

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

Betsy L. Spriggs,

Respondent,

v.

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

Appellant.

APPELLANT'S REPLY BRIEF

James B. Lybrand
McDonald, McKenzie, Rubin,
Miller and Lybrand, L.L.P.
Post Office Box 58
Columbia, South Carolina 29202
(803) 252-0500
Attorneys for Appellant

L. Lisa McPherson
Melissa G. Mosier
McWhirter, Bellinger & Associates
119 East Main Street
Lexington, SC 29072
(803) 252-5523
Attorneys for Respondent

John S. Nichols
Bluestein Nichols
Thompson and Delgado
Post Office Box 7965
Columbia, SC 29202
(803) 779-7599
Attorneys for Respondent

RECEIVED

DEC 31 2015

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

COUNTER-STATEMENT OF ISSUE ON APPEAL..... 1

ARGUMENT2

I. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT’S
MOTION FOR A NEW TRIAL BECAUSE THERE IS NO EVIDENTIARY BASIS IN
THE RECORD TO SUPPORT A FINDING OF JUROR MISCONDUCT SUCH THAT
RESPONDENT IS ENTITLED TO A NEW TRIAL2

A. The Trial Court’s Grant of a New Trial Absolute Was Not Based Upon the
Thirteenth Juror Doctrine.3

B. The Record Lacks the Required Showing to Support A Finding Juror
Misconduct Making the Grant of a New Trial an Error of Law..... 4

CONCLUSION 8

TABLE OF AUTHORITIES

<i>Folkens v. Hunt</i> , 300 S.C. 251, 387 S.E.2d 265 (1990).....	2,3
<i>Norton v. Norfolk S. Ry. Co.</i> , 350 S.C.473, 567 S.E. 851 (2002).....	3
<i>South Carolina State Highway Dep't v. Clarkson</i> , 267 S.C. 121, 266 S.E.2d 696 (1979).....	5
<i>Southeastern Mobile Homes, Inc. v. Walicki</i> , 282 S.C. 298, 317 S.E.2d 773 (Ct. App. 1984).....	5
<i>State v. Bantan</i> , 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010).....	6
<i>State v. Carrigan</i> , 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985).....	7
<i>State v. Cooper</i> , 334 S.C. 540, 514 S.E.2d 584 (1999).....	8
<i>State v. Grovenstein</i> , 335 S.C. 347, 517 S.E.2d 216 (1999).....	7
<i>State v. Kelly</i> , 331 S.C. 132, 502 S.E.2d 99 (1998),.....	7
<i>State v. Lemire</i> , 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013).....	5,7
<i>State v. Wasson</i> , 299 S.C. 508, 386 S.E.2d 255 (1989).....	7
<i>State v. Zeigler</i> , 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005).....	2,5
<i>Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.</i> , 384 S.C. 441, 682 S.E.2d 489 (2009).....	6,7
<i>Wannamaker v. Traywick</i> , 136 S.C. 21, 134 S.E. 234 (1926).....	5
<i>Watford v. South Carolina State Highway Dep't</i> , 269 S.C. 130, 236 S.E.2d 558 (1977).....	5

COUNTER-STATEMENT OF ISSUE ON APPEAL

- I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL ABSOLUTE BASED UPON A FINDING THE JURY CONSIDERED MATTERS OUTSIDE OF THE EVIDENCE IN REACHING ITS VERDICT?

In her initial brief, Respondent raised the following counter-statement of the issue on appeal:

DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL ABSOLUTE BASED UPON A FINDING THE JURY CONSIDERED MATTERS OUTSIDE OF THE EVIDENCE IN REACHING ITS VERDICT?

Below is Appellant's response to this counter-statement posed by Respondent.

ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL BECAUSE THERE IS NO EVIDENTIARY BASIS IN THE RECORD TO SUPPORT A FINDING OF JUROR MISCONDUCT SUCH THAT RESPONDENT IS ENTITLED TO A NEW TRIAL

The decision to grant or deny a new trial motion rests within the court's discretion and will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "Where a defeated party seeks a new trial on the basis of juror misconduct, he is required to prove both the alleged misconduct and the resulting prejudice." *State v. Zeigler*, 364 S.C. 94, 98, 610 S.E.2d 859, 866 (Ct. App. 2005).

