STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS CASE NO. 2022CP3203865
Ted Wingo, Plaintiff, vs. T. Campen M.D. & Associates, LLC, Stanton Optical, Stanton Optical Florida, LLC d/b/a/ Stanton Optical & My Eyelab, Vision Precision Holdings, LLC and Prabhjot McTague, Defendants.	ORDER ON POST-TRIAL MOTIONS

Heard: June 13, 2025, at Westbrook/Lexington Co. Judicial Center
Plaintiff's Attorneys: Todd R. Lyle, Esq., and Paul L. Reeves, Esq.
Attorneys for Defendant Dr. McTague: Ronald B. Diegel, Esq., and Zachary B. Randolph, Esq.
Attorneys for Defendants T. Campen M.D. & Associates, LLC, Stanton Optical, Stanton Optical Florida, LLC d/b/a Stanton Optical &My Eyelab, and Vision Precision Holdings, LLC ("Corporate Defendants"): Blake T. Williams, Esq. and G. Mark Phillips, Esq.
Court Reporter: Digital – Melinda D. Jones

Post-trial motions were filed in this optometry malpractice action. The motions for new trial *nisi remittitur* filed by the Defendant McTague (Dr. McTague) and by the Defendants Thomas Campen M.D. & Associates, LLC, Stanton Optical, Stanton Optical Florida, LLC, d/b/a Stanton Optical & My Eyelab, and Vision Precisions Holdings, LLC (the Campen Defendants) are granted as to the economic damages award. That award is reduced from $2 million to a total economic loss award of **$226,611**. As for the noneconomic damages, the Defendants' motion to cap those damages pursuant to S.C. Code Ann. § 15-32-200 *et seq* is granted, and they are reduced from $1 million to **$580,461**. The total verdict is reduced from $3 million to **$807,072**.

If the reduction in verdict is not accepted, a new trial is to be held with the issues limited to economic damages. Liability, agency, the assessment of percentages of fault, and the Plaintiff's failure to prove reckless misconduct have been determined by the jury.

The Plaintiff's motion for prejudgment interest is denied. Should the reduced verdict be accepted, the Plaintiff will be entitled to recover the costs of this action.

MOTIONS

The following motions were filed:

Motions by Dr. McTague

(1) The Motion for Judgment Not Withstanding the Verdict (JNOV) is denied.
(2) The Motion for New Trial Based on the Verdict Form is denied.
(3) The Motion for Setoff or Credit Based on Settlement is granted.
(4) Motion for New Trial Absolute is denied.
(5) Motion for New Trial *Nisi Remittitur* is granted.

Motions by Thomas Campen M.D. & Associates, LLC, Stanton Optical, Stanton Optical Florida, LLC, d/b/a Stanton Optical & My Eyelab, and Vision Precisions Holdings, LLC (the Campen Defendants)

(1) The Motion for JNOV is denied.
(2) Motion for New Trial *Nisi Remittitur* is granted.
(3) Motion for New Trial Under the Thirteenth Juror Doctrine is denied.
(4) Motion to Apply Noneconomic Damages Cap and Setoff is granted.

Plaintiff's Motion

(1) The Motion for Interest and costs pursuant to the offer of judgment is denied.

BACKGROUND

The Plaintiff went to a Stanton Optical store for an eye examination. He asserts that he has been rendered almost completely blind due to misdiagnosis and failure to refer for treatment.

Initial screening was done by employees of the Campen Defendants, and he was then escorted to be examined by Dr. McTague. The jury determined that the Campen Defendants are liable for the malpractice of Dr. McTague. Unbeknownst to the Campen Defendants, Plaintiff and Dr. McTague entered a settlement on the first day of trial whereby her $2 million professional liability insurance limits were tendered in exchange for a covenant not to execute. This was not disclosed to the other defendants or to the court prior to the conclusion of trial. It was discovered by the Campen Defendants on April 28, 2025, days after the verdict.

