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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Grace Knie, Circuit Court Judge

Appellate Case No. 2025-001716

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

v.

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

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

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I. Dr. Lim is entitled to JNOV on Plaintiff's medical malpractice claim because Plaintiff failed to present sufficient evidence of required elements of her claim.

With respect to the JNOV issues, Respondent challenges the JNOV standard of review set forth in Dr. Lim's Initial Brief. (Respondent's Br. pp. 8-9). However, Respondent attempts to distinguish the cases Dr. Lim cites based on them being factually different or having been reversed/abrogated on other grounds. These attempts are without merit. JNOV standards of review are universal regardless of the individual facts of the case – hence, "standards" – and abrogation on other grounds has no impact on the veracity of the standards of review set forth in those cases.

When a trial court refuses to grant a JNOV, reversal is appropriate "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *See Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006). Only "reasonable inferences" are viewed in the light most favorable to the nonmoving party. *See Gastineau v. Murphy*, 331 S.C. 565, 570, 503 S.E.2d 712, 714 (1998). Contrary to Respondent's assertion, Dr. Lim is not asking this Court to "resolve conflicts in the testimony or evidence." (Respondent's Br. p. 8). There was a complete lack of relevant evidence on the required elements of Plaintiff's medical malpractice claim against Dr. Lim. *See Pampu v. Wingo*, 446 S.C. 236, 252, 918 S.E.2d 717, 726 (Ct. App. 2025), *reh'g denied* (Aug. 12, 2025), *cert. granted* (Apr. 1, 2026) (affirming grant of JNOV and explaining that expert witness's testimony "was pure speculation and does not qualify as even minimally probative evidence to support the jury's verdict"); *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 48, 691 S.E.2d 135, 148 (2010) (holding evidence presented was not type required to prove required element of claim and trial judge erred in failing to grant JNOV).

A. Dr. Lim's "standard of care" argument is preserved for appellate review.

After the Respondent rested her case, Appellants moved for a directed verdict on negligence and gross negligence. (Trial Tr. 307:13-308:2). As to the negligence issue, counsel stated:

> 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, sufficient evidence to give to the jury on the issue of negligence. And we would ask for a directed verdict on that.

(*Id.* at 307:13-18); *see Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 338, 611 S.E.2d 485, 487 (2005) ("A trial court should grant JNOV when the evidence is insufficient to support the verdict."). Plaintiff's counsel then responded: "Dr. Erb clearly satisfies our burden on both issues. Dr. Erb set forth multiple deviations from the standard of care, proximate cause, foreseeability and causation." (Trial Tr. 308:5-13); *see State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (stating that although moving counsel's directed verdict motion was not as specific as it could have been, "it is clear from the argument presented in the record that the motion was made on this ground" because the opposing counsel addressed that argument in his response; "[t]herefore, we find the argument was raised to the trial court and is preserved.").

After the close of the evidence, Appellants renewed the motion for directed verdict "on both the standard of care and upon the issue of gross negligence, incorporating the same arguments we made earlier." (Trial Tr. 490:3-6). At trial, defense counsel specifically argued there was insufficient evidence on the issue of negligence, which is the same ground asserted herein. Thus, Dr. Lim's negligence argument is preserved for appellate review. *See State v. Cain*, 419 S.C. 24, 34, 795 S.E.2d 846, 851 (2017) ("While a party may not argue one ground at trial and another ground on appeal, we do not require a party to use the same language on appeal as it did at trial. We find Cain's argument at trial and his argument on appeal were the same: that Stuart's testimony was not sufficient to prove [a required element of the claim]. Thus, the argument before us now is preserved for appeal because it was raised to and ruled upon by the trial court.") (citations omitted).

B. Plaintiff failed to set forth any evidence of a "standard of care" that meets the South

Carolina requirements for what a standard of care should consider.

It is not enough for Respondent to generally allege that Dr. Erb testified to some undefined, general standard of care for doctors. Respondent had to establish through expert testimony: (1) a standard of care premised on "[r]ecognized and generally accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine **under similar circumstances**"; (2) that Dr. Lim failed to do what this standard required him to do; and (3) that his breach proximately caused Mr. Jefferies' death. *See Brouwer v. Sisters of Charity Providence Hosps.*, 409 S.C. 514, 521, 763 S.E.2d 200, 203 (2014) (emphasis added). Failure on any one of these elements is fatal to Plaintiff's medical malpractice claim.

This Court's recent decision in *Carolina Real Estate Holdings, LLC v. Brilin Electric, LLC*, 446 S.C. 376, 388, 919 S.E.2d 918, 924 (Ct. App. 2025), is instructive. There, this Court reversed and remanded for entry of JNOV on a claim. In doing so, this Court set out the elements of the claim and then determined whether there was evidence to support each element. Despite recognizing that plaintiff entered some evidence, this Court recognized that the evidence was not the evidence necessary to support required elements of the claim. *Id.* at 387, 919 S.E.2d at 924 ("The quotes obtained by CREH and Brilin and the invoices paid by Brilin were entered into evidence. However, a difference in quotes alone does not mean there were actual damages [actual damages element of UTPA claim]…. Brilin, at most, showed that CREH's quotes were higher than the ones Brilin collected…. However, there are no specific facts that show CREH fraudulently inflated quotes for other tenants in the past or would do so in the future [public interest element of UTPA claim]."). Thus, the introduction of some evidence is insufficient to withstand a JNOV when the evidence is not the type of evidence necessary to support a required element of the claim.

