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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman
Circuit Court Judge
2019-CP-40-04185

2024-000548

CRYSTAL GOODWIN AND
JAMES GOODWIN.. Respondents,

v.

MIDLANDS ORTHOPEDICS AND
NEUROSURGERY AND
DR. THOMAS J. HOLBROOK, M.D..Appellants.

INITIAL BRIEF OF APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW 5

STANDARD OF REVIEW 5

ARGUMENT 7

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Able v. Young,
259 S.C. 362, 191 S.E.2d 781 (1972) 8

Adams v. Duffie,
244 S.C. 365, 137 S.E.2d 276 (1964) 8

Bailey v. Peacock,
318 S.C. 13, 455 S.E.2d 690 (1995) 5, 11

Folkens v. Hunt,
300 S.C. 251, 387 S.E.2d 265 (1990) 5, 8, 11

Graham v. Whitaker,
282 S.C. 393, 321 S.E.2d 40 (1984) 6, 7

Howard v. Roberson,
376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007)....................11

Lane v. Gilbert Constr. Co.,
383 S.C. 590, 681 S.E.2d 879 (2009) 6, 11

Lee v. Kirby,
133 S.C. 127, 243 S.E.2d 185 (1963) 8

Mack v. Frito-Lay,
243 S.C. 376, 133 S.E.2d 833 (1963) 8

McEntire v. Mooregard Exterminating Servs.,
353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003)....................10

Norton v. Norfolk Southern Railway Company,
350 S.C. 473, 567 S.E.2d 851 (2002) .... *passim*

Pocisk v. Sea Coast Constr. of Beaufort,
380 S.C. 584, 671 S.E.2d 98 (Ct. App. 2008)....................5

Rock Smith Chevrolet, Inc. v. Smith,
309 S.C. 91, 419 S.E.2d 841 (1992) 6

South Carolina State Highway Dep't v. Clarkson,
267 S.C. 121, 226 S.E.2d 696 (1976) 6

South Carolina State Highway Dep't v. Townsend,
265 S.C. 253, 217 S.E.2d 778 (1975) 8

Worrell v. South Carolina Power Co.,
186 S.C. 306 195 S.E. 638 (1938) 6, 8

Youmans v. S.C. DOT,
380 S.C. 263 (Ct. App. 2008) 5, 6

Rules

Rule 50 10

Statutes

S.C. Code. Ann. §§ 14-3-330(2) 5

STATEMENT OF ISSUES ON APPEAL

1. Did The Trial Court Commit Reversible Error By Granting Plaintiff's Motion For A New Trial Under The Banner of The Thirteenth Juror Doctrine, But Doing So By Applying An Erroneous Standard and Making Legal Determinations?

STATEMENT OF THE CASE

On July 29, 2019, Plaintiffs Crystal Goodwin and James Goodwin ("Plaintiffs") filed a medical malpractice action against Midlands Orthopedics and Neurosurgery, Dr. Thomas J. Holbrook, M.D, ("Defendants"), Carolina Anesthesiology Associates PA, ("CAA") Jennifer R. Root ("Root"), and Palmetto Health ("Palmetto"). (Complaint, R.) Plaintiffs filed an amended complaint on January 27, 2021, alleging that Crystal Goodwin was injured during a decompressive thoracic laminectomy performed by Dr. Holbrook on her on July 28, 2016. (Amended Complt., R.) Plaintiffs further alleged that as a result of the surgery, James Goodwin has been deprived of Crystal Goodwin's services, society, and companionship as his spouse. (Amended Complt., R.) The Amended Complaint sets forth claims for medical malpractice, loss of consortium, and ordinary negligence/negligent training against Defendants. (*Id.*, R.) Defendants filed an answer on February 25, 2021, which denied Plaintiffs' allegations and pled several affirmative defenses. (Answer, R.) Stipulations of dismissal were subsequently filed as to the following before trial: CAA on 10/4/22; Root on 8/10/22, and Palmetto on 11/17/22. (Stipulations of Dismissal, R.)