As a medical malpractice claim, the verdict form asked the jury to designate economic damages separately from noneconomic damages. *See*, S.C. Code Ann. § 15-32-220. A verdict was issued finding the Defendants 85% at fault for causing $2 million in economic damages and $1 million in noneconomic damages. The jury found that recklessness was not proven by clear and convincing evidence.

STANDARD OF REVIEW

In South Carolina, the trial judge "has the power, and with it the responsibility," of reducing a damages award that is "unduly liberal" or "merely excessive." *Easler v. Hejaz Temple of Greenville*, 329 S.E.2d 753, 758 (S.C. 1985); *see also Becker v. Wal-Mart Stores, Inc.*, 529 S.E.2d 758, 762 (S.C. Ct. App. 2000).

Following a jury trial, a new trial may be granted to all or any of the parties and on all or part of the issues "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State." Rule 59(a), SCRCP. "A new trial *nisi* is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). An order granting a new trial *nisi due to an excessive verdict* contemplates not the striking down of the verdict

altogether, but remission of part of it and the granting of a new trial in default thereof. *Howard v. Roberson*, 376 S.C. 143, 155, 654 S.E.2d 877, 883 (Ct. App. 2007).

A new trial *nisi remittitur* is proper when the jury's verdict is merely excessive or "unduly liberal," but not necessarily "actuated by passion, caprice, or prejudice" sufficient to warrant a new trial absolute. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). However, compelling reasons must be given to justify invading the jury's province in this manner. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). In ruling upon a motion for new trial *nisi remittitur*, the trial judge must consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006). The critical inquiry is whether the award excessively compensates the injured party. *See Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). While there is no formulaic measure for a damages award, "if the trial judge 'is convinced that the amount awarded is overly liberal, he has the authority and corresponding *duty* to reduce the verdict by order *nisi.*'" *Gamble v. Stevenson*, 305 S.C. 104, 111, 406 S.E.2d 350, 354 (1991) (emphasis in original) (quoting *Hicks v. Herring*, 246 S.C. 429, 436, 144 S.E.2d 151, 154 (1965)).

DISCUSSION

Because no economist or lifecare planner testified,[1] and due to the paucity of specific evidence of dollar amounts attributable to economic losses, the court acknowledges concerns about whether the jury fully grasped the distinction between economic and noneconomic losses. Having reviewed the record, the court finds that the jury's verdict was not the result of passion, caprice,

[1] Testimony from financial experts was presented on the issue of corporate structure, not Plaintiff's damages.

prejudice, misapplication of the law, or any other reason that would justify setting the entire verdict aside.

Without question, the jury was well within its province to set noneconomic damages at $1 million. A substantial award for noneconomic losses is expected in a case where a person loses nearly all his eyesight due to the negligence of others. Motions to reduce or reject the verdict for noneconomic loss is denied, subject to the reductions for other reasons stated below.

Due to the great deference accorded to jury verdicts, the court must deny granting a new trial absolute, deny granting judgment notwithstanding the verdict (JNOV), deny a new trial under the thirteen-juror doctrine, but grant the motion for new trial *nisi remittitur*.

The jury's economic damages award was unduly liberal. There was insufficient evidence to support the award. It was clear that plaintiff's strategy and presentation were geared toward the noneconomic loss claim. Much of that is to the credit of the Plaintiff who, despite the physical limitations he is enduring, continued to work as a professor and to engage in all his normal activities that he could do. There are compelling reasons to order a new trial *nisi remittitur*.

The court further finds that: (1) the noneconomic damages cap would apply and the noneconomic damages award be reduced to the cap amount; (2) the Defendants are entitled to a setoff; and (3) Plaintiff is not entitled to prejudgment interest.

I. The jury's economic damages award was unduly liberal and unsupported by the record evidence, which the Court finds compels a new trial *nisi remittitur*.

