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**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**APPEAL FROM COLLETON COUNTY**  
Court of Common Pleas  
Brooks Goldsmith, Circuit Court Judge

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Appellate Case No.: 2023-000132

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Jill Maliszewski

Appellant,

v.

Margaret Yeager,

Respondent.

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**INITIAL BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

I. STATEMENT OF THE ISSUES ON APPEAL ..... 1

II. STATEMENT OF THE CASE ..... 2

III. STATEMENT OF THE FACTS ..... 4

IV. STANDARD OF REVIEW ..... 5

V. ARGUMENT..... 5

    A. The Circuit Court Correctly Held That A Jury Verdict of \$0 Is Not Grossly  
    Inadequate Where There Was Sufficient Evidence Presented To Support Such An  
    Award.

VI. CONCLUSION..... 10

**TABLE OF AUTHORITIES**

**Cases**

Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995)..... 5

Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct.App.1991)..... 7,8

Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716, 717 (Ct. App. 1989). .... 6

Fallon v. Rucks, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950). .... 6

Gastineau v. Murphy, 323 S.C. 168, —, 473 S.E.2d 819, 827 (Ct.App.1996)..... 5

Hughes v. Children's Clinic, P. A., 269 S.C. 389, 237 S.E.2d 753 (1977). .... 6

Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983)..... 6

McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995).. 5

Newton v. South Carolina Pub. Rys. Comm'n, 312 S.C. 107, 439 S.E.2d 285  
(Ct.App.1993)..... 6

O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993).. .... 5

Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993)..... 6

South Carolina Department of Highways & Public Transportation v. Mooneyham, 275  
S.C. 205, 269 S.E.2d 329 (1980)..... 5

Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993)..... 6

Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996).. .... 5,6,7,8

**I. STATEMENT OF THE ISSUES ON APPEAL**

- 1) DID THE CIRCUIT COURT CORRECTLY DENY APPELLANTS MOTION FOR A NEW TRIAL?

## II. STATEMENT OF THE CASE

This lawsuit arises out of an automobile accident that occurred on or about October 14, 2018, where Appellant, Jill Maliszewski, was a passenger. As a result of the accident, Ms. Maliszewski allegedly sustained injuries to her lower back. In addition, Ms. Maliszewski alleged lost wages following the accident. Ms. Maliszewski filed her Complaint against Respondent, Margaret Yeager on June 9, 2020, alleging negligence and gross negligence. [See Complaint].

On October 22, 2018, one week after the accident, Ms. Maliszewski treated with the Injury Care Centers where she complained of back pain. An MRI was performed on October 29, 2018, which was unremarkable. Ms. Maliszewski continued to treat with Injury Care Centers for approximately nineteen sessions until she was discharged on January 30, 2019. Ms. Maliszewski did not treat again for her alleged injuries until June 3, 2019 with Tri-Dimension Spinal Rehab. After the June 3, 2019 visit, Ms. Maliszewski did not treat for her injuries until November 26, 2019.

At trial, Ms. Maliszewski testified regarding her alleged injuries and treatment for such following the accident. Ms. Maliszewski testified several times that she did not have any prior back pain. However, on cross-examination, Ms. Maliszewski testified that she had treated with the Jacksonville Orthopaedic Institute and Baptist Medical Center for back pain prior to the October 2018 accident. [Transcript pp. 61-65].

Ms. Maliszewski's treating chiropractor, Amy Bernstein, testified that she recommended that Ms. Maliszewski undergo an MRI of her neck and back in 2022. Ms. Maliszewski had an MRI performed in May of 2022, which showed a disc bulging at L3-4, L4-5, and a minor disc herniation at L5-S1. An MRI of Ms. Maliszewski's back from two weeks after the accident showed no bulges or herniations at any level. Ms. Bernstein testified that she believed that the radiologist or MRI machine from the 2018 MRI was wrong.

