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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Unpublished Opinion No. 2018-UP-281 (S.C. Ct.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.

APPENDIX – VOLUME I

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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
C.A. No. 13-CP-20-0012

Philip Ethier and Jeanne Ethier

Guy R. Bibeau, MD

PLAINTIFF(S)

DEFENDANT(S)

2015 APR 30 AM 10 32
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. BECKHAM

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

X **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment

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

Parties were granted ten (10) days in which to file written post- trial Motions by Order from the Bench after the receipt of the verdict.

RECEIVED
MAY _ 4 2015
BY PROFFITT & COX, LLP

ORDER INFORMATION

This order ___ ends _X__ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

SCANNED
Date: 5/4/15
Proffitt & Cox, LLP

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge	2135 **Judge Code**	4/27/15 **Date**

For Clerk of Court Office Use Only

This judgment was entered on the 30 day of April, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of April 2015 to attorneys of record or to parties (when appearing pro se) as follows:

David Proffitt, Proffitt & Cox, LLP 140 Wildwood Park, Dr., Ste. A COLUMBIA, SC 29223-6518	G. Murrell Smith, Jr. and David C. Holler PO Box 580 Sumter, SC 29150
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**

Pattie J. Dickson
CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	C/A NO.: 13-CP-20-12
Philip Ethier and Jeanne Ethier,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**VERDICT FORM**
	)	**(Phillip Ethier and Jeanne Ethier)**
Guy R. Bibeau, M.D.	)	
	)	
Defendants.	)	

2015 APR 9 AM 9 03
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

1. Was the Defendant Dr. Bibeau negligent?

__✓__ Yes

_____ No

(If "Yes", go to Question 2.)
(If "No", deliberate no further. Foreperson sign and date this verdict form.)

2. Was the Defendant, Dr. Bibeau's negligence at least one of the proximate causes of injury or damages sustained by Philip Ethier?

__✓__ Yes

_____ No

(If "No" deliberate no further. Foreperson sign and date this verdict form.)
(If "Yes", go to Question 3)

3. Was Philip Ethier negligent?

__✓__ Yes

_____ No

(If "Yes", go to Question 4)
(If "No", go to Question 6)

4. Was Mr. Ethier's negligence at least one of the proximate causes of injury or damage sustained by him?

✓ Yes

_____ No

(If "Yes", go to Question 5)
(If "No", go to Question 6)

5. Taking into consideration that the total percentage of negligence of Dr. Bibeau and Mr. Ethier is 100%, assign percentages of negligence to both of them:

30 % Guy R. Bibeau, M.D.

70 % Philip Ethier

(Again, these two percentages must equal 100%)

6. What is the total amount of economic damages that Mr. Ethier sustained as a proximate result of the negligence of the Defendant? Do not reduce this sum by any percentage of negligence that you may have noted in response to Question 5.

$ 1,250,000.00

7. What is the total amount of non-economic damages that Mr. Ethier sustained as a proximate result of the negligence of the Defendant? Again, do not reduce this sum by any percentage of negligence you may have noted in response to Question 5.

$ 500,000.00

8. Do you find that Jeanne Ethier has proven by a preponderance of the evidence that Dr. Bibeau's negligence was the proximate cause of a loss of consortium?

✓ Yes

_____ No

9. What is the total amount of damages sustained by Jeanne Ethier for any loss of consortium?

$ 250,000.00

Connie Pete

Foreperson

4/8/2015

Date

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD)

2015 SEP 8 PM 3 49
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Philip Ethier and Jeanne Ethier,)

Plaintiffs,) Civil Action No. 2013-CP-20-0012

v.)

Guy R. Bibeau, M.D.,) **ORDER DENYING PLAINTIFFS' POST-TRIAL MOTIONS**

Defendant.)

This matter is before this Court on the Plaintiffs' post-trial motions including a Motion for New Trial and Motion to Alter or Amend Judgment. A hearing was held with counsel of record for both sides present on July 6, 2015. The hearing was held in Spartanburg County with the consent of the parties. In addition, the Court held an evidentiary hearing on May 12, 2015, during which all jurors who participated in reaching the verdict in this case were present and testified to the Court's questioning. After a review of parties' various motions and filings which were extensive, including the affidavits, exhibits and other submissions by the parties, and the oral arguments of counsel, this Court denies all post-trial relief sought by the Plaintiffs and directs that judgment be entered in the Defendant's favor consistent with the judgment entered April 30, 2015.[1]

[1] To the extent not otherwise addressed in this order, the Court has considered and rejected issues and arguments raised by Plaintiffs in their Motions for a New Trial including Memorandum in Support and Exhibits A through D filed April 20, 2015, before the juror evidentiary hearing; Plaintiffs' Rule 59 Motion to Alter or Amend the Judgment by Correcting Error in Form 4 Order filed May 11, 2015; Plaintiffs' Motions for a New Trial including Memorandum in Support and Exhibits A through L filed June 30, 2015, after the juror evidentiary hearing; Plaintiffs' Rule 59 Motion to Alter or Amend the Judgment by Correcting

I. Procedural Background

This is a medical malpractice action. Prior to trial, the Plaintiffs entered into a settlement with the Defendant Fairfield Memorial Hospital for a total of $100,000 which was allocated by the parties to that settlement as follows: $60,000 was apportioned to Philip Ethier's claims and $40,000 was apportioned to Jeanne Ethier's claims. The case proceeded to trial before a jury beginning on March 30, 2015. On April 8, 2015, the jury returned a verdict whereby the Plaintiff Philip Ethier was found to have been 70 percent negligent and the Defendant was found to have been 30 percent negligent. On April 30, 2015, the Court entered judgment in favor of the Defendant against both Plaintiffs.

On April 15, 2015, the Plaintiffs filed a timely Motion for New Trial which was supported by the affidavit of juror Sandra Carmichael. The Plaintiffs sought a new trial on four separate grounds: (1) juror concealment during the voir dire; (2) juror misconduct during premature deliberations; (3) juror misconduct during deliberations; and (4) pursuant to the thirteenth juror doctrine. The Defendant objected to the consideration of the Carmichael affidavit and opposed the Plaintiffs' arguments for a new trial. Following the entry of the judgment on April 30, 2015, the Plaintiffs filed a timely motion pursuant to Rule 59(e), SCRCP, to alter or amend the judgment whereby the Plaintiffs requested the Court to "correct" or "amend" the judgment "to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim." Pl. Motion to Alter or Amend, p. 2.[2]

Error in Form 4 Order including Memorandum in Support and Exhibit A; and in oral arguments at the post-trial motion hearing on July 6, 2015.

[2] During the post-trial proceedings, the Defendant Bibeau filed a number of motions as well including a motion for new trial that preceded the entry of judgment and was thus rendered moot when the judgment was entered in the Defendant's favor. In addition to objecting to the Court's consideration of the Carmichael affidavit, the Defendant also filed a

On May 12, 2015, the Court conducted a *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) hearing to voir dire the jurors regarding possible premature deliberations, the possible introduction of extrinsic evidence during the trial or deliberations, and an alleged lack of candor from one juror during pretrial qualification. All jurors who participated in the verdict were summoned and appeared for questioning by the Court on that date.

II. Legal Analysis

A. Juror Concealment During Voir Dire

The Plaintiffs seek a new trial on the basis of juror concealment during voir dire that was conducted prior to jury selection. The Plaintiffs argue that "Teresa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial Hospital; and that she was biased in their favor due to her personal knowledge of them." Pl. Mot. for New Trial, p. 2. This Court disagrees.

In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the South Carolina Supreme Court established a two-part test to determine whether a juror's failure to disclose information during voir dire warrants a new trial. First, the trial court must find "the juror intentionally concealed the information." *Woods*, 550 S.E.2d at 284. If the court finds no intentional concealment occurred, the inquiry ends there. "However, if the court finds the juror's concealment was intentional, it must then determine whether the concealed information 'would have been a material factor in the use of the party's peremptory challenges.'" *Id.* The Supreme Court further explained 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

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motion to cancel the Court's evidentiary hearing that took place on May 12, 2015. That motion is also now moot.

is of such significance that the juror's failure to respond is unreasonable." *Id.* In contrast, unintentional concealment 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." *Id.* This test was also recently applied by the Court of Appeals in the case of *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014).

Thus, the initial inquiry for this Court is to review the responses of Teresa Killian (juror #42) to ascertain whether her responses amount to intentional concealment. The Court clearly recognizes that Ms. Killian had worked previously as a nurse at Fairfield Memorial Hospital during the time that the Defendant and Nurse Jerilyn Wadford worked at the same facility. In doing so, Ms. Killian had come into contact, on a professional basis, with the Defendant and Nurse Wadford. The Court has thoroughly reviewed the relevant portions of the voir dire asked of Ms. Killian and her responses to the Court's questions. The relevant sections are stated verbatim in the Defendant's opposition memorandum. In addition, the Court questioned Ms. Killian at length during the May 12, 2015 hearing regarding her responses to the voir dire questions, her understanding of those questions and the bases for her responses. The Court inquired why Ms. Killian did not disclose that she knew and/or worked with the Defendant or the nurses who were identified as witnesses.

When Ms. Killian's responses are viewed in light of her testimony given at the May 12th hearing, the Court finds that Ms. Killian did not intentionally conceal from the litigants or the Court her past professional relationship with several witnesses. The Court finds that the voir dire questions did not directly ask the potential jurors about work or professional relationships. A reasonable juror could have reasonably understood the voir dire as asking only about personal or social relationships with the witnesses. The Court finds it reasonable that Ms. Killian understood

the questions to be about personal friendships or other social relationships and that she felt those types of relationships are separate and distinct from relationships that may have only existed in and were generated by the workplace.

Ms. Killian did in fact disclose she had worked at Fairfield Memorial Hospital during the time Dr. Bibeau was employed there. Importantly, she made no attempt to conceal her employment history. Moreover, when given the opportunity, the Plaintiffs' counsel failed to request any follow up voir dire questions about who she knew or may have had contact with during her prior employment at the hospital.

In addition, the Court finds that Ms. Killian's testimony at the May 12th hearing demonstrates that she did not view her relationship with Dr. Bibeau and the nurses as a "close social or personal relationship" which was the precise question asked. A juror does not commit misconduct by failing to respond to a different or broader question than what was actually asked. Furthermore, the use of the phrasing "close social or personal relationship" interjects subjectivity and interpretation for the juror, and Ms. Killian cannot be criticized for the manner in which she construed that language. If Plaintiffs' counsel wanted to know whether Ms. Killian "knew" the parties or witnesses, that could have been asked, but it was not in this instance. The use of the phrasing "close social or personal relationship" reasonably suggests a relationship much different than simply knowing a person or working with him or her at one time. In short, this Court concludes that Ms. Killian reasonably responded to the questions asked during pretrial voir dire.

Because the Court finds that an average juror could have interpreted the court's voir dire questions in the same manner that Ms. Killian did, and that this interpretation is reasonable, the Court finds that intentional concealment by Ms. Killian did not occur, and therefore, no inference of bias can be drawn by this Court. The motion for new trial on this basis is denied.

B. **Juror Misconduct in Preliminary Deliberations**

The Plaintiffs also seek a new trial on the basis of alleged juror misconduct committed during preliminary deliberations. The Plaintiffs argue that "Teresa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn because she had personally worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau 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 (3) by unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them." Pl. Mot. for New Trial, p. 2.

The issue surrounding premature deliberations by a jury is a question of fundamental fairness. In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), the South Carolina Supreme Court held that "premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." 509 S.E.2d at 813. The Supreme Court then proceeded to provide a "suggested procedure to follow in cases in which an allegation of premature deliberations arises." 509 S.E.2d at 815. The Supreme Court explained:

> If ... the fact of the premature deliberations does not become apparent until after the jury's verdict, we hold the trial court **may** consider affidavits [on the issue of premature deliberations]. If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court

> may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Id. (Emphasis in original) (Citation omitted).

The Plaintiffs' motion was supported by an affidavit from juror Sandra Carmichael which raises the issue of juror misconduct in initiating preliminary deliberations. The Court's consideration of that affidavit is governed by Rule 606(b) of the South Carolina Rules of Evidence which allows a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b), SCRE. Rule 606(b) further provides:

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ... [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. Therefore, as the Supreme Court has recognized, Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). The Supreme Court further explained that "juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness." *Id.* Yet, the Supreme Court also cautioned that "trial courts are justified in exercising a degree of caution before entertaining such evidence in an attack on a jury's verdict." 661 S.E.2d at 372.

The Defendant here argued that the Carmichael affidavit does not rise to the level of extrinsic misconduct as set forth in Rule 606(b). In her affidavit, Ms. Carmichael describes statements made by juror Teresa Killian that began during the second or third day of trial and continued into the jury's deliberations. Ms. Carmichael characterized these statements as indicating that Ms. Killian had worked with Dr. Bibeau and Nurse Jerilyn Wadford at the Fairfield Memorial Hospital and were made to bolster their professional work abilities and credibility. After reviewing the Carmichael affidavit, the Court found it to be sufficiently credible to justify further inquiry by the Court. Based on the information in that affidavit, the Court overruled the Defendant's objection to the affidavit and concluded that it was necessary to hold a hearing as described in the *Aldret* decision to determine if misconduct occurred and if so, what effect, if any, it may have had on the outcome of the case. The hearing was held on May 12, 2015. All jurors who participated in the finding of the verdict in this case were present and did testify.

As indicated, the Supreme Court has used "the language of 'fundamental fairness' to describe the constitutional implications of juror misconduct." *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489, 493 (2009). The Supreme Court has cautioned, however, that "not all juror misconduct impinges upon the fundamental fairness of a trial." *Id.* The Court explained that "[a] defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct does not *ipso facto* justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors." *Id.*

The standard for evaluating alleged juror misconduct requires proof of the resulting prejudice by clear and convincing evidence. *See, Vestry and Church Wardens of Church of Holy*

Cross v. Orkin Exterminating Co., Inc., 384 S.C. 441, 682 S.E.2d 489, 494 (2009) (Court explained that trial court found "no clear and convincing evidence that any of the twelve jurors ... were improperly influenced by [the juror's] misconduct"). *See also, Aldret,* 509 S.E.2d at 814, *citing Hunt v. Methodist Hospital*, 240 Neb. 838, 485 N.W.2d 737 (Neb. 1992) ("party claiming juror misconduct has burden to prove prejudice by clear and convincing evidence"). Therefore, the Plaintiffs cannot rest upon evidence that misconduct merely occurred, but rather must prove prejudice resulting from that misconduct by clear and convincing evidence.

A misunderstanding of one juror or an inappropriate comment made during the course of the trial does not warrant setting aside a verdict. *State v. Galbreath*, 359 S.C. 398, 406, 597 S.E.2d 845, 849 (Ct. App. 2004). Litigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials. *Smoak v. Seaboard Coast Line Railroad Company*, 259 S.C. 632, 193 S.E.2d 594, 598 (1972). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." *Id. See also, Aakjer v. Spagnoli*, 291 S.C. 165, 352 S.E.2d 503 (Ct. App. 1987). The Court notes that this was a five day trial which involved rather tedious testimony. Other courts have similarly noted that given the length and nature of trial it is not surprising that a juror may make some comments as the trial progresses. *United States v. Piccarreto*, 718 F. Supp. 1088 (W.D.N.Y. 1989). When that does happen, a court must decide whether a new trial is warranted. In doing so, the inquiry is whether the evidence shows prejudice in that the improper comments shaped the final deliberations or that the moving party was prejudiced by the comments. As indicated, this should be shown by clear and convincing evidence to justify the court invading the sanctity of the jury room and setting aside the verdict.

In applying these benchmarks and after thoroughly reviewing the testimony of the jurors from the May 12th hearing and the positions of the parties as set forth in the extensive

memoranda received, the Court finds that Ms. Killian did make statements that were heard by several jurors concerning her work experience with the Defendant and Nurse Wadford. However, the Court concludes that these statements had no real effect on the consideration of the verdict in this case.

The pertinent testimony from the jurors is correctly and succinctly summarized in the Defendant's opposition memorandum and need not be restated verbatim here. Taking that testimony as a whole, the Court finds that some premature comments were made to a few jurors. However, the Court further finds that these comments did not affect the ultimate verdict to an extent that a new trial should be granted.

Moreover, the Court finds that the premature discussions by Ms. Killian were comments made by her to other jurors during breaks in the trial. Her comments were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences or from extraneous matters.

In addition, the Court concludes that there was no testimony from any juror that would indicate that other jurors entered into discussions with her on these matters. In fact, the vast majority of the jurors did not recall the statements being made or indicated that the statements had no bearing on their ultimate verdict in the case. Therefore, the number of jurors even exposed to Ms. Killian's comments was minimal.

The Court does not find that Ms. Killian's comments during breaks in the trial had any effect on the jurors – Ms. Carmichael included – so as to render the trial fundamentally unfair. The Court does not find that any misconduct by Ms. Killian as ascertained from the jurors' testimony actually influenced the jury's verdict. The Court thus denies the Plaintiffs' motion for new trial on this ground.

C. **Juror Misconduct During Deliberations**

The Plaintiffs also seek a new trial on the basis of juror misconduct committed during jury deliberations. The Plaintiffs make substantially the same arguments as they did with respect to comments made during preliminary deliberations. Pl. Mot. for New Trial, p. 3.

As the Court of Appeals recently instructed, "[i]nitially, the trial judge must make a factual determination as to whether juror misconduct has occurred." *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111, 114 (Ct. App. 2014). In addition, the Plaintiffs must also prove by clear and convincing evidence that prejudice actually occurred as a result of that misconduct. The Court finds that the Plaintiffs have not satisfied that burden of proof.

The Plaintiffs allege that juror Teresa Killian committed misconduct during the jury deliberations by describing the Defendant as being a "good doctor" and by claiming that the Defendant and the nurses were "thorough and competent." As addressed above, the Court finds after considering the testimony from the May 12th hearing that Ms. Killian's comments were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences or from extraneous matters. In *Lynch*, the Court of Appeals explained that "[i]nternal influences involve information coming from the jurors themselves." *Lynch*, 760 S.E.2d at 115, *citing State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859, 867 (Ct. App. 2005). There is no evidence of any outside influence or extraneous influence on the jury. Because the comments attributed to Ms. Killian are internal influences, the testimony regarding such statements is inadmissible under Rule 606(b), SCRE, consistent with the analysis by the Court of Appeals in *Lynch*. Therefore, the Court concludes, as an initial point, that the evidence of the juror misconduct is actually inadmissible, and the Plaintiffs' proof fails on that basis.

In addition, the Court finds that the Plaintiffs have not satisfied their burden of proving by clear and convincing evidence any resulting prejudice to the jury from Ms. Killian's

comments. In assessing the testimony of the jurors at the May 12, 2015 hearing, the Court observes that none of the jurors, with the exception of Ms. Carmichael, indicated that the comments made by Ms. Killian had any bearing on their deliberations or the verdict that was reached. Each juror testified he or she decided the case on the law and evidence presented at trial. The Court thus finds that the deliberations conducted in this case do not violate fundamental fairness and that the actions of Ms. Killian in this case are not such that would justify a new trial.

Even with Ms. Carmichael, the Court finds insufficient proof of prejudice. In assessing the impact of Ms. Killian's comments on Ms. Carmichael, the following are the pertinent portions of her testimony. Ms. Carmichael testified as follows:

> Q. But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?
>
> A. I think it did a little.
>
> Q. Can you tell me in what way?
>
> A. Because when we got back there we was -- several of us was leaning towards in favor of the plaintiff and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then may be he didn't, you know, sign those papers. She knew him.
>
> Q. Okay, so it did have some effect on your ultimate decision?
>
> A. Yeah. She stated several times that she knew him and he was a good, reliable doctor.
>
> (Tr. 26).

* * * * *

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

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

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

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

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

A. Yes, sir.

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

A. Theresa's knowledge of Doctor Bibeau's work.

(Tr. 27-28).

The Court has evaluated Ms. Carmichael's testimony. She claims that Ms. Killian's comments had an effect on her own deliberations, but when asked whether there was an effect, she responded, "I think it did a little." (Tr. 26). Therefore, Ms. Carmichael herself attributes only minimal impact to Ms. Killian's comments. She also prefaced her response with the words "I think" which are suggestive that she has a certain degree of uncertainty. Thus, the testimony of Ms. Carmichael, in and of itself, establishes only a possibility of prejudice even within her own subjective thought process. Moreover, the Court finds that it is more likely than not that Ms. Carmichael simply changed her mind after the verdict was rendered and after her jury

service had ended, but that does not support a finding of prejudice. Her perception of impropriety is in stark contrast to every other juror who testified that no prejudice occurred during the trial or during deliberations.

The Court further observes that the jurors' testimony as a whole strongly demonstrates that Ms. Killian was not a leader on that jury. She was not a juror with any particular influence over other jurors. The Court notes that many of the jurors did not recall any comments being made by Ms. Killian regarding her personal opinions of the Defendant or the nurses. Moreover, the jurors who did recall such comments testified without reservation that such comments had no effect on their deliberations. As one particular example, the foreperson testified that she "didn't pay much attention" to Ms. Killian. (Tr. 82). The Court was left with the impression that that was likely true for the other jurors as well.

The Court is also cognizant of the ultimate verdict. The jury, including Ms. Carmichael as well as Ms. Killian, did not return a verdict absolving the Defendant of all fault. To the contrary, this jury found the Defendant thirty percent at fault and, when asked to determine damages, awarded $1.75 million for Mr. Ethier and $250,000 for Mrs. Ethier. Thus, the jury, including both Ms. Carmichael and Ms. Killian, found negligence on the part of the Defendant and awarded substantial damages. That is further evidence to the Court that any comments by Ms. Killian regarding her personal opinion did not impact the fundamental fairness of the trial or the jury deliberations.

Finally, the Court finds the Supreme Court's decision in *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489 (2009), to be instructive to this analysis. In that case, the trial judge received information that a juror named Abrams committed misconduct in numerous particulars including personally viewing the building at issue and informing the jury of her opinions of its condition, consulting with a painter

and advising the jury what the painter told her, and consulting with her own minister and sharing her minister's comments with the jury. Abrams also made comments that the plaintiff "has money" and was trying to get someone else "to pay their bills." The trial judge held a hearing and those allegations were "in large measure" corroborated by the other jurors, but as the Supreme Court explained, "none of the jurors indicated that their final deliberations were affected by Abrams' misconduct." 682 S.E.2d at 491. The trial judge ultimately denied the plaintiff's motion for a new trial. The Court of Appeals reversed, but the Supreme Court then on certiorari upheld the trial judge's denial of a new trial. The trial judge's rulings, which were affirmed by the Supreme Court, are described as follows:

> On February 22, 2006, the judge issued an order denying Holy Cross's motion for new trial. The judge found that Holy Cross failed to "demonstrate prejudice affecting the impartiality of the verdict," and that "[t]he statements and actions by Ms. Abrams were not of a kind to impermissibly influence the jury or effect the verdict." The judge noted that there was nothing Abrams could have learned from driving to the church that was not already apparent from photographs in evidence. Likewise, the judge found that the statement made by the painter was consistent with statements made by Holy Cross's witnesses and therefore did not unduly prejudice Abrams's deliberation. Finally, the judge found that there was no evidence that Abrams's comments shaped the final deliberations or improperly influenced the other jurors, in light of the testimony indicating that the jurors admonished Abrams, "laughed off" her comments, and generally paid her little attention. The judge concluded that, "having conducted an extensive individual voir dire of each juror and having viewed the conduct of the offending juror, this Court has found no indication that the jury's unanimous verdict was compromised, and [Holy Cross] has not made the showing of any prejudice by clear and convincing evidence, as required by the applicable case law."

682 S.E.2d at 491-492.

The allegations of juror misconduct committed by Ms. Killian in the present case pale in comparison to the misconduct of juror Abrams in *Church of Holy Cross*. In fact, the trial judge in that case held the juror in contempt of court for her conduct. Nonetheless, *Church of Holy*

Cross is instructive because this Court, like the trial judge in that case, finds that the misconduct of Ms. Killian, which is limited at most to interjecting her personal opinion that the Defendant is a "good doctor" and is "thorough and careful," did not shape or improperly influence the jury deliberations. Ms. Carmichael claims that the comments by Ms. Killian may have affected her "a little," but the Court does not find that assertion to be credible in light of her testimony and the result reached by the jury as a whole. The Court does not find that the Plaintiffs have sustained their burden of proving prejudice by clear and convincing evidence. In sum, the Court concludes that the deliberations conducted in this case do not violate fundamental fairness and that the actions of Ms. Killian in this case are not such that justify a new trial. The Court thus denies the Plaintiffs' motion for new trial on this ground as well.

D. Thirteenth Juror Doctrine

The Plaintiffs have requested that the Court order a new trial under the thirteenth juror doctrine "because the jury's verdict on the apportionment of negligence between the parties is against the weight of the evidence." Pl. Mot. for New Trial, p. 3.

Under South Carolina law, a trial judge may grant a new trial following a jury verdict under the thirteenth juror doctrine, which "entitles the trial 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 v. Gilbert Construction Co., Ltd.,* 383 S.C. 590, 681 S.E.2d 879, 883 (2009). "As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Id.* Under the thirteenth juror doctrine, a new trial may be granted if the trial judge determines the jury's verdict is contrary to the fair preponderance of the evidence. *Burke v. AnMed Health,* 393 S.C. 48, 710 S.E.2d 84, 88 (Ct. App. 2011) *citing R.C. McEntire v. Mooregard Exterminating Servs., Inc.,* 353 S.C. 629, 578 S.E.2d 746, 748 (2003). This is also called granting a new trial upon the facts, and the trial judge

is not required to give the reasons for his ruling, with the effect being the same as if the jury had failed to reach a verdict. *RFT Management Co., LLC v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 732 S.E.2d 166, 172 (2012).

The Court has thoroughly reviewed the evidence presented and the arguments made by the Plaintiffs for a new trial. The Court finds that the jury verdict and in particular the apportionment of fault are supported by the evidence presented, and thus this Court declines to set aside that verdict under the thirteenth juror doctrine. The motion for new trial on that basis is also denied.

E. Rule 59 Motion to Alter or Amend Judgment

The Plaintiff has also filed a motion pursuant to Rule 59(e), SCRCP, requesting that "the Form 4 order and judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim." See, Pl. Motion to Alter or Amend, p. 2. The Court denies that motion.

Comparative negligence was an issue in this case. The jury was instructed to issue a special verdict that addressed the questions required to be answered in a comparative negligence case. The jury ultimately returned a verdict whereby Mr. Ethier was found to have been 70 percent negligent. Thereafter, in applying the rules governing a comparative negligence case, the Court entered judgment in favor of the Defendant against both Plaintiffs.

The jury was charged that "if the Plaintiff's negligence was greater than the Defendant's negligence ... the Plaintiff would not be entitled to any damages, and your verdict would be for the Defendants." Neither party objected to this charge. Moreover, the jury was instructed not to reduce Plaintiff's damages as a result of comparative negligence and was informed that the Court would compute the amount of damages for which the Defendant is ultimately responsible. In

addition to there being no objection to this charge, the parties did not request any additional charge to be given on the issue of comparative negligence. Moreover, the special verdict as returned by the jury was not challenged before the jury was discharged.

The Court finds that this case is very similar to the case of *Lee v. Bunch*, 373 S.C. 654, 647 S.E. 2d 197 (2007). In *Lee*, as in this case, there was a finding by the jury that the plaintiff was 70 percent negligent, and as a result, the claim by the injured spouse was unsuccessful. The Supreme Court in *Lee* explained 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." 647 S.E.2d at 202, *citing* 41 Am. Jur. 2d *Husband and Wife* § 227 (2007). That authority is dispositive of the issues and arguments raised by the Plaintiffs in their Rule 59(e) motion. Because the impaired spouse's claim fails, the loss of consortium claim must fail as well. Thus, the Court concludes that judgment was correctly entered in favor of the Defendant on the loss of consortium claim as well as the underlying malpractice claim. This Court finds that the judgment should not be amended and denies the Plaintiffs' motion.[3]

III. Conclusion

IT IS, THEREFORE, ORDERED that the Plaintiffs' post-trial motions including the Motion for New Trial and the Rule 59 Motion to Alter or Amend Judgment are denied for the reasons stated herein. The Judgment entered on April 30, 2015 is reaffirmed.

AND IT IS SO ORDERED.

---

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

ROGER L. COUCH
Presiding Circuit Court Judge,
Sixth Judicial Circuit

Spartanburg, South Carolina

8/28, 2015

13-CP-20-0012

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-20-430

2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

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

Defendants.

2013 JAN -4 A 11:39
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

SUMMONS

TO: FAIRFIELD MEMORIAL HOSPITAL
GUY R. BIBEAU, M.D.
TUOMEY MEDICAL PROFESSIONALS, INC.
PEE DEE EMERGENCY MEDICAL ASSOCIATES, PA

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office at 8910 Two Notch Rd., Suite 400, Columbia, South Carolina, 29223-6518 within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

PROFFITT & COX, LLP

David Proffitt
8910 Two Notch Rd. Suite 400
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
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Email: dproffitt@proffittcox.com

Attorneys for Plaintiffs

January 2, 2013

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-20-430

2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

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

Defendants.

2013 JAN -4 A 11:40
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

COMPLAINT

Plaintiffs, by and through their undersigned counsel and complaining of the Defendants named above, would respectfully show unto this Honorable Court as follows:

PARTIES

1. Plaintiff Philip Ethier is a resident of Chester County, South Carolina.

2. Plaintiff Jeanne Ethier is the wife of Philip Ethier and a resident of Chester County, South Carolina.

3. Defendant Fairfield Memorial Hospital, upon information and belief, is a political subdivision or an agency of Fairfield County, which has its principal place of business in Fairfield County, South Carolina.

4. Defendant Guy R. Bibeau, M.D., upon information and belief, is physician licensed to practice in the state of South Carolina and a resident of Sumter County, South Carolina. Dr. Bibeau at all times referenced herein held himself out as an emergency department physician who was an employee or agent of Fairfield Memorial Hospital, and at all times acted

within the course and scope of his employment or as an agent of Fairfield Memorial Hospital.

5. Defendant Tuomey Medical Professionals, Inc., upon information and belief, is a corporation with its principal place of business in Sumter County, South Carolina, which does business in Fairfield County, and is an employer of Guy R. Bibeau, M.D.

6. Defendant Pee Dee Emergency Medical Associates, PA, upon information and belief, is a corporation with its principal place of business in Clarendon County, South Carolina, which does business in Fairfield County, and is an employer of Guy R. Bibeau, M.D.

7. Venue is proper in Fairfield County in that one or more defendants resides in Fairfield County and the events giving rise to the facts at issue occurred in Fairfield County.

FACTUAL ALLEGATIONS

8. On or about the afternoon of April 10, 2011, Plaintiff Philip Ethier sought medical care and treatment at the emergency department of Defendant Fairfield Memorial Hospital.

9. Plaintiff was seen by Defendant Guy R. Bibeau, M.D., in the emergency department. Plaintiff reported that he had an unusual black or dark purple area on his right leg which was painful and had just appeared.

10. Dr. Bibeau noted that the right leg was cold, numb and echymotic. He diagnosed the condition as a "probable spider bite," prescribed pain and steroid medications, and sent Plaintiff home.

11. In succeeding days and weeks, Plaintiff, who is employed at Fairfield Memorial Hospital, on several occasions asked various emergency department physicians, including Dr. Bibeau, about the ongoing condition of his right leg and foot. Plaintiff continued to report that his leg was numb, cold and sometimes painful. No further examination or tests were conducted, and Plaintiff repeatedly was told not to worry about it, and that the condition would resolve itself

over time.

12. On or about May 25, 2011, Plaintiff again suffered an onset of acute and severe pain in his right leg and foot, which again turned a mottled black or dark purple color and was cold and numb. Plaintiff went to Chester Medical Center's emergency department, where he was diagnosed with an acute arterial blockage in his right leg with ischemic symptoms. Plaintiff was given medication and transferred by ambulance to Carolinas Medical Center in Charlotte, N.C.

13. On or about May 25, 2011, Plaintiff was admitted to Carolinas Medical Center with a diagnosis of a thrombosed right popliteal artery aneurysm. Plaintiff subsequently underwent a surgical procedure described as a reverse saphenous bypass of the superficial femoral to posterior tibial artery with exclusion of the popliteal aneurysm. The femoral bypass procedure required an incision from the ankle of Plaintiff's right leg to the groin. Plaintiff suffered complications immediately following the surgery and required a followup procedure.

14. Plaintiff suffered physical pain and discomfort, disability, mental anguish and emotional distress during and after his hospitalization and recovery period, including the use of a vacuum assisted closure device which had to be kept on the wound for several months.

15. Plaintiff continues to suffer with a permanent injury and disability to his right leg and foot, including a condition known as "foot drop" and a substantial loss of sensation in his leg and foot.

16. Plaintiff has suffered and will suffer damages in the past, present and future, including, but not limited to, physical pain and suffering, emotional distress, mental anguish, fear, anxiety, physical disability, scarring and disfigurement, loss of enjoyment of life, loss of income, loss of earning capacity, loss of job-related benefits and medical expenses.

FOR A FIRST CAUSE OF ACTION
(Negligence / Gross Negligence / Medical Malpractice Against All Defendants)

17. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

18. Defendants undertook to render medical care to Plaintiff Philip Ethier and as such had a duty to provide care that was within accepted professional standards of care for emergency department physicians in the national community.

19. Upon information and belief, Defendants either individually, or acting by and through their duly authorized employees or agents, jointly and severally, breached their duties of care to Plaintiff Philip Ethier by acting in a manner that was negligent, grossly negligent, willful, wanton, reckless, in one or more of the following ways:

a. In failing to properly and timely diagnose Plaintiff's symptoms and actual physical condition;

b. In failing to properly and timely treat and provide appropriate medical care for Plaintiff's symptoms and actual physical condition;

c. In failing to properly and timely perform necessary examinations or tests which would have revealed the existence of a popliteal aneurysm in the right leg;

d. In failing to properly and timely formulate, review, and modify plans of care for Plaintiff in accordance with his needs;

e. In failing to provide adequate discharge instructions or followup care; and

f. In such other particulars as may be ascertained through discovery and proven at trial.

20. Upon information and belief, Defendants either individually, or acting by and through their duly authorized employees or agents, jointly and severally, breached their duties of

care to Plaintiff Philip Ethier by negligently hiring, negligently training or negligently supervising their employees or agents.

21. Upon information and belief, Defendant Bibeau is an employee or agent of Defendant Tuomey Medical Professionals, which is vicariously liable for his acts and omissions.

22. Upon information and belief, Defendant Bibeau is an employee or agent of Defendant Pee Dee Emergency Medical Associates, which is vicariously liable for his acts and omissions.

23. Upon information and belief, Defendant Bibeau is an employee or agent of Defendant Fairfield Memorial Hospital, which is vicariously liable for his acts and omissions. The Hospital consciously or impliedly represented Defendant Bibeau to be its employee or agent in the Emergency Department, Plaintiff Philip Ethier relied upon the representation, and Plaintiff changed his position to his detriment in reliance on the representation.

24. Upon information and belief, Defendant Fairfield Memorial Hospital owes a nondelegable duty, under the ostensible agency doctrine, toward Plaintiff Philip Ethier. The Hospital may not delegate that duty, or the liability flowing from a breach of its duty, to the emergency room physician under the facts and circumstances of this case. The Hospital held itself out to the public by offering to provide services; Plaintiff looked to the Hospital rather than to the individual physician for care; and a similarly situated person reasonably would have believed the doctor treating the patient was a hospital employee.

25. As a direct and proximate result of the acts and omissions of Defendants, Plaintiff has suffered injuries and damages due to the delay in diagnosis and treatment was forced to undergo more serious and invasive surgical procedures. Defendants' actions and omissions also have resulted in Plaintiff's permanent injury, disability and disfigurement.

26. The breach by Defendants and their employees and agents of one or more of the duties owed to Plaintiff was the sole or concurrent proximate cause of damages suffered by Plaintiff.

27. Plaintiff suffered substantial physical pain and suffering, disability and emotional distress during and after his hospitalization and recovery period, including the use of a vacuum assisted closure device which had to be kept on the wound for months. Plaintiff continues to suffer with a permanent injury and disability to his right leg and foot, including a condition known as "foot drop" and a loss of sensation in his leg and foot.

28. Plaintiff has suffered or will suffer damages in the past, present and future, including, but not limited to, physical pain and suffering, emotional distress, mental anguish, fear, anxiety, scarring and disfigurement, loss of enjoyment of life, temporary or permanent physical disability, loss of income, loss of earning capacity, loss of job-related benefits and medical expenses.

29. As a direct or proximate result of the negligent, grossly negligent, reckless, willful or wanton actions or omissions of Defendants and their employees or agents, Plaintiff is entitled to recover all damages available under the law, including actual damages, special damages and punitive damages in an amount to be determined by a jury.

FOR A SECOND CAUSE OF ACTION
(Negligence / Gross Negligence Against Defendant Fairfield Memorial Hospital)

30. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

31. Defendant Fairfield Memorial Hospital undertook to render medical care to Plaintiff Philip Ethier and as such owed a duty directly to Plaintiff to provide care that was within accepted professional standards of care for a hospital which offers emergency department

services.

32. Upon information and belief, the Hospital either individually, or acting by and through its duly authorized employees or agents, breached its duties of care owed directly to Plaintiff Philip Ethier by acting in a manner that was negligent, grossly negligent, willful, wanton, reckless, in one or more of the following ways:

a. In failing to establish or adequately enforce or maintain standards and policies which govern the provision of emergency department services;

b. In failing to establish or adequately enforce or maintain standards and policies to ensure that emergency department services were provided by properly licensed, certificated or qualified physicians and staff;

c. In failing to establish or adequately enforce or maintain standards and policies to ensure that the coordination of care and treatment provided in the emergency department is based on the patient's needs;

d. In negligently hiring, negligently training or negligently supervising its employees or agents;

e. In failing to provide adequate discharge instructions or followup care; and

f. In such other particulars as may be ascertained through discovery and proven at trial.

33. As a direct and proximate result of the acts and omissions of Defendant, Plaintiff has suffered injuries and damages due to the delay in diagnosis and treatment was forced to undergo more serious and invasive surgical procedures. Plaintiff was forced to undergo more serious and invasive surgical procedures. Defendant's actions and omissions also have resulted in Plaintiff's permanent injury, disability and disfigurement.

34. The breach by Defendant and its employees and agents of one or more of the duties owed to Plaintiff was the sole or concurrent proximate cause of damages suffered by Plaintiff.

35. Plaintiff suffered substantial physical pain, disability and emotional distress during and after his hospitalization and recovery period, including the use of a vacuum assisted closure device which had to be kept on the wound for months. Plaintiff continues to suffer with a permanent injury and disability to his right leg and foot, including a condition known as "foot drop" and a loss of sensation in his leg and foot.

36. Plaintiff has suffered or will suffer damages in the past, present and future, including, but not limited to, physical pain and suffering, emotional distress, mental anguish, fear, anxiety, scarring and disfigurement, loss of enjoyment of life, temporary or permanent physical disability, loss of income, loss of earning capacity, loss of job-related benefits and medical expenses.

37. As a direct or proximate result of the negligent, grossly negligent, reckless, willful or wanton actions or omissions of Defendant and its employees or agents, Plaintiff is entitled to recover all damages available under the law, including actual damages, special damages and punitive damages in an amount to be determined by a jury.

FOR A THIRD CAUSE OF ACTION
(Loss of Consortium by Spouse)

38. Plaintiffs incorporate each of the foregoing allegations as fully as if repeated herein verbatim.

39. Defendants and their employees and agents owed a duty of care to Plaintiff Philip Ethier as described herein.

40. Defendants and their employees and agents breached one or more of the duties owed to Plaintiff Philip Ethier by their negligent, grossly negligent, willful, wanton and reckless acts, as

described herein.

41. The breach by Defendants and their employees or agents of one or more of these duties was the sole or concurrent proximate cause of damages suffered by Plaintiff Jeanne Ethier.

42. Plaintiff Jeanne Ethier has suffered and will continue to suffer a loss of consortium with her husband, including the value of her husband's aid, services, society and companionship.

43. As a direct or proximate result of the negligent, grossly negligent, reckless, willful or wanton actions or omissions of Defendants and their employees or agents, Plaintiff Jeanne Ethier is entitled to recover all damages available under the law, including actual damages, special damages and punitive damages in an amount to be determined by a jury

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all causes of action to which they are entitled by law to a trial by a jury of their peers.

WHEREFORE, having fully set forth their Complaint, Plaintiffs prays that the Court grant by verdict or judgment an award of all damages they are entitled to recover from Defendants under the law, including actual damages, special damages and punitive damages in an amount to be determined by a jury, the costs of this action, and such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

January 2, 2013

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Philip Ethier and Jeanne Ethier,

Plaintiffs,

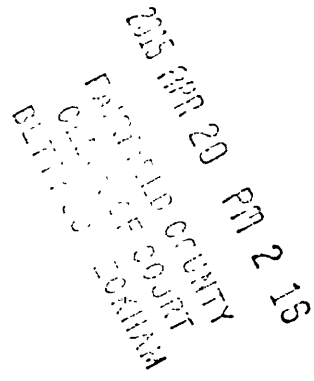
v.

Guy R. Bibeau, M.D.,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12



PLAINTIFFS' MOTIONS FOR NEW TRIAL

Plaintiffs Philip Ethier and Jeanne Ethier, by and through their undersigned counsel and pursuant to Rule 59, SCRCP, move this Honorable Court for a new trial absolute. This motion is based on the grounds set forth herein, any memorandum, testimony, evidence or exhibits submitted to the Court in connection with this motion, trial testimony and exhibits, the Rules of Civil Procedure and applicable law.

Plaintiffs request an expedited hearing on this motion and any evidentiary hearing while this case is still fresh in jurors' minds.

PROCEDURAL POSTURE

The jury rendered a verdict on April 8, 2015, after a seven-day trial which began March 30, 2015. The jury awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Plaintiff Philip Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Defendant Dr. Guy Bibeau was 30% negligent. The jury awarded $250,000 to Plaintiff Jeanne Ethier. The Court granted Plaintiffs' request for 10 days to file post-trial motions.

MOTIONS

Plaintiffs move for a new trial absolute on the following grounds:

I. JUROR CONCEALMENT DURING VOIR DIRE

Plaintiffs are entitled to a new trial because Teressa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial 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 Ms. Killian would have supported a challenge for cause or would have been a material factor in the use of Plaintiffs' peremptory challenges.

II. JUROR MISCONDUCT DURING PREMATURE DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn because she had personally worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau 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 (3) by unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Ms. Killian's unlawful and improper actions and statements because one or more jurors' verdict was affected by the statements.

III. JUROR MISCONDUCT DURING DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, wrongfully brought extraneous prejudicial information to the jury's attention by: (1) stating during jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn because she had personally worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau and the two nurses, and by stating in jury 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) by unlawfully and improperly expressing during jury deliberations her bias in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Ms. Killian's unlawful and improper actions and statements because one or more jurors' verdict was affected by the statements.

IV. THIRTEENTH JUROR DOCTRINE

Plaintiffs are entitled to a new trial pursuant to the Thirteenth Juror Doctrine because the jury's verdict on the apportionment of negligence between the parties is against the weight of the evidence.

MEMORANDUM IN SUPPORT OF MOTIONS

I. JUROR CONCEALMENT DURING VOIR DIRE

Plaintiffs are entitled to a new trial because Teressa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial 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 Ms. Killian would have supported a challenge for cause or would have been a material factor in the use of Plaintiffs' peremptory challenges.

"Under South Carolina law, litigants are guaranteed the right to an impartial jury." 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").

"To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282 (2001) (citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)). "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." Woods, 345 S.C. at 587, 550 S.E.2d 282 (quoting State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982)).

"A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge." Woods, 345 S.C. 590, 550 S.E.2d 282 (citing Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986)).

"Trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information. . . . Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge." State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) (citations omitted).

"A party seeking a new trial based upon the disqualification of a juror must show (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to the verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505 (1986). Whether a new trial is warranted depends on the circumstances of each case. Id. at 15, 339 S.E.2d 505.

The Supreme Court has further explained the analysis of juror concealment of material facts during voir dire as follows:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *Thompson v. O'Rourke,* 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. *State v. Savage,* 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).
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> We hold that intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or

> incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.
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> Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.

Woods, 345 S.C. at 587-88, 550 S.E.2d 282.

> The Supreme Court has stated that
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> [i]ntentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.
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> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

Woods, 345 S.C. at 588, 550 S.E.2d 282.

In Woods, the Supreme Court held that the defendant was entitled to a new trial because a prospective juror failed to disclose during voir dire that she had worked as a volunteer victims' advocate in the prosecutor's office. The Supreme Court held that, in cases of intentional concealment, the moving party it is ***not*** required to show actual prejudice because the juror's bias will be inferred.

> The State argues that because respondent has not shown that he was prejudiced by Juror B's responses, the Court of Appeals' decision [granting the defendant new trial] was erroneous. We disagree. The test pronounced in *Thompson v. O'Rourke, supra,* makes clear that *where a juror's response to voir dire amounts to an intentional concealment, the movant 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. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred.* Conversely, where the failure to disclose is innocent, no inference of bias can be drawn.

Woods, 345 S.C. at 588-89, 550 S.E.2d 282 (emphasis added); accord Gulledge, 277 S.C. 368, 287 S.E.2d 488 (granting new trial where juror failed to respond to voir dire questioning

concerning relationship with law enforcement personnel; juror was related by marriage to police officer who had custody of defendant during trial and who had viewed crime scene).

"In the face of a juror's intentional nondisclosure of pertinent information during voir dire, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. . . . Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; *however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent.*" State v. Coaxum, 410 S.C. 320, 764 S.E. 2d 242 (2014) (in unintentional concealment case, Supreme Court rejected defendant's request for mistrial where trial judge replaced a juror in mid-trial after juror recognized one of defendant's family members sitting in the courtroom) (citing Woods, infra) (citations and quotation marks omitted) (emphasis added).

When a case involves *unintentional* concealment, the inquiry usually ends and a new trial is not likely to be granted unless the moving party can otherwise show prejudice. Woods, 345 S.C. 587-89, 550 S.E.2d 282; State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375 (2004) (in unintentional concealment case, Supreme Court rejected defendant's request for new trial because a juror failed to reveal during voir dire that he had been the victim of a crime 40 years ago; juror stated that he did not remember his attack until after deliberations began and he was unsure whether the attack was a "serious" crime; trial court questioned other jurors about the impact of the statements even though it was not necessary to do so); Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (in unintentional concealment case, Court of Appeals affirmed trial court's ruling that none of voir dire questions

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

In the present case, Ms. Killian intentionally concealed information by failing to respond to direct, straightforward, unambiguous questions. Bias of the juror is inferred and a new trial is required because the information concealed by Ms. Killian would have supported a challenge for cause or would have been a material factor in the use of Plaintiffs' peremptory challenges.

The Court during voir dire asked prospective jurors whether they knew any of the parties or potential witnesses, or whether they had any personal, business or working relationship with the parties or potential witnesses. The Court identified Dr. Bibeau as the Defendant and also identified Jerilyn Wadford, RN, and Rhonda Gwynn, LPN, as potential witnesses. Nurses Wadford and Gwynn were the emergency department nurses who allegedly were directly involved in Plaintiff Phil Ethier's care and treatment on April 10, 2011.[1]

During voir dire, the Court asked the parties' counsel and the parties themselves to identify themselves either by standing up or being pointed out by counsel to the jury pool.

Ms. Killian responded that she was a certified nurse assistant who had been formerly employed at Fairfield Memorial Hospital. However, Ms. Killian never responded that she personally knew Dr. Bibeau, Wadford or Gwynn, or that she had personally worked with any of them. Ms. Killian sat silently when prospective jurors were asked straightforward, direct, unambiguous questions about whether they knew anyone involved in the case as a party or witness, or whether they had any personal, business or working relationship with any party or witness.

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[1] The Clerk swore in the jury pool before prospective jurors responded to questions during voir dire, and all indicated that they swore or affirmed to provide truthful responses.

During voir dire, the Court asked the prospective jurors, in straightforward, direct and unambiguous questions, whether they could be fair and impartial to all parties, and whether they were aware of any bias or prejudice for or against any party. Ms. Killian did not state or indicate in any way that she could not be fair or impartial to all parties; nor she did state or indicate in any way that she harbored any bias or prejudice for or against any party.

Consequently, the information which Plaintiffs had about Ms. Killian while striking jurors was that she was a certified nurse assistant formerly employed by Fairfield Memorial Hospital; she did not have a personal, business or working relationship with any party or witness, including Dr. Bibeau or the nurses; and she believed she could be fair and impartial to all parties. (Aff. of David Proffitt, ¶ 9, attached as EXHIBIT C.)

After the trial ended and the jury was dismissed, Plaintiffs' counsel spoke with juror Sandra Carmichael. Plaintiffs for the first time discovered that Ms. Killian personally knew and had personally worked with Dr. Bibeau and the nurses; that Ms. Killian poisoned the well throughout the trial by unlawfully and improperly vouching for the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses based on her personal knowledge, both throughout the trial in premature jury deliberations and during the jury's actual deliberations; that Ms. Killian violated the Court's instructions not to discuss the case during the trial by discussing the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses during breaks; and that Ms. Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (Aff. of Sandra Carmichael, attached as EXHIBIT A).

Given the fact that Ms. Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions about personal, business or working relationships with any party or witness, Plaintiffs were unaware that Ms. Killian personally knew and had

personally worked with Dr. Bibeau or the nurses. Given the fact that Ms. Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions whether anyone had any bias or prejudice for or against any party, Plaintiffs were unaware that Ms. Killian harbored a bias or prejudice in favor of Dr. Bibeau. See State v. Galbreath, 359 S.C. 398, 404, 597 S.E.2d 845, 848 (Ct. App. 2004) (juror's decision not to respond to question about being fair and impartial to all parties suggests that juror felt she could be fair and impartial). Plaintiffs were entitled to rely on the truthfulness of prospective jurors' responses, as well as their non-responses, during voir dire. See Gulledge, 277 S.C. at 371, 287 S.E.2d at 490 ("Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason.")

If Ms. Killian had revealed during voir dire the material fact that she personally knew Dr. Bibeau or the nurses, or that she had personally worked with them at the hospital, the Court may have chosen to strike her for cause, depending on whether she said that she could be fair to all parties despite those relationships. If the Court had declined to strike Ms. Killian for cause based on her responses, Plaintiffs would have had the opportunity to challenge her for cause or exercise a peremptory challenge to strike her.

If Ms. Killian had revealed during voir dire the material fact that she was biased or prejudiced in favor of Dr. Bibeau and the nurses, or would give undue weight to their testimony due to her personal knowledge and working relationship with them, the Court may have chosen to strike her for cause, depending on whether she said that such bias or prejudice would affect her ability to be fair and impartial to all parties. If the Court had declined to strike Ms. Killian

for cause based on her responses, Plaintiffs would have had the opportunity to challenge her for cause or exercise a peremptory challenge to strike her.

Ms. Killian was the first juror listed on the Juror Strike Sheet as Juror #72. (Juror Strike Sheet, attached as EXHIBIT B.) Plaintiffs did not possess crucial information withheld by Ms. Killian and Plaintiffs were not negligent in failing to learn of the reasons and necessity to disqualify Ms. Killian before the verdict. (Aff. of Proffitt, ¶¶ 13-14, attached as EXHIBIT C.)

The information and responses which Ms. Killian failed to provide during voir dire would have supported a challenge for cause by Plaintiffs or would have been a material factor in Plaintiffs' use of their peremptory challenges. Plaintiffs, in fact, would have struck Ms. Killian from the jury if they had known the information she withheld during voir dire.[2] (Aff. of Proffitt, ¶¶ 15-16, attached as EXHIBIT C.)

As a result of Ms. Killian's intentional concealment of information during voir dire, by virtue of her standing silent in response to direct, straightforward, unambiguous questions, Plaintiffs were deprived of the right to a fair and impartial jury. Bias of the juror is inferred and a new trial is required because the information concealed by Ms. Killian would have supported a challenge for cause or would have been a material factor in the use of Plaintiffs' peremptory challenges. Plaintiffs ask that the Court grant them a new trial absolute.

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[2] Although bias is inferred and prejudice is presumed in this case of intentional concealment, Plaintiffs note that it appeared Ms. Killian paid little attention during the trial. She often appeared to be dozing or sleeping during the presentation of testimony and evidence. The Court may infer from Ms. Killian's obvious lack of attention during the trial that her mind was already made up and she had no need or reason to listen to testimony or evidence. Ms. Killian was determined to conceal her bias and then express and act upon that bias in favor of Dr. Bibeau and the nurses, which is exactly what she did.

Plaintiffs submit that they are entitled to a new trial *solely* on the basis of juror concealment of information during voir dire. However, Plaintiffs believe they also are entitled to a new trial on the following grounds.

II. JUROR MISCONDUCT DURING PREMATURE DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau 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 (3) by unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Ms. Killian's unlawful and improper actions and statements because one or more jurors' verdict was affected by the statements.

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

Hunter, 320 S.C. 88, 463 S.E.2d at 316. Rule 606(b), SCRE, allows juror testimony regarding extraneous prejudicial information or an outside influence.[3]

The Supreme Court has held that when the alleged misconduct pertains to premature jury deliberations, the issue involves a matter of fundamental fairness. The trial court may inquire into the allegations and consider affidavits in support of the allegations.

> We have routinely held instructions which invite jurors to engage in premature deliberations constitute reversible error. . . . The rationale for prohibiting premature jury deliberations was set forth in *McGuire, supra,* in which we stated:
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> [A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed. . . . The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. Aldret, 333 S.C. 307, 311-12, 509 S.E.2d 811 (1999) (holding that defendant's allegation of premature deliberations, which he discovered during trial, was procedurally barred because he failed to timely bring matter to trial court's attention before jury was dismissed) (citations omitted); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008) (holding that juror testimony involving internal misconduct "may be received only when necessary to ensure fundamental fairness").

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[3] Rule 606(b), SCRE, provides:

Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The moving party has the burden to establish prejudice by proving that the misconduct affected the jury's impartiality. Aldret, 333 S.C. at 313-15, 509 S.E.2d 811. When the fact of premature deliberations becomes known after the jury's verdict, the Supreme Court held that the trial court may consider affidavits.

> If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Aldret, 333 S.C. at 315-16, 509 S.E.2d 811.

In the present case, after the trial ended and the jury was dismissed, Plaintiffs for the first time discovered that Ms. Killian personally knew and had personally worked with Dr. Bibeau and the nurses; that Ms. Killian throughout the trial in premature jury deliberations unlawfully and improperly vouched for the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses based on her personal knowledge, all in violation of the Court's instructions not to discuss the case during the trial; and that Ms. Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (Aff. of Sandra Carmichael, attached as EXHIBIT A).

Ms. Carmichael testified in her affidavit that:

> During the trial before deliberations, one of the jurors, Teressa, told us that she formerly worked at Fairfield Memorial Hospital.
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> I know that Teressa is a certified nursing assistant because she told us that is her job.
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> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
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> 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.
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> 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."
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> Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."
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> 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."
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> Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor."
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> . . .
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> 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.
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> . . .
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> 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, attached as EXHIBIT A.)

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

Ms. Killian's statements constitute misconduct and premature jury deliberations which poisoned the well against Plaintiffs throughout the trial, all in violation of the Court's instructions and Plaintiffs' right to a fair and impartial jury. Although made in the jury room, the

statements constituted 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.[4] Plaintiffs, of course, were unable to prevent, challenge or rebut any of these improper statements offered as the gospel truth by a person in the know, as they occurred in the jury room.

Plaintiffs were prejudiced because Ms. Killian's statements affected the verdict of one or more jurors. Plaintiffs are entitled to an evidentiary hearing on this matter and a ruling that the misconduct and premature deliberations affected the fundamental fairness of their trial. Plaintiffs are entitled to a new trial because they did not have a fair and impartial jury.

[4] Defendant opposed any effort at trial to allow witnesses to testify about Dr. Bibeau's character, habits or practice as a physician on other occasions in the emergency room. Defendant filed a motion in limine to that effect. Plaintiffs agreed that such evidence was not properly admissible and did not attempt to elicit such testimony at trial.

III. JUROR MISCONDUCT DURING DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, wrongfully brought extraneous prejudicial information to the jury's attention by: (1) stating during jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn; (2) unlawfully and improperly offering inadmissible, irrelevant evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau and the two nurses, and by stating in jury 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) by unlawfully and improperly expressing during jury deliberations her bias in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Ms. Killian's unlawful and improper actions and statements because one or more jurors' verdict was affected by the statements.

As stated above, the law provides that juror testimony may be used when extraneous prejudicial information was improperly brought to the jury's attention ***or*** when an outside influence was improperly brought to bear upon any juror. Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. The moving party must prove both the alleged misconduct and the resulting prejudice. Hunter, 320 S.C. 85, 463 S.E.2d 314; Rule 606(b), SCRE; Vestry and Church Wardens of the Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489, 492-93 (2009); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371-73 (2008); State v. Zeigler, 364 S.C. 94, 108-10, 610 S.E.2d 859 (Ct. App. 2005); State v. Franklin, 341 S.C. 555, 560, 534 S.E.2d 716 (Ct. App. 2000); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 158-160 (2007). In determining whether extraneous prejudicial information or an outside influence has affected the verdict, the Court may consider factors such as the number of jurors exposed, the weight of the evidence properly before the jury

and the likelihood that curative measures were effective in reducing the prejudice. Vestry and Church Wardens, 384 S.C. 441, 682 S.E.2d at 492.

The case of Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) is instructive even though no new trial was granted. In that case, the jury foreperson stated in an affidavit that a juror commented during deliberations that the plaintiff had a large bank account and did not need money, and that the plaintiff could afford to live next to a doctor. The Court of Appeals affirmed the trial court's ruling that the affidavit did not constitute evidence of improper outside influence, but "demonstrates nothing more than a generalized bias against a party unconnected to any specific facts about [the plaintiff] or the accident that are not in the record." The affidavit also failed to name the juror who made the comments, state the reason the juror held this opinion or suggest that the juror developed her opinion based on something other than her observations at trial. Therefore, the affidavit was not admissible under Rule 606(b). Lynch, 409 S.C. 146, 760 S.E.2d at 115-16.

Significantly, the Court of Appeals stated that the focus of the inquiry into misconduct during deliberations should be on whether jurors "discussed specific extra-record *facts* relating to [a party] and whether the statements concerned specific facts about [the party] or the incident in which he was charged." Lynch, 409 S.C. 146, 760 S.E.2d at 115 (citing U.S. v. Benally, 546 F.3d 1230 (10th Cir. 2008)) (emphasis in original).

In the present case, Ms. Carmichael testified by affidavit that:

> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
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> 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.
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> . . .
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> After jury deliberations began on the last day of the trial, Teressa again repeatedly made the same statements about how thorough and careful Dr. Bibeau and Jeri were. Teressa repeatedly said that she knew them well, had worked with both of them for three years, and knew that they were thorough and careful. Teressa made these statements firmly and was adamant about them. Teressa kept saying that she knew them personally, and they were thorough and careful.
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> Teressa repeatedly said during jury deliberations that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."
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> Teressa repeatedly said during jury deliberations that "if Dr. Bibeau said he took the foot pulses, then he did it."
>
> Teressa repeatedly said during jury deliberations 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 jury deliberations that "Dr. Bibeau is a good doctor."

(Aff. of Carmichael, ¶¶ 6-7, 17-21, attached as EXHIBIT A.)

