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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-001405

Linda C. Horne,.....Appellant,

v.

Kelsey Rae Clapp,.....Respondent.

**RESPONDENT’S FINAL BRIEF**

Respectfully Submitted,

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## STATEMENT OF THE ISSUES ON APPEAL

**I. APPELLANT FAILED TO PRESERVE FOR APPEAL HER OBJECTIONS TO THE JURY'S VERDICT AND TO THE VERDICT FORM.**

**II. THE TRIAL COURT CORRECTLY DENIED APPELLANT'S NEW TRIAL MOTION UNDER THE THIRTEENTH JUROR DOCTRINE BECAUSE THE VERDICT WAS NOT INCONSISTENT WITH THE EVIDENCE OR CONTRARY TO LAW.**

## STATEMENT OF THE CASE

This appeal arises from a jury verdict finding that an automobile accident admittedly caused by Defendant Kelsey Clapp<sup>1</sup> did not proximately cause the injuries alleged by Plaintiff Linda Horne. On February 15, 2018, Horne's vehicle was stopped in traffic on Highway 521 in Lancaster County when she was rear-ended by Clapp's vehicle. (R. p. 224, line 9 – p. 225, line 1). At that time, Horne was on the way to her chiropractor for regular treatment for pre-existing low back and sciatica pain. (R. p. 223, line 2 – p. 224, line 17). Horne denied having any pain at the accident scene. (R. p. 244, lines 8-12). She further testified that the airbags in her vehicle did not deploy and her car was still drivable. (R. p. 244, lines 13-15 & p. 251, lines 12-17). In fact, she drove her vehicle from the accident scene directly to her chiropractor's office, where she neither mentioned the accident nor reported new injuries. (R. p. 244, line 13 – p. 245, line 1). Horne's husband testified that her car "didn't look too bad, mainly scuffs and scratches." (R. p. 199, lines 17-22).

On August 15, 2020, Horne brought this negligence action. Horne alleged Clapp's negligence caused two categories of personal injuries: first, that she required several weeks of chiropractic care to treat low back and neck pain following the accident; and second, that the

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<sup>1</sup> Clapp is also referred to in the trial transcript as Kelsey Partin, her married name.

accident damaged a sacral nerve stimulator (“InterStim”) device that was previously installed to treat gastrointestinal problems. (R. pp. 9-10, at ¶¶ 4-5).

The case was tried by a Lancaster County jury before the Honorable Daniel D. Hall from June 19-22, 2023. At the beginning of trial, Clapp’s counsel offered to stipulate to Clapp’s negligence in proximately causing the accident and that as a result of the accident Horne incurred costs for chiropractic care in the amount of \$1,055.00. Horne did not initially accept the stipulation, which the trial court advised counsel must be agreed to by both sides. (R. p. 82, lines 7-11 & p. 277, lines 18-21). Ultimately, the parties did stipulate to certain matters, though the precise terms of the stipulation were never read to the jury, nor admitted into the record. Instead, both counsel referenced the stipulation to the jury; and, the court instructed the jury that “defendant and plaintiff have stipulated to defendant’s negligence in this case.” (R. p. 348, lines 2-11).

On the last day of trial, Judge Hall sent an email to counsel attaching the court’s proposed jury charge and verdict form. (R. p. 274, line 15 – p. 275, line 11; R. p. 422; R. pp. 354-367; R. p. 423). During the conference, the court and counsel first discussed the jury charge. The court and counsel for both parties discussed the effect of the stipulation. The court agreed to eliminate portions of the negligence charge related to the duty of care and breach of that duty, as those were obviated by the stipulation. Instead, the judge would simply charge the jury that “defendant and plaintiff have stipulated to defendant’s negligence in this case.” The court decided to retain the proximate cause and damages portions of the negligence formula. Judge Hall explained that notwithstanding the stipulation, “the jury still has to take the evidence that has been presented to them.” (R. p. 280, line 21 – p. 281, line 9). Horne’s counsel agreed to the jury charge and the court concluded that “we’re all on the same page with the charge.” (R. p. 279, lines 11-12).

As with the jury instructions, the court and counsel discussed the court's proposed verdict form. In view of the stipulation, the court eliminated the first question asking the jury whether the defendant was negligent. Thus, the jury was asked this threshold question: "was the defendant's negligence the proximate cause of any of the plaintiff's injuries?" Horne's counsel agreed to this revision. (R. p. 281, lines 10-15).

Horne's counsel did object to the verdict form's damages language and requested to have one line for economic damages and separate lines for different types of noneconomic damages. (R. p. 279, line 13 – p. 280, line 13). However, the court declined to divide "between economic and noneconomic" damages citing the risk of jury confusion. (R. p. 281, line 16 – p. 282, line 10). Horne's counsel submitted an alternative verdict form to preserve his objection for appeal. That form asked the jury to decide whether the defendant's "admitted negligence was the proximate cause of the following damages" and then provided separate lines to enter dollar values for economic damages and five categories of noneconomic damages. (R. p. 424).

Horne did not move for a directed verdict at the close of all evidence. (R. p. 268, line 2 – p. 269, line 2; R. p. 288, line 11 – p. 289, line 11). The court charged the jury consistent with the language agreed upon during the charge conference. (R. p. 340, line 16 – p. 350, line 18). Horne raised no objection to the charge after it was given. (R. p. 350, lines 23-24). The court then submitted the case to the jury with the revised, two-question verdict form.

Later that day, the jury returned a verdict answering "No" on the verdict form finding that Clapp's negligence did not proximately cause of any of Horne's injuries. Horne did not raise any objections to the verdict before the jury was discharged. (R. p. 352, lines 3-19).

On June 30, 2023, Horne's counsel filed a motion seeking a new trial under Rule 50(b), Rule 59, and the thirteenth juror doctrine. (R. pp. 425-31). The trial court denied that motion

without a hearing in a Form 4 order entered on July 26, 2023. (R. pp. 2-4). Horne filed a motion to alter, amend, and reconsider on August 4, 2023, which the court denied on August 24, 2023. (R. pp. 439-41; R. pp. 5-7). Horne subsequently filed a notice of appeal on August 30, 2023. (R. pp. 445-53).

### **STANDARD OF REVIEW**

When reviewing the trial court's ruling on a motion for judgment notwithstanding the verdict, the court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). “The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt.” *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). “Moreover, ‘[a] motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.’” *Id.* (quoting *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998)). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418-19 (Ct. App. 2000). In deciding such motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. *Id.*

“Under the thirteenth juror doctrine, a trial court may grant a new trial if the judge determines the jury's verdict is contrary to the fair preponderance of the evidence. The trial court's discretion to grant or deny a new trial as the thirteenth juror is very broad.” *Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (internal citations omitted) (refusing to reverse the denial of a motion for new trial under the thirteenth juror doctrine). “The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock

the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives.” *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005) (quoting *Vinson v. Hartley*, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996)).

