THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jocelyn Newman
Circuit Court Judge

Civil Action Case No. 2019-CP-40-04185

Appellate Case No. 2024-000548

Crystal Goodwin and James Goodwin ..... Respondents,

v.

Midlands Orthopaedics and Neurosurgery and Thomas J. Holbrook, M.D. ..... Appellants.

INITIAL BRIEF OF THE RESPONDENTS

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I. Did the Trial Court apply the proper standard when invoking the Thirteenth Juror Doctrine and appropriately exercise its discretion in granting a new trial?

STATEMENT OF THE CASE

The present matter stems from a medical malpractice action filed on July 29, 2019, and tried before a Richland County jury from April 11–20, 2023. (Complaint; Transcript p. 1). The jury returned a defense verdict, and Respondents timely moved for a new trial under the Thirteenth Juror Doctrine. (Plaintiffs' Motion for New Trial). On June 1, 2023, the trial judge, the Honorable Jocelyn Newman, conducted a hearing on the motion. (June 1, 2023 Hearing Transcript). On March 22, 2024, the trial court issued an Order Granting New Trial Based on the Thirteenth Juror Doctrine (hereinafter often referenced as the "Order"), explicitly stating that it was convinced that a new trial was necessitated based on the facts. (Order, p. 3). Defendants then filed and served their Notice of Appeal on April 4, 2024, contending the trial court committed error in granting the motion. (Notice of Appeal).

STATEMENT OF FACTS

On the morning of July 28, 2016, Dr. Thomas Holbrook, who was employed by Midlands Orthopaedics and Neurosurgery, performed a relatively routine decompressive thoracic laminectomy on Crystal Goodwin. (Pl. Ex. 13). At the time of the procedure, Mrs. Goodwin was 38 years old. Although she had chronic hypertension documented throughout her medical chart, Dr. Holbrook's surgical plan did not include a directive or indicate an intent to maintain Mrs. Goodwin's blood pressure at a level that was close to her baseline or in any way account for her chronic hypertension. (*Id.*) During the surgery and during several sustained periods of time, Dr. Holbrook's surgical team allowed Mrs. Goodwin's intra-operative blood pressure to drop below twenty percent (20%) of her pre-operative baseline. (Pl. Ex. 5, Pl. Ex. 29). At approximately 10:00

AM, more than two hours into the operation, surgical neuromonitoring indicated a total loss of sensory signal coming to/from Mrs. Goodwin's lower extremities. (Tr. p. 493). The neuromonitoring technician alerted Dr. Holbrook to the loss of signal from his patient's legs and, after performing a check, informed him that she did not find any failure or malfunction with her equipment. (Tr. p. 493). Nonetheless, Dr. Holbrook presumed the loss of neuromonitoring signal did not actually indicate a neurologic deficiency, and, despite the technician's assurance that she had found no problems with the monitoring equipment, proceeded with the surgery as if there had been no loss of signal. (Tr. p. 495, line 17- p. 496, line 2). He did not notify the attending anesthesiologist about the change in the patient's condition or make any changes to his treatment plan. (Tr. p. 1252, lines 5-15).

After completion of the surgery, Mrs. Goodwin awoke in the recovery room paralyzed from the waist down. Although she now has very slight sensation in her legs, by all accounts she remains functionally paralyzed—she is unable to walk, is incontinent of both bladder and bowel, and will most likely spend the rest of her life in a wheelchair. (Tr. p. 426, line 10-p. 429, line 10).

Mrs. Goodwin and her husband, James Goodwin, brought this medical malpractice lawsuit against Dr. Holbrook and Midlands Orthopaedics and Neurosurgery. Supported by qualified expert witnesses, the Goodwins alleged that Dr. Holbrook fell below the standard of care and was otherwise negligent and grossly negligent during the 2016 surgery. (Tr. pp. 158-176). The gravamen of their assertion was that Mrs. Goodwin was paralyzed because Dr. Holbrook failed to ensure her intra-operative blood pressure remained within twenty percent (20%) of her pre-operative baseline. *Id.* More specifically, the Goodwins asserted that Dr. Holbrook should have determined—or directed a member of his staff to review the patient's records and determine—Mrs. Goodwin's pre-operative baseline blood pressure so he could share that information with the anesthesia team to ensure her intra-operative blood pressure remained within twenty percent (20%)

of that baseline.[1] *Id.* Second, the Goodwins claimed the standard of care required Dr. Holbrook to hold a pre-surgery timeout or consultation, which would have included discussion of matters such as Mrs. Goodwin's chronic hypertension and how her blood pressure should be maintained by the surgical team. *Id.* Finally, the Goodwins asserted that when the neuromonitoring technician alerted Dr. Holbrook about the loss of sensory signal to/from his patient's legs, he should have taken immediate steps to determine the reason for the lost signal.[2] *Id.*

Also supported by qualified expert witnesses, the Goodwins alleged that, as a consequence of this sustained low blood pressure, the "watershed" region of Mrs. Goodwin's spinal cord received inadequate blood during the operation, and she thereby suffered damage to her spinal cord that caused near total paralysis from the waist down. (Tr. p. 1074). Mrs. Goodwin's providers and family gave testimony explaining the drastic impact Mrs. Goodwin's injuries had on her life, and experts presented a life care plan and economic loss analysis totaling between $1.3 to $2.6 million dollars. (Plaintiff's Exhibit 22).