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

Specific, important and hotly disputed facts were implicated and discussed by Ms. Killian: whether the foot pulses actually were taken and who supposedly took them, and the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses in providing care to Mr. Ethier. The taking of the foot pulses by Dr. Bibeau was essential to his defense that he actually

had considered the possible diagnosis of a blood vessel problem and had performed a vascular exam. Ms. Killian did not simply offer a couple of random comments about a party's bank account or express some generalized bias. Ms. Killian presented herself to the jury as a witness who had an insider's knowledge of the Dr. Bibeau and the nurses – all key witnesses – and preached their virtues, credibility, skill and knowledge throughout the trial and in deliberations.

Extraneous prejudicial information was unlawfully brought to the jury's attention through the statements of Ms. Killian. *The jurors in this case did discuss specific, extra-record facts relating directly to Dr. Bibeau and the nurses, and those statements concerned specific, disputed facts about Dr. Bibeau and the nurses and the incident in which Dr. Bibeau was involved. Ms. Killian essentially offered unlawful and improper testimony about crucial facts and hotly disputed issues in the case.* This case presents precisely the situation envisioned in Lynch, where extraneous prejudicial information or outside influence warrants a new trial because the moving party was prejudiced.

Moreover, although made in the jury room, the statements constituted 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. Ms. Killian, by her statements, managed to unlawfully and improperly present precisely the type of character evidence and evidence of care allegedly provided to other patients which Defendant opposed presenting at trial – except that the extra-record evidence which she offered favored Dr. Bibeau

instead of discrediting him.[5] Ms. Killian told jurors that Dr. Bibeau had always been a good doctor, thorough and careful, on all the other occasions she had personally witnessed. Ms. Killian did it behind closed doors where no attorney could object or challenge it, and no judge could rule on its propriety or admissibility. Her unrebuttable and unlawful testimony behind closed doors apparently was compelling, and it affected the jury's verdict.

This case is extremely different and presents far more egregious facts than reported cases. It is of no import that evidence of extraneous information or outside influence, or prejudice to the moving party, often was found lacking in reported cases. See e.g. Lynch, supra; Vestry and Church Wardens of the Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489 (2009) (affirming trial court's ruling that plaintiff failed to show, after a hearing, that a juror's comments in deliberations had affected the verdict; juror commented that historic people have money and should clean up their own mess, juror discussed the case with her mother and minister, and juror drove to the church to view; judge held the juror in contempt, but concluded the comments "were not of a kind to impermissibly influence the jury or affect the verdict" because other jurors admonished the offending juror, laughed off the comments and paid her little attention); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371-73 (2008) (holding PCR court properly refused to consider affidavit in which juror said that some jurors may have considered fact that defendant did not testify as speculation; the allegations raised only internal misconduct and affidavit did not contain concrete, specific allegations implicating fundamental fairness); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 158-160 (2007) (holding that trial court properly denied defendant's allegation of juror misconduct where juror prematurely discussed case with his wife and perhaps a bartender, but could not show that several jurors'

[5] See footnote 4.

limited knowledge of the comments prejudicially affected the verdict); State v. Zeigler, 364 S.C. 94, 108-10, 610 S.E.2d 859 (Ct. App. 2005) (holding trial court properly denied defendant's allegation of juror misconduct where only unsworn statements were obtained from seven jurors and none indicated that they found defendant guilty because he did not testify; the allegations raised only internal misconduct and did not implicate fundamental fairness); State v. Franklin, 341 S.C. 555, 560, 534 S.E.2d 716 (Ct. App. 2000) (holding trial court properly denied defendant's allegation of juror misconduct where juror stated in affidavit that she was called derogatory names, she perceived an implied threat against her physical safety, and other jurors yelled at her; the allegations raised only internal misconduct and did not implicate fundamental fairness).

None of the reported cases on juror misconduct during deliberations present a scenario anything like Plaintiffs' case. Ms. Carmichael's affidavit describes extra-record statements about hotly disputed facts by an identified juror which clearly reveal that the juror brought extraneous prejudicial information to the jury's attention throughout the trial. All jurors presumably were exposed to the information. Due to Ms. Killian's wrongful and secretive efforts behind closed doors, there were no curative measures taken.

While Ms. Killian's statements were "internal" misconduct in the sense that the information came from a juror, the extraneous prejudicial information conveyed about Dr. Bibeau came from outside the evidence and record presented at trial. Suppose another hospital employee had made the same statements to a juror while in the grocery store and the juror had repeated that information during deliberations. There would be no doubt that the information was extraneous and came from an outside source or influence. The fact that the hospital employee who made the statements happened to be on the jury while bringing extraneous

prejudicial information to the jury's attention does not mean this is a case of only internal misconduct; it is a case of extraneous prejudicial information being wrongly and unlawfully brought to the jury's attention throughout the trial.

Ms. Killian's statements constitute misconduct during jury deliberations which poisoned the well against Plaintiffs throughout the trial, all in violation of the Court's instructions and Plaintiffs' right to a fair and impartial jury. Plaintiffs were prejudiced because Ms. Killian's statements affected the verdict of one or more jurors. Plaintiffs are entitled to an evidentiary hearing on this matter and a ruling that the misconduct during jury deliberations affected the fundamental fairness of their trial. Plaintiffs are entitled to a new trial because they did not have a fair and impartial jury.

IV. THIRTEENTH JUROR

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722 (Ct. App. 1996). "Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." Id. (citing Worrell v. S.C. Power Co., 186 S.C. 306, 195 S.E. 638 (1938)).

"We have also refused to require trial judges to explain the reasons for the ruling. 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. . . . 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." Vinson, 324 S.C. 389, 477 S.E.2d at 722 (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant a new trial when he is convinced that a new trial is necessitated

on the basis of the facts in the case. . . . Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. . . . Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion." Id (citations omitted).

In the present case, the jury's verdict finding Mr. Ethier 70% at fault and Dr. Bibeau 30% at fault is against the weight of the evidence. It is undisputed that Dr. Bibeau had 11 years of college and medical education as a board-certified family physician while Mr. Ethier had only one year of technical school education as a licensed practical nurse. Mr. Ethier knew little or nothing about the vascular system of the leg and popliteal aneurysms.

Plaintiffs' experts on emergency medicine and vascular surgery, Dr. Carl Adams and Dr. Scott Jolin, testified that plentiful, obvious signs of a vascular event (pain, pallor/change in color, polar and paresthesia) were present and absolutely required consideration of a possible diagnosis of a blood vessel problem in the emergency room on April 10, 2011. Defendant's experts on emergency medicine and vascular surgery, Dr. Eric Weinstein and Dr. Dorn Smith, also testified that a blood vessel problem was required to be on the list of possible diagnoses considered in the ER. Tellingly, Dr. Bibeau testified that he never considered a blood vessel problem as a possible diagnosis, but only considered the diagnoses of acute trauma, chemical exposure to the skin or spider bite.

Under these facts, where Dr. Bibeau admitted that the only indication of a spider bite was pain (and he knew it was not even pain at a bite mark because there was no mark), it is incomprehensible that a jury could conclude that Mr. Ethier was more at fault than Dr. Bibeau. (The verdict makes somewhat more sense in light of the unlawful and improper statements and actions of Ms. Killian throughout the trial as described herein.)

While Mr. Ethier did not follow up with an "outside" family physician, he did so informally with Dr. Bibeau and three other ER physicians in "curbside consultations." Mr. Ethier trusted and believed Dr. Bibeau, as he had trusted and believed doctors for more than 20 years as an LPN. It is ingrained in his very nature to accept the word of a doctor. And then, as his symptoms gradually improved and things returned to normal, he had all the more reason to trust and believe Dr. Bibeau's diagnosis.

Moreover, if Dr. Bibeau had diagnosed a potential blood vessel problem on April 10, 2011, and referred Mr. Ethier for further tests or consultations as needed, there would have been no opportunity or need for Mr. Ethier to follow up with anyone. His condition would have been timely treated and he would not have been left in the debilitated condition he is in today.

All of the experts on vascular surgery – Dr. Adams for Plaintiffs and Dr. Smith for Defendant and Dr. Jeremiah Holleman, the treating surgeon – agreed that Mr. Ethier would not have suffered the complications of compartment syndrome, fasciotomy, permanent muscle and nerve damage in the right leg, permanent chronic pain and permanent foot drop if he had been timely diagnosed and non-emergency surgery performed shortly after April 10, 2011.

In short, the jury determined that Dr. Bibeau was negligent and attempted to award damages to Mr. Ethier. Jurors erred in finding Dr. Bibeau more negligent than Mr. Ethier, but their tainted verdict is infected with the unlawful statements and actions of Ms. Killian and it should not be allowed to stand.

Accordingly, Plaintiffs move the Court, acting as the thirteenth juror, to hang the jury because the verdict is against the weight of the evidence. Justice has not been done in this case. Plaintiffs should be granted a new trial absolute.

CONCLUSION

For all the foregoing reasons, Plaintiffs move for a new trial absolute. Plaintiffs are entitled to a new trial due to Ms. Killian's intentional concealment of information during voir dire. Plaintiffs are entitled to a new trial due to Ms. Killian's misconduct and her unlawful, improper statements made throughout the trial in premature jury deliberations and during actual jury deliberations, all of which prejudiced Plaintiffs by affecting the verdict of one or more jurors. The Court should grant a new trial as the thirteenth juror.

Plaintiffs request an expedited hearing on this motion and any evidentiary hearing while this case is still fresh in jurors' minds.

Respectfully submitted,

PROFFITT & COX, LLP

David Proffitt
Ronald B. Cox
140 Wildewood Park Drive, Suite A
Columbia, S.C. 29223-6518
Telephone: (803) 834-7097
Fax: (888) 711-1057
dproffitt@proffittcox.com
rcox@proffittcox.com

Attorneys for Plaintiffs

April 15, 2015

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

2015 APR 20 PM 2 16
FAIRFIELD COUNTY
CLERK OF COURT

AFFIDAVIT

I, the undersigned I, Sandra R. Carmichael, being duly sworn, state under oath as follows:

1. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

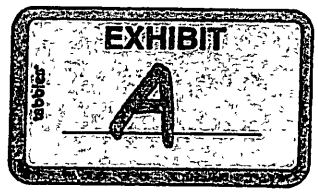
2. I served as a juror in the seven-day trial of this case from March 30 to April 8, 2015. I participated in jury deliberations and in the verdict issued by the jury.

3. My address is 208 Riding Ridge Rd., Ridgeway, South Carolina, 29130.

4. During the trial before deliberations, one of the jurors, Teressa, told us that she formerly worked at Fairfield Memorial Hospital.

5. I know that Teressa is a certified nursing assistant because she told us that is her job.

6. Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.



S.C.

7. 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.

8. 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."

9. Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."

10. 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."

11. Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor."

12. Early on in the case, Teressa said that Dr. Bibeau's handwriting was awful. I did not know that it was awful until one of the witnesses mentioned it on the stand.

13. 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.

14. One day, a red-haired, white lady came and sat in the courtroom behind Dr. Bibeau's table. Teressa told us while on a break in the jury room that the red-haired, white lady was a nurse supervisor at the hospital, and that Teressa also knew her well. Teressa said the red-haired, white lady's name, but I do not remember it.

15. Teressa said that the red-haired, white lady and Jeri were both very careful and thorough in their jobs.

SC.

16. 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.

17. After jury deliberations began on the last day of the trial, Teressa again repeatedly made the same statements about how thorough and careful Dr. Bibeau and Jeri were. Teressa repeatedly said that she knew them well, had worked with both of them for three years, and knew that they were thorough and careful. Teressa made these statements firmly and was adamant about them. Teressa kept saying that she knew them personally, and they were thorough and careful.

18. Teressa repeatedly said during jury deliberations that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."

19. Teressa repeatedly said during jury deliberations that "if Dr. Bibeau said he took the foot pulses, then he did it."

20. Teressa repeatedly said during jury deliberations that "if Dr. Bibeau did not do the foot pulses, then it was because Jeri did it and she's very thorough."

21. Teressa repeatedly said during jury deliberations that "Dr. Bibeau is a good doctor."

22. I noticed that Teressa often had her eyes closed during testimony in the courtroom, and she appeared to be dozing or asleep much of the time while in the courtroom.

23. At the beginning of deliberations, I believed that Dr. Bibeau was more at fault than Mr. Ethier. Several other jurors expressed the same opinion.

S.C.

24. However, Teressa repeatedly stated her opinions about knowing Dr. Bibeau and Jeri personally, and that she had worked with them for three years, and that they were very careful and thorough.

25. Teressa's statements, which she had made so often and so firmly and which she made during deliberations, were a big reason that I eventually changed my mind and became persuaded that Mr. Ethier was more negligent than Dr. Bibeau.

Further affiant sayeth not.

WITNESS my hand this 10th day of April, 2015, at Columbia, South Carolina.

Sandra R. Carmichael

Sandra R. Carmichael

SWORN TO and subscribed before me this
10th day of APRIL, 2015.

Notary Public for the State of South Carolina
My commission expires 8/20/2020

Fairfield County Courthouse
RANDOM STRIKE SHEET

JUDGE NAME : Roger L. Couch
TRIAL TYPE : Civil
PANEL ID : 2013CP2000012
COURTROOM CTR

DESCRIPTION : 2013CP2000012 Eithier v Bibeau

Sorted by: Random Nbr
Trial

	NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1	Killian, Teressa A	72	B	F	( )	( )	( )	
2	Pete, Connie D	102	B	F	( )	( )	( )	
3	Cason, Shawna M	32	B	F	( )	( )	( )	
4	Stewart, Kayla D	121	B	F	( )	( )	( )	
5	Alston, Victor T JR	4	B	M	( )	(X)	( )	
6	Smith, Austin C	118	W	M	( )	( )	( )	
7	Brown, Tara S	24	B	F	( )	( )	( )	
8	Albowicz, Linda S	2	W	F	( )	( )	( )	
9	Beam, Misty M	9	B	F	( )	( )	( )	
10	Carmichael, Sandra R	31	B	F	( )	( )	( )	
11	Anderson, Donald Jeffery	5	W	M	(X)	( )	( )	
12	Henry, Tara Y	60	B	F	( )	(X)	( )	
13	Humphries, Charles L	65	W	M	(X)	( )	( )	
14	Boulware, Randy	18	B	M	( )	(X)	( )	
15	Botts, Cynthia A	16	W	F	( )	( )	( )	
16	Usher, Michael J	131	W	M	( )	( )	( )	
17	Moody, Gerald F Jr.	89	W	M	( )	(X)	( )	
18	Rabb, Kathy R	106	B	F	( )	( )	( )	
19	Marshall, Paul	80	W	M	(X)	( )	( )	
20	Stocker, Keith G	122	W	M	(X)	( )	( )	
21	Ward, Keith P	138	W	M	(X)	( )	( )	
22	Booker, Leon III	15	B	M	( )	(X)	( )	
23	Harrison, Shikierra A	59	B	F	( )	( )	( )	
24	Belton, Darryl D	12	B	M	( )	(X)	( )	

2015 APR 20 PM 2 17
FAIRFIELD COUNTY COURT
CLERK OF COURT
BY: _____ DEP.

EXHIBIT
B

Fairfield County Courthouse
RANDOM STRIKE SHEET

JUDGE NAME : Roger L. Couch
TRIAL TYPE : Civil
PANEL ID : 2013CP2000012
COURTROOM CTR

DESCRIPTION : 2013CP2000012 Eithier v Bibeau

Sorted by: Random Nbr
Trial

	NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
25	Richards, Laconnique	108	B	F	(X)	( )	( )	
26	Mitchell, Sandra P	87	W	F	( )	( )	( )	

Total Number of Jurors: 26

** END OF REPORT **

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

2015 APR 20 PM 2 17
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. ECKHAM

AFFIDAVIT

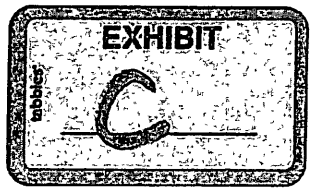
I, the undersigned, David Proffitt, being duly sworn, state under oath as follows:

1. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

2. I, along with attorney Ronald B. Cox, represented Plaintiffs in the seven-day trial of this case from March 30 to April 8, 2015.

3. I recall that the Clerk swore in the jury pool before prospective jurors responded to questions during voir dire, and all indicated that they swore or affirmed to provide truthful responses.

4. During voir dire, I recall that the Court asked prospective jurors whether they knew any of the parties or potential witnesses, or whether they had any personal, business or working relationship with the parties or potential witnesses. The Court identified Dr. Guy Bibeau as the Defendant and also identified Jerilyn Wadford, RN, and Rhonda Gwynn, LPN, as potential witnesses. Nurses Wadford and Gwynn were the emergency department nurses who allegedly were directly involved in Plaintiff Philip Ethier's care and treatment on April 10, 2011.



5. During voir dire, the Court asked the parties' counsel and the parties themselves to identify themselves either by standing up or being pointed out by counsel to the jury pool.

6. During voir dire, prospective juror Teressa A. Killian (Juror #72) responded that she was a certified nurse assistant who had been formerly employed at Fairfield Memorial Hospital. However, Ms. Killian never responded that she personally knew Dr. Bibeau, Wadford or Gwynn, or that she had worked with any of them. Ms. Killian sat silently when prospective jurors were asked questions about whether they knew anyone involved in the case as a party or witness, or whether they had any personal, business or working relationship with any party or witness.

7. During voir dire, I recall that the Court asked the prospective jurors whether they could be fair and impartial to all parties, and whether they were aware of any bias or prejudice for or against any party. Ms. Killian did not state or indicate in any way that she could not be fair or impartial to all parties; nor she did state or indicate in any way that she harbored any bias or prejudice for or against any party.

8. I have not reviewed a transcript of the voir dire because none is presently available.

9. Based on Ms. Killian's responses, or lack thereof, the information which Plaintiffs and their counsel had about Ms. Killian while selecting a jury was that she was a certified nurse assistant formerly employed by Fairfield Memorial Hospital. Ms. Killian did not personally know any party or witness, including Dr. Bibeau and the nurses involved in Mr. Ethier's care, and she had not personally worked with them. Ms. Killian believed she could fair and impartial to all parties.

10. After the trial ended and the jury was dismissed, Plaintiffs for the first time, through discussions with juror Sandra Carmichael, discovered that Ms. Killian personally knew and had worked with Dr. Bibeau and the nurses. Plaintiffs discovered that Ms. Killian improperly vouched for the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses based on her personal knowledge, both during the trial in premature deliberations and during the jury's deliberations. Plaintiffs discovered for the first time that Ms. Killian violated the Court's instructions not to discuss the case during the trial by discussing the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses during breaks. Plaintiffs discovered for the first time that Ms. Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (See Affidavit of Sandra Carmichael.)

11. Given the fact that Ms. Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions about personal, business or working relationships with any party or witness, Plaintiffs were unaware that Ms. Killian personally knew and had personally worked with Dr. Bibeau and the nurses.

12. Given the fact that Ms. Killian sat silently when asked whether she had any bias or prejudice for or against any party, Plaintiffs were unaware that she harbored any bias or prejudice in favor of Dr. Bibeau.

13. Ms. Killian was the first juror listed on the Juror Strike Sheet as Juror #72.

14. Plaintiffs did not possess the crucial information withheld by Ms. Killian and Plaintiffs were not negligent in failing to learn of the reasons and necessity to disqualify Ms. Killian before the verdict.

15. The information and responses which Ms. Killian failed to provide during voir dire would have supported a challenge for cause, and Plaintiffs would have made such a challenge if they had known the information withheld by Ms. Killian during voir dire.

16. The information and responses which Ms. Killian failed to provide during voir dire would have been a material factor in Plaintiffs' use of their peremptory challenges. Plaintiffs, in fact, would have struck Ms. Killian from the jury if they had known the information she withheld during voir dire.

17. I recall that Ms. Killian paid little attention during the trial and often appeared to be dozing or sleeping during the presentation of testimony and evidence.

Further affiant sayeth not.

WITNESS my hand this 15th day of April, 2015, at Columbia, South Carolina.

David Proffitt

SWORN TO and subscribed before me this
15th day of April, 2015.

Notary Public for the State of South Carolina
My commission expires 1-29-2017

PROFFITT & COX
Attorneys at Law

PROFFITT & COX, LLP
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DAVID PROFFITT
dproffitt@proffittcox.com

FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. BECKHAM
2015 MAY 11 PM 1 21

May 7, 2015

The Honorable Betty Jo Beckham
Fairfield County Clerk of Court
ATTN: CIVIL DIVISION
P.O. Drawer 299
Winnsboro, SC 29180

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
C.A. No. 2013-CP-20-12
PC File No. 1236.01

Dear Ms. Beckham:

Please find enclosed a one-page document marked as EXHIBIT D, to be included as an exhibit with Plaintiffs' Motions for New Trial filed April 20, 2015. Please attach this letter and the enclosed document to the prior motion.

Please file the original and return the date-stamped copy to me in the enclosed envelope.

The enclosed document constitutes the response of Fairfield Memorial Hospital to Plaintiffs' subpoena seeking information about juror Teressa Killian.

I have mailed and e-mailed a copy of this document directly to the Honorable Roger L. Couch, and served a copy on counsel for Defendant.

With kindest personal regards, I remain,

Sincerely yours,

PROFFITT & COX, LLP

David Proffitt

SCANNED
Date: 5/12/15
Proffitt & Cox, LLP

cc: The Honorable Roger L. Couch
Murrell Smith
David Holler
Stanley Myers
Enclosures

RECEIVED
MAY 12 2015
BY PROFFITT & COX, LLP

Fairfield
MEMORIAL HOSPITAL
Modern Medicine. Old-Fashioned Care.

2015 MAY 11 PM 1 21
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. BECKHAM

May 5, 2015

Proffitt & Cox
140 Wildewood Park Drive, Suite A
Columbia, South Carolina 29223

RE: Subpoena Request – Teressa A. Killian

Dear Mr. Proffitt:

The Hospital has received your subpoena request for information about a former employee, Teressa A. Killian.

The Hospital is releasing the following information:

Date of Hire: 10/03/2005
Date of Termination: 05/28/07
Position Held: CNA
Department(s): Nursing Department (Med/Surg)

The Hospital does not release any other information on former employees without written consent from the employee.

Sincerely,

Michael L. Williams
Chief Executive Officer

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FAIRFIELD	)	C/A NO.: 13-CP-20-12
Philip Ethier and Jeanne Ethier,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Defendant's Post Verdict Motions**
	)	
Fairfield Memorial Hospital, Guy R. Bibeau, M.D. and Tuomey Medical Professionals, Inc.,	)	
	)	
Defendants.	)	

Defendant Bibeau submits the following post jury verdict motions per the Trial Judge's oral in court instructions and in response to Plaintiffs' Motion for New Trial absolute dated April 15, 2015.

I. **JUROR'S AFFIDAVIT IS EXCLUDED BY RULE 606 AND PLAINTIFF'S MOTION FOR A NEW TRIAL ABSOLUTE SHOULD BE DISMISSED AS A MATTER OF LAW.**

1. Juror's affidavit should be stricken under Rule 606(b), SCRE.

   a. Rule 606, *SCRE*, provides *inter alia*:

   (b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. [Adopted effective September 3, 1995.]

   b. *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999)("It has long been the rule in this state that a juror's testimony is not admissible in order to prove either his own misconduct or that of fellow jurors."). "Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." citing *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998). Id. "[T]he burden is on the party alleging premature deliberations

to establish prejudice." Id.

c. *State v. Zeigler*, 364 S.C. 94, 110, 610 S.E.2d 859, 867 (Ct. App. 2005) ("Internal influences involve information coming from the jurors themselves."); See generally *Fed.R.Evid.* 606(b) advisory committee's note (stating "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment"); Rule 606, *SCRE* note (stating "[t]he language of this rule is identical to the federal rule"). See also *Warger v Shauers*, 135 S.Ct. 521, 190 L.Ed.2d 422, 83 USLW 4017 (2014)(rule [606(b)] barring evidence about any statement made during jury deliberations in inquiry into verdict's validity applied to exclude juror's affidavit regarding foreperson's conduct during deliberations).

d. Affidavit should be stricken based upon misconduct of Plaintiff's counsel;

e. Affidavit does not raise any issue of external misconduct;

f. Jurors encouraged to discuss beliefs, opinions, and other matters of personal persuasion during deliberations;

g. Affidavit does not discuss early deliberations, but rather suggests comments made by one juror during intermissions of testimony;

h. Jurors asked at the start of every session of court if they were able to comply with the court's instructions not to deliberate, read newspapers, perform research, speak with anyone about the case, or begin to reach conclusions about the evidence;

i. No juror raised any issue of juror misconduct during the course of the trial;

j. Affiant did not respond or otherwise bring the alleged misconduct to the attention of the court during the trial;

k. Affiant complicit in any violation of the court's instructions and should be barred from collateral attacking verdict;

l. No verdict safe if lawyers allowed to troll jurors in hopes of casting doubt on the events which occurred during a jury's deliberations;

II. **NOW CHALLENGED PROSPECTIVE JUROR DISCLOSED ALL RELEVANT INFORMATION DURING VOIR DIRE.**

A. Plaintiff's request to voir dire:

Question 1: Do any of you know or have a family or business relationship with any of the following persons or entities:

3. Dr. Guy R. Bibeau ...
22. Samantha Anthony, CNA
23. Jerilyn Wadford, RN, of Columbia
24. Rhonda Gwynn, LPN, of Winnsboro;

B. During qualification, the now challenged prospective juror revealed that:

1. she had previously worked as a CNA at Fairfield Memorial Hospital;
2. she knew several of the witnesses identified in voir dire;
3. she had been diagnosed and treated for depression;

4. After each disclosure, she testified under oath that she could be fair and impartial to all parties during the trial.
5. Plaintiff failed to request additional voir dire;
6. Plaintiff failed to request striking prospective juror for cause;
7. Plaintiff failed to exercise an elective strike against prospective juror;
8. Plaintiff waived any defect in voir dire process by not making a contemporaneous objection or requesting additional relief at that time;

C. Plaintiff's requested voir dire is vague in reference to scope and time and could easily be interpreted as "Do any of you know or have a [current] family or business relationship with ..."
1. Prospective juror had previously revealed her relationship with Fairfield Memorial Hospital as an employee;
2. Fairfield Memorial Hospital is a small county hospital in a rural county of only 23,000 people;
3. *Lynch v Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 157, 760 S.E.2d 111, 117 (Ct. App. 2013)("the juror's responsibility is only to disclose information that reasonably should be disclosed in response to a question that is reasonably comprehensible.").

III. **PLAINTIFF'S MOTION FOR NEW TRIAL SHOULD BE DISMISSED BASED UPON MISCONDUCT BY PLAINTIFF'S COUNSEL.**

A. Plaintiff's counsel violated ethical rules:
"Although not absolutely prohibited under all circumstances, the Court looks with disfavor upon officers of the court approaching jurors after a verdict has been written. Counsel can eliminate the possible embarrassment to himself and jurors by merely staying away from those who wrote a verdict in cases in which they are involved." *In re Delgado*, 279 S.C. 293, 306 S.E.2d 591 (1983)(public reprimand for attorney contacting juror after trial);

B. "By his conduct, respondent has violated Rule 8.4(e) of the Rules of Professional Conduct, Rule 407, *SCACR*, which prohibits an attorney from engaging in conduct prejudicial to the administration of justice and Rule 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, *SCACR*, which prohibits an attorney from engaging in conduct tending to pollute the administration of justice or to bring the courts or legal profession into disrepute. Indeed, this Court "looks with disfavor upon officers of the court approaching jurors after a verdict has been written," and "an attorney approaching a juror after a verdict is rendered, does so at his own peril." *In the Matter of Delgado*, 279 S.C. 293, 296-97, 306 S.E.2d 591, 594 (1983)." *In re Smith,* 338 S.C. 465, 527 S.E.2d 758, 759 (2000)(public reprimand for frustrated attorney who contacting jurors following verdict).

C. "This Court does not permit the disgusting practice of unbridled interrogation of jurors about their deliberations." See *United States v Sanchez* (1973, ND Tex) 380 F Supp 1260, 1265-1266, affd (CA5 Tex) 508 F2d 388, cert den 423 US 827, 46 L Ed 2d 44, 96 S Ct 45, ("However, where good cause appears, the Court does allow jurors to be interrogated in a manner that does not amount to harassment. That must be done under order of the Court and under circumstances where there

will be reasonable expectation that lawyers in all subsequent cases will not be filing motions claiming that the minds of the jurors were poisoned by lawyer's or investigator's statements made during the previous interrogation.").

D. [Fourth Circuit] 'The inviolability of the jury room from outside influence of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court. The same rule requires that jurors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it.' *Rakes v. United States*, 169 F.2d 739, 745-46 (4th Cir. 1948), cert. denied, 335 U.S. 826, 69 S.Ct. 51, 93 L.Ed. 380 (1948).

E. 'A jury deliberates in secrecy to encourage each juror to state his thoughts, good and bad, so that they may be talked out. 'Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.' *Clark v. United States*, 289 U.S. 1, 13, 53 S.Ct. 465, 469, 77 L.Ed. 993, 999 (1932).

F. "All trial lawyers know that jurors, after the event, are always ready to be on the side of whoever asks them." *Northern Pacific Railway Company v Mely*, 219 F.2d 199 (1954)("We do hold for future guidance that it is improper and unethical for lawyers, court attaches or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury.").

G. First Amendment interests of disgruntled litigant and counsel in interviewing jurors in order to satisfy their curiosity and improve their advocacy were limited, and were plainly outweighed by jurors' interest in privacy and public's interest in well administered justice. *Haeberle v Texas International Airlines*, 739 F2d 1019 (5th Cir. [Tex] 1984).

H. As a matter of policy, efforts to undermine a jury's verdict by systematically questioning the individual jurors long after they have been dismissed in hopes of discovering some form of misconduct should not be encouraged. *People v Friedgood*, 58 NY2d 467, 462 NYS2d 406, 448 NE2d 1317 (1983).

I. Defendant moves for, and is entitled to, dismissal of Plaintiff's motion for a new trial based upon misconduct of Plaintiff's counsel.

J. Alternatively, Defendant moves for, and is entitled to, convene discovery deposition(s) of Plaintiff's counsel and any other person who communicated, or attempted to communicate, with any juror, said testimony to occur before any juror has been summoned to a hearing. Defendant asserts a right to due process.

K. Alternatively, Defendant moves for, and is entitled to, an in camera examination of Plaintiff's counsel and any other person who communicated, or attempted to communicate, with any juror, said testimony to occur before any juror has been summoned to a hearing. Defendant asserts a right to due process.

L. Alternatively, Plaintiff's motion for new trial absolute should be dismissed upon the merits without a hearing;

IV. **PLAINTIFFS RECEIVED A FAIR TRIAL.**

"Litigants, whether plaintiffs or defendants, are entitled to **fair trials** but not perfect trials. *Smoak v. Seaboard Coast Line Railroad Company*, 259 S.C. 632, 193 S.E.2d 594 (1972). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." *Id.* at 640, 193 S.E.2d at 598." *Aakjer v Spagnoli*, 291 S.C. 165, 177, 352 S.E.2d 503 (Ct. App. 1987).

A. Plaintiffs were allowed to introduce and publish an alleged prior consistent statement (diary) that was not, in fact, uttered, spoken, or published until November of 2013 allegedly documents the events of April 10, 2011 and the following days;

1. Admitted under Rule 803(3) and (5), *SCRE* over objection;
2. Plaintiffs recognized reversible error and sought to withdraw the diary after significant testimony and publication of diary, complete with cascading, impermissible bolstering of his in court testimony under the guise of a prior consistent statement or hearsay exception;
3. Rule 803(5) specifically states document not to be received into evidence, yet it was entered into evidence over objection;
4. Diary used to "recreate" and bolster memories not revealed in discovery depositions;
5. Later offered under 801(d)(1)(B), *SCRE*, as prior consistent statement when statement not made until November 2013, and thus was not a prior statement, and was made after the time of the alleged fabrication;

B. Plaintiff allowed to assert claim for curbside consults occurring after April 10, 2011, where no medical authority acknowledges a physician-patient relationship in any such encounter;

C. Intervening consult with another physician broke causal relationship and directed verdict not granted on this basis;

D. Directed verdict not entered on Plaintiff's failure to follow medical advice of Defendant;

F. Defense expert Smith not allowed to refute Plaintiff expert Adam's claim that Rutherford's Vascular Surgery textbook supported his testimony;

G. Sister allowed to improperly bolster Plaintiff's testimony that he told her he was "speaking with doctors" who said "to give it time", said testimony over objection;

H. Defendant stipulated to authenticity of medical bills only, but not to admissibility, reasonable in amount, necessity of treatment, or related to the alleged negligence of Defendant, such that Trial Judge's ruling amounted to burden shifting to Defendant to show the medical bills were NOT admissible into evidence;

I. Allowed Plaintiff Jeanne Ethier to testify her husband told her doctors told him to "give it more time" thereby bolstering his testimony and exceeding the scope of Rule 803(3) under which testimony was offered, said evidence entered over objection;

K. Plaintiff argued in closing, over objection, that the jury should "send a message" to everyone outside the courthouse, a clear request for nullification by the jury;

L. Allowing Plaintiff's counsel to cross examine nurse Watford over policy requiring that only registered nurses should perform triage at Fairfield, and not allowing the fact that hospital was a party defendant into evidence;

M. Plaintiff prevailed on virtually every evidentiary ruling;

N. No indication that a new trial would proceed in any manner more favorably for Plaintiffs or be appreciably different than this trial;

O. Greater weight of the evidence supported jury's verdict that Plaintiff was 70% at fault by not seeking normal follow up care, and by not following the clear, written instructions to see a family physician within a week, said instructions having been signed by Plaintiff, and where Plaintiff gave the same instructions to patients while he worked at the emergency department;

P. Plaintiffs not entitled to a direction of verdict on negligence or comparative negligence, and therefore Plaintiffs not entitled to new trial absolute as jury had two physicians testify that Defendant acted within the standard of care, and a third physician, Holloman, testified that he did not believe Defendant or any other family physician would have found Plaintiff's popliteal artery aneurism in the back of his right knee;

Q. Trial Judge properly charged the jury:

1. IN EVERY CASE TRIED IN THIS COURT BEFORE A JURY, THE JURY BECOMES THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS. A TRIAL JUDGE CANNOT COMMENT ON OR MAKE ANY STATEMENT ABOUT THE FACTS IN A CASE. SINCE YOU ARE THE SOLE JUDGES OF THE FACTS, DO NOT THINK BY ANYTHING I HAVE SAID DURING THE TRIAL THAT I HAVE ANY OPINION ABOUT THE FACTS IN THIS CASE. THE LAW DOES NOT ALLOW ME TO HAVE AN OPINION ABOUT THE FACTS
2. Trial Judge should not grant a new trial absolute in contradiction to the jury charge which correctly states South Carolina law;
3. Jury was required to decide a question of fact, and jury's decision should be allowed to stand;
4. New trial absolute is extraordinary relief not warranted in this case;
5. Trial court should not invade the province of the jury by granting new trial absolute.

V. **DEFENDANT MOVES FOR PROMPT ENTRY OF JUDGMENT UNDER RULE 58(A)(2), *SCRCP*;**

1. Defendant respectfully submits that no post trial motions may occur under Rule 59 unless and until a separate written entry of a verdict or decision has been entered by the Court or the Clerk of Court under Rule 58.

   a. Defendant moves for an immediate entry of judgment in Defendant's favor pursuant to Rule 58(a)(2), *South Carolina Rules of Civil Procedure*, which provides:

   upon a decision by the court granting other relief, or **upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly prepare the form of the judgment**, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court, and after review and approval by the court, **the clerk shall promptly enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record. Entry of the judgment should not be delayed for the taxing of costs. (Emphasis added)**

   b. South Carolina's courts have not interpreted this rule in the absence of the entry of a separate written order filed with the clerk of court. However, North Carolina courts have interpreted a similar rule holding that "Under Rule 58, 'a judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.' Id. We have also held that 'Rule 58 applies to orders, as well as judgments, such that an order is likewise entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.'(citations omitted)" *In Re Thompson*, 754 S.E.2d 168, 171 (N.C. Ct. App 2014). "Thus, an oral ruling announced in open court is "not enforceable until it is entered. (citations omitted)" Id. "Accordingly, a party cannot appeal an order until entry occurs." Id. "Because the order was not filed, it was not entered. Accordingly, the time period to file notice of appeal of clerk['s] ... order has not yet commenced." Id.

   c. Federal civil procedure may also shed light on this issue: See *Horn v. Transcon Lines, Inc.*, 898 F.2d 589, 591 (7th Cir. 1990) ("A document saying that judgment is entered, but not saying who is entitled to what from whom, is ineffectual."); *Reytblatt v. Denton*, 812 F.2d 1042, 1044 (7th Cir. 1987) ("[The final judgment in a case] must set forth the relief to which the prevailing party is entitled or the fact that the plaintiff has been denied all relief."); *Otis v. Chicago*, 29 F.3d 1159, 1163 (7th Cir. 1994) ("[A proper judgment] says who is liable for how much, then stops.");

VI. **A VERDICT SHOULD BE PROMPTLY ENTERED IN FAVOR OF DR. BIBEAU ON ALL CAUSES OF ACTION BASED UPON THE LAW OF COMPARATIVE NEGLIGENCE AS CHARGED TO THE JURY;**

A. The jury was properly instructed on the law of comparative negligence and returned a verdict for Defendant based upon Plaintiff's negligence being greater than fifty (50%) percent.

1. The Trial Court properly charged the jury:
   a. "QUESTION 6 ASKS YOU IF THE PLAINTIFF'S NEGLIGENCE WAS GREATER THAN THE DEFENDANT'S NEGLIGENCE. IF SO, THE PLAINTIFF WOULD NOT BE ENTITLED TO ANY DAMAGES, AND YOUR VERDICT WOULD BE FOR THE DEFENDANT."
   b. Plaintiff did not object to the jury charge;
   c. Plaintiff did not object to the verdict form;
   d. Plaintiff did not object to the jury's verdict before dismissal of the jury;
2. Trial Judge properly instructed the jury on the law of comparative negligence.
   a. Trial judge delivered proposed charges to the parties and allowed each an opportunity to review and object to proposed charges;
   b. Plaintiff did not object to the Trial Judge's proposed jury charge on comparative negligence;
   c. Following the jury charge and before deliberations began, Plaintiff failed to object to the jury charge on comparative negligence, or request a corrective charge on comparative negligence;
   d. Following the publication of the jury verdict and before the dismissal of the jury, Plaintiff did not object to the jury's verdict based upon allocation of comparative negligence between Plaintiff and Defendant;
   e. Following the publication of the jury verdict and before the dismissal of the jury, Plaintiff did not object to the jury's verdict based upon allocation of comparative negligence between Plaintiff and Defendant and a finding of damages as being inconsistent with the Trial Judge's jury charge;
   f. Absent objection, the jury charge on comparative negligence is the law of the case;
3. Verdict Form accurately allowed the jury to follow the law of comparative negligence as charged by the Trial Judge to reach the Jury's verdict.
   a. Trial judge delivered the proposed verdict form to the parties and allowed each an opportunity to review and object to the verdict form on the record;
   b. Plaintiff did not object to the proposed verdict form;
   c. Following the jury charge and before deliberations began, Plaintiff failed to object to the verdict form, or request any corrective charge as to any alleged inconsistencies between the jury charge and the verdict form on the issue of comparative negligence;
   d. Following the publication of the jury's verdict and before the dismissal of the jury, Plaintiff did not object to the jury's verdict based upon the language of the jury's verdict or any alleged inconsistencies on the issue of comparative negligence;
   e. Following the publication of the jury's verdict and before the dismissal of

the jury, Plaintiff did not object to the jury's verdict on any basis whatsoever;

f. Absent objection, the jury's verdict became the law of the case;

B. Jury's verdict and jury charge on comparative negligence is consistent in that Plaintiffs are barred from recovery *as a matter of law* because his negligence exceeded fifty (50%) percent although Plaintiff proved *as a matter of fact* that his damages were suffered by a preponderance of evidence;

1. Jury's verdict consistent with law as charged;
   a. "It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found." *Longshore v Saber Security Services, Inc.*, 365 S.C. 554, 562-563, 619 S.E.2d 5, 10 (Ct. App. 2005).
   b. "Neither the parties to the litigation nor the court should be required to guess what the jury sought to accomplish." Id.
   c. "It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found." *Holly Woods Association of Residence Owners v Hiller*, 392 S.C. 172, 192, 708 S.E.2d 787, 798 (Ct. App. 2011);
   d. "the law imposes no duty upon the trial judge to reject an inconsistent verdict in the absence of an objection by either party." *Longshore v Saber Security Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5 (Ct. App. 2005).
   e. "Neither party moved the trial court to resubmit the matter to the jury, and the trial court had no authority or duty to do so in the absence of such a motion.
2. Plaintiff failed to object to the verdict form therefore waived any defect in the verdict form.
3. As an alternative basis, Defendant moves for reformation of the verdict based upon *South Carolina Code* §15-38-15;
4. As an alternative basis, Defendant moves for an offset for all amounts paid in settlement by Fairfield Memorial Hospital. Sec Covenant Not to Execute.
5. Loss of consortium is NOT a derivative cause of action
   a. Trial Judge properly instructed jury on loss of consortium:
      THE PLAINTIFF CLAIMS A LOSS OF CONSORTIUM BECAUSE OF THE INJURIES RECEIVED BY [HER] SPOUSE .
      THE COMPANIONSHIP AND SOCIETY OF A SPOUSE ARE NOT ARTICLES OF COMMERCE WHICH CAN BE WEIGHED OR MEASURED OR BOUGHT AND SOLD. NO EXPERT IS COMPETENT TO TESTIFY TO THEIR VALUE. THE CONSIDERATION ON WHICH THEY ARE GIVEN IS NOT MONETARY. BUT THE PLAINTIFF'S SPOUSE JEANNE EITHER IS ENTITLED TO COMPENSATION IN MONEY FOR THEIR LOSS SHOULD YOU FIND THAT THE DEFENDANT'S MEDICAL NEGLIGENCE WAS THE PROXIMATE CAUSE OF THE LOSS OF HER RIGHTS OF CONSORTIUM.
      THE AMOUNT OF THAT COMPENSATION IS TO BE DETERMINED BY YOU, NOT FROM EVIDENCE OF VALUE, BUT FROM YOUR

OWN OBSERVATION, EXPERIENCE, AND KNOWLEDGE, CONSCIENTIOUSLY APPLIED TO THE FACTS AND CIRCUMSTANCES OF THE CASE.
IF YOU FIND THE DEFENDANT LIABLE IN DAMAGES, THE PLAINTIFF SPOUSE IS ENTITLED TO RECOVER THE VALUE OF THOSE SERVICES OF HER SPOUSE WHICH WERE LOST, INCLUDING THE LOSS OF HER SPOUSE'S SOCIETY AND COMPANIONSHIP IN THE HOME. THE PLAINTIFF IS ALSO ENTITLED TO RECOVER FOR ANY EXPENSES INCURRED FOR THE CARE AND TREATMENT OF HER SPOUSE BECAUSE OF ILLNESS OR BODILY HARM SUFFERED BY THE SPOUSE, AND FOR ANY MEDICAL EXPENSES WHICH THE PLAINTIFF HAS INCURRED.

b. *South Carolina Code* §15-75-20 became effective June 25, 1969;
c. 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. *Kizer v. Kinard,* 361 S.C. 68, 602 S.E.2d 783 (S.C.App. 2004).
d. jury followed instructions of trial judge;

Defendant specifically reserves the right to assert matters properly raised under Rule 59, South Carolina Rules of Civil Procedure, and such other matters as may be hereinafter raised.

For the reasons set forth above, Defendant respectfully request that a verdict be entered in his favor on all causes of action.

LEE, ERTER, WILSON, HOLLER & SMITH, LLC

G. Murrell Smith, Jr.
David C. Holler
126 North Main Street
PO Box 580 (29151)
Sumter, SC 29150
803-778-2471
ATTORNEY FOR DEFENDANT BIBEAU

April 20, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF FAIRFIELD)

COVENANT NOT TO EXECUTE

KNOW ALL MEN BY THESE PRESENTS that we, Philip Ethier and Jeanne Ethier, for and in consideration of the sum of One Hundred Thousand and 00/100 Dollars ($100,000.00), to us in hand, paid by or on behalf of Fairfield Memorial Hospital, and all of its former and current insurance carriers, successors, assigns, agents, apparent agents, servants, employees, physicians, officers, board members, and their heirs, successors and assigns (collectively as "Hospital"), the receipt and sufficiency of which is hereby acknowledged, do hereby agree not to institute, pursue or continue any claims, suits or actions in any form or on any basis, because of anything that was done or not done at any time, against Hospital, for any and all claims, demands, debts, rights, actions, causes of action, damages, attorney's fees, medical costs, costs, loss of service, loss of consortium, expenses and compensation of whatsoever nature, now existing or which may hereafter accrue, and all known and unknown, foreseen and unforeseen, bodily and personal injuries and the consequences thereof resulting, which heretofore have been and which hereafter may be sustained by us on account of the injuries and damages to Philip Ethier, which allegedly resulted from medical care and treatment rendered to him by Hospital during his Emergency Room visit on April 10, 2011, and thereafter. From the total settlement proceeds of $100,000.00, Sixty Thousand and 00/100 Dollars ($60,000.00) shall be apportioned to Philip Ethier's claims, and Forty Thousand and 00/100 Dollars ($40,000.00) shall be apportioned to Jeanne Ethier's claims.

This Covenant Not To Execute shall cover and include and does cover and include any and all future injuries, death and/or damages, and any and all past, present and future subrogation claims/liens, including Medicaid and/or Medicare claims/liens, not known to the Parties hereto, but which may later develop or be discovered, including the effects and consequences thereof, and including all causes of action therefore, that arise out of the injuries and damages to us.

The settlement proceeds paid herein shall be paid as full and complete settlement and satisfaction of the past, present and future claims against Hospital for all of our medical expenses, which are known and which are not now known and which may later develop. We certify, represent and warrant that any past, present and future subrogation claims/liens in this matter, including any Medicaid and/or Medicare claims/liens, resulting from the injuries and damages to us, will be paid and satisfied by us from the settlement proceeds herein as required by law.

In consideration of the above payment, we agree that this settlement is the compromise of disputed claims and that the payment made in settlement hereof is not to be construed as an admission of liability on the part of Hospital, or any other Party hereby included, and Hospital denies liability of any nature or kind to us.

We further expressly understand and agree, stipulate, and acknowledge that the settlement proceeds paid in this matter are and shall be a complete bar to any subsequent action or proceeding to set aside or vacate this Covenant Not To Execute, because of a mistake in fact or otherwise, and we further agree that should the terms of this Covenant Not To Execute be breached by us, Hospital has no adequate remedy at

law and may seek injunctive or other equitable relief preventing any breach of this Covenant Not To Execute by us.

We further declare and represent that no promise, inducement or agreement not herein expressed has been made to us, that we have neither made nor suffered any assignment or transfer whatsoever of any part of the claims made by us, that this Covenant Not To Execute contains the entire agreement between Hospital and us, and that the terms of this Covenant Not To Execute are contractual and not a mere recital.

We clearly understand and agree that Hospital and James E. Parham, Jr., make no representation, warranty, promise or assertion to us of the tax liabilities and/or consequences of this Covenant Not To Execute, if any, and we shall make an independent determination of any tax liability or consequence contained therein.

Furthermore, in consideration of the foregoing, we specifically agree to indemnify and hold harmless Hospital and James E. Parham, Jr., from any and all loss, expense, claims or demands in any way arising out of or connected with the injuries and damages to us, and/or any and all past, present and future subrogation claims/liens, including any Medicaid and/or Medicare claims/liens, which any entity (person, firm, corporation or partnership) may have to, from or against the settlement proceeds herein and/or the distribution of the proceeds received in settlement of all claims arising out of the injuries and damages to us.

We hereby agree that our attorneys and representatives and we shall not reveal to anyone, other than as may be required by law or as revealed In the public record, any of the terms of this Covenant Not To Execute or any of the amounts, numbers or terms and conditions of any sums payable to us hereunder or any of the facts, events,

statements, representations or discovery related to or created by our claims against Hospital and others (Fairfield County Civil Action No.: 2013-CP-20-12). We may reveal and discuss the terms and conditions of this settlement with our attorneys, accountants, financial advisors and taxing authorities.

We hereby further expressly agree and covenant that this Covenant Not To Execute may be pled as a defense and as a bar to any action or proceeding or judgment that may be brought, instituted or taken by us against Hospital, and that this Covenant Not To Execute shall forever be a complete bar to the commencement or prosecution of any action or proceeding or judgment whatever against Hospital on account of the injuries and damages to us, as well as any future claims for injuries and damages of any kind whatever.

This agreement is a covenant not to execute and nothing in this agreement shall operate as a discharge against any other persons or entities, and we expressly reserve the right to pursue any claims against any other persons or entities, other than Hospital. This Covenant Not To Execute does not release or acquit Guy R. Bibeau, M.D., from any potential claims that we may have against him.

This Covenant Not To Execute is the entire agreement between Hospital and us.

Further, we hereby expressly authorize our attorneys to consent to such Order or Orders as may be necessary to forever end any actions against Hospital.

We further declare and state that we have read the foregoing Covenant Not To Execute and sign it as our free acts this 24 day of March, 2015, and subscribe our names and affix our seals hereto in affirmation of this Covenant Not To Execute and its purport and effect.

WITNESSES:

Philip Ethier

Jeanne Ethier

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

PERSONALLY APPEARED before me, the undersigned witness, who made oath that s(he) saw Philip Ethier and Jeanne Ethier sign the foregoing Covenant Not To Execute, and that s(he) with the other witness witnessed the execution thereof.

SWORN to before me this
26th day of March, 2015.

(L.S.)
Notary Public for South Carolina
My commission expires: 1-17-2017

As the attorney for Philip Ethier and Jeanne Ethier, and as a member of the South Carolina Bar, I have reviewed and discussed the foregoing settlement and Covenant Not To Execute with my clients.

David Proffitt, Esquire
Attorney for Philip Ethier and
Jeanne Ethier

Columbia, South Carolina

March 26, 2015

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

2015 MAY 11 PM 1 09
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J[illegible] ECKHAM

PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND JUDGMENT BY CORRECTING ERROR IN FORM 4 ORDER

Plaintiffs Philip Ethier and Jeanne Ethier, by and through their undersigned counsel and pursuant to Rule 59, SCRCP, move this Honorable Court to strike or amend an erroneous Form 4 order and judgment filed April 30, 2015, in connection with the verdict rendered by the jury. This motion is based on the grounds set forth herein, any memorandum, testimony, evidence or exhibits submitted to the Court in connection with this motion, trial testimony and exhibits, the Rules of Civil Procedure and applicable law.

The jury rendered a verdict on April 8, 2015, after a seven-day trial which began March 30, 2015. The jury awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Plaintiff Philip Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Defendant Dr. Guy Bibeau was 30% negligent. The jury awarded $250,000 to Plaintiff Jeanne Ethier for loss of consortium.

On May 4, 2015, Plaintiffs received a Form 4 order and judgment filed by the Clerk on April 30, 2015. The Form 4 order 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.

The true verdict of the jury, with regard to Plaintiff Jeanne Ethier, was that the jury found Defendant Dr. Bibeau negligent (Verdict Form Question No. 1, answered "yes"); Jeanne Ethier proved by a preponderance of the evidence that Dr. Bibeau's negligence was the proximate cause of her loss of consortium (Verdict Form Question No. 8, answered "yes"); and the total damages sustained by Jeanne Ethier for loss of consortium was $250,000 (Verdict Form Question No. 9.)

To the extent that the Form 4 order and judgment conflicts with the jury's true verdict by stating that verdict was for Defendant on Mrs. Ethier's claim, Plaintiffs hereby move to strike or amend the erroneous language of the Form 4 order and judgment so that it accurately states that the verdict was in favor of Mrs. Ethier. Specifically, Plaintiffs move that the Form 4 order and judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim.

The Form 4 order and judgment states that "Plaintiff" was found to have been 70% negligent – apparently referring only to Plaintiff Philip Ethier – and the result was a verdict for Defendant. If that is the case, then the order simply needs clarification with an additional sentence and reference to Plaintiff Jeanne Ethier's verdict in her favor.

Plaintiffs request a hearing on their motion. Plaintiffs reserve the right to submit a memorandum of law in support of their motion.

Respectfully submitted,

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May 7, 2015

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BY U.S. MAIL AND E-MAIL

June 29, 2015

The Honorable Roger L. Couch
Spartanburg County Courthouse
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2015 JUN 30 AM 10 42
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
C.A. No. 2013-CP-20-12
PC File No. 1236.01

Dear Judge Couch:

Please find enclosed the following documents, which have been filed with the Clerk and served on counsel for Defendant:

Plaintiffs' Motions for New Trial, including a Memorandum in Support and Exhibits A through L; and

Plaintiffs' Rule 59 Motion to Alter or Amend Judgment By Correcting Error in Form 4 Order, including a Memorandum in Support and Exhibit A.

I look forward to seeing you at the hearing on July 6.

With kindest personal regards, I remain,

Sincerely yours,

PROFFITT & COX, LLP

David Proffitt

cc: The Honorable Betty Jo Beckham
Murrell Smith (murrellsmith@leeandmoise.com)
David Holler (davidholler@leeandmoise.com)
Stanley Myers (stanley@mttlaw.com)
Andrew Lindemann (alindemann@dml-law.com)

Enclosures

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

C.A. No. 2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

2015 JUN 30 AM 10 42
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

PLAINTIFFS' MOTIONS FOR NEW TRIAL

Plaintiffs Philip Ethier and Jeanne Ethier, by and through their undersigned counsel and pursuant to Rule 59, SCRCP, move this Honorable Court for a new trial absolute. This motion is based on the grounds set forth herein, any memorandum, testimony, evidence or exhibits submitted to the Court in connection with this motion, including Plaintiffs' Motions for New Trial and Memorandum in Support filed April 20, 2015, the Rules of Civil Procedure and applicable law.

PROCEDURAL POSTURE

The jury rendered a verdict on April 8, 2015, after a seven-day medical malpractice trial which began March 30, 2015. The jury awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Plaintiff Philip Ethier; however, the jury determined that Mr. Ethier was 70% negligent while Defendant Dr. Guy Bibeau was 30% negligent. The jury awarded $250,000 to Plaintiff Jeanne Ethier. The Court granted Plaintiffs' request for 10 days to file post-trial motions.

Plaintiffs timely served motions seeking a new trial absolute on April 15, 2015, and requested a hearing for the Court to consider allegations of juror concealment during voir dire, juror misconduct during premature deliberations and juror misconduct during deliberations. A juror evidentiary hearing was held on May 12, 2015.

MOTIONS

Plaintiffs move for a new trial absolute on the following grounds:

I. JUROR CONCEALMENT DURING VOIR DIRE

Plaintiffs are entitled to a new trial because Teressa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau and two nurse witnesses, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial 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 Plaintiffs' peremptory challenges.

Plaintiffs are entitled to a new trial *solely* on the basis of juror concealment of information during voir dire. However, Plaintiffs also are entitled to a new trial on the following grounds.

II. JUROR MISCONDUCT DURING PREMATURE DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurse witnesses Wadford and Gwynn because she had personally worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant

and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau 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 (3) unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Killian's unlawful misconduct because one or more jurors' verdict was affected by the statements.

III. JUROR MISCONDUCT DURING DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, wrongfully exercised her personal, improper bias in favor of Defendant and wrongfully brought extraneous prejudicial information to the jury's attention by: (1) stating during jury deliberations that she personally knew Dr. Bibeau and nurse witnesses Wadford and Gwynn; (2) unlawfully and improperly offering inadmissible, irrelevant evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau and the two nurses, and by stating in jury 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 during jury deliberations her bias in favor of Dr. Bibeau and the nurses due to her personal knowledge of them; and (4) unlawfully and improperly exercising her personal bias in favor of Defendant by arguing and voting for a defense verdict as to Mr. Ethier.

Plaintiffs were prejudiced by Killian's unlawful misconduct because one or more jurors' verdict – including Killian herself, Sandra Carmichael and probably others – was affected by Killian's beliefs and statements

IV. THIRTEENTH JUROR DOCTRINE

Plaintiffs are entitled to a new trial pursuant to the Thirteenth Juror Doctrine because the jury's verdict on the apportionment of negligence between the parties is against the weight of the evidence.

MEMORANDUM IN SUPPORT OF MOTIONS

I. JUROR CONCEALMENT DURING VOIR DIRE

Plaintiffs are entitled to a new trial because Teressa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau and two nurse witnesses, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial 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 Plaintiffs' peremptory challenges.

"Under South Carolina law, litigants are guaranteed the right to an impartial jury." 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").

"To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282 (2001) (citing State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)). "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." Woods, 345 S.C. at 587, 550 S.E.2d 282 (quoting State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982)).

"A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge." Woods, 345 S.C. 590, 550 S.E.2d 282 (citing Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986)).

"Trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information. . . . Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge." State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014) (citations omitted).

"A party seeking a new trial based upon the disqualification of a juror must show (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to the verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict." Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505 (1986). Whether a new trial is warranted depends on the circumstances of each case. Id. at 15, 339 S.E.2d 505.

The Supreme Court has further explained the analysis of juror concealment of material facts during voir dire as follows:

> When a juror conceals information inquired into during voir dire, a new trial is required only when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. *Thompson v. O'Rourke,* 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. *State v. Savage,* 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).
> . . .

> We hold that intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.
>
> Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis.

Woods, 345 S.C. at 587-88, 550 S.E.2d 282.

> The Supreme Court has stated that
>
> [i]ntentional nondisclosure occurs: 1) where there exists no reasonable inability to comprehend the information solicited by the question asked of the prospective juror, and 2) where it develops that the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable.
>
> Unintentional nondisclosure exists where, for example, the experience forgotten was insignificant or remote in time, or where the venireman reasonably misunderstands the question posed.

Woods, 345 S.C. at 588, 550 S.E.2d 282.

In Woods, the Supreme Court held that the defendant was entitled to a new trial because a prospective juror failed to disclose during voir dire that she had worked as a volunteer victims' advocate for three years in the solicitor's office which prosecuted the case. The Supreme Court held that, in cases of intentional concealment, the moving party it is ***not*** required to show actual prejudice because the juror's bias will be inferred.

> The State argues that because respondent has not shown that he was prejudiced by Juror B's responses, the Court of Appeals' decision [granting the defendant new trial] was erroneous. We disagree. The test pronounced in *Thompson v. O'Rourke, supra,* makes clear that *where a juror's response to voir dire amounts to an intentional concealment, the movant 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. Where the juror's failure to disclose information is "without justification," i.e., intentional, the juror's bias will be inferred.* Conversely, where the failure to disclose is innocent, no inference of bias can be drawn.

Woods, 345 S.C. at 588-89, 550 S.E.2d 282 (emphasis added); accord Gulledge, 277 S.C. 368, 287 S.E.2d 488 (granting new trial where juror failed to respond to voir dire questions concerning relationship with law enforcement personnel; juror was related by marriage to police officer who had custody of defendant during trial and who had viewed crime scene).

"In the face of a juror's intentional nondisclosure of pertinent information during voir dire, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. . . . Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; *however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent.*" State v. Coaxum, 410 S.C. 320, 764 S.E. 2d 242 (2014) (in unintentional concealment case, Supreme Court rejected defendant's request for mistrial where trial judge replaced a juror in mid-trial after juror recognized one of defendant's family members sitting in the courtroom) (citing Woods, infra) (citations and quotation marks omitted) (emphasis added).

