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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2025-001716

Civil Action No. 2020-CP-42-02169

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

v.

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

REPLY BRIEF OF APPELLANT MEGAN NICHOLAS, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Statutes

ARGUMENT

Appellant Megan Nicholas, P.A. ("PA Nicholas") submits this reply in support of her appeal in this matter, and to respond to certain points and arguments made by Respondent in Respondent's Initial Brief. PA Nicholas will not address every argument made by the Respondent but instead refers the Court to Ms. Nicholas's Initial Brief for a full articulation of her position in this appeal.

I. PA Nicholas sufficiently raised the standard-of-care and gross negligence issues in her directed verdict motions.

Respondent claims that PA Nicholas failed to preserve her arguments that Respondent did not prove: (1) the standard of care for an orthopedic surgeon, or (2) that PA Nicholas acted in conscious disregard of the rights of decedent Albert Jefferies. (Respondent's Brief ("RB") 9, 19.) Respondent claims that, to preserve an issue for appeal, a defendant must raise the "precise" and identical arguments in the directed verdict motion and the motion for judgment notwithstanding the verdict ("JNOV"). (*Id.*) ("the ***precise argument*** questioning Dr. Erb's qualifications or that his opinion was not specific to orthopaedic surgical care was not made during [PA] Nicholas's motion for directed verdict") (emphasis added); *id.* at 18 (claiming PA Nicholas did not make the "precise arguments" about lack of proof of gross negligence in her JNOV motion as she did in her directed verdict motion).

The Court should reject Respondent's forfeiture arguments. Under South Carolina Supreme Court precedent, "only the grounds raised in the directed verdict motion may properly be reasserted in a JNOV motion." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170–71 (2012). But that's exactly what PA Nicholas did here. As conceded by

Respondent, PA Nicholas moved for a "directed verdict on both the standard of care and upon the issue of gross negligence." (RB 9–10 (quoting Tr. 490.).)[1]

Further, the circuit court addressed both arguments in its Order denying Defendants' JNOV motion. (*See* July 28, 2025 Order at 5–7.) The Court should address the merits of PA Nicholas's standard-of-care and gross negligence arguments.

II. Respondent failed to prove that PA Nicholas breached the standard of care.

With respect to Respondent's "communication" standard of care, Respondent alleges that Dr. Lim and PA Nicholas could have satisfied this standard of care if they had "listed heparin as an active medication in the records at transfer." (RB 16). But that is exactly what Dr. Lim and PA Nicholas 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); (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); (Tr. 350:19-22; 354:9-14). As argued in PA Nicholas's initial brief, the hospital is responsible for transferring records to the rehab facility, and if the hospital failed to do so, PA Nicholas was unaware of that.[2]

Respondent also points to Dr. Erb's testimony "that had Dr. Lim and [PA] Nicholas continued DVT prophylaxis it was more likely than not that Mr. Jefferies would not have suffered

[1] It should be noted that in responding to PA Nicholas's JNOV motion, Respondent did not claim that PA Nicholas had failed to preserve her standard-of-care or gross negligence arguments.

[2] 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. (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 Respondent's 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 those notes, or the hospital failed to deliver them.

the fatal pulmonary embolism." (RB 16–17). There is no dispute that Dr. Lim and PA Nicholas continued DVT prophylaxis while Mr. Jefferies was under their care in the hospital. Dr. Erb's testimony concerns DVT prophylaxis treatment at the rehab facility. However, Dr. Erb testified that Dr. Lim and PA Nicholas could not have *required* the rehab facility to continue DVT prophylaxis. (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"). Moreover, turning a patient's treatment over to the rehab doctor, who is actually able to monitor and manage the patient's treatment at the rehab facility—including prescription medication—is not a breach of any legitimate standard of care. Thus, there was no evidence that PA Nicholas failed to do something that a legitimate standard of care required her to do. Nor was there any evidence that such a failure caused Respondent's death.

