

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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

**RECEIVED**

**Apr 22 2020**

**S.C. SUPREME COURT**

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Appellate Case No. 2018-001435  
Op. No. 27953 (Filed March 11, 2020)

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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.

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**PETITIONERS' RETURN TO RESPONDENT'S PETITION FOR REHEARING**

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Petitioners Philip Ethier and Jeanne Ethier submit their return to the petition for rehearing of Respondent Guy R. Bibeau, M.D. Petitioners respectfully submit that the Court has not overlooked or misapprehended any of the points raised by Respondent. Petitioners ask the Court to deny the petition.

I.

Respondent contends that the Court “overlooked and failed to apply the heightened standard of proof,” i.e., the standard of “clear and convincing evidence.” (Pet. at 1.) Respondent’s rehashed argument is without merit and incorrectly states and assumes the Court has adopted this standard.

To Petitioners’ knowledge, this Court and the Court of Appeals never have held that the standard of proof by clear and convincing evidence is required in analyzing the impact of a rogue juror’s unlawful comments and conduct on a jury verdict. Respondent cites in support of his argument only Vestry and Church Wardens of Holy Cross v. Orkin Exterminating Co., Inc., 384 S.C. 441, 682 S.E.2d 489 (2009), overruled by the present case, and State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999). Neither case supports Respondent’s argument.

In Vestry, the Supreme Court while describing the facts of the case noted that the *trial judge* applied the clear and convincing standard. Vestry, 682 S.E.2d at 492 and 494. The Supreme Court did not otherwise discuss, embrace or adopt the clear and convincing standard. Likewise, the Court of Appeals did not discuss, embrace or adopt the clear and convincing standard. Vestry and Church Wardens of Holy Cross v. Orkin Exterminating Co., Inc., 373 S.C. 200, 644 S.E.2d 735 (Ct. App. 2007).

In Aldret, the only mention of the clear and convincing evidence standard is when this Court recited it in a single parenthetical while describing a Nebraska case, Hunt v. Methodist

Hospital, 485 N.W.2d 737 (Neb.1992). None of the other 10 state and federal cases cited alongside Hunt by the Court in Aldret discusses or adopts the clear and convincing standard. Aldret, 333 S.C. at 314-15. The Court in Aldret did not otherwise discuss, embrace or adopt the standard, but stated only, “[w]e hold, further, that in such cases, the burden is on the moving party to demonstrate prejudice from the premature deliberations.” Aldret, 333 S.C. at 315-16.

In this case, the Court stated that “[w]hile the burden to demonstrate prejudice is high, when evidence strongly supports the fact that votes were changed as a result of a juror’s impermissible conduct, we cannot countenance such a tainted verdict.” Ethier v. Fairfield Mem. Hosp., Op. No. 27953, Adv. Sh. No. 10 at 22, 27 (filed March 11, 2020). Petitioners submit that the Court accurately stated the standard of proof applied in prior case law, but did not adopt a clear and convincing standard as urged by Respondent, just as it has not adopted that standard in the past. Petitioners submit the Court should not adopt such a standard of proof in this setting.

In Petitioners’ view, evidence of the impact of Teresa Killian’s words and conduct on the jury during both premature and actual deliberations, which resulted in a fundamentally unfair trial, is overwhelming and plainly meets the clear and convincing standard even if that were required. As the Court recognized and explained in its decision, at the post-trial hearing, “nine jurors testified they heard [Teresa] Killian state during breaks at trial that she worked at the hospital with Bibeau and the nurses. Four jurors testified Killian vouched for the skill of all three by stating they were ‘good, careful, or thorough,’ and if Bibeau did not take foot pulses, then ‘the nurse’ did. Further, four jurors noted Killian vouched for the truthfulness and credibility of all three, asserting Killian informed the jury during breaks that if they ‘said they did something, they did it.’ . . . [I]t is clear that Killian’s conduct severely hampered the fundamental fairness of the trial, and that the circumstances here demonstrate prejudice.