While the trial court may have exercised its discretion in ordering a new trial absolute, the trial judge did so solely on the basis of "juror misconduct" and not under the power granted to the trial judge by the thirteenth juror doctrine. The court erred in granting a new trial on the basis of juror misconduct because there was no evidence proffered by the Respondent to support a finding that any alleged misconduct occurred. Furthermore even if misconduct occurred, the court did not find the Respondent was in fact prejudiced as a result of the misconduct. The

record fails to reflect the evidentiary showing necessary to grant a new trial based on juror misconduct. Granting the new trial motion on the basis of juror misconduct was error and an abuse of the trial court's discretion.

A. The Trial Court's Grant of a New Trial Absolute Was Not Under Thirteenth Juror Doctrine.

Respondent asserts the trial court exercised its discretion as a thirteenth juror in granting a new trial absolute. Respondent contends that "[a]lthough the trial court did not say it was granting a new trial 'on the facts,' that is necessarily what the court did." (Res. Br. p.6 FN2). Respondent concludes that since a trial judge has the authority to grant a new trial when he or she finds the verdict to be contrary to the evidence, this trial court was proper in granting a new trial absolute. (Res. Br. p.10). This Court should not be persuaded.

The thirteenth juror doctrine has been well established by the South Carolina Supreme Court. "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial on the facts." *Folkens* at 254, 387 S.E.2d at 267. Under this doctrine, the trial court has wide discretion to grant a new trial when it finds as a matter of fact the verdict returned by the jury is contrary to the fair preponderance of the evidence presented at trial. *Norton v. Norfolk S. Ry. Co.*, 350 S.C.473, 481, 567 S.E. 851, 855 (2002).

Respondent moved for a new trial based on two reasons. First, the jury's verdict was perverse as the jurors had taken into account factors outside the scope of evidence when deliberating. Second, the verdict was contrary to the preponderance of the evidence. The Respondent's second reason clearly mirrors the standard used by trial courts in granting a new

trial pursuant to the thirteenth juror doctrine. In its order, however, the trial judge declined to grant the Respondent's motion for a new trial based upon the preponderance of the evidence analysis. Instead, the trial judge expressly found “. . . *that the jury did, in fact, improperly consider matters outside the record in reaching its verdict and further finds that for this reason . . .*” Respondent is entitled to a new trial. [Emphasis Added] (R. p. 4). There is nothing in the court's Order which bases the ruling on the preponderance of the evidence.

Respondent also contends that the trial court was proper in ordering a new trial because “if the amount of the jury's verdict is grossly inadequate or excessive as to be the result of passion, caprice, prejudice, *or some other influence outside the evidence*, the trial judge must grant a new trial.” (Respondent Initial Brief p.7) However, the trial court's order does not address the inadequacy or excessiveness of the verdict whatsoever. The trial court made no finding as to the verdict, except to say it was reached after jurors considered factors outside the scope of evidence. This Court should find the trial court abused its discretion in granting Respondent's motion for a new trial absolute on the grounds of juror misconduct. The thirteenth juror doctrine was not the basis adopted by the trial judge as is clearly shown in the order.

B. The Record Lacks the Required Showing to Support A Finding Juror Misconduct Making the Grant of a New Trial an Error of Law.

Respondent contends that the trial court's finding of juror misconduct was not founded on mere speculation. Specifically, Respondent argues that the finding of juror misconduct was based upon the jurors' note to the trial court (R. p. 77) together with the brevity in returning their verdict. (Respondent Initial Brief p.8). Respondent asserts these circumstances alone bring the allegation of juror misconduct outside the realm of speculation and are sufficient to support a

finding that jurors considered factors outside the scope of evidence when rendering their verdict. This Court should not be convinced.