This case was tried against the remaining Defendants (now the Appellants) before a jury from April 11 to April 20, 2023. The jury returned a unanimous verdict in favor of Defendants on April 20, 2023, and a Form 4 was entered consistent therewith on April 21, 2023. (Form 4, R.) Plaintiffs filed two post-trial motions on April 26, 2023. One was for a new trial and mistrial based on alleged juror misconduct. (Motion for New trial and Mistrial, R. ___) The other post-trial motion was for a new trial based on the thirteenth juror doctrine. (New Trial Motion Under

Thirteenth Juror Doctrine, R.   ) Plaintiffs did not file a JNOV motion. Defendants filed responses in opposition to both motions on May 5, 2023. (Response to Motion for New Trial based on Juror Misconduct, R. ___); (Response to Thirteenth Juror New Trial Motion, R.   ) The trial court granted Plaintiffs' motion for a new trial based on the thirteenth juror doctrine on March 22, 2024. (Order Granting New Trial Under Thirteenth Juror Doctrine, R.   ) The trial court did not rule on Plaintiffs' other motion for new trial, although Defendants did file a response in opposition, and that motion was heard by the trial court as well. (Response to Motion for New Trial and Mistrial, R. __) Defendants filed a timely notice of appeal to this Court on April 17, 2024. (Notice of Appeal, R.   )

STATEMENT OF THE FACTS

Plaintiff Crystal Goodwin was a patient of Defendant Dr. Thomas Holbrook ("Dr. Holbrook") and his practice Midlands Orthopedics and Neurosurgery since 2009. (T. p. 1226-1229) After a 2016 fall in a bathtub, Ms. Goodwin experienced numbness and tingling in her lower extremities. (T. p. 157-162; 470) Spinal imaging confirmed scar tissue from two prior spinal surgeries as well as bone spurs. (*Id.*) She consequently underwent a decompressive thoracic laminectomy performed by Dr. Holbrook on July 28, 2016 in order to remove bone spurs pressing on the thoracic spine. (T. p. 1231-32) During the surgery, the Somatosensory Evoked Potential (SSEP) signal, an electrical response in the brain and spinal cord triggered by stimulating a peripheral nerve in the legs, went out. (T. p. 1243-44) Dr. Holbrook confirmed that no wires had disconnected and completed the surgery after which it was discovered that Ms. Goodwin was paralyzed from the waist down. (T. pp. 1246-47) An MRI performed expeditiously after surgery showed an infarction of the spinal cord occurred at T-9 (ninth vertebrae of the thoracic spine). (*Id.*)

At trial, Plaintiffs' expert witness in neurosurgery and neurology, Dr. Gary Lustgarten, testified that Ms. Goodwin's long-term hypertension caused vascular remodeling. (T p 192) Thus, according to Dr. Lustgarten, the applicable standard of care required Dr. Holbrook, as the neurosurgeon, to determine a mean baseline blood pressure for Ms. Goodwin, being a patient with diabetes and elevated blood pressure. (T p. 205) Such information should have been provided to the anesthesia team to keep plaintiff within 20% of such baseline blood pressure throughout the surgical procedure. (*Id.*) Once the SSEP signal went out during surgery, Plaintiffs' expert Dr. Lustgarten opined that the standard of care also required Dr. Holbrook to stop the surgery, check the patient's blood pressure, and immediately alert the attending anesthesiologist, Dr. Jennifer Root, to raise patient's blood pressure, and wake up the patient to ask her to move her legs. (T p. 235-238) Plaintiffs' expert attested that because these things were not done, Ms. Goodwin's blood pressure remained too low during surgery, which caused an infarction of her spinal cord at T-9 due to inadequate blood flow to the area. (T p. 238-246) Had her blood pressure been properly maintained within 20% of her mean baseline pressure of 113, Dr. Lustgarten opined that the SSEP signal loss would not have likely occurred. (T. p. 247-49) But even if it had, should her blood pressure have been raised once the SSEP signal was lost, he opined her spinal cord would have recovered to a point where she would have obtained useful function of her lower extremities, bowel and bladder, and not required use of a wheelchair. (Id.) This opinion was also held by Dr. Frank Mancuso, Plaintiffs' neuroradiology expert, who testified at trial. (T. p. 330-45)

