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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 Neurosurgical Associates, ASC, LLC .... Appellants,

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**INITIAL BRIEF OF RESPONDENT TO
BRIEF OF CHI HUN LIM, M.D.**

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 A. There was evidence of the requisite standard of care?

 B. There was evidence to support the jury's finding that Dr. Lim breached the standard of care?

 C. There was evidence to support the jury's finding that Dr. Lim's breach of the standard of care was a proximate cause of Mr. Jefferies' death?

 D. There was reasonable evidence to support the jury's finding that Dr. Lim was grossly negligent?

II. Did the Circuit Court (Judge Cole) exercise appropriate discretion in denying Defendants' motion to amend the Answer to assert independent, intervening and/or superseding causation?

III. Did the Trial Court (Judge Knie) use a proper verdict form without objection?

IV. Did the Trial Court (Judge Knie) correctly assess pre-judgment interest against Dr. Lim?

COUNTER-STATEMENT OF THE CASE[1]

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 an entity identified as Carolina Orthopaedic and Neurosurgical Association 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.

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[1] Dr. Lim includes contested matters in his Statement of the Case. For instance, he takes issue with the jury's verdict despite the limited standard of review in this case. (Lim App. Br. p. 2). He also asserts there was "an apparent double recovery," again a disputed fact. (Lim App. Br. pp. 2- 3). Accordingly, Respondent includes her own Statement of the Case. *See* Rule 208(b)(2), SCACR ("If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case.").

[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.

(Offer of Judgment). Defendants rejected the offer.

Respondent opposed the motion to amend the Answer, contending Defendants, including Dr. Lim, knew for over four (4) years that Respondent alleged negligence by Peachtree and its employee, Dr. Ezman, but the Defendants failed to raise the defense in their Answer to the Amended Complaint or at any time 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 in his deposition 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 $6,000,000, allotting $3,000,000 to Ms. Allen and $3,000,000 to Mr. Jefferies' other daughter, 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, SCRCP (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, SCRCP, 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, with attachments). 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 Dr. Lim) 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 employees, including CONA 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 Dr. Lim's appeal.

STANDARD OF REVIEW

The standard of appellate review for each issue Dr. Lim raises involves either an "any evidence" standard or whether the trial court committed an abuse of discretion. *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."). Accordingly, pursuant to Rule 208(b)(1)(D), SCACR, Respondent includes a Standard of Review at the start of each argument.

FACTS

The following background is from the Amended Complaint. (Amended Complaint of June 29, 2021). 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 by Dr. Lim.

Dr. Lim performed back surgery on Mr. Jefferies at Spartanburg Regional Medical Center (SRMC) on July 18, 2018. Mr. Jefferies was a high risk patient for the development of life-threatening deep vein thrombosis (DVT) and pulmonary embolism (PE). Dr. Lim and Ms. Nicholas administered DVT prophylaxis throughout Mr. Jefferies' 8-day stay at SRMC.

On July 26, 2018, Dr. Lim and Ms. Nicholas discontinued DVT prophylaxis (Nicholas Dep. p. 48, l. 17 - p. 49, l. 18) and discharged Mr. Jefferies for post-surgical rehabilitative care to Peachtree Center SNF (Peachtree), where he was under the care of Dr. Alfred Ezman. However, Dr. Lim and Ms. Nicholas sent only partial medical records to Peachtree, and all records from July 22 through July 26 were missing. Furthermore, a discharge summary failed to report Mr. Jefferies had been on Heparin for DVT prophylaxis and stated erroneously that he was ambulatory.

At 4:00 a.m. on July 28, 2018, a nurse at Peachtree found Mr. Jefferies on the floor of his room. He was unresponsive and resuscitation efforts were unsuccessful. Mr. Jefferies was pronounced dead at 5:14 a.m. He died of a PE.

Mr. Jefferies' daughter, Andrea Allen (Respondent), sent a pre-suit notice to SRMC and its staff, Peachtree and its staff, and Dr. Lim, Ms. Nicholas and "Carolina Orthopaedic

Neurosurgical Associates ASC, LLC" (CONA) as their employer. When the matter did not resolve at pre-suit mediation Respondent filed suit. (Amended Complaint of June 29, 2021).

Respondent ultimately settled with all defendants except for CONA, Dr. Lim and Ms. Nicholas. As noted above, following a trial the jury brought back a verdict for $6,000,000.00 against all defendants and found Dr. Lim and Ms. Nicholas committed gross negligence so as to avoid a statutory non-economic damages cap. CONA, CONA ASC, LLC, Dr. Lim and Ms. Nicholas all appeal. This brief addresses only Dr. Lim's appeal.

Dr. Lim raises questions regarding the sufficiency of the evidence to support the jury's verdict in that he challenges whether there is evidence of the standard of care, its breach by Dr. Lim, and causation with Mr. Jefferies' death. He also challenges the existence of evidence to support the jury's finding that he committed gross negligence. Specific facts related to each issue with citation to the trial record are discussed under each heading below.

ARGUMENTS

I. The Trial Court (Judge Knie) Correctly Denied Dr. Lim's Motion for JNOV

Standard of Review

The correct standard of appellate review of the denial of JNOV is as follows: This Court must consider the evidence in the light most favorable to Respondent and construe all reasonable inferences and ambiguities in her favor. *Cruce v. Berkeley County School Dist.*, 442 S.C. 1, 896 S.E.2d 765 (2024). The appellate court will reverse "only when there is *no evidence* to support the ruling or when the ruling is governed by an error of law." *Garrison v. Target Corp.*, 435 S.C. 566, 576, 869 S.E.2d 797, 803 (2022) (emphasis added). "The motions should be denied when either the evidence yields more than one inference or its inference is in doubt." *Id., citing Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*, 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007). However, "neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Garrison*, at 576, 869 at 803, *citing Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006).

