

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Nancy Arellano, as Parent and Natural
Guardian of Minor Z.A.,

Plaintiffs,

vs.

School District No. Two of Lexington County,
State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Civil Action No. 2022CP3202339

ORDER ON POST-TRIAL MOTIONS

RECEIVED
APR 03 2025
SC Court of Appeals

Heard: February 7, 2025 via Webex Virtual Courtroom
Plaintiff's Attorney:
Defense Attorney:
Court Reporter: None – Webex Recording Procedure

Post-trial motions were filed by the defendant following a jury verdict¹ that awarded the plaintiff \$245,000, actual damages. The defendant moves for judgment notwithstanding the verdict (JNOV), a new trial absolute, a new trial nisi additur, and a new trial under the Thirteenth Juror Doctrine. The motions are respectfully denied.

This lawsuit was brought by the mother of a young child on behalf of herself and her daughter concerning an incident that occurred at Cayce Elementary School on May 25, 2022. The case was submitted to the jury only as it related to the minor's claim. The child was attending school as a 5-K student (6 years of age) and in a classroom with a teacher and a teaching assistant while a movie was being shown. A male student left his seat, walked over to the child, and assaulted her. The Complaint alleged that the male student pulled down her pants, touched her private parts, held her forcibly, and kissed her, inserting his tongue into her mouth. Another young

¹ The trial was conducted October 7 through October 10, 2024.

student promptly went to the teacher and reported what had taken place, though the teacher testified that the student who reported the incident never said that the male student touched Z.A. This lawsuit was based on allegations of gross negligence concerning what the school officials did and failed to do during and after the incident.

Essentially, there was an evidentiary dispute where the school officials claimed that they would have seen such an incident take place, that they did not, and that they indicated to the child that the event had not happened. The plaintiff also raised a claim that school officials were grossly negligent in determining that the events described by the child raised concerns about whether she had suffered sexual abuse from others, possibly at home, and that these concerns had to be reported to the South Carolina Department of Social Services. The child resided with an older male sibling, and there was an investigation which was ended without a finding of impropriety at the home. A directed verdict was granted on this issue, and the jury was instructed that they could not find for the plaintiff concerning the reporting to DSS or the investigation due to mandatory reporting laws.

The child testified, without objection to her qualifications as a witness. She is a very emotional child who cries easily and cried repeatedly while testifying. Her teacher testified that she began crying loudly immediately after the teacher was advised of the incident. The plaintiff's claim is that she suffered and continues to suffer emotional trauma and mental anguish. The child's sister and mother testified, in addition to her brother, and they were permitted to tell the jury many things that were not based on firsthand knowledge – things that the child had indicated to them – without objection. Essentially, the plaintiff's position is that the child was traumatized by school officials not properly supervising the classroom and calling her a "liar." Testimony was elicited that the child has nightmares where she screams out, has panic attacks where she cannot breathe, that her demeanor changed, that she developed issues dealing with boys, and that she began stuttering, which she had never done before.

A Licensed Professional Counselor testified for the plaintiff. She stated that she is certified in treatment and assessment of trauma and assists children aged 2 through 18 years. She is also certified in play therapy and positive parenting. She has a masters degree in professional counseling and testified that she is halfway through courses to complete her doctorate. She diagnosed this child as having an adjustment disorder with symptoms of depression and anxiety. She indicated that the child is permanently affected by the incidents. She said that the child is still having panic attacks and may be diagnosed with post-traumatic stress disorder.

The child was moved to another school after the incident. It was reported that her grades had declined and that she misses her friends from Cayce Elementary. The expert testified that there is no way to know exactly how many treatment sessions might be required for the child to recover.

ERROR IN FAILING TO CHARGE JURY: The defendant's first argument was that the court erred in failing to charge the jury on a provision of the South Carolina Tort Claims Act granting protection of governmental entities from criminal acts of third parties. While the court acknowledges that some of the alleged misconduct concerned the action of a very young child in perpetrating a sexual assault and that others may view the charge appropriate, the criminal act alleged was committed by a 6-year-old child, so it is doubtful that that child could be considered to fall within the protections afforded by the Tort Claims Act because of his age. Perhaps more significantly, the Complaint seeks recovery for the acts and omissions of school officials in failing to supervise, but also with the way they handled the aftermath. The child's major source of trauma was asserted to be how she was treated by school officials. The motion for a new trial on the failure to charge the exemption is denied.

