RECEIVED
APR 18 2019
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. 2018-001435

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 BRIEF

David Proffitt, SC Bar # 11193
Ronald Cox, SC Bar # 11129
Proffitt & Cox, LLP
140 Wildewood Park Drive, Suite A
Columbia, S.C. 29223-4311
Telephone: (803) 834-7097
Email: dproffitt@proffittcox.com
Email: rcox@proffittcox.com

Attorneys for Petitioners

TABLE OF CONTENTS

I. The Court of Appeals' decision conflicts with the prior decisions of the Supreme Court, and the Supreme Court should plainly hold that a spouse who is awarded damages for loss of consortium is entitled to fully recover those damages in her separate and distinct cause of action regardless of the outcome of the directly injured spouse's claim. 1

II. 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. 5

III. 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. 7

IV. The Court should not consider any of Respondent's arguments related to S.C. Code Ann. § 15-38-15 because certiorari was neither requested nor granted on the issues, none of the arguments are preserved for review because they were never raised by Respondent at trial or ruled on by the trial judge and, regardless, the statute is not applicable in any way. 11

A. Certiorari was neither requested nor granted on the issues and they are not preserved for appellate review anyway. 11

B. Respondent's arguments regarding § 15-38-15 and the reduction of Jeanne Ethier's award are without merit because the statute does not apply in this single-defendant case. The statute does not affect the law of comparative negligence or Mrs. Ethier's right to an award of damages as determined by the jury. 15

TABLE OF AUTHORITIES

CASES

Allegro, Inc. v. Scully, 400 S.C. 33, 733 S.E.2d 114 (Ct. App. 2012)....13
Bennett v. Investors Title Ins. Co., 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006)....15
C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993)....14
Campbell v. Robinson, 398 S.C. 12, 726 S.E.2d 221 (Ct. App. 2012)....13
Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006)....15
Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1999)....3
Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, (2004)....14
Ex Parte McMillan, 319 S.C. 331, 461 S.E.2d 43 (1995)....14
First Savings Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994)....15
Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001)....15
Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)....14
Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992)....19
Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000)....19
Jennings v. Dargan, 308 S.C. 317, 417 S.E.2d 646 (Ct. App. 1992)....14
Keeter v. Alpine Towers Int'l, Inc., 399 S.C. 179, 730 S.E.2d 890 (Ct. App. 2012)....14
Lee v. Bunch, 373 S.C. 654, 647 S.E.2d 197 (2007)....1, 2
Machin v. Carus Corp., 419 S.C. 527, 799 S.E.2d 468 (2017)....16
McClurg v. Deaton, 380 S.C. 563, 671 S.E.2d 87 (Ct. App. 2008)....14
McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996)....14
Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 476 S.E.2d 690 (1996)....19
Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)....14
Rhame v. City of Sumter, 113 S.C. 151, 101 S.E. 832 (1920)....13
Rourk v. Selvey, 252 S.C. 25, 164 S.E.2d 909 (1968)....13
Smith v. Phillips, 318 S.C. 453, 458 S.E.2d 427 (1995)....13
Smith v. Ridgeway Chemicals, Inc., 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990)....2
Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017)....16
State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982)....5
State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001)....5
Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000)....13
Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997)....18
Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 399 S.E.2d 779 (1990).14
Wade v. Berkeley County, 348 S.C. 224, 559 S.E.2d 586 (2002)....19
Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)....14

STATUTES

S.C. Code Ann. § 15-38-15....14

RULES

Rules 401, 403, 404, 406, 607, 608 and 701, SCRE....11

ARGUMENTS

I. The Court of Appeals' decision conflicts with the prior decisions of the Supreme Court, and the Supreme Court should plainly hold that a spouse who is awarded damages for loss of consortium is entitled to fully recover those damages in her separate and distinct cause of action regardless of the outcome of the directly injured spouse's claim.

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. Br. 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***. Respondent conveniently ignores this fact.