This Court “employ[s] a highly deferential standard of review when considering the trial judge's ruling on each of the grounds for a new trial ... recogniz[ing] the unique position of the trial judge to hear the evidence firsthand [and] evaluate the credibility of the witnesses...” *Burke*, 393 S.C. at 57, 710 S.E.2d at 89. “An order denying a new trial on [thirteenth juror doctrine] will hardly ever be reversed.” *Id.*, 393 S.C. at 55, 710 S.E.2d at 88.

## **ARGUMENTS**

### **I. APPELLANT FAILED TO PRESERVE FOR APPEAL HER OBJECTIONS TO THE JURY’S VERDICT AND TO THE VERDICT FORM.**

If, as Horne argues, she was entitled to a damages award based on a stipulation, then she had several ways to ensure that outcome. First, she should have objected to the jury’s verdict prior to the jury’s dismissal. Second, she should have challenged the court’s jury instructions, which clearly left the issue of proximate causation of damages to the jury. Third, to the extent Horne believed that the evidence could support the sole outcome that Clapp was liable to her for certain damages, she should have moved for a directed verdict. Finally, Horne should have objected to the verdict form on the grounds that it allowed the jury to find that Clapp did not proximately cause any of Horne’s injuries. If Horne had taken any of those steps, she could have preserved her contentions for appeal. However, she did not and thus her appeal must fail. Instead, Horne asks this Court to reverse the trial court’s order denying her motion for a new trial and overturn the

jury's verdict under Rule 50(b) and the thirteenth juror doctrine. However, the court need not decide if Horne is entitled to new trial because she failed to preserve these issues for appeal.

**A. HORNE FAILED TO PRESERVE HER OBJECTIONS TO THE ALLEGEDLY INCONSISTENT VERDICT WHEN SHE FAILED TO CHALLENGE THE VERDICT PRIOR TO THE JURY'S DISMISSAL.**

When a jury returns a verdict that is wholly unsupported by the evidence,<sup>2</sup> the losing party must act swiftly to allow the trial court to address that outcome. This Court has directly instructed trial courts and practitioners on the correct "procedure to use to cure a facially inconsistent and ambiguous verdict." *Stevens v. Allen*, 336 S.C. 439, 451, 520 S.E.2d 625, 631 (Ct. App. 1999), *aff'd*, 342 S.C. 47, 536 S.E.2d 663 (2000). In *Stevens*, the jury answered a verdict form posing the following interrogatory: "Do you find that the defendant ... was negligent and that such negligence proximately caused [the decedent's] injuries?" *Id.* Despite answering "yes", the jury returned a "zero verdict." *Id.*, 336 S.C. at 448, 520 S.E.2d at 630. In such a case, the trial judge "should inform the jury that he cannot accept their verdict ... send them back for further deliberations, ... [and instruct the jury] to assess a definite dollar amount in damages." *Id.*, 336 S.C. at 451, 520 S.E.2d at 631.

The procedure set out in *Stevens* relied on two well-established principles. First, a "court cannot lawfully enter judgment on an inconsistent or incomplete verdict." *Stevens*, 336 S.C. at 451, 520 S.E.2d at 631 (quoting *Krepps by Krepps v. Ausen*, 324 S.C. 597, 609, 479 S.E.2d 290, 296 (Ct. App. 1996)). Second, the court "cannot cure this inconsistent and ambiguous verdict *sua sponte*." *Stevens*, 336 S.C. at 451, 520 S.E.2d at 631.

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<sup>2</sup> As argued in Section II, the jury's verdict here was supported by substantial evidence showing that Horne's injuries were not proximately caused by Clapp's negligence.

For this latter point, this Court relied on the Supreme Court’s decision in *Smith v. Phillips*, 318 S.C. 453, 458 S.E.2d 427 (1995). In *Smith*, which involved a dispute between adjoining landowners over water damage claims, the jury found the plaintiff was liable for nuisance but awarded him zero damages. Although neither party challenged this inconsistent verdict at trial, the Court of Appeals reversed concluding “that such a verdict imposed a duty on the trial judge to reject it and to reinstruct the jury.” *Smith*, 318 S.C. at 455, 458 S.E.2d at 429. The Supreme Court disagreed, reversed the Court of Appeals, and held “there is no duty imposed on the trial judge to question a jury’s verdict of liability, but no damages, unless requested to by a party.” *Stevens*, 336 S.C. at 451–52, 520 S.E.2d at 631 (quoting *Smith*, 318 S.C. at 455, 458 S.E.2d at 429).

Critically, the Court in *Stevens v. Allen* determined that the estate preserved for appeal its challenge to the inconsistent verdict because it “moved for a new trial absolute and a new trial nisi additur immediately after the verdict was read and accepted.” 336 S.C. at 454, 520 S.E.2d at 632 (emphasis supplied). The necessity of promptly raising an issue with the jury’s verdict is clear: the trial court must be notified so that, before they are dismissed, the jury can be charged again and returned to the jury room to deliberate further. Failure to act promptly is fatal to preserving the issue for appeal. As this Court recently noted, “[s]ome post-trial motions—such as those seeking to correct or clarify an inconsistent verdict—must for practical reasons be made before the jury is discharged, or they are forever lost.” *Ex parte Travelers Home & Marine Ins. Co. v. Stringfellow*, 427 S.C. 238, 242, 830 S.E.2d 718, 720 (Ct. App. 2019) (emphasis supplied); *Campbell v. Robinson*, 398 S.C. 12, 26, 726 S.E.2d 221, 229 (Ct. App. 2012) (“When a jury renders an inconsistent verdict, the only remedies available at that moment are to resubmit the case to the jury or grant a new trial absolute”). Post-trial motions under JNOV or thirteenth juror doctrine are simply not the appropriate procedure for correcting an allegedly inconsistent verdict.

The procedure dictated in *Stevens* was not a novel approach. This Court articulated the same standard in *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990). The jury in *Page* returned a zero verdict for the plaintiff-husband for a loss of consortium claim in an action consolidated with the plaintiff-wife's negligence action arising from a motor vehicle collision. *Id.*, 303 S.C. at 118, 399 S.E.2d at 162. The defendants admitted liability for the accident and the jury awarded the plaintiff-wife \$44,000 for her injuries. The same jury simultaneously returned a "zero dollar" verdict for the plaintiff-husband. After the verdict "was published, counsel requested the judge to send the jury back to the jury room with instructions to write a verdict in his favor." *Page*, 303 S.C. at 119, 399 S.E.2d at 162. On appeal, this Court reversed the trial court's refusal to so instruct the jury.

