IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Appellate Case No. 2013-002367

Barbara Gaines, ...Respondent,

v.

Joyce Ann Campbell, ...Appellant.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This matter comes before the Court by way of a Summons and Complaint filed by Barbara Gaines, the plaintiff. The complaint was filed on March 20, 2012. The Summons and Complaint alleged that Joyce Ann Campbell, the defendant, was negligent in driving her automobile, which caused an accident on January 8, 2010. The negligence arose as a result of the fact that Ms. Campbell's vehicle hit the rear of Ms. Gaines's vehicle. (Complaint) Ms. Campbell answered Ms. Gaines's complaint on April 16, 2012. At that time, Ms. Campbell conceded that she was negligent. However, she denied that she caused any longstanding injury to Ms. Gaines. Furthermore, she alleged that Ms. Gaines suffered from a preexisting or post-existing injury. Finally, Ms. Campbell

alleged that Ms. Gaines had failed to mitigate her damages. (Answer)

Discovery then proceeded, and the matter was ultimately called for trial on August 5, 2013. At the trial's conclusion, Ms. Campbell asked the jury to return a verdict in favor of Ms. Gaines. However, she suggested that the verdict be limited to the amount of the emergency room bill, as that bill was the only damage that could have been proximately caused by any action of Ms. Campbell. (T2 p. 98) That emergency room bill totaled Three Thousand Nine Hundred Forty-One Dollars and Zero Cents ($3,941.00). Ms. Gaines, on the other hand, requested that the jury award medical bills in the amount of Seventy-Seven Thousand Nine Hundred Sixty-Six Dollars and Fifty-Six Cents ($77,966.56). (T2 p. 74) That sum represented the medical expenses Ms. Gaines felt she had incurred as a result of the accident with Ms. Campbell. Ms. Gaines also requested that the jury award her for damages in excess of her medical bills, as a result of the personal injuries that she felt resulted from the accident. (T2 p. 75) The jury then deliberated, and, thereafter, returned a verdict for the emergency room bill only. (T2 p. 118, Verdict Form)

Ms. Gaines then made a motion for a new trial, or, in the alternative, a new trial additur. The formal hearing with regard to that request took place on August 15, 2013. At the conclusion of the hearing, the Court issued an oral ruling granting a new trial based upon the thirteenth juror doctrine. The Court's Order was formally executed on September 18, 2013. Ms. Campbell received written notice of the entry of that order on September 23, 2013. (Order) Ms. Campbell then filed a notice of intent to appeal the Court's Order on October 23, 2013. On November 27, 2013, the Appellate Court forwarded a letter, wherein it requested that both parties submit a memorandum addressing the issue of appealability of the Court's Order. (Letter) On December 6, 2013, Ms. Campbell filed a memorandum addressing the issue of appealability. (Memorandum)

FACTS

The documents, photographs, and testimony from independent witnesses elicited facts as follows:

As early as July 23, 1987, Ms. Gaines was at a hospital for neck therapy treatments. By July 24, 1987, Ms. Gaines was on medical disability for a neck injury which occurred in the course of her then-employment. (T1 p. 96-98) In 1999, Ms. Gaines filled out a health questionnaire for the Jervey Eye Group, wherein she indicated that she was having arthritis in her spine. (T1 p. 98) On July 23, 1999, she told Dr. Beth Brown that she had a history of a neck injury which was the result of falling while performing a cartwheel. (T1 p. 98-99) On June 17, 2002, she was at Piedmont Orthopedics, wherein she filled out a document stating that she was suffering from pain in her joints or bones, swelling of her joints, arthritis, and stiffness. (T1 p. 99-101) On August 25, 2006, Ms. Gaines told a doctor at Adult Medical Specialists of Easley that she had injured her shoulder about two weeks prior, and since that injury, had experienced trouble moving her upper arm, as well as pain in her neck. (T1 p.102) On August 29, 2006, she went to see Dr. Anne Claire Edwards, wherein she indicated that she was having neck pain. (T1 p. 102-103) Ms. Gaines then went to Dosher Physical Therapy on August 30, 2006, wherein she indicated that she was a sixty-five year old female who had been referred to physical therapy with a six-week history of left shoulder pain, with that left shoulder pain occurring especially with overhead movement. She also reported neck pain that had been in existence longer than the shoulder issue, as well as feeling stiff, achy, and tight. (T1 p.103-105) On September 01, 2006, Ms. Gaines reported to the same physical therapist that one of her problems was neck tightness. (T1 p. 105) On September 07, 2006 she was back at the physical therapist's office, and noted that her neck tightness that was not getting better. (T1 p.105) On September 13, 2006, she advised the physical therapists that her arm, shoulder, and neck pain were better. However, this could have been attributed to the fact that her pain typically