Noticeably missing from Respondent's Brief is any clear enunciation of what exactly the standard of care required Dr. Lim to do (that he failed to do). Thus, it is difficult to determine exactly what type of evidence would support such a "standard of care" – but was Respondent's burden to prove the standard of care (and breach).

To the extent Respondent points to any testimony by Dr. Erb that Dr. Lim was required to continue heparin and SCDs after the patient's discharge to another treatment facility where the patient was under the care of another doctor, this does not meet the standard of care element of the claim. (Respondent's Br., p. 13 ("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.")). Plaintiff's own expert admitted that Dr. Lim and his staff could not require the rehab facility to continue Mr. Jefferies on heparin and SCDs. *See* (Trial Tr. 168:20-170:20) (noting that this would be a mere "recommendation" because subsequent providers "take over his [Mr. Jefferies'] care at the rehab facility"). He also admitted that he is not even personally involved in the care of his own patients after they are transferred to a rehab facility. (Trial Tr. 147:15-17). Plaintiff offered no evidence that any orthopedic surgeon has personally continued heparin and SCDs for a patient after the patient's discharge to a rehab facility where the patient was under the care of another doctor, much less that it is standard practice to do so. *See Watson v. Ford Motor Co.*, 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) ("The trial court must examine the substance of the testimony to determine if it is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge.").

To the extent Respondent points to any testimony by Dr. Erb that Dr. Lim was required to personally send the daily progress notes to the rehab facility, this also does not meet the standard of care element of the claim. *See* (Respondent's Br., p. 13). Respondent did not present evidence of "accepted standards, practices, and procedures which are exercised by competent physicians in the same branch of medicine under similar circumstances" – as a standard of care is required to do. Dr.

Erb is not an orthopedic surgeon at a hospital. He also does not practice at a hospital in South Carolina, much less Spartanburg Regional. Based on his testimony, it is apparent that he did not account for Spartanburg Regional's hospital policy and procedures, as he was required to do if he was going to set forth a legitimate standard of care. *See* (Trial Tr. 157:2-20 (Dr. Erb listing the items he "review[ed] in this case in order to arrive at [his] conclusions" and not mentioning any Spartanburg Regional hospital policies or procedures)).

Plaintiff offered no evidence of an accepted practice and procedure for surgeons practicing at hospitals in South Carolina to personally send daily progress notes to a rehab facility when discharging a patient to that facility, much less that surgeons practicing at and subject to Spartanburg Regional's policies and procedures do so. In fact, the **only** relevant evidence was to the contrary. At Spartanburg Regional, the hospital case manager is responsible for sending the patient records to the rehab facility. (Trial Tr. 341:1–342:25; 345:3-8; 346:1-14; 403:18-404:15; 470:4–472:17; 477:7–21); (Nicholas Dep. 82:21–24). As Dr. Lim testified:

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

(Trial Tr. 403:24-404:15); (Trial Tr. 471:4-17; 472:2-18 (Defendants' expert, Dr. Steven Poletti, concurring that it is a hospital staff employee's job to send the medical records to the rehab facility and that Dr. Lim and his staff did not have any responsibility to send those records to Peachtree)).

The surgical team relied on hospital case managers to ensure that records and information were sent with the patient to the receiving facility. (Nicholas Dep. 47:20–48:14); (Trial Tr. 341:1–342:25, 355:14–16; 469:2–22). The surgical team deferred to Spartanburg Regional with respect to transmitting records or instructions to the receiving facility because coordination between the hospital and the facility was handled through the hospital's case-management process. The surgical team had never been tasked with personally sending such records, and everything the surgical team had done would have been reflected in the daily progress notes transmitted to the receiving facility. (Nicholas Dep. 82:17–83:10); (Trial Tr. 341:1–342:25). Spartanburg Regional's protocols and HIPAA requirements likewise required those records to be transmitted through case management or medical records, not by the surgeon's office. (Trial Tr. 403:18–404:15). Further, the surgical team did not personally instruct case management to send the records because that was part of the ordinary, everyday process whereby hospital case managers handled placement and record transmission automatically. (Trial Tr. 345:3–346:17; 352:24–353:17; 355:14–16).

Moreover, this Spartanburg Regional hospital policy/procedure is borne out by what actually happened. On July 20th, the hospital case manager began arranging Mr. Jefferies' transfer to Peachtree. (Trial Tr. 225:5-15; 330:7-17; 394:6-17; 395:17-396:5); (Spartanburg Regional Medical records). At that time, <u>the hospital case manager</u> sent Peachtree the patient's daily progress notes from July 18th through 20th. (Trial Tr. 179:11-15; 223:18-23; 401:21-25). However, Mr. Jefferies was actually discharged to Peachtree several days later on July 26th. (Trial Tr. 173:4-8; 391:24-392:4; 394:14-17; 353:18-20). Progress notes were completed daily for every day of Mr. Jefferies' stay at the hospital and were all complete before Mr. Jefferies' discharge. (Nicholas Dep. 12:11-17); (Trial Tr. 354:9-12). Had the hospital case manager sent these additional daily progress notes to the rehab facility – in addition to the three days' worth of notes the hospital case manager previously sent, then the rehab facility would have been informed of Mr. Jefferies' SCD and heparin treatments. Thus, Dr. Erb did not set forth a legitimate standard of care with respect to the transfer of patient records because his testimony failed to take into account the "accepted practices and procedures that would be followed by average, competent practitioners in the physician's field of medicine under the same or similar circumstances." *See Melton v. Medtronic, Inc.*, 389 S.C. 641, 655, 698 S.E.2d 886, 893 (Ct. App. 2010) ("[I]f the expert merely testifies as to his own personal standard of care, rather than the generally recognized and accepted standard of care, such testimony is insufficient to survive summary judgment.").