Horne argues that the jury's verdict was "legally invalid," "plainly inconsistent," in disregard of the court's instructions, and "not a viable outcome under the stipulation's terms or in light of the evidence presented at trial." (Brief of Appl., pp. 4 & 6). Of course, Horne believed this was the case as soon as the jury returned its verdict. Her remedy was to request the court re-instruct the jury before they were dismissed. Because she failed to raise this objection at that time, her arguments are not preserved for appeal.

**B. HORNE FAILED TO OBJECT TO THE COURT'S JURY INSTRUCTIONS, WHICH DIRECTED THE JURY TO DETERMINE IF CLAPP CAUSED ANY OF HORNE'S INJURIES.**

Despite the style of Horne's arguments, she is unavoidably asserting that the court's jury instructions were inconsistent with the evidence and thus, in error. However,

No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.

Rule 51, SCRPC. It cannot be disputed that the court instructed the jury that Clapp stipulated that her negligence caused the accident and charged the jury to determine whether the accident proximately caused any of Horne's injuries. The court's instruction to the jury was no surprise<sup>3</sup> to Horne.

At the conclusion of Horne's case in chief, the court advised counsel that he would send a copy of the proposed jury charges by email over the lunch break. (R. pp. 274-75; R. p. 422; R. p. 354; R. p. 423). During the charge conference, the court and counsel first discussed the jury charge and addressed the effect of the stipulation on the jury's role. During that discussion, Clapp's counsel stated:

MR. SPEARS: Your Honor, on the negligence charge, it is stipulated that the defendant's negligence proximately caused the accident, and so what I would suggest would be the first sentence of the negligence charge, plaintiff claims that the defendant was negligent and should be compensated for the injuries plaintiff has suffered as a result of the defendant's negligence, and stop there, because they don't have to prove negligence. And so you can take out that second sentence in the first paragraph, and take out the next three paragraphs, and then where you pick back up you say the defendant has stipulated to her negligence in the case. And then the rest of that charge stays the same.

(R. p. 276, line 21 – p. 277, line 8).

The court and counsel subsequently had the following exchange about the jury charge:

THE COURT: Well, I think your position is you want to communicate to the jury that this is one thing that the defendant has agreed to without any objection to anybody else, and it was the defendant's stipulation. That may -- that's your position, but I think the correct -- the law is both have to -- a stipulation is an agreement between both and I'm going to leave it like it is, that the defendant and plaintiff have stipulated, but I don't have any problem with deleting where Mr. Spears has indicated we need to delete. Does that make sense to you?

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<sup>3</sup> Even if she hadn't participated in crafting the jury instructions, she could have raised this objection after the jury was charged. *Hennes v. Shaw*, 397 S.C. 391, 397, 725 S.E.2d 501, 505 (Ct. App. 2012) (finding the appellant's objection to a charge inconsistent with the pleadings timely when, as soon as the jury exited the courtroom, counsel objected to the jury charge).

MR. LUGINBILL: Yes, sir.

MR. SPEARS: And then I think that eliminates the need for on the next page the driver's duty of care, duty to keep a proper lookout, duty to keep the vehicle under control could all be removed.

THE COURT: I agree with that. Do you agree with that?

MR. LUGINBILL: Yes.

(R. p. 278, lines 2-18).

Based on that discussion, the court revised its proposed charges<sup>4</sup> on negligence as follows.

### NEGLIGENCE

~~The plaintiff claims that the defendant was negligent and should compensate the plaintiff for the injuries the plaintiff suffered as a result of the defendant's negligence. In order to prove that the defendant was negligent, the plaintiff must prove by a preponderance, or greater weight, of the evidence the following things.~~

~~First, the plaintiff must prove by a preponderance, or greater weight, of the evidence that the defendant owed the plaintiff a duty of care. This is a question of law which I will decide.~~

~~If I find there was a duty of care, you must then decide the remaining questions. The first of these is whether the plaintiff has proven by a preponderance, or greater weight, of the evidence that the defendant breached the duty of care by a negligent act or omission.~~

~~Negligence means that a person has done something that a reasonable person would not have done or has failed to do something that a reasonable person would have done in the same situation.~~

The defendant and plaintiff have stipulated to defendant's negligence in this case.

The plaintiff must also prove by a preponderance, or greater weight, of the evidence that he [she] suffered damages as a result of the defendant's breach of duty.

Finally, the plaintiff must prove by a preponderance, or greater weight, of the evidence that the damages were proximately caused by the defendant's breach of duty.

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<sup>4</sup> Changes to the court's proposed jury instructions proposed by Clapp's counsel, and agreed to by the court, are stricken out.

Proximate cause is something that produces a natural chain of events which, in the end, brings about the injury. It is the direct cause of the injury.

To prove that the defendant's negligence proximately caused the plaintiff's injury, the plaintiff must first prove causation in fact. This is proven by showing that the injury would not have occurred but for the defendant's negligence.

The plaintiff must also prove legal cause. Legal cause is proven by showing that the injury was foreseeable. This means that the injury occurred as a natural and probable consequence of the defendant's negligence. The plaintiff must prove that some injury from the defendant's negligence was foreseeable, but does not have to prove that the particular injury that occurred was foreseeable. However, the defendant cannot be held responsible for things which could not be expected to happen.

Proximate cause does not mean the only cause. The defendant's act can be a proximate cause of the plaintiff's injury if it was at least one of the direct, concurring causes of the injury.

Counsel for Horne clearly agreed to these changes to the jury instruction. (R. p. 278, lines 18-19). After some further discussion, the court stated:

THE COURT: All right. I think we're all on the same page with the charge. How about the verdict form?

(R. p. 279, lines 11-12).

What remained in the jury charge, without objection from Horne, was the proximate causation portion of the negligence formula.<sup>5</sup> The court further charged that "If you decide that the plaintiff is entitled to a verdict, your next step would be to decide how much money the defendant should be required to pay." (R. p. 345, lines 5-7) (emphasis supplied).

It is clear from the jury instruction that the court charged the jury to determine if Horne was entitled to any award for damages whatsoever. The court never instructed the jury to award

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<sup>5</sup> The court later explained its rationale for including the proximate cause charge by stating that "the jury still has to take the evidence that has been presented to them." (R. p. 280, line 21 – p. 281, line 9).

Horne damages for her chiropractic treatment nor did it charge the jury to award the \$1,055 for her chiropractic bills. Of course, Horne never asked the court to so instruct the jury. Horne therefore failed to preserve any objection to the court's jury instructions.