When a case involves *unintentional* concealment, the inquiry usually ends and a new trial is not likely to be granted unless the moving party can otherwise show prejudice. Woods, 345 S.C. 587-89, 550 S.E.2d 282; State v. Sparkman, 358 S.C. 491, 497, 596 S.E.2d 375 (2004) (in unintentional concealment case, Supreme Court rejected defendant's request for new trial where juror failed to reveal during voir dire that he had been the victim of a crime 40 years ago; juror stated that he did not remember his attack until after deliberations began and he was unsure whether the attack was a "serious" crime; trial court questioned other jurors about the impact of the statements even though it was not necessary to do so); Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (in unintentional concealment case, Court

of Appeals affirmed trial court's ruling that none of voir dire questions unambiguously called for juror to disclose that her ex-husband was represented in divorce by plaintiff's law firm).

In the present case, after the trial ended and the jury was dismissed, Plaintiffs' counsel spoke with juror Sandra Carmichael. Plaintiffs for the first time discovered that juror Teressa Killian personally knew and had personally worked with Dr. Bibeau and the nurses; that Killian poisoned the well throughout the trial by unlawfully and improperly vouching for the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses based on her personal knowledge, both throughout the trial in premature jury deliberations and during the jury's actual deliberations; that Killian violated the Court's instructions not to discuss the case during the trial by discussing the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses during breaks; and that Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (Aff. of Sandra Carmichael, attached as EXHIBIT A.)

The Court during voir dire directed prospective jurors to stand in response to questions and told them "[i]t is necessary that you tell the truth again to these questions or give me full information, because this information again will be used by the litigants in making jury selection decisions, and I'll be making decisions concerning your qualification to serve in this case." (Tr. of voir dire, p. 4.) Just before the clerk swore in the jury pool for a second time, the Court again stated that "it is important, as I said, that the information you give us is truthful, honest and complete information." (Tr. of voir dire, p. 6.)

During voir dire, the Court asked the parties' counsel and the parties to identify themselves by standing up and being pointed out to the jury pool. (Tr. of voir dire, pp. 5-6.)

The Court asked, "Is there any member of the jury panel who has ever had a close social or a personal relationship with either the plaintiffs, Philip and Jeanne Ethier, or the defendant, Guy R. Bibeau?" Juror Killian did not respond. (Tr. of voir dire, p. 7.)

The Court identified possible witnesses, including Michael Williams, CEO of Fairfield Memorial Hospital, and twice identified Jerilyn Wadford, RN and Rhonda Gwynn, LPN. (Tr. of voir dire, pp. 8-9.) Nurses Wadford and Gwynn were the emergency department nurses who were directly involved in Plaintiff Philip Ethier's care and treatment on April 10, 2011, and both testified at trial as defense witnesses. The Court then asked, "Now, as to the individuals that I just identified as possible witnesses in this case, has any member of the jury panel ever been related by marriage or are you related by blood or have you ever had a close social or a personal relationship with the people that I've identified as possible witnesses?" Juror Killian stood up. (Tr. of voir dire, pp. 9-10).

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

(Tr. of voir dire, pp. 9-10.)

The Court asked, "Is there any member of the jury panel or a member of your immediate family who has ever been employed or been a patient in or treated by any of the following medical professionals . . . Rhonda Gwynne, an RN, or Jerilyn Wadford, an RN? So if you have been employed by or been treated by or been a patient of any of those medical professionals, please stand." Juror Killian did not respond. (Tr. of voir dire, pp. 15-16.)

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.[1] (Hearing Tr., p. 38.) Killian testified that she worked as a certified nurse assistant on the medical/surgical floor and in the emergency department. In the emergency department, Killian testified she triaged patients and worked directly with Dr. Bibeau, "Jeri" Wadford and Rhonda Gwynn for nearly two years. (Hearing Tr., pp. 39-45.)

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

Killian testified that she knew nurse "Jeri" Wadford and worked directly with her for 1½ to 2 years in the emergency department and on the medical/surgical floor. (Hearing Tr. pp. 43-

[1] Killian actually worked as a certified nurse assistant at the hospital from October 2005 to May 2007, according to information provided by the hospital after the trial. (EXHIBIT D). Killian testified that she did not know Plaintiff Philip Ethier. (Hearing Tr., pp. 45-46.) Ethier did not begin working at the hospital until March 2012.

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

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

When the Court asked Killian why she did not reveal during voir dire that she knew and had worked with Dr. Bibeau, Killian testified, inexplicably, that she "didn't really consider myself as knowing him personally." (Hearing Tr., p. 46.) However, the Court 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.

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

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

The Court 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. (Hearing Tr., p. 48.) Killian testified, inexplicably and without really answering the Court's question, that she

no longer takes her children to Fairfield Memorial Hospital, but goes instead to Chester hospital. Killian then testified that Williams' treatment of her son 16 years ago was something I "had forgot. It just popped in my head just now." (Hearing Tr., p. 49.)[2]

This case presents a slam-dunk case of intentional concealment because 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, infra. 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 Dr. Bibeau and the nurses for nearly two years, and those experiences were of such significance that her purported forgetfulness is unreasonable. See id.

This case is *not* a case of unintentional concealment because the Court'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.

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[2] Other pertinent questions and responses were:

The Court asked, "Is there any member of the jury panel who is aware of any bias or prejudice that you might have, either for or against either the plaintiffs or the defendants in this case? If that's true, please stand." (Tr. of voir dire, p. 27.) Juror Killian did not respond.

The Court asked, "Does any member of this jury panel know of any reason whatsoever why he or she should not serve as a juror in this case, with particular emphasis being placed upon your ability to be both fair and impartial to both the plaintiff and the defendant? If you know of such a reason, please stand." (Tr. of voir dire, p. 28.) Juror Killian did not respond.

The Court asked, "Is there any member of the jury panel who has had any medical or legal education, training or experience?" (Tr. of voir dire, p. 16.) Juror Killian stated that she had been a certified nurse assistant at Fairfield hospital, but it would not affect her ability to be impartial. (Tr. of voir dire, p. 17.) In response to a later question, Juror Killian stated that her daughter suffered from depression, but it would not affect her impartiality. (Tr. of voir dire, p. 20.)

The record shows that not only should a reasonable juror have understood the Court's questions were intended to reveal whether potential jurors knew or had worked with anyone involved in the case, but *Killian actually understood the questions that way.* Killian responded that she "used to *work* at Fairfield Memorial Hospital with Mike Williams" and confirmed that she "knew him from that *employment.*" (Tr. of voir dire, pp. 9-10) (emphasis added). Killian did not go on to reveal that she also knew and had worked with Bibeau, Wadford and Gwynn even though the record now shows that she personally knew all three very well by working with them for nearly two years in ER.

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 Williams – but not with Bibeau, 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 Bibeau, Wadford or Gwynn if she saw them on the street.) Killian testified that she first met Williams 16 years ago with her ill son, then did not see him anymore, and then later met him again while employed at the hospital. (Hearing Tr., p. 48.) It strains credulity to conclude that any reasonable or honest juror on these facts would have identified Williams as a co-worker, but not the doctor or nurses.

The issue, however, is not whether Killian actually lied or had a nefarious motive during voir dire, although Plaintiffs submit that she did.[3] Plaintiffs do *not* have to prove, and the Court

[3] Regardless of her reasons or motives, Killian's testimony about why she failed to respond as required during voir dire or what she did or said in the jury room is fabricated, continued . . .

does *not* have to find, actual prejudice by showing that Killian lied, intentionally concealed information or had a nefarious motive. Plaintiffs are not required to show actual prejudice because Killian's bias against Plaintiffs is inferred in this case of intentional concealment, and prejudice from Plaintiff's inability to strike the juror is apparent. Plaintiffs need only show that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. See Woods, Gulledge, Coaxum, infra.

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

Defendant's argument that Plaintiffs should have inquired further of Killian during voir dire is without merit. Plaintiffs were not negligent in failing to learn of the disqualification before the verdict.

At the close of voir dire, Plaintiffs knew that Killian had worked as a CNA at the hospital several years ago, she was no longer employed there, she knew Mike Williams from her employment, she had a depressed daughter, and she believed she could be fair and impartial.

Plaintiffs also knew from discovery that Dr. Bibeau, Wadford and Gwynn were part-time "moonlighters" at the hospital, and the nurses in recent years had worked only in the ER. Dr. Bibeau worked only a few days each month, while Wadford worked only on Sundays and Gwynn worked only on Saturdays and Sundays. (Dr. Bibeau's FMH schedule in April 2011, Trial Ex. 32, attached as EXHIBIT E; Tr. of Wadford, pp. 57-60, attached as EXHIBIT F; Tr. of

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incredible and unreliable. As discussed below, Killian's testimony about what went on in the jury room is not truthful in light of other jurors' testimony. Similarly, any effort by Killian to explain or justify her responses or non-responses during the voir dire process lacks credibility.

Gwynn, pp. 9-12, attached as EXHIBIT G.) Plaintiffs knew about the basic division between medical/surgical and ER staff. It was neither surprising nor unreasonable for Plaintiffs to conclude that Killian – based on her responses – did not work in the ER and did not know and had not worked with part-time weekenders Bibeau, Wadford or Gwynn.

It certainly was a reasonable conclusion in light of the fact that Killian had been asked – in plainly worded, easily understood questions – about any personal or employment relationships with the specified parties and witnesses. It was obvious Killian understood the questions because she had identified in voir dire the one person from the hospital that she did know and had worked with – Mike Williams. To reach the opposite conclusion or to request further voir dire would have required Plaintiffs to assume that Killian was lying or intentionally concealing information only minutes after she had twice sworn to tell the truth. In fact, Plaintiffs were entitled to assume that Killian and other potential jurors were responding completely and honestly to reasonably comprehensible questions, just as the Court had instructed them to do. See Gulledge, 277 S.C. at 371, 287 S.E.2d at 490 ("Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason.")

Moreover, it is unlikely the Court would have looked kindly on any effort by counsel to call out a particular juror and ask repetitive questions which called the juror's honesty or intelligence into question: "Ms. Killian, are you sure you don't personally know and haven't worked with any of these people I just named?" "So, Ms. Killian, you really haven't worked with Dr. Bibeau or nurses Wadford or Gwynn? Come on now, are you sure you're telling us the truth?" The Court likely would have concluded additional, repetitive questions were

unnecessary and a waste of time, and would not have wanted to risk embarrassing or offending members of the pool by badgering or singling them out. The Court's reasonably comprehensible questions were proper and sufficient, and Plaintiffs were entitled to rely on potential jurors' responses and non-responses.

In short, the facts of this case are exponentially more egregious than the reported cases which are controlling on these facts. See Woods, 345 S.C. at 588-89, 550 S.E.2d 282 (holding that defendant was entitled to a new trial because a prospective juror failed to disclose during voir dire that she had worked as a volunteer victims' advocate for three years in the solicitor's office which prosecuted the case); Gulledge, 277 S.C. 368, 287 S.E.2d 488 (granting new trial where juror failed to respond to voir dire questions concerning relationship with law enforcement personnel; juror was related by marriage to police officer who had custody of defendant during trial and who had viewed crime scene). In Woods, the juror merely had volunteered in the solicitor's office, but the solicitor and staff did not testify at trial. In Gulledge, the 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 nearly two years with the defendant himself and two of the defendant's key witnesses, all of whom testified at trial.*

Killian intentionally concealed information by failing to respond to direct, straightforward, unambiguous questions. 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 Plaintiffs' peremptory challenges.

Given the fact that Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions about personal, business or working relationships with

any party or witness, Plaintiffs were unaware that Killian personally knew and had personally worked with Dr. Bibeau or the nurses. Given the fact that Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions whether anyone had any bias or prejudice for or against any party, Plaintiffs were unaware that Killian harbored a bias or prejudice in favor of Dr. Bibeau. See State v. Galbreath, 359 S.C. 398, 404, 597 S.E.2d 845, 848 (Ct. App. 2004) (juror's decision not to respond to question about being fair and impartial to all parties suggests that juror felt she could be fair and impartial). Plaintiffs were entitled to rely on the truthfulness of prospective jurors' responses, as well as their non-responses, during voir dire. See Gulledge, 277 S.C. at 371, 287 S.E.2d at 490 ("Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason.")

If Killian had revealed during voir dire the material fact that she personally knew Dr. Bibeau or the nurses, or that she had personally worked with them at the hospital, the Court may have chosen to strike her for cause, depending on whether she said that she could be fair to all parties despite those relationships. If the Court had declined to strike Killian for cause based on her responses, Plaintiffs would have had the opportunity to challenge her for cause or exercise a peremptory challenge to strike her.

If Killian had revealed during voir dire the material fact that she was biased or prejudiced in favor of Dr. Bibeau and the nurses, or would give undue weight to their testimony due to her personal knowledge and working relationship with them, the Court may have chosen to strike her for cause, depending on whether she said that such bias or prejudice would affect her ability to be fair and impartial to all parties. If the Court had declined to strike Killian for cause based on

her responses, Plaintiffs would have had the opportunity to challenge her for cause or exercise a peremptory challenge to strike her.

Killian was the first juror listed on the Juror Strike Sheet as Juror #72. (Juror Strike Sheet, attached as EXHIBIT B.) Plaintiffs did not possess crucial information withheld by Killian and Plaintiffs were not negligent in failing to learn of the reasons and necessity to disqualify Killian before the verdict. (Aff. of Proffitt, ¶¶ 13-14, attached as EXHIBIT C.)

The information and responses which Killian failed to provide during voir dire would have supported a challenge for cause by Plaintiffs or would have been a material factor in Plaintiffs' use of their peremptory challenges. Plaintiffs, in fact, would have struck Killian from the jury if they had known the information she withheld during voir dire.[4] (Aff. of Proffitt, ¶¶ 15-16, attached as EXHIBIT C.)

As a result of Killian's intentional concealment of information during voir dire, by virtue of her standing silent in response to direct, straightforward, unambiguous questions, Plaintiffs were deprived of the right to a fair and impartial jury. 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 Plaintiffs' peremptory challenges. Plaintiffs ask that the Court grant them a new trial absolute.

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[4] Although bias is inferred and prejudice is presumed in this case of intentional concealment, Plaintiffs note that it appeared Killian paid little attention during the trial. She often appeared to be dozing or sleeping during the presentation of testimony and evidence. The Court may infer from Killian's obvious lack of attention during the trial that her mind was already made up and she had no need or reason to listen to testimony or evidence. Killian was determined to conceal her bias and then express and act upon that bias in favor of Dr. Bibeau and the nurses, which is exactly what she did.

Plaintiffs are entitled to a new trial *solely* on the basis of juror concealment of information during voir dire. However, Plaintiffs also are entitled to a new trial on the following grounds.

II. JUROR MISCONDUCT DURING PREMATURE DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurse witnesses Wadford and Gwynn; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau 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 (3) by unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them. Plaintiffs were prejudiced by Killian's unlawful misconduct because one or more jurors' verdict was affected by the statements.

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

Hunter, 320 S.C. 88, 463 S.E.2d at 316. Rule 606(b), SCRE, allows juror testimony regarding extraneous prejudicial information or an outside influence.[5]

The Supreme Court has held that when the alleged misconduct pertains to premature jury deliberations, the issue involves a matter of fundamental fairness. The trial court may inquire into the allegations and consider affidavits in support of the allegations.

> We have routinely held instructions which invite jurors to engage in premature deliberations constitute reversible error. . . . The rationale for prohibiting premature jury deliberations was set forth in *McGuire, supra,* in which we stated:
>
> [A] jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed. . . . The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation.

State v. Aldret, 333 S.C. 307, 311-12, 509 S.E.2d 811 (1999) (holding that defendant's allegation of premature deliberations, which he discovered during trial, was procedurally barred because he failed to timely bring matter to trial court's attention before jury was dismissed) (citations omitted); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008) (holding that juror testimony involving internal misconduct "may be received only when necessary to ensure fundamental fairness").

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[5] Rule 606(b), SCRE, provides:

Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

The moving party has the burden to establish prejudice by proving that the misconduct affected the jury's impartiality. Aldret, 333 S.C. at 313-15, 509 S.E.2d 811. When the fact of premature deliberations becomes known after the jury's verdict, the Supreme Court held that the trial court may consider affidavits.

> If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Aldret, 333 S.C. at 315-16, 509 S.E.2d 811.

In the present case, after the trial ended and the jury was dismissed, Plaintiffs for the first time discovered that Killian personally knew and had personally worked with Dr. Bibeau and the nurses; that Killian throughout the trial in premature jury deliberations unlawfully and improperly vouched for the alleged credibility, skill and knowledge of Dr. Bibeau and the testifying nurses based on her personal knowledge, all in violation of the Court's instructions not to discuss the case during the trial; and that Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (Aff. of Sandra Carmichael, attached as EXHIBIT A).

Carmichael testified in her affidavit that:

> During the trial before deliberations, one of the jurors, Teressa, told us that she formerly worked at Fairfield Memorial Hospital.
>
> I know that Teressa is a certified nursing assistant because she told us that is her job.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teressa, when she referred to "Jeri," meant Jerilyn

> Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.
>
> Teressa repeatedly said during breaks in the jury room that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."
>
> Teressa repeatedly said during the breaks that "if Dr. Bibeau did not do the foot pulses, then it was because Jeri did it and she's very thorough."
>
> Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor."
>
> . . .
>
> Teressa repeatedly made these statements about Dr. Bibeau and Jeri every day when we were on break in the jury room. No one asked her to make them, although she and another juror, Kayla, would often discuss them.
>
> . . .
>
> After the other nurse, Rhonda Gwynn, testified, Teressa said during a break in the jury room that she also personally knew Rhonda and that Rhonda was a good nurse who was thorough in her job. Teressa did not talk as much about Rhonda as she did about Dr. Bibeau and Jeri.

(Aff. of Carmichael, ¶¶ 4-11, 13, 16, attached as EXHIBIT A.)

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

Carmichael verified the accuracy of her affidavit and offered the same testimony at the juror evidentiary hearing held after the trial. (Hearing Tr., pp. 25-27.)

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

"It was almost like . . . once the defendant started calling witnesses and we go back there on a short break or whatever she [Killian] was always bringing up Doctor Bibeau. He's a good doctor. He's a dependable doctor. I know because I worked with him," Carmichael testified. (Hearing Tr., p. 23.) Other jurors heard Killian's statements and at least a couple discussed them with Killian, including juror Kayla Stewart. (Hearing Tr., pp. 22-23.)

Carmichael testified that she was afraid to speak up during trial did not know how to broach the issue. It worried her because she believed Killian should not have been on the jury and was not supposed to make such comments. "I didn't know what to do about it," she testified. "I didn't want to be singled out to be the one that stood up and said, yeah, well, this person is talking [when we] go back there. . . . And that's the reason why it bothered me because I didn't speak up at the time."[6] (Hearing Tr., pp. 20, 36.)

Carmichael testified that Killian's statements about Bibeau and the nurses affected her verdict and other jurors' verdicts. "I just felt like she kept on saying it over and over once we

[6] The Court repeatedly reminded jurors throughout the trial not to discuss the case prematurely. The Court repeatedly asked jurors whether they had complied with his instructions upon their return to the courtroom. However, jurors may have understood the Court's questions to be directed at each of them individually. Jurors were not explicitly asked whether they were aware of any other juror's violation of the Court's instructions. (Hearing Tr., pp. 29-31.)

started deliberating to sway other jurors to her side Doctor Bibeau as far as his reputation or whatever, you know," Carmichael testified. (Hearing Tr., p. 24.)

> Q. [THE COURT:] But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?
>
> A. [CARMICHAEL:] I think it did a little.
>
> Q. Can you tell me in what way?
>
> A. Because when we got back there we was – several of us was leaning towards in favor of the plaintiff and she [Killian] kept on repeating the reputation and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then maybe he didn't, you know, sign those papers. She knew him.
>
> Q. Okay, so it did have some effect on your ultimate decision?
>
> A. Yeah. She [Killian] stated several times that she knew him and he was a good, reliable doctor.
>
> . . .
>
> Q. Now, as to the information that you were given by Theresa can you tell me how it affected your final decision. Take a minute to think about it. You don't have to answer it right away?
>
> A. Well, like I said she stated that she knew him. She worked with him. He's a good doctor. A thorough doctor. So I just felt like if she worked with him she knew him better then, you know any of us did. So, I felt like if she worked with him that long and she thinks he's a good doctor then he must be a good doctor.
>
> Q. Now, you said when the deliberations began you were of one opinion or had a opinion. What was your opinion when the deliberations began when you first started about the case, the issues that we were concerned with?
>
> A. That Doctor Bibeau was more at fault then (sic) Phil. I had him at fault because he was suppose to go to your own physician but I thought that Doctor Bibeau being a doctor was more at fault.
>
> Q. And you changed that opinion before the final verdict?
>
> A. Yes, sir.

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

A. Theresa's knowledge of Doctor Bibeau's work.

(Hearing Tr., pp. 26-28.)

Nine jurors testified they heard Killian say, in the jury room during breaks in the trial, that she worked at the hospital with Dr. Bibeau, Wadford and Gwynn. (Sandra Carmichael, Hearing Tr., pp. 20-23, Aff. of Carmichael, ¶¶ 4-7; Kayla Stewart, Hearing Tr., pp. 66-67, 71-72; Foreperson Connie Pete, Hearing Tr., pp. 81-84; Shawna Cason, Hearing Tr., p. 96; Austin Smith, Hearing Tr., p. 101; Linda Albowicz, Hearing Tr., pp. 127-128, 134; Misty Beam, Hearing Tr., pp. 138, 140-141; Kathy Rabb, Hearing Tr., pp. 157-158; Shikierra Harrison, Hearing Tr., pp. 167-168; Alternate Sandra Mitchell, Hearing Tr., p. 176.) See attached EXHIBIT H containing excerpts of the testimony of these jurors.

Four jurors testified they heard Killian, in the jury room during breaks in the trial, vouch for the skill or proficiency of Bibeau, 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. (Sandra Carmichael, Hearing Tr., pp. 21-23; Aff. ¶¶ 7-16; Kayla Stewart, Hearing Tr., pp. 66-67, 71-72; Shawna Cason, Hearing Tr., pp. 89-90; Kathy Rabb, Hearing Tr., pp. 157-159. See attached EXHIBIT I containing excerpts of the testimony of these jurors.

Four jurors testified they heard Killian, in the jury room during breaks in the trial, vouch for the truthfulness or credibility of Bibeau, Wadford or Gwynn by making statements to the effect of, if they said they did something, they did it. (Sandra Carmichael, Hearing Tr., pp. 21-22, Aff. ¶¶ 7-16; Shawna Cason, Hearing Tr., pp. 93-94; Tara Brown, Hearing Tr., pp. 115-117[7];

[7] Tara Brown first testified that she did hear such statements in the jury room before deliberations began, but then testified she did not.

Kathy Rabb, Hearing Tr., pp. 157-159.) See attached EXHIBIT J containing excerpts of the testimony of these jurors.

Sandra Carmichael testified that, "[o]ne day, a red-haired, white lady came and sat in the courtroom behind Dr. Bibeau's table. Teressa told us while on a break in the jury room that the red-haired, white lady was a nurse supervisor at the hospital, and that Teressa also knew her well. Teressa said the red-haired, white lady's name, but I do not remember it. Teressa said that the red-haired, white lady and Jeri were both very careful and thorough in their jobs." (Aff. of Carmichael, ¶¶ 14-15.)

Three other jurors testified they heard Killian, in the jury room during breaks in the trial, identify or discuss the red-haired, white lady. Misty Beam recalled that Killian identified the lady by name as "Star." (Kayla Stewart, Hearing Tr., pp. 64-66; Foreperson Connie Pete, Hearing Tr., pp. 77-78; Misty Beam, Hearing Tr., pp. 139-140.) See attached EXHIBIT K containing excerpts of the testimony of these jurors. Although "Star" did not testify at trial, the testimony again indicates that Killian was regularly and routinely discussing hospital employees and their alleged proficiency during breaks.

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

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

For her part, Killian testified that she recalled the Court's instructions not to talk about the case prematurely and denied doing so. Killian flatly denied making any statements at all to other jurors about Dr. Bibeau or the nurses during the trial before deliberations began. (Hearing Tr., pp. 49-51, 54.) "We didn't discuss the case until you told us to discuss it," she testified. (Hearing Tr., p. 51.)

When asked about specific statements which other jurors reported that Killian made about the doctor or nurses before deliberations began, Killian repeatedly denied making any such statements. (Hearing Tr., pp. 57-59.) When asked about the red-haired, white lady, Killian first denied knowing her, then admitted she knew the lady as a hospital employee named "Star," and then denied anything was said about that lady in the jury room. (Hearing Tr., pp. 52-54.)

Other jurors' testimony at the hearing establishes without doubt that either Killian's memory is utterly unreliable or she continued to be less than truthful to the Court at the hearing, just as she was less than truthful during voir dire. Numerous other jurors testified that Killian, in

fact, did make the reported statements, although every juror did not hear or recall every statement.

Other jurors' testimony strongly corroborates Carmichael's detailed testimony about Killian's misconduct and the premature deliberations. Eight other jurors testified that Killian talking about working at the hospital with Dr. Bibeau and the nurses. Three other jurors testified that Killian vouched for the skill or proficiency of the doctor and nurses. Three other jurors testified that Killian vouched for the truthfulness or credibility of the doctor and nurses. Three other jurors testified that Killian talked about the red-haired, white lady.

Carmichael's memory of the statements is by far the most reliable because she obviously was the one most bothered by Killian's wrongful conduct throughout the trial. Other jurors may not have heard all the statements, may have promptly forgotten about them after the trial ended, or may have been afraid or reluctant at the hearing to admit anything was amiss in the jury room unless they had an ironclad recollection of it. Carmichael admitted her fear and uncertainty in how to handle the matter during the trial and she was bold enough to report it after the trial ended; not everyone is so conscientious.

As the Supreme Court explained in Aldret, "a jury should not begin discussing a case, nor deciding the issues, until all of the evidence, the argument of counsel, and the charge of the law is completed. . . . The reason for the rule is apparent. The human mind is constituted such that when a juror declares himself, touching any controversy, he is apt to stand by his utterances to the other jurors in defiance of evidence. A fair trial is more likely if each juror keeps his own counsel until the appropriate time for deliberation." Aldret, 333 S.C. at 311-12, 509 S.E.2d 811.[8]

[8] In a recent murder trial in Richland County, the Honorable Robert E. Hood apparently recognized the crucial importance of the principles expressed in Aldret by declaring a mistrial continued . . .

The record shows that Killian's statements constitute juror misconduct and premature jury deliberations which poisoned the well against Plaintiffs throughout the trial, all in violation of the Court's instructions and Plaintiffs' fundamental right to a fair and impartial jury. Although made in the jury room, the statements constituted 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

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just before deliberations began in the five-day trial, according to media reports. A hearing revealed that a prosecution investigator saw an alternate juror hugging the defendant's family members outside the courtroom after alternate jurors were released. In comments apparently made during the trial in the jury room in the presence of other jurors, the alternate juror said she "had made up her mind" and that the State's case against the defendant was "ridiculous." The alternate juror also told other jurors that "all black people should stick together," according to media reports.

Prosecutors asserted that jurors were discussing evidence during the trial despite orders not to do so. Judge Hood questioned jurors and afterward stated from the bench that "while no one indicated they cannot be fair or impartial moving forward, it is my belief that the jury has been exposed to pressure from the defendant's family and/or associates and a juror who attempted to improperly persuade the jury and they have openly disregarded the court's instructions to refrain from discussing the case," according to media reports. (EXHIBIT L, media reports dated June 22 and 24, 2015.)

The alternate juror apparently had no prior relationship or knowledge of the defendant and, therefore, had no reason to be a "trusted" or "reliable" source of information in other jurors' eyes. Nevertheless, Judge Hood concluded that the premature deliberations and comments of that *one, alternate* juror tainted the entire jury, despite other jurors' stated belief they could remain fair and impartial.

In the present, more egregious case, Killian, as a *regular* juror deciding the verdict, presented herself as someone with insider knowledge due to her personal knowledge and working relationship with Dr. Bibeau and the nurses. Killian's premature deliberations and comments tainted the entire jury, despite the majority of jurors' after-the-fact assertions that they were not affected.

inadmissible because their probative value was outweighed by their prejudicial impact. See Rules 401, 403, 404, 406, 607, 608 and 701, SCRE.[9] Plaintiffs, 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.

Plaintiffs 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 Plaintiff 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 Dr. Bibeau and Philip Ethier, and found Dr. Bibeau more at fault than Ethier. An untainted jury likely would have awarded a larger verdict instead of a compromise verdict.

Killian's misconduct and the premature deliberations affected the fundamental fairness of their trial, and that remains true regardless of whether the majority of jurors actually realized the ultimate impact of the misconduct on their verdict. Plaintiffs are entitled to a new trial because they did not have a fair and impartial jury.

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[9] Defendant opposed any effort at trial to allow witnesses to testify about Dr. Bibeau's character, habits or practice as a physician on other occasions in the emergency room. Defendant filed a motion in limine to that effect. Plaintiffs agreed that such evidence was not properly admissible and did not attempt to elicit such testimony at trial.

III. JUROR MISCONDUCT DURING DELIBERATIONS

Plaintiffs are entitled to a new trial because Teressa A. Killian, as a seated juror, wrongfully exercised her personal, improper bias in favor of Defendant and wrongfully brought extraneous prejudicial information to the jury's attention by: (1) stating during jury deliberations that she personally knew Dr. Bibeau and nurse witnesses Wadford and Gwynn; (2) unlawfully and improperly offering inadmissible, irrelevant evidence by vouching personally for the alleged credibility, skill and knowledge of Dr. Bibeau and the two nurses, and by stating in jury 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 during jury deliberations her bias in favor of Dr. Bibeau and the nurses due to her personal knowledge of them; and (4) unlawfully and improperly exercising her personal bias in favor of Defendant by arguing and voting for a defense verdict as to Mr. Ethier.

Plaintiffs were prejudiced by Killian's unlawful misconduct because one or more jurors' verdict – including Killian herself, Sandra Carmichael and probably others – was affected by Killian's beliefs and statements.

As stated above, the law provides that juror testimony may be used when extraneous prejudicial information was improperly brought to the jury's attention ***or*** when an outside influence was improperly brought to bear upon any juror. Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. The moving party must prove both the alleged misconduct and the resulting prejudice. Hunter, 320 S.C. 85, 463 S.E.2d 314; Rule 606(b), SCRE; Vestry and Church Wardens of the Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489, 492-93 (2009); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371-73 (2008); State v. Zeigler, 364 S.C. 94, 108-10, 610 S.E.2d 859 (Ct.

App. 2005); State v. Franklin, 341 S.C. 555, 560, 534 S.E.2d 716 (Ct. App. 2000); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 158-160 (2007). In determining whether extraneous prejudicial information or an outside influence has affected the verdict, the Court may consider factors such as the number of jurors exposed, the weight of the evidence properly before the jury and the likelihood that curative measures were effective in reducing the prejudice. Vestry and Church Wardens, 384 S.C. 441, 682 S.E.2d at 492.

The case of Lynch v. Carolina Self Storage Centers, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) is instructive even though no new trial was granted. In that case, the jury foreperson stated in an affidavit that a juror commented during deliberations that the plaintiff had a large bank account and did not need money, and that the plaintiff could afford to live next to a doctor. The Court of Appeals affirmed the trial court's ruling that the affidavit did not constitute evidence of improper outside influence, but "demonstrates nothing more than a generalized bias against a party unconnected to any specific facts about [the plaintiff] or the accident that are not in the record." The affidavit also failed to name the juror who made the comments, state the reason the juror held this opinion or suggest that the juror developed her opinion based on something other than her observations at trial. Therefore, the affidavit was not admissible under Rule 606(b). Lynch, 409 S.C. 146, 760 S.E.2d at 115-16.

Significantly, the Court of Appeals stated that the focus of the inquiry into misconduct during deliberations should be on whether jurors "discussed specific extra-record *facts* relating to [a party] and whether the statements concerned specific facts about [the party] or the incident in which he was charged." Lynch, 409 S.C. 146, 760 S.E.2d at 115 (citing U.S. v. Benally, 546 F.3d 1230 (10th Cir. 2008)) (emphasis in original).

In the present case, Carmichael testified by affidavit that:

> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.
>
> Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teressa, when she referred to "Jeri," meant Jerilyn Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.
>
> . . .
>
> After jury deliberations began on the last day of the trial, Teressa again repeatedly made the same statements about how thorough and careful Dr. Bibeau and Jeri were. Teressa repeatedly said that she knew them well, had worked with both of them for three years, and knew that they were thorough and careful. Teressa made these statements firmly and was adamant about them. Teressa kept saying that she knew them personally, and they were thorough and careful.
>
> Teressa repeatedly said during jury deliberations that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."
>
> Teressa repeatedly said during jury deliberations that "if Dr. Bibeau said he took the foot pulses, then he did it."
>
> Teressa repeatedly said during jury deliberations 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 jury deliberations that "Dr. Bibeau is a good doctor."

(Aff. of Carmichael, ¶¶ 6-7, 17-21, attached as EXHIBIT A.)

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

Carmichael verified the accuracy of her affidavit and offered the same testimony at the juror evidentiary hearing held after the trial. (Hearing Tr., pp. 25-27.) Carmichael testified that Killian's statements affected her verdict and the verdict of several other jurors during deliberations, as set forth in detail in Section II of this memorandum. (Hearing Tr., pp. 24, 26-28.) "I just felt like she kept on saying it over and over once we started deliberating to sway other jurors to her side Doctor Bibeau as far as his reputation or whatever, you know," Carmichael testified. (Hearing Tr., p. 24.)

Aside from Killian herself, Carmichael was the only juror to testify that Killian's misconduct affected her verdict based on Killian's statements made prematurely and during deliberations. However, the effect on even a single juror's verdict is enough to prove prejudice because one juror can change the verdict or even cause a hung jury.

But in this case, the verdicts of at least two jurors undoubtedly were affected – Carmichael and Killian. Killian unlawfully and improperly exercised her personal bias in favor of Defendant by arguing and voting for a defense verdict as to Mr. Ethier. Killian's repeated statements and misconduct throughout the trial and in actual deliberations likely affected other jurors, regardless of whether they realized it at the time or whether they recalled details of the statements or their impact on the verdict at the evidentiary hearing.

The Court did not question jurors as extensively at the evidentiary hearing about their deliberations, but typically asked only whether they were affected by other jurors' comments or any outside information brought into the jury room. While the Court usually did not ask questions about whether specific statements were made by Killian during deliberations, the record plainly demonstrates Killian's misconduct and the resulting prejudice to Plaintiffs.

The record shows that specific, important and hotly disputed facts were implicated and discussed by Killian: whether the foot pulses actually were taken and who supposedly took them, and the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses in providing care to Plaintiff. The taking of the foot pulses by Dr. Bibeau 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 about a party's bank account or express some generalized bias, as the juror did in Lynch. Killian presented herself to the jury as a witness who had an insider's knowledge of the Dr. Bibeau and the nurses – all key defense witnesses – and preached their virtues, credibility, skill and knowledge throughout the trial and in deliberations.

As discussed above, other jurors' testimony at the hearing establishes without doubt that Killian did make the reported statements before deliberations began, although every juror did not hear or recall every statement. Other jurors' testimony strongly corroborates Carmichael's detailed testimony about Killian's misconduct and the premature deliberations.

Eight other jurors recalled Killian talking about working at the hospital with Dr. Bibeau and the nurses. Three other jurors testified that Killian vouched for the skill or proficiency of the doctor and nurses. Three other jurors testified that Killian vouched for the truthfulness or credibility of the doctor and nurses. Three other jurors testified that Killian talked about the red-haired, white lady.

On this record, it is difficult to believe that Killian – who talked so much in the jury room that the jury foreperson admitted she "blocked her out" – suddenly turned into the Sphinx on the last day of trial when deliberations began. Carmichael obviously had the clearest memory of what occurred throughout the trial and during deliberations because she was upset by it and

believed it to be wrong. Carmichael's testimony is clear that Killian continued her unlawful lobbying effort on behalf of Dr. Bibeau and the nurses during deliberations, and it had an impact on Carmichael and others. And, of course, Killian already had her mind made up as she dozed through much of the trial testimony.

Extraneous prejudicial information was unlawfully brought to the jury's attention through the statements of Killian. *The jurors in this case did discuss specific, extra-record facts relating directly to Dr. Bibeau and the nurses, and those statements concerned specific, disputed facts about Dr. Bibeau and the nurses and the incident in which Dr. Bibeau was involved. Killian essentially offered unlawful and improper testimony about crucial facts and hotly disputed issues in the case.* This case presents precisely the situation envisioned in Lynch, where extraneous prejudicial information or outside influence warrants a new trial because the moving party was prejudiced.

Moreover, although made in the jury room, the statements constituted 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.

Killian, by her statements, managed to unlawfully and improperly present precisely the type of character evidence and evidence of care allegedly provided to other patients which Defendant opposed presenting at trial – except that the extra-record evidence which she offered favored Dr. Bibeau instead of discrediting him.[10] Killian told jurors that Dr. Bibeau had always been a good doctor, thorough and careful, on all the other occasions she had personally

[10] See footnote 9.

witnessed. Killian did it behind closed doors where no attorney could object or challenge it, and no judge could rule on its propriety or admissibility. Her unrebuttable and unlawful testimony behind closed doors apparently was compelling, and it affected the jury's verdict.

This case is extremely different and presents far more egregious facts than reported cases. It is of no import that evidence of extraneous information or outside influence, or prejudice to the moving party, often was found lacking in reported cases. See e.g. Lynch, supra; Vestry and Church Wardens of the Church of Holy Cross v. Orkin Exterminating Co., 384 S.C. 441, 682 S.E.2d 489 (2009) (affirming trial court's ruling that plaintiff failed to show, after a hearing, that a juror's comments in deliberations had affected the verdict; juror commented that historic people have money and should clean up their own mess, juror discussed the case with her mother and minister, and juror drove to the church to view; judge held the juror in contempt, but concluded the comments "were not of a kind to impermissibly influence the jury or affect the verdict" because other jurors admonished the offending juror, laughed off the comments and paid her little attention); Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369, 371-73 (2008) (holding PCR court properly refused to consider affidavit in which juror said that some jurors may have considered fact that defendant did not testify as speculation; the allegations raised only internal misconduct and affidavit did not contain concrete, specific allegations implicating fundamental fairness); State v. Pittman, 373 S.C. 527, 647 S.E.2d 144, 158-160 (2007) (holding that trial court properly denied defendant's allegation of juror misconduct where juror prematurely discussed case with his wife and perhaps a bartender, but could not show that several jurors' limited knowledge of the comments prejudicially affected the verdict); State v. Zeigler, 364 S.C. 94, 108-10, 610 S.E.2d 859 (Ct. App. 2005) (holding trial court properly denied defendant's allegation of juror misconduct where only unsworn statements were obtained from seven jurors

and none indicated that they found defendant guilty because he did not testify; the allegations raised only internal misconduct and did not implicate fundamental fairness); State v. Franklin, 341 S.C. 555, 560, 534 S.E.2d 716 (Ct. App. 2000) (holding trial court properly denied defendant's allegation of juror misconduct where juror stated in affidavit that she was called derogatory names, she perceived an implied threat against her physical safety, and other jurors yelled at her; the allegations raised only internal misconduct and did not implicate fundamental fairness).

None of the reported cases on juror misconduct during deliberations present a scenario anything like Plaintiffs' case. The testimony of Carmichael and other jurors describes extra-record statements about hotly disputed facts by an identified juror which clearly reveal that the juror brought extraneous prejudicial information to the jury's attention throughout the trial. Numerous jurors testified they were exposed to the information. Due to Killian's wrongful and secretive efforts behind closed doors, there were no curative measures taken.

While Killian's statements were "internal" misconduct in the sense that the information came from a juror, the extraneous prejudicial information conveyed about Dr. Bibeau came from outside the evidence and record presented at trial. Suppose another hospital employee had made the same statements to a juror while in the grocery store and the juror had repeated that information during deliberations. There would be no doubt that the information was extraneous and came from an outside source or influence. The fact that the hospital employee who made the statements happened to be on the jury while bringing extraneous prejudicial information to the jury's attention does not mean this is a case of only internal misconduct; it is a case of extraneous prejudicial information being wrongly and unlawfully brought to the jury's attention throughout the trial.

Plaintiffs were prejudiced because Killian's own verdict was affected by her bias and alleged insider knowledge. 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.

Carmichael also testified that she believed the statements affected other jurors' verdicts because several of them were in favor of Plaintiff until Killian's repeated comments swayed their opinion. If the biased Killian had not been on the jury, or 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 Dr. Bibeau and Philip Ethier, and found Dr. Bibeau more at fault than Ethier. An untainted jury likely would have awarded a larger verdict instead of a compromise verdict.

Killian's statements constitute misconduct during jury deliberations which poisoned the well against Plaintiffs throughout the trial, all in violation of the Court's instructions and Plaintiffs' right to a fair and impartial jury. Plaintiffs were prejudiced because Killian's misconduct and statements affected the verdicts of Carmichael, Killian and other jurors. Killian's misconduct during jury deliberations affected the fundamental fairness of their trial. Plaintiffs are entitled to a new trial because they did not have a fair and impartial jury.

IV. THIRTEENTH JUROR

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 722 (Ct. App. 1996). "Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." Id. (citing Worrell v. S.C. Power Co., 186 S.C. 306, 195 S.E. 638 (1938)).

"We have also refused to require trial judges to explain the reasons for the ruling. 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. . . . 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." Vinson, 324 S.C. 389, 477 S.E.2d at 722 (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. Id.

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant a new trial when he is convinced that a new trial is necessitated

on the basis of the facts in the case. . . . Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. . . . Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion." Id (citations omitted).

In the present case, the jury's verdict finding Mr. Ethier 70% at fault and Dr. Bibeau 30% at fault is against the weight of the evidence. It is undisputed that Dr. Bibeau had 11 years of college and medical education as a board-certified family physician while Mr. Ethier had only one year of technical school education as a licensed practical nurse. Mr. Ethier knew little or nothing about the vascular system of the leg and popliteal aneurysms.

Plaintiffs' experts on emergency medicine and vascular surgery, Dr. Carl Adams and Dr. Scott Jolin, testified that plentiful, obvious signs of a vascular event (pain, pallor/change in color, polar and paresthesia) were present and absolutely required consideration of a possible diagnosis of a blood vessel problem in the emergency room on April 10, 2011. Defendant's experts on emergency medicine and vascular surgery, Dr. Eric Weinstein and Dr. Dorn Smith, also testified that a blood vessel problem was required to be on the list of possible diagnoses considered in the ER. Tellingly, Dr. Bibeau testified that he never considered a blood vessel problem as a possible diagnosis, but only considered the diagnoses of acute trauma, chemical exposure to the skin or spider bite.

Under these facts, where Dr. Bibeau admitted that the only indication of a spider bite was pain (and he knew it was not even pain at a bite mark because there was no mark), it is incomprehensible that a jury could conclude that Mr. Ethier was more at fault than Dr. Bibeau. (The verdict makes somewhat more sense in light of the unlawful and improper statements and actions of juror Killian throughout the trial as described herein.)

While Mr. Ethier did not follow up with an "outside" family physician, he did so informally with Dr. Bibeau and three other ER physicians in "curbside consultations." Mr. Ethier trusted and believed Dr. Bibeau, as he had trusted and believed doctors for more than 20 years as an LPN. It is ingrained in his very nature to accept the word of a doctor. And then, as his symptoms gradually improved and things returned to normal, he had all the more reason to trust and believe Dr. Bibeau's diagnosis.

Moreover, if Dr. Bibeau had diagnosed a potential blood vessel problem on April 10, 2011, and referred Mr. Ethier for further tests or consultations as needed, there would have been no opportunity or need for Mr. Ethier to follow up with anyone. His condition would have been timely treated and he would not have been left in the debilitated condition he is in today.

All of the experts on vascular surgery – Dr. Adams for Plaintiffs and Dr. Smith for Defendant and Dr. Jeremiah Holleman, the treating surgeon – agreed that Mr. Ethier would not have suffered the complications of compartment syndrome, fasciotomy, permanent muscle and nerve damage in the right leg, permanent chronic pain and permanent foot drop if he had been timely diagnosed and non-emergency surgery performed shortly after April 10, 2011.

In short, the jury determined that Dr. Bibeau was negligent and attempted to award damages to Mr. Ethier. Jurors erred in finding Dr. Bibeau more negligent than Mr. Ethier, but their tainted verdict is infected with the unlawful statements and actions of Killian and it should not be allowed to stand.

Accordingly, Plaintiffs move the Court, acting as the thirteenth juror, to hang the jury because the verdict is against the weight of the evidence. Justice has not been done in this case. Plaintiffs should be granted a new trial absolute.

CONCLUSION

For all the foregoing reasons, Plaintiffs move for a new trial absolute. Plaintiffs are entitled to a new trial due to juror Killian's intentional concealment of information during voir dire. 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 Plaintiffs' peremptory challenges.

Plaintiffs are entitled to a new trial due to Killian's misconduct and her unlawful, improper statements made throughout the trial in premature jury deliberations and during actual jury deliberations, all of which prejudiced Plaintiffs by affecting the verdict of one or more jurors. The Court should grant a new trial as the thirteenth juror.

Respectfully submitted,

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Attorneys for Plaintiffs

June 29, 2015

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

2015 APR 20 PM 2 16
FAIRFIELD COUNTY
CLERK OF COURT
BETTY [illegible] SOMMER

AFFIDAVIT

I, the undersigned I, Sandra R. Carmichael, being duly sworn, state under oath as follows:

1. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

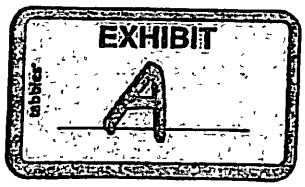
2. I served as a juror in the seven-day trial of this case from March 30 to April 8, 2015. I participated in jury deliberations and in the verdict issued by the jury.

3. My address is 208 Riding Ridge Rd., Ridgeway, South Carolina, 29130.

4. During the trial before deliberations, one of the jurors, Teressa, told us that she formerly worked at Fairfield Memorial Hospital.

5. I know that Teressa is a certified nursing assistant because she told us that is her job.

6. Beginning on the second or third day of the trial, Teressa began saying in the jury room during breaks that she personally knew Dr. Guy Bibeau and had worked with him for about three years.



S.C.

7. 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.

8. 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."

9. Teressa repeatedly said during the breaks that "if Dr. Bibeau said he took the foot pulses, then he did it."

10. 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."

11. Teressa repeatedly said during the breaks that "Dr. Bibeau is a good doctor."

12. Early on in the case, Teressa said that Dr. Bibeau's handwriting was awful. I did not know that it was awful until one of the witnesses mentioned it on the stand.

13. 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.

14. One day, a red-haired, white lady came and sat in the courtroom behind Dr. Bibeau's table. Teressa told us while on a break in the jury room that the red-haired, white lady was a nurse supervisor at the hospital, and that Teressa also knew her well. Teressa said the red-haired, white lady's name, but I do not remember it.

15. Teressa said that the red-haired, white lady and Jeri were both very careful and thorough in their jobs.

SC.

16. 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.

17. After jury deliberations began on the last day of the trial, Teressa again repeatedly made the same statements about how thorough and careful Dr. Bibeau and Jeri were. Teressa repeatedly said that she knew them well, had worked with both of them for three years, and knew that they were thorough and careful. Teressa made these statements firmly and was adamant about them. Teressa kept saying that she knew them personally, and they were thorough and careful.

18. Teressa repeatedly said during jury deliberations that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."

19. Teressa repeatedly said during jury deliberations that "if Dr. Bibeau said he took the foot pulses, then he did it."

20. Teressa repeatedly said during jury deliberations that "if Dr. Bibeau did not do the foot pulses, then it was because Jeri did it and she's very thorough."

21. Teressa repeatedly said during jury deliberations that "Dr. Bibeau is a good doctor."

22. I noticed that Teressa often had her eyes closed during testimony in the courtroom, and she appeared to be dozing or asleep much of the time while in the courtroom.

23. At the beginning of deliberations, I believed that Dr. Bibeau was more at fault than Mr. Ethier. Several other jurors expressed the same opinion.

S.C.

24. However, Teressa repeatedly stated her opinions about knowing Dr. Bibeau and Jeri personally, and that she had worked with them for three years, and that they were very careful and thorough.

25. Teressa's statements, which she had made so often and so firmly and which she made during deliberations, were a big reason that I eventually changed my mind and became persuaded that Mr. Ethier was more negligent than Dr. Bibeau.

Further affiant sayeth not.

WITNESS my hand this 10th day of April, 2015, at Columbia, South Carolina.

Sandra R. Carmichael

Sandra R. Carmichael

SWORN TO and subscribed before me this
10th day of APRIL, 2015.

Notary Public for the State of South Carolina
My commission expires 8/20/2020

Fairfield County Courthouse
RANDOM STRIKE SHEET

JUDGE NAME : Roger L. Couch
TRIAL TYPE : Civil
PANEL ID : 2013CP2000012
COURTROOM CTR

DESCRIPTION : 2013CP2000012 Eithier v Bibeau

Sorted by: Random Nbr
Trial

	NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
1	Killian, Teressa A	72	B	F	( )	( )	( )	
2	Pete, Connie D	102	B	F	( )	( )	( )	
3	Cason, Shawna M	32	B	F	( )	( )	( )	
4	Stewart, Kayla D	121	B	F	( )	( )	( )	
5	Alston, Victor T JR	4	B	M	( )	(X)	( )	
6	Smith, Austin C	118	W	M	( )	( )	( )	
7	Brown, Tara S	24	B	F	( )	( )	( )	
8	Albowicz, Linda S	2	W	F	( )	( )	( )	
9	Beam, Misty M	9	B	F	( )	( )	( )	
10	Carmichael, Sandra R	31	B	F	( )	( )	( )	
11	Anderson, Donald Jeffery	5	W	M	(X)	( )	( )	
12	Henry, Tara Y	60	B	F	( )	(X)	( )	
13	Humphries, Charles L	65	W	M	(X)	( )	( )	
14	Boulware, Randy	18	B	M	( )	(X)	( )	
15	Botts, Cynthia A	16	W	F	( )	( )	( )	
16	Usher, Michael J	131	W	M	( )	( )	( )	
17	Moody, Gerald F Jr.	89	W	M	( )	(X)	( )	
18	Rabb, Kathy R	106	B	F	( )	( )	( )	
19	Marshall, Paul	80	W	M	(X)	( )	( )	
20	Stocker, Keith G	122	W	M	(X)	( )	( )	
21	Ward, Keith P	138	W	M	(X)	( )	( )	
22	Booker, Leon III	15	B	M	( )	(X)	( )	
23	Harrison, Shikierra A	59	B	F	( )	( )	( )	
24	Belton, Darryl D	12	B	M	( )	(X)	( )	

2015 APR 20 FM 2 17
FAIRFIELD COUNTY
CLERK OF COURT
DEPUTY

EXHIBIT
13

Fairfield County Courthouse
RANDOM STRIKE SHEET

JUDGE NAME : Roger L. Couch
TRIAL TYPE : Civil
PANEL ID : 2013CP2000012
COURTROOM CTR

DESCRIPTION : 2013CP2000012 Eithier v Bibeau

Sorted by: Random Nbr
Trial

	NAME	JUROR NBR	RACE	SEX	ST/PLTFF	DEF	CRT	REMARKS
25	Richards, Laconnique	108	B	F	(X)	( )	( )	
2nd Alt 26	Mitchell, Sandra P	87	W	F	( )	( )	( )	

Total Number of Jurors: 26

** END OF REPORT **

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

2015 APR 20 PM 2 17
FAIRFIELD COUNTY
CLERK OF COURT
BETTY ... ECKHAM

AFFIDAVIT

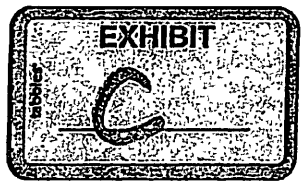
I, the undersigned, David Proffitt, being duly sworn, state under oath as follows:

1. I have personal knowledge of the facts set forth in this affidavit to the extent specified herein and, if called as a witness, I could competently testify to these facts.

2. I, along with attorney Ronald B. Cox, represented Plaintiffs in the seven-day trial of this case from March 30 to April 8, 2015.

3. I recall that the Clerk swore in the jury pool before prospective jurors responded to questions during voir dire, and all indicated that they swore or affirmed to provide truthful responses.

4. During voir dire, I recall that the Court asked prospective jurors whether they knew any of the parties or potential witnesses, or whether they had any personal, business or working relationship with the parties or potential witnesses. The Court identified Dr. Guy Bibeau as the Defendant and also identified Jerilyn Wadford, RN, and Rhonda Gwynn, LPN, as potential witnesses. Nurses Wadford and Gwynn were the emergency department nurses who allegedly were directly involved in Plaintiff Philip Ethier's care and treatment on April 10, 2011.



5. During voir dire, the Court asked the parties' counsel and the parties themselves to identify themselves either by standing up or being pointed out by counsel to the jury pool.

6. During voir dire, prospective juror Teressa A. Killian (Juror #72) responded that she was a certified nurse assistant who had been formerly employed at Fairfield Memorial Hospital. However, Ms. Killian never responded that she personally knew Dr. Bibeau, Wadford or Gwynn, or that she had worked with any of them. Ms. Killian sat silently when prospective jurors were asked questions about whether they knew anyone involved in the case as a party or witness, or whether they had any personal, business or working relationship with any party or witness.

7. During voir dire, I recall that the Court asked the prospective jurors whether they could be fair and impartial to all parties, and whether they were aware of any bias or prejudice for or against any party. Ms. Killian did not state or indicate in any way that she could not be fair or impartial to all parties; nor she did state or indicate in any way that she harbored any bias or prejudice for or against any party.

8. I have not reviewed a transcript of the voir dire because none is presently available.

9. Based on Ms. Killian's responses, or lack thereof, the information which Plaintiffs and their counsel had about Ms. Killian while selecting a jury was that she was a certified nurse assistant formerly employed by Fairfield Memorial Hospital. Ms. Killian did not personally know any party or witness, including Dr. Bibeau and the nurses involved in Mr. Ethier's care, and she had not personally worked with them. Ms. Killian believed she could fair and impartial to all parties.

10. After the trial ended and the jury was dismissed, Plaintiffs for the first time, through discussions with juror Sandra Carmichael, discovered that Ms. Killian personally knew and had worked with Dr. Bibeau and the nurses. Plaintiffs discovered that Ms. Killian improperly vouched for the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses based on her personal knowledge, both during the trial in premature deliberations and during the jury's deliberations. Plaintiffs discovered for the first time that Ms. Killian violated the Court's instructions not to discuss the case during the trial by discussing the alleged credibility, skill and knowledge of Dr. Bibeau and the nurses during breaks. Plaintiffs discovered for the first time that Ms. Killian harbored a bias or prejudice in favor of Dr. Bibeau and the nurses. (See Affidavit of Sandra Carmichael.)

11. Given the fact that Ms. Killian sat silently when the jury pool was asked direct, straightforward, unambiguous questions about personal, business or working relationships with any party or witness, Plaintiffs were unaware that Ms. Killian personally knew and had personally worked with Dr. Bibeau and the nurses.

12. Given the fact that Ms. Killian sat silently when asked whether she had any bias or prejudice for or against any party, Plaintiffs were unaware that she harbored any bias or prejudice in favor of Dr. Bibeau.

13. Ms. Killian was the first juror listed on the Juror Strike Sheet as Juror #72.

14. Plaintiffs did not possess the crucial information withheld by Ms. Killian and Plaintiffs were not negligent in failing to learn of the reasons and necessity to disqualify Ms. Killian before the verdict.

15. The information and responses which Ms. Killian failed to provide during voir dire would have supported a challenge for cause, and Plaintiffs would have made such a challenge if they had known the information withheld by Ms. Killian during voir dire.

16. The information and responses which Ms. Killian failed to provide during voir dire would have been a material factor in Plaintiffs' use of their peremptory challenges. Plaintiffs, in fact, would have struck Ms. Killian from the jury if they had known the information she withheld during voir dire.

17. I recall that Ms. Killian paid little attention during the trial and often appeared to be dozing or sleeping during the presentation of testimony and evidence.

Further affiant sayeth not.

WITNESS my hand this 15th day of April, 2015, at Columbia, South Carolina.

David Proffitt

SWORN TO and subscribed before me this
15th day of April, 2015.

Notary Public for the State of South Carolina
My commission expires 1-29-2017

Fairfield
MEMORIAL HOSPITAL
Modern Medicine Old-Fashioned Care

2015 MAY 11 PM 1 21
FAIRFIELD COUNTY
CLERK OF COURT
BETTY J. ECKHAM

May 5, 2015

Proffitt & Cox
140 Wildewood Park Drive, Suite A
Columbia, South Carolina 29223

RE: Subpoena Request – Teressa A. Killian

Dear Mr. Proffitt:

The Hospital has received your subpoena request for information about a former employee, Teressa A. Killian.

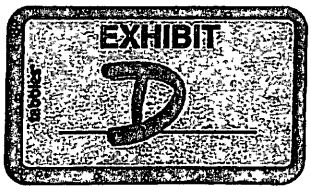
The Hospital is releasing the following information:

Date of Hire: 10/03/2005
Date of Termination: 05/28/07
Position Held: CNA
Department(s): Nursing Department (Med/Surg)

The Hospital does not release any other information on former employees without written consent from the employee.

Sincerely,

Michael L. Williams
Chief Executive Officer



P.O. Box 620 Winnsboro, SC 29180 803-635-5548
www.FairfieldMemorial.com

PLAINTIFF TRIAL EXHIBIT 32

PEE DEE EMERGENCY MEDICAL ASSOCIATES
GUY BIBEAU, M.D.
APRIL 2011

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
					1	2
3	4	5 WRH 9A-9A	6	7	8	9 FMH 8A-8P
10 FMH 8A-8P	11	12	13	14	15	16
17	18	19 FMH 8A-8A	20	21	22 FMH 8A-8A	23
24	25	26	27	28	29	30

EXHIBIT
E

ROA-0152

APPENDIX-0152

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

PHILIP ETHIER AND JEANNE ETHIER,

Plaintiffs,

vs. CASE NO. 2013-CP-20-12

FAIRFIELD MEMORIAL HOSPITAL AND
GUY R. BIBEAU, M.D.,

Defendants.

DEPOSITION OF: JERILYN WADFORD

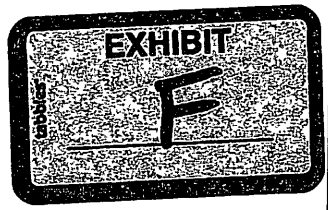
DATE: January 30, 2014

TIME: 2:45 P.M.

LOCATION: Fairfield Memorial Hospital
102 U.S. Highway 321 Bypass
Winnsboro, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: WANDA K. CECIL
Certified Court Reporter



A. WILLIAM ROBERTS, JR., & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC (843) 722-8414
Hilton Head, SC (843) 785-3263
Myrtle Beach, SC (843) 839-3376
Columbia, SC (803) 731-5224
Greenville, SC (864) 234-7030
Charlotte, NC (704) 573-3919

because I'm not sure. I'm working -- I work only on Sundays. So as far as I know, they have a capability to do ultrasounds.