The case was tried in April 2023 before a Richland County jury, with Judge Newman presiding. During the trial, Respondents presented extensive evidence demonstrating Dr. Holbrook's deviations from the standard of care and how this negligent/grossly negligent conduct caused Mrs. Goodwin's paralysis.

Dr. Gary Lustgarten, a neurosurgeon who was qualified as an expert in the fields of orthopedic surgery and spine surgery, explained that Mrs. Goodwin's pre-operative blood pressure

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[1] The Goodwins also brought suit against Dr. Jennifer Root (the attending anesthesiologist), Carolina Anesthesiology Associates, P.A. (Dr. Root's employer), Erich Starn (the CRNA involved in delivering anesthesia), and Palmetto Health (Mr. Starn's employer). (Amended Complaint). The Goodwins settled all their claims against Dr. Root, Carolina Anesthesiology Associates, Mr. Starns, and Palmetto Health prior to trial.

[2] Expert testimony established that Dr. Holbrook should have checked on Mrs. Goodwin's vitals, contacted the attending anesthesiologist, and increased perfusion. (Tr. p. 237, line 11-p. 238, line 24; Tr. p. 240, line 21-p. 241, line 7 and Pl. Ex. 7; Tr. p. 928, line 20-p. 930, line 8)

recordings corresponded to mean arterial pressure averaging 116, which would be considered high. (Tr. pp. 218-220). Given that Mrs. Goodwin was a hypertensive patient at baseline, Dr. Holbrook breached the standard of care by (1) failing to ensure that his patient's intra-operative blood pressure stayed within 20% of her baseline, (2) failing to conduct a pre-operative time-out with the surgical team where things like blood pressure could be discussed, and (3) ignoring the loss of sensory signal to/from Mrs. Goodwin's legs, even once he was informed that the equipment detecting the loss of signal was working correctly. (Tr. pp. 207, 224, 230, 242). Dr. Lustgarten espoused that the standard of care required responding to a loss of signal by alerting anesthesia, raising the patient's blood pressure, and, if the signal did not return, waking the patient (called the "Stagnara Wake-Up Test").[3] (Tr. pp. 244-254). Importantly, Dr. Lustgarten opined that, had Mrs. Goodwin's intra-operative blood pressure been kept within 20% of her baseline, she never would have suffered a neurological injury, and, even if the blood pressure was allowed to go too low during the surgery (as did occur), appropriately responding (as opposed to presuming an equipment malfunction) when the sensory signal was lost would have prevented the functional paralysis Mrs. Goodwin suffered and will continue to suffer for the remainer of her life. (Tr. pp. 246-247). Dr. Lustgarten's opinion that the sustained low blood pressure was the cause of Mrs. Goodwin's injuries was bolstered by Dr. Frank Mancuso, who was admitted as an expert in neuroradiology. Dr. Macuso testified that Mrs. Goodwin's post-surgery imaging demonstrated an ischemic

[3] Dr. Lustgarten also explained/described how the watershed region of the spine is the last area of the spinal cord to receive blood from our circulatory system and, because of this and especially for people with chronic hypertension who are likely to have had vascular remolding, if a patient's intraoperative blood pressure drops below his/her normal/baseline blood pressure for a sustained amount of time, the watershed region is vulnerable to suffering an ischemic injury. He further explained how medical imaging performed after the surgery show Mrs. Goodwin's injury to be in the watershed region, just as he would have expected from the events that occurred during the surgery Dr. Holbrook negligently performed.

infarction of the spinal cord due to diminished blood supply to the cord caused by low blood pressure. (Tr. p. 338, line 22-p. 339, line 15).

Dr. Fredrick Jones, an expert in anesthesiology, testified via *de bene esse* deposition. (Tr. p. 999). Dr. Jones confirmed the need to keep patients' intra-operative blood pressure within twenty percent (20%) of their pre-operative baseline and opined that the failure to ensure such caused Mrs. Goodwins' injury. (Tr. p. 1015, lines 8-12; p. 1074, lines 3-18). He further testified that the attending physicians should have raised Mrs. Goodwin's blood pressure at the time the neuromonitoring signal was lost, which would likely have prevented her severe neurological injury. (Tr. p. 1067, lines 18-25; p. 1084, line 15-p. 1085, line 1).