III. Respondent failed to prove gross negligence.

Respondent claims that PA Nicholas conflates "gross negligence" with "recklessness," despite the two concepts being distinct. (RB 18–19.) Specifically, Respondent argues that gross negligence is not concerned with the actor's ***consciousness*** of wrongdoing, because "that is the standard for recklessness"; she claims, therefore, that the "jury's finding required it to determine whether there was a lack of slight care, not a conscious choice to breach [her] duty of care." (RB 24.) She is wrong. South Carolina courts have defined gross negligence in various ways. *See, e.g.*, *Berberich v. Jack*, 392 S.C. 278, 287 n. 1, 709 S.E.2d 607, 612 n. 1 (2011). In back-to-back sentences, the Supreme Court defined gross negligence as "'the failure to exercise slight care,'" and also "'the ***intentional, conscious failure*** to do something which it is incumbent upon one to do.'" *Id.* (quoting *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 71, 651 S.E.2d 305, 309 (2007).) (emphasis added). Thus, whether PA Nicholas's conduct constitutes an "intentional, conscious failure" to do an act is relevant as to whether Respondent satisfied her burden to prove gross negligence.

Ultimately, the two definitions are not separate and distinct but are just two ways of saying the same thing. *See Rainey v. S.C. Dep't of Soc. Servs.*, 434 S.C. 342, 350, 863 S.E.2d 470, 474 (Ct. App. 2021) ("Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. In other words, [i]t is the failure to exercise slight care.") (quotations omitted). The bottom line is that Respondent failed to offer any evidence that PA Nicholas intentionally and consciously failed to do something which it was incumbent upon her to do. In other words, Respondent did not establish that PA Nicholas failed to exercise even slight care. Thus, her gross negligence claim fails.

Respondent claims that "[i]n this case there was evidence from which the jury could find both Dr. Lim and [PA] Nicholas failed to exercise even slight care in their treatment of Mr. Jefferies." (RB 19.) Respondent cites only two pieces of testimony that she claims proves PA Nicholas failed to exercise slight care. *First*, she asserts that "Dr. Erb testified both as to the standard of care and, to a reasonable degree of medical certainty, how Dr. Lim and [PA] Nicholas breached the standard of care … directly causing Mr. Jefferies' death." (RB 20.) But this testimony is, at best, arguably some proof of *simple negligence*. A doctor or physician's assistant who breaches the standard of care, causing injury, is liable for medical malpractice. But to overcome the statutory caps on damages in a medical malpractice case, a plaintiff must prove something more than mere negligence. Respondent did not do so.

Second, Respondent points to testimony from Dr. Lim's other physician's assistant, Rebecca Lehman, to support her claim that PA Nicholas was grossly negligent:

> Dr. Lim's other PA, Rebecca Lehman, testified regarding errors and omissions in Mr. Jefferies records that were sent to Peachtree. [Citations omitted] 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. [Citations omitted] Ms. Lehman agreed that one of the most frequent causes of medical errors is communication errors.

(RB 20.) To the extent PA Lehman's cited testimony is relevant to the question of "slight care" by PA Nicholas—it's not—it is only directed at Dr. Lim's actions, ***not*** PA Nicholas's. Thus, the testimony does not support in any way Respondent's gross negligence argument as to PA Nicholas.

Further, as argued in PA Nicholas's initial brief, Respondent failed to offer any expert testimony in support of her alleged gross negligence claims (Nicholas's Initial Br. 28–30.) Respondent did not rebut this argument in her response brief, again, pointing only to Dr. Erb's expert testimony as to the standard of care, and alleged breach thereof (which is insufficient to prove gross negligence). Further, the record demonstrates that PA Nicholas's care and treatment of Respondent, including administration of post-surgical SCDs and heparin, was timely and appropriate. Importantly, it is undisputed that the EMS ambulance transport documents listed heparin among Respondent's medications. (Nicholas Dep. 46:25–47:5, 59:3–24; Tr. 249:22–252:24.) The daily progress notes prepared by PA Nicholas and the rest of the care team—which was the hospital's responsibility to send to the rehab facility—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); (Tr. 350:19-22; 354:9-14). Therefore, there was at minimum some care in ensuring that Dr. Ezman and Peachtree were informed that Mr. Jefferies was on heparin at the time of discharge.