occurred in the mornings. Furthermore, it was noted that her neck might not have been as tight. (T1 p. 105) On September 18, 2006, it was noted that her neck and shoulder were tight. (T1 p.106) On October 11, 2006, it was also noted that her neck was much better. (T1 p.106) However, by October 13, 2006, she reported that her shoulders weren't not too bad, until her neck became stiff. (T1 p.106) On October 18, 2006, she continued with complaints of cervical spine pain. (T1 p.106-107) On April 05, 2007, Ms. Gaines filled out a document wherein she specifically noted that her medical history included neck problems. (T1 p. 107) On April 05, 2007, she engaged physical therapy a second time, wherein she noted a history of left and right carpel tunnel syndrome, neck problems, diabetes, and arthritis. (T1 p. 107-108) On September 01, 2009, she went to Dr. Mark Baker of Easley Family Practice and Internal Medicine. At that point, it was noted that the patient had pain and stiffness in her upper trapezius and cervical spine muscles. (T1 p. 109-111) On August 27, 2009, she went to Dr. Lisa G. Harding's office, wherein she indicated that, in addition to other medications, she was taking Cymbalta and Tylenol Arthritis. (Harding Depo. p. 29 & 33-34) Indeed, by September 11, 2009, her doctor was continuing to prescribe Cymbalta, a medication capable of aiding nerve and muscle problems, as well as Tylenol Arthritis, an arthritic medication. However, Ms. Gaines's doctor then added Ultram, an opiate-type of pain medication, to Ms. Gaines's medical regimen. (Harding Depo. p. 35-36) On November 30, 2009, she was still taking the Tylenol Arthritis, Ultram, and Cymbalta. (Harding Depo. p. 36-37)

On January 8, 2010, Ms. Gaines and Ms. Campbell were involved in the automobile accident which gives rise to this lawsuit. That accident resulted in very little visible damage to either party's vehicle. (Defendant's Exhibits 1-6; T1 p. 82-85; T1 p. 132-133; T2 p.72-73; T2 p. 82; T1 p. 45-47; and, Gaines Deposition Exhibits 1-3) In fact, Ms. Gaines testified that she told the investigating police officer that she did not know if she were injured at the time of the accident. (T1

p. 58; T1 p. 47; and, T1 p.135) Furthermore, after the investigation's conclusion, both Ms. Gaines and Ms. Campbell drove away from the scene of the accident. (T1 p. 89-90 and T1 p.135)

Shortly after the accident, Ms. Gaines went to the emergency room. While there, her pulse rate was checked and found to be seventy-six. (Harding Depo. p. 38-39) Her respiratory rate was checked and found to be sixteen. (Harding Depo. p. 39) Indeed, her pulse rate was lower and her respiratory rate was equal to measurements taken during a visit with her doctor, a few weeks before the accident. (Harding Depo. p. 37-40) While at the hospital, Ms. Gaines complained of headaches, nausea, and low back pain. However, she did not present with an altered state of consciousness, denied any dizziness, and, most important, denied any loss of consciousness as a result of the accident. Indeed, her neurological system was examined and noted to be normal. Her neck was found to be supple, with no spasms, and no stiffness. She did have pain when moving her neck. However, that pain was characterized as mild. Thereafter, no blood was found in the tissues of her neck. On the other hand, she did report that her neck was tender to touch. Regardless, she never complained of right arm pain. Furthermore, her neck was x-rayed, and the radiologist determined that she had severe degenerative changes in the same. However, no acute abnormalities were noted. (Harding Depo. p. 40-49)

After the above examinations were completed, Ms. Gaines was released from the hospital. Twenty days thereafter, she went to her family physician so as to receive blood work. During that visit, she made no request to see her doctor. (Harding Depo. p. 49-50)

On February 8, 2010, Ms. Gaines returned to her doctor, wherein her complaints were listed in this order: 1) hot flashes; 2) skin problems; 3) moles; and, 4) right arm pain. That doctor performed an exam, after which she felt there was a problem in Ms. Gaines's arm, which correlated to a pinched nerve at the C5-6 level. (Harding Depo. p. 50-53)

