THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

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

Appellate Case No. 2018-001435
Case No. 2013-CP-20-0012

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, P.A., ... Defendants

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

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a medical malpractice action. The Petitioners Philip Ethier and Jeanne Ethier filed a Complaint against the Respondent Guy R. Bibeau, M.D. alleging claims for medical malpractice and loss of consortium. (R. 25-34). The original Complaint also named as Defendants Fairfield Memorial Hospital, Tuomey Medical Professionals, Inc. and Pee Dee Emergency Medical Associates, P.A., the latter two of which were dismissed. Prior to trial, the Ethiers entered into a settlement with 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 claim and $40,000 was apportioned to Jeanne Ethier's claim. (R. 85-90).

The case proceeded to trial before Circuit Court Judge Roger L. Couch and a jury beginning on March 30, 2015. On April 8, 2015, the jury returned a verdict whereby Philip Ethier was found to have been 70 percent at fault and Dr. Bibeau was found to have been 30 percent at fault. (R. 3-5). The jury awarded $250,000 to Mrs. Ethier on her loss of consortium claim. (R. 4-5). Thereafter, on April 30, 2015, Judge Couch entered judgment in favor of Dr. Bibeau on all claims brought by the Ethiers. (R. 1-2).

On April 20, 2015, the Ethiers filed a Motion for New Trial which was supported by the affidavit of juror Sandra Carmichael. They 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. (R. 36-37). Dr. Bibeau objected to the consideration of the Carmichael affidavit and opposed the Ethiers' arguments for a new trial absolute. Following the entry of the judgment on April 30, 2015, the Ethiers also filed a motion pursuant to Rule 59(e), SCRCP, to alter or amend the judgment whereby they requested the trial 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." (R. 92).

On May 12, 2015, Judge Couch 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.

On June 6, 2015, Judge Couch held a subsequent motion hearing to hear arguments on all pending post-trial motions, which included the Ethiers' Motion for New Trial and Motion to Alter or Amend Judgment. Thereafter, on September 8, 2015, Judge Couch issued an Order Denying Plaintiffs' Post-Trial Motions. (R. 6-24).

The Ethiers subsequently filed a timely appeal. The Court of Appeals heard oral argument and thereafter issued an unpublished *per curiam* opinion affirming the trial court pursuant to Rule 220(b), SCACR. The Ethiers now seek a writ of certiorari.

DISCUSSION

I. The decision of the South Carolina Court of Appeals does not warrant the issuance of a writ of certiorari.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. Dr. Bibeau submits that, aside from the merits which are addressed below, there are several factors that demonstrate that a writ of certiorari is unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the opinion of the Court of Appeals is unpublished and a *per curiam* opinion issued in accordance with Rule 220(b), SCACR, and thus the opinion has no precedential value and will impact no future cases. Third, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. To the contrary, it relies on well-established precedent from this Court. Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance.

Based upon these considerations, there is simply no need for this Court to review the decision of the Court of Appeals.

II. The trial court, as affirmed by the Court of Appeals, was correct in entering a judgment for the defense on the loss of consortium claim because the Petitioners failed to establish liability on the injured spouse's medical malpractice claim.

At the close of the trial, the jury returned a Special Verdict Form whereby it found Philip Ethier seventy percent at fault and Dr. Bibeau thirty percent at fault. The jury also found in favor of Jeanne Ethier on her consortium claim and awarded damages of $250,000. (R. 3-5). On April 30, 2015, Judge Couch entered a judgment that states:

> 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 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.

(R. 1). Consequently, Judge Couch entered a verdict for Dr. Bibeau on all claims.

Jeanne Ethier thereafter 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." (R. 92). Judge Couch denied that motion.

As Judge Couch ruled, this case is remarkably similar to and controlled by 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 seventy percent negligent, and as a result, the defendant was found not liable to the plaintiff on the injured spouse's negligence claim. This 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). This Court in *Lee* also cited to the case of *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990), for the holding that "[a] husband could not recover on loss of consortium because the jury found that the wife was not entitled to recover on her strict liability claim." *Id.*

Likewise, in *Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1999), a case not cited in *Lee*, the Court of Appeals had explained that "[i]n order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's *liability* for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury."

