THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court Of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Case No. 2012-CP-25-38-0845
South Carolina Court of Appeals No. 2017-000963

Ralph C. Williams, Sr., and Linda Williams, Appellants,

v.

Patricia A. Johnson, Josette Peppers and
UniHealth Post-Acute Care—Orangeburg, LLC, Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Because ample evidence supports the trial court's decision to grant a new trial under the thirteenth juror doctrine, the standard of review requires that the decision remain undisturbed.

II. As part of the *prima facie* case for his *respondeat superior* claim, Appellant bore the burden of proving that the employees acted within the scope of their employment, but because he argued that they acted intentionally and with malice, the trial court properly denied his motions for directed verdict.

III. Appellant may not raise for the first time on appeal issues and arguments not raised at trial.

STATEMENT OF THE CASE

This appeal stems from the trial court's exercise of its broad authority under South Carolina's well-established "thirteenth juror" doctrine, a vehicle that vests in trial courts veto power to the "Nth degree." When, as here, the trial court finds that the evidence does not justify the verdict, the Judge may exercise the power and grant a new trial. On appeal, as long as there is conflicting evidence, the trial court's grant of a new trial will not be disturbed. And while there is, therefore, no requirement for this Court to evaluate the justification for the decision, the trial court's decision in this case was certainly well justified.

The case involves the reporting of suspected sexual abuse of a young, female nursing home resident in Orangeburg. Two nurses, now defendants in this case, reported a fellow male nursing assistant, the Appellant, for suspected sexual assault on an incapacitated female patient. Walking into the resident's closed-door room

in the dead of night, one of the nurses found the Appellant in bed on top of a younger female resident with his pants down, the resident's pants down, and the lights off. Appellant's naked butt was exposed, and the resident's gown was pushed up so far that her naked breasts were exposed. The first nurse rushed for help and found a second nurse. When they returned, Appellant was adjusting his pants and offered no explanation for his conduct. Appellant admits that he was on the resident's bed, in violation of his training and standard practice. Appellant admits that his pants had come down. Suspecting sexual abuse, the nurses reported the incident to law enforcement, as South Carolina law requires.

One can hardly pick up a paper today without reading about an incident of sexual abuse that went unreported or remained stifled for years. Recognizing the danger of unreported abuse, the State of South Carolina sought to encourage—indeed, require—the affirmative reporting of even *suspected* abuse of the state's vulnerable patients. The Omnibus Adult Protection Act (the "Protection Act") requires nurses to "immediately" report "suspected" sexual abuse. S.C. Code Ann. § 43-35-25(G). To encourage the immediate reporting of suspected sexual abuse, the Protection Act presumes the good faith of reporting nurses and grants them immunity for good faith reporting. S.C. Code Ann. § 43-35-75(A).

On appeal, and contrary to the position he took at trial, Appellant now admits: "*The only evidence was that [the defendant nurses] . . . were attempting to*

follow the Omnibus reporting law of South Carolina [i.e., Protection Act]." (Appellant's Initial Br. at 36 (emphasis added).) He even acknowledges, only now on appeal, that the nurse Defendants were "mandated to report possible abuse or neglect of a resident immediately." (Appellant's Initial Br., p. 36.)

Despite this statutory requirement for the immediate reporting of even suspected abuse and despite Appellant's recent admission that the defendant nurses "were attempting to follow the [Protection Act]," Appellant sued these nurses and their employer, the nursing home. In an attempt to avoid the immunity of the Protection Act, Appellant alleged, on the one hand, that the nurses acted "intentionally" and with "malice" and did not report their suspicions in good faith. But, self-contradicting these allegations of bad faith, Appellant asserted on the other hand that the nurses acted within the scope of their employment.[1]

The Defendants all maintained that the nurses acted in good faith based on what they saw, and they therefore sought the immunity offered by the Protection Act. Further, the nursing home argued that the Appellant could not proceed to trial with two directly conflicting positions. That is, Appellant could not argue on the one hand that the defendant nurses had acted maliciously and reported their suspicions in bad faith in order to avoid the immunity of the Protection Act and simultaneously argue that they were acting within the course and scope of their

[1] Thus, Appellant backtracks from his own "bad faith" allegations in an attempt to support a claim of *respondeat superior* liability against the nursing home.

employment. Appellant would either have to acknowledge that the nurses had not intentionally acted in bad faith, or he would have to abandon his claim of *respondeat superior*. He could not have it both ways.

Nevertheless, despite uncontradicted evidence supporting a good faith suspicion that Appellant had sexually abused a vulnerable nursing home resident, when Appellant sued the nurses and their employer for defamation, the case was allowed to reach the jury. Thus, the statutory immunity afforded the reporting nurses went unenforced. And, unfortunately, Appellant was permitted to advance both of his wildly inconsistent theories at trial, resulting in a wildly inconsistent verdict.

The jury found in favor of the Appellant, indicating on the special verdict that the two nurses did not act in good faith and that they acted outside the scope of their employment when they made their reports. As a result, the jury did not award compensatory damages against the nursing home. But in conflict with these specific findings, the jury sought to impose punitive damages not only against the defendant nurses but also against the nursing home.

This inconsistent verdict resulted in both the Appellant and Defendants seeking JNOV and a new trial. In resolving these post-trial motions, the trial court "exercise[d] its discretion as the thirteenth juror and grant[ed] a new trial." The trial court found that "the evidence did not justify the verdict," and that the

"interests of justice persuade the Court that a new trial is warranted." Rejecting Appellant's motion for reconsideration, the trial court reaffirmed its finding. This appeal followed.

