THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2015-001964

Unpublished Opinion No. 2018-UP-281 (S.C. Ct.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

Philip Ethier and Jeanne Ethier,

Petitioners,

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.

PETITION FOR A WRIT OF CERTIORARI

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

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

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

CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 27, 2018.

QUESTIONS PRESENTED

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

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

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

STATEMENT OF THE CASE

Petitioners filed and served a Summons and Complaint in this medical malpractice case against Defendants on January 4, 2013. Petitioner Philip Ethier asserted that Defendants'

negligence caused his injuries and damages. Petitioner Jeanne Ethier, his wife, asserted a loss of consortium claim. (Complaint, Appx. pp. 25-34.)

The jury rendered a verdict on April 8, 2015, after a seven-day trial. The jury awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Mr. Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Respondent was 30% negligent. The jury awarded $250,000 to Mrs. Ethier on her loss of consortium claim. The Clerk entered judgment entirely in Respondent's favor on April 30, 2015. (Verdict and Judgment, Appx. pp. 1-5.)

Petitioners timely served motions for a new trial absolute based on juror misconduct. (Motions for New Trial and Mem. filed April 20, 2015, Appx. pp. 35-74.) Petitioners timely served a Rule 59, SCRCP, motion to correct or amend the judgment, asserting that the verdict was in favor of Mrs. Ethier on her loss of consortium claim. (Pl. Motion filed May 11, 2015, Appx. pp. 91-93.) An evidentiary hearing was held by the trial judge on May 12, 2015, with all jurors present. (Tr. of Juror Hearing, Appx. pp. 271-456.) Petitioners filed memoranda and exhibits in support of their motions for a new trial and to correct or amend the judgment. (Pl. Motions for New Trial and Mem. filed June 30, 2015, Appx. pp. 96-224; Pl. Rule 59 Motion and Mem. filed June 30, 2015, Appx. pp. 225-252.) Respondent filed a memorandum in opposition. (Appx. pp. 253-270.)

A hearing on Petitioners' post-trial motions was held July 6, 2015. (Tr. of Motion Hearing, Appx. pp. 457-501.) The trial judge denied Petitioners' motions by written order filed September 8, 2015. (Order, Appx. pp. 6-24.) Petitioners timely appealed.

The Court of Appeals affirmed the judgment of the circuit court in an unpublished, per curiam opinion. Ethier v. Fairfield Mem. Hospital, Unpublished Op. No. 2018-UP-281 (S.C. Ct. App. filed June 27, 2018)) (Appx. pp. 1193-1195). Petitioners timely filed a petition for hearing, which the Court of Appeals denied. (Appx. pp. 1196-1215.)

STATEMENT OF FACTS

Philip Ethier, accompanied by his wife, Jeanne Ethier, went to Fairfield Memorial Hospital's Emergency Department (ED) on April 10, 2011, while experiencing severe pain, numbness, discoloration and coldness in his right lower leg and foot. (Appx. pp. 660-61.) Mr. Ethier reported these symptoms during his triage exam with a certified nurse assistant and he reported them to Respondent. (Pl. Ex. 22, Appx. pp. 1052-61 and Pl. Dem. Exs. 23, 24 and 25, Appx. pp. 1062-64; Appx. pp. 667-86 (Mr. Ethier); Appx. pp. 578-83 (Dr. Adams); Appx. pp. 761-71 (Dr. Jolin).) Mr. Ethier was briefly examined by Respondent, who looked at and touched his leg, summarily concluded it was a "probable spider bite," gave him pain and steroid medications and discharged him. (Appx. pp. 679-86 (Mr. Ethier); Appx. pp. 878-79 (Resp.); Pl. Ex. 22, Appx. pp. 1052-61; Pl. Dem. Exs. 24 and 25, Appx. pp. 1063-64.)

Mr. and Mrs. Ethier testified they never mentioned or reported a spider bite at the ED on April 10. (Appx. p.678 (Mr. Ethier); Appx. pp. 812-14 (Mrs. Ethier).) Numerous witnesses for both Petitioners and Respondent testified that the only mention of a spider bite in the ED record was written by Respondent; no other ED staffer or nurse ever mentioned or noted it. (Pl. Ex. 22, Appx. pp. 1052-61; Pl. Dem. Exs. 23, 24 and 25, Appx. pp. 1062-64; Appx. pp. 589-90 (Dr. Adams); Appx. pp. 780-82 and 793-94 (Dr. Jolin); Appx. pp. 903-05 (Resp.); Appx. p.866 (RN Wadford); Appx. pp. 948-49 (Dr. Smith); Appx. pp. 933-34 (Dr. Weinstein); Appx. pp. 804-05 (CNA Anthony).) It was undisputed at trial that no spider bite mark was ever found on Mr. Ethier that day or later. There never was any spider bite – a diagnosis deemed "ridiculous" by Petitioners' vascular expert and an "egregious departure" from the standard of care by Petitioners' emergency medicine expert. (Appx. p.618 (Dr. Adams); Appx. pp. 791-92 (Dr. Jolin).).