Defendants offered the testimony of Dr. John Sampson, their neurosurgery expert. (T p. 780) Dr. Sampson attested that the lost SSEP signal does not provide a lot of valuable information because once the signal goes out, there is virtually nothing that can be done about it, which was the case here. (T. p. 783) From the surgical perspective, all that can be done is to check the signal

wires, which Dr. Holbrook properly did. (T. p. 786) Dr. Sampson further testified that Dr. Holbrook performed the surgery correctly and the standard of care did not require Dr. Holbrook to request that the attending anesthesiologist come to the operating room. (T. p. 787) Further, Dr. Sampson opined that the standard of care did not require Dr. Holbrook to direct the anesthesiology team to raise Ms. Goodwin's blood pressure, because such heightened pressure would have caused too much blood flow to enter the spinal cord. (T. p. 785) Accordingly, Dr. Sampson testified that Ms. Goodwin suffered a reperfusion injury, which was unrelated to any breach of the standard of care by Dr. Holbrook. (T. p. 810) Rather, Dr. Samson opined that once Dr. Holbrook properly removed Ms. Goodwin's bone spur from her thoracic spine, the blood flow naturally increased in her spinal cord, which her arteries could not self-regulate, and caused the infarction to T-9 and resulting lower paralysis. (T. p. 808-810)

This opinion was also held by the defense's orthopedic surgical expert Dr. Stephen Poletti. (T p. 901) Dr. Poletti opined that Dr. Holbrook performed the surgery with proper skill and correctness, and that Ms. Goodwin, an obese patient who had two prior spine surgeries, suffered a reperfusion injury which is largely unpredictable and a known risk from decompression surgery. (T. p. 901-905) Dr. Root, the attending anesthesiologist, and Defendant's anesthesiology expert Dr. Frank Balestri, both attested that all blood pressure readings during the surgery were always kept at appropriate and safe parameters. (T. pp. 1398-1401, 1570-76) Dr. Balestri further attested that raising Ms. Goodwin's pressure would have been dangerous because it would have been likely to cause her to suffer a heart attack or congestive heart failure. (Id.) Defendants opined that Crystal Goodwin's injury was not caused by low blood pressure or low blood reperfusion, but was instead caused by a reperfusion injury. (T. pp. 808-810) Defendants' experts opined that a reperfusion injury is unpredictable, unforeseeable, and unpreventable. (T. pp. 826, 905).

Defendants' evidence was that Dr. Holbrook appropriately responded to the neuro-monitor tech in the operating room when it was announced that the SSEP signal suddenly went out. (T. pp. 783-788). Dr. Holbrook then stopped the surgery, asked the technician to check to see if her equipment was working properly, asked anesthesia if there were any anesthesia issues, and was informed there were no issues. (T. pp. 1570-76). Dr. Holbrook then inspected the surgical wound site to see if there was any hematoma or anything he was doing that may have caused a loss of signal and when he did, he could not see anything that would have caused the sudden loss of signal. (T. pp. 749-750). At the conclusion of the trial, the jury returned a defense verdict.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The trial court's order granting Plaintiffs a new trial based on the thirteenth juror doctrine is immediately appealable to this Court for review. *See* S.C. Code. Ann. §§ 14-3-330(2), *Bailey v. Peacock*, 318 S.C. 13, 15 n.2, 455 S.E.2d 690, 692 n.2 (1995) (the granting of a new trial affects a substantial right and is immediately appealable); *Pocisk v. Sea Coast Constr. of Beaufort*, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008) (an order meeting the requirements of section 14-3-330(2) is immediately appealable); *Youmans v. S.C. DOT*, 380 S.C. 263, 271-88 (Ct. App. 2008) (reviewing and reversing order granting a new trial based on the thirteenth juror doctrine).

