

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

---

Case No. 2015-000789

---

H. Wesley Kirkland, as Personal Representative of the Estate of James Walker,

Appellant,

v.

Betsy L. Spriggs,

Respondent.

---

APPELLANT'S INITIAL BRIEF

---

JAMES B. LYBRAND, JR.  
S.C. Bar #3453  
McDONALD, McKENZIE, RUBIN,  
MILLER AND LYBRAND, L.L.P  
POST OFFICE BOX 58  
1704 MAIN STREET, 2<sup>nd</sup> FLOOR  
COLUMBIA, SOUTH CAROLINA 29202  
(803) 252-0500  
Attorneys for Appellant

RECEIVED  
AUG 20 2015  
SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL ..... 1

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 3

    I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT’S MOTION FOR A  
    NEW TRIAL BECAUSE THERE WAS NOTHING TO SUPPORT THE FINDING  
    THAT THE JURY IMPROPERLY CONSIDERED MATTERS OUTSIDE THE  
    RECORD. .... 3

        A. Granting a New Trial Based on Mere Suspicions of Juror Misconduct is an  
        Error of Law. .... 3

            i. Jury misconduct cannot be inferred from the duration of a jury’s  
            deliberation. . . . . 4

            ii. When a trial judge properly instructs the jury as to what it may  
            consider in reaching a verdict, a jury’s note asking questions about  
            matters which are improper for their consideration does not amount  
            to misconduct if the trial judge correctly re-charges the jury on  
            what matters it can and cannot consider. . . . . 6

CONCLUSION ..... 6

TABLE OF AUTHORITIES

*Haselden v. A. Coast Line R. Co.*, 214 S.C. 410, 53 S.E.2d 60 (1949). . . . . 4

*S.C. State Highway Department v. Dolphin*, 275 S.C. 205, 269 S.E. 2d 329 (1980). . . . . 4

*State v. Smith*, 338 S.C. 66, 525 S.E.2d 263. (S.C. Ct. App. 1999). . . . . 3

*State v. Zeigler*, 364 S.C. 94, 610 S.E.2d 859 (S.C. Ct. App. 2005). . . . . 6

*Thomas v. Atlantic Coast Line Railroad Co.*, 221 S.C. 462, 71 S.E.2d 403 (1952). . . . . 5

*Youmans v. S.C. DOT*, 380 S.C. 263, 670 S.E.2d 1 (S.C. Ct. App. 2008). . . . . 3, 4

STATEMENT OF ISSUE ON APPEAL

- I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL BASED UPON THE JURY ASKING QUESTIONS RELATED TO MATTERS ABOUT WHICH THEY WERE INSTRUCTED NOT TO CONSIDER AND ON THE BREVITY OF DELIBERATIONS?

## STATEMENT OF THE CASE

This case arises from an automobile accident that occurred on February 4, 2008, in Richland County, South Carolina. The Respondent was driving a vehicle immediately in front of a car being operated by the Appellant. The Appellant struck Respondent's vehicle in the rear.

A Summons and Complaint was filed on November 8, 2010, alleging that Appellant was negligent in causing the accident and seeking to recover actual and punitive damages for Respondent's alleged personal injuries. Appellant filed and timely served an Answer. On October 27, 2011, Appellant's decedent died from unrelated causes, and H. Wesley Kirkland, Jr. was appointed as Personal Representative of Appellant's Estate. On March 4, 2013 the court issued an Order changing the caption to reflect the proper parties.

The case proceeded to a jury trial which began on September 9, 2013. On September 12, 2013, the jury began deliberations. After commencing its deliberations, the jury sent a written note to the trial judge containing five (5) questions. The trial judge brought the jury back into the courtroom and instructed the jury that its verdict must be based only on the evidence and testimony presented. The trial judge further instructed the jury that they were not to consider any of the issues raised by their questions. The jury was sent back to deliberate. Subsequently, the jury returned a verdict in favor of Appellant. The trial court allowed ten (10) days for the parties to file post-trial motions.

On or about September 13, 2013, Respondent filed and served her Motion for New Trial Absolute. The trial judge held a hearing on Respondent's post-trial motions on October 17, 2013. On March 16, 2015, the trial judge issued an Order granting Respondent's motion for a new trial. Appellant timely filed and served a Notice of Intent to Appeal this Order on April 15, 2015.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL BECAUSE THERE WAS NOTHING TO SUPPORT THE FINDING THAT THE JURY IMPROPERLY CONSIDERED MATTERS OUTSIDE THE RECORD.

“Upon review, a trial judge's order granting . . . a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. An appellate court's review is limited to consideration of whether evidence exists to support the trial court's order.” *Youmans v. S.C. DOT*, 380 S.C. 263, 271, 670 S.E.2d 1, 4 (S.C. Ct. App. 2008).