512 S.E.2d at 523. (Emphasis added). In that case, the negligence action and the consortium action were tried together by consent. Based thereon, after the jury found the defendants were not liable to the injured spouse on the negligence claim, the trial court entered a judgment in the defendant's favor on the consortium claim. *See*, 512 S.E.2d at 522 ("At the conclusion of the liability trial, the trial judge entered judgment reflecting the jury verdict for the defendants and simultaneously dismissed the loss of consortium claim by order 'because of a defendant verdict on companion case'"). The Court in *Creighton* pointed out that "the only issue during the two day trial was defendants' *liability* for Ms. Creighton's slip and fall. This determination was a prerequisite to recovery in both the negligence and loss of consortium cases." 512 S.E.2d at 523. (Emphasis added). Again, because there was no *liability* for the injured spouse's claim, there can be no liability for the consortium claim.

In *Lee*, while finding the defendant driver thirty percent negligent and thus not liable to the injured spouse, the jury issued a defense verdict on the consortium claim. The trial judge then determined that the verdicts were inconsistent and required the jury to return a monetary amount. The jury returned a verdict of $9,000 on the consortium claim. On appeal, the defendant requested that the original verdicts be reinstated, which was the relief ultimately awarded by this Court. In so ruling, this Court distinguished other consortium cases by recognizing that "the jury determined Bunch was not liable on Lee's primary negligence claim." 647 S.E.2d at 202.

Importantly, this Court in *Lee* did not disregard that "claims for personal injuries and for loss of consortium are separate and distinct." 647 S.E.2d at 201. But, in the context of a negligence case where the injured spouse's claim failed because he was found more than fifty percent at fault, this Court ruled that the defendant could not be held liable for the consortium claim just as he could not be held liable for the injured spouse's claim. This Court noted that this

was the correct result "whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202. This was clearly not *dicta* as the Ethiers insist. This Court was explaining why the original verdicts were consistent and should be reinstated.

That is the precise same fact pattern in the present case, where the negligence and consortium claims were tried together because they were joined in one lawsuit. The percentages of fault are even identical as in *Lee*. Philip Ethier was found seventy percent at fault, like the injured spouse in *Lee*. Dr. Bibeau was found thirty percent at fault, like the defendant in *Lee*. This Court explained that "a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails." 647 S.E.2d at 202. That is the exact scenario in the present case – Dr. Bibeau was found not liable for the injured spouse's claim. As a result, Judge Couch correctly applied the *Lee* decision and ruled that the plaintiff spouse's consortium claim fails. Likewise, the Court of Appeals was correct in affirming based exclusively on this Court's reasoning in *Lee*.

On appeal, the Ethiers have spent countless pages and lengthy footnotes to cite many cases that hold that a consortium claim in South Carolina is separate and independent and is not derivative. The *Lee* case already acknowledges the state of the law as such (as does the *Creighton* case), but this Court also explains that the result reached in the present case, like it was in *Lee*, is correct "whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202. The *Smith v. Ridgeway* case, while a strict liability claim rather than a negligence claim, supports that same principle, as does the *Creighton* case.

In sum, the trial court and the Court of Appeals were both correct in applying the holding from *Lee v. Bunch*, a case with remarkably similar facts as the present case. The judgment in favor of Dr. Bibeau on the consortium claim was correctly affirmed because the Ethiers both

failed to prove Dr. Bibeau's liability for Mr. Ethier's claim. There is no basis for the issuance of a writ of certiorari on this issue.[1]

III. The trial court, as affirmed by the Court of Appeals, was correct in denying the Petitioners' motion for a new trial absolute based on alleged intentional juror concealment during voir dire.

