THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-001964

Philip Ethier and Jeanne Ethier,

Appellants,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc; And Pee Dee Emergency Medical Associates, PA,

Defendants,

Of whom Guy R. Bibeau, M.D., is the Respondent.

SECOND AMENDED INITIAL BRIEF OF APPELLANTS

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(2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by improperly bolstering and vouching personally for the alleged credibility, skill and knowledge of Respondent and the two nurses, and by stating throughout the trial in premature and actual deliberations that all three persons were thorough and careful in their work, and that if they said they did something, then they did it; and

(3) unlawfully and improperly expressing her bias during premature and actual deliberations in favor of Respondent and the nurses due to her personal knowledge of them; and

(4) unlawfully and improperly exercising her personal bias in favor of Respondent by arguing and voting for a defense verdict as to Mr. Ethier.

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial judge err in ruling that the law of comparative negligence dictates that Appellant Jeanne Ethier recover nothing on her loss of consortium claim when the directly injured spouse, Appellant Philip Ethier, recovered nothing because he was found more negligent than Respondent, where South Carolina law says the negligence of one spouse is not imputed to the other and our courts repeatedly have held since the 1920s that a loss of consortium claim is a separate and independent cause of action which is not derivative of the directly injured spouse's claim?

II. Did the trial judge err in denying Appellants' motion for a new trial based on juror concealment, where a prospective juror intentionally or unintentionally concealed during voir dire the facts that she personally knew Respondent and two testifying nurse witnesses, that she had personally worked with them while employed at the hospital, and that she was biased in their favor due to her personal knowledge of them?

III. Did the trial judge err in denying Appellants' motion for a new trial based on juror misconduct consisting of premature and actual deliberations, where a seated juror engaged in misconduct by: (1) stating throughout the trial in premature and actual jury deliberations that she personally knew Respondent and two testifying nurse witnesses because she personally had worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by improperly bolstering and vouching personally for the alleged credibility, skill and knowledge of Respondent and the two nurses, and by stating throughout the trial in premature and actual deliberations that all three persons were thorough and careful in their work, and that if they said they did something, then they did it; (3) unlawfully and improperly expressing her bias during premature and actual deliberations in favor of Respondent and the nurses due to her personal knowledge of them; and (4) unlawfully and improperly exercising her personal bias in favor of Respondent by arguing and voting for a defense verdict as to Mr. Ethier?

STATEMENT OF THE CASE

Appellants filed and served a Summons and Complaint in this medical malpractice case against Defendants on January 4, 2013.[1] Appellant Philip Ethier asserted that Defendants' negligence caused his injuries and damages. Appellant Jeanne

[1] Defendants Tuomey Medical Professionals, Inc., and Pee Dee Emergency Medical Associates, PA, were subsequently dismissed. Appellants settled with Fairfield Memorial Hospital for $100,000 and the case went to trial only against Respondent.

Ethier, his wife, asserted a loss of consortium claim. (Complaint.) Respondent Guy R. Bibeau, M.D., and Defendant Fairfield Memorial Hospital timely answered.

The jury rendered a verdict on April 8, 2015, after a seven-day trial. The jury awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Mr. Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Respondent was 30% negligent. The jury awarded $250,000 to Mrs. Ethier on her loss of consortium claim. The Clerk entered judgment entirely in Respondent's favor on April 30, 2015. (Verdict and Judgment.)

Appellants timely served motions for a new trial absolute based on juror misconduct. (Pl. Motions for New Trial and Mem. filed April 20, 2015.) Appellants timely served a Rule 59, SCRCP, motion to correct or amend the judgment, asserting that the verdict was in favor of Mrs. Ethier on her loss of consortium claim. (Pl. Motion filed May 11, 2015.) An evidentiary hearing was held by the trial judge on May 12, 2015, with all jurors present. (Tr. of Juror Hearing.) Appellants filed memoranda and exhibits in support of their motions for a new trial and to correct or amend the judgment. (Pl. Motions and Mem. filed June 30, 2015.) Respondent filed a memorandum in opposition.

A hearing on Appellants' post-trial motions was held July 6, 2015. (Tr. of Motion Hearing.) The trial judge denied Appellants' motions by written order filed September 8, 2015. (Order.) Appellants timely appealed.

STATEMENT OF FACTS

Philip Ethier, accompanied by his wife, Jeanne Ethier, went to Fairfield Memorial Hospital's Emergency Department (ED) on April 10, 2011, while experiencing severe pain, numbness, discoloration and coldness in his right lower leg and foot. Mr. Ethier, a

licensed practical nurse, recently had been hired on the hospital's ED staff, his first job at an Emergency Department. (Tr. pp. 316-17.) Mr. Ethier reported these symptoms during his triage exam with a certified nurse assistant and he reported them to Respondent. (Pl. Ex. 22; Pl. Dem. Exs. 23, 24, 25; Tr. pp. 323-42 (Mr. Ethier); pp. 154-59 (Dr. Adams); pp. 533-43 (Dr. Jolin).) Mr. Ethier was briefly examined by Respondent, who looked at and touched his leg, summarily concluded it was a "probable spider bite," gave him pain and steroid medications and discharged him. (Tr. pp. 335-42 (Mr. Ethier); pp. 978-79 (Resp.); Pl. Ex. 22; Pl. Dem. Exs. 24, 25.)

Mr. and Mrs. Ethier testified they never mentioned or reported a spider bite at the ED on April 10. (Tr. p. 334 (Mr. Ethier); pp. 792-94 (Mrs. Ethier).) Numerous witnesses for both Appellants and Respondent testified that the only mention of a spider bite in the ED record was written by Respondent; no other ED staffer or nurse ever mentioned or noted it. (Pl. Ex. 22; Pl. Dem. Exs. 23, 24, 25; Tr. pp. 165-66 (Dr. Adams); pp. 552-54 and 605-06 (Dr. Jolin); pp. 1006-08 (Resp.); p. 898 (RN Wadford); pp. 1159-60 (Dr. Smith); pp. 1088-89 (Dr. Weinstein); Tr. of Anthony Video Dep. pp. 28-31.) It was undisputed at trial that no spider bite mark was ever found on Mr. Ethier that day or later. There never was any spider bite – a diagnosis deemed "ridiculous" by Appellants' vascular expert and an "egregious departure" from the standard of care by Appellants' emergency medicine expert. (Tr. p. 241 (Dr. Adams); pp. 563-64 (Dr. Jolin.)

In fact, Mr. Ethier's true condition on April 10 – which Respondent admitted he failed to even consider, let alone diagnose as a blood vessel problem – was an aneurysm in the popliteal artery behind the right knee. (Tr. pp. 168-70 (Dr. Adams); pp. 554-55 (Dr. Jolin); pp. 265-68 (Dr. Holleman); pp. 1004-06 (Resp.).) An aneurysm is a balloon-

like area of an artery which causes blood to swirl around and clot over time, and clots can break off into the bloodstream and block it. (Tr. pp. 160-61 (Dr. Adams).)

Dr. Jeremiah Holleman, the treating vascular surgeon who performed emergency surgery 45 days later to save Mr. Ethier's leg, Mr. Ethier's medical experts (Dr. Carl Adams and Dr. Scott Jolin), and Respondent's medical experts (Dr. Dorn Smith and Dr. Eric Weinstein) all testified that the popliteal aneurysm existed on April 10. (Tr. pp. 266-67 (Dr. Holleman); p. 169 (Dr. Adams); pp. 557-58 (Dr. Jolin); p. 1162 (Dr. Smith); p. 1089 (Dr. Weinstein).) Mr. Ethier's treating surgeon and experts testified that the popliteal aneurysm threw off a clot down one of three main arteries in the leg to a toe in the right foot, causing Mr. Ethier's pain and symptoms on April 10, 2011. (Tr. pp. 266-69 (Dr. Holleman); pp. 179-80 (Dr. Adams); pp. 559-60 (Dr. Jolin).) April 10 was the

> sentinel event. I mean, that type of visit is what emergency physicians look for. In other words, there could have been a diagnosis made or at least a referral to a specialist who could have made the definitive diagnosis. The vascular surgeon could have made the diagnosis, repaired the aneurysm, and then we wouldn't be here discussing any more events today. It would have been cured, essentially. . . . I think the point is that when a patient has a life threatening or limb threatening situation and we can actually do something about it and reverse it, . . . that's why emergency physicians exist. (Tr. pp. 607-08 (Dr. Jolin).)

Respondent testified that the only diagnoses he considered on April 10 were chemical exposure, trauma and spider bite. Respondent testified he never considered a blood vessel problem as a possible diagnosis after his examination. (Tr. pp. 1004-06 (Resp.); p. 167 (Dr. Adams); pp. 549-51 (Dr. Jolin).) Respondent testified he did not see signs of a vascular problem and believed his examination was adequate. (Tr. pp. 976-80.)

Dr. Adams, Appellants' vascular surgery and emergency medicine expert, and Dr. Jolin, Appellants' emergency medicine expert, testified that the written medical records of the ED visit showed that several "Ps" indicating a vascular event were present and

obvious on April 10: pain, pallor (change in color), polar (cool or cold) and paresthesia (numbness or tingling). (Tr. pp. 158-61 (Dr. Adams); pp. 540-43 (Dr. Jolin); Pl. Ex. 22; Pl. Dem. Exs. 23, 24, 25.) The "P" of pulselessness allegedly was not present; however, issues related to the alleged taking and reporting of the foot pulses by Respondent and ED nursing staff probably were the most contested facts at trial.

Dr. Holleman and Dr. Adams testified that a blood vessel problem may be present in the leg despite normal foot pulses[2] because other main and peripheral arteries can temporarily carry adequate flow to the foot. (Tr. pp. 266-69 (Dr. Holleman); pp. 160-61 (Dr. Adams).) Respondent admitted this fact. (Tr. pp. 1000-02.)

However, Respondent's experts testified that allegedly normal pulses in the right foot meant Respondent was not negligent in his examination and the diagnosis of a spider bite was reasonable. Respondents' experts testified it was not necessary for Respondent to order further diagnostic tests or a referral to a vascular specialist because Mr. Ethier was told to follow up with another physician. (Tr. pp. 1098-99, 1143-44 (Dr. Smith); pp. 1057-58 (Dr. Weinstein).)

The existence, scope and adequacy of the examination of Mr. Ethier by Respondent and the alleged triage examination by registered nurse Jerilyn Wadford were

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[2] The foot pulses are the dorsalis pedis pulse on top of the foot and the posterior tibial pulse on the side of the foot. Appellants' experts testified that the foot pulses on the left foot, as well as popliteal (knee) and femoral (groin) pulses on both legs, should have been done in a proper exam. (Tr. pp. 158-59 and 163-65 (Dr. Adams); pp. 542-44 (Dr. Jolin).)

It is undisputed that the only pulses allegedly taken by Respondent or the ED staff were on the right foot. According to the written ED record, only the admittedly inexperienced certified nurse assistant, Samantha Anthony, took the foot pulses on the right foot. (Pl. Ex. 22; Pl. Dem. Ex. 23.)

hotly disputed at trial. The dispute in particular focused on whether right foot pulses were taken only by Samantha Anthony, an inexperienced certified nurse assistant in triage, or also by a registered nurse in triage, Jerilyn Wadford, or, most importantly, by Respondent himself. The credibility of Respondent and the RN Wadford's testimony on this point was of critical importance.