Carmichael testified that Killian's comments directly affected her vote, as she initially believed Bibeau was more negligent." Ethier, Adv. Sh. No. 10 at 27-28.

The Court recognized and explained that "Killian's intentional disregard of the trial court's repeated instructions not to engage in premature deliberations directly affected the verdict" and her repeated comments went to "the most hotly disputed fact at trial – whether Bibeau checked Ethier's foot pulses. . . . In essence, Bibeau received the benefit of having a character witness on the jury who could attest to his skill without being subject to cross-examination. This benefit is not speculation, as Killian directly affected Carmichael's vote." Id. at 28-29.

Killian's impermissible conduct occurred throughout the trial in both premature and actual deliberations. Carmichael testified in her post-trial affidavit and at the post-trial evidentiary hearing that:

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

Beginning on the second or third day of the trial, Teresa began saying in the jury room during breaks that she personally knew the nurse, "Jeri," and had worked with her for about three years. I know that Teresa, when she referred to "Jeri," meant Jerilyn Wadford, the registered nurse who testified at trial. It was clear to me that "Jeri" was Nurse Wadford who testified at trial.

Teresa repeatedly said during breaks in the jury room that "Dr. Bibeau and Jeri were very careful and thorough, and if they said they did something, they did it."

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

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

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

Teresa repeatedly made these statements about Dr. Bibeau and Jeri every day when we were on break in the jury room. No one asked her to make them, although she and another juror, Kayla, would often discuss them. . . .

After the other nurse, Rhonda Gwynn, testified, Teresa said during a break in the jury room that she also personally knew Rhonda and that Rhonda was a good nurse who was thorough in her job. Teresa did not talk as much about Rhonda as she did about Dr. Bibeau and Jeri. (Aff. of Carmichael, ¶¶ 4-11, 13, 16, Appx. pp. 141-43.)

Carmichael testified by affidavit and at the hearing that Killian made these same statements during actual deliberations. (Aff. of Carmichael, ¶¶ 6-7, 17-21, Appx. pp. 141-43, 290-298, 306.)

Petitioners note that in addition to the impact on Carmichael, *Killian's* verdict was affected by her obvious and oft-expressed bias in favor of Dr. Bibeau and the two testifying nurses. If Carmichael or other jurors had not been affected or swayed by Killian's misconduct and if not for the fact of Killian's own biased vote, the outcome of the trial likely would have been different. An untainted jury likely would have reached a different conclusion on the apportionment of fault between Dr. Bibeau and Mr. Ethier, and found Dr. Bibeau more at fault than Mr. Ethier. An untainted jury likely would have awarded a larger verdict instead of a compromise verdict.

As for Respondent's argument that the clear and convincing standard is the law of the case, again, that is not the standard, although it is clearly met even if it were required. However, Petitioners further submit that their comprehensive challenges of the trial judge's rulings on the issues of voir dire, premature and actual deliberations certainly included a challenge of any erroneously stated or applied standard of proof. The application of the wrong standard of proof is part and parcel of the judge's erroneous ruling; it was challenged across the board and the erroneous standard is not the law of the case.

## II.

The Court has not confused or conflated the premature and actual deliberations by the jury. As explained above, the Court in granting a new trial accurately described the factual record of Killian's impermissible comments and conduct as they occurred and affected the jury during both premature and actual deliberations. It was a continuing course of conduct by Killian throughout the trial and it resulted in a fundamentally unfair trial and verdict.

Respondent argues that jurors are allowed to change their mind during deliberations "and the Court cannot possibly intend to give credence to one juror's testimony as to the subjective thought processes of other jurors." Respondent contends the Court's opinion somehow creates an inconsistency with Shumpert v. State, 378 S.C. 62, 661 S.E.2d 369 (2008) because there is no factual support for the Court's decision and it "sets a dangerous precedent that invites jurors to testify to the thought processes of other jurors during deliberations." (Pet. at 4.)

