

77123

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.

**RECEIVED**

SEP 02 2015

SC Court of Appeals

Case No. 2012-CP-23-1971

**RESPONDENT'S MEMORANDUM IN SUPPORT OF  
RESPONDENT'S PETITION FOR REHEARING**

John R. Peace, Esq.  
John Robert Peace, PA  
PO Box 8087  
Greenville, SC 29604-8087  
Tel: (864) 298-0500  
Fax: (864) 271-3130  
**Attorney for Respondent Barbara Gaines**

Other Counsel of Record:

Marcus K. McGarr, Esq.  
108 Whitsett Street  
Greenville, SC 29601  
Tel: (864) 298-0089  
Fax: (864) 235-0503  
**Attorney for Appellant Joyce Ann Campbell**

Pursuant to Rule 221, SCACR, Respondent Barbara Gaines (hereinafter “Gaines”) hereby petitions this Court for Rehearing regarding the Opinion issued on August 19, 2015. This Court’s 8/19/15 Opinion misapprehends the standard for granting a new trial under Rule 59, SCRCR. In addition, this Court’s 8/19/15 Opinion further misapplies the standard of review of such an order on appeal. Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court’s Order Granting a New Trial.

### DISCUSSION

This Court’s 8/19/15 Opinion’s “Law/Analysis” section begins:

We note at the outset the Circuit Court’s order granting Gaines’ motion for a new trial conflated the standards for a new trial pursuant to the thirteenth juror doctrine and a new trial absolute. We address the two standards below as well as the language of the Circuit Court’s order.

8/19/15 Opinion, p. 2 (underline added). Since the adoption of the Rules of Civil Procedure in 1985, however, Rule 59 has provided the sole mechanism by which a party can move for a new trial. Accordingly, this Court’s 8/19/15 Opinion misunderstands the interplay between Rule 59 and the long-standing “13<sup>th</sup> Juror Doctrine”. Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court’s Order Granting a New Trial.

Rule 59(a) provides 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**” (bold added). Our Supreme Court has long recognized that “**South Carolina’s thirteenth juror doctrine is well established as the standard**

**for granting a new trial in state law actions.”** *Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 477, 567 S.E.2d 851, 854 (2002)(bold added). This Court’s 8/19/15 Opinion is incorrect that there are “two standards”, one for a “new trial absolute” and another standard for the “thirteenth juror doctrine.” Therefore, this Court should reverse the August 19, 2015 Opinion and affirm the Circuit Court’s Order Granting a New Trial.

In *Lane v. Gilbert Const. Co., Ltd.*, the Supreme Court summarized the 13<sup>th</sup> Juror Doctrine as follows:

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. **The doctrine “entitles the judge to sit, in essence, as the thirteenth juror when he finds ‘the evidence does not justify the verdict,’ and then to grant a new trial based solely ‘upon the facts.’**” *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), *citing Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id.*

383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)(bold added). In the present case, the Circuit Court “hung” the jury because the Circuit Court found that the verdict was not supported by the evidence. The Circuit Court’s order identified the evidence supporting the Circuit Court’s decision to grant Gaines’ New Trial Motion:

Plaintiff’s New Trial Motion centered on the testimony of her two medical expert witnesses who each opined that this motor vehicle accident, more probably than not, to a reasonable degree of medical certainty, was the cause of injury to the Plaintiff which necessitated the disputed spinal surgery. Both witnesses were presented at trial through the use of *de bene esse* video depositions. Defendant did not present any evidence to refute these experts and relied solely on McGarr’s cross-examination of the witnesses to contest the proximate cause issue.

The Circuit Court’s order “hanging” the jury is clearly supported by the expert witnesses’

testimony introduced at trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

Regarding appellate review of an order granting a new trial, the *Lane v. Gilbert Const. Co., Ltd.* Court went on to explain that:

Upon review, a trial judge's order granting or denying 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. *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. This Court's review is limited to consideration of whether evidence exists to support the trial court's order. *Id.* at 478-79, 567 S.E.2d at 854. **As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed.** *Id.*

383 S.C. 590, 597-598, 681 S.E.2d 879, 883 (2009)(bold & underline added); *see also Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 478-479; 567 S.E.2d 851, 854 (2002). As discussed above, the Circuit Court's order specifically identified the testimony of Plaintiff's two expert witnesses as the evidence supporting the court's order granting a new trial. Because the Circuit Court's order is supported by the evidence offered at trial, this Court should not disturb the Circuit Court's order granting a new trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

In *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990), the Supreme likewise stated the rule as:

A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976). When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.

