

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Barbara Gaines.....Respondent,

v.

Joyce Ann Campbell.....Appellant.

Case No. 2012-CP-23-1971

RESPONDENT'S INITIAL BRIEF

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June 21, 2014

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None

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Circuit Court properly exercised its discretion by granting Plaintiff's Rule 59 Motion for a New Trial, where the Circuit Court heard a 3-day car-wreck jury trial in which multiple witnesses testified regarding the issues of proximate cause and damages, during which Appellant's counsel repeatedly mis-stated the law and made improper arguments during cross-examination of witnesses, where the Circuit Court then held a subsequent, fully briefed-hearing on Plaintiff's Rule 59 New Trial Motion, and where the Circuit Court made specific findings that, based on the Court's observations made during the jury trial, Appellant's counsel's improper arguments during the jury trial impermissibly affected the outcome of the trial.

STATEMENT OF THE CASE

On March 20, 2012, Barbara Gaines filed this action in the Greenville County Court of Common Pleas. Joyce Ann Campbell answered on April 23, 2012. This matter was tried to a jury on August 5-7, 2013. The jury returned a verdict for \$3,941.00. After the jury verdict in this case, pursuant to Rule 59, SCRPC, Plaintiff/Respondent Barbara Gaines moved for a New Trial, or in the alternative, for a New Trial *nisi additur*.¹ Transcript, p. 121.

After considering the 3-day jury trial in this case, as well as the several Memoranda and oral arguments for and against Plaintiff's Rule 59 Motions, the Circuit Court granted Plaintiff's Rule 59 Motion for a New Trial Absolute by Order filed on September 19, 2013. As discussed below, the Circuit Court properly exercised its discretion when it granted Plaintiff's Motion. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

¹The Circuit Court granted Plaintiff's Motion for New Trial, so this Brief does not address any issues regarding Plaintiff's Motion for New Trial *nisi additur*.

FACTS

At trial, Joyce Ann Campbell admitted negligence in colliding with the back of Barbara Gaines' car on January 8, 2010. At trial, the elements of proximate cause and the amount of damages were the disputed issues of fact.

At trial, and in her deposition testimony that was read into the record during her testimony at trial, Campbell estimated her speed at about 35-40 miles per hour before the collision. According to Gaines and the investigating Easley City Police Officer, Gaines was at a complete stop a Stop Sign at the time of the collision.

Gaines testified that the wreck caused Gaines to suffer neck injuries that caused neck pain, as well as pain radiating into her right arm and hand. Barbara Gaines testified extensively about neck injuries caused by the wreck and about her pre-existing arthritis and prior neck injuries and complaints. Gaines testified that she did not have neck pain radiating into her right arm prior to the wreck with the Campbell. Gaines and daughter both testified that Gaines suffered from severe neck pain radiating into her right arm after the wreck.

Gaines, both her physicians, and her adult daughter Joye Gaines all testified about Gaines's medical care. Barbara and Joye Gaines each testified that, at the time of trial, Barbara Gaines was 72 years old. Ms. Gaines is a retired the Pickens County School District, where she worked at a Special Needs Teachers Aide for many years. Barbara Gaines lives with daughter Joye, who works as a teacher in Pickens County.

By video depositions taken for use at trial, Gaines offered the expert opinions of her primary care physician Dr. Lisa Harding, and her neurosurgeon Dr. Christie Mina. Both Dr. Harding and Dr. Mina testified regarding their investigation of Gaines's injuries. Based on

Gaines's reported symptoms, Dr. Harding ordered a cervical MRI. Dr. Harding testified that Dr. Harding suspected a herniated disk at the C5-6 level in Gaines's neck. Dr. Harding testified that she referred Gaines to Piedmont Neurosurgical and Spine for evaluation and specialized care by a neurosurgeon.

Both Dr. Harding and Dr. Mina described the affected anatomical area of the Gaines's right arm and hand as the "C6 Distribution". Both doctors described the nature of the medical diagnosis of "C6 Radiculopathy", a condition whereby a pinched nerve in the neck causes causing pain and sensory changes in the affected area of the neck, arm, and hand.

Dr. Mina testified regarding Gaines's neurosurgical treatment. Dr. Mina testified about Gaines's neck surgery, an "anterior cervical discectomy and fusion" surgery designed to relieve pressure on Gaines's C6 nerve root. Gaines and her neurosurgeon both testified that Gaines had a complete resolution of her symptoms following the surgery.