Dr. Lim includes a number of cases in support of his attempt to have this Court "dissect the record and perhaps conclude" that the evidence is most favorable to him. (Lim App. Br. p. 16). Those cases are meaningfully distinct or are of questionable force regarding the issues in this appeal. *See Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010) (appeal from the entry of summary judgment for defendant in a premises liability case; Court affirmed because plaintiff presented no evidence her injuries resulted from any act by Piggly Wiggly that created a dangerous condition or that demonstrated actual or constructive knowledge of a dangerous condition and a failure to remedy it); *Richardson v. Piggly Wiggly Cent., Inc.*, 404

S.C. 231, 743 S.E.2d 858 (Ct. App. 2013) (premises liability case where plaintiff slipped on wet sidewalk outside the store during a rainstorm; plaintiff knew it was raining and the sidewalk was not covered and the Court held there was no duty of care owed); *Allegro, Inc. v. Scully*, 418 S.C. 24, 791 S.E.2d 140 (2016) (reversing the denial of JNOV in a civil conspiracy case where plaintiff failed to plead and prove "special damages" apart from the underlying tort; the rule upon which this part of *Allegro* relied (requiring a plaintiff to plead and prove special damages in a civil conspiracy case) was subsequently overturned in *Paradis v. Charleston County School Dist.*, 433 S.C. 532, 861 S.E.2d 774 (2021), and *Allegro* was abrogated further in *Hall v. UBS Financial Services, Inc.*, 435 S.C. 75, 866 S.E.2d 75 (2021) (abrogating *Allegro* insofar as it held there was no implied covenant of good faith or fair dealing in at-will employment contracts)). Insofar as *Allegro*, then, may support Dr. Lim's position (and it does not), it has been overruled.

Even so, to do what Dr. Lim requests, this Court would "have to ignore [its] duty under the governing standard of review for JNOV rulings...." *Cruces*, at 19, 896 S.E.2d at 774, *citing Curcio v. Caterpillar*, 355 S.C. 316. 320, 585 S.E.2d 272, 274 (2003). The Court should reject Dr. Lim's invitation to apply an incorrect standard of appellate review to the review of this issue.

Elements of Medical Malpractice Claim

As this Court recently observed, "Subsection 15-79-110(6) of the South Carolina Code (Supp. 2019) defines medical malpractice as 'doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances.'" *Turner v. Medical University of South Carolina*, 430 S.C. 569, 583, 846 S.E.2d 1, 8 (Ct App.

2020). A plaintiff is required to prove the following facts by the preponderance of the evidence to establish a cause of action for medical malpractice:

(1) The presence of a doctor-patient relationship between the parties;

(2) Recognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances;

(3) The medical or health professional's negligence, deviating from generally accepted standards, practices, and procedures;

(4) Such negligence being a proximate cause of the plaintiff's injury; and

(5) An injury to the plaintiff.

Brouwer v. Sisters of Charity Providence Hosps., 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014); *Turner v. Medical University of South Carolina*, at 583, 846 S.E.2d at 8.

There is no dispute that a doctor-patient relationship between Dr. Lim and Mr. Jefferies existed (Lim Dep. p. 19, ll. 18-23) and that Mr. Jefferies suffered an injury. Dr. Lim contends, however, Respondent "failed to prove one or more of the required elements of medical malpractice claim," namely the standard of care, a breach of the standard of care, and proximate cause. Dr. Lim also contends Respondent failed to establish gross negligence, which avoids the statutory damages cap. (Lim App. Br. pp. 19-20). The Court should reject Dr. Lim's arguments and affirm the trial court's denial of JNOV.

A. There Was Evidence of the Requisite Standard of Care

Dr. Lim first contends there was no "adequate" evidence to establish the requisite standard of care. (Lim App. Br. pp. 20-23). Dr. Lim contends Respondent "failed to establish the standard of care as to a reasonably prudent orthopaedic spine surgeon practicing under the same or similar circumstances as here." (Lim App. Br. p. 21). Dr. Lim contends further that Respondent's expert, Dr. Chris Erb, "failed to opine as to the standard of care as it relates to the specific branch of medicine in which Dr. Lim practices." (Lim App.Br. p. 21). Dr. Lim asserts "[b]ecause Dr. Erb testified only to the standard of care of a physician generally, but not specifically to an orthopaedic spine surgeon, the testimony failed to establish the standard of care in the relevant field of medicine." (Lim App. Br. p. 21).

Dr. Lim adds "the record is replete with uncontradicted evidence" that Dr. Lim and Ms. Nicholas did not breach their duty of care and is "clear" that they did not have a duty under any standard of care to send medical records to Peachtree. (Lim App. Br. p. 22). These arguments seek for this Court to apply the wrong standard of appellate review from the denial of a motion for JNOV. Furthermore, the thrust of Dr. Lim's argument is that Respondent's expert, Dr. Chris Erb, was not sufficiently qualified to testify regarding the standard of care or its breach. The Court should reject this argument.

To begin with, this precise argument was not made during Dr. Lim's motion for directed verdict. Dr. Lim contended:

> On behalf of the defense, we respectfully make a motion for directed verdict on the issue of negligence. We don't believe there is significant evidence, significant evidence to give it to the jury on the issue of negligence. And we would ask for a directed verdict on that.

(Tr. p. 307, ll. 13-18). At the close of all of the evidence Dr. Lim stated, "[a]t this time we would renew our motion at the close of plaintiff's case for a directed verdict on both the standard of care and upon the issue of gross negligence, incorporating the same arguments we made earlier." (Tr. p. 490, ll. 3-6). This broad statement makes no argument regarding Dr. Erb's qualification to testify on the appropriate standard of care. It was not until Dr. Lim filed his Motion for JNOV that he contended that Dr. Erb's testimony was not sufficient to permit the jury to consider the applicable standard of care. (Motion for JNOV of 6/17/25, pp. 4-5). *See* Rule 50(b), SCRCP (a motion for JNOV must be "in accordance with [the party's] motion for directed verdict"); *RFT Management Co., LLC v. Tinsley & Adams, LLP*, 399 S.C. 322, 331, 732 S.E.2d 166, 170-171 (2012) (a party making a directed verdict motion must state the specific grounds relied upon therefore; moreover, only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion). James F. Flanagan, *et al.*, *South Carolina Civil Procedure*, Vol. II, p. 588-589 (4th Ed. 2020) ("the JNOV motion may only raise issues that were asserted in the motion for a directed verdict at the conclusion of all of the evidence"; "the JNOV is a renewal of the motion made before the verdict"). The precise argument that Dr. Erb's testimony was insufficient, therefore, is not preserved for appeal.