Respondent's Brief repeatedly touts Dr. Erb's "training and experience in VTE prophylaxis," but this case is not about Dr. Lim's VTE prophylaxis treatment of Mr. Jefferies. (Respondent's Br., pp. 15-17). Even Dr. Erb agrees that Dr. Lim appropriately assessed Mr. Jefferies and provided him with proper VTE prophylaxis treatment while Mr. Jefferies was in Dr. Lim's care at the hospital. (Trial Tr. 247:9-248:21). Based on Respondent's asserted breaches with respect to Dr. Lim, this case is about: (1) whether Dr. Lim had a duty to continue Mr. Jefferies on heparin and SCDs after Mr. Jefferies was discharged to a rehab facility and under the care of the rehab doctor; and (2) whether Dr. Lim had a duty to personally send the completed daily progress notes to the rehab facility. As explained above, with respect to either of these alleged breaches, Plaintiff's expert failed to provide a legitimate standard of care that took into account accepted standards, practices, and procedures, which are exercised by competent physicians in the same branch of medicine under similar circumstances. Therefore, Dr. Lim was entitled to JNOV.

Respondent mischaracterizes Dr. Lim's argument as an argument that Plaintiff's expert was not sufficiently qualified to testify regarding the standard of care and from this mischaracterization attempts to inject preservation issues. (Respondent's Br., pp. 11-12 ("[T]he 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.")). However, that is not Dr. Lim's argument. Dr. Lim is not arguing that Dr. Erb could not have given an informed expert opinion to satisfy the standard of care requirements. Dr. Lim's argument is that Dr. Erb did not give such an expert opinion. Consequently, Respondent's issue preservation arguments are also without merit.

C. Plaintiff failed to set forth any evidence that Dr. Lim breached a legitimate "standard of care" and that such a breach proximately caused Mr. Jefferies' death.

With respect to Respondent's "communication" standard of care, Respondent alleges that Dr. Lim could have satisfied this standard of care if he had "listed heparin as an active medication in the records at transfer". (Respondent's Br. p.p. 17-18). This is exactly what Dr. Lim did. The Progress notes were completed daily for every day of Mr. Jefferies' stay at the hospital and were all complete before Mr. Jefferies' discharge. (Nicholas Dep. 12:11-17); (Trial Tr. 354:9-12). These daily progress notes listed heparin as an active medication, with the last dose given on the morning of transfer. (Daily Progress Notes); (Nicholas Dep. 36:5-19; 44:21-47:5); (Trial Tr. 350:19-22; 354:9-14). Again, the hospital is responsible for transferring records to the rehab facility, and if the hospital failed to transfer those records, then Dr. Lim was not aware that they failed to do so. [1]

Respondent also points to Dr. Erb's testimony "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." (Respondent's Br. p. 17). There is no dispute that Dr. Lim continued DVT prophylaxis while Mr. Jefferies was under his care in the hospital. Dr. Erb's testimony concerns DVT prophylaxis treatment at the rehab facility. However, Dr. Erb testified that Dr. Lim could not

[1] To the extent Respondent focuses on the discharge summary, even in the normal course of business, the discharge summary would not have been completed and sent to the rehab facility until after Mr. Jefferies' 4:30 a.m. death on July 28th. (Trial Tr. 337:13-24; 353:21-25) (PA Lehman testifying that in the normal course of business the discharge summary would be completed on the 28th or 29th)). Consequently, it is a red herring. The daily progress notes gave all the information about Mr. Jefferies' treatment in the hospital, including the use of heparin and SCDs. To the extent the rehab facility lacked this information, it was either because the rehab facility failed to inform the hospital that it did not receive the daily progress notes or the hospital failed to deliver those notes.

have required the rehab facility to continue DVT prophylaxis. (Trial Tr. 168:20-170:20) (noting that this would be a mere "recommendation" because subsequent providers "take over his [Mr. Jefferies'] care at the rehab facility"). Dr. Erb also admitted that he is not even personally involved in the care of his own patients after they are transferred to a rehab facility. (Trial Tr. 147:15-17). Thus, Dr. Lim could not have required "continued DVT prophylaxis" while Mr. Jefferies was at the rehab facility. Moreover, turning a patient's treatment over to the rehab doctor who is actually able to monitor the patient's treatment at the rehab facility and prescribe treatment at that facility is not a breach of any legitimate standard of care. Thus, there was no evidence that Dr. Lim failed to do something that a legitimate standard of care required him to do and that such failure caused Mr. Jefferies' death.

D. Plaintiff failed to set forth any evidence that Dr. Lim was grossly negligent.

South Carolina Code § 15-32-220(E) removes the limitations for noneconomic damages rendered against a health care provider 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…." S.C. Code § 15-32-220(E). Respondent makes the irreconcilable argument that "wilful", "wanton" and "reckless" in the statute all mean the same thing – a conscious failure to exercise due care, but that "grossly negligent" in that same string of words does not mean the same thing because of the word "or" in the sentence. (Respondent's Br. pp. 20-22). Both of these things cannot be true. All of these words/phrases are connected in the same list by the word "or." This is called a "coordinate list" or "series." Respondent gives no explanation why the Court should ignore the "or" when looking at the words "wilful", "wanton" and "reckless" but focus narrowly on the word "or" when looking at the words "grossly negligent" in the same coordinate list. In accordance with the rules of grammar, either they all mean the same thing, or they all mean different things.