Both Dr. Harding and Dr. Mina testified that, to a reasonable degree of medical certainty, Gaines's C6 radiculopathy was caused by the wreck with Campbell. Dr. Mina further testified that to a reasonable degree of medical certainty, Gaines's anterior cervical discectomy and fusion surgery was necessitated by neck injuries caused by the wreck on January 8, 2010.

The parties stipulated that Gaines's medical expenses following the wreck, including the neck surgery, totaled \$77,966.56. Gaines sought general damages for pain and suffering from the time of the wreck until after her neck surgery resolved her C6 radiculopathy.

Campbell's counsel vigorously cross-examined both Dr. Harding and Dr. Mina. When Dr. Mina's opinion differed from the report issued by the Emergency Room radiologist, Campbell's counsel pursued this line of questioning:

- 2 Q. So as far as you're concerned, the ER doctors are
3 quacks?
- 4 A. I beg your pardon?
- 5 MR. PEACE:
- 6 I'm going to object to that question --
- 7 EXAMINATION RESUMED BY MR. McGARR:
- 8 Q. You said more --
- 9 WITNESS:
- 10 I'll object to that question, too.
- 11 MR. PEACE:
- 12 -- as being argumentative.
- 13 EXAMINATION RESUMED BY MR. McGARR:
- 14 Q. You said, more than once, that you don't think the
15 emergency room records are reliable.
- 16 A. Correct. That does not mean that the emergency room
17 doctor is a quack. That means that the records here,
18 the history that's obtained from the patient and
19 family, is not necessarily exactly what happened or
20 what the patient was feeling at the time.
- 21 Q. Okay, and that's because two heads are never better
22 than one?
- 23 A. That has nothing to do with it.
- 24 Q. Okay. So, Doctor, the bottom line is everything I've
25 shown you and anything else I could show you, you

- 1 would end up saying no, this automobile accident
2 caused this surgery; is that correct?
- 3 A. No. I'm certain that if you could show me some other
4 evidence that was consistent with a C-6 radiculopathy
5 that pre-existed this -- this automobile accident,
6 then -- then I might reconsider.

Without such evidence, of course, Dr. Mina declined to change her opinion that, to a reasonable degree of medical certainty, the wreck with the Campbell caused Gaines's neck injuries and C6 radiculopathy. The Circuit Court noted that, while the Campbell does not have the burden of proof, Campbell did not introduce any evidence or testimony contrary to the expert opinions of Dr. Mina and Dr. Harding that Gaines's C6 radiculopathy was caused by the wreck

on January 8, 2010. Accordingly, the Circuit Court found that the record did not contain evidence which would support the jury's verdict in the amount of \$3,941.00.

Based on the overwhelming weight of the evidence and testimony offered at trial, Barbara Gaines argued that the jury's verdict of \$3,941.00 was grossly inadequate and is unsupported by the evidence in this case. After considering the 3-day jury trial in this case, as well as the several Memoranda and oral arguments for and against Gaines's Rule 59 Motions, the Circuit Court properly exercised its discretion in granting Gaines's Rule 59 Motion for a New Trial Absolute. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

ARGUMENT

1. **Rule 59 Requires the Circuit Court to Grant a New Trial Where the Circuit Court Reasonably Believes that the Amount of the Verdict Was Grossly Inadequate Because of Improper Influences Outside the Evidence.**

Rule 59(a) states, in pertinent part, that “A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of this State”. In *O’Neal v. Bowles*, our Supreme Court observed that:

If the amount of the verdict is *grossly* inadequate or *excessive* so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute. The failure of a trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.

314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)(italics in original). In the present case, the Circuit Court found that the jury verdict was grossly inadequate in light of the evidence and testimony offered at trial. After hearing the witnesses and arguments in this case, the Circuit Court properly exercised its discretion to grant Gaines’s Rule 59 Motion for a New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

2. **Under the “Thirteenth Juror” Doctrine, the Circuit Court has Discretion to Grant New Trials where the Circuit Court finds that the jury’s verdict is Not Supported by the Evidence.**

In *Vinson v. Hartley*, this Court noted that “The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996)(citing *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). Considering the evidence and testimony offered at trial in this

case, the Circuit Court found that the evidence does not support the jury's verdict. The Circuit Court further found that counsel for Joyce Ann Campbell made arguments that may have confused the jury or otherwise interfered with the jury's proper role. The Circuit Court properly granted Gaines's Motion for New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

The *Vinson* Court further outlined the nature of the "Thirteenth Juror" doctrine:

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). *See also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion). In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the "thirteenth juror." *South Carolina State Hwy. Dep't v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). Such discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them..." *Fallon v. Rucks*, 217 S.C. 180, 189, 60 S.E.2d 88, 92 (1950).