**C. HORNE FAILED TO PRESERVE HER OBJECTIONS TO THE VERDICT FORM BECAUSE HER ARGUMENTS AT TRIAL, AND HER PROPOSED VERDICT FORM, DID NOT RAISE THE SAME ISSUES ARGUED ON APPEAL.**

**1. Horne Argued at Trial for a Verdict Form Distinguishing Categories of Noneconomic Damages, but Left Unchallenged the Form's Proximate Causation Query.**

Appellant argues that she objected to the court's verdict form because it risked the jury "finding Clapp was not responsible for 'any' of Ms. Horne's alleged damages despite" the stipulation. (Brief of Appl., p. 3). However, the transcript tells a different tale. The "inconsistent" outcome Appellant identified to the trial court related only to the jury's allocation of any monetary award among categories of noneconomic damages. As she argued to the trial court, Appellant's purpose in offering an alternative verdict form was to "separate out economic and noneconomic damages" in light of the "38 noneconomic damages that South Carolina law acknowledges." (R. pp. 279-280). Noting Horne's objection, the court ruled that it would not ask "for the jury to figure out on a verdict form what noneconomic and economic damages are." (R. p. 282). However, at no point during the charge conference did Horne object to or obtain a ruling regarding the court's proposed proximate cause issue. Horne therefore waived any objections she may have had to the form's language asking the jury to determine if Clapp proximately caused Horne's injuries. *S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007) (to preserve an issue on appeal, it must be raised with sufficient specificity before the trial court and a ruling obtained); *Murray v. Bank of Am., N.A.*, 354 S.C. 337, 347, 580 S.E.2d 194, 199 (Ct. App. 2003)

(issue not preserved if party argues one ground when objecting at trial and a different ground on appeal).

After the parties agreed to the jury charges, the court heard arguments on the verdict form, which was also provided to counsel by email. The verdict form initially proposed by the court asked the jury to address three issues:

1. With regards to the automobile collision involving the plaintiff and defendant, was the defendant negligent?

\_\_\_\_\_ Yes. If yes, proceed to question 2.

Plaintiff and Defendant have stipulated to Defendant's negligence.

2. Was the defendant's negligence the proximate cause of any of the plaintiff's injuries?

\_\_\_\_\_ Yes. If yes, proceed to question 3.

\_\_\_\_\_ No. If no, sign below and deliberate no further.

3. As a result of the defendant's negligence, plaintiff suffered damages in the following amount:

\$ \_\_\_\_\_.

(R. p. 423).

Regarding the verdict form, Horne's counsel addressed the third (damages) issue, asking the court to have one line for economic damages and separate lines for different types of noneconomic damages. (R. p. 279, line 13 – p. 280, line 13). In response, Clapp's counsel stated that Clapp disagreed and felt the third (damages) issue was sufficient as laid out by the court. (R. p. 280, lines 15-17). However, Clapp's counsel suggested that, in light of the stipulation on negligence, the court eliminate the first issue—was the defendant negligent—and leave the remaining two. (R. p. 280, lines 18-20). Horne's counsel responded:

MR. LUGINBILL: Sort of the way I would propose setting it up is -- and I agree with Mr. Spears that was the defendant's negligence the proximate

cause of injuries. We do it that way because they've admitted some are and some aren't, that's just going to be a problem, that would create an issue.

(R. p. 281, lines 10-15).

The court and Horne's counsel then had the following exchange:

THE COURT: Okay. I'll strike number one. In other words number [1] will be what is -- was the defendant's negligence the proximate cause of plaintiff's injury, three, and number [2] will be as a result of the defendant's negligence plaintiff suffered damages in the following amount. I'm not going to divide it in this particular case between economic and noneconomic.

MR. LUGINBILL: Your Honor, if I may just preserve the record, I would like to submit a proposed verdict form that I understand you're not adopting, but to --

THE COURT: That's fine. And I note your objection for the record, and you submit whatever you believe is an appropriate verdict form. However, I'm not going to, in this particular case at this point, have to now for the jury to figure out on a verdict form what noneconomic and economic damages are, that might be confusing when they've heard sort of the whole ball of wax it hadn't been differentiated necessarily in the trial, so I'm going to leave it like it is. But I'll note your objection.

MR. LUGINBILL: I understand, Your Honor.

(R. p. 281, line 16 – p. 282, line 10).

Consistent with this exchange, and in conformity with the jury instructions, the court removed the first question. The verdict form submitted to the jury containing the following two questions:

1. Was the defendant's negligence the proximate cause of any of the plaintiff's injuries?

\_\_\_\_\_ Yes. If yes, proceed to question 2.

\_\_\_\_\_ No. If no, sign below and deliberate no further.

2. As a result of the defendant's negligence, plaintiff suffered damages in the following amount:

\$ \_\_\_\_\_.

(R. p. 1).

Thus, the jury was invited to determine, as a threshold matter, whether Clapp's admitted negligence was the proximate cause of any of Horne's injuries. Although Horne voiced objections about the content of the verdict form, her objections were not directed at the initial question presented to the jury.

Horne argued that her proposed form was superior in that it would avoid the risk of an "inconsistent verdict, or how did they get to the number that was on the total damages amount." (R. p. 280, lines 5-8). After hearing Horne's arguments, the trial court concluded that it was "not going to divide it in this particular case between economic and noneconomic" damages and cited the risk of jury confusion. (R. p. 281, lines 16-22). On cue, Horne's counsel reiterated his objection and requested permission to submit an alternative form, which differed substantively from the court's form only in that it listed the damages categories.<sup>6</sup> However, an "issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014).

In *Stephens v. CSX Transp., Inc.*, the defendant-railroad admitted to breaching a statutory duty and stipulated to the accuracy of evidence demonstrating that breach. 415 S.C. 182, 196, 781 S.E.2d 534, 541 (2015). The plaintiff's theory in *Stephens* was that he was entitled to a directed verdict because the defendant admitted that it failed obey a statute requiring an engineer sound a train whistle at a specific distance from a rail crossing. The court affirmed the denial of the plaintiff's post-trial JNOV motion because he failed to renew a directed verdict at the close of

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<sup>6</sup> The format of Horne's alternative form dovetailed perfectly with her closing argument suggesting \$10,000 to, \$20,000 for pain and suffering, \$100,000 to \$125,000 for mental suffering, \$100,00 for apprehension, and \$75,000 to \$100,000 for anxiety. (R. p. 303, lines 18-23; R. p. 312, line 24 – p. 313, line 9). Combined with the medical bills related to the InterStim device replacement, Horne's counsel recommended to the jury a "ballpark" verdict of \$750,000 to \$900,000. (R. p. 314, lines 6-8).

evidence. As an additional sustaining ground, the court noted the plaintiff's failure to timely object to the verdict form. *Id.*, 415 S.C. at 196, 781 S.E.2d at 541.