Mr. and Mrs. Ethier testified that the only ED staffer who triaged Mr. Ethier and took his right foot pulses was Samantha Anthony. (Tr. pp. 329-31, 333-34, 337 (Mr. Ethier); pp. 790-92 (Mrs. Ethier).) Anthony, then a certified nurse assistant and student nurse, testified she took Mr. Ethier's right foot pulses and capillary refill and found them to be normal. However, Anthony testified she was inexperienced and did not ever recall taking foot pulses on a patient at the hospital before that date. (Tr. of Anthony Video Dep. pp. 19-21.) Anthony's only clinical experience in taking pulses at that point had been on sedated patients for several Saturdays in a clinical class at another hospital. (Tr. of Anthony Video Dep. pp. 9-10.) Anthony testified that RN Wadford did not take Mr. Ethier's foot pulses, she did not recall Wadford participating in the triage of Mr. Ethier at all, and Wadford usually was not present when Anthony triaged patients. (Tr. of Anthony Video Dep. pp. 26-27, 14-17; Pl. Ex. 22; Pl. Dem. Ex. 23.)

Mr. and Mrs. Ethier testified that he was never seen by and never spoke to RN Wadford or any other nurse while in triage, and no one else in the ED ever took his foot pulses besides Anthony. (Tr. pp. 329-31, 333-34, 337 (Mr. Ethier); pp. 790-92 (Mrs. Ethier).) Mr. Ethier testified that Respondent never took his foot pulses. (Tr. p. 337.)

Respondent testified that he believed he took the right foot pulses, although he admitted he did not take the pulses of the left foot or any other pulses (popliteal or

femoral) in either leg. Respondent admitted that his written ED notes on Mr. Ethier do not record that he took any foot or leg pulses at all. (Pl. Ex. 22; Pl. Dem. Exs. 24, 25; Tr. pp. 994-98.) The spaces for recording the various foot and leg pulses on the Physician's ED record completed by Respondent are blank. (Pl. Ex. 22; Pl. Dem. Ex. 25.) Respondent testified that on April 10, he believed RN Wadford had taken the foot pulses. (Tr. pp. 995-96.)

Contrary to the testimony of Appellants and nursing student Anthony that RN Wadford never examined or saw Mr. Ethier in triage, Wadford testified that her signature on the form meant she personally examined Mr. Ethier in triage while confirming the information recorded by Anthony. (Tr. pp. 878-86; Pl. Ex. 22; Pl. Dem. Ex. 23). Contrary to the testimony of Appellants and Anthony, RN Wadford testified that she personally checked Mr. Ethier's right foot pulses. (Tr. pp. 887-88.) Wadford did not know whether Respondent checked the foot pulses because she was not in the room when Respondent examined Mr. Ethier. (Tr. pp. 896-97.)

The hospital's written policy explicitly requires that the "[i]nitial assessment must be documented for each patient arriving to the Emergency Department. A triage note shall be written and signed by a registered nurse **only**." (Pl. Ex. 46) (emphasis in original). Wadford testified she was "not sure" if she would be fired if she were to admit under oath she did not perform the triage exam or check the foot pulses, but allowed Anthony to do it alone. (Tr. pp. 909-11.) Both Wadford and Anthony testified that all of the handwriting on the triage record was done by Anthony, with the exception of the date and Wadford's signature. (Tr. pp. 897-98 (Wadford); Tr. of Anthony Video Dep., p. 15; Pl. Ex. 22; Pl. Dem. Ex. 23.)

The only other nurse Mr. Ethier saw on April 10 was a licensed practical nurse, Rhonda Gwynn, who discharged him. Gwynn testified she had nothing to do with the triage exam. (Tr. p. 916; Pl. Ex. 22.)

The existence, scope and adequacy of the exam by Respondent and alleged exam by RN Wadford, including the issue of the disputed foot pulses, were addressed by counsel in opening statements and closing arguments. (Tr. pp. 94-95 (Pl. Opening); pp. 1254-66, 1335-36, 1342-44 (Pl. Closing); p. 138 (Def. Opening); pp. 1300-01, 1306-07, 1320-22 (Def. Closing). Defense counsel in closing repeatedly emphasized that judging the credibility of Mr. Ethier and Respondent was crucial. (Tr. pp. 1320-21, 1330.)

Appellants' experts, Dr. Adams and Dr. Jolin, testified that Respondent negligently failed to properly examine and diagnose Mr. Ethier with a blood vessel problem, negligently diagnosed him with a nonexistent spider bite, negligently failed to order a diagnostic test such as an ultrasound or CT scan which would have revealed the popliteal aneurysm, and negligently failed to refer Mr. Ethier for a consultation with a vascular specialist. (Tr. pp. 163-71 (Dr. Adams); pp. 543-58 (Dr. Jolin).) Dr. Jolin testified that it was clear that a blood vessel problem was the number one potential diagnosis simply by looking at the first several lines of the written ED record prepared by Respondent – which showed reports of "pain" and a "cold, numb and ecchymotic" (discolored) leg and foot. (Tr. pp. 544-47; Pl. Ex. 22; Pl. Dem. Ex. 24.)

Dr. Adams and Dr. Jolin testified Respondent was required simply to identify a blood vessel problem and order the diagnostic tests or referral; Respondent did not have to actually identify or diagnose the popliteal aneurysm. (Tr. p. 244 (Dr. Adams); pp. 557-58 (Dr. Jolin).) Dr. Adams, Dr. Jolin and Dr. Holleman testified the botched exam by

Respondent was a "missed opportunity" to identify the blood vessel problem and promptly schedule a non-emergency repair. (Tr. p. 180 (Dr. Adams); pp. 607-08 (Dr. Jolin); p. 269 (Dr. Holleman).)

Dr. Adams and the treating surgeon, Dr. Holleman, testified that if a vascular diagnostic test or referral had happened on April 10, the true condition would have been promptly discovered and a non-emergency, surgical repair of affected artery performed. Mr. Ethier would have avoided the additional arterial blockages and later emergency surgery which left him with compartment syndrome, a fasciotomy,[3] a seven-month recovery period, severe, permanent pain due to damaged muscles and nerves in the right leg which requires daily use of narcotic pain medication, and foot drop, a physical disability in which his foot drags and cannot bend up or down or side to side. (Tr. pp. 190-94 (Dr. Adams); pp. 269-74 (Dr. Holleman); Pl. Dem. Exs. 1, 2, 3, 4; Pl. Exs. 7, 9, 10, 11, 13, 15 and 16.) Respondent's vascular expert, Dr. Smith, agreed the severe complications and permanent injuries would not have occurred if Mr. Ethier had undergone non-emergency surgery shortly after April 10. (Tr., pp. 1161-64.)

The written discharge instructions stated that Mr. Ethier was to follow up with his primary care physician. (Pl. Ex. 22.) Mr. Ethier testified the only discharge instruction he received from Respondent or LPN Gwynn was to follow up on his blood pressure medication. (Tr. pp. 340-42.) Gwynn testified she handed the discharge instructions to

[3] Compartment syndrome occurs when muscle and tissue are deprived of blood flow and then blood flow is restored, causing swelling. A fasciotomy, in which the band or sheet of connective tissue beneath the skin is cut open, was performed on Mr. Ethier's leg to try to relieve the swelling and avoid permanent injury. The leg was saved, but permanently damaged. (Tr. pp. 270-74 (Dr. Holleman); Pl. Exs. 7, 9, 10, 11, 13, 15 and 16.)

Mr. Ethier and told him to follow up with a physician on his blood pressure and the spider bite. (Tr. pp. 918-20.)

Mr. Ethier testified he had informal, unrecorded "curbside consultations" with Respondent and three other ED physicians in the weeks after April 10. (Tr. pp. 346-48, 357-60.) Respondent told him to give it time and Mr. Ethier followed that instruction. Mr. Ethier testified that he did not follow up with a family physician but – as an LPN accustomed to believing and trusting doctors for 20 years – he believed and trusted in the correctness of Respondent's spider bite diagnosis. (Tr. pp. 338-39.) His leg and foot, in fact, did improve just as Respondent predicted, as the pain and symptoms gradually lessened and the leg seemed to return to normal. (Tr. pp. 346-47, 357.)

Dr. Smith, Respondent's vascular expert, and Dr. Weinstein, Respondent's emergency medicine expert, testified that Respondent's exam was sufficient and the spider bite diagnosis was reasonable on April 10. (Tr. p. 1144 (Dr. Smith); pp. 1057-58 (Dr. Weinstein).) Dr. Smith and Dr. Weinstein testified that curbside consultations were not proper and doctors expect their patient to follow up with another physician as instructed. (Tr. p. 1099 (Dr. Smith); pp. 1068-69 (Dr. Weinstein).)

On May 25, 2011, Mr. Ethier again experienced the same symptoms as on April 10 and went to another hospital. He was promptly and properly diagnosed with an aneurysm in the popliteal artery behind his right knee. He was transferred by ambulance to a Charlotte hospital where he underwent emergency treatment and surgery, ultimately undergoing an open femoral bypass graft procedure to repair one artery. (Tr. pp. 363-75 (Mr. Ethier); pp. 248-61 (Dr. Holleman); Pl. Dem. Exs. 1, 2, 3, 4.) The blockages of three main arteries in his lower leg (two of which remain permanently blocked) resulted

in compartment syndrome, a condition which permanently damaged the nerves and muscle tissue and led to permanent pain and the disability of foot drop. (Tr. pp. 190-94 (Dr. Adams); pp. 269-74 (Dr. Holleman); Pl. Dem. Exs. 1, 2, 3, 4.)

Mr. Ethier testified that he continued working for more than two years as an LPN, first at the hospital and then at a home health company. He inexorably grew unable to handle the daily cycle of severe pain, disability and depression resulting from his condition. He was unable to take narcotic pain medication while working and driving. He began considering suicide in December 2013 and was saved only after finally stopping work and obtaining consistent pain management and psychiatric treatment. Mr. Ethier testified that he has suffered constant pain and disability of his leg and foot since May 25, 2011, and expects to do so for the rest of his life. He takes narcotic pain medications daily to stave off the pain, uses a leg brace due to his permanent foot drop and limps if he walks any distance, suffers from depression and anxiety, and regularly sees a psychiatrist and pain management doctor. Formerly a gung-ho, active, hardworking man his entire life, he no longer is able to work or engage in home projects or recreational activities as he once did. (Tr. pp. 375-86, 388-97, 409-14.)

Mrs. Ethier testified about Mr. Ethier's pain and suffering as he recovered and attempted to work until he could no longer do so. She testified about her own emotional distress and the impact of Mr. Ethier's permanent pain and disability on their relationship, life and future. Mrs. Ethier testified that she still loves her husband, but their lives have been forever changed. (Tr. pp. 799-804, 807-13.)[4]

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[4] Appellants also presented the testimony of Dr. Tammy Chen, the treating psychiatrist; Dr. Mark Porter, the treating neurologist; Dr. Sanjay Nandurkar, the treating continued . . .

STANDARD OF REVIEW

"An appellate court may decide questions of law with no particular deference to the trial court." In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008) (citations omitted); I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000). In deciding a question of law, the appellate court reviews the circuit court's decision de novo. Lambries v. Saluda County Council, 409 S.C. 1, 7, 760 S.E.2d 785, 788 (2014).

