

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court Of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000768

Ralph C. Williams, Sr., and Linda Williams,

Appellants,

v.

Patricia A. Johnson, Josette Peppers and
UniHealth Post-Acute Care—Orangeburg, LLC,

Respondents.

RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Jason E. Bring, Esquire
South Carolina Bar No. 100275
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Phone: (404) 873-8500
jason.bring@agg.com

Attorney for Respondents

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STATEMENT OF THE ISSUES ON APPEAL

- I. Because Appellant failed to articulate why this case warrants additional review under the standards articulated by the South Carolina Appellate Court Rules, his Petition should be denied.
- II. Because ample evidence supports the trial court's decision to grant a new trial under the thirteenth juror doctrine, the standard of review requires that the decision remain undisturbed.
- III. As part of the *prima facie* case for his *respondeat superior* claim, Appellant bore the burden of proving that the employees acted within the scope of their employment, but because he argued that they acted intentionally and with malice, the trial court properly denied his motions for directed verdict.
- VI. Appellant may not raise for the first time on appeal issues and arguments not raised at trial.

STATEMENT OF THE CASE

As a threshold matter, Appellant failed to abide by the South Carolina Appellate Court Rules in bringing his Petition for Writ of Certiorari, in that he failed to identify any criterion under those Rules that would support review of this case. Turning to the merits, this appeal stems from the trial court's exercise of its broad authority under South Carolina's well-established "thirteenth juror" doctrine, a vehicle that vests in trial courts broad veto power. When, as here, the trial court finds that the evidence does not justify the verdict, the Judge may exercise the power and grant a new trial. On appeal, as long as there is conflicting evidence, the trial court's grant of a new trial is "inviolable." In issuing its decision, the Court of Appeals found that the trial court's thirteenth jury decision was not "wholly unsupported by the evidence," and properly affirmed. And as the Court of Appeals

found, the remaining issues need not be reached because the determination of the prior issue is dispositive of the appeal.

But even if the Court chooses to examine Appellants' remaining arguments, both are easily dispelled. Appellant argues that the trial court erred in overruling his objection to the verdict form and in denying his motion for directed verdict and for JNOV on whether the nurse defendants were acting within the scope of their employment. As part of his *prima facie* case for *respondeat superior* liability, Appellant bore the burden of proving that the nurses were acting within the scope of their employment. Nevertheless, throughout his complaint, in his opening, and in closing, Appellant argued that the nurses acted "deliberately," "maliciously," and "intentionally." Thus, Appellant's own arguments conflicted with his motions for JNOV and directed verdict seeking a legal determination that the nurses acted within the scope of their employment. Although Appellant now admits that "[t]he only evidence was that [the defendant nurses] . . . in making these report, . . . were attempting to follow the Act" (Appellant's Pet. at 17 (emphasis added)), this admission comes too late. Appellant cannot erase his own theory and arguments from the record through this eleventh-hour acknowledgement that his own theory and arguments had no evidentiary support.

For his last issue, the Court of Appeals properly found that Appellant failed to preserve the issue on appeal. Specifically, Appellant argues that the trial court erred in permitting the individual nurse defendants and their employer to assert a joint defense. Likewise, Appellant alleges violations of the Rules of Professional Conduct and asserts a conflict of interest on appeal. But Appellant never raised these alleged violations before

the trial court or brought a motion to disqualify. His arguments, therefore, are untimely and unpreserved. Issues may not be raised in an appeal for the first time.

His arguments, moreover, are without merit. Defendants have always asserted and continue to assert, together and with unanimity, that the nurses acted in good faith in reporting Appellant's highly suspicious activities to authorities as required under the Omnibus Adult Protection Act (the "Protection Act"), codified at S.C. Code Ann. § 43-35-25(G). Indeed, as Appellant now admits: "[t]he only evidence was that [the defendant nurses] . . . in making these report, . . . *were attempting to follow the Act*" (Appellant's Pet. at 17 (emphasis added)), Appellant's attempt to impugn defense counsel's ethics based on a set of facts that he now admits did not exist is improper.

The trial court, therefore, correctly exercised its authority to grant a new trial, and the Court of Appeals properly affirmed. Those decisions should remain undisturbed.