In fact, Mr. Ethier's true condition on April 10 – which Respondent admitted he failed to even consider, let alone diagnose as a blood vessel problem – was an aneurysm in the popliteal artery behind the right knee. (Appx. pp. 592-94 (Dr. Adams); Appx. pp. 782-83 (Dr. Jolin); Appx. pp. 640-43 (Dr. Holleman); Appx. pp. 901-03 (Resp.).) An aneurysm is a balloon-like area of an artery which causes blood to swirl around and clot over time, and clots can break off into the bloodstream and block it. (Appx. pp. 584-85 (Dr. Adams).)

On May 25, 2011, Mr. Ethier again experienced the same symptoms as on April 10 and went to another hospital. He was promptly and properly diagnosed with an aneurysm in the popliteal artery behind his right knee. He was transferred by ambulance to a Charlotte hospital where he underwent emergency treatment and surgery, ultimately undergoing an open femoral bypass graft procedure to repair one artery. (Appx. pp. 698-710 (Mr. Ethier); Appx. pp. 623-36 (Dr. Holleman); Appx. pp. 1048-51 (medical illustrations).)

Mr. Ethier testified that he inexorably grew unable to handle the daily cycle of severe pain, disability and depression resulting from his condition. Mr. Ethier testified that he has suffered constant pain and disability of his leg and foot since May 25, 2011, and expects to do so for the rest of his life. He takes narcotic pain medications daily to stave off the pain, uses a leg brace due to his permanent foot drop and limps if he walks any distance, suffers from depression and anxiety, and regularly sees a psychiatrist and pain management doctor. Formerly a gung-ho, active, hardworking man his entire life, he no longer is able to work or engage in home projects or recreational activities as he once did. (Appx. pp. 710-21, 723-32, 744-49.)

Mrs. Ethier testified about Mr. Ethier's pain and suffering as he recovered and attempted to work until he could no longer do so. She testified about her own emotional distress and the impact of Mr. Ethier's permanent pain and disability on their relationship, life and future. Mrs.

Ethier testified that she still loves her husband, but their lives have been forever changed. (Appx. pp. 819-24, 827-33.)[1]

ARGUMENT

I. LOSS OF CONSORTIUM VERDICT

The Court of Appeals erred in affirming the trial judge's ruling that comparative negligence law dictates Petitioner Jeanne Ethier recover nothing on her loss of consortium claim when the directly injured spouse, Petitioner 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.

In order to affirm the trial judge's ruling, the Court of Appeals necessarily overlooked or rejected 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 Court of Appeals necessarily had to conclude that South Carolina is a "derivative" state instead of a "separate and independent" state with regard to consortium claims. Second, the Court of Appeals necessarily had to conclude that the negligence of the directly injured spouse is imputed to the consortium spouse, which also is contrary to established law.

FACTS

The jury in a special verdict form awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Mr. Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Dr. Bibeau was 30% negligent. The jury awarded $250,000 to Mrs. Ethier for loss of consortium. (Appx. pp. 3-5.)

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[1] A more detailed recitation of the factual background and evidence presented at trial is contained in Petitioners' Brief to the Court of Appeals. (Appx. pp. 1082-1091.)

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

> A Verdict was issued by the jury in the above captioned matter on April 8, 2015, a copy of which is attached and incorporated by reference. The Plaintiff was found [to] have been 70% negligent and the Defendant was found to have been 30% negligent. The result is a Verdict in favor of the Defense. (Appx. p.1.)

Petitioners timely moved to correct the erroneous Order and Judgment. (Pl. Motion filed May 11, 2015, Appx. pp. 91-93.) Petitioners asserted that the true verdict of the jury as shown in the special verdict form, with regard to Mrs. Ethier, was that the jury found Respondent negligent; Mrs. Ethier proved by a preponderance of the evidence that Respondent's negligence was the proximate cause of her loss of consortium); and the total damages suffered by Mrs. Ethier for loss of consortium was $250,000. (Verdict Form Question Nos. 1, 8, 9, Appx. pp. 3-5.)