Q. All right. Were you only working on Sundays back in 2011?

A. I think so.

Q. So you just work one day?

A. Yes.

Q. Are you just a part-time nurse?

A. Yes. Here.

Q. Do you work anywhere else?

A. Yes.

Q. Where else do you?

A. For an insurance company.

Q. What insurance company?

A. Absolute Total Care.

Q. What do you do there?

A. I'm manager of prior authorization.

Q. Okay. So that's where the doctor's office calls in or whatever and gets the pre-approval --

A. Correct.

Q. -- for procedures?

A. Correct.

Q. Is that your full-time job?

A. Yes.
Q. How long have you had that job?
A. Since February last year.
Q. All right. Did you have that -- so you didn't have that job in April 2011?
A. No. I worked for Palmetto GBA.
Q. What is Palmetto GBA?
A. Another insurance company who -- I worked in the appeals department.
Q. Okay. And again is that assessing, usually by telephone, correct, what procedures or care is necessary and approved?
A. No. It's an appeal, so looking at documentation.
Q. Oh, okay.
A. Records, medical records.
Q. All right. How long have you done that for Palmetto GBA?
A. I did that for two and a half years.
Q. All right. So what were your hours at Palmetto GBA as of April 2011, your weekly schedule?
A. My weekly schedule was eight to five, Monday through Friday.
Q. Okay. And then you just worked here at the ER on Sundays?

A. That's correct.
Q. How long was your shift on Sundays?
A. Twelve hours.
Q. And did you work every Sunday or just one Sunday a month or what?
A. I work every Sunday.
Q. All right. How long have you done the -- how long have you worked for an insurance company doing the assessment or the appeal process in house with an insurance company?
A. Worked for the insurance company with appeals?
Q. Let me ask it this way. Have you done anywhere else besides Palmetto GBA or Absolute Total Care?
A. Have I done it? No. Just those two companies. Yes.
Q. All right. So --
A. Oh, no. I'm sorry.
Q. Go ahead.
A. It was called Companion Health, but it was a subsidiary of Blue Cross/Blue Shield. I did work there.
Q. How long did you work there?
A. Eighteen months as a case manager.

Q. And was it a full-time job as well?
A. Yes.
Q. And did you also work on the weekends at Fairfield Hospital?
A. Yes.
Q. So how many years have you been working full time for an insurance company and doing part-time work at Fairfield?
A. I guess about 17 years.
Q. All right. So your full-time job is working for the insurance company, your part-time job is being an ER nurse?
A. Correct.
Q. All right. Any other jobs that we didn't discuss earlier that you had as of April 2011?
A. Well, I did work for Palmetto. Oh, 2011? Okay. No. That's it. No. 2011? What is this? This is '13. So 2011 until -- no. I had been at Palmetto GBA doing appeals in 2011 and then went to Absolute Total Care doing prior auths at this period of time.
Q. All right. Have you ever been to any continuing education courses for emergency room nurses?

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

PHILIP ETHIER AND JEANNE ETHIER,

Plaintiffs,

vs. CASE NO. 2013-CP-20-12

FAIRFIELD MEMORIAL HOSPITAL AND
GUY R. BIBEAU, M.D.,

Defendants.

DEPOSITION OF: RHONDA GWYNN

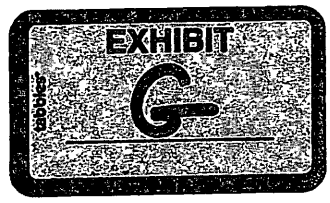
DATE: January 30, 2014

TIME: 4:18 P.M.

LOCATION: Fairfield Memorial Hospital
102 U.S. Highway 321 Bypass
Winnsboro, SC

TAKEN BY: Counsel for the Plaintiffs

REPORTED BY: WANDA K. CECIL
Certified Court Reporter



GWYNN

finished all my employment.

Q. I know. Okay. Go ahead. What was your next employment?

A. At Fairwind and then I came to work over here at Fairfield Memorial.

Q. And about what year?

A. I've been here around 21 years. I think this is my 21st year, but I don't know the months.

Q. Oh, that's fine.

A. And then -- I came to work here and then I went to work for Dr. Harmon Patrick and then my mother -- how was it? Let me see. I worked at Fairwind and then I came to work over here and then my mother went on dialysis, peritoneal dialysis, so I had to -- I couldn't do this as a full, during the day thing, so I had -- Fairwind hired me back.

(Interruption.)

THE WITNESS: And then because my mother went on peritoneal dialysis, I had to go back to the doctor's office because I had to be able to leave at lunchtime and after work, because that's a four-time-a-day thing. And I went back to Fairwind and I kept this as a weekend job.

BY MR. PROFFITT:

Q. Okay. Worked part time?

A. And then Dr. Harmon Patrick called me. Things were kind of rocky financially at Fairwind and Dr. Harmon Patrick called and asked me would I be interested in coming to work for him. And he's a doctor's office, a family practice.

Q. Here in Winnsboro?

A. Uh-huh.

Q. Okay. How long did you work for him?

A. I'm still working with him.

Q. Okay.

A. And I've been with him, I would say, right at 19 years.

Q. All right.

A. And I've kept this job. I'm part time here.

Q. All right. So as of April 2011, you were working for Dr. Patrick full time?

A. Uh-huh.

MR. PARHAM: Say yes.

THE WITNESS: Yes. Yes.

BY MR. PROFFITT:

Q. And what was your schedule there generally?

A. Roughly 8:15 until 5 p.m. and we would take Thursday office. You know, the nurse takes the

GWYNN

day of the doctor off. If he's off on Thursday, I'm off on Thursday.

Q. All right. And then you worked on -- what days did you work at Fairfield Memorial?

A. Weekends, 7A to 7P, Saturday and Sunday.

Q. You work both days?

A. Uh-huh.

Q. Did you work every weekend?

A. I do.

Q. So you work seven days a week?

A. I'm off on Thursday.

Q. Okay. So you work six days a week, except Thursday?

A. (Nodding head.)

Q. And that's what you were doing in April 2011?

A. Yes.

Q. Where have you worked -- strike that.

What departments have you worked in at Fairfield Hospital for nursing?

A. I've worked in the emergency room and on the med surg floor.

Q. All right. How long have you worked in the emergency room at Fairfield Hospital?

A. I don't want to be held to an exact

answer, but I worked on the medical surgical floor maybe three or four years. Maybe three years.

Q. All right. And so the rest of the 21 years or so, you've worked in the ER department?

A. Yes.

Q. All right. And that's what you were doing as of April 2011?

A. Yes.

Q. And so you're working part time on the weekends at the ER here at Fairfield and full time at a doctor's office during the week?

A. Right. But the doctor's office hours are -- we usually work maybe 32 hours.

Q. All right. What are your duties generally at the ER department -- in the ER department?

A. To check in patients, assist the doctor as needed, give injections, give medication.

Q. Okay. Ms. Gwynn, do you have any independent recollection of the visit by Mr. Ethier to the Fairfield ER on April 10, 2011?

A. What do you mean by independent recollection?

Q. Other than looking at a record.

A. I remember he came that day.

EXHIBIT H

EXCERPTS OF JURORS' TESTIMONY WHO HEARD JUROR TERESSA KILLIAN SAY, IN THE JURY ROOM DURING BREAKS IN THE TRIAL, THAT SHE WORKED AT THE HOSPITAL WITH DR. BIBEAU, WADFORD AND GWYNN

Q Okay. Now, during that conversation can you tell me what you told Mr. Cox about?

A I told him that I was glad he called because my conscious was bothering me because I felt once we got back in the jury room things wasn't fair, you know. I just felt that one of the jurors shouldn't have been in there because she knew the defendant and she stated that on several occasions that she worked for him for three years.

Q Now, you say one of the jurors. Do you remember which juror we are talking about?

A Teresa. I don't know her last name.

Q Teresa is her name?

A Yes, sir.

Q All right. Now, you say that she began to talk as if she knew the defendant, Mr. Bibeau, Doctor Bibeau?

A Yes, sir.

Q Now, can you tell me when she began to make those comments? At what point in the trial?

A Almost immediately, but she talked more about it once the witnesses started coming in. Jeri and all of them when they were sitting there. Once we went back in there she started talking more and more about it.

Q Well, if you recall the first part of the trial the plaintiff would have been putting up witnesses. Doctor Bibeau would not have testified at that point in time. We went several

days with the plaintiff putting up witnesses. Did she make comments about the case while the plaintiff was putting up witnesses?

A No.

Q So, the comments occurred after the defense started testifying?

A Yes, once the witnesses coming in over there.

Q All right. Now, can you tell me what types of things she said? What did she say specifically that you can remember?

A Okay. What I remember was the record keeping, when Doctor Bibeau said he did not sign off on the record and she stated that if he said he didn't do it he didn't do it because he was reliable. He is dependable. You know, basically that's what she said about nurse Jeri too. If they said they didn't do it -- if she said she did it she did it.

Q So her comments were more toward their honesty?

A Yes, their dependability and their honesty.

Q I see. Did she say how she knew these things?

A Because she worked with him. She stated she worked with him.

Q All right. So she indicated that she had worked directly with Doctor Bibeau?

A Yes, sir.

Q At some point in time?

A Yes, sir.

Q Now these discussions all took place before you began deliberations; is that right?

A Yes.

Q Now as she made these comments did other jurors discuss these matters with her?

A A couple of them. I don't know. I don't remember their names. I don't remember names.

Q Well, did they talk this over with her at that time or did she just make the comment and nobody said anything else about it?

A One of the jurors said well, if you knew Doctor Bibeau you should not be on the jury. One juror did state that to her and she stated that --

Q And her the response was?

A Her response was I told them that I knew him once we were being called out here.

Q Right.

A She stated that she did say that. She stated that she knew Doctor Bibeau.

Q Did she indicate that she had worked with him at the hospital?

A Yes, sir.

Q She said that at that time as well?

A Yes, sir.

Q All right. Now, do you know about how many times this

occurred?

A Oh, several times. It was almost like once we started -- once the defendant started calling witnesses and we go back there on a short break or whatever she was always bringing up Doctor Bibeau. He's a good doctor. He's a dependable doctor. I know because I worked with him.

Q In your affidavit you indicated that she had discussions with another juror that you identified in your affidavit as Kayla.

A Yes.

Q Is that one of the people that discussed these statements with her?

A Um --

Q I'll read to you what you said. You said Teresa repeatedly made these statement about Doctor 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 also discuss them.

So, do you recall Kayla is that someone you remember specifically discussing this with Theresa?

A Yes, sir.

Q What was the nature those discussions? What were they saying?

A Basically, like I said Doctor Bibeau is a good doctor and Kayla was like how do you know him. I worked with him for

or whoever until she came here.

Q Well, Jeri would have been the nurse that did testify. Jeri Wadford I believe.

A I do remember her testifying, but like I said I didn't know either one of them.

Q Okay. So I take it then that you did not hear anybody vouch for the credibility of Rhonda Gwynne either, is that true before deliberations started?

A There was one of the jurors that said that she had worked with them before and said that, you know, she knew of them as being good people. That is the only thing.

Q That was before deliberations started?

A That was before deliberations.

Q Do you remember what juror may have said something to that affect?

A The one that was just in here. She said she worked for Fairfield.

Q The lady I just talked to?

A Yes.

Q I believe her name is Theresa Killian?

A Yes.

Q She was number one on the list. All right. Now, did you hear Theresa Killian say anything else about the participants in the trial, the people involved in the trial --

A No.

Q -- before deliberations started? While you were back there after lunch or during a break?

A No, I didn't have lunch with them or anything, but she just said that she worked with them and that they were good ladies. That was it.

Q Do you remember when she said that or did she say it on more than one occasion.

A More than likely it was on the day that that Jerilyn Wadford testified. It was on that day.

Q But not on other days?

A Oh, no, not on other days.

Q Okay. Specifically, did you hear any juror state at any time that if Doctor Bibeau said he took foot pulses that he did it or if Doctor Bibeau did not do the foot pulses that it was because Jeri did it because she's very thorough or that Doctor Bibeau is a good Doctor. Did you hear any of those statements prior to deliberations starting?

A No. Now I had, you know, of course throughout the jury I'm trying to think things like what might have had happened but just from looking at evidence I had my thoughts, but those weren't influenced of what other jurors may have said or what I might have heard or anything like that.

Q I am going to get to what effect, if any, of the things you already told me about might have had on you. But I am just asking you do you remember anyone specifically talking about the

hospital.

THE COURT: That was answered in open court, so I am sure all the jurors heard it. Now whether they recall it I will be glad to ask her. They had the ability to be aware of it.

MR. PROFFITT: What I want to know if they talked about that during the breaks or during the actual deliberations. Theresa Killian talking about knowing these people and trusting them and working with them.

THE COURT: I will ask about that. Defense?

MR. HOLLAR: Judge, I am assuming your question will be asked before deliberations, but no additional questions.

THE COURT: All right. Bring her back.

(WHEREUPON, the juror enters the courtroom.)

Q Ma'am, I am going to remind you that you are still under oath at this time. Do you understand that?

A Yes, sir, I do.

Q All right. During the period of time prior to deliberations were you aware of the fact that perhaps we talked about Theresa Killian earlier --

A Yes.

Q -- that Theresa Killian had worked at the hospital previously?

A Yes.

Q Tell me how you came to know that?

A She said what when we first got here the first day before the jury was even chosen.

Q When I was asking questions out there?

A Uh-huh.

Q So you remember that from then?

A Uh-huh, yes.

Q Okay. During the time before deliberations did she ever make the jury aware of that fact or talk about that during your breaks and times that you were in the jury room?

A No. The only time that she mainly said anything about that is when Jerilyn came up. She just said I remember working with her that she is a pretty good lady. That's it.

Q Said a pretty good lady?

A Yes.

Q And that's all you remember her saying about Jerilyn?

A Uh-huh.

Q And that was -- okay, then that was the only time she mentioned having worked at the hospital or been employee with other people in that time before deliberations other then when she answered the question in open court?

A She said that she remembered Jerilyn. She recalled Doctor Bibeau. That was pretty much it. Just, you know, other employees in general.

Q Well, the comments that she made did those comments end

information that would have been gathered from sources outside of the courtroom?

A No, sir.

Q That would have had a bearing on the decision in the case. Are you aware of anything of that nature?

A No, sir.

Q All right. Now as to Miss Killian, during what is called voir dire in the case -- that is when we asking you questions before we pick the jury -- she had indicated during that time that she had been employed at Fairfield Memorial Hospital. Do you recall that?

A Yes, sir.

Q All right. Now, did she bring that fact up again during the deliberations of the jury that she had been employed there or any information she may have gathered while she was employed?

A Possibly that she was -- you know, that she was employed.

Q Can you tell me what way that came up?

A I don't know.

Q Your best recollection. It's been a few weeks, but tell me what you remember.

A Miss -- what is her name?

Q Her name -- the lady who indicated she worked there was Theresa Killian.

A She was a very talkative person. She kind of talked a lot. Kind of blocked her out.

Q I will take your word for that. That's all right.

A So you know, may be what she was talking about not necessarily grasped a lot of people because I kind of blocked her. So I am not exactly sure she all said but I do --

Q You may have blocked out some things she said?

A I do recall her saying that she did work there.

Q Was that during deliberations or before deliberations?

A I don't know. Like I said kind of blocked her off.

Q So you didn't pay much attention to her?

A No, sir. No, sir.

Q That's quite all right. You have a right to do that. Would anything she have said somehow affected your verdict in the case then?

A No, sir.

Q All right. Miss Pete, I think I asked what I would like to ask at this time. I would ask you step out with the bailiff for a minute and we may have a couple more questions.

A Yes, sir.

(Juror leaves the courtroom.)

THE COURT: All right. Any objections or additional questions from the plaintiff at this time?

MR. PROFFITT: No objections, Your Honor, but I would ask that you try to get her to clarify. She

indicated that Theresa Killian did say during pre-deliberations and actual deliberations, but she didn't say what.

THE COURT: Her statement was that she had blocked out what she said because she didn't pay her any attention.

MR. PROFFITT: Yes.

THE COURT: Couldn't recall. But I will ask her again for sure could she recall anything she said. She said she just blocked her out.

MR. PROFFITT: Specifically, that Theresa Killian had personnel knowledge and had a working relationship with Doctor Bibeau and the two nurses.

THE COURT: Well again, I will ask her again if she can state specifically what she said, but she didn't do very well the first try.

MR. PROFFITT: She may not be able to recall anything else.

THE COURT: Objections or additions from the defense>

MR. HOLLAR: No additional questions.

THE COURT: All right. Let's bring her back in.

(Juror enters the courtroom.)

Q I will remind you you are still under oath at this time. You had had mentioned that perhaps Miss Killian did say

-- made some statements about having worked at the hospital or -- I'm not going to try and put words in your mouth -- that you indicates that you blocked it out. You didn't pay much attention to it. Specifically, can you remember anything that she said? And if you can't that's a truthful answer. I just want to know can you remember anything --

A No, sir, I really can't.

Q -- she said in regard to that matter?

A Not anything but that she worked there. She worked with the people there. Nothing specific.

Q But you can't say specifically what she said?

A I can not.

Q Very good. I will release you at this time from this hearing. I don't anticipate that we will be getting back together on this again, but I can't guarantee that. I am going to ask you please don't talk about this matter, if you would in the interim. I appreciate you not discussing this. Okay.

A Yes, sir.

Q Thank you for coming today and taking your time. You are free to go. Thank you.

A Thank you.

(Juror leaves the courtroom.)

THE COURT: Shawn Cason.

MR. SMITH: Your Honor, while they are getting the next juror, just one thing. You didn't ask Miss Pete

would take us long here. Okay.

I am going to go back and focus on the statements that might have been made by Miss Killian for just a minute that you said you may have heard or did hear. Did Miss Killian ever indicate to the jury and this would be during deliberations or even before deliberations that her knowledge of Doctor Bibeau and/or the nurses was based on her personnel knowledge of them from her working at the hospital?

A Yes.

Q Is that the way she put it to you?

A Yes.

Q All right, and did she say that both during before the deliberations and during deliberations?

A Mostly before deliberations.

Q Mostly before?

A Yes.

Q All right. Okay.

THE COURT: Anything further from the plaintiff?

MR. PROFFITT: No, Your Honor.

THE COURT: Anything from the defense?

MR. HOLLAR: No, sir.

THE COURT: All right, ma'am, at this point in time I am going to release you from this hearing. I am going to ask that you don't discuss this case with anyone in the meantime. I will thank you for taking

Q Did the person indicate how they knew what Doctor Bibeau's handwriting looked like? Did they say how they knew that?

A Yes.

Q How did they say they knew it?

A I believe they said they worked with him.

Q Okay, so that person had indicated in the past they had worked with Doctor Bibeau?

A Yes, sir.

Q During the trial there was a lady who came in to the courtroom apparently and sat on the defense side of the courtroom. She is described as white lady with red hair. Do you recall her?

A I'd seen many people come and go in here.

Q There was a lot of people that came and went during at trial. Do you recall a white lady with red hair?

A No, sir.

Q Did you hear a discussion about such a person come up in the jury room before deliberations began?

A No, sir.

Q Did you hear anyone in the jury room identify such a person as a perhaps a nurse supervisor from the Fairfield Hospital?

A No, sir.

Q Okay. So you don't recall any discussion about her or

didn't recall anybody standing during that period of time during the trial. Do you remember those instructions?

A Yes, I remember those instructions.

Q You can probably say them yourself, can't you. I thought you would remember them.

A Yes.

Q Now ma'am, I want to know that during the trial, during the trial of the case and before deliberations began, do you recall anything that you felt might have been something that would have somehow violated or somehow breached the instructions that I gave, that some other juror may not have reported to me or you had not reported to me?

A I am not aware.

Q You weren't aware of anything that you felt like should have been brought up by any other juror or yourself?

A No, sir.

Q All right. Now, I am also again talking about the period of time the trial went on, and I am going to ask specifically about some matters that I just want to be sure -- I want to know your knowledge concerning these matters. Okay. Or if you have any knowledge. During that period of time do you recall anyone during any of the breaks or during any of your discussions in the jury room may have somehow vouched for the credibility or the believability or the truthfulness of any witness and specifically Doctor Bibeau or either of the nurses

that testified in the case?

A Did someone vouch for their credibility?

Q In other words someone might have said I know them or I work with them and I can tell you that if they say they did something they did it?

A Well, there was a young lady on the jury who had worked with all of them.

Q How did you become aware of that?

A She let us know that she wasn't sure how she got chosen to be on the jury because she worked with everybody.

Q Right.

A We explained to her when she was asked if this would, you know, prevent her from rendering a non-bias judgement that was her opportunity to get out of it. She should have answered in the affirmative.

Q But she didn't?

A No, she didn't.

Q Okay. All right, so she indicated that she had worked with them in the past?

A Yes.

Q All right, and in those discussions did she indicate that if Doctor Bibeau told you that he had done something that you could believe that, that would be truthful?

A I don't recall her saying that.

Q Okay. Do you remember her saying anything about if

profession?

A Not that I recall.

Q Okay. All right. And when you are talking about all the witnesses you are talking about the doctors and the nurses that were involved in the case is that right?

A I am sorry.

Q You had referred to that she had may be talked about all of the people. Are you referring to the people who testified' the doctors and the nurses?

A Yes, the doctors and the nurses.

Q That she had worked with?

A Yes, worked with them.

THE COURT: All right. Thank you, ma'am. I am going to release at this time from any further responsibility in this hearing. I will ask you not to discuss this matter with anyone outside of the courtroom and I don't know that we would need you to come back. If we do we will let you know. I don't think that will be the case so you are free to go at this time.

JUROR: Thank you.

THE COURT: Thank you, very much.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: All right. I think we are going to need Misty Beam.

the what we call the voir dire at the time in which we interviewed jurors before we pick them that indicated she had worked at the past at Winnsboro Hospital. Do you remember one juror who indicated that?

A Yes.

Q And her name I believe is Theresa Killian?

A Yes.

Q Do you know her?

A I know her daughter. Her daughter went to my school.

Q So you don't know her directly?

A No.

Q Now were you -- during the trial did she ever discuss with people on the jury the fact that she had worked at the hospital in the past and that gave her some special knowledge about the people involved in the trial or anything that was going on in the trial?

A She mentioned working at the hospital but never about having, you know, extra knowledge or anything. Just mentioned it.

Q Well, at any point in time did you hear her or any other juror I like to say vouch for someone's credibility or say that, you know, Doctor Bibeau or one of the nurses tells you something that's what happened. They are honest, truthful people. Did you ever hear her say that?

A Not to me specifically.

A I possibly do. I remember a white lady with red hair coming in and she never testified.

Q No, she did not testify. So you probbly recall when she came in?

A Yes.

Q Now, at any time was that person identified to you as to who she was?

A I think she was identified as star.

Q As who?

A A lady name Star.

Q Star. Did you ever hear what she did for a living?

A No.

Q Did you ever hear whether or not she was an employee or supervisor at the Winnsboro Hospital?

A May be. I think she mentioned as being an employee.

Q Who would have said that?

A Miss Killian.

Q Miss Killian would have said something about that?

A She recognized Star.

Q Do you remember her saying anything else about Star?

A No.

Q Other then that she may have worked at the hospital?

A That's about it.

Q Okay. Now did you ever hear anyone else speak about Rhonda Gwynne, she was one of the other witnesses. And this is

in the period of time before you started deliberations. Did you hear anybody talking about Rhonda?

A Yes, I think Miss Killian did mention Rhonda.

Q And what did she say about Rhonda?

A She worked with Rhonda when she worked at the hospital.

Q Did she say anything else about Rhonda that you can remember?

A Not that I know of.

Q All right. Now, I am going to move on to the period of time in the trial after deliberations started and I want you to know that I am not asking you for any answers about what the jury deliberated about during deliberations, what they may have said in that period of time other then I am going to inquire as to whether or not certain information might have been brought into the jury from outside of the courtroom. You remember that one of the instructions was to decide the case based upon the law and the evidence in the courtroom.

During deliberations did you hear anyone who brought information from outside of the courtroom into those deliberations, such as someone who claimed to have personnel knowledge of the truthfulness or honesty of the witnesses, or that you should believe some witnesses as against others? Anything of that nature because of information they got outside of the courtroom?

A No.

remember me doing that?

A Yes, sir.

Q And I did that in the mornings and I did that after lunch too after everyone came in form the lunch break. Now, of course the way I framed that question I was asking if any juror wanted to tell me about any problem they had had. I am going to frame it a little bit differently today. I am going to ask if during the trial you felt like something had happened or you had observed something that should have been reported to me during the trial. Do you recall anything of that nature?

A No, sir.

Q All right. Now specifically I am going to ask about whether or not some things might have been said among jurors before deliberations started. So that's what I am going to be asking you about at this point in time.

Do you recall anyone during that period of time on the jury indicating that they had some personnel knowledge of Doctor Bibeau or the nurses involved in this case and that based on that knowledge that you could trust them or believe the things that they said. Do you remember somebody making statements such as that?

A Somewhat.

Q Tell me what you remember?

A I remember one the jurors saying that they worked with Doctor Bibeau and he was a good doctor and that the nurses were

efficient.

Q Do you remember who might have said that?

A Yes, sir.

Q Okay. Who was that?

A Teressa Killian.

Q Miss Killian said that?

A Yes, sir.

Q All right. Now do you remember when that occurred?

A I don't remember the exact date.

Q But it was before we started deliberations?

A Yes, sir.

Q Okay. Now, was that said directly to you or was that just said in general to whoever happened to be in the room at that time?

A It was in general.

Q Now, do you recall any statement such as this having been made, a statement that was to the effect that it Doctor Bibeau and nurse Jeri were very careful and thorough and if they say they did something they did it? Do you recall a statement being made such as that?

A I believe so.

Q All right. And was that again Miss Killian?

A Yes.

Q Do you recall a statement having been made -- and one of the issues during the trial was the question of whether or

inability to follow my instructions to please report it. I never asked the question in this fashion and I am just going to ask it now. During the trial of the case did you observe, hear or see anything that any other juror may have been involved in that you felt like might have had some problems with my instructions or should have reported to the court. Did you see anything like that or hear anything like that?

A No.

Q All right. Now, I'm specifically going to ask you about some issues that may have come up in the jury room and may not have come up in the jury room. I will see what your recollection is of it.

During the trial of the case do you recall any juror who claimed to have some type of knowledge or experience with plaintiff -- I mean with the defendant or with the nurses involved in this case such that they knew them well enough to tell you that they were a good doctor or good nurse or if they told you something you could believe what they said? Did you ever hear any juror talk about things like that?

A Not to the extent that you are asking.

Q All right. Tell me what you heard?

A Just that they worked with some people that were kind of involved in the case. They worked at the hospital before. They didn't go into as to their worth ethic. They did mention that they worked with these people before, certain people.

Q I believe you are probably referring to Teressa Killian?

A I don't know her name, but she is short, dark-skin woman but I am not sure what her name was,

Q She was the lady -- Teressa Killian was the lady --

A She went second today.

Q Beg your pardon?

A She went second today.

Q She did go second today. That's Teressa Killian. So you did hear her mention that she had worked with them in the past?

A Yes.

Q Okay, but you didn't hear her say anything about their skill or there truthfulness or anything of that nature, or did you hear that?

A I can't recall, so I don't want to say yes. But she mentioned, you know, knowing them and having worked with them. But I am not sure.

Q Let me ask you a little more specific questions and see if this helps, or may or may not help. Did you ever hear any statement by any juror to the affect that Doctor Bibeau and Jeri were very careful and thorough and if they said something they did it. Did you ever hear anybody make a statement such as that?

A No.

case did you observe anything or see anything or hear anything that you felt would have been somehow would have run afoul or gone against my instructions during the trial?

A No, sir.

Q Now ma'am, I am going to ask you some specific things, about some specific things that may have come up, or you may have heard something about. Again, I just like for you to be truthful in answering my questions about this these matters?

During the trial of the case do you recall any juror who indicated that at some point in time that juror had in fact worked with either the doctor or the nurses that are involved?

A Yes.

Q Doctor Bibeau or the nurses?

A Yes.

Q Okay, and tell me do you remember which juror that was?

A I do not know their names.

Q Okay. Do you recall what was said?

A No.

Q Could you tell me generally what was said?

A The only thing I know is they worked with them. That's all I know.

Q Okay. So you heard at some point in time one of the jurors say I had worked with the doctors and the nurses?

A Yes, I did hear that.

Q All right. Now, I am going to ask about some specific

EXHIBIT I

EXCERPTS OF JURORS' TESTIMONY WHO HEARD JUROR TERESSA KILLIAN, IN THE JURY ROOM DURING BREAKS IN THE TRIAL, VOUCH FOR THE SKILL OR PROFICIENCY OF BIBEAU, 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

days with the plaintiff putting up witnesses. Did she make comments about the case while the plaintiff was putting up witnesses?

A No.

Q So, the comments occurred after the defense started testifying?

A Yes, once the witnesses coming in over there.

Q All right. Now, can you tell me what types of things she said? What did she say specifically that you can remember?

A Okay. What I remember was the record keeping,when Doctor Bibeau said he did not sign off on the record and she stated that if he said he didn't do it he didn't do it because he was reliable. He is dependable. You know, basically that's what she said about nurse Jeri too. If they said they didn't do it -- if she said she did it she did it.

Q So her comments were more toward their honesty?

A Yes, their dependability and their honesty.

Q I see. Did she say how she knew these things?

A Because she worked with him. She stated she worked with him.

Q All right. So she indicated that she had worked directly with Doctor Bibeau?

A Yes, sir.

Q At some point in time?

A Yes, sir.

Q Now these discussions all took place before you began deliberations; is that right?

A Yes.

Q Now as she made these comments did other jurors discuss these matters with her?

A A couple of them. I don't know. I don't remember their names. I don't remember names.

Q Well, did they talk this over with her at that time or did she just make the comment and nobody said anything else about it?

A One of the jurors said well, if you knew Doctor Bibeau you should not be on the jury. One juror did state that to her and she stated that --

Q And her the response was?

A Her response was I told them that I knew him once we were being called out here.

Q Right.

A She stated that she did say that. She stated that she knew Doctor Bibeau.

Q Did she indicate that she had worked with him at the hospital?

A Yes, sir.

Q She said that at that time as well?

A Yes, sir.

Q All right. Now, do you know about how many times this

occurred?

A Oh, several times. It was almost like once we started -- once the defendant started calling witnesses and we go back there on a short break or whatever she was always bringing up Doctor Bibeau. He's a good doctor. He's a dependable doctor. I know because I worked with him.

Q In your affidavit you indicated that she had discussions with another juror that you identified in your affidavit as Kayla.

A Yes.

Q Is that one of the people that discussed these statements with her?

A Um --

Q I'll read to you what you said. You said Teresa repeatedly made these statement about Doctor 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 also discuss them.

So, do you recall Kayla is that someone you remember specifically discussing this with Theresa?

A Yes, sir.

Q What was the nature those discussions? What were they saying?

A Basically, like I said Doctor Bibeau is a good doctor and Kayla was like how do you know him. I worked with him for

or whoever until she came here.

Q Well, Jeri would have been the nurse that did testify. Jeri Wadford I believe.

A I do remember her testifying, but like I said I didn't know either one of them.

Q Okay. So I take it then that you did not hear anybody vouch for the credibility of Rhonda Gwynne either, is that true before deliberations started?

A There was one of the jurors that said that she had worked with them before and said that, you know, she knew of them as being good people. That is the only thing.

Q That was before deliberations started?

A That was before deliberations.

Q Do you remember what juror may have said something to that affect?

A The one that was just in here. She said she worked for Fairfield.

Q The lady I just talked to?

A Yes.

Q I believe her name is Theresa Killian?

A Yes.

Q She was number one on the list. All right. Now, did you hear Theresa Killian say anything else about the participants in the trial, the people involved in the trial --

A No.

Q -- before deliberations started? While you were back there after lunch or during a break?

A No, I didn't have lunch with them or anything, but she just said that she worked with them and that they were good ladies. That was it.

Q Do you remember when she said that or did she say it on more than one occasion.

A More than likely it was on the day that that Jerilyn Wadford testified. It was on that day.

Q But not on other days?

A Oh, no, not on other days.

Q Okay. Specifically, did you hear any juror state at any time that if Doctor Bibeau said he took foot pulses that he did it or if Doctor Bibeau did not do the foot pulses that it was because Jeri did it because she's very thorough or that Doctor Bibeau is a good Doctor. Did you hear any of those statements prior to deliberations starting?

A No. Now I had, you know, of course throughout the jury I'm trying to think things like what might have had happened but just from looking at evidence I had my thoughts, but those weren't influenced of what other jurors may have said or what I might have heard or anything like that.

Q I am going to get to what effect, if any, of the things you already told me about might have had on you. But I am just asking you do you remember anyone specifically talking about the

hospital.

THE COURT: That was answered in open court, so I am sure all the jurors heard it. Now whether they recall it I will be glad to ask her. They had the ability to be aware of it.

MR. PROFFITT: What I want to know if they talked about that during the breaks or during the actual deliberations. Theresa Killian talking about knowing these people and trusting them and working with them.

THE COURT: I will ask about that. Defense?

MR. HOLLAR: Judge, I am assuming your question will be asked before deliberations, but no additional questions.

THE COURT: All right. Bring her back.

(WHEREUPON, the juror enters the courtroom.)

Q Ma'am, I am going to remind you that you are still under oath at this time. Do you understand that?

A Yes, sir, I do.

Q All right. During the period of time prior to deliberations were you aware of the fact that perhaps we talked about Theresa Killian earlier --

A Yes.

Q -- that Theresa Killian had worked at the hospital previously?

A Yes.

Q Tell me how you came to know that?

A She said what when we first got here the first day before the jury was even chosen.

Q When I was asking questions out there?

A Uh-huh.

Q So you remember that from then?

A Uh-huh, yes.

Q Okay. During the time before deliberations did she ever make the jury aware of that fact or talk about that during your breaks and times that you were in the jury room?

A No. The only time that she mainly said anything about that is when Jerilyn came up. She just said I remember working with her that she is a pretty good lady. That's it.

Q Said a pretty good lady?

A Yes.

Q And that's all you remember her saying about Jerilyn?

A Uh-huh.

Q And that was -- okay, then that was the only time she mentioned having worked at the hospital or been employee with other people in that time before deliberations other then when she answered the question in open court?

A She said that she remembered Jerilyn. She recalled Doctor Bibeau. That was pretty much it. Just, you know, other employees in general.

Q Well, the comments that she made did those comments end

to discuss the case with anyone or to try to gather any information or listen to media reports? Did you hear or see anything that would have indicated that someone on the jury may have had any trouble in following my deliberations during the trial?

A No.

Q So you didn't feel that there was anything that needed to be or should have been reported to me during the trial?

A No.

Q Okay. Now, specifically I want to ask you about some things that may have come up or may not have come up and these may or may not be something that is of importance to me, but I do want to ask you if you ever heard or saw anybody make statements such as I am going to go over with you at this point during the trial.

A Okay.

Q And I understand that not all the jurors are in the jury room at the same time. In the morning you get there at the different times. Not everybody was there all the time but I do want to know if there was anything that you remember being said such as did you ever hear any juror vouching for Doctor Bibeau or Jeri Wadford as being very careful and thorough and if they said they did something they did it? Now this would have been in the timeframe from the time the trial started and before deliberations started before I gave the trial to you and let you

decide the case. Do you remember anybody making a statement such as that?

A Yes.

Q Tell me who may have done that?

A Miss Theresa.

Q Theresa?

A Yes.

Q The lady I already had in here?

A Yes.

Q Her name is I believe Theresa Killian?

A Yes.

Q All right, do you remember when she may have said that?

A I am not sure, but I have heard her say it.

Q You heard her say that?

A Yes.

Q And that was before deliberations started?

A Yes.

Q All right. Did you hear anybody discuss that with her when she said that?

A No.

Q Now let me ask you about another statement that I have a concern about. And the statement, if Doctor Bibeau said he took a foot pulse then he did it, or if Doctor Bibeau did not do the foot pulse then it was because Jeri did it and she's very thorough. Do you remember anybody making that statement during

remember me doing that?

A Yes, sir.

Q And I did that in the mornings and I did that after lunch too after everyone came in form the lunch break. Now, of course the way I framed that question I was asking if any juror wanted to tell me about any problem they had had. I am going to frame it a little bit differently today. I am going to ask if during the trial you felt like something had happened or you had observed something that should have been reported to me during the trial. Do you recall anything of that nature?

A No, sir.

Q All right. Now specifically I am going to ask about whether or not some things might have been said among jurors before deliberations started. So that's what I am going to be asking you about at this point in time.

Do you recall anyone during that period of time on the jury indicating that they had some personnel knowledge of Doctor Bibeau or the nurses involved in this case and that based on that knowledge that you could trust them or believe the things that they said. Do you remember somebody making statements such as that?

A Somewhat.

Q Tell me what you remember?

A I remember one the jurors saying that they worked with Doctor Bibeau and he was a good doctor and that the nurses were

efficient.

Q Do you remember who might have said that?

A Yes, sir.

Q Okay. Who was that?

A Teressa Killian.

Q Miss Killian said that?

A Yes, sir.

Q All right. Now do you remember when that occurred?

A I don't remember the exact date.

Q But it was before we started deliberations?

A Yes, sir.

Q Okay. Now, was that said directly to you or was that just said in general to whoever happened to be in the room at that time?

A It was in general.

Q Now, do you recall any statement such as this having been made, a statement that was to the effect that it Doctor Bibeau and nurse Jeri were very careful and thorough and if they say they did something they did it? Do you recall a statement being made such as that?

A I believe so.

Q All right. And was that again Miss Killian?

A Yes.

Q Do you recall a statement having been made -- and one of the issues during the trial was the question of whether or

not foot pulses had been taken and properly recorded. Do you remember that?

A During the trial? Say that again.

Q During the trial one of the questions or issues that came up was whether or not during the emergency room visit foot pulses, pulses on someone's foot, had had been properly. Taken do you remember that?

A Yes, sir.

Q Did you ever hear Miss Killian make a statement that if Doctor Bibeau said he took the foot pulses that he did it and if he had did not then that was because Jeri did it and she was very thorough? Do you remember any comments about the foot pulses being taken or not taken? Do you remember Miss Killian talking about that?

A I'm not sure about that one.

Q You don't remember that?

A No, I am not sure about that one.

Q I want you to tell me what you remember. You don't remember that?

A I don't remember that.

Q Okay. Very good. Now at some point during the trial a person came in to the courtroom. She sat behind the defense table and has been described in the papers that I have seen as a white lady who had red hair. That she sat again on that side of the courtroom. Now that person did not testify in the case.

EXHIBIT J

EXCERPTS OF JURORS' TESTIMONY WHO HEARD JUROR TERESSA KILLIAN, IN THE JURY ROOM DURING BREAKS IN THE TRIAL, VOUCH FOR THE TRUTHFULNESS OR CREDIBILITY OF BIBEAU, WADFORD OR GWYNN BY MAKING STATEMENTS TO THE EFFECT OF, IF THEY SAID THEY DID SOMETHING, THEY DID IT

days with the plaintiff putting up witnesses. Did she make comments about the case while the plaintiff was putting up witnesses?

A No.

Q So, the comments occurred after the defense started testifying?

A Yes, once the witnesses coming in over there.

Q All right. Now, can you tell me what types of things she said? What did she say specifically that you can remember?

A Okay. What I remember was the record keeping, when Doctor Bibeau said he did not sign off on the record and she stated that if he said he didn't do it he didn't do it because he was reliable. He is dependable. You know, basically that's what she said about nurse Jeri too. If they said they didn't do it -- if she said she did it she did it.

Q So her comments were more toward their honesty?

A Yes, their dependability and their honesty.

Q I see. Did she say how she knew these things?

A Because she worked with him. She stated she worked with him.

Q All right. So she indicated that she had worked directly with Doctor Bibeau?

A Yes, sir.

Q At some point in time?

A Yes, sir.

Q Now these discussions all took place before you began deliberations; is that right?

A Yes.

Q Now as she made these comments did other jurors discuss these matters with her?

A A couple of them. I don't know. I don't remember their names. I don't remember names.

Q Well, did they talk this over with her at that time or did she just make the comment and nobody said anything else about it?

A One of the jurors said well, if you knew Doctor Bibeau you should not be on the jury. One juror did state that to her and she stated that --

Q And her the response was?

A Her response was I told them that I knew him once we were being called out here.

Q Right.

A She stated that she did say that. She stated that she knew Doctor Bibeau.

Q Did she indicate that she had worked with him at the hospital?

A Yes, sir.

Q She said that at that time as well?

A Yes, sir.

Q All right. Now, do you know about how many times this

there. I believe Miss Pete was the foreperson and you all were discussing the merits of the case. Do you remember that period of time?

A Yes.

Q And I am not asking you now to get in to any specific statements that were made by any of the jurors during that period of time. I am asking generally about some information that I would like to know about.

Now, during that period of time did you feel like or did you hear information that might have been gathered from some source outside of the trial that was discussed or brought before the jury in making its decision? In other words information that might have been gathered from some source outside of the courtroom?

A No.

Q You didn't hear anybody discuss anything of that nature?

A No.

Q During that period of time did you hear again, I will ask specifically about juror Killian, Theresa Killian, did you hear her talking about the truthfulness or the honesty of the people who worked at the hospital based on her personnel knowledge having worked there?

A Yes.

Q Did she make that statement to you?

A Yes.

Q All right. Now ma'am, the statement that may have been made by Miss Killian, did they somehow affect your decision in the case?

A No.

Q Did you decide the case based upon the law and the evidence that was presented in the trial?

A Yes.

Q And you can say that without reservation that her -- whatever she said or whatever she brought did not affect your final decision?

A Yes.

Q All right. All right ma'am, I am going to ask you if you would go outside with the bailiff for just a moment and then I will talk with the lawyers and we may have a couple more questions and then I may call you back. And officer be sure to pull that door all the way closed.

OFFICER: Yes, sir.

(Juror leaves the courtroom.)

THE COURT: Objections or additional questions from the plaintiff?

MR. PROFFITT: Just one, Your Honor. I would ask for just a specific question about whether in premature deliberations Theresa Killian ever told them during breaks that she had personnel knowledge of

Q All right. Now, during that timeframe, during the times that the jury would have been on break or been coming in the evening or coming in from lunch, did you hear anyone discuss anything about this case with any other jurors?

A No.

Q I am going to ask you about some specific things to see if you heard any statements that might have been similar to the ones that I am going to ask you about.

Did you hear anyone vouch for the truthfulness of any of the witnesses or parties in the case?

A No.

Q Did anyone say, well, I know that person and they are an honest person. If they said they did something they did it. Did you anybody make a statement like that?

A No, sir.

Q Did you hear anybody talk about -- there was an issue in the trial about foot pulses, about whether or not a foot pulse had been taken or had not been taken. Did you hear anyone talk about if someone said that they took a foot pulse then they did it or if they didn't do it then someone else would have done it because they were very thorough in their jobs. Did you hear that come up before the jury started deliberations?

A Talking about -- ask that one more time.

Q All right, this is the timeframe between the start of the trial and before deliberations began. Did you hear anyone

discussing the taking of foot pulses or if someone said that they took it then they did take it or if they didn't do it then they would be sure somebody else would have taken it. Did you hear anyone make statements about the foot pulses at all before deliberations started in the jury room?

A Yes.

Q Tell me what you heard?

A That Doctor Guy Bibeau took the foot pulse but he didn't document it. I don't know I can't remember the name, Rhonda Win (phonetics) something. I can't remember her name. Took the foot pulse. She documented it -- it's been a while. When I left here this case was not on my mind.

Q I understand that, but I am trying to find out now was that said by a juror to other jurors in the jury room, or is that something you heard in the trial? I am trying to distinguish between what was said in the trial and what was say in the jury room. I am asking about what was said during your breaks in the jury room?

A Okay.

Q Not what was say in the trial of the case?

A Okay.

Q I think you might be getting confused?

A Okay.

Q So the issue of foot pulses came up in the trial. No doubt about that. My concern is, or my question is, was that

discussed before deliberations started by anyone in the jury room?

A No.

Q You did not hear any discussion about foot pulses during that period of time?

A No.

Q Okay, did you hear anyone discuss Doctor Bibeau's handwriting in the jury room among jurors before deliberations started?

A Yes.

Q Tell me what you heard about that?

A They couldn't read it.

Q Okay, and that's all they said?

A Yes.

Q All right. Now, there was a lady who came in the courtroom at some point in time. She has been described as a white lady with red hair. She would have sat over on the side of the courtroom behind Doctor Bibeau's table. I don't know how long she was there. I didn't really pay attention to her. She was not a witness in the case. I do remember she was there. Do you remember that person?

A Red hair?

Q A white lady with red hair that would have sat on that side of the courtroom over there behind Doctor Bibeau's table?

A No, I wasn't really paying attention.

remember me doing that?

A Yes, sir.

Q And I did that in the mornings and I did that after lunch too after everyone came in form the lunch break. Now, of course the way I framed that question I was asking if any juror wanted to tell me about any problem they had had. I am going to frame it a little bit differently today. I am going to ask if during the trial you felt like something had happened or you had observed something that should have been reported to me during the trial. Do you recall anything of that nature?

A No, sir.

Q All right. Now specifically I am going to ask about whether or not some things might have been said among jurors before deliberations started. So that's what I am going to be asking you about at this point in time.

Do you recall anyone during that period of time on the jury indicating that they had some personnel knowledge of Doctor Bibeau or the nurses involved in this case and that based on that knowledge that you could trust them or believe the things that they said. Do you remember somebody making statements such as that?

A Somewhat.

Q Tell me what you remember?

A I remember one the jurors saying that they worked with Doctor Bibeau and he was a good doctor and that the nurses were

efficient.

Q Do you remember who might have said that?

A Yes, sir.

Q Okay. Who was that?

A Teressa Killian.

Q Miss Killian said that?

A Yes, sir.

Q All right. Now do you remember when that occurred?

A I don't remember the exact date.

Q But it was before we started deliberations?

A Yes, sir.

Q Okay. Now, was that said directly to you or was that just said in general to whoever happened to be in the room at that time?

A It was in general.

Q Now, do you recall any statement such as this having been made, a statement that was to the effect that it Doctor Bibeau and nurse Jeri were very careful and thorough and if they say they did something they did it? Do you recall a statement being made such as that?

A I believe so.

Q All right. And was that again Miss Killian?

A Yes.

Q Do you recall a statement having been made -- and one of the issues during the trial was the question of whether or

not foot pulses had been taken and properly recorded. Do you remember that?

A During the trial? Say that again.

Q During the trial one of the questions or issues that came up was whether or not during the emergency room visit foot pulses, pulses on someone's foot, had had been properly. Taken do you remember that?

A Yes, sir.

Q Did you ever hear Miss Killian make a statement that if Doctor Bibeau said he took the foot pulses that he did it and if he had did not then that was because Jeri did it and she was very thorough? Do you remember any comments about the foot pulses being taken or not taken? Do you remember Miss Killian talking about that?

A I'm not sure about that one.

Q You don't remember that?

A No, I am not sure about that one.

Q I want you to tell me what you remember. You don't remember that?

A I don't remember that.

Q Okay. Very good. Now at some point during the trial a person came in to the courtroom. She sat behind the defense table and has been described in the papers that I have seen as a white lady who had red hair. That she sat again on that side of the courtroom. Now that person did not testify in the case.

EXHIBIT K

EXCERPTS OF JURORS' TESTIMONY WHO HEARD JUROR TERESSA KILLIAN, IN THE JURY ROOM DURING BREAKS IN THE TRIAL, IDENTIFY OR DISCUSS A "RED-HAIRED, WHITE LADY," A HOSPITAL EMPLOYEE

A Oh, no, not during deliberations. It was just like a funny comment like, gosh, you know, handwriting is horrible. How do they understand that.

Q So it's when the things are on the video screens and that sort of thing?

A Yes.

Q Someone may have talked about doctor's handwriting in general?

A In general. It was just like a joke.

Q Okay. All right. That's fine. I'm trying to figure out exactly what might have been said or wasn't said.

A It wasn't anything bad about Doctor Bibeau or, you know, what he did or anything like that. It was just the handwriting, like gosh, his handwriting is horrible.

Q Well, you know if people saw mine they might say the same thing?

A I agree with mine too.

Q All right. Now do you recall at some point in time during the trial and I can't tell you when it was, a lady may have come in to the courtroom and sat behind the defense side and she was a white lady. She had red hair and I don't think she testified in the case. Do you know who I'm talking about? Do remember that lady who came in and sat down?

A I know who you are talking about. I remember the lady, but I don't know her. I don't know her name.

Q All right, do you know anything about her?
A I don't know who that is.
Q So you just recall her having been in the courtroom?
A Uh-huh.
Q Do you recall any juror in the jury room identifying that person?
A Yeah, but I don't -- I can't remember her name. They might have said who she was but I can't remember her name.
Q And when you say "they" might have said, was that several jurors talking about her or one in particular that may have said who she might have been?
A I know at least two.
Q Who knew who she was?
A Uh-huh.
Q Can you tell me what she said about her?
A No, they was just like, you know, I thought she was going to do something or whatever. She was here speaking.
Q I don't think she testified.
A No, she didn't testify.
Q All right. So then you would not have recalled -- or do you recall any juror indicating that the red-hair, white lady and Jeri were very careful and thorough in there jobs. Do you remember anybody making that statement before deliberations started in the case?
A I don't know about the white lady. I didn't know Jeri

or whoever until she came here.

Q Well, Jeri would have been the nurse that did testify. Jeri Wadford I believe.

A I do remember her testifying, but like I said I didn't know either one of them.

Q Okay. So I take it then that you did not hear anybody vouch for the credibility of Rhonda Gwynne either, is that true before deliberations started?

A There was one of the jurors that said that she had worked with them before and said that, you know, she knew of them as being good people. That is the only thing.

Q That was before deliberations started?

A That was before deliberations.

Q Do you remember what juror may have said something to that affect?

A The one that was just in here. She said she worked for Fairfield.

Q The lady I just talked to?

A Yes.

Q I believe her name is Theresa Killian?

A Yes.

Q She was number one on the list. All right. Now, did you hear Theresa Killian say anything else about the participants in the trial, the people involved in the trial --

A No.

remember that person coming in to the courtroom? It was a long trial.

A No, sir I do not.

Q If you don't remember that is fine. Do you remember anybody discussing her and who she was during the trial?

A I don't remember what person with that description. I don't know that person.

Q Did you hear anyone mention that perhaps a nurse supervisor had come in to the courtroom and was seated behind the defense table?

A I'm not really sure, but like may be somebody from the hospital but not necessarily. I can't remember who.

Q Do you remember who might have identified that person?

A I don't remember names. I am bad with names.

Q All right. Well, has that person already been in front of me this morning?

A Yes, sir.

Q Would it have been perhaps Theresa Killian, who made that statement concerning nurse supervisor in the courtroom.

A Can you describe her. I don't remember names. I'm sorry.

Q She would have been the second person I had in here. I had Miss Carmichael and then Miss Killian?

A Yes, sir.

Q Okay. So you do remember her may be mentioning that a

employee from the hospital had come in to the courtroom?

A Yes.

Q Do you remember her saying anything about that person other then that?

A Not really.

Q All right. Now, throughout the trial every time the jury left the courtroom and the courthouse, you could probably tell me what I said. I instructed the jury not to talk about the case, not to gather any information on there own. Do you recall all those instructions?

A Yes, sir.

Q And every time the jury came back in the courtroom I would ask if anybody had any trouble with complying with my instructions please stand and throughout the trial no one indicate that had occurred.

A Right.

Q Are you aware of anything that occurred before deliberations began in the case that would have been a violation of my instructions? Someone talking about issues that might have been involved in the case prior to the time the jury was suppose to begin deliberations?

A Not really, no. Because most of the time we went back there and I'm so tired of seeing such and such, but not directly on the case.

Q So you don't recall anyone saying anything about the

Q Oay, did you hear her say it to the members the jury panel?

A Not that I recall.

Q One of the issues in the trial was a thing about whether or not foot pulses had been taken. You probably remember that being discussed a good bit. Do you recall that?

A Yes.

Q Did you ever hear that discussed by any member the jury before deliberations began?

A No.

Q About the fact that if Doctor Bibeau said he took a foot pulse that he would have done so?

A No.

Q Did you ever hear anyone say that, or did you ever hear that nurse Jeri if she had done it she would have made a record and she was very thorough and she would have done something like that? Did you ever hear anything mention like that of that nature?

A No.

Q Next one. Excuse me. Now, during the trial at some point in time a lady came into the courtroom and my understanding is that she had a seat over here on the right side behind the defense counsel table. She was described as white lady who had red hair. Do you remember that person coming in to the courtroom?

A I possibly do. I remember a white lady with red hair coming in and she never testified.

Q No, she did not testify. So you probbly recall when she came in?

A Yes.

Q Now, at any time was that person identified to you as to who she was?

A I think she was identified as star.

Q As who?

A A lady name Star.

Q Star. Did you ever hear what she did for a living?

A No.

Q Did you ever hear whether or not she was an employee or supervisor at the Winnsboro Hospital?

A May be. I think she mentioned as being an employee.

Q Who would have said that?

A Miss Killian.

Q Miss Killian would have said something about that?

A She recognized Star.

Q Do you remember her saying anything else about Star?

A No.

Q Other then that she may have worked at the hospital?

A That's about it.

Q Okay. Now did you ever hear anyone else speak about Rhonda Gwynne, she was one of the other witnesses. And this is

The State
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WEDNESDAY, JUNE 24, 2015 • WWW.THESTATE.COM • PAGE A3

HUNNEWELL SLAYING

Mistrial declared for 3rd defendant

Jury misconduct tainted case, prosecutors tell judge

By HARRISON CAHILL
hcahill@thestate.com

A mistrial was declared this week by the judge in the case against the third defendant in the 2013 killing of Kelly Hunnewell, a 33-year-old mother of four, during a robbery at a Columbia bakery.

The week-long trial was scheduled to conclude Monday with closing statements from prosecutors Luck Campbell, Dolly Garfield and Nicole Simpson as well as defendant Troy Stevenson's defense attorney, Aimee Zmroczek.

Stevenson

But just before the jury was to begin deliberations, prosecutors requested a mistrial on grounds of jury misconduct.

Circuit Judge Robert Hood granted the mistrial after prosecutors said one of their investigators saw an alternate juror hugging Stevenson's family members outside of the courtroom. Despite Hood's orders to "keep an open mind" about the evidence presented in the case, one alternate juror said she already had made up her mind "that the case was ridiculous."

Hood also said one of the alternate jurors was attempting to elicit cooperation from other black jurors to not convict Stevenson on charges of murder, second-degree burglary, kidnapping and attempted armed robbery.

The jury was made up of seven African-Americans and five white people.

Prosecutors accused Stevenson, 18 at the time of the crime, of being the "lookout" while his younger half-brother Trenton Barnes, then 16, and Lorenzo Young, then 18, entered an offsite bakery for the Carolina Cafe July 1, 2013, and shot and killed Hunnewell, who was preparing bagels.

Hunnewell, a single mother, had four children, ages 13, 9, 8 and 6 at the time of her death.

Barnes and Young were both found guilty of murder in December. Barnes received a 50-year sentence, while Young is serving a life sentence without the possibility of parole.

Prosecutors said Barnes was the triggerman.

There has been no word regarding a retrial date if one is to be held.

EXHIBIT
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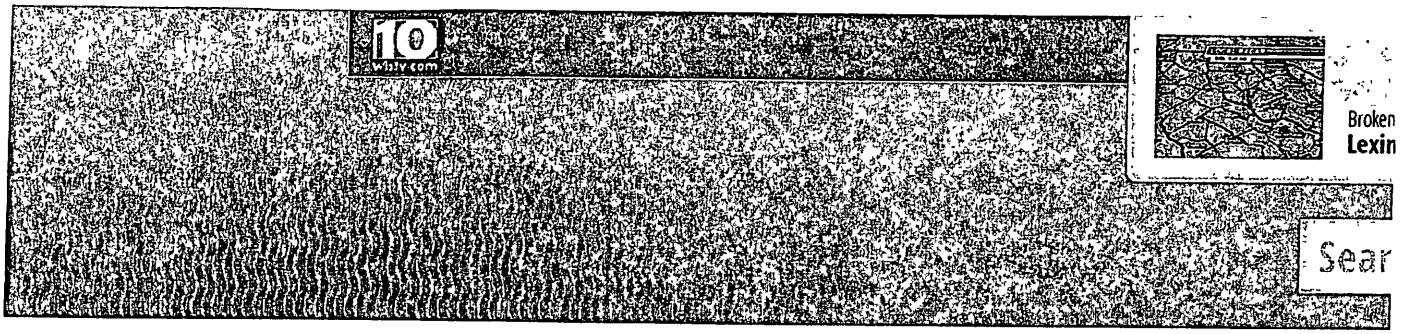

No retrial date set following mistrial for third man accused in 2013 shooting

Posted: Jun 22, 2015 8:07 AM EST
Updated: Jun 24, 2015 6:47 AM EST

By WIS Staff CONNECT

COLUMBIA, SC (WIS) - Troy Stevenson remains in jail on Tuesday despite a mistrial declared in his murder case.

Stevenson was the third man accused in the shooting of a Columbia mother of four in 2013.

Jurors listened to testimony for five days before beginning deliberations on Monday afternoon. However, the deliberations were stopped after prosecutors reported questionable behavior by one of the members of the jury.

Judge Robert Hood said that 11 jurors heard an alternate juror say "I've made up my mind" about the case. Hood also noted that the juror told other jurors "all black peopl should stick together" and the case was "ridiculous."

According to prosecutors, an alternate juror also embraced or kissed a member of Tr Stevenson's family. The interaction was seen by an investigator in a hall outside the courtroom after alternate jurors were released.

Prosecutors also noted that two female alternate jurors were seen walking down the street with Stevenson's family.

Attorneys for the state also said jurors were discussing evidence during the trial despi orders not to do so. Hood later said the communication was a direct violation of the court's orders.

"The fact that the majority of the jury failed to follow the repeated orders to not discus the case in any manner with anyone -- given the serious risk of prejudice to both the s and the defendant, Council's in favor of granting a mistrial based upon juror miscond Hood said on Monday. "While no one indicated that they cannot be fair or impartial moving forward, it is my belief that the jury has been exposed to pressure from the defendant's family and/or associates and a juror who attempted to improperly persu the jury and they have openly disregarded the court's instructions to refrain from discussing the case."

Hood went on to say that juror misconduct was "pervasive" in this case.

Stevenson was accused of being a lookout for Trenton Barnes and Lorenzo Young wh were both convicted last December in the murder of Kelly Hunnewell.

Stevenson was charged with murder. Last week, he rejected an offered plea agreeme

Barnes, who is Stevenson's half brother, testified on his behalf on Friday.

A retrial date has not been set for Stevenson, according to the Solicitor's Office.

Hunnewell was working overnight at a Columbia bakery in July 2013 when she gunned down during an attempted armed robbery.

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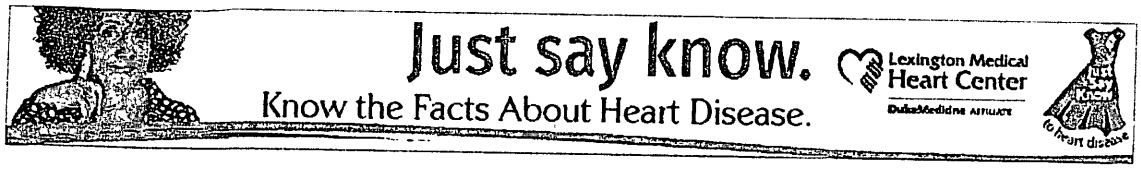

Judge Declares Mistrial in Columbia Murder Case

Loren Thomas, WLTX *10:24 p m EDT June 22, 2015*

(Photo: WLTX)

Columbia, SC (WLTX) - A mistrial has been declared in the trial of a man charged with murder in the death a Columbia mother of four.