STANDARDS FOR NEW TRIAL ABSOLUTE, JNOV, and NISI REMITTITUR: A new trial absolute is permitted when "the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the

result of passion, caprice, prejudice, partiality, corruption or some other improper motives.”

Waring v. Johnson, 341 S.C. 248 at 257, 533 S.E.2d 906 (Ct.App. 2000). Judges may to grant a new trial upon finding that justice has not prevailed. *See, Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App. 1993). A judge may also grant a new trial if the verdict reflects juror confusion. However, a jury verdict should be upheld when it is possible to do so and carry into effect the jury’s clear intention. *See, Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983).

In *Riley v. Ford Motor Company*, 414 S.C. 185, 777 S.E.2d 824 (2015), our Supreme Court stated:

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 530–31, 431 S.E.2d 557, 558 (1993) (citing *Easler v. Hejaz Temple*, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985)). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial *nisi*." *Id.* at 531, 431 S.E.2d at 558 (citing *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Id.* (citing *Easler*, 285 S.C. at 356, 329 S.E.2d at 758).

"Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge." *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) (quoting *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973)). "His exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law." *Id.* at 401–02, 321 S.E.2d at 45. "Compelling reasons" must be given to justify the trial court invading the jury's province in this manner. *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) (citing *Pelican Bldg. Ctrs. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)).

In *Stevens v. Allen*, 336 S.C. 625, 520 S.E.2d 625, 629 (Ct.App.1999, *affirmed* 342 S.C. 47, 536 S.E.2d 663 (2000), the Court of Appeals wrote:

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. Compelling reasons, however, must be given to justify invading the jury's province in this manner. While the trial judge may impose his will on a party by substituting his judgment for that of the jury, he may give the party an option in the way of additur or remittitur, or, in the alternative, a new trial.

DISCUSSION ON NEW TRIAL ABSOLUTE: The verdict was higher than the court anticipated, but after reviewing the notes taken at trial and having considered the arguments and submissions of counsel, the court finds that there was evidence in the record sufficient to support the award reached. The verdict could have been rendered in favor of the defendant, but that is not what the jury chose to do. The verdict and the amount awarded are entitled to deference so long as the jury acted within its prerogative. There is no indication that it improperly exceeded the proper exercise of its powers.

The verdict does not shock the conscience of the court. There has been no showing that the amount was the result of passion, caprice, prejudice, partiality, corruption, or other improper motives. No compelling reasons have been shown justifying a determination that the verdict was founded on improper considerations. The motion for a new trial absolute is respectfully denied.

DISCUSSION ON NISI REMITTITUR: Again, the court acknowledges that the verdict was higher than anticipated. It was liberal in the court's estimation, but the court cannot find that it was "unduly" liberal. After review, the court finds that there was evidence in the record sufficient to support the award reached and there are no compelling reasons justifying a determination that the verdict was founded on improper considerations. Recognizing that a jury's verdict is to be given deference, the motion for a new trial, *nisi remittitur*, is respectfully denied.

DISCUSSION ON JNOV: Likewise, the court does not find the verdict to be "so grossly excessive" or "shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence."

Riley, supra. It is not enough for a judge to feel that a lower award or no award at all would have been justified.

The court evaluated whether this small child, presenting herself in such an emotional state, caused the jury to be motivated by improper considerations such as passion or undue sympathy. It seems clear that she is a highly emotional child by nature. Her presentation at trial supported many of the assertions that substantial damages are appropriate for this particular plaintiff because her emotions are so easily triggered, and she seems unable to get over the trauma that she perceived.

The jury was charged on how to evaluate proximate cause, including the element of foreseeability.² Tortfeasors must take their “victims” as they are. Jurors are permitted to consider the demeanor of witnesses. Plaintiff’s counsel asked for an award of one million dollars in his summation, without objection. The jury deliberated for hours. There is no indication of a rush to judgment, nor is there any evidence from which this court can find that the jury’s province should be invaded by granting JNOV. The motion is respectfully denied.