Although Appellant previously fought to have the verdict modified, he now asserts that the trial court's decision to set aside the verdict was improper. Remarkably, he does so with a brand new theory of the case that was never presented below and that is directly contradictory to the theory he pursued at trial. Now, Appellant admits: "The only evidence was that [the defendant nurses] . . . *were attempting to follow the Omnibus reporting law of South Carolina.*" (Appellant's Initial Br. at 36 (emphasis added).) This eleventh-hour pivot appears to be motivated by a desire to avoid the result of pursuing a theory at trial against the nurses (intentional and deceitful misconduct) that was inherently inconsistent with the desire to also impose liability upon their employer. This acknowledgement that "[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the [Protection Act]," of course, establishes the good faith of the nurse defendants and, therefore, the immunity of all defendants. This acknowledgement, by itself, would support why the trial court determined "that the evidence did not justify the verdict" and granted a new trial.

Appellant attacks the trial court's exercise of the thirteenth juror power as a "legal" conclusion, notwithstanding the court's specific finding that the "evidence

did not justify the verdict." On appeal, this Court's inquiry can begin and end with the thirteenth juror analysis, where appellate review is limited to the consideration of whether evidence exists to support the trial court's order. It clearly does. Thus, the Court need not reach the remaining issues raised by Appellant because to do so would result in an advisory opinion without altering the outcome of the appeal.

Nevertheless, turning to Appellant's two additional issues, both are easily dispelled. As his second issue, Appellant argues that the trial court erred in overruling his objection to the verdict form and in denying his motion for directed verdict and for JNOV on whether the nurse defendants were acting within the scope of their employment. As part of his *prima facie* case for *respondeat superior* liability, Appellant bore the burden of proving that the nurses were acting within the scope of their employment. Nevertheless, throughout his complaint, in his opening, and in closing, Appellant argued that the nurses acted "deliberately," "maliciously," and "intentionally." Thus, as framed by Appellant, *his* own arguments advanced *his* own theory that the nurses acted deliberately and with malice. Appellant's own arguments, therefore, conflicted with his motions for JNOV and directed verdict seeking a legal determination that the nurses acted within the scope of their employment. Although Appellant now admits that "[t]he only evidence was that [the defendant nurses] . . . *were attempting to follow the Omnibus reporting law of South Carolina*" (Appellant's Initial Br. at 36 (emphasis

added)), this admission comes too late. Appellant cannot erase his own theory and arguments from the record through this eleventh-hour acknowledgement that his own theory and arguments had no evidentiary support.

For his third issue, Appellant seeks to appeal a motion that he never made and an issue that he did not preserve. Appellant argues that the trial court erred in permitting the individual nurse defendants and their employer to assert a joint defense. Although he does not state this in his issue presented (which, in-and-of-itself, is a failure to preserve), Appellant finally states on page 43 of his brief that "counsel should not have been permitted to proceed as counsel for all defendants."

Appellant appears to be asserting that defense counsel should have been disqualified, but Appellant never brought a motion to disqualify before the trial court. Likewise, Appellant is asserting in his brief, for the first time, alleged violations of the Rules of Professional Conduct. But Appellant never raised these alleged violations before the trial court. In his appellate brief, Appellant asserts a conflict of interest, but he never voiced this issue to the trial court.[2] He points to nothing in the record to support his position. His arguments, therefore, are untimely and are unpreserved. Issues may not be raised in an appeal for the first time.

[2] This appeal was captioned as if both Plaintiffs (husband and wife) were appealing, but only the husband seeks to have the verdict reinstated. His brief uses the singular "Appellant" throughout. The jury awarded Appellant's wife nothing, so she could potentially benefit from a new trial. These conflicting interests are ironic given the arguments Appellant is advancing in this appeal.

His arguments, moreover, are without merit. The Defendants have always asserted and continue to assert, together and with unanimity, that the nurses acted in good faith in reporting Appellant's highly suspicious activities to authorities as required under the Protection Act. Indeed, as Appellant now admits: "The only evidence was that [the defendant nurses] . . . *were attempting to follow the Omnibus reporting law of South Carolina.*" (Appellant's Initial Br. at 36 (emphasis added).) Appellant's attempt to impugn defense counsel's ethics based on a set of facts that he now admits did not exist is improper.

The trial court, therefore, properly exercised its authority to grant a new trial. That decision should remain undisturbed.

STATEMENT OF FACTS

Appellant, Ralph Williams, and his wife filed this lawsuit alleging that his colleagues, nurses Patricia Johnson and Josette Peppers, defamed Mr. Williams when they reported their suspicion that Mr. Williams was attempting to have sex with an incapacitated female nursing home resident. (Am. Compl.) Mr. Williams worked as a certified nursing assistant (CNA) at a nursing home in Orangeburg operated by Defendant UniHealth Post-Acute Care—Orangeburg, LLC ("UniHealth"). (Tr. p. 491, line 6 though p. 492, line 19.) Defendants Johnson and Peppers worked at UniHealth with Mr. Williams. The Williamses sued Johnson and Peppers, as well as their employer, UniHealth, asserting causes of action for

defamation and loss of consortium. (See Am. Compl.) Appellant asserted in his Amended Complaint that the nurses acted intentionally and with malice. (See Am. Compl., ¶¶ 52, 169, 170, 172, 187, 188, 190, 204, 205, 221, 222, 224, 257 and 269 (repeated use of terms "malignity toward Appellant," "actual malice," "intending to charge," and "intentionally").) Appellant's allegations and theory of liability against UniHealth were limited to the *respondeat superior* doctrine. (See Am. Compl., ¶¶ 163-165, 180-182, 198-200, 215-217, 252-254, 265-268.)

