THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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App. Case No. 2015-002347
Unpublished Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)

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BARBARA GAINES........................................................Petitioner,

vs.

JOYCE ANN CAMPBELL...................................................Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## INTRODUCTION

The subject of this appeal is an automobile accident which took place on January 8, 2010. On that date, Joyce Ann Campbell (Ms. Campbell) bumped into the rear of Barbara Gaines's (Ms. Gaines) vehicle. On March 20, 2012, Ms. Gaines filed suit against Ms. Campbell. Ms. Campbell then filed an Answer to Ms. Gaines's Complaint on April 23, 2012, wherein she admitted that she was negligent in causing the accident. However, Ms. Campbell denied that her actions proximately caused injuries and/or damages to Ms. Gaines, as she felt those issues were either pre-existing and/or post-existing in nature. Thereafter, the Circuit Court presided over a jury trial with regard to this dispute, from August 5, 2013 through August 7, 2013.

During the trial, Ms. Campbell continued to admit her negligence in bumping Ms. Gaines's vehicle. On the other hand, Ms. Gaines had to admit that she did not know whether or not she was injured while at the scene of the accident. She also had to admit that she was able to drive her vehicle away from the scene of the accident, absent assistance. Regardless, Ms. Gaines felt that she received an injury to her neck as a result of this accident, for which she ultimately incurred Seven Thousand Nine Hundred Sixty-Six Dollars and Fifty-Six Cents ($77,966.56) in reparative medical expenses.

In the alternative, Ms. Campbell was able to show the jury that Ms. Gaines's neck issues had been in existence since 1987, and, in fact, were still in existence at the time of the January 8, 2010 accident. She was also able to show that Ms. Gaines subsequently injured her neck while working in her yard, on May 4, 2010. Indeed, it was made apparent that this post-existing injury occurred approximately five months after the January automobile accident in question, and approximately twelve months prior to Ms. Gaines having surgery performed on her neck. That surgery was ultimately performed on June 7, 2011, wherein doctors removed a bone spur, or bony overgrowth,

that was irritating nerves in Ms. Gaines's neck. In other words, the surgery that occurred seventeen months after the subject automobile accident was designed to eliminate a non-acute problem. Fortunately, this surgery was successful, and Ms. Gaines's complaints ultimately resolved.

Regardless, Ms. Campbell suggested that the jury award Ms. Gaines an amount that corresponded to her emergency room bill. Indeed, that emergency room bill totaled Three Thousand Nine Hundred Forty-One Dollars ($3,941.00). The jury then deliberated, wherein they returned a verdict for that amount.

Thereafter, Ms. Gaines requested a new trial. The Circuit Court then granted this request, pursuant to the Thirteenth Juror Doctrine. Indeed, the Circuit Court's ruling was grounded upon a series of perceived trial errors which, in its opinion, collectively warranted the granting of this new trial.

Upon receipt of the Circuit Court's Order, Ms. Campbell respectfully filed an appeal with the Court of Appeals. This filing was based upon Ms. Campbell's belief that the Circuit Court misapprehended the laws it set forth as justification for granting a new trial. Indeed, Ms. Campbell felt that these misapprehensions caused the Circuit Court to err in its granting of a new trial. The Court of Appeals, after reviewing the briefs and hearing oral arguments, unanimously determined that the Circuit Court had erred in granting a new trial. As such, the Court of Appeals, in an unpublished opinion, reversed the Circuit Court.

## I. PETITIONER PROVIDED NO JUSTIFICATION AS TO WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

A review by our Supreme Court is not a matter of right. The Court will only grant a review if the petitioner can demonstrate evidence of one of the following: a novel question of law;

dissent in the decision of the Court of Appeals; evidence that the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; direct involvement of a substantial constitutional issue; a federal question in the decision of the Court of Appeals which conflicts with a decision of the United States Supreme Court; and/or a special or important reason exists that requires review.

The petitioner failed to identify any of the above issues. This is because, frankly, the decision of the Court of Appeals was an unpublished opinion that contained no novel question of law; involved no dissent within the Court of Appeals; in no way conflicted with any decision of the Supreme Court; contained no constitutional issue; involved no federal question; and, contained no special or important rationale for review.

In essence, the petitioner has requested a Supreme Court audience, despite her inability to provide any rationale for the same.

## II. COUNTER-STATEMENT OF THE CASE

### A. Background Facts and the Circuit Court's Order

On January 8, 2010, Ms. Gaines and Ms. Campbell were involved in the automobile accident which gave rise to this lawsuit. That accident resulted in very little visible damage to either involved vehicle. (R. pp. 101-106; R. p. 191, line 12-p. 194, line 12; R. p. 241, line 17-p. 242, line 22; R. p. 338, lines 3-22; and, R. p. 154, line 5-p. 156, line 2) The photographs did not suggest a thirty-five to forty-five mile per hour collision. (R. pp. 101-106) **Furthermore, during the trial, Ms. Campbell did not testify that she hit Ms. Gaines at that speed.** (R. p. 159, lines 7-24) In fact, Ms. Gaines told the investigating police officer that she did not know if she were injured while at the scene of the accident. (R. p. 167, lines 21-24; R. p. 156, lines 3-12; and, R. p. 243, line 23-p.244, line 6) Indeed,

after the conclusion of the officer's investigation, both Ms. Gaines and Ms. Campbell drove their respective vehicles away from the scene. (R. p. 198, line 23-p. 199, line 1; and, R. p. 244, lines 13-23)