For the foregoing reasons, and those made in PA Nicholas's initial brief, this Court should vacate the finding of gross negligence and impose the statutory cap on medical malpractice damages. *See Rainey*, 434 S.C. at 351, 863 S.E.2d at 474 ("Normally, the question of what activity constitutes gross negligence is a mixed question of law and fact. However, when the evidence supports but one reasonable inference, the question becomes a matter of law for the court.") (quotation omitted).

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

A. PA Nicholas preserved the verdict-form issue.

Respondent argues that PA Nicholas failed to preserve her argument that the circuit court prejudicially erred in listing both statutory beneficiaries on the verdict form, instead of only the personal representative. (RB 25–27.) Specifically, she claims no defendant made an on-the-record objection to the verdict form that was submitted to the jury. (*Id.*) The Court should reject Respondent's forfeiture argument for five main reasons.

First, Defendants submitted their proposed verdict form to the circuit court prior to closing arguments. (Tr. 490:15–492:2; Proposed Verdict Form.) The verdict form proposed by Defendants listed only Respondent (Andrea Allen, Personal Representative of the Estate of Charles Jefferies) as a person potentially entitled to recover damages. (Proposed Verdict Form.) Respondent's proposed verdict form listed two people potentially entitled to recover damages: Plaintiff Andrea Allen, and Mr. Jefferies's other daughter, statutory beneficiary Michelle Hemphill. In an off-the-record, in chambers argument regarding the verdict form, Defendants objected to Ms. Hemphill being included on the verdict form because only the personal representative should be on the verdict form per the wrongful-death statute, but the trial court chose Respondent's verdict form, which listed Ms. Allen and Ms. Hemphill on the verdict form, with separate line-items for each person.

Defendants' proposed verdict is properly part of the record on appeal. Counsel for PA Nicholas handed up (presented) the proposed verdict form to the circuit court 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." (Tr. 492:10-12). Under SCAR 210(c), only matter presented to the lower court shall be made a part of the record on appeal. (SCAR 210(c) ("The Record shall not, however, include matter which was not presented to the lower court or tribunal.").) Here, Defendants' proposed verdict form was presented to the lower court. Therefore, it was properly made part of the record on appeal.

Second, the circuit court decided to have the charge conference about the verdict form on June 5, 2025 without a court reporter present. (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). As noted, PA Nicholas's proposed verdict form included a damage line for only the Plaintiff. (Proposed Verdict Form.)

The next day, as noted, the circuit court stated on the record that the parties had a conference off the record about the verdict form and that there was some "back and forth." (Tr. 490:15-491:19; 492:10-11). The court 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, the court 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 PA Nicholas's counsel agreed.

Third, Defendants filed a Motion for New Trial or Reduction of Non-Economic Damages. (Defendants' 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).

Fourth, the circuit court acknowledged during the July 2, 2025, hearing on post-trial motions that Defendants had objected to the verdict form:

> And with regard to the verdict form, the objection was not - - I mean, there was a little bit of an objection, but not much. And I'm not sure if it was put on the record. I hope it was.

(July 2, 2025 Transcript at 15.) 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.

Fifth, the circuit court considered the merits of Defendants' argument that they were entitled to a new trial based on the erroneous verdict form. (*See* July 28, 2025 Order at 7–8.) Specifically, the court concluded that it "was correct to include a separate line on the verdict form for each wrongful death beneficiary," and "[w]hether the verdict form included one line or two, the jury was entitled to consider the damages to each beneficiary separately." (*Id.*) Because Defendants raised the issue of the verdict form before the circuit court, and that court ruled on it, the issue is properly preserved for appellate review. *See, e.g., S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) ("'[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been *raised to and ruled upon by the trial judge* to be preserved for appellate review'") (quoting *Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (emphasis added).)

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.”). The issue of Michelle Hemphill being added to the verdict form is preserved for appellate review. *See Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 330, 730 S.E.2d at 285 (stating it is a “good practice for [the court] to reach the merits of an issue when error preservation is doubtful”).