As a result, Ms. Gaines was sent for an MRI. Again, the MRI was to be performed as a result of Ms. Gaines's complaint of right arm numbness and weakness. The radiologist who interpreted that MRI indicated that Ms. Gaines suffered from severe bone spurring, a congenitally small spinal canal, and severe spinal canal stenosis. (Harding Depo. p. 55-57)

The findings of this MRI ultimately resulted in Mr. Gaines being referred to a neurosurgeon. Indeed, the neurosurgeon then placed her into physical therapy. In fact, on May 04, 2010, Ms. Gaines was at physical therapy, wherein she reported that she had been doing better, but had developed soreness in her shoulder and neck after putting out mulch over the weekend. (Mina Depo. p. 74) Thereafter, On June 07, 2011, Ms. Gaines underwent surgery to her neck, so as to have the bone spur that was pinching her nerve removed. (Harding Depo. p. 60-62) That spur, by all accounts, existed long before the automobile accident in question occurred. Indeed, once the bone spur was removed, Ms. Gaines's symptoms ceased to exist. (Harding Depo. p. 61-62 and T1 p.71)

The facts as elicited by Ms. Gaines are as follows:

Ms. Gaines testified that the impact to her automobile was as if a bomb had gone off. (T1 p. 57) In fact, she told the jury that the impact was so significant that it caused her to be knocked out. (T1 p. 57) Ms. Gaines did concede that she told Ms. Campbell that she did not know if she were injured, while at the scene. (T1 p.58) Furthermore, Ms. Gaines agreed that she said the same to the officer who investigated the accident. (T1 p. 58) Thereafter, upon completion of the police officer's investigation, she drove from the scene of the accident, to her home. (T1 p. 89-90) Thereafter, she presented to the emergency room, wherein she was ultimately released. (T1 p. 59) Ms. Gaines then waited for a period of time before seeking additional medical treatment, and, ultimately, surgery. Once she received said surgery, she experienced no recurrence of the symptoms that were in existence prior to the same. (T1 p. 71)

Upon cross examination, Ms. Gaines was forced to admit that, when given photographs of her vehicle during her deposition, it was evident that her vehicle suffered very little visible damage. (Defendant's Exhibits 1-3; T1 p. 82-85; T1 p. 132-133; T2 p.72-73; T2 p. 82; T1 p. 45-47; and, Gaines Deposition Exhibits 1-3) She was then forced to concede that she did not mention right arm problems while at the emergency room, shortly after the accident. (T1 p. 60 & T1 p. 91 & Harding Depo. p. 40-49) Ms. Gaines then had to confirm that during her deposition testimony, she indicated that she had never been treated for neck pain, prior to the automobile accident in question. (T1 p. 96-111) Furthermore, she was forced to acknowledge that, during her direct examination, she told the jury that she had been to the Piedmont Orthopedic Clinic before the accident with regard to a shoulder problem, only. (T1p. 76-77) Last, Ms. Gaines had to admit that, during direct examination, she told the jury that she had never been on disability because of a neck issue. (T1 p. 55)

Again, it is important to note that the accident in question took place on January 8, 2010. Unfortunately, and in spite of Ms. Gaines's prior testimony regarding her neck, her medical records indicate a very different story. For example, Ms. Gaines was at a hospital engaging in neck therapy treatments as early as July 23, 1987. It was then apparent that she was on disability as a result of a neck injury on July 24, 1987. She then filled out a health questionnaire in 1999, wherein she indicated that she had arthritis in her spine. On July 23, 1999, she told a doctor that she had medical history that included a neck injury. On June 17, 2002, she filled out a document at another physician's office, wherein she indicated that she was suffering from pain in her joints, her bones, slowing of her joints, arthritis and stiffness. She was then at another medical provider's office on August 25, 2006, wherein she stated that she had injured her shoulder two weeks earlier, and, since that time, had experienced trouble moving her arm. She also noted that she was experiencing pain in her neck. On August 29, 2006, she specifically told a doctor that she was having pain in her neck.