The salient facts of the case are not in dispute. During the early morning hours of June 21, 2010, Nurse Johnson found Mr. Williams' supply cart outside of Room 39. (See Tr. p. 158, lines 12-14 and p. 188, line 18; see also Tr. p. 507, line 15.) When she opened the door to Room 39, Mr. Williams was on the bed of the female resident closest to the door, and his pants were down. (Tr. p. 190, lines 1-14.)[3] Johnson saw his naked butt. (Tr. p. 190, lines 10-14; Tr. p. 176, lines 8-19; and p. 177, lines 11-13.) Johnson also saw that the resident's gown was pushed so far up that her naked breasts were exposed. (Tr. p. 190, lines 21-23.) Mr. Williams admits that he was on top of the resident and that his pants had come down. (Tr. p. 508, lines 6-7; Tr. p. 509, lines 9-15; Tr. p. 569, lines 23-25.) The proper procedure for a CNA changing a resident's adult brief does not require a CNA to be on a resident's bed. (See Tr. p. 216, line 6 through p. 218, line 1; Tr. p.

[3] The resident was a "vulnerable adult" as defined under South Carolina's Omnibus Adult Protection Act. S.C. Code Ann. § 43-35-10.

254, lines 18-23; Tr. p. 742, line 10 through p. 745, line 2; Tr. p. 564, line 18 through p. 565, line 6.) The female resident, who was incapacitated, was only 42 years old and thus much younger than a typical nursing home resident. (Tr. p. 325, lines 24-25.) Mr. Williams was 54 at the time. (Tr. p. 325, lines 20-21.)

Upon observing Mr. Williams, Johnson exclaimed, "What are you doing!?" (See Tr. p. 508, lines 21-22.) Mr. Williams responded, "Will you please shut the door." (See Tr. p. 508, lines 22.) Johnson left the door open and ran to get another nurse, Peppers. (See Tr. p. 509, lines 1-3; Tr. p. 178, lines 9-10; and p. 203, lines 19-25.) The two nurses immediately returned and found Mr. Williams in the corner of the room with the overhead lights off and adjusting his pants, which he admitted were down. (See Tr. p. 245, lines 1-7; Tr. p. 264, lines 2-6; Tr. p. 172, lines 2-4; Tr. p. 197, lines 4-6; Tr. p. 509, lines 9-15.) The nurses immediately escorted Mr. Williams out of the room without objection. (See Tr. p. 209, lines 9-22; see also Tr. p. 250, lines 3-10.) Meanwhile, Peppers immediately went to alert the facility's Director of Nursing and the local authorities. (See Tr. p. 250, lines 22-25 and p. 251, lines 1-25.) Mr. Williams never questioned why he was escorted out of the room, and he did not offer any explanation to anyone at the facility as to why he was on the resident's bed or why his pants were down. (Tr. p. 172, lines 5-25; Tr. p. 274, lines 6-8.)

Police arrived at the facility and investigated the incident. (See generally Testimony of Officer Warrington, Tr. pp. 271-284 and Officer Scott, pp. 289-301.) The police determined that there was sufficient cause to arrest Mr. Williams. (See Tr. p. 286, lines 23-25 and p. 287, line 1.) The arresting officer explained to Mr. Williams why they were at the facility, and Mr. Williams did not protest while being arrested or offer any explanation for why he was in the room, with his pants down, and up on the resident's bed, hovering over her. (See Tr. p. 274, lines 6-8.) Mr. Williams did not suggest that there was any misunderstanding or that there was anything that might affect the credibility of the nurses' reports. He simply put his head down and said, "I'm sorry." (See p. 287, lines 2-9.)

A detective investigated the matter, and the solicitor sought an indictment. (Tr. p. 693, line 16; Tr. p. 528, lines 1-13.) Shortly after his arrest, Mr. Williams admitted himself to the Dorn VA Medical Center in Columbia, South Carolina. (See Def. Ex. 2A.) During his stay, he explained to a member of the staff, Ms. Mary Rogers, what transpired on the night of June 21, 2010. (See Tr. p. 733, line 19 through p. 735, line 4; see also Def. Ex. 2A.) He explained to her that the resident had "already ripped off her diaper—which she was known to do" and that he was on the resident's bed in an effort to change the padding under the resident. (See Def. Ex. 2A; see also Tr. p. 734, lines 2-5.) Mr. Williams's statement to Mary Rogers, however, contradicted his trial testimony that the diaper was on the

resident when he entered the room, that the resident was covered in feces, and that *he* meticulously attempted to *remove* the diaper. (See Tr. p. 566, line 20 through p. 570, line 7; contra Def. Ex. 2A.)

Indeed, one of Appellant's major themes at trial was his assertion that the diaper was covered in feces and that was why he was on the bed meticulously trying to remove the soiled diaper and change the resident. (Tr. p. 110, lines 21-23; Tr. p. 567-571.) The nurses and the police, however, all testified that there were no feces and that the diaper was not dirty. (Tr. p. 168, lines 1-6; Tr. p. 213, lines 4-23; Tr. p. 250, lines 9-21; Tr. p. 301, line 13 through p. 302, line 25.) Moreover, as indicated above, Mr. Williams gave a conflicting statement to the VA employee, claiming that the resident had already removed the diaper. (Def. Ex. 2A; Tr. p. 734, lines 2-5.)

Contrary to Mr. Williams' claim that he needed to be on the bed to change the resident, his former nursing professor and the nurse Defendants were all adamant that it is never appropriate for a caregiver to climb onto a resident's bed. (Tr. p. 742-745; Tr. p. 216-218; Tr. p. 254, line 15 through p. 255, line 13.) Mr. Williams agreed that he was not trained to climb onto a resident's bed. (Tr. 570, lines 21-24.)