Respondent's description is an utterly inaccurate account of what happened at trial and attempts to hook the herring, paint it red and offer it up. The extensive factual support for the Court's decision – Killian's impermissible conduct and its impact on the jury and verdict – is ably described in the Court's opinion and in Petitioners' briefs to this Court and the Court of Appeals. There is no conflict at all with Schumpert.

The trial judge properly held an Aldret hearing to determine if there were extraneous influences on the jury. Carmichael simply testified about what she and other jurors *said* and *did* in describing the extraneous influence of Killian's conduct during breaks and in the jury room during deliberations. Other jurors did the same. The trial judge did not ask questions or elicit testimony about what Carmichael or other jurors believed their fellow jurors were thinking or why their fellow jurors thought it.

Carmichael testified that at the beginning of deliberations, she believed that Dr. Bibeau was more at fault than Mr. Ethier, and that several other jurors expressed the same opinion. However, Killian's repeated comments caused her to change her mind and believe that Mr. Ethier was more negligent than Dr. Bibeau. (Aff. of Carmichael, ¶¶ 23-25, Appx. pp. 143-44.) Killian, of course, was unfair to Petitioners and partial to Dr. Bibeau from the outset. This Court properly reviewed the factual record and concluded the trial was fundamentally unfair.

Moreover, as the Court held, a litigant is entitled to twelve fair and impartial jurors. In this case, Killian obviously was never fair and impartial, Carmichael's verdict certainly was affected by Killian's impermissible conduct, and it is a logical and reasonable conclusion that the verdicts of several other jurors who admittedly heard Killian's repeated unlawful comments throughout the trial also were affected.

Respondent in a rehashed argument again urges the Court to focus solely on Carmichael's statement that, when asked if Killian's statements affected her verdict, she stated, "I think it did a little." (Pet. at 5.) This statement, of course, is entirely consistent with the Court's quotation of Carmichael where she testified that Killian's comments directly affected her vote and her "ultimate decision" because she initially believed Bibeau was more negligent, but eventually changed her mind of light of Killian's comments. Ethier, Adv. Sh. No. 10 at 28.

Petitioners also point to Judge Goolsby's astute observation in the Court of Appeals' decision in Vestry. Judge Goolsby, while explaining how the record showed three jurors' votes were affected by the offending juror's unlawful comments and actions, stated the record showed the first juror admitted to being influenced by the comments. "Improper influence, however slight, is still improper influence, or as Paul writes in Galatians 5:9 (RSV), 'A little leaven

leavens the whole lump.” Vestry, 644 S.E.2d at 736 n. 2. Although the Court of Appeals’ opinion in Vestry was reversed, Judge Goolsby’s observation still rings true.

Respondent further asserts the Court disregarded the observation in Schumpert in which the Court failed to find persuasive a single affidavit presented in a post-conviction relief proceeding which speculated about the impact that comments about the defendant’s failure to testify may have had on jurors. The juror-affiant stated he believed that he and perhaps two other jurors may have been affected. There was no Aldret hearing; there was no factual support to find the trial fundamentally unfair except for the single juror’s speculative statements in an affidavit. Furthermore, the Court was careful to note that it was simply a lack of proof that led it to conclude the PCR applicant had not proven his trial was fundamentally unfair. “This analysis should not be interpreted as suggesting that more concrete and factually specific allegations regarding a jury’s consideration of a defendant’s failure to testify might not raise such significant questions that it is necessary to admit the testimony in order to ensure fundamental fairness.” Schumpert, 661 S.E.2d at 372.

The present case is nothing like Schumpert and the Court has in no way disregarded Schumpert. The factual record is replete with evidence of Killian’s impermissible conduct throughout the trial, Killian’s obvious bias in favor of Dr. Bibeau and the testifying nurses, the impact on Carmichael as she explicitly testified, and the fact that numerous other jurors admitted hearing Killian’s repeated unlawful comments about Dr. Bibeau and the testifying nurses.