STATEMENT OF FACTS

Appellant, Ralph Williams, and his wife filed this lawsuit alleging that his colleagues, nurses Patricia Johnson and Josette Peppers, defamed Mr. Williams when they reported their suspicion that Mr. Williams was attempting to have sex with an incapacitated female nursing home resident. (R. pp. 143-177.) Mr. Williams worked as a certified nursing assistant (CNA) at a nursing home in Orangeburg operated by Defendant UniHealth Post-Acute Care—Orangeburg, LLC ("UniHealth"). (R. p. 490, line 6-p. 491, line 19.) Defendants Johnson and Peppers worked at UniHealth with Mr. Williams. The Williamses sued Johnson and Peppers, as well as their employer, UniHealth, asserting causes of action for defamation and loss of consortium. (See Am. Compl., R. pp. 143-177.) Appellant asserted in his

Amended Complaint that the nurses acted intentionally and with malice. (See Am. Compl., R. p. 149, ¶ 52; R. p. 163, ¶¶ 169, 170, 172; R. p. 165, ¶ 187; R. p. 166, ¶¶ 188, 190; R. p. 168, ¶¶ 204, 205; R. p. 171, ¶¶ 221, 222, 224; R. p. 173, ¶ 257; and R. p. 175, ¶ 269 (repeated use of terms “malignity toward Appellant,” “actual malice,” “intending to charge,” and “intentionally”).) Appellant’s allegations and theory of liability against UniHealth were limited to the *respondeat superior* doctrine. (See Am. Compl., R. p. 162, ¶¶ 163-165; R. p. 165, ¶¶ 180-182; R. p. 167, ¶¶ 198-200; R. p. 170, ¶¶ 215-217; R. p. 172, ¶ 252; R. p. 173, ¶¶ 253-254; and R. p. 174, ¶¶ 265-268.)

The salient facts of the case are not in dispute. During the early morning hours of June 21, 2010, Nurse Johnson found Mr. Williams’ supply cart outside of Room 39. (See R. p. 279, lines 12-14 and R. p. 188, line 18; see also R. p. 506, line 15.) When she opened the door the room, Mr. Williams was on the bed of the female resident closest to the door, and his pants were down. The female resident, who was incapacitated, was only 42 years old and thus much younger than a typical nursing home resident. (R. p. 407, lines 24-25.) Mr. Williams was 54 at the time. (R. p. 407, lines 20-21.)

Upon observing Mr. Williams, Johnson exclaimed, “What are you doing!?” (See R. p. 507, lines 21-22.) Mr. Williams responded, “Will you please shut the door.” (See R. p. 507, line 22.) Johnson left the door open and ran to get another nurse, Peppers. (See R. p. 508, lines 1-3; R. p. 297, lines 9-10; and R. p. 312, lines 19-25.) The two nurses immediately returned and found Mr. Williams in the corner of the room with the overhead lights off and adjusting his pants, which he admitted were down. (See R. p. 344, lines 1-7; R. p. 361, lines 2-6; R. p. 292, lines 2-4; R. p. 308, lines 4-6; R. p. 508, lines 9-15.) The

nurses escorted Mr. Williams out of the room without objection. (See R. p. 316, lines 9-22; see also R. p. 348, lines 3-10.) Meanwhile, Peppers immediately went to alert the facility's Director of Nursing and the local authorities. (See R. p. 348, lines 22-25 and R. p. 349, lines 1-25.)

Police arrived at the facility, investigated the incident, and determined that there was sufficient cause to arrest Mr. Williams. (See generally Testimony of Officer Warrington, R. p. 363-376 and Officer Scott, R. pp. 381-393.; R. p. 378, lines 23-25 and R. p. 379, line 1.)

One of Appellant's major themes at trial was his assertion that the diaper was covered in feces and that was why he was on the bed meticulously trying to remove the soiled diaper and change the resident. (R. p. 270, lines 21-23; R. p. 540-544.) The nurses and the police, however, all testified that there were no feces and that the diaper was not dirty.¹ (R. p. 288, lines 1-6; R. p. 320, lines 4-23; R. p. 348, lines 9-21; R. p. 393, line 13-R. p. 394, line 25.)

Contrary to Mr. Williams' claim that he needed to be on the bed to change the resident, his former nursing professor and the nurse Defendants were all adamant that it is never appropriate for a caregiver to climb onto a resident's bed. (R. p. 601-604; R. p. 322-324; R. p. 352, line 15-R. p. 353, line 13.)