Despite the defendant's concessions, the special verdict form in *Stephens* "asked the jury to consider all elements<sup>7</sup> of his negligence claim," including whether CSX breached its duty of care. *Stephens*, 415 S.C. at 196, 781 S.E.2d at 541. Similarly, Horne failed to object to the proximate cause language in the verdict form despite its invitation for the jury to consider whether Clapp's conduct was the proximate cause of **any** of the plaintiff's injuries. "When an appellant acquiesces to the trial court's ruling, that issue cannot be raised on appeal." *Stephens*, 415 S.C. at 196, 781 S.E.2d at 541-42 (quoting *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597, 608 (Ct. App. 2012)).

Horne's objections to the verdict form were unrelated to her belated concerns regarding the jury's task to assess whether Clapp's negligence caused Horne any damages. Because she failed to raise these objections to the court, she has waived her argument. Therefore, Horne's complaints about the verdict form are not preserved for appeal.

## **2. The Verdict Form Proposed by Horne Demonstrates that She Failed to Challenge the Proximate Cause Language with the Trial Court.**

Horne argues that her proposed verdict form adequately raised to the trial court the risk that the court's "defective" form<sup>8</sup> would allow the jury to conclude that Clapp's conduct did not cause Horne's injuries. If that were the case, then it would be apparent from the language of her alternate

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<sup>7</sup> "To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages." *Stephens*, 415 S.C. at 196-97, 781 S.E.2d at 542 (quoting *Lord v. D & J Enters., Inc.*, 407 S.C. 544, 558, 757 S.E.2d 695, 702 (2014)).

<sup>8</sup> A verdict form is defective if, when reviewed, the trial court "cannot determine whether the jury intended to render a verdict for the plaintiff or defendant." *Campbell*, 398 S.C. at 26, 726 S.E.2d at 229 (citing *Stevens*, 336 S.C. at 450-51, 520 S.E.2d at 630-31). The verdict form employed here was not defective because the only reasonable inference to draw is that the jury concluded that Horne's injuries were not caused by the accident.

form, especially in hindsight. In fact, as it relates to the question of proximate cause, there is virtually no difference between the questions posed to the jury by the court's form and Horne's proposed form.

The court's form asked whether "the defendant's negligence [was] the proximate cause of any of the plaintiff's injuries." (R. p. 423). Horne's form instead asked whether Clapp's "admitted negligence was the proximate cause of the following damages." This is a distinction without a difference. Moreover, the jury could still have answered Horne's proposed form with an adverse verdict by simply filling in all the blanks with zeros. (R. p. 424). Therefore, the court should not credit Horne's proposed verdict form for preserving her appeal because that form is inconsequential to the issues she now argues.

**D. HORNE WAIVED HER ARGUMENT THAT THE JURY'S VERDICT WAS INCONSISTENT WITH THE EVIDENCE BY FAILING TO MOVE FOR DIRECTED VERDICT.**

Appellant's Rule 50(b) motion for judgment non obstante veredicto ("JNOV") is defective because she did not move for a directed verdict at trial. Therefore, she relies instead on the thirteenth juror doctrine on appeal.

In her first issue on appeal, Horne blames the verdict form for allowing the jury to decide that none of her damages were caused by Clapp's admitted negligence. Appellant is essentially asserting that, as a matter of law, the stipulation entitled Horne to a damages award for her chiropractic care. However, Horne never moved for a directed verdict.

If Clapp was liable, as a matter of law, to Horne for the chiropractic care she received after the accident, it was Horne's responsibility to ask the court to so rule before handing the case to the jury. She failed to do so and cannot now complain that the verdict denied the relief she could have obtained from the court. Horne's failure to move for a directed verdict is fatal to her appeal from

the order denying her new trial motion under Rule 50(b). “A motion for judgment notwithstanding the verdict is limited to the grounds stated in the motion for directed verdict.” *Marsh v. S.C. Dep’t of Highways & Pub. Transp.*, 298 S.C. 420, 423, 380 S.E.2d 867, 869 (Ct. App. 1989) (citing Rule 50(b), SCRCP); see also *Stephens*, 415 S.C. at 196-97, 781 S.E.2d at 541-42 (holding that a party cannot move for JNOV post-trial where it failed to move for a directed verdict at the close of all evidence); *Peay v. Ross*, 292 S.C. 535, 537, 357 S.E.2d 482, 483 (1987) (“an objection to the sufficiency of the evidence cannot be raised for the first time in a motion for a new trial; a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict.”).

## **II. THE TRIAL COURT CORRECTLY DENIED APPELLANT’S NEW TRIAL MOTION UNDER THE THIRTEENTH JUROR DOCTRINE BECAUSE THE VERDICT WAS NOT INCONSISTENT WITH THE EVIDENCE OR CONTRARY TO LAW.**

The trial court correctly refused to grant a new trial under the thirteenth juror doctrine<sup>9</sup> because the jury’s conclusion that that the accident was not the proximate caused any of Horne’s injuries was consistent with evidence presented at trial. South Carolina's thirteenth juror doctrine is so named because it entitles the trial 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.” *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). Horne cannot meet her burden on this record.

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<sup>9</sup> As addressed in Section I, D above, Horne must seek relief under the thirteenth juror doctrine because she never moved for a directed verdict. Accordingly, to the extent she argues for relief under Rule 50(b), this effort must fail.

**A. THE VERDICT WAS CONSISTENT WITH EVIDENCE PRESENTED AT TRIAL.**

**1. A Jury Is Not Required to Credit Evidence as True Merely Because it is Uncontested.**

On appeal, Horne argues that the jury's verdict was "foreclosed by stipulated facts and undisputed evidence" and must be overturned as a matter of law. (Brief of Appl., p. 7). However, this Court has already weighed this simple question: "must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no." *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (finding that despite an absence of witnesses directly contradicted the plaintiff's testimony, or that of her doctors, the jury had a right to determine that she was not injured in the minor accident).

When, as here, a plaintiff seeks extraordinary damages from a relatively minor traffic accident, the jury is entitled to weigh that plaintiff's credibility in light of her obvious interest in the outcome of the trial. That interest is "sufficient to cast doubt" on the plaintiff's credibility. *Black*, 306 S.C. at 198, 410 S.E.2d at 596. Horne testified that she had no pain at the time of the collision, drove her car from the scene to her chiropractor's office, and didn't even mention the wreck at her previously scheduled chiropractic appointment that evening. Despite the relatively minor collision, Horne's counsel argued to the jury in closing that she was entitled to an award between "\$750,000 to ... \$900,000." (R. p. 314).