Ms. Yeager retained an expert in radiology, Dr. Aron Rosenthal, who testified at trial that the 2018 MRI did not show any signs of trauma, disc bulging, or herniations. [Transcript p. 78]. Dr. Rosenthal testified that the MRI taken in 2022 showed signs of disc bulging and herniations, which were new findings compared to 2018. [Transcript p. 82]. Dr. Rosenthal testified that, in his expert opinion, the disc bulges and herniations developed sometime between the 2018 MRI and the 2022 MRI. [Transcript pp.82-83]. In addition, Dr. Rosenthal testified that the pain Ms. Maliszewski was complaining of in 2018 could not have been due to a bulging disc, as there was no evidence of such. [Transcript p. 83].

In closing arguments, defense counsel urged the jury to consider whether Ms. Maliszewski was seriously injured, and encouraged the jury to consider the evidence and credibility of each witness. [Transcript pp. 130-132]. Further, defense counsel argued the testimony and evidence showed that Ms. Maliszewski's pain was not caused by the accident. The jury was charged with the elements of negligence, including whether the actions of Ms. Yeager were the proximate cause of Ms. Maliszewski's injuries. The jury was also charged with instructions on weighing the credibility of witnesses.

After deliberations, the jury returned a verdict of \$0 for Ms. Maliszewski. [Verdict Form]. On December 14, 2022, Ms. Maliszewski filed a Motion for a New Trial *Nisi Additur* or, in the alternative, New Trial pursuant to the Thirteenth Juror Doctrine. In her Motion, Ms. Maliszewski argued that she presented uncontroverted evidence proving the accident was the proximate cause of her alleged back pain. Therefore, a jury verdict of \$0 was wholly unsupported by the evidence. [Motion for New Trial]. On December 16, 2022, Ms. Yeager filed a response to Ms. Maliszewski's Motion for a New Trial, arguing that a jury could easily deduce, and did, that the evidence

presented showed contradictions in Ms. Maliszewski's allegations and impacted the credibility of her case. [Response to Motion for New Trial].

On January 4, 2023, Judge Brooks Goldsmith denied Ms. Maliszewski's Motion. [Order Denying Motion for New Trial]. This appeal followed.

### **III. STATEMENT OF THE FACTS**

The above constitutes the statement of the facts. However, Appellant asserts in her Initial Brief that defense counsel admitted that the Plaintiff was entitled to some money. Instead, defense counsel argued that the most the jury should award Ms. Maliszewski was \$11,000, if they found that she was injured. During closing arguments, defense counsel stated:

“It was about \$9,000 to the Injury Care Center, and then the MRI that was clear was about \$1,500, a little bit more than that, so it was about \$11,000. Is that fair? That's all of her care until she is released to come back whenever she wants, and she doesn't for months. So I would say that's fair, but so be it.” [Transcript p. 146, lines 6-12].

Defense counsel then urged the jury to consider the evidence and apply logic to it when determining what to award Ms. Maliszewski. In her Initial Brief, Ms. Maliszewski argues that defense counsel admitted that she was hurt and, therefore argues that Ms. Maliszewski is entitled to compensation. However, defense counsel asked the jury to consider what Ms. Maliszewski's actual damages were. [Transcript p. 145, line 7-8]. Furthermore, the jury was instructed on how to determine the amount of damages to be awarded, including weighing the credibility of the witnesses and analyzing the evidence presented. The jury was then tasked with determining the amount of damages to award Ms. Maliszewski after considering all of the evidence presented. After deliberating for an hour, the jury returned a verdict of \$0 for Ms. Maliszewski.

#### IV. STANDARD OF REVIEW

Under the “thirteenth juror” doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. Gastineau v. Murphy, 323 S.C. 168, —, 473 S.E.2d 819, 827 (Ct.App.1996). The grant or denial of new trial motions rest within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court’s order. South Carolina Department of Highways & Public Transportation v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980).

The trial judge alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995). The denial of a motion for a new trial nisi is within the trial judge’s discretion and will not be reversed on appeal absent an abuse of discretion. O’Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993). This Court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law. Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995).