Shortly after the accident, Ms. Gaines went to the emergency room. While there, her pulse rate was checked and found to be seventy-six. (R. p. 541, line 2-p. 543, line 16) Her respiratory rate was checked and found to be sixteen. (R. p. 541, line 2-p. 543, line 16) Indeed, her pulse rate was lower and her respiratory rate was equal to measurements taken during a visit with her doctor, a few weeks before the accident. (R. p. 541, line 2-p. 543, line 16) While at the hospital, Ms. Gaines complained of headaches, neck pain, nausea, and low back pain. However, she did not present with an altered state of consciousness, and she denied any dizziness or loss of consciousness as a result of the accident. Indeed, her neurological system was examined and noted to be normal. Her neck was found to be supple and without any spasms or stiffness. She did report pain when moving her neck, with that pain being characterized as mild. Thereafter, no blood was found in the tissues of her neck. On the other hand, she did report that her neck was tender to touch. Ultimately her neck was x-rayed, and the radiologist determined that she had severe degenerative changes in the same; however, no acute abnormalities were noted. **More importantly, she did not complain of right arm pain.** (R. p. 543, line 17-p. 552, line 13)

After the above examinations were completed, Ms. Gaines was released from the hospital. Twenty days thereafter, she went to her family physician's office to receive blood work. During that visit, she made no request to see her doctor. (R. p. 552, line 21-p. 553, line 13)

On February 8, 2010, Ms. Gaines returned to her doctor, wherein her complaints were set forth in the following order: 1) hot flashes; 2) skin problems; 3) moles; and, 4) right arm pain. The doctor then performed an exam, after which she felt there was a problem in Ms. Gaines's arm, which correlated to a pinched nerve at the C5-6 level. (R. p. 553, line 14-p. 558, line 10)

As a result, Ms. Gaines was referred to receive an MRI. Please note that this MRI was ordered as a result of Ms. Gaines's complaint of right arm numbness and weakness. The radiologist who interpreted this MRI found that Ms. Gaines suffered from severe bone spurring, a congenitally small spinal canal, and severe spinal canal stenosis. (R. p. 558, line 11-p. 567, line 7)

Ultimately, the findings of this MRI resulted in Ms. Gaines's referral to a neurosurgeon. Indeed, that neurosurgeon placed her into physical therapy. In fact, on May 4, 2010, Ms. Gaines was at physical therapy, wherein she reported that she had been doing better, but had developed soreness in her shoulder and neck after putting out mulch over the weekend. (R. p. 484, line 6-p. 485, line 16) Thereafter, On June 7, 2011, Ms. Gaines underwent surgery to her neck, **so as to have the bone spur that was pinching her nerve removed.** (R. p. 431, line 24-p. 432, line 5; and, R. p. 434, lines 1-18) That spur, by all accounts, existed long before the automobile accident in question occurred. Indeed, once the bone spur was removed, Ms. Gaines's symptoms ceased to exist. (R. p. 563, line 4-p. 566, line 1; and, R. p. 180, lines 13-15)

Despite the above, Ms. Gaines set forth an alternate version of the facts.

Ms. Gaines testified that the impact to her automobile was as if a bomb had gone off. (R. p. 166, lines 10-18) In fact, she told the jury that the impact was so significant that it caused her to be knocked out. (R. p. 166, lines 10-18) Ms. Gaines did concede that she told Ms. Campbell that she did not know whether she was injured, while at the scene of the accident. (R. p. 166, line 25-p. 167, line 1) Furthermore, Ms. Gaines agreed that she said the same to the officer who investigated the accident. (R. p. 167, lines 21-24) Thereafter, upon completion of the police officer's investigation, she drove from the scene of the accident, to her home. (R. p. 198, line 23-p. 199, line 1) Thereafter, she presented to the emergency room, wherein she was ultimately released. (R. p. 168, line 21-p. 170, line 3) Ms. Gaines then waited for a period of time before seeking additional medical treatment, and, ultimately, surgery.

Once she received surgery, she experienced no recurrence of the symptoms in existence prior to the same. (R. p. 180, lines 13-15)

During her cross-examination, Ms. Gaines was forced to admit that, when given photographs of her vehicle during her deposition, it was evident that the same suffered very little visible damage. (R. pp. 101-103; R. p. 191, line 12-p. 194, line 12; R. p. 241, line 17-p. 242, line 22; R. p. 154, line 5-p. 156, line 2; and, R. pp. 104-106) She was then forced to concede that she did not mention right arm problems while at the emergency room, shortly after the accident. (R. p. 169, lines 13-19; R. p. 200, lines 2-16; and, R. p. 543, line 17-p. 556, line 4; and, R. p. 562, line 5-p. 563, line 7) Ms. Gaines then had to confirm that during her deposition testimony, she stated that she had never been treated for neck pain, prior to the automobile accident in question. (R. p. 202, lines 1-4) Furthermore, she was forced to acknowledge that during her direct examination, she told the jury that prior to the accident, she had only been to the Piedmont Orthopaedic Clinic with regard to a shoulder problem. (R. p. 202, lines 5-9) Furthermore, she had to admit that she was wrong during her direct examination, wherein she told the jury that she had never been on disability with regard to a neck issue. (R. p. 164, lines 18-22; and, R. p. 202, lines 10-12)