Even so, Dr. Erb was qualified *without objection* as an expert in internal medicine, pulmonary medicine, and critical care medicine, including venous thromboembolism (VTE) prophylaxis (a central issue in this case). (Tr. p. 133, l. 19 - p. 134, l. 2; p. 152, l. 18 - p. 153, l. 7). He is board certified in each of those fields. (Tr. p. 134, l. 3 - p. 135, l. 9). His practice and teaching areas included VTE prophylaxis with patients recovering from orthopaedic surgery. (Tr. p. 143, l. 19 - p. 164, l. 14; p. 226, ll. 11-15; p. 235, ll. 18-21). He testified based upon his experience, education, and training, the standard of care for the duration of VTE prophylaxis is the same for all specialties, including orthopaedic spine surgeons and physicians assistants. (Tr.

p. 138, ll. 2-17; p. 139, l. 10 - p. 140, l. 18; p. 141, ll. 8-17; p. 141, l. 18 - p. 143, l. 6; p. 143, l. 17 - p. 144, l. 4; p. 144, l. 5 - p. 145, l. 5). This includes patients recovering from orthopaedic surgery and he has worked collaboratively with surgeons (including orthopaedic surgeons) his entire career. (Tr. p. 145, ll. 6-21; p. 146, ll. 15-22; p. 226, ll. 11-15). Dr. Erb is part of the "PE Response Team" at the University Medical School at Yale Medical School. (Tr. p. 136, ll. 5-9; p. 143, ll. 7-16).

Dr. Erb testified that with an orthopaedic patient, the question of when to initiate chemical prophylaxis is a surgical decision. (Tr. p. 152, ll. 5-17). However, once initiated the management of VTE prophylaxis, including its duration, was the same as any other patient at risk for blood clots. (Tr. p. 152, ll. 5-17). The standard, which is the same for any specialty for a physician or physician's assistant, is straightforward – once begun, VTE prophylaxis must be continued until the risk is resolved. (Tr. p. 150, l. 11 - p. 151, l. 2; p. 151, l. 12 - p. 152, l. 4). In sum, Dr. Erb testified both as to the standard of care and, to a reasonable degree of medical certainty, how Dr. Lim and Ms. Nicholas both breached the standard of care (Tr. p. 168, l. 21 - p. 171, l. 9; p. 171, l. 23 - p. 172, l. 3; p. 176, l. 14 - p. 177, l. 3; p. 178, l. 25 - p. 181, l. 20; p. 184, ll. 4-25; p. 188, ll. 9-16; p. 201, ll. 4-9; p. 227, ll. 1-5; p. 256, l. 22 - p. 257, l. 7; p. 257, l. 15 - p. 258, l. 11) directly causing Mr. Jefferies' death. (Tr. p. 185, ll. 1-11; p. 186, l. 24 - p. 187, l. 7; p. 245, ll. 15-25). This included failing to send Mr. Jefferies' complete medical records to Peachtree. (Tr. p. 227, ll. 1-3).

Expert testimony need not come from a specialist in the same field as the defendant physician. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997) ("Defects in an expert witness' education and experience go to the weight, rather than the admissibility, of the expert's testimony"); *Creed v. City of Columbia*, 310 S.C. 342, 345, 426 S.E.2d 785, 786 (1993) ("A physician is not incompetent to testify merely because he is not a specialist in the particular branch of his profession involved."). Regardless of the area in which the prospective expert witness practices, the expert "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." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). *See, e.g., Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (2002) (finding trial court correctly allowed podiatrist to testify regarding treatment at pain center even though expert not qualified himself to administer the treatment he recounted); *Gooding* (Supreme Court found trial court erred in excluding testimony of EMT regarding intubation procedures and rendering opinion regarding physician's performance of the procedure); *Walker v. AnMed Health*, 446 S.C. 419, 919 S.E.2d 565 (Ct. App. 2025) (finding nurse qualified to render expert opinion regarding basic care and work up of a patient in an emergency room even though the nurse was not a nurse practitioner nor was he trained as one); *Brown v. Carolina Emergency Physicians, PA*, 348 S.C. 569, 560 S.E.2d 624 (Ct. App. 2001) (Court of Appeals found trial court abused its discretion in excluding expert testimony by licensed psychologist regarding standard of care of emergency room physician and the diagnosis and treatment of mental illness). "[A] medical practitioner's experience teaching in particular specialty and his professional interaction with practitioners in that specialty are facts sufficient to support his qualification as an expert." *Lee v. Seuss*, 318 S.C. 283, 285, 457 S.E.2d 344, 346 (1995). If there were defects in the amount or quality of Dr. Erb's education and experience, those defects go to the weight of his testimony and not its admissibility. *Lee v. Seuss*.

Dr. Erb provided sufficient evidence of the standard of care in this case. He testified extensively regarding the standards for managing VTE prophylaxis as well as the requirement to communicate fully regarding a patient's care with subsequent medical providers. This included reading from a list of opinions he brought with him during his deposition. (Tr. p. 256, l. 22 - p. 258, l. 11; Erb Dep. Exh. 1). The list included that a reasonable physician in a similar situation would document the decision making process and communicate those decisions to colleagues and future medical providers in the form of a medical note or verbal communication. (Tr. p. 256, l. 24 - p. 257, l. 3).

Dr. Lim cites to *Botehlo v. Byccura*, 282 S.C. 578, 320 S.E.2d 59 (Ct. App. 1984) as "instructive." (Lim App. Br. pp. 22-23). *Botehlo*, however, is distinct from this case in very meaningful ways.

The primary issue in *Botehlo* was whether the decision by Dr. Bycura, a podiatrist, to perform foot surgery rather than use conservative treatment violated the applicable standard of care. Plaintiff proffered the expert testimony of Dr. Robert M. Scoville, an orthopaedic surgeon, who also treated the Plaintiff. Dr. Scoville did not criticize Dr. Bycura's surgery, and conceded the conservative treatment Dr. Scoville recommended might not have alleviated Plaintiff's foot problem so that the surgery would have been necessary anyway. The issue on appeal was whether Dr. Scoville, an orthopaedic surgeon, could testify as an expert regarding the standard of care to be observed by a podiatrist.

The Court of Appeals noted that podiatry is a recognized profession in South Carolina and added:

> [T]he podiatrist's duty of care must be measured by the practices and

> principles of the particular branch of the healing arts in which he is trained and licensed. He is not bound to possess and exercise the degree of skill and learning required of a physician or surgeon. When a patient chooses a practitioner of a recognized branch of the healing professions, he elects to undergo the kind of care and treatment common to that particular profession. He cannot afterward complain that the care he received fell short of the standards in another profession. For this reason, Botehlo had to present evidence on the standard of care required of podiatrists, not physicians and surgeons.