Finally, Respondent argues that (1) counsel for PA Nicholas “agreed to the verdict form the Court ultimately submitted”; and (2) that Rule 51, SCRCP, required counsel for PA Nicholas to renew the objection to the verdict form after it was read. (RB 27–29). 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. This 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)).

In sum, Respondent’s forfeiture 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.

As explained in PA Nicholas's opening brief, the circuit court prejudicially erred by listing statutory beneficiary Michelle Hemphill on the verdict form and permitting the jury to award damages to her. (Nicholas's Initial Br. 31–36.) Only the personal representative—Plaintiff Andrea Allen—should have been named on the verdict form under the wrongful death statute, not each statutory beneficiary. *See* S.C. Code Ann. §§ 15–51–20, 40.

Respondent's statutory-interpretation argument focuses on the wrong statute. She claims that both wrongful death beneficiaries—Ms. Allen and Ms. Hemphill—were entitled to be listed on the verdict form and separately awarded damages **not** under the Wrongful Death Statute, but under the Damages Act. (RB 29 ("Putting both persons on the verdict form resolved tension between the Wrongful Death Statute and the Damages Act.").) The portion of the Damages Act on which Respondent relies provides limitations on damages "*for each claimant*, regardless of the number of separate causes of action on which the claim is based[.]" S.C. Code Ann. § 15–32–220 (A)-(C) (emphasis added). Respondent relies on the phrase "for each claimant" to advance her argument. She claims that the verdict form submitted to the jury "permitted the jury to allocate the 'each claimant' portion of the damages as contemplated by the Damages Act." (RB 30.) So even though the Wrongful Death Statute provides that a wrongful-death claim can only be brought by and in the name of the personal representative, Respondent nonetheless argues that the "for each claimant" provision in the Damages Act permits every statutory beneficiary (i.e., "claimant") to be listed on the verdict form. (*Id.*) Her argument should be rejected.

There is no conflict or tension between the Wrongful Death Statute and the Damages Act. Under section 15-32-210 of the Damages Act, "claimant means the person suffering personal injury." Section 15-32-220 in turn provides that "[i]n an action on a medical malpractice claim when final judgment is rendered against a single health care provider, the limit of civil liability for noneconomic damages of the health care provider is limited to an amount not to exceed three hundred fifty thousand dollars *for each claimant*, regardless of the number of separate causes of action on which the claim is based." (emphasis added). Simply put, a "claimant" is a person who suffers personal injury, and each person suffering personal injury is limited to damages in an amount not to exceed $350,000. In other words, the relevant provisions from the Damages Act operate as a cap on damages, unless the plaintiff proves, at a minimum, gross negligence. S.C. Code Ann. § 15–32–220(E).

In the context of a wrongful death claim—where the action must be brought in the name of the personal representative—"claimant" could mean one of two things. *First*, a "claimant" might only be the personal representative of the Estate. The personal representative stands in the shoes of the estate of the person who died. Under this reading, there is only one Estate and only one claimant under the Damages Act. Thus, the personal representative could only recover $350,000 (unless gross negligence was proven).

Second, "claimant" might be any statutory beneficiary of the decedent. Under this reading, both Michelle Hemphill and Andrea Allen would be "claimants," and both could recover up to $350,000 ($700,000 for the estate as a whole). But of course, the jury found gross negligence, so the caps do not apply here (unless this Court vacates the finding of gross negligence, as it should). Under this reading, to determine the total cap, the court would take the number of statutory beneficiaries times $350,000 to determine the total cap.

Under either interpretation, there is no need to put each statutory beneficiary on the verdict form. All that is needed for the court to properly apply the cap on noneconomic damages is the total number of statutory beneficiaries. Once the court knows the answer to that question, it can determine the total cap by taking that number and multiplying it times $350,000. The jury—per the wrongful death statute—would determine the total amount of compensable injury suffered by all statutory beneficiaries and award that amount to the personal representative on the verdict form. In other words, the jury would award a lump sum to the personal representative. That lump sum then is required to be disbursed to the beneficiaries as if the decedent had died intestate, *see* S.C. Code Ann. § 15–32–220,[3] *after* applying the noneconomic damages cap under S.C. Code Ann. § 15–32–220. There's nothing inconsistent between the operation of the Wrongful Death Statute and the Damages Act as outlined above.