Prior to trial, Defendant UniHealth brought a motion for summary judgment, asserting as a matter of law that if the nurses acted in good faith, then neither they nor

¹ Moreover, Mr. Williams admitted to a nurse at Dorn VA Medical Center (where he sought treatment shortly after his arrest) that the resident had "already ripped off her diaper—which she was known to do" and that he was on the resident's bed in an effort to change the padding under the resident. (See R. pp. 697-702; see also R. p. 599, lines 2-5.)

UniHealth could be liable because of the immunity afforded under the Protection Statute. (Aug. 27, 2013 Motion, R. pp. 104-117.) And on the flip side, UniHealth showed that if the nurses were found not to have acted in good faith, then their actions would be outside of their employment, and UniHealth would not be liable. (*Id.*)² That motion was denied (Jan. 6, 2014 Order, R. P. 1-2), and the case proceeded to trial. At trial, the Defendants remained united in their position that the nurses acted appropriately and in good faith in reporting their suspicions of Mr. Williams' questionable conduct. Indeed, even Appellant now concedes that “[t]he only evidence was that [the defendant nurses] . . . in making these report, . . . *were attempting to follow the Act*” (Appellant’s Pet. at 17 (emphasis added)). All Defendants argued at trial and continue to maintain that they are entitled to statutory immunity under the Protection Act. (R. p. 618, lines 5-20.)

During opening argument, Appellant’s counsel told the jury “[t]his case, ladies and gentlemen, is about a false statement that was made by Ms. Patricia Johnson, as well as, Ms. Josette Peppers against my client.” (R. p. 270, lines 17-19.) He went on to argue that Ms. Johnson’s statements were made with an intentional purpose by stating the following: “there’s a very important *deliberate* statement that was inserted into this police report.” (Tr. p. 115, lines 19-21.) While explaining the Protection Act, Appellant’s counsel stated,

² UniHealth never asserted or even suggested that its nurses had reported their suspicions in bad faith or had acted inappropriately in any regard as Appellant claimed. UniHealth merely explained that, whichever way the facts fell, the only possible logical conclusion was that UniHealth could not be legally liable, as follows: If the nurses acted in good faith, both they and UniHealth were immune; and if the nurses acted in bad faith, UniHealth could not be responsible for their acts under Appellant’s *respondeat superior* theory.

“Now, what is not good faith? *Intentionally* asserting false information.” (R. p. 271, lines 14-15.)

In his closing, and with full knowledge of the content of the Judge’s verdict form, Appellant’s counsel hammered the same themes that he outlined in his amended complaint and in his opening, i.e., that the nurses acted intentionally, deliberately, and with malice. (See R. p. 610, lines 13-23; R. p. 611, lines 14-18.; R. p. 611, lines 22-25; R. p. 612, lines 1-5; R. p. 613, lines 10-18; R. p. 614, lines 11-14; R. p. 615, lines 2-6; R. p. 616, lines 9-15; R. p. 617, line 15-19.)³

Using the trial court’s verdict form, the jury returned a verdict in favor of Appellant but not his wife. (Verdict, R. pp. 3-5.) Answering the special interrogatories in the verdict form, the jury concluded that the nurse Defendants did not act in good faith. (Id.) Consistent with their finding that the nurses did not act in good faith, the jury found that the nurses were acting outside of their employment. (Id.) But then the jury exhibited some confusion. Although it had found that the nurses acted without good faith and outside their employment, the jury sought to impose punitive damages not only against the nurses but also against their employer, UniHealth. (Id.)

After the trial, *both* sides⁴ sought to have the verdict modified or set aside. (Defendants’ Post-Trial Motions, R. pp. 188-201; Plaintiffs’ Post-Trial Motions, R. pp. 178-

³ In their post-trial motions, Defendants also sought to set aside the verdict because it was the result of prejudices raised by Appellant in his closing, namely that all women are “calculating” by nature. (Defendants’ Post-Trial Motions, May 1, 2015, pp. 8-9 and 11, R. pp. 195-196.)

⁴ The trial court noted this, stating: “both the Plaintiffs and the Defendants have moved to set aside or otherwise modify the verdict, which reinforces the Court’s view that a new trial is warranted.” (Jan. 22, 2016 Order, R. p. 6, n. 14.)

187.) Following briefing and oral argument, the trial court exercised its authority as the thirteenth juror and granted a new trial, finding that the evidence did not support the jury's determination and that the interests of justice had not been served. (Order of Jan. 22, 2016, R. pp. 6-11.) Appellant moved for reconsideration, which the trial court denied. (March 10, 2017 Order, R. pp. 12-13.)