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. See Pet. Br. pp. 9-11, 13-14 and fns. 2 and 6 – the "countless pages and lengthy footnotes" in Respondent's view – describing precedent which Respondent hopes this Court will ignore.

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. Br., p. 5.) 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. Br., 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 where ***Mrs. Ethier won her 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 never has 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 ask the Court to plainly hold that a spouse who is awarded damages for loss of consortium is entitled to fully recover those damages in her separate and distinct cause of action regardless of the outcome of the directly injured spouse's claim. The Court should reverse the Court of Appeals and reinstate the jury's verdict in favor of Mrs. Ethier.

II. 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 Appeals. 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.)

III. 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.[1] 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.

[1] See "Twelve Angry Men" briefly described at https://www.rogerebert.com/reviews/great-movie-12-angry-men-1957.

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.

IV. The Court should not consider any of Respondent's arguments related to S.C. Code Ann. § 15-38-15 because certiorari was neither requested nor granted on the issues, none of the arguments are preserved for review because they were never raised by Respondent at trial or ruled on by the trial judge and, regardless, the statute is not applicable in any way.

A. Certiorari was neither requested nor granted on the issues and they are not preserved for appellate review anyway.

The Court granted certiorari in this case pursuant to Petitioners' petition, which raised the issues and arguments discussed above. Respondent did not file a cross-petition for certiorari and the Court should reject his improper effort to slip numerous, plainly unpreserved issues and arguments regarding S.C. Code Ann. § 15-38-15 into this appeal. (Resp. Br., pp. 7-11.)

None of Respondent's arguments regarding § 15-38-15 are 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.

Respondent spends several pages of his brief discussing his view of § 15-38-15 and making absurd calculations. None of these issues or arguments were ever raised to or ruled on by the trial judge – as shown by Respondent's failure to cite a single page of the record where they were raised. The time to raise any such issues and arguments passed when the jury rendered its verdict on April 8, 2015. The Court should conclude that such issues cannot be raised now or on remand to the trial court for any further proceedings which result from the 2015 jury trial and verdict.

Respondent for the first time in his brief to the Court of Appeals and now in his brief to this Court asserts 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 urges the Court 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 argues 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., p. 8.)

At a hearing on post-trial motions on July 6, 2015 – three months after the trial – Respondent briefly mentioned § 15-38-15 and stated that "there's an allocation of liability that needs to be done." Respondent asserted only that there were two "tortfeasors," himself and Mr. Ethier, and because the jury found Mr. Ethier 70% at fault, then Respondent should

be liable for no more than 30% of Mrs. Ethier's award. (Tr. of Motion hearing, R. pp. 496-97.)

The trial judge did not rule on Respondent's arguments or decide any issue regarding § 15-38-15. The judge stated in his Order:

> 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.

(Order, App. p. 23 at n.3.)

If Respondent believed that the verdict was inconsistent, not in keeping with the Court's instructions, or otherwise ambiguous, Respondent was required to request clarification of the verdict before the jury was dismissed. Respondent failed to do so and may not now be heard to challenge the verdict.[2] Remanding this case for consideration of Respondent's arguments is neither lawful nor necessary.

---

[2] See 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
continued . . .

Respondent's arguments are not preserved for review because they were either not raised to the trial judge, not ruled on, or both.[3]

Respondent's arguments are not preserved because an issue or argument cannot be raised for the first time after a trial when it should have been raised during the trial.[4]

---

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).

[3] E.g. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court"; if trial court fails to rule on issue, party must file Rule 59(e) motion in order to preserve it for review); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (issue must be raised to and ruled on by the PCR judge in order to be preserved for review, and party must make a Rule 59(e) motion when PCR judge fails to rule on an issue the party has raised); Ex Parte McMillan, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995) (refusing to consider argument not raised to and ruled on by trial court); Tri-County Ice and Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 243, 399 S.E.2d 779, 783 (1990) (refusing to consider alternative argument regarding validity of default judgment that was not raised to and ruled on by trial court); Jennings v. Dargan, 308 S.C. 317, 322, 417 S.E.2d 646, 648 (Ct. App. 1992) (refusing to consider argument not raised to and ruled on by family court).