STANDARD OF REVIEW

The thirteenth juror doctrine is a common law means by which a trial court may grant a new trial absolute, based on the facts alone, when it finds that the evidence does not justify the verdict. *Norton v. Norfolk Southern Railway Company*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). The effect is the same as if the jury failed to reach a verdict, and thus, the trial court is not required to give any reason for granting the new trial if invoking the doctrine. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). However, if the trial court provides reasoning, this Court *will review* the reasons offered by the

trial court on appeal. *See Lane v. Gilbert Constr. Co*., 383 S.C. 590, 597-600, 681 S.E.2d 879, 883-84 (2009) (reviewing the trial court's rationale for granting a new trial despite the fact the trial court granted the new trial under the thirteenth juror doctrine and was not required to provide any reasons for the outcome); *Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 287-88, 670 S.E.2d 1, 10, 13 (Ct. App. 2008) (holding that despite the discretion given the trial court by the thirteenth juror doctrine, appellate court reviewed the trial court's reasoning for its grant of a new trial based on the doctrine, and finding that it could not grant a new trial under the thirteenth juror doctrine based on the brevity of the jury deliberations).

The thirteenth juror doctrine is a powerful tool available only to the trial judges. However, it is to be used cautiously and *sparingly* and *must be used correctly*. *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) ("There is given to the trial judge a broad discretion which has been used sparsely and rightly so.") *Id. see also Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 92, 419 S.E.2d 841 (1992). ("It is an authority well recognized but seldom used in South Carolina courts.") (emphasis added); *cf. Worrell v. South Carolina Power Co.*, 186 S.C. 306, 313-314 195 S.E. 638, 641 (1938) (To invoke the thirteenth juror doctrine it must be presumed the trial court "recognizes and appreciates [its] responsibility, and exercises the discretion vested in him with fairness and impartiality). Thus, for good reason, our appellate courts carefully review an order granting a new trial based on the thirteenth juror doctrine. Such an order will be reversed where its decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 126-27, 226 S.E.2d 696, 697 (1976).

<u>ARGUMENT</u>

The Trial Court's Order Granting Plaintiffs A New Trial Under The Thirteenth Juror Doctrine Should Be Reversed Because The Trial Court Granted The Motion Based On An Erroneous Standard and Employed Legal Conclusions, Which Is An Error Of Law.

The South Carolina Supreme Court has not hesitated to reverse an order granting a new trial under the thirteenth juror doctrine where the doctrine was improperly applied. *Norton v. Norfolk Southern Railway Company*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). In *Norton*, the trial court, following a defense verdict, granted a new trial absolute in plaintiff's favor based on the thirteenth juror doctrine. *Id.*, 350 S.C. at 476, 567 S.E.2d at 853. The trouble was that the federal standard for granting a new trial- based on the "clear weight of the evidence" - should have applied because the action was brought under the federal FELA statute. *Id.*, 350 S.C. at 480, 567 S.E.2d at 855. The Supreme Court concluded that the trial court erroneously applied the state-law thirteenth juror doctrine in granting the new trial, and failed to apply the proper federal standard. *Id.*, 350 S.C. at 481, 567 S.E.2d at 856. The Supreme Court ruled that such misapplication was consequential, stating "while the state and federal standards use some similar language, we do not believe the standards, compared on the whole, are substantially similar, or similar enough to be used interchangeably." *Id.*, 350 S.C. at 478, 567 S.E.2d at 854. Accordingly, the trial court's application of an incorrect legal standard to grant plaintiff a new trial under the thirteenth juror doctrine constituted "an error of law, which, by definition, constitutes an abuse of discretion." *Id.*, 350 S.C. at 482, 567 S.E.2d at 856.

So too here. Plaintiffs argued that their motion should be granted because the verdict "was contrary to the greater weight of the evidence." (Motion for New Trial, R.   ) But that is not the correct standard under the thirteenth juror doctrine. Instead, the South Carolina Supreme Court has instructed the trial bench that to invoke the thirteenth juror doctrine, the trial judge must be *convinced* that a new trial is *necessitated* on the basis of the *facts* in the case." *Graham v. Whitaker*,

282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984) (emphasis added). The trial court need not state its reasons for this determination, just as a juror need not state reasons for the juror's verdict. *Folkens, supra*. If the trial court merely states it is invoking its powers based on the facts, it will be presumed that the trial court was indeed convinced that it was one of the rare cases where the new trial was necessitated on such basis. However, in instances where the trial judge has given reasons for invoking its thirteenth juror powers and those reasons demonstrate the improper invocation of those powers, such invocations have consistently been reversed.