#### A. Granting a New Trial Based on Mere Suspicions of Juror Misconduct is an Error of Law.

“The general test for evaluating alleged juror misconduct is whether there in fact was misconduct and, if so, whether any harm resulted to the defendant as a consequence.” *State v. Smith*, 338 S.C. 66, 72, 525 S.E.2d 263, 266. (S.C. Ct. App. 1999). This Court has noted that “granting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.” *Youmans*, 380 S.C. at 267, 670 S.E.2d at 2. Thus, a trial court must make a factual finding based upon evidence of misconduct, not merely an impression or suspicion of such behavior.

Respondent presented no evidence whatsoever to support a finding that the jury actually considered the matters contained in the five questions presented in their note. (Transcript of Hearing on Respondent's Motion for a New Trial, October 17, 2013). The trial record establishes that the judge properly instructed the jury that they could not base their verdict on sympathy or on other factors but that their verdict must be based solely upon the evidence and testimony presented. Moreover, the trial judge specifically told the jury that they were not to consider any of the issues indicated in their questions. (Trial Transcript of September 9-12, 2013, pp. 336-339).

The jury's verdict should be given proper weight and not set aside based solely on speculation of misconduct. "The court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors, for to do so would violate a constitutional privilege to have the fair verdict of the jury and not the fair judgment of the court." *Haselden v. A. Coast Line R. Co.*, 214 S.C. 410,434, 53 S.E.2d 60, 70 (1949).

In *S.C. State Highway Department v. Dolphin*, 275 S.C. 205, 269 S.E. 2d 329 (1980), Justice Ness and Justice Littlejohn (in dissenting with the majority in the results) provided the following guidance for trial judges, which has been adopted by our courts:

*When a trial judge grants a new trial outright, or a new trial nisi, based on the facts, he undertakes to disagree with and, in effect, repudiate the collective thinking and findings of the jury, whose basic duty it is to evaluate the evidence in every case. The judge exercises a tremendous authority. It should be exercised seldom and with much caution. The judge is not permitted to substitute his judgment for that of the jury.* 269 S.E.2d 329 at 333.

Here, there was no evidence presented to create a strong conviction of injustice. In granting the new trial, the judge erred in finding misconduct based only on speculation that the jury considered matters outside of the record. The judge supported his finding of misconduct based only upon: (i) the jury asking five questions regarding matters not in evidence (Juror Note, dated September 12, 2013) and (ii) the brevity of returning a verdict. (Order of March 16, 2015). However, this Court has held that brevity of deliberation alone is insufficient to support granting a new trial and that proper instructions to the jury can cure indications of misconduct based upon questions from the jury. *Youmans*, 380 S.C. at 286, 670 S.E.2d at 13.

- i. Jury misconduct cannot be inferred from the duration of a jury's deliberation.

This Court has specifically held that "[a] court cannot infer misconduct from the duration of the jury's deliberation." *Youmans*, 380 S.C. at 267, 670 S.E.2d at 2. "As a general rule, the

shortness of time taken by a jury in reaching its verdict has no effect upon the validity of the verdict." *Id.* Moreover, "[t]he brevity of jury deliberations does not indicate by itself, improper behavior, or that the verdict was the result of error." *Id.* Indeed,

*There is no rule of law which prescribes how long a jury should be required to deliberate before returning its verdict. Of course, the verdict should be the result of conscientious deliberation, but the fact that the verdict was returned within a few minutes does not necessarily show that the jury disregarded this duty, and is not sufficient in itself to justify a new trial.* 380 S.C. at 267, 670 S.E.2d at 2.

The South Carolina Supreme Court has also stated that "[w]hile it was unusual for the jury to arrive at its verdict in so short a time, we would not be justified in concluding therefrom that the jury acted capriciously or that it was [actuated] by passion or prejudice." *Thomas v. Atlantic Coast Line Railroad Co.*, 221 S.C. 462, 471-72, 71 S.E.2d 403, 407 (1952).

In this case, the jury deliberated for over an hour prior to sending in the jury note. (Trial Transcript of September 9-12, 2013, pp. 336-339). After the judge instructed the jury for a second time not to consider the issues contained in the questions included in the jury note, the jury deliberated for roughly five minutes before returning a verdict. (Trial Transcript of September 9-12, 2013, pp. 340-341). This brief deliberation after the jury's questions does not itself indicate that the jury considered any matters included in the note. Thus, it was improper for the trial judge to rely upon the length of deliberation in his finding of misconduct. The only other evidence upon which the judge based his finding of misconduct was the questions themselves, which like the length of deliberation, is not indicative of misconduct. To draw such a conclusion would be based upon pure speculation. It is impossible to know, for example, how many jurors were actually seeking the information contained in the questions. It is possible that only one or just a few jurors insisted on asking the questions. After being instructed that they could not consider these matters,

those jurors could have quickly agreed with the remainder of the jurors in reaching the verdict.

Again, this analysis, like that employed by the judge, amounts to speculation.

- ii. When a trial judge properly instructs the jury as to what it may consider in reaching a verdict, a jury's note asking questions about matters which are improper for their consideration does not amount to misconduct if the trial judge correctly re-charges the jury on what matters it can and cannot consider.