The Ethiers seek a new trial absolute on the basis of intentional juror concealment during voir dire that was conducted prior to jury selection. In the lower court, the Ethiers argued 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." (R. 36). On appeal, the Ethiers continue to insist this is "a slam-dunk case of intentional concealment." *See*, Petition, p. 19. They are clearly incorrect. Judge Couch correctly concluded that "intentional concealment by Ms. Killian did not occur, and therefore, no inference of bias can by drawn by this Court." (R. 10). That ruling was correctly affirmed on appeal.

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[1] In the trial court and again in the Court of Appeals, Dr. Bibeau preserved additional issues in the event that the court agreed that Mrs. Ethier could recover on her consortium claim even though the defendant was not found liable on the primary negligence claim. Because it affirmed the judgment in favor of Dr. Bibeau on the merits of the consortium claim, the Court of Appeals did not reach these issues. However, should this Court grant a writ of certiorari, Dr. Bibeau requests permission to argue, in the alternative, that the 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) an equitable and/or statutory set-off based on the pre-trial settlement reached by the Ethiers with Fairfield Memorial Hospital. The Ethiers, in fact, acknowledged in the Court of Appeals "that the award of $250,000 to Mrs. Ethier would be reduced by $40,000, the amount she received in settlement from Fairfield Memorial Hospital." *See*, Reply Brief, p. 13. Dr. Bibeau simply wants to make certain those issues are preserved for a decision, should Mrs. Ethier prevail on her appeal issue. These issues were briefed to the Court of Appeals which, as indicated, did not find it necessary to reach them. Dr. Bibeau incorporates that briefing herein to the extent necessary.

The applicable standard of appellate review on issues of juror misconduct is very deferential to the trial judge. "Generally, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion." *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67, 69 (Ct. App. 2000). "Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion." 539 S.E.2d at 69-70.

In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), this 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." *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111, 116 (Ct. App. 2014). "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.'" *Woods*, 550 S.E.2d at 284.

In *Woods*, this 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 is of such significance that the juror's failure to respond is unreasonable." *Woods*, 550 S.E.2d at 284. 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.* "[W]here the failure to disclose is innocent, no inference of bias can be drawn." *Id.*

In applying this test, Judge Couch was correct in first reviewing the responses of Teresa Killian (juror #72) to voir dire questions to ascertain whether her responses amounted to

intentional concealment. After identifying the parties and a lengthy list of witnesses by name during voir dire, Judge Couch asked the venire whether anyone had a "close social or a personal relationship" with Dr. Bibeau and the other witnesses. Juror Killian responded that she "used to work at Fairfield Memorial Hospital with Mike Williams" but she "could be fair." (R. 512-515).

Judge Couch also engaged in extensive questioning of Juror Killian 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. Killian acknowledged that she had worked at Fairfield Memorial Hospital for about two years from 2007 to 2009 (R. 308), that she worked on the medical floor and in the emergency department (R. 309-310), that she worked triage in the emergency department (R. 310-311), and that she worked with Dr. Bibeau and Nurse Wadford but did not know them socially. (R. 312-313). Killian also testified she worked with Nurse Gwynne. (R. 315). Killian explained that she did not view her relationship with Dr. Bibeau and the nurses as a "close social or personal relationship" which was the precise voir dire question asked. She distinguished them from Mike Williams, a Hospital employee, that she did acknowledge knowing during the voir dire. However, she explained that Williams had actually treated her son and she knew him from outside the Hospital. (R. 316-319).

Judge Couch ultimately ruled "that Ms. Killian did not intentionally conceal from the litigants or the Court her past professional relationship with several witnesses." (R. 9). Judge Couch made a number of key findings to support that conclusion. First, he found "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." (R. 9). Second, Judge Couch found "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." (R. 9-10). Third, Judge Couch noted that "Ms. Killian did in fact disclose she had worked at Fairfield Memorial Hospital during the time Dr. Bibeau was employed there" and that she "made no attempt to conceal her employment history." (R. 10). If Juror Killian *intended* to deliberately conceal her history with Dr. Bibeau and the nurses, she would not have revealed that she had worked at Fairfield Memorial Hospital. That was voluntarily offered by her.