The decision came Monday night just an hour after jurors began deliberating the fate of Troy Stevenson. Stevenson is the third suspect in the July 2013 shooting death of Kelly Hunnewell and had been on trial for six days before the mistrial was granted.

Judge Robert Hood of Richland County asked jurors to stop their deliberations, and explained to the court that one of the alternate jurors was seen hugging and speaking with the family of Stevenson when she was dismissed during the start of deliberations.

Judge Hood interviewed the other jurors and discovered that the alternate juror had discussed the case at the beginning of the trial.

"Jurors heard the alternate, juror number 183, make a statement to the effect of "this is ridiculous. I've already made up my mind.'," says Judge Hood.

The state requested the mistrial, saying that there was juror misconduct. Stevenson's defense, on the other hand, believed the jurors could still remain impartial to the case.

State prosecutor Luck Campbell also explained that the alternate juror told black jurors to stick together and not convict Stevenson.

Judge Hood explained that 11 out of the 12 jurors were also affected by the comments of the alternate juror.

"There is no cure of destruction that can undo the continuing, improper influence that was exerted on this jury and the fact that the majority of the jury has simply failed to follow the courts repeated order to not discuss the case to anyone," says Judge Hood. "Council is in favor of granting a mistrial based upon juror misconduct that rises to the level of manifest necessity."

The court has not determined how they will move forward or when a new trial will take place. Until then, Stevenson will remain behind bars.

He is charged with murder, kidnapping, second degree burglary, and attempted armed robbery.

If found guilty of those charges, Stevenson faces more than 90 years behind bars.

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STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

C.A. No. 2013-CP-20-12

Philip Ethier and Jeanne Ethier,

Plaintiffs,

v.

Guy R. Bibeau, M.D.,

Defendant.

2015 JUN 30 AM 10 42
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

PLAINTIFFS' RULE 59 MOTION TO ALTER OR AMEND JUDGMENT BY CORRECTING ERROR IN FORM 4 ORDER

Plaintiffs Philip Ethier and Jeanne Ethier, by and through their undersigned counsel and pursuant to Rule 59, SCRCP, move this Honorable Court to strike or amend an erroneous Form 4 order and judgment filed April 30, 2015, in connection with the verdict rendered by the jury. This motion is based on the grounds set forth herein, any memorandum, testimony, evidence or exhibits submitted to the Court in connection with this motion, including the motion filed on May 7, 2015, trial testimony and exhibits, the Rules of Civil Procedure and applicable law.

PROCEDURAL POSTURE

Plaintiff Philip Ethier, the directly injured plaintiff and patient of Defendant Guy R. Bibeau's, asserted that the doctor's negligence caused his injuries and damages. Plaintiff Jeanne Ethier, his wife, asserted a loss of consortium claim.

The jury rendered a verdict on April 8, 2015, after a seven-day medical malpractice trial which began March 30, 2015. The jury in a special verdict form awarded $1,250,000 in economic damages and $500,000 in non-economic damages to Plaintiff Philip Ethier; however,

the jury determined that Mr. Ethier was 70% negligent while Defendant Dr. Guy Bibeau was 30% negligent. The jury awarded $250,000 to Plaintiff Jeanne Ethier for loss of consortium.

MOTION

On May 4, 2015, Plaintiffs received a Form 4 order and judgment filed by the Clerk on April 30, 2015. The Form 4 order 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.

(Form 4 Order and Jury Verdict Form attached as EXHIBIT A.)

The true verdict of the jury as shown in the special verdict form, with regard to Plaintiff Jeanne Ethier, was that the jury found Defendant Dr. Bibeau negligent (Verdict Form Question No. 1, answered "yes"); Jeanne Ethier proved by a preponderance of the evidence that Dr. Bibeau's negligence was the proximate cause of her loss of consortium (Verdict Form Question No. 8, answered "yes"); and the total damages sustained by Jeanne Ethier for loss of consortium was $250,000 (Verdict Form Question No. 9.)

To the extent that the Form 4 order and judgment conflicts with the jury's true verdict by stating that verdict was for Defendant on Mrs. Ethier's claim, Plaintiffs hereby move to strike or amend the erroneous language of the Form 4 order and judgment so that it accurately states that the verdict was in favor of Mrs. Ethier. Specifically, Plaintiffs move that the Form 4 order and judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff

Jeanne Ethier on her loss of consortium claim.[1]

MEMORANDUM IN SUPPORT OF MOTION

The Court should correct or amend the Form 4 order and judgment for the following reasons:

FIRST, the jury's special verdict form is unambiguous on the award of damages to Plaintiff Jeanne Ethier. The jury found Defendant Dr. Bibeau negligent (Verdict Form Question No. 1, answered "yes"); Jeanne Ethier proved by a preponderance of the evidence that Dr. Bibeau's negligence was the proximate cause of her loss of consortium (Verdict Form Question No. 8, answered "yes"); and the total damages sustained by Jeanne Ethier for loss of consortium was $250,000 (Verdict Form Question No. 9.) The jury unambiguously found Dr. Bibeau negligent, found that his negligence caused Mrs. Ethier's loss of consortium, and awarded damages for her loss of consortium.

The jury, of course, was neither instructed nor 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. The jury was not instructed on comparative negligence with regard to Mrs. Ethier and was not asked to determine whether Mrs. Ethier was comparatively negligent. 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. See e.g. Nelson v. Concrete Supply Co., 399 S.E.2d 783, 303 S.C. 243

[1] The Form 4 order and judgment states that "Plaintiff" was found to have been 70% negligent – apparently referring only to Plaintiff Philip Ethier – and the result was a verdict for Defendant. If that is the case, then the order simply needs clarification with an additional sentence and reference to Plaintiff Jeanne Ethier's verdict in her favor.

(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).

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

SECOND, any assertion or motion by Defendant 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 Dr. Bibeau 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.

If Defendant believed that the verdict was inconsistent, not in keeping with the Court's instructions, or otherwise ambiguous, Defendant was required to request clarification of the verdict before the jury was dismissed. Defendant failed to do so and may not now be heard to challenge the verdict. Stevens v. Allen, 342 S.C. 47, 52-53, 536 S.E.2d 663, 665-66 (2000) (holding that, "when the issue is raised, a trial judge should resubmit a verdict assessing liability but awarding zero damages to the jury with instructions to either find for the defense or award some amount of damages"); Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995) (holding that "there is no duty imposed on the trial judge to question a jury's verdict of liability, but no damages, unless requested to by a party"; further, appellate court may not address an issue which was not raised to and ruled on by trial court); Rhame v. City of Sumter, 113 S.C. 151, 154, 101 S.E. 832, 833 (1920) ("The defendant's counsel made no attempt to find out what the jury

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

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

THIRD, the Uniform Contribution Among Joint Tortfeasors Act[2] does not apply in any way to the present case because there was only one Defendant. The entire Act addresses only cases with multiple defendants and has no application or relevance in a case involving only a single defendant. The purpose of the Act is to govern the right of contribution among multiple

[2] S.C. Code Ann. §§ 15-38-10 to -70.

defendants, provide a remedy to address contribution issues and apportion liability in cases in which there are multiple defendants.

More specifically, nothing in S.C. Code Ann. § 15-38-15, a provision of the Act enacted in 2005, applies to prohibit or reduce the award of full damages to Jeanne Ethier.[3]

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[3] Section 15-38-15 provides:

(A) In an action to recover damages resulting from personal injury, wrongful death, or damage to property or to recover damages for economic loss or for noneconomic loss such as mental distress, loss of enjoyment, pain, suffering, loss of reputation, or loss of companionship resulting from tortious conduct, if indivisible damages are determined to be proximately caused by more than one defendant, joint and several liability does not apply to any defendant whose conduct is determined to be less than fifty percent of the total fault for the indivisible damages as compared with the total of: (i) the fault of all the defendants; and (ii) the fault (comparative negligence), if any, of plaintiff. A defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact.

(B) Apportionment of percentages of fault among defendants is to be determined as specified in subsection (C).

(C) The jury, or the court if there is no jury, shall:

(1) specify the amount of damages;

(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under applicable rules concerning "comparative negligence"; and

(3) upon a motion by at least one defendant, where there is a verdict under items (1) and (2) above for damages against two or more defendants for the same indivisible injury, death, or damage to property, specify in a separate verdict under the procedures described at subitem (b) below the percentage of liability that proximately caused the indivisible injury, death, damage to property, or economic loss from tortious conduct, as determined by item (1) above, that is attributable to each defendant whose actions are a proximate cause of the indivisible injury, death, or damage to property. In determining the percentage attributable to each defendant, any fault of the plaintiff, as determined by item (2) above, will be included so that the total of the percentages of fault attributed to the plaintiff and to the defendants must be one hundred percent. In calculating the percentage of fault attributable to each defendant, inclusion of any percentage of fault of the plaintiff (as determined in item (2) above) shall not reduce the amount of plaintiff's recoverable damages (as determined under item (2) above).

continued . . .

Even if it applied in this case (which it does not), § 15-38-15(B) simply requires the jury – as the law has required in comparative negligence cases since 1991 – to "(1) specify the amount of damages" and "(2) determine the percentage of fault, if any, of plaintiff and the amount of recoverable damages under the applicable rules concerning 'comparative negligence.'" Subsection (3) does not apply because there is only one Defendant in this case.

Section 15-38-15 applies only to the various claims of the directly injured plaintiff and the apportionment of damages for those claims among multiple defendants. The statute does not apply at all to a spouse asserting a separate and distinct loss of consortium claim.

The jury specified the amount of damages for Mrs. Ethier – $250,000. Under the "applicable rules concerning comparative negligence" as explained below, Mr. Ethier's

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> (a) For this purpose, the court may determine that two or more persons are to be treated as a single party. Such treatment must be used where two or more defendants acted in concert or where, by reason of agency, employment, or other legal relationship, a defendant is vicariously responsible for the conduct of another defendant.
>
> (b) After the initial verdict awarding damages is entered and before the special verdict on percentages of liability is rendered, the parties shall be allowed oral argument, with the length of such argument subject to the discretion of the trial judge, on the determination of the percentage attributable to each defendant. However, no additional evidence shall be allowed.

(D) A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.

(E) Notwithstanding the application of this section, setoff from any settlement received from any potential tortfeasor prior to the verdict shall be applied in proportion to each defendant's percentage of liability as determined pursuant to subsection (C).

(F) This section does not apply to a defendant whose conduct is determined to be wilful, wanton, reckless, grossly negligent, or intentional or conduct involving the use, sale, or possession of alcohol or the illegal or illicit use, sale, or possession of drugs.

comparative negligence is ***not*** imputed to Mrs. Ethier with regard to her claim for loss of consortium. In South Carolina, the acts of one spouse are not imputed to the other. Further, South Carolina courts have held since the 1920s that a consortium claim is a separate and distinct cause of action, not a derivative one. Consequently, Mrs. Ethier is entitled to recover her full award of damages.

Section 15-38-15(A) does not apply at all in the present case because there are no multiple defendants among whom joint and several liability must be determined. Subsection (A), by its plain terms, applies only "if indivisible damages are determined to be proximately caused by more than one defendant" and the directly injured plaintiff's negligence is not greater than the combined negligence of multiple defendants. Subsection (A) simply means, e.g., that if the directly injured plaintiff is 40% at fault, defendant 1 is 40% at fault and defendant 2 is 20% at fault, then each defendant is only liable for its respective percentage of damages owed to the directly injured plaintiff because each was less than 50% at fault.

Subsection (A) does not apply in a case involving only the directly injured plaintiff and a single defendant because – under the "applicable rules concerning comparative negligence" – either the single defendant will be solely and completely liable for up to 50% of the damages or the single defendant will be liable for nothing because the directly injured plaintiff's negligence is greater than the single defendant's negligence. The fact that "loss of companionship" is mentioned in this subsection simply means that damages of this type awarded to the directly injured plaintiff, like other types of damages awarded, may be apportioned in cases involving multiple defendants.

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

FOURTH, 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." 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).

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

FIFTH, the South Carolina Supreme Court repeatedly has 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.

In 1962, the Legislature codified the common law claim in S.C. Code Ann. § 15-75-20 (1976) ("Any 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.") This statute, by its plain terms, clearly indicates it 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. 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. 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").

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

SIXTH, 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. 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."). Moreover, in an endorsement of South Carolina law, the opposing view that a consortium claim is derivative has been roundly rejected by the commentators. Feltech v. General Rental Co., 383 Mass. 603, 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)).

South Carolina law is in keeping with the modern view is that the negligence of one person usually is not imputed to another, except in certain well-established circumstances such as principal-agent or respondeat superior. "As a general rule, the law holds a person liable only for his own acts and omissions." 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 v. Government Employees Ins. Co., 325 S.E.2d 62, 64, 284 S.C. 66, 69 (1985) (noting coverture has long been abolished and "in South Carolina, the acts of one spouse are not, as a matter of law, imputed to the other spouse"; 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).

Courts in other jurisdictions which 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. 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.

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

In Huber v. Hovey, 501 N.W.2d 53 (Iowa 1993), the Iowa Supreme Court, following its precedent, held that an injured spouse's negligence does not prohibit or affect a consortium claim by the other spouse. That principle remains true even in a case where the injured spouse signed an enforceable release at a race track waiving his injury claims. Furthermore, the spouse's

separate damages for loss of consortium may not be reduced or eliminated by the negligence or action of the directly injured spouse. "The policy issue is a simple one. Why should innocent parties who have suffered loss have their right of recovery diminished as a result of the acts of another party whose fault is not imputed to them under established common-law or statutory rules? . . . These same principles of autonomy apply to releases signed by only one spouse. One spouse's signature on a release is not imputed to the other spouse any more than is one spouse's negligent act." Id. at 57.

See also Herold v. Burlington Northern, Inc., 761 F.2d 1241, 1249 (8th Cir. 1985) (holding that under North Dakota law "it is clear that a wife's claim for loss of consortium is an independent right, not contingent upon the rights or liabilities of her husband"; therefore, the Court of Appeals concluded that the Supreme Court of North Dakota would not allow a loss of consortium award to be reduced by the other spouse's negligence, and contrary cases were from states which consider loss of consortium claims to be derivative actions); Macon v. Seaward Constr. Co., 555 F.2d 1, 2 (1st Cir.1977) (holding that wife's recovery for loss of consortium may not be reduced under New Hampshire law in proportion to her husband's degree of comparative negligence, where state law treats a loss of consortium claim as separate and distinct from injured spouse's claim); Braun v. Exeter Clinic, Inc., 498 A.2d 334 (N.H. 1985) (holding that "this court removed all doubt that we view a loss of consortium claim as 'separate and distinct and not derivative' in Reid v. Spadone Mach. Co., 119 N.H. 198, 199, 400 A.2d 54, 55 (1979). Therefore, the plaintiff's loss of consortium action will not be barred or reduced by a verdict rendered against the plaintiff in a negligence action."); Fuller v. Buhrow, 292 N.W.2d 672, 674-676 (Iowa 1980) (holding that one spouse may recover damages even though the other spouse, injured in an accident as a result of the defendant's negligence, was barred from

recovering because of contributory negligence); Feltech v. General Rental Co., 421 N.E.2d 67, 70-71 (Mass. 1981) (holding that a loss of consortium claim is not derivative, but separate and distinct, from injured spouse's claim; and further holding that spouse's damages for loss of consortium may not be reduced by degree of injured spouse's negligence because "the wife is regarded as a separate individual, whose negligence is no more to be attributed to the husband, or his to her, than in the case of any other person"); Morgan v. Lalumiere, 493 N.E.2d 206 (Mass. App. 1986) (holding that consortium claim is separate and distinct cause of action, independent of the injured spouse's claim, and the spouse's consortium damages are not reduced in proportion to the injured spouse's degree of fault; thus husband was entitled to award of full damages for loss of consortium even though wife, as injured pedestrian, was found to be 52% at fault and recovered nothing); Christie v. Maxwell, 696 P.2d 1256 (Wash. App. 1985) (holding that consortium claim was separate and distinct, not derivative, and spouse's damages for loss of consortium were not reduced or barred by injured spouse's comparative negligence); Stapleton v. Palmore, 291 S.E.2d 445 (Ga. App. 1982) (holding that wife may bring later loss of consortium suit even though prior jury had determined defendant was not liable for husband's injury because the claims are separate and distinct).

In the present case, Mrs. Ethier is entitled to recover the full amount of damages awarded by the jury and, 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.[4]

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

SEVENTH, 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 v. Bunch, 373 S.C. 654, 647 S.E.2d 197, 201-02 (2007). It is not inconsistent for the jury to return the same verdict on both spouses' claims or different verdicts on each claim. Simply put, the verdicts do not have to be the same on these separate and independent claims. Id. (where plaintiff-husband motorcyclist was found 70% at fault and defendant found 30% at fault, and jury returned verdict for defendant on plaintiff-wife's loss of consortium claim, trial judge erred in ruling that it was an inconsistent verdict for jury not to award any damages to plaintiff-wife because defendant was partially negligent and further erred in requiring jury to award some amount of damages; Supreme Court held that "the original verdicts were consistent. In South Carolina, claims for personal injuries and for loss of consortium are separate and distinct.");[5] accord Craven v. Cunningham, 292 S.C.

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

[5] While discussing the inconsistent verdict issue, the Supreme Court observed in passing that a defendant "should not be forced to pay all of [plaintiff-wife's] damages if he only contributed 30% to the accident. Generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and

continued . . .

independent from the impaired spouse's claim or derivative in nature.") (citing 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. 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.

Moreover, the cases cited in § 227 of Am. Jur. 2d do ***not*** support the stated proposition which was recited in Lee. 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.

Among the authority cited in § 227, except for two inapplicable 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 (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).

continued . . .

441, 443, 357 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");

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

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

Related Am. Jur. 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 Am. Jur. 2d 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.

In the present case, a verdict in Mrs. Ethier's favor is not inconsistent with the defense verdict on Mr. Ethier's claim. Each Plaintiff'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 Defendant'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.

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

In this case, the jury found Dr. Bibeau's negligence caused Mrs. Ethier's damages. The jury's verdict in favor of Mrs. Ethier and the award of damages of $250,000 to her are proper.

NINTH, any ruling or interpretation of a statute which required the imputation of Mr. Ethier's negligence to Mrs. Ethier's consortium claim would violate the Due Process and Equal Protection Clauses of the state and federal constitutions. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3.

The United States Supreme Court recently held that state laws which prohibit same-sex marriage or the recognition of such marriages legally made in another state violate due process and equal protection under the United States Constitution. Obergefell v. Hodges, ___ U.S. ____ (U.S. Sup. Ct No. 14-556 decided June 26, 2015). The Court outlined the historical development and changing attitudes toward marriage, including the abandonment of arranged marriages and "the centuries-old doctrine of coverture in which a married man and woman were treated by the State as a single, male-dominated legal entity." Id. "As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned." Id.

A foundational premise of the majority opinion in Obergefell is that each person in a marriage is an individual. "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy." Id; see also Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014) (applying similar principles and finding that marriage is a fundamental right in which the state's burden is subject to strict scrutiny under the Due Process and Equal Protection Clauses of the Fourteenth Amendment; court held that Virginia's marriage laws prohibiting same-sex marriages or the recognition of such marriages were unconstitutional).

The concept that each spouse is a separate human with an equivalent bundle of individual and legal rights, of course, underlies South Carolin's case law. See e.g. McCracken v.

Government Employees Ins. Co., 325 S.E.2d 62, 64, 284 S.C. 66, 69 (1985) (noting coverture has long been abolished and "in South Carolina, the acts of one spouse are not, as a matter of law, imputed to the other spouse"; 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).

Each Plaintiff'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 Defendant'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.

CONCLUSION

The jury found that Defendant Dr. Bibeau was negligent, his negligence caused Mrs. Ethier's loss of consortium, and awarded her damages on her separate and distinct cause of action. The fact that Mr. Ethier recovered nothing because the jury determined his negligence exceeded Dr. Bibeau's has no bearing or impact on Mrs. Ethier's award. The negligence of Mr. Ethier as determined by the jury is not imputed to her and has no impact on her award. Mrs. Ethier could not be found to be comparatively negligent because that doctrine and law apply only to Mr. Ethier, the directly injured spouse.

The acts of one spouse are not imputed to the other spouse. Mrs. Ethier's loss of consortium claim is separate and independent – as South Carolina courts have held since the

1920s – and her claim must be separately proven. Each of the Plaintiffs' claims stands alone; both may succeed; both may fail; or one or the other may succeed. As the California Court of Appeals stated in Lantis, the jury awarded damages to Mrs. Ethier based on her "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, [Mrs. Ethier] is simply a foreseeable plaintiff to whom he owes a separate duty of care." Lantis, supra. Any other result would violate equal protection and due process, and would be contrary to established law.

For all the foregoing reasons, to the extent that the Form 4 order and judgment conflicts with the jury's true verdict, Plaintiffs hereby move to strike or amend the erroneous language of the Form 4 order and judgment so that it does not conflict with the jury's verdict form as stated herein. Specifically, Plaintiffs move that the Form 4 order and judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim.

Respectfully submitted,

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Attorneys for Plaintiffs

June 29, 2015

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
C.A. No. 13-CP-20-0012

Philip Ethier and Jeanne Ethier

Guy R. Bibeau, MD

PLAINTIFF(S)

DEFENDANT(S)

2015 APR 30 AM 10 31
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

X **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment

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

Parties were granted ten (10) days in which to file written post- trial Motions by Order from the Bench after the receipt of the verdict.

RECEIVED
MAY - 4 2015
BY PROFFITT & COX, LLP

ORDER INFORMATION

This order ___ ends _X_ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

EXHIBIT 4

SCANNED
Date: 5/4/15

SCRCP Form 4C (10/2011)

Proffitt & Cox, LLP
Page 1 of 2

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge | 2135 Judge Code | 4/27/15 Date

For Clerk of Court Office Use Only

This judgment was entered on the 30 day of April, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 30 day of April 2015 to attorneys of record or to parties (when appearing pro se) as follows:

David Proffitt, Proffitt & Cox, LLP
140 Wildwood Park, Dr., Ste. A
COLUMBIA, SC 29223-6518

ATTORNEY(S) FOR THE PLAINTIFF(S)

G. Murrell Smith, Jr. and David C. Holler
PO Box 580
Sumter, SC 29150

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF FAIRFIELD)	C/A NO.: 13-CP-20-12
Philip Ethier and Jeanne Ethier,)	
)	
Plaintiffs,)	
)	
v.)	**VERDICT FORM**
)	**(Phillip Ethier and Jeanne Ethier)**
Guy R. Bibeau, M.D.)	
)	
Defendants.)	

2015 APR 9 AM 9 03
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

1. Was the Defendant Dr. Bibeau negligent?

__✓__ Yes

_____ No

(If "Yes", go to Question 2.)
(If "No", deliberate no further. Foreperson sign and date this verdict form.)

2. Was the Defendant, Dr. Bibeau's negligence at least one of the proximate causes of injury or damages sustained by Philip Ethier?

__✓__ Yes

_____ No

(If "No" deliberate no further. Foreperson sign and date this verdict form.)
(If "Yes", go to Question 3)

3. Was Philip Ethier negligent?

__✓__ Yes

_____ No

(If "Yes", go to Question 4)
(If "No", go to Question 6)

4. Was Mr. Ethier's negligence at least one of the proximate causes of injury or damage sustained by him?

✓ Yes

_____ No

(If "Yes", go to Question 5)
(If "No", go to Question 6)

5. Taking into consideration that the total percentage of negligence of Dr. Bibeau and Mr. Ethier is 100%, assign percentages of negligence to both of them:

30 % Guy R. Bibeau, M.D.

70 % Philip Ethier

(Again, these two percentages must equal 100%)

6. What is the total amount of economic damages that Mr. Ethier sustained as a proximate result of the negligence of the Defendant? Do not reduce this sum by any percentage of negligence that you may have noted in response to Question 5.

$ 1,250,000.00

7. What is the total amount of non-economic damages that Mr. Ethier sustained as a proximate result of the negligence of the Defendant? Again, do not reduce this sum by any percentage of negligence you may have noted in response to Question 5.

$ 500,000.00

8. Do you find that Jeanne Ethier has proven by a preponderance of the evidence that Dr. Bibeau's negligence was the proximate cause of a loss of consortium?

✓ Yes

_____ No

9. What is the total amount of damages sustained by Jeanne Ethier for any loss of consortium?

$ 250,000.00

Connie DPate

Foreperson

4/8/2015

Date

PROFFITT & COX
Attorneys at Law

PROFFITT & COX, LLP
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DAVID PROFFITT
dproffitt@proffittcox.com

June 29, 2015

2015 JUN 30 AM 10 39
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

The Honorable Betty Jo Beckham
Fairfield County Clerk of Court
ATTN: CIVIL DIVISION
P.O. Drawer 299
Winnsboro, SC 29180

RE: Philip Ethier and Jeanne Ethier v. Guy R. Bibeau, M.D.
C.A. No. 2013-CP-20-12
PC File No. 1236.01

Dear Ms. Beckham:

Please find enclosed the following documents:

Transcript of jury selection on March 30, 2015 (35 pages); and
Transcript of juror evidentiary hearing held May 12, 2015 (186 pages).

Please file the originals and return the date-stamped copies of the first page of each transcript to me in the enclosed envelope.

I have mailed and e-mailed a copy of these transcripts directly to the Honorable Roger L. Couch.

With kindest personal regards, I remain,

Sincerely yours,

PROFFITT & COX, LLP

David Proffitt

cc: The Honorable Roger L. Couch
Murrell Smith
David Holler
Stanley Myers
Andrew Lindemann

Enclosures

SCANNED
Date: 7/2/15
Proffitt & Cox, LLP

RECEIVED
JUL 2 2015
BY PROFFITT & COX, LLP

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF FAIRFIELD	)	
Philip Ethier and Jeanne Ethier,	)	
	)	Civil Action Number 2013-CP-20-12
Plaintiffs,	)	
	)	
v.	)	**Defendant's Memorandum in Opposition to Plaintiffs' New Trial Motion**
	)	
Fairfield Memorial Hospital, Guy R. Bibeau, M.D. and Tuomey Medical Professionals, Inc.,	)	
	)	
Defendants.	)	
	)	

Defendant Guy R. Bibeau, M.D. submits the following memorandum, along with all previously filed post verdict documents, in opposition to Plaintiffs motion for a new trial. On May 12, 2015, the Court conducted a *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) hearing to *voir dire* the jurors regarding possible premature deliberations, the possible introduction of extrinsic evidence during the trial or deliberations, and an alleged lack of candor from one juror during pretrial qualification.

STANDARD OF REVIEW

In *Aldret, supra*, the South Carolina Supreme Court "set forth the following suggested procedure to follow in cases in which an allegation of premature deliberations arises: ...

> If ... the fact of the premature deliberations does not become apparent until after the jury's verdict, we hold the trial court **may** consider affidavits [on the issue of premature deliberations]. If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature

> deliberations. If the court determines the misconduct did not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

509 S.E.2d at 815. (Emphasis added). Initially, Defendant respectfully submits the Carmichael affidavit does not rise to the level of extrinsic misconduct as set forth in Rule 606(b), *South Carolina Rules of Evidence.* This rule anticipates a certain level of intrinsic misconduct in any jury trial and echoes the constitutional integrity of a trial by jury versus decisions made by Kings and Rulers. The South Carolina Supreme Court limited *Aldret* in the decision of *Shumpert v State*, 378 S.C. 62, 661 S.E.2d 369 (2008), stating "we think trial courts are justified in exercising a degree of caution **before** entertaining such evidence in an attack on a jury's verdict." 661 S.E.2d at 372.

BURDEN OF PROOF IS CLEAR AND CONVINCING EVIDENCE THAT PREJUDICE OCCURRED

In this case, the Court determined that an inquiry was warranted and that hearing occurred May 12, 2015. The standard for evaluating the testimony of the jurors under Rule 606(b), *South Carolina Rules of Evidence*, is that prejudice must be proven by clear and convincing evidence. *Adret,* citing *Hunt v. Methodist Hospital*, 240 Neb. 838, 485 N.W.2d 737 (Neb.1992). Plaintiffs cannot rest upon evidence that misconduct merely occurred, but rather must **prove prejudice** resulting from that misconduct **by clear and convincing evidence**. *Id.*

A misunderstanding of one juror or an inappropriate comment made during the course of the trial does not warrant setting aside a verdict. *State v. Galbreath*, 359 S.C. 398, 406, 597 S.E.2d 845, 849 (Ct. App. 2004) ("A misunderstanding of the law does not warrant a new trial absent a denial of fundamental fairness"); See *State v Pittman*, 373 S.C. 527, 554, 647 S.E.2d 144, 158 (2008) ("One juror stated [during a post verdict hearing] that she voted guilty because another juror told her that the majority rules, and therefore everyone had to vote together to return a

unanimous verdict. The other stated that she voted guilty because the other jurors told her that she had to vote one way or the other. ... We find that these misunderstandings of the law regarding the unanimity of the verdict were insufficient to warrant a new trial").

Juror misconduct must also fall within a specific category in order to land outside the shield of Rule 606(b), *South Carolina Rules of Evidence*. *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811, 812 (1999) ("It has long been the rule in this state that a juror's testimony is not admissible in order to prove either his own misconduct or that of fellow jurors."). "Unless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." 509 S.E.2d at 814, citing *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998). "[T]he burden is on the party alleging premature deliberations to establish prejudice." *Id.*

The mere fact that one juror has reservations or an emotional reaction after the verdict does not warrant setting aside the unanimous verdict of all the jurors. *State v. Zeigler*, 364 S.C. 94, 110, 610 S.E.2d 859, 867 (Ct. App. 2005) ("Internal influences involve information coming from the jurors themselves"); See generally *Fed.R.Evid.* 606(b) advisory committee's note (stating "[t]he mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment"); Rule 606, *SCRE* note (stating "[t]he language of this rule is identical to the federal rule"). See also *Warger v Shauers*, 135 S.Ct. 521, 526, 190 L.Ed.2d 422, 83 USLW 4017 (2014)(rule [606(b)] bars evidence about any statement made during jury deliberations, and in an inquiry into a verdict's validity Rule 606(b) applies to exclude a juror's affidavit regarding foreperson's conduct during deliberations).

In juxtaposition to Plaintiff's burden of proof is the Court's responsibility to conduct a fair trial. "Litigants, whether plaintiffs or defendants, are entitled to **fair trials** but not perfect trials.

Smoak v. Seaboard Coast Line Railroad Company, 259 S.C. 632, 193 S.E.2d 594 (1972). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." 193 S.E.2d at 598. *Aakjer v Spagnoli*, 291 S.C. 165, 177, 352 S.E.2d 503 (Ct. App. 1987).

Jurors need only respond to voir dire that was asked to them. *Lynch v Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 157, 760 S.E.2d 111, 117 (Ct. App. 2013) ("the juror's responsibility is only to disclose information that reasonably should be disclosed in response to a question that is reasonably comprehensible.").

VOIR DIRE OF TERESA KILLIAN

Defendant respectfully submits Teresa Killian responded fully and truthfully to all questions asked during pretrial voir dire.

A. **Juror Teresa Killian is not related by marriage or related by blood to Guy R. Bibeau. Questioning from Page 7:**

THE COURT – The record will reflect that all potential jurors have been sworn in this case. Now, is there any member of this jury panel who has ever been related by marriage or are you related by blood to either the plaintiff, Philip Ethier, and Jeanne Ethier or to the defendant, Guy R. Bibeau? If that's true, please stand.

(NO RESPONSE)

B. Juror Teresa Killian is not related by marriage, related by blood nor ever had a close social or a personal relationship with Guy Bibeau, Samantha Anthony, CNA, Jerilyn Wadford, RN, or Rhonda Gwynne, LPN. Questioning from Page 8-10.

THE COURT – Now, I'm going to go over a list of individuals who have been identified to me as possible witnesses in this case. Listen carefully, because there is a good number of these individuals, and, in fact, I may end up saying some of these names twice, but I'll try to cover everybody to be sure I've covered them all, so listen carefully to the people who have been identified to me as possible witnesses in this matter. First of all, Jeremiah Holleman, MD. He's with the Sanger Heart and Vascular Institute in Charlotte. Carl Adams, MD of Durango, Colorado. Scott Joplin, (sic) MD, of Old Saybook, Connecticut, Tammy Chen, MD, with the Southern Psychiatric Practice in Rock Hill, South Carolina, Mark Porter, MD, of Metrolina Neurological Associates in Rock Hill, South Carolina,

Sanjay Nandurkar, MD, of Piedmont Interventional Spine & Pain Center in Lancaster, Eric Weinstein, MD, of Summerville, South Carolina, Charlie Dorn Smith, III, MD, of Florence, South Carolina, Dr. Oliver Wood, a PHD from Columbia, South Carolina, Joel Leonard of Leonard & Associates in Columbia, Shelene Giles of FIG Services in Hendersonville, North Carolina, Gerald Johnson, MD, of Pee Dee Emergency Medical Associates in Manning, Angie Johnson of Pee Dee Emergency Medical Associates in Manning, South Carolina, Samantha Anthony, CNA, Jerilyn Wadford, RN, in Columbia, Rhonda Gwynne, LPN, in Winnsboro, George Duquette of Chester, South Carolina, Lorraine Duquette of Chester, South Carolina, Jeffrey Gaskill of Indian Trail, North Carolina, Kathleen Gaskill of Indian Trail, North Carolina, Dr. Carl Adams, Todd Keith, Registered Nurse, Dr. Larry Canty, with Medical Director at Fairfield Memorial, Michael Williams, CEO of Fairfield Memorial, Marc Harari — it's H-a-r-a-r-i, a PHD, Jennifer Kimbrell, Tammy Chen, NaMetris Blount, a PHD with Palmetto Counseling and Consulting, David Sward, a masters in education and a professional counselor, Karen Thompson, RN, Joel Leonard, vocational consultant, Dr. Gerald Johnson, or Angie Johnson with Pee Dee Emergency Medical, Eric Weinstein, an MD, Dorn Smith, an MD, Rhonda Gwynne, an RN, registered nurse, Jerilyn Wadford, an LPN and Patti Locklair. 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? If that's true, please stand.

(JUROR STANDS)

THE COURT – Ma'am, your name and number?

JUROR – Teresa Killian, juror 72. I used to work at Fairfield Memorial Hospital with Mike Williams.

THE COURT – So you knew him from that employment?

JUROR – Yes, sir.

THE COURT – You no longer work there. Is that right?

JUROR – Right.

THE COURT – Okay. How long ago did you work there?

JUROR – It's been about three, four years ago.

THE COURT – I see. Now, ma'am, if that person were to be a witness in this case and you were seated on the jury, would that fact affect your ability to be fair and impartial to both the plaintiff and the defendant in case?

JUROR – No, sir, it wouldn't. I could be fair.

THE COURT – All right. Okay, thank you, ma'am, you can be seated. Anyone else?

(NO RESPONSE)

C. **Teresa Killian AGAIN identified that she worked at Fairfield Memorial Hosptial. Questioning from Pages 16-17:**

THE COURT – Is there any member of the jury panel who has had any medical or legal education, training or experience? If that's true, please

stand.
(JURORS STAND)
...
THE COURT – Thank you. Ma'am, you said you worked at Fairfield at one time. What'd you do there?
JUROR – I'm a certified nurse assistant.
THE COURT – I see. Would that affect your impartiality in this matter?
JUROR – No, sir, it won't.
THE COURT – Thank you, ma'am.
COURT REPORTER – What was her number, Judge?
THE COURT – Your number, please, ma'am? I'm sorry; we didn't get it. The lady standing before her.
JUROR – Oh, I'm sorry. 72.

D. **Teresa Killian identified that her daughter suffered from depression. Questioning from Pages 19-20.**

THE COURT – Thank you, sir. I'm going to ask about several medical conditions. Listen carefully to the conditions. I'm asking you concerning any member of the jury panel or any member of your immediate family, if they have ever undergone by-pass procedure, suffered from an occlusion of any of the arteries as a result of an aneurysm, suffered any nerve damage, suffered from depression or anxiety. If you or a member of your immediate family has ever suffered from any of those conditions, please stand.
(JURORS STAND)
...
THE COURT – Thank you. Ma'am, name and number?
JUROR – Juror number 72, my daughter's been going through depression.
THE COURT – All right, would that affect your impartiality in the case, ma'am?
JUROR – No, sir, it won't.

E. **Plaintiff failed to request additional voir dire, request jurors be stricken for cause, or otherwise request contemporaneous relief on the record. Questioning from Page 28:**

THE COURT – Additional questions from the plaintiff at this time. Are there any?
MR. PROFFITT – No, Your Honor.

POST VERDICT VOIR DIRE OF KILLIAN

Defendant respectfully submits the post verdict voir dire contained inquiry not requested by the parties BEFORE the selection of the jury. Ms. Killian's testimony was consistent during

both pretrial and post verdict voir dire.

Ms. Killian testified she worked at Fairfield for about two years around 2007 to 2009 (Tr. 38), that she worked on the medical floor and in the emergency department (Tr. 39-40), that she worked triage in the ED (Tr. 40-41), that she worked with Dr. Bibeau and Nurse Wadford (sic) but did not know them socially. Tr. 42-43. Ms. Killian also testified she worked with Nurse Gwynne. Tr. 45.

Q I see. Now, I had some questions before the trial started and let me go over these questions with you. One of the questions I asked was, is there any member of the jury panel who has ever had a close social or a personal relationship with either the plaintiffs, Philip and Jeanne Ethier -- by the way did you know Mr. Ethier from the hospital?
A He came after I left.
Q So he was not working (sic) there at the same time you were working?
A No, sir.
Q So then you didn't know him?
A No, sir.
Q Okay. Or the defendant, Guy R. Bibeau, if that's true please stand. Now, no one stood when I asked that question?
A No, sir, I didn't because actually when I said I worked at the hospital I thought -- I didn't really consider myself as knowing him personally. You said personally, right?
Q A personal knowledge of someone that would be that you had worked personally. Because later on, let me point out something to you, and may be you can tell me what the difference was. I asked another question, and it was a very long question. I asked about everybody who would possibly be a witness in the case.
A And I stood up.
Q Let me finish. And some of the names that were in there were, Jerilyn Wadford, Rhonda Gwynne and a fella by the name of Mike Williams. Now on that question you stood up and said you had a personnel [sic] relationship with Mike Williams.
A Uh-huh.
Q But you didn't indicate that you knew the other individuals?
A No, see the reason I know Mike is because I talk to him in the hospital and outside the hospital.
Q So you felt like if you knew him from work that was not

a personnel [sic] relationship?
A I didn't know because see, I didn't really -- like I said, you know, I just work with them and then after that that was it. We have no more contact.
Q Well, how you know Mr. Williams? Where did you know him from?
A Mike use to take care of my son when he was in the hospital and we got to know each other, and then --
Q Let me back. Your son had been in the hospital?
A He was sick. That was when he was two. He is eighteen now.
Q Oh, I understand. And Mr. Williams had been a nurse or someone who helped treat him?
A Yes, sir, he use to give him oxegne [sic] when he was there.
Q Right.
A And that's how I knew Mike and then I saw him outside the hospital. But the rest, I didn't know those ladies until I start working there. But see, I hardly work with those ladies because they work at other places.

(Tr. 45-47).

Ms. Killian testified that neither she nor her family received medical care from Fairfield Hospital, although her son had been treated by Mike Williams sixteen years earlier. Tr. 46-49. Her testimony demonstrates that she did not view her relationship with Dr. Bibeau and the nurses as a "close social or personal relationship" which was the precise question asked. Plaintiffs' counsel had the opportunity to request additional voir dire after learning that Ms. Killian worked at the Hospital, but they made no such request. A juror does not commit misconduct by failing to respond to a different or broader question than what was actually asked. Furthermore, the use of the phrasing "close social or personal relationship" interjects subjectivity and interpretation for the juror, and Ms. Killian cannot be criticized for the manner in which she construed that language. If Plaintiffs' counsel wanted to know whether Ms. Killian "knew" the parties or witnesses, that could have been asked, but it was not in this instance. The use of the phrasing "close social or personal relationship" reasonably suggests a relationship much different than simply knowing a person or working with him or her at one time. In short, Ms. Killian reasonably responded to the questions

asked during pretrial voir dire.

NO PREJUDICE HAS BEEN SHOWN, MUCH LESS BY CLEAR AND CONVINCING EVIDENCE

Plaintiffs must prove by clear and convincing evidence that prejudice actually occurred in this trial. The testimony of Sandra Carmichael, in and of itself, establishes only a possibility of prejudice within her own subjective thought process.

Ms. Carmichael asserts that prior to deliberations Ms. Killian stated "Doctor Bibeau is a good doctor" and that "I worked with him for three years and I just felt she kept saying it over and over and over once we started deliberating to sway other jurors to her side." Tr. 24-25. Carmichael stated further:

> Q Is there some reason you didn't report that to the Court during the trial?
> A I just didn't know what to do. When Mr. Cox's office called I was basically glad or relieved to let them know what had happened back there.
> Q So this is something that had been bothering you?
> A Yes, sir.
> Q Okay. And so you wanted to talk to someone about this?
> A Yes.
>
> (Tr. 24-25).

She continues:

> Q But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?
> A **I think it did a little.** [emphasis added]
> Q Can you tell me in what way?
> A Because when we got back there we was -- several of us was leaning towards in favor of the plaintiff and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then may be he didn't, you know, sign those papers. She knew him.
> Q Okay, so it did have some effect on your ultimate decision?

19 A Yeah. She stated several times that she knew him and
20 he was a good, reliable doctor.
(Tr. 26).

Carmichael continues:

14 Q Now, as to the information that you were given by
15 Theresa can you tell me how it affected your final decision.
16 Take a minute to think about it. You don't have to answer it
17 right away?
18 A Well, like I said she stated that she knew him. She
19 worked with him. He's a good doctor. A thorough doctor. So I
20 just felt like if she worked with him she knew him better then,
21 you know any of us did.
22 So, I felt like if she worked with him that long and she
23 thinks he's a good doctor then he must be a good doctor.
24 Q Now, you said when the deliberations began you were of
25 one opinion or had a opinion. What was your opinion when the
1 deliberations began when you first started about the case, the
2 issues that we were concerned with?
3 A That Doctor Bibeau was more at fault then Phil. I had
4 him at fault because he was suppose to go to your own physician
5 but I thought that Doctor Bibeau being a doctor was more at
6 fault.
7 Q And you changed that opinion before the final verdict?
8 A Yes, sir.
9 Q And what did you base that on your change?
10 A Theresa's knowledge of Doctor Bibeau's work.
(Tr. 27-28)

Significantly, Carmichael admits that at the beginning of deliberations she was of the opinion that Dr. Bibeau was more at fault than Mr. Ethier. Only during the deliberative process [which is shielded from inquiry by Rule 606(b)] did Carmichael change her opinion to join the unanimous decision of her eleven fellow jurors. Carmichael's alleged misconduct should be disregarded under Rule 606(b).

Defendant respectfully submits that any alleged misconduct, which was not observed by the other jurors, fails to establish prejudice even within the subjective mind of Ms. Carmichael herself. Simply because her personal initial impression at the beginning of deliberations [that Dr.

Bibeau was more at fault than Mr. Ethier] changed during the course of deliberations with the other jurors is not an indication of prejudice. Jurors are expected – in fact, jurors are charged with a duty[1] – to deliberate honestly and openly with fellow jurors in reaching an unanimous verdict.

The fact that Carmichael simply changed her mind after the verdict was rendered and after her jury service had ended does not support a finding of prejudice. Her perception of misconduct is in stark contrast to every other juror who testified that NO PREJUDICE OCCURRED during the trial or during the deliberations.

KAYLA STEWART

Ms. Stewart indicated that Killian remembered Jerilyn and that she was "a pretty good lady." Tr. 72. She testified:

1.	Q	Well, the comments that she made did those comments end
2		up somehow affecting your final decision in the case; those
3		comments made by Miss Killian?
4	A	No. No.
5	Q	You made up your own mind?
6	A	I made up my own mind by looking at the evidence that
7		was presented.
8	Q	All right. So you would deny that those comments would
9		have had any influence on your verdict?
10	A	Nom [sic], they did not have any influence on me.

(Tr. 73).

CONNIE PETE (Foreperson)

1	Q	So you don't recall anyone saying anything about the
2		truthfulness of the evidence they were hearing, about the
3		honesty of the people that were testifying; either about the
4		plaintiff or the defendant? Anybody discussing the litigants or
5		the issues involved in the case or the truthfulness of
6		witnesses?
7	A	No, sir.
8	Q	Do you recall any discussions about anyone in the jury

[1] The Court charged as follows: "All twelve of you must agree on the verdict. Your verdict should be based upon the evidence and the law that you have received in this case." See, Proposed Charge, p. 48.

room that would have been a violation of my instructions?
A No, sir.
(Tr. 79)

The foreperson testified that Killian "was a very talkative person. ... [I] Kind of blocked her out." Tr. 82. She testified that she didn't pay attention to Killian. Tr. 82. She denied that anything Killian said affected her verdict. Tr. 82.

Q So you didn't pay much attention to her?
A No, sir. No, sir.
Q That's quite all right. You have a right to do that. Would anything she have said somehow affected your verdict in the case then?
A No, sir.
(Tr. 82).

SHAWNA CASON

Q During that period of time did you hear again, I will ask specifically about juror Killian, Theresa Killian, did you hear her talking about the truthfulness or the honesty of the people who worked at the hospital based on her personnel knowledge having worked there?
A Yes.
Q Did she make that statement to you?
A Yes.
Q All right. Now ma'am, the statement that may have been made by Miss Killian, did they somehow affect your decision in the case?
A No.
Q Did you decide the case based upon the law and the evidence that was presented in the trial?
A Yes.
Q And you can say that without reservation that her -- whatever she said or whatever she brought did not affect your final decision?
A Yes.
(Tr. 93-94)

AUSTIN SMITH

Q ... Now during the deliberations did you hear, see or were you affected by any information that was brought from any source outside of the trial of the case?

14 A No, sir.
15 Q Did you hear anyone make any statement based on their
16 experiences or their knowledge of other people that they
17 gathered from outside of the trial of the case?
18 A Not that I can recall.
19 Q So I am going on ask the question although I think I
20 already may know the answer. Would it be your position that
21 your verdict, the verdict that you reached was not affected by
22 any outside information or outside sources?
23 A No, sir.
24 Q And were you affected by statements that were made
25 prior to deliberations that may have come up about anything that
1 had to do with the case? Did those statements made by other
2 jurors, if there were any, would they have affected your
3 verdict?
4 A No, sir.
(Tr. 103-104)

TARA BROWN

18 Q ... Now are you aware of any information that
19 was brought by any juror from outside of the courtroom,
20 information they gathered from some other source that was used
21 by them in those deliberations?
22 A No.
23 Q Did you at any time hear a juror state that because she
24 had worked with those people in the past that they were very
25 believable? In other words brought information from her job or
1 work in to the jury room during those deliberations?
2 A No, sir.
3 Q So you don't recall any discussions about those kinds
4 of things?
5 A I don't recall.
6 Q Okay. Now anything that would have been said by other
7 jurors in the jury room before deliberations took place, do you
8 know of any information that was shared by other jurors before
9 deliberations took place that somehow effected your decision in
10 this case?
11 A No, sir.
12 Q Did you decide this case based upon the law and the
13 evidence that was presented during the trial?
14 A Yes.
(Tr. 118-119)

LINDA ALBOWICZ

Q ... So I am going to ask you do you recall anything that was said or information that was brought to the jury during deliberations that you felt came from outside of the trial or some information that came from some source other then the trial that was introduced into the deliberations?
A No, I don't think so.
Q So you are not aware that and don't feel that that occurred?
A Yes.
Q Is that right or wrong?
A That is, correct. I am not aware of that and don't feel that that occurred.
Q Okay. All right. Just one second. Now you did indicate that Miss Killian may have mentioned to the jury that she had worked at the hospital. That sort of thing. I am going to ask you the statements that she made -- whatever they were or to what extent did those statements in any way influence your ultimate decision in the case?
A No.
Q Do you feel that you decided the case based upon the law and the evidence presented during the trial?
A Yes, I do.

(Tr. 131-132)

MISTY BEAM

Q Now, as to the ultimate decision in this case, apparently you did hear Miss Killian talk about especially the red-headed lady or perhaps about Rhonda you heard her say something about her, the information that you got from those comments, the things that she said, do you feel that somehow influenced or somehow caused you to change your mind or did it affect your decision in the case?
A No.
Q Did you decide the case on your own from the evidence that was presented during the trial?
A Yes.

(Tr. 141-142).

CYNTHIA BOTTS

Q Now during the deliberations of the jury, do you recall anything being said by any of the jurors that you believe would have been information that they would have gathered either

through their employment at some other location or by information they gathered from some other source outside of the courtroom?

A No, sir.

Q So you don't feel that any information was brought from outside of the trial into the deliberations?

A No, sir.

Q All right. And specifically was there any juror who made any statements about the fact that she may have worked with either the doctor or the nurses, that you should listen to her or listen to her opinions concerning their truthfulness or there skill?

A No, sir.

Q Did you hear that come up during deliberations at all?

A No.

(Tr. 151-152)

KATHY RABB

Q During those discussions, those deliberations, do you feel that any juror brought any information into those discussions from a source outside of the jury room?

A No, sir.

Q Do you feel that any of the jurors during those deliberations and in particular I am probably talking about Miss Killian, that she talked about her experience as having worked with the doctors or nurses involved. That her experience in that regard should be considered by the jury in reaching its verdict in this matter? In other words did she vouch for their truthfulness or there skill during deliberations based on information she had gathered at her job?

A Not during deliberation.

Q Not during deliberations?

A No, sir.

Q Now, the the information that you did hear Miss Killian talk about, at some point during the trial. Can you tell me what affect that had on you and your decision making process? The information that you would have gotten before deliberations started, whatever she said, did it affect your ultimate decision making process in the case?

A No, sir.

Q Were you able to make up your own mind based on the law and the evidence presented during the trial?

A Yes, sir.

(Tr. 161-162).

SHIKIERRA HARRISON

Q All right, and specifically I want to ask about Miss Killian because she had worked at the hospital. During the deliberations of the jury do you recall her using her knowledge as a co-worker somehow to influence the jury or vouch for the credibility or the skill of the doctors and/or nurses during deliberations?
A Not that I recall.
Q Now given the things that you do remember being said, and particularly by Miss Killian in this case --
A Yes.
Q -- Do you feel that the information that she gave or the statements that she made somehow had an influence on you and the decision making process that you had in this case?
A No.
Q In other words did her statements somehow influence your final decision you made?
A No.
Q So you did not use that information upon which to base your decision you made?
Q No.

(Tr. 171-172).

SANDRA MITCHELL

Q ... So I am going to ask you now during the trial of the case did you observe anything or see anything or hear anything that you felt would have been somehow would have run afoul or gone against my instructions during the trial?
A No, sir.

(Tr. 176)

CONCLUSION

Ms. Carmichael only changed her opinion after the deliberations began, and those deliberations are shielded from inquiry by Rule 606(b). Rather than showing prejudice, Ms. Carmichael's testimony indicates that she was distrustful of Ms. Killian because she knew Dr. Bibeau and did not believe that she should have been on the jury. She stated: "I just felt that one of the jurors shouldn't have been in there because she knew the defendant." Tr. 20, l. 6-8. Ms.

Carmichael admittedly was NOT prejudiced by Ms. Killian's pre-deliberation statements. She began deliberations with the opinion that Dr. Bibeau was more at fault than Ethier. Rule 606(b) excludes inquiry into the deliberation process which led to an unanimous verdict.

Plaintiffs must establish prejudice by clear and convincing evidence. Ms. Carmichael's testimony does not even establish by clear and convincing evidence that her own opinion was prejudiced by Ms. Killian's alleged comments. ("I think it did a little." Tr. 26). "A little," Defendant submits, does not rise to clear and convincing evidence. Additionally, Ms. Carmichael's post verdict testimony should be tempered by her failure to raise these concerns during the course of the trial.

Every other juror confirms that no prejudice occurred. Every other juror affirmed that their verdict was based upon the evidence presented at trial. Every other juror denied that extrinsic evidence played any role in their unanimous verdict. Plaintiffs motion for a new trial based upon juror misconduct should be denied.

Respectfully submitted,

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June 29, 2015

STATE OF SOUTH CAROLINA

----------x

PHILIP ETHIER AND JEANNE ETHIER,

Plaintiff,

Case No.

-against- 2013-cp-20-12

FAIRFIELD MEMORIAL HOSPITAL, GUY R. BIBEAU AND TUOMEY MEDICAL PROFESSIONALS,

Defendants.

----------x

May 12, 2015

Winnsboro, S.C.

B E F O R E:

HONORABLE ROGER L. COUCH

A P P E A R A N C E S:

DAVID PROFFITT, Esquire

Attorney for the Plaintiff

DAVID HOLLAR

Attorney for the Defendant

Aileen Butler

Official Court Reporter

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
SANDRA CARMICHAEL				
The Court	17			
TERESSA KILLIAN				
The Court	37			
KAYLA STEWART				
The Court	61			
CONNIE PETE				
The Court	74			
SHAWNA CASON				
The Court	84			
AUSTIN SMITH				
The Court	96			
TARA BROWN				
The Court	110			
LINDA ALBOWICZ				
The Court	123			
MISTY BEAM				
The Court	134			
CYNTHIA BOTTS				
The Court	144			
KATHY RABB				
The Court	153			

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
SHIKIERRA HARRISON				
The Court	164			
SANDRA MITCHELL				
The Court	173			
WALLACE BOULWARE				
The Court	180			

E X H I B I T S

NO.	DESCRIPTION	I.D.	EVD.
	NO EXHIBITS MARKED		

THE COURT: Good morning. How is everyone this morning?

MR. PROFFITT: Morning.

MR. HOLLAR: Good morning.

THE COURT: We are on the record of the case of Philip and Jeanne Ethier versus Guy Bibeau.

I have received information concerning activities by the jury from the plaintiff accompanied by a motion for a new trial. Is that correct?

MR. PROFFITT: That's correct, Your Honor.

THE COURT: There is also other matters that are pending that I'm aware of, but this is the one that I'm here on right now and we will discuss the others later.

As part of this motion the Court has received an affidavit that was signed by Sandra R. Carmichael, a member of the jury in this case. The Court has reviewed the affidavit and based on the affidavit has decided to conduct a hearing. It's my understanding that the Court has the right to consider affidavits in such a situation if the Court finds those affidavits to be credible. My intention is to question Miss Carmichael first concerning the affidavit and what is contained in it, and then the Court would then make a determination as to whether or not I find that

affidavit to be credible. If I do find that there is sufficient information to require additional inquiry, I would proceed with an inquiry concerning the matters raised in the affidavit.

The issues that effect the jury process in this case are, one, a possible juror concealment issue during the Court's questioning of the jury prior to the jury selection; the voir dire process, and that would be separate from the other issues. The other issues that have been raised concerning the juror's conduct is jury misconduct concerning possible premature deliberations that occurred and then possible juror misconduct that occurred during the deliberations.

It is my intention to ask questions that would touch on all of these issues with each individual juror that is present. I'm informed that they have all appeared and are available for my questioning.

Now, as to the process that I am following, plaintiff have any additional request of the Court?

MR. PROFFITT: No, sir Your Honor.

THE COURT: And does the defense have any additional request of the Court?

MR. HOLLAR: Judge, David Holler on behalf of Doctor Bibeau.

THE COURT: Yes, sir.

MR. HOLLAR: Since we left there has been some level of contact between plaintiff's counsel and perhaps others, with the jurors. We had a brief status conference before you in Spartanburg --

THE COURT: Yes, sir.

MR. HOLLAR: -- mention it briefly, but obviously there is no record. We are very concerned as we move into this process to the extent that Doctor Bibeau's position in this case could be compromised. Again, we understand our Supreme Court has given rules for lawyers contacting jurors. Those rules are in place and they are what they are. My concern though is we would like to document either by inquiry from the Court, deposition or cross examination or some type of process here what and how the contact was initiated with these jurors. I do believe there is a bright line and we have no idea what happened.

THE COURT: Well, my intention is to conduct by inquiry as a voir dire process, which is what the cases speak to. I certainly will be asking them concerning any contact they may have had with parties and/or attorneys post trial. So I will be touching on those things. But at this point in time I take the position that this inquiry is the Court's inquiry into

the matter. Now, when I finish with any particular juror I will give you an opportunity as I would when I voir dire the jury to suggest additional questions. I will be glad to hear from you at that time. Of course I don't have a script written out because I don't know what the answers to my questions are going to be, so I don't know where we are going to go. But I will give an opportunity to suggest additional questions with each person that I interview.

MR. HOLLAR: And judge, obviously understanding the contemporaneous objections required we have filed written motions that State our position that we don't believe the affidavit by Miss Carmichael rises to the level of extrinsic misconduct.

THE COURT: I understand that and that's the reason why I intend to question Miss Carmichael first so I can inquire in to what she has said and then make a determination as to where we go from there.

MR. HOLLAR: Could we at least have -- there was discussion -- as officers of the Court -- what contact was initiated. In other words, I understand you are going to ask the jurors what information and what contact came towards them, but I think we also would like an opportunity to document what the external contact at the jurors was. In other words --

THE COURT: You mean after the trial?

MR. HOLLAR: After the trial, yes, sir.

THE COURT: Okay.

MR. HOLLAR: In other words, what kind of information was attempted to be disseminated to the jurors. Even if there wasn't a conversation, what messages were left. What social media messages were sent towards the jurors. All of that I think is critical in terms of Doctor Bebeau protecting his right to have --

THE COURT: Well, my inquiry has to do with the issues that are before the Court and those are the issues that I outlined; that is, possible juror concealment during my questioning, whether or not there was a premature deliberation and then any misconduct that may have occurred during deliberation.

MR. HOLLAR: Absolutely.

THE COURT: And there is different levels of inquiry that I can go in to, but inquiry concerning misconduct that may have occurred during deliberation is very limited as to what I can get in to because we encourage free discussion during deliberations. So I don't intend to spend a great deal of time on that particular issue, but the others are some that I think that I do need to ask you about. And again, I will

give you a chance to suggest questions once I finish.

MR. HOLLAR: Thank you, Judge.

THE COURT: All right. Now I intend to bring the jury in as a group to give them some idea of what this is all about. I don't know if they know what this is all about at this point in time or not, and also to instruct them that I will not tolerate any discussions concerning the case among themselves during this process. What I have done to insure that that doesn't occur I have directed that a bailiff be seat in the jury room with them this morning. That bailiff was instructed to not allow them to discuss anything about this case this morning. Once we finish the process I indicated to him that I will be questioning him concerning what has gone on in the jury room today. Now during the process that bailiff will remain in the jury room. My intention is that once I completed questioning each juror to release them from further responsibility. I rather get them out of the courthouse rather then go back into the jury room and discuss anything with fellow jurors. Once I release them we will not be calling them back. So again, if you want to ask questions ask questions when they are hear. My intention is not allow any repeat of the possible problems we may have had during the trial.

And this is a different situation. Before you were not allowed to put bailiffs in jury rooms because that might effect the deliberations in some fashion, so we couldn't go through this process now. We are not in deliberations now. It's a different situation. So I instructed the bailiff to remain in the jury room and not allow any discussion concerning the case during this process. So at this time I am going to ask you to bring the entire jury in please.

(Jury enters the courtroom.)