PA Nicholas does not claim that the personal representative is barred from submitting evidence about the alleged noneconomic harm suffered by each statutory beneficiary. Indeed, that's what happened here. Both Ms. Hemphill and Ms. Allen testified about their relationship with their father Mr. Jefferies. Section 15-51-40 provides that 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." S.C. Code Ann. Sec. 15-51-40. So the jury can look at the evidence of both statutory beneficiaries, in proportion to each beneficiaries' injury, and then list one damages line in the name of the personal representative that then gets "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." SC Code Ann. Sec. 15-51-40. There is only one plaintiff—the personal representative—and thus

[3] S.C. Code Ann. § 15–32–220 ("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.").

only one name that goes on the verdict form, even though there may be multiple statutory beneficiaries who will recover under the verdict.

The Court should not be led astray by Respondent's focus on the word "claimants" in the Damages Act. Instead, the Court should focus on the Wrongful Death Statute, which provides in relevant part that a jury considering a wrongful death claim "may give damages, … as they may think proportioned to the injury resulting from the death ***to the parties*** respectively for whom and for whose benefit such action shall be brought." S.C. Code § 15–51–40 (emphasis added). Under the plain terms of § 15–51–20, the jury can only award damages to the **party** for whose benefit the action was brought. Here, the only plaintiff party is Andrea Allen, the Personal Representative of the Estate. It was error for the circuit court to list Michelle Hemphill on the verdict form and allow the jury to award damages to her.

Respondent's attempt to distinguish the case law cited in PA Nicholas's initial brief is unconvincing. (RB 32–36.) Notably, Respondent has identified no case law supporting her argument that it was proper to list both statutory beneficiaries on the verdict form and to allow the jury to award damages to both beneficiaries. Instead, Respondent relies on her misreading of the Damages Act to advance her claim. But PA Nicholas continues to ask this Court to review and apply the analysis and holding of the Montana Supreme Court's decision in *Hern v. Safeco Ins. Co. of Illinois*, 125 P.3d 597, 606 (Mont. 2005), which reasons in relevant part:

> As indicated above, under § 27–1–513, MCA, the personal representative of the decedent's estate is authorized to bring an action for wrongful death. 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. Renville v. Fredrickson, 2004 MT 324, 324 Mont. 86, 101 P.3d 773.

> 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, sorrow, and mental anguish, and $200,000.00 for loss of consortium.

Id. Hern is on point and this Court should apply its holding here. As in Montana, under South Carolina law, only the personal representative can bring a wrongful death action and only one such action may be brought. Further, the personal representative holds the proceeds of the damages award, and the award does not become part of the decedent's general estate but is distributed as if the deceased had died intestate. *See Lester v. McFaddon*, 415 F.2d 1101, 1103 (4th Cir. 1969); S.C. Code Ann. § 15–51–40. Thus, Montana and South Carolina wrongful-death law is nearly identical. Just as the Montana Supreme Court held that ***only*** the personal representative could be listed on the verdict form, and vacated the award of a statutory beneficiary who was improperly listed on the verdict form, this Court should order a new trial or, at minimum, do so likewise here.