Moreover, the fact that Juror Killian did make it known that she had been employed at the Hospital placed the impetus to request additional information on the Ethiers' counsel. As recognized in *Lynch*, "the responsibility for obtaining such information falls on the attorneys to request precise voir dire questions that are reasonably comprehensible to the average juror." *Lynch*, 760 S.E.2d at 117. Here, as Judge Couch explained, "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." (R. 10).

This is a critical point particularly given the specific nature of the voir dire questions that were asked. The jury panel was asked about "close social or personal relationships," and as Judge Couch noted, that phrasing "interjects subjectivity and interpretation for the juror, and Ms. Killian cannot be criticized for the manner in which she construed that language." (R. 10). He explained that "[t]he 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." (R. 10).

It is well settled that "[w]hether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375, 377 (2004). Furthermore, appellate courts will "defer to the sound judgment of the trial judge" who is "in the best position to determine the credibility of the

jurors." *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67, 71 (Ct. App. 2000); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99, 104 (1998). *See also*, *State v. Loftis*, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors).

Here, the Ethiers have not shown any abuse of discretion. Judge Couch made the appropriate review of the voir dire questions. He examined Juror Killian under oath about her answers and the reasons for those answers. He ultimately concluded "that Ms. Killian reasonably responded to the questions asked during pretrial voir dire" and that "intentional concealment by Ms. Killian did not occur." (R. 10). Moreover, he noted that the Ethiers' counsel had the opportunity to ask follow-up voir dire questions including a specific inquiry whether Killian "knew" or "worked with" the parties or witnesses, but such questions were never posed. In sum, Judge Couch's rulings on the intentional concealment issue are not in error and were correctly affirmed by the Court of Appeals in its *per curiam* decision.

Moreover, as an alternative position, the Ethiers continue to assert a new issue for the first time on appeal which is unpreserved for appellate review.[2] The Ethiers argue that even if this were a case of "unintentional concealment," a new trial absolute should be granted because they have shown prejudice. The Ethiers, however, never made this argument to Judge Couch, nor does his order address an "unintentional concealment." In fact, in their motion for new trial, the Ethiers specifically wrote: "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." (R. 108). (Emphasis in original). Moreover, during the hearing on their motion for

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[2] In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780.

new trial, Ethiers' counsel never made this alternative argument.

Finally, as to the merits of this newly asserted theory, it is well settled that, pursuant to the two-part test from *Woods* and *Lynch*, "[i]f the court finds no intentional concealment occurred, the inquiry ends there." *Lynch*, 760 S.E.2d at 116. *See also*, *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375, 378 (2004) ("[b]ecause Scott's concealment was unintentional, our inquiry is over"). In sum, the Ethiers are not entitled to a new trial absolute for an unintentional concealment, which bears repeating is a finding Judge Couch never made (nor was asked to make). To the contrary, he concluded that "Ms. Killian reasonably responded to the questions asked during pretrial voir dire." (R. 10). Thus, there was no unintentional concealment.

IV. The trial court, as affirmed by the Court of Appeals, was correct in denying the Petitioners' motion for a new trial absolute based on alleged juror misconduct committed during preliminary deliberations and then later during jury deliberations.

The Ethiers also seek a new trial absolute on the basis of alleged juror misconduct committed during preliminary deliberations and then later during jury deliberations. Those issues were raised as separate grounds in the trial court and were addressed separately by Judge Couch. On appeal, the Ethiers continue to jumble the two issues and treat them as the same, which they are not.

While the analysis of the two issues is different in certain respects as discussed below, the standard of review is not. In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), this Court reiterated that "the trial court has broad discretion in assessing allegations of juror misconduct." 509 S.E.2d at 814. "[U]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." *Id. See also*, *Lynch*, 760 S.E.2d at 114 ("it is within the trial court's discretion to grant a new trial based on juror misconduct during deliberations").