Botehlo, 585, 320 S.E.2d at 64. The Court noted that "[t]he standards of education and licensure for podiatrists are different from those of medical doctors." *Id.*, at 586, 320 S.E.2d at 64. The Court held:

> The circuit judge properly concluded Dr. Scoville was not an expert on the standards of good podiatric practice. Dr. Scoville testified he does not have any training in podiatry, is not licensed in podiatry, and has received no instruction in the practice of podiatry. He was not familiar with any journals, periodicals, or books written by podiatrists. He had never attended any seminars in podiatry. He further testified that he is not familiar with the standards of professional care generally observed by podiatrists, nor the standards of practice of members of the American Academy of Ambulatory Foot Surgeons or the American College of Podiatric Foot Surgeons. Dr. Scoville admitted he had never performed ambulatory foot surgery and that he was not familiar with the surgical procedure Bycura performed on Botehlo. He said he did not know if conservative management was a generally accepted standard for podiatric practice. When asked if he held himself out as an expert, Dr. Scoville answered: "No, not in podiatry. No."
>
> Taking Dr. Scoville's testimony in the light most favorable to Botehlo, as we must in reviewing a summary judgment, it amounts to an assertion that Bycura did not observe the standard of care Dr. Scoville, as an orthopaedic surgeon, would have observed in deciding to perform surgery on Botehlo's foot. Since the material question was not the standard required of orthopaedic surgeons, but the standard required of podiatrists, Dr. Scoville's testimony created no genuine issue of fact for trial. The circuit court was, therefore, correct in granting judgment as a matter of law on the issue of Bycura's failure to attempt conservative management before performing surgery to alleviate Botehlo's problem.

Id., at 587, 320 S.E.2d at 65.

Unlike Dr. Scoville, Dr. Erb testified extensively about his education, training and experience in VTE prophylaxis, including following orthopaedic surgery. Contrary to Dr. Lim's statement in his brief, the trial court correctly determined that Dr. Erb had the requisite knowledge, experience, training and teaching experience to testify regarding the applicable standards of care in this case. His opinions were, in fact, "tailored to the facts of this case."

Dr. Lim misstates the narrow holding of *Botehlo* and tries to use the holding to require the very thing South Carolina appellate courts have rejected repeatedly, as set forth above. The Court should reject Dr. Lim's overstatement of the holding of *Botehlo*.

Despite Dr. Lim's arguments otherwise, there was sufficient testimony of the standard of care for both VTE prophylaxis and communication of care among medical providers. The trial court correctly denied Dr. Lim's motion for JNOV on this point and this Court should affirm.

B. There was evidence to support the jury's finding that Dr. Lim breached the standard of care

As discussed above, Dr. Erb's testimony was sufficient to create an issue for the jury as to whether Dr. Lim breached the applicable standard of care in his treatment of Mr. Jefferies. Dr. Erb testified there was a failure by both Dr. Lim and Ms. Nicholas to communicate the thought process in treatment and the treatment plan to Peachtree and Dr. Ezman. (Tr. p. 169, l. 8 - p. 171, l. 22; p. 178, l. 25 - p. 181, l. 20; p. 184, ll. 14-25). He also testified that had Dr. Lim and Ms. Nicholas continued DVT prophylaxis it was more likely than not that Mr. Jefferies would not have suffered the fatal pulmonary embolism. (Tr. p. 168, l. 20 - p. 169, l. 7; p. 171, l. 23 - p. 173, l. 1; p. 176, l. 14 - p. 177, l. 3; p. 185, ll. 1-11; p. 186, l. 24 - p. 187, l. 7).

Dr. Erb described the ways Dr. Lim and Ms. Nicholas could have met the standard of care with regard to communication with Peachtree. They could have listed heparin as an active medication in the records at transfer; they did not.[3] (Tr. p. 184, ll. 10-25; p. 226, ll. 16-21). They could have ensured that current medical records showing Mr. Jefferies VTE prophylaxis regimen at the time of discharge were sent to Peachtree; the records that were sent were incomplete. (Tr. p. 187, l. 8 - p. 16; p. 201, ll. 7-9; p. 227, ll. 1-5). They could have timely and accurately completed a discharge summary; they did not. (Tr. p. 169, l. 25 - p. 170, l. 9). They could have simply called Peachtree or Dr. Ezman to alert him that Mr. Jefferies was at risk for blood clots and needed continued VTE prophylaxis; they did not. (Tr. p. 170, ll. 17-23). Dr. Erb stated that by failing to take steps to ensure the need for continued VTE prophylaxis was communicated to Peachtree and Dr. Ezman, it was reasonably foreseeable that the VTE prophylaxis would not be continued and Mr. Jefferies would be at risk for developing blood clots. (Tr. p. 176, l. 14 - p. 177, l. 3; p. 179, l. 3 - p. 181, l. 20). Dr. Erb opined that the deviations by Dr. Lim and Ms. Nicholas from the standard of care resulted in Mr. Jefferies' fatal embolism. (Tr. p. 186, l. 24 - p. 187, l. 7).

This testimony was sufficient to submit these issues to the jury. The Court should reject Dr. Lim's arguments to the contrary.

C. There was evidence to support the jury's finding that Dr. Lim's breach of the standard of care was a proximate cause of Mr. Jefferies' death

Only on the rarest occasion should the circuit court determine the issue of proximate cause as a matter of law. *Turner v. Medical University of South Carolina*, 430 S.C. at 587, 846 S.E.2d at 10; *Bailey v. Segars*, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001)

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[3] Dr. Lim admitted that the discharge summary had "significant errors," failed to list Heparin and mistakenly said Mr. Jefferies was ambulatory at discharge. (Tr. p. 422, ll. 3-20).

("Ordinarily, the question of proximate cause is one of fact for the jury. The trial court's sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Only in rare or exceptional cases may the issue of proximate cause be decided as a matter of law.").

Once again, as set forth above, Dr. Erb testified that the deviations from the standard of care in this case led to Mr. Jefferies' death. This testimony was sufficient to submit this case to the jury. The Court should reject Dr. Lim's contention that there was no evidence of proximate cause in this case and should affirm the trial court's denial of JNOV on this ground.

