

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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S.C. Supreme Court

Case No.: 2005-CP-19-244
(Appeal Tracking No.:2009139792)

Freddie Bartley, as Personal Representative
of the Estate of Rachel Bartley,

Petitioner

v.

Ford Motor Company, Inc.,

Respondent

APPENDIX

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William P. Keesley, Circuit Court Judge

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Freddie Bartley as Personal Representative of the Estate of Rachel Bartley Appellant

v.

Ford Motor Company, ... Respondent

RECORD ON APPEAL

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EDGEFIELD COUNTY
CLERK OF COURT
SHIRLEY F. NEWBY

STATE OF SOUTH CAROLINA 2005 NOV -2 AM 10: 52

COUNTY OF EDGEFIELD

Freddie Bartley as PR for the Estate of
Rachel D. Bartley,

Plaintiff,

vs.

Jim Satcher, Inc., and Ford Motor
Company, Inc.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) Civil Action No.: 2005-CP-19-24

) **COMPLAINT**
) **(Jury Trial Demanded)**

FACTS COMMON TO ALL THEORIES OF LIABILITY

The Plaintiff would respectfully show that:

1. He is the surviving spouse of Rachel Bartley and duly appointed personal representative of the Estate of Rachel Bartley and is a resident of Saluda County, South Carolina.
2. Defendant Ford Motor Company, Inc., (Ford) is a corporation organized and existing under the laws of a State other than the State of South Carolina, transacts business in South Carolina, contracts to supply goods in South Carolina, regularly solicits business in South Carolina, and derives substantial revenue therefrom.

3. Defendant Jim Satcher, Inc. is a corporation organized and existing under the laws of the state of South Carolina and has its principal place of business in Johnston, South Carolina.

4. Defendant Ford designed, manufactured, tested, assembled and placed in the stream of commerce that certain 2001 Ford Explorer that is the subject of this lawsuit.

5. Plaintiff Freddie Bartley purchased said Ford Explorer, VIN Number 1FMZU63P31ZA74495, from Defendant Jim Satcher, Inc., an authorized dealer doing business in Johnston, South Carolina.

6. The vehicle described above was in substantially the same condition at the time of the accident that is the subject of this lawsuit as it was when it left the possession and control of Defendants.

7. On or about November 8, 2002, Rachel Bartley was driving the above-described vehicle on Pen Creek Road in Saluda County, South Carolina.

8. The Explorer briefly left the roadway on the right side, and upon re-entering the roadway, the Explorer became uncontrollable and veered back on to the roadway and entered a counter clockwise yaw and then rolled onto its roof.

9. Upon rolling onto its roof, the roof structures of the vehicle collapsed inward and the restraint system did not sufficiently restrain Rachel Bartley.

10. As a result of the actions of the Defendants as set forth herein, Rachel Bartley suffered damages in the nature of:

- a. pain and suffering;
- b. mental anguish and emotional distress;
- c. permanent disfigurement and disability;
- d. medical expenses;
- e. lost income and loss of earning capacity;
- f. impairment of health and bodily efficiency; and
- g. loss of enjoyment of life.

**FOR A FIRST THEORY OF LIABILITY
(Strict Liability)**

11. Plaintiff's Ford Explorer and the component parts utilized for the manufacture of the vehicle were designed, manufactured, assembled, tested, distributed and sold by the Defendants in a defective condition unreasonably dangerous to persons using it for its foreseeable and intended purposes.

12. The Ford Explorer was in substantially the same condition at the time of the accident as it was when it left the exclusive possession and control of the Defendants.

13. As a direct and proximate result of the Defendant's strict liability, the Plaintiff has been injured and damaged as set forth above.

**FOR A SECOND THEORY OF LIABILITY
(Breach of Express Warranty)**

14. At one time or various times, Defendants expressly represented through advertising that said Ford Explorer was safe for use, fit for the purpose intended, and of

merchantable quality by warranting that said Explorer was a safe and effective means of transportation.

15. Said Explorer did not conform to the affirmation made by the Defendant and upon which Rachel Bartley relied.

16. As a direct and proximate result of the Defendant's breach of express warranty, the Plaintiff has been injured and damaged as set forth above.

**FOR A THIRD THEORY OF LIABILITY
(Breach of Implied Warranty of Merchantability)**

17. In manufacturing, labeling, promoting, distributing, leasing and otherwise placing said Explorer into the stream of interstate commerce, the Defendants impliedly warranted that it was merchantable.

18. The Explorer was in substantially the same condition at the time of the accident as it was when it left the exclusive control of Defendants.

19. The Explorer was not merchantable in that the vehicle was designed or manufactured in such a manner that rendered it unsafe in a foreseeable accident.

20. As a direct and proximate result of the Defendant's breach of implied warranty of merchantability, the Plaintiff has been injured and damaged as set forth above.

**FOR A FOURTH THEORY OF LIABILITY
(Negligence)**

21. The Defendant Ford was negligent, careless, and reckless in:

a. failing to properly design the vehicle;

- b. failing to properly assemble the vehicle;
- c. failing to properly test the vehicle;
- d. placing a defective and unreasonably dangerous product into the stream of commerce;
- e. failing to design the roof and adjacent and surrounding structures of the Explorer to withstand the foreseeable impact of this accident;
- f. failing to design the roof and adjacent and surrounding structures to be sufficiently padded to prevent the injuries that occurred in this accident;
- g. failing to design the roof and adjacent and surrounding structures to absorb the force of impact in this type of accident;
- h. failing to design the handling and stability characteristics of the Explorer in a manner to prevent it from becoming uncontrollable and unstable under foreseeable operator steering inputs; and
- i. failing to adequately warn potential buyers of the dangers of the failure of the roof and adjacent and surrounding structures in an accident and failing to warn potential buyers of the handling and stability characteristics of the Explorer.

22. As a direct and proximate result of the Defendant's negligence, carelessness and recklessness, the Plaintiff has been injured and damaged as above stated.

**FOR A FIFTH THEORY OF LIABILITY
(Wrongful Death)**

23. This action is brought pursuant to Section 15-51-10, *et seq.*, of the Code of Laws of South Carolina (1976, as amended) and is brought by Freddie Bartley, personal representative of the Estate of Rachel Bartley, on behalf of the statutory beneficiaries of Rachel Bartley, her husband Freddie Bartley, as well as her children, Lynn B. Smith, Susan B. Black and Freda B. Barrett.

24. The aforementioned actions as alleged caused the demise and death of Rachel Bartley, on November 15, 2004. The death of Mrs. Bartley was caused and occasioned by the negligent and grossly negligent acts on behalf of the defendants as set forth above.

25. Prior to her death, Rachel Bartley, resided in Saluda County, South Carolina, with her husband, Freddie Bartley. By reason of her untimely death, her heirs have been deprived of ~~all benefits of her society and companionship and have been caused great mental shock and~~

suffering by reason of her death. They have been deprived of her future experience and judgment. They have been and will forever be caused grief and sorrow by the loss of their mother's love, society and companionship. They have incurred expenses for her funeral and final expenses and, as result of the foregoing, they have been damaged in ACTUAL DAMAGES as follows:

- (a) pecuniary loss, loss of economic support for family;
- (b) mental shock and suffering;
- (c) wounded feelings;
- (d) grief and sorrow;
- (e) loss of companionship; and

(f) deprivation of the use and comfort of the intestate's society, loss of her experience,

26. As a further result and because of the defendants' reckless, willful, negligent and grossly negligent conduct, this plaintiff is entitled to PUNITIVE DAMAGES in an amount to be determined by the jury in accordance with the law and evidence in this case

WHEREFORE, the Plaintiff prays for judgment against the Defendants for actual damages in a sum sufficient to compensate him for his injuries and for punitive damages in an amount to be ascertained by a jury, for the costs and disbursements of this action, and for such other and further relief as may appear just and proper.

Respectfully Submitted,

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BY: _____

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STATE OF SOUTH CAROLINA

COUNTY OF EDGEFIELD

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2005-CP-19-244

Freddie Bartley as PR for the Estate of
Rachel D. Bartley,

Plaintiff,

vs.

Jim Satcher, Inc., and Ford Motor
Company, Inc.,

Defendants.

**ANSWER OF DEFENDANT FORD
MOTOR COMPANY**

(Jury Trial Demanded)

Defendant Ford Motor Company ("Ford") hereby answers Plaintiff's Complaint as follows. To the extent any numbered paragraph of Plaintiff's Complaint contains allegations against multiple defendants, Ford answers only as to itself and not on behalf of any other defendant. Each and every allegation not hereinafter specifically admitted, qualified, or explained, is denied.

1. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 at this time, and, therefore, denies said allegations.

2. Answering Paragraph 2, Ford admits only so much of these allegations that allege or can be construed to allege that Ford is a corporation organized and existing under the laws of one of the several states of the United States of America with its principal place of business in a state other than South Carolina, and that it designs and manufactures, in part, and finally assembles certain vehicles that are then sold by independent dealerships. Ford further admits that Ford does business in the State of South Carolina. Ford denies the remaining allegations of Paragraph 2.

3. Answering Paragraph 3, Ford responds that these allegations are directed toward a defendant other than Ford and, therefore, no response is required. To the extent the Court may deem a response is required, Ford denies these allegations.

4. Ford admits only so much of the allegations in Paragraph 4 that allege or can be construed to allege that Ford designs and manufactures, in part, and finally assembles certain vehicles, including, but not limited to, Ford Explorers. Ford designed and manufactured, in part, Ford Explorers in 2001. Ford denies the remaining allegations set forth in Paragraph 4.

5. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 5 at this time, and, therefore, denies said allegations.

6. Ford denies the allegations directed against it in Paragraph 6.

7. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 7 at this time, and, therefore, denies said allegations.

8. Ford is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 8 at this time. To the extent Plaintiff alleges or can be construed to allege that the driver lost control, Ford admits this allegation. Ford denies the remaining allegations of Paragraph 8.

9. Ford denies the allegations directed against it in Paragraph 9.

10. Ford denies the allegations directed against it in Paragraph 10, including all subparts, and demands strict proof thereof.

FOR A FIRST DEFENSE
TO THE FIRST THEORY OF LIABILITY

11. Ford denies the allegations directed against it in Paragraph 11 and demands strict proof thereof.

12. Ford is without knowledge or information sufficient to form a belief as to the truth

of the allegations set forth in Paragraph 12 at this time, and, therefore, denies said allegations.

13. Ford denies the allegations directed against it in Paragraph 13 and demands strict proof thereof.

FOR A FIRST DEFENSE
TO THE SECOND THEORY OF LIABILITY

14. Answering Paragraph 14, Ford responds that these allegations constitute legal conclusions to which no response is required. To the extent the Court may deem a response is required, Ford denies the allegations directed against it.

15. Ford denies the allegations directed against it in Paragraph 15.

16. Ford denies the allegations directed against it in Paragraph 16 and demands strict proof thereof.

FOR A FIRST DEFENSE
TO THE THIRD THEORY OF LIABILITY

17. Answering Paragraph 17, Ford responds that these allegations constitute legal conclusions to which no response is required. To the extent the Court may deem a response is required, Ford denies the allegations directed against it.

18. Ford denies the allegations directed against it in Paragraph 18.

19. Answering Paragraph 19, Ford responds that these allegations constitute legal conclusions to which no response is required. To the extent the Court may deem a response is required, Ford denies the allegations directed against it.

20. Ford denies the allegations directed against it in Paragraph 20 and demands strict proof thereof.

FOR A FIRST DEFENSE
TO THE FOURTH THEORY OF LIABILITY

21. Ford denies the allegations directed against it in Paragraph 21, including all subparts, and demands strict proof thereof.

22. Ford denies the allegations directed against it in Paragraph 22 and demands strict proof thereof.

FOR A FIRST DEFENSE
TO THE FIFTH THEORY OF LIABILITY

23. Answering Paragraph 23, Ford responds that these allegations constitute legal conclusions to which no response is required. To the extent the Court may deem a response is required, Ford denies the allegations directed against it.

24. Ford denies the allegations directed against it in Paragraph 24 and demands strict proof thereof.

25. Ford denies the allegations directed against it in Paragraph 25, including all subparts, and demands strict proof thereof.

26. Ford denies the allegations directed against it in Paragraph 26, including the prayer for relief that follows, and demands strict proof thereof.

FOR A SECOND DEFENSE

27. Ford submits that Plaintiff's Complaint fails to state a claim upon which relief can be granted against Ford and, thus, should be dismissed, in whole or in part, pursuant to 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

28. Ford submits that Plaintiff's Complaint fails for improper venue pursuant to Rule 12(b)(3) of the South Carolina Rules of Civil Procedure and *Whaley v. CSX Transp., Inc.*, 362

S.C. 456, 609 S.E.2d 286 (2005) *reh'g. denied* (March 10, 2005).

FOR A FOURTH DEFENSE

29. Ford submits that Plaintiff's Complaint fails, in whole or in part, because the Plaintiff, as named in the Complaint, lacks standing or capacity to prosecute this action

FOR A FIFTH DEFENSE

30. Ford submits that at all times, its vehicles were designed, manufactured, and assembled in compliance with all applicable industry and governmental standards and regulations, and, therefore, Plaintiff cannot recover against Ford

FOR A SIXTH DEFENSE

31. Ford submits that its vehicles were designed, manufactured, and assembled in conformance with the prevailing industry customs and practices, and, therefore, Plaintiff cannot recover against Ford.

FOR A SEVENTH DEFENSE

32. Ford submits that the subject vehicle was state-of-the-art and did not present an unreasonable risk to Plaintiff or other occupants or users of this vehicle, and, therefore, Plaintiff cannot recover against Ford.

FOR AN EIGHTH DEFENSE

33. Ford would show that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, voluntary actions taken in full knowledge of any associated risk, of which one, in the exercise of due care, should have known or appreciated, and, therefore, this voluntary assumption of risk constitutes a complete bar to this action; or, in the alternative, a facet of comparative fault.

FOR A NINTH DEFENSE

34. Ford submits that *S.C. Code Ann. § 15-73-20* serves as a bar, in whole or in part, to this action.

FOR A TENTH DEFENSE

35. Ford pleads the doctrines of comparative negligence and comparative fault and alleges that the negligence and/or fault of Plaintiff or Plaintiff's decedent was greater than any negligence, if any, which may be established against Ford and, therefore, Plaintiff is barred from recovery. Ford further alleges that any injury and damage sustained by Plaintiff or Plaintiff's decedent was due to and caused by the negligence and/or fault of Plaintiff or Plaintiff's decedent, combining, concurring, and contributing with the negligence and/or fault, if any, on the part of Ford, and that any amount of recovery awarded to Plaintiff for the alleged injuries and damage shall be reduced by the Court based on the percentage of negligence and/or fault attributed to Plaintiff or Plaintiff's decedent.

FOR AN ELEVENTH DEFENSE

36. Ford submits that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the negligence, recklessness, willfulness, or wantonness of Plaintiff's decedent in the operation, maintenance, or use of the subject vehicle. Plaintiff's claims against Ford, therefore, should be barred or reduced by the amount of such negligence, recklessness, willfulness, or wantonness.

FOR A TWELFTH DEFENSE

37. Ford submits that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the intervening negligence, recklessness, willfulness, wantonness, and fault of a party or parties other than Ford. Such intervening negligence,

recklessness, willfulness, wantonness, and fault are the sole cause of the injuries and damages for which Plaintiff seeks recovery, and, therefore, Plaintiff may not recover against Ford.

FOR A THIRTEENTH DEFENSE

38. Ford submits that the injuries and damages for which Plaintiff seeks recovery were due to, and proximately caused by, the abuse, misuse, or improper use of the subject vehicle, and, therefore, Plaintiff may not recover against Ford.

FOR A FOURTEENTH DEFENSE

39. Ford submits that the injuries and damages for which Plaintiff seeks recovery may have been due to, and proximately caused by, the modification or alteration of the subject vehicle, and, therefore, Plaintiff may not recover against Ford.

FOR A FIFTEENTH DEFENSE

~~40. Ford would show that the injuries and damages for which Plaintiff seeks recovery~~
were due to, and proximately caused by, the sole negligence, recklessness, willfulness, wantonness, and fault of third parties for whom Ford is not liable. Therefore, the acts or fault of third parties are the real, efficient, and proximate cause of the injuries for which Plaintiff seeks recovery, and, therefore, Plaintiff cannot recover against Ford.

FOR A SIXTEENTH DEFENSE

41. Ford submits that it may be entitled to a set off or credit for any amount paid to Plaintiff by any third party as compensation for the injuries and damages for which Plaintiff seeks recovery.

FOR A SEVENTEENTH DEFENSE

42. Ford submits that Plaintiff and/or Plaintiff's decedent failed to properly utilize the safety restraint system provided in the subject vehicle.

FOR AN EIGHTEENTH DEFENSE

43. Ford affirmatively pleads all defenses which are or may become available to it under Restatement (Second) of Torts § 402A and the comments thereto.

FOR A NINETEENTH DEFENSE

44. Ford submits that Plaintiff's claims for breach of warranty are barred because: such warranties are expressly excluded, disclaimed, and are limited by the agreements between the parties or by a written warranty, which accompanied the sale of the vehicle; any warranties had expired prior to the accident date; Plaintiff failed to give timely notice of any alleged breach of warranty; and Plaintiff's recovery for breach of warranty is limited to those remedies set forth in the written warranty that accompanied the sale of the vehicle.

FOR A TWENTIETH DEFENSE

~~45. Ford craves reference to and hereby incorporates by reference the terms,~~
limitations, disclaimers, and exclusions of any warranties issued with the purchase and/or lease of the vehicle at issue.

FOR A TWENTY-FIRST DEFENSE

46. Ford denies Plaintiff's claim for punitive damages. An award of punitive damages under South Carolina law violates the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 3, of the South Carolina Constitution in that:

- (a) The judiciary's ability to correct a punitive damages award only upon a finding of passion, prejudice, or caprice is inconsistent with due process guarantees;
- (b) Any award of punitive damages serving a compensatory function is inconsistent with due process guarantees;
- (c) Any award of punitive damages based upon the wealth of the defendant violates due process guarantees;

- (d) The jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of meaningful standards and is inconsistent with due process guarantees;
- (e) Even if it could be argued that the standard governing the imposition of punitive damages exists, the standard is void for vagueness;
- (f) Plaintiff's claim for punitive damages violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3, of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant; and
- (g) Any award of punitive damages for conduct or activity of Ford outside the State of South Carolina is inconsistent with the interests of federalism.

Plaintiff's claim for punitive damages violates the federal doctrine of separation of powers and Article I, Section 3, of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government, which invades the province of the legislative branch of government.

FOR A TWENTY-SECOND DEFENSE

47. To the extent Plaintiff seeks punitive damages against Ford under Plaintiff's strict liability and breach of warranty causes of action, those claims are barred because punitive damages are not recoverable under strict liability or breach of warranty causes of action.