[4] E.g. McGee v. Bruce Hosp. Sys., 321 S.C. 340, 468 S.E.2d 633 (1996) (issue is not preserved where party first raised it in a new trial motion); C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (party may not use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not); McClurg v. Deaton, 380 S.C. 563, 579-80, 671 S.E.2d 87, 96 (Ct. App. 2008) (holding a party may not raise an issue for the first time in a motion to reconsider, alter or amend a judgment); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) (a party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not).

Moreover, the Court should reject Respondent's conclusory, unsupported assertions that the Court should consider the "spirit" of § 15-38-15, and that refusing to interpret the statute as Respondent suggests would violate equal protection.[5]

B. Respondent's arguments regarding § 15-38-15 and the reduction of Jeanne Ethier's award are without merit because the statute does not apply in this single-defendant case. The statute does not affect the law of comparative negligence or Mrs. Ethier's right to an award of damages as determined by the jury.

On the merits, Respondent's arguments are without merit.

The plain terms of the statute show that it does not apply at all in this case and it cannot now be applied because – even if it did apply – any allocation of fault among multiple defendants must be done by the trial jury which heard the evidence and that never occurred. Remanding this case for consideration of Respondent's arguments is neither lawful nor necessary.

Petitioners submit that § 15-38-15 provides:

FIRST, the Court recently has recognized that § 15-38-15 by its plain terms applies *only* when a jury which heard the evidence at trial is asked to determine the percentage of fault among *two or more defendants.* The existence of multiple defendants at trial is a prerequisite for applying the statute at all and it does not apply when a trial involves only

---

[5] E.g. Colleton County Taxpayers Ass'n v. School Dist. of Colleton County, 371 S.C. 224, 638 S.E.2d 685 (2006) (issue is deemed abandoned if the argument in the brief is conclusory); First Savings Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating a party failing to provide arguments or supporting authority for its assertion is deemed to have abandoned the issue); Bennett v. Investors Title Ins. Co., 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (holding that issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal); Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 690 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

a single defendant – as in this case which had only a single Defendant, Dr. Bibeau. At least one defendant must make a motion for the jury to allocate fault among the multiple defendants. See S.C. Code Ann. § 15-38-15(A) ("In an action to recover damages . . . if indivisible damages are determined to be proximately caused by *more than one defendant*. . . .") (emphasis added); § 15-38-15(B) ("Apportionment of percentages of fault *among defendants* is to be determined as specified in subsection (C)) (emphasis added); §15-38-15(C)(3) (the jury shall, "upon a motion by *at least one defendant*, where there is a verdict . . . for damages *against two or more defendants* for the same indivisible injury . . . specify in a separate verdict . . . the percentage of liability that proximately caused the indivisible injury that is attributable to *each defendant* whose actions are a proximate cause of the indivisible injury. . . .") (emphasis added); § 15-38-15(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. . . .") (emphasis added). See Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479, 483 (2017) (stating that "we are unwilling to accept Appellants' invitation to look outside the text of the Act to justify the assumption that the legislature's use of differing terms – "defendants" and "potential tortfeasors" – in section 15-38-15 was not deliberate or that those words mean anything other than what they say"); Machin v. Carus Corp., 419 S.C. 527, 535-36, 799 S.E.2d 468, 472-73 (2017) (explaining that § 15-38-15 is directed at allocation of fault among multiple "defendants" under plain language of statute and employer cannot be a "potential tortfeasor" in lawsuit brought by employee against third party due to workers' compensation exclusivity bar).

SECOND, in order for the statute to apply, *the jury which heard the evidence,* determined there was negligence and awarded damages, must upon proper motion then assign percentages of fault to the multiple defendants in a special verdict form. The parties must be given an opportunity at trial to make a separate oral argument to the jury on the percentage attributable to each defendant. § 15-38-15(C)(3)(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.").