Petitioners argued that, to the extent that the Order and Judgment conflicted with the jury's true verdict by stating that the verdict was for Respondent on Mrs. Ethier's claim, the trial judge should strike or amend the erroneous language so that it accurately states that the verdict was in favor of Mrs. Ethier. Specifically, Petitioners moved that the judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Respondent on Mr. Ethier's claims and a verdict of $250,000 in favor of Mrs. Ethier on her loss of consortium claim. (Pl. Motion, Appx. pp. 91-93; Pl. Rule 59 Motion and Mem., Appx. pp. 225-51; Tr. of Motion Hearing, Appx. pp. 490-501.)

RULING

The Court of Appeals, affirming the trial judge's ruling, applied the law of comparative negligence to Mrs. Ethier's claim and concluded this case is controlled by Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007). In Lee, the Supreme Court stated in passing that "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative

in nature." (Order, Appx. p.23.)

LAW AND ARGUMENT

The Court of Appeals erred because the Supreme Court in Lee actually explained again – as it has repeatedly since the 1920s – that because a loss of consortium claim is separate and distinct, "it is not inconsistent for the jury to return a verdict for the injured spouse on the primary claim and a verdict for the defendant on the loss of consortium claim." Lee, 373 S.C. 654, 647 S.E.2d at 201-02. It is not inconsistent for the jury to return the same verdict on both spouses' claims or different verdicts on each claim. Simply put, the verdicts do not have to be the same on these separate and independent claims. Id. (where plaintiff-husband motorcyclist was found 70% at fault and defendant found 30% at fault, and jury returned verdict for defendant on plaintiff-wife's loss of consortium claim, trial judge erred in ruling that it was an inconsistent verdict for jury not to award any damages to plaintiff-wife because defendant was partially negligent and further erred in requiring jury to award some amount of damages; Supreme Court held that "the original verdicts were consistent. In South Carolina, claims for personal injuries and for loss of consortium are separate and distinct.");[2] accord Craven v. Cunningham, 292 S.C. 441, 443, 357

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

This observation is dicta because the Court in Lee was faced with the issue of whether the verdicts were inconsistent, not whether the directly injured spouse's negligence should be imputed to the other spouse's consortium claim. There was no mention or discussion of the imputation issue in Lee. There was no reason to discuss the imputation issue because the original verdict reinstated by the Court on the consortium claim was a defense verdict on both husband and wife's claims – unlike the present case. Moreover, the cases cited in § 227 of American Jurisprudence 2d do ***not*** support the stated proposition which was recited in Lee and relied on by

the trial judge. It is ***not*** true that a consortium claim fails if the directly injured spouse's claim fails, regardless of whether the consortium claim is considered independent or derivative. ***In fact, that actually is the key distinction. If the consortium claim is derivative, it rises and falls with the injured spouse's claim. If the consortium claim is independent, it is resolved separately from directly injured spouse's claim and does not rise and fall with that claim.*** See cases cited herein and footnotes 6, 7, 8 and 10, infra.

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

See Owens Corning v. R.J. Reynolds Tobacco Co., 868 So.2d 331, ¶ 24 (Miss. 2004) (stating that a loss of consortium claim is *derivative*, thus the spouse claiming it stands in the shoes of the directly injured spouse and is subject to defenses available against the directly injured spouse); Durham ex rel. Estate of Wade v. U-Haul Intern., 745 N.E.2d 755, 764 (Ind. 2001) (stating that a loss of consortium claim is "*derivative* of the injured spouse's personal injury claim"; therefore, "if the spouse's cause of action for personal injury fails, the loss of consortium claim falls with it"); Richardson v. State Highway & Transp. Com'n, 863 S.W.2d 876, 880 (Mo. 1993) (stating that plaintiff's "loss of consortium is *derivative* only, so that if [the directly injured spouse] had no valid claim for personal injuries, [the other spouse] cannot recover for loss of consortium"); Hauck v. Danclar, 620 A.2d 479 (N.J. Super. Law Div. 1993) (trial court opinion stated that loss of consortium claim is *derivative*; thus when directly injured spouse's claim fails then other spouse's loss of consortium claim also fails); Murray v. Frankel, 626 A.2d 1328, 1331 (Conn. App. 1993) (stating that loss of consortium claim is *derivative*; therefore, when directly injured spouse's claim is dismissed then other spouse does not have loss of consortium claim); Henderson v. Hercules, Inc., 324 S.E.2d 453 (Ga. 1985) (holding "[o]ne spouse's right of action for the loss of the other's society or consortium is a *derivative* one, stemming from the right of the other"; therefore, wife had no cause of action against employer for loss of consortium because husband's exclusive remedy against employer was in workers' compensation); Watters v. Dinn, 633 N.E.2d 280, 292 (Ind. Ct. App. 1994) (holding that "[l]oss of consortium is *derivative* in nature and its viability depends upon the validity of the injured spouses' claim"; court reversed summary judgment on some of husband's claims and wife's loss of consortium claim derived from those claims was proper).

