999)	30, 31
<i>Dykema v. Carolina Emergency Physicians, P.C.</i> , 348 S.C. 549, 560 S.E.2d 894 (2002)	13, 26
<i>Erickson v. Jones St. Publishers, LLC</i> , 368 S.C. 444, 629 S.E.2d 653 (2006)	29
<i>Ex parte Builders Mut. Ins. Co.</i> , 431 S.C. 93, 847 S.E.2d 87 (2020)	20
<i>Foggie v. CSX Transp.</i> , 315 S.C. 17, 431 S.E.2d 587 (1993)	31
<i>Fontaine v. Peitz</i> , 291 S.C. 536, 354 S.E.2d 565 (1987)	30
<i>Forrester v. Smith & Steele Builders, Inc.</i> , 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988)	31
<i>Garrison v. Target Corp.</i> , 435 S.C. 566, 869 S.E.2d 797 (2022)	22
<i>Glenn v. 3M Company</i> , 440 S.C. 34, 890 S.E.2d 569 (Ct. App. 2023)	32
<i>Griffin v. Capital Cash</i> , 310 S.C. 288, 423 S.E.2d 143 (Ct. App. 1992)	11
<i>Haskins v. Fairfield Elec. Co-op.</i> , 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984)	25
<i>Higgins v. Medical Univ. of South Carolina</i> , 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997)	7
<i>In re Horry Cnty. State Bank</i> , 361 S.C. 503, 604 S.E.2d 723 (Ct. App. 2004)	15

<i>James v. Kelly Trucking Co.</i> , 377 S.C. 628, 661 S.E.2d 329 (2008)	14
<i>Koutsogiannis v. BB&T</i> , 365 S.C. 145, 616 S.E.2d 425 (2005)	11
<i>Limehouse v. Southern Ry.</i> , 216 S.C. 424, 58 S.E.2d 685 (1950)	26
<i>Longshore v. Saber Sec. Servs., Inc.</i> , 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005)	29
<i>Machin v. Carus Corp.</i> , 419 S.C. 527, 799 S.E.2d 468 (2017)	27
<i>Mains v. K Mart Corp.</i> , 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988)	23
<i>McAlister v. Thomas and Howard Co.</i> , 116 S.C. 319, 108 S.E. 94 (1921)	26
<i>Moore v. North American Van Lines</i> , 310 S.C. 236, 423 S.E.2d 116 (1992)	13
<i>Moore v. Pilot Life Ins. Co.</i> , 205 S.C. 474, 32 S.E.2d 757 (1945)	12
<i>Morrow v. Fundamental Long-Term Care Holdings, LLC</i> , 412 S.C. 534, 773 S.E.2d 144 (2015)	14
<i>New York Carpet World v. Houston</i> , 292 S.C. 101, 354 S.E.2d 924 (Ct. App. 1987)	25
<i>O'Neal v. Bowles</i> , 314 S.C. 525, 431 S.E.2d 555 (1993)	25
<i>Orangeburg Sausage Co. v. Cincinnati Ins. Co.</i> , 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994)	25
<i>Osterneck v. Osterneck</i> , 374 S.C. 573, 649 S.E.2d 127 (Ct. App. 2007)	21
<i>Oulla v. Valezques</i> , 427 S.C. 428, 831 S.E.2d 450 (Ct. App. 2019)	29
<i>Pool v. Pool</i> , 329 S.C. 324, 494 S.E.2d 820 (1998)	30
<i>Porter v. South Carolina Pub. Serv. Comm'n</i> , 327 S.C. 220, 489 S.E.2d 467 (1997)	27
<i>Prevatte v. Prevatte</i> , 297 S.C. 345, 377 S.E.2d 114 (Ct. App. 1989)	22
<i>Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</i> , 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006)	28
<i>Rhodes v. Winn-Dixie Greenville, Inc.</i> , 249 S.C. 526, 155 S.E.2d 308 (1967)	25

<i>Rickborn v. Liberty Life Ins. Co.</i> , 321 S.C. 291, 468 S.E.2d 292 (1996)	13
<i>Rickerson v. Karl</i> , 412 S.C. 215, 770 S.E.2d 767 (Ct. App. 2015)	5
<i>Roddey v. Wal-Mart Stores E., LP</i> , 415 S.C. 580, 784 S.E.2d 670 (2016)	32
<i>Sentell v. Southern Ry. Co.</i> , 67 S.C. 229, 45 S.E. 155 (1903)	7
<i>Synder's Auto World, Inc. v. George Coleman Motor Co.</i> , 315 S.C. 183, 434 S.E.2d 310 (Ct. App. 1993)	32
<i>Soil & Material Eng'rs, Inc. v. Folly Assocs.</i> , 293 S.C. 498, 361 S.E.2d 779 (Ct. App. 1987)	31
<i>South Carolina Dept. of Transp. v. First Carolina Corp. of SC</i> , 372 S.C. 295, 641 S.E.2d 903 (2007)	23, 28
<i>Staubes v. City of Folly Beach</i> , 339 S.C. 406, 529 S.E.2d 543 (2000)	28
<i>Sullivan v. Hawker Beechcraft Corp.</i> , 397 S.C. 143, 723 S.E.2d 835 (Ct. App. 2012)	29
<i>Visual Graphics Leasing Corp. v. Lucia</i> , 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993)	13
<i>Washington v. Whitaker</i> , 317 S.C. 108, 451 S.E.2d 894 (1995)	26
<i>Williams v. Williams</i> , 335 S.C. 386, 517 S.E.2d 689 (1999)	11
<i>York v. Conway Ford, Inc.</i> , 325 S.C. 170, 480 S.E.2d 726 (1997)	23

Statutes

S.C. Code Ann. § 15-32-220 (2005 & Supp. 2025)	27
S.C. Code Ann. § 15-35-400 (Supp. 2025)	2, 22
S.C. Code Ann. § 15-51-20 (Supp. 2025)	27

Rules

Local Civil Rule 26.01, D.S.C.	12
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Rule 208, SCACR	1, 5, 6, 7
Rule 267, SCACR	7
Rule 268, SCACR	7
Rule 3.1, RPC, Rule 407, SCACR	8
Rule 3.3, RPC, Rule 407, SCACR	8
Rule 15, SCRCPP	5, 9, 29, 30
Rule 24, SCRCPP	4, 15, 20
Rule 26, SCRCPP	32
Rule 33, SCRCPP	9, 32
Rule 43, SCRCPP	19
Rule 49, SCRCPP	23, 28, 29
Rule 51, SCRCPP	25
Rule 59, SCRCPP	3
Rule 68, SCRCPP	2, 21

Miscellaneous

James F. Flanagan, <i>et al.</i> , <i>South Carolina Civil Procedure</i> (4th ed. 2020)	10, 20, 32
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COUNTER-STATEMENT OF THE ISSUES ON APPEAL¹

- I. Did the Trial Court (Judge Knie) Err in Amending the Caption to Correct the Name of Carolina Orthopedic and Neurosurgical Associates, PA (CONA) when there was no objection to the correction and CONA's counsel stipulated to the correction?
- II. Did the Trial Court (Judge Knie) Err in Not Permitting CONA to intervene when CONA, PA was already a party to the suit?
- III. Did the Trial Court (Judge Knie) Correctly Assess Pre-Judgment Interest Against CONA?
- IV. Did the Trial Court (Judge Knie) Use a Proper Verdict Form Without Objection?
- V. Did the Circuit Court (Judge Cole) Exercise Appropriate Discretion in Denying CONA's Motion to Amend the Answer to Assert Independent, Intervening and/or Superseding Causation?

¹ CONA includes an assertion that it "joins in all the appellate arguments separately made in this appellate matter by either Dr. Lim, PA Nicholas and/or CONA-ASC which are not inconsistent with and/or contrary to the arguments CONA-PA has asserted herein, either in whole or in part." (CONA App. Br. p. 45). This blanket and vague assertion does not comply with Rule 208(b)(6), SCACR, which provides parties "may adopt *by reference* all or any part of the brief of another." (Emphasis added). The requirement of specificity "by reference" to a part of another party's brief permits any party who challenges an argument by another party to know exactly what the first party is adopting. The requirement of providing a specific reference also provides the Appellate Court with certainty that an appellant is appropriately joining or raising an issue and providing sufficient argument to avoid the issue being deemed abandoned. Respondent simply cannot respond to this type of blanket and open-ended joinder in any of the other briefs in this appeal, and only insofar as there is some unspoken consistency with CONA's arguments. The Court should disregard CONA's inappropriate assertion and attempt to join other briefs in this fashion.

