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.

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I.

The present case is not at all similar to the cases cited by Respondent. 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.

Contrary to Respondent Dr. Guy Bibeau's argument, the present case is not at all "identical" or "remarkably similar" to Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007) or two other cases cited by Respondent. In fact, Appellants' case presents the opposite set of facts. The cases cited by Respondent did not address the issue at hand and are not dispositive.

In Lee, a wreck case, the jury found the injured plaintiff 70% at fault, the defendant 30% at fault, and also found that the defendant was *not* liable for the injured plaintiff's wife's loss of consortium claim. In this case, the jury found Appellant Philip Ethier 70% at fault, Respondent 30% at fault, and *did find* Respondent liable for negligently causing Appellant Jeanne Ethier's loss of consortium damages and awarded damages to her. (Verdict Form Question Nos. 1, 8, 9, R. pp. 3-5.)

Furthermore, as explained at length in Appellants' main brief, there was no holding or discussion by the Supreme Court in Lee on the issue raised in this case – whether the consortium spouse may recover her damages when the jury determines that the defendant is negligent and awards damages to the consortium spouse, but the injured spouse recovers nothing because his negligence exceeds that of the defendant. The Supreme Court in Lee simply made an observation in passing that had no bearing on its decision in Lee. The

Supreme Court did not address South Carolina law which says the negligence of one spouse is not imputed to the other; nor did the Supreme Court address the many cases since the 1920s holding 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. (See App. Br., pp. 13-26.)

Respondent's interpretation of Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 119-21, 512 S.E.2d 510 (Ct. App. 1999) is incorrect and his reliance on that case is misplaced. In Creighton, the trial judge dismissed the consortium spouse's case after the jury determined the defendant was not liable to either the injured spouse or the consortium spouse in a slip-and-fall case. The claims of both the injured and consortium spouses were tried together by consent in a bifurcated case in which the liability issue was tried first. Id. at 119-21.

In fact, the Court of Appeals in Creighton explicitly noted that "[a]lthough the trial judge's order dismissing the loss of consortium claim misstates the law, we find the order to be mere surplusage because the action was consolidated for trial with the liability action by consent of the parties." Id. at 119. The Court of Appeals explained that, " [u]nder South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative. . . . A verdict for a defendant in the injured party's action does not bar the loss of consortium claim." Id. at 119 (citations omitted). The Court of Appeals further explained that "[a]lthough a loss of consortium claim is not res judicata because of a defendant's verdict in a negligence action, a loss of consortium claim cannot arise if no tort is committed against the impaired spouse. . . . In order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's liability for the spouse's injuries, as well

as damages to the plaintiff resulting from the spouse's injury." Id. at 121 (citations and footnote omitted).

The Court of Appeals in Creighton simply applied the unsurprising principle that – when the jury returns a verdict finding no negligence at all by a defendant in a case brought by both injured and consortium spouses – neither the injured spouse nor the consortium spouse may recover damages.

That unsurprising principle has no application in the present case. 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, R. pp. 3-5.)

Respondent's reliance on Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 307, 395 S.E.2d 742, 744 (Ct. App. 1990), also is misplaced. In Smith, 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. Smith does not support Respondent's argument.

For all of these reasons and the reasons set forth in Appellants' main brief, the jury's verdict in favor of Mrs. Ethier and the award of damages of $250,000 to her are proper.

II.

A. Respondent's arguments regarding the purported impact of S.C. Code Ann. § 15-38-15 on the award of damages to Jeanne Ethier are not preserved for appellate review for multiple reasons.

Respondent in his brief asserts that, pursuant to S.C. Code Ann. 15-38-15, he should be liable for only 30% of the damages owed to Jeanne Ethier, and Philip Ethier should be liable for the rest. Respondent urges this Court to apply the "spirit" of the statute and asserts, without explanation or any citation to authority, that to refuse to apply it in the suggested manner would somehow violate equal protection. Respondent argues that the statute allows a defendant to assert that another potential tortfeasor contributed to causing the damages and may be held liable for it, and Mr. Ethier in this case is the other "potential tortfeasor." (Resp. Br. at pp. 33-38.)

Respondent's arguments regarding § 15-38-15 are not preserved for review because (1) Respondent never raised the application of the statute or challenged the jury's verdict at trial; (2) Respondent briefly mentioned § 15-38-15 at a post-trial hearing, but did not make the arguments he now makes on appeal; (3) Respondent's arguments regarding the statute were raised for the first time at a post-trial motion hearing and were never ruled on by the trial judge; and (4) as explained further below, the statute explicitly requires the jury which heard the evidence at trial to perform any allocation of damages among multiple defendants and that never occurred, of course, because there was only one defendant.

At a hearing on post-trial motions on July 6, 2015 – three months after the trial – Respondent briefly mentioned § 15-38-15 and stated that "there's an allocation of liability

that needs to be done." Respondent asserted only that there were two "tortfeasors," himself and Mr. Ethier, and because the jury found Mr. Ethier 70% at fault, then Respondent should be liable for no more than 30% of Mrs. Ethier's award. (Tr. of Motion hearing, R. pp. 496-97.)

