

THE STATE OF SOUTH CAROLINA  
In the South Carolina Court of Appeals

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971

Joyce Ann Campbell

Appellant,

v.

Barbara Gaines

Respondent.

MEMORANDUM ADDRESSING THE ISSUE OF APPEALABILITY

PROCEDURAL FACTS

On August 7, 2013, a jury returned a verdict in favor of the plaintiff. That award encompassed the costs associated with the plaintiff's emergency room treatment only. As a result, plaintiff's counsel made a motion for a new trial, or, in the alternative, a new trial additur. Thereafter, a hearing was held, wherein the Court issued an oral ruling granting a new trial, based upon the thirteenth juror doctrine. This took place on August 15, 2013.

The Court's Order was formally executed on September 18, 2013. Appellant then filed a Notice of Intent to Appeal the Court's Order on October 23, 2013. On November 27, 2013, the Appellate Clerk forwarded a letter wherein she requested that appellant submit a memorandum addressing the issue of the appealability of the Court's Order.

FACTUAL BACKGROUND

This matter arose as a result of an automobile accident which took place on February 8, 2010. The defendant conceded that she was negligent in causing the accident. However, defendant denied that the plaintiff suffered an injury as a result of the automobile accident. The witnesses with the most pertinent testimony consisted of the plaintiff, two of the plaintiff's treating physicians, and the defendant. There was a dispute as to whether or not the plaintiff

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claimed an injury at the scene. However, there was no dispute with regard to the fact that the plaintiff ultimately went to the emergency room on the day of the accident, wherein she incurred \$3,941.00 in medical expenses. Thereafter, the plaintiff continued to seek treatment, with the ultimate result being that the plaintiff had surgery performed on her neck. The plaintiff then submitted medical bills that she felt were related to the automobile accident, in the sum of \$77,966.56. In closing, plaintiff's counsel suggested that the jury award all of the medical bills, as well as an additional sum for pain and suffering. On the other hand, defense counsel suggested that the jury award a verdict for the emergency room bill, only. The jury then deliberated and returned a verdict for the emergency room bill, only. As stated above, the verdict resulted in plaintiff's counsel making post trial motions. Ultimately, the Court chose to invoke the thirteenth juror doctrine, thereby granting a new trial.

The Court's Order granting a new trial pursuant to the thirteenth juror doctrine is based on the following issues:

1. The plaintiff presented two experts who testified, to a reasonable degree of medical certainty, that the plaintiff's surgery was caused by the automobile accident in question. Furthermore, the defendant proffered no expert to contradict the opposing expert's testimony;
2. Defense counsel pitted witnesses against each another when cross-examining the plaintiff's experts;
3. Defense counsel cross-examined the plaintiff's experts by asking if things were possible, as opposed to asking if a different set of facts would have resulted, to a reasonable degree of medical certainty, in a different conclusion; and,
4. Defense counsel personally addressed and appealed to the jury in his closing remarks, with the same being in violation of *SCRPC* Rule 43(i).

It is important to note that during the course of the trial of this matter, plaintiff's counsel did not object to any of these issues.

Regardless, as a result of the above-stated issues, the Trial Court felt that the "competent evidence" presented in trial failed to support the jury's verdict and, as such, the Trial Court granted a new trial based upon the thirteenth juror doctrine.

#### LAW

"The axiom that an order granting a new trial upon the facts is not appealable... has been soundly applied to limit review in these cases to a determination of whether they was an abuse of discretion amounting to an error of law." However, the trial judge needs to set forth reasons to support the order, and those orders can be appealed. *South Carolina Dept. of Highways and Public Transp. v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (S.C. 1980).

"Ordinarily, the order of a trial judge granting a new trial on the grounds that the verdict

is contrary of the evidence is non-appealable. However, when it is manifest that the order for the new trial is founded upon a fundamental error of law, it is axiomatic that this Court may review the decision.” *South Carolina State Highway Dept. v. Terrain, Inc.*, 267 S.C. 186, 195, 227 S.E. 2d 184 (S.C. 1976).