Even when evidence is not contradicted directly, that does not mean that it is undisputed as a matter of law. "There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation. 'If there is anything tending to create distrust in his [or her] truthfulness, the question must be left to the jury.'" *Black*, 306 S.C. at 198, 410 S.E.2d at 596 (emphasis supplied) (quoting *Terwilliger v. Marion*, 222

S.C. 185, 188, 72 S.E.2d 165, 166 (1952)). Horne's plea for an extraordinary award, coupled with the inconsistent testimony of causation, undermines her right to relief under the thirteenth juror doctrine.

**2. The Jury Heard Evidence Supporting Its Verdict That the Accident Did Not Proximately Cause Any of Horne's Alleged Injuries.**

The jury's verdict was consistent with evidence at trial undermining Horne's claim that the accident proximately caused her injury. The jury heard abundant evidence of Horne's pre-existing neck and back pain. The evidence also called into question the severity of the accident and whether any of Horne's claimed damages were actually caused by the collision. Thus, there was much evidence at trial supporting the jury's verdict that the accident did not proximately cause Horne any injury.

At trial, Horne offered evidence that nine months before the accident, on June 1, 2017, she was treated by a chiropractor named Dr. Jessica Bradburn for complaints of sciatica pain. (R. p. 145, lines 2-6). On that date, Horne reported severe back pain in her left lower back for the previous four weeks. (R. p. 259, lines 19-21). In the following months, she received periodic treatment from Dr. Bradburn. (R. p. 148, line 25 – p. 149, line 6). Also in June of 2017, Horne complained of "severe pain in her lower left back" to her general practitioner. (R. p. 258, line 25 – p. 259, line 24). She was diagnosed with degenerative disc disease and spinal stenosis in the vertebrae of the lumbar spine. (R. p. 260, lines 16-23; R. p. 261, line 16 – p. 262, line 2). On February 12, 2018, three days before the accident, Horne was given a spinal adjustment to her cervical and thoracic spine. (R. p. 147, line 11 – p. 148, line 21).

On February 15, 2018, Horne was on her way to her chiropractor's office for a previously scheduled appointment when this accident occurred. (R. p. 224, line 9 – p. 225, line 1). Horne testified that she did not have "any pain or problems from the accident." (R. p. 244, lines 8-12).

She further testified that the airbags in her vehicle did not deploy and her car was still drivable. (R. p. 244, lines 13-15; R. p. 251, lines 12-17). Immediately after the accident, Horne drove herself to her chiropractor's office for her appointment.

Horne said nothing to her chiropractor about the accident and reported no new complaints during that visit. (R. p. 244, line 8 – p. 245, line 1). That chiropractor, Dr. Bradburn, testified at trial and confirmed that she had no record or recollection of Horne telling her about the accident or any new injuries during the February 15, 2018, visit. (R. p. 150, lines 2-10).

Horne returned to Dr. Bradburn's office on February 19, 2018. Contrary to Horne's testimony that she had no pain or problems at the time of the accident, Dr. Bradburn informed the jury that Horne reported on that date that her neck had been sore immediately after the accident. (R. p. 152, lines 4-6). Horne also reported that her neck, upper back, and right arm were sore, but the accident did not restrict her work activities. (R. p. 248, line 11 – p. 249, line 10).

Horne's husband, Donald Horne, testified that Horne called him from the accident scene, that she was not scared or upset, and that he believed she was okay. (R. p. 198, lines 6-13). Mr. Horne further testified that when Horne returned home from her chiropractic visit, she seemed "[s]hook up, nervous, but good." (R. p. 199, lines 6-8). Donald Horne testified that he examined the vehicle and it "didn't look too bad, mainly scuffs and scratches." (R. p. 199, line 17 – p. 200, line 25).

Further, an abundance of evidence was presented contradicting Horne's claim that her InterStim device was damaged in the accident. The jury was told that a urologist, Dr. Manish Patel, installed the device in December 2013, and that it had a limited life of only five to seven years. (R. p. 218; R. p. 243, lines 2-7). During the first five years after the unit was installed, it

required reprogramming several times to increase the amplitude in order to maintain the same therapeutic benefit. (R. p. 221, lines 9-25).

One month after the accident, Horne reported to Dr. Patel that there were no complications with the InterStim unit. (R. p. 227, lines 16-19). During that visit, Horne reported she was “doing a thousand times better” since the last reprogramming. (R. p. 256, lines 3-8). Eight months after the accident, Horne visited Dr. Patel again and reported the InterStim device was working well and she was still happy with the results. (R. p. 256, lines 9-17). Horne testified that she first mentioned the accident to Dr. Patel in May of 2019. (R. p. 256, line 24 – p. 257, line 5).

Despite the long delay between the accident and problems with the InterStim device, Horne argued that the device’s failure,<sup>10</sup> and the hefty medical bills for its replacement,<sup>11</sup> resulted from Clapp’s negligence.

On those facts, there was plenty of evidence from which the jury could conclude that the accident did not proximately cause Horne any injury. “[W]here, as here, .... conflicting evidence exists on the contested issues, a circuit court's decision to [refuse to] sit as a thirteenth juror and grant a new trial absolute is inviolable.” *Ex parte Travelers Home & Marine Ins. Co.*, 427 S.C. at 244-45, 830 S.E.2d at 722. Consequently, the trial court’s denial of Horne’s motion for a new trial under the thirteenth juror doctrine should be upheld.

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<sup>10</sup> At closing, Horne told the jury, “[i]f you think [the accident] fractured the leads and caused the damage to the modulator then you would check yes, it's as simple as that.” (R. p. 313, lines 21-23).

<sup>11</sup> As noted, the first InterStim device failed after five years, which is within the range of its expected useful life. In June of 2019, Dr. Patel replaced the unit with one having a predicted life of three to three-and-a-half years. (R. p. 243, lines 8-22). Right on time, the second device had to be replaced in January of 2023. *Id.* Despite this evidence, Horne asked the jury to compensate her for the expenses related to all three devices.

**3. Horne Erroneously Relies on *Lane v. Gilbert Construction Co., Ltd.***

Horne's reliance on *Lane v. Gilbert* misses the underlying premise of the Supreme Court's analysis. 383 S.C. 590, 599, 681 S.E.2d 879, 883 (2009). *Lane* demonstrates the level of deference due to a trial court's decision to grant or deny a motion for new trial under the thirteenth juror doctrine. Appellate review of that decision "is limited to consideration of whether evidence exists to support the trial court's order." *Lane*, 383 S.C. at 597-98, 681 S.E.2d at 883 (finding that the existence of conflicting evidence is sufficient to affirm a ruling on a motion under the thirteenth juror doctrine). Because of the standard of review employed, the court's opinion in *Lane* does not operate as a guide for courts to follow when presented with a similar factual pattern. It is the trial court's assessment of the evidence to which the reviewing court must defer.