The decision whether to grant or deny a new trial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008). An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, 467 (2006); Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987).

ARGUMENT

I. LOSS OF CONSORTIUM VERDICT

The trial judge erred in ruling that comparative negligence law dictates Appellant Jeanne Ethier recover nothing on her loss of consortium claim when the directly injured spouse, Appellant Philip Ethier, recovered nothing because he was found more negligent than Respondent. South Carolina law says the negligence of one spouse is not imputed to the other and our courts repeatedly have held since the 1920s that a loss of consortium claim is a separate and independent cause of action which is not derivative of the directly injured spouse's claim.

FACTS

The jury in a special verdict form awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Mr. Ethier; however, the jury determined that Mr.

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pain management specialist; Dr. Oliver Wood, an economic loss expert; Joel Leonard, a vocational expert; Shelene Giles, a medical cost expert; and two family members. (Index pages.)

Ethier was 70% negligent while Dr. Bibeau was 30% negligent. The jury awarded $250,000 to Mrs. Ethier for loss of consortium. (Judgment.)

The filed Form 4 Order and Judgment states, in pertinent part:

> A Verdict was issued by the jury in the above captioned matter on April 8, 2015, a copy of which is attached and incorporated by reference. The Plaintiff was found [to] have been 70% negligent and the Defendant was found to have been 30% negligent. The result is a Verdict in favor of the Defense. (Judgment.)

Appellants timely moved to correct the erroneous Order and Judgment. (Pl. Motion filed May 11, 2015.) Appellants asserted that the true verdict of the jury as shown in the special verdict form, with regard to Mrs. Ethier, was that the jury found Respondent negligent; Mrs. Ethier proved by a preponderance of the evidence that Respondent's negligence was the proximate cause of her loss of consortium); and the total damages suffered by Mrs. Ethier for loss of consortium was $250,000. (Verdict Form Question Nos. 1, 8, 9.)

Appellants argued that, to the extent that the Order and Judgment conflicted with the jury's true verdict by stating that the verdict was for Respondent on Mrs. Ethier's claim, the trial judge should strike or amend the erroneous language so that it accurately states that the verdict was in favor of Mrs. Ethier. Specifically, Appellants moved that the judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Respondent on Mr. Ethier's claims and a verdict of $250,000 in favor of Mrs. Ethier on her loss of consortium claim. (Pl. Motion filed May 11, 2015; Pl. Rule 59 Motion and Mem. filed June 30, 2015; Tr. of Motion Hearing held July 6, 2015, pp. 34-45.)

TRIAL COURT'S RULING

The trial judge applied the law of comparative negligence to Mrs. Ethier's claim

and ruled this case is controlled by Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007). In Lee, the Supreme Court stated in passing that "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." (Order p. 18.) The trial judge stated that he did not view the Supreme Court's statement in Lee as a holding, but merely language indicating the Court's view of the issue. (Tr. of Motion Hearing held July 6, 2015, pp. 43-44.)

This ruling followed the judge's ruling at trial that Mr. and Mrs. Ethier were each entitled to recover non-economic damages up to the statutory maximum because each had a separate and distinct cause of action against Respondent. (Tr. p. 1209.)

LAW AND ARGUMENT

The trial judge erred because the Supreme Court in Lee actually explained again – as it has repeatedly since the 1920s – that because a loss of consortium claim is separate and distinct, "it is not inconsistent for the jury to return a verdict for the injured spouse on the primary claim and a verdict for the defendant on the loss of consortium claim." Lee, 373 S.C. 654, 647 S.E.2d at 201-02. It is not inconsistent for the jury to return the same verdict on both spouses' claims or different verdicts on each claim. Simply put, the verdicts do not have to be the same on these separate and independent claims. Id. (where plaintiff-husband motorcyclist was found 70% at fault and defendant found 30% at fault, and jury returned verdict for defendant on plaintiff-wife's loss of consortium claim, trial judge erred in ruling that it was an inconsistent verdict for jury not to award any damages to plaintiff-wife because defendant was partially negligent and further erred in requiring jury to award some amount of damages; Supreme Court held that "the original verdicts

were consistent. In South Carolina, claims for personal injuries and for loss of consortium are separate and distinct.");[5] accord Craven v. Cunningham, 292 S.C. 441,

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[5] While discussing the inconsistent verdict issue, the Supreme Court observed in passing that a defendant "should not be forced to pay all of [plaintiff-wife's] damages if he only contributed 30% to the accident. Generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature. 41 Am. Jur. 2d Husband and Wife, § 227 (2007)." Lee, 647 S.E.2d at 202.

This observation is dicta because the Court in Lee was faced with the issue of whether the verdicts were inconsistent, not whether the directly injured spouse's negligence should be imputed to the other spouse's consortium claim. There was no mention or discussion of the imputation issue in Lee. There was no reason to discuss the imputation issue because the original verdict reinstated by the Court on the consortium claim was a defense verdict on both husband and wife's claims – unlike the present case.

Moreover, the cases cited in § 227 of American Jurisprudence 2d do ***not*** support the stated proposition which was recited in Lee and relied on by the trial judge. It is ***not*** true that a consortium claim fails if the directly injured spouse's claim fails, regardless of whether the consortium claim is considered independent or derivative. ***In fact, that actually is the key distinction. If the consortium claim is derivative, it rises and falls with the injured spouse's claim. If the consortium claim is independent, it is resolved separately from directly injured spouse's claim and does not rise and fall with that claim.*** See cases cited herein and footnotes 10, 14 and 15, infra.

Among the authority cited in § 227, except for two inapposite cases, ***all*** of the cited cases finding that a spouse's consortium claim rises or falls with the directly injured spouse's claim were decided in states where a consortium claim is deemed ***derivative*** of the directly injured spouse's claim:

See Owens Corning v. R.J. Reynolds Tobacco Co., 868 So.2d 331, ¶ 24 (Miss. 2004) (stating that a loss of consortium claim is *derivative*, thus the spouse claiming it stands in the shoes of the directly injured spouse and is subject to defenses available against the directly injured spouse); Durham ex rel. Estate of Wade v. U-Haul Intern., 745 N.E.2d 755, 764 (Ind. 2001) (stating that a loss of consortium claim is "*derivative* of the injured spouse's personal injury claim"; therefore, "if the spouse's cause of action for personal injury fails, the loss of consortium claim falls with it"); Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876, 880 (Mo. 1993) (stating that plaintiff's "loss of consortium is *derivative* only, so that if [the directly injured spouse] had no valid claim for personal injuries, [the other spouse] cannot recover for loss of consortium"); Hauck v. Danclar, 620 A.2d 479 (N.J. Super. Law Div. 1993) (trial court opinion stated that loss of consortium claim is *derivative*; thus when directly injured spouse's claim fails

continued . . .

443, 357 S.E.2d 23, 25 (1987) (jury's award to injured spouse while denying wife's

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then other spouse's loss of consortium claim also fails); Murray v. Frankel, 626 A.2d 1328, 1331 (Conn. App. 1993) (stating that loss of consortium claim is *derivative*; therefore, when directly injured spouse's claim is dismissed then other spouse does not have loss of consortium claim); Henderson v. Hercules, Inc., 324 S.E.2d 453 (Ga. 1985) (holding "[o]ne spouse's right of action for the loss of the other's society or consortium is a *derivative* one, stemming from the right of the other"; therefore, wife had no cause of action against employer for loss of consortium because husband's exclusive remedy against employer was in workers' compensation); Watters v. Dinn, 633 N.E.2d 280, 292 (Ind. Ct. App. 1994) (holding that "[l]oss of consortium is *derivative* in nature and its viability depends upon the validity of the injured spouses' claim"; court reversed summary judgment on some of husband's claims and wife's loss of consortium claim derived from those claims was proper).

In Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 307, 395 S.E.2d 742, 744 (Ct. App. 1990), the Court of Appeals concluded that issue of whether trial judge erred by not submitting the husband's loss of consortium claim to jury under strict liability cause of action was not preserved for review. The Court of Appeals noted in passing that the jury did not award damages to the wife under that cause of action and so the husband could not show prejudice. The Court of Appeals did not cite the long-established line of South Carolina cases holding that a consortium claim is separate and distinct, and there was no need to do so because that was not the issue at hand and the issue was not even preserved for review anyway; nor did the Court of Appeal in any way address any imputation issue. This case does not support the proposition stated in § 227.

In the only other case cited in § 227 from a jurisdiction where a loss of consortium claim is deemed separate and distinct, the Massachusetts Supreme Court simply found that both the directly injured spouse and his spouse must have viable claims which survive summary judgment. The "implicit prerequisite" of surviving summary judgment simply recognizes the obvious fact that no plaintiff has a viable claim of any type when it is dismissed on summary judgment. Sena v. Commonwealth, 629 N.E.2d 986 (Mass. 1994) (dismissing various claims brought by husband against state, and dismissing wife's loss of consortium claim, after husband was charged with receiving stolen property; husband had bought Wyatt Earp's Colt-.45 revolver at flea market after it had been stolen from rightful owner, but refused to return it). This case does not support the proposition stated in § 227.

Related American Jurisprudence 2d sections correctly point out that courts are split on whether the directly injured spouse's contributory negligence affects the other spouse's loss of consortium claim. However, the treatise writers failed to explain that the deciding factor in the cases is whether the court considers a consortium claim to be derivative or separate and distinct from the directly injured spouse's claim. See 41 Am. Jur. 2d Husband and Wife, §§ 228-229 (2007).

consortium claim was not inconsistent because wife's claim was contested throughout trial); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002) (finding a verdict for plaintiff on wrongful death claim and a defense verdict on loss of consortium were not inconsistent and were allowed); Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (after finding for injured husband on medical malpractice claim, it was not inconsistent for jury to find for defendant on wife's consortium claim because "the jury obviously rejected her testimony, as was their prerogative").

Other treatise writers correctly have identified the clear demarcation between the view that a consortium claim is derivative versus separate and distinct. Jurisdictions holding the view – like South Carolina – that it is separate and distinct neither bar nor reduce the consortium spouse's damages based on contributory or comparative negligence. See 25 A.L.R.4th 118, § 2[a] (1983 & Supp. 2015) (explaining that "courts which have refused to permit the contributory negligence of the physically injured family member to bar or reduce damages for loss of consortium by another family member have reasoned that the consortium action is not derived from the physically injured family member's action but arises from an injury to a separate and distinct interest on the part of the spouse or parent seeking recovery for loss of consortium, and thus cannot be barred or reduced by the physically injured family member's contributory negligence.").

In the present case, a verdict in Mrs. Ethier's favor is not inconsistent with the defense verdict on Mr. Ethier's claim. Each Appellant's action is separate and independent, and the jury clearly and properly awarded damages to Mrs. Ethier for loss of consortium as a result of Respondent's negligence. The law of comparative negligence is irrelevant and inapplicable to her claim. The negligence of Mr. Ethier as determined by

the jury is not imputed to her and has no impact on her award. The jury's verdict in favor of Mrs. Ethier and the award of damages of $250,000 to her are proper. (Pl. Mem. filed June 30, 2015, pp. 16-19.)