THIRTEENTH JUROR DOCTRINE: Regarding the thirteenth juror doctrine, in *Howard v. Roberson*, 376 S.C. 143 (S.C. Ct. App. 2007), our Court of Appeals discussed the applicable law.

The seminal case stating the “thirteenth juror” doctrine is *Worrell v. South Carolina Power Co.*, [186 S.C. 306](#), [195 S.E. 638](#) (1938). Worrell states:
 . . . As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality. *Worrell*, [186 S.C. at 313-14](#), [195 S.E. at 641](#).
 . . .

² The jury was charged: “PROOF OF PROXIMATE CAUSE REQUIRES PROVING CAUSATION IN FACT. THIS INVOLVES PROOF THAT THE INJURY WOULD NOT HAVE OCCURRED BUT FOR THE GROSS NEGLIGENCE OF THE DISTRICT. PROXIMATE CAUSE ALSO REQUIRES PROVING LEGAL CAUSE. LEGAL CAUSE IS PROVEN BY SHOWING THAT IT WAS FORESEEABLE THAT INJURY WOULD FLOW FROM THE GROSS NEGLIGENCE IN QUESTION. THIS MEANS THAT THE INJURY MUST HAVE OCCURRED AS A NATURAL AND PROBABLE CONSEQUENCE OF THE GROSS NEGLIGENCE. PROVING FORESEEABILITY DOES NOT REQUIRE PROOF THAT THE PARTICULAR INJURY THAT OCCURRED WAS FORESEEABLE. HOWEVER, A WRONGDOER CANNOT BE HELD RESPONSIBLE FOR THINGS THAT COULD NOT BE EXPECTED TO RESULT FROM THAT PARTY’S MISCONDUCT.”

In *Norton v. North S. Ry. Co.*, [350 S.C. 473, 478, 567 S.E.2d 851, 854](#) (2002), the South Carolina Supreme Court explained, "the thirteenth juror doctrine is so named because it entitles a trial court to sit, in essence, as the thirteenth juror when [it] finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" (citing *Folkens v. Hunt*, [300 S.C. 251, 387 S.E.2d 265](#) (1990)). The supreme court further held, "[T]he result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict. . . ." *Norton*, [350 S.C. at 478, 567 S.E.2d at 854](#). In essence, the judge, as the thirteenth juror, can hang the jury and start the trial anew.

...

"The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." *Bailey v. Peacock*, [318 S.C. 13, 14-15, 455 S.E.2d 690, 692](#) (1995); see also *Pinckney v. Winn-Dixie Stores, Inc.*, [311 S.C. 1, 4-5, 426 S.E.2d 327, 329](#) (Ct.App. 1992). [Emphasis added.]

In *Roberson*, the trial judge was presented with a post-trial motion for a new trial nisi *additur*. Without ruling on that motion, the judge determined to award a new trial under the thirteenth juror doctrine. Ruling in what it described as a procedural conundrum, the Court of Appeals remanded the case to the trial court to rule on the *additur* motion, writing, "The thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages."

Roberson reflects the need to distinguish between the types of post-trial motions and the need to analyze the entirety of the proceedings, including the amount of the verdict. While this court understands that it has the authority to grant a new trial under the thirteenth juror doctrine without stating a reason, upon analyzing the entire proceeding and the verdict reached, and applying the deference required towards the jury's verdict, the court does not find this case to be one for judicial intervention and declines to exercise its power as the thirteenth juror.

THEREFORE, IT IS ORDERED that the post-trial motions filed by the defendant are respectfully denied, and the verdict of the jury is upheld.

AND IT IS SO ORDERED.

[Judge's electronic signature follows on separate page]



Lexington Common Pleas

Case Caption: Nancy Arellano VS School District No. Two Of Lexington County
Case Number: 2022CP3202339
Type: Order/Confirm

Circuit Judge (Code #2050)

s/ William P. Keesley