D. There Was Evidence to Support the Jury's Finding That Dr. Lim Was Grossly Negligent

Dr. Lim contends the trial court erred in upholding the jury's finding of gross negligence because there was no evidence Dr. Lim "consciously" failed to do something it was incumbent upon him to do. (Lim App. Br. pp. 29-31). He contends he "did not make a conscious choice to withhold critical information from Dr. Ezman and Peachtree." (Lim App. Br. p. 31). Dr. Lim attempts to steer this Court into conflating "gross negligence" with "recklessness." The Court should reject Dr. Lim's argument as it does not reflect the law of South Carolina.

The South Carolina Noneconomic Damages Award Act of 2005 (Damages Act) places limits on noneconomic damages in medical malpractice actions. *Pratt v. Amisub of SC, Inc.*, 445 S.C. 199, 912 S.E.2d 268 (Ct. App. 2025). The Damages Act provides:

> (C) In an action on a medical malpractice claim when final judgment is rendered against more than one health care institution, or more than one health care provider, or any combination thereof, the limit of civil liability for noneconomic damages for each health care institution and each health care provider is limited to an amount not to exceed three hundred fifty thousand dollars for each claimant,

> and the limit of civil liability for noneconomic damages for all health care institutions and health care providers is limited to an amount not to exceed one million fifty thousand dollars for each claimant, except as provided in subsection (E).
>
> * * *
>
> (E) The limitations for noneconomic damages rendered against any health care provider or health care institution do not apply *if the jury or court determines that the defendant was grossly negligent, wilful, wanton, or reckless*, and such conduct was the proximate cause of the claimant's noneconomic damages, or if the defendant has engaged in fraud or misrepresentation related to the claim, or if the defendant altered or destroyed medical records with the purpose of avoiding a claim or liability to the claimant.

S.C. Code Ann. § 15-32-220 (C), (E) (2005 & Supp. 2024) (emphasis added). In this case, the jury specifically found both Dr. Lim and Ms. Nicholas were grossly negligent with respect to their care of Mr. Jefferies. (Verdict Form, p. 2, ¶¶ 4, 5).

As this Court has explained:

> "'Recklessness implies the doing of a negligent act knowingly'; it is a 'conscious failure to exercise due care.'" *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (quoting *Yaun v. Baldridge*, 243 S.C. 414, 419, 134 S.E.2d 248, 251 (1964)). "[T]he terms 'willful' and 'wanton' when pled in a negligence case are synonymous with 'reckless,' and import a greater degree of culpability than mere negligence." *Id.* at 288, 709 S.E.2d at 612 (quoting *Marcum v. Bowden*, 372 S.C. 452, 458 n. 5, 643 S.E.2d 85, 88 n. 5 (2007)). Gross negligence, a lesser culpability standard, is a "relative term" meaning "the absence of care that is necessary under the circumstances" or "the failure to exercise slight care." *Jinks v. Richland County*, 355 S.C. 341, 345, 585 S.E.2d 281, 283 (2003)."

Pratt v. Amisub of SC, Inc., at 216, 912 S.E.2d at 277-278. *See* F. Patrick Hubbard and Robert L. Felix, *The South Carolina Law of Torts* 65 (5th ed. 2023) ("Recklessness is defined in South Carolina as conduct where the actor is in fact consciously aware that he or she is acting negligently."); *Id.* at 239 ("'gross negligence' ... has been defined as 'the failure to exercise slight care'").

In this case there was evidence from which the jury could find Dr. Lim failed to exercise even slight care in his treatment of Mr. Jefferies. As noted, Dr. Chris Erb was qualified without objection as an expert in pulmonary and critical care medicine and internal medicine, including venous thromboembolism (VTE) prophylaxis. (Tr. p. 133, l. 19 - p. 134, l. 2; p. 152, l. 18 - p. 153, l. 7). He is board certified in each of those fields. (Tr. p. 134, l. 3 - p. 135, l. 9). His practice and teaching areas included VTE prophylaxis with patients recovering from orthpaedic surgery. (Tr. p. 143, l. 19 - p. 164, l. 14; p. 226, ll. 11-15; p. 235, ll. 18-21). Dr. Erb testified both as to the standard of care and, to a reasonable degree of medical certainty, how Dr. Lim and Ms. Nicholas both breached the standard of care (Tr. p. 168, l. 21 - p. 171, l. 9; p. 171, l. 23 - p. 172, l. 3; p. 176, l. 14 - p. 177, l. 3; p. 178, l. 25 - p. 181, l. 20; p. 184, ll. 4-25; p. 188, ll. 9-16; p. 201, ll. 4-9; p. 227, ll. 1-5; p. 256, l. 22 - p. 257, l. 7; p. 257, l. 15 - p. 258, l. 11) directly causing Mr. Jefferies' death. (Tr. p. 185, ll. 1-11; p. 186, l. 24 - p. 187, l. 7; p. 245, ll. 15-25).

Dr. Lim's other PA, Rebecca Lehman, testified regarding errors and omissions in Mr. Jefferies records that were sent to Peachtree. (Tr. p. 339, l. 11 - p. 340, l. 2; p. 341, l. 24 - p. 342, l. 6). Dr. Lim agreed that the audit trail revealed he did not open Mr. Jefferies chart each day (in fact, not much at all) and that he signed off on the records that contained those significant errors. (Tr. p. 418, l. 14 - p. 423,l. 3; Pl. Exh. 2). Ms. Lehman agreed that one of the most frequent causes of medical errors is communication errors. (Tr. p. 352, ll. 13-18).

The Trial Court gave the jury the following instructions:

> The Plaintiffs are alleging that the Defendants were not only professionally negligent by their failure to comply with the applicable standard of medical care required in this case but that they were grossly negligent, willful, wanton, or reckless in the exercise of their judgment and in providing care of their patient.

> The term negligence refers to carelessness and thoughtlessness. Gross negligence is a higher degree of culpability than is mere negligence.
>
> The term willful, wanton, and reckless are synonymous and refer to conduct intentional and unreasonable or malicious, risking harm, with a conscious indifference to the consequences.
>
> Gross negligence is a relative term. It connotes a failure to exercise even a slight degree of care. Gross negligence involves a conscious failure to exercise reasonable and due care required under the circumstances.
>
> Gross negligence is the intentional, conscious failure to do or not to do that which the applicable standard of care requires the physician to do or to refrain from doing when providing medical care and treatment to a patient.

(Tr. p. 575, ll. 1-21). As mentioned above, there were no objections. (Tr. p. 591, ll. 11-14).