The trial judge also erred and abused his discretion for the following seven reasons:

FIRST, the trial judge erred because the jury's special verdict form is unambiguous on the award of damages to Mrs. Ethier. The jury found Respondent negligent; Mrs. Ethier proved by a preponderance of the evidence that Respondent's negligence was the proximate cause of her loss of consortium; and the total damages suffered by Mrs. Ethier for loss of consortium was $250,000. (Verdict Form Question Nos. 1, 8, 9.) The jury unambiguously found Respondent negligent, found that his negligence caused Mrs. Ethier's loss of consortium, and awarded damages for her loss of consortium.

The trial judge further stated that Appellants did not object to the jury charge or verdict as rendered. (Order pp. 17-18.) The judge erred because the jury was charged on comparative negligence and loss of consortium, but the jury never was instructed that it was to compare the negligence of *Mrs.* Ethier to Respondent. The jury was not asked to determine whether there was any comparative negligence by Mrs. Ethier because she could not be comparatively negligent under the law or under the facts and circumstances of this case. (Tr. pp. 1371, 1373-75, 1379-85.) At the hearing on Plaintiffs' post-trial motions, the judge acknowledged that the jury was correctly instructed to assign percentages of negligence only between *Mr.* Ethier and Respondent. (Tr. of Motion Hearing, p. 37).

Only Mr. Ethier properly could be found comparatively negligent under the law, and that is what the jury properly was asked to determine based on the instructions of the Court.[6] (Pl. Mem. filed June 30, 2015, pp. 3-4.)

SECOND, any assertion or motion by Respondent that the jury did not render a verdict in favor of Mrs. Ethier is untimely and may not be heard. The jury in its special verdict form answered the questions it was asked to answer. The jury plainly intended to award and, in fact, did award damages to Mrs. Ethier on her loss of consortium claim after finding Respondent negligent and finding that his negligence proximately caused her loss of consortium. After the Court published the verdict, the Court asked jurors whether it was their verdict. The jurors responded affirmatively. (Tr. pp. 1391-93; Verdict Form.)

If Respondent believed that the verdict was inconsistent, not in keeping with the Court's instructions, or otherwise ambiguous, Respondent was required to request clarification of the verdict before the jury was dismissed. Respondent failed to do so and may not now be heard to challenge the verdict.[7] (Pl. Mem. filed June 30, 2015, pp. 4-5.)

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[6] See e.g. Nelson v. Concrete Supply Co., 399 S.E.2d 783, 303 S.C. 243 (1991) and Langley v. Boyter, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) (teaching that focus of analysis is on the comparative negligence of the directly injured plaintiff and the defendant).

[7] See Stevens v. Allen, 342 S.C. 47, 52-53, 536 S.E.2d 663, 665-66 (2000) (holding that, "when the issue is raised, a trial judge should resubmit a verdict assessing liability but awarding zero damages to the jury with instructions to either find for the defense or award some amount of damages"); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (holding that "there is no duty imposed on the trial judge to question a jury's verdict of liability, but no damages, unless requested to by a party"; further, appellate court may not address an issue which was not raised to and ruled on by trial court); Rhame v. City of Sumter, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920) ("The defendant's counsel made no attempt to find out what the jury intended, and their objections come too

continued . . .

THIRD, the Supreme Court has held that "in South Carolina, the acts of one spouse are not, as a matter of law, imputed to the other spouse."[8] This same principle applies in the context of a spouse's loss of consortium action. The law of comparative negligence is irrelevant and inapplicable to Mrs. Ethier's claim. Any negligence of the directly injured plaintiff is not imputed to the spouse's consortium claim. (Pl. Mem. filed June 30, 2015, p. 9.)

FOURTH, South Carolina appellate courts repeatedly have held since the 1920s that a loss of consortium claim is not derivative of the directly injured spouse's claim, but is a distinct, independent cause of action. Consequently, any negligence of the directly

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late. It was [counsel's] business to clarify and ask for a correction and reformation of the verdict before the jury [was] discharged."), overruled on other grounds by Rourk v. Selvey, 252 S.C. 25, 164 S.E.2d 909 (1968); Campbell v. Robinson, 398 S.C. 12, 726 S.E.2d 221 (Ct. App. 2012) (holding that motions for JNOV or new trial absolute which argued that jury had rendered an inconsistent verdict "were not appropriate remedies to correct that error. When a jury renders an inconsistent verdict, the only remedies available at that moment are to resubmit the case to the jury or grant a new trial absolute."); Allegro, Inc. v. Scully, 400 S.C. 33, 49 n. 9 733 S.E.2d 114, 123 n.9 (Ct. App. 2012) ("When a question arises regarding the law or the verdict form, the better practice is to confer with counsel outside the presence of the jury to discuss the proper response, and then instruct the entire jury in court or in writing and return them to the jury room to act in accordance with the court's instructions."); Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 203, 730 S.E.2d 890, 902 (Ct. App. 2012) (providing the best practice to ensure a valid verdict is for the court to address any questions that arise in front of the entire jury).

[8] McCracken v. Government Employees Ins. Co., 325 S.E.2d 62, 64, 284 S.C. 66, 69 (1985) (noting that disability of coverture, in which husband and wife were viewed as single, legal entity, has long been abolished; thus innocent spouse could recover fire insurance policy proceeds where other spouse intentionally had burned the property); McCall v. Bangs, 207 S.E.2d 91, 93, 262 S.C. 657, 661 (1974) (stating that the "common-law theory of unity or identity of the spouses and the disability of coverture, insofar as they affect litigation have long since been completely abolished in this jurisdiction" by statute; therefore, usual statute of limitations applied to wife's claim against husband).

injured plaintiff is not imputed to the spouse's consortium claim, as shown in the case law cited herein.

In 1962, the Legislature codified the common law claim in S.C. Code Ann. § 15-75-20 (1976).[9] This statute, by its plain terms, clearly indicates loss of consortium is a separate, independent cause of action because it states that the damages recovered by the spouse shall not include damages recovered by the directly injured spouse.

The spouse's loss of consortium claim may be brought simultaneously with the injured spouse's claim or at a different time in a separate lawsuit. The dismissal of the injured spouse's claim does not result in the dismissal of the other spouse's loss of consortium claim, or vice versa. Similarly, a directed verdict or a defense verdict on the injured spouse's claim does not affect the viability of the other spouse's loss of consortium claim, or vice versa.[10]

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[9] Section 15-75-20 provides that "[a]ny person may maintain an action for damages arising from an intentional or tortious violation of the right to the companionship, aid, society and services of his or her spouse. Provided, that such action shall not include any damages recovered prior thereto by the injured spouse."

[10] See e.g. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 596 n.4, 586 S.E.2d 572 (2003) (concluding that fact passenger wife's claim against defendant was dismissed in wreck case due to discovery abuse did not bar or result in dismissal of husband's claim for loss of consortium against defendant because the claims are separate and distinct); Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474-75 (1996) ("Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative"; trial court erred in medical malpractice case in finding it derivative and case was remanded for determination of when wife's loss of consortium claim accrued); Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) (concluding that defense verdict in husband's prior lawsuit for loss of consortium and wife's medical expenses did not bar wife's subsequent lawsuit because "[i]t is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action"); Hiott v. Contracting Servs., 276 S.C. 632,

continued . . .

In the present case, Mrs. Ethier brought a separate and distinct action for loss of consortium, and the jury properly awarded her damages on that claim. The law of comparative negligence is irrelevant and inapplicable to her claim. Any negligence of the directly injured plaintiff is not imputed to the spouse's consortium claim. (Pl. Mem. filed June 30, 2015, pp. 9-11.)

FIFTH, because a loss of consortium claim is separate and distinct from an injured spouse's claim, and not derivative, that necessarily means any comparative negligence of the injured spouse is ***not*** imputed to the other spouse.[11] Moreover, in an

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281 S.E.2d 224 (1981) (where husband brought personal injury action and wife brought loss of consortium action, trial court erred in granting a stay on wife's action while her husband's action was pending on appeal because the "causes of action in the two cases are entirely different and distinct"); Priester v. Southern Ry. Co., 151 S.C. 433, 149 S.E. 226 (1929) (directed verdict against wife, because of her contributory negligence, in federal court case did not bar husband's action for loss of consortium in state court case because "the two cases are entirely different and distinct, and the judgment in favor of the defendants in an action on one is not a bar to an action on the other"); Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 119-21, 512 S.E.2d 510 (Ct. App. 1999) ("Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative"; defense verdict for injured spouse's negligence action was not res judicata on spouse's separate loss of consortium claim, although in this instance the jury's verdict was for defense as to both plaintiffs); Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990) (where wife brought personal injury action and husband instituted suit for loss of consortium, the claims involved two separate lawsuits); Page v. New Lower Richland Med. Ctr., 291 S.C. 82, 352 S.E.2d 295 (Ct. App. 1986) (holding that verdict for defendant in the injured spouse's action did not bar spouse's claims for loss of consortium claim and medical expenses because those are "different and distinct cause[s] of action from the one maintained by the injured spouse").

[11] See F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts (2d ed. 1997), at 185 ("[S]ince the spousal claim for loss of consortium is a separate and distinct cause of action rather than 'derivative,' the consortium claim is apparently not affected by any contributory negligence by the directly injured spouse.").

endorsement of South Carolina law, the opposing view that a consortium claim is derivative has been roundly rejected by the commentators.[12]

South Carolina law is in keeping with the modern view is that the negligence of one person usually is not imputed to another, except in certain well-established circumstances such as principal-agent or respondeat superior. "As a general rule, the law holds a person liable only for his own acts and omissions." [13] (Pl. Mem. filed June 30, 2015, pp. 12-13.)

SIXTH, courts in other jurisdictions which – like South Carolina – adhere to the view that a consortium claim is a separate, independent action uniformly have held that the negligence of the directly injured spouse is ***not*** imputed to the other spouse. Verdicts for each spouse are separate and distinct, and the consortium spouse's verdict is not affected or reduced by any comparative negligence of the directly injured spouse.

In Lantis v. Condon, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (Cal. App. 1st Dist. 1979), the California Court of Appeals held that a spouse's loss of consortium claim is not derivative, but separate and distinct from the injured spouse's claim.

> Although the wife's cause of action 'arises' from the bodily injury to her husband, . . . the injury suffered is personal to the wife. . . . Loss of her husband's consortium impairs a wife's interests which are wholly separate and distinct from that of her husband: . . . the wife's loss is just as real as it is distinct. She can no longer enjoy her legally sanctioned and morally proper privilege of copulation or

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[12] Feltech v. General Rental Co., 421 N.E.2d 67, 70-71 (Mass. 1981) (citing 2 F. Harper & F. James, Torts § 23.8 (1956); W. Prosser, Torts § 125, at 892-893 (4th ed. 1971)).

[13] S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617, 621 (Ct. App. 1986) (rejecting two insurance agents' defense of imputed contributory negligence by which each asserted that the other's negligence was imputed to their principal, the insurance company, so as to bar the company's action against them). See also McCracken and McCall, cited in footnote 8.

> procreation, and is otherwise deprived of her full enjoyment of her marital state. These are her rights, not his. . . .
>
> Thus, the injury incurred can neither be said to have been 'parasitic' upon the husband's cause of action nor can it be properly characterized as an injury to the marital unit as a whole. Rather, it is comprised of [the wife's] own physical, psychological and emotional pain and anguish which results when her husband is negligently injured to the extent that he is no longer capable of providing the love, affection, companionship, comfort or sexual relations concomitant with a normal married life. . . .
>
> From the vantage point of the negligent defendant, [the wife] is simply a foreseeable plaintiff to whom he owes a separate duty of care.