Sunny Jumper, who worked as a technician during Mrs. Goodwin's surgery, was admitted as an expert in the field of surgical technology. (Tr. pp. 539-540). Ms. Jumper testified that from her prior experience working with Dr. Holbrook in approximately 15-20 surgeries, he did not do surgical timeouts or pre-operative conferences (where the pre-operative baseline would be determined and a target intra-operative baseline would be established), even though such timeouts/conferences are required by hospital policy. (Tr. p. 542, line 2-p. 543, line 6). Further, Ms. Jumper testified that when the technician informed Dr. Holbrook the neuromonitoring signal to/from Mrs. Goodwin's legs was lost, checked her equipment, and reported that the equipment was not malfunctioning, Dr. Holbrook was steadfast that the loss of signal had to be due to faulty equipment and proceeded with the surgery. (Tr. p. 546, line 11-p. 547, line 11). By Ms. Jumper's observation, the other healthcare providers in the operating room "looked at each other like, wow, like what the -- what the hell? It was kind of a shock moment." (Tr. p. 548, line 22-p. 549, line 1).

While the Defendants presented expert witnesses in defense of their case, these witnesses conceded critical points and took some positions that were contrary to one another. By way of

example, Dr. John Sampson, who was admitted as an expert in neurosurgery, claimed that he considered baseline blood pressure to be the one recorded in the patient's immediate pre-operative assessment. (Tr. pp. 841-845). In contrast, Dr. Frank Balestrieri, the defense's anesthesiologist, acknowledged that multiple readings are used to determine a patient's baseline blood pressure. (Tr. p. 1407, line 10-p. 1408, line 10). Dr. Balestrieri also testified that chronically hypertensive patients (such as Mrs. Goodwin) require higher intraoperative pressures, accepting that maintaining blood pressure withing 20% of baseline is standard practice and done for the patient's benefit. (Tr. pp. 1406-1408). Dr. Balestrieri further conceded that the standard of care requires that the surgeon, anesthesiologist, and CRNA have an agreement *prior to surgery* as to how blood pressure should be maintained. (Tr. p. 1418, line 3-p.1419, line 1). This standard was not followed in the present case, as Erich Starn, the CRNA responsible for managing Mrs. Goodwin's anesthesia during the procedure, testified that he was not given any instructions or information pertaining to her blood pressure prior to her surgery. (Tr. p. 1199, lines16-18). Upon being shown records indicating what Mrs. Goodwin's blood pressures were in the week leading up to the surgery, Mr. Starn agreed "that Mrs. Goodwin's intraoperative blood pressure on the morning of 7/28 should have been kept higher than it was." (Tr. p. 1206, lines 1-7).

Dr. Steven Poletti, who has an orthopedic surgery practice in Charleston and was called as an expert witness by the Defense, acknowledged that the standard of care in a spine operation requires the intra-operative blood pressure for a patient with chronic hypertension to be kept "somewhat higher" than for a patient who does not suffer from hypertension. (Tr. p. 934, lines 11-16). He further admitted that the standard directs the physician to have a pre-surgery consult with the entire surgical team, including anesthesia, to discuss co-morbidities (such as hypertension), pre-existing conditions, and surgical history. (Tr. p. 932, line 20-p. 934, line 3). Notably, the

evidence established that Dr. Holbrook never held such a presurgical consultation, with the medical record making no mention of such an event and Ms. Jumper testifying that, in her experience working with him, which included Mrs. Goodwin's operation, Dr. Holbrook did not conduct presurgical consultations. (Tr. p. 542, line 2-p. 543, line 6). Dr. Poletti also conceded that Mrs. Goodwin's low urine output during the procedure could indicate insufficient blood perfusion (Tr. p. 934, lines 18-21), insufficient perfusion can cause ischemic injury to the spinal cord (Tr. p. 931, lines 13-16), and the area most susceptible to developing neurological deficits due to lack of perfusion is the thoracic region (where the "watershed" area is located) (Tr. p. 931, line 20-p. 932, line 4).[4]

Dr. Holbrook himself was impeached by his own testimony and prior statements. Respondents presented video testimony where Dr. Holbrook conceded under oath that Mrs. Goodwin's baseline blood pressure was never determined, claiming it was "not necessary." (Tr. p. 701, lines 19-24; *see also* Tr. p. 705, lines 4-9 (testimony from March 2021 deposition)). However, Dr. Holbrook also gave testimony, in May 2020, that the surgical team ***should*** look at and consider the patient's baseline blood pressure to determine how to maintain that patient's blood pressure during a surgery, indicating it is a "normal part of the process" for "everybody [to know] what the baseline blood pressure is." (Tr. p. 729, line 7-p. 730, line 18). Even more specifically, Dr. Holbrook testified early on in the litigation that he personally considers a patient's baseline blood pressure based on that patient's history. (Tr. p. 730, lines 19-20; p. 733, lines 12-14). This prior testimony was inconsistent with Dr. Holbrook's repeated claim at trial that considering a baseline blood pressure is "something anesthesia does." (Tr. p. 1280, lines 18-21).