THIRD, if there are two or more defendants at trial who have been determined by the jury to have caused an indivisible injury, such that the statute applies, then the jury must determine the percentage of fault, if any, applicable to each defendant and to the plaintiff if comparative negligence is an issue. The jury must determine the percentage of fault attributable to each of the multiple defendants and the plaintiff, with the total of the percentages equaling 100%. See § 15-38-15(A) ("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"); § 15-38-15(C)(2) and (3) (jury shall "determine the percentage of fault, if any, of plaintiff" and "[i]n determining the percentage attributable to each defendant, any fault of the plaintiff . . . 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").

FOURTH, if there are multiple defendants who caused an indivisible injury, such that the statute applies, and if the jury assigns a percentage of fault to each defendant, then a defendant found 50% or more at fault is jointly and severally liable for the entire award. A defendant in a multi-defendant case who is found less than 50% at fault is liable only for the percentage of the damages determined by the jury. §15-38-15(A) ("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."). See Summer v. Carpenter, 328 S.C. 36, 48, 492 S.E.2d 55, 61 (1997) (under doctrine of joint and several liability, joint tortfeasors are liable for plaintiff's damages, both jointly and severally).

FIFTH, if there are multiple defendants who caused an indivisible injury, such that the statute applies, a defendant has 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." § 15-38-15(D). Although a defendant may be entitled to make an "empty chair" argument, the percentages of fault on the special verdict form must be assigned only to the multiple defendants in the trial and the plaintiff in a comparative negligence case. § 15-38-15(C)(3) ("[i]n determining the percentage attributable to each defendant, any fault of the plaintiff . . . 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"). See Machin, 419 S.C. at 545-46, 799 S.E.2d at 477-78 (holding

a defendant in a tort action does not have the right to list a nonparty on the jury form for inclusion in the allocation of fault).

The primary rule of statutory construction is to ascertain and give effect to the intent of the Legislature. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "The first question of statutory interpretation is whether the statute's meaning is clear on its face." Wade v. Berkeley County, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002). If a statute's language is plain, unambiguous, and conveys a clear meaning, then "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).

The Legislature used the term "defendant" throughout the statute, indicating an intent to apply § 15-38-15 only to multiple defendants at trial who are ordered to pay damages. See Smith, 419 S.C. 548, 799 S.E.2d 479; Machin, 419 S.C. 527, 799 S.E.2d 468. In this case, there was only *one* Defendant at trial – Respondent Dr. Bibeau. There were no multiple defendants fighting about allocation of fault and § 15-38-15 does not apply at all. The jury did exactly what the trial judge instructed it to do and with the consent of the parties – decide whether Dr. Bibeau was negligent and then determine the respective degrees of fault between him and *Mr.* Ethier.

The jury was not asked to determine whether there was any comparative negligence by *Mrs.* Ethier because she could not be comparatively negligent under the law or under the facts and circumstances of this case. (Jury charges, Appx. pp. 1027-37.) At the hearing

on Plaintiffs' post-trial motions, the trial judge acknowledged that the jury was correctly instructed to assign percentages of negligence only between Respondent and *Mr.* Ethier. (Tr. of Motion Hearing, App. p. 493). There should be no need for any further argument or analysis; the statute is simply inapplicable.

Regardless, even if the statute did apply (which it does not), any argument by Respondent now seeking some allocation under the statute comes too late. The jury which heard the evidence at trial must determine the percentage of fault, if any, applicable to each of the multiple defendants. See § 15-38-15(C)(2) and (3). Respondent in this case never moved to have the jury allocate fault among Defendants at trial. Undoubtedly, that was because there was only one Defendant – Respondent – and so there obviously was no reason for such a motion. It also was because the jury had allocated fault among the only appropriate parties in the case based on comparative negligence – Respondent and Mr. Ethier.

The Court should reject Respondent's conclusory, unsupported argument that Mr. Ethier somehow is a "tortfeasor" along with Respondent under § 15-38-15, and so Mr. Ethier's negligence is somehow imputed to Mrs. Ethier, and so the statute somehow requires that Respondent only pay Mrs. Ethier 30% of the $250,000 awarded to her. Respondent's argument is far removed from the true purpose and application of the statute.

