THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2015-001964

Unpublished Opinion No. 2018-UP-281 (S.C. Ct.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

Philip Ethier and Jeanne Ethier,

Petitioners,

v.

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

Defendants,

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

PETITIONERS' REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Petitioners Philip and Jeanne Ethier submit their reply to Respondent's return to their petition for a writ of certiorari.

1. **Petitioners' case warrants review because it presents novel and unsettled questions of law and the decision of the Court of Appeals conflicts with the prior decisions of the Supreme Court.**

The issue of whether a spouse who is awarded money damages for loss of consortium is entitled to fully recover those damages in her separate and distinct cause of action – even though the directly injured spouse is not awarded damages due to the comparative negligence doctrine – remains a novel and unsettled issue of law in South Carolina. Despite long-established precedent to the contrary, the lower courts have ruled in Petitioners' case as if South Carolina is a derivative state in its approach to consortium claims based on a casual, erroneous observation contained in one sentence in one case that should rightly be classified as dicta.

Respondent contends that Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007), is somehow settled or clearly established law on the issue of whether a consortium spouse's claim may be barred by comparative negligence. Lee is anything but that. Respondent seizes on the "math" in Lee – the fact that the injured spouse was found 70% at fault and the defendant was 30% at fault – to argue that Petitioners' case is "remarkably similar to and controlled by" Lee. (Resp. Ret., p. 4.)

In fact, Petitioners' case is the polar opposite of Lee and presents issues never presented in Lee. "The jury also returned a verdict in favor of [defendant] Bunch on Mrs. Lee's loss of consortium claim." Lee, 647 S.E.2d at 199. In Petitioners' case, the jury did the exact opposite – it returned a *verdict in favor of Mrs. Ethier* on her consortium claim. The special verdict form is unambiguous on the award of damages to Mrs. Ethier. The jury found Respondent negligent; Mrs. Ethier proved by a preponderance of the evidence that Respondent's negligence was the proximate

cause of her loss of consortium; and the total damages suffered by Mrs. Ethier for loss of consortium was $250,000. (Verdict Form, Appx. pp. 3-5.)

The Supreme Court in Lee simply was not faced with the current factual circumstances. The casual, erroneous observation in Lee that "generally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature" constitutes dicta because that principle was not necessary to decide Lee. Furthermore, the observation relied on an erroneous and misleading entry in 41 Am. Jur. 2d § 227, and it conflicts with long-established precedent in South Carolina that a loss of consortium claim is a separate and distinct action which does not rise or fall with the directly injured spouse's claim.

Respondent contends that Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990), supports the Court of Appeals' decision. (Resp. Ret., p. 4.) Respondent is incorrect.

In Smith, the Court of Appeals concluded that issue of whether trial judge erred by not submitting the husband's loss of consortium claim to jury under strict liability cause of action was not preserved for review. The Court of Appeals noted in passing that the jury did not award damages to the wife under that cause of action and so the husband could not show prejudice. The Court of Appeals did not cite the long-established line of South Carolina cases holding that a consortium claim is separate and distinct, and there was no need to do so because that was not the issue at hand and the issue was not even preserved for review anyway; nor did the Court of Appeals in any way address any imputation issue. This case does not support the Court of Appeals' decision in Petitioners' case.

Respondent argues that Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1999), supports the Court of Appeals' decision. (Resp. Ret., p. 5.) Respondent is incorrect.

In Creighton, the directly injured spouse's claim and her spouse's consortium claim, originally brought in separately filed complaints, were tried together by consent. The Court of Appeals in Creighton correctly noted that, "[u]nder South Carolina law, unlike that of some other states, loss of consortium is an independent action, not derivative" and "[a] verdict for a defendant in the injured party's action does not bar the loss of consortium claim." Creighton, 334 S.C. at 119. The Court of Appeals further 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." Id. at 121.