COUNTER-STATEMENT OF THE CASE

On July 9, 2020, Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies, brought a wrongful death and survival case arising out of medical negligence against a number of medical professionals. (Complaint). Following two amendments and settlements with some of the defendants, the case proceeded against Chi Hun Lim, M.D., his physician's assistant Megan Nicholas, and Carolina Orthopaedic and Neurosurgical Associations ASC, LLC.² All Defendants denied liability and raised various defenses.

Extensive discovery and dispositive motions proceeded over the next four (4) years. The matter was scheduled for a day certain trial on June 2, 2025. On April 17, 2025, or about six (6) weeks before trial, all Defendants moved to amend their answers to assert the affirmative defense of independent, intervening and superseding negligence of Dr. Ezman, the physician at Peachtree Centre, a managed care facility where the Defendants had discharged Mr. Jefferies for post-surgical treatment. (Motion to Amend with Attachments).

On April 25, 2024, Respondent served an Offer of Judgment pursuant to Rule 68, SCRCP, and S.C. Code Ann. § 15-35-400 (Supp. 2025) against all Defendants for \$500,000. (Offer of Judgment). Defendants rejected the offer.

Respondent opposed the motion to amend the Answer, contending Defendants knew for over four (4) years that Respondent alleged negligence by Peachtree and its employee, Dr. Ezman, but failed to raise the defense in their Answer to the Amended Complaint or at any time

² The actual name of the Appellant is "Carolina Orthopaedic and *Neurosurgical* Associates," not "Carolina Orthopaedic and *Neurological* Associates." Unfortunately, several of the filings below as well as three of the Notices of Appeal contain the scrivener's error, and this Court adopted the erroneous name for its caption. For simplicity, Respondent refers to the entity as CONA. The Court may wish to correct this error for the caption in this Court.

until just prior to trial. Respondent also pointed out that the amendment would be contrary to Defendant's un-supplemented responses to discovery denying any other person had liability in this case. (Plaintiff's Opposition filed May 5, 2025). Respondent added that Defendants' lone expert offered no opinions about anything anyone at Peachtree did wrong. (*Id.*). On May 9, 2025, the circuit court (Judge Cole) denied Defendants' motion. (Order of May 9, 2025).

The case was tried from June 2 through June 5, 2025. The jury returned a verdict of \$3,000,000 for Ms. Allen and \$3,000,000 for Ms. Hemphill. On June 16, 2025, Respondent moved for assessment of prejudgment interest pursuant to Rule 68 and Section 15-35-400.

On June 17, 2025, all Defendants filed the following post-trial motions: (1) a joint motion to alter or amend the judgment pursuant to Rule 59, SCRCF (for the first time, CONA raised an issue over whether it was properly identified and asserted CONA ASC, LLC, was not liable for the negligence of Dr. Lim or Ms. Nicholas; CONA requested the court clarify the judgment) (Rule 59, SCRCF, Motion of June 17, 2025); (2) a motion for JNOV, contending Respondent failed to prove a deviation from the standard of care and causation of damages and that Respondent failed to establish gross negligence (JNOV Motion of June 17, 2025); (3) a motion for new trial, raising for the first time an issue regarding the verdict form, contending Judge Cole erroneously denied the motion to amend, and seeking application of the Thirteenth Juror Doctrine (Motion for New Trial/Thirteenth Juror of June 17, 2025); (4) a motion for new trial/new trial nisi remittitur based upon the amount of the verdict (Motion for New Trial/New Trial Nisi filed June 17, 2025); (5) a motion for setoff of amounts Respondents recovered in settlements with other defendants (Motion for Setoff of June 17, 2025); and (6) a motion to apply the noneconomic damages cap to the verdict, contending there was no evidence to support the

jury's finding of gross negligence (Motion for Cap of June 17, 2025).

On June 26, 2025, Respondent filed separate responses to each motion. (Plaintiff's Responses to Defendants' Motion, all of June 26, 2025). On July 1, 2025, Defendants filed a Reply to Plaintiff's Responses. (Defendants' Reply of July 1, 2025).

The court held a hearing on July 2, 2025 on all pending motions. At the commencement of the hearing counsel for all parties (including CONA) stipulated that the caption should be amended to reflect that "CONA, PA," and not "CONA ASC, LLC," as the true defendant against whom the verdict was rendered. (Order of July 3, 2025).

On July 14, 2025, through new counsel admitted *pro hac vice*, CONA, PA, filed a motion to intervene pursuant to Rule 24(a), SCRCP, contending for the first time that it was a "non-party" because everything was against CONA ASC, LLC, and not CONA, PA. (Motion to Intervene of July 14, 2025). CONA also moved to set aside the order amending the caption to correctly identify it as a party (which had been done through stipulation by CONA's counsel). (Rule 59, SCRCP, Motion of July 14, 2025). CONA attached affidavits from several physicians in support of its motion. (Affidavit Exhibits filed July 14 and July 17, 2025).

On July 28, 2025, the court entered an order denying all of Defendants' post-trial motions and granting Respondent's motion for Pre-Judgment Interest. (Order of July 28, 2025). The court also applied the setoff with Respondent's agreement.

On September 16, 2025, the court entered an order denying CONA, PA's motion to intervene and motion to set aside the July 14, 2025 order. (Order of September 16, 2025).

These separate appeals follow. This Brief addresses only CONA's appeal.

STANDARD OF REVIEW³

The standard of appellate review for each issue CONA raises involves whether the trial court committed an abuse of discretion. This means whether each of the rulings lacks evidentiary support or is controlled by an error of law. *E.g.*, *Rickerson v. Karl*, 412 S.C. 215, 219-220, 770 S.E.2d 767, 770 (Ct. App. 2015)(“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.”). However, some issues are subject to the “any evidence” standard of review. Accordingly, pursuant to Rule 208(b)(1)(D), SCACR, Respondent includes a Standard of Review at the start of each argument.

³ CONA does not include a discussion of this Court’s standard of review. *See* Rule 208(b)(1)(D) (mandating a separate statement of the standard of review in the brief). CONA mentions “abuse of discretion” in its discussion of Rule 15, SCRCP, but then seeks this Court to apply the trial court’s standard for granting a new trial. (App. Br. p. 41).

FACTS

This is a medical malpractice case involving a jury finding of gross negligence by a physician, Dr. Lim, and a physician's assistant, Ms. Nicholas, that led to the death of Respondent's Decedent, Albert Charles Jefferies. This Brief is filed in response to the Brief of Appellant filed on behalf of the employer of Dr. Lim and Ms. Nicholas, Carolina Orthopaedics and Neurosurgical Associations, PA ("CONA").

CONA raises no questions regarding the sufficiency of the evidence to support the jury's verdict. Therefore, specific facts related to each issue are discussed under each heading. Even so, Respondent refers to the factual recitations in the Respondent's Briefs directed to the Briefs of Appellant filed by Dr. Lim (Respondent Brief to Dr. Lim, pp. 12, 13, 14, 15, 17, 18, 21, 22, 27, 28, 29, 31, 32, 33, 34, 36, and 40) and Ms. Nicholas (Respondent Brief to Ms. Nicholas, pp. 5, 10, 11, 13, 15, 16, 19, 20, 21, 25, 26, 27, 29, 31, 35, 41 and 42). Rule 208(b)(6), SCACR.

ARGUMENTS⁴

I. The Trial Court (Judge Knie) Did Not Err in Amending the Caption to Correct the Name of Carolina Orthopedic and Neurosurgical Associates, PA (CONA, PA) When There Was No Objection to the Correction and CONA's Counsel Stipulated to the Correction

Standard of Review

The trial court has discretion to amend the caption of a case to correct a misnomer in furtherance of justice. *Sentell v. Southern Ry. Co.*, 67 S.C. 229, 45 S.E. 155 (1903).

