

IN THE STATE OF SOUTH CAROLINA **RECEIVED**
In the Supreme Court

NOV 17 2015

APPEAL FROM GREENVILLE COUNTY **S.C. Supreme Court**
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Barbara Gaines.....Petitioner,

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v.

NOV 20 2015

Joyce Ann Campbell.....Respondent.

SC Court of Appeals

Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)

PETITION FOR CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 19, 2015.

QUESTION PRESENTED

1. Whether the Court of Appeals 8/19/15 Opinion misapplied the Rule 59 standard for granting a new trial absolute, where the Court of Appeals reversed the Circuit Court's Order granting Plaintiff's New Trial Motion under the 13th Juror Doctrine, where the Circuit Court's Order was supported by substantial evidence.

STATEMENT OF THE CASE

On January 8, 2010, Joyce Ann Campbell collided with the back of Barbara Gaines car at a stop sign. On March 20, 2012, Barbara Gaines filed this action in the Greenville County Court of Common Pleas. Joyce Ann Campbell admitted negligence in her Answer filed on April 23, 2012. The issues at trial were the amount of damages and proximate cause. The Circuit Court conducted a jury trial on August 5-7, 2013. At trial, Joyce Ann Campbell admitted negligence in colliding with the back of Barbara Gaines' car on January 8, 2010. (R. p. 148, lines 11-13). At trial, the elements of proximate cause and the amount of damages were the disputed issues of fact. (R. p. 272, lines 15-18). At trial, "The stipulated total of Plaintiff's medical bills was \$77,966.56." Order Granting New Trial Motion, p. 1.

Defendant Campbell testified that she estimated her speed at about 35-40 miles per hour before the collision. (R. p. 148, lines 15-18). 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. (R. p. 66, lines 13-15).

Gaines testified that the collision caused Gaines to suffer neck injuries that caused neck

pain, as well as pain radiating into her right arm and hand. (R. p. 84, lines 5-15). Barbara Gaines testified extensively about neck injuries caused by the wreck and about her pre-existing arthritis and prior neck injuries and complaints. (R. p. 82, lines 4-24). Gaines testified that she did not have neck pain radiating into her right arm prior to the wreck with the Campbell. (R. p. 82, lines 4-24). Gaines and daughter both testified that Gaines suffered from severe neck pain radiating into her right arm after the wreck. (R. p. 82, line 25- p. 87, line 10; R. p. 178, lines 182, line 22 - p. 183, line 19).

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 retired from the Pickens County School District, where she worked at a Special Needs Teachers Aide for many years. (R. p. 75, line 25 - p. 76, line 11). Barbara Gaines lives with daughter Joye, who works as a teacher in Pickens County. (R. p. 174, line 23 - p. 175, line 9).

By video depositions taken for use at trial, Gaines offered the expert opinions of her primary care physician Dr. Lisa Harding (R. p. 416 - 491), and her neurosurgeon Dr. Christie Mina. (R. p. 323 - 414). 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. (R. p. 427, lines 16-23). Dr. Harding testified that Dr. Harding suspected a herniated disk at the C5-6 level in Gaines's neck. (R. p. 427, lines 16-23). Dr. Harding testified that she referred Gaines to Piedmont Neurosurgical and Spine for evaluation and specialized care by a neurosurgeon. (R. p. 428, lines 5-16).

Both Dr. Harding and Dr. Mina described the affected anatomical area of the Gaines's

right arm and hand as the "C6 Distribution". (R. p. 441, lines 5-17; R. p. 343, lines 4-17). 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. (R. p. 343, line 24- p. 345, p. 25).

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. (R. p. 347, line 11- p. 353, p. 8). Gaines and her neurosurgeon both testified that Gaines had a complete resolution of her symptoms following the surgery. (R. p. 92, line 13-15; R. p. 353, line 22- p. 354, p. 18). "The stipulated total of Plaintiff's medical bills was \$77,966.56." Order Granting New Trial Motion, p. 1.

On August 7, 2013, the jury returned a verdict for the Plaintiff in the amount of \$3,941.00, the amount of Barbara Gaines' Emergency Room bill. Pursuant to Rule 59, SCRPC, Plaintiff/Respondent Barbara Gaines moved for a New Trial. The Circuit Court granted Plaintiff's Rule 59 Motion by Order filed on September 19, 2013.

On October 23, 2013, Joyce Ann Campbell's counsel filed a Notice of Appeal in the South Carolina Court of Appeals. On June 3, 2014, the Court of Appeals heard oral arguments. On August 19, 2015, the Court of Appeals issued its unpublished decision reversing the Circuit Court's Order granting Plaintiff's Rule 59 Motion for a New Trial.

On September 2, 2015, Barbara Gaines filed her Petition for Rehearing in the Court of Appeals. On October 19, 2015, the Court of Appeals denied Barbara Gaines' Petition for Rehearing. This Court should reverse the Court of Appeals, affirm the Circuit Court, and remand this case for a New Trial.