It is fundamental that a jury must abide by the judge's charge. *Southeastern Mobile Homes, Inc. v. Walicki*, 282 S.C. 298, 302, 317 S.E.2d 773, 775 (Ct. App. 1984). Jurors are presumed to do their duty, and there is a presumption that they have followed their oaths. A court is not justified, except upon clear showing, to hold contrary to these presumptions. *Wannamaker v. Traywick*, 136 S.C. 21, 31, 134 S.E. 234, 238 (1926). South Carolina courts have well established the general rule against review of internal jury deliberation. *State v. Lemire*, 406 S.C. 558, 569, 753 S.E.2d 247, 253 (Ct. App. 2013). This rule is founded on the premise that "the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be made lightly." *Zeigler*, 364 S.C. at 109 610 S.E.2d at 868. To prevent unnecessary inquiry into the jury's deliberation process, the party seeking a new trial on the basis of juror misconduct is required to prove both the alleged misconduct and the resulting prejudice. *Id.* at 108, 610 S.E.2d at 866. If the trial court's reasons for granting a new trial are without evidentiary support, the new trial order is erroneous as a matter of law and must be set aside. *Watford v. South Carolina State Highway Dep't*, 269 S.C. 130, 134-135, 236 S.E.2d 558, 559 (1977); *see also South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 266 S.E.2d 696 (1979).

In *Walicki*, the verdict rendered by the jury clearly contradicted the judge's charge. The trial judge charged the jury that if they determined Walicki was entitled to recover, "she would be entitled to recover [only] the \$4,000.00 down payment which she made." *Walicki* at 302, 317 S.E.2d at 774. A general verdict was returned in favor of Walicki for an amount of \$5,000.00. *Id.* The amount of the verdict returned by the jury in *Walicki* is a clear showing the jury disregarded the judge's charge and did not follow their sworn oath.

By contrast, here the Respondent contends the five questions asked by the jury is a clear indication that jurors had been considering factors outside the scope of evidence during their deliberations prior to sending the note. (Respondent Initial Brief p. 7). However, Respondent has offered no proof such as affidavit(s) or other evidence supporting this conclusion. (R. p. 74). Upon receiving the note, the trial court provided further instructions to the jury. Respondent concedes in her Motion for New Trial that jurors were further instructed as follows:

[T]hat they [the jury] could not base their verdict on sympathy or other facts but that their verdict must be based only on the evidence and testimony presented; that they had heard all the testimony and seen all the evidence that it was going to hear or see; that their questions raised improper matters not in evidence and not to be considered; that the matters were not to be discussed further; that if the matters were, in fact, again raised in deliberations, the foreperson was to report that to the judge; and that they were to continue deliberations based on the testimony and evidence presented. (R. p. 19; pp. 54-57).

Following this instruction, the jury returned a verdict in favor of the Appellant. The foreperson did not provide any indication to the trial court these factors were ever discussed during deliberations following the trial court's curative instruction. (R. pp. 57-59).

Assuming *arguendo* the misconduct did occur during deliberations, every act of misconduct by or affecting the jury does not *ipso facto* warrant the grant of a new trial. *State v. Bantan*, 387 S.C. 412, 423, 692 S.E.2d 201, 206 (Ct. App. 2010); *see also Vestry & Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, 384 S.C. 441, 447, 682 S.E.2d 489, 493 (2009). The party seeking a new trial must show prejudice by the misconduct such that it was denied a full and impartial trial. *Vestry* at 449, 682 S.E.2d at 493. Based on this, the trial court must find the jury was improperly influenced by the misconduct. *Bantan* at 423, 692 S.E.2d at 206. The South Carolina Supreme Court has well established that unless the

misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict. *State v. Grovenstein*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999).

In *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998), the Court held the defendant failed to meet the burden of showing prejudice by misconduct in a death penalty case where although a religious pamphlet concerning God's view of death penalty was present in the jury room, the verdict had not been affected. *Also see State v. Wasson*, 299 S.C. 508, 386 S.E.2d 255 (1989) (stating burden on defendant to show not only error but resulting prejudice from jurors' reading of trial-related newspaper article); *State v. Carrigan*, 284 S.C. 610, 328 S.E.2d 119 (Ct. App. 1985) (holding mere fact that conversation occurred between juror and witness for State did not necessarily prejudice defendant).