Discussion

CONA contends the trial court violated its due process rights by accepting a “post-verdict stipulation” amending the caption to reflect that the true party-defendant to this litigation was CONA, PA, instead of CONA ASC, LLC. (CONA App. Br. pp. 13-20). CONA incredibly claims it “was not provided notice nor an opportunity to be heard before the trial court made the party substitution.” (App. Br. pp. 20-22). This Court should reject these arguments because they

⁴ CONA's opening Brief of Appellant contains 104 footnotes, and all are single-spaced and in 10-point type. *See* Rule 267(c), SCACR (mandating 12-point or larger type size and double-spacing). Although footnotes should properly be single-spaced, this method permitted CONA to avoid exceeding the 50-page limitation on brief length (the brief is still 46 pages long) without moving the Court to permit CONA to exceed that limitation. Rule 208(b)(5), SCACR. Furthermore, CONA's footnotes are replete with citations to unpublished Court of Appeals opinions, District Court memorandum orders, or South Carolina circuit court orders. Rule 268 (d)(2), SCACR. *See* footnotes 15, 16, 17, 42, 46, 58, 66, 71, 80, 82, 83, 84, 89, 91, and 104. There are also numerous cites to cases from other jurisdictions that are meaningfully distinct from this case and/or the procedures adhering in South Carolina. Respondent respectfully requests that the Court disregard any cite to an unpublished order, opinion, rule, or decision from other jurisdiction or from a trial court without CONA explaining why the cite is proper under South Carolina jurisprudence. *See, e.g., Higgins v. Medical Univ. of South Carolina*, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (reliance on unpublished orders is improper; this includes circuit court orders in unrelated cases).

do not reflect what actually occurred below.⁵

CONA, PA admits that it was the employer of Dr. Lim and Ms. Nicholas, and that CONA ASC, LLC is essentially a shell company (*i.e.*, “carries on no business and has no employee[and] [s]ome (not all) of its members are also employed by CONA[-]PA, and some, but not all, doctors at CONA-PA are also members of [CONA-]ASC.”). (App. Br. p. 6).⁶ Judge Knie rejected CONA’s assertions that it had no notice of this action and the verdict was not properly against it. This Court should affirm.

At trial, in discussing the doctrine of *respondeat superior*, counsel for all Defendants, including CONA, stipulated “that any verdict against Dr. Lim or Megan Nicholas is a verdict against and should be entered against CONA as well.” (R. p. 491, ll. 11-19). The Court then instructed the jury:

It is stipulated by the Plaintiffs and Defendants that Dr. Lim and Megan Nicholas,

⁵ CONA’s counsel who was admitted *pro hac vice* following the trial to represent CONA filed a Motion to Intervene on July 14, 2025, the same day as the order granting *pro hac* admission. In support of the motion to revisit this issue, *pro hac* counsel presented affidavits from a number of CONA’s employees, including several physicians, that are, frankly, incredible on their faces. The affidavits uniformly and falsely contend that “CONA PA was not involved in the litigation and was not present at trial” and the “attorneys purporting to speak for CONA PA do not represent CONA PA and had no authority to enter into any agreement or stipulation on behalf of CONA PA.” Judge Knie found these affidavits were belied by the evidence (*i.e.*, were false). (Order of Sept. 22, 2025, pp. 11-14). It is disturbing that CONA and its *pro hac* counsel presented these patently false affidavits to the Court in an attempt to promote the false narrative that it was never a party to this litigation, was not represented by the defense counsel who its carrier hired to defend Dr. Lim, Ms. Nicholas and their employer (CONA), and was, in fact, vaguely aware of the case, if at all. *Cf.* Rule 3.1, RPC, Rule 407, SCACR (meritorious claims and contentions); Rule 3.3(a), RPC, Rule 407, SCACR (candor toward the tribunal); Rule 3.4(b), RPC, Rule 407, SCACR (fairness to opposing party and counsel). Like Judge Knie, this Court should give no credence to these perjured affidavits in its review of this issue.

⁶ CONA relies upon the false affidavits of Dr. Chittum, Dr. Brown, and Dr. Hoenig for these assertions.

P.A. are employees of CONA. As such, it is agreed that CONA is vicariously liable for any negligence found against either Dr. Lim or Megan Nicholas, P.A. And, of course, CONA is Carolina Orthopaedic and Neurological (sic) Associates, ASC, LLC.

(Tr. p. 496, ll. 10-15). Both counsel acknowledged the court had “stated your agreement as requested.” (Tr. p. 496, ll. 16-18).

On July 2, 2025, the Court held a post-trial hearing. The Court subsequently entered an order which states:

Counsel informed the Court at the commencement of the hearing *that they agree and stipulate* that the caption in this action should be amended as follows: Defendant Carolina Orthopaedic and Neurological Associates, ASC, LLC, should correctly be referred to as Carolina Orthopaedic and Neurological⁷ (sic) Associates, PA. It is so ordered.

(Order of July 3, 2025) (emphasis added).

Despite all of this, CONA now contends this verdict is not against “CONA, PA” but is against the entity “CONA ASC, LLC,” which it admits was *not* the employer of Dr. Lim or Ms. Nicholas. Again, CONA relies upon affidavits which Judge Knie held were belied by the record. This Court should reject this argument.

The Rules of Civil Procedure seek to avoid the kind of gamesmanship CONA is attempting in this case. For instance, Rule 33(b)(8), SCRCF, mandates that a defendant who is improperly identified give proper identification and state whether counsel will accept service of an amended summons and pleading reflecting the correct information. Rule 15(c), SCRCF, provides further that amendments “changing the party against whom a claim is asserted” relate

⁷ On August 27, 2025, the Court held another hearing at which this error was pointed out and on September 4, 2025, issued an order correcting “Neurological” to “Neurosurgical” without objection. (Order of Sept. 4, 2025).

back to the original filing where the defendant “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.” As Professor Flanagan explains:

The third requirement [for an amendment changing parties to relate back] is that the person to be added “knew or should have known that, but for the mistake concerning the identity of the proper party the action would have been brought against him.” The commentators on the federal rules argue that this is an estoppel test. A new party cannot complain if he was served but misdescribed in the pleadings, particularly if the name used is a trade name. There is substantial federal precedent permitting amendments to relate back if the party to be added has a substantial “identity in interest” with the party actually named. Typical examples are parent and wholly owned subsidiaries, or related corporations sharing offices and officers or directors. Of course, if the party sought to be added misled the plaintiff into thinking that the proper party had been named, general principles of estoppel apply.

James F. Flanagan, *et al.*, *South Carolina Civil Procedure* Vol. I, p. 191 (4th ed. 2020).

In this case, Respondent filed an amended complaint on June 29, 2021, bringing Dr. Lim, Ms. Nicholas, and CONA into the case. (Amended Complaint of 6/29/21). Respondent alleged CONA ASC, LLC, was “in the business of providing medical and surgical services” and “employs physicians and physician assistants including Dr. Lim and Megan Nicholas, PA.” (Amended Complaint, p. 2, ¶¶ 11-12; see also p. 7, ¶¶ 53, 54, and 55 (alleging *respondeat superior* liability of CONA ASC, LLC)).

On August 30, 2021, a joint Answer was filed for Dr. Lim, Ms. Nicholas and “Carolina Orthopaedic and Neurosurgical Associates, P.A.” (Answer of 8/30/21). The Answer admits paragraphs 11 and 12 of the Amended Complaint. (Answer, p. 2, ¶¶ 6, 7). The Answer also states “Answering Paragraph 55 of the Complaint, these Defendants admit CONA is liable for the acts and omissions of its employees according to the doctrine of *respondeat superior*....” (Answer, p.

9, ¶ 44). At no time did CONA, PA, assert it had been misidentified.

Nearly four (4) years later, on April 17, 2025, counsel for all Defendants filed the Motion to Amend the Answer to assert intervening and superseding negligence. (Motion of 4/17/25). The Motion attached the proposed Amended Answer on behalf of “Carolina Orthopaedic and Neurosurgical Associates, P.A.” (Motion of 4/17/25, Exh. A, p. 1; see also p. 2, ¶ 4, 5, and p. 9, ¶ 44 (admitting respondeat superior)). Thus, Counsel for all Defendants, including CONA, PA, acknowledged it as the real party in this case. *Cf. Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 145 (Ct. App. 1992) (“A corporation may be known by several names in the transaction of its business. If it is sued in a name under which it transacts business, the process will ordinarily be sufficient to bring it before the court. The misnomer of a corporation has the same effect as the misnomer of an individual. If it later appears that the true name of the corporation is different from the name under which it was sued, the misnomer is properly a subject of amendment. However, failure to correct the corporate name does not invalidate the process or the judgment where the misnomer causes the corporation no prejudice.”) (citations omitted). Once again, however, CONA, PA, did not inform anyone it had been misidentified.