According to the South Carolina Supreme Court, "[g]ross negligence is the ***intentional, conscious failure*** to do something which it is incumbent upon one to do…." *Clyburn v. Sumter Cnty. Sch. Dist. No. 17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) (emphasis added). Here, Respondent presented no evidence that Dr. Lim intentionally and consciously failed to do something which it was incumbent upon him to do (and which proximately caused Mr. Jefferies' death). According to the evidence presented, it was hospital policy for the hospital case manager to send the daily progress notes to the rehab facility, and Dr. Lim thought the hospital case manager had done so – just like the hospital case manager did with the first three (3) days of Mr. Jefferies' daily progress notes. The daily progress notes – all of which were completed before Mr. Jefferies' transfer – show that Dr. Lim had Mr. Jefferies on heparin and SCDs. Additionally, Dr. Lim did not act grossly negligent by failing to prescribe heparin and SCDs for Mr. Jefferies while he was at the rehab facility and under the care of a separate doctor, Dr. Ezman. Respondent's own expert testified that, as a practical matter, Dr. Lim could not require the doctor at the rehab facility to treat Mr. Jefferies with heparin and SCDs while he was at the rehab facility. *See also* (Trial Tr. 387:25-388:4 (Dr. Lim testifying that "Peachtree or any rehab facility is a separate facility that we have no credentialing. We're not allowed to come see patients there and not be part of any day-to-day direct care management.")). Moreover, Dr. Lim reasonably expected that Dr. Ezman would timely perform his own assessment of Mr. Jeffries and prescribe any treatment necessary given the patient's progress in his care and the rehab facility's ability to monitor Mr. Jefferies for risks from such treatments. (Trial Tr. 344:12-22; 385:20-388:4).

Respondent focuses on the case of *Pratt v. Amisub of SC, Inc.*, 445 S.C. 199, 216, 912 S.E.2d 268, 278 (Ct. App. 2025)[2], in which a radiologist (Dr. Gilleland) discovered that nine rib fractures

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[2] *reh'g denied* (Feb. 19, 2025), *cert. granted* (Aug. 14, 2025), *cert. dismissed as improvidently granted*, 447 S.C. 404, 927 S.E.2d 782 (2026).

had been missed on an initial scan interpretation, then made a conscious decision not to call this critical discrepancy to the attention of the emergency room physician – even though he knew the patient had already been discharged without the correct information. The Court affirmed the jury's finding that the radiologist acted in a "grossly negligence or recklessness" manner, emphasizing the radiologist's own testimony that he knew "the E.R. doctor had already discharged the patient without having that knowledge" and that he "absolutely" knew the ER physician would remain unaware of the discrepancy unless Dr. Gilleland communicated it. 445 S.C. at 216, 912 S.E.2d at 278. The Court found "ample evidence that Dr. Gilleland acted with conscious indifference." *Id.* This Court specifically stated "[t]his error **went beyond ordinary negligence because—**according to Wife's experts—failing to call in the discrepancy under such circumstances **violated hospital policy requiring a radiologist to call the ER** if a chest image shows acute rib injuries or where "the radiologist is unsure of their acuity." *Id.* at 216, 912 S.E.2d at 278.

Here, unlike in *Pratt,* neither Respondent nor Respondent's expert presented any testimony that it was Spartanburg Regional Hospital's policy to have orthopedic surgeons personally send daily progress notes to a rehab facility or otherwise personally communicate with a rehab facility. In fact, all the evidence was to the contrary. The hospital case manager was responsible for sending the daily progress notes to the rehab facility, and hospital policy/HIPPA regulations prevented the surgical office from sending records directly. Moreover, Respondent presented no evidence that Dr. Lim knew the completed daily progress notes had not been received by the rehab facility. Despite the rehab doctor's and rehab facility's duty to review Mr. Jefferies' medical records, they never informed anyone that they were missing six (6) days of the most recent daily progress notes.

"Gross negligence ordinarily is a mixed question of law and fact. ***When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the***

court." *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887–88 (citation omitted) (emphasis added). The Circuit Court should have granted Dr. Lim's JNOV with respect to gross negligence.

II. The Circuit Court's denial of Dr. Lim's Motion to Amend is reversible error entitling him to a new trial.

A. The Circuit Court abused its discretion by denying Dr. Lim's Motion to Amend his Answer.

Respondent improperly focuses on the timing of the Motion to Amend – forty-five (45) days before trial – and not the prejudice Respondent was required to show the trial court to support its denial of Dr. Lim's Motion to Amend. *See* (Respondent's Br. pp. 23-27). Because Respondent failed to present the trial court with evidence that Respondent would be prejudiced by the amendment, the trial court's denial was an abuse of discretion. It was based upon a factual conclusion of prejudice, which lacked evidentiary support.

Rule 15's standard is clear: "***leave shall be freely given when justice so requires and does not prejudice any other party***." Rule 15(a), SCRCP (emphasis added). "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005). The Rule's "freely given" provision is "a 'mandate' that 'is to be heeded.'" *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962)).

