THE STATE OF SOUTH CAROLINA
In the 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.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent Guy R. Bibeau, M.D. has petitioned this Court for a rehearing of the recent decision in *Ethier v. Fairfield Memorial Hospital*, Op. No. 27953 (S.C. S.Ct. filed March 11, 2020). Dr. Bibeau respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

The Court overlooked and failed to apply the heightened standard of proof. In addressing whether the Petitioners proved prejudice from the alleged premature deliberations by Juror

Teresa Killian, the Court described the burden of proof as "high" but did not identify the burden of proof as requiring "clear and convincing evidence." (Slip Op. at 5). Under South Carolina law, 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"). While this Court overruled *Vestry*,[1] there is no indication in the opinion that the Court was also overruling or altering the applicable burden of proof. The "clear and convincing evidence" standard had previously been recognized by this Court in *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), where this Court cited to *Hunt v. Methodist Hospital*, 240 Neb. 838, 485 N.W.2d 737 (Neb. 1992), to the effect that the "party claiming juror misconduct has burden to prove prejudice by clear and convincing evidence." 509 S.E.2d at 814.

Moreover, even if the Court disagrees with "clear and convincing evidence" being the applicable standard, that is the law of *this* case and should still be applied in this appeal. The trial judge ruled that the Ethiers "cannot rest upon evidence that misconduct merely occurred, but rather must prove prejudice resulting from that misconduct by clear and convincing evidence." (App. 14). On appeal to the Court of Appeals and to this Court, the Ethiers have not challenged or objected 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. Therefore, the Court has erred in failing to apply the clear and convincing standard, as the

[1] *See* Section IV below.

trial judge did, in evaluating the proof of prejudice resulting from the alleged misconduct by Juror Killian.

II.

In its analysis, the Court has also confused and frankly conflated the premature deliberations and the actual deliberations by the jury. The Court focused initially on the Ethiers' allegations of premature deliberations where Juror Killian made statements during breaks in the trial regarding her work experience with Dr. Bibeau and one of the nurses. While finding that the premature deliberations "severely hampered the fundamental fairness of the trial" (Slip Op. at 6), the Court then cited only to the *actual* deliberations for evidence of prejudice. The Court identifies no evidence of prejudice resulting directly or indirectly from any premature deliberations. Instead, for evidence of prejudice, the Court cites *only* to the testimony of Juror Sandra Carmichael in the *Aldret* hearing where Juror Carmichael addresses Killian's comments *during* the actual deliberations at the close of the trial. Importantly, none of the jurors indicated that they were impacted by the comments during premature deliberations. Most importantly, the trial judge, who is the fact finder in the *Aldret* hearing and whose findings must control if supported by any evidence, found 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.

(App. 15). There is no evidence to defeat that finding, let alone for this Court to conclude that there is *no evidence* to support that finding -- that is, if the standard of review were properly applied.

As indicated, as the *only* potential evidence of prejudice, the Court cites to Juror Carmichael's testimony during the *Aldret* hearing. That testimony is problematic in several

respects, none of which the Court appears to consider. First, Juror Carmichael should not be permitted to testify as to what transpired with other jurors during deliberations. Here, the Court places weight on her testimony that "some of us were leaning towards in favor of [Philip Ethier]" and "some of the jurors changed their minds." (Slip Op. at 7). Even if true, jurors *are* allowed to change their minds during deliberations, and the Court cannot possibly intend to give credence to one juror's testimony as to the subjective thought process of other jurors -- so as to suggest why other jurors may have changed their minds (assuming any of this testimony is even true). Moreover, Rule 606(b), SCRE, does not even permit a juror to testify about votes taken during deliberations. In effect, this Court disregards its own previous holding in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), as follows: "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." 661 S.E.2d at 372. In other words, this opinion, if not reheard, creates an inconsistency with *Shumpert* on this critical point and frankly sets a dangerous precedent that invites jurors to testify to the thought processes of other jurors during deliberations.

Additionally, the testimony from Juror Carmichael is not sufficient to show that *her own thinking* was materially impacted. Certainly, that was the finding by the trial judge, and under an abuse of discretion standard when strictly applied as it should be, that finding should not have been overridden by this Court. Importantly, in including the testimony from Juror Carmichael, this Court *omitted* the previous question and answers that provide the proper context. The full testimony from Juror Carmichael supports the trial judge's findings. The full testimony is 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 maybe he didn't, you know, sign those papers. She knew him.

Q. Okay, so it did have some effect on your ultimate decision?

A. Yeah. She stated several times that she knew him and he was a good, reliable doctor.

(App. 296). (Emphasis added). Citing that testimony, the trial judge 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. (App. 296). The trial judge 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." (App. 18). In addition, the trial judge 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." (App. 18-19). Clearly, the trial judge's findings are supported by the evidence and should not be reversed under an abuse of discretion standard[2] -- particularly where the burden of proof is clear and convincing evidence.

[2] "An abuse of discretion occurs when the [circuit court's] ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565, 566 (1987).

Practically speaking, by rejecting those findings this Court has in practice applied a *de novo* standard and is actually substituting its own fact-finding and judgment for that of the trial judge. The Court overlooks (or at least fails to mention) the well-settled principle that "[t]he trial judge saw the witnesses, heard their testimony delivered from the stand, and had that personal observance of and contact with them, which is of peculiar value in arriving at a correct result." *Lee v. Lee*, 237 S.C. 532, 118 S.E.2d 171, 174 (1961). *See also, Costa and Sons Construction Co. v. Long*, 306 S.C. 465, 412 S.E.2d 450, 452 (Ct. App. 1991) ("[a]s a practical matter ... we are impotent to determine questions of credibility and must defer to the good judgment of the trial court who heard and observed the witnesses").