“Where the trial judge’s reasons for granting a new trial are without evidentiary support, the new trial order is erroneous as a matter of law.” *South Carolina State Highway Dept. v. Clarkson*, 267 S.C. 121, 226 S.C.2d 696 (S.C. 1976).

#### ERRORS OF LAW WHICH MANDATE REVIEW

The Trial Court’s Order states, in part: “The plaintiff’s new trial motion centered on the testimony of her two medical expert witnesses who opined that this motor vehicle accident, more probably than not, to a reasonable degree of medical certainty, was the cause of the injury to the plaintiff, which necessitated the disputed spinal surgery. Both witnesses were presented at trial through the use of *de bene esse* video depositions. Defendant did not present any evidence to refute these experts, and relied solely on McGarr’s (defense counsel) cross-examination of the witnesses to contest the proximate cause issue.”

Essentially, the Trial Court misapprehended the law with regard to what the jury must consider when hearing expert testimony. “A jury can disregard an expert’s opinion, entirely, if the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence. An expert witness’s testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert, and a jury does not have to accept an expert’s opinion even though it is uncontradicted.” *Berkeley Elec Coop., Inc. v. South Carolina Public Serv. Comm’n* 304 S.C. 15, 402 S.E.2d 674 (S.C. 1991). In fact, the Court cited the case of *Vinson v. Hartley* in its Order. However, it failed to take into consideration that *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C. App. 1996) affirmed the Trial Court’s refusal to utilize the thirteenth juror doctrine, as well as its refusal to grant the plaintiff a new trial. The issues in *Vinson v. Hartley* are almost identical to the issue now before the Court. During trial, Vinson presented himself as a witness. He also presented an expert witness who was a dentist. Hartley produced no expert witnesses. However, Hartley’s attorney cross-examined Vinson and his dentist. That cross-examination produced severe issues with regard to the credibility of both witnesses. The Appellate Court noted this, with approval, and held that the jury is not required to accept a plaintiff’s uncontradicted testimony that he or she had been injured. Furthermore, the Court stated that the fact that the testimony is not contradicted directly does not render it undisputed. Just as important, the Court recognized that the testimony of the plaintiff and her expert witnesses was not directly contradicted. Despite the same, their credibility was brought into question. As a result of those credibility issues, the lower Court refused to grant a new trial, and the Appellate Court affirmed the lower Court’s decision. In essence, our courts do not require an opposing expert to contradict a presented expert. Furthermore, our courts do not require an opposing witness to contradict a presented witness. The issue at hand is, and always will be, whether or not the witnesses presented are credible.

Plaintiff's counsel was aware of the Court's decision in *Vinson v. Hartley*, Id., given the fact that he cited the same to the Court during his post trial motions.

Unfortunately, the Court misconstrued South Carolina law whereby it felt that because the plaintiff's experts were not directly contradicted, their testimonies should have been accepted by the jury. This is not the law. To accept the same as such is an abuse of the lower Court's discretion.

The Court also found that "McGarr repeatedly and argumentatively questioned Dr. Mina (an expert witness for plaintiff) about the veracity of other witnesses. Not only did McGarr continuously ask Dr. Mina to comment on the plaintiff's credibility using collateral sources, but McGarr went so far as to ask Dr. Mina if she were calling the emergency room physicians 'quacks.' This questioning was in clear violation of South Carolina's long standing rule prohibiting the 'pitting' of witnesses."