300 S.C. 251, 254-255, 387 S.E.2d 265, 267 (1990). Applying this rule, the *Folkens* Court analyzed the evidence presented at trial:

A review of this record reveals that the trial court's ruling is not "wholly unsupported by the evidence" because conflicting evidence was presented on the issues of liability and damages. For example, while McLendon complained about negligent advice rendered by the Hunt firm, evidence was presented that he consulted with independent advisers before making any decisions regarding the distribution of funds to Wellman. This would constitute evidence to support the trial judge's conclusion that McLendon may not have relied upon any erroneous advice from the Hunt firm. **If the testimony and evidence are in conflict, this court has consistently held that the trial judge's granting of a new trial upon the facts has support and will not be disturbed.** *S.C. Dept. of Highways and Public Transportation v. Mooneyham, supra*, 269 S.E.2d at 330. In the instant case, we find that evidence existed to support the judge's ruling granting a new trial upon the facts.

*Folkens v. Hunt*, 300 S.C. 251, 255, 387 S.E.2d 265, 267-68 (1990)(bold added). In the present case, the testimony and evidence regarding the issues of proximate cause and the amount of damages were clearly in conflict and the Circuit Court's Order is clearly supported by the evidence introduced at trial. Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

Moreover, the Circuit Court's order was not "controlled by an error of law."

Indeed, this Court specifically found that **"the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements."**

Opinion, p. 6 (bold added). The Circuit Court's Order states that:

McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses. Not only did McGarr continuously ask Dr. Mina to comment on the Plaintiff's credibility using collateral sources but McGarr went so far as to ask Dr. Mina if she was calling the Emergency Room Physicians "quacks". This questioning was in clear violation of South Carolina's long standing and basic rule prohibiting the "pitting" of

witnesses.

Order, p. 2. However, this Court clearly misapplied the applicable standard for reviewing the Circuit Court's Order granting a new trial, when this Court found "little harm in this line of questioning". 8/19/15 Opinion, p. 6. This Court's 8/19/15 Opinion attempts to second-guess the trial judge on each reason cited by the Circuit Court for granting the motion for new trial. Accordingly, this Court's 8/19/15 Opinion fails to understand that **"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."**

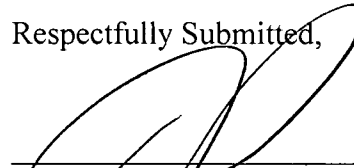
*Worrell v. South Carolina Power Co.*, 195 S.E. 638, 642 (1938)(quoting *Byus v. Eason*, 178 S.C. 175, 179, 180, 182 S.E. 442, 444 (1935)(bold added). Therefore, this Court should reverse the 8/19/15 Opinion and affirm the Circuit Court's order.

### **CONCLUSION**

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 granted Gaines' Rule 59 Motion for New Trial. The Circuit Court properly ruled that a new trial was necessitated on the basis of the facts of this case. The Circuit Court's order specifically identified Gaines' experts' testimony as the evidence supporting the Circuit Court's ruling. Indeed, this Court specifically found that "the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements." 8/19/15 Opinion, p. 6. Although this Court may disagree with the Circuit Court regarding the impact of Campbell's counsel's misconduct, the Circuit Court

properly exercised its discretion in granting the Gaines's Rule 59 Motion for a New Trial. Because the trial judge heard the evidence, saw the witnesses, and was in much better position than this Court to judge of the righteousness of the verdict, this Court should affirm the Circuit Court's Order and remand this case for a New Trial.

Respectfully Submitted,



John R. Peace, SC Bar # 15521

John Robert Peace, P.A.

PO Box 8087

1225 S. Church Street

Greenville, SC 29604-8087

Ph: (864) 298-0500

FAX: (864) 271-3130

[John@PeaceLawFirm.com](mailto:John@PeaceLawFirm.com)

September 1, 2015

**Attorney for Respondent Barbara Gaines**