FOR A TWENTY-THIRD DEFENSE

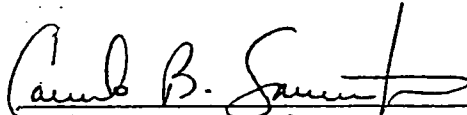
48. Ford has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Ford intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any reported injury or damage as alleged in Plaintiff's Complaint, and gives notice of its intent to assert any further affirmative defenses that its information gathering process may indicate are supported by fact and law. These defenses may include, but are not limited to, a defense that the action is barred in whole or in part by any applicable statute, contract, release, covenant, and the

doctrine of laches. Ford thus reserves the right to amend this Answer and assert such defenses.

WHEREFORE, having fully answered Plaintiff's Complaint, Defendant Ford Motor Company prays that the Complaint be dismissed, with prejudice, and for such other and further relief as the Court may deem just and proper.

TURNER, PADGET, GRAHAM & LANEY, P.A.

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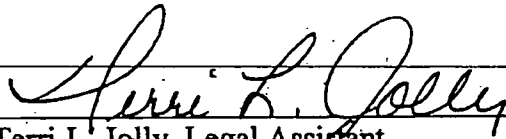
ATTORNEYS FOR DEFENDANT
FORD MOTOR COMPANY

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of December 2005 a copy of the ANSWER OF DEFENDANT FORD MOTOR COMPANY has been served upon other counsel of record, by mailing same, postage prepaid in the United States Mail, addressed to the following:

D. Michael Kelly, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
P. O. Box 8113
Columbia, SC 29201

ATTORNEYS FOR PLAINTIFF


Terri L. Jolly, Legal Assistant

1 five minutes. Let y'all go ahead and eat lunch.

2 Just try to go somewhere that's not --

3 **MR. ESDALE:** Some place quick.

4 **THE COURT:** -- leisurely and get back up here
5 as quickly as you can, okay?

6 **MR. PORTIS:** What time are you thinking?

7 **THE COURT:** I'm thinking y'all have got a full
8 30 minutes and maybe a little more than that, 30 to
9 45 minutes.

10 (Whereupon, there was a luncheon recess.)

11 **THE COURT:** Are you ready, Mr. Conroy?

12 **MR. CONROY:** Yes, sir.

13 **THE COURT:** Tell them to bring the jury in,
14 please.

15 (The jury returns to the courtroom.)

16 **THE COURT:** All right. Ladies and gentlemen,
17 you're going to hear the defense's only closing
18 argument at this point.

19 Mr. Conroy, you're recognized.

20 **MR. CONROY:** May it please the Court. Counsel,
21 Mr. Bartley.

22 Members of the jury, good afternoon. First,
23 I'd like to thank you for your time in this matter.
24 It's been a week and a half, a lot of hours, a lot
25 of testimony, a lot of exhibits we've seen. We know

1 and her head's in the opposite side of that impact
2 point.

3 And he acknowledges that when her head came to
4 a stop against the ground with the roof in between
5 her head and the ground, her head stopped and her
6 neck began to compress, began to experience these
7 compressive forces and experienced some level of
8 injury, and this is before any roof deformation
9 began. He's acknowledged that.

10 **THE COURT:** Mr. Conroy, let me interrupt you a
11 second.

12 Ladies and gentlemen, I'm going to ask you to
13 step in the jury room. Don't discuss the case,
14 please. I'll get back to you in about five minutes.

15 (The jury retires to the jury room.)

16 **THE COURT:** I'm sorry, Mr. Conroy, but one of
17 the jurors is fighting sleep. You have a very
18 soothing voice.

19 **MR. CONROY:** I saw that, Judge.

20 **THE COURT:** And I kept watching three of them
21 very closely. Two are of no concern at all, but one
22 of them I thought maybe we needed to give her an
23 opportunity to have a shot of caffeine or something,
24 okay.

25 **MR. CONROY:** Yes, sir.

1 **THE COURT:** All right. Thank you. We'll be at
2 ease for a few minutes.

3 (Brief recess.)

4 (The jury returns to the courtroom.)

5 **THE COURT:** All right. Thank you, ladies and
6 gentlemen, and I'm very sorry.

7 Mr. Conroy, you may continue.

8 **MR. CONROY:** Yes, sir.

9 Members of the jury, I'm going to pick up where
10 I left off on the issue of how Ms. Bartley got hurt.
11 And the point I was making before we took our brief
12 break was the following, that Dr. Burton agrees that
13 there was some level of compressive loading to Ms.
14 Bartley's neck as a result of her head with the roof
15 together stomping against the ground and that this
16 compressive loading was happening before there was
17 any appreciable roof deformation. And his opinion
18 is that it took significant roof deformation for
19 this neck injury to happen.

20 And as you know, Dr. McNish is of the opinion
21 that the roof and her head together struck the
22 ground.

23 And here's a model and Dr. Burton drew the
24 circle of where Ms. Bartley's head would have been
25 located approximately on the other side of this

1 the head and body are lined up, this is the
2 situation we're talking about, what they call torso
3 augmentation. The head stops, the rest of your body
4 moves just enough to compress the neck to cause this
5 injury. And it's happening even in the absence of
6 significant -- this is true even in the absence of a
7 significant amount of roof crush.

8 One of the things that Dr. Burton told you
9 yesterday that I think is really important is you
10 can't look at the new standard, you can't look at
11 the IIHS study and say, because of these studies,
12 that proves, in this case or in any other particular
13 case, how the injury happened. And Dr. Burton
14 recognized that.

15 These cases literally stand on their own and
16 you need to analyze in each of those cases what
17 happened. That's why I've taken the time to walk
18 you through the accident facts so you'll understand
19 just what the real forces were and how Ms. Bartley
20 was positioned inside this vehicle.

21 Facts are stubborn things, ladies and
22 gentlemen. We can't change them with sympathy or
23 compassion or emotion. They are what they are in
24 this accident.

25 **THE COURT:** Hold on just a second, Mr. Conroy.

1 Folks, y'all have got to keep your eyes open.
2 I realize some people think with their eyes closed,
3 but if you've got your eyes closed, I have to stop.
4 So keep your eyes open for me, okay. Thank you.

5 You may continue.

6 **MR. CONROY:** I know you're tired. It's been a
7 long week and a half. We're all tired. I'm almost
8 finished. And I really would ask -- I'd really ask
9 that you do your best, please.

10 What I'm trying to say to you is you may want a
11 certain result, but when the facts are telling you
12 what the real results should be, this is what our
13 system is built on. This is what makes this system
14 work everyday in this country. That's why I ask you
15 to take a hard look at these accident facts, take a
16 hard look at really Ms. Bartley's injury.

17 The last thing I want to talk about deals with
18 the design issues, some additional things that we
19 are really not in dispute here. Dr. Burton and
20 Mr. Forrest agree that you can't design a vehicle
21 that will be a hundred percent risk free to a
22 seatbelted occupant in a rollover accident. It will
23 be great if it could be done, it cannot.

24 They both agree that when you look at the
25 statistics, the ones that Mr. Friedman, who is

1 It's going to be a hard decision with what I'm
2 asking you to do and I acknowledge that. I'm
3 telling you right now I know how hard this is, but
4 you're going to think back on this experience for a
5 long time and you're going to say to yourself, did I
6 do the right thing? Did I give in because I just
7 felt really bad? Did I give in because I just
8 wasn't really sure? I hope that what I said for the
9 past hour has empowered you with the facts and the
10 understanding that this is the right result here, as
11 difficult as it might be.

12 One of the things that the Court had asked of
13 all of you during jury selection was something to
14 the effect that can you put sympathy aside and if
15 the evidence justifies it, return a verdict for
16 Ford? I submit to you the evidence supports that
17 conclusion here. I'm going to take you up on that
18 promise. Thank you.

19 **THE COURT:** Thank you, Mr. Conroy.

20 Ladies and gentlemen, we're going to take a ten
21 minute break. Don't discuss the case. Thank you.

22 (The jury retires to the jury room.)

23 **THE COURT:** My opinion is that one of those
24 jurors slept through half of the closing. Despite
25 the fact that I stopped, despite the fact that I

1 turned the air conditioner down so much that the
2 lady beside her kept pulling covers up over her and
3 despite the fact that I interrupted Mr. Conroy a
4 second time and asked the jurors, told the jurors
5 they have to keep their eyes open. If I don't see
6 their eyes, I've got a problem.

7 She wasn't deeply asleep, but she definitely
8 disobeyed my directive to keep her eyes open. And
9 from the point that I gave that instruction, she
10 pretty much kept her eyes closed roughly 80 to 90
11 percent of the time. I intend to set her aside.

12 Now, y'all put what you need on the record.

13 **MR. PORTIS:** Yes, sir, Your Honor. As I
14 observed all of the jurors in there, I think the
15 Court is mistaken. And I think what the Court has
16 done, it has confused someone who is -- who may have
17 not been paying attention to the point that she's
18 disinterested in what Mr. Conroy says. And his --
19 whatever Mr. Conroy says is not evidence in this
20 case.

21 And as the Court has said from the very
22 beginning, in fact told the jury last night, that
23 they have been very diligent throughout this trial
24 to pay attention to the evidence in the case.

25 **THE COURT:** They have.

1 **MR. PORTIS:** She has listened to the evidence.
2 She has paid attention to the evidence, whichever
3 juror you're talking about, and the fact that she
4 doesn't give her full and utter attention to Mr.
5 Conroy on stuff that is not evidence, it is improper
6 for the Court to excuse her, Your Honor, from this
7 jury.

8 **THE COURT:** I'd love for you to cite me a case
9 on that because every case I've ever read about a
10 sleeping juror says you set them aside.

11 You can't sleep through part of the trial, Mr.
12 Portis. If the closing arguments didn't mean
13 anything, we would have skipped them.

14 **MR. PORTIS:** And I would submit to you that she
15 did not sleep through it. And I think if you would
16 bring her in here and ask her and say, well, what
17 did you hear, she would tell you what she heard.

18 **THE COURT:** And I won't believe her. I watched
19 her. I stopped and took a break. I sent the jury
20 out so that she could stretch her legs. I did
21 comment, Mr. Conroy has one of the most soothing
22 voices I ever heard, he can do voiceover work
23 probably in that field, but then I interrupted him
24 again. I can't keep interrupting him.

25 I turned the air conditioner down. There's a

1 vent right over the top of them. The lady sitting
2 beside her was about to freeze. I don't know what
3 else to do. And I have no idea what she's thinking
4 about the case. I don't even know her name.

5 Rule 47 -- do y'all want to be heard?

6 **MR. CONROY:** No, sir. Judge, I agree. I can't
7 add more. I actually changed, at the end of my
8 comments, I changed the inflection of my voice. And
9 there was no change, you know, just no change.

10 **THE COURT:** She's a wonderful lady and she sat
11 through eight days of testimony and she has paid
12 attention the whole time. The two that I was more
13 concerned about maybe being disinterested at times,
14 which that's just a pure speculation on my part, I
15 called attention to one early in the trial, she
16 followed exactly what I did. Another guy was
17 sitting on the back row, I think that's just the way
18 he reacts, that's his posture.

19 I've been around long enough to know the
20 difference between sleeping and not being
21 interested. That lady was asleep.

22 Bring that large lady that was sitting on the
23 right side in the back.

24 Bring Mildred up here, she'll know, because
25 Mildred had already said something to me before.

1 Rule 47 on the civil side says that we go to
2 the first alternate that was drawn and that's
3 Mr. Abner D. Huckaby, according to my records, juror
4 number 50.

5 (Juror enters the courtroom.)

6 **THE COURT:** You can stand right there. What's
7 your name, ma'am?

8 **JUROR:** Barbara Taylor.

9 **THE COURT:** Ms. Taylor is 107.

10 Ms. Taylor, I've made a decision. I'm going to
11 have to set you aside on the trial. I really do
12 appreciate your service very much and you're welcome
13 to stay if you'd like to stay, but you're free to
14 go. The only thing I need you to do is to give your
15 notes to the bailiffs so they'll be torn up, okay.

16 **JUROR:** Yes, sir.

17 **THE COURT:** If you need a slip for work, if you
18 check with Ms. Newby there, she'll be happy to get
19 it for you. Thank you very much for your service,
20 all right.

21 (The juror was excused.)

22 **THE COURT:** All right. We'll in recess for ten
23 minutes.

24 (Brief recess.)

25 **THE COURT:** All right. I need to put on the

1 record that I had to go next door to my office and
2 Ms. Taylor was at the metal detector, the juror.
3 And there was no incident or anything like that, she
4 just -- I said, Thank you very much, ma'am, for your
5 service. She said, Well, I don't know what
6 happened. And I said, Well, you didn't keep your
7 eyes open, so I couldn't tell what was going on with
8 you. And she said, Well, I have palsy in my left
9 eye and the glare bothers me sometimes so I have to
10 keep that eye shut. And I said, Well, I appreciate
11 your service.

12 I, obviously, was not going to have any
13 disagreement with her. And she said, Well, I was
14 awake. I can tell you what was going on.

15 Now, I'll let you all put whatever you want on
16 the record. And she seemed like a very, very nice
17 lady. The problem with her explanation to me was
18 that this is not a one day trial. I've watched this
19 lady now for -- I've been in her presence now for
20 eight days. As a matter of fact, the bailiff had
21 called my attention to her earlier in the week
22 because she was saying that the lady was sleeping,
23 so I was watching her because I wanted to make sure
24 that there wasn't a problem.

25 Now, I would have done similar to what I did

1 just a minute ago. I wouldn't have called her out
2 specifically and I would have made general
3 announcements to the jury, take breaks, things like
4 that, but even if I accept that she has palsy in her
5 eye, in one eye, that doesn't -- and she didn't say
6 it caused her to keep both eyes shut, she said,
7 Sometimes I have to shut my left eye, she said,
8 Because of the glare.

9 There doesn't appear to be anymore glare in the
10 courtroom today than any other day except the day it
11 was pouring down rain. And none of that explains
12 why both her eyes were closed, none of that explains
13 why her chin was almost on her chest.

14 And, again, I would love to have her serve.
15 She's been in the trial the entire time. And I
16 think all of the other days, she's paid attention,
17 but, unfortunately, I think today she had lunch, she
18 came in here and she was having trouble staying
19 awake.

20 So -- and as I said earlier, even if she
21 weren't having problems staying awake, if I tell
22 them that they have to do something and they don't
23 do it, then they're not following my directives.

24 So I'm helping you with your record to fill it
25 out, but I have no reason to doubt that my

1 assessment earlier was correct. So if y'all want to
2 put anything else on the record before we do the
3 final closings, that's fine.

4 **MR. PORTIS:** Judge, just to reemphasize, the
5 Plaintiff's position is it's inappropriate to excuse
6 that particular juror. Ultimately, it was
7 determined why, that she had Bell's Palsy. My
8 observation personally was that she paid attention
9 during this case and paid attention during closing
10 and she should not have been excused in this case.

11 **THE COURT:** I note your position. I don't know
12 how in the world -- we looked at the same thing and
13 we saw exact opposites, that's all I can say. And
14 if I'm wrong, I apologize.

15 All right. We're going to -- under the rule,
16 civil is different than criminal in this state, we
17 go under Rule 47 and we seat the first alternate
18 that was drawn and that's Mr. Huckaby.

19 So send for the jury for me, please, Mr. Dunn.

20 (The jury returns to the courtroom.)

21 **THE COURT:** All right. Ladies and gentlemen of
22 the jury, I have set aside one of the jurors. And
23 under the rules, that means that the alternate who
24 was first chosen is substituted in that place.
25 Abner D. Huckaby, is that your name, sir?

1 Mr. Huckaby, can you move down here into this chair
2 and you become one of the 12 jurors now.

3 All right. Mr. Esdale, you're recognized for
4 your closing.

5 **MR. ESDALE:** Thank you, Your Honor. Counsel.

6 Good afternoon, ladies and gentlemen.

7 Something Mr. Portis got up here and said earlier
8 was, you know, that you have to pay attention to
9 stuff that comes from the witness stand and the
10 exhibits and testimony and that if you don't like
11 Mr. Portis, you know, you've got to put that out of
12 your mind. I think actually he was doing that on my
13 behalf.

14 My tendencies are a little bit like a bull in a
15 china shop. And I sure hope that nothing I've done,
16 some of my folks say, well, you've got to quit being
17 rude to witnesses and stuff like that, and that's
18 not my intention. It's hard not to be passionate up
19 here in a case like this. And I sure hope I haven't
20 offended anybody. And, certainly, I hope nobody
21 would hold my passion in the way that I try a case
22 up against the Bartleys.

23 Having said that, I want to thank each and
24 every one of y'all for being here and thank you on
25 behalf of the Bartleys. It's very important to them

1 different room somewhere, the bailiff will leave,
2 the door will be shut and it'll just be the 12 of
3 you in there, you don't have to wait another second,
4 you start talking about the case, but don't talk
5 about the case until the 12 of you are alone in
6 there and you have the exhibits and the verdict
7 forms.

8 Now, your notes you may take them in there with
9 you at this time, do not physically show them to
10 another juror. You certainly may refer to them in
11 any way you like during your deliberations, but
12 don't physically show them to another juror and
13 remember we're going to tear them up at the end of
14 the trial.

15 Folks, I cannot begin to thank you enough for
16 your attention. I appreciate it so much. You may
17 retire to your jury room.

18 (The jury retires to the jury room.)

19 **THE COURT:** All right. Please state for the
20 record exceptions, additions or objections to the
21 instructions, from the Plaintiff?

22 **MR. ESDALE:** None at this time, Your Honor.

23 **THE COURT:** From the defense?

24 **MR. CARTER:** None.

25 **THE COURT:** All right. Do y'all want to

1 preserve anything you raised before the charge in
2 the charge conference, anything we discussed?

3 **MR. ESDALE:** No, sir.

4 **THE COURT:** And the verdict form, you want to
5 preserve that, right?

6 **MR. CARTER:** We would like to preserve the
7 request on the verdict form. I'm trying to think
8 back as to the -- I think you incorporated what we
9 talked about this morning so I don't know of
10 anything.

11 **THE COURT:** Modified it, but I tried to
12 incorporate pretty much everything you all discussed
13 this morning, but I don't want to not give you a
14 chance.

15 Well, gentlemen, it has been a true pleasure
16 trying the case with you. You are infinitely
17 prepared, very talented and it really has been a
18 pleasure.

19 The jury's got the hardest job in the
20 courthouse. We'll put it in their hands and see
21 what they decide. Check the verdict forms, check
22 the exhibits. When you're satisfied, give those to
23 the bailiff and bring the alternate out whenever
24 they go back, all right.

25 (Whereupon, the jury commences its

1 deliberations at 5:40 p.m.)

2 (A recess transpired.)

3 (The following occurred during jury
4 deliberations at 6:18 p.m.)