Again, it is important to note that the accident in question took place on January 8, 2010. Unfortunately, and in contrast with Ms. Gaines's prior testimony regarding her neck, the medical records presented to the jury provided documentation as to the objective reality and history of Ms. Gaines's neck problem. For example, Ms. Gaines was at a hospital engaging in neck therapy treatments as early as July 23, 1987. It was then made apparent that she was on disability as a result of a neck injury on July 24, 1987. She then filled out a health questionnaire in 1999, wherein she indicated that she had arthritis in her spine. On July 23, 1999, she told a doctor that she had medical history that included a neck injury. On June 17, 2002, she filled out a document at another physician's office,

wherein she indicated that she was suffering from pain in her joints, pain in her bones, slowing of her joints, arthritis, and stiffness. She was then at another medical provider's office on August 25, 2006, wherein she stated that she had injured her shoulder two weeks earlier, and, since that time, had experienced trouble moving her arm. She also noted that she was experiencing pain in her neck on that date. On August 29, 2006, she specifically told a doctor that she was having pain in her neck. On August 30, 2006, she was at physical therapy, wherein she reported a history of left shoulder pain and neck pain. On September 1, 2006, she reported having neck tightness. On September 7, 2006, she reported that her neck tightness was not getting better. On September 13, 2006, she reported that her neck pain was better. However, she noted that this improvement could have been due to the fact that her problems were primarily occurring in the mornings. Then, on September 18, 2006, she reported that her neck was tight. On October 11, 2006, she indicated that her neck was better. Indeed, on October 13, 2006, she reported that her shoulders were not too bad, until the point at which her neck would become stiff. Thereafter, on October 18, 2006, she was still complaining of cervical spine pain. On April 5, 2007, she filled out a document wherein she specifically stated that her medical history included neck problems. On April 5, 2007, she began physical therapy for a second time, wherein she indicated a medical history positive for neck problems. On August 31, 2009, she told a physician that she was experiencing pain and stiffness, in part, in her cervical spinal muscles. (R. p. 194, line 10-p. 220, line 23) On August 27, 2009, she told a different physician that she was taking Cymbalta and Tylenol Arthritis. On September 11, 2009, she was taking medications with applications regarding nerve and muscle problems, a medication for arthritis, and she had added an opiate-type of pain medication. On November 30, 2009, she continued to take Tylenol Arthritis, Ultram, which is a synthetic opiate, and Cymbalta. (R. p. 532, line 13-p. 540, line 18) She was then involved in the accident which gave rise to this lawsuit on January 8, 2010.

Furthermore, in the course of her deposition, Ms. Gaines stated that nothing had happened to her between the time of the accident on January 8, 2010, and the time of her July 5, 2012 deposition, which could have caused her additional problems with regard to her neck. (R. p. 200, line 24-p. 201, line 11; and, R. p. 483, line 21-p. 484, line 5) However, it is abundantly clear that she re-injured her neck on May 4, 2010. Indeed, at that time, she specifically told her physical therapist that her "Right arm has been doing better, though sore in shoulder and neck since putting out mulch over the weekend." (R. p. 484, line 6-11) In other words, it was readily apparent that her testimony was incorrect. Just as important, one of Ms. Gaines's expert witnesses, Dr. Harding, unequivocally stated that the mulching incident could have created the need for Ms. Gaines's neck surgery. (R. p. 566, lines 11-16; and, R. p. 567, lines 8-10)

Dr. Mina, another expert provided by Ms. Gaines, testified that to a reasonable degree of medical certainty, the automobile accident caused Ms. Gaines to require an operation to **remove the bone spur**. (R. p. 443, line 22-p. 444, line 5) This surgery took place on June 7, 2011. However, this conclusion was made after Dr. Mina admitted that she did not necessarily agree with radiologists' reports. (R. p. 420, lines 11-17) She then questioned the reliability of the emergency room records. (R. p. 455, line 12-p. 459, line 3; R. p. 486, line 1-p. 490, line 6; and, R. p. 496, line 1-p. 498, line 22) Indeed, Dr. Mina implied that her examination would have been better than an emergency room doctor's examination. (R. p. 491, line 16-p. 498, line 23) She then testified that there existed no possibility that the mulching incident could have precipitated Ms. Gaines's need for surgery. (R. p. 497, line 9-p. 498, line 1) This testimony was given despite the fact that the mulching incident occurred five months after Ms. Gaines's accident with Ms. Campbell, and twelve months prior to her date of surgery.

Dr. Harding, Ms. Gaines's second expert, also offered testimony. Unfortunately, most of the same was in direct contradiction with Dr. Mina's testimony. For example, Dr. Harding readily conceded

that an emergency room physician, in addition to a family physician, would have easily been able to diagnose a pinched nerve. (R. p. 556, line 1-p. 558, line 10) Furthermore, Dr. Harding did not feel the need to independently read radiological films. (R. p. 551, line 9-p. 552, line 13) Just as important, Dr. Harding did not question an emergency room's ability to accurately gather information and/or perform a proper evaluation of a patient. (R. p. 541, line 2-p. 542, line 13) In fact, Dr. Harding, in contrast with Dr. Mina, confirmed that Ms. Gaines's need for surgery could have been created by the mulching incident. (R. p. 566, line 21-p. 568, line 3)

At the trial's conclusion, Ms. Campbell asked the jury to return a verdict in favor of Ms. Gaines. However, she suggested that the verdict be limited to the amount of the emergency room bill, as that bill was the only damage that could have been proximately caused by any action of Ms. Campbell. (R. p. 354, lines 7-18) That emergency room bill totaled Three Thousand Nine Hundred Forty-One Dollars and Zero Cents ($3,941.00). Ms. Gaines, on the other hand, requested that the jury award medical bills in the amount of Seventy-Seven Thousand Nine Hundred Sixty-Six Dollars and Fifty-Six Cents ($77,966.56). (R. p. 330, lines 4-23) That sum represented the medical expenses Ms. Gaines felt she had incurred as a result of the accident with Ms. Campbell. Ms. Gaines also requested that the jury award her for damages in excess of her medical bills, as a result of the personal injuries that she felt resulted from the accident. (R. p. 331, lines 5-24) The jury then deliberated, and ultimately returned a verdict for the emergency room bill only. ( R. p. 374, lines 12-25; and, R. p. 93)