The jury sent a note to the Court seeking to be instructed on gross negligence again. (Tr. p. 595, l. 5-9). The Court repeated the instruction previously given. (Tr. p. 595, l. 15 - p. 596, l. 9). Again, there was no objection. (Tr. p. 596, ll. 11-13). These instructions were actually more favorable to Dr. Lim than the law provides.

The statute itself draws a distinction between "gross negligence" and "recklessness," providing the noneconomic damages cap does not apply "if the jury or court determines that the defendant was grossly negligent, wilful, wanton, *or* reckless...." (Emphasis added). *See, e.g.*, *Brewer v. Brewer*, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) ("The word 'or' used in a statute, is a disjunctive particle that marks an alternative. The word 'or' used in a statute imports choice between two alternatives and as ordinarily used, means one or the other of two, but not both.") (citation omitted); *State v. Middleton*, 407 S.C. 312, 755 S.E.2d 432 (2014) (same, citing *Brewer*).

There was evidence from which the jury could have found Dr. Lim and Ms. Nicholas failed to exercise even slight care in their treatment of Mr. Jefferies. Under the appropriate standard of appellate review this Court should affirm the trial court's denial of Dr. Lim's motion to apply the cap under the Damages Act.

II. The Circuit Court (Judge Cole) Exercised Appropriate Discretion in Denying Dr. Lim'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, SCRCP, 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

Dr. Lim contends the Circuit Court (Judge Cole) erred in denying his 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). (Lim App. Br. pp. 31-42). Dr. Lim asserts the denial was simply and solely due to "timing of the motion" and this factor cannot sufficiently establish prejudice. (Lim App. Br. p. 33). Dr. Lim 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 Dr. Lim's estimation, did not need additional discovery. (Lim App. Br. pp. 33-34). Dr. Lim also asserts the purported error was not harmless. The Court should not be persuaded by these arguments.

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) (emphasis added) (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 a sufficient reason to deny an amendment, *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988), delay up until just before trial after having knowledge for over four (4) years of the potential defense, after discovery had closed, after dispositive motions had been ruled upon, and on the eve of a day certain complex medical malpractice trial for which witnesses (including experts and other professionals) must arrange their schedules justified 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). Again, the case had been pending for over four (4) years, discovery was complete pursuant to an amended scheduling order (the last 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. *See* James F. Flanagan, *et al.*, *South Carolina Civil Procedure*, Vol. I, pp. 184-185 (4th Ed. 2020) ("Although there is no time limit for amendments with leave of court, the closer they are to trial the more likely the court will find them prejudicial or that there was no excuse for the delay in seeking the amendment."). *Compare South Carolina State Hwy. Dept. v. Rural Land Co.*, 250 S.C. 12, 156 S.E.2d 333 (1967) (Supreme Court affirmed denial of amendment that "substantially change[d] the issues" and defense shortly before and during a day-certain trial). It is not the case that Defendants were not aware of the availability of the defense until the eve of trial – a major thrust of the opinions and testimony their witnesses, including their expert, Dr. Poletti, involved the alleged superseding liability of Dr. Ezman and Peachtree.[4]

Even so, the Defendants all responded in 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 after filing their motion to amend, did they file an amended response to this discovery request. Rule 26(c), SCRCP (the obligation to update interrogatories continues until the time of trial); Rule 33(b), SCRCP ("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.").

Furthermore, the issue raising this defense is not as simple or one-dimensional as all Appellants, including Dr. Lim, present 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 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*

[4] Dr. Lim's argument that Respondent's prior suit against Dr. Ezman and Peachtree gave Respondent notice of the issue (Lim App. Br. p. 34) actually cuts against permitting the amendment right before a day-certain trial in a case that was nearly four (4) years old. Surely, Dr. Lim and his lawyers were also aware of the potential of this defense for the entirety of this case, yet responded in discovery that they did not allege any other party was at fault and then waited until discovery had closed, dispositive motions decided, and trial was imminent to attempt to formally raise the affirmative defense.

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 justice would have actually required a lengthy postponement of the day certain trial. *See* Rule 15(a) ("leave shall be freely given *when justice so requires* and does not prejudice any other party")(emphasis added). 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 "intervening" negligence was not reasonably foreseeable or anticipated by any of them. This would not have been a simple matter of relying on prior pleadings or discovery involving Dr. Ezman and Peachtree. Judge Cole recognized that the attempted amendment would have fully reopened discovery and further pleading and, in his discretion, he 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., Snyder'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 (especially Dr. Lim) 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 their 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).[5]

Furthermore, Defendants' counsel used opening statement (Tr. p. 124, l. 15 - p. 125, l. 3) and the majority of his 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, including Dr. Lim; 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

[5] 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)

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).[5]

Furthermore, Defendants' counsel used opening statement (Tr. p. 124, l. 15 - p. 125, l. 3) and the majority of his 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, including Dr. Lim; 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

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[5] 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 all 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, including Ms. Nicholas, 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 the day-certain trial. Even if there was error, Dr. Lim has not demonstrated prejudice. This Court should affirm.

III. 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

Dr. Lim contends "[o]ver Defendants' objection, the verdict form improperly listed statutory beneficiary Michelle Hemphill and permitted the jury to award damages to her." (Lim App. Br. pp. 42-43). Dr. Lim asserts this was error and permitted a duplicative recovery to the Estate of Albert Jefferies." (Dr. Lim App. Br. p. 43). The record does not support that any Defendant, including Dr. Lim, objected to the verdict form or that the jury awarded a "duplicative recovery."[6] This Court should not address this issue or be persuaded by Dr. Lim's

[6] In several places in his Brief Dr. Lim claims that the Court used the verdict form over his objection, but in none of those points in his Brief does he cite to any place in the Record where that objection appears. (Lim App. Br. pp. 16, 42-43). The reason is, of course, because no such objection occurred; in fact, his counsel affirmatively agreed to the verdict form as outlined

argument that the verdict was improper. On the merits, the Court should affirm.

Earlier in the trial the Court indicated it had revised proposed verdict forms the parties submitted. (Tr. p. 430, ll. 21-23). The Court provided a copy to each counsel for review of the verdict form the Court proposed to use. (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 stated "I will be referring to the Plaintiffs plural as opposed to singular." (Tr. p. 491, ll. 4-5). 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 true identity. (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 (Dr. Lim's counsel): From our perspective and short memory, yes, ma'am.