Appellant then appealed to the Court of Appeals, which upheld the circuit court's decision. In its opinion, the Court of Appeals explained that it must uphold the trial court's grant of a new trial under the thirteenth juror doctrine unless it is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Slip, at 4. The Court of Appeals reasoned that, under this standard of review, the circuit court's decision must remain undisturbed because the "circuit court found the evidence did not support the jury's verdict" because Appellant "admitted that he was on Victim's bed with his pants at least somewhat down, and it also noted the evidence established nurses were not permitted to be on a resident's bed." *Id.* at 4-5. The Court of Appeals also found that the circuit court did not err in denying Defendants directed verdict motion. *Id.* at 5.

In response to Appellant's argument that the circuit court misapplied the law regarding qualified immunity and erred in granting a new trial under the thirteenth juror doctrine, the Court of Appeals again noted the low threshold to uphold the lower court's decision. *Id.* at 6-7. Specifically, the Court of Appeals held that the decision must remain unless there was a "manifest error of law." *Id.* at 5. The Court of Appeals found that Appellant did not surmount the "heavy burden" in demonstrating that the circuit court committed error as the court properly evaluated the immunity provision under the Protection Act in granting a new trial.

Id. at 5-6. Upholding the circuit court’s decision under the thirteenth jury doctrine, the Court of Appeals declined to address Appellant’s remaining arguments. *Id.* at 7. This Petition for Certiorari followed.

STANDARD OF REVIEW

Under the thirteenth juror doctrine, the trial court may grant a new trial based on its view of the facts. Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). The appellate courts’ review of a trial court’s grant of a new trial is limited to consideration of whether evidence exists to support the trial court’s order. Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). As long as there is conflicting evidence, the trial court’s grant of a new trial will not be disturbed. *Id.* at 597–98, 681 S.E.2d at 883.

ARGUMENTS

I. BECAUSE APPELLANT FAILED TO FOLLOW THE SOUTH CAROLINA APPELLATE COURT RULES, HIS PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE CONSIDERED BY THIS COURT.

This Court has held it will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power. Haggins v. State, 377 S.C. 135, 659 S.E.2d 170 (2008). Rule 242(b), SCACR, emphasizes the discretionary authority of the Court to review decisions of the Court of Appeals. The rule states, “[a] writ of certiorari ... will be granted only where there are special and important reasons,” and provides examples of reasons which may justify review by this Court. *Id.* Criteria which may justify a writ of certiorari include appeals where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) substantial constitutional issues are directly

involved; and/or (5) a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Id.

Here, Appellant failed to address why the Court should exercise its discretion in granting this Petition. And there is a reason for that—there is no basis under Rule 242(b) for additional review. This case presents a straightforward application of the thirteenth jury doctrine, which was properly applied. There is no novel question of law, dissenting opinion, or other issue to warrant further appeal. Instead, this Court has upheld the thirteenth juror doctrine time and time again, acknowledging the broad authority it bestows on the circuit court in granting a new trial. See Folkens, 300 S.C. at 254, 387 S.E.2d at 267 (1990); Worrell v. South Carolina Power Co., 186 S.C. 306, 313-314, 195 S.E. 638, 641 (1938); and Trivelas v. S.C. Dep’t of Transp., 357 S.C. 545, 551–52, 593 S.E.2d 504, 508 (2004). Accordingly, Appellant’s Petition should be denied as a threshold matter.

Moreover, the South Carolina Appellate Court Rules mandate certain content in a petition for writ of certiorari. Among other requirements, the petition must include a “Certification by counsel for petitioner that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals” and “specific references to pertinent portions of the Record on Appeal.” Rule 242(d)(1)&(4), SCACR. Here, Appellant failed to satisfy these requirements. His Petition makes no reference to a petition for rehearing or reinstatement nor does it contain the requisite certification of counsel. And despite presenting over five pages of factual background, Appellant includes on four scant references to the Record on Appeal. Without proper citations to the record to vet his arguments, Appellants’ Petition should not be considered by this Court.

II. BECAUSE AMPLE EVIDENCE SUPPORTS THE TRIAL COURT’S DECISION TO GRANT A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE, THE STANDARD OF REVIEW REQUIRES THE DECISION REMAIN UNDISTURBED.