Mr. Ethier is not a "potential tortfeasor" under the statute. He is not an "empty chair" defendant. He is the injured plaintiff and was found to be partly at fault under comparative negligence when the jury allocated fault between Mr. Ethier and Respondent. Again, there was only one defendant at trial – meaning the statute is inapplicable – and

Respondent's effort to squeeze Mr. Ethier into the box of "potential tortfeasor" is improper and unpersuasive.

The Court also should reject Respondent's argument that, "taking the Ethiers' logic to its extreme, then § 15-38-15(A) would have no application in a case with a counterclaim where the 'defending party' – i.e., the tortfeasor – is a plaintiff. That is truly absurd." (Resp. Br., pp. 8-9.)

It is Respondent's argument which is absurd. If a case arises where a defendant has made a counterclaim against two or more plaintiffs, then the plaintiffs are defendants with regard to the counterclaim. If necessary, multiple counterclaim defendants could move for the jury to allocate fault among them as provided by § 15-38-15 just as any set of multiple defendants may do.

The purpose of § 15-38-15 is simply to provide a mechanism by which a jury that heard the evidence may be asked to allocate fault among *multiple* defendants and allow those defendants to pay only their assigned share if it does not exceed 50% – nothing more, nothing less. See Smith, 419 S.C. 548, 799 S.E.2d 479; Machin, 419 S.C. 527, 799 S.E.2d 468.

The Legislature had no intent to modify, and did not modify, the law of comparative negligence. The Legislature had no intent to modify, and did not modify, longstanding law which says that the negligence of one spouse is not imputed to the other. The Legislature had no intent to modify, and did not modify, longstanding law regarding the separate and independent nature of a consortium spouse's claim, which allows a consortium spouse to be awarded her full damages when the defendant's negligence is proven even though the injured spouse may not be entitled to damages.

Accordingly, the Court should reject Respondent's arguments regarding § 15-38-15 because certiorari was not granted to hear the issues, they are not preserved for appellate review for numerous reasons and they are utterly without merit.

CONCLUSION

For all the foregoing reasons, Petitioners ask that the Court reverse the Court of Appeals' decision and plainly hold that a spouse who is awarded damages for loss of consortium is entitled to fully recover those damages in her separate and distinct cause of action regardless of the outcome of the directly injured spouse's claim. Consequently, the Court should remand this case for entry of judgment in favor of Mrs. Ethier as stated in the jury's verdict. In addition, Petitioners further request that this Court reverse the Court of Appeals' decision and remand this case for a new trial absolute.

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

Respectfully submitted,

David Proffitt, SC Bar # 11193
Ronald Cox, SC Bar # 11129
Proffitt & Cox, LLP
140 Wildewood Park Drive, Suite A
Columbia, S.C. 29223
(803) 834-7097
dproffitt@proffittcox.com
rcox@proffittcox.com

Attorneys for Petitioners

April 15, 2019

RECEIVED
APR 18 2019
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. 2018-001435

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

Philip Ethier and Jeanne Ethier,

Petitioners,

v.

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

Defendants,

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

PROOF OF SERVICE

I, the undersigned lawyer or employee in the offices Proffitt & Cox, LLP, Attorneys for 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:

Pleading: Petitioners' Reply to Respondent's Brief

Counsel / Parties Served: Andrew F. Lindemann
Lindemann, Davis & Hughes, P.A.
PO Box 6923
Columbia, South Carolina 29260
andrew@ldh-law.com

G. Murrell Smith, Jr.
David Holler
Lee Erter Wilson Holler & Smith LLC
P.O. Box 580
Sumter, SC 29151
murrellsmith@leeandmoise.com

Stanley L. Myers
Moore Taylor Law Firm
PO Box 5709
W. Columbia, SC 29171
Stanley@mttlaw.com

Attorneys for Respondent

David Proffitt

April 18, 2019