Lantis, 95 Cal. App. 3d at 157, 157 Cal. Rptr. at 24 (citations and quotation marks omitted); accord Leonard v. John Crane, Inc., 206 Cal. App. 4th 1274, 142 Cal. Rptr. 3d 700 (Cal. App. 1st Dist. 2012) (favorably citing Lantis with regard to principles on independent action for loss of consortium).

In Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993), the Iowa Supreme Court, following its precedent, held that an injured spouse's negligence does not prohibit or affect a consortium claim by the other spouse. That principle remains true even in a case where the injured spouse signed an enforceable release at a race track waiving his injury claims. Furthermore, the spouse's separate damages for loss of consortium may not be reduced or eliminated by the negligence or action of the directly injured spouse. "The policy issue is a simple one. Why should innocent parties who have suffered loss have their right of recovery diminished as a result of the acts of another party whose fault is not imputed to them under established common-law or statutory rules? . . . These same principles of autonomy apply to releases signed by only one spouse. One spouse's

signature on a release is not imputed to the other spouse any more than is one spouse's negligent act." Id. at 57.[14]

In the present case, Mrs. Ethier is entitled to recover the full amount of damages awarded by the jury because hers is a separate and distinct action. The law of comparative negligence is irrelevant and inapplicable to her claim. The negligence of

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[14] See also Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1249 (8th Cir. 1985) (holding that under North Dakota law "it is clear that a wife's claim for loss of consortium is an independent right, not contingent upon the rights or liabilities of her husband"; therefore, the Court of Appeals concluded that the Supreme Court of North Dakota would not allow a loss of consortium award to be reduced by the other spouse's negligence, and contrary cases were from states which consider loss of consortium claims to be derivative actions); Macon v. Seaward Constr. Co., 555 F.2d 1; 2 (1st Cir.1977) (holding that wife's recovery for loss of consortium may not be reduced under New Hampshire law in proportion to her husband's degree of comparative negligence, where state law treats a loss of consortium claim as separate and distinct from injured spouse's claim); Braun v. Exeter Clinic, Inc., 498 A.2d 334 (N.H. 1985) (holding that "this court removed all doubt that we view a loss of consortium claim as 'separate and distinct and not derivative' in Reid v. Spadone Mach. Co., 400 A.2d 54, 55 (N.H. 1979). Therefore, the plaintiff's loss of consortium action will not be barred or reduced by a verdict rendered against the plaintiff in a negligence action."); Fuller v. Buhrow, 292 N.W.2d 672, 674-676 (Iowa 1980) (holding that one spouse may recover damages even though the other spouse, injured in an accident as a result of the defendant's negligence, was barred from recovering because of contributory negligence); Feltech v. General Rental Co., 421 N.E.2d 67, 70-71 (Mass. 1981) (holding that a loss of consortium claim is not derivative, but separate and distinct, from injured spouse's claim; and further holding that spouse's damages for loss of consortium may not be reduced by degree of injured spouse's negligence because "the wife is regarded as a separate individual, whose negligence is no more to be attributed to the husband, or his to her, than in the case of any other person"); Morgan v. Lalumiere, 493 N.E.2d 206 (Mass. App. 1986) (holding that consortium claim is separate and distinct cause of action, independent of the injured spouse's claim, and the spouse's consortium damages are not reduced in proportion to the injured spouse's degree of fault; thus husband was entitled to award of full damages for loss of consortium even though wife, as injured pedestrian, was found to be 52% at fault and recovered nothing); Christie v. Maxwell, 696 P.2d 1256 (Wash. App. 1985) (holding that consortium claim was separate and distinct, not derivative, and spouse's damages for loss of consortium were not reduced or barred by injured spouse's comparative negligence); Stapleton v. Palmore, 291 S.E.2d 445 (Ga. App. 1982) (holding that wife may bring later loss of consortium suit even though prior jury had determined defendant was not liable for husband's injury because the claims are separate and distinct); 25 A.L.R.4th 118, §§ 3[b], 4[b], 5[b] and 6[b] (1983 & Supp. 2015) (collecting cases).

Mr. Ethier as determined by the jury is not imputed to her and has no impact on her award. To hold otherwise would be to improperly treat her loss of consortium claim as a derivative action in violation of long-established law in South Carolina. It would also violate the long-established principle that each person in a marital relationship is an independent human who may suffer individual damages as a result of a defendant's negligence.[15] (Pl. Mem. filed June 30, 2015, pp. 13-16.)

SEVENTH, in order to prevail on the separate and distinct action for loss of consortium, the spouse asserting loss of consortium must prove liability and damages – just as the directly injured spouse must prove liability for negligence and damages. The spouse asserting loss of consortium must prove that the defendant is liable for proximately causing damages, which include support and services provided by the other spouse, love, companionship, affection, society, sexual relations, comfort, solace and guidance.[16] The requirement in case law and by statute to separately prove liability and damages again indicates that the claims and any award of damages are separate and distinct, as South Carolina courts have long held.

For all the foregoing reasons, the jury's verdict in favor of Mrs. Ethier and the award of damages of $250,000 to her are proper.

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[15] Foreign courts which have held that the directly injured spouse's negligence is imputed to the other spouse and a consortium claim, such that it serves to reduce a damage award, all reached that result because they view the consortium claim as derivative, not as a separate and distinct cause of action. See Blagg v. Illinois F.W.D. Truck & Eqpt. Co., 572 N.E.2d 920 (Ill. 1999); Lee v. Colo. Dept. of Health, 718 P.2d 221 (Colo. 1986); Runcorn v. Shearer Lumber Prod., Inc., 690 P.2d 324 (Id. 1984); 25 A.L.R.4th 118, § 2[a] (1983 & Supp. 2015).

[16] See e.g. Gosnell v. Dorchester School Dist. No. 2, 301 S.C. 21, 389 S.E.2d 865 (1990) (at common law, spouse is entitled to recover value of injured spouse's services, society, and companionship in action for loss of consortium); S.C. Code Ann. § 15-75-20 (1976).

II. JUROR CONCEALMENT DURING VOIR DIRE

The trial judge erred and abused his discretion in denying Appellants' motion for a new trial based on juror concealment, where a prospective juror intentionally concealed during voir dire the facts that she personally knew Respondent and two testifying nurse witnesses, that she had personally worked with them while employed at the hospital, and that she was biased in their favor due to her personal knowledge of them. Bias of the juror is inferred and a new trial is required because the information concealed by Killian would have supported a challenge for cause or would have been a material factor in the use of Appellants' peremptory challenges. Even if the concealment is deemed unintentional and bias is not inferred, Appellants have shown prejudice and a new trial is required.

FACTS

After the trial ended and the jury was dismissed, Appellants' counsel spoke with juror Sandra Carmichael. Appellants for the first time discovered that juror Teressa Killian personally knew and had personally worked with Respondent and the nurses; that Killian poisoned the well throughout the trial by unlawfully and improperly vouching for the alleged credibility, skill and knowledge of Respondent and the nurses based on her personal knowledge, both throughout the trial in premature jury deliberations and during the jury's actual deliberations; that Killian violated the Court's instructions not to discuss the case during the trial by discussing the alleged credibility, skill and knowledge of Respondent and the nurses during breaks; and that Killian harbored a bias or prejudice in favor of Respondent and the nurses. (Aff. of Sandra Carmichael; Pl. Mem. filed June 30, 2015, pp. 2, 5-20 and related exhibits; Tr. of Motion Hearing on July 6, 2015, pp. 3-8.)

The trial judge during voir dire told prospective jurors to tell the truth. (Tr. pp. 7, 9.) During voir dire, the trial judge asked the parties' counsel and the parties to identify themselves by standing up and being pointed out to the jury pool. (Tr. pp. 8-9.)

The trial judge asked, “Is there any member of the jury panel who has ever had a close social or a personal relationship with either the plaintiffs, Philip and Jeanne Ethier, or the defendant, Guy R. Bibeau?” Juror Killian did not respond. (Tr. p. 10.)

The trial judge identified possible witnesses, including Michael Williams, CEO of Fairfield Memorial Hospital, and *twice* identified Jerilyn Wadford, RN, and Rhonda Gwynn, LPN. (Tr. pp. 11-12.) Nurses Wadford and Gwynn were the emergency department nurses who were directly involved in Mr. Ethier’s care and treatment on April 10, 2011, and both testified at trial as defense witnesses. The trial judge then asked, “Now, as to the individuals that I just identified as possible witnesses in this case, has any member of the jury panel ever been related by marriage or are you related by blood or have you ever had a close social or a personal relationship with the people that I’ve identified as possible witnesses?” Juror Killian stood up. (Tr. pp. 12-13.)

> JUROR – Teresa Killian, juror 72. I used to work at Fairfield Memorial Hospital with Mike Williams.
>
> THE COURT – So you knew him from that employment?
>
> JUROR – Yes, sir.
>
> THE COURT – You no longer work there. Is that right?
>
> JUROR – Right.
>
> THE COURT – Okay. How long ago did you work there?
>
> JUROR – It’s been about three, four years ago.
>
> THE COURT – I see. Now, ma’am, if that person were to be a witness in this case and you were seated on the jury, would that fact affect your ability to be fair and impartial to both the plaintiff and the defendant in case?
>
> JUROR – No, sir, it wouldn’t. I could be fair. (Tr. pp. 12-13.)

The trial judge asked, “Is there any member of the jury panel or a member of your immediate family who has ever been employed or been a patient in or treated by any of the following medical professionals . . . Rhonda Gwynne, an RN, or Jerilyn Wadford, an

RN? So if you have been employed by or been treated by or been a patient of any of those medical professionals, please stand." Juror Killian did not respond. (Tr. pp. 18-19.)

At the juror evidentiary hearing held *after* the trial, Killian testified that she began working at Fairfield Memorial Hospital in about 2007, 2008 or 2009, and was there close to two years.[16] (Tr. of Juror Hearing p. 38.) Killian testified that she worked as a certified nurse assistant on the medical/surgical floor and in the emergency department. In the emergency department, Killian testified she triaged patients and worked directly with Respondent, Jeri Wadford and Rhonda Gwynn for nearly two years. (Tr. of Juror Hearing pp. 39-45.)

Killian testified that she knew Respondent from working with him in the emergency department, where she prepared paperwork for him, worked directly under him and was required to follow his instructions. "I worked in the ER when Doctor Bibeau was there. I worked – I would put the labs in the computer for him or I would go to medical records and pull a chart for him for the patient," Killian testified. (Tr. of Juror Hearing pp. 41-42.) Killian worked with Respondent for 1½ to 2 years. (Tr. of Juror Hearing p. 44.) Killian did not know Respondent outside the hospital. (Tr. of Juror Hearing p. 43.)

Killian testified that she knew nurse Jeri Wadford and worked directly with her for 1½ to 2 years in the emergency department and on the medical/surgical floor. (Tr. of

[16] Killian actually worked as a certified nurse assistant at the hospital from October 2005 to May 2007, according to information provided by the hospital after the trial. (Pl. Mem. filed June 30, 2015, EXHIBIT D). Killian testified that she did not know Mr. Ethier. (Tr. of Juror Hearing Tr. pp. 45-46.) Mr. Ethier did not begin working at the hospital until March 2011. (Tr. p. 317.)