Thereafter, Ms. Gaines made a motion for a new trial, or, in the alternative, a new trial nisi additur. The formal hearing with regard to that request took place on August 15, 2013. At the conclusion of that hearing, the Circuit Court issued an oral ruling granting a new trial based upon the Thirteenth Juror Doctrine. (R. p. 408, line 5-p. 409, line 6) The Court's formal Order was executed on September 18, 2013. Again, the Circuit Court's Order granted the new trial pursuant to the

Thirteenth Juror Doctrine. The rationale set forth in the Court's Order was rooted in its finding that Ms. Campbell had committed three interconnected legal errors during the course of the trial. Indeed, the Court felt that the cumulative effect of those errors was such that the only competent evidence admitted during the trial demanded a different result than the jury's verdict directed. (R. pp. 89-92)

B. Ms. Campbell's Appeal to the Court of Appeals

Following the entry of the Circuit Court's Order, Ms. Campbell filed a Notice of Appeal, after which the case proceeded to the Court of Appeals. In pertinent part, Ms. Campbell's appeal addressed the misapplications of law contained in the Circuit Court's formal Order granting a new trial via the Thirteenth Juror Doctrine. In particular, Ms. Campbell argued that the Circuit Court misunderstood the legal standards with regard to the pitting of witnesses, the requirements for cross-examining expert witnesses, and the rules associated with personally addressing jurors. Collectively, these legal misapprehensions caused the Circuit Court to misunderstand the facts elicited during trial. (R. pp. 22-47 and R. pp. 65-85)

Following oral arguments, the Court of Appeals unanimously concluded that the Circuit Court had erred in its application of the above principles of law. In a deferential ruling, the Court of Appeals determined that these misapprehensions of law led the Circuit Court to an incorrect perception of the facts, which ultimately caused the same to erroneously grant a new trial. (R. pp. 12-21)

## III. LAW/ANALYSIS

A trial court may appropriate Rule 59 and grant a new trial absolute, or it may invoke the Thirteen Juror Doctrine, to the same end. The Court of Appeals properly set forth the different standards associated with these methods for granting new trials. Indeed, a new trial absolute is only

warranted when a verdict is so grossly inadequate or excessive so as to shock the conscience of the court, and clearly indicate that the verdict reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive.[1] The Thirteenth Juror Doctrine can be applied if a court finds that the verdict is unsupported by the evidence.[2] An order granting a new trial absolute requires the court to explain its rationale for granting the same.[3] Indeed, that explanation must provide a compelling reason for invading the jury's province.[4] On the other hand, application of the Thirteenth Juror Doctrine warrants no explanation.[5] However, if an explanation is set forth, the same must be reviewed to determine if the conclusions of the court were controlled by errors of law, or if the conclusions were wholly unsupported by the evidence.[6]

In the present case, the Circuit Court chose to grant a new trial based upon the Thirteenth Juror Doctrine, and it set forth its legal reasoning for doing so. Indeed, the Court presented three legal issues for which it felt the cumulative result was a verdict inconsistent with the evidence.

In particular, the Circuit Court found the following: Ms. Campbell's cross-examination of Dr. Mina improperly pitted witnesses; Ms. Campbell's cross-examination of Ms. Gaines's expert witnesses had to be based upon a "reasonable degree of medical certainty, and more probably than not" standard; and, Ms. Campbell improperly addressed and appealed to the jury during closing arguments. As a result, the Circuit Court felt that the only competent evidence set forth during the

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[1]*O'Neal v. Bowles,* 314 S.C. 525, 527, 431 S.E.2d, 555, 556 (S.C. 1993)
[2]*Folkens v. Hunt,* 300 S.C. 251, 254, 387 S.E.2d, 265, 267 (S.C. 1990)
[3]*Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 61, 427 S.E.2d. 673, 676 (S.C. 1993)
[4]*Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 61, 427 S.E.2d. 673, 676 (S.C. 1993)
[5]*Vinson v. Hartley,* 324 S.C. 389, 403, 477 S.E.2d 715, 722 (S.C. App. 1996)
[6]*Lane v. Gilbert Constr. Co. Ltd,* 383 S.C. 590, 597-600; 681 S.E.2d 879, 883-884 (S.C. 2009)

course of the trial warranted a verdict in excess of the amount returned by the jury.

The Court of Appeals first addressed the pitting issue associated with Ms. Campbell's cross-examination of Dr. Mina.

It focused on the following statements:

> Q. Would you agree that her history was not true, with regard to what she told me in her deposition?
> A. That particular answer appears to not have been true.
> ....
> Q. And again, when you compare that along with these other records, does it appear that what the history Ms. Gaines gave me in her deposition would appear to be incorrect and/or false?
> A. Yes.
> ....
> Q. But if she's capable of telling someone, while under oath, I've never had a problem with that neck – and we've seen a discrepancy with her saying I was knocked out in the accident versus saying to the ER I was never knocked out – is it possible that she could be giving histories to fit whatever she wanted to fit? It is possible?
> A. Anything is possible, but unlikely.

The Court of Appeals determined that pitting did exist in this portion of Dr. Mina's cross-examination. However, this finding was qualified by the Court's acknowledgment that the "line of questioning was markedly different from a situation in which a witness is asked to pit her own credibility against that of another testifying witness." Indeed, it ultimately found the pitting to be harmless, as Dr. Mina was able to state that Ms. Gaines was a reliable historian, based on Ms. Gaines having told Dr. Mina the truth regarding her long neck history, when she was not under oath.