As the charge to the jury stated, economic damages are "tangible losses that an injured party suffers and will suffer in the future as a proximate result of the defendants' negligence." (Trial Tr. 1156:7-11.) They compensate the injured party for "monetary loss, financial losses and

expenses caused by the defendants' negligence. They include such things as medical expenses and the cost of replacing or providing services that the plaintiff is no longer able to due to the injury." (*Id.* at 1156:12-18.) No party objected to the charge. Moreover, it was consistent with the South Carolina Noneconomic Damages Act, which defines economic damages as:

> pecuniary damages arising from medical expenses and medical care, rehabilitation services, costs associated with education, custodial care, loss of earnings and earning capacity, loss of income, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, a claim for loss of spousal services, loss of employment, loss of business or employment opportunities, loss of retirement income, and other monetary losses.

S.C. Code Ann. § 15-32-210.

Plaintiff's presentation of evidence focused on the noneconomic damages associated with the progression of his glaucoma. During the charge conference, the court questioned the absence of dollar figures associated with economic losses. Plaintiff's counsel acknowledged that was correct and conceded that "the medical costs and the lost wages are very minute and minimal." (Trial Tr. 1005:2-12.) The court inquired if it should put zero in the blank for economic damages because "[t]here is no evidence of economic loss. There's no lost wages, there's no expense for going back and forth to the doctor, there's no cost about surgeries or treatments or medications. I never heard a dollar figure said." (*Id.* at 1005:17-1006:5) Plaintiff's counsel stated that there were "dollar figures in Dr. Clary's medical records" for the reasonable and necessary care Plaintiff received, although it "only comes to 11 or $12,000." (*Id.* at 1006:9-1007:10.)

In closing argument, Plaintiff conceded to the jury that he was not pursuing lost wages and stated that while he believed this case commanded large damages, it was "mostly noneconomic." (Tr. 1063:18-21, 1069:21-22.)

The Campen Defendants contend, and the court agrees, that the only evidence of damages that fits within the categories charged to the jury were the medical expenses from The Eye Center, which totaled $11,362. However, as indicated below, the court finds that the jury was free to extrapolate some additional amounts for economic loss.

Plaintiff contends that there was sufficient evidence from which the jury could reasonably infer previously existing and future economic damages. Future damages must be proven to be reasonably certain to occur as a proximate result of the Defendants' negligence. *Pearson v. Bridges*, 344 S.C. 366, 373, 544 S.E.2d 617, 620 (2001). Neither Plaintiff's experts nor Plaintiff's treating physician testified as to any expected future medical expenses consistent with this standard.

Plaintiff's first expert, Dr. Neal Sher, did not testify regarding any future medical needs. Moreover, Plaintiff's other expert, Dr. John Galanis, did not identify any specific treatments and associated expenses that he expected Plaintiff to require. When asked about the future, he detailed the treatments that could potentially be needed when a glaucoma patient's eye pressures worsen. (Tr. 633:12-23, 642:20-643:3.) Neither expert detailed their cost. Determinations of medical costs require the assistance of expert testimony because they are beyond the expertise of a layperson. Finally, Plaintiff's treating physician, Dr. Matthew Clary, testified that as long as the glaucoma does not damage any more of the optic nerve, "then you should be stable where you are." (Clary Trial Dep. 66:16-68:16.) Dr. Clary's goal is to maintain Plaintiff's current level of functioning. Although he acknowledged the future course remained uncertain, he did not identify specifically any future medical treatments and associated expenses that were reasonably certain to occur. (*See id.*)

Plaintiff contends that caregiving services that Plaintiff's wife provided supported the economic damages award. The defense contends that this is not a category of economic damages recognized by the statutory definition and no loss of consortium claim was pleaded. The defense also maintains that there was an absence of evidence attempting to quantify the value of such services in any event. The court acknowledges that no loss of consortium claim was pleaded but disagrees with the argument that the Plaintiff cannot recover an award for the reasonable value of the assistance required for him due to the Defendants' negligence, despite its being provided by his wife as opposed to a paid provider. This seems akin to a collateral source issue.