The Court of Appeals reached the unsurprising conclusion that a verdict for the defendants in a case in which both the directly injured and consortium spouse's claims were tried together meant a defense verdict on the consortium spouse's claim. In short, both plaintiffs in Creighton lost their case – unlike Petitioners' case. Creighton does not support the Court of Appeals' decision in Petitioners' case and it certainly does not address the issues raised in Petitioners' case, including whether the negligence of a directly injured spouse should be imputed to the consortium spouse to deprive her of a verdict and an award of damages.

Petitioners' case presents a novel issue of law because the Supreme Court has never squarely decided whether the negligence of the directly injured spouse is imputed to the other spouse's consortium claim. Petitioners submit that precedent establishes that such imputation does not occur when the consortium claim is a separate and distinct cause of action as it has been in

South Carolina since the 1920s, but this case presents the Court with the chance to resolve the matter.

Moreover, if long-standing precedent in South Carolina regarding the separate and independent nature of a consortium claim is overruled by an appellate court, then any such ruling should be applied prospectively only and the present case should be governed by the law as it currently exists. If South Carolina is now to be deemed a "derivative" state instead of a "separate and independent" state with regard to consortium claims, and if the directly injured spouse's negligence is now to be imputed to the consortium spouse, such novel and dramatic shifts in the law would constitute the equivalent of a new cause of action or the abolishment of an immunity.

Any abolition of a consortium spouse's present right to recover a verdict in a separate and independent action should be applied prospectively only. Similarly, any abolition of a consortium spouse's right to have her case decided without imputation of the directly injured spouse's negligence to her, should be applied prospectively only. Such a decision would constitute newly created substantive rights on the part of a defendant to defeat a consortium spouse's claim.

Petitioners submit that the Supreme Court should take this opportunity to clarify and establish the law on this important issue. It absolutely is an issue of public interest and importance.

2. If a juror concealing the fact that she had volunteered in a solicitor's office or the fact of knowing a deputy who merely went to the crime scene and had custody of the defendant in the courtroom – but none of the solicitor's staff or the deputy testified at trial – constitutes intentional concealment, then the present case is indeed a slam dunk case of intentional concealment.

The facts of Petitioners' case are exponentially more egregious than the reported cases which are controlling on these facts. In State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), the offending juror failed to reveal that she had volunteered as a victim's advocate in the solicitor's

office, but the solicitor and staff whom the juror knew did ***not*** testify at trial. In State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982), the offending juror failed to reveal that she knew a deputy because she was married to his wife's half-brother, and the deputy had custody of the defendant in the courtroom, but the deputy did ***not*** testify at trial. The Supreme Court in both instances held the juror's actions constituted intentional concealment.

In this case, juror Teresa Killian was asked plainly worded questions which prompted her to reveal her knowledge of and working relationship with the hospital's CEO, but those same plainly worded questions somehow did not prompt her to reveal that ***she had a paid, personal, direct working relationship for 1½ years with Respondent himself and two of Respondent's key witnesses, all of whom testified at trial.***

It is apparent that there existed no reasonable inability for Killian to comprehend the information solicited by the question asked. Killian clearly remembered personally knowing and working with Respondent and the nurses for 1½ years, and those experiences were of such significance that her purported forgetfulness is unreasonable. The trial judge's questions were *not* ambiguous or incomprehensible to the average juror, and the subject of the inquiry was *not* insignificant or so far removed in time that Killian's failure to respond is reasonable.

Killian's failure to respond to direct, straightforward, unambiguous questions that she plainly understood is truly incredible and disturbing. Killian concealed her relationship with Dr. Bibeau, Nurse Wadford and Nurse Gwynn until the jury room doors closed. Once there, she unlawfully preached their acumen and virtues non-stop throughout several days of the trial.

Based on Killian's statements and arguments in premature and actual deliberations, it is obvious that she lied in failing to respond to these questions. It is obvious that Killian could not be fair and impartial and she was biased in favor of Respondent from day one. Killian unlawfully

lobbied for days in favor of Respondent and the two testifying nurses, repeatedly telling jurors that she personally knew them and had worked with them. Killian repeatedly poisoned the well against Petitioners. Killian vouched personally for the alleged credibility, skill and knowledge of Respondent and the two nurses, and by stating throughout the trial in premature deliberations that all three persons were thorough and careful in their work, and that if they said they did something, then they did it; and she unlawfully and improperly expressed her bias during premature and actual deliberations, and exercised that bias during actual deliberations.