On August 30, 2006, she was at physical therapy, wherein she reported a history of left shoulder pain and neck pain. On September 1, 2006, she reported having neck tightness. On September 7, 2006, she reported that her neck tightness was not getting better. On September 13, 2006, she reported that her neck pain was better. However, she noted that this improvement could have been due to the fact that her problems were primarily occurring in the mornings. She then reported, on September 18, 2006, that her neck was tight. On October 11, 2006, she indicated that her neck was better. Indeed, on October 13, 2006, she reported that her shoulders were not too bad, until the point at which her neck would become stiff. Thereafter, on October 18, 2006, she was still complaining of cervical spine pain. On April 5, 2007, she filled out a document wherein she specifically stated that her medical history included neck problems. On April 5, 2007, she began physical therapy for a second time, wherein she indicated a medical history positive for neck problems. On August 31, 2009, she told a physician that she was experiencing pain and stiffness, in part, in her cervical spinal muscles. (T1 p. 90-111) On August 27, 2009, she told a different physician that she was taking Cymbalta and Tylenol Arthritis. On September 11, 2009, she was taking medications with applications regarding nerve and muscle problems, a medication for arthritis, and had added an opiate-type of pain medication. On November 30, 2009, she continued to take Tylenol Arthritis, Ultram, a synthetic opiate, and Cymbalta. (Harding Depo. p. 29-37) She was then involved in the accident which gives rise to this lawsuit on January 8, 2010.

Ms. Gaines also stated, during her deposition, that nothing had happened to her between the time of the accident on January 8, 2010, and the time of her July 5, 2012 deposition, which could have caused her additional problems with regard to her neck. (Mina Depo. p. 73) However, it is abundantly clear that she re-injured her neck on August 4, 2010. At that time, she specifically told her physical therapist that her "Right arm has been doing better, though sore in shoulder and neck

since putting out mulch over the weekend." (Mina Depo. p. 73-74) Obviously, her deposition testimony was incorrect. Just as important, one of her expert witnesses, Dr. Harding, unequivocally stated that the mulching incident could have created the need for Ms. Gaines's neck surgery. (Harding Depo. p. 64)

Dr. Mina, one of Ms. Gaines's experts, testified that, to a reasonable degree of medical certainty, the automobile accident caused Ms. Gaines to require an operation to remove the bone spur. (Mina Depo. p. 33-34) This surgery took place on June 7, 2011. However, this conclusion was made after Dr. Mina admitted that she did not necessarily agree with radiologists' reports. (Mina Depo. p. 10) She then questioned the reliability of the emergency room records. (Mina Depo p. 45-49 & p. 76-80 & p. 86-88) Indeed, Dr. Mina implied that her examination would have been better than an emergency room doctor's examination. (Mina Depo. p. 81-88) She then testified that there existed no possibility that the mulching incident could have been the catalyst that ultimately facilitated Ms. Gaines's need for surgery. (Mina Depo. p. 87-89) This testimony was given despite the fact that the mulching incident occurred eight months after the accident with Ms. Campbell, and ten months prior to her date of surgery.

Dr. Harding, Ms. Gaines's second expert, offered testimony. Unfortunately, most of this testimony was in direct contradiction with Dr. Mina's testimony. For example, Dr. Harding readily conceded that an emergency room physician, in addition to a family physician, would easily be able diagnose a pinched nerve.(Harding Depo. p. 53-55) Furthermore, Dr. Harding never questioned the need to independently read radiologic films. (Harding Depo. p. 48-49) Just as important, Dr. Harding did not question an emergency room's ability to accurately gather information and/or perform proper evaluations of its patients. (Harding Depo. p. 38-49) In fact, she, unlike Dr. Mina, admitted that Ms. Gaines's need for surgery could have been created by the mulching incident.

(Harding Depo. p. 63-64)

ARGUMENTS

A. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED A NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

A Trial Judge has the power to grant a new trial by utilizing the Thirteenth Juror Doctrine. However, this power may be exercised only when the verdict is, "shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (S.C. 2000). "The Trial Judge must grant a new trial absolute 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 the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives" *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (S.C.App. 1996). However, a jury's determination of damages is entitled to substantial deference. *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (S.C.App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (S.C. 2009). Just as important, the decision to grant or deny a new trial motion rests within the discretion of the Circuit Court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Brinkley v. S.C. Dep't of Corrs.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (S.C.App. 2009).

In essence, a court that "abuses its discretion," a term that sounds extraordinarily harsh, is simply misapprehending the facts or the law. However, if a court does misapprehend those issues, the same's new trial order must be reversed.

I. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN OPPOSING EXPERT'S TESTIMONY.

The Trial Court granted a new trial based upon a number of issues. The first issue is noted as follows: "Plaintiff's new trial motion centered on the testimony of her two medical expert witnesses who each 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 cross-examination of the witnesses to contest the proximate cause issue. No objections were made at the trial as to the admission of either deposition and no objections were made at trial as to the content of either deposition." In essence, the Court was of the opinion that a defendant, when confronted with a proximate cause issue, must present an expert to refute the testimony of a plaintiff's expert.

The Trial Court's statement is absolutely correct. Two doctors testified for the Plaintiff, without objection from either party. The Defendant produced no experts to counter the opinions of the Plaintiff's experts. However, the credibility of the statements given by the experts was clearly the issue in question.

To the best of the undersigned's knowledge, the above-noted issue was first addressed by a court in 1935. At that time, our Supreme Court held that, "the fact that the evidence was not contradicted by direct evidence does not render it undisputed as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result." *Green v. Greenville County*, 176 S.C. 433, 439, 180 S.E. 471, 474 (S.C. 1935). Indeed, by 1952, the issue

was unequivocally settled. At that time, our Supreme Court dealt with a Trial Court's jury charge that consisted of the following: "I charge you in that connection that the testimony of the witnesses, although uncontradicted, is not binding upon you. You have a right to determine it in the light of all circumstances and give it such weight as you think it is entitled to." Our Supreme Court, when dealing with that charge, reiterated, "the fact that evidence is not contradicted by direct evidence does not render it undisputed as there still remains the question of its inherent probability and the credibility of the witness or his interest in the result." *Terwilliger v. Marion*,222 S.C. 185, 188, 72 S.E. 2d 165 (S.C. 1952). By 1991, a case, almost identical in every respect to the case being presented to the Court today, was reviewed by the Court of Appeals. *Black v. Hodge*, 306 S.C. 196, 196, 410 S.E. 2d 595 (S.C.App. 1991). In *Black*, the Plaintiff alleged substantial injuries from an admittedly minor collision. No witness directly contradicted the Plaintiff's testimony or that of the doctor she called to testify on her behalf. Nevertheless, the jury returned a verdict for the defendant. In affirming the verdict, the Court held that the jury does not have to believe uncontradicted testimony. In fact, the Court stated, "Ms. Black makes several arguments on appeal, but the essential issue is whether the jury is required to accept her uncontradicted testimony that she was injured. Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no." Our Court of Appeals encountered yet another essentially identical case in 1996. Indeed, that matter was cited by the Trial Judge in the order granting a new trial. The case in question is 324 S.C. 389, 405, 477 S.E.2d 715, 723 (S.C.App. 1996). *Vinson* was also involved in a low impact automobile accident. Mr. Vinson then testified, as did his dentist. Defense counsel simply cross examined both witnesses, and, in the process, discredited their respective reliability. However, defense counsel did not present other witnesses to independently refute the testimony of the plaintiff's witnesses. When confronted with

this appeal, the Court referred to *Black* and *Terwilliger*, so as to explain that the Trial Court need not have granted a new trial, as a trier of fact must not always believe uncontradicted testimony.

Unfortunately, the Trial Court's misapprehension of the law, with regard to this issue, caused it to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of the law amounts to an abuse of discretion, which facilitates a reversal of the Judge's Order.

II. THE TRIAL COURT MISAPPREHENDED THE LAW IN BELIEVING THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

The Trial Court further rooted its decision to grant a new trial on the basis of a second issue. To wit, the Court stated, "this Court finds that much of McGarr's cross-examination of Dr. Mina (Plaintiff's neurosurgeon who performed the surgery) was objectionable and should have been excluded. McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses. Not only did McGarr continually 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 was calling the Emergency Room physician's 'quacks'. This question was in clear violation of South Carolina's long-standing and basic rule prohibiting the 'pitting' of witnesses."

Dr. Mina unequivocally stated that the bone spur, which she removed from Ms. Gaines's neck, was not created or aggravated by the automobile accident in question. However, based upon the history given to her by Ms. Gaines, she was capable of ascertaining that Ms. Gaines had suffered from a severe flexion-extension injury, which, in turn, inflamed the nerve that abutted the bone spur. In order resolve that inflammation, the bone spur had to be removed. Unfortunately, Ms. Gaines provided a history to Dr. Mina wherein she indicated that the impact from the accident in question was so significant that it caused her to be knocked out. This, according to Dr. Mina,

created a significant flexion-extension injury mechanism, and confirmed her opinion that the nerve abutting the bone spur was inflamed as a result of the automobile accident.