Giving great deference to the jury's verdict, it is clear from this record that the Plaintiff has required and will require extensive assistance in daily living following the misdiagnosis and failure to treat. There was ample testimony regarding things that the Plaintiff could no longer do himself due to the Defendants' negligence and that those functions must be performed by someone else as a care provider. The question then becomes whether and to what extent the jury was permitted to calculate an award. A jury is permitted to use its common sense, and the court finds that this record is sufficient to enable the jury to reasonably and conservatively determine that the Plaintiff should be allowed to recover at least minimum wage for time necessarily spent by a caregiver. It is common knowledge that the minimum wage is approximately $7.25 per hour. While there is abundant evidence that the Plaintiff requires assistance nearly all day, the court finds that the record supports a determination that the jury could award a normal working day of eight hours.

The Plaintiff's eyesight got much worse after the Defendants' failure to diagnose and treat Mr. Wingo. He testified that he was able to function at a relatively normal level when he went to the Defendants' clinic. About a year later, the exact date being May 16, 2019, a second doctor, Dr. Clary, diagnosed 85% to 90% damage to the Plaintiff's optic nerve, describing his eyes as being

in terrible shape. Using the day that Mr. Wingo saw Dr. Clary as the starting point, there were roughly 2,164 days from Dr. Clary's diagnosis to the first day of trial. Applying mathematics, 8 hours per day for extra assistance is 17,312 hours. The record supports assessing $7.25 per hour for a total of $125,512.00.

There was strong evidence of permanent impairment. The jury was told that Mr. Wingo's life expectancy under the statutory mortality table was 13.32 years or 4,861.8 days. Using 8 hours per day would total 38,894.4 hours. Applying $7.25 per hour would be $281,984.40. Future damages must be reduced to present day value. Though the jury was given no evidence concerning how to calculate present day value, the court finds it appropriate to determine a rough figure for that reduction in the context of developing an amount of reduction in a motion *nisi remittitur*. Using a 6% discount rate over the life expectancy of Mr. Wingo reduces that award from $281,984.40 to $129,763.02.

Those assessments ($125,512 + $129,763) total $255,275. The only other evidence of economic loss is $11,326 paid to The Eye Center. Those amounts total $266,601. Deducting 15% ($39,990) assessed as the Plaintiff's comparative negligence results in a total of **$226,611** as an economic loss award.

II. Pursuant to the South Carolina Noneconomic Damage Awards Act of 2005, S.C. Code Ann. § 15-32-200 *et seq.*, noneconomic damages are capped at $580,461.

The noneconomic damages cap for medical malpractice actions applies in any action asserting malpractice against a "health care provider." S.C. Code Ann. § 15-32-220(a). The Act defines "health care provider" to include optometrists. *Id.* at § 15-32-210(5).

The Act caps noneconomic damage awards against a single healthcare provider to $350,000, adjusted for inflation as determined annually by the Revenue and Fiscal Affairs Office. *Id.* at § 15-32-220(A), (F). This amount is $580,461 for 2025. *See* Memorandum, https://rfa.sc.gov/sites/default/files/2025-03/Medical%20Malpractice%20Limitation%20-%20Inflation%20memo.pdf (detailing the inflation adjusted amount for 2025).

The jury determined that the Campen Defendants are responsible for damages resulting from Dr. McTague's negligence. The Plaintiff's argument that there was more than one health care provider fails because the case was pursued on the theory of vicarious liability, and the jury reasonably found that the Plaintiff had proven agency. Dr. McTague is entitled to the benefit of the noneconomic damages cap, which would reduce the jury's $1 million award to $580,461. The Campen Defendants' liability is vicarious only and, therefore, is coexistent with Dr. McTague's for any judgment rendered against her. Accordingly, Plaintiff's noneconomic damages are capped at **$580,461**.

III. The Defendants are entitled to a setoff for the $2 million in settlement funds that Plaintiff received from Dr. McTague.

Section 15-38-50 of the South Carolina Code states that:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (1) it does not discharge any of the other tortfeasors from liability for the injury . . . unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater . . . .

S.C. Code Ann. § 15-38-50. South Carolina courts unequivocally agree that setoff is "statutorily mandated" from the total damages award. *See, e.g.*, *Smith v. Widener*, 397 S.C. 468, 471-72, 724 S.E.2d 188, 190 (Ct. App. 2012); *Ellis v. Oliver*, 335 S.C. 106, 113, 515 S.E.2d 268, 272 (Ct. App. 1999). As such, the statute "grants the court no discretion in determining the equities involved in applying a setoff once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." *Ellis*, 335 S.C. at 113, 515 S.E.2d at 272; *see also Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017) (noting "the General Assembly took steps to protect nonsettling defendants by codifying . . . the right to offset the value of any settlement received prior to the verdict—a right which arises by operation of law and is not within the discretion of the courts").

South Carolina's common law likewise mandates a non-settling defendant's right to set off prior settlement amounts against a verdict. In *Smith v. Widener*, the South Carolina Court of Appeals explained:

> There can be only one satisfaction for an injury or wrong. A settlement by a joint tortfeasor reduces the claim against the others to the extent of any amount stipulated by the release or the covenant. Therefore, *before entering judgment on a jury verdict*, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. Under this circumstance, section 15-38-50 grants the court no discretion in applying a set-off.

397 S.C. 468, 471–72, 724 S.E.2d 188, 190 (Ct. App. 2012) (emphasis added) (cleaned up).

Under the authority outlined above, the Defendants are entitled to a statutorily mandated and equitable setoff in the amount of all settlement proceeds received by Plaintiff and applied to the judgment rendered against the Defendants in this case. At the hearing, Plaintiff's counsel

confirmed that the only settlement that Plaintiff has received is the $2 million paid on behalf of Dr. McTague by her professional liability insurer pursuant to the covenant not to enforce that has been filed with the Court. Therefore, the Campen Defendants are entitled to setoff of **$2,000,000**.

IV. Plaintiff is not entitled to interest regarding the offer of judgment.

Considering the foregoing rulings, Plaintiff's motion for prejudgment interest is denied.

Plaintiff served an Offer of Judgment Nov. 11, 2022, of $850,000 to all defendants jointly. Under Rule 68, SCRCP, if the offer is not accepted within twenty days, it is considered rejected. *Id.* If it is not accepted and the Plaintiff offeror "obtains a verdict or determination at least as favorable as the rejected offer," the offeror can recover court costs and "eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of judgment." *Id.*

(explaining that in computing offer of judgment interest, the analysis should be performed "using the posttrial award as opposed to the jury's verdict"); *Civiello v. Owens-Corning Fiberglass Corp., Reinforced Cement Prods. Div.*, 544 A.2d 158, 162 (Conn. 1988) (explaining that the jury's verdict is "essentially a finding of fact and cannot be implemented until judgment has been rendered thereon" and thus it would be "incongruous" to reward a plaintiff with interest where the offer of judgment "proves to be excessive in light of the court's ultimate judgment").

In light of the rulings detailed above, the final reduced award of $807,072 is lower than the $850.000 offer of judgment. The court does not completely agree with the Defendants' or the Plaintiff's interpretations of Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797 (2022)

One issue before the Garrison court was whether 8% interest under the offer of judgment provisions was to be determined based on the entire judgment, including punitive damages, or just the actual damages. The present case does not involve punitive damages, but the question for our purposes is what constitutes the "damages award" that applies. Garrison states that the entirety of the award is utilized, including punitive damages. However, the opinion also mentions that there would be reviews by the trial court on remand concerning reductions.

It is this court's ruling that the proper figure to evaluate the applicability of interest under the offer of judgment rule is the net figure after reductions, excluding the setoff, Again, since the reduced award of $807,072 is lower than the $850.000 offer of judgment, interest cannot be collected. Nothing herein prevents the Plaintiff from seeking to recover interest related to the offer of judgment should there be a retrial and should he receive an award for economic loss, which combined with the noneconomic damage award contained herein, exceeds $850,000.

Because the outcome is not at least as favorable as the offer of judgment, Plaintiff's motion for interest related to Rule 68(b), SCRCP is denied at this stage.