#### V. ARGUMENT

##### **A. The Circuit Court Correctly Held That A Jury Verdict of \$0 Is Not Grossly Inadequate Where There Was Sufficient Evidence Presented To Support Such An Award.**

In her Initial Brief, Ms. Maliszewski argues that the issue for the jury to decide was not whether the Plaintiff was injured, but rather the extent of Plaintiff’s injury. The jury did just this. However, the issue Ms. Maliszewski has with the jury’s determination was that they awarded Ms.

Maliszewski nothing based on their analysis of the evidence and testimony presented. The record and evidence presented clearly supports the jury's determination and award.

To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty. Newton v. South Carolina Pub. Rys. Comm'n, 312 S.C. 107, 439 S.E.2d 285 (Ct.App.1993). In a negligence action, the plaintiff must prove proximate cause. Rush v. Blanchard, 310 S.C. 375, 426 S.E.2d 802 (1993). "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716, 717 (Ct. App. 1989). Negligence is deemed to be the proximate cause of an injury when, without such negligence, the injury would not have occurred or could have been avoided. Hughes v. Children's Clinic, P. A., 269 S.C. 389, 237 S.E.2d 753 (1977). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715, 721 (Ct. App. 1996).

"Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983). Such discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them." Fallon v. Rucks, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950).

In Hartley, the plaintiff, Vinson, was injured as a result of a motor vehicle accident that was caused by Hartley. At trial, Hartley argued that Vinson did not indicate that he was hurt at the scene and did not seek medical treatment. In addition, Vinson alleged dental injuries, but admitted that he did not hit his mouth or do anything during the accident that would have injured his teeth. It was established that the dental injuries being alleged did not occur until about a week after the accident. The jury deliberated and returned a verdict in favor of Hartley. Vinson then moved for JNOV and a new trial pursuant to the “Thirteenth Juror” doctrine.

On appeal, this Court held that the credibility of the witnesses was for the jury to determine, and a review of the record revealed there was sufficient evidence from which the jury could have reached a verdict in favor of Hartley. This Court reasoned that Vinson’s testimony related to his dental injuries showed that it could have been caused by something else. Further, this Court held that the jury could have concluded that the injuries suffered by Vinson were not caused by the accident at all. Lastly, this Court noted that there were certain inconsistencies in one of the witnesses testimony, which may have brought his credibility into question. This Court held “[s]implistically put, credibility of witnesses was for the jury to determine. The jury could have determined the medical bills testified to by Vinson were not the result of the accident which gave rise to this suit.” Id. at 727.

Similarly, in Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct.App.1991), the plaintiff alleged injuries following a motor vehicle accident. At trial, there were no witnesses that directly contradicted the plaintiff’s testimony or the testifying doctor. Yet, the jury returned a verdict in favor of the defendant. This Court reasoned that “[t]here remains the question of the inherent probability of the testimony and the credibility of the witnesses or the interests of the witness in the result of litigation.” Id. at 726. This Court held that “[u]nder the circumstances, the jury had

the right to find that she was not injured, and we do not have the right to second-guess the jury.”  
Id.

Here, in her Answer, Ms. Yeager denied that she was negligent, including that her actions proximately caused Ms. Maliszewski’s injuries. [Answer to Complaint]. At trial, Ms. Yeager presented evidence to support that denial of proximate cause. First, Ms. Maliszewski testified on direct examination that she never experienced back pain or treated for back pain prior to the accident. [Transcript p. 49]. However, on cross-examination, Ms. Maliszewski admitted that she treated with Jacksonville Orthopaedic Institute for back pain. [Transcript pp. 61-62]. Ms. Maliszewski also admitted on cross-examination that she had a prior MRI of her lumbar spine and a bone scan of her entire body in order to figure out what was causing her back pain. [Transcript pp. 63-64]. Further, Ms. Maliszewski testified that she decided not to seek medical treatment immediately after the accident. Like in Hartley, a reasonable jury could deduce that Ms. Maliszewski’s contradictory testimony impacted her credibility. Moreover, a jury could easily come to the conclusion that Ms. Maliszewski’s testimony suggested her injuries were pre-existing and not a result of the accident.