In this case, CONA not only “should have known” of the scrivener’s error in identity, it had actual knowledge through its counsel, who agreed to the stipulation changing the caption. *See, e.g., Koutsogiannis v. BB&T*, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005) (“In the attorney-client relationship, clients are generally bound by their attorneys’ acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys’ authority.”); *Williams v. Williams*, 335 S.C. 386, 391, 517 S.E.2d 689, 691 (1999) (“This Court has consistently recognized an attorney is the ‘alter-ego of his client’ and the attorney stands in

the place of the client. ‘Notice to an attorney is effective as notice to the client when the notice is received in the course of the transaction in which the attorney is acting.’”)(citations omitted).

CONA’s counsel was aware of the litigation and who the real parties were before the Court.

But even in those situations where a plaintiff sues the wrong party, South Carolina’s state court rules do not permit that party to sit back in silence in an attempt to escape responsibility as CONA, PA readily admits it did in this case. The federal rules are in agreement. *Compare* Local Civil Rule 26.01(F) and (G), D.S.C. (South Carolina federal court’s local civil rules mandate that defendants who are improperly identified give proper identification and, if contending another entity is, in fact liable, identify that fact and give the identity of that party).

CONA, PA, and its carrier paid the bills for counsel representing all Defendants (including CONA, PA), and their counsel provided filings and discovery responses for the employer of Dr. Lim and Ms. Nicholas, who are admittedly employed by CONA, PA. Counsel for all Defendants, including CONA, PA, had actual authority to answer the complaint, engage in discovery, report progress in the litigation to Ms. Roper, enter stipulations, send bills, receive payment for his work from CONA, PA’s carrier, and receive the verdict for CONA, PA by virtue of his interactions with CONA PA representatives and its insurance carrier. (See all Exhibits to Plaintiff’s Response to Motion to Alter or Amend filed 6/26/25) (discovery response p. 3, ¶ 6 admitting “[t]his defendant is a medical practice”; Discovery served by Defendants).

It is also the universal rule that private or secret limitations on an agent’s authority may not bind third persons who have no knowledge of such restrictions. *Moore v. Pilot Life Ins. Co.*, 205 S.C. 474, 32 S.E.2d 757 (1945) (where a principal clothes its agent with apparent authority to act in a certain capacity, it is bound by all the acts of such agent within the scope of such

authority; a person dealing with such an agent is not bound by any secret limitations on such apparent authority). Any limitations on Defense Counsel's authority were secret and, as such, unenforceable.

Defense Counsel also had apparent authority by virtue of the principal (CONA, PA and its carrier) placing him in a position that allowed justifiable reliance on his authority. The doctrine of apparent authority focuses on the principal's manifestation to a third party that the agent has certain authority. *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 468 S.E.2d 292 (1996). Accordingly, the principal is bound by the acts of its agent when it places the agent in such a position that persons of ordinary prudence, reasonably knowledgeable with business usages and customs, are led to believe the agent has certain authority and they in turn deal with the agent based on that assumption. *Id.* Thus, the concept of apparent authority depends upon manifestations by the principal to a third party and the reasonable belief by the third party that the agent is authorized to bind the principal. *Beasley v. Kerr-McGee Chem. Corp.*, 273 S.C. 523, 257 S.E.2d 726 (1979); *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993). *See also Moore v. North American Van Lines*, 310 S.C. 236, 423 S.E.2d 116 (1992) (basis of apparent authority is representations made by principal to third party and reliance by third party on those representations).

Even if CONA, PA, understood that it was not properly before the Court (and Respondent asserts it was), that means CONA, PA, sat "idly by" hoping to have this ace in the hole in case of a negative verdict. The law does not permit this type of misconduct. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) ("[Our supreme court] has repeatedly held that a party should not be permitted to sit idly by while a verdict

erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.”).

Finally, this issue is in reality a red herring that CONA has drawn across the path of this case in the hopes of misdirecting the Court’s attention. In its Answer and throughout this case, including the stipulation read to the jury, CONA, PA, admitted Dr. Lim and Ms. Nicholas were its employees and it would be liable for any verdicts against them. That is, of course, black letter law in South Carolina. *See, e.g., James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008) (“The doctrine of *respondeat superior* provides that the employer, as the employee’s master, is called to answer for the tortious acts of his servant, the employee, when those acts occur in the course and scope of the employee’s employment.”); *id.* (“Such liability is not predicated on the negligence of the employer, but upon the acts of the employee, whether those acts occurred while the employee was going about the employer’s business, and the agency principles that characterize the employer-employee relationship.”). CONA, PA’s, liability vicariously attached to CONA, PA, as the true employer for the negligence by its employees Dr. Lim and Ms. Nicholas through the doctrine of *respondeat superior*. *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). It cannot escape that responsibility by this attempt at sleight of hand.

The Court should reject CONA, PA’s specious assertion that it is the innocent victim of a miscarriage of justice in this case. CONA relies upon affidavits Judge Knie found to be false to support its narrative, and its arguments are belied by the record and contrary to settled precedent. The Court should affirm.

II. The Trial Court (Judge Knie) Did Not Err in Not Permitting CONA, PA to Intervene When CONA, PA, Was Already a Party to the Suit

Standard of Review

“The standard of review for a Rule 24(a)(2)[, SCRCP,] motion is whether the judge abused [her] discretion in granting or denying the motion.” *In re Horry Cnty. State Bank*, 361 S.C. 503, 507, 604 S.E.2d 723, 725 (Ct. App. 2004). “On reviewing the trial judge’s decision as to whether adequacy of representation exists, [this Court] must appraise all of the circumstances of a particular case as to whether interests sufficiently overlap so as to deny intervention.” *Id.*

Discussion

CONA contends the trial court erred as a matter of law in denying its Motion to Intervene pursuant to Rule 24, SCRCP. (CONA App. Br. pp. 22-31). The Court should affirm that ruling.

On July 14, 2025, CONA, PA, filed a Motion to Intervene pursuant to Rule 24. (Motion to Intervene of 7/14/25). CONA, PA, contended, as it does on appeal, that it had never been a party to the action and had never been served notice of the matter. CONA PA admitted it received updates from its insurer and sought intervention after “becoming aware of the action taken by attorneys in this action, purportedly on its behalf and potentially making it liable for a judgment in a case in which it was not a party.” (Motion to Intervene, p. 4). CONA also moved to set aside the order correcting the caption. In both motions CONA relied upon the affidavits Judge Knie found were belied by the record (*i.e.*, obviously false).

Following a hearing the Court denied both motions. (Order filed 9/22/25). The Court noted:

The record before me reveals that the medical practice does not use its corporate name in its medical records, on its letterhead, on its website, or on its

social media accounts. Even its CEO, Kelly Roper, does not use the corporate name in her email signature block. As a result, the practice group's corporate name is not readily ascertainable from the information available in the public domain. This appears to be the source of the confusion regarding the correct corporate name that resulted in the issues now before the Court.

(Order of 9/22/25, p. 2). The Court noted that throughout the four years of litigation “the parties, while referencing the medical practice that employed Dr. Lim and Ms. Nicholas, used the following names interchangeably: CONA, Carolina Orthopaedic & Neurosurgical Associates, P.A., and Carolina Orthopaedic & Neurosurgical Associates, ASC, LLC.” (Order of 9/22/25, p. 3). The Court added:

Regardless of which name was used, it is evident from the record that the parties were always referring to the medical practice that employed Dr. Lim and Ms. Nicholas. It is equally clear from the record that defense counsel, Ashby Davis and Ryan Ginty, both of Davis & Snyder, PA, were defending Dr. Lim's and Ms. Nicholas's employer in this action, regardless of which name was being used.

(Order of 9/22/25, p. 3). The Court found the record did not support the assertions in the various affidavits CONA submitted with its motion. (Order of 9/22/25, p. 4).