When finding issues with the Court of Appeals, Ms. Gaines presented very selective portions of the trial transcript, the Circuit Court's Order, and the ruling from the Court of Appeals.

For example, Ms. Gaines's argument with regard to "pitting of witnesses" was stripped of necessary context. The remaining portion of the "improper" cross-examination, is set forth below:

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6 Q. Does it appear that when she was being deposed,
7 - - and we were asking about her history while under
8 oath, that she was telling us that she had been
9 knocked out as a result of this accident?
10 A. Yes, sir, I believe that's referred to in my office
11 notes as well.
12 Q. So she was telling you the accident was severe enough
13 to have knocked her out; is that correct?
14 A. Right.
15 Q. Which would give you some indication of one heck of a
16 mechanism of injury, a good flexion extension type
17 injury - -
18 A. Yes.
19 Q. - - if she got hit enough to - -
20 A. In an - - in an impact to the head, yes.
21 Q. Yeah, a pretty good impact of the head.
22 A. Yes.
23 Q. If we could, going to the emergency room records on
24 the date of this accident, does it appear - - and I've
25 highlighted it. Does it appear that she never told

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1 them that she was knocked out? In fact, she said she
2 had no altered level of consciousness, denied
3 dizziness, and denied being knocked out? And I know
4 I'm using the lay people terms.
5 A. Yes, although when they say no altered level of
6 consciousness, I'm not sure if that's something that
7 the patient is saying that she is not altered now or
8 wasn't altered at the time of the accident. That it
9 doesn't specify.
10 Q. Wouldn't you think that if a patient had been knocked
11 out as a result of an automobile accident, that she
12 would report an injury to the police officer and
13 report to the emergency room that, I have been knocked
14 out?
15 A. It's possible - -

25 Q. Doctor, the question again would be, does it not

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1 strike you as extremely surprising that someone who
2 had been hit so hard that they were knocked out failed
3 to tell the police officer they were injured and fails

4 to tell the hospital that they were knocked out?
10 WITNESS CONTINUES:
11 A. If there was a significant head injury, then it might
12 not be unusual. Because the patient right after the
13 accident, right after a blow to the head, might be
14 confused.
15 Q. I understand. But by the time she has gotten to the
16 emergency room, she's specifically denying being
17 knocked out.
18 A. But again she could be confused at this point in time.
19 This is immediately after the accident.
20 Q. Don't' you think if she's able to tell you that she
21 presents following a motor vehicle collision, the
22 onset was just prior to arrival, the collision was a
23 rear impact, the patient was the driver, there were
24 safety mechanisms including seat belt - - that if she's
25 able to give that much detail, that she probably

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1 should be able to remember, if she knows what's
2 hurting her, that she had been knocked out? I mean,
3 it would be very unusual to have that much detail and
4 not remember being knocked out.
5 A. Well, but is this the patient herself giving the
6 information? Because according to this, History
7 Source says "patient and family." So a lot of this
8 may be obtained from family members
9 Q. But the bottom line is, wouldn't you think that if the
10 family members were there and she had been knocked
11 out, that someone would have told the hospital?
12 A. Again, there might have been confusion right after the
13 accident.
14 Q. But nonetheless, this hospital note makes no mention
15 of her being knocked out. In fact, it specifically
16 denies that she was knocked out.
17 A. That's - -
21 A. That's what the note says. Where the source of that
22 information comes from, I don't know.
23 Q. Okay, so at least with regard to what was stated on
24 the day of this accident when she goes to the
25 emergency room, the opposite of what she told us in

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1 the deposition is placed in these notes?
2 A. That's true. Again, I question the reliability of

3 this, this history, though.

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2 Q. So she was doing better until she started putting out
3 the mulch the weekend before, and now she's got a
4 flare-up; is that correct?
5 A. I'm sorry. I must be misunderstanding the timing of
6 something, because this implies to me that she has
7 some soreness in the shoulder and neck but that her
8 right arm at this point is feeling better.
9 Q. Does it say, "Right arm has been doing better, though
10 sore in shoulder and neck since putting out mulch over
11 the weekend?"
12 A. It is.
13 Q. Okay. So does it appear that she started having
14 soreness in her shoulder and her neck after putting
15 mulch out over the weekend?
16 A. It - - it does say that.
17 Q. And by the very act of putting out mulch, when you
18 have a spur to the extent that you have at C5-6, you
19 could inflame a nerve enough where you ultimately end
20 up doing surgery to fix it?
21 A. Well, you could. But if that were the case, then why
22 wouldn't the right arm be doing worse?
23 Q. Because - -
24 A. Because that would be where the symptoms would come
25 from, from an inflamed nerve.

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1 Q. Except if we go and we look back under those - - under
2 that theory, then why didn't she have radiating pain
3 at the hospital the day of the accident?
4 A. I can't - - I wasn't there the day of - -
5 Q. But they don't describe - -
6 A. At the hospital, - -
7 Q. - - radiating pain.
8 A. - - so I can't speak to that.
9 Q. But, the records that we saw, she doesn't refer to
10 radiating pain going into her right arm at the
11 hospital; did she?
12 A. Well, I'd have to look back at them to see.
13 Q. Can we do that?
14 A. There's no specific mention made of arm pain here.
15 Q. In fact, if we actually go through the ER records,
16 she's not complaining of arm pain. She's not