In *Norton*, *supra,* the South Carolina Supreme Court held that a "contrary to the clear weight of the evidence" federal standard was not interchangeable with the proper invocation of the thirteenth juror power in South Carolina, stating:

> For instance, this Court has held, "there can be no doubt that a trial judge has the discretionary power to grant a new trial absolute or Nisi in a law case *upon his disapproval of the verdict on factual grounds,* and in this role he has been recognized and designated as the thirteenth juror." *South Carolina State Highway Dep't v. Townsend,* 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975) (emphasis added) (citing *Worrell v. South Carolina Power Co.,* 186 S.C. 306, 195 S.E. 638 (1938)). In *Worrell,* this Court went so far as to describe the trial judge, when acting as thirteenth juror, as "possessing the veto power to the Nth degree," and held "it must be *presumed* ... [that the trial judge] 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 (emphasis added).

350 S.C. at 480, 567 S.E.2d at 855. Here, Plaintiffs argued for the application of a contrary to the "greater weight" of the evidence standard to invoke the thirteenth juror doctrine powers.[1] This is

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[1] Appellants acknowledge a case cited by Plaintiffs in which a new trial was ordered using verbiage regarding "greater weight" of evidence. *Adams v. Duffie*, 244 S.C. 365, 137 S.E.2d 276 (1964). This decision does not mention the thirteenth juror doctrine. Further, *Adams* relies upon *Lee v. Kirby,* 133 S.C. 127, 243 S.E.2d 185 (1963), which also does not name the thirteenth juror doctrine, and which upheld a new trial based on an inadequate verdict, and *Mack v. Frito-Lay,* 243 S.C. 376, 133 S.E.2d 833 (1963), which also does not name the thirteenth juror doctrine. Not cited to the trial court is a decision, *Able v. Young*, 259 S.C. 362, 191 S.E.2d 781 (1972) in which a trial judge *did* invoke the thirteenth juror doctrine and mentioned that he found the verdict against the "greater

also incorrect. The Plaintiffs' "greater weight" of the evidence standard erroneously projects that the trial court should grant a thirteenth juror new trial motion whenever the court *compares* the nature and quality of the evidence for the plaintiff to that of the defendant and concludes that the jury verdict is inconsistent with that comparison. This is the incorrect standard and provides no deference to the jury's verdict. Such an approach would not result in the "sparsely" or "seldom used" thirteenth juror new trial order but instead would result in the commonplace issuance of such an order. Instead, the trial court is supposed to determine whether a miscarriage of justice would occur by considering the facts and whether it is "convinced" that a new trial is "necessitated," a rare occurrence. The trial court should not simply substitute her own views for that of the jury's in a contested case with evidence presented for plaintiff and defendant.

Further, the appellate courts have made plain that in ruling on a motion for new trial where the request is for the trial court to invoke the thirteenth juror doctrine, the trial court acts as if it is the hypothetical thirteenth juror and is concerned only with whether justice is served by the verdict - based *only* on the facts. Yet, the trial court did not do so.

Here, the trial court stated the following reasons for its invocation of the thirteenth juror doctrine:

> At trial, Plaintiffs presented significant evidence of medical negligence and loss of consortium. *Witness testimony established the appropriate* ***standard of care*** *and that Defendants* ***breached t****he standard of care. Further, the evidence demonstrated that as* ***a proximate result*** *of Defendants' conduct, Crystal (and, therefore, James) was obviously permanently injured –*

(Order Granting Motion for New Trial Under 13th Juror Doctrine, R. p.) (emphasis added). Rather than acting as a hypothetical juror and deciding whether the Court was "convinced" that solely the facts

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weight of the evidence," *but* the trial court went further there, importantly stating he was *"convinced"* that the case was *"one of those rare cases"* where he believed the verdict would have resulted in a "miscarriage of justice."