[4] This corroborated Respondents' theory of the case that Mrs. Goodwin's paralysis was caused by spinal cord ischemia and infarction in the thoracic spine. (*See, e.g.,* Tr. p. 259, line 12 – p. 261, line 7).

Similarly, although Dr. Holbrook told Mrs. Goodwin shortly after her surgery that something "restricted blood flow" to that area of her spine and caused it to "occlude," resulting in what was essentially a stroke in her spinal cord (Tr. p. 992, line 10-p. 993, line 2), he took a different tact at trial, claiming she suffered an unavoidable reperfusion injury instead. (Tr. pp. 1265-1267).

After a nine-day trial, the jury returned a defense verdict. Plaintiffs/Respondents moved for a new trial pursuant to the Thirteenth Juror Doctrine, asserting that the verdict was contrary to the fair preponderance of the evidence. On March 22, 2024, Judge Newman granted Plaintiffs' Motion, explicitly stating she was convinced that a new trial was necessitated based on the facts. (Order, p. 3). Defendants appealed.

STANDARD OF REVIEW

A trial court's decision to grant a new trial under the thirteenth juror doctrine is reviewed for abuse of discretion. Such an order will not be disturbed unless it "is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267 (1990) (*citing South Carolina State Hwy. Dept. v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)). The doctrine grants the trial judge **broad discretion** to ensure justice is done, acting as a "thirteenth juror" when convinced the verdict is contrary to the evidence. *Watson v. Town of Pendleton*, 294 S.C. 155, 157, 363 S.E.2d 234, 235 (Ct. App. 1987) ("[T]he trial judge has a broad discretion sitting as the thirteenth juror to grant a new trial when he is convinced, as obviously here, that justice has not been done in the trial."). This discretion, though seldom invoked, is firmly established in South Carolina jurisprudence. *Lane v. Gilbert Const. Co.*, 383 S.C. 590, 600, 681 S.E.2d 879, 884 (2009) ("The Thirteenth Juror Doctrine is a well-established in South Carolina as the standard for granting a new trial.").

ARGUMENT

I. The Trial Court Applied the Correct Standard for the Thirteenth Juror Doctrine and Properly Granted Plaintiffs' Motion for a New Trial.

Appellants argue the trial court's order invoking the thirteenth juror doctrine must be reversed because it allegedly employed the wrong standard. Appellants do not base this argument on anything contained within the Order, but make the assertion wholly on cherry-picked language within Plaintiffs' Motion for a New Trial. Complaining solely of the word choice within Plaintiffs' motion, Appellants state: "Plaintiffs argued that their motion should be granted because the verdict 'was contrary to the greater weight of the evidence.'" (Appellants' Initial Brief, p. 7). This argument launches Appellants into a strange exercise in semantics, attempting to argue that the Court did not apply the standard it says it applied. Because the plain language of the Order demonstrates the trial court applied the correct standard, regardless of whether Respondents' memorandum to the trial court advocated for a different one,[5] Appellants' argument fails.

"The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). "Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." *Id. (citing Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993)). "Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. This ruling has also been termed a granting of a new trial upon the facts." *Vinson*, 324 S.C. at 402,

[5]As more fully explained below, Respondents do not believe they made any error in their memorandum, but even if they cited to the wrong standard, the court applied the exact standard Appellants advocate for.

477 S.E.2d at 722. It is well settled in this state that "the trial judge has the authority and responsibility to grant a new trial when, in [her] judgment, the verdict of the jury is contrary to the fair preponderance of the evidence." *Adams v. Duffie*, 244 S.C. 365, 366, 137 S.E.2d 276, 276 (1964). A motion for new trial is properly granted where the trial judge is simply "not satisfied with the justice of the case and feel[s] that it should be tried before another jury." *Id*. Whether to grant the motion "rests within the discretion of the trial judge" and "will not be disturbed [on appeal] unless his finding is **wholly unsupported** by the evidence, or the conclusion reached has been controlled by error of law." *S.C. Dep't of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 206, 269 S.E.2d 329, 330 (1980) (emphasis added). For the trial judge's finding to be supported by the evidence, it is only necessary that the moving party put forth evidence at trial that would support a verdict in the moving party's favor, even if that evidence is in conflict with other evidence. *Id*. Such discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them." *Vinson*, 324 S.C. at 404, 477 S.E.2d at 723 (*quoting Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950)).