17 complaining of radiating pain. She's not complaining
18 of chest pain. She's not complaining of low back
19 pain. She's essentially complaining of head and neck
20 pain; is that correct?
21 A. Correct.
22 Q. So if there was a C - - a C5-6 issues, it
23 wasn't presenting itself at the emergency room; was
24 it?
25 A. Well, it's not mentioned in these notes. But again,

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1 here I'm questioning the reliability of this, this
2 history, because here it doesn't even talk about the
3 loss of consciousness that she had.
4 Q. It actually says the exact opposite, she denied having
5 a loss of consciousness; does it not?
6 A. Well, other records state - -
7 Q. It's not silent. It says it.
8 A. Other records state that she did, and that she clearly
9 had a head injury, and, therefore, she was likely to
10 have some confusion at the time.
11 Q. Is it your testimony, Doctor, that you think that an
12 emergency room doctor would hear that someone's been
13 involved in an automobile accident, claiming headache,
14 and then not check to see if they had a loss of
15 consciousness? Is that your - -
16 A. No, that's - -
17 Q. Is that your testimony?
18 A. That's not my testimony.
19 Q. Okay, so if they come in and they're presenting or
20 they're saying, I've got a headaches and I've been
21 involved in an automobile accident, one of the first
22 things they're going to check, and they obviously did,
23 because they went through a litany of question, are
24 you feeling different, are you having nausea, are you
25 - - were you knocked out? And all of these occasions,

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1 she said no; is that correct?
8 Then let's read them together.
16 Q. Does it state, Doctor, that her chief complaint was
17 that she was rear ended this p.m.? Patient complains
18 of low back pain and headache. Patient complains of
19 nausea also.
20 A. I'm sorry. I'm on a different page, evidently.

21 Q. Are you not on the ER visit?
22 A. This says ED visit. Where on the page, are we?
23 Q. Are you not at the History of Present Illness?
24 A. Okay, can you read what you were reading again?
25 Q. Okay, just above that, Chief Complaint. "Rear ended

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1 this p.m., complains - - patient complains of low back
2 pain and headache, complains of nausea also." Is that
3 what it says at the top?
4 A. Yes.
5 Q. And does it go on to say, "The patient presents
6 following motor vehicle collision. The onset was just
7 prior to arrival. The collision was rear impact. The
8 patient was the driver. There was a safety mechanism,
9 including seat belt. Location, head and neck. The
10 degree of pain severe. The degree of bleeding is
11 none. Risk factors consist of age. Therapy today,
12 none. Associated symptoms - - nausea, headache.
13 Denies shortness of breath. Denied chest pain.
14 Denied abdominal pain. Denies vomiting. Denies back
15 pain. No altered level of consciousness. Denies
16 dizziness. And denies syncope." Which means, in lay
17 people's terms, denied being knocked out. Is that
18 what the document says?
19 A. That's what this says, but again we don't know if this
20 is coming directly from the patient or from a family
21 member who may not have had all the information,
22 because up here the history of source says patient and
23 family.
24 Q. Which would mean you would get more accurate
25 information, not less?

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1 A. I'm sorry?
2 Q. You would get more accurate information, not less.
3 Would that be correct?
4 A. No, not necessarily.
5 Q. So two heads are not better than one?
6 A. Not necessarily.

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5 Q. And even though she was doing better and she had these
6 post-existing events, they couldn't have had anything
7 to do with that surgery?
8 A. I'm sorry. Could you restate?

9 Q. Even though she's had these post-existing events,
10 those could have nothing to do with this surgery?
11 A. I'm sorry. What's a post-existing event?
12 Q. Mulching.
13 A. A pre-existing event?
14 Q. Post-existing, something that took place after the
15 accident. She was mulching and started having trouble
16 again.
17 A. Well, the trouble that she's describing with the
18 mulching does not fit with a C-6 radiculopathy in the
19 upper right extremity.
20 Q. If that's the case, then it doesn't fit with a C-6
21 radiculopathy when she went to the hospital either;
22 does it?
23 A. Well, that's - - again, that's documentation from rrthe
24 emergency room visit, the reliability of which is
25 unclear. And I wasn't there at that time to question

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1 or examine the patient.
2 Q. So as far as you're concerned, the ER doctors are
3 quacks?
4 A. I beg your pardon?
8 Q. You said more - -
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 mean 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. (R. Pp. 455-459; 485-486, and 497-498)

Quite frankly, the Court of Appeals, maintaining deference to the Trial Court, disregarded the above portion of the "argumentative and pitting cross-examination" because the same was proper. Indeed, please recognize that Ms. Campbell's Rule 803(3) statements were fashioned to establish the basis of the expert's testimony, pursuant to Rule 705. Indeed, the examination was designed to probe into the doctor's biases, assumptions, and fairness.

In essence, one can be guilty of "pitting a witness." However, if that pitting results in no prejudice to the opposition, then it is harmless and should be disregarded. See *Burgess v. State,* 329 S.C. 88, 495 S.E.2d 445 (S.C. 1998) and *State v. Benning,* 338 S.C. 59, 524 S.E.2d 852 (S.C. App. 1999) The Court of Appeals saw the harmlessness in Ms. Campbell's line of questioning, and determined that the Trial Court should have had the same conclusion.