The Court held:

Contrary to its assertions in these motions and the supporting affidavits, *CONA PA is already a party to this action*. It filed an answer to the complaint on August 30, 2021. As such, there is no need for a motion to intervene – CONA PA is, and has been, a party to this action.

(Order of 9/22/25, p. 4) (emphasis added). The Court added:

By virtue of filing an answer to the complaint CONA PA made a general appearance and became a party defendant in this action. By filing an answer to the complaint CONA PA waived any objections it might have had to any defect in service of process and submitted itself to the jurisdiction of the court. [citations omitted]

Having filed an answer to the complaint and appeared in this action, CONA's arguments asserting a lack of adequate service of process are baseless.

[citations omitted]

Without question, CONA PA had notice of the action and an opportunity to defend itself. It answered the complaint. [I]t was represented by experienced counsel retained by its own insurance carrier. A vigorous defense was mounted on its behalf over the course of nearly four years that culminated in a trial. Moreover, CONA PA's Chief Executive Officer, Kelly Roper, in her affidavit, acknowledged receiving a copy of the Notice of Intent to Sue, recognized that it was a medical malpractice action, recognized that it involved treatment of a deceased CONA PA patient by CONA PA employees, and forwarded it to CONA PA's insurance carrier. The Notice of Intent to Sue put her, and CONA PA, on actual notice that claims for vicarious liability were being asserted against Dr. Lim's and Ms. Nicholas's employer. She did, by her own admission, exactly what she would have done had CONA PA been correctly named in the caption of the Notice of Intent to Sue.

(Order of 9/22/25, pp. 5-6).

The Court used the same analysis in denying CONA PA's motion to set aside the order changing the caption. (Order of 9/22/25, pp. 6-8) The Court added, however, that CONA PA did not raise the issue regarding the name at any time before the verdict "and, in fact, led its own counsel and Plaintiff to believe that CONA ASC, LLC was a medical practice that employed healthcare providers." (Order of 9/22/25, p. 9). The Court observed that CONA's CEO, Ms. Roper, was consulted during the preparation of the discovery responses. (Order of 9/22/25, pp. 9-10).

The Court then listed five (5) other cases in which CONA was sued as "CONA ASC, LLC" and observed that CONA ASC, LLC filed answers or other pleadings in each of those cases asserting it was a medical practice that employed defendant healthcare providers. (Order of 9/22/25, pp. 10-11). The Court stated:

The common denominator in all of these cases is the client, not the law firm representing it. If CONA ASC, LLC truly conducts no business and has no employees, as it asserts here, then the problem is that CONA has not been giving

its attorneys accurate information. That appears to be what happened here. At the hearing, Mr. Davis informed the Court that the first time he learned that CONA PA and CONA ASC, LLC were not one in the same was on June 12, 2025, after the verdict in this case. It is unclear why Dr. Lim and Kelly Roper, both of whom should have recognized this issue, said nothing about it at any time before the jury's verdict.

(Order of 9/22/25, p. 11). The Court found CONA PA misled its own counsel and the plaintiff in this case and in others such that "it would be an extraordinary injustice to allow CONA PA to avoid the judgment on the jury's verdict. This Court will not permit such a result." (Order of 9/22/25, p. 11).

The Court then turned specifically to the affidavits CONA's new *pro hac* counsel submitted in support of the motions. The Court summarized each and noted "[t]he evidence presented does not support these assertions and, in fact, establishes just the opposite." (Order of 9/12/25, pp. 11-12).

For instance, the Court observed that Ms. Roper claimed she had no affiliation with CONA ASC, LLC, but public records revealed Ms. Roper filed a change of registered agent form with the South Carolina Secretary of State's office in May 2021 on behalf of CONA ASC, LLC, and identified herself as a member of the organization. (Order of 9/22/25, p. 12). She did the same in the articles of organization she filed for CONA ASC, LLC, on January 5, 2018, identifying herself as an organizer. (*Id.*)

The Court also described an email of July 7, 2021, in which Ms. Roper wrote "please see the email below from the attorney that is representing Dr. Lim and CONA in the following claim." (*Id.*). The Court described email exchanges between Mr. Davis and Ms. Roper regarding discovery responses as well as an email of June 1, 2021, from CONA's insurer, MagMutual

Insurance Company, notifying Ms. Roper as CONA's CEO, Dr. Lim and Ms. Nicholas that Mr. Davis had been retained to represent all of them in the action. (Order of 9/22/25, pp. 12-13).

Once again, the Court outlined the assertions in each of the affidavits CONA's *pro hac* counsel submitted and described them as containing assertions about which the record "establishes just the opposite," *i.e.*, they are false. (Order of 9/22/25, pp. 13-14). The Court then reaffirmed the stipulation at trial that any verdict against Dr. Lim and Ms. Nicholas would be a verdict against CONA. (Order of 9/22/25, p. 14). Further, Mr. Ginty, as counsel for all Defendants, "agreed to stipulate to the substitution of CONA PA for CONA ASC, LLC in the caption of the case and with respect to the judgment." (*Id.*) The Court added:

Had Ms. Roper, or Dr. Lim, or anyone else at CONA PA alerted their attorneys to this issue earlier, this matter could have, and likely would have, been resolved in the same fashion. Once counsel became aware of the issue, he raised it and the parties, with the Court, worked together to resolve it by a stipulation that was consistent with the facts and applicable law. *This is what our system expects from officers of the court and litigants.*

(Order of 9/22/25, p. 15) (emphasis added). The Court therefore reaffirmed the stipulations pursuant to Rule 43(k), SCRCP, and denied both motions. (*Id.*).

CONA's arguments in the Brief completely ignore that Judge Knie found the affidavits CONA submitted were belied by the record (that is, false). CONA cites repeatedly to those affidavits throughout its Brief as if the Court must accept their accuracy and veracity without question; of course, that is not the law. *Cf. Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App.1991) (even testimony that is not contradicted directly does not render it undisputed; there remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation). In light of

Judge Knie’s decision, however, this Court should completely disregard the affidavits except where they admit notice of the action. Despite its protestations, CONA, PA, was a party at all time and as such was not entitled to intervene as a matter of law. *See* James F. Flanagan, *South Carolina Civil Procedure*, Vol. 1 at 285 (4th Ed. 2020) (“Intervention is the procedure by which a non-party may petition and be granted party status in a case.”) (emphasis added).

Even so, these decisions were within the trial court’s discretion. As the Supreme Court held:

“The decision to grant or deny a motion to ... intervene in an action pursuant to Rule 24, SCRCp, lies within the sound discretion of the trial court.” On appeal, this Court will not disturb the trial court’s decision absent a manifest abuse of discretion that results in an error of law. Moreover, the error of law must be so opposed to the trial court’s sound discretion “as to amount to a deprivation of the legal rights of the party.”

Ex parte Builders Mut. Ins. Co., 431 S.C. 93, 98-99, 847 S.E.2d 87, 90 (2020) (citations omitted).

CONA PA’s entire argument is constructed upon a false narrative supported by false affidavits. Like the trial court this Court should reject those affidavits and CONA’s arguments and affirm the trial court’s discretionary order.

III. The Trial Court (Judge Knie) Correctly Assessed Pre-Judgment Interest Against CONA, PA

Standard of Review

Based upon the way CONA presents this issue, whether to apply the pre-judgment interest procedures against CONA depends on whether the trial court erred in finding and holding CONA, PA, had notice of the action, including the offer of judgment. This is a factual

dispute in a law case and is subject to an “any evidence” standard of review. *E.g., Osterneck v. Osterneck*, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007) (“In a law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge.”).

Discussion

CONA PA contends that because it was not a “party of record” it cannot be subject to the Offer of Judgment pursuant to Rule 68, SCRCP. (CONA App. Br. pp. 32-36). Judge Knie rejected that assertion as unsupported by the record. (Order filed 9/25/25). The Court should not be persuaded by this argument.

Rule 68 provides:

Any party in a civil action ... may file, no later than twenty days before the trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror’s favor, or to allow judgment to be taken against the offeror for a sum stated therein, or to the effect specified in the offer.

Rule 68(a). Respondent provided the timely offer of judgment to counsel for all Defendants, including CONA, pursuant to this provision.