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when [s]he finds that the evidence does not justify the verdict." *Vinson*, 324 S.C. at 403, 477 S.E.2d at 722. "The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror 'hangs' the jury." *Id*. For this reason, the trial judge is not required to give specific factual reasons for granting the motion for new trial. *Id*. (*citing Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990)). Just as a juror would not be required to give justification for his or her findings, the trial court, sitting in its role as thirteenth juror, is required only to find that the evidence supported the side of the moving party to justify its grant of a new trial. *Id*.

As an initial matter, to ascertain the standard a trial court employed in reaching a decision, the appellate court should look to the trial judge's order, and not to a party's motion and/or argument. What Respondents wrote in their motion/supporting memorandum or argued during a hearing is without consequence—the issue is what the trial court stated in the Order, and the Order does not contain the phrase/terminology about which Appellants complain, nor do the contents of the Order in any way suggest that an incorrect standard was applied.

The gravamen of Appellants' argument centers on the following statement appearing in Respondents' motion for a new trial:

> Plaintiffs hereby move for an order granting a new trial based on the Thirteenth Juror Doctrine on the grounds that the verdict was contrary to the greater weight of the evidence. *See, e.g. Adams v. Duffie*, 244 S.C. 365, 366, 137 S.E.2d 276, 276 (1964).

(Plaintiffs' Motion for New Trial, p. 1).[6] Notably, the trial court never uses this allegedly objectionable phrase (*i.e.* "contrary to the greater weight of the evidence") anywhere within its Order granting a new trial.

In fact, when discussing the applicable standard, the trial court's Order employs the exact phrasing that Appellants claim is required. Asserting that the trial court did not use the "correct standard," Appellants write:

> 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).

(Appellants' Initial Brief, p. 7, italics in the original). Appellants somehow overlook that this is exactly the standard that the trial court used, for the Order states:

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[6] Appellants also complain that Plaintiffs/Respondents improperly cited to court decisions approving new trials where there was juror confusion. Because these are not the grounds on which the Court granted a new trial, there is no need to consider the merit of those arguments.

> [T]he Court is "*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).

(Order, p. 3, emphasis added). Thus, per the language of the Order, the trial court bases its ruling on the very same legal concept and cites the very same case Appellants set forth as the correct standard.

Appellants rely on *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002) to make the argument that, even though the trial judge is entitled to broad discretion in granting a new trial, such a decision will be overturned if the wrong standard is applied. This assertion may be true, but *Norton* is inapplicable here for two reasons: first, because the plain language of the Order indicates the correct standard was used,[7] and second, the new trial award in *Norton* was only overturned because the correct standard (the federal one) created a higher burden than the one applied, and the appellate court determined the more stringent standard had not been met. *Id.* at 480-82, 567 S. E.2d at 855-57. The case simply does not support Appellants' assertion that because the trial court "weighed" the evidence or made a comparison between what the parties presented, the incorrect standard was applied, and there is no indication that the trial court considered something it should not have in exercising its discretion. The Order simply states the court was "convinced that a new trial is necessitated," (Order, pp. 2-3), which is the exact formulation repeatedly approved by South Carolina's appellate courts and touted by Appellants. Thus, Appellants' argument that the incorrect standard was applied falls flat.

Further, Appellants' argument that the trial court abused its power or improperly substituted its judgment for that of the jury misconstrues the standard being applied. None of the

[7] In *Norton*, there were federal questions at issue and although the state-court standard was argued to *and utilized by* the trial court, the parties conceded on appeal that the federal standard was the appropriate one. *Norton*, 350 S.C. at 480-81, 567 S.E.2d at 855.

cases addressing the thirteenth juror doctrine indicate there is any aspect or element of the doctrine that requires a trial judge to give deference to the jury. "As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the *n*th degree, and, it must be presumed, recognizes and appreciates [her] responsibility, and exercises the discretion vested in [her] with fairness and impartiality." *Worrell v. S.C. Power Co.,* 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938). While legal precedent establishes the doctrine should be used sparingly, there is zero evidence that Judge Newman is routinely using/overusing her power to stand in as the thirteenth juror, and it must be presumed that she appreciated the gravity of awarding this relief and exercised her discretion fairly. Indeed, the Appellants have not cited to a single other time that Judge Newman has used this power since she took the circuit court bench in 2016.