The Thirteenth Juror “doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.” Lane, 383 S.C. at 597, 681 S.E.2d at 883 (internal quotation omitted). As reiterated by the Court of Appeals, the appellate court “must uphold a trial court’s thirteenth juror decision unless it is ‘wholly unsupported by the evidence.’” Slip, at 4, citing Worrell, 186 S.C. at 314, 195 S.E. at 641 (“the trial judge is the thirteenth juror, possessing the veto power to the Nth degree”). “And ‘where . . . the circuit court applied the correct legal standard for granting a new trial, and conflicting evidence exists on the contested issues, a circuit court’s decision to sit as a thirteenth juror and grant a new trial absolute is inviolable.’” Id. citing Trivelas, 357 S.C. at 553, 593 S.E.2d at 508.

In his Petition, Appellant does not take issue with the Court of Appeal’s decision to affirm the circuit court’s grant of a new trial on the basis that the evidence did not support the verdict. Instead, Appellant focuses solely on the issue of whether the circuit court applied the correct legal standard when evaluating whether the jury improperly handled the nurses’ immunity under the Protection Act. (Appellant’s Pet. at 14.) But it is clear that the circuit court did not misapply the law. The trial court’s initial order was specific, stating: “The Court finds that the evidence did not justify the verdict.” (Jan. 22, 2016 Order, p. 5, R. p. 10.) Although not required, the trial court then went on to explain, in part, how the evidence conflicted with the verdict. It noted:

Ralph Williams, by his own testimony, was on a female resident's bed with the door closed in the middle of the night and his pants had at least somewhat fallen down. The evidence further showed that nurses are not supposed to get on a resident's bed.

(Jan. 22, 2016 Order, p. 5, R. p. 10.) The court concluded: "The facts of the case and the interests of justice persuade the Court that a new trial is warranted." (Id.)

On Appellant's Motion for Reconsideration, the trial court issued a much shorter order and again reaffirmed its decision to grant a new trial under the thirteenth juror doctrine. (See March 10, 2017 Order, R. pp. 12-13.) The trial court again found that the "evidence did not justify the verdict" and that "the facts of the case and the interests of justice persuade the court, sitting as the thirteenth juror, that a new trial is warranted." (Id., R. p. 13.) Despite these clear statements, Appellant seizes on a single sentence within the Reconsideration Order, which states: "This court is concerned that the jury improperly handled the issue of the Defendant nurses' immunity under South Carolina's Omnibus Adult Protection Act." (Id.) Appellant construes this sentence about the jury's application of the facts as a legal ruling by the trial court. (Appellant's Pet. at 10.) Appellant's position is without merit, and the Court of Appeals properly dispelled this theory.

Specifically, after thoroughly explaining that the circuit court had ample evidence to find the evidence did not support the jury's verdict, the Court of Appeals held the "exercise of discretion in granting a new trial was not 'clearly . . . controlled by a manifest error of law.'" Slip, at 5, quoting Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 271, 670 S.E. 2d 1, 4 (Ct. App. 2008). The Court also noted the "heavy burden" Appellant carries to demonstrate that "it clearly appeared that the judge's exercise of

discretion was controlled by a manifest error of law.” *Id.* (internal citation omitted). The Court of Appeals made clear that Appellant failed to meet this burden as “nothing about the court’s order indicates that the circuit court believed immunity was not qualified” under the Protection Act. Slip, at 6. Rather, the circuit court “properly cited to section 43-35-75(a) . . . correctly stating immunity under the Act depended on whether a reported acted in good faith and that good faith was a rebuttable presumption.” *Id.*

Simply put, Appellant’s portrayal of the sentence within the Reconsideration Order as a legal ruling on the immunity statute is a far stretch. The trial court repeatedly stated that the evidence did not justify the verdict, which is all that is required to invoke the thirteenth juror doctrine. The Court of Appeals properly affirmed on this basis. That the trial court voiced a “concern” that the jury misapplied the facts to the law fits squarely within the court’s authority under the doctrine.⁵ Consistent with Appellant’s acknowledgement that “[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Omnibus reporting law of South Carolina” (Appellant’s Pet. at 17), the court was justified in concluding that “the evidence did not justify the verdict.”

III. AS PART OF THE *PRIMA FACIE* CASE FOR HIS *RESPONDEAT SUPERIOR* CLAIM, APPELLANT BORE THE BURDEN OF PROVING THAT THE EMPLOYEES ACTED WITHIN THE SCOPE OF THEIR EMPLOYMENT, BUT BECAUSE HE ARGUED THAT THEY ACTED INTENTIONALLY AND WITH MALICE, THE TRIAL COURT PROPERLY DENIED HIS MOTIONS FOR DIRECTED VERDICT.