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

S.E.2d 23, 25 (1987) (jury's award to injured spouse while denying wife's consortium claim was not inconsistent because wife's claim was contested throughout trial); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002) (finding a verdict for plaintiff on wrongful death claim and a defense verdict on loss of consortium were not inconsistent and were allowed); Daves v. Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003) (after finding for injured husband on medical malpractice claim, it was not inconsistent for jury to find for defendant on wife's consortium claim because "the jury obviously rejected her testimony, as was their prerogative").

Other treatise writers correctly have identified the clear demarcation between the view that a consortium claim is derivative versus separate and distinct. Jurisdictions holding the view – like South Carolina – that it is separate and distinct neither bar nor reduce the consortium spouse's damages based on contributory or comparative negligence. See 25 A.L.R.4th 118, § 2[a] (1983 & Supp. 2015) (explaining that "courts which have refused to permit the contributory negligence of the physically injured family member to bar or reduce damages for loss of consortium by another

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

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

family member have reasoned that the consortium action is not derived from the physically injured family member's action but arises from an injury to a separate and distinct interest on the part of the spouse or parent seeking recovery for loss of consortium, and thus cannot be barred or reduced by the physically injured family member's contributory negligence.").

In the present case, a verdict in Mrs. Ethier's favor is not inconsistent with the defense verdict on Mr. Ethier's claim. Each Petitioner's action is separate and independent, and the jury clearly and properly awarded damages to Mrs. Ethier for loss of consortium as a result of Respondent's negligence. The law of comparative negligence is irrelevant and inapplicable to her claim. The negligence of Mr. Ethier as determined by the jury is not imputed to her and has no impact on her award. The jury's verdict in favor of Mrs. Ethier and the award of damages of $250,000 to her are proper. (Pl. Mem., Appx. pp. 240-43.)

The Court of Appeals also erred for the following reasons:

FIRST, 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, Appx. 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.

The jury was charged on comparative negligence and loss of consortium, but the jury never was instructed that it was to compare the negligence of *Mrs.* Ethier to Respondent. The jury was not asked to determine whether there was any comparative negligence by Mrs. Ethier because she could not be comparatively negligent under the law or under the facts and circumstances of this case. (Jury charges, Appx. pp. 1027-37.) At the hearing on Plaintiffs' post-trial motions, the judge

acknowledged that the jury was correctly instructed to assign percentages of negligence only between *Mr.* Ethier and Respondent. (Tr. of Motion Hearing, Appx. p. 493.) Only Mr. Ethier properly could be found comparatively negligent under the law, and that is what the jury properly was asked to determine based on the instructions of the Court.[3] (Pl. Mem., Appx. pp. 227-28.)

SECOND, the Supreme Court has held that "in South Carolina, the acts of one spouse are not, as a matter of law, imputed to the other spouse."[4] This same principle applies in the context of a spouse's loss of consortium action. The law of comparative negligence is irrelevant and inapplicable to Mrs. Ethier's claim. Any negligence of the directly injured plaintiff is not imputed to the spouse's consortium claim. (Pl. Mem., Appx. p.233.)

THIRD, South Carolina appellate courts repeatedly have held since the 1920s that a loss of consortium claim is not derivative of the directly injured spouse's claim, but is a distinct, independent cause of action. Consequently, any negligence of the directly injured plaintiff is not imputed to the spouse's consortium claim, as shown in the case law cited herein.

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

[4] 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).

In 1962, the Legislature codified the common law claim in S.C. Code Ann. § 15-75-20 (1976).[5] This statute, by its plain terms, clearly indicates loss of consortium is a separate, independent cause of action because it states that the damages recovered by the spouse shall not include damages recovered by the directly injured spouse.