The trial judge did not rule on Respondent's arguments or decide any issue regarding § 15-38-15. The judge stated in his Order:

> The Defendant takes the alternative position that any verdict on the loss of consortium claim in favor of Mrs. Ethier is subject to (1) a reduction of the verdict under S.C. Code Ann. § 15-38-15 and (2) equitable set-off based on the pre-trial settlement reached by the Plaintiffs with Fairfield Memorial Hospital. It is not necessary for the Court to address this alternative position by the Defendant or the Plaintiffs' arguments in opposition.

(Order, R. p. 23 at n.3.)

As argued in Appellants' main brief, 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. (App. Br., p. 19-20 and n.7.) Remanding this case for consideration of Respondent's arguments is neither lawful nor necessary.

Respondent's arguments also are not preserved for review because they were either not raised to the trial judge, not ruled on, or both. E.g. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court"; if trial court fails to rule on issue, party must file Rule 59(e) motion in order to preserve it for review); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled

upon by the trial judge to be preserved for appellate review."); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review, and party must make a Rule 59(e) motion when PCR judge fails to rule on an issue the party has raised); Ex Parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (refusing to consider argument not raised to and ruled on by trial court); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 243, 399 S.E.2d 779, 783 (1990) (refusing to consider alternative argument regarding validity of default judgment that was not raised to and ruled on by trial court); Jennings v. Dargan, 308 S.C. 317, 322, 417 S.E.2d 646, 648 (Ct. App. 1992) (refusing to consider argument not raised to and ruled on by family court).

Respondent's arguments also are not preserved because an issue or argument cannot be raised for the first time after a trial when it should have been raised during the trial. E.g. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (issue is not preserved where party first raised it in a new trial motion); C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (party may not use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not); McClurg v. Deaton, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) (holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not).

Moreover, the Court should reject Respondent's conclusory, unsupported assertions that the Court should consider the "spirit" of § 15-38-15, and that refusing to interpret the statute as Respondent suggests would violate equal protection. E.g. Colleton

County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006) (issue is deemed abandoned if the argument in the brief is conclusory); First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating a party failing to provide arguments or supporting authority for its assertion is deemed to have abandoned the issue); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal); Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 690 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

B. Respondent's arguments regarding § 15-38-15 and the reduction of Jeanne Ethier's award are without merit because the statute does not apply in this single-defendant case. The statute does not affect the law of comparative negligence or Mrs. Ethier's right to an award of damages as determined by the jury.

The plain terms of the statute show that it does not apply at all in this case and it cannot now be applied because – even if it did apply – any allocation of fault among multiple defendants must be done by the trial jury which heard the evidence and that never occurred. Remanding this case for consideration of Respondent's arguments is neither lawful nor necessary.

Appellants submit that § 15-38-15 provides:

FIRST, the statute by its plain terms applies *only* when a jury which heard the evidence at trial is asked to determine the percentage of fault among *two or more defendants*. The existence of multiple defendants at trial is a prerequisite for applying the statute at all and it does not apply when a trial involves only a single defendant. At least

one defendant must make a motion for the jury to allocate fault among the multiple defendants. See S.C. Code Ann. § 15-38-15(A) ("In an action to recover damages . . . if indivisible damages are determined to be proximately caused by *more than one defendant*. . . .") (emphasis added); § 15-38-15(B) ("Apportionment of percentages of fault *among defendants* is to be determined as specified in subsection (C)) (emphasis added); §15-38-15(C)(3) (the jury shall, "upon a motion by *at least one defendant*, where there is a verdict . . . for damages *against two or more defendants* for the same indivisible injury . . . specify in a separate verdict . . . the percentage of liability that proximately caused the indivisible injury that is attributable to *each defendant* whose actions are a proximate cause of the indivisible injury. . . .") (emphasis added); § 15-38-15(E) ("Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to *each defendant's* percentage of liability. . . .") (emphasis added).

SECOND, in order for the statute to apply, the jury which heard the evidence, determined there was negligence and awarded damages, must upon proper motion then assign percentages of fault to the multiple defendants in a special verdict form. The parties must be given an opportunity at trial to make a separate oral argument to the jury on the percentage attributable to each defendant. § 15-38-15(C)(3)(b) ("After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.").

THIRD, if there are two or more defendants at trial who have been determined by the jury to have caused an indivisible injury, such that the statute applies, then the jury must determine the percentage of fault, if any, applicable to each defendant and to the plaintiff if comparative negligence is an issue. The jury must determine the percentage of fault attributable to each of the multiple defendants and the plaintiff, with the total of the percentages equaling 100%. See § 15-38-15(A) ("joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff"); § 15-38-15(C)(2) and (3) (jury shall "determine the percentage of fault, if any, of plaintiff" and "[i]n determining the percentage attributable to each defendant, any fault of the plaintiff . . . will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent").