Prior to trial, Defendant UniHealth brought a motion for summary judgment, asserting as a matter of law that if the nurses acted in good faith, then neither they nor UniHealth could be liable because of the immunity afforded under the Protection Statute. (Aug. 28, 2013 Motion, R. __.) And on the flip side,

UniHealth showed that if the nurses were found not to have acted in good faith, then their actions would be outside of their employment, and UniHealth would not be liable. (Id.)[4] That motion was denied (Jan. 6, 2014 Order, R. __), and the case proceeded to trial. At trial, the Defendants remained united in their position that the nurses acted appropriately and in good faith in reporting their suspicions of Mr. Williams' questionable conduct. Indeed, even Appellant now concedes that "[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Omnibus reporting law of South Carolina [i.e., Protection Act]." (Appellant's Initial Br. at 36.) All Defendants argued at trial and continue to maintain that they are entitled to statutory immunity under the Protection Act. (Tr. p. 797, lines 5-20.)

During opening argument, Appellant's counsel told the jury "[t]his case, ladies and gentlemen, is about a false statement that was made by Ms. Patricia Johnson, as well as, Ms. Josette Peppers against my client." (Tr. p. 110, lines 17-19.) He went on to argue that Ms. Johnson's statements were made with an intentional purpose by stating the following: "there's a very important *deliberate* statement that was inserted into this police report." (Tr. p. 115, lines 19-21.)

[4] UniHealth never asserted or even suggested that its nurses had reported their suspicions in bad faith or had acted inappropriately in any regard as Appellant claimed. UniHealth merely explained that, whichever way the facts fell, the only possible logical conclusion was that UniHealth could not be legally liable, as follows: If the nurses acted in good faith, both they and UniHealth were immune; and if the nurses acted in bad faith, UniHealth could not be responsible for their acts under Appellant's respondeat superior theory.

While explaining the Protection Act, Appellant's counsel stated, "Now, what is not good faith? *Intentionally* asserting false information." (Tr. p. 123, lines 14-15.)

In his closing, and therefore with full knowledge of the content of the Judge's verdict form, Appellant's counsel hammered the same themes that he outlined in his amended complaint and in his opening, i.e., that the nurses acted intentionally, deliberately, and with malice. He argued, among other things, the following:

- "**Destruction of critical material is what we'll show. Deliberate alterations.**" (Tr. p. 761, lines 13-23.)
- "**That's deliberate alterations.**" (Tr. p. 766, lines 14-18.)
- "Not one of them said, please -- **that is deliberate alteration, omission of the facts.**" (Tr. p. 766, lines 22-25.)
- "All she had to do was say that's what happened. She doesn't want -- **she knows the deliberate intention for which she wrote this.**" (Tr. p. 768, lines 1-5.)
- "How do you make the exact same statement -- **that is a deliberate alteration. You're stating things deliberately.**" (Tr. p. 772, lines 10-18.)
- "**That statement was made with a deliberate purpose.**" (Tr. p. 778, lines 11-14.)
- "Ms. Patricia Johnson. **Wickedness.** That's the only way you have these allegations made. **Just wickedness.**" (Tr. p. 785, lines 2-6.)
- "**It's not good faith. It's not good -- it's worthlessness. It's malice, it's actual malice.**" (Tr. p. 790, lines 9-15.)

- **"And I can tell you, women and girls they think a little bit on another level than us guys. They can be a lot more calculating, a lot more calculating."** (Tr. p. 791, line 15-19.)[5]

Using the trial court's verdict form, the jury returned a verdict in favor of Appellant but not his wife. (Verdict, R. ___.) Answering the special interrogatories in the verdict form, the jury concluded that the nurse Defendants did not act in good faith. (Id.) Consistent with their finding that the nurses did not act in good faith, the jury found that the nurses were acting outside of their employment. (Id.) But then the jury exhibited some confusion. Although it had found that the nurses acted without good faith and outside their employment, the jury sought to impose punitive damages not only against the nurses but also against their employer, UniHealth. (Id.)

After the trial, *both* sides[6] sought to have the verdict modified or set aside. (R. __.) Following briefing and oral argument, the trial court exercised its authority as the thirteenth juror and granted a new trial, finding that the evidence did not support the jury's determination and that the interests of justice had not been served. (Order of Jan. 22, 2016 R. __.) Appellant moved for reconsideration, which the trial court denied. (March 10, 2017 Order, R. __.) This appeal followed.

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[5] In their post-trial motions, Defendants also sought to set aside the verdict because it was the result of passions and prejudices raised by Appellant in his closing, namely that all women are "calculating" by nature. (Defendants' Post-Trial Motions, May 1, 2015, pp. 8-9 and 11, R. __.)

[6] The trial court noted this, stating: "both the Plaintiffs and the Defendants have moved to set aside or otherwise modify the verdict, which reinforces the Court's view that a new trial is warranted." (Jan. 22, 2016 Order, p. 5, n. 14.)

STANDARD OF REVIEW

Under the thirteenth juror doctrine, the trial court may grant a new trial based on its view of the facts. Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). The appellate courts' review of a trial court's grant of a new trial is limited to consideration of whether evidence exists to support the trial court's order. Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). As long as there is conflicting evidence, the trial court's grant of a new trial will not be disturbed. Id. at 597–98, 681 S.E.2d at 883.

ARGUMENTS

I. BECAUSE AMPLE EVIDENCE SUPPORTS THE TRIAL COURT'S DECISION TO GRANT A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE, THE STANDARD OF REVIEW REQUIRES THAT THE DECISION REMAIN UNDISTURBED.