Juror Hearing pp. 43-44.) "When I worked in triage she [Wadford] would come in there and she would examine the patient and everything. Read what I wrote and everything. And when we worked on the floor she would take care of the patient. Give him medicine and everything like she did in ER," Killian testified. (Tr. of Juror Hearing p. 44.)

Killian testified that she knew nurse Rhonda Gwynn and worked directly with her in the emergency department. (Tr. of Juror Hearing pp. 44-45.)

When the trial judge asked Killian why she did not reveal during voir dire that she knew and had worked with Respondent, Killian testified, inexplicably and incredibly, that she "didn't really consider myself as knowing him personally." (Tr. of Juror Hearing p. 46.) However, the trial judge noted that Killian *did* respond to the questions by saying she had worked with the CEO, Mike Williams, at the hospital and knew him from that employment. (Tr. of Juror Hearing p. 46.)

Killian testified she talked to Williams "in the hospital and outside the hospital." (Tr. of Juror Hearing pp. 46-47.) Killian testified she first met Williams 16 years ago "at the hospital when my son was two and that was it. I didn't see him anymore. And then when I worked there that's when I got to know Mike." (Tr. of Juror Hearing p. 48.) Williams took care of her son, who is now 18, at the hospital 16 years earlier. (Tr. of Juror Hearing p. 47.)

Killian testified, inexplicably and incredibly, that she did not reveal during voir dire that she knew Respondent, Wadford and Gwynn because she saw them only at the hospital. (Tr. of Juror Hearing pp. 46-47.)

The trial judge asked Killian why she did not reveal she knew and had worked with Wadford and Gwynn when the jury pool was asked about persons who had been

employed or been a patient or treated by certain medical professionals, including Wadford and Gwynn. (Tr. of Juror Hearing p. 48.) Killian testified, inexplicably and without actually answering the Court's question, that she no longer takes her children to Fairfield Memorial Hospital, but goes instead to Chester hospital. Killian then testified that Williams' treatment of her son 16 years ago was something I "had forgot. It just popped in my head just now." (Tr. of Juror Hearing p. 49.)[17]

TRIAL COURT'S RULING

The trial judge ruled that

> Killian did not intentionally conceal from the litigants or the Court her past professional relationship with several witnesses. The Court finds that the voir dire questions did not directly ask the potential jurors about work or professional relationships. A reasonable juror could have reasonably understood the voir dire as asking only about personal or social relationships with witnesses. The Court finds it reasonable that Ms. Killian understood the questions to be about personal friendships or other social relationships and that she felt those types of relationships are separate and distinct from relationships that may have only existed in and were generated by the workplace. . . .
> Moreover, when given the opportunity, the Plaintiffs' counsel failed to request any follow up voir dire questions about who she knew or may have had contact with during her prior employment at the hospital. . . . (Order pp. 4-5.)

LAW

"Under South Carolina law, litigants are guaranteed the right to an impartial jury."[18] "To protect both parties' right to an impartial jury, the trial judge must ask

[17] The trial judge also asked, "Is there any member of the jury panel who has had any medical or legal education, training or experience?" (Tr. p. 19.) Juror Killian stated that she had been a certified nurse assistant at Fairfield hospital, but it would not affect her ability to be impartial. (Tr. p. 20.) In response to a later question, Juror Killian stated that her daughter suffered from depression, but it would not affect her impartiality. (Tr. p. 23.)

[18] Alston v. Black River Elec. Coop., 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001); see also U.S. Constit., Amend. VII; S.C. Code Ann. § 14-17-1050 (2008) ("in all

continued . . .

potential jurors whether they are aware of any bias or prejudice against a party."[19] "Through the judge, the parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for a cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge."[20] "A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge."[21]

"Trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information. . . . Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge."[22]

"A party seeking a new trial based upon the disqualification of a juror must show (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to the verdict; and (3) the moving party was not negligent in failing to learn of the

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civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury"); S.C. Code Ann. § 14-17-1020 (2008) (potential juror shall be deemed incompetent to serve on the jury if he has an interest in the lawsuit such that he is "not indifferent in the cause").

[19] State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282 (2001).

[20] Woods, 345 S.C. at 587, 550 S.E.2d 282 (quoting State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982)).

[21] Woods, 345 S.C. 590, 550 S.E.2d 282.

[22] State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) (citations omitted).

disqualification before verdict." Whether a new trial is warranted depends on the circumstances of each case.[23]

The Supreme Court has explained:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. . . . Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. . . .
>
> We hold that intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.
>
> Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis. . . .
>
> Intentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.
>
> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

Woods, 345 S.C. at 587-88, 550 S.E.2d 282 (citations omitted).

In Woods, the Supreme Court held that the defendant was entitled to a new trial because a prospective juror failed to disclose during voir dire that she had worked as a volunteer victims' advocate for three years in the solicitor's office which prosecuted the

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[23] Thompson v. O'Rourke, 288 S.C. 13, 14-15, 339 S.E.2d 505 (1986).

case. No one from the solicitor's office testified at trial. The Supreme Court held that, in cases of intentional concealment, the moving party it is ***not*** required to show actual prejudice because the juror's bias will be inferred. Woods, 345 S.C. at 588-89, 550 S.E.2d 282; accord Gulledge, 277 S.C. 368, 287 S.E.2d 488 (granting new trial where juror failed to respond to voir dire questions concerning relationship with law enforcement personnel; juror was related by marriage to deputy who had custody of defendant during trial and who had viewed crime scene; this deputy did not testify at trial).[24] When a case involves *unintentional* concealment, a new trial will be granted when the moving party can show prejudice resulting from the juror's failure to respond.[25]

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[24] "In the face of a juror's intentional nondisclosure of pertinent information during voir dire, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. . . . Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; *however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent.*" Coaxum, 410 S.C. 320, 764 S.E. 2d 242 (in unintentional concealment case, Supreme Court rejected defendant's request for mistrial where trial judge replaced a juror in mid-trial after juror recognized one of defendant's family members sitting in the courtroom) (citing Woods, infra) (citations and quotation marks omitted) (emphasis added).

[25] Woods, 345 S.C. 587-89, 550 S.E.2d 282 ("If a juror intentionally withholds material information requested on *voir dire,* bias and prejudice are inferred from such concealment. . . . Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional,* should the trial court inquire into prejudice.") (quoting Doyle v. Kennedy Heating & Service, Inc., 33 S.W.3d 199, 201 (Mo. Ct. App. 2000) (emphasis in original). See also State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375 (2004) (in unintentional concealment case, Supreme Court rejected defendant's request for new trial where juror failed to reveal during voir dire that he had been the victim of a crime 40 years ago; juror stated that he did not remember his attack until after deliberations began and he was unsure whether the attack was a "serious" crime; trial court questioned other jurors about the impact of the statements even though it was not necessary to do so); Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (in unintentional concealment case, Court of Appeals affirmed trial court's ruling that none of voir dire questions unambiguously
continued . . .

ARGUMENT

The trial judge erred and abused his discretion in denying Appellants' motion for a new trial because this case presents a slam-dunk case of intentional concealment. The questions "presented to the jury on voir dire [were] reasonably comprehensible to the average juror and the subject of the inquiry of such significance that the juror's failure to respond is unreasonable." See Woods, supra. It is apparent that there existed no reasonable inability for Killian to comprehend the information solicited by the question asked. Killian clearly remembered personally knowing and working with Respondent and the nurses for nearly two years, and those experiences were of such significance that her purported forgetfulness is unreasonable. See id. The trial judge's questions were *not* ambiguous or incomprehensible to the average juror, and the subject of the inquiry was *not* insignificant or so far removed in time that Killian's failure to respond is reasonable. See id.

The record shows that not only should a reasonable juror have understood the judge's questions were intended to reveal whether potential jurors knew or had worked with anyone involved in the case, ***but Killian actually understood the questions that way***. Killian responded that she "used to ***work*** at Fairfield Memorial Hospital with Mike Williams" and confirmed that she "knew him from that ***employment***." (Tr. p. 13.) (emphasis added). Killian did not go on to reveal that she also knew and had worked with Respondent, Wadford and Gwynn even though the record now shows that she personally knew all three very well by working with them for 1½ years in the ED.

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called for juror to disclose that her ex-husband was represented in divorce by plaintiff's law firm).

Killian's failure to respond to direct, straightforward, unambiguous questions that she plainly understood is truly incredible and disturbing. Her indefensible explanation that she believed she only had to reveal her working relationship with CEO Williams – but not with Respondent, Wadford or Gwynn – simply because she talked to Williams outside the hospital is belied by the fact *she only knew Williams through the hospital.* There is no evidence Killian had any social or personal relationship with Williams outside the hospital other than perhaps saying "hi" on the street. (Killian presumably would also say "hi" to Respondent, Wadford or Gwynn if she saw them on the street.) Killian testified that she first met Williams 16 years ago with her ill son, then did not see him anymore, and then later met him again while employed at the hospital. (Tr. of Juror Hearing pp. 47-48.) It strains credulity to conclude that any reasonable or honest juror on these facts would have identified the CEO as a co-worker, but not the doctor or nurses.

Appellants are not required to show actual prejudice because Killian's bias against Appellants is inferred in this case of intentional concealment, and prejudice from Appellants' inability to strike the juror is apparent. Appellants need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. See Woods, Gulledge, Coaxum, supra.

The key issue is whether the Court's questions were reasonably comprehensible to the average juror and the subject of the inquiry of such significance that the juror's failure to respond is unreasonable. The evidence shows the answer is unequivocally "yes" on both counts.

The judge further erred in ruling that Appellants under these circumstances should have inquired further of Killian during voir dire. At the close of voir dire, Appellants knew that Killian had worked as a certified nurse assistant at the hospital several years before the events at issue, she was no longer employed there, she knew CEO Williams from her employment, she had a depressed daughter, and she believed she could be fair and impartial.

Appellants knew from discovery that Respondent, Wadford and Gwynn were part-time "moonlighters" at the hospital, and the nurses in recent years had worked only in the ED. Respondent worked only a few days each month, while Wadford worked only on Sundays and Gwynn worked only on Saturdays and Sundays. (Pl. Mem. filed June 30, 2015, pp. 15-16; Resp.'s hospital schedule in April 2011, Trial Ex. 32, attached as EXHIBIT E; Tr. of Wadford, pp. 57-60, attached as EXHIBIT F; Tr. of Gwynn, pp. 9-12, attached as EXHIBIT G.) Appellants knew about the basic division between medical/surgical and ED staff. It was neither surprising nor unreasonable for Appellants to conclude that Killian – based on her responses – did not work in the ED and did not know and had not worked with part-time weekenders Respondent, Wadford or Gwynn.