THE COURT: The record will reflect that the jury has returned to the courtroom. I want to thank you for your attendance this morning. I realize that you did get a subpoena from the Court. The reason for that subpoena was that there have been certain issues that have come up. Certain matters that have been brought to the Courts attention that affects the procedure and the manner in which the trial that was conducted in the case of Ethier versus Bibeau. As a result of the information that has been supplied to the Court it's necessary that I conduct a hearing concerning matters that may or may not have occurred during the trial of this case. I can assure you we are going to handle this as quickly as possible so that we will take up as little of your time as

possible. However we are going to thoroughly inquire into the matters that have been raised concerning the trial of the case.

Now, how we are going to do this is I am going to be calling you in to the courtroom individually. I will be asking you some questions that are of importance to the Court, and then once we completed those questions I will be releasing you from any further contact with the Court at this time.

Now, during the process it's extremely important that you not discuss anything about the case even among yourselves during this matter. Now I am going to have have a bailiff seated in the jury room with you during this process to enforce that Order. So please don't discuss anything about this case while you are waiting to come in to the courtroom and of course please follow any directions that the bailiff gives you concerning your behavior in that regard. Now, I instructed the bailiff on that this morning. He's already been in the jury room with you this morning so I trust that we have not had any difficulty in that regard. So again I will be calling you individually to come back and speak with me. And let me -- as we go through this, let me tell you that as I ask questions about this matter there are no right

answers to my questions and there are no wrong answers to my questions. There are only truthful answers to my questions. So I'm asking for you to give you the truth concerning the matters that I am inquiring about and to answer the questions fully. Now at this point in time I will ask you to step back into the jury room and we will be calling you individually to come back and speak with the Court. And again, I want to thank you for your prompt appearance this morning. We will try to make this move along as quickly as possible. If you would please take the jury back to the jury room.

(Whereupon the jury leaves the courtroom.)

THE COURT: I will I ask you to bring Sandra Carmichael back.

MR. HOLLAR: Judge, may I ask you a question?

THE COURT: Yes.

MR. HOLLAR: And judge, I'm certainly understanding what you are doing. I'm not trying to interfere with the process. I've never done this before.

THE COURT: Me either.

MR. HOLLAR: We have certain objections as to the types of questions that we have done in writing. Is it fair to say if I don't make a contemporaneous objection at this point in time that's preserved?

THE COURT: Well, what I'll do is after each -- if you want to, after each juror I will give you an opportunity to raise objections or ask me to ask additional questions.

You don't know what I am going to ask because I don't know what I am going to ask at this point in time.

MR. HOLLAR: And judge quite frankly, that's what scares me.

THE COURT: I am going to try to inquire into the issues that according to my research I need to inquire in to.

MR. HOLLAR: So, I'm clear it is not necessary for me to make contemporaneous objection, but I will be allowed to just --

THE COURT: Well, anybody object to my opening comments to the jury?

MR. HOLLAR: No, sir.

THE COURT: Plaintiff?

MR. PROFFITT: No, sir.

THE COURT: As far as I know, as far as the Supreme Court views that, I will tell you that I will give you an opportunity once I completed questioning to raise objections.

MR. HOLLAR: Can we have an agreement that all

objections as to the type and nature and form of the questions that you will ask?

THE COURT: Any problem with that Mr. Proffitt?

MR. PROFFITT: I will agree that he has filed a document raising certain objections. I don't have an objection to him saying that he's made the written objections and those are in the record.

MR. HOLLAR: I guess the agreement would be that the contemporaneous objections are not required while you are questioning the jurors.

THE COURT: Any problem with that Mr. Proffitt? That objections can be raised at the end of the question?

MR. PROFFITT: To the extent that he has raised objections to the particular questions in writing I don't think he has to repeat those at this time.

THE COURT: Well, I'm not going to be reading your questions, so I don't know that -- I'm not -- I don't know. I think your objections were to the plaintiff's questions.

MR. HOLLAR: Yes, sir.

THE COURT: You don't know what my questions are going to be because I didn't put them in writing.

MR. HOLLAR: This is true.

THE COURT: So, I don't know that you raised any

objections at this point in time to the questions that I'm about to ask.

MR. PROFFITT: To that extent he would need to make a contemporaneous objection to some of the questions that has not been in the record already.

THE COURT: So he will not reach that agreement is what I think I just heard. He wants you to object as I question.

MR. HOLLAR: Can we talk about a method in which I can raise -- Judge, whatever you would like me to do.

THE COURT: Just stand up and object. I think that's what we are going to have to do. Is that right Mr. Proffitt?

MR. PROFFITT: That's fine with me.

THE COURT: That's fine with me too.

MR. HOLLAR: And judge, do I need to make a specific objection? Again, I am not trying to interfere with your inquiry.

THE COURT: Well, I think you are going have to. This thing may take all week I guess. I don't know what we are going to do here Mr. Proffitt, what do you want us to do?

MR. PROFFITT: Just to be clear, Your Honor, I wasn't saying that he needs to pop up every time you asked a question. What I was saying at the end of

that juror's questioning, if he has got any concerns or problems with it he should stand up and say I object to that.

THE COURT: That's what I proposed, is that at the close of questioning that we preserve your objections until I finish my questioning, then you can raise your objections and if I feel I need to go back and correct something or ask additional questions I'd be given an opportunity to do so.

This is my Court. I do it if I want too.

MR. PROFFITT: We absolutely agree with that. I misunderstood.

MR. HOLLAR: Thank you.

THE COURT: Miss Carmicheal, please.

(Miss Carmicheal enters the courtroom.)

THE COURT: Ma'am, if you would please raise your right hand.

SANDRA R. CARMICHEAL, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right. Ma'am, you are name is Sandra R. Carmicheal, am I correct?

A Yes, sir.

Q And Miss Carmichael, you were a member of the jury in the case of Ethier versus Bibeau, is that correct?

A Yes, sir.

Q Now, after the trial of the case I would I have instructed you you had the right to discuss the case with anyone. Do you remember me telling you that?

A After what?

Q When the trial ended I would have instructed the jury. Do you recall me instructing the jury that you at that time had the right to discuss the case with anyone if you choose to do that?

A Yes.

Q You also had the right not to discuss the case with anyone.

A Yes, sir.

Do you recall me giving you that instruction?

A Yes, sir.

Q All right. Now after the trial as many is over have you discussed this case with anyone?

A My husband.

Q Anyone else?

A No, sir.

Q So you have not talked about this case with anyone other then your husband?

A Yeah, Mr. -- the two attorneys. I don't know their

names.

Q That gentlemen, Mr. Proffitt. So you have discussed it with him?

A Yes.

Q Can you tell me how that discussion came about?

A I had a phone call on my machine. I guess the phone call was basically saying he wanted feed back about how the trial went and what they could have did differently and I had --

Q Did that message ask you to give them a phone call back?

A Give them a phone call back, yes.

Q And they were asking for feed back concerning the trial?

A Yes.

Q All right. Did you return that call?

A Yes, sir.

Q Do you recall who you talked to when you returned that call?

A Mr. Proffitt.

MR. FOX: I think it was me, Your Honor.

Q Mr. Cox perhaps.

A Probably.

Q Did you talk to a secretary or did you talk to one of the lawyers?

A I got passed from the secretary to the lawyer.

Q Okay. Now, during that conversation can you tell me what you told Mr. Cox about?

A I told him that I was glad he called because my conscious was bothering me because I felt once we got back in the jury room things wasn't fair, you know. I just felt that one of the jurors shouldn't have been in there because she knew the defendant and she stated that on several occasions that she worked for him for three years.

Q Now, you say one of the jurors. Do you remember which juror we are talking about?

A Teresa. I don't know her last name.

Q Teresa is her name?

A Yes, sir.

Q All right. Now, you say that she began to talk as if she knew the defendant, Mr. Bibeau, Doctor Bibeau?

A Yes, sir.

Q Now, can you tell me when she began to make those comments? At what point in the trial?

A Almost immediately, but she talked more about it once the witnesses started coming in. Jeri and all of them when they were sitting there. Once we went back in there she started talking more and more about it.

Q Well, if you recall the first part of the trial the plaintiff would have been putting up witnesses. Doctor Bibeau would not have testified at that point in time. We went several

days with the plaintiff putting up witnesses. Did she make comments about the case while the plaintiff was putting up witnesses?

A No.

Q So, the comments occurred after the defense started testifying?

A Yes, once the witnesses coming in over there.

Q All right. Now, can you tell me what types of things she said? What did she say specifically that you can remember?

A Okay. What I remember was the record keeping,when Doctor Bibeau said he did not sign off on the record and she stated that if he said he didn't do it he didn't do it because he was reliable. He is dependable. You know, basically that's what she said about nurse Jeri too. If they said they didn't do it -- if she said she did it she did it.

Q So her comments were more toward their honesty?

A Yes, their dependability and their honesty.

Q I see. Did she say how she knew these things?

A Because she worked with him. She stated she worked with him.

Q All right. So she indicated that she had worked directly with Doctor Bibeau?

A Yes, sir.

Q At some point in time?

A Yes, sir.

Q Now these discussions all took place before you began deliberations; is that right?

A Yes.

Q Now as she made these comments did other jurors discuss these matters with her?

A A couple of them. I don't know. I don't remember their names. I don't remember names.

Q Well, did they talk this over with her at that time or did she just make the comment and nobody said anything else about it?

A One of the jurors said well, if you knew Doctor Bibeau you should not be on the jury. One juror did state that to her and she stated that --

Q And her the response was?

A Her response was I told them that I knew him once we were being called out here.

Q Right.

A She stated that she did say that. She stated that she knew Doctor Bibeau.

Q Did she indicate that she had worked with him at the hospital?

A Yes, sir.

Q She said that at that time as well?

A Yes, sir.

Q All right. Now, do you know about how many times this

occurred?

A Oh, several times. It was almost like once we started -- once the defendant started calling witnesses and we go back there on a short break or whatever she was always bringing up Doctor Bibeau. He's a good doctor. He's a dependable doctor. I know because I worked with him.

Q In your affidavit you indicated that she had discussions with another juror that you identified in your affidavit as Kayla.

A Yes.

Q Is that one of the people that discussed these statements with her?

A Um --

Q I'll read to you what you said. You said Teresa repeatedly made these statement about Doctor 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 also discuss them.

So, do you recall Kayla is that someone you remember specifically discussing this with Theresa?

A Yes, sir.

Q What was the nature those discussions? What were they saying?

A Basically, like I said Doctor Bibeau is a good doctor and Kayla was like how do you know him. I worked with him for

three years and I just felt like she kept on saying it over and over once we started deliberating to sway other jurors to her side Doctor Bibeau as far as his reputation or whatever, you know.

Q All right. Now during the trial, you may recall that every time you left the courtroom I would instruct the jury not to discuss anything about the case. Do you remember that?

A Yes, sir.

Q I may have said that a lot during the trial. Do you remember that?

A Yes.

Q And then when you came back in to the courtroom I always asked the jury whether you have been able to follow my instructions during your absence from the Court. Do you remember that?

A Yes, sir.

Q Now, during the trial no juror reported to the Court that discussions were taking place about the case in the jury room, including yourself?

A Yes, sir.

Q Is there some reason you didn't report that to the Court during the trial?

A I just didn't know what to do. When Mr. Cox's office called I was basically glad or relieved to let them know what had happened back there.

Q So this is something that had been bothering you?
A Yes, sir.
Q Okay. And so you wanted to talk to someone about this?
A Yes.
Q Did you in any way feel pressured by the plaintiffs' attorneys questions to you about this matter?
A No, sir.
Q Did you freely and voluntarily sign the affidavit that is in front of me?
A Yes, sir.
Q And did you review it before you signed it?
A Yes, sir.
Q Is the information that's contained in that affidavit is that the truth?
A Yes, sir.
Q Did anyone tell you what to put in to this affidavit?
A No, sir.
Q So the statements that are contained in the affidavit are your own statements?
A Yes, sir.
Q Now, as to the deliberations that took place in the case. Once the case had been turned over to the jury -- I am not asking you to tell me specifically what went on in those deliberations because generally courts are not allowed to inquire into what jurors talk about during deliberations. Do

you understand what I am saying?

A Yes.

Q But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?

A I think it did a little.

Q Can you tell me in what way?

A Because when we got back there we was -- several of us was leaning towards in favor of the plaintiff and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then may be he didn't, you know, sign those papers. She knew him.

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

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

Q Ma'am, I am going to show you a copy of your affidavit and I want you to take a few minutes. It's several pages. Starts right here.

(Document handed to the witness.)

Q Look over it and when you are finished I want to ask you a couple more questions.

A Okay.

Q All right. Now Miss Carmichael, is that the first time you read over that affidavit since you signed it?

A Yes.

Q All right. Now again, I asked you earlier if what was in there is true. You had a chance to read it now. Is the information that is contained in this affidavit is it still the truth today?

A Yes, sir.

Q Is is there anything about the affidavit that you would like to change or amend at this point in time?

A No, sir.

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

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

So, I felt like if she worked with him that long and she thinks he's a good doctor then he must be a good doctor.

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

issues that we were concerned with?

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

Q And you changed that opinion before the final verdict?

A Yes, sir.

Q And what did you base that on your change?

A Theresa's knowledge of Doctor Bibeau's work.

Q All right, ma'am, at this point in time I am going to ask the bailiff to take you out and let you have a seat in the lobby out here. There maybe some other questions. I am going to talk with the attorneys and we may call you back so if you would just have a seat and wait for just a second. Just take her right out here.

(Whereupon, the witness leaves the courtroom.)

THE COURT: Let's start this way. Any objections to my questioning from the plaintiff?

MR. PROFFITT: None, Your Honor.

THE COURT: All right. Any additional questions that the plaintiff is requesting.

MR. PROFFITT: No, Your Honor.

THE COURT: Defense objections?

MR. HOLLAR: Judge, I am again concerned what Miss Carmichael was told before she began to give

information. In other words, what was the outcome of the case. What's your understanding of the outcome of the case. What's your understanding -- there was information that came to her before she began to have questions, and that's what I think is missing.

THE COURT: All right. I can ask her about that.

MR. HOLLAR: Judge, I also believe she was given two affidavits. I have a copy of the second affidavit. What was her understanding of why.

Judge, I do appreciate that you attempted to cover it, I'm still confused as to why she did not respond in literally every instance when they returned to the courtroom. And as I told you, you were more thorough in your questions to this jury that I ever heard in 24 years, and how she would not understand that ---

THE COURT: This is the first time I had this happened but it does happen apparently.

MR. HOLLAR: And I know you asked judge. I don't know how to ask it much differently, but I do think that you and we are entitled to an answer to that question that is a little bit more satisfying then I didn't understand.

MR. PROFFITT: If I can address that final point.

THE COURT: Yes, sir.

MR. PROFFITT: I think the Court went above and

beyond asking the jury repeatedly has anything gone on. Your question as I recall it, your question during trial on that issue were, you know, have you violated the Court's instructions? Have you done anything wrong? And I don't recall where the Court ever asked has anybody else? Are you aware of anyone else violated my instruction and I think that may have been --

THE COURT: I appreciate your comment. There apparently are a couple of people who allegedly at this point in time did participate in those discussions. At less one, Kayla, who was identified in the affidavit. So I will be asking more pointed questions of those individuals. I understand what you are saying.

MR. PROFFITT: All right.

THE COURT: And I would have hoped though that they have reported other people that were doing it, but they didn't.

MR. PROFFITT: Yeah.

THE COURT: But the people who were engaged in it should have and the ones who knew that they weren't properly answering the Court's questions probably should have reported that in some fashion.

MR. PROFFITT: Yeah, I think Miss Carmicheal among

others may have sat there and struggled with that.

THE COURT: All right. Mr. Hollar, my understanding is that you would like me to inquire more concerning what understanding she had of the outcome of the trial prior to signing the affidavit.

MR. HOLLAR: Yes. What information was given to her.

THE COURT: Yes.

MR. HOLLAR: What was told to her about the net result.

THE COURT: Right. And then questions concerning the one affidavit that was not signed.

MR. HOLLAR: Well, there were two affidavits that were signed.

THE COURT: I see.

MR. HOLLAR: That we were given after our status conference in Spartanburg.

THE COURT: Right.

MR. HOLLAR: And judge, simply for the record I know we filed this in writing. Obviously we believe much of the information and again how to go about this without violating 606 (b) is I guess the issue. But we certainly do object because --

THE COURT: Well, 606 (b) does provide for an inquiry concerning juror misconduct which is what I am

trying to do at this point in time.

MR. HOLLAR: Right.

THE COURT: And I am trying to stay away from there specific discussions during deliberations.

MR. HOLLAR: I understand.

THE COURT: But to the extent I have to determine whether or not what was said outside of the deliberations affected those deliberations I am not sure how you ask that question without asking a little bit about the deliberations.

MR. HOLLAR: Yes, sir. I am trying to establish for the record.

THE COURT: I understand.

MR. HOLLAR: Also judge, just for the record much of the information that was asked about and solicited is information that was readily available to the litigants prior to the jury being qualified.

THE COURT: Well, we will get in to that a little more because I do intend to bring Theresa in next and we will talk to her about her responses to voir dire.

MR. HOLLAR: Thank you, judge.

THE COURT: All right, bring Miss Carmichael back in.

(WHEREUPON, the witness was brought back in to the the jury room.

THE COURT: Have a seat, please. I just have a couple of other matters I want to talk to you about.

EXAMINATION BY

THE COURT CONT'D:

Q The first thing I want to point out to you, you are still under oath at this time. Do you understand that?

A Yes, sir.

Q Okay. Now ma'am, when you got the call from the attorneys' office and then you called back to the attorneys' office you indicated that the first inquiry was concerning what you thought about the trial. Was there anything that they could have done differently that sort of thing, is that right?

A Yes, sir.

Q All right. Now, how did it come up that there was a concern about some things that went on or some possible juror misconduct. How did that come up in the discussion?

A I brought it up.

Q You brought that up?

A Yes.

Q And a tell me how did that? What did you say?

A I told the lawyer when I spoke to him.

Q Mr. Cox I think is who was identified as perhaps who you talked to?

A Okay. I told him I'm glad you called. I said because there is some things that happened that has been bothering me

and I didn't think it was fair or right and I just told him what I thought, you know.

Q And so you related him to what? What did you say to him?

A About Theresa. What she was saying back there about knowing Doctor Bibeau, I thought she shouldn't have been on the jury panel.

Q Okay. Now ma'am, before you signed the affidavit were you provided any information as to what the result of the trial actually was?

A I'm not understanding.

Q Other then the verdict you rendered. Did you find out what if any money the plaintiff may have recovered or what the final result would have been of your verdict? Did you get any information from the plaintiff's attorney concerning those matters?

A He told me, but I'm not sure if it's before or after I signed it.

Q You don't know if it was before or after you signed the affidavit? You don't remember?

A No.

Q Did that information in any way affect what you put in your affidavit?

A No.

Q So what you put in your affidavit is what you had

related to them to begin with or not?

A Yes, sir.

Q All right. Now there were two affidavits actually. Do you recall that?

A Yes.

Q Can you tell me why that was?

A I don't remember exactly what Mr. Cox stated why the reason was. I don't remember.

Q Okay. Did you find that to be unusual in any way?

A No.

Q Did that bother you in any fashion?

A No.

Q Or concern you?

A No.

Q All right. But you can't recall exactly why you were told you needed to sign another affidavit?

A No.

THE COURT: All right. Anything further from the plaintiff before I release this witness?

MR. PROFFITT: No, Your Honor.

THE COURT: Anything further from the defense before I release this witness?

MR. HOLLAR: Judge, one other topic you said you were going to cover about --

THE COURT: Remind me.

MR. HOLLAR: Your instruction at the beginning.

THE COURT: Oh, yes.

Q Ma'am, again I want to get back to the fact that on several occasions, many occasions during the trial I asked if anyone was unable to comply with my instructions and I didn't get a response and you indicated that you didn't -- what did tell me about that?

A I said I didn't do because I didn't know what to do about it.

Q So you didn't understand?

A I understood.

Q But you didn't know what to do about it?

A I didn't want to be singled out to be the one that stood up and said, yeah, well, this person is talking go back there.

Q So were you afraid to get up?

A Yeah, basically.

Q Okay.

A And that's the reason why it bothered me because I didn't speak up at the time.

Q All right. You felt like you probably should have once you thought about it later on, is that correct a statement?

A Yes, sir.

Q Okay. All right.

THE COURT: Anything further, defense?

MR. HOLLAR: No, sir.

THE COURT: Ma'am, at this time I want to thank you very much for your attendance today. I don't anticipate that we will need to discuss this with you further at this point in time. That could change so we will be in touch if we feel like we need to. I will allow you to go at this point in time. You don't have to go back to the jury room. You are free to go at this time.

THE JUROR: Thank you.

THE COURT: Thank you very much.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: All right I want you to bring out Theresa Killian

THE COURT: Have a seat please and if you would please raise your right hand.

THERESA KILLIAN, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right. Miss Killian some matters that I want to go over with you this morning concerning the trial of the case. As I told you about earlier, the first thing that I do want to talk to you about, do you recall during the trial before the jury was

selected some questions that you were asked by the Court, do you remember sitting out in the galley while we were asking questions before the trial started?

A Yes, sir, I do.

Q All right. During that questioning some matters came up and I want to go over those with you at this time. First of all -- let me ask you preliminary questions to that.

You did indicate during that questioning that you had worked at some point in time at Fairfield Memorial Hospital?

A Yes, sir.

Q Do you remember that?

A Yes, sir.

Q All right. And you in fact did do that is my understanding?

A Yes, sir.

Q Can you tell me what years you worked there?

A Started about 2007, 2008, 2009.

Q Well, do you remember how many years you worked there?

A About a year. Close to two years there.

Q Almost two years?

A Yes, sir.

Q All right. And do you recall when you started? What year you would have started?

A I would have started in -- I think it was either -- I can remember the month. The end of May, first of June.

Q So it would have about this time of year?
A Yes, sir.
Q When you started working there?
A Yes, sir.
Q And since you worked almost two years you would have worked through the next May or June and then you would have left in what month?
A I left like in the fall.
Q In the fall. So you may have left actually before the next year started?
A Uh-huh.
Q Now, when you first started working there, what were you doing?
A I was working on Med serves on the floor, and I also worked in ER.
Q Now, what type of training do you have?
A I am certified nurse assistant and they was also training to be a secretary.
Q I see. Now, I don't know much about the Fairfield Hospital how it is organized. Was there a particular unit that you were working in like the -- the --you know, like OBGYN?
A They don't have that.
Q They don't divide the hospital up in to wards or things of that nature?
A You got beds basically on each floor and then you got

the ER.

Q Okay.

A And that's it.

Q All right. Now, so you were working not in the ER?

A I worked there some times.

Q So occasionally you did work in the ER?

A Yes, sir.

Q And what did you do when you worked in the emergency room?

A I was like -- sometimes I did triage or I did put labs in the computer for the doctor. I worked in the ER and did like triage and then the nurse would come back behind when I was in triage and checked. Talked to the patient and read my paper work about what I was doing in triage. I took the weight, the wrote down the age, the blood pressure and all that when I worked in the ER.

Q Okay. So you would have been one of the first people that a potential patient would have seen then?

A I was in there, yes, sir, with the nurse some times.

Q Working in triage?

A Yes.

Q All right. Now, during the period -- well, how often did you work in the ER during that year and a half or so that you were at the hospital.

A I worked off an on. Whenever they need me in ER I

worked there. See if a nurse call out they would call me in to help out.

Q All right. So, would you work there for like a week at the time sometimes? I am trying to get some idea. Would they assign you there a week?

A Yes, sometimes work there for like -- you work off an on in the ER. Some times you work on the floor and some times you work in the ER. So like rotation.

Q All right, so when you say you're working on the floor that means you would be back in the hospital somewhere where people had been admitted and are being treated?

A Yes, sir.

Q And you say you didn't work in any particular ward at that time you just worked on the floor?

A Yes, sir.

Q All right. How many beds are there for people to stay Fairfield Memorial?

A It's like -- I'm trying to think. They have two patients in a room and some times you have a private room.

Q Right.

Q So I mean it is eight to ten. More than that probably.

Q How many do you think?

A I think about 12. I'm not really sure.

Q Okay. All right. Now, during the time that you were working at the hospital, did you come to know Doctor Bibeau?

A Yes, sir, I did.

Q Tell me how you did?

A I worked in the ER when Doctor Bibeau was there. I worked -- I would put the labs in the computer for him or I would go to medical records and pull a chart for him for the patient.

Q All right. So, then you would have worked directly under him. He would have instructed you to do things and you would have been responsible to do them?

A Yes, sir.

Q And how often did that occur?

A Whenever a patient come in he would ask for -- he would call and ask me at the medical records for me to pull a chart, a file for the patient, you know, like that. And after I pull a file -- after we pull the file then I take it back to ER or if I'm working on the floor as a unit secretary they would call back to pull a chart and I take it to the ER.

Q I see. Now, in doing that did you deal directly with Doctor Bibeau on those matters?

A Yes, sir. I would read some of his lab work and I put it in the computer for him when lab come in and do that.

Q Okay. So you assisted him in preparing paperwork for people in the emergency room?

A Yes, sir.

Q All right. Now, you know Doctor Bibeau from any place

outside of the hospital?

A No, sir.

Q So you didn't have any contact with him on a regular basis other then during that period of time that you were at the hospital.

A Right. Because I didn't know him. I met him through the hospital. We never socialized outside.

Q All right. Now Jerilyn Wadford was another person involved in the case as a witness. Did you know her, Jerilyn Wadford? I think she went by Jeri during the trial?

A I know her as that.. I don't know her as Jerilyn.

Q All right.

A I know her as Jeri.

Q All right. And her last name is Wadford?

A Yes, sir.

Q Did you know her last name?

A Yes, sir, I knew her last name.

Q So you knew her name as Jeri Wadford?

A Yes, sir.

Q All right. Now, tell me your contact or what you -- how you came to know her?

A By working in ER also.

Q All right. So was she always at the ER.

A No, she had several days that she have off and another nurse would come in and work.

Q But when she was there was she working at the ER?
A Yes, sir, and sometimes she worked on the floor.
Q So she was in the same kind of situation that you were in?
A Yes, sir.
Q So you worked in both places?
A Yes, sir.
Q All right. How long -- did you know her from the first time you got there or did she come to work later on?
A She came to work later on.
Q Do you remember how long you may have worked with with her?
A The same amount of time I worked with Doctor Bibeau.
Q So about a year, year and a half?
A Yes, sir.
Q Less then two years?
A Uh-huh.
Q Okay. Did you work directly with her? Did you all work on things together?
A Yes, sir. When I worked in triage she would come in there and she would examine the patient and everything. Read what I wrote and everything. And when we worked on the floor she would take care of the patient. Give him medicine and everything like she did in ER.
Q Okay. Now there was another person who may have been a

witness in the case, Rhonda Gwynne?

A Yes, sir.

A Did you know her?

A Yes, sir.

Q Tell me how?

A Through the ER because Rhonda worked ER only. She didn't work on the floor.

Q So you never saw her other then the times you were working in the ER?

A Right.

Q And did you work directly with her?

A Yes, sir.

Q And did you assist her in doing whatever she was suppose to do?

A Yes, sir. I would take the patient vitals like I said and I would go in the room with the patient. Some times when they give the patient a shot I would talk to them and calm them down and everything.

Q I see. Now, I had some questions before the trial started and let me go over these questions with you. One of the questions I asked was, is there any member of the jury panel who has ever had a close social or a personal relationship with either the plaintiffs, Philip and Jeanne Ethier -- by the way did you know Mr. Ethier from the hospital?

A He came after I left.

Q So he was not working (sic) there at the same time you were working?

A No, sir.

Q So then you didn't know him?

A No, sir.

Q Okay. Or the defendant, Guy R. Bibeau, if that's true please stand. Now, no one stood when I asked that question?

A No, sir, I didn't because actually when I said I worked at the hospital I thought -- I didn't really consider myself as knowing him personally. You said personally, right?

Q A personal knowledge of someone that would be that you had worked personally. Because later on, let me point out something to you, and may be you can tell me what the difference was. I asked another question, and it was a very long question. I asked about everybody who would possibly be a witness in the case.

A And I stood up.

Q Let me finish. And some of the names that were in there were, Jerilyn Wadford, Rhonda Gwynne and a fella by the name of Mike Williams. Now on that question you stood up and said you had a personnel relationship with Mike Williams.

A Uh-huh.

Q But you didn't indicate that you knew the other individuals?

A No, see the reason I know Mike is because I talk to him

in the hospital and outside the hospital.

Q So you felt like if you knew him from work that was not a personnel relationship?

A I didn't know because see, I didn't really -- like I said, you know, I just work with them and then after that that was it. We have no more contact.

Q Well, how you know Mr. Williams? Where did you know him from?

A Mike use to take care of my son when he was in the hospital and we got to know each other, and then --

Q Let me back. Your son had been in the hospital?

A He was sick. That was when he was two. He is eighteen now.

Q Oh, I understand. And Mr. Williams had been a nurse or someone who helped treat him?

A Yes, sir, he use to give him oxegne when he was there.

Q Right.

A And that's how I knew Mike and then I saw him outside the hospital. But the rest, I didn't know those ladies until I start working there. But see, I hardly work with those ladies because they work at other places.

Q I went on and asked you about Mike Williams. I said, "So you knew him from that employment" and your answer was, "I use to work at Fairfield Hospital with Mike Williams"?

A Yes, sir, I did.

Q So you related a work relationship with him?

A Yes, sir.

Q And then I said, my question was, So you knew him from that employment. You said, "Yes, sir." And I said, so you know longer work there; is that right," and you said, "Right."

A And see --

Q Let me finish. And I said, "How long ago did you work there?" and you said, "It's been about three or four years." So when you told me about Mike Williams you didn't tell me about a personnel relationship. You told me about the fact that you had worked with him at the hospital?

A I met him at the hospital when my son was two and that was it. I didn't see him any more. And then when I worked there that's when I got to know Mike.

Q Okay. Later on I asked you about -- this question; "Is there any member of the jury panel or member of the immediate family who has ever been employed or been a patient in or treated by any of the following medical professionals" and the first one was Fairfield Memorial hospital. And in that I also asked you about Rhonda Gwynne and Jerlyn Wadford and you didn't respond to that at all?

A No, sir, because like I said I don't take to my kids to fair field hospital to get treated.

Q But you indicated that you knew Mike Williams from the fact he treated your son?

A Yes, sir, but that was when he was two. My son goes to Chester Hospital for treatment.

Q Well, the question was "ever" been treated?

A Yes, sir.

Q And you didn't respond to that?

A No, sir, because I had forgot. It just popped in my head just now.

Q Now, you did later on when I asked about people who had medical or legal education or training you did respond to that and you stated that you worked at Fairfield Hospital at one time and you did indicate that you were a certified nurse assistant. And I asked you if that would in any way effect your impartiality in the matter you said it wouldn't?

A It didn't.

Q Okay. Now during the trial you may recall that I asked probably every time you left the courtroom I would - I didn't ask I instructed members of the jury not to discuss anything about the case even among yourselves and then every time you came back in to the courtroom after being away from the courthouse I would ask if anybody had any difficult in following my instructions. Do you remember me asking you those questions?

A Yes, sir, I do.

Q Do you remember that I asked it a lot?

A Yes, sir, I do.

Q Okay. So your understood that it was important?

A Yes, sir, I did, because when I left here I didn't talk about the case. I did not watch the news. I didn't do anything. I didn't even when people asked me what the trial was over and I said I couldn't discuss it and I left it at that and I walked off.

Q Good. Now, during the breaks that the jury had do you recall any discussions that might have occurred between jurors or even by you, concerning such matters as whether or not Doctor Bibeau was truthful in what he said. Whether or not if he wrote something down that he did it.

Do you remember any comments or discussions that occurred between jurors during the breaks about those matters?

A No, sir.

Q So you never made any statements to anyone about Doctor Bibeau during the trial of the case?

A No, sir because you instructed us not too.

Q Right. And do you recall anyone else making those types ever comments?

A No, sir.

Q All right. Do you recall any discussions concerning Doctor Bibeau's handwriting and whether or not it was legible?

A No, sir.

Q You don't remember discussion about any of those matters?

A No, sir. No, sir.

Q Okay. Do you remember any discussions concerning the nurses?

A No, sir.

Q Jeri or -- I am trying to remember the other lady's name?

A Rhonda.

Q Rhonda. Do you remember any discussions concerning their honesty and whether or not if they told something it would be the truth?

A No, sir. We didn't discuss the case until you told us to discuss it.

Q Which was when?

A On the last -- on that Thursday.

Q When we had deliberations?

A Yes, sir.

Q Okay. So that's the only time those matters were discussion the by you or anyone else in the jury room?

A Yes, sir.

Q All right. Now, do you recall any one discussing anything from outside of the case? Something that came -- information that was not available during the trial?

A No, sir, because when we were leaving we was talking about how is the outside world and how beautiful it was and how it was cool outside. That's all we talked about.

Q Okay, so you don't recall anything about that?

A No, sir.

Q All right. Just one second.

Do you know another juror name Kayla.

A Kayla -- I don't know really know each others names in the jury room. I'm sorry.

Q So you don't recall anyone else on the jury that might have been named Kayla Stewart?

A No, sir. To be honest with you we didn't learn each other names. We didn't, you know, all we knew were the jury numbers. That's it.

Q Okay. Apparently during the trial and a lot happened during that trial. It went on for a long time. It's been related to me that a lady may have come in to the courtroom. A white lady; red-haired lady who sat behind Doctor Bibeau's table. Did you know that person?

A No, sir.

Q Do you recall who I'm talking about?

A No, sir, I don't. I'm being honest. I don't.

Q Well, I don't have a name to tell you, but it just has been related to me that perhaps someone of that description did come in to the courtroom and may have sat on the doctor's side of the courtroom and that person may have actually been a nurse supervisor from the hospital.

Do you know who I am talking about now who may have been a nurse supervisor?

A I know who you are talking about. Star.

Q Is that her name?

A I think that's her name.

Q All right, do you recall that she came in to the courtroom during the trial?

A Yes, sir.

Q All right, and do you remember her sitting on that side of the courtroom?

A Yes, sir.

Q Was there any discussion in the jury room concerning that person?

A No, sir.

Q So -- and I don't know that she even testified in the case, but I do know that has come up, that she may have been in the courtroom. So you did know who that was or you know who that is?

A Yes, sir.

Q And did she in fact work at the hospital?

A Yes, sir.

Q And was she in fact a nurse supervisor?

A No, sir, not at the time.

Q Had she been in the past been one?

A No, sir.

Q Do you remember what she had been at the hospital?

A She is a registered nurse.

Q So she is RN?

A Yes, sir.

Q But was never -- as far as you know -- never in a supervisory position?

A That's what through me off when you said supervisor like ---

Q Well, a nurse supervisor is someone I take it somebody who is in charge of several nurses?

A She was a wasn't the supervisor. We had a man when I was there.

Q I see.

A When I was there.

Q So she would not have been your supervisor?

A No, sir.

Q I am about finished Miss Killian. Just let me ask you a couple more questions.

You indicated to me that you don't recall any discussions being held between members of the jury that would have related to the case or about the case until deliberations started. Is that what you told me?

A Yes, sir.

Q So I take it then it would be your position that nothing that went on during the trial other then the evidence that was presented in the courtroom would have affected the ultimate verdict in the case. Would that be your position?

A Yes, sir, it is.

Q All right. Now ma'am, I am going to ask you for just a few minutes to step outside with the bailiff. We may ask you to come back and answer a couple more questions okay.

(WHEREUPON, the witness leaves the courtroom?

THE COURT: All right. Any additional questions or objections from the plaintiff?

MR. PROFFITT: Yes, Your Honor. I would ask that you specifically ask her during breaks about each of the things that Sandra Carmichael said that she said.

THE COURT: I think I asked about most of them. Let me look and see.

MR. HOLLAR: And Judge --

THE COURT: Tell me something -- let me finish with this and then I will get to you.

MR. PROFFITT: I believe you mentioned the one about being a good Doctor. I don't think you asked her did you ever say or did you hear someone say that Doctor Bibeau was careful and through. Did you say that during the break during the trial.

I think she may be confused about what occurred during actual deliberations and premature deliberations, before they were suppose to begin discusses things.

THE COURT: I don't mind asking her did she say,

but she denies having said anything. So, I don't mind asking her did she say those specific things. I will ask her that.

MR. PROFFITT: And also, did she ever tell the jury at any point, during breaks or deliberations that she personally knew Doctor Bibeau and had worked with Doctor Bibeau and personally knew those two nurses.

THE COURT: I will go down your list in your affidavit.

MR.PROFFITT: All right.

MR. HOLLAR: And judge we just note our objection for the leading aspect of it. It's accusatory and it's like any cross examination which is what it sounds like from our perceptive. We don't think that is appropriate. I think you handled it well.

THE COURT: Okay. I will just ask if any of these statements she recall having been made by her or anyone in the jury room.

MR. HOLLAR: All right.

MR. PROFFITT: Thank you, Your Honor.

THE COURT: Any objections other then that?

MR. HOLLAR: No, sir.

THE COURT: Or any other questions?

MR. HOLLAR: No, sir.

THE COURT: All right. Bring her back.

(WHEREUPON the witness enters the courtroom.(.

THE COURT: Come on and have a seat.

Q Miss Killian, I am going to go over some things. I am going to asked you if you heard either yourself, or anyone else make any statements like this and I am talking about before deliberations started. I am not asking you about what happened once I turned the case over to you for your decision. I am not asking you about those discussions at this time. All right.

Did you hear anyone make any statements such as that Doctor Bibeau and Jeri were very careful and thorough and if they said they did something they did it. Now again, this is in the period of time before deliberations started. Did you hear anybody make that statement, either yourself or anyone else on the jury?

A No, sir.

Q All right. Did you hear anyone make any statements to the effect that if Doctor Bibeau said he took foot pulses then he would have done that or he did it? Did you hear anyone make that kind of statement before deliberations started?

A No, sir.

Q All right. Did you hear anyone make statements to the affect that if Doctor Bibeau did not do the foot pulses then it was because that Jeri the nurse did it because she's very thorough. Did you hear anybody make a statement such as that before deliberations started?

A No, sir.

Q All right. Did anyone make any statements vouching for how good of a doctor Doctor Bibeau might have been before deliberations started?

A No, sir.

Q All right. Did you hear anyone make a statement concerning the quality of Doctor Bibeau's handwriting about that before deliberations?

A No, sir, because I already know how Doctor Bibeau writes.

Q I understand that. I'm interested in people making that kind of statement before deliberations started. Did you hear anything like that?

A No, sir.

Q All right.

A We was while we on the jury.

Q I'm sorry.

A Everybody was watching Doctor Bibeau write and they were looking at him write, and you know, it was like we was shaking real bad and I was saying to myself something must be wrong with him.

Q All right, but you said that to yourself?

A Uh-huh.

Q You didn't share that with the other jurors?

A No, sir.

Q You said you said it to yourself?

A Yes, sir.

Q All right. Concerning Miss Gwynne, do you recall anybody stating that she was a good nurse and very thorough in her job? Did you hear any statements like that made before deliberations started?

A No, sir.

Q Now, during go the deliberations -- this is after deliberations has started -- did you bring any of the personnel knowledge that you had of Doctor Bibeau and these nurses? Did you bring that information in to the jury's discussions?

A No, sir.

Q During deliberations?

A No, sir, I didn't I stayed on the case.

Q You stayed on the case. You didn't bring any of your personal knowledge or recollections concerning them to bear on the trial?

A No, sir.

Q During deliberations even?

A No, sir. We went over the case. When we didn't understand something we asked the young lady that was over --

Q The forelady?

A Yes, ma'am (sic) and that's when we came. You called us back in because we didn't understand something.

Q Okay. All right.

THE COURT: Any other questions from the plaintiff at this time?

MR. PROFFITT: No, Your Honor.

THE COURT: Any other from the defense?

MR. HOLLAR: No, sir.

THE COURT: All right. Ma'am, what I am going to do is I am going to at this time allow you to leave. You no longer have to stay here. I don't know that we are going to be need to talk to you in the future although I can't rule that out. I am going to urge you not to discuss this particular hearing with anyone. Do you understand that? That is my instruction to you not to do that.

THE WITNESS: Yes, because if I had to come back I couldn't come back because I take care of a blind lady.

THE COURT: I understand that, ma'am, but I have to make sure this case is handled properly.

THE WITNESS: I understand that.

THE COURT: So I am going to see to that. If we have to see you we will let you know.

THE WITNESS: Please don't let it be tomorrow.

THE COURT: It won't be tomorrow. I can promise you that.

You are free to go. Thank you, ma'am.

(WHEREUPON, the witness leaves the courtroom.)

THE COURT: All right we are going to take about five minute break and then we will get started.

(WHEREUPON, court was in recess).

THE COURT: Please bring in Kayla Stewart.

(Witness enters courtroom).

THE COURT: Ma'am if you have a seat right up here in the witness stand for me.

THE WITNESS: Sure.

THE COURT: And if you would please state your name.

THE WITNESS: Kayla Stewart.

THE COURT: Raise your right hand.

KAYLA STEWART, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q You can put your had down and turn around a little bit. I will be asking you some questions this morning. Okay?

A Okay.

Q Miss Stewart, I am going to be going over some matters concerning the trial in the case and what may or may not have occurred and as I stated to you earlier I'm not looking for any right answers or wrong answers, but what I am looking for is the

truth concerning this matter. Do you understand that?

A Yes, sir.

Q All right. Now specifically, I want to ask you about some things that may have come up during the trial. Now, do you recall that every time the jury left the courtroom I was giving instructions about you should not talk about the case even among yourselves. Do you remember those instructions?

A Yes, sir, I do.

Q And then at least every morning and after lunch every day if anybody had any problems in following my instructions that they please stand. Do you remember that?

A Yes, sir.

Q And of course throughout the trial know one reported any difficulties. Do you remember that as well?

A Yes, sir.

Q Now during the trial and right now I want to focus on the time period as we were taking testimony in the case but before I turned the case over to the jury for deliberations. This would be during the trial of the case is the way I look at it. Do you understand the timeframe that I am talking about?

A Yes, sir.

Q During the breaks that you had while the jury was back in the jury room, do you recall any comments or statements being made concerning any of the litigants, people involved, and in this case the litigants when I am saw that word I'm talking Mr.

and Mrs. Ethier or Doctor Bibeau. Do you remember any comments or statements being made by any of the jurors about them during the trial of the case?

A No.

Q All right. Do you recall any statements being made concerning Doctor Bibeau's truthfulness during the trial of the case and before deliberations began?

A No.

Q Do you recall any statements being made by any of the jurors concerning if Doctor Bibeau or one of the nurses said that they did something that in fact you could believe that they did it. Do you recall that statement ever being made?

A No, sir.

Q Do you recall that there was any statement made by anyone as to the quality of Doctor Bibeau's handwriting. Do you remember a statement being made about that during any of the breaks you had during the trial?

A No. I mean it was just a comment about doctor's handwriting in general, like oh, well --

Q Okay, so one did say something about doctor's handwriting?

A Yeah, when we looked at of course the paper work itself the --

Q But would that have been during deliberations when you were looking at the evidence?

A Oh, no, not during deliberations. It was just like a funny comment like, gosh, you know, handwriting is horrible. How do they understand that.

Q So it's when the things are on the video screens and that sort of thing?

A Yes.

Q Someone may have talked about doctor's handwriting in general?

A In general. It was just like a joke.

Q Okay. All right. That's fine. I'm trying to figure out exactly what might have been said or wasn't said.

A It wasn't anything bad about Doctor Bibeau or, you know, what he did or anything like that. It was just the handwriting, like gosh, his handwriting is horrible.

Q Well, you know if people saw mine they might say the same thing?

A I agree with mine too.

Q All right. Now do you recall at some point in time during the trial and I can't tell you when it was, a lady may have come in to the courtroom and sat behind the defense side and she was a white lady. She had red hair and I don't think she testified in the case. Do you know who I'm talking about? Do remember that lady who came in and sat down?

A I know who you are talking about. I remember the lady, but I don't know her. I don't know her name.

Q All right, do you know anything about her?
A I don't know who that is.
Q So you just recall her having been in the courtroom?
A Uh-huh.
Q Do you recall any juror in the jury room identifying that person?
A Yeah, but I don't -- I can't remember her name. They might have said who she was but I can't remember her name.
Q And when you say "they" might have said, was that several jurors talking about her or one in particular that may have said who she might have been?
A I know at least two.
Q Who knew who she was?
A Uh-huh.
Q Can you tell me what she said about her?
A No, they was just like, you know, I thought she was going to do something or whatever. She was here speaking.
Q I don't think she testified.
A No, she didn't testify.
Q All right. So then you would not have recalled -- or do you recall any juror indicating that the red-hair, white lady and Jeri were very careful and thorough in there jobs. Do you remember anybody making that statement before deliberations started in the case?
A I don't know about the white lady. I didn't know Jeri

or whoever until she came here.

Q Well, Jeri would have been the nurse that did testify. Jeri Wadford I believe.

A I do remember her testifying, but like I said I didn't know either one of them.

Q Okay. So I take it then that you did not hear anybody vouch for the credibility of Rhonda Gwynne either, is that true before deliberations started?

A There was one of the jurors that said that she had worked with them before and said that, you know, she knew of them as being good people. That is the only thing.

Q That was before deliberations started?

A That was before deliberations.

Q Do you remember what juror may have said something to that affect?

A The one that was just in here. She said she worked for Fairfield.

Q The lady I just talked to?

A Yes.

Q I believe her name is Theresa Killian?

A Yes.

Q She was number one on the list. All right. Now, did you hear Theresa Killian say anything else about the participants in the trial, the people involved in the trial --

A No.

Q -- before deliberations started? While you were back there after lunch or during a break?

A No, I didn't have lunch with them or anything, but she just said that she worked with them and that they were good ladies. That was it.

Q Do you remember when she said that or did she say it on more than one occasion.

A More than likely it was on the day that that Jerilyn Wadford testified. It was on that day.

Q But not on other days?

A Oh, no, not on other days.

Q Okay. Specifically, did you hear any juror state at any time that if Doctor Bibeau said he took foot pulses that he did it or if Doctor Bibeau did not do the foot pulses that it was because Jeri did it because she's very thorough or that Doctor Bibeau is a good Doctor. Did you hear any of those statements prior to deliberations starting?

A No. Now I had, you know, of course throughout the jury I'm trying to think things like what might have had happened but just from looking at evidence I had my thoughts, but those weren't influenced of what other jurors may have said or what I might have heard or anything like that.

Q I am going to get to what effect, if any, of the things you already told me about might have had on you. But I am just asking you do you remember anyone specifically talking about the

foot pulse issue before deliberations started?

A Oh, no.

Q You did not hear any statements like that?

A No.

Q Okay. I am now going to ask you about some things and this is very limited things about what happened during the jury's deliberations because it is not my purpose here to try to go through what you all discussed or how you arrived at your verdict. The jury has a right to do whatever it thinks is necessary with the evidence in reaching a verdict. So I hope you understand that is not the purpose of my questions at this point in time.

My may concern is if you felt or you believed that information was brought in to the jury room from outside of the case. In other words, outside of what went on in the trial that had a bearing on the jury's deliberations?

A No.

Q All right. The information that you did indicate that you might have heard, some general comments you indicated or comments that I asked you about, did that information have any affect on the way you formulated your verdict in the case?

A No.

Q Now ma'am, after when the trial ended and when the deliberations had been completed and the verdict was in you may recall that I instructed the jury that I had been telling you

not to talk about the case throughout the trial and then I told you that you had the right to talk about it now if you wanted to, but you also have the right not to talk about it if you didn't want to. Do you remember me telling you that?

A Yes, sir, I do.

Q Now after the trial -- since the trial, has anyone contacted you about the case to talk to you about what happened?

A I had a facebook message from attorney Cox just asking me if I wanted to speak about the case and, and you know, to discuss some of the decisions that the jury had made and I choose not to answer him back.

Q So you did not answer that inquiry?

A I didn't.

Q Now, did you receive any telephone calls or any verbal communication from anyone about the case?

A No.

Q All right. And have you discussed the case other then with me today have you discussed it with anyone else?

A I talked to my mom. You know, just speaking on what the case was about.

Q Well, I understand that. You have a right to do that. I am just trying to find out if anyone else did talk to you about it?

A No, not in that particular way. No.

Q Now the inquiry that you got was from attorney Cox and

he wanted to know if you wanted to speak about the case and the verdict and how it all came about?

A Uh-huh.

Q And you did not respond to that at all?

A I did not.

Q All right. Ma'am, I will ask you to step outside with the bailiff here for just a second. We may call you back. In fact I will call you back. We may have some other questions for you.

A Okay.

Q All right. Thank you, ma'am.

(Juror leaves the courtroom.)

THE COURT: All right. Now from the plaintiff's perceptive any objections to my questions or requests for additional questions?

MR. PROFFITT: No objection, but I would ask that you specifically ask her if she knew during pre-deliberations and actual deliberations that Theresa Killian had worked at the hospital and knew the doctors and nurses.

THE COURT: Well, Mr. Proffitt, I don't know how closely jurors pay attention to the voir dire, but Miss Killian answered in court that she had worked there before.

MR. PROFFITT: She did say she worked at the

hospital.

THE COURT: That was answered in open court, so I am sure all the jurors heard it. Now whether they recall it I will be glad to ask her. They had the ability to be aware of it.

MR. PROFFITT: What I want to know if they talked about that during the breaks or during the actual deliberations. Theresa Killian talking about knowing these people and trusting them and working with them.

THE COURT: I will ask about that. Defense?

MR. HOLLAR: Judge, I am assuming your question will be asked before deliberations, but no additional questions.

THE COURT: All right. Bring her back.

(WHEREUPON, the juror enters the courtroom.)

Q Ma'am, I am going to remind you that you are still under oath at this time. Do you understand that?

A Yes, sir, I do.

Q All right. During the period of time prior to deliberations were you aware of the fact that perhaps we talked about Theresa Killian earlier --

A Yes.

Q -- that Theresa Killian had worked at the hospital previously?

A Yes.

Q Tell me how you came to know that?

A She said what when we first got here the first day before the jury was even chosen.

Q When I was asking questions out there?

A Uh-huh.

Q So you remember that from then?

A Uh-huh, yes.

Q Okay. During the time before deliberations did she ever make the jury aware of that fact or talk about that during your breaks and times that you were in the jury room?

A No. The only time that she mainly said anything about that is when Jerilyn came up. She just said I remember working with her that she is a pretty good lady. That's it.

Q Said a pretty good lady?

A Yes.

Q And that's all you remember her saying about Jerilyn?

A Uh-huh.

Q And that was -- okay, then that was the only time she mentioned having worked at the hospital or been employee with other people in that time before deliberations other then when she answered the question in open court?

A She said that she remembered Jerilyn. She recalled Doctor Bibeau. That was pretty much it. Just, you know, other employees in general.

Q Well, the comments that she made did those comments end

up somehow affecting your final decision in the case; those comments made by Miss Killian?

A No. No.

Q You made up your own mind?

A I made up my own mind by looking at the evidence that was presented.

Q All right. So you would deny that those comments would have had any influence on your verdict?

A Nom, they did not have any influence on me.

THE COURT: All right. Any additional questions from the plaintiff?

MR. PROFFITT: No, Your Honor.

THE COURT: Any from the defense?

MR. HOLLAR: No, sir.

THE COURT: Ma'am, at this time I am going to release you from any further responsibility to this hearing. I'm not saying that you won't hear from us again. I don't know that you will, but if we feel that we need to we may need to talk to you again. I thank you for taking your time to come back up and talk with me again today, and at this time you are free to go and I'm going to instruct you please don't talk about this matter with anyone. Okay. Thank you, ma'am.

THE JUROR: Thank you.

(Witness excused (.

THE COURT: Okay. If you could get Connie Pete. I believe she might be our foreperson.

MR. PROFFITT: Your Honor, if I could note one thing.

THE COURT: Yes, sir.

MR. PROFFITT: By form of request, I would ask that you not tell them before you start asking about premature jury deliberations that you told them not to talk during the trial.

THE COURT: If they don't remember that they would have had to be deaf.

MR. PROFFITT: I know, but --

THE COURT: They would have to be deaf.

MR. PROFFITT: You are almost telling them before you question them, your answer to this better be no.

THE COURT: I made it clear that there is no right or wrong answers. That I want truthful answers. I will continue to do.

MR. PROFFITT: I would just ask that you not do that.

THE COURT: All right. Bring in Miss Peat.

(Juror enters the courtroom).

THE COURT: Good morning. I want to be sure it is still morning.

THE JUROR: Yes.

THE COURT: You are Connie Pete?

THE JUROR: Yes, sir.

THE COURT: If you would raise your right hand.

CONNIE PETE, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right. Miss Pete, I am going to go over some matters with you that as I indicated earlier that have come up during the trial in the case again. I will point out to you there is know right answers or wrong answer we wants the truth about the matter. Do you understand what we are doing today?

A Yes.

Q All right. Ma'am, I am going to be referring at this point in time to the timeframe between the time that we started the case and the time that we turned the case over to the jury for deliberations. And I believe I appointed you the foreperson at that time?

A Yes, sir.

Q So, it will be the time that the trial was actually going on. That's what I am going to be asking about at this point in time.

A Okay.

Q Now, during that period of time I want to know did at any time you hear any discussions to the affect that Doctor Bibeau and Jeri Wadford were very careful and thorough and if they said they did something they did it. Do you recall anyone making a statement like that during any of your breaks or any of the times that you were in the jury room before deliberations started?

A No, sir.

Q All right. Did you hear anybody repeatedly say that if Doctor Bibeau said he took the foot pulses then he did it, or if Doctor Bibeau did not do the foot pulses that it was because Jeri did it and she is very thorough. Did you hear any of the jurors make statements like that to the other jurors before deliberations started?

A Not that I can recall, no, sir.

Q Okay. Now, did you hear anyone vouch for either the nurses or the doctor's truthfulness before deliberations started? If they told you something that it was the truth. Did you hear anybody say that?

A No.

Q All right. During the trial apparently a person came in to the courtroom and had a seat over here behind the defense table. She has been described and some information that I received is a white lady with red hair. That she sat there and I don't recall specifically how long she was there. But do you

remember that person coming in to the courtroom? It was a long trial.

A No, sir I do not.

Q If you don't remember that is fine. Do you remember anybody discussing her and who she was during the trial?

A I don't remember what person with that description. I don't know that person.

Q Did you hear anyone mention that perhaps a nurse supervisor had come in to the courtroom and was seated behind the defense table?

A I'm not really sure, but like may be somebody from the hospital but not necessarily. I can't remember who.

Q Do you remember who might have identified that person?

A I don't remember names. I am bad with names.

Q All right. Well, has that person already been in front of me this morning?

A Yes, sir.

Q Would it have been perhaps Theresa Killian, who made that statement concerning nurse supervisor in the courtroom.

A Can you describe her. I don't remember names. I'm sorry.

Q She would have been the second person I had in here. I had Miss Carmichael and then Miss Killian?

A Yes, sir.

Q Okay. So you do remember her may be mentioning that a

employee from the hospital had come in to the courtroom?

A Yes.

Q Do you remember her saying anything about that person other then that?

A Not really.

Q All right. Now, throughout the trial every time the jury left the courtroom and the courthouse, you could probably tell me what I said. I instructed the jury not to talk about the case, not to gather any information on there own. Do you recall all those instructions?

A Yes, sir.

Q And every time the jury came back in the courtroom I would ask if anybody had any trouble with complying with my instructions please stand and throughout the trial no one indicate that had occurred.

A Right.

Q Are you aware of anything that occurred before deliberations began in the case that would have been a violation of my instructions? Someone talking about issues that might have been involved in the case prior to the time the jury was suppose to begin deliberations?

A Not really, no. Because most of the time we went back there and I'm so tired of seeing such and such, but not directly on the case.

Q So you don't recall anyone saying anything about the

truthfulness of the evidence they were hearing, about the honesty of the people that were testifying; either about the plaintiff or the defendant? Anybody discussing the litigants or the issues involved in the case or the truthfulness of witnesses?

A No, sir.

Q Do you recall any discussions about anyone in the jury room that would have been a violation of my instructions?

A No, sir.

Q Now, I am going to talk now about the time that you were in deliberations while the jury was deliberating. Do you know of any matters that came from outside of the courtroom that was introduced into the discussions of the jury during the deliberations? In other words information from some source outside of this courtroom, not from the witnesses or from the evidence, but from some other source, are you aware of any such information that was placed before the jury during the deliberations of the case?

A No, sir, I can't recall.

Q Now, given the matters that you did hear discussed in the jury room, did those particular matters in any way affect your verdict in the case?

A No, sir.

Q Was your verdict based upon the evidence that you heard and the law that I gave to you during the trial?

A As far as the discussions sir.

Q You have to speak up a little bit,

A As far as the discussions, sir because you appointed me I kind of like listened to what -- you know, I kind of like listened. Was the overseer.

Q The referee?

A Yeah. We all discussed, but they discussed and --

Q Well, I don't know need to know what they discussed. I am more concerned if you felt like someone had brought some information to the jury room that was not discussed during the trial in the case. In other words some information that nobody had heard or nobody was aware of other then that they had gathered it outside. For example if someone had looked this up at the internet and gotten some information --

A No.

Q -- that nobody had heard in the trial and came to the jury room and said, oh, by the way, guess what I found out?

A No.

Q Something like that?

A No.

Q Or they said that based on what I know, based on things I did outside the courtroom here is some information I think you need to be aware of?

A No, sir.

Q Did you hear of anything like that that sounded like

information that would have been gathered from sources outside of the courtroom?

A No, sir.

Q That would have had a bearing on the decision in the case. Are you aware of anything of that nature?

A No, sir.

Q All right. Now as to Miss Killian, during what is called voir dire in the case -- that is when we asking you questions before we pick the jury -- she had indicated during that time that she had been employed at Fairfield Memorial Hospital. Do you recall that?

A Yes, sir.

Q All right. Now, did she bring that fact up again during the deliberations of the jury that she had been employed there or any information she may have gathered while she was employed?

A Possibly that she was -- you know, that she was employed.

Q Can you tell me what way that came up?

A I don't know.

Q Your best recollection. It's been a few weeks, but tell me what you remember.

A Miss -- what is her name?

Q Her name -- the lady who indicated she worked there was Theresa Killian.

A She was a very talkative person. She kind of talked a lot. Kind of blocked her out.

Q I will take your word for that. That's all right.

A So you know, may be what she was talking about not necessarily grasped a lot of people because I kind of blocked her. So I am not exactly sure she all said but I do --

Q You may have blocked out some things she said?

A I do recall her saying that she did work there.

Q Was that during deliberations or before deliberations?

A I don't know. Like I said kind of blocked her off.

Q So you didn't pay much attention to her?

A No, sir. No, sir.

Q That's quite all right. You have a right to do that. Would anything she have said somehow affected your verdict in the case then?

A No, sir.

Q All right. Miss Pete, I think I asked what I would like to ask at this time. I would ask you step out with the bailiff for a minute and we may have a couple more questions.

A Yes, sir.

(Juror leaves the courtroom.)

THE COURT: All right. Any objections or additional questions from the plaintiff at this time?

MR. PROFFITT: No objections, Your Honor, but I would ask that you try to get her to clarify. She

indicated that Theresa Killian did say during pre-deliberations and actual deliberations, but she didn't say what.

THE COURT: Her statement was that she had blocked out what she said because she didn't pay her any attention.

MR. PROFFITT: Yes.

THE COURT: Couldn't recall. But I will ask her again for sure could she recall anything she said. She said she just blocked her out.

MR. PROFFITT: Specifically, that Theresa Killian had personnel knowledge and had a working relationship with Doctor Bibeau and the two nurses.

THE COURT: Well again, I will ask her again if she can state specifically what she said, but she didn't do very well the first try.