Horne's ability to point to some evidence contrary to the verdict is insufficient because the issue before this Court is whether the decision to deny a new trial "is wholly unsupported by the evidence." *Lane*, 383 S.C. at 600, 681 S.E.2d at 884. Although the trial court in *Lane* found that certain damages were "uncontested" in part because of the defendant's attorney's admission during arguments, this does not suggest that an admission displaces significant evidence contrary to the fact admitted. The lesson remains that on review, deference is given to the trial court's decision so long as there is any evidence in support.

Of course, Horne does not rely on the similar case of *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (Ct. App. 2011). In *Curtis*, which also involved a vehicle accident, the defendant admitted his negligence caused the accident, thus leaving for the jury only whether the accident proximately caused plaintiff's injuries and the monetary value of such injuries. 392 S.C. at 499, 709 S.E.2d at 81. After the jury returned a \$450,000.00 verdict, the defendant moved for a new trial under the thirteenth juror doctrine, which the court denied. On appeal, this Court affirmed that

decision for the same reason the court in *Lane* did: the narrow scope of review requiring only the existence of some evidence to support the trial court's ruling. 392 S.C. at 505-06, 709 S.E.2d at 85. That the defendant pointed to substantial evidence<sup>12</sup> contradicting the plaintiff's alleged damages did not alter the limited scope of review applied to the trial's court's order denying a new trial.

The lesson from both *Lane* and *Curtis* is the same. Horne carries the burden to show not that she presented evidence contrary to the verdict, but that there is no evidence to support Judge Hall's decision to deny her motion for a new trial. "Resolving disputes over the conflicting versions of the facts and the correct inferences to draw from those facts falls squarely within the jury's role as finder of fact." *First S. Bank v. S. Causeway, LLC*, 414 S.C. 434, 452, 778 S.E.2d 493, 502 (Ct. App. 2015) (denying a new trial under the thirteenth juror doctrine). Here, because there was ample evidence to support the jury's verdict, the trial court's denial of Horne's motion for new trial should be affirmed.

**B. THE VERDICT WAS CONSISTENT WITH THE JURY CHARGES AND VERDICT FORM, WHICH PROPERLY ASKED THE JURY TO DECIDE WHETHER CLAPP PROXIMATELY CAUSED HORNE'S DAMAGES.**

Horne argues that she is entitled to a new trial because the verdict form was defective and because the jury disregarded the court's instructions. However, the verdict was entirely consistent with the court's instructions to the jury. When an appellate court reviews an alleged error in a jury

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<sup>12</sup> Evidence contrary to the jury's verdict in *Curtis* included that the plaintiff: had medical expenses and lost wages totaled less than \$7200; did not request medical attention at the accident scene and did not go to an emergency room until one month later; did not take his prescribed medications; was released by his chiropractor after only four treatments; and, reported to a physician that he was no longer in pain. At trial the plaintiff contradicted this evidence by claiming the treatments were not helping him and he was concerned about the expenses. *Curtis*, 392 S.C. at 502, 709 S.E.2d at 83.

charge, it “must consider the court’s jury charge as a whole in light of the evidence and issues presented at trial.” *Stephens*, 415 S.C. at 197–98, 781 S.E.2d at 542 (quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). If the “verdict was not inconsistent ... the court [does] not err in denying [the appellant’s] motion for a new trial under the thirteenth juror doctrine.” *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d 565, 571 (Ct. App. 2013).

Whatever the statements of the parties regarding the stipulation, the trial court determined the scope of the stipulation<sup>13</sup> that would be charged to the jury. As discussed above, Judge Hall reviewed the stipulation at length during the charge conference and announced the decision to charge only that “plaintiff and defendant have stipulated to defendant’s negligence.” (R. p. 280, line 21 – p. 281, line 9). The court explained that “the jury still has to take the evidence that has been presented to them.” *Id.* This was within the court’s prerogative. “A stipulation entered into between counsel which materially affects conduct of litigation ... is subject to the consent of the judge.” *Porter Bros. v. Specialty Welding Co.*, 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985) (quoting 83 C.J.S. *Stipulations*, Section 17 at 39 (1953)). As discussed below, because the stipulation cited by Horne was not entered into evidence, the charge was not inconsistent with the evidence before the jury.

That charge clearly instructed the jury that Horne was required to prove by a preponderance of the evidence that she suffered damages as a result of the defendant’s breach of duty, and that her damages were proximately caused by Clapp’s conduct. (R. p. 344, line 5 – p. 345, line 5). The court further charged that “If you decide that the plaintiff is entitled to a verdict, your next step

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<sup>13</sup> This decision was not in error. The court was certainly aware of the abundant evidence conflicting with a Horne’s claims that her need for chiropractic care were caused by the accident.

would be to decide how much money the defendant should be required to pay.” (R. p. 345, lines 5-7) (emphasis supplied). In other words, the charges clearly instructed the jury to determine whether any of Horne’s claimed damages resulted from Clapp’s admitted negligence.

Horne never challenged the jury charge. Her argument on appeal that the charge was not “clear and cogent” is therefore not before the appellate court. In any case, Horne never identifies how the instructions are inconsistent with the law. *Sapp*, 402 S.C. at 510, 741 S.E.2d at 570 (“The trial court need only charge the current and correct law of South Carolina”). An unchallenged jury charge must be presumed sufficiently consistent with the evidence to cure the alleged deficiency in the verdict form.

A verdict form is defective if it was “unduly suggestive or misleading,” *S.C. Dep’t of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 304, 641 S.E.2d 903, 908 (2007). Because the jury’s verdict was consistent with the jury charge, any critique of the verdict form<sup>14</sup> is incomplete unless the charges were challenged. This is because the verdict form is not viewed in isolation. Instead, “[i]n evaluating the prejudicial effect of a defective special verdict question ... the court must consider the question ... along with the instructions given to the jury.” *Id.*, 372 S.C. at 303, 641 S.E.2d at 908 (citing *Fortune v. Gibson*, 304 S.C. 279, 282, 403 S.E.2d 674, 675 (Ct. App. 1991)).

Horne cannot credibly argue that the verdict form was “unduly suggestive or misleading” because her proposed form posed a nearly identical interrogatory to the jury. Absent an instruction to the jury that they were required to award Horne specific damages, a charge that was not given and which Horne did not request, she cannot claim that the verdict form was defective.

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<sup>14</sup> As argued in Section I, C Horne failed to effectively preserve her objections to the verdict form because the arguments raised at trial were not consistent with the errors she now claims.