It certainly was a reasonable conclusion in light of the fact that Killian had been asked – in plainly worded, easily understood questions – about any personal or employment relationships with the specified parties and witnesses. It was obvious Killian understood the questions because she had identified in voir dire the one person from the hospital that she did know and had worked with – CEO Williams. To reach the opposite conclusion or to request further voir dire would have required Appellants to assume that Killian was lying or intentionally concealing information only minutes after

she had twice sworn to tell the truth. In fact, Appellants were entitled to assume that Killian and other potential jurors were responding completely and honestly to reasonably comprehensible questions, just as the judge had instructed them to do.[26]

In short, the facts of this case are exponentially more egregious than the reported cases which are controlling on these facts. In Woods, the offending juror merely had volunteered in the solicitor's office, but the solicitor and staff whom the juror knew did *not* testify at trial. In Gulledge, the offending juror knew a deputy who had been involved peripherally in the defendant's case, but the deputy did *not* testify at trial. ***In this case, Killian failed to reveal that she had a paid, personal, direct working relationship for 1½ years with Respondent himself and two of Respondent's key witnesses, all of whom testified at trial.***

If Killian had revealed during voir dire the material fact that she personally knew Respondent or the nurses, or that she had personally worked with them at the hospital, or that she was biased or prejudiced in favor of Respondent and the nurses, the trial judge may have chosen to strike her for cause, depending on whether she said that she could be fair to all parties despite those relationships. If the trial judge had declined to strike Killian for cause based on her responses, Appellants would have had the opportunity to challenge her for cause or exercise a peremptory challenge to strike her. Appellants, in fact, would have struck Killian from the jury if they had known the information she

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[26] See Gulledge, 277 S.C. at 371, 287 S.E.2d at 490 ("Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason.")

withheld during voir dire. (Pl. Mem. filed June 30, 2015, Aff. of Proffitt, ¶¶ 15-16, attached as EXHIBIT C.)

Even if the Court were to accept Killian's inexplicable, incredible explanations for her failure to respond, the Court nevertheless should conclude this is a case of *unintentional* concealment and a new trial is required because Appellants have shown prejudice. The trial judge asked, "Is there any member of the jury panel who is aware of any bias or prejudice that you might have, either for or against either the plaintiffs or the defendants in this case? If that's true, please stand." (Tr. p. 30.) Juror Killian did not respond.

The trial judge asked, "Does any member of this jury panel know of any reason whatsoever why he or she should not serve as a juror in this case, with particular emphasis being placed upon your ability to be both fair and impartial to both the plaintiff and the defendant? If you know of such a reason, please stand." (Tr. p. 31.) Juror Killian did not respond.

As explained in Issue III, based on Killian's statements and arguments in premature and actual deliberations, it is obvious that she lied in failing to respond to these questions. It is obvious that Killian could not be fair and impartial and she was biased in favor of Respondent from day one. Killian unlawfully lobbied for days in favor of Respondent and the two testifying nurses, repeatedly telling jurors that she personally knew them and had worked with them. Killian repeatedly poisoned the well against Appellants. Killian vouched personally for the alleged credibility, skill and knowledge of Respondent and the two nurses, and by stating throughout the trial in premature deliberations that all three persons were thorough and careful in their work, and that if

they said they did something, then they did it; and she unlawfully and improperly expressed her bias during premature and actual deliberations, and exercised that bias during actual deliberations.

Given the abundant record of this rogue juror's actions and her impact on Appellants' right to a fair and impartial jury, Appellants have shown prejudice even when this case is analyzed as a case of unintentional concealment.

The trial judge erred in denying Appellants' motion for a new trial on the basis of juror concealment of information during voir dire, whether the case is viewed as one of intentional or unintentional concealment. This ground alone is sufficient to grant a new trial; however, the trial judge also erred in the rulings discussed below.

III. JUROR MISCONDUCT DURING PREMATURE AND ACTUAL DELIBERATIONS

The judge erred and abused his discretion in denying Appellants' motion for a new trial based on juror misconduct consisting of premature and actual deliberations, where a seated juror engaged in misconduct by:

(1) stating throughout the trial in premature and actual jury deliberations that she personally knew Respondent and two testifying nurse witnesses because she personally had worked with them;

(2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by improperly bolstering and vouching personally for the alleged credibility, skill and knowledge of Respondent and the two nurses, and by stating throughout the trial in premature and actual deliberations that all three persons were thorough and careful in their work, and that if they said they did something, then they did it; and

(3) unlawfully and improperly expressing her bias during premature and actual deliberations in favor of Respondent and the nurses due to her personal knowledge of them; and

(4) unlawfully and improperly exercising her personal bias in favor of Respondent by arguing and voting for a defense verdict as to Mr. Ethier.

FACTS

After the trial ended and the jury was dismissed, Appellants for the first time discovered that Teressa Killian personally knew and had personally worked with Respondent and the two testifying nurses; that Killian throughout the trial in premature and actual jury deliberations unlawfully and improperly vouched for the alleged credibility, skill and knowledge of Respondent and the nurses based on her personal knowledge, all in violation of the Court's instructions not to discuss the case during the trial; and that Killian harbored a bias or prejudice in favor of Respondent and the nurses. (Aff. of Sandra Carmichael; Pl. Mem. filed June 30, 2015, pp. 21-32 and related exhibits; Tr. of Motion Hearing on July 6, 2015, pp. 15-21.)

Carmichael testified in her affidavit that:

> During the trial before deliberations, one of the jurors, Teressa, told us that she formerly worked at Fairfield Memorial Hospital.
>
> I know that Teressa is a certified nursing assistant because she told us that is her job.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teressa, when she referred to "Jeri," meant Jerilyn Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.
>
> Teressa repeatedly said during breaks in the jury room that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau did not do the foot pulses, then it was because Jeri did it and she's very thorough."
>
> Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor."
>
> . . .
>
> Teressa repeatedly made these statements about Dr. Bibeau and Jeri every day when we were on break in the jury room. No one asked her to make them, although she and another juror, Kayla, would often discuss them.

. . .

> After the other nurse, Rhonda Gwynn, testified, Teressa said during a break in the jury room that she also personally knew Rhonda and that Rhonda was a good nurse who was thorough in her job. Teressa did not talk as much about Rhonda as she did about Dr. Bibeau and Jeri. (Aff. of Carmichael, ¶¶ 4-11, 13, 16.)

Carmichael testified that Killian made these same statements during actual deliberations. (Aff. of Carmichael, ¶¶ 6-7, 17-21.)

Carmichael testified that at the beginning of deliberations, she believed that Respondent was more at fault than Mr. Ethier, and that several other jurors expressed the same opinion. "However, Teressa repeatedly stated her opinions about knowing Dr. Bibeau and Jeri personally, and that she had worked with them for three years, and that they were very careful and thorough. Teressa's statements, which she had made so often and so firmly and which she made during deliberations, were a big reason that I eventually changed my mind and became persuaded that Mr. Ethier was more negligent than Dr. Bibeau." (Aff. of Carmichael, ¶¶ 23-25.)

Carmichael testified that Killian told jurors during the trial that she "knew the defendant and she stated that on several occasions that she worked for him for three years." (Tr. of Juror Hearing pp. 20-22.) Killian made the comments in the jury room during breaks, mostly after defense witnesses testified. "Once we went back in there she started talking more and more about it," Carmichael testified. (Tr. of Juror Hearing p. 20.) Killian told jurors that Respondent and nurse Jeri were honest and dependable and "if she [nurse Wadford] said she did it she did it." (Tr. of Juror Hearing p. 21.)

"It was almost like . . . once the defendant started calling witnesses and we go back there on a short break or whatever she [Killian] was always bringing up Doctor Bibeau. He's a good doctor. He's a dependable doctor. I know because I worked with

him," Carmichael testified. (Tr. of Juror Hearing p. 23.) Other jurors heard Killian's statements and at least a couple discussed them with Killian, including juror Kayla Stewart. (Tr. of Juror Hearing pp. 22-23.) Carmichael testified that she was afraid to speak up during trial and did not know how to broach the issue.[27] (Tr. of Juror Hearing pp. 20, 36.)

Carmichael testified that Killian's statements about Respondent and the nurses affected her verdict and other jurors' verdicts. "I just felt like she kept on saying it over and over once we started deliberating to sway other jurors to her side Doctor Bibeau as far as his reputation or whatever, you know," Carmichael testified. (Tr. of Juror Hearing p. 24.)

> Q. [THE COURT:] But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?
>
> A. [CARMICHAEL:] I think it did a little.
>
> Q. Can you tell me in what way?
>
> A. Because when we got back there we was – several of us was leaning towards in favor of the plaintiff and she [Killian] kept on repeating the reputation

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[27] The trial judge in his initial instructions told the jury they should only consider evidence presented by witnesses on the stand, and it would be a violation of their oath to consider evidence from outside the courtroom, that they should keep an open mind, and that "even the most innocent conversation that you might have among yourselves about the issues involved in this case or the personalities involved in the trial . . . that such a conversation of that might begin to color your decision. . . ." (Tr. pp. 38-39.) Appellants submit these instructions were repeatedly violated, jurors' decisions were colored prematurely and Appellants were greatly and unfairly prejudiced.

The trial judge repeatedly reminded jurors throughout the trial not to discuss the case prematurely. The judge repeatedly asked jurors whether they had complied with his instructions upon their return to the courtroom. <u>See e.g.</u> Tr. pp. 77, 245-46, 309, 464-65. However, jurors may have understood the judge's questions only to be directed at each of them individually. The trial judge acknowledged that jurors were not explicitly asked whether they were aware of any other juror's violation of the instructions. (Tr. of Juror Hearing pp. 29-31.)

and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then maybe he didn't, you know, sign those papers. She knew him.

Q. Okay, so it did have some effect on your ultimate decision?

A. Yeah. She [Killian] stated several times that she knew him and he was a good, reliable doctor. . . .

Q. Now, as to the information that you were given by Theresa can you tell me how it affected your final decision. Take a minute to think about it. You don't have to answer it right away?

A. Well, like I said she stated that she knew him. She worked with him. He's a good doctor. A thorough doctor. So I just felt like if she worked with him she knew him better then, you know any of us did. So, I felt like if she worked with him that long and she thinks he's a good doctor then he must be a good doctor.

Q. Now, you said when the deliberations began you were of one opinion or had a opinion. What was your opinion when the deliberations began when you first started about the case, the issues that we were concerned with?

A. That Doctor Bibeau was more at fault then (sic) Phil [Appellant]. I had him at fault because he was suppose to go to your own physician but I thought that Doctor Bibeau being a doctor was more at fault.

Q. And you changed that opinion before the final verdict?

A. Yes, sir.

Q. And what did you base that on your change?

A. Theresa's [Killian] knowledge of Doctor Bibeau's work. (Tr. of Juror Hearing pp. 26-28.)

Nine jurors testified they heard Killian say, in the jury room during breaks in the trial, that she worked at the hospital with Respondent, Wadford and Gwynn.[28]

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[28] (Sandra Carmichael, Tr. of Juror Hearing pp. 20-23; Aff. of Carmichael, ¶¶ 4-7; Kayla Stewart, Tr. of Juror Hearing pp. 66-67, 71-72; Foreperson Connie Pete, Tr. of Juror Hearing pp. 81-84; Shawna Cason, Tr. of Juror Hearing p. 96; Austin Smith, Tr. of Juror Hearing p. 101; Linda Albowicz, Tr. of Juror Hearing pp. 127-128, 134; Misty Beam, Tr. of Juror Hearing pp. 138, 140-141; Kathy Rabb, Tr. of Juror Hearing pp. 157-158; Shikierra Harrison, Tr. of Juror Hearing pp. 167-168; Alternate Sandra Mitchell, Tr. of Juror Hearing p. 176.; <u>see</u> Pl. Mem. filed June 30, 2015, EXHIBIT H containing excerpts of the testimony of these nine jurors.)