A. The Thirteenth Juror Doctrine.

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror doctrine. The doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." Lane, 383 S.C. at 597, 681 S.E.2d at 883 (internal quotation marks and citations omitted). As explained by the Supreme Court:

> The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not

> justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (internal citation omitted); see also Worrell v. South Carolina Power Co., 186 S.C. 306, 313-314, 195 S.E. 638, 641 (1938) ("the trial judge is the thirteenth juror, possessing the veto power to the Nth degree").

In Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 551–52, 593 S.E.2d 504, 508 (2004), the Supreme Court reasoned that the grant of a new trial under the thirteenth juror doctrine was warranted because justice was not served by the jury's verdict, and the evidence did not justify the result. Id. at 552, 593 S.E.2d at 508. In this case, the trial court found the exact same factors as in Trivelas: (i) justice was not served by the verdict, and (ii) the evidence did not justify the result.

Likewise, the judge may grant a new trial if the verdict is inconsistent and reflects potential confusion by the jury. Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983); see also Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

Although, in this case, the trial court did not make a specific finding that the jury was confused, the jury's inconsistent answers on the verdict form weigh in favor of invoking the thirteenth juror doctrine. As case in point, Appellant also sought to modify the verdict.

B. Appellant Mischaracterizes The Trial Court's Order As A Legal Ruling On The Application Of The Protection Act.

In his brief to this Court, Appellant asserts that the trial court included a legal determination in its order invoking the thirteenth juror power. (Appellant's Initial Br., p. 27.) This is inaccurate. The trial court's initial order was specific, stating: "The Court finds that the evidence did not justify the verdict." (Jan. 22, 2016 Order, p. 5, R. __.) Although not required, the trial court then went on to explain, in part, how the evidence conflicted with the verdict. It noted:

> Ralph Williams, by his own testimony, was on a female resident's bed with the door closed in the middle of the night and his pants had at least somewhat fallen down. The evidence further showed that nurses are not supposed to get on a resident's bed.

(Jan. 22, 2016 Order, p. 5, R. __.) The court concluded by stating: "The facts of the case and the interests of justice persuade the Court that a new trial is warranted." (Id.)

On Appellant's Motion for Reconsideration, the trial court issued a much shorter order and again reaffirmed its decision to grant a new trial under the thirteenth juror doctrine. (See March 10, 2017 Order, R. __.) The trial court again

found that the "evidence did not justify the verdict" and that "the facts of the case and the interests of justice persuade the court, sitting as the thirteenth juror, that a new trial is warranted." (Id., p. 2.) Despite these clear statements, Appellant seizes on a single sentence within the Reconsideration Order, which states: "This court is concerned that the jury improperly handled the issue of the Defendant nurses' immunity under South Carolina's Omnibus Adult Protection Act." (Id.) Appellant seeks to construe this sentence about the jury's application of the facts as a legal ruling by the trial court. (Appellant's Initial Br., p. 27.) Appellant's position is without merit.

As a starting point, Appellant's portrayal of the sentence within the Reconsideration Order as a legal ruling on the immunity statute is a far stretch. The trial court repeatedly stated that the evidence did not justify the verdict, which is all that is required to invoke the thirteenth juror doctrine. That the trial court voiced a "concern" that the jury misapplied the facts to the law fits squarely within the ambit of the court's authority under the doctrine.[7]

To support his position, Appellant cites two cases, Lane v. Gilbert Constr. Co., 383 S.C. 590, 681 S.E.2d 879 (2009) and Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), for the proposition that when the trial court gives a reason for granting a thirteenth juror motion and the reasons are

[7] Indeed, even Appellant concedes, as he must, that "the case law indicates the grant of a new trial under the Thirteenth Juror doctrine is nearly unreviewable . . . ." (Appellant's Br., p. 31.)

controlled by an error of law, the appellate court can review those reasons. Those cases do not support Appellant's position. First, the trial court did not give any reasons for his decision other than his repeated invocation that the "evidence did not justify the verdict" and "the interests of justice persuade the Court that a new trial is warranted." (Jan. 22, 2016 Order, p. 5, R. ___.) The trial court's voicing of a concern regarding the jury's application of the evidence to the law falls squarely within the thirteenth juror powers.

But going further, the Lane and Youmans cases simply do not apply, other than to support Defendants. In Lane, the Supreme Court *affirmed* the trial court's exercise of the thirteenth juror power, stressing that its role on appeal is limited to ascertaining "whether evidence exists to support the trial court's order." 383 S.C. at 597. The Supreme Court reviewed the evidence cited by the trial court in granting a new trial, but the Supreme Court never construed the trial court's review of the evidence as somehow transmuting into a legal analysis. Id. at 598. Instead, the Supreme Court found that evidence existed to support the trial court's grant of a new trial, and it affirmed that decision. This case therefore mirrors Lane.

In Youmans, the Supreme Court issued a rare reversal of a trial court's exercise of the thirteenth juror doctrine. It did so because the trial court found the exact opposite of what is required under the doctrine: Specifically, instead of finding that the evidence did not support the verdict, the trial court found the exact

opposite, stating that "the evidence is sufficient to support the verdict" and "[t]here's no doubt in my mind about that." 380 S.C. at 278. Despite having found that the evidence supported the verdict, the trial court nevertheless exercised the thirteenth juror doctrine because the jury did not deliberate long enough. The Supreme Court reversed, reasoning that granting a new trial based solely on the length of jury deliberations is not the same as granting a new trial on the facts. Id. at 282. Thus, the unique holding of Youmans is limited to the issue of the length of jury deliberations and has no bearing on this appeal, in which the trial court exercised its authority based on the lack of evidence supporting the verdict.