Given the above matters of fact, discussing the emergency room records became absolutely essential. This was in part due to the fact that the emergency room records clearly indicated that Ms. Gaines never lost consciousness as a result of this automobile accident. Indeed, the fact that the automobile accident was: a) low impact by nature; and, b) resulted in no loss of consciousness, directly related to the absence of a mechanism for which Ms. Gaines could have suffered the aforementioned flexion-extension injury. Additionally, Dr. Mina's disparaging statements with regard to an emergency room's ability to obtain a proper history and/or perform a proper exam were, at best, rather curious.

Furthermore, Dr. Mina agreed as to the importance of having an accurate history of her patient's problems, prior to the incident in question. Indeed, she affirmed that it would be difficult, given the facts of the case before the Court, to connect an incident to an injury, absent the patient giving an accurate and proper history.

If a true and accurate history is truly important with regard to relating an incident to an injury, that history should then be discussed. This is particularly true, given the fact that Ms. Gaines's testimony with regard to her prior neck history, which was given while she was under oath, was largely, if not completely, false.

Unfortunately, the law with regard to the cross-examination of expert witnesses is well settled. Indeed, the rules of evidence applicable to this trial were adopted on September 3, 1995. Rule 705 was incorporated during that adoption. 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 inadmissable, 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 inadmissable 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.

Obviously, one cannot pit a lay witness against another lay witness. In fact, it would be improper to ask a lay witness whether or not another lay witness had told the truth. Indeed, it would be equally improper to cross-examine a lay witness and ask him or her to explain why other witnesses testified contrary to the witness on the stand. However, by at least 1995, expert witnesses, particularly medical doctors, can be examined with regard to the ability of their patient to be a proper "historian." Of note would be the frequency with which Justices have been forced to read

transcripts with the following lines of questioning: "Doctor, in order to properly diagnose the patient, you first have to take their history, correct? The next question is, invariably, "And if the history is wrong, your diagnosis and/or ability to connect an injury to a particular incident is made much more difficult, am I correct?"

The sword, described above, allows a cross-examining attorney to present contrary versions of fact, so as to explore whether those contrary facts would affect an expert's opinion. The fact that Ms. Gaines was noted to be fully conscious in the emergency room records fits squarely withing this admissible form of cross-examination. That same sword allows an expert to be examined with regard to his or her patient's ability to give a proper history. This is particularly evident when the patient's history is given under oath. Moreover, the cross-examiner's sword allows an expert's biases and fairness to be questioned. Few statements could be more illuminating with regard to an expert's bias and/or lack of fairness, than said expert making disparaging remarks toward her colleagues, to the extent that Dr. Mina disparaged the emergency room doctors with data contradictory to her own version of her patient's history.

Unfortunately, the Court's misapprehension of the law, with regard to these issues, caused it to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of the law amounts to an abuse of discretion, which requires a reversal of the Judge's Order.

III. THE TRIAL COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINED BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

The Trial Court then bolstered its decision to grant a new trial with regard to a third issue. The Court stated, "Additionally, McGarr repeatedly requested Dr. Mina to state her opinion concerning the proximate cause of the injury which necessitated the surgery. McGarr asked Dr.

Mina if it was 'possible' for a disputed intervening event to have caused the necessity for the surgery." In pertinent part, the Court felt that, at the end of Dr. Mina's testimony, "the law in South Carolina requires that opinion testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not. There is no distinction made as to who the questioning party is."

The practice of using of hypothetical scenarios in cross-examining witnesses has been in existence since before the South Carolina Civil Rules of Procedure were adopted. Those rules were adopted on September 3, 1995. Moreover, it has been well-established law, since at least 2000, that hypotheticals are still acceptable. Indeed, our Court of Appeals dealt with this matter in the case of *Gazes v. Dillard's Department Store, Inc.*, 341 S.C. 507, 534 S.E.2d 306 (S.C.App. 2000). In *Gazes*, the Trial Court erred in excluding an expert's answer to a hypothetical question, and the Court of Appeals stated that an expert's opinion testimony may be based on a hypothetical question. Though the hypothetical question must be based upon facts supported by the evidence, counsel may pose the hypothetical on any theory which could reasonably be deduced from the evidence, and select as a predicate hypothetical such facts as the evidence proves or tends to prove. In essence, one can present a hypothetical by stating, "Hypothetically speaking, if this happened, would that change your opinion?" On the other hand, one can shorten the hypothetical by simply asking, "Is it possible that something else could actually have caused the problem." This practice was in effect long before the Rules of Evidence were adopted, and our Courts noted it to be a viable means of cross-examination even after the Rules of Evidence went into effect.