Although decisions on a motion to amend are reviewed under an abuse of discretion standard, a court errs when it denies a motion to amend for some reason other than the criteria for amendment set forth in Rule 15(a) – i.e. "justice so requires and does not prejudice any other party." *See Patton*, 420 S.C. at 490–91, 804 S.E.2d at 262; *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988); Rule 15(a), SCRCP. "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

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

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

> In addition to Forrester's delay in making application to amend, the City also claims prejudice because it will be required to file additional pleadings, engage in additional discovery, and incur additional costs. It also argues the amendment will prolong the litigation. Although several federal courts have found prejudice where motions were made to amend after extensive discovery, ***we have not been shown the extent of additional discovery the City claims in this case or how it will prejudice the City***.

> The fact the City will be "obliged to go to some additional time and expense in order to answer the amended complaint does not constitute such prejudice as will preclude the amendment." 35A C.J.S. Federal Civil Procedure Section 330, at 500 (1960)…. ***These reasons, we hold, do not constitute legal prejudice***.

295 S.C. at 509–10, 369 S.E.2d at 159–60 (holding trial court abused its discretion in denying motion to amend) (emphasis added). Even at the hearing on the Motion to Amend, the most specificity Plaintiff's counsel provided with respect to Plaintiff's prejudice burden was a single statement that he might consider deposing two persons Dr. Ezman previously named. (Hearing Tr. 10:24-11:9). This was the only potential additional discovery mentioned at the hearing. *See* (Hearing Tr.). However, Plaintiff's counsel gave no explanation for why these two depositions could not happen in the forty-five (45) days between the April 17, 2025 Motion to Amend and the June 2, 2026 trial.

Likewise, the trial judge did not articulate any finding of prejudice beyond a conclusory statement about lack of "time to conduct any additional discovery needed regarding the new defense." (May 9, 2025 Form 4 Order). Respondent's Brief now attempts to expand on her prejudice arguments, but these arguments should be disregarded. *See* (Respondent's Br. pp. 25-27). They are irrelevant to the issue of whether the trial court abused its discretion in refusing to grant the Motion to Amend. The trial court abused its discretion in denying the Motion to Amend if the trial court "lacked evidentiary support" for its prejudice ruling – when it made that ruling. *See Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017) ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."). As shown by the record, the trial court lacked such evidentiary support when it made that ruling and, consequently, abused its discretion.

B. The Circuit Court's denial of Dr. Lim's Motion to Amend was prejudicial.

In her Brief, Respondent alleges that there was no prejudice because Dr. Lim was able to present his case at trial on the basis that any fault was not his but the intervening fault of Dr. Ezman and Peachtree. (Respondent's Br. pp. 27-30). A jury could be given all the facts in the world, but those facts are useless if the jury is not instructed on the proper law to apply to those facts. The law is the framework through which the facts are sorted. Judge Knie properly instructed the jury after closing arguments: "We are not deliberating. We are not discussing the case. You-all do not have the law." (Trial Tr. 558:3-4). Why did she give this instruction? She gave this instruction because discussing the facts without having the proper framework of the law leads to an incorrect verdict. *See* (Trial Tr. 561:22-562:3 ("You must, under your oath as a juror, accept the law as I give it to you as being the law that you are to apply to this case. You then take that law and apply it to the facts…in order to reach your decision.")); *see also Dixon v. Besco Eng'g, Inc.*, 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995) ("Whether an intervening act breaks the causal connection is a question for the fact finder."). "[T]he purpose of jury instructions is to enlighten the jury as to what law is applicable to a certain state of facts in order that a just, fair and proper verdict can be reached." *State v. Peer*, 320 S.C. 546, 554, 466 S.E.2d 375, 380 (Ct. App. 1996).

The prejudice to Defendants was not cured by the Court's jury instructions. The Court instructed the jury about, among other things, proximate cause and concurring cause. *See* (Trial Tr. 578:8-580:23). Notably, the jury was told that the "plaintiff is required only to prove that negligence on the part of the defendant was at least one of the proximate, concurring causes of Plaintiffs' [sic] injuries or loss." (*Id.* at 580:20-23). But the jury was not told about the effect of an independent, intervening, or superseding cause. *See* (Trial Tr.). Although two causes can be concurring causes, they may not be when the intervening cause defense is charged and proven. Therefore, the Circuit Court erred in denying the Defendants' Motion to Amend. There was sufficient evidence of an intervening/superseding cause, but the jury was not instructed on that defense because the Circuit Court denied the Motion to Amend. *Bethea v. Pedro Land, Inc.*, 290 S.C. 341, 347, 350 S.E.2d 392, 396 (Ct. App. 1986) (holding that issue of concurrent and intervening causes were "raised by the evidence" and "therefore became a jury question whether the June accident was a concurring proximate cause of the injuries and disability, or whether the November accident was the sole proximate intervening cause of the injuries and disability"). Respondent's admission that the Defendants presented copious evidence of independent, intervening, and superseding negligence, cuts against her lack of prejudice argument since the trial court never gave a jury instruction on independent, intervening, and superseding negligence. *See* (Respondent's Br., p. 27-28). "A trial court has a duty to give a requested instruction that is supported by the evidence and correctly states the law applicable to the issues." *State v. Dantonio*, 376 S.C. 594, 608, 658 S.E.2d 337, 345 (Ct. App. 2008). Dr. Lim was prejudiced by the trial court's failure to allow the amendment and its resulting failure to instruct the jury on the effect of independent, intervening, and superseding negligence. As a result of the Circuit Court's prejudicial error in denying the Motion to Amend, Dr. Lim is entitled to a new trial.