Respondent attempts to distinguish *Hern* by arguing that Montana does not have an analogous Damages Act, and it is the Damages Act "claimants" language that changes the analysis here. (RB 33–34.) But as argued, *supra*, the language of "claimants" in the Damages Act is irrelevant here. Instead, the language in the Wrongful Death Statute allowing an award of damages only to the "party" (or "parties") of the wrongful death action is dispositive. There is no dispute that Ms. Hemphill was not a "party" to this lawsuit. Thus, she was not entitled to be listed on the verdict form and awarded damages. This conclusion is consistent with case law nationally. *See, e.g.*, *Carter v. New York City Health & Hosps. Corp.*, 47 A.D.3d 661, 664, 851 N.Y.S.2d 588 (2008) (holding that "it was improper for the Supreme Court in this case to use a special verdict sheet requiring the jury to determine the amount of economic loss damages to be awarded to each individual distributee. The jury's role should have been limited to determining, based on the evidence presented at trial, the total amount of wrongful death damages to be awarded to all distributes"); *Barry v. Owens-Corning Fiberglas Corp.*, 282 Ill. App. 3d 199, 205, 668 N.E.2d 8, 13 (1996) (concluding it was error for the trial court to list separate lines on the verdict form for each statutory beneficiary rather than a single line); *Machado v. Kunkel*, 804 A.2d 1238, 1248 (Pa. Super. Ct. 2002) (finding error "in permitting the jury to apportion the wrongful death damage award" because "in a wrongful death action, an award of damages should not be apportioned by the jury among the beneficiaries but should be a lump sum amount which would then be distributed pursuant to the intestacy statute"); *McDaniel v. Asuncion*, 214 Cal. App. 4th 1201, 1206–07, 155 Cal. Rptr. 3d 71, 74 (2013) ("Any recovery for wrongful death is in the form of a lump sum, i.e., a single verdict is rendered for all recoverable damages. … The respective rights of the heirs in any award are determined by the court based on the proportion that the heir's personal damage bears to the damage suffered by the others.").

The circuit court's error in listing Ms. Hemphill on the verdict form was not harmless. Adding an additional person on the verdict form for whom the jury can—and here did—award damages is inherently prejudicial. Placing more people on the verdict form increases the risk that the jury will inflate damages. The jury may have been loathe to put two different numbers on the verdict form given that both Ms. Hemphill and Ms. Allen were sisters and the daughters of Mr. Jefferies, even if they thought that one of the sisters had a greater proportional share of the total compensable injury. *See* S.C. Code Ann. Sec. 15-51-40 (jury shall award 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"). Because PA Nicholas was prejudiced by the submission of the erroneous verdict form, the verdict should be vacated and the case remanded for a new trial. Failing that, the award to Respondent's sister should be stricken and vacated.

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

A. Allowing Defendants' proposed amendment would not have delayed trial.

Respondent claims that the circuit court did not abuse its discretion in denying Defendants' motion to amend their Answer to add the affirmative defense of independent, intervening, and superseding cause. (RB 36–45.) To support her burden of proving that she would suffer prejudice by the proposed amendment, Respondent argues that "justice would have actually required a lengthy postponement of the day certain trial," because it would not have been as "simple" as "relying on prior pleadings or discovery involving Dr. Ezman and Peachtree." (RB 40.) But that is exactly how simple it would have been.

About a month before trial—and after Respondent had settled with Dr. Ezman and Peachtree—Defendants sought leave to add the affirmative defense of independent, intervening, and superseding cause regarding Dr. Ezman's and Peachtree's negligence. Respondent bore the burden of showing prejudice to block the attempted amendment. *See Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716 (Ct. App. 2005) (stating that the prejudice contemplated by SCRCP Rule 15 "is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it").

The need for additional discovery—as now argued by Respondent—was not a valid ground for rejecting Defendants' motion to amend because there was no additional discovery that was needed. At the May 8, 2025 hearing on Defendants' motion to amend, counsel for Defendants discussed the facts supporting the claim that Dr. Ezman's and Peachtree's negligence was an intervening, superseding, and independent cause:

- On September 30, **2020**, Plaintiff filed an amended complaint naming Dr. Ezman and Peachtree as defendants, with a supporting affidavit signed by Dr. Inna Sheyner;
- On January 19, **2021**, Plaintiff answered the hospital's interrogatories and listed Dr. Sheyner as an expert opining that Dr. Ezman and Peachtree were negligent and caused or contributed to Mr. Jefferies' death.
- On August 31, **2021**, Plaintiff answered Peachtree's interrogatories and listed Dr. Sheyner as an expert witness against Dr. Ezman and Peachtree
- On November 29, **2023**, Dr. Sheyner was deposed, during which she offered her expert opinions as to the negligent care of Dr. Ezman and Peachtree

(May 8, 2025 Transcript at 5–7.) Thus, by the time of the May 8, 2025 hearing, Plaintiff was well aware of the allegations of negligence against Dr. Ezman and Peachtree—and the corresponding facts supporting Defendants intervening cause defense— and had been for over four years. Further, at the hearing, defense counsel expressly confirmed that "[t]here are no facts that are new in order to support this motion." (*Id.* at 8.) Further, he stated:

> I can take now as an officer of the Court … there will be no additional factual revelations. There'll be no additional factual evidence that we intend to call up and present. It's all been there since June of 2020.