Unfortunately, the Trial Court's misapprehension of the law with regard to this issue, caused the Court to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of law amounts to an abuse of discretion, which necessitates a reversal of the

Judge's Order.

IV. THE TRIAL COURT MISAPPREHENDED THE LAW IN BELIEVING THAT A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC JUROR ACTUALLY VIOLATES THE RULE OF APPEALING TO THE JURY.

The Trial Court further based its decision to grant a new trial with regard to a fourth issue. The Court stated, "McGarr also violated SCRCP Rule 43(i) in his closing argument. McGarr personally addressed and personally appealed to the jury in his closing remarks. The comments in McGarr's closing included: '...I know that my Greenville County Jurors are going to be fair and decent to me.' 'And, you're bright enough and have the brains enough to know that what I said on Monday.' 'And you guys are not so foolish or dumb.' 'When you have heard the evidence yourself, are you guys just not bright enough to remember?' While these indiscretions are not objected to by Peace, the Court finds them to have prejudiced the outcome of the trial."

It is important to remember that the South Carolina Rules of Civil Procedure were adopted on September 3, 1995. This would include Rule 43(i). Rule 43(i) states, in pertinent part: "Counsel should 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 was designed to prevent any attorney from addressing the 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 and/or intimidating an individual juror. It is not designed to prevent an attorney from discussing an issue with the jury, collectively.

There is no dispute that the statements cited in the Court's Order were made. However, the following additional statements were made by Ms. Gaines's counsel: 1) "Good afternoon ladies and gentlemen. My name is John Peace. I was introduced to you earlier today during jury selection

during jury selection. Like the judge said, we really couldn't hold jury trials without you, obviously. You are the main event. You are the ultimate deciders of all issues of fact." 2) "So when you are in the jury room thinking, 'well, what is pain and suffering worth?' I can already tell you, I mean, Judge Miller's instructions is going to be, there is no market price for pain and suffering, it's not bought and sold. And there is no fixed amount that should be charged for it. You, in the exercise of your common sense, need to decide what its worth in this case, for this lady, under these circumstances. This is the individualized justice because this is the case that has been presented to you as the jury." 3) "Ladies and gentlemen, this is my closing argument. We are going to have these figures in the jury room with you. Which are the medical fees. It's also Dr. Mina's reśumé. We are going to have this medical log so that you can look more closely at it. You are going to see the hardware as it is today, you can see the course of treatment starting with MRI's right after the wreck. And you can see up close what Dr. Mina showed you in her testimony yesterday. Ultimately, I want you to go back to the jury room, after you have been instructed on the law and deliberate carefully. Discuss it amongst yourselves, use your common sense. But based, on the evidence that has been put before you in this trial, I would suggest that the only logical result would be a verdict for Barbara Gaines in the amount well in excess of the medical bills in this case. I thank you in advance for your hard work. Depending on what Mr. McGarr may say to you, I also have the right to respond to that. So I may be back here in just a moment and have a brief overview before you deliberate."; 4) "Ladies and gentlemen, I know you have been living with this case for a few days and you are ready to get on with your job. It won't take a lot of time, but I've got to tell you, its hard to sit here and listen to somebody accuse me of being disingenuous when he is calling Barbara Gaines a liar. You listened to her, you listened to her daughter, and you listened to her doctors. And I leave it to you to decide who is telling the truth as far as her injuries."; and, 5) "So ladies and

gentlemen, I am going to sit down and let the Judge instruct you all on the law. Please use your common sense. And weigh this for what it is and bring back a verdict that speaks the truth for both of these parties. I appreciate it."

In essence, an opening and closing statements cannot be accomplished during a jury trial, if one cannot speak to the jurors collectively. Ms. Gaines's attorney addressed the jurors in precisely that fashion. Mr. Campbell's attorney did the same.