5 **THE COURT:** I have a note from the jury that
6 reads: May I see the spine thing?

7 That was not entered in evidence. It was used
8 for demonstrative purposes. I cannot send it back
9 there to them, but if both sides agree, it's fine
10 with me if they have it. It's up to you, but I
11 can't do it without consent from both sides.

12 **MR. CARTER:** Give us just one second.

13 (Pause.)

14 **MR. CARTER:** Your Honor, we can't agree to let
15 it go back there to the jury so that they can do
16 with it whatever they want to do with it since it's
17 not evidence.

18 **THE COURT:** You said cannot?

19 **MR. CARTER:** Cannot.

20 **THE COURT:** All right. Do you all want me
21 to -- generally, I bring the jury out and put these
22 on the record, but if both sides agree, I can just
23 write on the bottom that that's not in evidence and
24 I cannot send it back to them. Do y'all want me to
25 do that or do you want me to bring them out?

1 do not show any sign of approval or disapproval with
2 the verdict, don't shake your head in agreement or
3 disagreement, don't make any sounds. Just stay
4 still, stay quiet, we'll get through it just fine.

5 Bring in the jury.

6 (The jury returns to open court to report
7 its verdict at 7:18 p.m.)

8 **THE COURT:** All right, madame Clerk.

9 **THE CLERK:** Mr. Foreman, have you reached your
10 verdict?

11 **FOREMAN:** Yes, ma'am.

12 **THE CLERK:** Please hand it to the bailiff.

13 (The bailiff hands the verdicts to the
14 Court.)

15 VERDICT OF THE JURY

16 **THE COURT:** This is case number
17 2005-CP-19-00244, Freddie Bartley, as personal
18 representative of the estate of Rachel Bartley, as
19 Plaintiff versus Ford Motor Company, Incorporated,
20 as Defendant.

21 As to the cause of action for wrongful death,
22 we, the jury, find for the Defendant, Ford Motor
23 Company, Incorporated, signed by the foreman.

24 As to the survival cause of action, we, the
25 jury, find for the Defendant, Ford Motor Company,

1 Incorporated, signed by the foreman.

2 Mr. Foreman and ladies and gentlemen of the
3 jury, if I have accurately stated your verdicts,
4 that is, verdict for the Defendant on both causes of
5 action, please signify by raising your right hand.

6 All 12 hands are raised. Thank you.

7 Are there any matters to take up prior to the
8 jury being discharged, from the Plaintiff?

9 **MR. ESDALE:** No, sir.

10 **THE COURT:** Defense?

11 **MR. CONROY:** No, sir.

12 **THE COURT:** Thank you.

13 All right. Ladies and gentlemen, I know it's
14 late. I've got a little bit of information to share
15 with you before you go that I think you may want to
16 know. I do have to talk to the lawyers briefly
17 before can I do that. If you'll wait for me back
18 there in the jury room, I'll be back momentarily.

19 And you all can put the alternate in there with
20 them. And I can address them all at one time.
21 Thank you.

22 (The jury was excused.)

23 **THE COURT:** Motions?

24 **MR. ESDALE:** No, sir.

25 **THE COURT:** You have a right to request ten

1 days to file written post-trial motions, if you'd
2 like.

3 **MR. ESDALE:** All right. That's what we want to
4 do.

5 **THE COURT:** Okay. And I'll make it reciprocal.
6 And you have -- that is one of those deadlines that
7 is an absolute deadline I cannot extend. So you
8 must have those filed and sent to my office at P.O.
9 Box 10, Edgefield, no later than ten days so I can
10 consider them if they're filed, all right.

11 Thank you very much. Court's in recess.
12

13 **END OF PROCEEDINGS**
14
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25

STATE OF SOUTH CAROLINA)
COUNTY OF EDGEFIELD)

IN THE COURT OF COMMON PLEAS

FREDDIE BARTLEY, AS)
PERSONAL REPRESENTATIVE)
OF THE ESTATE OF RACHEL)
BARTLEY,)

Plaintiff,)

-vs-)

FORD MOTOR COMPANY, INC.,)

Defendant.)

VERDICT

CASE NUMBER 2005-CP-19-00244

AS TO THE SURVIVAL CAUSE OF ACTION
[BROUGHT ON BEHALF OF RACHEL BARTLEY - FOR INJURIES AND
DAMAGES SHE IS CLAIMED TO HAVE SUFFERED DURING HER LIFETIME]

WE, THE JURY, FIND [CHECK ONE]:

[] FOR THE PLAINTIFF, THE ESTATE OF RACHEL BARTLEY,

IN THE AMOUNT OF \$ _____,

ACTUAL DAMAGES.

OR

[✓] FOR THE DEFENDANT, FORD MOTOR COMPANY, INC.

Carl B. Robinson III
Foreman

Edgefield, South Carolina

October 28, 2009

William P. Keesley, Judge
Court Reporter (S. Sheppard)

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF EDGEFIELD)

FREDDIE BARTLEY, AS)
PERSONAL REPRESENTATIVE)
OF THE ESTATE OF RACHEL)
BARTLEY,)

Plaintiff,)

-vs-)

FORD MOTOR COMPANY, INC.,)

Defendant.)

VERDICT

CASE NUMBER 2005-CP-19-00244

AS TO THE CAUSE OF ACTION FOR WRONGFUL DEATH
[BROUGHT ON BEHALF OF THE HUSBAND AND CHILDREN]

WE, THE JURY, FIND [CHECK ONE]:

[] FOR THE PLAINTIFF, THE ESTATE OF RACHEL BARTLEY,
IN THE AMOUNT OF \$ _____,
ACTUAL DAMAGES.

OR

[☒] FOR THE DEFENDANT, FORD MOTOR COMPANY, INC.

Carl B. Robinson III
Foreman

Edgefield, South Carolina

October 28, 2009

William P. Keesley, Judge
Court Reporter (S. Sheppard)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No.: 2005-CP-19-244

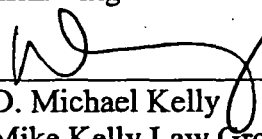
Freddie Bartley as Personal Representative of the Estate of Rachel Bartley Appellant

v.

Ford Motor Company, ... Respondent

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Freddie Bartley, individually and as Personal Representative of the Estate of Rachel Bartley appeals the final judgment of this matter and the Order of the Honorable William P. Keesley dismissing a member of the jury.


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Attorneys for Respondent

November 17, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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DEC 29 2009
SC Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No.: 2005-CP-19-244

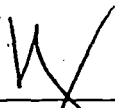
Freddie Bartley as Personal Representative of the Estate of Rachel Bartley Appellant

v.

Ford Motor Company, ... Respondent

AMENDED NOTICE OF APPEAL

Freddie Bartley, individually and as Personal Representative of the Estate of Rachel Bartley, appeals the decision of Honorable William P. Keesley to dismiss a member of the jury and the final verdict rendered, both dated October 28, 2009. Appellant received written notice of entry of the final judgment on November 19, 2009.



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Attorneys for Respondent

December 29, 2009

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

CASE NO. 2005-CP-19-244

RECEIVED
DEC 29 2009
SC Court of Appeals

Freddie Bartley as Personal Representative of the Estate of Rachel Bartley, . . . Appellant,

vs.

Ford Motor Company, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Amended Notice of Appeal on Ford Motor by depositing a copy of it in the United States Mail, postage prepaid, via certified mail on December 29, 2009, addressed to its attorney of record, J. Kenneth Carter, Jr., P.O. Box 1473, Columbia, SC 29202 and William J. Conroy, 690 Lee Road, Suite 300, Wayne PA 19087.

Respectfully Submitted,

MIKE KELLY LAW GROUP, LLC

BY:

TONIA V. MCCONNELL

500 Taylor Street
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Attorney for Appellant

December 29, 2009

FILED @ 10:05 pm
Oct. 1 2008
Hilary J. Newby C.C.C.P.
EDGEFIELD COUNTY

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF EDGEFIELD

CASE NO: 2005-CP-19-244

IN THE COURT OF COMMON PLEAS

FREDDIE BARTLEY AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF
RACHEL D. BARTLEY V. FORD MOTOR COMPANY, INC.

HECK ONE:

- ☒ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

IS ORDERED AND ADJUDGED:

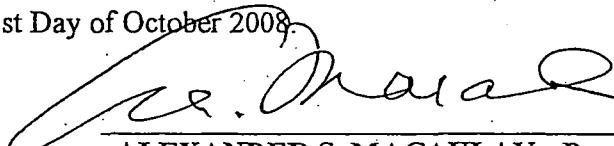
☐ See attached order;

☒ Statement of Judgment by the Court/Formal Order to Follow:

trial is declared pursuant to S.C. Code § 14-7-1330 - Procedure when jury fails to agree.

Dated at Edgefield, South Carolina, this 1st Day of October 2008.

Court Reporter: Robin Hild


ALEXANDER S. MACAULAY - Presiding Judge

This judgment was entered on the ____ Day of October 2008, and a copy mailed first class, to attorneys of record or to parties (when appearing pro se) as follows:

D. Michael Kelly, Mike Kelly Law Group, LLC - PO Box 8113, Columbia, SC 29202
R. Graham Esdale and Cole Portis, Beasley Allen Crow Methvin Portis & Miles, PC - 218 Commerce St. / PO Box 4160, Montgomery AL 36103

Elbert S. Dorn & Carmelo Sammataro, Turner Padgett Graham & Laney, PA - PO Box 1473, Columbia, SC 29202
R. Gordon Sproule, Jr. & Patrick Strubel, Huie Fernambucq & Steward, LLP - Three Protective Center, Suite 200, 2801 Hwy 280 South, Birmingham, AL 35223
William J. Conroy, Campbell, Campbell, Edwards & Conroy, Chesterbrook Corporate Center, Suite 300, 690 Lee Road, Wayne, PA

TORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

48

I therefore ask you to return to your deliberations and would hope you can arrive at a verdict within a reasonable time. Thank you.

You may retire to the jury room at this time.

(JURY OUT @ 9:17 P.M.)

THE COURT: Any exceptions or requests from the plaintiff?

MR. PORTIS: None, Your Honor.

THE COURT: From the defendant?

MR. CONROY: None, sir.

THE COURT: Very good. Thank you. All right. We'll stand at-ease.

(RECESS 9:17 - 9:57 P.M.)

THE COURT: It looks like we may have some activity. All right, gentlemen. (tenders jury note to counsel.) I can tell you there's no one in this courthouse who regrets doing what I think I've got to do.

I can bring them out as I did the first time and instruct them to go back, but unless they request further instruction or in some way indicate that they agree to go back, I can't send them back.

MR. CONROY: I think we need to try.

THE COURT: I'll ask if there's any way they can reach an agreement.

Again, let's face it, that these twelve people have been here for ten days and have given exemplary service. They've admitted they have difficulty reaching a verdict and that's not -- that's not their problem. They obviously have strong convictions on both sides.

MR. CONROY: I understand.

THE COURT: I don't know which way.

MR. CONROY: We don't know.

THE COURT: Gentlemen, I've been given another message: "Still deadlocked, no change. I don't think we'll ever be 12-0", and it is signed by the foreperson.

I'm going to call them back out and pursuant to section 14-7-1330, procedure when a jury fails to agree, I'm going to ask if there's anything the court can do as far as answering any particular questions they have -- and of course we already know that we are

limited in what we can do. If they say there's any chance of still reaching a verdict, we'll send them back out by their own agreement. As I read it, without their consent they can't be sent back. All right. Anything from the plaintiff?

MR. PORTIS: No, Your Honor.

THE COURT: From the defendant?

MR. CONROY: No, sir.

THE COURT: All right. Ask the jury to join us, please.

(JURY IN)

THE COURT: Mister Foreman, Ladies and Gentlemen of the jury, I've been provided a message that you are "Still dead-locked, no change. I didn't think we'll ever be twelve-to-zero." Is that the message from the jury?

THE FOREMAN: Yes.

THE COURT: Is there anything the court can do as far as helping you reach a verdict?

THE FOREMAN: I don't know what it would be.

THE COURT: All right. And you

are deadlocked and I don't care to know what the breakdown is, but you do feel that you are deadlocked and you could not agree on a verdict?

THE FOREMAN: I'm afraid so.

THE COURT: Again, under our law I will declare a mistrial. And what I want to say, though, is that is no reflection on you or any member of the jury or the jury as a whole because you'all have been as conscientious a group of citizens as I have ever seen.

If we have strong convictions, as I said in my instructions earlier we are not to in any way compromise those convictions and I feel that you have given all parties a fair and impartial trial.

Now, let me tell you that there are three verdicts that you can have in a trial. One is for one side, the other is for the other side and the third one is you just cannot agree. We do not force verdicts.

I want to thank you for your service on this trial, and I know that there's any other place you would rather have

been than where you have been for the last ten days. But the fact is that you responded to the call of service as jurors and you have served not only Edgefield County but also the State of South Carolina well, and I thank you for it.

I wish that there was something I could do for you because of what a fine job that you have done but -- if you remember on Monday when I qualified the jury I asked how many served on the last three years? At least you won't have to serve for another three years. But I do hope your service has not been without benefit. I hope that you understand how important it is to have citizen participation in our justice system, to examine our system of laws as a whole and I thank you for that.

With that I'm going to excuse you and thank you again. Now, is the clerk here?

MR. PORTIS: She is not. She's on the way.

THE COURT: If you need a work statement or something like that, the clerk's office is on the first floor. If you need a

statement for work or something, the clerk will be -- just stop by there and get it. Now, I hate to say this but "the check's in the mail." Again, I do want to thank you and I hope you have the balance of the week is much more enjoyable, but I do want to thank you for your service.

Thank you very much and goodnight, God speed to you all.

(JURY OUT @ 10:09 P.M.)

THE COURT: All right.

Gentlemen, again I want to thank you for another chapter in my life but the jury did their very best and didn't give up and I want to thank you for a job well done and this is one of the verdicts that a jury can reach, is no verdict. Good luck to you all.

(COURT ADJOURNED @ 10:10 P.M.)

(TRANSCRIPT CONCLUDED)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

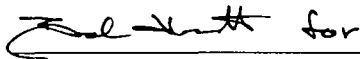
Case No.: 2005-CP-19-244
(Appeal Tracking No.: 2009139792)

Freddie Bartley, as Personal Representative
of the Estate of Rachel Bartley, Appellant

v.
Ford Motor Company, Inc., Respondent

CERTIFICATION OF COUNSEL

Pursuant to Rule 210(g), SCACR, the undersigned, an attorney in this matter for the Appellant, certifies that this Record on Appeal includes all matters proposed to be included by the parties and not any other material.


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FINAL APPELLANT'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

- I. SOUTH CAROLINA LAW PROVIDES THAT, BEFORE A TRIAL COURT CAN DISMISS A SWORN QUALIFIED JUROR FOR ALLEGED SLEEPING, IT MUST CONDUCT A "PROBING AND TACTFUL" INQUIRY OF THE JUROR. HERE, THE TRIAL COURT DISMISSED A QUALIFIED JUROR ALLEGEDLY FOR SLEEPING DURING CLOSING ARGUMENTS WITHOUT MAKING ANY INQUIRY OF THE JUROR ONLY TO LEARN THAT THE JUROR SUFFERED FROM BELL'S PALSY AND WAS CLOSING HER EYES BECAUSE OF HER CONDITION. UNDER THESE CIRCUMSTANCES, DID THE TRIAL COURT ABUSE ITS DISCRETION?

STATEMENT OF THE CASE

This case arose from an automobile accident that occurred on November 8, 2002, in Saluda County, South Carolina. [R. p. 4.] The Appellant, Freddie Bartley, as Personal Representative of the Estate of Rachel Bartley, filed a Complaint against Jim Satcher, Inc., and Respondent Ford Motor Company, Inc., on November 2, 2005, and served it on Respondent on November 8, 2005. The Complaint alleged that Respondent's negligence in designing and manufacturing the vehicle caused the spinal cord injuries and ultimately the death of Rachel Bartley. [R. p. 7.] The Complaint also contained allegations of strict liability and other product liability causes of action. [R. pp. 5-8.] Respondent filed and served a timely Answer which contained a general denial and other defenses. [R. p. 9.]

The case went to trial before the Honorable William P. Keesley on October 19, 2009. Closing arguments were held on October 28, 2009. [R. p. 20.] Following Respondent's closing and prior to Appellant's rebuttal, the trial judge informed both parties that he intended to dismiss a juror for sleeping during Respondent's closing argument. [R. pp. 25-28.] Appellant's attorney objected to

the dismissal, stating that he believed the juror was not asleep but merely disinterested in Respondent's closing argument. [R., p. 26.] Appellant's counsel stated that he thought the juror would be able to answer any questions about the closing if the judge would bring her back in and conduct an inquiry. [R., p. 27.] The trial judge stated that he would not believe the juror. [R., p. 27.] The trial judge called the juror into the courtroom and excused her from further participation. [R., p. 29.] The trial judge did not tell the juror why she was being dismissed and did not ask the juror or anyone else any questions at this time. [R. p. 29.]

During the recess that followed the dismissal, the trial judge and the dismissed juror engaged in a conversation in which the juror informed the trial judge that she did not know why she was dismissed. [R., p. 30.] The juror informed the trial judge that she suffered from a medical condition affecting one of her eyes and that the glare in the courtroom bothered her and caused her to close her eyes. [R., p. 30.] The juror provided that she was awake the entire time and that she could tell the judge "what was going on." [R., p. 30.] The trial judge stated for the record that there did not seem to be any difference in the lighting in the courtroom that day than any of the previous days and that the juror would have had no reason to close both of her eyes. [R., p. 31.]

The trial judge also provided that even if the juror was not having difficulty staying awake, she had disobeyed his instructions. [R., p. 31.] Appellant's counsel reiterated his position to the trial judge that the dismissal was inappropriate. [R., p. 32] The trial judge noted Appellant counsel's position and

seated the alternate juror. [R., p. 32.] Following Appellant's rebuttal, the jury returned a verdict against Appellant. [R., pp. 37-38.]

The Appellant filed a timely Notice of Appeal on November 30, 2009, pursuant to Rule 201 of the South Carolina Rules of Appellate Practice. [R. p. 42.] The Appellant filed an Amended Notice of Appeal on December 29, 2010. [R. p. 44.]

STATEMENT OF FACTS

On October 28, 2009, attorney for Respondent began his closing argument before the trial court in this products liability case arising from an automobile accident on November 8, 2002. [R., pg. 20] During the Respondent's closing argument, the trial judge interrupted Respondent's attorney and excused the jury for a five-minute break, noting that "one of the jurors is fighting sleep." [R., p. 22.] Shortly thereafter, the trial judge again stopped Respondent's attorney during his closing argument and reminded the jurors to keep their eyes open. [R., p. 24.] After Respondent's attorney concluded his closing and the jury had retired to the jury room, the following discussion took place before the court:

The Court: My opinion is that one of those jurors slept through half of the closing.