Rule 68 provides further:

If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall recover from the offeree: ... (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment

Rule 68(b). Similarly, Section 15-35-400(B) states:

If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: ... (2) if the offeror is a plaintiff, eight percent

interest computed on the amount of the verdict or award from the date of the offer....

S.C. Code Ann. § 15-35-400(B) (Supp. 2025). Both Rule 68 and Section 15-35-400(B) provide that Respondent was entitled to eight (8) percent interest on the entire amount of verdict. *Garrison v. Target Corp.*, 435 S.C. 566, 869 S.E.2d 797 (2022). There is no dispute that the verdict was at least as favorable as the offer of judgment in this case, which was \$500,000.00.

Like the issues above, however, this issue depends upon whether this Court accepts CONA's contrived and false argument that it was never a party to this litigation, and was even unaware of its existence. To accept these arguments would have required the trial court (and this Court on appeal) to suspend reality, ignore the record, and accept the statements by each of the affiants as truthful even though, as Judge Knie found, they were not supported by, and were in fact in opposition to, the actual record. *Compare Prevatte v. Prevatte*, 297 S.C. 345, 352, 377 S.E.2d 114, 118 (Ct. App. 1989) (Sanders, CJ) ("The trial judge, not having been born yesterday, was fully convinced that Mr. Prevatte had committed adultery. So are we.")

The trial court's decision has evidentiary support as set forth in Section II of this Brief. The Court should reject CONA's arguments and affirm the trial court's order awarding pre-judgment interest against CONA under the Offer of Judgment and denying CONA's motion for reconsideration of that order.

IV. The Trial Court (Judge Knie) Used a Proper Verdict Form Without Objection

Standard of Review

This issue is governed by error preservation rules. On the merits, the issue is subject to an abuse of discretion standard of review. *See South Carolina Dept. of Transp. v. First Carolina Corp. of SC*, 372 S.C. 295, 300-301, 641 S.E.2d 903, 906 (2007) (“The trial judge has the discretion to determine how a case is submitted to the jury... Rule 49, SCRCP, clearly allows the court to use special verdicts in its discretion.”).

Discussion

CONA, PA, contends “over [all Defendants’] objection, the Trial Court improperly allowed the verdict form to list, not only Ms. Allen, but also Ms. Hemphill - a mere statutory beneficiary – which in turn permitted the jury to specifically also award Ms. Hemphill damages of \$3M.” CONA, PA, contends this resulted in “duplicative recovery to the Jefferies Estate.” (CONA App. Br. p. 36). The record does not support that CONA objected to the verdict form or that the jury awarded a “duplicative recovery.”⁸ This Court should not address this issue or be persuaded by CONA’s argument that the verdict was improper.

First, CONA cites to lines 10-15 of page 492 of the transcript as evidence of an overall objection by all Defendants. (CONA App. Br. p. 36). The actual colloquy in the transcript,

⁸ CONA contends the objections occurred during conferences in chambers or otherwise off the record. This is insufficient to present the issue to this Court. *York v. Conway Ford, Inc.*, 325 S.C. 170, 480 S.E.2d 726 (1997) (an objection made during an off-the-record conference which is not made part of the record does not preserve the question for appellate review); *Mains v. K Mart Corp.*, 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988) (it is incumbent upon parties to state grounds on the record in order to lay a foundation for appellate review).

however, tells a different story:

THE COURT: * * * With regard to the verdict form, we had some back and forth. I had proposed verdict forms from Counsel, which I sincerely appreciate. *Does the current verdict form reflect what we ended up with?*

MR. DAVIS (Counsel for all Defendants, including CONA): It does from our perspective, Your Honor.

(Tr. p. 492, ll. 10-15) (emphasis added). Thus, CONA's counsel not only failed to raise any objection to the verdict form, CONA's counsel affirmatively agreed with the Court that the verdict form used was what all parties "ended up with," that is, agreed to use.

Furthermore, prior to that exchange, the Court indicated it had revised proposed verdict forms the parties submitted. (Tr. p. 430, ll. 21-23). The Court provided a copy of the proposed verdict form to each counsel. (Tr. p. 431, l. 22 - p. 432, l. 4).

Prior to closing arguments the Court stated, "Let's talk about the verdict form. I need to put some things on the record. I had a conference yesterday afternoon with Counsel *off the record* in the conference room on our hall. We met for maybe an hour, discussed the charges." (Tr. p. 490, ll. 15-19) (emphasis added). The Court then described amendments to the jury charges that resulted from that off-the-record conference as well as the stipulation by counsel for all parties regarding CONA's vicarious liability for Dr. Lim and Ms. Nicholas. (Tr. p. 490, l. 19 - p. 491, l. 23). The following exchange then took place:

THE COURT: Does that accurately reflect the charge conference?

MR. DAVIS (Defendants' counsel): From our perspective and short memory, yes, ma'am.

(Tr. p. 491, l. 24 - p. 492, l. 2). The verdict form discussion set forth above then took place.

The Court later described the verdict form during the jury instructions. (Tr. p. 588, l. 22 -

p. 590, l. 16). The Court also instructed the jury that if it found liability it was to return separate verdicts for Ms. Allen and Ms. Hemphill. (Tr. p. 589, l. 22 - p. 590, l. 2). Once the jury exited the courtroom the Court asked for “any objections to the charge by Counsel?” (Tr. p. 591, ll. 11-12). Counsel for all Defendants, including CONA, stated “No, Your Honor.” (Tr. p. 591, l. 14).

The Court then stated:

Thank you. I have the verdict form. I’m happy for y’all to look at it before it goes back. It’s the same one that’s been circulated.... If y’all have reviewed it, find it acceptable.

(Tr. p. 591, ll. 15-19). Counsel for all Defendants, including CONA, stated “It is, Your Honor.”

(Tr. p. 591, l. 20). Thus, any objection CONA may have had to the verdict form (although the record reveals none) was finally put to bed at that point, if not before. *See* Rule 51, SCRCP (“No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.”).

The jury returned its verdict of \$6,000,000.00, responding to the special interrogatories on the agreed-upon verdict form, including an apportionment of \$3,000,000.00 for Ms. Allen and a separate apportionment of \$3,000,000.00 for Ms. Hemphill. (Tr. p. 598, ll. 13-15).⁹ The Court

⁹ The Court should logically reconcile and construe the verdict in this case as a \$6,000,000.00 verdict that the jury allocated to each claimant under the Damages Act and as they were instructed to do without objection. *See Orangeburg Sausage Co. v. Cincinnati Ins. Co.*, 316 S.C. 331, 344-345, 450 S.E.2d 66, 74 (Ct. App. 1994), *cert. denied* May 9, 1995 (“It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967); *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984), *overruled in part on other grounds*, *O’Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). *See also New York Carpet World v. Houston*, 292 S.C. 101, 354 S.E.2d 924 (Ct. App. 1987) (a jury’s verdict should be affirmed if it is possible to do so and carry into effect the jury’s clear intention; it is the Court of Appeals’s duty to uphold jury verdicts if they can be logically reconciled)”).

confirmed the verdict with the jurors. (Tr. p. 597, l. 21 - p. 598, l. 25). The Court then asked all counsel, including counsel for CONA, “[i]s there anything else of the jury at this time?” and counsel for all Defendants, including CONA, responded “No, ma’am.” (Tr. p. 599, ll. 3-5).

Although CONA claims it presented a competing verdict form, Counsel for all Defendants, including CONA, did not proffer a different version of the verdict form for the record. *Cf. Carson v. South Carolina Dept. of Nat’l Resources*, 371 S.C. 114, 638 S.E.2d 45 (2002) (a proffer permits an appellate court to assess prejudice from any alleged error). The purported competing verdict form is therefore not a part of the Record before this Court.