V. Dr. McTague's motion for new trial concerning the verdict form.

Dr. McTague argues that a new trial should be granted because the verdict form did not provide a space for the jury to find the Campen Defendants liable independently from Dr. McTague's liability. The court directed a verdict on the Plaintiff's non-vicarious liability theories, and the verdict form was consistent with that ruling. The court disagrees with the assertion that there was error in the formulation of the verdict form. Second, even if there were error in not providing this option on the verdict form, there was no resulting prejudice to Dr. McTague. There is no reasonable construction of the evidence, including taking into account the loss of the Plaintiff's medical records and the initial screening done by Campen employees, that

would have avoided these verdicts of liability attributable to all defendants. In the absence of prejudice to the movant, a motion for new trial based on a verdict form must fail even if there was error in the manner of the verdict form. See Sulton v. HealthSouth Corp., 400 S.C. 412, 418-19, 734 S.E.2d 641, 645 (2012). The motion is denied.

VI. Defendants are not entitled to a new trial absolute.

It is asserted that the verdict shocks the conscience and is not supported by any reasonable view of the evidence. Reference is craved to the rulings on the motion for new trial *nisi remittitur*. The motions for new trial absolute are denied.

Under South Carolina law, the "court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." Welch v. Epstein, 342 S.C. 279, 302, 536 S.E.2d 408, 420 (Ct. App. 2000). "In other words, to warrant a new trial absolute, the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000) (quoting Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993)). The court also finds no error of law that would have materially affected the outcome reached by the jury.

The court must give substantial deference to the jury's determination of damages. Rush v. Blanchard, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (citing Brabham v. S. Asphalt Haulers, Inc., 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953)); Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). Every party to a civil jury trial "is entitled to the constitutional privilege of the fair judgment of a jury" and a court must "not interfere with the verdict of a jury simply because it is greater [or less] than its own estimate." Brabham, 223 S.C. at 430, 76 S.E.2d at 306.

A new trial on damages is not permitted simply because a verdict is larger than anticipated. Our Court of Appeals has held a new trial absolute was not warranted in a medical negligence action in which the jury awarded $1.2 million in actual damages. See Hamilton v. Reg'l Med. Ctr., 440 S.C. 605, 637-38, 891 S.E.2d 682, 699-700 (Ct. App. 2023), *cert. denied*, S.C. Sup. Ct. order filed May 1, 2024. In that case, the hospital argued that "little testimony was given regarding any pain and suffering" and "the size of the verdict alone [was] sufficient to show that the jury must have been moved by passion or prejudice." Id. at 637, 891 S.E.2d at 699. The court rejected those contentions. Id. at 638, 891 S.E.2d at 700.

Here, it is asserted that "[t]he only evidence of economic damages was approximately $12,000 in medical expenses incurred by Plaintiff Wingo during his treatment with Dr. Matthew Clary over the last six years." The court has addressed this issue in its rulings on the *remittitur* motion. The record includes the extensive impact that the Defendants' negligence has had upon Mr. Wingo. Absent the lack of specific proof detailed in the ruling on the *remittitur* motion, a verdict of $3 million would be totally appropriate for a person whose eyesight is reduced to the degree of the Plaintiff's vision, where the evidence demonstrates that a large part of that deficit could have been prevented had the Plaintiff received appropriate diagnosis and treatment.

The motions for new trial absolute are denied.

VII. Campen Defendants' motion for sanctions.

The Campen Defendants seek sanctions against the Plaintiff because the Plaintiff did not immediately disclose the existence of his covenant not to execute with Defendant McTague. The court declines to impose sanctions and respectfully denies this motion.

The motion is based largely upon the premise that there exists an independent duty for a plaintiff who settles with one defendant to provide, before or during trial, a copy of his

settlement agreement to any other defendant in the case. Because there is some question as to whether the Campen Defendants sought to discover any settlement documents, this motion is respectfully denied.