* * * *

She wasn't deeply asleep, but she definitely disobeyed my directive to keep her eyes open, and from the point that I gave that instruction she pretty much kept her eyes closed roughly 80 to 90 percent of the time. I intend to set her aside. Now ya'll put what you need on the record.

Mr. Portis: Yes sir. Your Honor, as I observed all of the jurors in there, I think the court is mistaken and I think

what the court has done, it has confused someone who is – who may have not been paying attention to the point that she's disinterested in what Mr. Conroy says. And his – whatever Mr. Conroy says is not evidence in this case, and as the court has said from the very beginning, in fact told the jury last night, that they've been very diligent throughout this trial to pay attention to this case.

The Court: They have.

Mr. Portis: She has listened to the evidence. She has paid attention to the evidence, whichever juror you're talking about, and the fact that she doesn't give her full and utter attention to Mr. Conroy on stuff that is not evidence, it is improper for the Court to excuse her, Your Honor, from this jury.

The Court: I'd love for you to cite me a case on that because every case I've ever read about a sleeping juror says you set them aside. You can't sleep through part of the trial, Mr. Portis. If the closing arguments didn't mean anything, we would have skipped them.

Mr. Portis: And I would submit to you that she did not sleep through it. And I think if you would bring her in here and ask her and say, well, what did you hear, she would tell you what she hear.

The Court: And I won't believe her. I watched her. I stopped and took a break. I sent the jury out so that she could stretch her legs. I did comment, Mr. Conroy, has one of the most soothing voices I ever heard. He can do voice-over work probably in that field, but then I interrupted him again. I can't keep interrupting him.

I turned the air conditioner down. There's a vent right over the top of them. The lady sitting beside her was about to freeze. I don't know what else to do. And I have no idea what she's thinking about the case. I don't even know her name.

* * * *

The Court: She's a wonderful lady and she sat through eight days of testimony, and she has paid attention the whole time. . . . I've been around long enough to know the difference between sleeping and not being interested. That lady was asleep. Bring that large lady that was sitting on the right side in the back.

[R., pp. 25-28.]

The trial judge called the juror into the courtroom and dismissed her without any inquiry as to whether the juror was sleeping. [R., p. 29.] After a recess, the trial judge addressed the court.

The Court: I need to put on the record I had to go next door to my office and Ms. Taylor was at the metal detector, the juror. And there was no incident or anything like that, she just -- I said Thank you very much, ma'am, for your service. She said, Well, I don't know what happened. And I said, Well, you didn't keep your eyes open, so I couldn't tell what was going on with you. And she said, Well, I have palsy in my left eye, and the glare bothers me sometimes so I have to keep that eye shut. And I said, Well, I appreciate your service.

I obviously, was not going to have any disagreement with her. And she said, Well, I was awake. I can tell you what was going on.

I'll let you all put whatever you want on the record, and she seemed like a very, very nice lady. The problem with her explanation to me was that this is not a one-day trial. I've watched this lady now -- I've been in her presence now for eight days. As a matter of fact, the bailiff had called my attention to her earlier in the week because she was saying that the lady was sleeping, so I was watching her because I wanted to make sure that there wasn't a problem.

* * * *

And, again, I would love to have her serve. She's been in the trial the entire time. And I think all the

other days she's paid attention, but unfortunately, I think today she had lunch, she came in here and she was having trouble staying awake.

* * * *

Mr. Portis: Judge, just to re-emphasize, the Plaintiff's position is it's inappropriate to excuse that particular juror. Ultimately, it was determined why, that she had Bell's Palsy. My observation personally was that she paid attention during this case and paid attention during closing, and she should not have been excused in this case.

The Court: I note your position. I don't know how in the world we looked at the same thing and saw the exact opposite. That's all I can say, and if I'm wrong, I apologize.

[R., pp. 29-32.]

The court proceeded to hear the Appellant's rebuttal to Respondent's closing. Following the conclusion of arguments, the jury deliberated for several hours before returning a verdict in favor of Respondent.

STANDARD OF REVIEW

This is an appeal from a judgment against Appellant in the trial court, pursuant to Rule 201 of the South Carolina Rules of Appellate Practice, based on the trial judge's dismissal of a sworn member of the jury for allegedly sleeping during closing arguments.

A decision on whether to dismiss a juror and replace her with an alternate lies within the sound discretion of the trial court. State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980); State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996). Before a trial court can replace a juror, it must make a finding that the juror is either "unable or disqualified to perform" her duties. S.C.R.C.P. 47(b). A

sleeping juror question is one of juror misconduct. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 1999) (citing State v. Cleveland, 959 S.W.2d 548 (Tenn. 1997)).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING A SWORN AND QUALIFIED JUROR FOR ALLEGED SLEEPING DURING TRIAL WITHOUT CONDUCTING A “PROBING AND TACTFUL” INQUIRY OF THE JUROR.

The trial judge in this case violated South Carolina Rule of Civil Procedure 47(b) by replacing a qualified juror with an alternate juror. The trial judge abused his discretion and prejudiced the Appellant by failing to conduct a probing and tactful inquiry into whether the dismissed juror was in fact unqualified. Therefore, the Court should find that the judge committed reversible error and remand the case for a new trial.

The issue of whether a trial judge *in a civil case* abuses his discretion by replacing a juror for misconduct sua sponte and without inquiry appears to be one of first impression for this Court. Legal authority in this area primarily concerns criminal cases where a defendant alleges juror misconduct as grounds for a new trial. See, e.g., State v. Zeigler, 364 S.C. 94, 109, 610 S.E.2d 859, 867 (Ct. App. 2005); Smith, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999); Hurd, 325 S.C. 384, 480 S.E.2d 94. The present case is distinguishable from existing South Carolina case law because (1) it is civil, not criminal, (2) the trial judge raised the issue of the alleged sleeping juror sua sponte, and (3) Appellant in this case does not allege prejudice based on any juror misconduct, but from the improper conduct of

the trial judge for dismissing the qualified juror without either the court or the parties questioning the juror on whether she was in fact asleep.

Rule 47(b) provides that “[a]lternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found unable or *disqualified* to perform their duties.” S.C.R.C.P. 47(b) (emphasis supplied). Therefore, before replacing a juror with an alternate juror, the trial court must first determine if misconduct occurred, i.e. whether the sworn juror was in fact sleeping, and then determine if misconduct rises to such a level that would disqualify her to perform her duties. A juror’s disqualification will not be disturbed on appeal if there is a reasonable basis from which the trial court could have concluded the juror would not have been able to faithfully discharge his responsibilities as a juror under the law. State v. Woods, 382 S.C. 153, 159, 676 S.E.2d 128, 131-132 (2009) (citing State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990)). In this matter, it was unreasonable for the trial judge to remove the juror without conducting an evidentiary hearing to determine whether the juror was disqualified to perform her duties. The decision is especially inequitable in light of the trial judge’s admission that the subject juror had paid attention the “whole time” during the eight day trial. [R., p. 28.]

The general test for evaluating alleged juror misconduct is (1) whether there in fact was misconduct, and (2) if so, whether any harm resulted as a consequence. Smith, 338 S.C. at 72, 525 S.E.2d at 266. First, the trial judge must make a factual determination as to whether juror misconduct in fact occurred. Zeigler, 364 S.C. at 109, 610 S.E.2d at 867 (citing Smith, 338 S.C. at 72, 525

S.E.2d at 266). Misconduct of a juror is a fact to be determined by the trial judge from the circumstances of each case. Smith, 338 S.C. at 71, 525 S.E.2d at 266 (citing State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)). The trial judge has a duty “to assure himself that each and every prospective juror is unbiased, fair, and impartial.” State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973).

In this case, Appellant’s counsel twice stated for the record his objection to the dismissal of the juror, once prior to the dismissal and once afterward. [R., pp. 27, 32.] Furthermore, Appellant’s counsel stated for the record that in his opinion the juror would be able to respond adequately to any inquiry regarding the trial if the judge would simply ask her. [R., p. 27.] Despite the Appellant’s petition, the trial judge elected to dismiss the juror prior to conducting the required inquiry.

In sleeping juror situations, “it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified.” Hurd, 325 S.C. at 389, 480 S.E.2d at 97 (citing People v. Valerio, 529 N.Y.S.2d 350, 351 (N.Y. App. Div. 1988); State v. Reevey, 387 A.2d 381 (N.J. Super. Ct. App. Div. 1978)). The court “must not speculate . . . but must ascertain the juror’s state of mind and must place its reasons for excusing or retaining the juror on the record.” Hurd, 325 S.C. at 389-90, 480 S.E.2d at 97. “Just because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination whenever a juror appears to be asleep.” Id. at 390, 480 S.E.2d at 97.

For example, in Hurd, where the trial judge refused defense counsel's request to question a juror who appeared to have been sleeping during trial, the judge committed reversible error by failing to determine whether the juror heard all of the information in question. See Id. at 390, 480 S.E.2d at 97. This Court reversed the defendant's conviction and ordered a new trial, holding that the trial judge "should have either determined whether the juror was in fact asleep, recharged the entire jury, or replaced the juror." Id.

While it is clearly within the discretion of the lower tribunal to take particular action when dealing with the ramifications of juror misconduct, the court must first determine if misconduct occurred, i.e. was the juror in fact sleeping. Here, the trial court abused its discretion because it never conducted any inquiry of the juror to determine if misconduct had occurred. Appellate courts in other jurisdictions have cited a trial judge's inquiry, or lack thereof, into juror misconduct as a basis for abuse of discretion.

In State v. Cass, 356 So.2d 396 (La. 1977), the Louisiana Supreme Court reversed a conviction, finding the trial judge erred in replacing a juror whom he thought to be sleeping. In reversing, the court held that once a jury was selected and sworn the accused had a right to have his fate decided by the particular jurors selected to try him. "The right of the accused to have a juror selected by him try the case is a substantial one, the improper deprivation of which is prejudicial." Id., at 398, (quoting State v. White, 153 So.2d 401 (La. 1963)). The Cass court determined that even if the juror in question did briefly doze off, that was not per se proof of inability to perform, or any character disqualification and that the trial

court did not have legal cause to remove the juror. Similar to the juror's objections in this matter, the juror in Cass protested to the court that he had not been asleep.

In State v. Tennors, 923 So.2d 823 (La. App. 3 Cir. 2/15/2006), the court reversed a conviction holding that the trial court committed legal error by discharging a juror to allow that juror to fulfill a personal obligation prior to deliberations. The Tennors court went on to provide that the trial court's accommodation for the juror should not have preempted the defendant's right to be tried by a properly impaneled jury selected by him and that summarily dismissing the juror without holding an evidentiary hearing constituted reversible error. Id.

In Tennors, the court relied on Louisiana Code of Criminal Procedure Article 789, which provides that "[a]lternate jurors, in the order in which they are called, shall replace jurors who become unable to perform or disqualified from performing their duties." This language is nearly identical to S.C.R.C.P. 47(b). Analogous to Tennors, the trial court in this case committed reversible error by summarily dismissing the juror without conducting an evidentiary hearing to determine whether the juror was qualified to continue.

While Tennor and Cass both involved criminal actions, the issue of whether a juror is disqualified does not hinge upon whether the underlying proceeding was criminal or civil in nature. Relevant provisions of the South Carolina Code regarding juror disqualification do not make any distinction as to

whether the proceeding is criminal or civil in nature. See, e.g., S.C. Code Ann. §§14-7-810, 14-10-820, 14-7-860, 14-7-1010, 14-7-1020.

In Stokes v. State, 72 Md. App. 673 (Md. Ct. Spec. App. 1987), the defendant contended that the trial judge erred when, sua sponte, he substituted an alternate juror for a designated juror during the trial. Similar to this matter, the presiding judge in Stokes interrupted the proceedings and announced that he had observed a juror sleeping at times. Without conducting any inquiry of the juror and over defendant's objection, the trial judge in Stokes dismissed the juror and substituted the first alternate. The court agreed with defendant's contention and reversed, holding that the trial judge's observation of "gross attentiveness" was insufficient to establish the juror was unable to continue.

Similar to Stokes, the trial judge in the case at bar removed the juror summarily, solely on the basis of his own observations, without giving either the Appellant or Respondent an opportunity to determine for the record whether the juror was unable or disqualified to perform her duty. The record in Stokes failed to support the trial judge's statement that the juror was unable to continue and the reviewing court held the dismissal amounted to an abuse of discretion. The trial judge in this matter acknowledged to Appellant that the subject juror had paid attention during the whole trial despite allegedly sleeping during Respondent's closing argument. (R., p. 28). The record in this case does not support the trial judge's dismissal of the juror.

In Golsun v. United States, 592 A.2d 1054, 1057 (D.C. 1991), the trial judge had his law clerk toss a coin to decide which of the two jurors who may

have been sleeping during the trial would be replaced by the only remaining alternate juror. The District of Columbia Court of Appeals reviewed the defendant's claim that the lower tribunal abused its discretion by employing such a method to determine which juror should be replaced and agreed that the trial judge erred in relying on a coin toss rather than on the court's own judgment after voir dire of the ostensibly sleeping jurors to decide a matter committed to judicial discretion. While not as arbitrary as flipping a coin, the trial judge in this case should have employed measures to deduce whether the juror was actually sleeping, such as questioning the juror and any other observers in the courtroom.

As the trial judge acknowledged in this matter, the subject juror maintained that she had not been asleep but rather affected by an ailment that may have caused her to appear asleep. (R., p. 30.) In United States ex rel. Moore v. Fay, 238 F. Supp. 1005, 1007 (S.D.N.Y. 1965), Judge Edward Weinfeld of the United States District Court stated: "[t]he dereliction must be such that it may be said to deprive the parties of the continued objective and disinterested judgment of the juror, thereby foreclosing a fundamentally fair trial." The juror's conduct in this case does not amount to a dereliction that would have deprived the parties of a fundamentally fair judgment. The trial judge could have verified any uncertainties concerning the juror's fulfillment of her duties had he simply examined the juror or afforded the parties the opportunity to do so.

In Commonwealth v. Saxton, 353 A.2d 434, 436 (1976), the Supreme Court of Pennsylvania reasoned that "[w]hile the decision to remove a juror because of inability to perform the usual functions of a juror is within the sound

discretion of the trial judge, the exercise of this judgment must be based upon a sufficient record of competent evidence to sustain removal.” Here, as in Stokes, a competent record was especially crucial as counsel for Appellant not only objected to the sua sponte dismissal, but also disputed the trial judge’s observations regarding the juror’s alleged slumber during Respondent’s closing argument. There is no evidence in the record indicating that good cause exists in this case for the trial judge to have dismissed the subject juror.

In People v. Delamora, 48 Cal.App.4th, 1850, 1856 (Cal App. 2d Dist. 1996), two jurors were dismissed immediately by the trial judge upon asking for the court’s assistance in obtaining pay from their employers for an extra day of service. The Delamora court provided that “the trial court’s determination that good cause exists to discharge a juror must be supported by substantial evidence and where, as here, there is no evidence at all to show good cause (because no inquiry of any kind was made), the procedure used was by definition inadequate.” Id., (internal citations omitted).

Appellant concedes that the ultimate decision whether to retain or discharge a juror is subject to the sound discretion of the trial court. However, that discretion should be “bridled to the extent the juror’s inability to perform his or her functions must appear in the record as a demonstrable reality, and courts must not presume the worst of a juror.” People v. Hernandez, 95 Cal. App. 4th 1346, 1357 (Cal. App. 2d Dist. 2002) (quoting People v. Bowers, 87 Cal. App. 4th 722, 729 (Cal App. 2d Dist. 2001)). In this case, the trial judge presumed the worst of the subject juror by assuming she was sleeping during Respondent’s

closing argument. In fact, the sleeping juror was hampered by Bell's Palsy and could not keep her eyes open because of the glare in the courtroom. (R., p. 30.)

In Durham v. State, 867 A.2d 176 (Del. 2005), a criminal defendant sought a new trial because a juror slept through parts of the trial. Because there was no particularized evidence showing that the juror in fact missed parts of the trial, the Supreme Court of Delaware found no abuse of discretion. Id. at 181. The court commended the trial judge for properly examining the juror, for promptly making a comprehensive factual inquiry into defendant's claim, and for analyzing the claim in an orderly, logical deductive-reasoning process. Id.

In United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983), where a juror came forward and admitted to the judge that he slept through parts of the trial, the United States Court of Appeals for the Ninth Circuit concluded that the judge abused his discretion by refusing to conduct an inquiry into the juror's attentiveness upon request by defense counsel. Id. at 1083. In United States v. Monreal-Miranda, 103 F. App'x 83, 86 (9th Cir. 2004), the same court found no abuse of discretion where the juror denied sleeping and the trial judge conducted a limited inquiry. In People v. South, 177 A.D.2d 607, 608, 576 N.Y.S. 2d 314, 314 (N.Y. App. Div. 1991), the trial judge denied defense counsel's request for mistrial or in-camera inquiry into whether a juror was sleeping despite the fact that the judge admitted seeing the juror with her eyes closed. As a result, the court held that the defendant in South was entitled to a new trial because the judge should have granted counsel's request and conducted a probing and tactful inquiry into the qualifications of the juror.

If the court notices, or is reliably informed, that a juror is asleep during trial, the court has a responsibility to inquire and to take further action if necessary to rectify the situation. Samad v. United States, 812 A.2d 226, 230 (D.C. 2002) (quoting Golsun v. United States, 592 A.2d 1054, 1057 (D.C. 1991)). The trial court should begin, for example, with a hearing to determine whether the juror had been asleep and, if so, whether the juror had missed essential portions of the trial. Id. at 230-31.

An example of measures that the trial court could have implemented are found in People v. Buel, 53 A.D.3d 930, 861 N.Y.S.2d 535 (N.Y. App. Div. 2008). In Buel, where the trial judge, upon realizing that a juror appeared to be sleeping, immediately stopped trial, informed counsel of his observations, and questioned the juror about whether he was sleeping, and the juror informed the court that he had not fallen asleep, the court had an adequate basis, based on this probing and tactful inquiry, for its conclusion that the juror was qualified. Another example of an appropriate inquiry would be that of the trial court in People v. Dupont, 444 N.Y.S.2d 40 (N.Y. Sup. Ct. 1981). In Dupont, where a juror was observed falling asleep on numerous occasions, the trial judge stopped the trial, swore the juror in as a witness, and questioned the juror. The juror admitted that he had fallen asleep on the previous occasions and that he “got most of (the evidence)” being presented during the times in question. Based on these facts the judge disqualified the juror because it was apparent that the juror had not heard all of the evidence.

In State v. Hampton, 549 N.W.2d 756, 760 (Wis. Ct. App. 1996), the lower court's refusal to at least conduct an inquiry into the matter of alleged misconduct was such as to warrant remand so that the lower court could conduct a hearing to determine the extent or length of time of the inattentiveness, the importance of the information purportedly missed by the juror, and whether such inattention prejudiced the defendant to the extent that he did not receive a fair trial. "Where there is a sufficient showing of juror inattentiveness, the appropriate remedy is to engage in a fact-finding process to establish a basis for the exercise of the lower court's discretion in dealing with the situation." Id.

