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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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SC Court of Appeals

Appellate Case No. 2015-001964

Unpublished Opinion No. 2018-UP-281 (S.C. Ct. App. filed June 27, 2018)

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.

APPELLANTS' PETITION FOR REHEARING

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Appellants Philip Ethier and Jeanne Ethier submit their Petition for Rehearing pursuant to Rule 221, SCACR. Appellants submit that the Court of Appeals overlooked or misapprehended the following issues or arguments in the per curiam opinion filed June 27, 2018:

1. Appellants incorporate by reference each and every argument and issue raised to the Court of Appeals in their main and reply briefs, regardless of whether it is explicitly restated herein.

I. LOSS OF CONSORTIUM VERDICT

2. The trial judge abused his discretion and 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 South Carolina 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.

3. The trial judge abused his discretion and erred in relying on Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007), as controlling authority on whether Mrs. Ethier is entitled to the verdict awarded to her by the jury. 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.

4. The trial judge abused his discretion and erred in relying on Lee because, 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 Supreme 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 Supreme Court on the consortium claim was a defense verdict on both husband and wife's claims – unlike the present case in which the jury rendered a verdict in favor of the wife and awarded damages.

5. The trial judge abused his discretion and erred in disregarding or overlooking the fact that the authority cited in § 227 of Am. Jur. 2d does ***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 – as it is in South Carolina – it is resolved separately from directly injured spouse's claim and does not rise and fall with that claim.***

6. The trial judge abused his discretion and erred in disregarding or overlooking the fact that Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 307, 395 S.E.2d 742, 744 (Ct. App.

1990), does not stand for the stated proposition which was recited in Lee and relied on by the trial judge. In Smith, the Court of Appeals concluded that the 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 Appeals in any way address any imputation issue. Smith does not support the proposition stated in § 227 of Am. Jur. 2d.

7. The trial judge erred and abused his discretion 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, R. pp. 3-5.) 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.

8. The trial judge erred and abused his discretion because 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. (R. pp. 1043-45; Verdict Form, R. pp. 3-5.) 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.

9. The trial judge erred and abused his discretion because 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.

10. The trial judge erred and abused his discretion because, 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. 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.

11. The trial judge abused his discretion and erred because, in order to reach the result the judge and Court of Appeals did, it is necessary to overlook or reject long-established law on two points. First, the myriad of South Carolina cases which establish that a spouse's loss of consortium cause of action is a separate and independent cause of action would have to be

overruled and that principle rejected. The trial judge and appellate court would have to conclude that South Carolina is a "derivative" state instead of a "separate and independent" state with regard to consortium claims. Second, the trial judge and appellate court would have to conclude that the negligence of the directly injured spouse is imputed to the consortium spouse. The trial judge and appellate court would have to overrule and reject authority stating the opposite. See 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).

12. If long-standing precedent in South Carolina regarding the separate and independent nature of a consortium claim is overruled by an appellate court, then any such ruling should be applied prospectively only and the present case should be governed by the law as it currently exists. If South Carolina is now to be deemed a "derivative" state instead of a "separate and independent" state with regard to consortium claims, and if the directly injured spouse's negligence is now to be imputed to the consortium spouse, such novel and dramatic shifts in the law would constitute the equivalent of a new cause of action or the abolishment of an immunity. Any abolition of a consortium spouse's present right to recover a verdict in a separate and independent action should be applied prospectively only. Similarly, any abolition of a consortium spouse's right to have her case decided without imputation of the directly injured spouse's

negligence to her, should be applied prospectively only. Such a decision would constitute newly created substantive rights on the part of a defendant to defeat a consortium spouse's claim.[1] See e.g. Toth v. Square D Co., 298 S.C. 6, 8, 377 S.E.2d 584, 585 (1989) ("[T]he general rule regarding retroactive application of judicial decisions is that decisions creating new substantive rights have prospective effect only, whereas decisions creating new remedies to vindicate existing rights are applied retrospectively. . . . Prospective application is required when liability is created where formerly none existed."); cf. Wells Fargo Bank, N.A. v. Fallon Prop. of S.C., LLC, Op. No. 27773 (S.C. Sup. Ct. filed Feb. 28, 2018) (prospectively applying decision which held that an email provides written notice of entry of an order or judgment and triggers time for serving notice of appeal; Court concluded that "fairness dictates that our holding on this issue be applied prospectively given the novelty of the issue, the frequency in which the issue is likely to arise, and the inconsistency in the case law interpreting Rule 203, SCACR").