MR. PROFFITT: She may not be able to recall anything else.

THE COURT: Objections or additions from the defense>

MR. HOLLAR: No additional questions.

THE COURT: All right. Let's bring her back in.

(Juror enters the courtroom.)

Q I will remind you you are still under oath at this time. You had had mentioned that perhaps Miss Killian did say

-- made some statements about having worked at the hospital or -- I'm not going to try and put words in your mouth -- that you indicates that you blocked it out. You didn't pay much attention to it. Specifically, can you remember anything that she said? And if you can't that's a truthful answer. I just want to know can you remember anything --

A No, sir, I really can't.

Q -- she said in regard to that matter?

A Not anything but that she worked there. She worked with the people there. Nothing specific.

Q But you can't say specifically what she said?

A I can not.

Q Very good. I will release you at this time from this hearing. I don't anticipate that we will be getting back together on this again, but I can't guarantee that. I am going to ask you please don't talk about this matter, if you would in the interim. I appreciate you not discussing this. Okay.

A Yes, sir.

Q Thank you for coming today and taking your time. You are free to go. Thank you.

A Thank you.

(Juror leaves the courtroom.)

THE COURT: Shawn Cason.

MR. SMITH: Your Honor, while they are getting the next juror, just one thing. You didn't ask Miss Pete

about the post trial contact.

THE COURT: I am sorry I didn't.

(Juror enters courtroom.)

THE COURT: All right. Ma'am, if you will have a seat in the witness stand please and will I ask you to raise your right hand.

SHAWNA CASON, called as a witness, having been duly sworn by the COURT, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q What is your name?

A Shawna Cason.

Q I already knew that, but I wanted to put that on the record.

Now Miss Cason, I am going to go over some matters with you that have to do with the Ethier trial and you were here for a good while. I'm sure you remember a good bit about that case. So I am going to go over some things with you to try and clarify some matters or some issues that had come up about the case. Now, first of all let me ask you about this, you may recall when the case ended as I was releasing the jury from the trial, I would have instructed you that while I had told you up to that point in time not to discuss the case with anyone even among yourselves I instructed you that you had the right to discuss

the case with anyone if you wanted too, but you also had the right not to. And I also explained at that time a juror owes no one an explanation for their service on a jury panel and you are not required to talk to anyone about it. Do you remember me telling you that?

A Yes.

Q You got to answer verbally because this lady is taking it down and so head shakes aren't going to work, okay. Do you remember me telling you that?

A Yes.

Q All right. Now, since the trial occurred which is about a month ago now, have you discussed this case with anyone and it is okay if you had done so. I just want to know if you had.

A No.

Q Has anyone tried to contact you about this case?

A As far as --

Q Well, did you get a telephone call? Did you get a message somehow on the internet?

A I received a message on the internet.

Q And how was that done?

A Through facebook message.

Q Facebook?

A Yes.

Q And can you tell me where that came from?

A The name?
Q Yes.
A I think it was Ron Cox.
Q All right, Mr. Cox.
A Yes.
Q I believe he is one of the attorneys involved for the plaintiff; is that right?
A Yes.
Q In that message what was he asking you?
A I think it was set up a meeting and talk about what they could do better in the next case. I think that is what they want.
Q You don't remember exactly what was said but that was the gist of it?
A Yes.
Q Now, did you answer that request?
A No.
Q And so you have not -- you didn't follow up on that or you didn't offer any information?
A No.
Q Now, did that facebook message include any information about the result of the trial or what affect it might have the on anyone?
A I can't even remember.
Q So you don recall whether it did or not?

A No.

Q All right. Now I am going to focus now on the timeframe in the case between the time that the trial started, and the time that the trial was turned over to the jury for deliberations. You know what I am talking about? The trial of the case it went on for about seven days so I hope you remember those seven days. All right. And during that period of time I gave instructions on what you were suppose to do when you left the courthouse and how you were suppose to act when you are in the jury room. Do you remember all those instructions?

A Yes.

Q All right. And every time you came back in to the courtroom the next morning and after lunch I would have inquired of the jury if anybody had any difficulty in keeping up and following my instructions, if they had any problems to please stand. Do you recall me asking those questions?

A Yes.

Q I did it pretty religiously didn't I?

A Yes.

Q All right. During the trial no one stood up, no one indicated that there was any difficulty in people complying with my instructions or themselves complying with my instructions. My question now is, do you recall anything that occurred during the trial of the case that you would have felt would have somehow violated my instructions; that is the instructions not

to discuss the case with anyone or to try to gather any information or listen to media reports? Did you hear or see anything that would have indicated that someone on the jury may have had any trouble in following my deliberations during the trial?

A No.

Q So you didn't feel that there was anything that needed to be or should have been reported to me during the trial?

A No.

Q Okay. Now, specifically I want to ask you about some things that may have come up or may not have come up and these may or may not be something that is of importance to me, but I do want to ask you if you ever heard or saw anybody make statements such as I am going to go over with you at this point during the trial.

A Okay.

Q And I understand that not all the jurors are in the jury room at the same time. In the morning you get there at the different times. Not everybody was there all the time but I do want to know if there was anything that you remember being said such as did you ever hear any juror vouching for Doctor Bibeau or Jeri Wadford as being very careful and thorough and if they said they did something they did it? Now this would have been in the timeframe from the time the trial started and before deliberations started before I gave the trial to you and let you

decide the case. Do you remember anybody making a statement such as that?

A Yes.

Q Tell me who may have done that?

A Miss Theresa.

Q Theresa?

A Yes.

Q The lady I already had in here?

A Yes.

Q Her name is I believe Theresa Killian?

A Yes.

Q All right, do you remember when she may have said that?

A I am not sure, but I have heard her say it.

Q You heard her say that?

A Yes.

Q And that was before deliberations started?

A Yes.

Q All right. Did you hear anybody discuss that with her when she said that?

A No.

Q Now let me ask you about another statement that I have a concern about. And the statement, if Doctor Bibeau said he took a foot pulse then he did it, or if Doctor Bibeau did not do the foot pulse then it was because Jeri did it and she's very thorough. Do you remember anybody making that statement during

that period of time that I am talking about' from the start of the trial until it was turned over for you to deliberations?

A I can't recall.

Q You can't recall that statement?

A No.

Q That is fine. I want to know the truth. Your memory is what I want.

Now did you hear anybody vouching for how good of a Doctor, Doctor Bibeau was before the case was turned over for deliberations?

A I can't recall.

Q All right. Did you hear anyone discussing Doctor Bibeau's handwriting as to how bad it was during that period of time?

A Yes.

Q Who did that?

A Same lady, Theresa.

Q Theresa. And do you remember who she said that to or who she discussed that, or was that just a statement she made to everybody?

A That was just a statement she made to everybody.

Q Okay. Now at some time during the trial a lady came in to the courtroom. She was described in the paperwork I got as white lady with red hair and she was described as having sat down behind where the Doctor was seated on his this side of the

courtroom. Do you remember who I am talking about? She did not testify in the trial, but she came in and sat for a while over at that side of the courtroom. Do you remember that?

A No.

Q Okay. It's been indicated to me that perhaps she was identified to the jury as being a nurse supervisor from Fairfield Hospital. Do you remember anybody telling the other jurors that that person was a nurse supervisor from Fairfield Hospital?

A I can't recall.

Q Okay. Did you ever hear anybody vouch for her or her credibility or thoroughness, that lady who didn't testify?

A I can't recall.

Q Okay. Now as to Rhonda Gwynne, did you ever hear anyone and specifically Terressa Killian vouch for the nurse named Rhonda as to her ability or her truthfulness?

A She had called her name, but I am not sure exactly what she said.

Q You didn't pay attention to what she said?

A No.

Q You couldn't tell me what she said?

A No, I couldn't.

Q Okay, that is fine. Now, I am going to ask you now about the time that the jury was in deliberations while you were considering the case. I turned it over to you. You were back

there. I believe Miss Pete was the foreperson and you all were discussing the merits of the case. Do you remember that period of time?

A Yes.

Q And I am not asking you now to get in to any specific statements that were made by any of the jurors during that period of time. I am asking generally about some information that I would like to know about.

Now, during that period of time did you feel like or did you hear information that might have been gathered from some source outside of the trial that was discussed or brought before the jury in making its decision? In other words information that might have been gathered from some source outside of the courtroom?

A No.

Q You didn't hear anybody discuss anything of that nature?

A No.

Q During that period of time did you hear again, I will ask specifically about juror Killian, Theresa Killian, did you hear her talking about the truthfulness or the honesty of the people who worked at the hospital based on her personnel knowledge having worked there?

A Yes.

Q Did she make that statement to you?

A Yes.

Q All right. Now ma'am, the statement that may have been made by Miss Killian, did they somehow affect your decision in the case?

A No.

Q Did you decide the case based upon the law and the evidence that was presented in the trial?

A Yes.

Q And you can say that without reservation that her -- whatever she said or whatever she brought did not affect your final decision?

A Yes.

Q All right. All right ma'am, I am going to ask you if you would go outside with the bailiff for just a moment and then I will talk with the lawyers and we may have a couple more questions and then I may call you back. And officer be sure to pull that door all the way closed.

OFFICER: Yes, sir.

(Juror leaves the courtroom.)

THE COURT: Objections or additional questions from the plaintiff?

MR. PROFFITT: Just one, Your Honor. I would ask for just a specific question about whether in premature deliberations Theresa Killian ever told them during breaks that she had personnel knowledge of

Bibeau and those two nurses based on the fact she worked with them and the same question with regard to actual deliberations; that she said those same things in actual deliberations.

THE COURT: Say that again.

MR. PROFFITT: Did Theresa Killian ever say during breaks back in the jury room that she personally knew Bibeau and the two nurses and had worked with them at the hospital. Same question for during the breaks as well as during deliberations.

THE COURT: All right. Anything further?

MR. PROFFITT: No, Your Honor.

THE COURT: Defense?

MR. HOLLAR: No additional questions, judge, but I would point out that what you just been asked would have been appropriate voir dire before the panel was certified and before the jury was drawn. Those are the specific types of questions the statute require that we ask if we want that information from jurors.

MR. PROFFITT: It was asked in voir dire. She did not respond. We will get into that later I guess.

THE COURT: All right. Thank you. Bring her back.

(Juror enters the courtroom.)

Q Thank you, ma'am. I just got couple of things. It

would take us long here. Okay.

I am going to go back and focus on the statements that might have been made by Miss Killian for just a minute that you said you may have heard or did hear. Did Miss Killian ever indicate to the jury and this would be during deliberations or even before deliberations that her knowledge of Doctor Bibeau and/or the nurses was based on her personnel knowledge of them from her working at the hospital?

A Yes.

Q Is that the way she put it to you?

A Yes.

Q All right, and did she say that both during before the deliberations and during deliberations?

A Mostly before deliberations.

Q Mostly before?

A Yes.

Q All right. Okay.

THE COURT: Anything further from the plaintiff?

MR. PROFFITT: No, Your Honor.

THE COURT: Anything from the defense?

MR. HOLLAR: No, sir.

THE COURT: All right, ma'am, at this point in time I am going to release you from this hearing. I am going to ask that you don't discuss this case with anyone in the meantime. I will thank you for taking

your time and coming up here and helping us with this issue. I know you got a subpoena but I appreciate you being here. Thank you very much. You are free to go.

THE JUROR: Thank you.

THE COURT: I believe the next one on the list is Austin Smith.

(Juror enters the courtroom.)

THE COURT: Sir, if you have a seat in the witness stand and if you raise your right hand.

AUSTIN SMITH, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q State your name for me?

A Austin Smith.

Q All right. Mr. Smith, I am going to be asking you some questions this morning that relate to the trial. You were a juror in the Ethier versus Bibeau trial about a month ago and some things have come up that I want to ask you about and I am going to again point out to you as I did this morning, that there aren't any right answers or wrong answers to my questions. I am not looking for any particular answer. What I am looking for is the truth about the things that I am asking you about.

Do you understand what we are doing at this point in time?

A Yes, sir.

Q All right. Very good. Now, first of all I want to talk to you about the timeframe in the trial between the time that we started taking testimony. You would have been selected on the jury, seated in the jury box and the time that I turned the case over to you for deliberations. So this would be during the trial of the case is the way I refer to it. Do you understand the timeframe that I am talking about now?

A Yes, sir.

Q So I am not talking about your deliberations and that sort of thing. We will talk about that in just a few minutes. I want to focus on this timeframe before the actual deliberations began.

Now, during that time you may recall that I gave instructions every time the jury left the courtroom about what to say, what to do or what to watch or what to listen to. I gave you a lot of orders, mostly the same every time I think. Do you recall me doing that?

A Yes, sir.

Q And do you recall when you came back in the morning and after lunch I asked if anybody had any difficulties in complying with my instructions I would ask that they stand up. Do you remember that?

A Yes, sir.

Q And during the trial throughout the trial no one

indicated that they had any problems in following my instructions. Do you remember that as well?

A Yes, sir.

Q Now, during the trial, during the pretrial portion of the case do you recall any one in the jury room doing anything that should have been reported to the Court?

A Not that I can recall sir.

Q All right. Let me ask you specifically about some things that have been called to my attention, been raised and I would like to know if you have any knowledge about some of these things that I am going to ask you about at this point in time. All right. Do you recall any juror or any jurors plural, having a discussion or making statements that referred to Doctor Bibeau and/or a nurse known as Jeri, that would be Jerilyn Wadford, that that particular juror or those jurors might have known them and made statements to other members of the jury that they were very careful and thorough and if they did something they did it. If they said something they did it. Do you remember a statement made like that before deliberations began?

A No, sir.

Q All right. Did you hear anyone made a statement that fellow jurors or just make a statement in the jury room to the affect that if Doctor Bibeau said he took foot pulses that he did it and if he did not do the foot pulses that it was because that Jeri did it and she is very thorough. Do you remember

anyone making a statement about the foot pulses or discussing how thorough they did their job?

A Not, that I can recall.

Q All right. Now, did you hear anyone vouch for how good of a doctor, Doctor Bibeau might be?

A In honesty, no, sir.

Q I want you to be honest with me if you heard it. I am not saying that you had to hear it, I'm just asking if you recall hearing anything like that during that period of time?

A No, sir.

Q Now, did you hear anyone make a statement concerning Doctor's Bibeau handwriting or his writing abilities?

A That came up one time.

Q And tell me what was said that you can remember? It's been a while.

A I just remember someone saying that he had very bad handwriting.

Q Do you remember who might have said that?

A I can't recall.

Q You did not get in to those discusses at that time?

A No, sir.

Q So you weren't involved in that conversation?

A No, sir.

Q You overheard something said?

A Yes, sir.

Q Did the person indicate how they knew what Doctor Bibeau's handwriting looked like? Did they say how they knew that?

A Yes.

Q How did they say they knew it?

A I believe they said they worked with him.

Q Okay, so that person had indicated in the past they had worked with Doctor Bibeau?

A Yes, sir.

Q During the trial there was a lady who came in to the courtroom apparently and sat on the defense side of the courtroom. She is described as white lady with red hair. Do you recall her?

A I'd seen many people come and go in here.

Q There was a lot of people that came and went during at trial. Do you recall a white lady with red hair?

A No, sir.

Q Did you hear a discussion about such a person come up in the jury room before deliberations began?

A No, sir.

Q Did you hear anyone in the jury room identify such a person as a perhaps a nurse supervisor from the Fairfield Hospital?

A No, sir.

Q Okay. So you don't recall any discussion about her or

how she did her job?

A No, sir.

Q Now also did you hear anyone during the time before deliberations vouch for the abilities of nurse Rhonda Gwynne?

A No, sir.

Q Did you hear any discussions concerning the taking or recording of foot pulses before deliberations began?

A No, sir.

Q So you didn't hear anybody say that if Doctor Bibeau and Jeri were very careful and if they said they did something they did it and if he took foot pulses that he did it. If he said it that he did it and if Doctor Bibeau did not do it then it is because Jeri did it because she's very thorough. Did you hear that statement being made before deliberations by anyone in the jury room?

A No, sir.

Q Now, were you aware Theresa Killian had work at Fairfield Memorial Hospital?

A No, sir.

Q So you didn't even pick up on that during the trial in any fashion?

A I sort of kept to myself.

Q Well, we reviewed the transcript and in fact she did answer during pretrial interview of the jurors that she had worked there. Do you remember hearing that question that she

was a former employee at Fairfield Memorial Hospital?

A No, sir.

Q Now, I am going to ask you now about the deliberations once the jury got the case and was discussing the case and in doing so let me point out to you it is not my purpose to get involved in your discussion and your deliberations other then to find out if they were affected by some information or something that came from outside the trial. That's what I am concerned about.

Now during the deliberations did you hear, see or were you affected by any information that was brought from any source outside of the trial of the case?

A No, sir.

Q Did you hear anyone make any statement based on their experiences or their knowledge of other people that they gathered from outside of the trial of the case?

A Not that I can recall.

Q So I am going on ask the question although I think I already may know the answer. Would it be your position that your verdict, the verdict that you reached was not affected by any outside information or outside sources?

A No, sir.

Q And were you affected by statements that were made prior to deliberations that may have come up about anything that had to do with the case? Did those statements made by other

jurors, if there were any, would they have affected your verdict?

A No, sir.

Q All right. I will ask you step outside with the bailiff for just a minute. I will talk with the lawyers. We may have a couple more questions, but I want to thank you so far. If you step outside.

(Juror leaves the courtroom.)

THE COURT: Plaintiff, objections or additional questions?

MR. PROFFITT: Only additional question would be the same one about during premature and actual deliberations did you -- did Teressa Killian say in there that she had a personal working relationship with Bibeau and the nurses.

THE COURT: I asked that, but I will ask it again just to be sure.

MR. HOLLAR: You did ask that earlier. Judge, and the problem, the objection is leading to the questions and I understand what you are trying to do Judge Couch, but, you know, as a political science major you often find out the answer to your question is determined by how you ask it and when your constantly asking questions you ask a general question did anyone bring it to you outside of the courtroom and then you

say did they tell you A, did they tell you B, did they tell you C, it has cascading effect suggesting that the answer should be otherwise. And that's the concern.

THE COURT: I hope that's not the case, but I am going to ask if they heard any of these specific statements.

MR. HOLLAR: I understand that, and the only additional question we would have about contact. People who to contact them from the litigants.

THE COURT: I will ask them about that.

MR. PROFFITT: And again, I will ask Your Honor not to warn them ahead of time. You almost tell you I told you during the trial don't talk before premature deliberations. Now I am going to ask you did you talk before premature deliberations, so I think when you do that, they are going to answer no.

THE COURT: Well, my question is when I ask it, do they know of any activity that someone should have reported to me. I am not asking about them necessarily. I am asking if they knew of anything that happened that someone should have reported to me.

MR. PROFFITT: Before you ask them that you remind them --

THE COURT: I'm concerned about the fact that

during the trial -- and I'm probably going to change the way I ask that question. I always ask if any of you have any difficulty please stand, and I don't ask them to snitch on anybody and may be I should. I don't know. So I never asked that question before. I'm asking it now, if there is anything that they should have reported from someone else just to be sure that door is not opened somehow.

MR. PROFFITT: But I would simply ask that you not again tell them I told you not to do this during the trial and now I am going to ask you if you did it.

THE COURT: But Mr. Proffitt, I don't know how they escape the fact that I told them that for seven days I told them 14 times at least that.

MR. PROFFITT: You did that.

THE COURT: So it's not a secret that I instructed them in that fashion. I don't think it is a surprise to them that I gave those instructions.

MR. PROFFITT: It's not, but I still would object. I think it's suggestive to them.

THE COURT: I understand what you are saying. I am not trying to kill their answers and that's the reason I'm asking it the way I'm asking it is it gives them a chance to snitch on someone else and say, well, I didn't have anything to report but that person

should have.

MR. PROFFITT: All right.

MR. HOLLAR: Judge, again on the leading issue, I think the way that the questions are being pitched if you will, Miss Carmichael made certain statements and everyone else is being held to a different standard. Like when you tell them to keep an open mind. We have assumed for the purposes of inquisition --

THE COURT: This is a voir dire.

MR. HOLLAR: I understand, but we are assuming that Miss Carmichael is telling the truth and everyone else must answer to Miss Carmichael.

THE COURT: I'm just asking if they ever heard those statements.

MR. HOLLAR: And I think the more appropriate way would be what statements, if any, did you hear.

THE COURT: Well, I do start off that way because I start off by saying is there something you should report that somebody said and talked about. So I start off that way and then I just want to be sure that we are not -- because I am concerned. These people have never been in this situation. You and I understand what we are talking about. I'm not sure they understand the intricacies of some of things I am asking them. So to a certain degree I am asking

somewhat leading questions because I want to be sure they understand that I am asking about some specific things. I could start off by asking specific questions and go to the general, but I am going to ask them if they heard these statements.

MR. HOLLAR: I understand judge. It's just the way it is pitched.

THE COURT: Well, I am not trying to pitch it any way other than to get truthful answers.

Where are we? You wanted to find out about how think were contacted?

MR. HOLLAR: Yes, sir.

THE COURT: And you wanted to know if she ever said her source of information was personal based on her work.

MR. PROFFITT: Her working relationship with the Doctor Bibeau and the nurses.

THE COURT: All right. Lets bring him back.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: Have a seat sir.

THE JUROR: Yes, sir.

CONT'D EXAMINATION

BY THE COURT:

Q It was pointed out to me during the break you were the soul male juror in the case. Congratulations on your

perseverance in this matter.

Now, just a couple other questions I want to follow up. When we ended the trial I instructed you that you could discuss the case with anyone. Throughout the trial I told you not to discuss it, but at the end of the trial I did tell you that you had the right to discuss it with anyone. You also had the right not to. Do you remember me giving you that instruction?

A Yes, sir.

Q All right, now since the trial has ended have you in fact discussed the trial or the case with anyone?

A Yes, sir, with two people.

Q Tell me who you talked it over with?

A My father and one of my brothers.

Q Okay. All right. Well, I would expect you might do that. Now did you receive any contact from anyone involved in the trial since the trial ended?

A No, sir.

Q So you haven't gotten any phone calls, letters or anyone other contact from anyone who participated in the case?

A No, sir.

Q Okay. Now, during the the pretrial or the pre-deliberation part of the trial, did you -- did any juror make a comment concerning any of the witnesses or parties that was based on their personal knowledge based on their work at the Fairfield Hospital?

A No, sir.

Q You didn't hear anyone state that I know so and so because I worked there and they are a good person? Did you hear any person make a statement such as that?

A No, sir.

Q All right. And did that occur during deliberations, did anyone vouch for someone based on there personal knowledge that you heard?

A No, sir.

THE COURT: Okay. Any other questions from the plaintiff?

MR. PROFFITT: No, sir.

THE COURT: Anything from the defense?

MR. HOLLAR: No, sir. Thank you.

THE COURT: All right. Thank you. I am going to at will time allow to you leave and I am going to direct you not to discuss this case with anyone at this point in time because obviously we all have a little inquiry going on and I want it to go on without anybody influencing anybody from the outside. So I will ask you not to discuss this with anyone at this time. But at this time you are free to go and thank you for coming.

THE JUROR: Yes, sir.

(WHEREUPON, the juror leaves the courtroom.).

THE COURT: Tara Brown.

(WHEREUPON juror enters the courtroom.)

THE COURT: Have a seat please, ma'am and raise your right hand.

TARA BROWN, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q State your name please, ma'am?

A Tara Brown.

Q All right. Miss Brown, I am going to be asking you some questions concerning some things about the trial that you were involved in, Ethier versus Bibeau case. I am sure you recall that, about a month ago and it lasted for about seven days of trial. So I am sure you remember a good bit if it. Is that correct?

A Yes.

Q Now ma'am, first thing I want to ask you about you may recall I released the jury when you finished and the verdict had been rendered and I went over things with you. At that time I told you that contrary to my earlier discussions which was not to discuss the case with anyone that I told you that you now have the right to discuss the case with anyone but you also had the right not to do so. Do you remember me talking about that?

A I do.

Q All right. Now since the trial of the case, have you discussed -- and there is nothing wrong with discussing it with anyone -- have you discussed it with anyone?

A No, I haven't.

Q Has anyone contacted you in any way to try and talk it over with you?

A No, sir.

Q So you have not received a phone call, a message on social media, anything of that nature from anyone asking you to speak to you about the case?

A I received a message on social media.

Q All right. Tell me about that?

A Well, it was from -- can I say who it was?

Q Absolutely. I want the truth here today, so tell me about it.

A From Ron Cox.

Q Mr. Cox. And tell me what he was asking about. Was this on facebook?

A Yes.

Q Okay.

A He wanted to talk about it to get information on what we can do to make things better. I didn't really read. I just saw his name in my e-mail and just clicked on it and x'd it out, but I didn't really read read it, but I know I got a message

from him, Ron Cox.

Q So you can't remember exactly what it said?

A No, I can't. It was a long paragraph.

Q But you didn't read it all?

A No.

Q Okay. You deleted it?

A No.

Q So you still have it?

A Yes.

Q All right, but did you follow up on it? Did you answer it?

A No.

Q Okay. So you did not talk this case over with anybody?

A No, sir.

Q Okay. That's fine.

Now, getting back to the -- I just touched on my instructions to you during the trial and my instructions you heard them many times that I gave about not talking over the case with anyone and not trying to gather any information on your own outside the courtroom. You remember all those instructions that I gave you during the trial?

A Yes.

Q All right. And during the trial I asked I guess just about every time that the jury came back from being outside the courtroom I was asking if anyone had any problems with following

my instructions I was asking them to stand up and talk to me about it. Do you remember me doing that?

A I do.

Q Pretty religious about it, wasn't I?

A Yes.

Q And during the trial no one got up and reported anything, but of course I asked the question always from the point of view if anyone had any difficulties I asked that person to stand up. Now, during the trial did you observe anything or hear anything or see anything that you feel that other people should have reported to me or should have been reported to me during the trial?

A I didn't.

Q Tell me what that was?

A I said I didn't.

Q You did not?

A Yes, I did not.

Q I misunderstood you. I'm sorry. All right.

Now ma'am, I am going to focus now on the timeframe between the time that case began and the time I turned the case over to the jury for its deliberations. What I would refer to as the actual trial of the case and it went on for about seven days or so before the case was turned over to the jury. So that's the period of time I am talking about right now.

A Okay.

Q All right. Now, during that timeframe, during the times that the jury would have been on break or been coming in the evening or coming in from lunch, did you hear anyone discuss anything about this case with any other jurors?

A No.

Q I am going to ask you about some specific things to see if you heard any statements that might have been similar to the ones that I am going to ask you about.

Did you hear anyone vouch for the truthfulness of any of the witnesses or parties in the case?

A No.

Q Did anyone say, well, I know that person and they are an honest person. If they said they did something they did it. Did you anybody make a statement like that?

A No, sir.

Q Did you hear anybody talk about -- there was an issue in the trial about foot pulses, about whether or not a foot pulse had been taken or had not been taken. Did you hear anyone talk about if someone said that they took a foot pulse then they did it or if they didn't do it then someone else would have done it because they were very thorough in their jobs. Did you hear that come up before the jury started deliberations?

A Talking about -- ask that one more time.

Q All right, this is the timeframe between the start of the trial and before deliberations began. Did you hear anyone

discussing the taking of foot pulses or if someone said that they took it then they did take it or if they didn't do it then they would be sure somebody else would have taken it. Did you hear anyone make statements about the foot pulses at all before deliberations started in the jury room?

A Yes.

Q Tell me what you heard?

A That Doctor Guy Bibeau took the foot pulse but he didn't document it. I don't know I can't remember the name, Rhonda Win (phonetics) something. I can't remember her name. Took the foot pulse. She documented it -- it's been a while. When I left here this case was not on my mind.

Q I understand that, but I am trying to find out now was that said by a juror to other jurors in the jury room, or is that something you heard in the trial? I am trying to distinguish between what was said in the trial and what was say in the jury room. I am asking about what was said during your breaks in the jury room?

A Okay.

Q Not what was say in the trial of the case?

A Okay.

Q I think you might be getting confused?

A Okay.

Q So the issue of foot pulses came up in the trial. No doubt about that. My concern is, or my question is, was that

discussed before deliberations started by anyone in the jury room?

A No.

Q You did not hear any discussion about foot pulses during that period of time?

A No.

Q Okay, did you hear anyone discuss Doctor Bibeau's handwriting in the jury room among jurors before deliberations started?

A Yes.

Q Tell me what you heard about that?

A They couldn't read it.

Q Okay, and that's all they said?

A Yes.

Q All right. Now, there was a lady who came in the courtroom at some point in time. She has been described as a white lady with red hair. She would have sat over on the side of the courtroom behind Doctor Bibeau's table. I don't know how long she was there. I didn't really pay attention to her. She was not a witness in the case. I do remember she was there. Do you remember that person?

A Red hair?

Q A white lady with red hair that would have sat on that side of the courtroom over there behind Doctor Bibeau's table?

A No, I wasn't really paying attention.

Q Okay, that's fine. Did you hear anybody discuss anything about her in the jury room?

A No, sir.

Q Did you hear anybody identify her as someone who might have worked at Fairfield Memorial Hospital who would have been a nurse supervisor?

A No, sir.

Q So you weren't aware of any information like that?

A No.

Q Now, I am going to ask you about the timeframe now as the jury was deliberating. This is after I turned the case over to you and I would have appointed I believe Miss Pete to serve as foreperson of the jury and you were actually discussing what you were going to do about the case.

Do you understand what I am asking you about now?

A Yes, sir.

Q All right. Now are you aware of any information that was brought by any juror from outside of the courtroom, information they gathered from some other source that was used by them in those deliberations?

A No.

Q Did you at any time hear a juror state that because she had worked with those people in the past that they were very believable? In other words brought information from her job or work in to the jury room during those deliberations?

A No, sir.

Q So you don't recall any discussions about those kinds of things?

A I don't recall.

Q Okay. Now, anything that would have been said by other jurors in the jury room before deliberations took place, do you know of any information that was shared by other jurors before deliberations took place that somehow effected your decision in this case?

A No, sir.

Q Did you decide this case based upon the law and the evidence that was presented during the trial?

A Yes.

Q And you are not aware of any other information that you used in making the decision?

A No.

Q Okay. Ma'am, I will ask you to go outside with the bailiff in just a minute. I will talk some matters with the lawyer and then we may call you back for a couple more questions.

A Okay.

THE COURT: Thank you.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Objections or additional questions from the plaintiff?

MR. PROFFITT: Just sort of the same one, Your Honor. I would ask the Court to ask -- and I can hand this up if you like -- this is what I want to ask every juror. Did any juror prior to the deliberations discuss the fact that they knew Doctor Bibeau or the nurses; Jeri Wadford and Rhonda Gwynne and having worked with them in the the past.

THE COURT: I asked that question.

MR. HOLLAR: Yes.

THE COURT: I asked if anybody --

MR. PROFFITT: But you did not use their name.

THE COURT: I am sorry.

MR. PROFFITT: You did not use their names. You did not name Doctor Bibeau and Jeri Wadford and Miss Rhonda Gwynne.

THE COURT: I said about any witness. I think I asked that question.

MR. PROFFITT: All right.

THE COURT: I am trying to ask that question, but I am not reading it verbatim off your page, but I am trying to ask that question.

MR. PROFFITT: I don't believe you did, with this one.

THE COURT: I beg your pardon.

MR. PROFFITT: I don't believe you asked

specifically with this particular juror about Doctor Bibeau and Jeri Wadford. I think you did ask about Rhonda Gwynne. If I could just hand this up. If you will just ask this of every juror I will stop having --

THE COURT: Well, I will ask my questions. This is voir dire.

MR. PROFFITT: I understand.

THE COURT: So can you pass it up and I will ask my questions. That's fine.

MR. HOLLAR: No additional questions.

THE COURT: Beg your pardon.

MR. HOLLAR: No additional questions.

THE COURT: Pass it up.

MR. COX: Sure. I didn't write the the nurses names on there, Gwynne and Wadford.

THE COURT: All right. Bring her back please.

(WHEREUPON, the juror enters the courtroom.)

Q All right. I think I asked this question before but I am going to try and phrase it in such fashion to insure. Did you hear any of the jurors vouch for any of the witnesses in the case, and specifically the Doctor or the nurse; Doctor Bibeau or the nurses, based on their knowledge of them from some source outside of the courthouse such as at the hospital or having worked with them?

A Okay. You are asking me have of -- has some of jurors worked --

Q I didn't ask if they had worked with them. I asked you if they vouched for their believability or credibility based on there work with them outside of the hospital? Outside of the courthouse?

A No.

Q You did not here that?

A Yes, sir.

Q And that includes the doctors and the nurses?

A Yeah.

Q Okay. All right,

THE COURT: Any further questions from the plaintiff?

MR. PROFFITT: No, Your Honor.

THE COURT: Any from the defense?

MR. HOLLAR: No, sir, thank you.

THE COURT: All right, ma'am I will excuse you at this time from the trial. I will ask you not to discuss this case with anyone at this point in time. We are obviously are looking into some matters and I would like to do so with a lot of discussion. You apparently weren't going to discuss it any way, but I would ask you not to do so. So at this time you are free to go.

THE JUROR: Thank you.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: All right. We are going to recess for lunch. Bring in the remainder of the jurors please.

(WHEREUPON, jurors enter the courtroom.)

THE COURT: All right, it's all ladies now. I lost my gentleman. He is not here any more. I want to thank you for your patience thus far this morning. We are going to break for lunch at this time. I will ask you to be back in the jury room at 1:30. We should start shortly thereafter.

I am going to instruct you to continue to maintain your silence about this case even among yourselves and follow the instructions that I normally gave you when you leave the courthouse. That is don't try to gather any information about the case on your own, don't discuss the case with anyone, don't allow anyone to discuss it with you and should anybody contact you about your service in this case please let me know. I ask you again to be back in the jury room at 1:30. We will try to move through this as quickly a possible. I want to thank you for your corporation thus far and at this time you are free to leave for lunch. Thank you very much.

(WHEREUPON, jurors leave the courtroom.)

THE COURT: We will be in recess until 1:30. Thank you, very much.

(WHEREUPON, lunch was taken at this time.)

THE COURT: Bring around Linda Albowicz.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: Come up and have a seat in the witness stand. Raise your right hand.

LINDA ALBOWICZ, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right, your name is Linda Albowicz?

A Yes.

Q Did I say that right?

A Yes, you did.

Q Okay, thank you. Ma'am, I am going to ask you a few questions about the trial. Of course you were a juror and you participated in Ethier versus Bibeau trial and there are things I would like to ask you about in connection with that case. First of all, I am going to divide the trial up in to a couple of different segments. We are going to talk about different segments of the trial and I got different questions I will ask you about each segment.

The first thing I will ask you, do you recall after the

verdict had had been read I advised you that you had the right to talk to anyone that you wanted to talk about the case. I also told you that you did not have to talk to anyone unless you choose to do that. Do you remember me telling you that?

A I do.

Q All right, now since the case has been over have you discussed the case with anyone?

A No one other then my husband.

Q Okay. So you did talk to him about it?

A Yes.

Q Has anyone contacted you about your service on the jury panel?

A Yes, I was contacted.

Q Can you tell me in what fashion?

A There was a message on answering machine at the home. I was contacted by the plaintiff's attorney. I am sorry I can't remember your name but the gentleman to my left.

Q That is Mr. Cox. M

A Mr. Cox left a message on answering machine thanking me for my service and that I was no way obligated to speak to him but if I would do so it may help him rendering verdicts for future client's or getting feed back. Something to that nature.

Q Did you return that call?

A I did not return that call.

Q Okay, so you have not spoken to anyone on the

plaintiff's side of the case since the trial?

A No, I have not.

Q And the message that was left for you was that they wanted to talk with you about possible future cases?

A They wanted feed back that may help better serve clients in the future.

Q Okay. All right, and that's the way you took that message?

A Yes.

Q Very good. The next thing I want to talk to you about or the next break down of the trial I guess, I want to ask you some questions that have to do about the period of time between when the jury was seated and the case was turned over for the jury for deliberations. What I would refer to as the trial of the case as the trial went along. So this is before deliberations began.

Now, as to that section of the trial you may recall that I every time you left the courtroom I would have instructed the jury about your behavior. What you should do or shouldn't do. Do you remember all the times that I brought that up?

A Yes, I do.

Q And when you returned to the courtroom especially in the mornings and after lunch I would say if there was anyone that had any difficulty in following my directions I would ask that person stand, anybody have any problems. And of course I

didn't recall anybody standing during that period of time during the trial. Do you remember those instructions?

A Yes, I remember those instructions.

Q You can probably say them yourself, can't you. I thought you would remember them.

A Yes.

Q Now ma'am, I want to know that during the trial, during the trial of the case and before deliberations began, do you recall anything that you felt might have been something that would have somehow violated or somehow breached the instructions that I gave, that some other juror may not have reported to me or you had not reported to me?

A I am not aware.

Q You weren't aware of anything that you felt like should have been brought up by any other juror or yourself?

A No, sir.

Q All right. Now, I am also again talking about the period of time the trial went on, and I am going to ask specifically about some matters that I just want to be sure -- I want to know your knowledge concerning these matters. Okay. Or if you have any knowledge. During that period of time do you recall anyone during any of the breaks or during any of your discussions in the jury room may have somehow vouched for the credibility or the believability or the truthfulness of any witness and specifically Doctor Bibeau or either of the nurses

that testified in the case?

A Did someone vouch for their credibility?

Q In other words someone might have said I know them or I work with them and I can tell you that if they say they did something they did it?

A Well, there was a young lady on the jury who had worked with all of them.

Q How did you become aware of that?

A She let us know that she wasn't sure how she got chosen to be on the jury because she worked with everybody.

Q Right.

A We explained to her when she was asked if this would, you know, prevent her from rendering a non-bias judgement that was her opportunity to get out of it. She should have answered in the affirmative.

Q But she didn't?

A No, she didn't.

Q Okay. All right, so she indicated that she had worked with them in the past?

A Yes.

Q All right, and in those discussions did she indicate that if Doctor Bibeau told you that he had done something that you could believe that, that would be truthful?

A I don't recall her saying that.

Q Okay. Do you remember her saying anything about if

Doctor Bibeau for example testified that he had done foot pulses that you could believe that he had done foot pulses in particular?

A No, I don't recall her saying.

Q Do you remember anything being said about either the doctor or the nurses as to whether or not they would have done foot pulses during that period of time when the trial was going on, not in deliberations?

A No.

Q Okay. Now, did you ever hear any -- and in particular the juror you are talking about who happens to be Teressa Killian -- did you hear her make any statements about Doctor Bibeau and Jeri being thorough?

A Not that I can recall. I mean, I knew she knew all the parties involved. I don't feel like at any point she vouched for their credibility.

Q Okay. All right. Now at some point in time during the trial a lady came in to the courtroom. She's described in the paperwork I received as white lady with red hair. They indicated that she would have sat in the courtroom in the area behind Doctor Bibeau's table, his representatives. Do you recall that lady being in the courtroom?

A I can't say that I do.

Q Okay. Now, do you remember any he one in the jury room indicating that someone had come in to the courtroom who worked

at the Fairfield hospital and perhaps was a nurse supervisor there. Did you hear anybody talk about that in the jury room during the trial of the case before the deliberations?

A No, I didn't hear anyone say that. I know nurses were in the courtroom who I believe who are testifying.

Q There were. There were a couple who testified, but this lady apparently did not testify but came in the courtroom.

A I can't say that I recall.

Q Okay. All right. Now, did you hear any statements made by anyone of the jurors concerning Doctor Bibeau's handwriting abilities?

A I think everyone commented on the handwriting abilities in the courtroom and thereafter.

Q All right, was that generally as to what you seen on the video screens and things of that nature?

A Yes.

Q All right. Now, did you hear any juror and in particular Miss Killian specifically talk about the fact that because she had worked at the hospital with these individuals that she had some particular extra knowledge about them or something that other jurors might not have had?

A I don't believe so.

Q You didn't hear that?

A I wasn't sitting very close to her in the jury room. I was at one end of the table and she was on the other.

Q So whatever she was saying it was not loud enough to hear or you didn't pay that much attention?

A It could have one of the two.

Q All right. So that's why you think you didn't --

A I don't believe I heard that, no.

Q Okay. All right. Now I am going to ask you specifically about the time in which you would have been in deliberations and I want you to know I am not asking you specifically for what anyone's opinion was or what your opinion was in the case at any given time. Jurors have the right to speak freely in deliberations. There is no problem with that, but there one thing the Court has the right to inquire about and that is whether or not there might have been information that was brought into the jury room from a source outside of the trial. From some source other then what went on in the courtroom during the trial. The oath you took is to decide the case based upon the law and the evidence.

So I am going to ask you do you recall anything that was said or information that was brought to the jury during deliberations that you felt came from outside of the trial or some information that came from some source other then the trial that was introduced into the deliberations?

A No, I don't think so.

Q So you are not aware that and don't feel that that occurred?

A Yes.

Q Is that right or wrong?

A That is, correct. I am not aware of that and don't feel that that occurred.

Q Okay. All right. Just one second. Now you did indicate that Miss Killian may have mentioned to the jury that she had worked at the hospital. That sort of thing. I am going to ask you the statements that she made -- whatever they were or to what extent -- did those statements in any way influence your ultimate decision in the case?

A No.

Q Do you feel that you decided the case based upon the law and the evidence presented during the trial?

A Yes, I do.

Q And do you feel like you were unduly influenced by any other juror in making that decision?

A No.

Q All right. I am going to ask you step outside with the bailiff for just a moment. I will talk some things over with the attorneys. We may call you back for some other questions. Thank you, ma'am.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Objections or additional questions from the plaintiff?

MR. PROFFITT: Your Honor, I think you

sufficiently covered this, but Miss Albowicz, but I want to make sure there is specific question asked about whether they -- whether Theresa Killian vouched not just for the credibility of Doctor Bibeau and their nurses and also their proficiency.

THE COURT: I will ask that question. Their skill in other words.

MR. PROFFITT: Right. She also said she kept saying "all" which I understood to mean Doctor Bibeau and the nurses, as your question was framed if there any doubt about that I would want to qualify that when she said Theresa Killian knew all parties that she is talking about Doctor Bibeau and those two nurses; Jerilyn Wadford and Rhonda Gwynne.

THE COURT: Okay. I will see if I can nail it down.

MR. HOLLAR: No additional questions.

THE COURT: Bring her back.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: Have a seat please, ma'am.

Q Just one or two other questions. First of all, I had asked you as to whether or not Miss Killian had vouched for the credibility of the doctor or the nurses involved in this case. I would also ask at any time did you hear Miss Killian at any time vouch for the their skill or there proficiency within their

profession?

A Not that I recall.

Q Okay. All right. And when you are talking about all the witnesses you are talking about the doctors and the nurses that were involved in the case is that right?

A I am sorry.

Q You had referred to that she had may be talked about all of the people. Are you referring to the people who testified' the doctors and the nurses?

A Yes, the doctors and the nurses.

Q That she had worked with?

A Yes, worked with them.

THE COURT: All right. Thank you, ma'am. I am going to release at this time from any further responsibility in this hearing. I will ask you not to discuss this matter with anyone outside of the courtroom and I don't know that we would need you to come back. If we do we will let you know. I don't think that will be the case so you are free to go at this time.

JUROR: Thank you.

THE COURT: Thank you, very much.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: All right. I think we are going to need Misty Beam.

THE COURT: Ma'am, have a seat in the witness stand and if you would once you are seated raise your right hand.

MISTY BEAM, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE Court

Q I believe your name is Misty Beam; is that right?

A Yes, sir.

Q Miss Beam I got some questions that I am going to ask you that pertain to the Ethier Bibeau trial. As I told you earlier there aren't any right or wrong answers to my questions. I'm not looking for any particular answers. I do want truthful and honest answers concerning my questions. So do you feel like you can do that for me today?

A I do.

Q Okay. I will divide the case up in to a couple different segments as we go along or some different areas that I want to talk about in particular. And the first thing I want to remind you of, do you recall when the trial ended I had given instructions throughout the trial. Every time you stood up and walked out of the courtroom you could probably tell me what I said, I said not to discuss the case with anyone even among yourselves. I went through all that thing about what you should

and shouldn't do. You remember that don't you?

A Yes, sir.

Q Well, then at the close of the trial when you were leaving the courtroom for the last time I told you that while I told you not to talk about it up to then at that time you had the right to talk about it, but you also had the right not to do so. Do you remember me telling you that?

A Yes, sir.

Q All right. Now since the trial have you discussed the case with anyone?

A With my mother.

Q Anybody else?

A No.

Q Has anyone tried to contact you about your service on the jury since that time?

A No.

Q Have you received a telephone call, or a message, have you received a message on internet or anything of that nature about your service on the jury in this case?

A No.

Q So you are not aware of any contacts you have had?

A No.

Q Okay. Now ma'am, I leave that part of the case and go to another part of the case, and this is what I am going to refer to as the trial of the case. This is the time between

when the jury was first seated and time that I turned the case over to the jury for your decision or deliberations. So this is while we were trying the case. It went on for seven days, so it went on for quite a while and I am going to ask you about some things that may or may not have happened during that period of time. And I want you to answer from your best knowledge, your best recollection as to what may have occurred during that time.

Now ma'am, of course I don't need to repeat my -- I have already gone over what I instructed you in the case and when you would come back in to the courtroom from lunch or being home over night I would always ask the jury if any of you had any difficult in following my instructions that I wanted you to stand and of course nobody reported that they had any problems during that time. And the way I asked that question I kind of asked you if you are any problems you should stand up and tell me. Now during the trial of the case do you feel that there was anything that happened that some other juror should have reported to me or let me know about that may have occurred? Did you see or hear anything happen that you feel like would have been a violation of what I had told you?

A No.

Q All right. Now I am going to ask you about some specific things that had been discussed to see if you are aware of these things.

First of all, there was one juror in particular who during

the what we call the voir dire at the time in which we interviewed jurors before we pick them that indicated she had worked at the past at Winnsboro Hospital. Do you remember one juror who indicated that?

A Yes.

Q And her name I believe is Theresa Killian?

A Yes.

Q Do you know her?

A I know her daughter. Her daughter went to my school.

Q So you don't know her directly?

A No.

Q Now were you -- during the trial did she ever discuss with people on the jury the fact that she had worked at the hospital in the past and that gave her some special knowledge about the people involved in the trial or anything that was going on in the trial?

A She mentioned working at the hospital but never about having, you know, extra knowledge or anything. Just mentioned it.

Q Well, at any point in time did you hear her or any other juror I like to say vouch for someone's credibility or say that, you know, Doctor Bibeau or one of the nurses tells you something that's what happened. They are honest, truthful people. Did you ever hear her say that?

A Not to me specifically.

Q Oay, did you hear her say it to the members the jury panel?

A Not that I recall.

Q One of the issues in the trial was a thing about whether or not foot pulses had been taken. You probably remember that being discussed a good bit. Do you recall that?

A Yes.

Q Did you ever hear that discussed by any member the jury before deliberations began?

A No.

Q About the fact that if Doctor Bibeau said he took a foot pulse that he would have done so?

A No.

Q Did you ever hear anyone say that, or did you ever hear that nurse Jeri if she had done it she would have made a record and she was very thorough and she would have done something like that? Did you ever hear anything mention like that of that nature?

A No.

Q Next one. Excuse me. Now, during the trial at some point in time a lady came into the courtroom and my understanding is that she had a seat over here on the right side behind the defense counsel table. She was described as white lady who had red hair. Do you remember that person coming in to the courtroom?

A I possibly do. I remember a white lady with red hair coming in and she never testified.

Q No, she did not testify. So you probbly recall when she came in?

A Yes.

Q Now, at any time was that person identified to you as to who she was?

A I think she was identified as star.

Q As who?

A A lady name Star.

Q Star. Did you ever hear what she did for a living?

A No.

Q Did you ever hear whether or not she was an employee or supervisor at the Winnsboro Hospital?

A May be. I think she mentioned as being an employee.

Q Who would have said that?

A Miss Killian.

Q Miss Killian would have said something about that?

A She recognized Star.

Q Do you remember her saying anything else about Star?

A No.

Q Other then that she may have worked at the hospital?

A That's about it.

Q Okay. Now did you ever hear anyone else speak about Rhonda Gwynne, she was one of the other witnesses. And this is

in the period of time before you started deliberations. Did you hear anybody talking about Rhonda?

A Yes, I think Miss Killian did mention Rhonda.

Q And what did she say about Rhonda?

A She worked with Rhonda when she worked at the hospital.

Q Did she say anything else about Rhonda that you can remember?

A Not that I know of.

Q All right. Now, I am going to move on to the period of time in the trial after deliberations started and I want you to know that I am not asking you for any answers about what the jury deliberated about during deliberations, what they may have said in that period of time other then I am going to inquire as to whether or not certain information might have been brought into the jury from outside of the courtroom. You remember that one of the instructions was to decide the case based upon the law and the evidence in the courtroom.

During deliberations did you hear anyone who brought information from outside of the courtroom into those deliberations, such as someone who claimed to have personnel knowledge of the truthfulness or honesty of the witnesses, or that you should believe some witnesses as against others? Anything of that nature because of information they got outside of the courtroom?

A No.

Q You didn't hear anybody say that because -- lets take in the case of Miss Killian because she had worked with those people and that you ought to believe them over anybody else?

A No.

Q You didn't hear anything like that?

A No.

Q Now, as to the ultimate decision in this case, apparently you did hear Miss Killian talk about especially the red-headed lady or perhaps about Rhonda you heard her say something about her, the information that you got from those comments, the things that she said, do you feel that somehow influenced or somehow caused you to change your mind or did it affect your decision in the case?

A No.

Q Did you decide the case on your own from the evidence that was presented during the trial?

A Yes.

Q So you don't feel like the comments that might have been made by any juror before deliberations started somehow changed or influenced the way you looked at the case?

A No.

Q Now did you ever hear Miss Killian make the statement that because she worked at the hospital somehow she had some special or extra knowledge about the doctor or the nurses in this case that you needed to pay attention to?

A No.

Q Never felt like she was talking in those terms?

A No, not when I talked to her.

Q All right. Well, I want to know what you know?

A Mostly when I talked to her I just mentioned her daughter. Other than that I never really talked to her about anything else.

Q Because that's who you know, you know her daughter?

A Yes.

Q Ma'am, I will ask you to step outside for just a minute. I will talk to the lawyers. We will call you back in just a second.

Thank you, ma'am.

(WHEREUPON, juror leaves the courtroom.)

THE COURT: All right. Objections or additional questions from the plaintiff?

MR. PROFFITT: I don't think so, Your Honor.

THE COURT: And from the defense.

MR. HOLLAR: No, thank you.

THE COURT: All right, bring her back.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: All right. Ma'am, you can have a seat, I don't have any other questions for you at this time so I am going to release you from this particular hearing. I am going to request or direct you not to

discuss this with anyone, this hearing or the matters that I asked you about and I don't know that we will have to call you back at any time but if we do we will be letting you know, but I don't think that is going to occur. I want to thank you for your cooperation and your patience today and at this time you are free to leave the courthouse. Thank, you ma'am.

THE JUROR: Thank you.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: We are going to need Cynthia Botts.

(WHEREUPON, a juror enters the courtroom).

THE COURT: Come in ma'am and have a seat in the witness stand for me and if you would raise your right hand.

CYNTHIA BOTTS, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Your name is Cynthia Botts, I believe?

A Yes.

Q Is that right?

A Yes, sir.

Q You need to speak up loud enough so this lady can take you down. Remember we had to tell witnesses to speak up. Now

it is my turn to tell you to speak up.

A Okay.

Q As I told you earlier I am going to ask you some questions that have to do with the trial of this case. There are no right or wrong answers. What I want is your recollection of what happened during the trial. Do you understand that?

A Yes, sir.

Q You going to be able to answer those questions for me I hope?

A Yes, sir.

Q All right. Now ma'am, I am going to divide the trial up in to a couple different matters that I want to ask about separately. So I want you to think about these particular areas of the trial. The first thing I am going to ask you about is on the last day when the jury rendered a verdict. The last instructions I gave you before you left the courthouse you may recall that throughout the trial I had warned everyone about talking about the case among themselves or with anyone else and not to try to gather any information on your own, don't listen to media reports. You remember all things I told you every time. You could probably tell me what I said. But at any rate you remember me doing that every time. But then last time when you left I gave you a different instruction. I told you that while I had told you throughout the trial not to discuss it with anyone on that occasion I said you had the right to talk about

it but you also had the right not to talk about it. Do you remember me telling you that?

A Yes, sir.

Q And so my question right now has to do with what has occurred since I gave you those instructions. Have you discussed the case with anyone since that time?

A No, sir.

Q All right. Now did anyone try to contact you about your service on the jury? Did you get a phone message or any other message about the case?

A I got a facebook message.

Q Okay. A message on facebook?

A Yes, sir.

Q All right, and who was that from?

A I think Pruitt. I can't pronounce the name.

Q The law firm for the plaintiff was Proffitt and Cox.

A Yes.

Q Who was it from? Was it the firm or was it from one individual?

A I think it was the firm. It says Proffitt.

Q All right. And that was on facebook?

A Yes, sir.

Q And do you recall what you were asked?

A It said how they could do things better, you know.

Q So they wanted to talk to you about the trial; is that

right?

A Yeah.

Q To see how they could do things better?

A Yes.

Q Okay. So that's what you recall them saying?

A Yes.

Q Did you respond to that?

A No, sir.

Q So you never had really talked to them about the case?

A No, sir.

Q But you did get that one contact?

A Yeah, and they called also but I did not answer the phone.

Q Did they leave a message?

A I don't have an answering machine.

Q You saw it on caller ID or something --

A Yes.

Q -- is that how you know? Okay, I understand, but you did not return the call?

A No.

Q Okay. All right. That pretty much covers what I wanted to talk about as far as that is concerned.

Now the next thing I am going to talk to you about is the time period in the trial between the time that the jury was seated and the time that the jury began deliberations. So this

this is what I would call the trial of the case. That is the time when we were hearing from witnesses, you heard the arguments by the lawyers, you heard my charge concerning the law. So you were listening to all those things before I finally instructed you to start your deliberations. So you understand what I am talking about now?

A Yes.

Q All right. Now, during that timeframe I was -- we talked about this just a minute ago -- I was giving instructions as to what you should do or what you shouldn't do when you left the courtroom. Now, when you came back I would always ask the question if any juror had any difficulty in complying with my instructions I asked that that juror please stand and would I have discussed that with them and I don't think anybody ever reported that they had any problems. I guess my question now is that during that period of trial do you recall any one doing anything that you felt that they should have reported to the Court?

A No, sir.

Q You don't recall any one discussing the case with anyone or with other jurors?

A No, sir.

Q Or anything of that nature?

A No.

Q Let me ask you specifically about some matters to see

if you have any recollection of any of these things either being done or said or anything of that nature. First of all, do you recall any juror who indicated to the remainder of the jury that because they had worked at Winnsboro Hospital with Doctor Bibeau and/or the nurses that they had some special knowledge or had some opinion concerning their truthfulness or there skills? Did you hear anybody make any statements about those things?

A No, sir.

Q At any time did you hear anyone make any statements about that if Doctor Bibeau said he did something or that Jeri had said she had done something that you could believe they did it. Did you ever hear anyone say that before deliberations started?

A No, sir.

Q There was an issue in the trial about whether or not somebody had taken foot pulses. It came up a lot about the taking of these foot pulses during emergency room visit. Did you ever hear a juror make a statement that if Mr. Doctor Bibeau said he took the foot pulses that if Bibeau did not do the foot pulses it was because Jeri did and because she very thorough. Did you hear anybody make that statement before deliberations started?

A No, sir.

Q All right. Did you hear anyone discussing Doctor Bibeau's handwriting before deliberations?

A No, sir.

Q Now, during the trial apparently a lady came in to the courtroom. She's a white lady. She is red-headed. She apparently sat on the side of the courtroom behind Doctor Bibeau's team. She did not testify in the case. Do you recall the lady I am talking about?

A I don't recall.

Q Okay. There is no reason why you should. I just want to remember if you do remember her. She again didn't testify in the case.

Now as to that individual do you recall anybody in the jury room ever identifying who she was?

A Not to my recollection, no.

Q Did you hear anybody make a statement to the affect that particular person might have been an employee of Winnsboro Hospital or even a supervisor of nurses at Winnsbory Hospital?

A No, sir.

Q You did not here that being discussed by anybody?

A No, sir.

Q Now as to Rhonda Gwynne, did you ever hear anybody make statements as to her truthfulness or her abilities as a nurse?

A No, sir.

Q Now, I am going to shift my inquiry to another phase of the trial, and this is the phase where I had turned the case over to the jury for deliberations. In other words, this was

when you were discussing the decision that you were going to make in the jury room and I believe we appointed Miss Pete to be the foreperson of the jury. She would have been handling that for me. So understand what part of the trial I am now talking about?

A Yes.

Q All right. And I want you to understand that generally courts do not and are not allowed to inquire in to jury's deliberations or what you actually say in reaching a verdict accept for one thing, and that is if someone were to bring information into the jury room from outside of the trial, outside of the courtroom. In other words, information that they get from some source that I instructed not for people to gather any information from. Do you follow what I am saying?

A Uh-huh.

Q Or that they bring information into the courtroom from there own knowledge or sources outside of the courtroom. In other words the case is suppose to be decided on the law and the evidence in the courtroom. Do you understand what I am saying?

A Yes, sir.

Q Now during the deliberations of the jury, do you recall anything being said by any of the jurors that you believe would have been information that they would have gathered either through their employment at some other location or by information they gathered from some other source outside of the

courtroom?

A No, sir.

Q So you don't feel that any information was brought from outside of the trial into the deliberations?

A No, sir.

Q All right. And specifically was there any juror who made any statements about the fact that she may have worked with either the doctor or the nurses, that you should listen to her or listen to her opinions concerning their truthfulness or there skill?

A No, sir.

Q Did you hear that come up during deliberations at all?

A No.

Q All right.

THE COURT: All right ma'am, at this time I am going to ask you to step outside for just a moment. I am going to go over some things with the lawyers. After I discuss that with them I may have some other questions for you. So if you will step outside for just a moment.

(WHEREUPON, juror exits the courtroom.)

THE COURT: Objection or questions from the plaintiff?

MR. PROFFITT: No, sir.

THE COURT: And from the defense?

MR. HOLLAR: No, sir thank you.

THE COURT: All right. Let's bring her back.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: All right, ma'am, at this point in time I am going to excuse you from any further responsibility to this hearing. I am going to ask you not to discuss what I discussed with you in this hearing with anyone else. I don't anticipate that we are going to be calling you back at any time, but I didn't know that we were going to call you back this time. So if something were to come I might have to do that. Thank you for your time and cooperation. I am sorry we had to bother you again. At this time you are free to go.

THE JUROR: Thank you.

THE COURT: Thank you, very much.

Next is Michael Usher.

COURT CLERK: He was released.

THE COURT: That's right. Kathy Rabb.

(WHEREUPON, juror enters the courtroom.)

THE COURT: All right, ma'am, if you would raise your right hand.

KATHY RABB, called as a witness, having been duly sworn by the Court, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q Ma'am, state your name please?

A Kathy Rabb.

Q Miss Rabb, I am going to ask you some questions that pertain to the trial, Ethier versus Bibeau. I'm sure you remember that trial. As I told you earlier there aren't any particular right or wrong answers to my questions. I just want to know your recollection, I want to know the truth of the matter that I am asking you about. So do you understand what I am doing today? Do you have an idea about what I am doing?

A Have an idea.

Q Very good. All right. Now, what I am going to do I am going to go through some things about the trial and I will divide it up into different times during the trial so that we can focus on those particular areas.