In the case at bar, the trial judge did not make a sufficient factual determination as to whether any juror misconduct in fact occurred. The trial judge failed to "conduct a probing and tactful inquiry" to determine whether the juror was unqualified. As a result, the trial court could not properly ascertain the juror's state of mind. The trial judge did not make any inquiry at all prior to dismissing the juror, failed to explain to the juror why she was dismissed, or give her an opportunity to establish that she was qualified. [R., p. 27.]

Only after the trial judge had already dismissed the juror did he learn of the juror's medical condition, which caused her to appear to be sleeping. [R., p. 30.] Because of the trial judge's failure to assure himself of the juror's status, the trial court ultimately speculated as to whether the juror was in fact asleep. Indeed, the trial judge's own statements for the record are conflicting and indicate some degree of speculation. After initially stating that the juror was "fighting sleep," the trial judge later said he thought the juror "slept through half of the closing."

[R., pp. 21, 25.] The trial judge then stated that the juror “wasn’t deeply asleep” but that she “pretty much kept her eyes closed roughly eighty to ninety percent of the time.” [R., p. 26.] Later, the trial judge indicated “[t]hat lady was asleep.” [R., p. 28.]

When rebutted by the juror following the dismissal, the trial judge said he “couldn’t tell what was going on” with her. [R., p. 30.] The trial judge concluded his determination by stating that “if I’m wrong, I apologize.” [R., p. 32.] The appropriate procedure was for the trial judge to conduct a probing and tactful inquiry to determine whether the juror was sleeping. Prior to dismissing the juror, the trial judge could have simply asked the juror why her eyes were closed, posed specific questions to the juror about the trial, or allowed the Appellant and Respondent the opportunity to determine for the record whether the juror was unable or disqualified to perform her duty. Had the trial judge engaged in this required protocol, the court likely would have discovered *before* dismissing the juror that her medical condition caused her to close her eyes and could have verified with certainty whether any misconduct had in fact occurred.

Theoretically, even if the juror in question did briefly doze off, such conduct is not per se proof of inability to perform or any character of disqualification. Thus, there was no legal cause for the trial judge to remove her. Had the juror been shown to have been sleeping through a substantial part of the trial or been unable to stay awake despite warnings or efforts to arouse her, and had the Appellant and Respondent been afforded an opportunity to explore on the record the juror’s inability to perform on this account, this Court would have a

substantially different question for review. As it stands, the trial judge acknowledged that the subject juror had paid attention during the trial and refused Appellant's requests to bring the juror back in and conduct an inquiry.

The record makes clear that a hearing to determine whether to discharge the juror was not conducted and that Appellant made known to the court his opposition to the discharge of the juror. Indeed, the trial judge provided for the record that the juror insisted she was not asleep. Consequently, there was no legal cause for the trial judge to remove the juror and the trial judge's failure to conduct an evidentiary hearing precluded any reasonable basis for the disqualification of the juror. This conduct was in direct violation of S.C.R.C.P. 47(b) and impinged upon the Appellant's right to have the case decided by the particular jurors selected to try him. The trial judge's violation of S.C.R.C.P. 47(b) constitutes an abuse of discretion and the Court should therefore remand this case for a new trial.

II. BECAUSE CLOSING ARGUMENTS ARE NOT CONSIDERED EVIDENCE, THE TRIAL COURT ABUSED ITS DISCRETION BY DISMISSING A QUALIFIED JUROR WHO HEARD ALL OF THE EVIDENCE.

The trial court abused its discretion by dismissing a qualified juror who had had heard all of the evidence in the trial and was qualified to render a verdict. It is well established in South Carolina that closing arguments are not evidence. See, e.g., Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009); Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); State v. Charping, 333 S.C. 124, 508 S.E.2d 851 (1998); Sosebee v. Leake, 293 S.C. 531, 362 S.E.2d 22 (1987). Appellant

contended at the time of the dismissal that the closing arguments were not evidence and the trial court concurred with Appellant that the jury had “been very diligent throughout this trial to pay attention to the *evidence* in the case.” [R., p. 26]. Consequently, the trial court committed error by improperly dismissing a qualified juror.

The court in Hurd provided that “a juror who has not heard all the evidence in the case or the court’s instructing as to the applicable principles of law is grossly unqualified to render a verdict.” Hurd, 325 S.C. at 389, 480 S.E.2d at 97 (quoting People v. Valerio, 529 N.Y.S. 2d at 351). The trial court conceded that the subject juror had “paid attention the whole time.” [R., p. 28]. The juror’s behavior in this case did not rise to the level that would prompt misconduct and had the trial court not improperly dismissed the juror, she would have been afforded the opportunity to receive the court’s instructions as to the law and render a verdict. The juror was qualified to render a verdict and the trial court committed reversible error by dismissing the juror notwithstanding the fact that she was not asleep and heard the evidence in the case.

III. THE TRIAL COURT’S IMPROPER DISMISSAL OF THE JUROR PREJUDICED THE APPELLANT.

The trial court’s improper dismissal of the juror sua sponte and without the required inquiry prejudiced the Appellant. Civil litigants, like criminal defendants, have a constitutionally protected right to the complete consideration of their case by an impartial panel of jurors. “The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate.” S.C.R.C.P. 38(a); see also S.C. Const. Art. I, §14.

Generally, a trial error not shown to be prejudicial to an appellant does not constitute grounds for reversal. Aakjer v. Spagnoli, 291 S.C. 165, 170, 352 S.E.2d 503, 507 (Ct. App. 1987) (quoting JKT Company, Inc. v. Hardwick, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980)); see also Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974). In order for an error to warrant reversal, the error must result in prejudice to the appellant. State v. Northcutt, 372 S.C. 207, 219, 641 S.E.2d 873, 879 (2007) (citing State v. Locklair, 341 S.C. 352, 365, 535 S.E.2d 420, 427 (2000)).

As aforementioned, Smith and Hurd were both criminal matters where a sleeping juror was not removed by the trial judge. This Court held that in criminal cases where a defendant alleges juror misconduct as grounds for a new trial, the defendant must also show that the juror misconduct caused prejudice to the defendant. Smith, 338 S.C. at 74, 525 S.E.2d at 267; see also State v. Hunter, 320 S.C. 85, 463 S.E.2d 314 (1995) (motion for new trial denied where defendant failed to demonstrate prejudice resulting from jury misconduct). In State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999), the South Carolina Supreme Court rejected a presumption of prejudice.

Understanding that this Court has rejected a presumption of prejudice in criminal matters concerning juror misconduct, specifically where a juror was seated despite alleged misconduct, this case is distinguishable from existing case law on the issue of prejudice. In contrast to existing South Carolina precedent on juror misconduct, specifically a sleeping juror, this is a civil matter where a juror was dismissed sua sponte instead of being permitted to deliberate. This

misconduct stems from the trial judge's subjective finding that a juror was unqualified to fulfill her obligation.

In Perkins v. Komarnycky, 834 P.2d 1260 (1992), the Arizona Court of Appeals held that removal of two jurors from the deliberative process before its conclusion deprived the defendants "of their right to have all of the jurors participate in deciding all of the issues." Id., at 1264. "Prejudice is conclusively presumed where the nature of the error deprives a litigant of an essential right." Id. As contained within the South Carolina Constitution and the South Carolina Rules of Civil Procedure, the right of a trial by jury shall remain "inviolable." This Court should not require Appellant to show the extent of prejudice resulting from an error when, as a practical matter, the nature of the error renders it impossible to prove the extent of any prejudice. The Eleventh Circuit has stated that prejudice will be found where the trial judge discharges a juror without factual support or for a legally irrelevant decision. United States v. Zerduche, 133 F. App'x. 599, 600 (11th Cir. 2005).

In this case, Appellant does not allege prejudice resulting from juror misconduct, but rather from the improper conduct of the trial judge. The prejudice arises from the trial court's refusal to conduct an inquiry. The appellant has, in fact, been denied of his right to establish a record that would demonstrate the juror was qualified.

The nature of the trial judge's error inhibits a clear determination of the extent of the prejudice. "Prejudice will be found when there has been significant misconduct affecting the essential rights of a litigant and when the very nature of

the misconduct makes it impossible to determine the extent of prejudice.” Leavy v. Parsell, 932 P.2d 1340, 1344 (1997). The Maryland Court of Special Appeals observed:

It is again an article of faith among trial advocates and part of the core curriculum of trial advocacy seminars and institutes that the ideal jury will be made up of twelve clones of one’s client. When, therefore, two skilled professionals, each armed with a cartridge belt full of peremptory challenges, sit down before a panel of forty or fifty prospective jurors knowing that only twelve will survive, their aim is to leave standing the most favorable jury possible. The purpose is not only to eliminate the negative but to accentuate the positive.

Admittedly, much guesswork is involved, but it is intelligent guesswork, educated hunches, background checks and statistical probabilities, hopefully valid generalizations and the law of averages. The goal is not only to minimize the cultural differences and the lack of points of identity that might likely distance a juror from one’s client but also to maximize the likely sympathies; empathies and common experiences that will help a juror identify with one’s client. Generally speaking, the issue is not that of good jurors versus bad jurors or adequate jurors versus inadequate jurors. It is rather the wily maneuvering of two skilled chess players to obtain a slight edge, a barely discernible ‘tilt,’ as they mold a jury.

Chew v. State, 527 A.2d 332, 344 (1987). The trial judge’s dismissal prejudiced the Appellant by casting a jury in a manner contravening both parties preferred mold, accomplished by the use of its peremptory strikes.

The trial judge impermissibly altered the dynamic of the jury by erroneously excusing the juror. Such error was “so substantial in nature or so connected with the rights of the parties or the course of the proceedings that it cannot be said prima facie not to have influenced the result.” See generally 5A C.J.S. Appeal and Error §1677, at 695 (1958 & Supp. 1991). In light of the obvious difficulties in showing actual prejudice when a juror is wrongfully

excused from a jury, adoption of a burden of proof requiring actual prejudice to be shown would mean that a trial judge could impermissibly excuse a sitting juror with impunity as long as a full complement of jurors eventually deliberates the case. Such a result would contradict the notion that litigants are entitled to have all impaneled jurors decide a case, absent a legally sufficient ground for excusal or disqualification.

The subject juror was indisputably part of the lawfully impaneled jury and Appellant was therefore deprived of his essential right to a fair jury trial when the trial judge excused the juror without a sound basis for doing so and without having conducted a probing and tactful inquiry. The trial court's improper dismissal of the juror without the required inquiry prejudiced the Appellant, the Court should therefore remand this case for a new trial.

CONCLUSION

For the reasons stated herein, the Court should reverse the trial court's verdict and remand this case for a new trial.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court Of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 2005-CP-19-244

Freddie Bartley as Personal Representative of the Estate of Rachel Bartley Appellant

V.

Ford Motor Company Respondent

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. DID APPELLANT'S FAILURE TO MOVE FOR MISTRIAL OR FOR A NEW TRIAL CHALLENGING THE TRIAL COURT'S SEATING OF AN ALTERNATE JUROR WAIVE THAT ISSUE ON APPEAL?
- II. DID THE TRIAL COURT EXERCISE SOUND DISCRETION BY REPLACING A SLEEPING JUROR WITH AN UNQUESTIONABLY QUALIFIED ALTERNATE WITHOUT ANY PREJUDICE TO APPELLANT?

STATEMENT OF THE CASE

Appellant Freddie Bartley (“Bartley”) filed this automotive product liability action on November 2, 2005, following a November 2, 2002 rollover collision in which his wife sustained physical injuries from which she later died. In his Complaint, Appellant alleged strict liability, breach of warranty, and negligence causes of action. Respondent Ford Motor Company’s (“Ford”) Answer denied these allegations and raised substantive defenses.

A jury trial commenced before the Honorable Alexander S. Macaulay on September 22, 2008. Following eight days of trial, the jury could not reach a unanimous verdict, and Judge Macaulay declared a mistrial pursuant to S.C. Code Ann. § 14-7-1330. [R. p. 47-53] Thereafter, a second trial commenced October 19, 2009, before the Honorable William P. Keesley. After eight days of trial, the jury deliberated for one hour and thirty-eight minutes before it returned a unanimous verdict for Ford on all causes of action. [R. p. 35, line 25 – p. 36, line 1; p. 37, line 6 – p. 38, line 6; p. 40-41]

Bartley did not file any post-trial motions. On November 17, 2009, he served his Notice of Appeal on Ford, followed by an Amended Notice of Appeal on December 29, 2009.

FACTS

The pertinent facts are not in dispute. On November 8, 2002, Rachel Diane Bartley lost control of a 2001 Ford Explorer along Pen Creek Road in Saluda County and exited the paved roadway to her right. [R. p. 3, ¶ 8] Thereafter, the vehicle crossed back over the roadway before rolling over and coming to rest on its roof in a wooded area adjacent to Pen Creek Road. [*Id.*] She sustained a cervical fracture and was rendered a quadriplegic as a result of the accident. She died approximately two years later from complications allegedly related to the accident.

INTRODUCTION

After the parties tried this case to a jury two times over sixteen trial days, the only issue Bartley presents for appeal is whether the trial judge erred in replacing a juror the trial judge determined to be sleeping with an undeniably qualified alternate juror. Barley's appeal fails for two reasons. First, Bartley failed to preserve this issue for appellate review because he did not object to the seating of the alternate juror and move for a mistrial or new trial on this ground. Second, Bartley's argument fails on its merits. Far from abusing his discretion, the trial judge exercised sound judgment following his personal observations that the juror's eyes were closed despite multiple attempts to arouse her. Bartley further cannot establish the requisite prejudice because the jurors who decided the case were all qualified. Consequently, this Court should affirm.

ARGUMENT

I. APPELLANT'S FAILURE TO MOVE FOR MISTRIAL OR FOR A NEW TRIAL CHALLENGING THE TRIAL COURT'S SEATING OF AN ALTERNATE JUROR WAIVES THAT ISSUE ON APPEAL.

Bartley failed to object to the seating of the alternate, never argued that the juror's dismissal would be prejudicial to his case, and never moved for a mistrial or a new trial on these grounds. As such, Bartley deprived the trial court of the opportunity to remedy any alleged error and waived his right to appellate review.

A. Appellant Did Not Object To The Seating Of The Alternate Juror Or Move For Mistrial Or New Trial.

Following a lunch break sandwiched between the parties' closing arguments, Judge Keesley observed a juror, Ms. Barbara Taylor, "fighting sleep." [R p. 21, lines 9-17] He interrupted Ford's closing argument and excused the jury to give her "an

opportunity to have a shot of caffeine or something. . . .” [R. p. 21, lines 20-24]

Following a short recess, the jury returned and Ford’s closing resumed. [R. p. 22, lines 1-7] After just a few moments, Judge Keesley again interrupted Ford’s closing to admonish the jurors to “keep your eyes open. I realize some people think with their eyes closed, but if you’ve got your eyes closed, I have to stop. So keep your eyes open for me, okay. Thank you.” [R. p. 23, line 25 - p. 24, line 5]

At the conclusion of Ford’s closing, Judge Keesley excused the jury and noted:

My opinion is that one of those jurors slept through half of the closing. Despite the fact that I stopped, despite the fact that I turned the air conditioner down so much that the lady beside her kept pulling covers up over her and despite the fact that I interrupted Mr. Conroy a second time and asked the jurors, told the jurors they have to keep their eyes open. If I don’t see their eyes, I’ve got a problem.

She wasn’t deeply asleep, but *she definitely disobeyed my directive to keep her eyes open*. And from the point that I gave that instruction, she pretty much kept her eyes closed roughly 80 to 90 percent of the time. I intend to set her aside.

[R. p. 25, line 19 - p. 26, line 12 (emphasis added)]

Following this announcement, but prior to Ms. Taylor’s dismissal, Bartley objected and argued that Ms. Taylor was paying attention and merely disinterested in Ford’s closing argument. [R. p. 26, line 13 – p. 27, line 17] In response, the court disagreed on the record, adding “I’ve been around long enough to know the difference between sleeping and not being interested. That lady was asleep.” [R. p. 27, line 18 – p. 28, line 21] Judge Keesley then dismissed Ms. Taylor. [R. p. 28, line 10 – p. 29, line 21]

Following a short recess, Judge Keesley memorialized his off-the-record encounter with Ms. Taylor wherein she indicated she suffers from “a palsy” in her left eye, that the palsy makes her eye sensitive to glare, and that, as a result, it is sometimes

necessary for her to keep the affected eye shut. [R. p. 29, line 25 – p. 30, line 11] Judge

Keesley rejected this explanation as unpersuasive based on his personal observations:

The problem with her explanation to me was that this is not a one day trial. I've watched now for eight days. As a matter of fact, the bailiff had called my attention to her earlier in the week because she was saying that the lady was sleeping, so I was watching her because I wanted to make sure that there wasn't a problem.

Now, I would have done similar to what I did just a minute ago. I wouldn't have called her out specifically and I would have made general announcements to the jury, take breaks, things like that, but even if I accept that she has palsy in her eye, in one eye, that doesn't -- and she didn't say it caused her to keep both eyes shut, she said, sometimes I have to shut my left eye, she said, because of the glare.

There doesn't appear to be anymore [sic] glare in the courtroom today than any other day except the day it was pouring down rain. And none of that explains why both her eyes were closed, none of that explains why her chin was almost on her chest.

And again, I would love to have her serve. She's been in trial the entire time. And I think all of the other days, she's paid attention, but, unfortunately, I think today she had lunch, she came in here and she was having trouble staying awake.

So -- and as I said earlier, even if she weren't having problems staying awake, if I tell them that they have to do something and they don't do it, then they're not following my directives.

So I'm helping you with your record to fill it out, but I have no reason to doubt that my assessment earlier was correct. So if y'all want to put anything else on the record before we do the final closings, that's fine.

Mr. Portis: Judge, just to reemphasize, the Plaintiff's position is it's inappropriate to excuse that particular juror. Ultimately, it was determined why, that she had Bell's Palsy. My observation personally was that she paid attention during this case and paid attention during closing and she should not have been excused in this case.

The Court: I note your position. I don't know how in the world - we looked at the same thing and we saw exact opposites, that's all can I [sic] say. And if I'm wrong, I apologize.