Further, the Court has also disregarded its own observations in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), which are most pertinent to the analysis in this case:

> 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.

Finally, the Court failed to consider (or at least discuss) the ultimate decision of the jury. The Court suggests that the Ethiers were prejudiced by Juror Killian's comments because "Bibeau received the benefit of having a character witness on the jury who could attest to his skill without being subjected to cross-examination." (Slip Op. at 7). The Court points to "the most hotly disputed fact at trial -- whether Bibeau checked Ethier's foot pulses." (Slip Op. at 7). However, the Court completely overlooks that this was not a case where the jury found no fault

by Dr. Bibeau. The jury did indeed find that Dr. Bibeau *committed malpractice* and awarded a significant verdict -- $1.75 million for Mr. Ethier and $250,000 for Mrs. Ethier. Thus, as the trial judge aptly recognized, the "ultimate verdict" 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." (App. 19). In short, 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. Contrary to this Court's analysis, if the jury, including Juror Carmichael, had been swayed by Juror Killian serving as a "character witness," the jury would not have found that Dr. Bibeau committed malpractice. Thus, the Court cannot conclude -- and certainly not by clear and convincing evidence -- that Juror Killian's comments impacted the jury's decision on Dr. Bibeau's liability. That was proven, and thus, as the trial judge concluded, there is no prejudice -- and certainly not to the extent that it impacted fundamental fairness.

The Court is respectfully asked to rehear this appeal and consider all of these critical points that demonstrate that the trial judge's decision should have been affirmed -- particularly under the heightened standard of proof and the deferential standard of review that apply.

III.

The Court also overlooked and failed to address an additional ruling by the trial judge and as affirmed by the Court of Appeals that required an affirmance based both on the merits and by application of the two-issue rule. In *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014), written by Justice Few, the Court of Appeals explained that "[i]nitially, the trial judge must make a factual determination as to whether juror misconduct has occurred." 760 S.E.2d at 114. Here, the trial judge determined that the comments by Juror Killian about Dr. Bibeau and one of the nurses "were based only on her own experiences and,

therefore, would be internal influences on the jury rather than external influences or from extraneous matters." (App. 16). The Ethiers did not challenge that ruling on appeal, which was acknowledged by the Court of Appeals in the opinion's footnote.[3]

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). The trial judge 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*." (App. 16). He accordingly ruled that "the evidence of the juror misconduct is actually inadmissible, and the Plaintiffs' proof fails on that basis." (App. 16).

The trial judge's analysis on the merits was correct. But even if it was not, the Ethiers, as the Court of Appeals noted, did not appeal that ruling, and that implicates the "two-issue" rule as a basis for affirmance. In applying the "two-issue" rule, this Court has explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). *See also*, *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839, 845 (Ct. App. 1986) ("[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal"). However, this

---

[3] In their brief to this Court, the Ethiers now dispute the Court of Appeals' conclusion on this preservation issue. But, the citation they give to their Court of Appeals brief does not demonstrate what they claim. In the Court of Appeals, the Ethiers never took exception to Judge Couch's ruling that Juror Killian's comments were internal influences rather than external influences or from extraneous matters. In fact, the "Argument" section of the Ethiers' Court of Appeals brief on this issue does not even include the words "internal," "external" or "extraneous," let alone a discussion of the issue. (App. 1126-1128). As the Court of Appeals correctly noted, that ruling was simply not addressed or challenged.

Court never addressed this issue -- either the merits or the application of the "two-issue" rule. The Court is respectfully requested to address these points on rehearing.

IV.

Dr. Bibeau submits that the Court should also reconsider its decision in overruling *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), and then relying on that overruling as a basis for reversal in this case. That, in itself, presents a certain lack of fairness for several reasons. First, the *Vestry* decision is entitled to continuing precedential effect under the doctrine of *stare decisis*. The decision by this Court in *Vestry* is barely ten years old, and there has not been any material change in society, mores, or existing law from this Court or the United States Supreme Court in that interval that would require or justify its overruling. The only change has been the members of the Court are now different and have a differing perspective. Second, and perhaps more importantly, the Ethiers never requested that *Vestry* be overruled. The Ethiers never even argued that *Vestry* was incorrectly decided or was distinguishable in any respect. In fact, the Ethiers *never even cite to* -- let alone discuss -- the *Vestry* decision in either their opening brief or their reply brief. The Court is urged not to grant relief by overruling a published decision from 2009 that should be given precedential effect when that relief was never even requested by the appealing party. Instead, *Vestry* should remain as supporting authority for the decisions of the trial court and the Court of Appeals in this case.

CONCLUSION

Based on the foregoing discussion, the Respondent Guy R. Bibeau, M.D. respectfully requests that the Court rehear its decision in this case. Dr. Bibeau renews his request that this Court affirm the decision of the Court of Appeals which in turn affirmed the Post-Trial Order issued by Circuit Judge Roger L. Couch and the judgment entered.

Respectfully submitted,

LINDEMANN, DAVIS & HUGHES, P.A.

BY: *s/ Andrew F. Lindemann*

ANDREW F. LINDEMANN #13030
5 Calendar Court, Suite 202
Post Office Box 6923
Columbia, South Carolina 29260
(803) 881-8920

G. MURRELL SMITH, JR.
DAVID C. HOLLER
Smith Robinson Holler DuBose Morgan, LLC
Post Office Box 580
Sumter, South Carolina 29151-0580
(803) 778-2471

STANLEY L. MYERS
Moore Taylor Law Firm, P.A.
1700 Sunset Boulevard
Post Office Box 5709
West Columbia, South Carolina 29171
(803) 796-9160

Counsel for Respondent
Guy R. Bibeau, M.D.

April 15, 2020