"necessitated" a new trial to avoid a miscarriage of justice, the trial court engaged in a legal assessment of the Plaintiffs' standard of care evidence, finding that such had been "established," assessed Plaintiffs' legal theories for recovery, finding breach of the standard of care had occurred, and concluded that proximate cause had been "demonstrated." The trial court then granted Plaintiffs' motion, through which they requested that she employ the "greater weight of the evidence" standard.[2]

The trial court's explanation in its Order that it was employing its "intimate knowledge of the applicable law" to reach its decision is incompatible with its service as the hypothetical thirteenth juror assessing *facts.* (Order, R. ___) So too is the trial court's heading in its order explaining its invocation of the thirteenth juror doctrine as "Findings of Fact ***and Conclusions of Law.***" *Id.* <u>There *is no legal determination*</u> applied by a trial judge who steps into the role of the thirteenth juror. The conflation by the trial court here of legal analysis, assessment, and conclusions with the role of the trial court under the thirteenth juror doctrine was improper and error. In *Norton,* 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 <u>***solely***</u> 'upon the facts.'"

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[2] The trial court's legal analysis is also akin to relief under Rule 50. A JNOV requires a court to determine the sufficiency of evidence. Here, no JNOV motion was made. Of course, Defendants would have opposed any such motion, and it would have been manifest error to grant JNOV to Plaintiffs. This Court has long observed that:

> [t]he granting of a new trial upon the facts is not the equivalent of granting a directed verdict [or JNOV]. A directed verdict is warranted when the case presents only questions of law and should be allowed only if the evidence would not be legally sufficient to sustain a verdict for the opposite party. The question of whether the evidence adduced by a party can support a verdict in the party's favor is a question of law.

McEntire v. Mooregard Exterminating Servs., 353 S.C. 629, 633, 578 S.E.2d 746, 747 (Ct. App. 2003).

(citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990))(emphasis added). This, the trial court did not do.

As stated, the appellate courts do not hesitate to reverse the erroneous use of the thirteenth juror doctrine, which should only be used in rare instances and with caution. The appellate courts have no thirteenth juror powers. Only the trial courts do. Thus, the trial courts must properly use the power or it is reversible error. For example, in *Bailey v. Peacock*, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995) the Court purported to use the thirteenth juror doctrine as a mechanism to award *additur*. Regardless of whether the trial court in *Bailey* may have been convinced the jury's verdict did not do justice based on the facts (in terms of the amount of the verdict), the Supreme Court reversed. The Court noted that the use of the thirteenth juror doctrine was not allowed to create a new trial *nisi additur* scenario. The trial court's invocation of the doctrine was thus deemed error and reversed. Similarly, this Court has ruled in *Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007) that the thirteenth juror doctrine may not be used to award a party a new trial based on damages alone. *See also Lane, supra* (doctrine not invoked properly based on short time of deliberations); *Norton, supra*, (doctrine not invoked properly based on inapplicable standard).

Further, in Plaintiffs' motion for a new trial based on the thirteenth juror doctrine, Plaintiffs cited to certain court decisions approving of new trials ordered where there was juror confusion. (Plaintiffs' Motion at R. ___). Those decisions do not support the new trial order here. The jury verdict here was unanimous, and each individual juror was polled and interviewed by Judge Newman at the post-trial motions hearing, and did not change their unanimous verdict. Judge Newman also did not reference juror confusion in her Order. Hence, there is no support for the new trial order on this basis.

The power of the trial judge to "hang" the jury by using its thirteenth juror status is an incredibly powerful apparatus that can undo the collective will of a unanimous jury, which is owed deference. It is supposed to be "seldom used." When invoked, it must be used properly. Here, the doctrine was not properly invoked or used, and the trial court applied an erroneous standard and conflated legal analysis with facts. Rather than being "convinced" that this case was one of those rare instances where it was "necessitated" to award a new trial based on "facts," the trial court improperly employed legal analysis and legal conclusions to its view of the "greater weight" of the evidence. Hence, the order on appeal should be reversed and the jury's unanimous verdict for Defendants should be reinstated.

CONCLUSION

Based on the forgoing, the Court should reverse the trial court's order granting Plaintiffs a new trial under the Thirteenth Juror Doctrine and remand the case with instructions to the trial court to reinstate the jury's verdict in favor of Defendants.

Respectfully submitted,

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