[R. p. 30, line 17 – p. 32, line 14]

The trial court seated the first alternate juror, Abner D. Huckaby, pursuant to Rule 47, SCRCF. [R. p. 32, line 15 – p. 33, line 4] Bartley never objected to the seating of Mr. Huckaby and continued with his closing argument without further mention of Ms. Taylor or Mr. Huckaby. [R. p. 32, line 21 – p. 33, line 6] At the conclusion of his charge to the jury, Judge Keesley specifically asked counsel for the parties whether they wished to “preserve anything you raised before the charge in the charge conference, anything we discussed,” to which Bartley’s counsel stated “No, sir.” [R. p. 34, line 25 – p. 35, line 3]

After the jury’s verdict, the court asked the parties if there were “any matters to take up prior to the jury being discharged, from the Plaintiff?”, to which counsel again stated “No, Sir.” [R. p. 38, lines 7-9] Following dismissal of the jury, the court asked the parties for motions, and again, counsel for Bartley stated “No, sir.” [R. p. 38, lines 22-24] Thereafter, Judge Keesley explained that Bartley had the right to request ten days to file post-trial motions, and counsel stated “All right. That’s what we want to do.” [R. p. 38, line 25 – p. 39, line 4] Judge Keesley cautioned, “that is one of those deadlines that is an absolute deadline I cannot extend. So you must have those filed and sent to my office . . . no later than ten days so I can consider them if they’re filed. . . .” [R. p. 39, lines 6-10] Nevertheless, Bartley did not file post-trial motions. Thus, despite several opportunities, Bartley never objected to the seating of the alternate juror, never moved for mistrial, and never filed any post-trial motions raising these issues or asking Judge Keesley to reconsider his rulings.

B. *State v. McDaniel* Establishes Appellant Has Waived Appellate Review.

State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980), is factually and legally indistinguishable and mandates dismissal. In that case, the appellant alleged error in the trial court's dismissal of a seated juror and the impaneling of an alternate juror at the conclusion of the testimony. *Id.*, 275 S.C. at 224, 268 S.E.2d at 586. The alternate juror was seated "only after the trial court made specific findings of fact on the matter." *Id.* Counsel for appellant objected to the procedure used to excuse the juror, but failed to object to the seating of the alternate or to move for a mistrial. Noting that "[i]t is well-settled that an issue may not be raised for the first time on appeal," the South Carolina Supreme Court concluded that "appellant waived the right to raise this issue on appeal." *Id.*; see also *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004) (an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review).

In this case, Bartley first objected to the pending dismissal of Ms. Taylor on the basis that Ford's closing was not evidence, that the juror was free to ignore it, and that perhaps she had merely been disinterested in Ford's closing. [R. p. 26, line 13 – p. 27, line 17] Later, Bartley also argued that Ms. Taylor suffered from a palsy and, in any event, had been alert and paying attention throughout the proceedings. [R. p. 32, lines 4-10] Bartley never asserted how Ms. Taylor's dismissal would prejudice his case. Moreover, Bartley neither objected to the seating of Mr. Huckaby nor moved the trial court for a mistrial or a new trial on the basis that his case had been unduly prejudiced by the trial court's actions. In fact, Bartley never again objected, either to Ms. Taylor's

dismissal or to the seating of an alternate juror, prior to deliberations, prior to dismissal of the jury, prior to the close of trial, or by way of a motion for mistrial or for a new trial.

Bartley's failure to challenge the empanelling of the alternate juror on the basis of prejudice or to move for a mistrial or a new trial on that basis effectively deprived the trial court of the opportunity to assess these arguments and determine whether or not it ruled correctly. *See Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 n. 4 (2004), quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("[t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments"). Bartley never requested the trial court to grant him the relief (a new trial) that he now seeks from this Court. As such, his claims are not preserved, and this appeal should be dismissed.

II. THE TRIAL COURT EXERCISED SOUND DISCRETION BY REPLACING A SLEEPING JUROR WITH AN UNQUESTIONABLY QUALIFIED ALTERNATE WITHOUT ANY PREJUDICE TO APPELLANT.

Even if Bartley preserved his appeal, it fails on the merits. The decision whether to replace a juror with an alternate is vested within the sound discretion of the trial judge. *State v. Smith*, 338 S.C. 66, 71, 525 S.E.2d 263, 266 (Ct. App. 2000). That decision will not be reversed on appeal absent a trial judge's abuse of discretion. *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94, 97 (Ct. App. 1996). An abuse of discretion occurs when the

trial judge has no evidence or law to support his ruling or when he refuses to exercise his discretion under an erroneous belief that he lacks discretion. *Fontaine v. Peitz*, 291 S.C. 536, 354 S.E.2d 565 (1987); *Abrofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986). The rationale underlying this abuse of discretion standard lies in the trial court's unique position in presiding over the trial. *See State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99 (1998) ("The trial judge is in the *best position* to determine the credibility of the jurors; therefore, *this Court should grant him broad deference* on this issue.") (emphasis added).

The issue of sleeping jurors is properly framed as one of juror misconduct. *Smith*, 338 S.C. at 71-72, 525 S.E.2d at 266. Juror misconduct is a factual inquiry for the trial judge from the circumstances of the particular case. Generally, the judge considers two questions: (1) Was there misconduct? (2) If so, did any harm result as a consequence? *Id.*

A. The Trial Court Inquired And Determined The Juror's Eyes Were Closed Despite Repeated Attempts To Arouse Her.

Although Bartley devotes seven pages of his brief to analysis of foreign case law, existing South Carolina precedent provides the analytical framework. In *State v. Hurd*, the trial judge denied the defendant's request to question a juror whom the judge had noticed nodding off during portions of the closing arguments and jury charges. *Hurd* held the trial court was required to determine whether the juror was asleep, and the failure to investigate warranted reversal of the conviction: "[w]e hold the trial judge should have either determined whether the juror was in fact asleep, recharged the entire jury, or replaced the juror." *Hurd*, 480 S.E.2d at 97.

Subsequent to *Hurd*, this Court revisited sleeping jurors in *State v. Smith*. There, the defendant's lawyer advised the trial judge of a juror who appeared to be asleep. The judge acknowledged the juror "had the appearance of sleeping," but also noted that she surprised the judge by taking notes during testimony which indicated to the court that she was actually attentive. The judge continued to monitor the juror's attention throughout the trial and denied the defendant's motion to strike the juror at the conclusion of the case based on his personal observation that the juror was in fact paying attention. *Smith* compared the trial judge's responses in *Hurd*, where no attempt was made to ascertain the juror's condition, and the trial judge's inquiry in *Smith*.

We find *Hurd* distinguishable from the instant case. In *Hurd*, the trial court at least implicitly found that the juror was in fact asleep during the charge, declaring specifically that he 'noticed [the juror] nodding off a couple times' but that the juror 'was alert during most of the charge.' Here, on the other hand, the trial judge stated on the record that he concluded that the juror was awake and listening with her eyes closed, because on several occasions she surprised him by picking up her notebook and writing something down. In this instance, therefore, the trial court did make the requisite factual finding mandated by *Hurd*, and he needed to take no further action. *Smith*, 338 S.C. at 73, 525 S.E.2d at 267 (citations omitted).

Based on this distinction, the court affirmed the defendant's conviction in *Smith*.

This Court should likewise affirm because Judge Keesley handled the sleeping juror according to the mandates of *Hurd* and *Smith*. Bartley's brief repeatedly states the trial judge excused the juror "without inquiry" in an attempt to analogize this case to *Hurd* instead of *Smith*. However, the record belies this attempt. As opposed to *Hurd*, where the trial judge, confronted with an alleged sleeping juror, "made no . . . attempt" to determine whether the juror was asleep, Judge Keesley extensively inquired into Ms. Taylor's condition. Judge Keesley first noticed Ms. Taylor's eyes were closed during

Ford's closing argument that immediately followed the lunch break. In response, the court chose the drastic step of interrupting Ford's closing argument to allow a break for jurors as the appropriate remedy. When Judge Keesley noticed Ms. Taylor continued to close her eyes after the break, he again interrupted Ford's closing with a specific instruction to the jury to keep their eyes open. He also adjusted the air conditioner to the point where the juror adjacent to the sleeping juror was shivering. However, this specific instruction and cooler temperatures still had no effect on Ms. Taylor based on Judge Keesley's observations that she kept her eyes closed for eighty to ninety percent of Ford's closing argument even after these interruptions and his specific admonition. Indeed, Judge Keesley was so convinced she was asleep that he stated he would not believe her if she attempted to say that she was in fact alert and attentive. [R. p. 27, line 14 – p. 28, line 4]

Bartley cannot seriously equate these deliberate actions of Judge Keesley, to include his specific observations and efforts to awaken Ms. Taylor, with the utter absence of any effort by the trial judge in *Hurd* to determine the condition of the subject juror. Rather, this case is analogous to, and entirely consistent with, *Smith*. Both trial judges, upon recognizing the situation, inquired and observed the juror to determine whether the juror was asleep. The only difference is that in *Smith* the trial court concluded the juror was in fact awake whereas here Judge Keesley determined she was asleep and thus replaced her with the alternate. Upon closer notice, the alleged error about which Bartley appeals is actually the conclusion reached based on the judge's inquiry and observation, not whether he utilized his discretion. However, a dispute about the conclusion reached after the exercise of sound discretion can never constitute an abuse of discretion. Indeed,

the only way Judge Keesley could have abused his discretion, once he determined the juror was in fact asleep, was not to replace the juror.

Bartley attempts to avoid this conclusion because there was no questioning of the juror or a formal hearing. However, this argument ignores the treatment of this issue in *Smith*. The trial judge in *Smith* did not question the juror or conduct a hearing; rather, he personally observed the juror to determine that she was not asleep based on her periodic note taking. In affirming the conviction, this Court held that the trial judge “did make the requisite factual finding mandated by *Hurd*, and he needed to take no further action.” *Smith*, 338 S.C. at 73, 525 S.E.2d at 267 (citations omitted). Indeed, the citations following this quotation include a parenthetical summarizing a California case *Smith* cites with approval: “*no formal hearing was required* and trial court’s self-directed inquiry was sufficient where court observed jurors closely to ascertain whether they were asleep and none were dozing.” *Id.* (emphasis added). In this appeal, Judge Keesley similarly watched the juror and observed she continued to shut her eyes even after a break, a specific instruction to keep her eyes opened, and cooler temperatures specifically ordered by Judge Keesley. In fact, he was so convinced she was asleep that he stated on the record that he would not believe the juror even if she told him that she was awake. Accordingly, a formal hearing was not necessary, and it would not have altered his ruling.

B. Bartley Cannot Prove The Requisite Prejudice.

Even setting aside whether Judge Keesley abused his discretion, Bartley’s appeal fails because he cannot prove prejudice. As stated by the South Carolina Supreme Court, “unless the misconduct affects the jury’s impartiality, it is of no such misconduct as will

affect the verdict.” *Grovenstein v. State*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (quoting *State v. Kelly*, 331 S.C. at 141, 502 S.E.2d at 104 (1998)). “Accordingly, we hold the burden was on [appellant] to demonstrate prejudice, and the Court of Appeals [sic] adoption of a presumption of prejudice standard is reversed.” *Id.*

Despite recognizing his burden to prove prejudice and South Carolina’s explicit rejection of any presumption of prejudice, Bartley’s brief attempts to distinguish this appeal from previous cases based on the source of the alleged prejudice. Bartley claims the prejudice to him resulted from the trial court’s decision not to hold a hearing as opposed to any influence Ms. Taylor’s misconduct had on the remaining jurors. However, as argued above, no formal hearing is required, and Judge Keesley conducted the necessary inquiry to make his determination based on his personal observations.

Furthermore, and more importantly, Bartley cannot prove any prejudice regardless of its source. He can at most speculate that a juror Judge Keesley determined was unqualified would have reached a different verdict than that reached by the other original eleven members of the jury and the alternate who replaced the sleeping juror. However, that speculation does not constitute proof of prejudice because Bartley cannot establish that any of the jurors was unqualified. In fact, it is impossible for Bartley to prove prejudice given the undisputed fact that the twelve jurors who decided the case were all qualified. *See* Rule 47(b), SCRPC (“Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as regular jurors.”). Prejudice can never exist where a juror whose qualification to hear the matter in dispute is replaced with a qualified juror. Bartley

received exactly what the law provides: a verdict by twelve unbiased, disinterested and qualified jurors. As recognized in *McDaniel*:

Even assuming the issue was properly before us, the procedure employed by the trial court, however irregular, was not sufficient to deprive appellant of his right to a jury trial. *There is no right to be tried by a jury composed of particular individuals. The alternate juror had been approved by both sides at the inception of the trial, and there is no showing that appellant withdrew that approval at the time of substitution.* Moreover, appellant has failed to establish in what manner this procedure prejudiced him. *McDaniel*, 275 S.C. at 224, 268 S.E.2d at 586 (citations omitted) (emphasis added).

Like appellant in *McDaniel*, there is nothing in the record indicating Bartley disapproved of Mr. Huckaby at any point. Because South Carolina precedent specifically rejects the presumption of prejudice, and because no prejudice can ever exist where twelve qualified jurors decide the verdict, this Court must affirm.

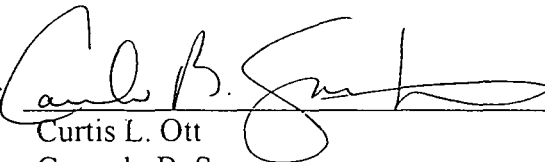
CONCLUSION

For the reasons stated herein, Ford submits that Bartley waived appellate review and that this appeal must be dismissed. Alternatively, Bartley cannot demonstrate the trial court abused its discretion in dismissing the juror at issue or that prejudice resulted thereby. Accordingly, the verdict below should be affirmed.

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In The Court of Appeals

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SC Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No.: 2005-CP-19-244
(Appeal Tracking No.:2009139792)

Freddie Bartley, as Personal Representative
of the Estate of Rachel Bartley,

Appellant

v.

Ford Motor Company, Inc.,

Respondent

FINAL REPLY BRIEF

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I. BECAUSE THE APPELLANT OBJECTED TO THE DISMISSAL OF THE JUROR WITH SUFFICIENT SPECIFICITY, THE ISSUE IS PROPERLY PRESERVED FOR APPEAL.

It is well settled law in South Carolina that “issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.” *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 22, 602 S.E.2d 772, 779-80 (2004). *See also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review”); and *S.C.A.C.P.*, Rule 210(c) (record on appeal shall not include matter which was not presented to lower court.)

There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.

South Carolina Dept. of Transportation v. First Carolina Corp., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (quoting *Jean Hoefer Toal, et al.*, Appellate Practice In South Carolina, 57 (2d ed. 2002)). An objection at the trial court level need not be phrased in exact legal terms as long as the objection raised at the trial court was a “meaningful objection with sufficient specificity to allow the trial court to rule on the issue.” *South Carolina Dept. of Transportation*, 372 S.C. at 302, 641 S.E.2d at 907 (citing *State v. Russell*, 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct. App. 2001) (holding that a party need not use the exact name of a legal doctrine in order to preserve an argument, but it must be clear that the argument has been presented on that ground)). In other words, all

that is required to preserve an issue for appeal is that the trial court be given an opportunity to resolve the issue before it is presented to the appellate court." *In the Interest of Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004) (citing *Toal, Vafai, & Muckenfuss*, Appellate Practice In South Carolina, at 66 (South Carolina Bar 1999)) (internal citations omitted).

Here, upon the conclusion of Ford's closing arguments, the trial judge informed counsel that it was dismissing Juror 107, a black female, for allegedly sleeping through some of Ford's closing arguments. (R., pp. 25-26.)

She wasn't deeply asleep, but she definitely disobeyed my directive to keep her eyes open. And from that point that I gave that instruction, she pretty much kept her eyes closed roughly 80-90 percent of the time. **I intend to set her aside.**

Now, ya'll put what you need on the Record.

(R., p. 26.) (Emphasis added.) After announcing its decision, the trial court then invited the Appellant to put any objections to its ruling on the Record. At this invitation, attorney for Appellant laid out with specificity the basis for his objection.

Mr. Portis: Yes, sir, your Honor. As I observed all of the jurors in there, I think the Court is mistaken. And I think what the Court has done, it has confused someone who is – who may have not been paying attention to the point that she's disinterested in what Mr. Conroy says. And his – whatever Mr. Conroy says is not evidence in this case.

And as the Court has said from the very beginning, in fact, told the jury last night, that they have been very diligent throughout this trial to pay attention to the evidence in the case.

The Court: They have.

Mr. Portis: She has listened to the evidence. She has paid attention to the evidence, whichever juror you are talking about, and the fact that

she doesn't give her full and utter attention to Mr. Conroy on stuff that is not evidence, it is improper for the Court to excuse her, your Honor, from this jury.

The Court: I'd love for you to cite me a case on that because every case I've ever read about a sleeping juror says you set them aside.

You can't sleep through part of the trial, Mr. Portis. If the closing arguments didn't mean anything, we would have skipped them.

Mr. Portis: And I would submit to you that she did not sleep through it. And I think if you would bring her in here and ask her and say, well, what did you hear, she would tell you what she heard.

The Court: And I won't believe her. I watched her. I stopped and took a break. I sent the jury out so that she could stretch her legs. I did comment, Mr. Conroy has one of the most soothing voices I ever heard, he can do voiceover work probably in that field, but then I interrupted him again. I can't keep interrupting him.

I turned the air conditioner down. There's a vent right over the top of them. The lady sitting beside her was about to freeze. I don't know what else to do. And I have no idea what she's thinking about the case. I don't even know her name.

Rule 47 – do y'all want to be heard?

Mr. Conroy: No, sir. Judge, I agree. I can't add more. I actually changed, at the end of my comments, I changed the inflection of my voice. And there was no change, you know, just no change.

The Court: She's a wonderful lady and she sat through eight days of testimony and she has paid attention the whole time. The two that I was more concerned about maybe being disinterested at times, which that's just a pure speculation on my part, I called attention to one early at the trial, she followed exactly what I did. Another guy was sitting on the back row, I think that's just the way he reacts, that's his posture.

I've been around long enough to know the difference between sleeping and not being interested. That lady was asleep.

Bring that large lady that was sitting on the right side in the back.

* * *

(R., pp. 25-29.) This exchange demonstrates that the issue was preserved for appeal. The trial court ruled that he was going to dismiss the juror and then told counsel to make his record for appeal, which was done.

The issue was again preserved by the next exchange between the trial court and counsel for Appellant. After dismissing the juror and replacing her with the first alternate, Juror 50, a white male, the trial court took a recess. (R., p. 29.) After the recess, the trial court again brought the attorneys before it and the following colloquy occurred:

The Court: All right. I need to put on the record that I had to go next door to my office and Ms. Taylor was at the metal detector, the juror. And there was no incident or anything like that, she just – I said, Thank you very much ma'am, for your service. She said, Well, I don't know what happened. And I said, Well, you didn't keep your eyes open, so I couldn't tell what was going on with you. And she said, Well, I have palsy in my left eye and the glare bothers me sometimes so I have to keep that eye shut. And I said, Well, I appreciate your service.

I, obviously, was not going to have any disagreement with her. And she said, Well, I was awake. I can tell you what was going on.