Again, the Court misapprehended the rules associated with pitting witnesses. Obviously, one cannot ask a lay witness whether or not another witness told the truth. Furthermore, one cannot cross-examine a lay witness and ask him or her to explain why other witnesses testified contrary to the witness on the stand. However, this rule does not apply to experts who have been called to testify. Again, *Vinson v. Hartley*, Id, the case cited by the Trial Court, addressed this issue and quoted, with approval, a number of instances wherein Harlley's attorney cross-examined Vinson's expert witness in a fashion similar to that used to cross-examine the plaintiff's expert witnesses in the present case. This is due to the fact that Rule 705 SCRPC governs the cross-examination of experts. Rule 705 states that during an expert's testimony, "The expert in any event may be required to disclose the underlying facts or data on cross-examination." This rule was more fully set forth in the case of *State v. Sclocumb*, 366 S.C. 619, 521 S.E.2d 507 (S.C. App. 1999). In that case, the Court stated, "Under this provision (Rule 705) a cross-examiner is permitted 'to ask the expert to reveal otherwise inadmissible, underlying information to the jury.' On cross-examination, in the process of probing the witness's qualifications, experience, biases, and assumptions, opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so, how, the nonexistence of any fact, data, or opinion, or the existence of a contrary version of the fact, data, or opinion supported by the evidence would affect the expert's opinion. Similarly, the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry, subject to the requirements of Fed. R. Evid. 403, the cross-examiner is not limited to facts finding support in the record." The Court went on to say that "Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert's opinion; Rule 705 is the cross-examiner's sword, and,

within very broad limits, he may wield it as he or she likes.” Id.

Plaintiff’s counsel was aware of Rule 705, and its corresponding case law, as he did not object to McGarr’s cross-examination of the experts on these grounds. Furthermore, plaintiff’s counsel cited *Vinson v. Hartley*, Id., while addressing the Court during his post trial motions.

Despite all of the above, the Trial Court misapprehended South Carolina’s law with regard to pitting witnesses and, after the trial was concluded, applied the pitting of witnesses prohibition to the cross-examination of the experts. Unfortunately, this application of the law is incorrect, and, as such, an abuse of the Trial Court’s discretion.

The Court also relied upon the fact that McGarr asked the plaintiff’s experts if things were “possible” based upon information being given to them. The Court felt that this was incorrect, as an expert can only be asked if the new information he or she is given upon cross-examination has changed his or her opinion to a reasonable degree of medical certainty, and with a more probably than not response. Again, there is no dispute that in South Carolina, a person who presents an expert is only allowed to have the expert’s opinion go to a jury after the expert can assert that, to a reasonable degree of certainty, “X” more probably than not caused “Y.” A plaintiff is bound by that standard when placing his or her expert witness on the stand. The defendant is also bound by that standard when placing his or her expert witness on the stand.

However, the Court misapprehended the standard applied when an expert is being cross-examined. Again, a review of *Vinson v. Hartley*, Id, makes it apparent that no such standard applies. That is because the standard that applies during the circumstances comes from *SCRCP* Rule 705. This Rule was eloquently explained in the case of *State v. Sclocumb*. “Rule 703 creates a shield by which a party may enjoy the benefit of inadmissible evidence by wrapping it in an expert’s opinion; Rule 705 is the cross-examiner’s sword, and, with very broad limits, he may wield it as he likes.” In fact, as recently as 2003, the Court, in the matter of *Collins Entertainment Corp. v. Coats and Coats Rental Amusement*, 355 S.C. 125, 584 S.E.2d 120 (S.C. App. 2003), allowed that sword to be used during cross-examination. Indeed, the Court specifically allowed hearsay testimony to be used in the cross-examination of an expert, as the hearsay testimony was of a type reasonably relied upon by experts in that particular field.

As previously noted, plaintiff’s counsel was aware of the impact of Rule 705, as he did not object to McGarr’s cross-examination of his client’s experts on this ground. Also previously noted, plaintiff’s counsel cited *Vinson v. Hartley* while addressing the Court during his post trial motions.

Despite the above, the Trial Court misapprehended the law associated with standards applied when someone presents an expert to testify, versus when someone cross-examines an opposing party’s expert. The Trial Court felt that cross-examination required questions premised by, “To a reasonable degree of certainty, ‘X’ caused ‘Y.’” This is not the law, and the misapprehension of the same reflects an abuse of the Trial Court’s discretion.