Unfortunately, the Court misconstrued Rule 43(i) by indicating that one attorney can present opening and closing statements to a jury, addressing the same as a collective, while the other attorney is prevented from doing the same. In other words, the statements from counsel with regard to both the plaintiff and defendant were proper. By misconstruing this law the Court abused its discretion, and the Judge's Order granting a new trial should be reversed.

V. THE TRIAL COURT'S MISAPPREHENSION OF THE LAW RESULTED IN A MISAPPREHENDING OF FACTS.

The Trial Court's final basis for granting a new trial is stated as follows: "The only competent evidence admitted in trial requires a verdict that compensates the Plaintiff, at a minimum, for the medical bills and expenses incurred as the result of the spinal surgery. This Court finds an award of damages for only the emergency room bills in their value of $3,941.00 is grossly inadequate and unsupported by the evidence in this case."

This conclusion fails to take into consideration Ms. Gaines's longstanding preexisting issues with regard to her neck. This conclusion also fails to take into consideration that the pain medications Ms. Gaines had been utilizing were being increased just prior to the occurrence of the automobile accident in question. Additionally, this conclusion fails to take into consideration the minor nature of this automobile accident. Moreover, it fails to consider the credibility issues

associated with a number of the plaintiff's witnesses. Furthermore, it does not consider the fact that Ms. Gaines's neck was doing better up until the point wherein she mulched her yard. At that point, her neck issues were exacerbated and, sometime thereafter, surgery was performed. Indeed, this conclusion fails to consider the fact that Ms. Gaines simply grew older, and, a defendant cannot be held responsible for the natural progression of the aging process, and the worsening of conditions associated therewith.

As stated above, almost identical versions of this case have previously been tried and discussed on appeal, *Black v. Hodge*, *Vinson v. Hartley*. In fact, *Vinson* was appealed because the Trial Court refused to invoke the Thirteenth Juror Doctrine, in spite of the plaintiff's attorney request that the same be done. Furthermore, the Court of Appeals upheld the Trial Court's refusal of that request.

To grant a new trial in the case before you, after citing *Vinson*, is clear evidence that the Trial Court simply misapprehended the Rules of Evidence and Rules of Civil Procedure and, as a result, the facts of the matter. For that reason, the Trial Court abused its discretion, and its Order granting a new trial should be reversed.

CONCLUSION

To summarize, the jury was presented with a plaintiff that had a longstanding history of neck problems. Indeed, those neck issues were of a progressive nature, and were worsening in concurrence with the Plaintiff's natural aging process. In the meantime, the Plaintiff was involved in a low impact automobile accident. The same Plaintiff confirmed that, at the scene of this low impact accident, she advised the investigating officer who inquired as to her health that she did not know if the accident had caused her any injury. Moreover, she then drove away from the scene of that accident. Thereafter, she ultimately went to the hospital, wherein she was examined. While at

the hospital, she did not complain of pain radiating into her arm. One month later, she went to her family physician's office, wherein she reported arm pain. However, that arm pain, by all accounts, was associated with and caused by a bone spur located in the Plaintiff's neck. That very bone spur had been in existence well before the automobile accident in question occurred. Regardless, the Plaintiff was then treated to improvement, until a point some time later, wherein she mulched her yard, and, during that process, re-injured her neck. Thereafter, the bone spur was surgically removed, and the Plaintiff's neck and arm symptoms were resolved.

The jury then heard testimony from Ms. Gaines and a number of Ms. Gaines's witnesses. The credibility of all those witnesses was ultimately subjected to grave suspicion during the course of cross-examination.

In consideration of all the above, it was suggested to the jury that it award the Plaintiff an amount commensurate with the emergency room bill that she incurred on the date of the accident. After deliberating, the jury logically and fairly returned a verdict in the amount of the emergency room bill. There is no competent evidence to suggest that this verdict was shockingly disproportionate to the injuries suffered, or affected by passion, caprice, or prejudice.

In conclusion, the Trial Court misapprehended multiple laws. Those misapprehensions of law led to misapprehensions of fact. In the course of these errors, the Trial Court erroneously granted a new trial based upon the Thirteenth Juror Doctrine. These errors represent a clear abuse of the Trial Court's discretion, and, as such, Counsel for Appellant respectfully requests a reversal of the Trial Court's Order, and a reinstatement of the jury's fair and reasonable verdict.

Respectfully submitted,

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