Now, I'll let you all put whatever you want on the record. And she seemed like a very, very nice lady. The problem with her explanation to me was that this is not a one day trial. I've watched this lady now for – I've been in her presence now for eight days. As a matter of fact, the bailiff had called my attention to her earlier I the week because she was saying that the lady was sleeping, so I was watching her because I wanted to make sure that there wasn't a problem.

Now, I would have done similar to what I did just a minute ago. I wouldn't have called her out specifically and I would have made general announcements to the jury, take breaks, thinks like that,

but even if I accept that she has palsy in her eye, in one eye, that doesn't – and she didn't say it caused her to keep both eyes shut, she said, Sometimes I have to shut my left eye, she said, Because of the glare.

There doesn't appear to be anymore glare in the courtroom today than any other day except the day it was pouring down rain. And none of that explains why both her eyes were closed, none of that explains why her chin was almost on her chest.

And, again, I would love to have her serve. She's been in the trial the entire time. And I think all of the other days, she's paid attention, but, unfortunately, I think today she had lunch, she came in here and she was having trouble staying awake.

So – and as I said earlier, even if she weren't having problems staying awake, if I tell them that they have to do something and they don't do it, then they're not following my directives.

So, I'm helping you with your record to fill it out, but I have no reason to doubt that my assessment earlier was correct. So if y'all want to put anything else on the record before we do the final closings, that's fine.

Mr. Portis: **Judge, just to reemphasize, the plaintiff's position is it's inappropriate to excuse that particular juror. Ultimately, it was determined why, that she had Bell's Palsy. My observation personally was that she paid attention during this case and paid attention during closing and she should not have been excused in this case.**

The Court: I note your position. I don't know how in the world – we looked at the same thing and we saw exact opposites, that's all I can say. And if I'm wrong, I apologize.

All right. We're going to – under the rule, civil is different than criminal in this state, we go under Rule 47 and we seat the first alternate that was drawn and that's Mr. Huckaby.

(R., pp. 29-32.)

The Record clearly establishes that the Appellant twice objected to the trial court's dismissal of Juror 107. The trial court repeatedly acknowledged Appellant's

argument, noted the objection, and yet still ruled that the juror should be dismissed and an alternate juror selected under Rule 47. All of the four basic requirements to preserve issues for appeal have been met. The Record establishes that (1) the issue was raised to and ruled upon by the trial court; (2) it was raised by the Appellant; (3) it was raised in a timely manner; (4) and was raised to the trial court with sufficient specificity. See *South Carolina Dept. of Transportation*, 372 S.C. at 302; 641 S.E.2d at 907. Those are all the requirements necessary to preserve an issue for appeal.

Yet, despite the clear record, Ford argues that the issue was not properly preserved because the Appellant “did not object to the seating of the alternative juror and move for a mistrial or new trial on this ground.” (Initial Brief of Respondent at 4.) In essence, Ford argues that the Appellant should have filed a post-trial motion on this issue asking the trial court to reconsider its ruling. But Ford’s argument is misplaced. Under South Carolina law, post-trial motions are only required to preserve issues that have not been ruled upon by the trial court. “A Rule 59(e) motion is required to preserve issues that have not been ruled upon by the trial court.” *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court)).

South Carolina’s Rules contemplate two basic situation in which a party should consider filing a post-trial motion. “A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps fail to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party

must file such a motion when an issue or an argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in the original). Here, post-trial motions were not necessary because the trial court ruled that a juror should be dismissed; it invited the Appellant to establish his objection on the Record for purposes of appeal; and the Appellant stated his objection timely with sufficient specificity as evidenced by the fact that the trial court acknowledged counsel’s objections and commented on them. Thus, this issue was raised and ruled on and is properly preserved for appellate review.

Ford relies almost exclusively on *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (1980) in arguing that this issue was not preserved for appeal. *McDaniel*, however, is not on point and is readily distinguishable from the facts of this case. In *McDaniel*, after being convicted of burglary, the appellant argued, on appeal, that the trial court erred when it empanelled an alternate juror at the conclusion of the testimony. The *McDaniel* court held that the appellant’s argument was without merit and, in so holding, stated as follows:

During the trial, the juror was observed making improper remarks and gestures. Upon being apprised of this, the trial court conducted an *in camera* hearing to determine the propriety of the conduct. The challenged juror was replaced with the alternate juror only after the trial court made specific findings of fact on the matter.

While appellant’s counsel objected to the procedure used, he made no objection to the seating of the alternate juror and no motion for a mistrial. It is well settled that an issue may to be raised for the first time on appeal. See cases annotated in 7A West’s S.C. Digest, Criminal Law, Key No. 1028. We conclude appellant waived the right to raise this issue on appeal.

McDaniel at 223-24 (emphasis added). In *McDaniel*, the appellant never objected to the dismissal of the challenged juror or to the replacement of the alternate juror. Instead, the appellant only objected to the *in camera* hearing conducted by the trial court.

Here, on the other hand, the Appellant objected twice to the dismissal of Juror 107. Ford contends that *McDaniel* stands for the proposition that an appellant can preserve the issue of the improper dismissal of a juror *only* by making a specific objection to the seating of the alternate juror. But *McDaniel* cannot be read so broadly. The Appellant specifically objected to the improper dismissal of the juror. It is axiomatic that Appellant also is objecting to the replacing of that juror with an alternate. Under South Carolina law, all that is required to preserve an issue for appellate review is that the issue must have been raised and ruled on by the trial court in a timely manner and with sufficient specificity. Although the Appellant did not phrase his objection in the exact terms as Ford would like, Appellant's objection to the trial court provided a meaningful objection with sufficient specificity to allow the trial court to rule on the issue. See, *South Carolina Dept. of Transportation v. First Carolina Corp.*, 372 S.C. 295, 302-03, 641 S.E.2d 903, 907 (2007); *State v. Russell*, 345 S.C. 128, 134, 546 S.E.2d 202, 204 (Ct. App. 2001). Therefore, the issue was properly presented for appeal.

II. SOUTH CAROLINA LAW MANDATES THAT, UPON REQUEST INTO JUROR MISCONDUCT, THE TRIAL COURT MUST ALLOW PARTIES AN OPPORTUNITY TO QUESTION THE JUROR TO ASCERTAIN WHETHER THE JUROR IS UNQUALIFIED TO CONTINUE TO SERVE.

All parties agree that the issue of a sleeping juror is framed as one of juror misconduct. *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (1999). A decision on whether

to dismiss a juror and replace her with an alternate lies within the sound discretion of the trial court. *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996). But before a juror can be replaced, the trial court must make a finding that the juror was “disqualified to perform” her duties. *S.C.R.C.P. 47(b)*. By failing to interview and question the juror at the Appellant’s request prior to the dismissal, the trial court never established that the juror was unqualified to serve. The failure to allow the Appellant the opportunity to question the juror is reversible error under South Carolina law. See *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (1996). Instead, the trial court relied solely on its own speculation and thus violated Rule 47.

South Carolina law recognizes the constitutional right to be tried by a jury. In fact, the right to trial by jury shall be preserved inviolate.

South Carolina Constitution Article I, §14 provides “the right to a trial by jury shall be preserved inviolate.” This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868. Under the common law, legal actions for the recovery of money were triable by a jury. Consequently, both appellant and respondent are constitutionally entitled to a jury trial in an action for monetary damages arising out of a motor vehicle accident.

Cooper v. Poston, 326 S.C. 46, 48 483 S.E.2d 750, 751 (1997) (internal citations omitted). The Plaintiff has “a constitutional right to be tried by competent jurors, which implies a tribunal both impartial and mentally competent to afford a hearing.” *Hurd*, 325 S.C. at 389, 480 S.E.2d at 97. “Consistent with these principles, a juror who has not heard all of the evidence in the case or the court’s instructions as to the applicable principles of law is grossly under qualified to render a verdict.” *Id.* The opposite holds true as well. A jury who has heard all of the evidence in the case and/or the court’s

instructions as to the applicable principles of law is *qualified* to render a verdict. This constitutional right to be tried by competent jurors imposes an important duty on every trial judge to assure himself that “each and every perspective juror is unbiased, fair, and impartial.” *Id.* at 390. Because of this constitutional right and the duties it imposes upon a trial judge, South Carolina recognizes that it “is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified and the court must not speculate but must ascertain the juror’s state of mind and must place its reasons for excusing or retaining the juror on the record.” *Id.* at 389-90.

Here, despite the heavy burden the trial court has in establishing that a sworn juror is unqualified to serve and despite the Appellant’s specific request to question the juror, the trial court dismissed the juror based on its own subjective speculation and observations. “Just because a juror closed his eyes does not necessarily mean that he was asleep, but a trial judge should at least attempt to make this determination whenever a juror appears to be asleep. **The trial judge committed reversible error by refusing defense counsel’s request to question the juror as to whether he had heard all of the charge.**” *Id.* (emphasis added). As in *Hurd*, it was reversible error for the trial judge to refuse defendant’s request to question the juror.

Ford attempts to water down this heavy burden of establishing that a juror is “unqualified” by relying predominately on *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (1999). But there is one critical, distinguishable aspect of *Smith* that was not mentioned by Ford in its brief. In *Smith*, the defendant never asked the trial court to voir dire the

juror or to undertake further inquiry after the trial judge had determined that the alleged sleeping juror was not in fact sleeping.

Finally, as noted above, the trial court found that the juror who appeared to be sleeping was in fact alert. **Defendants apparently accepted this finding and did not ask the trial court to voir dire the juror or undertake further inquiry. Because the defendants bore the burden to show the juror was actually asleep, their failure, unlike the defendant in *Hurd*, to request direct examination of the juror waives any complaint on appeal.**

Smith, 338 S.C. at 75, 525 S.E.2d at 268 (string cite of supporting case law omitted) (emphasis added). *Hurd* clearly states that it is reversible error to refuse a request by counsel to question a juror. In *Smith*, no request to question the juror was made. Here, the Appellant specifically requested the trial court to question the juror concerning her alleged sleeping and the trial court rejected the request by implying it would be a waste of time.

Mr. Portis: And I would submit to you that she did not sleep through it. And I think if you would bring her in here and ask her and say, well, what did you hear, she would tell you what she heard.

The Court: And I won't believe her. . . .

(R. p. 27.) The request to question the juror was made and it was abruptly rejected by the trial court. Under the precedent set in *Hurd*, the trial court abused its discretion and committed reversible error.

III. PREJUDICE RESULTED FROM THE IMPROPER CONDUCT OF THE TRIAL JUDGE IN DISMISSING A QUALIFIED JUROR FROM THE JURY.

Ford argues that there has been no prejudice established because the Appellant has not shown how the jury's impartiality was affected. Ford's argument confuses two

very distinct and separate concepts. Under South Carolina law, the requirement of proving prejudice based on juror misconduct only attaches in situations where there is an allegation of an unqualified juror remaining on the jury and participating in jury deliberations.¹ In those circumstances, South Carolina law provides that, “unless the misconduct affects the jury’s impartiality, it is not such misconduct as will affect the verdict.” *Groverstein v. State*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999). In *Groverstein*, the appellant argued that his conviction should be reversed because an alternate juror had been sent to the jury room with the remaining jurors. While there, the alternate juror participated in discussions about the case and in one preliminary vote. The *Groverstein* court held that the defendant had to demonstrate prejudice from the presence of the alternate juror during deliberations. In so holding, the Court reasoned that it had “consistently required defendants to demonstrate prejudice due to improper jury influences.” *Groverstein* at 352, 517 S.E.2d at 218. In *State v. Smith*, 338 S.C. 66, 525 S.E. 263 (1999), the appellant argued that a juror was unqualified to serve on the jury because she slept during portions of the trial, and that the trial court erred when it failed to replace this alleged sleeping juror. The Court noted that when there is an allegation of a juror *not being qualified* to serve due to sleeping, a defendant must demonstrate prejudice because the “harm to defendant does not automatically follow a determination that a juror was sleeping. Most states require a defendant to show prejudice such as the juror failed to follow some essential part of the proceedings.” *Smith* at 72, 525 S.E.2d at 266. In both *Groverstein* and *Smith*, the issue was whether the defendant had established

¹ Prejudice must also be proven in cases where a party complains that outside influences have affected the jury’s impartiality, such as a juror reading a Black’s Law Dictionary. See *State v. Harris*, 340 S.C. 59, 530 S.E.2d 626 (2000).

whether an unqualified juror participated in deliberations. If so, the defendant had to prove prejudice, i.e., that the jury's impartiality to render a verdict was affected.

Here, the error is not in allowing an unqualified juror to remain on a jury; instead, the error is that a trial judge removed a *qualified* juror without questioning that juror to determine if the juror was in fact unqualified to serve. It is a per se violation of South Carolina law to remove a qualified juror. See Rule 47 of *South Carolina Rules of Civil Procedure* (stating that alternate juror can be empanelled only after juror is determined to be disqualified to perform his duties). See also *State v. Hurd, supra*.

Once a jury has been selected and sworn, the defendant has a right to have his or her case decided by the particular jurors selected to serve. A juror may not be discharged unless there is a legal cause, meaning death, illness, or any other cause which renders a juror unable or disqualified to perform, and an absence of this legal cause will lead to reversal. Reversal will be ordered where a trial judge summarily discharges a jury for inability to perform without allowing the defendant an opportunity to explore that inability on the record.

75(b) Am.Jur.2d Trial §1461.

The juror's inability to perform the functions of a juror, however, must appear as a demonstrable reality. Thus, the discharge of a particular juror must be for a meritorious reason. The trial court should, prior to excusing the juror, ask questions of the juror and make findings on the record that not only established a meritorious reason of discharge, but also eliminate improper reasons.

75(b) Am.Jur 2d Trial §1456.

The trial court's error was inherently prejudicial and no further showing of prejudice is needed to require reversal and retrial on all issues. *State v. Hurd*, 325 S.C. 384, 390, 480 S.E. 94, 97 (1996) is directly on point. In *Hurd*, this Court held that the trial judge committed reversal error by refusing defense counsel's request to question the

juror as to whether he heard all of the charge. The Court did not require the defendant to establish prejudice in determining if the jury's impartiality was affected. Instead, prejudice was tacitly established by the trial court's refusal to allow the defendant the opportunity to question the juror.

South Carolina law is in line with other states that recognize the inherently prejudicial act of a trial judge discharging a juror for an alleged inability to perform without allowing the defendant an opportunity to explore that inability on the record. See *State v. Clay*, 441 So.2d 1227, 1230 La.Ct.App. 1st Cir. 1983, writ denied, 446 So.2d 1213 (La. 1984) (“[R]eversal will be ordered when a trial judge summarily discharges a juror for inability to perform without allowing the defendant an opportunity to explore that inability on the record”); *State v. Cass*, 356 So.2d 396, 398 (La. 1977) (“[W]e determined that even if the juror in question did briefly dose off, such is not per se proof of inability to perform, or any character of disqualification. Thus, there would be no legal cause for removing him. Had the juror been shown to have been sleeping through a substantial part of the trial or had been unable to stay awake despite warnings or efforts to arouse him, and had defendant and the state been afforded an opportunity to explore on the record the defendant's inability to perform on this account, we would be presented with a substantially different question for review.”); *People v. Bennett*, 45 Cal. 4th 577, 621, 199 P.3d 535, 566 (2009) (“[A] juror's inability perform must appear in the record at a demonstrable reality and bias may not be presumed.”); and *Garcia v. People*, 997 P.2d 1 (Colo. 2000) (holding that it was reversible error for the trial court to dismiss a

qualified juror without proper inquiry into whether the juror could follow the court's instructions).

Arizona also recognizes the inherently prejudicial nature of an error by the trial court which effectively prevents a litigant from proving prejudice. "Moreover, we cannot require a litigant to show the extent of prejudice resulting from an error when, as a practical matter, the nature of the error renders it impossible to prove the extent of any prejudice. . . . In short, prejudice is conclusively presumed where the nature of the error deprives a litigant of an essential right." *Perkins v. Komarnyckyj, DDS*, 172 Ariz. 115, 119, 834 P.2d 1260, ___ (1992). See also, *Leavy v. Parsell*, 188 Ariz. 69, 73, 932 P.2d 1340, 1344 (1997) ("[I]f the law in civil cases requires that a litigant subjected to misconduct of the type presented in this case to make an explicit showing of probable influence, then the rule is self-defeating. As we have recently recognized in other similar context, it is impossible for a party to carry the burden of proving prejudice when the misconduct or error prevents the court from determining the exact extent of the prejudice.") The Arizona court went on to say that "any other result would encourage deliberate, unethical conduct by giving lawyers carte blanche to violate professional standards and court orders with relative impunity." *Leavy* at 73, P.2d at 1344.

In the instant case, the adoption by this Court of a rule that requires a litigant to make an explicit showing of prejudice would be self-defeating and would set a dangerous precedent. It is impossible for a party to carry the burden of proving prejudice when the misconduct or error of the trial court, as a practical matter, renders it impossible to prove the extent of any prejudice due to the trial court's failure to allow the appellant to

question the juror. Further, it would set a dangerous precedent that would allow trial judges to remove qualified jurors at their own whim and with relative impunity.

An additional concern is that the discharge of a particular juror be for a meritorious reason. See *Commonwealth v. Connor*, 392 Mass. 838, 844-45, 467 N.E.2d 1340, 1346 (1984) (good cause includes only reasons personal to the deliberating juror, having nothing to do with the issues of the case or with the juror's relationship with fellow jurors). "The discharge of a deliberating juror is a sensitive undertaking and is fraught with potential for error. It is to be done only in special circumstances, and with special precautions. Great care must be taken to ensure that a lone dissenting juror is not permitted to evade his responsibilities." *Id.* at 843, 467 N.E.2d at 1345; see *Isaacs v. State*, 259 Ga. 717, 386 S.E.2d 316 (1989) (no error in substituting alternate juror after deliberations had begun when original juror fainted, was taken to hospital, and was physically unable to continue), *cert. denied*, 497 U.S. 1032 (1990); *People v. Guzman*, 66 Cal. App. 3d 549, 136 Cal. Rptr. 163 (1977) (trial court erroneously substituted alternate juror where original juror made a vote-bartering proposal; a mistrial should have been declared instead). The trial court should, prior to excusing a juror from deliberations, ask questions of the juror and make findings on the record that not only establish a meritorious reason for such discharge, but eliminate improper reasons as suggested above. See *Commonwealth v. Haywood*, 377 Mass. at 769, 388 N.E.2d at 657.

The principles set forth above pertain to civil as well as criminal cases.

Opinion of the Justices (Alternate Jurors), 137 N.H. 100, 104-105, 623 A.2d 1334, 1337-1338 (1993). The concern recognized by the above passage is that discharging an otherwise qualified juror without the proper safeguards and precautions could potentially allow a trial court to dismiss a lone dissenting juror simply because of the fact that she was a dissenting juror.