The Court of Appeals next reviewed the portion of the Circuit Court's Order wherein the same asserted than an expert witness must be cross-examined based upon the "more probably than not, to a reasonable degree of medical certainty" standard. The Court of Appeals found error in the Circuit Court's conclusion that hypothetical questions were not permitted when cross-examining expert witnesses. As a result of this error, the Circuit Court failed to consider the other possible reasons which could have precipitated Ms. Gaines's need for surgery. Furthermore, the surgery that Ms. Gaines ultimately received simply removed portions of bones from her neck, which were pinching nerves in the same. Indeed, Ms. Gaines's cervical disc was only involved as a means to gain access to those bony problems. Viewed in the proper light, there were numerous reasons for which the jury could have determined that Ms. Gaines might have otherwise needed surgery, including: the progression of her neck disease over time; the lack of impact associated with the automobile accident; Ms. Gaines's lack of symptoms while at the hospital shortly after the accident; Ms. Gaines's failure to seek treatment for four weeks after the accident; the improvement Ms. Gaines's neck was exhibiting until she mulched her yard; and/or, the fact that Ms. Gaines simply aged between the January 8, 2010 automobile accident and the June 7, 2011 surgery.

Finally, the Court of Appeals reviewed the Circuit Court's determination that Ms.

Campbell violated rule 43(i) during her closing argument. The Court of Appeals determined that only one statement made by Ms. Campbell's counsel "could possibly be construed as 'unfairly calculated to arouse passion or prejudice.'" That statement is as follows: **"Greenville County jurors are going to be fair and decent to [him]."** Again, the Court of Appeals was clearly being deferential in its analysis, as the above statement could easily have been evaluated with the benefit of full context. Indeed, in his opening statements, Ms. Campbell's counsel stated, in pertinent part: **"In the end, what we're asking you to do is come back that with a verdict that is fair for Ms. Gaines. It is her day in Court. She has every right to be here, because we have a dispute. We also ask you to be fair and listen to the evidence and be fair to my client, Ms. Campbell. We are just asking you to be fair to both parties, because it is my client's day in Court also, and when you do so, you will have done your job, and that's all we're asking."** In his closing argument, Mr. Campbell's counsel stated, in pertinent part, "**But let me start with this. I request jury trials in Greenville County because, when I do, I know that my Greenville County juries are going to be fair and decent to me."** Counsel for Campbell further stated, **"My job is to present you with the evidence. Your job, as I said in opening, is to come back with a verdict that is fair for Ms. Gaines. Because, as you have heard from Joyce, (Ms. Cambpell) Joyce caused this accident. And you have to come back with a verdict for the emergency room bill, (you) just have to. She (Ms. Campbell) hit her (Ms. Gaines). She (Ms. Gaines) has every right to be checked out. But when you are checked out and there is no evidence of pinching, and a month later you start having evidence of pinching, is that fair to say, defense team, pay for those problems that had been coming along for years, and were going to happen because you're getting older anyway?"**

Given this context, it becomes readily apparent that the Court of Appeals was affording proper deference to the Circuit Court when it found the statement, "Greenville County jurors are going to be fair and decent to [him]" could "possibly be construed as 'unfairly calculated to arouse passion or prejudice.'" Regardless, the Court of Appeals ultimately found this statement harmless, given the instructions provided to the jury by the Circuit Court. This ruling was applied in *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220; 317 S.E.2d 748, 756 (S.C. App. 1984). It was also agreed upon in *State v. Hamilton,* 344 S.C. 344, 362-364, 543 S.E.2d 586 (S.C. App. 2001). Indeed, the Supreme Court determined that errors in closing arguments, if harmless, will not cause reversal, even if the arguments risk constitutional errors. *United States v. Hasting,* 461 U.S. 499, 508-509, 103 S.Ct. 1974, 76 L.Ed.2d 96. In essence, the ruling of the Court of Appeals was correct.

Again, when finding fault with the Court of Appeals, Ms. Gaines cited very selective portions of the trial transcript, the Circuit Court's Order, and the ruling from the Court of Appeals. Indeed, Ms. Gaines stripped away a great deal of context by providing only small portions of the whole, thereby portraying a skewed image of the manner in which this trial was conducted.

For example, Ms Gaines also cited the following statements: "**And you're bright enough and have brains enough to know 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?'"** Given the recurrent pattern of arguments absent context, and in the interest of brevity, please review Appellate's Reply Brief. (R. pp. 80-82) Again, these statements, viewed in proper context, were clearly not calculated to unfairly arouse the jury's passion or

prejudice. The Court of Appeals, given the benefit of context, properly came to the same conclusion.

Ultimately, the Court of Appeals recognized that the Circuit Court's combined legal misapprehensions engendered an inaccurate perception of the competent evidence presented during the trial of the case. The aggregate effect of this misapplication of law and subsequent misinterpretation of evidence resulted in the Circuit Court's erroneous granting of a new trial. Indeed, the Court, by virtue of its errant conclusion, did not consider the issues which were made readily apparent throughout the trial. Those issues included the progression Ms. Gaines's neck disease over time; the lack of impact associated with the automobile accident; Ms. Gaines's lack of symptoms while at the hospital shortly after the accident; Ms. Gaines's failure to seek treatment for four weeks after the accident; the improvement Ms. Gaines's neck was exhibiting until she mulched her yard; and/or, the fact that Ms. Gaines simply aged between the January 8, 2010 automobile accident and the June 7, 2011 surgery. Again, please remember that the surgery Ms. Gaines received was not designed to resolve an acute issue; rather, that surgery simply removed a bony overgrowth that was pinching a nerve in her neck, and causing issues with her right arm.

### A. The Court of Appeals Correctly Ruled that the Circuit Court Erred in Granting Ms. Gaines's Request for a New Trial, Pursuant to the Thirteenth Juror Doctrine.

The Court of Appeals was presented with an Order from the Circuit Court, wherein the same granted a new trial pursuant to the Thirteenth Juror Doctrine. In that Order, the Circuit Court provided an explanation as to the three legal reasons for which it granted the new trial. The Court of Appeals, performing its duty as a court of review, deferentially evaluated the rationale

set forth in the Circuit Court's Order.