Further, the court accepts that the covenant not to execute does not release liability but states that it preserves all actionable claims against all the defendants. South Carolina law distinguishes covenants not to execute from releases: a covenant is "a promise not to enforce a right of action or execute a judgment," while a release relinquishes a claim outright. *See* Wade v. Berkeley Cnty., 348 S.C. 224, 228, 559 S.E.2d 586, 587-88 (2002).

In determining whether an agreement is a release or a covenant not to execute, courts look to the "intention of parties." Cobb v. Benjamin, 325 S.C. 573, 578, 482 S.E.2d 589, 591 (Ct. App. 1997). Here, the covenant not to execute states that it preserves Plaintiff's right to sue Dr. McTague "to final judgment" for additional liability, excess, or umbrella coverage, limiting only enforcement against her personal assets. (Covenant, ¶¶ 1-2). Through its plain words, the covenant makes clear that it is not intended to function as a release. Additionally, parties may structure covenants as they wish, provided they do not contravene public policy. Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007).

Campen Defendants cite Andrade v. Johnson wherein a covenant not to sue contained words that the Court of Appeals found released the agent, stating the plaintiff would "never institute any action or suit against covenantee." 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), *rev'd on other grounds,* 356 S.C. 1, 586 S.E.2d 858 (2003). The Andrade plaintiff then attempted to proceed against the principal as the covenant stated that it reserved "all rights of actions,

claims, and demands against any and all persons **other than [the agent]** including [the principal].” Id. (emphasis added). That case is distinguishable on it facts.

Here, the words of the covenant did not release any claims. Defendant McTague remained a defendant under the covenant’s terms, which expressly stated that she could be sued “to final judgment” for additional liability, excess, or umbrella coverage. (Covenant, ¶¶ 1-2).

The Campen Defendants also cite a circuit court order, Oyuela-Martinez v. Kuhn & Kuhn, LLC, No. 2019-CP-10-00341 (Ct. Comm. Pl. May 28, 2020). That determination by a learned trial judge is not precedent for this court. There is also an issue of whether Oyuela-Martinez is distinguishable because the agent’s release under the settlement terms was uncontested.

Other case law also clarifies that a principal’s liability persists absent the agent’s complete exoneration. In Austin v. v. Specialty Transportation Services, the court held that dismissing an agent as a party does not extinguish the principal’s liability unless the agent is exonerated from liability. 358 S.C. 298, 319, 594 S.E.2d 867, 878 (Ct. App. 2004). Here, Defendant McTague was not exonerated. The jury explicitly found her negligent, which was the basis for the Campen Defendants’ liability for damages caused by their agent.

The Campen Defendants argue that their trial strategy would have been different and repeat their arguments about the damages awarded. Having considered those arguments, the court fails to see how the disclosure would have a meaningful impact upon the trial or upon the verdicts.

VIII. Defendants’ motion for new trial under thirteenth juror doctrine.

The thirteenth juror doctrine allows a new trial if the judge finds “the evidence does not justify the verdict” or “justice has not prevailed.” Acting as a thirteenth juror, the trial judge may

put the case on the same footing as though the jury had been unable to reach a verdict. Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002).

For the reasons stated above, the court finds that the Plaintiff presented a case warranting a determination of medical malpractice and a substantial award of damages. The court has declined to impose sanctions for not notifying the Campen Defendants of the covenant not to execute.

THEREFORE, IT IS ORDERED, subject to any caveats contained in the body of this order, that the motions for JNOV are denied, the motions for a new trial absolute are denied, the motion for a new trial based on an erroneous verdict form is denied, the motions for a new trial under the thirteenth juror doctrine are denied, the motion for sanctions is denied, the motions for a new trial *nisi remittitur* are granted, the motion for setoff or credit based on the settlement is granted, the motion to apply the noneconomic damages cap is granted, and the Plaintiff's motion for interest under Rule 68 is denied.

AND IT IS SO ORDERED.

[Judge's electronic signature appears on separate page]

Lexington Common Pleas

Case Caption: Ted Wingo VS T Campen Md And Associates Llc , defendant, et al

Case Number: 2022CP3203865

Type: Order/Civil Judgment

Circuit Judge (Code #2050)

s/ William P. Keesley