(*Id.* at 8.)

In response, Plaintiff did not make the argument she makes now. (*See id.* at 1–17.) Specifically, she did not argue that she would be prejudiced by delay because of the need for additional discovery. Instead, she argued that "the failure to supplement the discovery response that we served three years ago and the proximity [to] trial is sufficient basis to deny this motion." (*Id.* at 11; *see also* Pl.'s Resp. in Opp.) Further, nowhere in her opposition did Plaintiff set forth any additional discovery she would allegedly need to respond to this defense. (*See* Pl.'s Resp. in Opp.)

As noted above, and as argued in PA Nicholas's initial brief, the circuit court erred by denying Defendants' motion to amend because Plaintiff failed to establish the prejudice necessary to defeat the motion. Motions to amend are to be liberally granted. This Court should thus reverse and remand for a new trial.

B. Lack of proximate cause is not the same as intervening/superseding/independent cause.

Respondent argues that even if the circuit court erred in denying Defendants' motion to amend, the error was harmless. (RB 41–45.) Specifically, she claims that in light of the circuit court's instruction on proximate cause and concurrent cause, and Defendants' arguments to the jury placing blame on the hospital, Dr. Ezman, and Peachtree, Defendants were not prejudiced by the lack of an instruction on intervening, superseding, and independent causation. (RB 42–43 ("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 [PA] Nicholas, was cut off by the conduct of Peachtree and its employees.").) Notably, Plaintiff made the opposite argument at the hearing on Defendants' motion to amend.

At that hearing, the circuit court asked counsel for PA Nicholas how she could prove prejudice given that Defendants had already pled lack of proximate cause as an affirmative defense, and thus the alleged negligence of other parties (*i.e.*, the hospital, Dr. Ezman, and Peachtree) was already relevant. Counsel responded: "It does, because under those circumstances there could - - they could be negligent - - negligent, yet some other cause other than another actor could have caused the ultimate injury and the death." (May 8, 2025 Transcript at 12.) In other words, the intervening/superseding/independent cause defense is different than the lack of proximate cause defense. The former is available even if Defendants were negligent, so long as the negligence of another (*e.g.*, Dr. Ezman/Peachtree) intervened and broke the causal chain, whereas the latter defense (lack of proximate cause) is more circumscribed.

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

Respondent's admission that the Defendants presented significant 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* RB 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). The circuit court's error in denying Defendants' timely motion to amend was prejudicial, entitling PA Nicholas to a new trial.

VI. Plaintiff failed to satisfy the requirements of Rule 68, SCRCP, and her award of prejudgment interest should be vacated.

A. PA Nicholas's argument regarding prejudgment interest is preserved.

Respondent argues that before the circuit court Defendants did not argue that the offer of judgment was defective because it was directed at CONA ASC, LLC and not CONA, PA, and the circuit court did not rule upon this issue. (RB 47.) Further, she claims that none of the Defendants, including PA Nicholas, challenged the circuit court's order awarding prejudgment interest by moving to alter or amend or revise the order. (*Id.*) According to Respondent, the issue is therefore not preserved. (*Id.*) She is wrong.