This Court’s inquiry should begin and end with the thirteenth juror analysis. As the Court of Appeals explained, this Court need not reach the remaining issues raised by

⁵ Indeed, even Appellant concedes, as he must, that “the case law indicates the grant of a new trial under the Thirteenth Juror doctrine is nearly unreviewable” (Appellant’s Pet. at 13.)

Appellant. See Slip, at 7 (citing Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive on appeal)). But even if the Court evaluates Appellant's argument regarding his Motion for JNOV, it can be easily dispelled.

“A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment.” Lane v. Modern Music, Inc., 244 S.C. 299, 301, 136 S.E.2d 713 (1964). There can be no *respondeat superior* liability without a factual finding that the employee was acting within the scope of her employment. The burden of proof, therefore, is with the plaintiff to show that the conduct of the employee fell within the scope of his or her employment at the employer's business. See Vereen v. Liberty Life Insurance Co., 306 S.C. 423, 428, 412 S.E.2d 425, 427 (1991) (holding that burden of production and persuasion are with plaintiff; the defendant “was free to leave the burden of proof on the [plaintiffs] and simply rely for its defense on the cross examination of their witnesses”).

In this case, Appellant did not argue that the nurse Defendants were “about [their] master's business,” but instead made scathing arguments to the contrary. Appellant argued to the jury that the nurse employees acted intentionally by engaging in “wicked” conduct, making “deliberate” false statements and “destroying” evidence, bearing “false witness against thy neighbor,” being “calculating” women, and trying to “set a person up.” Appellant had the burden to prove that the nurse Defendants acted within the scope of their

employment. His failure to meet that burden was the result of his own arguments and presentation to the jury. Thus, Appellant may not now complain that he was entitled to a judgment as a matter of law. See generally Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) (“Ordinarily, one cannot complain of an error which his own conduct has induced.”).

And in a defamation case such as this, the standard charge is clear: “A principal may be held liable for defamatory statements made by an agent acting within the scope of his employment or within the scope of his apparent authority.” See Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986); Murray v. Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). In this case, the trial court provided specific instructions regarding the *respondeat superior* doctrine and the definition of scope of employment. (See Tr., pp. 827-828.) Thereafter, the Court provided a verdict form that allowed the jury to make multiple factual findings—first, a factual finding regarding whether the nurses acted in good faith and, if not, a second factual determination as to whether the nurses acted outside the scope of their employment at UniHealth. (R. p. 637, line 8-R. p. 639, line 8; Verdict, R. pp. 3-5.)

Defendants were not required to prove anything with respect to the scope of employment; instead, the burden rested upon Appellant to prove this element as part of his *prima facie* case. See Vereen, 306 S.C. at 428; 412 S.E.2d at 427. The jury was required to make that determination as a condition precedent to any legal liability being imposed upon UniHealth under the *respondeat superior* doctrine. Appellant recognized as much, stating that whether the nurse defendants “were acting within the scope of their employment”

raised “an issue of material fact for the jury to decide this issue.” (Appellants’ Mem. in Opp’n to MSJ, Dec. 30, 2013, R. p. 138.) Moreover, as the trial court concluded while ruling on Appellants’ Motion for Directed Verdict, “the way the case has been tried[,] there is inherently an issue about whether or not [the Nurse Employees] were acting inside or outside the scope of their employment, and that’s a question of fact...for the jury to determine.” (R. p. 607, lines 3-6.)

On appeal, against everything that he argued at trial, Appellant seeks to avail himself of the Protection Act and UniHealth’s policies implementing that Act. He asserts that the nurse Defendants were “mandated to report possible abuse or neglect of a resident immediately.” (Appellant’s Pet. at 17.) Appellant further acknowledges that “[t]he only evidence was that [the defendant nurses] . . . were attempting to follow the Act.” (Id.) If Appellant now concedes that his conduct constituted “possible abuse or neglect of a resident” that the nurses were required to report and that they “were attempting to follow the Act,” then Defendants are entitled to immunity under the Protection Act. See S.C. Code Ann. § 43-35-75(A). But absent such a concession, Appellant cannot credibly argue, on the one hand, that the nurses were acting “maliciously” and “wickedly,” while, on the other hand, claiming that they had a duty to report. Appellant bore the burden of proof, which the jury found that he failed to satisfy. For all of these reasons, to the extent the Court considers this issue (which it should not), Appellant’s argument fails.