The Court has not in any way applied a *de novo* standard and substituted its own fact-finding and judgment for the trial judge. As Petitioners stated in their main brief and as applied by this Court, the decision whether to grant or deny a new trial rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. Fields v. J. Haynes

Waters Builders, Inc., 376 S.C. 545, 569, 658 S.E.2d 80, 93 (2008). An abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case. Ex Parte Capital U-Drive-It, Inc., 369 S.C. 1, 630 S.E.2d 464, 467 (2006); Fontaine v. Peitz, 291 S.C. 536, 539, 354 S.E.2d 565, 566 (1987). (Pet. Br. at 6.)

The trial judge abused his discretion in denying the motion for a new trial because his ruling is based upon an error of law, is without evidentiary support, and does not fall within the range of permissible decisions applicable in this case. The factual record overwhelming shows that the trial was fundamentally unfair due to Killian's impermissible conduct.

Finally, Respondent in a rehashed argument again contends the jury found that he committed malpractice, was 30 percent at fault and Mr. Ethier was awarded a significant amount of damages; therefore, Killian's impermissible conduct must have had no impact on the jury. Respondent's argument completely overlooks the fact that Killian's repeated comments throughout the trial meant she was unfair to Petitioners and partial to Dr. Bibeau, Carmichael's vote was directly affected as she explicitly testified, and several other jurors likely were affected because they admittedly heard the repeated lobbying and inadmissible statements of good character and skill made on behalf of Dr. Bibeau.

The factual record supports the conclusion that jurors were far more inclined and amenable to blaming Mr. Ethier more than Dr. Bibeau for the ultimate medical outcome because Killian was biased in favor of Dr. Bibeau, and she repeatedly and unlawfully expressed that bias throughout the trial, thereby leading Carmichael and likely others to change their votes. After

all, as Killian had told them for days, “he was a good doctor. He was a thorough doctor. If he said he did something, he did it.” He must have taken those foot pulses even though it was never noted on the physician’s exam. So while maybe Dr. Bibeau is a bit at fault, Mr. Ethier is more to blame because he did not go see another doctor. That line of reasoning flowed directly from Killian’s fervent, unceasing praise of the doctor and testifying nurses. The ultimate verdict obviously is a direct result of Killian’s impermissible conduct. The Court properly recognized and held that it resulted in a fundamentally unfair trial and verdict which deprived Mr. Ethier of any compensation at all.

### III.

Petitioners properly challenged the trial judge’s ruling with regard to internal versus external influences, and the two-issue rule has no application in this case.

Contrary to the Court of Appeals’ conclusion and Respondent’s rehashed argument on rehearing, Petitioners did challenge the trial judge’s erroneous ruling that that the evidence of juror misconduct involved internal influences and thus was inadmissible. This Court properly recognized the trial judge’s ruling should not be deemed law of the case and did not find Respondent’s arguments persuasive. The Court should again reject this same argument by Respondent.

Briefly, 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 Killian had been repeatedly damning Respondent and the nurses instead of praising them.

Petitioners incorporate by reference their argument in Section III of their reply brief to this Court at pages 7-11.

#### IV.

Respondent asks the Court to reconsider its decision overruling Vestry. Petitioners submit the Court should reject the request. As the Court succinctly and accurately stated, “[b]ecause *Vestry* stands for the principle that less than twelve fair and impartial jurors is perfectly acceptable and is an anomaly in our jurisprudence, we overrule it.” Ethier, Adv. Sh. No. 10 at 27. Petitioners could not agree more.

Vestry is certainly an anomaly in South Carolina jurisprudence. As the Court has observed since 1927, when there exists a “state of conflict between the decisions, it is up to the court to ‘choose ye this day whom he will serve’; and, in the duty of this decision, this court has the right to determine which doctrine best appeals to its sense of law, justice, and right.” Antley v. New York Life Insurance Co., 139 S.C. 23, 30, 137 S.E. 199, 201 (1927).

#### **CONCLUSION**

For all the foregoing reasons, Petitioners ask the Court to deny Respondent’s petition for rehearing.

Respectfully submitted,

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