

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

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Case No. 2010-CP-42-00462

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Robert W. Edwards, Jr., . . . . . Appellant,

v.

Linda N. Jordan, . . . . . Respondent.

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REPLY TO PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING EN BANC

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JAN 14 2014

**SC Court of Appeals**

**I. The Court of Appeals was correct in holding that there was evidence in the record regarding comparative negligence and open and obvious condition.**

In response to Appellant's Complaint, the Respondent pled comparative negligence in her Answer. (R. p. 8-9.) In the trial of this matter, the Appellant presented photographs showing the condition of the deck. (R. p. 167-185.) Appellant also submitted a video showing the condition of the deck. (R. p. 99-103.) Respondent testified that the photographs showed what the deck looked like at the time of the fall. (R. p. 53, lines 18-22.) The deck was walked on weekly by the Appellant and daily by the Respondent. (R. p. 48, lines 16-22; p. 54, lines 11-16.) Respondent further testified that she walked on the center portion, but Appellant stepped on the side. (R. p. 70, lines 4-13.) Respondent testified she would not have done that. (R. p. 70, lines 12-13.)

Appellant testified that he was familiar with the deck before the accident. (R. p. 107, lines 15-21.) He further testified that he continued to walk on the deck after the accident. (R. p. 106, line 25- p. 107, line 11.) Appellant testified that he had walked on the deck "a thousand times". (R. p. 107, lines 22-26.) Appellant was very familiar with the deck and its condition prior to the accident.

In affirming the decision of the trial court, the Court of Appeals held that the trial court correctly charged the jury on comparative negligence and open and

obvious condition. An appeal as to an alleged error in jury instructions should not be reversed absent an abuse of discretion. Hennes v. Shaw 397 S.C. 391, 402, 725 S.E. 2d 501, 507 (Ct. App. 2012) For an abuse of discretion to occur, the trial court's ruling must be based on an error of law or not supported by evidence. Cole v. Raut, 378 S.C. 398, 404, 663 S.E. 2d 30, 33 (2008).

Plaintiff submits that the Respondent abandoned the affirmative defense of comparative negligence. Plaintiff bases this position on the testimony of the Respondent that the Appellant did not do anything improper (R. p. 70, lines 4-18.) as well as the testimony of Bobby Pearson. ( R. p. 83, lines 4-21.) Appellant further argues that Respondent's counsel stated in his closing argument that "we're not blaming him". (R. p. 132, lines 19-21.)

It is clear from the record that the comparative negligence defense was never abandoned by the Respondent. Arguments made by counsel are not evidence. South Carolina Department of Transportation vs. Thompson, 357 S.C. 101, 590 S.E. 2d 511 (Ct. App. 2003). At the close of the testimony the Appellant made a motion for a directed verdict as to the defense of comparative negligence. (R. p. 116-120, line 3.) It is clear that Respondent's counsel did not abandon the comparative negligence defense. It is also clear that the trial court correctly ruled that the issue is not what a witness thinks about fault but "what the evidence in the case shows or what might be reasonably inferred from the evidence in the case".

(R. p. 105, lines 5-7.) The trial judge correctly ruled that there was ample evidence in the record regarding comparative negligence and the defense was never abandoned by the Respondent.

Finally, Appellant cites a case from the Supreme Court of Montana for the proposition that comparative negligence cannot be raised where a party states that the other party is not to blame for an accident. However, Larchick v. Diocese of Great Falls-Billings, 208 P. 3d 836 (Mont. 2009) is clearly distinguishable from the case at bar. In that case, the Diocese of Great Falls-Billings was sued as a result of a student striking another student with a lacrosse stick during a lacrosse game during P. E. class. Unlike the case at bar, that court found that there was **no evidence** that the Plaintiff/Appellant breached any duty owed to the Defendants or acted negligently. (Emphasis added)

In the present case, there is ample evidence of comparative negligence in the record. This evidence includes photographs and a video introduced by the Appellant showing the condition of the deck. Appellant also testified that he was familiar with the deck before the accident, walking on it “a thousand times”. Appellant continued to walk on the deck after the accident. The Respondent testified that she walked on the center portion of the deck, but that the Appellant stepped on the side where she would not have walked. Finally, Appellant’s attorney stated several times that the deck was “an accident about to happen”, indicating that

the condition was open and obvious. (R. p. 124, lines 15-16.) Appellant's petition for rehearing on this issue should be denied.

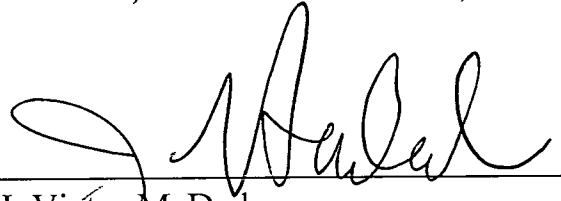
**II. The Court of Appeals did not overlook or misapprehend Appellant's argument for a New Trial or New Trial Nisi Additur.**

In affirming the denial of Appellant's Motion for a New Trial or New Trial Nisi Additur, this court cited Camden v. Hilton, 360 S.C. 164, 174, 600 S.E. 2d 88,93 (Ct. App. 2004) ("In South Carolina, an Appellant Court must uphold a jury verdict if it possible to reconcile its various features.") It is well settled that the decision on a Motion for a New Trial Nisi is within the discretion of the trial judge and will not be overturned unless the findings are "wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Waring v. Johnson 341 S.C. 248, 256, 533 S.E. 2d 906, 910 (Ct. App. 2000). Only "if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was a result of passion, caprice, prejudice, partiality, corruption or some other improper motives" must the court grant a new trial. Vinson v. Hartley, 324 S.C. 389, 404, 477, S.E. 2d 715, 723 (Ct. App. 1996). "The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possess a better informed view of the damages than this Court." Vinson v. Hartley, 324 S.C. 389, 477, S.E. 2d 715 (Ct. App. 1996) "Great

deference should be given to the trial judge.” Id.

Appellant cannot show an abuse of discretion. The Respondent respectfully requests that Appellant’s Motion be denied on this issue.

**DOYLE, TATE & McDADE, P.A.**

A handwritten signature in black ink, appearing to read "J. Victor McDade", written over a horizontal line.

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JANUARY 10, 2014

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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J. Derham Cole, Circuit Court Judge

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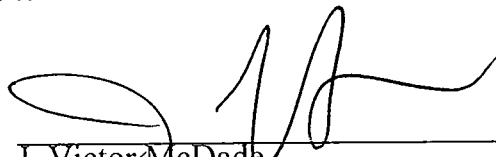
Linda N. Jordan, ..... Respondent.

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**PROOF OF SERVICE**

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I certify that I have served the Reply to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc on Robert W. Edwards, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on December 4, 2012, addressed to his attorney of record, William B. Darwin, Post Office Box 1897, Spartanburg, South Carolina 29304.

  
\_\_\_\_\_  
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January 10, 2014

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**SC Court of Appeals**

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January 10, 2014

The Honorable Jenny Kitchings  
Clerk of the South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RE: Robert W. Edwards, Jr. vs. Linda N. Jordan  
Case No. 2010-CP-42-00462

Dear Mrs. Kitchings:

Enclosed please find the original and six (6) copies of the Reply to Petition for Rehearing and Suggestion for Rehearing En Banc with our and Proof Of Service on all counsel of record. I am enclosing an extra copy and ask that you please provide me with a clocked copy using the self-addressed stamped envelope provided.

Thanks.  
Best regards.

Sincerely,



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JAN 14 2014

cc: Kip B. Darwin  
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**SC Court of Appeals**



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