As to both issues, it is noted that the Ethiers make only conclusory arguments. They treat the standard of review as though it was *de novo*. In effect, as was also their approach in the Court of Appeals, the Ethiers merely re-argue the merits of their position rather than even attempting to show an abuse of discretion committed by Judge Couch. The appeal will not turn on whether the appellate court would have ruled differently *de novo*. Instead, the issue is whether Judge Couch committed an error of law that gives rise to an abuse of discretion. The Ethiers have failed to make that showing on either issue, and the Court of Appeals was correct to affirm.

A. Juror Misconduct in Preliminary Deliberations

In the trial court, the Ethiers claimed 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." (R. 36).

As Judge Couch correctly ruled, 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), this 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. This 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. This 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 Ethiers' 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 this 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). This Court further explained that "juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness." *Id.*

Dr. Bibeau had argued that the Carmichael affidavit does not rise to the level of extrinsic misconduct as set forth in Rule 606(b). In her affidavit, Juror Carmichael describes statements made by Juror Killian that began during the second or third day of trial and continued into the jury's deliberations. Carmichael characterized these statements as indicating that Killian had worked with Dr. Bibeau and Nurse Jerilyn Wadford at Fairfield Memorial Hospital and were made to bolster their professional work abilities and credibility. (R. 64-65). After reviewing the Carmichael affidavit, Judge Couch found it to be sufficiently credible to justify further inquiry by the court and held 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. All jurors who participated in the finding of the verdict in this case were present and did testify at the hearing which was held on May 12, 2015.

As indicated, this 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). This Court has cautioned, however, that "not all juror misconduct impinges upon the fundamental fairness of a trial." *Id.* This Court further 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.*

As Judge Couch determined, 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, as Judge Couch ruled, the Ethiers "cannot rest upon evidence that misconduct merely occurred, but rather must prove prejudice resulting from that misconduct by clear and convincing evidence." (R. 14).[3]

The Court of Appeals has previously held that 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).

Judge Couch recognized that this case involved "a five-day trial which involved rather

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[3] During the hearing, the Ethiers' counsel questioned whether the proper standard is clear and convincing or preponderance of the evidence. Judge Couch applied the clear and convincing standard, which is supported by case law. Nonetheless, on appeal, the Ethiers do not challenge or object to the use of the clear and convincing standard, and as a result, that constitutes the law of the case. In *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), this Court explained that an "unappealed ruling is the law of the case" and the unappealed ruling "should not have been reconsidered by the Court of Appeals." 489 S.E.2d at 472.

tedious testimony" and "that given the length and nature of trial it is not surprising that a juror may make some comments as the trial progresses." (R. 14). 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.

Ultimately, Judge Couch found 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." (R. 15). More specifically, Judge Couch determined that the comments by Juror Killian "were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences or from extraneous matters." (R. 15). He also found that no jurors engaged Killian and that "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." (R. 15). He thus denied the Ethiers' motion for a new trial absolute upon concluding as follows:

> 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.

(R. 15).

Judge Couch's findings in this regard are fully supported by the evidentiary record and were correctly affirmed by the Court of Appeals. The Ethiers have not argued nor shown any error of law in his analysis nor an absence of evidence to support those findings. The findings

are entitled to great deference and therefore should not be overturned absent an error of law. The denial of a new trial absolute with respect to the preliminary deliberations issue was correctly affirmed and does not warrant the issuance of a writ of certiorari.

B. Juror Misconduct During Deliberations

The Ethiers have also sought a new trial absolute on the basis of juror misconduct committed by Juror Teresa Killian during jury deliberations. As the Court of Appeals has 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 Ethiers must also prove by clear and convincing evidence that prejudice actually occurred as a result of that misconduct.

The Ethiers allege that Juror Killian committed misconduct during the jury deliberations by describing Dr. Bibeau as being a "good doctor" and by claiming that Dr. Bibeau and the nurses were "thorough and competent." Judge Couch found that such 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." (R. 16). The Ethiers did not challenge the ruling on appeal, which was acknowledged by the Court of Appeals in the opinion's footnote.