And, finally, it is of no consequence that the trial court previously denied Defendants' motions for a directed verdict on the application of the Protection Act. This is because in exercising its thirteenth juror powers, the court may weigh the evidence even though it is not permitted to do so in considering a directed verdict motion. See Buxton v. Thompson Dental Co., 307 S.C. 523, 528, 415 S.E.2d 844, 848 (Ct. App. 1992) (affirming the trial court's grant of a new trial motion after its denial of a directed verdict motion), overruled on other grounds by Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994). "The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." McEntire v. Mooregard Exterminating Servs., Inc., 353 S.C. 629, 632, 578 S.E.2d 746, 748 (Ct. App. 2003) (citation omitted). And a trial court's refusal to grant a directed verdict

is not inconsistent with the grant of a new trial. See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 334, 732 S.E.2d 166, 172 (2012) ("The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion.").

Consistent with Appellant's acknowledgement that "[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Omnibus reporting law of South Carolina" (Appellant's Initial Br. at 36), the court was justified in concluding that "the evidence did not justify the verdict."

II. AS PART OF THE *PRIMA FACIE* CASE FOR HIS *RESPONDEAT SUPERIOR* CLAIM, APPELLANT BORE THE BURDEN OF PROVING THAT THE EMPLOYEES ACTED WITHIN THE SCOPE OF THEIR EMPLOYMENT, BUT BECAUSE HE ARGUED THAT THEY ACTED INTENTIONALLY AND WITH MALICE, THE TRIAL COURT PROPERLY DENIED HIS MOTIONS FOR DIRECTED VERDICT.

"A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment." Lane v. Modern Music, Inc., 244 S.C. 299, 301, 136 S.E.2d 713 (1964). Thus, there can be no *respondeat superior* liability without a factual finding that the employee was acting within the scope of her employment. The burden of proof, therefore, is with the plaintiff to show that the conduct of the employee fell within

the scope of his or her employment at the employer's business. See Vereen v. Liberty Life Insurance Co., 306 S.C. 423, 428, 412 S.E.2d 425, 427 (1991) (holding that burden of production and persuasion are with plaintiff; the defendant "was free to leave the burden of proof on the [plaintiffs] and simply rely for its defense on the cross examination of their witnesses").

In this case, Appellant did not argue that the nurse Defendants were "about [their] master's business," but instead made scathing arguments to the contrary. Appellant argued to the jury that the nurse employees acted intentionally by engaging in "wicked" conduct, making "deliberate" false statements and "destroying" evidence, bearing "false witness against thy neighbor," being "calculating" women, and trying to "set a person up." Appellant had the burden to prove that the nurse Defendants acted within the scope of their employment. His failure to meet that burden was the result of his own arguments and presentation to the jury. Thus, Appellant may not now complain that he was entitled to a judgment as a matter of law. See generally Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) ("Ordinarily, one cannot complain of an error which his own conduct has induced.").

And in a defamation case such as this, the standard charge is clear: "A principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority."

See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). In this case, the trial court provided specific instructions regarding the *respondeat superior* doctrine and the definition of scope of employment. (See Tr., pp. 827-828.) Thereafter, the Court provided a verdict form that allowed the jury to make multiple factual findings—first, a factual finding regarding whether the nurses acted in good faith and, if not, a second factual determination as to whether the nurses acted outside the scope of their employment at UniHealth. (Tr. 838, p. line 8 through p. 840 line 8; Verdict, R. __.)

In summary, Defendants were not required to prove anything with respect to the scope of employment; instead, the burden rested upon Appellant to prove this element as part of his *prima facie* case. See Vereen, 306 S.C. at 428. The jury was required to make that determination as a condition precedent to any legal liability being imposed upon UniHealth under the *respondeat superior* doctrine. Appellant recognized as much, stating that whether the nurse defendants "were acting within the scope of their employment" raised "an issue of material fact for the jury to decide this issue." (Appellants' Memo in Opposition to MSJ, Dec. 30, 2013, p. 21, R. ___.) Moreover, as the trial court concluded while ruling on Appellants' Motion for Directed Verdict, "the way the case has been tried[,] there is inherently an issue about whether or not [the Nurse Employees] were acting inside or outside

the scope of their employment, and that's a question of fact...for the jury to determine." (Tr., p. 754, lines 3-6.)

On appeal, against everything that he argued at trial, Appellant now seeks to avail himself of the Protection Act and UniHealth's policies implementing that Act. He asserts that the nurse Defendants were "mandated to report possible abuse or neglect of a resident immediately." (Appellant's Initial Br., p. 36.) Appellant further acknowledges that "[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Omnibus reporting law of South Carolina." (Appellant's Initial Br. at 36.) Okay then. If Appellant now concedes that his conduct constituted "possible abuse or neglect of a resident" that the nurses were required to report and that they "were attempting to follow the Omnibus reporting law of South Carolina" then Defendants—all of the Defendants—are entitled to immunity under the Protection Act. See S.C. Code Ann. § 43-35-75(A). But absent such a concession, Appellant cannot credibly argue, on the one hand, that the nurses were acting "maliciously" and "wickedly,"[8] while, on the other hand, claiming that they had a duty to report. Appellant bore the burden of proof on the

[8] Ignoring everything that he argued at trial, Appellant now suggests that his theory was not that the defendant nurses acted intentionally or deliberated. He now asserts, for the first time on appeal, a theory that the nurses were required to report their suspicions that Appellant had sexually abused the resident, "but they just went about it in a reckless manner." (Appellant's Initial Br., p. 36.) Setting aside the issue of whether such a theory could override the nurses' immunity (it could not), this was not the theory advanced by Appellant below. And Appellant cannot erase his theory of maliciousness, deceit, and intentional misconduct from the record by imagining a wholly inconsistent theory which he never advanced at trial. That Appellant attempts this maneuver is quite telling.

issue, which the jury found that he failed to satisfy. It was a fact question of Appellant's own making. For all of these reasons, Appellant's argument fails.