The spouse's loss of consortium claim may be brought simultaneously with the injured spouse's claim or at a different time in a separate lawsuit. The dismissal of the injured spouse's claim does not result in the dismissal of the other spouse's loss of consortium claim, or vice versa. Similarly, a directed verdict or a defense verdict on the injured spouse's claim does not affect the viability of the other spouse's loss of consortium claim, or vice versa.[6]

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

[6] See e.g. Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 596 n.4, 586 S.E.2d 572 (2003) (concluding that fact passenger wife's claim against defendant was dismissed in wreck case due to discovery abuse did not bar or result in dismissal of husband's claim for loss of consortium against defendant because the claims are separate and distinct); Preer v. Mims, 323 S.C. 516, 521, 476 S.E.2d 472, 474-75 (1996) ("Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative"; trial court erred in medical malpractice case in finding it derivative and case was remanded for determination of when wife's loss of consortium claim accrued); Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) (concluding that defense verdict in husband's prior lawsuit for loss of consortium and wife's medical expenses did not bar wife's subsequent lawsuit because "[i]t is well settled in South Carolina that one spouse's cause of action for medical expenses and loss of consortium resulting from negligent injuries to the other spouse is a different and distinct cause of action from one maintained by the injured spouse; judgment in favor of the defendant in one action is not a bar to the other action"); Hiott v. Contracting Servs., 276 S.C. 632, 281 S.E.2d 224 (1981) (where husband brought personal injury action and wife brought loss of consortium action, trial court erred in granting a stay on wife's action while her husband's action was pending on appeal because the "causes of action in the two cases are entirely different and distinct"); Priester v. Southern Ry. Co., 151 S.C. 433, 149 S.E. 226 (1929) (directed verdict against wife, because of her contributory negligence, in federal court case did not bar husband's action for loss of consortium in state court case because "the two cases are entirely different and distinct, and the judgment in favor of the defendants in an action on one is not a bar to an action on the other"); Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C.

In the present case, Mrs. Ethier brought a separate and distinct action for loss of consortium, and the jury properly awarded her damages on that claim. The law of comparative negligence is irrelevant and inapplicable to her claim. Any negligence of the directly injured plaintiff is not imputed to the spouse's consortium claim. (Pl. Mem., Appx. pp. 233-35.)

FOURTH, because a loss of consortium claim is separate and distinct from an injured spouse's claim, and not derivative, that necessarily means any comparative negligence of the injured spouse is ***not*** imputed to the other spouse.[7] Moreover, in an endorsement of South Carolina law, the opposing view that a consortium claim is derivative has been roundly rejected by the commentators.[8]

South Carolina law is in keeping with the modern view is that the negligence of one person usually is not imputed to another, except in certain well-established circumstances such as

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96, 119-21, 512 S.E.2d 510 (Ct. App. 1999) ("Under South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative"; defense verdict for injured spouse's negligence action was not res judicata on spouse's separate loss of consortium claim, although in this instance the jury's verdict was for defense as to both plaintiffs); Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990) (where wife brought personal injury action and husband instituted suit for loss of consortium, the claims involved two separate lawsuits); Page v. New Lower Richland Med. Ctr., 291 S.C. 82, 352 S.E.2d 295 (Ct. App. 1986) (holding that verdict for defendant in the injured spouse's action did not bar spouse's claims for loss of consortium claim and medical expenses because those are "different and distinct cause[s] of action from the one maintained by the injured spouse").

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

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

principal-agent or respondeat superior. "As a general rule, the law holds a person liable only for his own acts and omissions." [9] (Pl. Mem., Appx. pp. 236-37.)

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

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

> Although the wife's cause of action 'arises' from the bodily injury to her husband, . . . the injury suffered is personal to the wife. . . . Loss of her husband's consortium impairs a wife's interests which are wholly separate and distinct from that of her husband: . . . the wife's loss is just as real as it is distinct. She can no longer enjoy her legally sanctioned and morally proper privilege of copulation or procreation, and is otherwise deprived of her full enjoyment of her marital state. These are her rights, not his. . . .
>
> Thus, the injury incurred can neither be said to have been 'parasitic' upon the husband's cause of action nor can it be properly characterized as an injury to the marital unit as a whole. Rather, it is comprised of [the wife's] own physical, psychological and emotional pain and anguish which results when her husband is negligently injured to the extent that he is no longer capable of providing the love, affection, companionship, comfort or sexual relations concomitant with a normal married life. . . .
>
> From the vantage point of the negligent defendant, [the wife] is simply a foreseeable plaintiff to whom he owes a separate duty of care.