Finally, even if one were to overlook the very language of the trial court's Order, there is nothing incorrect about Respondents having sought the invocation of the thirteenth juror doctrine "on the grounds that the verdict was contrary to the greater weight of the evidence." This is not an inaccurate legal statement or incorrect standard, as it is wholly consistent with the court being "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). South Carolina's case law on the thirteenth juror doctrine shows terms such as "greater weight of the evidence" and "fair preponderance of the evidence" being frequently employed and often used interchangeably. *See e.g., Sorin Equip. Co. v. Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (S.C. Ct. App 1996) (affirming the granting of a new trial in which the trial judge's order stated, "The verdict is **contrary to the weight of the evidence**, is not supported by the evidence, and is grossly excessive and unreasonable" and finding "in light of the trial judge's express wording and absence of facts on which his decision is based, we believe he intended to invoke the thirteenth juror doctrine"); *Taylor v. Devore*, 253 S.C. 393, 171 S.E.2d

158 (1969) (affirming the granting of a new trial in which the trial judge concluded, "In view of the extent of damages to person and property proven by the **greater weight** of the evidence, I am of the opinion that the verdict is inadequate."); *Able v. Young*, 259 S.C. 362, 191 S.E.2d 781, (1972); *Dent v. Reed*, 270 S.C. 585, 586, 243 S.E.2d 460 (1968) (affirming the ordering of a new trial upon the ground the verdict was "**contrary to the greater weight of the evidence**" and stating, "it is settled that the trial judge has the authority and the responsibility to grant a new trial when, in his judgment, the verdict of the jury is **contrary to the fair preponderance** of the evidence"); *Adams v. Duffie*, 244 S.C. 365, 137 S.E.2d 276, (1964) ("It is well settled in this state that the trial judge has the authority and responsibility to grant a new trial when, in his judgment, the verdict of the jury is **contrary to the fair preponderance of the evidence** and that an order granting a new trial on such ground is not appealable."). Just as the court did in the *Able v. Young* case, which Appellants cite with approval in footnote one, the court here held it was "convinced a new trial is necessitated on the basis of the facts in this case" and further indicated "that the evidence present[ed] at trial simply [did] not support the jury's verdict" and a new trial was needed to "see that justice [be] done." (Order. p. 3 (*citing Graham v. Whitaker*, 282, S.C. 393, 401, 321 S.E.2d 40, 45 (1984) and *Ex Parte Travelers Home & Marine Ins. Co. v. Stringfellow,* 427 S.C.238, 244, 830 S.E.2d 718, 721 (Ct. App. 2019))). Therefore, regardless of whether the trial judge considered "the greater weight of the evidence," "the fair preponderance of the evidence," or other similar terms that may have been included in Respondents' memorandum, there is no legitimate basis for Appellants' complaint regarding the standard the trial court employed in determining that the thirteenth juror doctrine entitled Respondents to a new trial.

Under South Carolina law, an order granting a new trial must be affirmed if there is any evidence supporting the trial judge's decision, even where the evidence and testimony are in

conflict. *See Mooneyham*, 275 S.C. at 206, 269 S.E.2d at 330 ("An order granting a new trial upon the facts [is] not disturbed if the evidence and testimony are in conflict so that the trial judge's ruling has support."). Here, there is ample support, including extensive expert testimony, hospital policy evidence, and even defense admissions. Because the record supports the decision to grant a new trial based on the thirteenth juror doctrine, the only acceptable conclusion is that the trial court properly exercised its discretion to prevent a miscarriage of justice.

II. The Trial Court Properly Exercised its Discretion, Basing its Decision to Grant a New Trial on the Facts Presented at Trial, and Did Not Make Any Improper Legal Conclusions.

Appellants second and final argument contends the trial court improperly conflated law and fact because the Order included a section captioned "Findings of Fact and Conclusions of Law." (Appellants' Initial Brief, p. 10). Appellants assert that because the trial judge notes her knowledge of the applicable law and finds that the evidence "established" breach and "demonstrated" causation, the Court must have wrongfully awarded a new trial based on legal conclusions rather than based on the facts.[8] This claim of "conflation" ignores that trial judges may reference testimony and evidence to explain why a verdict is unjust. That explanatory context

[8] In a footnote, Appellants go so far as to suggest that the "trial court's legal analysis is also akin to relief under Rule 50," seemingly suggesting that because Respondents would not have been entitled to a JNOV, it was error to grant the new trial. (Appellants' Initial Brief, fn. 2). This argument, however poorly developed, is a red herring. Even where a trial court is compelled to submit the issues to the jury, it retains the power to grant a new trial absolute. *Worrell v. S.C. Power Co.,* 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938). The trial court did not grant judgment in favor of the Plaintiffs/Respondents, discuss the JNOV standard, or otherwise decide that Plaintiffs/Respondents were entitled to judgment as a matter of law. The trial court's clear holding is that Respondents are entitled to a new trial on the basis of the facts. Although obvious, it is important to keep sight of the fact that the trial court did not enter a judgment in favor of Plaintiffs, but rather ordered that Plaintiffs/Respondents be given a second opportunity to present their case to a jury.

does not convert the ruling into judgment notwithstanding the verdict or otherwise indicate an improper legal conclusion.