IV. APPELLANT MAY NOT RAISE FOR THE FIRST TIME ON APPEAL ISSUES AND ARGUMENTS NOT RAISED AT TRIAL.

As explained above, the Court need not address the remaining arguments presented in Appellant's Petition as this appeal rises and falls under the thirteenth juror doctrine. Nevertheless, if the Court chooses to examine this issue, this Court should affirm the Court of Appeals' holding that Appellant failed to preserve this issue for appeal. But even if this issue had been raised before the trial court, there is no conflict of interest present in this case.

A. Appellants May Not Raise Issues For The First Time On Appeal.

Appellant claims that the trial court erred in permitting Defendants to present a joint defense. (Appellant's Pet. at 19.) Tellingly, Appellant does *not* assert that the trial court erred in denying any motion or objection brought by Appellant. There was none. Instead, Appellant claims that he "raised the issue" during a conference before the trial court, but then blamed Defendants for his failure to move to disqualify Defendants' counsel and preserve the issue on appeal. (Appellant's Pet. at 19.) In reality, this argument was neither raised before, nor ruled upon by, the trial court. In the status conference cited to by Appellant, he attempted to discuss the jury charge regarding intentional conduct, and the trial court stated that "until I find out what the testimony is I'm not going to be able to tell you what the charge is going to be." (R. p. 269.) Appellant never alleged a conflict of interest nor sought to disqualify counsel prior to or during the trial. Id.

As the Court of Appeals properly held, Appellant's argument regarding the alleged conflict of interest "issue is unpreserved for appellate review because, *as conceded by*

Appellants at oral argument, Appellants never asked the circuit court to disqualify Respondents' counsel, and they did not raise the issue of the potential conflict of interest to the circuit court until they filed their post-trial motion for a JNOV." Slip, at 7 (emphasis added) (citing Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.")) To preserve an issue for appeal, specific grounds in support of the objection must be clearly stated. Wilder Corp v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998). The objection must be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge. Id. It is well-settled that issues must have been raised to, and ruled upon by, the lower court in order to preserve those issues for appellate review, which did not occur. Doe v. Roe, 369 S.C. 351, 631 S.E.2d 317 (Ct. App. 2006).

It is equally well settled that a party "cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." Kiawah Prop. Owners Group v. Public Serv. Comm'n, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004); see also MailSource, LLC v. M.A. Bailey & Assoc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise issue for first time in Rule 59(e), SCRPC motion which could have been raised at trial.").

Prior to the verdict, Appellant never asserted that defense counsel should be disqualified. The word "disqualify" does not appear anywhere in the entire trial transcript. The word "conflict" appears only once in the entire transcript and was spoken by the Appellant's sister-in-law in her direct testimony. (R. p. 448.) Appellant simply failed to

preserve these arguments for appellate review. There are no citations in Appellant's brief indicating that he ever moved to disqualify counsel. That is because he did not. He did not believe it to be an issue during the entire trial and only raises it afterward in an attempt to salvage a verdict.

Having failed to object at trial or move to disqualify, Appellant resorts to implying that the trial court, on its own initiative, should have removed defense counsel. (Appellant's Pet. at 20.) Appellant cites only two cases in support of this theory, and both are criminal cases. But the cases do not support Appellant's position. In the first case, State v. Wilson, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010), the defendant filed a formal motion to disqualify the state's assistant solicitor because of prior representation of family members. The issue on appeal was whether the trial court's grant of that motion was immediately appealable, and the Court of Appeals held it was not.⁶ Here, by contrast, Appellant failed to file any motion to disqualify or even raise the issue before the trial court. And the State v. Wilson case certainly does not stand for the notion that a trial court, in a civil case, may disqualify counsel *sua sponte*. Instead, the Supreme Court stressed the heightened scrutiny given to motions to dismiss in civil cases because of, among other things, the importance of the party's right to counsel of his choice. Id. at 601-602, citing Hagood v. Sommerville,

⁶ The second case cited by Appellant, State v. Justus, 392 S.C. 416, 419-420, 709 S.E.2d 668, 670 (2011), provides even less support. There, the solicitor filed a "Motion to Have the Court Determine Whether Defense Counsel has an Actual Conflict of Interest." Id. at 417. Thus, unlike here, there was no question that the issue had been preserved for appeal.