Next, the jury heard testimony from Ms. Maliszewski that she suffered constant pain as a result of the accident. Ms. Maliszewski testified that the only time she felt relief from the pain was when she was out of work and lying in bed for three months due to COVID-19. [Transcript p.60]. Further, Ms. Maliszewski testified that her job is very physically demanding. [Transcript p. 70]. This testimony by Ms. Maliszewski seemingly suggests that the physical demands of her job are causing her pain, and not the accident. The testimony avows that the only time she felt relief was when she was not working. Therefore, a reasonable juror could have, and likely did, conclude that the accident was not the source or cause of Ms. Maliszewski’s pain.

Lastly, Amy Bernstein, who was Ms. Maliszewski's treating chiropractor at the time testified that, in her opinion, Ms. Maliszewski's pain was caused by the accident. When asked about the MRI taken days after the accident, which showed no herniations or disc bulges, Ms. Bernstein testified that either the radiologist interpreting the image was wrong or the MRI machine itself was wrong. By contrast, Ms. Yeager presented the testimony of Dr. Aron Rosenthal, who testified that there clearly were no disc bulges or herniations in the 2018 MRI. However, in the 2022 MRI, there was evidence of disc bulges and a mild herniation. Dr. Rosenthal articulated that because there was no evidence of trauma in the 2018 MRI, but mild degenerative changes in the 2022 MRI, those changes could not have been the result of the accident. The testimony of Dr. Rosenthal directly contradicted the testimony of Amy Bernstein. The jury was instructed to weigh the credibility of the witnesses and evidence related thereto. As mentioned, Amy Bernstein's testimony contained certain inconsistencies which may have brought her credibility into question. As such, the jury likely concluded that Dr. Rosenthal's testimony was more credible than Amy Bernstein's.

In her Initial Brief, Ms. Maliszewski argues that defense counsel admitted that Ms. Maliszewski was entitled to some compensation. However, the record does not support such a contention. In closing arguments, defense counsel repeatedly urged the members of the jury to weigh the credibility of the witnesses and closely look at the evidence presented. Defense counsel argued that Ms. Maliszewski was not in the constant pain that she alleged, and asserted that the injuries complained of were not caused by the accident. Defense counsel then asked the jury if they believe that it is more likely than not that Ms. Maliszewski's injuries were related to the accident, then the most she should be awarded is \$11,000. Defense counsel then encouraged the jury to consider what Ms. Maliszewski's actual damages were.

The jury was then charged with determining whether the actions of Ms. Yeager proximately caused Ms. Maliszewski's injuries. The jury was then asked to decide if Ms. Maliszewski was entitled to a verdict, and if so, how much money the defendant should be required to pay. Judge Goldsmith instructed the jury to consider the evidence, and stated that "evidence must allow you to determine the amount of damages as reasonable, fair – reasonable, just, and fair." [Transcript p. 157, lines 3-4]. The record clearly establishes that the jury properly weighed the evidence and found Ms. Maliszewski's evidence unconvincing. The record and evidence presented does not suggest that the jury was confused, misled, or in any way inadequately performed the function of the finder of fact. Moreover, the record and evidence certainly does not reflect a verdict that is grossly inadequate to shock the conscience of the court. Instead, the verdict displayed a fair and reasonable sum determined by the evidence and testimony.

## VI. CONCLUSION

The circuit court properly denied Ms. Maliszewski's Motion for a New Trial, and properly found that the jury's verdict was reasonable based on the evidence presented. Therefore, Respondent respectfully requests that the circuit court's January 4, 2023 Order denying the Motion for a New Trial be affirmed.

Respectfully Submitted by:  
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On this 5<sup>th</sup> day of October 2023  
Charleston, SC

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