In *McEntire v. Mooregard Exterminating Srvs. Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003), the Court of Appeals distinguished between weighing sufficiency of the evidence under Rule 50, SCRCP, and factual analysis under the thirteenth juror doctrine. *McEntire* involved a breach of contract claim against an exterminating company, wherein the jury returned a defense verdict, and the trial court granted a new trial under the thirteenth juror doctrine.[9] The defendants appealed, arguing that a new trial award was improper because the plaintiffs never moved for a directed verdict motion during the course of the trial. The Court of Appeals disagreed, stating:

> [A] trial judge may grant a new trial upon the facts if the judge determines the verdict "is contrary to the fair preponderance of the evidence." Unlike a motion for directed verdict, the trial judge weighs the evidence under the thirteenth juror doctrine and need not view it in the light most favorable to the opposing party. Moreover, the question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge.
>
> Because the question of whether the evidence is legally sufficient to support a verdict—a question of law—is totally different from the question of whether the **fair preponderance of the evidence** supports a verdict—a question involving the exercise of discretion—there is no inconsistency in a party's failure to move for a directed verdict and a party's moving to have the verdict set aside as being against the fair preponderance of the evidence. Stated differently, "[i]t may well be that a party's evidence makes a case for the jury **while it is so outweighed by the countervailing evidence that, in the exercise of its discretion, the trial court should not hesitate to set aside the verdict in his favor.**"
>
> A motion for a directed verdict or similar motion, therefore, was not a prerequisite to a motion to set aside the verdict on the ground the verdict was contrary to the fair preponderance of the evidence.

[9] In *McEntire*, the plaintiffs moved for "a new trial upon the facts," which the Court of Appeals noted is another name for motion for a new trial under the Thirteenth Juror Doctrine. *Id*. at 631, 578 S.E.2d at 747.

Id. at 633-34, 578 S.E.2d at 748 (internal footnotes with citations omitted) (emphasis added). In other words, the court's determination that the verdict was contrary to the fair preponderance of the evidence did not constitute a "legal conclusion" or decision as a matter of law, but was an assessment of whether the facts entitled the moving party to a new trial. Likewise, in this case, the trial court's mention that Respondents presented significant evidence of breach, proximate cause, and damages was an explanation for the concluding she was "convinced a new trial was necessitated on the basis of the facts," and is a proper background or context when issuing such an order.

Appellants' reliance on *Norton* for the assertion that the trial court erred in failing to grant a new trial "based ***solely*** 'upon the facts'" is also misplaced. (Appellants' Initial Brief, p. 10 (*citing Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (emphasis added by Appellants)). In *Norton*, as mentioned above, the trial court applied the state-court thirteenth juror standard where the federal standard should have been applied. In reversing the grant of a new trial, the Supreme Court provided a summary of South Carolina jurisprudence on the thirteenth juror doctrine:

> This Court has reviewed the thirteenth juror doctrine on several occasions and has refused to abolish it or to require trial judges to provide reasons for their decisions. South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when [s]he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." **As the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict.** As this Court explained in *Folkens,* "The effect is the same as if the jury failed to reach a verdict . . . . When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings."

Id. at 478, 567 S.E.2d at 854 (2002) (internal citations omitted) (emphasis added). The court then distinguished this standard from the federal court requirement that the verdict be contrary to "the clear weight of the evidence" to justify a new trial, indicating that the thirteenth juror doctrine requires "something less" than the federal standard, and holding that although the evidence presented in that trial would have supported a new trial under the state court standard, it did not support a new trial under the more stringent federal court standard. *Id.* at 479-82, 567 S.E.2d at 855-56. The court was not admonishing trial judges to leave the law out of the equation and decide such motions "solely" on the facts, but rather indicating that the federal court standard may require some legal analysis in a way the state standard does not. Indeed, it would make no sense to consider the facts presented as evidence in a trial completely apart from the context of the law. The jury's role is to apply the facts to a legal framework in order to reach a verdict. [10] This relationship between the facts and the law is recognized in *Watson v. Pendleton*, 294 S.C. 155, 363 S.E.2d 234 (Ct. App. 1987), where the trial court granted a new trial, noting the jury's verdict was "contrary to the evidence **and contrary to the instructions of this court**," and the Court of Appeals affirmed, holding the trial court's "finding and conclusions [were] supported by the record." *Id.* at 157, 363 S.E.2d at 234 (emphasis added).