FOURTH, if there are multiple defendants who caused an indivisible injury, such that the statute applies, and if the jury assigns a percentage of fault to each defendant, then a defendant found 50% or more at fault is jointly and severally liable for the entire award. A defendant in a multi-defendant case who is found less than 50% at fault is liable only for the percentage of the damages determined by the jury. §15-38-15(A) ("joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier

of fact."). See Summer v. Carpenter, 328 S.C. 36, 48, 492 S.E.2d 55, 61 (1997) (under doctrine of joint and several liability, joint tortfeasors are liable for plaintiff's damages, both jointly and severally).

FIFTH, if there are multiple defendants who caused an indivisible injury, such that the statute applies, a defendant has the right to assert that "another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." § 15-38-15(D). Although a defendant may be entitled to make an "empty chair" argument, the percentages of fault on the special verdict form must be assigned only to the multiple defendants in the trial and the plaintiff in a comparative negligence case. § 15-38-15(C)(3) ("[i]n determining the percentage attributable to each defendant, any fault of the plaintiff . . . will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent").

The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The Legislature used the term "defendant" throughout the statute, indicating an intent to apply § 15-38-15 only to multiple defendants at trial who are ordered to pay damages. In this case, there was only *one* Defendant at trial – Respondent Dr. Bibeau. There were no multiple defendants fighting about allocation of fault and § 15-38-15 does not apply at all. The jury did exactly what the trial judge instructed it to do and with the consent of the parties – decide whether Dr. Bibeau was negligent and then determine the respective degrees of fault between him and *Mr.* Ethier.

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. (Jury charges, R. pp. 1027-37.) At the hearing on Plaintiffs' post-trial motions, the trial judge acknowledged that the jury was correctly instructed to assign percentages of negligence only between Respondent and *Mr.* Ethier. (Tr. of Motion Hearing, R. 493). There should be no need for any further argument or analysis; the statute is simply inapplicable.

Regardless, even if the statute did apply (which it does not), any argument by Respondent now seeking some allocation under the statute comes too late. The jury which heard the evidence at trial must determine the percentage of fault, if any, applicable to each of the multiple defendants. See § 15-38-15(C)(2) and (3). Respondent in this case never moved to have the jury allocate fault among Defendants at trial. Undoubtedly, that was because there was only one Defendant – Respondent – and so there obviously was no reason for such a motion. It also was because the jury had allocated fault among the only appropriate parties in the case based on comparative negligence – Respondent and Mr. Ethier. (See also App. Br., p. 19-20 and n.7.)

The Court should reject Respondent's conclusory, unsupported argument that Mr. Ethier somehow is a "tortfeasor" along with Respondent under § 15-38-15, and so Mr. Ethier's negligence is somehow imputed to Mrs. Ethier, and so the statute somehow requires that Respondent only pay Mrs. Ethier 30% of the $250,000 awarded to her. Respondent's argument is far removed from the true purpose and application of the statute.

Mr. Ethier is not a "potential tortfeasor" under the statute. He is not an "empty chair" defendant. He is the injured plaintiff and was found to be partly at fault under comparative negligence when the jury allocated fault between Mr. Ethier and Respondent. Again, there was only one defendant at trial – meaning the statute is inapplicable – and Respondent's effort to squeeze Mr. Ethier into the box of "potential tortfeasor" is improper and unpersuasive.

The Court also should reject Respondent's argument that, "taking the [Appellants'] logic to its extreme, then § 15-38-15(A) would have no application in a case with a counterclaim where the 'defending party' – i.e., the tortfeasor – is a plaintiff. That is truly absurd." (Resp. Br., p. 35.)

Respondent's argument is without merit. If a case arises where a defendant has made a counterclaim against two or more plaintiffs, then the plaintiffs are defendants with regard to the counterclaim. If necessary, multiple counterclaim defendants could move for the jury to allocate fault among them as provided by § 15-38-15 just as any set of multiple defendants may do.

The purpose of § 15-38-15 is simply to provide a mechanism by which a jury that heard the evidence may be asked to allocate fault among multiple defendants and allow

those defendants to pay only their assigned share if it does not exceed 50% -- nothing more, nothing less.

The Legislature had no intent to modify, and did not modify, the law of comparative negligence. The Legislature had no intent to modify, and did not modify, longstanding law which says that the negligence of one spouse is not imputed to the other. The Legislature had no intent to modify, and did not modify, longstanding law regarding the separate and independent nature of a consortium spouse's claim, which allows a consortium spouse to be awarded her full damages when the defendant's negligence is proven even though the injured spouse may not be entitled to damages. (See App. Br., pp. 13-26.)

Accordingly, the Court should reject Respondent's arguments regarding § 15-38-15 because they are not preserved for appellate review and because they are without merit.

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.[1] In addition, 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,

[1] Appellants acknowledge that the award of $250,000 to Mrs. Ethier would be reduced by $40,000, the amount she received in settlement from Fairfield Memorial Hospital. See Truesdale v. S.C. Hwy. Dept., 264 S.C. 221, 235, 213 S.E.2d 740 (1975).

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CERTIFICATE OF COUNSEL

The undersigned certified that Appellant's Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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