Thereafter, the Court of Appeals unanimously concluded that the Circuit Court's Order had been controlled by errors of law. As such, the Court of Appeals properly reversed the Circuit Court's Order.

### B. The Court of Appeals had to Determine Whether the Circuit Court Misapprehended the Law when Granting Ms. Gaines's Request for a New Trial, Pursuant to the Thirteenth Juror Doctrine, and Correctly Determined that the Circuit Court Misapprehended the Law and, Therefore, the Facts, in so Doing.

Ms. Gaines cited three cases in support of her contention that appellate review of an order granting a new trial, pursuant to the Thirteenth Juror Doctrine, must be limited to a consideration of whether evidence exists to support the trial court's order. With regard to this issue, Petitioner attempts to portray a confused Court of Appeals, as each contention is a misrepresentation of the law. Indeed, each case cited supports the opposite conclusion. Unequivocally, reviewing courts must evaluate lower court orders for errors of law, and reverse those orders if errors are found.

For example, the first case cited is *Lane v. Gilbert Const. Co., Ltd,* 383 S.C. 590, 681 S.E.2d 879 (S.C. 2009). *Lane* specifically reviewed the Trial Court's Order for legal error. After finding none, it upheld the Order. The second case cited was *Norton v. Norfolk Southern Ry. Co.,* 350 S.C. 473, 567 S.E.2d 851 (S.C. 2002). *Norton* specifically reviewed the Trial Court's order for legal error. Thereafter, it found a legal error, and reversed the Trial Court as a result. The third case cited was *Folkens v. Hunt,* 300 S.C. 251, 387 S.E.2d 265 (S.C. 1990). *Folkens* reviewed the Trial Court's order for legal error. Thereafter, it found none, and upheld the Trial Court's Order.

Appellate courts must review trial court orders granting new trials pursuant to the

Thirteenth Juror Doctrine, so as to determine whether the conclusion reached was controlled by an error of law. The Court of Appeals performed that duty when reviewing *Youmans v. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (S.C. App. 2008). *Youmans* reviewed the Trial Court's Order for legal error. Thereafter, it found legal error, and reversed the Trial Court's Order, as a result. The Supreme Court performed that duty when reviewing *Norton* (the case cited by Ms. Gaines). It searched for legal error, and found the same. As a result, it reversed the Trial Court. The Supreme Court also performed that duty when reviewing *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (S.C. 1992). The Court searched for legal error, found the same, and ultimately reversed the Trial Court. Again, all of the above cases involved the review of a trial court's Thirteenth Juror Doctrine order.

In essence, Ms. Gaines's argument has no merit.

Indeed, Ms. Gaines repeatedly presented statements out of context, wherein she ultimately argued that the Court of Appeals attempted to "second guess" the Circuit Court when issuing its opinion in this case. In reality, and as set forth above, the Court of Appeals was appropriately deferential to the Circuit Court. However, the Court of Appeals must review rulings from lower courts. That review is the function of the Court. If an appellate court finds an error in the ruling of a lower court, it is not second guessing the same. In fact, it is simply performing its duty. Criticizing the Court of Appeals for properly and graciously performing that duty is unjustified.

## IV. Conclusion

Petitioner failed to identify any reason for the Supreme Court to review this matter. That omission substantiates the lack thereof. As such, the petition fails, and a writ of certiorari should

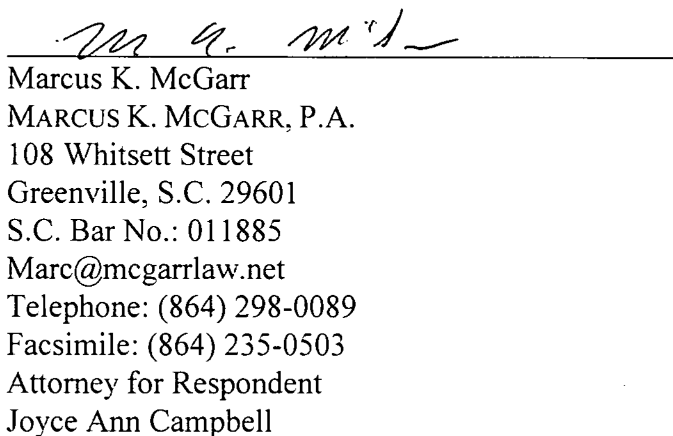
be denied.

Furthermore, the matter at hand is quite clear, despite Petitioner's efforts to suggest the contrary. Indeed, the Circuit Court simply misapplied a series of laws, wherein the result was an errant granting of a new trial. When Ms. Campbell received that ruling, she respectfully asked the Court of Appeals to review the same.

After that review, the Court of Appeals found that the Circuit Court issued an order that was controlled by errors of law. Moreover, in a fittingly unpublished and deferential ruling, the Court of Appeals reversed that errant Order.

In essence, this matter merits no further consideration. For that reason, this Return should mark the quiet resolution of the same.

Respectfully submitted,



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December 16, 2015
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
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S.C. Supreme Court

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App. Case No. 2015-002347
Unpublished Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)

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BARBARA GAINES.......................................................................................Petitioner,

vs.

JOYCE ANN CAMPBELL..............................................................................Respondent.

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**PROOF OF SERVICE**

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I certify that this 16th day of December, 2015, I have served the foregoing Return to Petition for Writ of Certiorari via U.S. Mail, first class postage prepaid, on the following counsel:

John Robert Peace, Esq.
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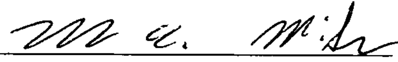
*(Signature on following page)*



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