In the current case, the court charged the jury on the law applicable to medical malpractice claims and instructed them to consider the facts and determine whether the Goodwins had proven their case. (Tr. pp. 1790-1813). After receiving the defense verdict, the court determined that the

[10] The role of a juror (including the thirteenth juror) requires both an understanding and a consideration of the law. While jurors do not decide the law, they are charged to "take the law . . . and apply it to the facts as [the juror] find[s] them from the . . . evidence that is presented." The honorable Ralph King Anderson, Jr., South Carolina Requests to Charge—Civil (2d ed. 2016). The trial court's statement that it had an "intimate knowledge o the applicable law" simply does not indicate that an improper standard was applied.

verdict was unsupported by the evidence, as the Plaintiffs/Respondents "established" that Defendants/Appellants breached the standard of care and "demonstrated" that Defendants/Appellants' conduct proximately caused damages. (Order, p. 2). Therefore, having been "convinced that a new trial [was] necessitated on the basis of the facts in the case," the court granted Respondents' motion for new trial. (Order p. 3). Nothing about this is an improper conflation of law and fact, and there is no basis to infer that legal analysis supplanted factual assessment, nor that the improper standard was applied. The trial court's Order, then, must be affirmed.

III. The Trial Court Order Must be Affirmed Because the Record Supports Granting a New Trial Based on the Thirteenth Juror Doctrine.

Even if, despite the plain language of the order, the Court were convinced the trial court made an error of law in ruling on Plaintiffs' Motion for New Trial, the award must stand on the basis that the record amply supports the trial court's decision. Regardless of what was argued or ordered at the trial court, the new trial award should be affirmed because this was one of those rare cases where it would be a miscarriage of justice to allow the jury's verdict to stand, making the thirteenth juror doctrine an appropriate tool for granting a new trial.

"No principle in the disposition of appeals is more firmly established then that a right decision upon a wrong ground will be affirmed." *Moorhead v. First Piedmont Bank & Tr. Co.*, 273 S.C. 356, 360, 256 S.E.2d 414, 416 (1979) (quoting *Foster v. Taylor*, 210 S.C. 324, 329, 42 S.E.2d 531, 534) and upholding the grant of a new trial). The Court "may affirm a trial [court's] decision on any ground appearing in the record and, hence, may affirm the trial [court's] correct result even though [it] may have erred on some other ground." *Fay v. Grand Strand Reg'l Med. Ctr.*, 412 S.C. 185, 195, 771 S.E.2d 639, 645 (Ct. App. 2015) (*quoting Potomac Leasing Co. v. Otts Mkt., Inc.*, 292 S.C. 603, 606, 358 S.E.2d 154, 156 (Ct. App. 1987)) (alterations in original).

"The reasoning adopted by the trial court is not binding upon this court if the record discloses a correct result." *Id.*

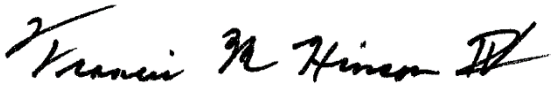
Respondents' experts more than adequately explained how the facts established both breach and causation in this case, as set forth above. At least five witnesses testified to the life-long pain and indignities Mrs. Goodwin will be forced to endure because of Appellants' medical negligence, and defense witnesses were repeatedly forced to make admissions that supported Respondents' case. Illustratively, Dr. Sampson opined on behalf of the defense that Dr. Holbrook did not breach the standard of care, but had to admit that his opinion was based on using the immediate pre-operative blood pressure reading to establish a baseline, which contravened hospital policy. (Tr. p. 841-845). Dr. Poletti conceded that the defense theory of a reperfusion injury was largely theoretical. (Tr. p. 1514-1515). Dr. Balestrieri admitted chronically hypertensive patients (such as Mrs. Goodwin) require higher intra-operative pressures and that "the 20% rule" is accepted practice. (Tr. p. 1406-1408). These admissions, along with numerous others not included in this brief, undercut the defense theory and confirmed the Goodwins' case.

The Parties in this case presented evidence and arguments for nine days, leaving no stone unturned. Respondents argue herein that the support required to affirm the trial court's discretionary decision can be discovered with only a cursory review of the record, making it unnecessary for this Court to delve into all the evidence. If, however, the Court does endeavor to read the entire trial transcript, it will be compelled to affirm the result, regardless of whether the trial court came to its conclusion the "right" way, because the record establishes that this is one of those rare cases where upholding the jury's verdict would be a miscarriage of justice. Thus, there can be no doubt that the Order granting a new trial must stand.

CONCLUSION

The trial court correctly applied the thirteenth juror doctrine, based its ruling on the facts presented at trial, and had ample evidentiary support for its discretionary decision. The Appellants have not and cannot show that the Order was wholly unsupported or controlled by error of law, and therefore, the new trial award must be affirmed. *Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267 (1990) (*citing South Carolina State Hwy. Dept. v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)).

Respectfully submitted,



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