The Trial Court then stated that “McGarr also violated *SCRCP* 43(i) in his closing arguments.” The Court elaborated on this by asserting that McGarr stated, “...I know that my Greenville County jurors are going to be fair and decent to me.” “And, you are bright enough and have the brains enough to know that what I said on Monday.” “You guys are not so foolish or dumb.” “When you heard the evidence yourself, are you guys just not bright enough to remember?”

The Court misapprehended Rule 43(i). The rule actually states the following, in pertinent part: “Counsel shall not address or refer to by name any member of the jury to which he is addressing, or otherwise personally appeal to any member thereof.” This rule is designed to prevent an attorney from addressing a jury via one of the following examples: “Mr. Smith, as you know....” “You are a nurse and you heard.” “Sir, in the blue tie, you must understand.” Simply stated, the rule is designed to prevent an attorney from personally appealing to or intimidating an individual juror. It is not designed to prevent an attorney from discussing an issue with the jury, collectively. The Court must understand this concept on some level, for during its opening instructions, the Court told the jury that it needed to bring its common sense to the trial. Furthermore, during closing instruction, the Court advised the jury that it was to determine the credibility and believability of the witnesses who had testified, as the jury’s duty was to evaluate the evidence in order to determine what it felt to be the truth.

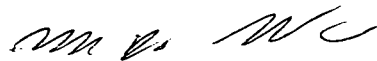
Again, plaintiff’s counsel must have been cognizant of Rule 43, as he never objected to the closing statements now in question.

The Court’s misapprehension of Rule 43 led it to believe that McGarr’s closing arguments prejudiced the jury. Unfortunately, the Court’s understanding of the law is incorrect, and, as such, is an abuse of discretion.

## CONCLUSION

In essence, the conclusions reached by the Trial Court, when invoking the thirteenth juror doctrine, were controlled by numerous errors of law. These errors were still controlling the Court when it determined that, “The only competent evidence admitted at trial requires a verdict that compensates the Plaintiff, at a minimum, for medical bills and expenses incurred as a result of the spinal surgery.” As stated above, if a Court makes incorrect legal conclusions in determining the facts which support its use of the thirteenth juror doctrine, then the very act of incorrectly ruling on the law gives rise to an Appellate Court reviewing the matter. If the Trial Court’s findings are incorrect, then the Appellate Court must overrule the Trial Court’s granting of a new trial. As such, the Court’s Order is appealable, as it arises from distinct and serious conclusions of law.

December 6, 2013



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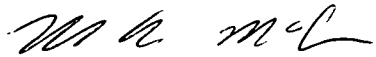
Respondent.

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PROOF OF SERVICE

I certify the I have served the Memorandum Addressing the Issue of Appealability on Barbara Gaines by depositing a copy of it in the United States Mail, postage prepaid, on December 6, 2013, addressed to her attorney of record, John R. Peace, Esq., John Robert Peace, P.A., PO Box 8087, Greenville, SC 29604-8087.

December 6, 2013



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December 6, 2013

The Honorable V. Claire Allen  
Deputy Clerk of Court  
South Carolina Court of Appeals  
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RE: Case Name: Barbara Gaines v. Joyce Ann Campbell  
Appellate Case #: 2013-002367  
Case #: 2012-CP-23-1971  
Claim #: 40-8536-882  
MKM File #: 200.1077

Dear Ms. Allen:

Please find enclosed the original, and seven (7) copies of the following documents:

1. A Memorandum Addressing the Issue of Appealability;
2. A Proof of Service; and,
3. A stamped, self-addressed envelope.


I would appreciate your filing the originals of these documents, clocking the copies, and returning the same to me in the enclosed, self-addressed, stamped envelope provided for your convenience.

Furthermore, please note that by copy of this letter, that I am placing counsel for the plaintiff/respondent on notice that the originals of these documents have been filed with your Court.

As always, I thank you and your staff for all the help and assistance you repeatedly provide with regard to these matters.

Sincerely,

MARCUS K. MCGARR, P.A.



Marcus K. McGarr

MKM/meg  
Enclosures

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