III. Defendant Lim is entitled to a new trial or, at a minimum, remittitur because the Circuit Court erroneously listed a statutory beneficiary on the verdict form.

A. The verdict form issue is preserved for appellate review.

Judge Knie decided to have a conference about the verdict form on June 5, 2025 without a court reporter present. (Trial Tr. 430:21-431:14; 431:22-432:4). The Judge handed the parties a proposed verdict form and gave them a lunch period to review it before the conference. (*Id.*). During the conference, the parties submitted proposed verdict forms. (*Id.* at 492:10-12). Since there is only one Plaintiff in this action, Dr. Lim's proposed verdict form included a damage line for only the Plaintiff – "Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies, deceased." (Lim Verdict Form).

The next day, Judge Knie noted on the record that the parties had a conference off the record about the verdict form. (*Id.* at 490:15-491:19). The Judge stated: "With regard to the verdict form, we had some back and forth." (*Id.* at 492:10-11). The Judge specified the changes to which both parties agreed. (*Id.* at 490:15-491:19) (medical malpractice elements, the addition of certain terminology, respondeat superior charge). The addition of Michelle Hemphill to the verdict form was not one of those changes the Court specified as being agreeable to both parties. (*Id.*). Instead, Judge Knie unilaterally stated: "I will be referring to the Plaintiffs plural as opposed to singular." (*Id.* at 491:4-5). Thus, the record shows that this was not a change to the verdict form to which Dr. Lim's counsel agreed.

Moreover, Dr. Lim filed a Motion for New Trial or Reduction of Non-Economic Damages. (Lim Mot. for New Trial). The Motion stated: "Over Defendants' objection, the verdict form improperly listed statutory beneficiary Michelle Hemphill and permitted the jury to award her damages." (*Id.* at p. 3). Nowhere in her Response did Respondent challenge this factual assertion. *See* (Pl.'s Resp. to Mot. for New Trial, pp. 1-3). At the hearing on this Motion, counsel for the Defendants again stated: "As to the verdict form, the defendants – defendants objected to Michelle Hemphill being listed on the form during the charge conference in this case." (July 2, 2025 Hearing Tr. 13:2-5). He further stated: "Michelle Hemphill was improperly listed on the verdict form over our objection." (*Id.* at 14:11-24). Judge Knie then asked Respondent's counsel whether he consented to the removal of Michelle Hemphill from the verdict form during the charge conference. He confirmed that he did not consent to that during the conference. (*Id.*). In response, Judge Knie stated that she remembered "a little bit of an objection" at the off-the-record conference and that she was "not sure if it was put on the record" the next day but that she "hope[d] it was." (*Id.* at 14:25-15:11). She said, "I – I don't remember how strongly that was stated on the record the next day." (*Id.*). Thus, the Circuit Court also acknowledged that the Defendants objected to Michelle Hemphill being listed on the verdict form during the verdict conference. The Circuit Court made this acknowledgement on the record.

As the South Carolina Supreme Court has repeatedly admonished, "issue preservation rules should not be applied in a technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023); *see also Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) ("We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner."); *Johnson v. Roberts,* 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018), *aff'd*, 427 S.C. 258, 830 S.E.2d 910 (2019) ("Our supreme court has cautioned that issue preservation 'is not a 'gotcha' game aimed at embarrassing attorneys or harming litigants.'") (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)).

Where "the initial off-the-record bench conferences were later made a part of the record by the acquiescence and agreement of the judge … and defense counsel," then the objections are preserved for appellate review. *State v. Hamilton*, 344 S.C. 344, 361, 543 S.E.2d 586, 595 (Ct. App. 2001), *overruled on other grounds, State v. Gentry,* 363 S.C. 93, 610 S.E.2d 494 (2005); *see also Nelson v. Harris,* 441 S.C. 379, 388, 893 S.E.2d 592, 596 (Ct. App. 2023) (noting "[w]e are unable to look back to the specific discussion during the charge conference as it was conducted in chambers and off the record" but holding that objection to jury charge made during an off-the-record conference was preserved for appellate review where judge acknowledged on the record that objections were made during such off-the-record conference). According to the South Carolina Supreme Court, it is the trial court's job to either hold conferences on the record or memorialize such discussions on the record. *State v. Benton,* 443 S.C. 1, 7, 901 S.E.2d 701, 704, *reh'g denied* (June

20, 2024), *cert. denied*, 145 S. Ct. 443, 220 L. Ed. 2d 190 (2024) ("[T]he transcript states an 'off the record' conference occurred before the trial court's ruling. The trial court should have held or memorialized these discussions on the record…."); *see also Davis v. Davis*, 372 S.C. 64, 87, 641 S.E.2d 446, 458 (Ct. App. 2006) ("We caution the Bench in regard to the utilitarian efficacy of a sidebar conference."). Thus, the issue of Michelle Hemphill being added to the verdict form is preserved for appellate review.