First thing I am going to ask you about is, you may recall that as the trial proceeded I probably told you every time you left the courtroom not to discuss the case with anyone and when you left the courthouse I told you not to gather any information on your own. You remember all those instructions that I gave because I did it a lot. Do you remember that?

A Yes, sir.

Q Now, what I want to focus on though is the last time you left the courthouse I changed those instructions and at that

time I advised you while I had been telling you not to discuss the case with anyone I told you then you had the right to do that. I also explained to you that you had the right not to discuss the case with anyone. You didn't owe an explanation to anyone unless you choose to give it. Do you remember when I gave you that instruction?

A Yes, sir.

Q Now, what I am focusing on now from the time since I gave you that instruction up until now have you discussed the case with anyone during that period of time?

A No. No, only just family.

Q Okay. But let me ask you this, did anyone try to contact you about your service on the jury?

A No, sir.

Q Did you get a telephone call or message from anyone or did you get any type of electronic communication, facebook posting, things of that nature?

A No, sir.

Q So you do not recall having getting any information or any requests for information during the interim?

A No, sir.

Q And the only people you talked to are family members, is that right?

A Yes, sir.

Q Okay. Now, the next thing I want to ask you about

would be the timeframe during the trial between the time that the jury was selected and we started the trial and the time that I turned the case over to the jury for deliberations. So this would have been the trial of the case and I am sure you remember it went on about seven days that, we were in that phase of the trial. So that's the time period I am trying to focus on at this point in time. So do you understand what I am referring to. I'm not referring to your deliberations in the case?

A Yes, sir.

Q Okay. And I'm not talking about our discussions before the jury was seated. Do you remember that during that time when we were talking about that that one of the jurors indicated that she had worked at the hospital before?

A Yes, sir.

Q Do you remember that? Do you know who that juror was? Do you remember who that was?

A Teressa Killian.

Q Okay. Did you know her before the trial?

A No, sir.

Q So you only would have met her during the trial?

A Yes, sir.

Q Okay. I am going to be asking you about my instructions. Every day when you came in the courtroom you may recall that I asked if any juror had not been able to comply with my instructions I asked them to please stand. Do you

remember me doing that?

A Yes, sir.

Q And I did that in the mornings and I did that after lunch too after everyone came in form the lunch break. Now, of course the way I framed that question I was asking if any juror wanted to tell me about any problem they had had. I am going to frame it a little bit differently today. I am going to ask if during the trial you felt like something had happened or you had observed something that should have been reported to me during the trial. Do you recall anything of that nature?

A No, sir.

Q All right. Now specifically I am going to ask about whether or not some things might have been said among jurors before deliberations started. So that's what I am going to be asking you about at this point in time.

Do you recall anyone during that period of time on the jury indicating that they had some personnel knowledge of Doctor Bibeau or the nurses involved in this case and that based on that knowledge that you could trust them or believe the things that they said. Do you remember somebody making statements such as that?

A Somewhat.

Q Tell me what you remember?

A I remember one the jurors saying that they worked with Doctor Bibeau and he was a good doctor and that the nurses were

efficient.

Q Do you remember who might have said that?

A Yes, sir.

Q Okay. Who was that?

A Teressa Killian.

Q Miss Killian said that?

A Yes, sir.

Q All right. Now do you remember when that occurred?

A I don't remember the exact date.

Q But it was before we started deliberations?

A Yes, sir.

Q Okay. Now, was that said directly to you or was that just said in general to whoever happened to be in the room at that time?

A It was in general.

Q Now, do you recall any statement such as this having been made, a statement that was to the effect that it Doctor Bibeau and nurse Jeri were very careful and thorough and if they say they did something they did it? Do you recall a statement being made such as that?

A I believe so.

Q All right. And was that again Miss Killian?

A Yes.

Q Do you recall a statement having been made -- and one of the issues during the trial was the question of whether or

not foot pulses had been taken and properly recorded. Do you remember that?

A During the trial? Say that again.

Q During the trial one of the questions or issues that came up was whether or not during the emergency room visit foot pulses, pulses on someone's foot, had had been properly. Taken do you remember that?

A Yes, sir.

Q Did you ever hear Miss Killian make a statement that if Doctor Bibeau said he took the foot pulses that he did it and if he had did not then that was because Jeri did it and she was very thorough? Do you remember any comments about the foot pulses being taken or not taken? Do you remember Miss Killian talking about that?

A I'm not sure about that one.

Q You don't remember that?

A No, I am not sure about that one.

Q I want you to tell me what you remember. You don't remember that?

A I don't remember that.

Q Okay. Very good. Now at some point during the trial a person came in to the courtroom. She sat behind the defense table and has been described in the papers that I have seen as a white lady who had red hair. That she sat again on that side of the courtroom. Now that person did not testify in the case.

First of all do you remember that lady coming in and sitting over there? There is no reason why you should have but if you did notice it did you see that?

A I remember one person that was sitting there who didn't testify.

Q All right. Do you recall that person ever being identified by one of the jurors as to who she was?

A I don't remember.

Q Do you remember anybody ever saying anything to the affect that perhaps she worked at the hospital and was a nurse supervisor? Did you hear that said about that red-headed lady?

A No, sir.

Q Okay. There was another nurse. Her name was Rhonda Gwynne. Now do you recall any statements having been made by Miss Killian concerning Miss Gwynne, Rhonda Gwynne as to anything about her.

A I don't remember.

Q So you don't remember any comments having been made about Rhonda Gwynne?

A No.

Q Okay. Now I am going to switch to another part of the trial and that is the part of the trial after deliberations had begun in the case. This was when I had turned the case over to you, I appointed Miss Pete to be the foreperson of the jury and you would have been at this point in time discussing what your

decision was going to be. So do you understand what I am referring to now, at what part of the trial I am talking about?

A Yes, sir.

Q During that part of the trial generally courts don't get in to how a jury goes about its deliberations. In other words a jury is free to discuss what the jury thinks is important in reaching a verdict in the case. So I am not asking specifically about who was voting one way or who was voting another way or what your discussions were during that period of time. But what the courts do get concerned about and can get involved in if there is an attempt by a juror to bring information in to the jury deliberation room from outside of the trial, outside of the courtroom. In other words the law calls it extraneous information. Information that was not developed in the trial of the case. So do you understand what I am talking about?

A Yes, sir.

Q All right. During those discussions, those deliberations, do you feel that any juror brought any information into those discussions from a source outside of the jury room?

A No, sir.

Q Do you feel that any of the jurors during those deliberations and in particular I am probably talking about Miss Killian, that she talked about her experience as having worked

with the doctors or nurses involved. That her experience in that regard should be considered by the jury in reaching its verdict in this matter? In other words did she vouch for their truthfulness or there skill during deliberations based on information she had gathered at her job?

A Not during deliberation.

Q Not during deliberations?

A No, sir.

Q Now, the the information that you did hear Miss Killian talk about, at some point during the trial. Can you tell me what affect that had on you and your decision making process? The information that you would have gotten before deliberations started, whatever she said, did it affect your ultimate decision making process in the case?

A No, sir.

Q Were you able to make up your own mind based on the law and the evidence presented during the trial?

A Yes, sir.

Q Do you feel that what she told you was in any way somehow serving as undue influence on your decision making process?

A No, sir.

Q All right.

THE COURT: Ma'am, I will ask you step outside with the bailiff for just a minute. I will talk to

the lawyers and then I will call you back.

(WHEREUPON, the juror exits the courtroom.)

THE COURT: Any objections or additional questions from the plaintiff?

MR. PROFFITT: No.

THE COURT: Any from the defense?

MR. HOLLAR: None.

THE COURT: All right. Let's bring her back.

(WHEREUPON, the juror enters the courtroom.

THE COURT: First of all I want to thank you for your patience today in putting up with me for another day. There were some matters that had come up obviously that I had to look in to so that's what I'm doing. I don't anticipate that we will need you in the future, however about the time I say that something might change. So I am going to tell you that I don't anticipate that happening. I am going to instruct and ask that you not talk about what we talked about today with anyone outside of us. Do you understand that? I do not want you discuss it with anyone.

THE JUROR: I understand.

THE COURT: At this time you are free to go. Thank you for coming today.

THE JUROR: Thank you.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Let's take Harrison next.

(WHEREUPON, a juror enters the courtroom.)

THE COURT: Ma'am, if you would please raise your right hand.

SHIKIERRA HARRISON, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right, your name is?

A Shikierra Harrison.

Q Miss Harrison, I am going to ask you some questions about the Ethier trial, and again, as I told you earlier I am not asking for any particular answers. I just want to know the truth as you remember it about the case. Do you understand that?

A Yes, sir.

Q So there is no right answer or wrong answers to my questions. I just want to know what you recall and what is the truth about these situations.

Now, I am going to divide the case up into a couple different stages or steps. So I want you to kind of think in terms of different parts of the trial as I go through asking you about these things. The first thing I want to talk to you about

is what has occurred since the trial was over. You may recall that during the trial I instructed you many, many times as you left the courtroom about not discussing the case with anyone, not allow anyone to discuss it with you. Do you remember all those instructions about not gathering information on your own, not watching media reports; do you remember all that?

A Yes.

Q Now ma'am, at the close of the trial when I released the jury I gave you some different instructions. At that time I told you that you would have the right to discuss it with anyone you would like to talk it over with or you had the right not to talk it over. Do you remember me giving you those instructions?

A Yes.

Q Now since the time of the trial I want you to tell me had you discussed the case with anyone?

A Yes.

Q Can you tell me who you talked to about it?

A Co-worker, my supervisor.

Q Okay, and anybody else?

A No.

Q No family members anything like that you ever talk it over with them?

A No.

Q Now, has anyone tried to contact you about the case?

A No.

Q Have you gotten any letters, phone calls, messages on things like facebook or anything of that nature?

A No.

Q Okay. So no one has tried to contact you about your service?

A No.

Q Okay. I will move away from that part. And now I am going to be talking to you about the actual trial of the case. That would be the time from when the jury was seated until the time I turned the case over to the jury for your deliberations. So that went on for about seven days. It went on for a while. I think you were an alternate originally weren't you?

A Yes.

Q And you got seated during the middle of the trial, almost early in the trial?

A The first day.

Q Was it the first day? I can't remember. I knew the gentleman got sick. Actually the second day.

A Second day.

Q So you served as juror from that point forward and again, I am going to talk about the instructions I talked to you about. And when you came back into the courtroom I was asking people if they had any difficulty complying with my instructions I asked them to stand up. And the way I asked the question it was asked more if any particular juror had had problems or

inability to follow my instructions to please report it. I never asked the question in this fashion and I am just going to ask it now. During the trial of the case did you observe, hear or see anything that any other juror may have been involved in that you felt like might have had some problems with my instructions or should have reported to the court. Did you see anything like that or hear anything like that?

A No.

Q All right. Now, I'm specifically going to ask you about some issues that may have come up in the jury room and may not have come up in the jury room. I will see what your recollection is of it.

During the trial of the case do you recall any juror who claimed to have some type of knowledge or experience with plaintiff -- I mean with the defendant or with the nurses involved in this case such that they knew them well enough to tell you that they were a good doctor or good nurse or if they told you something you could believe what they said? Did you ever hear any juror talk about things like that?

A Not to the extent that you are asking.

Q All right. Tell me what you heard?

A Just that they worked with some people that were kind of involved in the case. They worked at the hospital before. They didn't go into as to their worth ethic. They did mention that they worked with these people before, certain people.

Q I believe you are probably referring to Teressa Killian?

A I don't know her name, but she is short, dark-skin woman but I am not sure what her name was,

Q She was the lady -- Teressa Killian was the lady --

A She went second today.

Q Beg your pardon?

A She went second today.

Q She did go second today. That's Teressa Killian. So you did hear her mention that she had worked with them in the past?

A Yes.

Q Okay, but you didn't hear her say anything about their skill or there truthfulness or anything of that nature, or did you hear that?

A I can't recall, so I don't want to say yes. But she mentioned, you know, knowing them and having worked with them. But I am not sure.

Q Let me ask you a little more specific questions and see if this helps, or may or may not help. Did you ever hear any statement by any juror to the affect that Doctor Bibeau and Jeri were very careful and thorough and if they said something they did it. Did you ever hear anybody make a statement such as that?

A No.

Q Did you ever hear anyone said during the breaks that if Doctor Bibeau said he had taken foot pulses then he did it, or if Doctor Bibeau did not do the foot pulses then it was because Jeri did it and she is very thorough. Did you ever hear anybody say something to that affect?

A No.

Q Did you hear anyone talking about Doctor Bibeau's handwriting?

A You me like back in the jury room?

Q Yeah, while you all were back on breaks or gathering in the morning or whatever?

A Yes, the same juror was mentioning that his handwriting was been like unreadable but nothing else other then that,.

Q Now during the trial a lady came in to the courtroom, had a seat over here on the right side behind the defense. She had been described to me as a white lady with red hair. Now this person did not testify in the case. Do you recall that person being in the courtroom?

A Yes.

Q Now, at any time was that person ever identified to you? Did you be tell you you who she was?

A Someone mentioned her, but I don't know if it was the same person or not. They mentioned that she was over the nurses at the hospital if I am not mistaken.

Q So she may have been like a supervisor?

A Yes.

Q Okay. Did they name her by name?

Q They may have but I don't remember?

A Now, there was another nurse who testified, Rhonda Gwynne, or how good she was on her job or thorough she was? Do you remember anyone vouching for the abilities of Rhonda Gwynne?

A I can't recall. Her name was mentioned as well, but I can't remember exactly what was said.

Q Okay. Now I am going to switch to a different part of the case and this would be during deliberations. This would be after I turned the case over to the jury room for you to make a decision. I would have appointed Miss Pete to be the foreperson of the jury, so she would have been leading your decisions or handling the jury. Do you remember that part of the trial?

A Yes.

Q During that part of the trial I will tell you that courts generally do not get in to and are not allow to get in to what juries discuss during that period of time or how they go about making their decisions. It is truly is the jury's deliberation and generally courts don't get involved in that. Now there is an exception to that general rule and that is where a juror might bring information in to the jury's discussions from outside of the trial. In other words information they had had gathered from some other source other then the trial of case.

Now if I were to ask you during the deliberations of this trial, do you recalling any juror bringing information into those discussions that you would have considered information that was given from some source outside of the court?

A No.

Q All right, and specifically I want to ask about Miss Killian because she had worked at the hospital. During the deliberations of the jury do you recall her using her knowledge as a co-worker somehow to influence the jury or vouch for the credibility or the skill of the doctors and/or nurses during deliberations?

A Not that I recall.

Q Now given the things that you do remember being said, and particularly by Miss Killian in this case --

A Yes.

Q -- Do you feel that the information that she gave or the statements that she made somehow had an influence on you and the decision making process that you had in this case?

A No.

Q In other words did her statements somehow influence your final decision you made?

A No.

Q So you did not use that information upon which to base your decision you made?

A No.

Q Now ma'am, I will ask you to step outside.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Objections or additional questions from the plaintiff.

MR. PROFFITT: None, from the plaintiff.

THE COURT: And from the defense?

MR. HOLLAR: None, thank you.

THE COURT: All right bring her back.

(WHEREUPON, the juror enters the courtroom.)

THE COURT: All right. Ma'am, first of all I want to thank you for your patience today. I know it is not any fun to be called back up here about something like this again, but there was obviously some things had come up that I got to look in to them so I am doing that. I don't anticipate we will be talking to you again although some things happen sometimes and I might have to talk to you again. But in the meantime I am going to ask that you not discuss with anyone our questioning and what we ask you about in this matter. I want you to not share that information with anybody. Do you understand those instructions?

THE JUROR: Yes.

THE COURT: All right. At this time are going to be free to go. Thank you for coming here today.

THE JUROR: Thank you.

THE COURT: Bring the last one.

(WHEREUPON, a juror enters the courtroom.)

THE COURT: Have a seat please, ma'am and raise your right hand.

SANDRA MITCHELL, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q All right. State your name please?

A Sandra Mitchell.

Q And Miss Mitchell you will have to speak so we can hear you.

A Sure.

Q Now Miss Mitchell, you are one of the alternates in the case, in the case of Ethier versus Bibeau. I am going to ask you something about this particular case and what I am going to do is I am going to try to divide the case up in to a couple of different segments so we can talk about these different segments separately. Now, as the alternate in this case you would have not have gone in to the deliberations in the trial. I would have released you once the jury begins its deliberations. Do you recall my having done that?

A Yes, sir.

Q Now, up to that point in time I had given you

instructions concerning your behavior in talking to people about the case, or trying to gather any information on your own, and I'm sure you could probably tell me my instructions I told you so many times. So do you remember me giving you those instructions as the trial went on?

A Yes.

Q Now when you left the courthouse you would have been in a position at that point in time to discuss the case with anyone if you wanted to. Of course you are not required to talk about the case with people who ask you about it unless you choose to do that.

Now my question first of all is in the time since the trial of the case have you discussed the trial of that case with anyone?

A After the trial was over I did discuss it with my family because they were concerned.

Q And could you tell me who in your family you would have talked to?

A I spoke to --

Q You don't have to identify by name, husband, children?

A I spoke to my son, my sister, my niece and my borther-in-law.

Q I see. Now ma'am has anyone tried to talk to you about your participation in the case?

A No.

Q So you have not received a letter, an e-mail or phone call from anyone asking you to talk to them about it?

A No.

Q Okay. Now the next thing I want to talk to you about is the period of time between the time that the jury was seated and the time I turned the case over to the jury for its deliberations. So it would be have been the trial of the case in which you participated in it mainly since you didn't participate in the deliberations. Do you understand the timeframe that I am talking?

A Yes, sir.

Q And during that particular timeframe, I guess every morning and every day after lunch when you came back in to the courtroom I would always ask if there was any juror who had any difficulty in complying with my instructions I would ask those jurors to please stand. Do you remember me doing that?

A Yes, sir.

Q And of course we didn't have anybody during the trial who stood or reported anything. The way I asked that question is for example, if you had been contacted by someone or discussed the case with someone, I would have expected you to tell me about that. But now I didn't ask it from the point of view if you knew of anyone else in the jury panel who needed to report something, would you tell me that. I didn't ask that question. So I am going to ask you now during the trial of the

case did you observe anything or see anything or hear anything that you felt would have been somehow would have run afoul or gone against my instructions during the trial?

A No, sir.

Q Now ma'am, I am going to ask you some specific things, about some specific things that may have come up, or you may have heard something about. Again, I just like for you to be truthful in answering my questions about this these matters?

During the trial of the case do you recall any juror who indicated that at some point in time that juror had in fact worked with either the doctor or the nurses that are involved?

A Yes.

Q Doctor Bibeau or the nurses?

A Yes.

Q Okay, and tell me do you remember which juror that was?

A I do not know their names.

Q Okay. Do you recall what was said?

A No.

Q Could you tell me generally what was said?

A The only thing I know is they worked with them. That's all I know.

Q Okay. So you heard at some point in time one of the jurors say I had worked with the doctors and the nurses?

A Yes, I did hear that.

Q All right. Now, I am going to ask about some specific

things to see if you recall ever hearing any of these things mentioned during the trial.

Did you ever hear a juror make a statement that Doctor Bibeau and Jeri are very careful and thorough and if they said they did something then they did it. Did you ever hear a statement such as that?

A No.

Q All right. Did you ever hear anyone make a statement that if Doctor Bibeau said he took foot pulses then he did it, and if Doctor Bibeau did not do the foot pulses then it was because Jeri did it and she is very thorough. Did you ever hear anybody make a statement such as that in the jury room?

A No, sir.

Q Now, did you ever hear a juror repeatedly say things about Doctor Bibeau being a good doctor?

A No, sir.

Q Did you hear comments in the jury room about how bad Doctor Bibeau's handwriting might be?

A No, sir.

Q You didn't hear anything about that?

A (Shakes head no.)

Q Now during the trial of the case I'm informed -- and I believe it's true -- a lady came in to the courtroom and sat over here on the right side behind where Doctor Bibeau's table was and she has been described to me as white lady who had red

hair and that lady did not testify in the case. So she was not a witness, but she sat over on that side. I am going to ask you do you remember or recall that person being in the courtroom?

A Yes, sir.

Q All right. And that person did not testify did she?

A No, sir.

Q Now, an any time was that person identified by one of the jurors in the jury room?

A Not that I no of.

Q Did you ever hear anybody say that she worked at the hospital or she may have been a nurse supervisor at that time?

A No.

Q You did not hear those statement being made about that person?

A No.

Q Now as to nurse Rhonda Gwynne, that was another one of the nurses involved in this case. Did you hear any of the jurors talk about her or vouch for her abilities or her truthfulness?

A No.

Q You never heard anybody make any statements about Rhonda Gwynne in the case?

A No.

Q All right.

THE COURT: Ma'am, I am going to ask you if you

would step outside with the bailiff. I will talk some matters over with the lawyers and we will call you back. Thank you very much.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Any objections or additional questions from the plaintiff?

MR. PROFFITT: No, sir.

THE COURT: Any from the defense?

MR. HOLLAR: No, sir.

THE COURT: Bring her back.

THE COURT: All right. Ma'am, I want to thank you very much for your patience with me today and you coming back and assisting me in my discussions with you about this case. I don't anticipate we will need to talk to you any further about this matter but then again I have been fooled in the past, so if something were to come up we will be in touch. In the meantime I would ask you not discuss this inquiry with anyone. Do you understand that ma'am?

THE JUROR: Yes, I do.

THE COURT: Again, thank you for your cooperation and you are free to go at this time.

THE JUROR: Thank you.

(WHEREUPON, the juror leaves the courtroom.)

THE COURT: Bailiff, do you want to come around

and get in the witness stand for me. Raise your right hand.

WALLACE BOULWARE, called as a witness, having been duly sworn by the clerk, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q State your name?

A Wallace Boulware.

Q And Mr. Boulware I believe you are a bailiff here at the Fairfield County Courthouse?

A I am.

Q I believe at my request you came in this morning and you have been sitting with the jury today?

A I have.

Q Now have you been sitting with them since they arrived this morning?

A I have.

Q And during that time I instructed you not to allow the jury to discuss anything about the Ethier Bibeau case. Do you recall my instruction?

A Yes, sir.

Q Now, did the jury at any time or any members of the jury in your presence discuss anything about this case?

A No, sir.

Q And so you have been able to carry out my instructions in that regard?

A I have.

Q All right.

THE COURT: Plaintiff wish to ask any questions of the bailiff?

MR. PROFFITT: No, sir.

THE COURT: Defense?

MR. HOLLAR: His wife had a few questions judge.

THE COURT: I think we will leave that out. Thank you Mr. Bailiff. I appreciate your assistance. Thank you very much.

THE BAILIFF: Thank you.

THE COURT: All right gentleman, I will be glad to allow to you file briefs or memos if you would like to do that after the hearing. How much time do you think the plaintiff would like to prepare any memo or brief.

MR. PROFFITT: The clerk has put the posttrial motion on the roster for June 11th. I don't know if that's something automatically or at your direction.

THE COURT: I am sure the clerk has done that. I have no problem with that. Do you want to submit a brief prior to that time.

MR. SMITH: Are you the judge on June 11th?

THE COURT: I don't know.

MR. SMITH: It has to be you.

THE COURT: It has got to be in front of me.

THE COURT: Well, right now it says Judge Kinard, but I don't know.

THE COURT: Judge Kinard is not holding court right now. I will have to check my schedule. I don't know what I am doing in June. I will have to look in to that.

MR. HOLLAR: I think as the trial judge we would come to you judge wherever you might be.

MR. PROFFITT: Yes, sir.

THE COURT: I am on vacation that week. I will not be available that week.

MR. SMITH: If you set a date, we can do the briefs. Do you want anymore argument or will you decide on briefs.

THE COURT: Well, that's what I wanted to know how you wanted to do it. If you want submit briefs I will be glad to do that and I will be glad to hear argument. We can do this in Spartanburg for that matter, I think. I've got some non-jury terms coming up, civil nonjury terms coming up. Would you like for me to do that.

MR. PROFFITT: That would be good. I would like to know how long it might take to get a transcript.

THE COURT: You have to talk to her about that. Let me get back to Spartanburg and I will need to check with the roster clerk there. I got a two week medical malpractice case starting in Spartanburg on Monday morning next week and it should go for two weeks is what I have been told, so I won't be scheduling it during those weeks. So that's a good three weeks out before I would be scheduling it.

MR. SMITH: Judge, and just -- I know I will come whenever the Court tells me to come, but I just have May 29th fall out on a bunch of depositions that I had all day so if you happen to be available that day that would be a great day.

THE COURT: Well, let me look at calender and I will have John get in touch with you.

MR. PROFFITT: We also filed a motion that you may recall on the verdict form and --

THE COURT: Yeah, I am aware of that.

MR. PROFFITT: Do you want to hear that at the same time.

THE COURT: Yes, I will take care of all post trial moti. Ns that will be fine.

MR. PROFFITT: So you will be in touch with us about the dates.

THE COURT: Yes. Why don't we do it that way.

MR. HOLLAR: Judge, should we -- if you want we can coordinate bringing the court file if you think you need it or we could have a extra copy of everything just to make sure you have all that you need,

THE COURT: I don't think I will take the clerk's file. I will leave it here.

MR. HOLLAR: Okay.

THE COURT: So whatever you want to bring it with you, okay.

MR. HOLLAR: Are you requesting briefs, judge.

THE COURT: I am not requesting them. I was giving you the opportunity to do briefs. However you gentleman want to present it to me I am happy to listen to it. So if you rather do briefs or I will take it on argument when we argue post trial motions.

MR. PROFFITT: I will probably submit a brief.

THE COURT: Okay. If he submits a brief then it is up to you whether you want to reply to it.

I will give you an opportunity to argue it at post trial motions.

MR. HOLLAR: Yes, sir.

THE COURT: Thank you, very much and we will be in touch and schedule a time.

MR. PROFFITT: Thank you, Your Honor.

MR. HOLLAR: Thank you, judge.

MR. HOLLAR: Can we submit briefs judge or are we going to do that -- I would prefer that both parties just give each other an opportunity to review it maybe two days before the hearing.

THE COURT: Well, he is asking for the transcript and that I guess that will take a couple of weeks probably. So, I will give you enough time to get a brief ready.

MR. HOLLAR: Yes, sir. We can get a brief ready. What I don't want to do is we walk in do what we do normally at the hearing and hand each other briefs.

THE COURT: No, I want you to submit it to each other lets say a week before the hearing.

MR. PROFFITT: Okay.

THE COURT: That will give you a chance to hash it out. All right. Thank you gentlemen.

(END OF TRANSCRIPT)

CERTIFICATE

I, the undersigned Aileen Butler, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings in the captioned case, in the Circuit Court for Fairfield County, South Carolina, on the 12th day of May, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

May 22, 2015

Aileen Butler

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD)

PHILIP ETHIER and JEANNE ETHIER,) TRANSCRIPT
)
PLAINTIFF,) OF
)
vs.) RECORD
)
FAIRFIELD MEMORIAL HOSPITAL, GUY R. BIBEAU AND TURMEY MEDICAL PROFESSIONALS,) 2013-CP-20-12
)
DEFENDANT.)

July 6th, 2015
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE ROGER L. COUCH, Judge.

A P P E A R A N C E S:

DAVID PROFFITT
ESQ.
Attorney for the Plaintiff

ANDREW LINDEMANN
ESQ.
Attorney for the Defendant Doctor Bibeau

PAMELA E. GREEN
Circuit Court Reporter
Seventh Judicial Circuit

INDEX OF WITNESSES

(There were no exhibits marked or testimony taken during this hearing.)

PROCEEDINGS

THE COURT: All right. I'm on the record in the case of Philip and Jeanne Ethier versus Guy R. Bibeau, M.D.

This is a motion for a new trial as well as, as well as some other post, post-trial issues. Plaintiff is present and represented and the defense is also present and represented.

I believe it's the plaintiff's motion. So I'll hear from you.

MR. PROFFITT: All right. Thank you, Your Honor.

My name is David Proffitt. I, of course, represent the plaintiffs in this case. I guess I'll start with the motions for a new trial if you'd like to do that.

THE COURT: That's fine.

MR. PROFFITT: Okay. Our, our first ground for a new trial, Your Honor -- I assume you have our memos in both---

THE COURT: I do.

MR. PROFFITT: ---instances?

(The Court nods affirmatively.)

MR. PROFFITT: Okay. Is the juror concealment issue where Teresa Killiam, we learned after the fact, after the trial was over, actually had personally known and personally worked with Doctor Bibeau, Jeri Lynn Wadford, and Rhonda Gwinn for nearly two years, and so, to show juror

concealment, we have to show a fact of disqualification, that the grounds were unknown to us, and that we were not negligent in, in learning about those grounds.

Intentional concealment is when a juror easily -- is asked a reasonably comprehensible question and fails to answer it, for whatever reasons, and the failure to respond is unreasonable because the question is so significant and so understandable that the juror should of understood it.

In this case, just to get right to the point, Teresa Killiam answered to your question on whether or not there was a social or personal relationship with any of the defendants or plaintiffs or witnesses that you listed, and in your questions you listed Jeri Lynn Wadford and Rhonda Gwinn twice, and then, in response to those questions, all we ever learned from Teresa Killiam is that she knew Mike Williams, the CEO of the hospital.

She's a certified nurse assistant, way down the totem pole. Mike Williams is the CEO. So she says I know Mike Williams and I know him from employment. You asked her how do you know him. I know him from employment. I've worked with him.

So she understood the question to be what -- do you know these people and do you work with them. So that's -- she understood that because she revealed it, and, in fact, one of your questions also was whether or not they had been

employed by her or treated by any of the witnesses and, again, she failed to answer that one as well when Rhonda Gwinn and Jeri Lynn Wadford were again listed.

Now, her failure to do that is just really incomprehensible because I mean, I mean she understood the questions. She's sitting in the courtroom. She's just been sworn in twice to tell the truth. She says I know Mike Williams and I know him because I knew him from 16 years ago when he treated my son, which made absolutely no sense, because, as I understand her testimony at the evidentiary hearing on May 12th is she says I knew Mike way back when when he would give my son breathing treatments 16 years ago. Her son's now 18. And then she comes to work at the hospital and she sort of meets him again.

So, as I understood her, she has no social or personal relationship with him outside the hospital. They're not best buds. They don't go to church together. They don't go out to eat together. They don't socialize. If she sees him on the street she says hi. And if she saw Doctor Bibeau or Jeri Lynn Wadford or Rhonda Gwinn, she'd say hi to them too presumably.

I mean she just knew -- the only way she knew any of them is through the hospital. Yet, for some reason, the only one she answered about was Mike Williams.

Now, I think that she had a nefarious motive. I think

she was deliberately concealing with intent and she sat there on purpose and didn't say anything about those other two that she knew, the defendant himself and two nurses who actually testified at trial. She knew all those, but didn't reveal any of it.

But it doesn't matter. We don't have to show that she had some kind of nefarious intent or a, or a bad motive. Prejudice is presumed. If you can show that it was intentional concealment where the juror was asked a question that's reasonably comprehensible and it's of such significance that she should of answered it, then that is intentional concealment and bias is inferred, bias is presumed, and, and all you have to show is that it would of been a cause for the judge to or a reason for the judge to strike her or a reason for us to challenge her for cause or to strike her ourselves if the Court chose not to strike her anyway and that certainly is what we would of done here.

If we heard and had any hint whatsoever in anyway whatsoever that she knew these people, she would of been struck first thing all day everyday. There's no doubt about that.

But what we knew going in, and this is set out in detail in my memo, is that these -- all these -- all three of these people, Bibeau, Wadford, and Gwinn, were moonlighters. They were part-time weekenders. All of them

had other full-time jobs. They only worked at the hospital on week -- well, Bibeau did work at the hospital on some weekdays, but he was at the hospital infrequently. He would only go there two or three days a month. Wadford worked on -- only on Sundays. Gwinn only worked on Saturdays and Sundays.

So -- and we knew that there was a medical surgical, surgical division and an emergency department division. So they're sort of this separation of the two wings of the hospital. We knew that.

So it was not unreasonable for us to think that she had been there years earlier, Teresa Killiam had been there years earlier, she wouldn't know these part-time weekenders, these moonlighters, she wouldn't necessarily of had a chance to work with them. She's in med surge and they're, they're in the ER. So it made sense that she would, she would know that -- she would not know them. That was not something that would jump out at us.

So we were not negligent -- plaintiffs were not negligent in anyway in failing to realize that she was disqualified or that she knew these people. She had answered a question that she clearly understood and said the only person I know is this Mike Williams you just listed indicating to us, and we're entitled to rely on her responses, that she did not know Bibeau, Gwinn, or Wadford,

the defendant himself, and two of the key witnesses for the defense.

So it's our contention, Your Honor, that, that alone is reason for a new trial. That one ground alone. You don't even have to get to anything else, but that alone is reason for a new trial standing alone, that first issue.

If---

THE COURT: Do you want to respond to that issue so we can take them issue by issue?

MR. LINDEMANN: Be happy to do that, Your Honor.

THE COURT: Why don't we do that.

MR. LINDEMANN: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. LINDEMANN: May it please the Court?

THE COURT: Yes, sir.

MR. LINDEMANN: I'm Andrew Lindemann on behalf of the defendant, Doctor Guy Bibeau.

THE COURT: Yes, sir, good to see you again.

MR. LINDEMANN: Thank you, Your Honor.

Real quickly, Your Honor, I don't think this is actually a very complicated issue at all to be decided. I think the case I think that guides or should guide the Court's consideration is the 2014 case where the Court of Appeals of Lynch versus Carolina Self-Storage Centers. It lays out the analysis that should apply in this particular

case, and the first question says the Trial Court must first find that the juror intentionally concealed the information.

What's important to recognize here, Your Honor, is this very specific and narrow scope of the voir dire question that was asked of this -- of, of all the witnesses or all of the potential jurors. Excuse me.

Your Honor listed out a lengthy list, first of all. Did not take each potential witness and focus on any, any particular one. Gave a very lengthy list with the question, and I'm not being critical of how the Court did it, but I think that has to be recognized---

THE COURT: That, that is the way I did it.

MR. LINDEMANN: ---and how it's---

THE COURT: I understand.

MR. LINDEMANN: ---and how jurors respond to it and you didn't ask this juror -- the jury pool whether or not they knew any of these witnesses or whether or not they worked with any of these witnesses, and, again, I was not there at trial. So I don't know if this was a question that was actually posed by the lawyers or something that the Court used. But the bottom line is, what you asked the, the jurors to identify, is whether they had a "close social or personal relationship with the individuals that you named."

I would suggest to the Court that close social or personal relationship, it can certainly be construed

numerous ways by numerous people, but the fact that you used the words close would suggest that it's not an acquaintance. It's somebody you're close to. Maybe not necessarily related to, but at least probably good friends with. I wouldn't think close would suggest an acquaintance.

Then social or personal relationships, certainly social, would not lead a reasonable person to conclude you're looking for work relationships, and personal wouldn't suggest to a reasonable person, I would suggest, that you're looking for a work relationship.

THE COURT: I think Ms. Killiam, at some point in the voir dire, did disclose she'd worked at the hospital in the past---

MR. LINDEMANN: That is correct.

THE COURT: ---and I was talking -- asking about a specific work relationship with the hospital.

MR. LINDEMANN: That is correct. And I think that's an important factor to look at as you're determining whether or not this is an intentional concealment. And as the Lynch case points out, if you find that there's not an intentional concealment, it ends the inquiry and no further analysis is done, and that, that ground for a new trial fails.

I know Mr. Proffitt just talked about how he thinks it was something nefarious on the part of Ms. Killiam. There's no evidence to support that, Your Honor, and, in fact, I

would suggest to the Court, just using common sense, that Ms. Killiam had some sort of nefarious motive that she was gonna get involved and try to get herself on this jury to help Doctor Bibeau somehow, some sort of conspiracy like that, for which there's obviously no evidence, she wouldn't of stood up and offered not once, but on multiple occasions, that she worked at the hospital. She wouldn't have stood up and answered affirmatively on Mike Williams who, as she explained in her testimony, you know -- and she's not the most articulate person. I mean I would recognize that. But I think what she was trying to get across to the Court is she had more than a working or a working relationship with Mr. Williams. She knew him beyond the employment because he had treated or assisted in the treatment of her son at one time.

So she explained that there was a way that she distinguished Mr. Williams from Doctor Bibeau and the two nurses. But, again, if, if this was intentional concealment, Ms. Killiam wouldn't have mentioned that she was working, she had worked at the hospital in the past, and she certainly wouldn't have mentioned that she had any type of connection with Mr. Williams I think.

So I think the Court, based on the evidence before Your Honor, can certainly discount any type of nefarious or any type of intentional concealment.

I think what this boils down to is could a reasonable person hear the words close, social, or personal relationship and, and feel that someone who she has come in contact with, on a very limited basis in the ER, does not qualify as a close social or personal relationship.

You also have to realize she doesn't know the order of the questions. She doesn't know if they're gonna be more specific questions about work relationships coming up. She certainly tried to convey to the Court and to the lawyers that she did have some connection with the medical profession in Winnsboro and I think that came out.

Now, Mr. Proffitt is very defensive in saying I couldn't have done anything about it. We weren't negligent in that. In fact, I found it -- that kind of a little laughable, with all due respect in their memorandum, that they suggest that the follow-up questions should of been are you telling the truth, Ms. Killiam.

That's not the follow-up question that this -- these questions, these answers should of triggered. It should of been hmm, she's worked there before. Maybe I'm gonna ask a specific question since she hasn't answered to close social or personal relationship.

Why don't we ask this particular juror do you know any of these people?

Have you personally worked with any of these people?

Those questions weren't asked. They had absolutely the right to ask the Court. In fact, you, as every judge does in trial, asked the lawyers if they have any other questions that you would like to have asked, and I'm sure, Your Honor, if they had asked you to ask those questions you would of done so, and then they would of gotten the answers to their questions.

So, ultimately, I think a lot of the blame does fall on plaintiff's counsel. But I don't think the blame falls on Ms. Killiam. She's not someone who's use to these circumstances. She hasn't gotten -- I know Your Honor didn't ask her prior juror -- jury experience, but I would submit that she's probably not a regular jury, a juror if she's ever done it in the past, and so, quite frankly, given the narrow nature and the way the question was asked, and the, and the existing case law in South Carolina, what is required to show intentional concealment.

I would submit, Your Honor, that this case doesn't come close, and the simple fact that she did point out Mr. Williams, she did have a different relationship with him, and I think that's actually beneficial for the defense's argument in this case cause it shows that she wasn't intentionally trying to conceal anything. That might be the, the only name that she actually heard. She might not have heard the other nurses.

Again, that wasn't something that was really inquired of her, and, again, Jeri Lynn Wadford is even referred, I picked up on this last night getting ready for this, she's identified as for -- being from Columbia in the, in the actual questions. So I don't know if that impacted.

But then, you know, they're obviously a lot of names that were given to these jurors at one time. I don't think it's beyond belief that they might focus on one name or miss a name as they're hearing a long list of names. Particularly in a situation that's nerve racking too for people who don't go through this process, being in Court, having to stand up in front of people.

Clearly this woman, not to beat a dead horse, was not trying to get on this jury for some nefarious purpose. She wasn't trying to hide her past involvement with Fairfield Memorial Hospital. She provided that information, provided it several times. They could of asked for follow-ups and -- if they had questions as to whether or not she actually knew or worked with any of these witnesses and that wasn't done.

THE COURT: All right.

MR. LINDEMANN: Thank you, Your Honor.

THE COURT: Let's move to the next question -- next issue.

MR. PROFFITT: Well, just a couple of points to, to sort of respond.

THE COURT: Well, we've got limited time.

MR. PROFFITT: All right.

THE COURT: So however you want to use your time.

MR. PROFFITT: I do want to, I do want to point out that Woods and the Gulledge cases would be controlling cases, Your Honor. Woods is the one where you had the prosecutor's victim's advocate, who had worked in the prosecutor's office for three years, she didn't reveal that. New trial.

Gulledge is the case where you had the juror who knew a deputy who had only been to the scene, and had actually had custody of the defendant for a brief period. New trial.

THE COURT: I'll review those.

MR. PROFFITT: Very minimal contacts.

THE COURT: All right.

MR. PROFFITT: Very minimal contacts there.

All right. Your Honor, the second grounds for our new trial motion is the actual -- I mean the premature deliberations.

THE COURT: Yes, sir.

MR. PROFFITT: I, again, have prepared a very detailed memo. So I'll rely in large part on that.

THE COURT: Yes, sir.

MR. PROFFITT: But you're familiar, I believe, with Ms. Carmichael's affidavit. You did the hearing. So I think

you remember her testimony. She verified the affidavit was correct. You recall she talked about Teresa Killiam talking in the jury room about knowing Doctor Bibeau for almost two years, knowing the two nurses for almost two years, the two nurses who testified at trial and were crucial defense witnesses. She talked about how good and dependable they were, how they said if they did something they did it. That's what Ms. Carmichael told us.

Now, in, in our memo I set out in detail, as well as the exhibits, there were nine jurors who heard her say in the jury room on breaks during premature deliberations that, that Teresa Killiam worked at the hospital and, and worked with these three people, Bibeau, Wadford, and Gwinn.

Four of the jurors recalled that Teresa Killiam, in premature deliberations in the jury room during the trial, talked about and vouched for the skill and proficiency of Doctor Bibeau and the nurses -- and/or the nurses.

Four jurors also recalled that Teresa Killiam, in the jury room in premature deliberations during the trial over days or whatever, talked about and vouched for the truth or the credibility of the, of the doctor and/or the nurses.

Four of the jurors also heard Teresa Killiam, in the jury room during premature deliberations, talk about Star, the red haired white lady that showed up sort of midway through the trial, and that Teresa -- and one or two of them

could name her as Star. So Teresa Killiam obviously had talked about those -- Star in the jury room.

Now, Teresa, for her part, either she has a horrible, horrible memory, the worst memory that ever existed since the beginning of time, or she was deliberately just being untruthful to put it kindly because she said that I didn't talk about anything back there. I didn't talk about these people. I did what you -- I didn't discuss it until you told us to.

Well, that's not true at all. That just -- we have all this testimony, very detailed testimony from Sandra Carmichael, the juror who was most bothered by it all and most remembered it all because it did bother her so badly, and other jurors who weren't obviously bothered but recalled that she talked about knowing the doctor and the nurses, vouched for their credibility, and their proficiency, and recalled that.

Now, all of them, except for Sandra Carmichael, said it really didn't affect them, but even though I heard this stuff, it really didn't affect me, and I would submit to Your Honor that that's a little bit incredible, but it's understandable that, when called back into Court and sat on that -- sat in the jury box and you know something, you're getting called on the carpet for some reason, you're there for some reason, that something's wrong, and all the jurors

know the right answer. They know that they're suppose to say that they weren't affected by it, anything like that, and so that's what they said, for the most part except for Sandra Carmichael, who is, I would submit, one of the more self-aware and conscientious jurors we had on that panel.

She admitted that she was affected by it, that it did affect her verdict, and that she changed her verdict because of it. She also testified that several other jurors were of the opinion that Doctor Bibeau was more at fault than Phil Ethier in regard to the medical issues at the beginning of their deliberations, but that, that changed, and that the reason she changed, she was honest and forthright, Ms. Carmichael was, and said that I changed because Teresa's knowledge of Doctor Bibeau's good work, that Teresa had said that all along, and it swayed her, it affected her.

So we have Ms. Carmichael who's absolutely affected by this -- these -- this misconduct that went on most of the week, as well as Teresa Killiam herself. We can't forget that. Teresa comes in and she's obviously biased. Even if she will not admit it and would never admit it, there is no doubt that she is biased in favor of Doctor Bibeau and she's biased in favor of, of listening to and believing everything that the nurse is saying.

She's worked with these people for nearly two years. She believes them. She trusts them and she relays that

repeatedly.

So she's the -- we have two jurors who are affected by the misconduct of Ms. Killiam, her -- Ms. Killiam herself and Ms. Carmichael. I would submit that the record shows that several others were affected as well even though, in the evidentiary hearing, they were not -- they did not testify that way. That was only Ms. Carmichael that said that at the evidentiary hearing.

Now, the -- I think one powerful way to look at this, and this is what I often try to do when I'm trying to think, you know, how to handle something, is sort of flip the coin and say would this have mattered, if everything was reversed, and how would it look then.

So let's imagine that Teresa Killiam, the same thing happened in voir dire, the same questions were asked. She didn't reveal anything. We all go in the trial not knowing that she knows Bibeau, Watford, and Gwinn. But Teresa Killiam turns out to dislike and disfavor and even, you know, strongly dislike Doctor Bibeau. She just has no use for them.

So she's back in the jury room all week long running them into the ground. They're terrible people. They don't do a good job. You can't believe a thing they say. You know, Doctor Bibeau, he's not a dependable doctor. He's not a good doctor. I've seen him miss things so many times, and

I know I'm just a CNA, but he's missed so much over the years. He's just a bad doctor and she's back there the whole time preaching the opposite tune that she preached -- actually preached.

They would be screaming murder most foul and rightly so. They would be screaming it, bloody murder, and it would be the same situation we have today except reversed and they ought to get a new trial because that is not fair. It is prejudicial and it is just completely -- the system can not work when, when it's like that. You can not have jurors on there that are like that, and it was -- so if you flip it over and imagine how they would respond and how the arguments would be reversed, I mean it'd be the same.

You've reached the same result. It has to be a new trial. No matter which way this lady was going back in the jury room, which way Teresa Killiam was going back in the jury room, whether she was for us or against us, somebody was unfairly prejudiced and there's no way that we expect a perfect trial. There's no way that you go through a week long trial and absolutely nothing happens in the jury room that shouldn't happen. There's always something minor that goes wrong. Some, you know, minor tangent or whatever, but nothing like this.

I mean we don't expect a perfectly trial -- perfect trial, but this was a perfectly unfair trial. That's what

this was. And we do have a right to a fair and impartial jury, not a perfect jury, but we have a right to a trial without someone on there who is back in the jury room all day every day preaching to those other jurors about how great the doctors and nurses were, and that's -- actual prejudice is shown.

We do have to show actual prejudice. I submit that it is based on a preponderance of evidence, not clear and convincing evidence, but it don't matter. I mean this is clear and convincing. This is beyond a reasonable doubt. But we don't have to meet that, but the evidence is preponderance. The defense cites one case that is cited in the Aldrect case. They cite a Nebraska case saying it's clear and convincing.

Our Court, in all these cases I've looked at, doesn't say clear and convincing. It doesn't say preponderance. It's just silent on the issue, which I would submit means it's a preponderance, but, regardless, preponderance or clear and convincing, we've met the standard and actual prejudice has been shown and we deserve a new trial on that ground.

THE COURT: All right. Thank you.

Hear from the defense.

MR. LINDEMANN: Thank you, Your Honor.

If I can hand up a, a case that Your Honor may of

already looked at. It's the---

THE COURT: Sure.

MR. LINDEMANN: ---the Supreme Court's version from 2009, which I think it's probably the last time the Supreme Court is significantly weighed in on these issues, it's The Vestry and Church of Wardens of the Church of the Holy Cross versus Orkin Exterminating case.

I would submit to Your Honor that your analysis of this issue doesn't need to go beyond taking a look at this case. I think this case fully governs, not only a recent case compared to some of the others from the South Carolina Supreme Court, but I think it really sets forth what type of juror misconduct is necessary in order to require a new trial. This case also clarifies the burden of proof. If you look at the conclusion or, or the paragraph actually right above the conclusion of this particular opinion, the, the Supreme Court said the Trial Judge thus found that there was no clear and convincing evidence that any of the 12 jurors, including Abrams, were improperly influenced by Abrams' misconduct.

So I would suggest to Your Honor, in 2009, the Supreme Court actually found that the standard was clear and convincing. I think there's a cite in Aldrect to a Nebraska case that we relied on. But that's not all we're relying on in asking this Court to apply the much heightened standard

of clear and convincing. The Supreme Court applied it in 2009, and, in fact, reversed the Court of Appeals, which had, had reversed the denial of a new trial motion by Judge Tommy Cooper.

But why -- the reason why I want to highlight this case, Your Honor, and if you'll just indulge me for a minute?

THE COURT: Sure.

MR. LINDEMANN: What happened in this case is, after the trial was over, an alternate juror contacted Judge Cooper directly and raised numerous allegations regarding a juror named Vicki Abrams, and if I could just go through these real quickly what exactly this particular alternate contended Ms. Abrams did because I think it's very critical to compare that behavior to what are the allegations in this case.

They said that early in the trial Abrams questioned aloud the instructions not to talk about the case and made comments to other jurors in spite of these instructions.

She stated that the "historic people," meaning the Historic Church, have money and that Holy Cross was trying to get someone else to pay their bills when everyone knows that all buildings fall down."

Number Three. She stated that she did not know why she had to hear both sides of the case, and she had discussed

the case with her mother, and should, and should clean-up their own mess meaning the church.

Number Four. She said she had talked to a painter who told her that termite damage can cause building walls to collapse. She said that Holy Cross should tear down the church and bring in a double wide.

Number -- and, lastly, on the day of the deliberations, she told the jurors that she had prayed with her minister about the case and that she had driven to Holy Cross over to the church over the weekend and it looked fine to her.

That is the allegations. Judge Cooper did exactly what you did, conducted an evidentiary hearing. They say, based on the evidentiary hearing, one juror's testimony indicated and Abrams had commented that her minister had told her the church should take care of the church and churches need to stick together. However, and this exact quote, "however, none of the jurors indicated that their final deliberation were affected by Abrams misconduct."

So Judge Cooper did an analysis, the same analysis that's facing Your Honor, and concluded that there was not a showing of actual prejudice. He, in fact, went farther. At least I don't believe Your Honor's taken this action, he actually found the offending juror in contempt of Court, and ultimately still did not grant a new trial. And, of course, the Court of Appeals, when they looked at it, and I got a

copy of their opinion and it's published as well, they made a -- they put a lot of emphasis, of course, on the fact that Judge Cooper actually held that juror in contempt but then didn't grant a new trial.

The Supreme Court reversed and I think their analysis is very appropriate in this case cause, number one, they showed you got to have clear and convincing evidence. But they also emphasized that the lack of actual prejudice does not -- is not outweighed by Court fundamental unfairness. You've got to show actual prejudice and they're several quotes in here which I think are very appropriate.

They said, in fact, this is quoting from a CGS article, they say "a defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury as such conduct -- misconduct does not ipso facto justify the granting of a new trial. But in order that a new trial may be granted on such ground of misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors."

Again, if you compare what Ms. Abrams did to Ms. Killiam, it's night and day, and here the Supreme Court reversed the Court of Appeals granting a new trial, and so I think, as I indicated, I don't know that Your Honor's analysis needs to go beyond this case. But what's also very

informative about this case is Footnote Number 2, the last footnote in the opinion, goes through a series, about a dozen or so cases going back to the 30s and the 40s, indicating what kinds of behavior that the Supreme Court and the Court of Appeals have faced in the past and not granted a new trial, what types of jury misconduct. It is a substantially high burden.

Now, applying that to this particular case, Your Honor, what we have here is no juror other than Ms. Carmichael said that anything that Ms. Killiam did had any affect on them, and what's interesting is Ms. Killiam, when you asked her the question, she answered I think it did a little. I think it did a little. Those were her -- that was her sworn testimony.

So you have 11 jurors saying it didn't affect them a bit. You got one juror saying it, it affected her a little.

Well, it's a case of buyer's remorse I would suggest, and, again, the Supreme Court's decision in 2008 of Shumpert versus State of South Carolina I think is very telling as you analyze Ms. Carmichael's testimony. It says "the generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict to be given much credence. Moreover, although the juror refers that if he had a preliminary vote to do over again he would cast an

initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict and the Trial Court polled the jury after it returned a verdict." The same instance in this case, Your Honor.

It is a classic case of buyer's remorse. We don't know what affect going out and looking for these jurors, and that's certainly something the Supreme Court is -- of our state is quoted about being very very careful about actually doing, and there's a great quote about that from the McDonald case in the Shumpert case.

But here's, I think, the key point that's been, been missed in all of this.

Where is the actual prejudice?

This is not a case, Your Honor, where that jury found no fault on the part of Doctor Bibeau. The types of questions that they -- or the types of comments that they contend Ms. Killiam made improperly, he's a good doctor, he's a -- she's a nice lady, they're efficient, I don't think those are even comments to even, one way or the other, affect any type of decision making by a jury. They're just too general and nonspecific to the facts of the case.

But the bottom line is that jury unanimously found Doctor Bibeau breached the standard of care. They found him thirty percent at fault. So in order for them to find him

thirty percent at fault, they found him negligent.

So obviously the jury didn't believe he was a "good doctor" at least on that instance or efficient or this whole issue about whether or not foot pulses were taken or not. They ultimately found liability on the part of Doctor Bibeau. The problem for the plaintiffs in this particular case is they found Mr. Ethier more than fifty percent at fault.

The types of juror misconduct that's being alleged here doesn't go to the allocation of damages -- of fault between the two parties. At best it would go to the issue of breach of the standard of care by Doctor Bibeau. Give the plaintiffs credit. They won that issue.

So where's the actual prejudice?

To make one last point. This whole idea about this red headed white lady, honestly I just do not follow the relevance of that whatsoever because the jury never found out who she was. She never testified. There was no vouching for her. There was no building her up. I mean there, there -- the red headed lady has absolutely no bearing whatsoever on the decisions in this case.

So what you're faced with here is you've got about nine jurors who, at best, said yeah, I remember her saying that she worked with them. Of course, some of those jurors were a little confused whether they heard that in -- during the

voir dire when Ms. Killiam stood up several times and said I worked at the hospital. So they knew she worked at the hospital and they probably were in disbelief that she was on the jury. I mean a couple of them said we didn't understand why she was on the jury.

That's not her fault she was on the jury and so the simple fact that she says she knew them, that's not -- that doesn't create actual prejudice.

So, at best, they have a couple who remember describing -- that, that she described him as a good doctor. In fact, I would submit to Your Honor that the only person who used careful and thorough consideration was Ms. Casing, and if you look at Page 89 of the, of the record, I'm not being critical of Your Honor, but she was responding to a leading question where you asked her. You didn't ask her what did she remember her saying about the doctor. You said do you recall her, and I don't have it right in front of me, but it was definitely a leading question.

THE COURT: I'm granted some latitude in leading in that situation I think.

MR. LINDEMANN: And I recognize that, Your Honor. But I think that needs to be factored in.

Now, Ms. Stewart called -- said that she called him good people, and that Jeri Lynn was a pretty good lady. And Juror Robb, I can't remember if it was Mr. or Mrs. right

now, said good doctor and was efficient.

Now, there -- that was not a leading question, I'll admit. That was their own words.

That's the best they have. That is -- and if you compare that to what Ms. Abrams did, I mean it is night and day.

THE COURT: All right.

MR. LINDEMANN: Your Honor?

THE COURT: Let's, let's wrap it up so we can get onto---

MR. LINDEMANN: Thank you, Your Honor.

I would submit to the Court, Your Honor, that there is no basis for a new trial on any, any misconduct by Ms. Killiam.

THE COURT: All right. Thank you.

MR. PROFFITT: Your Honor, just briefly.

It is night and day. The Lynch -- the Vestry case is night and day. That case is nothing like what we have here. It is -- I mean that lady in the Vestry case was going around, I think people ought to pay their own thing. I think rich people ought to pay for themselves. I don't think -- buy the building new. I think termite damage to me.

That's just nonsense. She's not making any comments about specific actual problems in the case unlike what we

have here where Teresa Killiam is talking about the very doctor defendant and the very two nurses that were involved in Phil Ethier's case and praising them to High Heaven. That is night and -- that is night and day from the Vestry case.

I would submit that the case you need to look at for -- is the Lynch case, even through there was no new trial, and that is Lynch v. Carolina Self-Storage case. That's the one where the Court of Appeals talks about when a jury is discussing, wrong, wrongly through outside influences or extraneous prejudicial, prejudicial information, you know, extra record facts, things that are brought in the jury by someone on the jury that's not in the courtroom. It's outside evidence brought into the courtroom, outside information, and that's what we have here. That's exactly what we have here and that's what you did not have in the Lynch case, and you did not have in the Vestry case, and you did not have in most cases.

I mean most of the time it's just some random comment about how -- one of the cases was about well, she lives next to a doctor. You know, plaintiff lives next to a doctor. If she can afford to live next to a doctor, she don't need no money. I mean that's the kind of thing that doesn't rise to the prejudice, but what we have here, when you have a juror talking about, in premature deliberations and actual

deliberations according to Ms. Carmichael, that -- how great the doctors and nurses were, that is unfair prejudice and we deserve a new trial for that reason.

Your Honor, most of the -- I will rely on my memo for the actual deliberations part. I would only point out that your questioning at the evidentiary hearing, understandably, was more reticent than it was about premature, but there's still evidence in the record that this jury talked about and heard extra records, specific facts, as to the Lynch Court talks about in this case and both premature and actual deliberations. That's actual prejudice, and whether the standard is clear and convincing or preponderance, it doesn't matter. We have met the standard and we should -- we are entitled to a new trial.

As for the 13th Juror Doctrine, I'll rely on my memo.

THE COURT: Okay. All right.

MR. LINDEMANN: Your Honor, and, again, I won't belabor the point on, on the, the juror misconduct during deliberation, but I would raise the point that there's a serious issue that Your Honor will need to grapple with under Rule 606(b) because obviously the rules of evidence in this state, like the Federal Rule which it's patterned after, very much limit the ability of the Court to actually go into and use testimony of deliberations.

In this particular case---

THE COURT: Yes, sir, I'm very familiar with that limitation and it's an area that Courts go to with reluctance.

MR. LINDEMANN: And I, I recognize and I just want to make certain I'm protected on the record in making that point, and also the State v. Zeigler case that we cite talks about internal influences involve information coming from the jurors themselves.

I think what you're faced with here, Your Honor, is all this information came from Ms. Killiam. There's no evidence of reading any type of newspapers, going on the Internet, visiting the scene like you have in the Vestry case. You have all internal actions by the juror, and as far as the issue dealing with deliberations, none of that testimony should be admissible to try to obtain a new trial we would submit.

But other than that, it's the same analysis, Your Honor, that I think the Vestry case speaks, speaks loudly about that just wasn't that type of misconduct and certainly none of the jurors indicated that they were affected by it at all.

THE COURT: All right.

MR. LINDEMANN: Thank you, Your Honor.

THE COURT: Anything further?

MR. PROFFITT: One final point.

Your Honor can consider extraneous prejudicial information or outside influences. It doesn't matter that it was Teresa Killiam doing it internally. She was bringing in extraneous prejudicial, prejudicial information and outside information and influence. You can consider that, absolutely, under Rule 606 and the related authority.

THE COURT: All right. Thank you, gentlemen. I'll take the matter under advisement and issue an order.

Thank you very much.

Yes, sir.

MR. PROFFITT: You, you -- we have the Rule 59 motion.

THE COURT: All right. Go ahead. I'm sorry.

MR. PROFFITT: All right. We also have a memo on that. In this -- and the ruling in our motion, Your Honor, the Court -- the jury issued a verdict in which it said that -- it awarded damages, 1.75 million dollars to Phil Ethier and then found him to be seventy percent liable, and the doctor thirty percent liable. So he gets nothing.

The jury also awarded, in the verdict form, $250,000 to his wife on the loss of consortium claim. In your Form 4 order it appears to read, and the way the defense is interpreting it, that there is -- it's a total verdict for the defense.

That is not the case. The verdict is for defendant, for Phil Ethier's case, because he was found to be more