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[9] S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 348 S.E.2d 617, 621 (Ct. App. 1986) (rejecting two insurance agents' defense of imputed contributory negligence by which each asserted that the other's negligence was imputed to their principal, the insurance company, so as to bar the company's action against them). See also McCracken and McCall, cited in footnote 4.

Lantis, 95 Cal. App. 3d at 157, 157 Cal. Rptr. at 24 (citations and quotation marks omitted); accord Leonard v. John Crane, Inc., 206 Cal. App. 4th 1274, 142 Cal. Rptr. 3d 700 (Cal. App. 1st Dist. 2012) (favorably citing Lantis with regard to principles on independent action for loss of consortium).[10]

In the present case, Mrs. Ethier is entitled to recover the full amount of damages awarded by the jury because hers is a separate and distinct action. The law of comparative negligence is irrelevant and inapplicable to her claim. The negligence of Mr. Ethier as determined by the jury is not imputed to her and has no impact on her award. To hold otherwise would be to improperly treat her loss of consortium claim as a derivative action in violation of long-established law in South Carolina. It would also violate the long-established principle that each person in a marital relationship is an independent human who may suffer individual damages as a result of a defendant's negligence. (Pl. Mem., Appx. pp. 237-40.)

SIXTH, 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.

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[10] See e.g. Huber v. Hovey, 501 N.W.2d 53, 57 (Iowa 1993) (holding that injured spouse's negligence does not prohibit or affect a consortium claim by the other spouse in case where injured spouse signed an enforceable release at a race track waiving his injury claims; "The policy issue is a simple one. Why should innocent parties who have suffered loss have their right of recovery diminished as a result of the acts of another party whose fault is not imputed to them under established common-law or statutory rules?"); see also numerous cases from other states adopting the same view, listed in Petitioner's brief to the Court of Appeals, Appx. pp. 1103-04.

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.[11]

II. JUROR CONCEALMENT DURING VOIR DIRE

The Court of Appeals erred in affirming the denial of Petitioners' 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 Teressa Killian would have supported a challenge for cause or would have been a material factor in the use of Petitioners' peremptory challenges. Even if the concealment is deemed unintentional and bias is not inferred, Petitioners have shown prejudice and a new trial is required.

FACTS

The trial judge during voir dire identified Respondent and possible witnesses, including Michael Williams, CEO of Fairfield Memorial Hospital, and *twice* identified Jerilyn Wadford, RN, and Rhonda Gwynn, LPN. (Appx. pp. 511-14.) Nurses Wadford and Gwynn were the emergency department nurses who were directly involved in Mr. Ethier's care and treatment on April 10,

[11] 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. 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").

2011, and both testified at trial as defense witnesses. Respondent testified in his defense. The trial judge then asked, "Now, as to the individuals that I just identified as possible witnesses in this case, has any member of the jury panel ever been related by marriage or are you related by blood or have you ever had a close social or a personal relationship with the people that I've identified as possible witnesses?" Juror Killian stood up and testified only that she "used to work at Fairfield Memorial Hospital with Mike Williams." (Appx. pp. 514-15.)

The trial judge asked, "Is there any member of the jury panel or a member of your immediate family who has ever been employed or been a patient in or treated by any of the following medical professionals . . . Rhonda Gwynne, an RN, or Jerilyn Wadford, an RN? So if you have been employed by or been treated by or been a patient of any of those medical professionals, please stand." Juror Killian did not respond. (Appx. pp. 520-21.)

At the juror evidentiary hearing held ***after*** the trial, Killian testified that she began working at Fairfield Memorial Hospital in about 2007, 2008 or 2009, and was there close to two years. (Tr. of Juror Hearing, Appx. p.308.) Killian testified that she worked as a certified nurse assistant on the medical/surgical floor and in the emergency department. In the emergency department, Killian testified she triaged patients and worked directly with Respondent, Jeri Wadford and Rhonda Gwynn for nearly two years. (Appx. pp. 309-15.)

When the trial judge asked Killian why she did not reveal during voir dire that she knew and had worked with Respondent, Killian testified, inexplicably and incredibly, that she "didn't really consider myself as knowing him personally." (Appx. p.316.) However, the trial judge noted that Killian *did* respond to the questions by saying she had worked with the CEO, Mike Williams, at the hospital and knew him from that employment. (Appx. p.316.)

Killian testified, inexplicably and incredibly, that she did not reveal during voir dire that she knew Respondent, Wadford and Gwynn because she saw them only at the hospital. (Appx. pp. 316-17.)