Respondent makes the baseless argument that Dr. Lim's verdict form should not be part of the Record on Appeal because it was not proffered to the trial court. (Respondent's Br., p. 32 n.7). However, counsel for Dr. Lim handed up his proposed verdict form to the Judge at the verdict form conference. This is reflected in the trial transcript – "With regard to the verdict form, we had some back and forth. I had proposed verdict forms from Counsel, which I sincerely appreciate." (Trial Tr. 492:10-12). In fact, this exact quote was included in Respondent's Brief. (Respondent's Br., p. 31). Therefore, Respondent's argument is without any basis in fact, and Dr. Lim's proposed verdict form is properly part of the Record on Appeal. *See* Rule 210(c) (only excluding designated matters if they were "not presented to the lower court or tribunal"). Dr. Lim's proposed verdict form includes a single damages line for the sole Plaintiff – "Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies, deceased." (Lim Verdict Form).

Respondent also makes the baseless arguments that: (1) counsel for Dr. Lim "affirmatively agreed" to the addition of Michelle Hemphill to the verdict form merely because he agreed the next day that the current form provided by the court "reflect[ed] what we ended up with" after the court made all of its rulings the prior day during the off-the-record conference; and (2) that Rule 51, SCRCP, required counsel for Dr. Lim to renew his objection to the verdict form after it was read. (Trial Tr. pp. 30-32). This Court has already rejected similar arguments in *Nelson v. Harris*. In that case, Nelson asked the court to instruct the jury that it could not consider insurance coverage during an off-the-record charge conference. 441 S.C. at 387, 893 S.E.2d at 596. The trial court declined to give this charge. *Id.* "Then, after closing arguments, the court provided copies of its proposed instructions, which the attorneys agreed were 'consistent with what [they] discussed and what [the court] decided in chambers.'" *Id.* This Court held that Nelson's argument addressing the requested jury instruction was preserved for appellate review. *Id.* at 388, 893 S.E.2d at 596. The Court did not find his counsel's agreement that the jury charge reflected what the trial court had decided in chambers waived his prior objection. This Court also stated: "Rule 51, 'does not require that the objection to a charge be renewed after the charge is given and prior to the jury's retiring to deliberate.'" *Id.* at 387, 893 S.E.2d at 596 (quoting *Dixon v. Ford*, 362 S.C. 614, 625, 608 S.E.2d 879, 885 (Ct. App. 2005)). Thus, Respondent's arguments are without merit, and this issue was properly preserved for appellate review.

B. The Circuit Court erroneously listed a statutory beneficiary on the verdict form, thereby permitting a double recovery for the Estate when the jury awarded damages to the beneficiary and the Personal Representative.

Over Defendants' objection, the verdict form improperly listed statutory beneficiary Michelle Hemphill and permitted the jury to award damages to her. This was error, and it resulted in a duplicative recovery for the Estate of Albert Jefferies. Defendants are, therefore, entitled to: (1) a new trial absolute; or, at minimum, (2) a reduction of that part of the verdict awarded improperly to a non-party, which alternatively could be construed as an improper double recovery.

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

A jury considering a wrongful death claim "may give damages, … as they may think proportioned to the injury resulting from the death ***to the parties respectively for whom and for whose benefit such action shall be brought***." S.C. Code § 15–51–40 (emphasis added). Under the plain terms of § 15–51–20, the jury can only award damages to the <u>**party**</u> for whose benefit the action was brought. A "party" is "[o]ne by or against whom a lawsuit is brought … For purposes of res judicata, a party to a lawsuit is a person who has been named as a party and has a right to control the lawsuit[.]" Black's Law Dictionary (12th ed. 2024). "Those persons who institute actions for the recovery of their rights, or the redress of their wrongs, and those against whom the actions are instituted, are ***the parties to the actions***. The former are, in actions at common law, called plaintiffs, and the latter, defendants." *Id.* (quoting Oliver L. Barbour, *A Summary of the Law of Parties to Actions at Law and Suits in Equity* 18 (1864)) (emphasis added). Under the plain and well understood meaning of *party*, the court erred in listing both of decedent's daughters on the verdict form. There is only one plaintiff party here: Andrea Allen, as Personal Representative of the Estate of Albert Charles Jefferies. Thus, there should have been only <u>**one party**</u> listed on the verdict form: Andrea

Allen, as Personal Representative of the Estate of Albert Charles Jefferies. The Court violated the wrongful-death statute by listing both daughters—Andrea Allen and Michelle Hemphill—even though only Andrea Allen, as personal representative of the Estate, was a plaintiff, and therefore only Andrea Allen was a **party**.

Respondent provides no case law to support her argument that a non-party can be listed on the verdict form in violation of the Wrongful Death Act, S.C. Code § 15-51-10, et seq. *See* (Respondent's Br.). Instead, Respondent argues that listing the sole Plaintiff and a non-party on the verdict form was necessary to resolve supposed "tension" between the Wrongful Death Act (S.C. Code § 15-51-10 et seq.) and the Noneconomic Damages Awards Act (S.C. Code § 15-32-200 et seq.). (Respondent's Br., p. 35). As an initial matter, the Noneconomic Damages Awards Act does not permit a separate cap for each of multiple statutory beneficiaries. But even if it did, there would be no tension between these two statutes. In accordance with the Wrongful Death Act, the sole plaintiff – the personal representative of the estate – is listed on the verdict form. After the jury enters its verdict, the trial court applies the proper damage limitations to such verdict in accordance with the Noneconomic Damages Awards Act. This is how statutory damage limitations are routinely applied in this State. *See, e.g., Giannini v. S.C. Dep't of Transp.*, 378 S.C. 573, 587, 664 S.E.2d 450, 457 (2008) (approving trial court's application of Tort Claims Act damage limitations after jury verdict entered for plaintiffs); *Garrison v. Target Corp.*, 435 S.C. 566, 583, 869 S.E.2d 797, 806 (2022) (approving trial courts application of statutory cap on punitive damages after the verdict and noting that limitation statute merely requires the trial court to determine where the statutory limitation sections "are applicable and does not create any issue for the jury to resolve"). Thus, there is a straightforward way to give effect to both statutes without enticing the jury to improperly give a double recovery for the Estate.