Importantly, 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). Judge Couch thus ruled that "[b]ecause 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*." (R. 16). He accordingly ruled that "the evidence of the juror misconduct is actually inadmissible, and the Plaintiffs' proof fails on that basis." (R. 16). Again,

as the Court of Appeals noted, the Ethiers did not appeal that ruling, and that implicates the two-issue rule as a basis for affirmance.

Judge Couch further concluded 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." (R. 17). Judge Couch observed 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." (R. 17). Based thereon, he ruled 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." (R. 17). In their petition, the Ethiers do not even address this issue and certainly have not shown an abuse of discretion with that ruling.

Focusing as well on Sandra Carmichael, who was sought out by the Ethiers' counsel after the trial and who provided the affidavit that started this process, Judge Couch found what he termed "insufficient proof of prejudice." (R. 17). During the *Aldret* evidentiary hearing, 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.

(R. 296).

Citing that testimony, Judge Couch points out that Juror Carmichael responded, "I think it did a little" when she was asked whether Juror Killian's comments had an effect on her own deliberations. (R. 296). He focused on her use of the words "I think" as being "suggestive that she has a certain degree of uncertainty" and that there was "only a possibility of prejudice even within her own subjective thought process." (R. 18). In addition, Judge Couch proceeded to find "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." (R. 18-19). In this respect, this Court's observation in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), is most pertinent:

> We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. 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 avers that if he had the 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.

661 S.E.2d at 372.

Judge Couch also supported his ultimate ruling with other observations, none of which have been refuted by the Ethiers on appeal. In particular, he recognized that "the jurors' testimony as a whole strongly demonstrates that Ms. Killian was not a leader on that jury" and

that "[s]he was not a juror with any particular influence over other jurors." (R. 19). Also, in assessing the effect on the verdict, Judge Couch was "cognizant of the ultimate verdict" and explained as follows:

> 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.

(R. 19). Indeed, the comments attributed to Juror Killian, i.e., that Dr. Bibeau was a "good doctor," did not prevent the jury from finding a breach of the standard of care by Dr. Bibeau. Those generalized comments would have an impact, if any, only on whether there was a breach and not the allocation of fault between the doctor and the patient. But, the Ethiers clearly prevailed on showing a breach of the standard of care – thus, there is no prejudice.

Finally, Dr. Bibeau submits that this 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), is particularly instructive. 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 this Court then on certiorari upheld the trial judge's denial of a new trial. The trial judge's rulings, which were affirmed by this 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.

As Judge Couch also recognized, the allegations of juror misconduct committed by Juror Killian in the present case "pale in comparison to the misconduct of juror Abrams in *Church of Holy Cross*." (R. 20). In fact, the trial judge in that case held the juror in contempt of court for her conduct. Yet, most importantly, in *Church of Holy Cross*, this Court stressed the deferential standard of review and found no basis to reverse the trial judge. This Court upheld on appeal the finding by the trial judge "that there was no clear and convincing evidence that any of the twelve jurors – including Abrams – were improperly influenced by Abrams' misconduct." 682 S.E.2d at 494.

In the present case, the Court of Appeals applied that same deferential standard of review

and correctly upheld the trial court. Judge Couch concluded 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." (R. 20). He found no violation of fundamental fairness. Those rulings are all supported by the evidence and are not impacted by any error of law. Quite simply, the Ethiers with their largely conclusory briefing on this issue – where they do not address any specific finding made by Judge Couch – have failed to show any abuse of discretion so as to warrant a reversal and remand for a new trial absolute. The issuance of a writ of certiorari is not warranted on this issue either.

CONCLUSION

Based on the foregoing discussion, the Respondent Guy R. Bibeau, M.D. respectfully requests that this Court deny the Petitioners' petition for writ of certiorari.

Respectfully submitted,

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September 4, 2018

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Respondent, does hereby certify that service of **Respondent's Return to Petition for Writ of Certiorari** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 4th day of September 2018:

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