The trial judge asked Killian why she did not reveal she knew and had worked with Wadford and Gwynn when the jury pool was asked about persons who had been employed or been a patient or treated by certain medical professionals, including Wadford and Gwynn. (Appx. p.318.) Killian testified, inexplicably and without actually answering the Court's question, that she no longer takes her children to Fairfield Memorial Hospital, but goes instead to Chester hospital. Killian then testified that Williams' treatment of her son 16 years ago was something she "had forgot. It just popped in my head just now." (Appx. p.319.)

LAW AND ARGUMENT

"Under South Carolina law, litigants are guaranteed the right to an impartial jury."[12] "Through the judge, the parties have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for a cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge."[13]

"A party seeking a new trial based upon the disqualification of a juror must show (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to the verdict; and

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[12] Alston v. Black River Elec. Coop., 345 S.C. 323, 326, 548 S.E.2d 858, 859 (2001); see also U.S. Constit., Amend. VII; S.C. Code Ann. § 14-17-1050 (2008) ("in all civil cases any party shall have the right to demand a panel of twenty competent and impartial jurors from which to strike a jury"); S.C. Code Ann. § 14-17-1020 (2008) (potential juror shall be deemed incompetent to serve on the jury if he has an interest in the lawsuit such that he is "not indifferent in the cause").

[13] State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282 (quoting State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982)).

(3) the moving party was not negligent in failing to learn of the disqualification before verdict." Whether a new trial is warranted depends on the circumstances of each case.[14]

The Supreme Court has held that "intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Woods, 345 S.C. at 587-88, 550 S.E.2d 282 (citations omitted).

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

The record shows that not only should a reasonable juror have understood the judge's questions were intended to reveal whether potential jurors knew or had worked with anyone involved in the case, ***but Killian actually understood the questions that way***. Killian responded

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

that she "used to ***work*** at Fairfield Memorial Hospital with Mike Williams" and confirmed that she "knew him from that ***employment***." (Appx. 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.

Killian's failure to respond to direct, straightforward, unambiguous questions that she plainly understood is truly incredible and disturbing. Her indefensible explanation that she believed she only had to reveal her working relationship with CEO Williams – but not with Respondent, Wadford or Gwynn – simply because she talked to Williams outside the hospital is belied by the fact *she only knew Williams through the hospital.* There is no evidence Killian had any social or personal relationship with Williams outside the hospital other than perhaps saying "hi" on the street. (Killian presumably would also say "hi" to Respondent, Wadford or Gwynn if she saw them on the street.) 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.

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.***

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 Petitioners have shown prejudice. 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 Petitioners. 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

The Court of Appeals erred in affirming the denial of Petitioners' motion for a new trial based on juror misconduct consisting of premature and actual deliberations, where a seated juror engaged in misconduct by:

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

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

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

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

FACTS

Juror Sandra Carmichael testified in her post-trial affidavit and at the post-trial evidentiary hearing that:

> Beginning on the second or third day of the trial, [juror] Teressa [Killian] began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teressa, when she referred to "Jeri," meant Jerilyn Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.
>
> Teressa repeatedly said during breaks in the jury room that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau did not do the foot pulses, then it was because Jeri did it and she's very thorough."
>
> Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor." . . .
>
> Teressa repeatedly made these statements about Dr. Bibeau and Jeri every day when we were on break in the jury room. No one asked her to make them, although she and another juror, Kayla, would often discuss them. . . .
>
> After the other nurse, Rhonda Gwynn, testified, Teressa said during a break in the jury room that she also personally knew Rhonda and that Rhonda was a good nurse who was thorough in her job. Teressa did not talk as much about Rhonda as she did about Dr. Bibeau and Jeri. (Aff. of Carmichael, ¶¶ 4-11, 13, 16, Appx. pp. 141-43.)

Carmichael testified by affidavit and at the hearing that Killian made these same statements during actual deliberations. (Aff. of Carmichael, ¶¶ 6-7, 17-21, Appx. pp. 141-43, 290-298, 306.) Nine jurors testified they heard Killian say, in the jury room during breaks in the trial, that she worked at the hospital with Respondent, Wadford and Gwynn.[15] Four jurors testified they heard

[15] (Sandra Carmichael, Appx. pp. 290-93; Aff. of Carmichael, Appx. pp. 141-42; Kayla Stewart, R. 336-37, 341-42; Foreperson Connie Pete, Appx. pp. Tr. of Juror Hearing pp. 351-54; Shawna Cason, Appx. p.366; Austin Smith, Appx. p.371; Linda Albowicz, Tr. of Juror Hearing