Four jurors testified they heard Killian, in the jury room during breaks in the trial, vouch for the skill or proficiency of Respondent, Wadford or Gwynn by making statements to the effect of, they were good, careful or thorough, or if the doctor did not take the foot pulses, then the nurse did.[29]

Four jurors testified they heard Killian, in the jury room during breaks in the trial, vouch for the truthfulness or credibility of Respondent, Wadford or Gwynn by making statements to the effect of, if they said they did something, they did it.[30]

Foreperson Connie Pete testified that Killian talked so much in the jury room that she tried to ignore her. "She [Killian] was a very talkative person. She kind of talked a lot. Kind of blocked her out. . . . So you know, may be what she was talking about [was] not necessarily grasped [by] a lot of people because I kind of blocked her. So I am not exactly sure she all said but I do – . . . I do recall her saying that she did work there" at the hospital, Pete testified. (Tr. of Juror Hearing p. 82.) Pete did not deny that Killian made additional, specific statements, but she did not recall them. (Tr. of Juror Hearing p. 84.)

Juror Linda Albowicz testified that Killian at one point even confessed she did not believe she should be on the jury. "She let us know that she wasn't sure how she got

[29] (Sandra Carmichael, Tr. of Juror Hearing pp. 21-23; Aff. of Carmichael ¶¶ 7-16; Kayla Stewart, Tr. of Juror Hearing pp. 66-67, 71-72; Shawna Cason, Tr. of Juror Hearing pp. 89-90; Kathy Rabb, Tr. of Juror Hearing pp. 157-159; see Pl. Mem. filed June 30, 2015, EXHIBIT I containing excerpts of the testimony of these four jurors.)

[30] (Sandra Carmichael, Tr. of Juror Hearing pp. 21-22, Aff. of Carmichael ¶¶ 7-16; Shawna Cason, Tr. of Juror Hearing pp. 93-94; Tara Brown, Tr. of Juror Hearing pp. 115-117; Kathy Rabb, Tr. of Juror Hearing pp. 157-159; see Pl. Mem. filed June 30, 2015, EXHIBIT J containing excerpts of the testimony of these four jurors.) Tara Brown first testified that she did hear such statements in the jury room before deliberations began, but then testified she did not.

chosen to be on the jury because she worked with everybody. . . . We explained to her when she was asked if this would, you know, prevent her from rendering a non-bias[ed] judgment that was her opportunity to get out of it. She should have answered in the affirmative," Albowicz testified. "But she didn't?" the trial judge asked. "No, she didn't," Albowicz replied. (Tr. of Juror Hearing Tr. p. 128.) Albowicz did not deny that Killian made additional, specific statements about Respondent and the nurses, but she was at the opposite end of the table from Killian and may not have heard her or paid attention to her. (Tr. of Juror Hearing pp. 130-131.)

For her part, Killian testified that she recalled the Court's instructions not to talk about the case prematurely and denied doing so. In an obvious lie, Killian flatly denied making any statements at all to other jurors about Respondent or the nurses during the trial before deliberations began. (Tr. of Juror Hearing pp. 49-51, 54.) When asked about specific statements which other jurors reported that Killian made about the doctor or nurses before deliberations began, Killian repeatedly denied making any such statements. (Tr. of Juror Hearing pp. 57-59.)

TRIAL COURT'S RULING

The trial judge found that Killian "did make statements that were heard by several jurors concerning her work experience with [Respondent] and Nurse Wadford" and "that some premature comments were made to a few jurors." (Order p. 10.) "However, the Court concludes that these statements had no real effect on the consideration of the verdict in this case." (Order p. 10.) The trial judge ruled that the "comments were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences or from extraneous matters." (Order p. 10.) The judge

concluded there "was no testimony from any juror that would indicate the other jurors entered into discussions with her on these matters. In fact, the vast majority of the jurors did not recall the statements being made or indicated that the statements had no bearing on their ultimate verdict in the case." (Order p. 10.)

LAW

"As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995); accord State v. Thomas, 268 S.C. 343, 234 S.E.2d 16 (1977); Barsh v. Chrysler Corp., 262 S.C. 129, 203 S.E.2d 107 (1974). However, the Supreme Court in Hunter and its progeny has held that "[w]hen an extraneous influence is alleged, juror testimony can normally be used. If the alleged misconduct is internal, courts are more strict. Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e., fundamental fairness." Hunter, 320 S.C. 88, 463 S.E.2d at 316. Rule 606(b), SCRE, allows juror testimony regarding extraneous prejudicial information or an outside influence. The Supreme Court has held that

> a jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed. . . . The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. Aldret, 333 S.C. 307, 311-12, 509 S.E.2d 811 (1999); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008). The moving party has the burden to establish prejudice by proving that the misconduct affected the jury's impartiality. Aldret, 333 S.C. at 313-15, 509 S.E.2d 811.

ARGUMENT

The trial judge erred and abused his discretion in denying Appellants' motion for a new trial because the record shows that Killian's statements constitute juror misconduct and premature and actual jury deliberations which poisoned the well against Appellants throughout the trial, all in violation of the Court's instructions and Appellants' fundamental right to a fair and impartial jury.

The existence, scope and adequacy of the examination of Mr. Ethier by Respondent and the alleged triage examination by RN Wadford were hotly disputed at trial. The dispute in particular focused on whether right foot pulses were taken only by Anthony, an inexperienced certified nurse assistant in triage, or also by RN Wadford in triage or, most importantly, by Respondent himself. The credibility of Respondent and the RN Wadford's testimony on this point was of critical importance. Defense counsel in closing repeatedly emphasized that judging the credibility of Mr. Ethier and Respondent was crucial. (Tr. pp. 1320-21, 1330.)

The trial judge erred in denying Appellants' motion for a new trial because the record shows that specific, important and hotly disputed facts were implicated and unlawfully discussed by Killian during premature and actual deliberations: whether the foot pulses actually were taken and who supposedly took them, and the alleged credibility, skill and knowledge of Respondent and RN Wadford in providing care to Mr. Ethier. The alleged taking of the foot pulses by Respondent was essential to his defense that he actually had considered the possible diagnosis of a blood vessel problem and had performed a vascular exam. Killian did not simply offer a couple of random comments or express some generalized bias. Killian in the jury room presented herself to the jury as

a witness who had an insider's knowledge of the Respondent and the ED nurses – all key defense witnesses – and preached their virtues, credibility, skill and knowledge throughout the trial and in deliberations.

Other jurors' testimony strongly corroborates Carmichael's detailed testimony about Killian's misconduct during premature and actual deliberations. Carmichael and eight other jurors testified that Killian talked about working at the hospital with Respondent and the nurses. Carmichael and three other jurors testified that Killian vouched for the skill or proficiency of the doctor and nurses. Carmichael and three other jurors testified that Killian vouched for the truthfulness or credibility of the doctor and nurses.

Although made in the jury room, Killian's statements constituted improper bolstering, inadmissible, irrelevant character evidence, inadmissible opinion testimony by a lay witness, inadmissible evidence of care allegedly provided to other patients, inadmissible evidence of routine habit or practice, and were inadmissible because their probative value was outweighed by their prejudicial impact. See Rules 401, 403, 404, 406, 607, 608 and 701, SCRE. Appellants, of course, were unable to prevent, challenge or rebut any of these improper statements offered as the gospel truth by a person allegedly in the know, as they occurred in the jury room.

Appellants were prejudiced because Killian's verdict was affected by her obvious and oft-expressed bias. Appellants also were prejudiced because Carmichael testified that Killian's statements affected her verdict, and the effect on a single juror's verdict is enough to prove prejudice. One juror can change the entire verdict or even cause a hung jury. However, Carmichael also testified that she believed the statements affected other

jurors' verdicts because several of them were in favor of Appellants until Killian's repeated comments swayed their opinion. If Carmichael or other jurors had not been affected or swayed by Killian's misconduct, the outcome of the trial likely would have been different. An untainted jury likely would have reached a different conclusion on the apportionment of fault between Respondent and Mr. Ethier, and found Respondent more at fault than Mr. Ethier. An untainted jury likely would have awarded a larger verdict instead of a compromise verdict. Appellants are entitled to a new trial because they did not have a fair and impartial jury.

CONCLUSION

For all the foregoing reasons, Appellants request that this Court reverse the trial judge's ruling that the jury's verdict was in favor of Respondent on Mrs. Ethier's loss of consortium claim and remand this case for entry of judgment in favor of Mrs. Ethier as stated in the jury's verdict. Appellants further request that this Court reverse the trial judge's denial of their motions for a new trial and remand this case for a new trial absolute.

Respectfully submitted,

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June 30, 2016

Attorneys for Appellants

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2015-001964

Philip Ethier and Jeanne Ethier,

Appellants,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc; and Pee Dee Emergency Medical Associates, PA,

Defendants,

Of whom Guy R. Bibeau, M.D., is the Respondent.

PROOF OF SERVICE

I, the undersigned lawyer or employee in the offices Proffitt & Cox, LLP, Attorneys for Appellants, do hereby certify that I have served the counsel or parties specified below in this action with a copy of the specified pleadings by causing a copy of the same to be _X_ mailed by United States Mail, postage prepaid; ____ e-mailed; ____faxed; ____ hand-delivered, to the following address:

Pleading: Appellants' Motion for Permission to File Second Amended Initial Brief Out of Time
and
Appellants' Second Amended Initial Brief dated June 30, 2016

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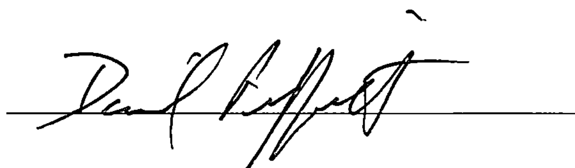

June 30, 2016

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June 30, 2016

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
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SC Court of Appeals

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
Appellate Case No. 2015-001964
PC File No. 1236.01

Dear Ms. Kitchings:

Please find enclosed the original and one copy of Appellants' Second Amended Initial Brief. Also enclosed are the original and seven copies of Appellants' Motion for Permission to File Second Amended Initial Brief Out of Time.

Appellants incorporate by reference their Designation of Matter previously filed on January 22, 2016.

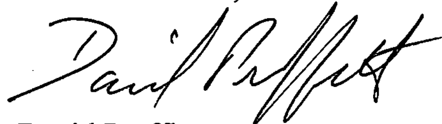
Please file the originals and return the date-stamped copies to me in the enclosed envelope.

A check for the $25 motion filing fee is enclosed.

With kindest personal regards, I remain

Sincerely yours,

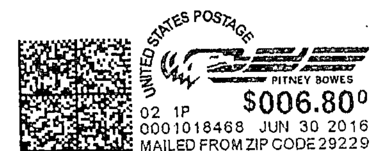
PROFFITT & COX, LLP



David Proffitt

RDP/nif
Enclosures

cc: Andrew F. Lindemann (w/ enclosures)
G. Murrell Smith, Jr. (w/ enclosures)
David Holler (w/ enclosures)
Stanley L. Myers (w/ enclosures)



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