Even if a competing verdict form had been proffered, CONA did not object and in fact its counsel agreed to the verdict form the Court ultimately submitted. (Tr. p. 492, ll. 10-15; p. 591, ll. 15-20). *See, e.g., Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002) (“[Our supreme court] has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence.”). The *Dykema* Court cited the following: *Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1995) (holding that party may not wait until JNOV to object to punitive damage award as the Supreme Court does not recognize a “plain error” rule); *Limehouse v. Southern Ry.*, 216 S.C. 424, 58 S.E.2d 685 (1950) (where verdict is objectionable as to form, party who desires to complain should call that fact to the Court’s attention when the verdict is published; otherwise, the right to do so is waived); *McAlister v. Thomas and Howard Co.*, 116 S.C. 319, 108 S.E. 94 (1921) (defect in the form of a verdict must be presented at the time it is published, and failure to do so waives the right to raise that matter later); *Bethea v. Western*

Union Telegraph, 97 S.C. 385, 81 S.E. 675 (1914) (irregularity of jury verdict awarding punitive but no actual damages must be called to the attention of the court at the earliest opportunity; otherwise it will be deemed to have been waived; waiting until jury separates and then urging irregularity as ground for new trial is too late). This issue, therefore, is not preserved for appellate review.

On the merits, there was no error. Putting both persons on the verdict form resolved tension between the wrongful death statute and the Damages Act. The wrongful death statute provides “Every such action shall be brought by or in the name of the executor or administrator of such person.” S.C. Code Ann. § 15-51-20 (Supp. 2025). The Damages Act provides limitations “*for each claimant*, regardless of the number of separate causes of action on which the claim is based, except as provided in subsection (E).” S.C. Code Ann. § 15-32-220(A)-(C) (2005 & Supp. 2025) (emphasis added). Section 15-32-220 (E) is the “grossly negligent” exception to the statutory cap. So while the caption complies with the wrongful death statute, the verdict form that all parties agreed for the Court to submit to the jury permitted the jury to allocate the “each claimant” portion of the damages as contemplated by the Damages Act, which harmonized the two statutes. *See, e.g., Machin v. Carus Corp.*, 419 S.C. 527, 799 S.E.2d 468 (2017) (noting the Court has an obligation to harmonize statutory schemes whenever such a construction is consistent with legislative intent; Supreme Court harmonized the Workers’ Compensation Act with the Uniform Contribution Among Tortfeasors Act); *Porter v. South Carolina Pub. Serv. Comm’n*, 327 S.C. 220, 224 n. 3, 489 S.E.2d 467, 469 n. 3 (1997) (“Where two statutes can be reconciled and are susceptible of a construction that will render both operative without doing violence to either, it is the duty of the court to so construe them.”).

Accordingly, even if this issue was preserved for review (and it is not), the Trial Court's decision was correct.

Additionally, Rule 49 of the Rules of Civil Procedure provides:

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate.

Rule 49(a), SCRCP. This Rule permitted the trial court the discretion to submit this apportionment to each claimant to the jury for its resolution in compliance with the Damages Act. *South Carolina Dept. of Transp. v. First Carolina Corp. of SC*. And again, not only did CONA not object, its counsel affirmatively agreed to the procedure and use of the verdict form.

One primary purpose of issue preservation rules is to "give the trial court a fair opportunity to rule." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). A trial court's opportunity to rule necessarily includes both parties being aware of the nature of the objection such that they may present their best arguments addressing that objection. This then serves another purpose of our rules – "meaningful appellate review." *Id.* (quoting *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. at 373, 628 S.E.2d at 919). *See, also, Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments).

The trial court's decision to put both Ms. Allen and Ms. Hemphill on the verdict form for

separate awards was correct. Even so, the time for CONA, PA, to raise any issue with the verdict form was prior to the verdict, or at the latest while the jury was still assembled after the verdict. That would have allowed the trial court to resubmit a different verdict form to the jury, similar to the “zero verdict” cases. *Cf. Longshore v. Saber Sec. Servs., Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005) (noting when a jury returns an improper “zero” verdict, the proper and most consistent approach is to require, upon request, the trial court to re-submit the matter to the jury). *See, also, Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (“[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.”).

The Court should hold this issue is not preserved for appellate review. If the Court addresses the merits of the issue, the Court should hold that the trial court properly exercised its discretion pursuant to Rule 49 in permitting the jury to award separate damages “for each claimant” under the Damages Act.

V. The Circuit Court (Judge Cole) Exercised Appropriate Discretion in Denying Appellant’s Motion to Amend the Answer to Assert Independent, Intervening And/or Superseding Causation

Standard of Review

A denial of a motion to amend a pleading pursuant to Rule 15, SCRCPP, is within the sound discretion of the circuit court. *Oulla v. Valezques*, 427 S.C. 428, 435, 831 S.E.2d 450, 453 (Ct. App. 2019), *citing Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012) (holding a Rule 15 motion is subject to abuse of discretion review). Because the motion is subject to the sound discretion of the circuit court, it “will rarely be disturbed on

appeal. The [circuit court's] finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Oulla, supra, citing Sullivan*, 397 S.C. at 153, 723 S.E.2d at 840 (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)). "An abuse of discretion occurs when the [circuit court]'s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Oulla, supra, citing Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

Discussion

CONA contends the Circuit Court (Judge Cole) erred in denying its late-in-the-day motion to amend the joint answer to assert the defense of independent, superseding negligence of a third party (Dr. Ezman and Peachtree). (CONA App. Br. pp. 40-45). CONA asserts the denial was simply and solely due to "timing," and this factor "did not afford a legitimate basis to conclude their proposed amendment was made 'too late'...." (CONA App. Br. p. 41). CONA contends Respondent had the burden to establish prejudice from the proposed amendment nearly a month before trial and failed to do so, particularly since Respondent had actually sued the third party, Dr. Ezman and Peachtree, and in CONA's estimation did not need additional discovery. (CONA App. Br. p. 42-44). The Court should not be persuaded by this argument.

The proposed amendment required "leave of court." Rule 15(a), SCRCP (requiring leave of court or written consent to amend a pleading after 30 days or after a responsive pleading is served). Rule 15 provides further that "leave shall be freely given when justice so requires and does not prejudice any other party." *Id.* The 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.* *Duncan v CRS Sirrine Engineers*, 337 S.C. 537, 542, 524 S.E.2d 115, 117-118 (Ct. App. 1999) (citing *Pool v. Pool*, 329

S.C. 324, 328–9, 494 S.E.2d 820, 823 (1998) and *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct. App. 1987).

This Court will reverse Judge Cole's decision only for an abuse of discretion, which means his decision was controlled by an error of law or lacked evidentiary support. *Duncan v CRS Sirrine Engineers, id.* at 543, 524 S.E.2d at 118 (citing *Soil & Material Eng'rs, Inc.*, at 501, 361 S.E.2d at 781 ("In considering potential prejudice to the opposing party, the court should consider whether the opposing party has had the opportunity to prepare for the issue now being raised formally.")).

While delay *alone* in raising the issue "will not *ordinarily* be held to bar an amendment," *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 508, 369 S.E.2d 156, 159 (Ct. App. 1988) (emphasis added), delay up until just before trial after having knowledge for over four (4) years of the potential defense justifies denying the motion. *Cf. Foggie v. CSX Transp.*, 315 S.C. 17, 431 S.E.2d 587 (1993) (affirming denial of a late-in-the-day motion to amend because of the prejudice caused by delay resulting from the required investigation into the new issue). The case had been pending for four (4) years, discovery was complete pursuant to an amended scheduling order (one of several entered in the case), dispositive motions had been ruled upon, and it was only a few weeks till a day certain trial at which both sides intended to present witnesses, including physicians and experts, who had to arrange schedules.

It is also not the case that Defendants were not aware of the availability of the defense until the eve of trial – a major thrust of their expert's (Dr. Poletti) opinions and testimony

involved the superseding liability of Dr. Ezman and Peachtree.¹⁰ In fact, the Defendants all responded to discovery that they did “not allege that any person or entity caused or contributed to any of the Plaintiff’s injuries, losses, or damages at this time.” (Exh. to Plaintiff’s Response to Motion to Alter or Amend filed 6/26/25, p. 2, ¶ 2). At no time, even to this day, have they updated those responses. Rule 26(e), SCRPC (ongoing duty to supplement responses); Rule 33(b), SCRPC (“The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party”); James F. Flanagan, *South Carolina Civil Procedure*, Vol. 1, p. 340 (4th Ed. 2020) (“The duty to supplement previous answers is quite broad. It not only includes the duty to provide new information, but also to correct incomplete, inadequate or misleading answers.”).