(Tr. p. 491, l. 24 - p. 492, l. 2). The following colloquy then took place:

> 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*?

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below. Even accepting that objections may have occurred during a conference in chambers or otherwise off the record, an off-the-record objection 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).

MR. DAVIS (Counsel for Dr. Lim): It does from our perspective, Your Honor.

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

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 Dr. Lim 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 Dr. Lim stated "It is, Your Honor." (Tr. p. 591, l. 20).[7] Thus, any objection Dr. Lim 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

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[7] Assuming Dr. Lim's Counsel did object (and the Record does not demonstrate that he did), the Record does not contain a proffer of a competing verdict form from Dr. Lim's counsel. *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). Dr. Lim contends in his Brief that he submitted a proposed verdict form and designates its inclusion in the Record (Dr. Lim App. Brief p. 16), but it was not proffered nor should it be part of the Record on Appeal. Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").

objection.").

The jury returned its verdict responding to the special interrogatories on the agreed-upon verdict form, including an award of damages of $3,000,000.00 for Ms. Allen and a separate award of $3,000,000.00 in damages for Ms. Hemphill. (Tr. p. 598, ll. 13-15). The Court confirmed the verdict with the jurors. (Tr. p. 597, l. 21 - p. 598, l. 25). The Court then asked all counsel, including counsel for Dr. Lim, "[i]s there anything else of the jury at this time?" and counsel for Dr. Lim responded "No, ma'am." (Tr. p. 599, ll. 3-5).

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 verdicts was correct. Even so, the time for Dr. Lim 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.").

Dr. Lim's Counsel did not object and in fact Counsel agreed to the verdict form the Court ultimately submitted. (Tr. p. 492, ll. 10-15; p. 591, ll. 15-20). If there was a problem counsel had an obligation to speak up before the verdict, or at the latest before the Court discharged the jury *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 on damages "*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 Dr. Lim not object, his counsel affirmatively agreed to the procedure and use of the verdict form.

Dr. Lim cites to four cases which are meaningfully distinct from this case. For instance, *Ballard v. Ballard*, 314 S.C. 40, 443 S.E.2d 802 (1994) (Lim Br. pp. 44-45), the narrow issue in the case involved the operation of another portion of the wrongful death statute, Section 15-51-40, which currently provides:

> In every such action the jury 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. The amount so recovered shall be divided among the before-mentioned parties in those shares as they would have been entitled to if the deceased had died intestate and the amount recovered had been personal assets of his or her estate....

S.C. Code Ann. § 15-51-40 (Supp. 2025). The Supreme Court construed the statute:

> to allow a total recovery equal to those damages proved to have been sustained by the statutory beneficiaries in a wrongful death action; the distribution of the damages among the statutory beneficiaries, however, is controlled strictly by the share each would take as an heir in intestacy regardless of the proportion of the damages suffered by each.

Ballard, at 42, 443 S.E.2d at 803. Nothing in *Ballard* prevented the Court, pursuant to Rule 49, from using the agreed-upon verdict form in this case.

Dr. Lim cites to *Branham v. Ford Motor Co.*, 390 S.C. 203, 701 S.E.2d 5 (2010) as "consistent" with its arguments. (Lim Br. p. 45). But the issue in *Branham* was an interrogatory that required the jury to apportion fault among *defendants* under the then-existing rules for comparative fault and joint and several liability, which was improper. Dr. Lim admits *Branham* is not "dispositive" of this issue but contends the analysis is "relevant and analogous" (Lim Br. p. 45), but of course there the defendant, Ford, objected on the record. Furthermore, the Court stated "[w]hether Ford was prejudiced by the improper verdict form is speculation, but we address the issue in light of the remand for a new trial (on a different issue)." *Branham*, at 235, 701 S.E.2d at 22. *Branham* does not advance Dr. Lim's claim that the Trial Court should not have used the verdict form her counsel agreed for the Court to use.

Dr. Lim next cites to *Hern v. Safeco Ins. Co.*, 125 P.3d 597 (Mont. 2005) as "instructive." (Lim App. Br. pp. 46-47). The case, however, is meaningfully distinct and of questionable continued efficacy and does not aid Dr. Lim's argument.

Hern involved members of a class action who brought claims arising out of Safeco's wrongful denial of stacking UM coverage; the underlying case involved the death of Becky Hern. The underlying case involved both wrongful death and survival claims brought by Becky's mother, Ardell Hern, as Becky's personal representative. The trial court had submitted a verdict form to the jury that apportioned damages between the two claims and then permitted the jury to further apportion the wrongful death damages between the decedent's two wrongful death beneficiaries, Ardell and Becky's father, Robert.

The Supreme Court of Montana first adopted a cause of action for parents to recover for loss of consortium related to the death of their adult child. *Hern*, 125 P.3d at 608. The Montana Court then noted that under Montana law, the estate's personal representative is authorized to bring the wrongful death action under Montana's Wrongful Death Act. The Court stated:

> This statute and its predecessor have been interpreted to mean 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. The personal representative 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.

Hern, 125 P.2d at 606. The Court added:

> In the case before us, 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. Therefore, we vacate the $500,000.00 awarded to Robert as part of the wrongful death claim, $300,000.00 of which was for grief, sorry, and mental anguish, and $200,000.00 for loss of consortium.

Id. The Court also removed an award to Ardell for parental loss of consortium based on the evidence. It therefore found it did not need to specifically address Safeco's claim that the trial court abused its discretion in using the special verdict form. *Id.*, at 609.

Importantly, the Court in *Hern* did not have a second statutory scheme to consider similar to the Damages Act in South Carolina. Furthermore, in *Hern*, the defendant Safeco challenged on the record at trial the use of the special verdict form to permit Robert to pursue a separate claim for loss of consortium. The primary challenge was that Montana did not recognize such a claim, and the Court used its analysis of the claim against the backdrop of the wrongful death statute to remove Robert's separate claims from the verdict form.

In this case, only Ms. Allen brought the claims under the wrongful death statute. However, unlike Montana, South Carolina has the Damages Act which provides a cap *for each* *claimant.* The trial court, with the agreement of all counsel (including counsel for Dr. Lim), permitted the jury to determine what portion of the damages belonged to each claimant pursuant to Rule 49. There was only one award for wrongful death – $6,000,000.00 – which the parties agreed the jury could decide how to divide.[8] *Hern* is, therefore, distinct from this case in very meaningful ways.