362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (reviewing the four-pronged rationale for immediate review of disqualification orders in civil cases).⁷

B. Even Assuming Appellant Had Raised The Issue At Trial, He Has No Standing To Assert A Conflict Or Move To Disqualify.

Even had the Appellant raised a motion or an objection, the allegations are unfounded. The Defendants remained united throughout the trial in their arguments to the jury that the nurses acted in good faith. There was no conflict. Indeed, Appellant concedes that “[t]he only evidence was that [the defendant nurses] . . . in making these report, . . . were attempting to follow the Act” (Appellant’s Pet. at 17 (emphasis added)). Regardless, Appellant has no standing to assert a violation of the Rules of Professional Conduct (“RPC”) within this appeal or at trial.

The RPC’s Scope states that “[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” Rule 407, SCACR, Scope 7; Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435–36, 472 S.E.2d 612, 613 (1996). Thus, “the Rules of Professional Conduct do not, in

⁷ Intermixed with Appellant’s third appeal issue is a rehashing of his arguments about the jury charges on his own claim for *respondeat superior* liability. (Appellant’s Pet. at 20-21.) Appellant complains that Defendants requested jury instructions on “scope of employment.” (*Id.*) But as discussed above, part of Appellant’s *prima facie* case on *respondeat superior* liability required proof, by him, as the plaintiff, of whether the employees were acting within the scope of their employment. See Vereen, 306 S.C. at 428; 412 S.E.2d at 427. This is part of the pattern jury instructions. It was not some novel theory advanced by Defendants. Moreover, Appellant failed to raise any objections to these charges at trial and therefore waived the opportunity to raise an objection for the first time in this appeal. Thus, having failed to object to the jury charge on *respondeat superior* at any time during the trial, it is axiomatic that Appellant has waived his objection and may not raise it for the first time on appeal. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004) (it is “axiomatic” that issue cannot be raised for the first time on appeal).

themselves, create a cause of action” Spence v. Wingate, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011). “A review of the Scope of Rule 407, SCACR clearly indicates that the rules are intended for guidance and disciplinary purposes, not to form the basis for civil litigation.” Id. This comports with most other jurisdictions. See Biller Associates v. Peterken, 849 A.2d 847 (Conn. 2004) (“The rules governing the professional conduct of attorneys, without more, do not give rise to a cause of action.”); Barsotti v. Merced, 788 A.2d 802 (NJ 2002) (The RPC do not create a duty, nor does a violation of the Rules, standing alone, form a basis for a cause of action.).

Thus, Appellant not only failed to raise an issue of conflict or request disqualification during trial or in his post-trial briefs, he lacked standing to assert violations of the RPC. But as indicated, there was no conflict among Defendants. Moreover, even to the extent that a conflict had existed (which it did not), Appellant cannot claim any injury as a result. He has not been prejudiced. The standing to assert a conflict rests with the person owed the legal duty, not an opposing party in litigation. See Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (1986) (“an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client”). Appellant is not attempting to protect any secrets or confidences of his own, as is generally the case with motions to disqualify. Instead, he is seeking to weaponize the RPC to drive a wedge between his opponents. This contravenes the RPC’s admonition: “[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.” Rule 407 (Scope), note 7, SCACR.

For all of these reasons, Appellant waived any objections regarding defense counsel, and the Court should reject his third issue on appeal.

CONCLUSION

In closing, the Court of Appeals opinion affirming the trial court's exercise of its power to set aside the verdict under the thirteenth juror doctrine should stand. More than ample evidence supported the trial court's decision.

/s/ Jason E. Bring
Jason E. Bring
South Carolina Bar No. 100275
ARNALL GOLDEN GREGORY LLP
171 17th Street, N.W., Suite 2100
Atlanta, Georgia 30363
Telephone: (404) 873-8500
Facsimile: (404) 873-8501
jason.bring@agg.com

Attorney for Respondents

June 25, 2020

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Jun 25 2020

S.C. SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court Of Common Pleas
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2020-000768

Ralph C. Williams, Sr., and Linda Williams,

Appellants,

v.

Patricia A. Johnson, Josette Peppers and
UniHealth Post-Acute Care—Orangeburg, LLC,

Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Return in Opposition to Petition for Writ of Certiorari complies with Rule 242, SCACR.

June 25, 2020

s/ Jason E. Bring

Jason E. Bring, Esquire
South Carolina Bar No. 100275
Arnall Golden Gregory LLP
171 17th Street, NW, Suite 2100
Atlanta, Georgia 30363
Telephone: (404) 873-8500
jason.bring@agg.com

Attorney for Respondents