While Petitioners believe it clearly is a case of intentional concealment, they are entitled to a new trial even if it is analyzed as a case of unintentional concealment. The law regarding both intentional and unintentional concealment was set forth and argued in Petitioners' memoranda to the trial judge and to the Court of Appeal. Petitioners raised the issue of unintentional concealment even though they admittedly emphasized the rogue juror's actions were so blatantly obvious and outrageous that they constituted intentional concealment. (Pet. Motion & Mem., Appx. pp. 38-46; Pet. Br., Appx. pp. 1110-18.)

3. Petitioners challenged the trial judge's erroneous ruling that evidence of juror misconduct involved internal influences and the matter is preserved for appellate review. The inadmissible, unlawful and unfairly prejudicial information provided by the rogue juror was an extraneous influence.

Contrary to the Court of Appeals' conclusion, Petitioners did challenge the trial judge's erroneous ruling that that the evidence of juror misconduct involved internal influences and thus was inadmissible. This ruling should not be deemed law of the case. Petitioners described in detail the external nature of the information conveyed by rogue juror Killian to the jury during premature and actual deliberations, and other jurors' knowledge of that extraneous, improper and inadmissible information. (App. Br. to Ct. of App., Appx. pp. 1119-24.) Petitioners outlined the

law regarding extraneous influences and internal misconduct. (App. Br., Appx. pp. 1125-26.) Petitioners argued that the extraneous, improper and inadmissible nature of Killian's oft-repeated information absolutely influenced jurors and their verdict. (App. Br., Appx. pp. 1126-28.) It is obvious that Petitioners challenged every aspect of the trial judge's ruling, including any subsidiary ruling that misconduct was internal. It is also noteworthy that the trial judge properly held a lengthy Aldret hearing in which the nature of the misconduct and its impact on the jury were fully explored. The judge presumably would not have done so unless persuaded at the outset that the alleged misconduct involved extraneous influences.

The "evidence" unlawfully presented to the jury for days by Killian constitutes an extraneous influence. Although made in the jury room, Killian's statements constituted improper bolstering, inadmissible, irrelevant character evidence, inadmissible opinion testimony by a lay witness, inadmissible evidence of care allegedly provided to other patients, inadmissible evidence of routine habit or practice, and were inadmissible because their probative value was outweighed by their prejudicial impact. See Rules 401, 403, 404, 406, 607, 608 and 701, SCRE. Petitioners, 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.

Just because this "evidence" came from Killian's mouth does not somehow transform it into an internal-only influence. The external-internal distinction is intended to discourage courts from unduly probing jurors' internal thought processes and comments made to one another during deliberations about evidence lawfully presented in the courtroom. But that distinction and reticence does not mean inadmissible, unlawful, unfairly prejudicial information which comes solely from the mouth of a juror must go unchallenged and unreviewed simply because it was spoken by a juror. Inadmissible, unlawful and unfairly prejudicial information provided during

premature and actual deliberations by a rogue juror – a juror who has intentionally or unintentionally concealed her direct working relationship for 1½ years with Respondent and two key defense witnesses – remains subject to judicial review as an external influence. To conclude it is not would be to turn a blind eye to blatant injustice and unfair prejudice, which should not be tolerated or condoned in any courtroom. One can only imagine the howls of outrage from Respondent and his counsel – and rightfully so – if the tables were turned and juror Killian had been repeatedly damning Respondent and the nurses instead of praising them.