Respondent makes this argument despite also arguing that the limitations in that statute do not apply because the Defendants were grossly negligent. If the limitations in the statute do not apply, then there cannot possibly be anything to "harmonize" between the two Acts. *See* (Respondent's Br. p. 35). However, a trial court would not know if the limitations apply until after the jury returned the verdict form and indicated whether the medical providers were grossly negligent. Unfortunately, under Respondent's scheme, the trial court would have already erroneously included a non-party on the verdict form regardless of whether the Noneconomic Damages Award Act limitations are applicable. Thus, Respondent's argument also does not logistically make sense.

In reference to both the Tort Claim Act damage limitations and a "statute limiting recovery in medical malpractice claims" the South Carolina Supreme Court explained as follows:

> [Statutory limitations on recovery do] nothing more than establish the outer limits of a remedy provided by the legislature. A remedy is a matter of law, not a matter of fact. Although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award, the legal consequences of its assessments.

Wright v. Colleton Cnty. Sch. Dist., 301 S.C. 282, 290–91, 391 S.E.2d 564, 569–70 (1990). By improperly adding a non-party damage line to the verdict form, the trial court not only violated the plain language of the Wrongful Death Act but also had the jury act outside the scope of their designated function. Contrary to Respondent's argument in her Brief, application of statutory limitations is not an "issue of fact" that may be submitted to the jury by special verdict under Rule 49 of the South Carolina Rules of Civil Procedure. (Respondent's Br., p. 36 (arguing that Rule 49, which states that "[t]he court may require a jury to return only a special verdict in the form of a special written finding ***upon each issue of fact***", applied to permit the trial court to add a non-party to the verdict form for purposes of application of the damage limitations of the Noneconomic Damages Award Act)). As the Supreme Court in *Wright* explained, application of a statutory damages limitation is "a matter of law, not a matter of fact" that could be decided by a jury. 301 S.C.

at 290–91, 391 S.E.2d at 569–70.

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

IV. The Circuit Court's Order awarding Plaintiff prejudgment interest should be vacated because Plaintiff failed to satisfy the requirement of Rule 68, SCRCP.

Contrary to Respondent's assertion in her Brief, the issue of whether her Offer of Judgment was valid is a question of law subject to de novo review. *See Wells v. Vetech, LLC*, 437 S.C. 428, 431, 879 S.E.2d 6, 7 (Ct. App. 2022) ("Because interpreting offers made under Rule 68 involves construing a contract and a court rule—both questions of law—our review is de novo."); (Respondent's Br. p. 41). Here, Plaintiff's Offer of Judgment was invalid because it failed to comply with Rule 68, as it was a joint offer directed at two parties and an entity she now claims was not a correct party to the action. *See* Rule 68(a), SCRCP ("Any party in a civil action…may file…a written offer of judgment signed by the offeror or his attorney, ***directed to the opposing party***….") (emphasis added). This fact does not change the standard of review.

Plaintiff had notice as early as August 30, 2021 – when Defendants Dr. Lim, PA Nicholas, and "Carolina Orthopaedic and Neurosurgical Associates, P.A." – filed their Answer to Plaintiff's Amended Complaint – that she had sued the wrong entity. Specifically, Defendants informed Plaintiff in their Answer that Dr. Lim and PA Nicholas were employed by CONA, PA and were acting within the scope of their employment with CONA, PA during the relevant time frame of the lawsuit. *See* (Lim Answer ¶¶ 4-5). Nevertheless, in 2024, Plaintiff directed her joint Offer of Judgment to Dr. Lim, PA Nicholas, and CONA ASC, LLC, not CONA PA, which is a separate legal entity. Respondent's own Motion for Assessment of Prejudgment Interest evidences her error – "Plaintiff filed an Offer of Judgment on Defendants Chi Hun Lim, M.D., Megan Nicholas, P.A., and Carolina Orthopaedic and Neurological Associates <u>ASC, LLC</u>." (Pl.'s Mot.) (emphasis added). Plaintiff never issued a valid joint offer of judgment. Respondent offers no explanation for how her statutorily invalid joint offer could be retroactively edited and made valid after the trial – because it cannot. *See* (Respondent's Br. pp. 41-44).[3] Therefore, the award of prejudgment interest should be vacated.

<u>CONCLUSION</u>

For the reasons set forth herein and in Dr. Lim's prior Brief, Appellants respectfully request that the Court reverse the Circuit Court and grant other, alternative relief described in the principal brief.

Respectfully submitted,

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[3] Dr. Lim joined CONA PA's Motion to Alter or Amend the Court's Order regarding pre-judgment interest. (Defendants' Joinder). The trial court held a hearing on this Motion wherein the Defendants raised the invalidity of the offer of judgment. (September 12, 2025 Hearing Tr. 7:8-10:19). On September 25, 2025, the trial court issued an Order addressing these arguments. Therefore, they are properly preserved for appellate review.

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