In *Zeigler*, a note asking about a matter which the jury should not consider (*i.e.*, the lack of testimony by the Defendants) did not provide the trial court with proof of juror misconduct. *Zeigler*, 364 S.C. at 111, 610 S.E.2d at 868. To support the finding that there was no juror misconduct, this court noted that "the judge gave a detailed charge to the jury instructing them not to consider the fact that the defendants did not testify." *Id.* This Court then noted that "[t]he judge reiterated this principle [of law] in a charge after receipt of the jury note." *Id.*, 364 S.C. at 212, 610 S.E.2d at 868. Our Court of Appeals held that the trial court properly denied the motion for a new trial based upon the proper instructions before and after the jury's note. *Id.*

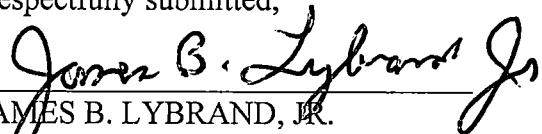
#### CONCLUSION

The trial judge properly instructed the jury that they could not base their verdict on sympathy or on other factors but that their verdict must be based solely upon the evidence and testimony presented. (Trial Transcript of September 9-12, 2013, pp. 336-339). Following this instruction, the judge received the note regarding matters which he could not answer. *Id.* As a result, the trial judge specifically told the jury that they were not to consider any of the issues indicated by its questions. *Id.* Based on this Court's finding in *Zeigler*, the note itself is not evidence of misconduct and the proper charges and reiteration of instructions to the jury served to cure any alleged juror misconduct.

Because there is no evidence beyond the juror's note itself and the brief time of deliberations, the finding that the jury considered of matters outside of the record in reaching its verdict was error.

For the reasons set forth above, the Appellant respectfully requests that the Order granting the Respondent a new trial be reversed and that the jury verdict be reinstated.

Respectfully submitted,



JAMES B. LYBRAND, JR.

S.C. Bar #3453

McDONALD, McKENZIE, RUBIN,

MILLER AND LYBRAND, L.L.P

POSTOFFICE BOX 58

1704 MAIN STREET, 2<sup>nd</sup> FLOOR

COLUMBIA, SOUTH CAROLINA 29202

(803) 252-0500

Attorneys for Appellant

Columbia, South Carolina

August 10, 2015

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2015-000789

H. Wesley Kirkland, as Personal representative of the Estate of James Walker,

Appellant,

v.

Betsy L. Spriggs,

Respondent.

---

**CERTIFICATE OF SERVICE**

---

I hereby certify that a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal was served upon the following by depositing said papers in the United States Mail, Columbia, South Carolina, on the 20th day of August, 2015, with the first class postage duly affixed and a return address clearly indicated on the envelope, addressed as follows:

L. Lisa McPherson  
Melissa G. Mosier  
McWhirter, Bellinger & Associates  
119 East Main Street  
Lexington, SC 29072

John S. Nichols  
Bluestein, Nichols, Thompson & Delgado, LLC  
P.O. Box 7965  
Columbia, SC 29202

RECEIVED  
AUG 20 2015  
SC Court of Appeals

*Bernadette Gebhardt*

Bernadette Gebhardt

Legal Assistant to James B. Lybrand, Jr.

Columbia, South Carolina  
August 20, 2015

James B. Lybrand, Jr.  
\*Certified Mediator & Arbitrator

**McDonald, McKenzie, Rubin, Miller and Lybrand, L.L.P.**  
Attorneys at Law  
2<sup>nd</sup> Floor, 1704 Main Street  
P.O. Box 58 - 29201  
Columbia, South Carolina 29202  
P: (803)252-0500 – F: (803)929-3530  
[www.mmrml.com](http://www.mmrml.com)

Direct Dial (803)223-6156  
Email: [Lybrand@mmrml.com](mailto:Lybrand@mmrml.com)

August 20, 2015

**HAND DELIVERED**

Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Calhoun Building  
1220 Senate Street  
Columbia, SC 29201

RECEIVED  
AUG 20 2015  
SC Court of Appeals

**Re: Spriggs v. Kirkland, et al**  
**Appellate Case No.: 2015-000789**

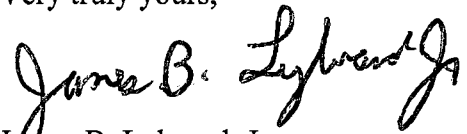
Dear Ms. Kitchings:

Enclosed for filing please find an original and two copies of Appellant's Designation of Matter to be Included in the Record and Appellant's Initial Brief in connection with the captioned case. Kindly file the original and return time-stamped copies to this office in the enclosed envelope.

Please let me know if anything further is required. Thank you for your assistance in this matter.

With kind regards, I am

Very truly yours,

  
James B. Lybrand, Jr.

JBLjr/mkb  
Enclosures

cc: L. Lisa McPherson  
Melissa G. Mosier  
John S. Nichols