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

The Court of Appeals erred in affirming the trial judge's denial of a new trial because the record shows that specific, important and hotly disputed facts were implicated and unlawfully discussed by Killian during premature and actual deliberations: whether the foot pulses actually were taken and who supposedly took them, and the alleged credibility, skill and knowledge of Respondent and RN Wadford in providing care to Mr. Ethier. The alleged taking of the foot pulses by Respondent was essential to his defense that he actually had considered the possible diagnosis of a blood vessel problem and had performed a vascular exam. Killian did not simply offer a couple of random comments or express some generalized bias. Killian in the jury room presented herself to the jury as a witness who had an insider's knowledge of the Respondent and the ED

nurses – all key defense witnesses – and preached their virtues, credibility, skill and knowledge throughout the trial and in deliberations.

Other jurors' testimony strongly corroborates juror Sandra Carmichael's detailed testimony about Killian's misconduct during premature and actual deliberations. Carmichael and eight other jurors testified that Killian talked about working at the hospital with Respondent and the nurses. Carmichael and three other jurors testified that Killian vouched for the skill or proficiency of the doctor and nurses. Carmichael and three other jurors testified that Killian vouched for the truthfulness or credibility of the doctor and nurses.

Petitioners were prejudiced because Killian's verdict was affected by her obvious and oft-expressed bias. Petitioners also were prejudiced because Carmichael testified that Killian's statements affected her verdict, and the effect on a single juror's verdict is enough to prove prejudice. 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 Petitioners until Killian's repeated comments swayed their opinion. If Carmichael or other jurors had not been affected or swayed by Killian's misconduct, the outcome of the trial likely would have been different. An untainted jury likely would have reached a different conclusion on the apportionment of fault between Respondent and Mr. Ethier, and found Respondent more at fault than Mr. Ethier. An untainted jury likely would have awarded a larger verdict instead of a compromise verdict. Petitioners are entitled to a new trial because they did not have a fair and impartial jury.

Finally, Petitioners submit this Court should consider the overall impact of the rogue juror's actions and statements, both during voir dire and throughout the trial. It is impossible and would be unjust to debate each of the repeated instances of wrongdoing only in isolation. The

Court should instead consider the cumulative impact of the rogue juror on this case, from the beginning during voir dire to the end of as she unlawfully used her personal knowledge to lobby day after day in favor of Respondent's cause.

4. Issues related to S.C. Code Ann. § 15-38-15 were never raised by Respondent at trial or ruled on by the trial judge, and the statute is not applicable in any way.

Respondent seeks permission to argue issues related to the applicability of S.C. Code Ann. § 15-38-15. (Resp. Ret., p. 7 n.1.) The Court should not grant certiorari on any issues related to this statute.

Respondent in his brief to the Court of Appeals asserted that, pursuant to S.C. Code Ann. 15-38-15, he should be liable for only 30% of the damages owed to Jeanne Ethier, and Philip Ethier should be liable for the rest. Respondent urged the Court of Appeals to apply the "spirit" of the statute and asserts, without explanation or any citation to authority, that to refuse to apply it in the suggested manner would somehow violate equal protection. Respondent argued that the statute allows a defendant to assert that another potential tortfeasor contributed to causing the damages and may be held liable for it, and Mr. Ethier in this case is the other "potential tortfeasor." (Resp. Br., Appx. pp. 1167-72.)

Respondent's arguments regarding § 15-38-15 are not preserved for review because (1) Respondent never raised the application of the statute or challenged the jury's verdict at trial; (2) Respondent briefly mentioned § 15-38-15 at a post-trial hearing, but did not make the arguments he now makes on appeal; (3) Respondent's arguments regarding the statute were raised for the first time at a post-trial motion hearing and were never ruled on by the trial judge; and (4) the statute explicitly requires the jury which heard the evidence at trial to perform any allocation of damages among multiple defendants and that never occurred, of course, because there was only one defendant.

Petitioners call the Court's attention to their arguments in their reply brief to the Court of Appeals, but submit that the Court should not grant certiorari on issues related to § 15-38-15. (Pet. Reply Br. to Ct. of App., Appx. pp. 1182-91.)

CONCLUSION

For the reasons stated herein and in their main petition, Petitioners ask the Court to grant the petition for a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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PROOF OF SERVICE

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

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