ARGUMENT

1. **The Circuit Court Order Properly Exercised its Discretion Under the 13th Juror Doctrine to Grant Rule 59 New Trial Motion.**

In granting Barbara Gaines' Rule 59 Motion for New Trial, the Circuit Court found **"that much of [Joyce Campbell's attorney] McGarr's cross examination of Dr. Mina . . . objectionable and should have been excluded."** Order Granting New Trial Motion, p. 2 (bold added). The Circuit Court specifically noted that **"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 calling the Emergency Room Physicians 'quacks.'" Order Granting New Trial Motion, p. 2 (bold added).** The Circuit Court concluded that **"this questioning was in clear violation of South Carolina's long standing and basic rule against the "pitting" of witnesses."** Order Granting New Trial Motion, p. 2 (bold added).

The Circuit Court further found **"McGarr also violated SCRCP Rule 43(I) in his closing argument. McGarr personally addressed and personally appealed to the jury in his closing remarks."** Order Granting New Trial Motion, p. 3 (bold added). The Circuit Court specifically recalled that **"McGarr's closing included: 'I know that my Greenville County jurors are going to be fair and decent to me.' 'And you're bright enough and have brains enough to know that that's what I said on Monday.' 'And you guys are not so foolish or dumb.' 'When you heard the evidence yourself, are you guys just not bright enough to remember?'"** Order Granting New Trial Motion, p. 3 (bold added). Sitting as the 13th Juror, the Circuit Court found that **"McGarr's argument prejudiced the outcome of the trial."** Order Granting New Trial Motion, p. 3 (bold added).

Based on the Circuit Court's first-hand observations of the 3-day jury trial, as well as the several Memoranda and oral arguments on Gaines's Rule 59 Motion, the Circuit Court properly exercised its discretion in granting Gaines's Rule 59 Motion for a New Trial Absolute. Therefore, this Court should reverse the Court of Appeals and affirm the Circuit Court, remanding this case for a New Trial.

2. The Court of Appeals Did Not Limit its Review to Consideration of Whether Evidence Exists to Support the Circuit Court's Order Granting Plaintiff's Rule 59 New Trial Motion

The Court of Appeal'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). The Court of Appeals' 8/19/15 Opinion misunderstands Rule 59 and the long-standing "13th Juror Doctrine". Therefore, this Court should reverse the Court of Appeals' 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). This 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). The Court of Appeals' 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 Court of Appeals' 8/19/15 Opinion, affirm the Circuit Court's Order, and remand for a New Trial.

In *Lane v. Gilbert Const. Co., Ltd.*, this Court summarized the 13th 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 "hanging" the jury is clearly supported by the expert witnesses' testimony introduced at trial. Therefore, this Court should reverse the Court of Appeals' 8/19/15 Opinion, affirm the Circuit Court's order, remanding this case for a New Trial.

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, the Court of Appeals committed an error of law by reversing the Circuit Court's order granting a new trial. Therefore, this Court should reverse the Court of Appeals' 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), this Court 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)(bold added). 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 Court of Appeals' 8/19/15 Opinion, affirm the Circuit Court's order, and remand this case for a new trial.

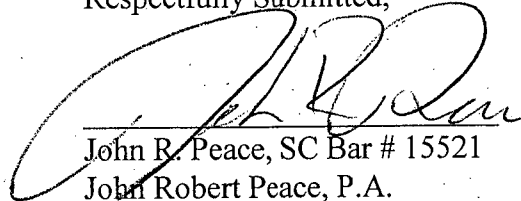
Moreover, the Circuit Court's order was not "controlled by an error of law." Indeed, the Court of Appeals 8/19/15 Opinion specifically found that "**the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements.**" Opinion, p. 6 (bold added). Surprisingly, the Court of Appeals found "*little harm in this line of questioning*". 8/19/15 Opinion, p. 6 (italics added). Because the Circuit Court's Order granting a new trial was not controlled by an error of law, the Court of Appeals committed an error of law by reversing the Circuit Court. Therefore, this Court should reverse the Court of Appeals, affirm the Circuit Court, and remand this case for a new trial.

Indeed, the Court of Appeals' 8/19/15 Opinion attempts to second-guess each reason cited by the Circuit Court for granting the motion for new trial. The Court of Appeals' 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 Court of Appeals' 8/19/15 Opinion and affirm the Circuit Court's order.

CONCLUSION

For the reasons cited above, Petitioner Barbara Gaines respectfully asks this Court to grant the petition for a writ of certiorari.

Respectfully Submitted,



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November 17, 2015

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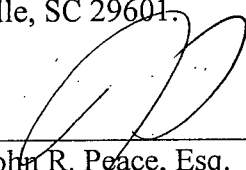
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PROOF OF SERVICE

I certify that I have served the Petition for Certiorari and Appendix by depositing a copy of it in the U.S. Mail, postage prepaid, on November 17, 2015, addressed to attorney of record, Marcus K. McGarr, Esq., 108 Whitsett Street Greenville, SC 29601.



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