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[1] There is absolutely no statement or indication in Lee, of course, that the Supreme Court intended to make such novel and dramatic shifts in the law.

II. JUROR CONCEALMENT DURING VOIR DIRE

13. The trial judge abused his discretion and erred 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.

14. 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 State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282 (2001). It is apparent that there existed no reasonable inability for rogue juror Teresa 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.

15. The trial judge abused his discretion and erred because 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***." (R. p. 515.) (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.

16. The trial judge abused his discretion and erred because 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, nurse Wadford or nurse 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.) 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.

17. The trial judge abused his discretion and erred because 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, supra; State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982); State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014).

18. The trial judge abused his discretion and erred because the key issue is whether the voir dire 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.

19. The trial judge abused his discretion and erred because 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.***

20. The trial judge abused his discretion and erred because, 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." (R. p. 532.) 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." (R. p. 533.) 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.

III. JUROR MISCONDUCT DURING PREMATURE AND ACTUAL DELIBERATIONS

21. The trial judge abused his discretion and erred 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 jury and actual 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.

22. Contrary to the Court of Appeals' conclusion, Appellants did challenge the trial judge's erroneous ruling that that the evidence of juror misconduct involved internal influences and thus was inadmissible. This ruling should not be deemed law of the case. Appellants described in detail the external nature of the information conveyed by rogue juror Killian to the jury during premature and actual deliberations, and other jurors' knowledge of that extraneous, improper and inadmissible information. (App. Br. pp. 40-45.) Appellants outlined the law regarding extraneous influences and internal misconduct. (App. Br. pp. 46-47.) Appellants argued that the extraneous, improper and inadmissible nature of Killian's oft-repeated information absolutely influenced jurors and their verdict. (App. Br. pp. 47-49.) It is obvious that Appellants challenged every aspect of the trial judge's ruling, including any subsidiary

ruling that misconduct was internal. It is also noteworthy that the trial judge properly held a lengthy Aldret hearing in which the nature of the misconduct and its impact on the jury were fully explored. The judge presumably would not have done so unless persuaded at the outset that the alleged misconduct involved extraneous influences.

23. The trial judge abused his discretion and erred 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.

24. The trial judge abused his discretion and 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

25. The trial judge abused his discretion and erred because, 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.

26. The trial judge abused his discretion and erred because Appellants were prejudiced since 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 the Court of Appeals reconsider its decision and 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. 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.

Appellants ask that this case be remanded to the trial court, where Mrs. Ethier will then have to decide whether to accept the verdict she received from the tainted and unlawful jury or reject the verdict and proceed to a new trial along with Mr. Ethier. Such an outcome would place Appellants in the position they would have been in but for the trial judge's erroneous rulings.

Respectfully submitted,

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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:

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SC Court of Appeals

July 6, 2018

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RE: Philip Ethier and Jeanne Ethier v. Fairfield Memorial Hospital; Guy R. Bibeau, M.D.; Tuomey Medical Professionals, Inc; and Pee Dee Emergency Medical Associates, PA
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Unpublished Opinion No. 2018-UP-281 (S.C. Ct. App. filed June 27, 2018)
PC File No. 1236.02

Dear Ms. Kitchings:

Please find enclosed the original and six copies of Appellants' Petition for Rehearing in the above-referenced appeal, along with a proof of service showing service of the same on opposing counsel. Also enclosed is a check for the $25.00 filing fee.

Please file the original and return a date-stamped copy to me.

With kindest personal regards, I remain

Sincerely yours,

PROFFITT & COX, LLP

David Proffitt

RDP/nif
Enclosures

cc: Andrew F. Lindemann
G. Murrell Smith, Jr.
David Holler
Stanley L. Myers