On August 7, 2025, CONA, PA moved to alter or amend the judgment regarding pre-judgment interest. CONA, PA argued that, as conceded by Plaintiff, the offer of judgment was directed at a party—CONA ASC, LLC— "against whom Plaintiff agrees there can be no verdict or judgment," and "was not provided to CONA PA, so CONA PA never had the opportunity to accept it." (August 7, 2025, Motion to Alter or Amend at 5.) CONA, PA further argued that because Plaintiff's offer was a joint offer directed toward an incorrect opposing party, the offer was ineffective and the order awarding prejudgment interest must be vacated. (*Id.* at 4–5.) That same day, Dr. Lim and PA Nicholas filed a joinder motion to join in CONA, PA's motion to alter or amend prejudgment interest order, incorporating the "reasons and grounds set forth" in CONA, PA's motion. (August 7, 2025 Joinder Motion.)

Thus, contrary to Respondent's contention otherwise, PA Nicholas objected to the circuit court awarding prejudgment interest on the ground that the offer of judgment was defective because it was a joint offer directed at three parties (Dr. Lim, PA Nicholas, and CONA ASC, LLC), one of whom was not a proper party, and was never directed at CONA, PA. This is the argument that PA Nicholas advances on appeal. Accordingly, the issue and PA Nicholas's arguments are preserved for appellate review.

Furthermore, Defendants raised the argument as soon as they could. At the time Plaintiff moved for prejudgment interest on June 16, 2025, CONA, PA had not yet been substituted for CONA, ASC LLC. CONA, PA was not substituted in the caption until July 2, 2025. Plaintiff's motion for assessment of prejudgment interest was granted by the circuit court by order dated July 28, 2025. Before then, PA Nicholas did not know that the circuit court would (a) substitute CONA, PA for CONA ASC, LLC, (b) deem CONA, PA liable for the judgment, and (c) award prejudgment interest based on a joint offer of judgment concededly made to a different named entity (CONA ASC, LLC). Defendants timely objected to the July 28, 2025 order awarding prejudgment interest by filing motions to alter or amend on August 7, 2025, *see supra*. The Court should reject Respondent's forfeiture argument and reach the merits of PA Nicholas's claim.

B. Plaintiff's offer of judgment did not comply with 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*."); (RB 45). 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 current parties and an entity she concedes 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.

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* (Defendants' Answer ¶¶ 4-5). Nevertheless, in 2024, Plaintiff directed her joint Offer of Judgment to Dr. Lim, PA Nicholas, and CONA ASC, LLC, <u>not</u> CONA PA, which is a separate legal entity.

Respondent's offer of judgment was a *joint offer*, directed at PA Nicholas, Dr. Lim, and CONA ASC, LLC (now determined to not be, nor have been, a proper party). The offer thus is defective, as it was directed to a non-party.

Multiple courts have held that such unallocated joint offers of judgment are invalid and do not trigger Rule 68's cost-shifting provisions. *See, e.g., Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1077 (7th Cir. 1999); *Thomas v. Nat'l Football League Players Ass'n*, 273 F.3d 1124, 1130 (D.C. Cir. 2001); *Alaska Fur Gallery, Inc. v. First Nat. Bank Alaska*, 345 P.3d 76, 99 (Alaska 2015); *Burch v. Children's Hosp. of Orange Cnty. Thrift Stores, Inc.*, 109 Cal. App. 4th 537, 551, 135 Cal. Rptr. 2d 404 (2003); *Lunn v. Cont'l Motors, Inc.*, 568 P.3d 589, 592 (Okla. 2025).

The Court here need not hold that, as a matter of law, joint offers are *per se* invalid. Instead, it can and should hold that here, because the joint offer was made to an improper entity, it is invalid as to all the Defendants. Therefore, the award of prejudgment interest should be vacated. The offer did not comply with the requirements of Rule 68.

CONCLUSION

For the foregoing reasons, and the reasons stated in PA Nicholas's initial brief, the Court should reverse and order the circuit court to enter judgment notwithstanding the verdict, or, in the alternative, to order a new trial absolute.

In the event the Court does not grant JNOV or a new trial, the Court should, at a minimum, grant remittitur of $3,000,000 because the circuit court erroneously listed a statutory beneficiary on the verdict form, thereby permitting a double recovery for the Estate. Further, the award of prejudgment interest should be vacated because Plaintiff failed to satisfy the requirements of Rule 68, SCRCP.

Respectfully submitted,

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September 10, 2026