Furthermore, the issue raising this defense is not as simple or one-dimensional as CONA presents it to this Court. As this Court recently explained:

“The defendant’s negligence does not have to be the sole proximate cause of the plaintiff’s injury; instead, the plaintiff must prove the defendant’s negligence was at least one of the proximate causes of the injury.” *Roddey v. Wal-Mart Stores E., LP*, 415 S.C. 580, 590, 784 S.E.2d 670, 676 (2016). “An intervening force may be a superseding cause that relieves an actor from liability, but *for there to be relief from liability, the intervening cause must be one that could not have been reasonably foreseen or anticipated.*” *Id.* (emphasis added). “In other words, the intervening negligence of a third party will not excuse the

¹⁰ CONA’s argument that Respondent’s prior suit against Dr. Ezman and Peachtree gave Respondent notice of the issue cuts against permitting the amendment right before a day-certain trial in a case that was nearly four (4) years old. Surely, CONA and its lawyers were also aware of the potential of this defense for the entirety of this case, yet waited until discovery had closed, dispositive motions decided, and trial was imminent to attempt to formally raise the affirmative defense.

first wrongdoer if such intervention ought to have been foreseen in the exercise of due care.” *Id.* “In such case, the original negligence still remains active[] and a contributing cause of the injury.” *Id.* (quoting *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998)).

Glenn v. 3M Company, 440 S.C. 34, 74, 890 S.E.2d 569, 590 (Ct. App. 2023), *cert. denied* Aug. 13, 2024). This means that, in fairness, justice would have required a lengthy postponement of the trial. Respondent would have needed to explore not only whether the negligence of Dr. Ezman and Peachtree was at least a concurring proximate cause (the basis for the suit against those defendants), Respondent would have had to have reopened all discovery to explore the discrete issues pertaining to possible evidence CONA, Dr. Lim, and/or Ms. Nicholas intended to present to establish that Dr. Ezman’s negligence not only cut off their liability but that Dr. Ezman’s negligence was not reasonably foreseeable or anticipated. This would not have been a simple matter of relying on prior pleadings or discovery involving Dr. Ezman and Peachtree. Judge Cole recognized that and, in his discretion, appropriately denied the late-in-day motion to amend.

Even so, an appellant must not only show error but prejudice flowing therefrom. *See, e.g., Synder’s Auto World, Inc. v. George Coleman Motor Co.*, 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (stating an appellant is required to show both error and prejudice in order for an appellate court to reverse a court’s ruling). As noted, all Defendants tried this case on the basis that any fault was not that of CONA or its employees, Dr. Lim and Ms. Nicholas, but was the intervening fault of Dr. Ezman and Peachtree. The testimony the Defendants presented, including by Defendants Dr. Lim and Ms. Nicholas and the expert, Dr. Poletti, directed any fault at Dr. Ezman and Peachtree. (Tr. p. 222, l. 20 - p. 224, l. 24; p. 225, l. 20 - p. 226, l. 5; p. 226, l. 16 - p.

228, l. 12; 228, l. 17 - p. 230, l. 13; p. 231, l. 3 - p. 233, l. 13; p. 242, ll. 2-5; p. 243, l. 5 - p. 246, l. 24; p. 248, l. 22 - p. 249, l. 25; p. 254, ll. 17-23; p. 255, ll. 7-14; p. 340, l. 24 - p. 342, l. 10; 344, l. 17 - p. 345, l. 2; p. 352, l. 24 - p. 353, l. 17; p. 354, ll. 1-8; p. 387, l. 21 - p. 388, l. 4; p. 386, l. 6-8; p. 399, l. 18 - p. 400, l. 2; p. 402, l. 16 - p. 404, l. 24; p. 404, l. 6 - p. 410, l. 7; p. 471, l. 4 - p. 478, l. 15).¹¹

Furthermore, Defendants' counsel used opening statement (Tr. p. 124, l. 15 - p. 12, l. 3) and the majority of the closing argument to deflect blame for any negligence away from CONA and its employees and onto Dr. Ezman and Peachtree. (Tr. p. 521, l. 5 - p. 522, 2; p. 526, ll. 16-21; p. 527, ll. 3-8; p. 527, l. 23 - 528, l. 11; p. 528, l. 20 - p. 529, l. 7; p. 529, l. 25 - p. 530, l. 7; p. 531, ll. 1-6; p. 532, l. 19 - p. 536, l. 6; p. 536, l. 9 - p. 537, l. 6; p. 537, l. 11 - p. 539, l. 8; p. 539, ll. 9-25; p. 540, ll. 11-19; p. 540, l. 25 - p. 541, l. 13; p. 543, l. 22 - p. 544, l. 4; p. 546, ll. 18-24; p. 547, l. 16 - p. 548, l. 7; p. 548, ll. 12-14). The jury heard all of this evidence and argument and could have chosen to agree with the Defendants by exonerating CONA and its employees; it simply did not believe them or accept this view of the evidence.

Next, the trial court charged the jury regarding Respondent's burden of proof. (Tr. p. 567, l. 8 - p. 568, l. 17; p. 571, ll. 8-14; p. 572, ll. 2-15; p. 573, l. 23 - p. 574, l. 3). This included the burden of establishing Defendants' breach of the standard of care (Tr. p. 571, ll. 8-14) and that the Defendants' negligence was a proximate cause of Respondent's injuries. (Tr. p. 568, ll. 13-17; p. 575, l. 22 - p. 576, l. 19). The Court specifically charged:

Where the cause of an injury may be as reasonably attributed to an act or cause for which the Defendants [are] not liable as to one for which the Defendants

¹¹ The Defendants even deflected fault onto the EMS crew that transported Mr. Jefferies to Peachtree. (Tr. p. 250, l. 17 - p. 253, l. 12; p. 254, l. 24 - p. 255, l. 6)

are liable, *the Plaintiffs will have failed to establish that the injury was proximately caused by the negligence of the Defendant.*

It is only when the negligence or failing to conform to the applicable standard of care of the Defendants, if any, proven on the part of the Defendants is a proximate cause of any injury proven to have been sustained by the Plaintiffs that the medical – that the Defendant medical doctor and his medical practice would be held liable and that the Plaintiffs are entitled to a verdict against them.

(Tr. p. 576,l. 25 - p. 577, l. 11) (emphasis added). The Court also charged:

In determining the question of proximate causation or proximate cause, *you must distinguish between an intervening cause and a concurring cause. An intervening cause succeeds or follows that which for convenience is called the primary cause.* Though, as we have seen, it is only the remote cause.

Concurring causes operate contemporaneously to produce the injury so that it would not have happened in the absence of either.

If, by the exercise of reasonable foresight and diligence a concurring cause should have been foreseen, liability for it attaches. However, the mere fact that one of several concurring causes may not have been reasonably anticipated, is not enough to shield from liability he who sets in motion the other for it is well settled that the negligence complained of need not be the sole cause of the injury. It is enough to show that it is a proximate concurring cause that is one that was so efficient in causation that but for it, the injury would not have occurred.

(Tr. p. 578, ll. 8-25) (emphasis added).

The Court went on to instruct the jury in detail on what Plaintiff had to prove to establish concurrent causation. (Tr. p. 579, l. 1 - p. 580, l. 23). In light of the Defendants' presentation of evidence deflecting fault to Dr. Ezman and Peachtree (and the EMS crew) and their closing argument that CONA and its employees were not at fault but Dr. Ezman and Peachtree were the liable parties, these jury instructions permitted the jury to determine not only that Respondent failed to establish proximate cause, but that any negligence by CONA and its employees was cut off by the conduct of Peachtree and its employees. That would have led to a verdict for the

defense. However, this jury rejected those claims and arguments as they were permitted to do.

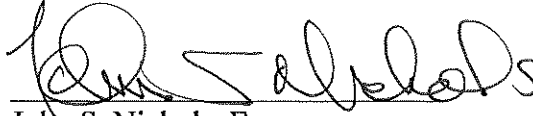
Judge Cole did not abuse his discretion in denying Defendants' motion to amend to raise the defense of intervening and superseding negligence on the eve of a day-certain trial. Even if there was error, CONA has not demonstrated prejudice. This Court should affirm.

CONCLUSION

For the reasons stated the Court should affirm the verdict and the circuit court orders in this case and remit the matter to the circuit court for further proceedings.

Respectfully submitted, /

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