**C. THE STIPULATION ENTITLED HORNE TO NEITHER A VERDICT IN HER FAVOR NOR A NEW TRIAL.**

**1. That Negligence in Causing the Accident was Stipulated to Does Not Render the Jury's Verdict Inconsistent.**

Horne argues that the parties' stipulation mandated that the jury<sup>15</sup> return a damages award. However, "[i]n a personal injury action, a determination of negligence, standing alone, does not entitle a plaintiff to a favorable verdict as a matter of law." *Hinds v. Elms*, 358 S.C. 581, 586, 595 S.E.2d 855, 858 (Ct. App. 2004) (affirming trial court's denial of motion for new trial absolute where jury returned defense verdict despite directed verdict for the plaintiff on issue of the defendant's simple negligence).

Without objection, the court charged the jury that the parties stipulated that Clapp was negligent in causing the accident but reserved the question of proximate causation to the jury's view of the evidence. This was not error. "A determination of negligence, standing alone, is a far cry from a determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence." *Hinds*, 358 S.C. at 585, 595 S.E.2d at 857. Judge Hall's jury instruction made clear that only the first two elements of the negligence cause of action were determined by the stipulation.

**2. Horne Waived Her Right to Rely on Any Stipulation as to Proximate Cause.**

In this case, the parties, through their counsel, entered into an agreement that they referred to as a "stipulation" with respect to certain matters. However, the stipulation does not appear in

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<sup>15</sup> The cases cited by Horne regarding the binding effect of stipulations involve actions tried without a jury and are inapposite to the issues in this appeal. See e.g. *Griffith v. Griffith*, 332 S.C. 630, 506 S.E.2d 526 (Ct. App. 1998) (family court trial); *Belue v. Fetner*, 251 S.C. 600, 164 S.E.2d 753 (1968) (bench trial); *Indep. Grain Dealers Mktg. Ass'n, Inc. v. Beard*, 284 S.C. 309, 326 S.E.2d 169 (Ct. App. 1985) (action tried before a master with all facts stipulated to by agreement of the parties).

the record in a form that complies with Rule 43(k) of the South Carolina Rules of Civil Procedure, and its precise terms were unclear.<sup>16</sup> See Rule 43(k), SCRCP (“No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.”); see also *Reed v. Associated Invs. of Edisto Island, Inc.*, 339 S.C. 148, 152, 528 S.E.2d 94, 96 (Ct. App. 2000) (noting that the purpose of Rule 43(k) is, *inter alia*, “to prevent disputes as to the existence and terms of agreements and to relieve the court of the necessity of determining such disputes”). Horne, as the appealing party, had the burden of furnishing a sufficient record from which the appellate court can make “an intelligent review.” *Hennes*, 397 S.C. at 402, 725 S.E.2d at 507 (citing *Sweatt v. Norman*, 283 S.C. 443, 448, 322 S.E.2d 478, 481 (Ct. App. 1984)); Rule 210(h), SCACR (“the appellate court will not consider any fact which does not appear in the Record on Appeal”).

Because the terms of the stipulation were not placed into the record, the trial court interpreted the stipulation in its sound discretion. *Milton P. Demetre Family Ltd. P'ship v. Beckmann*, 413 S.C. 38, 50, 773 S.E.2d 596, 603 (Ct. App. 2014) (“The interpretation of a stipulation is addressed to the sound discretion of the court and will not be reversed on appeal

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<sup>16</sup> Although counsel referred to a stipulation at various points throughout the trial, the precise terms of that agreement are not contained in the trial transcript. Moreover, as Horne conceded in her Motion for New Trial, the “final” stipulation lacked terms the parties intended to insert into the written document. (R. p. 426, fn. 1). On the final day of trial, Clapp’s counsel identified a copy of a written stipulation as Defendant’s Exhibit No. 15. However, when Horne’s counsel objected to several of the Defendant’s exhibits, Mr. Spears retracted this exhibit and recharacterized it as Court’s Exhibit No. 5. (R. pp. 16-17; R. p. 284, line 19 – p. 285, line 2; R. p. 287, lines 4-20). The Court’s Exhibits were never entered into evidence, and there is no indication that the jury ever heard or read the final terms of the stipulation. The written stipulation is likewise not part of the record on appeal.

absent an abuse of that discretion." ). In exercise of that discretion, the trial court instructed the jury that the parties had a stipulation as to Clapp's negligence but left to the jury the determination of whether such negligence proximately caused any of Horne's damages.

As discussed previously, Horne made no objection at trial to the trial court's statement of the parties' stipulation in the jury charge. Horne did not object to the submission of the issue of proximate cause to the jury. Horne did not move for a directed verdict that she was entitled as a matter of law to \$1,055 in damages on the basis of the parties' stipulation. And, Horne permitted without objection—and her counsel in fact elicited from Horne and others—testimony inconsistent with the any stipulation as to proximate cause. *See supra*, Section II, A, 2. On those facts, Horne waived her right to rely upon any stipulation as to proximate cause, if a binding stipulation on that issue existed. *See Stephens*, 415 S.C. at 196-97, 781 S.E.2d at 541-42 (party waived the right to rely on an admission of negligence where it failed to move for a directed verdict at the close of all evidence and further approved a special verdict form that asked the jury to consider all elements of negligence, including breach of duty); *Bonnette v. State*, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) ("Acts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver."); see also *Houston First Am. Savs. v. Musick*, 650 S.W.2d 764, 769 (1983) (a party relying on an opponent's factual admissions "must protect his record by objecting to the introduction of evidence contrary to that admission of fact and by objecting to the submission of any issue bearing on the fact admitted").

## CONCLUSION

Appellant is not entitled to prevail on appeal because she did not take the actions necessary at trial to preserve the exceptions she now relies upon. Horne should have objected to the jury's verdict prior to the jury's dismissal, but she did not. She had every opportunity to challenge the court's jury instructions, but she acquiesced. Horne could have moved for a directed verdict if she was entitled to prevail on her claims for chiropractic treatment. Once again, she declined to so move. Finally, Horne's objections to the verdict form were inconsequential to the arguments she now raises. This Court should pass on her request to reverse Judge Hall's order denying her motion for a new trial because the evidence at trial validates the jury's defense verdict. For these reasons, Respondent respectfully requests the Court affirm the trial court's denial of Appellant's motion for a new trial.

Respectfully Submitted,

By: *s/Todd Russell Flippin*

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Spartanburg, South Carolina

May 28, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LANCASTER COUNTY  
Court of Common Pleas

The Honorable Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-001405

Linda C. Horne,.....Appellant,

v.

Kelsey Rae Clapp,.....Respondent.

**PROOF OF SERVICE**

The undersigned hereby certifies that, on May 28, 2024, he served Appellant’s counsel with the **Respondent’s Final Brief** at the email address listed below pursuant to Rule 262(c)(3), SCACR and Section (d)(1) of the South Carolina’s Supreme Court’s August 25, 2021, Order No. 2021-08-25-02.

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