Here, it is undisputed that juror 107 sat through eight days of testimony and evidence taken from the witness stand. The trial court stated that, during those eight days of trial, this juror had "paid attention the whole time." (R., p. 28.) Even during Ford's closing argument, which was not evidence, the trial court noted that the juror "wasn't

deeply asleep.” (R., p. 26.) Yet, the Judge, without allowing any party to question the juror, or without the trial court questioning the juror, dismissed female juror 107 and replaced her with male juror 50. No safeguards or precautions were taken by the trial court to ensure that it had a meritorious reason for the discharge. No safeguards or precautions were taken by the trial court to eliminate improper reasons for the discharge.

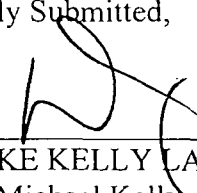
But safeguards and precautions must be taken to ensure the integrity of the judicial process. No trial court should be given even a remote chance of predetermining a certain outcome of a jury trial by removing a potential lone dissenting juror based solely on speculation. Thus, a trial court is required, as recognized by *Hurd, supra*, to ask questions of a juror upon request by a party and to make findings on the record that not only establish a meritorious reason for the discharge, but would also eliminate improper reasons. Here, the trial court failed to conduct such a “probing and tactful inquiry” after being requested to by the Appellant. *Hurd, supra*. The Appellant was denied his right to establish a record as to the qualifications of the juror prior to the juror’s dismissal. Because the trial court violated a clear mandate of South Carolina law, it committed reversible error.

CONCLUSION

For the reasons stated herein, the Court should reverse the trial court's verdict and remand this case for new trial.

Respectfully Submitted,

By:



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Re: Bartley, Fred v. Ford Motor Co.

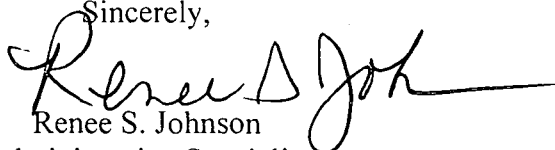
Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Clerk of Court for Edgefield County after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,


Renee S. Johnson
Administrative Specialist

TAG/rj

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Freddie Bartley, as Personal
Representative of the Estate
of Rachel Bartley, Appellant,

v.

Ford Motor Company, Respondent.

Appeal From Edgefield County
William P. Keesley, Circuit Court Judge

Unpublished Opinion No. 2011-UP-462
Heard September 12, 2011 – Filed October 19, 2011

AFFIRMED

D. Mike Kelly, of Columbia and R. Graham Esdale,
Jr. and J. Cole Portis, both of Montgomery, Alabama,
for Appellant.

J. Kenneth Carter, Jr. and Carmelo V. Sammataro,
both of Columbia and William J. Conroy, of
Philadelphia, Pennsylvania, for Respondent.

PER CURIAM: On appeal, Freddie Bartley, as personal representative of the estate of Rachel Bartley, asserts the circuit court abused its discretion by excusing a juror the court observed sleeping and impaneling an alternate during closing arguments.

1. We find no error in the circuit court's decision to replace the sleeping juror with an alternate. Whether to replace a juror with an alternate is a matter within the sound discretion of the circuit court, and its decision will not be reversed on appeal absent an abuse of discretion. State v. Carmack, 388 S.C. 190, 198, 694 S.E.2d 224, 228 (Ct. App. 2010); State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007). Bartley's reliance on State v. Hurd, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996), is misplaced. In Hurd, counsel brought the sleeping juror to the attention of the court, and the circuit court implicitly acknowledged the juror was in fact asleep during some parts of the closing arguments and the jury charge, but the circuit court refused a request to question the juror or replace the juror. Id. at 384, 480 S.E.2d at 97. Here, the circuit court brought the sleeping juror to the attention of trial counsel, attempted to put several safeguards into place to prevent the dismissal of the sleeping juror, but ultimately had to replace the juror with a qualified, alternate juror.¹ As this court held in Hurd, "the [circuit court] should have either determined whether the juror was in fact asleep, recharged the entire jury, or replaced the juror." Id. at 384, 480 S.E.2d at 97 (emphasis added). By replacing the sleeping juror with a qualified, alternate juror, the circuit court did not abuse its discretion in refusing Bartley's request to question the juror as to whether she heard all of the closing arguments.

2. Even if the circuit court abused its discretion, Bartley failed to prove he was prejudiced by the circuit court's decision to replace the sleeping juror

¹ The circuit court interrupted Ford's closing argument and excused the jury for a short recess to give the juror an "opportunity to have a shot of caffeine or something." After a few moments, the circuit court took the extraordinary measure of interrupting Ford's closing argument again to admonish the jury and ensure that the jurors were being attentive. In addition, the circuit court stated on the record that he "turned the air conditioner down" in an attempt to keep the juror awake.

with an alternate juror. South Carolina law has consistently rejected a per se reversible error rule and has required the defendant to prove prejudice. See State v. Grovenstein, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (rejecting a presumption of prejudice and holding a defendant must establish he was denied a fair trial as a result of an alternate juror's momentary participation in jury deliberations); State v. Wasson, 299 S.C. 508, 510, 386 S.E.2d 255, 256 (1989) (stating the burden is on the defendant to show not only error but resulting prejudice from jurors' reading of trial-related newspaper article); State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1981) (holding that it is incumbent on a defendant to demonstrate the presence of an alternate juror denied him a fair trial). The alternate juror had been approved by both sides at the inception of the trial, and there was no showing that Bartley withdrew that approval at the time of substitution. Accordingly, Bartley has failed to establish in what manner this procedure prejudiced him.

AFFIRMED.

SHORT, WILLIAMS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No.: 2005-CP-19-244

Freddie Bartley as Personal Representative of the Estate of Rachel Bartley Appellant

v.

Ford Motor Company, ... Respondent

MOTION FOR REHEARING

Appellant respectfully moves this Honorable Court for a rehearing pursuant to South Carolina Appellate Rule 221. The Court's opinion misapprehends the significance of the trial court's removal of a qualified juror, whose only fault was that she suffered from Bell's palsy, a condition that made her sometimes have to close her eyes during trial. The Appellate Court's decision improperly accepted the trial court's subjective finding that the juror was sleeping when the record itself established that the juror was not, but suffered from a medical condition requiring the juror to periodically close her eyes. The result of this Court's opinion will give unbridled discretion to trial courts in removing qualified jurors without a hearing and without a party being given an opportunity to establish prejudice. Hurd v. State, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996), commanded trial courts to conduct a "probing and tactful inquiry" before a qualified juror can be deemed unqualified to serve. The Hurd Court required trial courts to ascertain the juror's state of mind before the court could remove the qualified juror from the jury. Specifically, Hurd provided that a trial court "must not speculate . . . but must ascertain the juror's state of mind" before excusing a juror. None of those mandates were done here. By holding that the trial court did not abuse its discretion, this Court has essentially overturned Hurd.

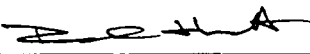
Now a trial court may use its own subjective observations to remove a qualified juror without safeguards in place to insure that the trial court's motives in removing the juror were proper. This Court's opinion will open a Pandora's Box that will allow trial courts' unbridled discretion to remove a qualified juror with impunity. A defendant or plaintiff is left with no ability to challenge the trial court's subjective observations. The Court's opinion has given trial courts the unfettered ability to refuse a party's request to question the juror to determine if the juror was still qualified to serve.

Appellant respectfully disagrees with the Court's view that Appellant's reliance on State v. Hurd is misplaced. The Hurd court found that the trial court committed reversible error by failing to question a juror to determine whether the juror was asleep. This Court interpreted the lower court's actions of taking a caffeine break, admonishing the jury to stay attentive and turning the air conditioner down as proper "safeguards" to insure the integrity of the trial court's removal of the juror. But those are not the intended "safeguards" within the meaning of Hurd or State v. Groverstein, 335 S.C. 347, 517 S.E.2d 216 (1999). The "safeguards" intended by those Courts were "safeguards" that insured that the trial court's subjective observations were supported by a judicial process that established a record that the trial court was not "speculating", had questioned the juror to determine his/her state of mind and had allowed the parties to do the same. Turning down the temperature in the courtroom or taking a break do nothing to insure that a judge's subjective motives for removing a juror were proper ones. The only way to insure the integrity of the lower court's motives is to follow Hurd and allow questioning of the alleged sleeping juror to determine if the juror was still qualified to serve. The questioning of the juror establishes an objective record that maintains the integrity of the process and insures that the lower court's reasoning for removing a juror was proper.

Additionally, prejudice can never be established if a trial court relies solely upon its subjective observations and a party has no ability to challenge those subjective observations. Integrity of the judicial process requires an objective process through which a trial court's decision to remove a qualified juror based only upon its subjective observations can be challenged. Here, this objective process was denied to the Plaintiff because the trial court refused the Plaintiff's request to question the juror-- a juror that was later found to have Bell's palsy, a condition that made it appear that the juror was sleeping.

Appellant submits that this Court should not require Appellant to establish the extent of prejudice resulting from the circuit court's error when the nature of the error renders it impossible to prove the extent of any prejudice. Unlike the criminal cases cited by this Court regarding prejudice as a result of juror misconduct, the improper conduct of the trial court prevented the Appellant from having an opportunity to establish prejudice. The trial judge impermissibly altered the dynamic of the jury and committed error so substantial in nature that the very integrity of the judicial process is called into question here. The Court overlooked the points set forth by the Appellant that the adoption of proof requiring actual prejudice in these limited circumstances could result in a trial judge, with improper motives, excusing a qualified juror with impunity as long as a full complement of jurors were available to deliberate the case.

Respectfully Submitted,

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Attorneys for Appellant

October 28, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No.: 2005-CP-19-244
(Appeal Tracking No.:2009139792)

Ford Motor Company, Inc.,

Respondent

v.

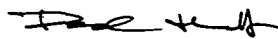
Freddie Bartley, as Personal Representative
of the Estate of Rachel Bartley,

Appellant

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this 31st day of October 2011, served copies of the Motion for Rehearing upon counsel of record for the Respondent by causing them to be deposited in the United States mail, first class postage paid addressed to Carmelo B. Sammataro/Curtis Ott; Turner Padgett Graham & Laney P.A., PO Box 1473, Columbia SC 29202.

BY:


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Attorney for Appellant

October 28, 2011

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court Of Common Pleas

William P. Keesley, Circuit Court Judge

Case No: 2005-CP-19-244

Freddie Bartley as Personal Representative of the Estate of Rachel Bartley,..... Appellant,

v.

Ford Motor Company,..... Respondent.

RESPONDENT'S RETURN TO
APPELLANT'S PETITION FOR REHEARING

I. INTRODUCTION

This Court affirmed the trial court's dismissal of a sleeping juror in its unpublished decision filed October 19, 2011. (Unpublished Opinion No. 2011-UP-462) In doing so, this Court rejected Appellant Bartley's contentions that the trial court abused its discretion in failing to conduct a formal inquiry and that this Court should assume prejudice. Bartley filed his Petition for Rehearing in this Court on October 28, 2011. For the reasons stated herein, Respondent submits the petition should be denied.

II. ARGUMENT

South Carolina Appellate Court Rule 221 permits the filing of a petition for rehearing where issues of law or fact have been "overlooked or misapprehended" by the Court. Here, no such omission or misapprehension has occurred. Rather, Bartley's

petition simply repeats the same facts and arguments raised in his briefs; to wit, that the trial court erred in dismissing a sleeping juror without conducting a “probing and tactful inquiry,” and that this Court should deviate from the long-standing rule requiring Bartley to demonstrate actual prejudice. (Pet. p. 1-2) The Court correctly considered the facts and applicable law and rejected Bartley’s arguments. These issues were fully explored in the briefs and oral argument, and the Court need not rehash them by way of a petition for rehearing.

The Court’s opinion correctly frames the abuse of discretion standard applicable to the trial court’s determination that the sleeping juror violated the directive to remain attentive and, therefore, was dismissed properly. (Slip Opinion p. 2) (citing *State v. Carmack*, 388 S.C. 190, 198, 694 S.E.2d 223, 228 (Ct. App. 2010); *State v. Bell*, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007). The Court also correctly recognized that its holding in *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94, 97 (Ct. App. 1996), affords the trial court wide discretion in replacing a juror where it has reason to believe the juror may be sleeping. Accordingly, the Court’s opinion correctly and unequivocally holds the trial court did not abuse its discretion in refusing Bartley’s request to interrogate the dismissed juror further once it determined that she slept through substantial portions of Ford’s closing argument. (Slip Opinion p. 2) The Court also recognized that the trial court went beyond what *Hurd* requires in imposing a number of “safeguards” designed to forestall the ultimate act of dismissing the sleeping juror.

To find error on this record would do a disservice to the trial bench, which is “in the best position to determine the credibility of the jurors [and is entitled to] broad deference on this issue.” *State v. Kelly*, 331 S.C. 132, 142, 502 S.E.2d 99 (1998).

Furthermore, Bartley's repeated argument about the "subjective" nature of the trial court's decision simply misapprehends that subjectivity is inherent in discretion. Ultimately, the decision *Hurd* and *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999), require the trial court to make, whether the juror was in fact asleep, will always be subjective to the trial court. *Hurd* and *Smith* provide the framework for the judge to follow to make the required subjective determination.

Bartley also advances a sky is falling argument that trial judges can whimsically remove jurors without safeguards. This argument is based on an incorrect assumption and an incorrect reading of *Hurd*. The mistaken assumption is that Bell's Palsy required the juror to keep both of her eyes closed. That explanation is the one the juror gave the trial court after her dismissal. However, that medical condition, as noted by both the trial court and this Court during oral argument, affects only one eye. The trial judge also questioned why it affected the juror during Ford's closing argument when it had not affected her on other days despite the amount of glare in the courtroom being consistent. These questions concerning the juror's attempted explanation, along with her chin being on her chest and her disobedience to the specific instruction to keep her eyes open, explain why the trial court determined he would not believe the juror even if she denied she was sleeping.

Bartley's incorrect reading of *Hurd* is that a trial judge must actually question the juror. *Smith* effectively dismisses that argument. Applying *Hurd* to another sleeping juror context, this Court affirmed the decision not to remove the suspect juror based on the trial court's subjective observation that the juror would periodically write in her notepad despite her eyes periodically being closed. *Smith*, 338 S.C. at 265, 525 S.E.2d at

69-70. The trial judge never questioned the juror or held a hearing. However, this Court ruled the trial judge acted properly by making “the factual finding mandated by *Hurd*, and he needed to take no further action.” *Id.* at 73, 525 S.E.2d at 267. Likewise, the trial court in this case conducted a probing inquiry and determined the juror was in fact asleep despite her attempted explanations.

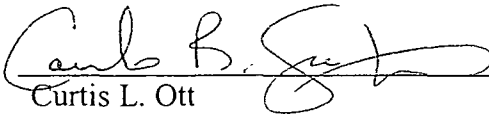
Turning to the prejudice prong, Bartley argues, contrary to existing precedent, that this Court should apply a presumption of prejudice resulting from the trial court’s dismissal of a sleeping juror without conducting a full-blown hearing. As this Court has correctly recognized, however, “South Carolina law has consistently rejected a *per se* reversible error rule and has required the defendant to prove prejudice.” (Slip Opinion p. 3) (collecting cases) Moreover, the Court’s opinion demonstrates that this record does not support such a presumption, particularly where “[t]he alternate juror had been approved by both sides at the inception of the trial, and there was no showing that Bartley withdrew that approval at the time of substitution.” (*Id.*) Because South Carolina has rejected a presumption of prejudice in this context, and because prejudice can never result where twelve qualified jurors render a verdict, Bartley’s petition should be denied.

III. CONCLUSION

The Court’s opinion fully addresses all of the issues on appeal, and it correctly decided those issues. Bartley’s Petition for Rehearing does not demonstrate otherwise, and there is no reason for the Court to revisit its decision. For all of these reasons, the petition should be denied.

(Signature page to follow.)

November 9, 2011

By: _____

Curtis L. Ott

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court Of Common Pleas

William P. Keesley, Circuit Court Judge

Case No: 2005-CP-19-244

Freddie Bartley as Personal Representative of the Estate of Rachel Bartley,..... Appellant,

v.

Ford Motor Company,..... Respondent.

PROOF OF SERVICE

I certify this 9th day of November 2011 that I have served a copy of
Respondent's Return To Appellant's Petition For Rehearing on counsel of record for
Appellant as follows:

VIA HAND DELIVERY:

D. Michael Kelly, Esquire
Mike Kelly Law Group, LLC
500 Taylor Street
Columbia, SC 29201

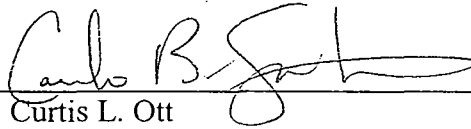
VIA U.S. MAIL:

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(Signature page to follow.)

November 9, 2011

By:

A handwritten signature in black ink, appearing to read "Carmelo B. Sammataro", is written over a horizontal line.

Curtis L. Ott

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November 18, 2011

D. Mike Kelly, Esquire
Brad D. Hewett, Esquire
Dana Taunton
Mike Kelly Law Group, LLC
P.O. Box 8113
Columbia, SC 29202

Re: Bartley, Fred v. Ford Motor Co.

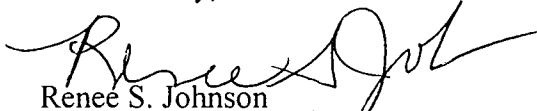
Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,


Renee S. Johnson
Case Specialist II

VPA
VTAG/rj

cc: R. Graham Esdale, Jr., Esquire
J. Cole Portis, Esquire
J. Kenneth Carter, Jr., Esquire
William J. Conroy, Esquire

The South Carolina Court of Appeals

Freddie Bartley as Personal
Representative of the Estate of Rachel
Bartley,

Appellant,

v.

Ford Motor Company,

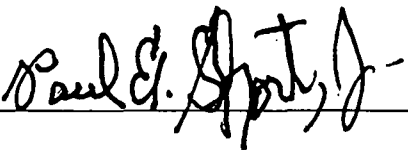
Respondent.

The Honorable William P. Keesley
Edgefield County
Trial Court Case No. 2005-CP-19-00244

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

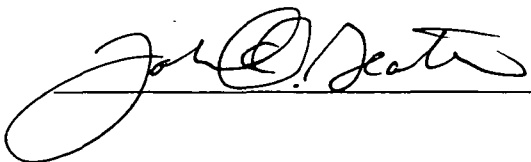
It is, therefore, ordered that the Petition for Rehearing be denied.



J. Short



J. Williams



J. Geathers

Columbia, South Carolina

cc: D. Mike Kelly, Esquire
Brad D. Hewett, Esquire
Dana Taunton
R. Graham Esdale, Jr., Esquire
J. Cole Portis, Esquire
J. Kenneth Carter, Jr., Esquire
William J. Conroy, Esquire

FILED

NOV 18 2011