III. APPELLANT MAY NOT RAISE FOR THE FIRST TIME ON APPEAL ISSUES AND ARGUMENTS NOT RAISED AT TRIAL.

A. Appellants May Not Raise Issues For The First Time On Appeal.

For his third appeal issue, Appellant claims that the trial court erred in permitting Defendants to present a joint defense. (Appellant's Initial Br., p. 39.) Tellingly, Appellant does *not* assert that the trial court erred in denying any motion or objection brought by Appellant. There was none. This argument was neither raised before, nor ruled upon by, the trial court.

To preserve an issue for appeal, specific grounds in support of the objection must be clearly stated. Wilder Corp v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. Id. Thus, it is a well-settled rule that issues must have been raised to, and ruled upon by, the lower court in order to preserve those issues for appellate review. Doe v. Roe, 369 S.C. 351, 631 S.E.2d 317 (Ct. App. 2006). "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." Lucas v. Rawl Family Ltd. P'ship, 359 S.C. 505, 598 S.E.2d 712 (2004).

It is equally well settled that a party "cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." Kiawah Prop. Owners Group v. Public Serv. Comm'n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); see also MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise issue for first time in Rule 59(e), SCRCP motion which could have been raised at trial.").

Prior to the verdict, Appellant never asserted that defense counsel should be disqualified. The word "disqualify" does not appear anywhere in the entire trial transcript. The word "conflict" appears only once in the entire transcript and was spoken by the Appellant's sister-in-law in her direct testimony. (Tr. 389.) Appellant simply failed to preserve these arguments for appellate review. There are no citations in Appellant's brief indicating that he ever moved to disqualify counsel. That is because he did not. He did not believe it to be an issue during the entire trial and only raises it afterward in an attempt to salvage a verdict.[9] In fact, Appellant's acknowledgement that "[t]he only evidence was that [the defendant

[9] Appellant acknowledges as much in his brief, stating: "UniHealth did not offer evidence on the scope of employment issue or argue the issue to the jury." (Appellant's Initial Br., p. 40.) Defendants agree. Moreover, Defense counsel stressed that "we do not want it stated that the facility has taken the position that the ladies – acted intentionally. This is not our position." (Id.; Tr. p. 90, lines 20-24.) Contrast this with the unsupported assertion on the next page of Appellant's brief that UniHealth made the scope of employment an issue by "pointing its finger at the nurses in an attempt to absolve itself." (Appellant's Initial Br., p. 41.) Appellant's two statements cannot reconcile. There was no finger pointing among the Defendants.

nurses] were furthering the interests of the master, UniHealth in making these reports, and were attempting to follow the Omnibus reporting law of South Carolina" (Appellant's Initial Br. at 36) illustrates that there was no conflict. Having failed to raise any such issue at trial, the law in South Carolina is clear that Appellant may not do so on appeal.

Having failed to object at trial or move to disqualify, Appellant resorts to implying that the trial court, on its own initiative, should have removed defense counsel. (Appellant's Initial Br., p. 40.) Appellant cites only two cases in support of this theory, and both are criminal cases. But the cases do not support Appellant's position. In the first case, State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010), the defendant filed a formal motion to disqualify the state's assistant solicitor because of prior representation of family members. The issue on appeal was whether the trial court's grant of that motion was immediately appealable, and the Court of Appeals held it was not.[10] Here, by contrast, Appellant failed to file any motion to disqualify or even raise the issue before the trial court. And the State v. Wilson case certainly does not stand for the notion that a trial court, in a civil case, may disqualify counsel *sua sponte*. Instead, the Supreme Court stressed the heightened scrutiny given to motions to dismiss in civil

[10] The second case cited by Appellant, State v. Justus, 392 S.C. 416, 419-420, 709 S.E.2d 668, 670 (2011), provides even less support. There, the solicitor filed a formal motion entitled "Motion to Have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest." Id. at 417. Thus, unlike here, there was no question that the issue had been preserved for appeal.

cases because of, among other things, the importance of the party's right to counsel of his choice. Id. at 601-602; citing Hagood v. Sommerville, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (reviewing the four-pronged rationale for more immediate review of disqualification orders in civil cases).

B. Appellant Waived Any Objections About The *Respondeat Superior* Jury Charges.

Intermixed with Appellant's third appeal issue is a rehashing of his arguments about the jury charges on his own claim for *respondeat superior* liability. (Appellant's Initial Br., p. 40.) Appellant complains that Defendants requested jury instructions on "scope of employment." (Id.) But as discussed in Section II, *supra*, part of Appellant's *prima facie* case on *respondeat superior* liability required proof, by him, as the plaintiff, of whether the employees were acting within the scope of their employment. See Vereen, 306 S.C. at 428. This is part of the pattern jury instructions. It was not some novel theory advanced by Defendants.

Moreover, Appellant failed to raise any objections to these charges at trial and therefore waived the opportunity to raise an objection for the first time in this appeal. At trial, Appellant only had two objections to the jury charges: (1) an objection to a portion of the Protection Act related to criminal penalties; and (2) an objection regarding the continuing publication doctrine. (See Tr., p. 756, lines 2-20.) Thus, having failed to object to the jury charge on *respondeat superior* at any time during

the trial, it is axiomatic that Appellant has waived his objection and may not raise it for the first time on appeal. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) (it is "axiomatic" that issue cannot be raised for the first time on appeal).

C. Because Appellant's Statement Of Issues Does Not Raise Issues Of Conflict, Disqualification, Or Rules Of Professional Conduct, This Court Should Not Entertain Any Such Arguments.