Dr. Lim next cites to *Castillo v. Exclusive Builders, Inc.*, 733 N.W.2d 62 (Mich. App. 2007) (Lim App. Br. p. 47), but that case also does not advance Dr. Lim's position. In *Castillo*, the narrow issue was whether the trial court could order a decedent's wife, who was the personal representative of his estate, to individually pay sanctions under Michigan's offer of judgment statute where a jury brought back a defense verdict. The Wife had pled that she brought the case "individually and as personal representative" of her husband's estate. The Michigan Court of Appeals noted that the wrongful death statute requires the action be "brought by, and in the name of, the personal representative of the estate of the deceased." *Castillo*, 733 N.W.2d at 65. The Court stated:

> * * * *Therefore, plaintiff could not state a claim under the wrongful death*

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[8] 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 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 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)").

> *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.* Thus, while plaintiff improperly filed the complaint individually and as the personal representative of her husband's estate, no individual claim, beyond that presented by the estate, was pleaded or pursued at trial. Moreover, defendant's defense at trial consisted entirely of disputing plaintiff's wrongful death claim. Therefore, because there is no evidence that defendant's attorney fees were causally linked in any way to plaintiff's poorly captioned complaint, and thus no indication that defendant incurred any fees necessitated by plaintiff's rejection of the offer of judgment in her individual capacity, the trial court erred in ordering plaintiff to pay attorney fees jointly with plaintiff's husband's estate.

Id. (emphasis added). Placed back into context, then, the quoted language amplifies that only those damages available to a personal representative under a wrongful death claim were submitted to the jury (as they were in this case) so that the individual was not liable to pay in response to the defense's offer of judgment. *That* is the narrow holding of this case.

In this case, the Court charged the jury, "[t]he Personal Representative has a right to recover compensatory damages for wrongful death." (Tr. p. 581, ll. 16-18). The Court then outlined the elements of damages available under a wrongful death claim. (Tr. p. 581, l. 23 - p. 587, l. 6). These were correct statements of the law regarding wrongful death recovery. Even so, as noted above, Dr. Lim did not object to the jury instructions. Thus, as was the case in *Catillo*, the jury considered only those claims and elements of damages in support of the wrongful death claim brought by Ms. Allen as Mr. Jefferies' personal representative, and nothing more.

The Michigan Court in *Castillo* also was dealing only with a claim by the defense for an award of costs and fees against the party in her individual capacity, not as personal representative. There is no indication that any party had objected to the manner in which the case was submitted to the jury or that the Michigan Court had to reconcile a separate statute like the

Damages Act under South Carolina law. Plucking this one sentence from *Castillo*, then, grossly overstates both the holding and usefulness of that opinion.

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 statutory cap statute.

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

Standard of Review

This issue is also guided by error preservation principles. If the issue on appeal had been construction of Rule 68, SCRCP, or an agreement accepting an offer of judgment (a contract), the scope of review would involve a question of law that this Court would review *de novo*. *Wells v. Vetech, LLC*, 437 S.C. 428, 879 S.E.2d 6 (Ct. App. 2022). However, in this case, the issue is whether the offer of judgment directed at Dr. Lim and his employer, misnamed CONA ASC, LLC, was actually an offer to CONA PA; insofar as the issue is not waived that question involves either an abuse of discretion in correcting the caption, *Sentell v. Southern Ry. Co.*, 67 S.C. 229, 45 S.E. 155 (1903), or any evidence with regard to the factual issue of the true target of the offer of judgment. *Cf.* S.C. Code Ann. § 14-3-330 (2015) (appellate court "shall have appellate jurisdiction for correction of errors of law in law cases"); *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999) (appellate court will give deference to factual findings of trial court in response to motions preliminary to trial; although not controlling the same principle should apply in this case).

Discussion

Dr. Lim contends that even though the caption in this case was changed to reflect that CONA, PA was the correct defendant, Respondent never directed the offer of judgment to "CONA PA" but instead directed it to "CONA ASC, LLC," and "the Offer of Judgment says what it says, and cannot be edited in retroactive fashion by the circuit court nor was it." (Lim App. Br. p. 48). Dr. Lim continues this construct by claiming that because it was a "joint offer," and it is invalid as against CONA, PA, "it is also necessarily invalid as to Dr. Lim and PA Nicholas." (*Id.*). The Court should not be drawn into this false narrative based upon perjured evidence: CONA, PA, was Dr. Lim's employer (Lim Dep. p. 7, ll. 22-24), was sued in that capacity, *answered the complaint* in that name, and the lawyer representing both Dr. Lim and CONA, PA, consented to the Rule 15 amendment to correct the caption, which related back to the initial filing of the complaint. Rule 15(c), SCRCP (an amendment changing a party against whom a claim is asserted relates back if the new party had notice of the institution of the action and "knew, or should have known, that, but for a mistake concerning the identity of the proper party, the action would have been brought against them.").

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, PA, 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. 2020). 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.

This issue depends upon whether this Court accepts CONA, PA's contrived and false argument, continued by Dr. Lim in his Brief, that CONA, PA 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 false statements by each of the affiants CONA, PA, proffered 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.").

Furthermore, this precise issue (that the Offer of Judgment was defective because it was aimed at CONA ASC, LLC and not CONA, PA) was not made below and was certainly not ruled upon by Judge Knie. In her order granting pre-judgment interest, Judge Knie stated:

> Defendants do not contest that the Offer of Judgment was made and rejected, nor the calculations made by Plaintiff. Defendants, as outlined in their motions below, contest the verdict as being excessive and not supported by the evidence.

(Order of July 28, 2025, p. 3). None of the Defendants, including Dr. Lim, challenged this finding by motion to alter or amend pursuant to Rules 52(a) and 59(e), SCRCP, or revision pursuant to Rule 54(b), SCRCP. And none of them claimed that the Offer of Judgment was defective as to any of them, much less as to them all, for this reason. This issue is not preserved for this Court's review. *See, e.g.*, *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial court to be preserved for appellate review."); *Id.* ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error."). Even if it is, the record belies the argument.

The trial court's decision that CONA, PA, was the real party-defendant has evidentiary support as set forth in Part I of the Respondent's Brief to CONA, and Respondent incorporates those arguments here. Rule 208(b)(6), SCACR. The Court should reject Dr. Lim's arguments and affirm the trial court's order awarding pre-judgment interest against all Defendants under the Offer of Judgment, and denying the motion for reconsideration of that order.

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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