324 S.C. 389, 403-404, 477 S.E.2d 715, 722-723 (Ct. App. 1996). Under the "Thirteenth Juror" doctrine, based on the three day jury trial, first-hand observation of live witnesses, and subsequent arguments of counsel, the Circuit Court properly ruled that a new trial was necessitated on the basis of the facts of this case. The Circuit Court properly exercised its discretion when granting the Circuit Court's Order granting Gaines's Rule 59 Motion for a New

Trial. Therefore, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

"The matter of granting a new trial on the grounds stated is left under our law to the discretion of the trial judge, who hears the evidence, sees the witnesses, and who is in much better position than this court to judge of the righteousness of verdicts." *Worrell v. South Carolina Power Co.*, 195 S.E. 638, 642 (1938)(quoting *Byus v. Eason*, 178 S.C. 175, 179, 180, 182 S.E. 442, 444 (1935)). Analyzing the *Worrell* case, this Court further observed that:

The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). The Circuit Court properly exercised its discretion when granting the Circuit Court's Order granting Gaines's Rule 59 Motion for a New Trial. Therefore, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

3. The Improper Conduct of Campbell's Counsel further supports the Circuit Court's Decision to Grant a New Trial.

The Circuit Court further noted that counsel for Joyce Ann Campbell engaged in a variety of conduct which may have confused the jury or introduced passion, prejudice, or other improper influence on the jury. As the Circuit Court noted, counsel for Joyce Ann Campbell repeatedly sought to pit one witness against another. For example, defense counsel showed isolated pages from the Gaines's deposition to Gaines's physicians and asked the physicians if they believed that Gaines was lying under oath. During Dr. Mina's cross examination, Defense counsel

referred to the treating Emergency Room doctors as “**quacks**” after Dr. Mina testified that she questioned some of the information contained in Emergency Room treatment records. In closing, Campbell’s counsel reiterated this “pitting” by arguing “**Do you really believe that emergency room physicians are so incompetent that they can’t list what your problems are?**”

Transcript, p. 84, line 25 - p. 85, line 2. The Circuit Court reasonably believed that such inflammatory and improper argument, offered only as a rhetorical question, improperly influenced the outcome of the trial. Therefore, this Court should affirm the Circuit Court and remand for a New Trial.

Finally, during his closing arguments to the jury, defense counsel made various personal appeals to the jury’s intelligence and/or stupidity in weighing evidence introduced by Gaines.

Campbell’s counsel began his closing argument by saying:

But let me start with this. I request jury trials in Greenville County, because when I do, I know that my Greenville County jurors are going to be fair and decent to me. And be honest with yourselves with regard to what a case is about. We look to you because you will be fair to us and provide us justice. The other reason that I ask for jury trials is because you guys collectively are extraordinary [sic] intelligent. So much so that it becomes a bit disingenuous to give you bits and pieces of evidence and leave out other evidence that you guys have clearly heard. And think that you don’t remember the rest of the story.

Transcript, p. 79 - 80. Regarding the impact, however, Campbell’s counsel argued facts not in evidence, stating that “You’ve seen the crashes on television where they’re going 35 miles per hour, cars are ripped apart.” Transcript, p. 82, lines 14-16.

Campbell’s counsel confused the nature of the medical issues and testimony:

For example, **when I was here Monday, did I tell you guys that this is not an issue of whether or not Ms. Gaines had a problem with her neck that required surgery? Is that what I said? I don’t know where this argument comes up that she’s faking her problems.** She didn’t. She had a problem with

her neck at the C-5-6 area – C-4-5 area that caused a problem to go down her arm. There's no doubt. Nobody - - I told you nobody was going to dispute that. **That was on Monday, that was just three days ago. Did I not tell you that? And I want to tell you that gain, there's no question but that she had to have surgery to get it fixed. Said it on Monday and I [sic] it again today.** At no time have I said to a doctor or to Ms. Gaines or to any other witness, she's faking these problems. She's not. **And you're bright enough and have the brains enough to know that that's what I said on Monday.**

Transcript, p. 80, lines 8-25 (bold added). Regarding the existence of Gaines' neck problems and need for surgery, however, Campbell's counsel mis-characterized Dr. Mina's testimony by arguing more facts that were not in evidence:

What did I tell you on Monday? The issue is not that she had the neck problems, the issue is what caused the problems. And what caused the problems, a bone spur that had to be drilled out and then other holes opened up wider so that this nerve would quite being pinched [sic]. That's what I told you. **That's what the doctors have told you. That's what she was showing when she did this. I'll come back to it, there's no disc herniation. I'm going to read the doctors depositions with regard to that. It was a bone spur. And you guys are not so foolish or so dumb and its disingenuous to pretend like you are, that you didn't hear that the doctor says, She's got a bone spur that is squishing on that nerve that's causing a problem and makes it go down her arm.** I went in, had to take out the disc to get to the bone spur what I then had to remove. Then I opened some more holes so that she would have more space.

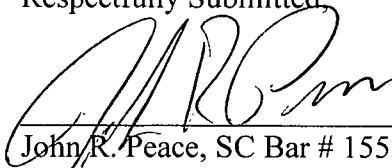
Transcript, p. 81, lines 1 - 16 (emphasis added). Campbell's Counsel further told the jury that **“you were told in closing that she had Ms. Gaines' old records and had been able to take a look at them. Told it in opening and told it in closing. As if you guys don't have enough brains . . .”** Transcript, p. 88, lines 20-23. As a result of the improper influence of Campbell's counsel's argument, the jury's verdict was grossly inadequate. The Circuit Court properly exercised its discretion under the 13th Juror Doctrine by granting Gaines' Motion for New Trial. Therefore, this Court should affirm the Circuit Court and remand for a New Trial.

CONCLUSION

In the present case, the Circuit Court found that the jury's verdict of \$3,941.00 was grossly inadequate and warranted a New Trial Absolute. In *O'Neal v. Bowles*, the Supreme Court held that under Rule 59, "If the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)(italics in original). Accordingly, considering the 3-day jury trial in this case and the subsequent hearing on the Rule 59 Motion, the Circuit Court properly granted Gaines' Motion New Trial Absolute. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

In the present case, after conducting a 3-day jury trial, the Circuit Court specifically found that the verdict was grossly inadequate and the result of the improper cross-examination of Dr. Mina and Dr. and argument by Campbell's counsel. Indeed, in the present case, as in *O'Neal v. Bowles*, "The failure of a trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). Had the Circuit Court failed to grant the New Trial Motion, then this Court would have reversed such an abuse of discretion and remanded for a New Trial. Therefore, this Court should affirm the Circuit Court and remand this case for a New Trial.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'JRP', is written over a horizontal line.

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June 21, 2014

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The Honorable Edward W. Miller, Circuit Court Judge

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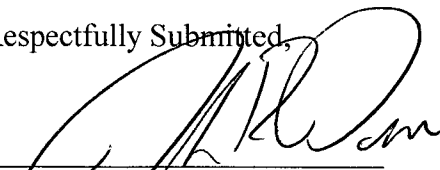
Joyce Ann Campbell.....Appellant.

Case No. 2012-CP-23-1971

PROOF OF SERVICE

I certify that I have served the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal by depositing a copy of it in the U.S. Mail, postage prepaid, on June 21, 2014, addressed to attorney of record, Marcus K. McGarr, Esq., 108 Whitsett Street Greenville, SC 29601.

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RE: Gaines v. Campbell
C.A. # 2012-CP-23-1971
Court of Appeal Case Tracking #2013-002367

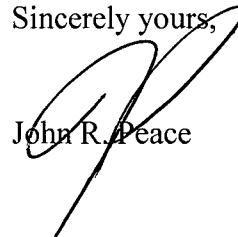
To Whom It May Concern:

Please find enclosed for filing the original and one (1) copy of the Appellant's Initial Brief and the Appellant's Designation of Material to be Included in the Record on Appeal in the above case, along with the original and one copy of the associated Proof of Service.

Please return the clocked copies of the Appellant's Initial Brief, Designation of Material to be Included in the Record on Appeal, and the Proof of Service in the enclosed, self-addressed, stamped envelope.

With kindest regards, I remain,

Sincerely yours,



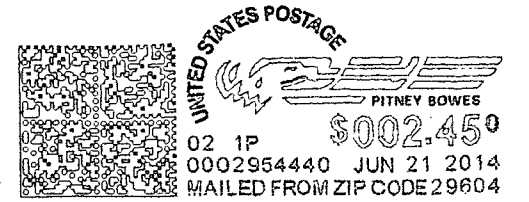
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Enclosures

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