This Court's rules are clear that no point will be considered that is not set forth in the statement of the issues on appeal. See Rule 208(b)(1)(B), SCACR; Gamble v. International Paper Realty Crop., 323 S.C. 367, 474 S.E.2d 438 (1996) (under SCACR, ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal; State v. Hughes, 346 S.C. 339, 552 S.E.2d 35 (Ct. App. 2001) (same)).

Nothing in the Appellant's Statement of the Issues on Appeal asserts error regarding a legal conflict, a motion to disqualify, or the application of the Rules of Professional Conduct. Instead, Appellant frames his third Issue as if the trial court erred by not, *sua sponte*, intervening and requiring Defendants to abandon their joint defense and pit themselves against one another. For this reason, in addition to Appellant having failed to preserve the issues, the appeal should be denied.

D. Even Assuming Appellant Had Raised The Issue At Trial, He States No Grounds And Has No Standing To Assert A Conflict Or Move To Disqualify.

Even had the Appellant raised a motion or an objection, the allegations are unfounded. The Defendants remained united throughout the trial in their arguments to the jury that the nurses acted in good faith. There was no conflict.[11] Indeed, Appellant concedes that "[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Omnibus reporting law of South Carolina." (Appellant's Initial Br. at 36.) But, nevertheless, this is not Appellant's issue to raise, and he has no standing to assert a violation of the Rules of Professional Conduct ("RPC) within this appeal or at trial.

The RPC's Scope states that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." Rule 407, SCACR, Scope 7; Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435–36, 472 S.E.2d 612, 613 (1996). Thus, "the Rules of Professional Conduct do not, in themselves, create a cause of action . . . ." Spence v. Wingate, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011). "A review of the Scope of Rule 407, SCACR clearly indicates that the rules are intended for

[11] Again, having conceded that "UniHealth did not offer evidence on the scope of employment issue or argue the issue to the jury" (Appellant's Initial Br., p. 40), on the next page of his brief, Appellant cites a post-hearing brief, claiming that "UniHealth argued that the evidence showed the nurses were furthering their own agenda, they acted intentionally and outside the scope of their employment . . . ." (Id. at 41.) Appellant's characterization of the brief is false. He quotes nothing from UniHealth's brief except two words "deliberate" and "destroy" that do not even appear on the pages that he cites. This mischaracterization of the brief by Appellant is troubling.

guidance and disciplinary purposes, not to form the basis for civil litigation." Id. This comports with most other jurisdictions. See Biller Associates v. Peterken, 849 A.2d 847 (Conn. 2004) ("The rules governing the professional conduct of attorneys, without more, do not give rise to a cause of action."); Barsotti v. Merced, 788 A.2d 802 (NJ 2002) (The Rules of Professional Conduct do not create a duty, nor does a violation of the Rules, standing alone, form a basis for a cause of action.).

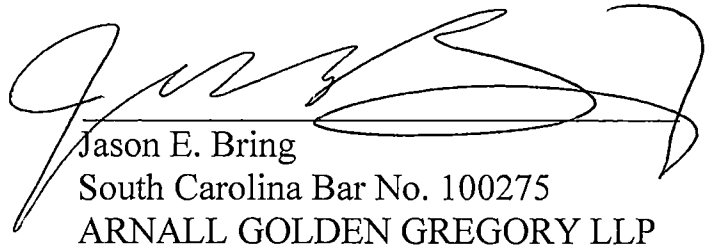
Thus, Appellant not only failed to raise an issue of conflict or request disqualification during trial or in his post-trial briefs, he lacked standing to assert violations of the Rules of Professional Conduct. But as indicated, there was no conflict among Defendants. Moreover, even to the extent that a conflict had existed (which it did not), Appellant cannot claim any injury as a result. He has not been prejudiced. The standing to assert a conflict rests with the person owed the legal duty, not an opposing party in litigation. See Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (1986) ("an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client"). Appellant is not attempting to protect any secrets or confidences of his own, as is generally the case with motions to disqualify. Instead, he is seeking to weaponize the Rules of Professional Conduct to drive a wedge between his

opponents. This contravenes the RPC's admonition: "[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Rule 407 (Scope), note 7, SCACR.

For all of these reasons, Appellant waived any objections regarding defense counsel, and the Court should reject his third issue on appeal.

CONCLUSION

For the reasons set forth above, the Court of Appeals should affirm the trial court's exercise its power to set aside the verdict under the thirteenth juror doctrine. More than ample evidence supported the trial court's decision.



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December 15, 2017

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the **INITIAL BRIEF OF RESPONDENTS** upon all other parties in this matter via first class mail, as follows:

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December 15, 2017

VIA U.S.P.S PRIORITY MAIL

Ms. Jenny Kitchings, Clerk of Appellate Court
South Carolina Court of Appeals
1200 Senate Street
Columbia, SC 29201

Re: Ralph C. Williams, et al. v. Patricia A. Johnson, et al.
Client-Matter No. 25875.5

Dear Ms. Kitchings:

Enclosed for filing with the Court please find the following:

1. Initial Brief of Respondents; and

2. Respondent's Designation of Matters to be Included in the Record on Appeal.

Although these documents were sent to you previously via United Parcel Service (UPS) overnight delivery, we were informed by UPS that their flight was delayed. In an abundance of caution we are re-sending the enclosed to you postmarked today, December 15, 2017.

We would appreciate receiving file-stamped copies of the enclosed, and have enclosed sufficient copies and a self-addressed, stamped envelope for your convenience in forwarding the file-stamped copies to us. Should you have any questions or comments, please do not hesitate to contact me.

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Sonya M. Sowell
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