Killian, in the jury room during breaks in the trial, vouch for the skill or proficiency of Respondent, Wadford or Gwynn by making statements to the effect of, they were good, careful or thorough, or if the doctor did not take the foot pulses, then the nurse did.[16] Four jurors testified they heard Killian, in the jury room during breaks in the trial, vouch for the truthfulness or credibility of Respondent, Wadford or Gwynn by making statements to the effect of, if they said they did something, they did it.[17]

Carmichael testified that at the beginning of deliberations, she believed that Respondent was more at fault than Mr. Ethier, and that several other jurors expressed the same opinion. However, Killian's repeated comments caused her to change her mind and believe that Mr. Ethier was more negligent than Respondent. (Aff. of Carmichael, ¶¶ 23-25, Appx. pp. 143-44.)

LAW AND ARGUMENT

"As a general rule, juror testimony may not be the basis for impeaching a jury verdict. Normally, courts should not intrude into the privacy of the jury room to scrutinize how jurors reached their verdict." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). However, the Supreme Court in Hunter and its progeny has held that "[w]hen an extraneous influence is

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pp. 397-98, 404; Misty Beam, Appx. p.408, 410-11; Kathy Rabb, pp. 427-28; Shikierra Harrison, Appx. pp. 437-38; Alternate Sandra Mitchell, Tr. of Juror Hearing p. 446; see Pl. Mem., EXHIBIT H containing excerpts of the testimony of these nine jurors, Appx. pp. 163-88.)

[16] (Sandra Carmichael, Appx. pp. 291-93; Aff. of Carmichael ¶¶ 7-16, Appx. pp. 142-43; Kayla Stewart, Appx. pp. 336-37, 341-42; Shawna Cason, Appx. pp. 359-60; Kathy Rabb, Appx. pp. 427-29; see Pl. Mem., EXHIBIT I containing excerpts of the testimony of these four jurors, Appx. pp. 189-201.)

[17] (Sandra Carmichael, Tr. of Juror Hearing pp. 291-92, Aff. of Carmichael ¶¶ 7-16, Appx. pp. 142-43; Shawna Cason, Appx. pp. 363-64; Tara Brown, Appx. pp. 385-87; Kathy Rabb, Appx. pp. 427-29; see Pl. Mem., EXHIBIT J containing excerpts of the testimony of these four jurors, Appx. pp. 202-12.) Tara Brown first testified that she did hear such statements in the jury room before deliberations began, but then testified she did not.

alleged, juror testimony can normally be used. If the alleged misconduct is internal, courts are more strict. Normally, juror testimony involving internal misconduct is competent only when necessary to ensure due process, i.e., fundamental fairness." Hunter, 320 S.C. 88, 463 S.E.2d at 316. Rule 606(b), SCRE, allows juror testimony regarding extraneous prejudicial information or an outside influence.

Contrary to the Court of Appeals' conclusion, Petitioners 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. Petitioners 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., Appx. pp. 1119-24.) Petitioners outlined the law regarding extraneous influences and internal misconduct. (App. Br., Appx. pp. 1125-26.) Petitioners argued that the extraneous, improper and inadmissible nature of Killian's oft-repeated information absolutely influenced jurors and their verdict. (App. Br., Appx. 1126-28.) It is obvious that Petitioners 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.

The Court of Appeals erred because the record shows that Killian's statements constitute juror misconduct and premature and actual jury deliberations which poisoned the well against Petitioners throughout the trial, all in violation of the Court's instructions and Petitioners' fundamental right to a fair and impartial jury.

The existence, scope and adequacy of the examination of Mr. Ethier by Respondent and the alleged triage examination by RN Wadford were hotly disputed at trial. The dispute in particular focused on whether right foot pulses were taken only by Anthony, an inexperienced certified nurse assistant in triage, or also by RN Wadford in triage or, most importantly, by Respondent himself. The credibility of Respondent and the RN Wadford's testimony on this point was of critical importance. Defense counsel in closing repeatedly emphasized that judging the credibility of Mr. Ethier and Respondent was crucial. (Appx. pp. 1008-09, 1011.)

Petitioners were prejudiced because Killian's verdict was affected by her obvious and oft-expressed bias. Petitioners 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. 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. Petitioners are entitled to a new trial because they did not have a fair and impartial jury.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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August 3, 2018

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Appellate Case No. 2015-001964

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

Philip Ethier and Jeanne Ethier,

Petitioners,

v.

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

Defendants,

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

PROOF OF SERVICE

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

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August 3, 2018