When evaluating alleged prejudice of juror misconduct in *Lemire*, the Court held that to conclude that a note from the jury is a sign or indication of prejudice is merely speculative, even if taken in light of a jury's quick deliberation. 406 S.C. at 558, 753 S.E.2d at 253. It also determined that Lemire failed to meet his burden where no other prejudice was identified "beyond speculation about the happenings within the jury room." *Id* at 559, 753 S.E.2d at 253. The court recognized that a variety of factors could attribute to the length of a jury's deliberation, and declined to speculate about what occurred in the jury room. *Id*. Respondent has only provided conclusions based on speculation as to what went on during jury deliberations. No affirmative action was taken by the Respondent to inquire if actual prejudice occurred as a result of juror misconduct during deliberations. Following the verdict, the trial judge expressly asked Respondent if a poll of the jury should be taken. Respondent declined. (R. p. 59). Even if juror misconduct had occurred, the record does not reflect evidence offered by the Respondent sufficient to support a finding that the verdict was prejudiced by the misconduct to such extent as to warrant a new trial.


A curative instruction is generally deemed to have cured any alleged error. In *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 584 (1999), after the solicitor's closing argument made reference to Defendant's failure to testify or present a defense at trial, the trial court charged the jury that Defendant did not have the burden of proving his innocence, and the jury could not consider Defendant's failure to testify in its deliberations. This curative instruction was deemed to have cured any prejudice to the Defendant that may have occurred as a result of the solicitor's comments during closing arguments. *Id.* at 554, 514 S.E.2d at 591. The record reflects that no objection or further request to the trial judge regarding his curative charge given to the jury. (R. p. 57). Based on his observations during the trial proceedings, the trial judge found the jury to be a respectful, attentive group that listened the entire time he delivered his charge. (R. pp. 71-72; p. 75). Absent evidence otherwise, the curative instruction given by the trial court in response to the jury's note should be deemed to have cured any potential or alleged misconduct or prejudice to the Respondent.

CONCLUSION

There is no evidence in the record to support a finding that the jury disregarded the trial judge's curative instruction and considered factors outside the scope of evidence when reaching their verdict. Respondent has not met her burden of proving that any alleged misconduct occurred and that she was prejudiced as a result of any alleged misconduct. Without a clear showing of prejudice as a result of any alleged impropriety, Respondent is not entitled to a new trial on the basis of juror misconduct. The record provides no evidentiary support for the trial judge's order granting Respondent a new trial. This Court should reverse.

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, 2nd FLOOR

COLUMBIA, SOUTH CAROLINA 29202

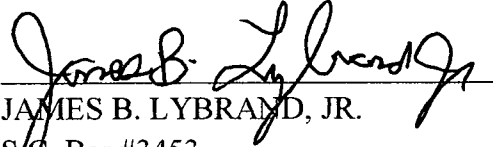
(803) 252-0500

Attorneys for Appellant

Columbia, South Carolina

December 30, 2015

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, 2nd FLOOR

COLUMBIA, SOUTH CAROLINA 29202

(803) 252-0500

Attorneys for Appellant

Columbia, South Carolina

December 30, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning Circuit Court Juge

RECEIVED

DEC 31 2015

SC Court of Appeals

Case No.: 2010-CP-40-07858
Appellate Case Tracking No.: 2015-CP-000789

Betsy L. Springgs, Respondant,

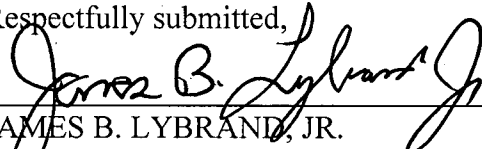
v.

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

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the Final Brief of Appellant and Reply Brief complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,



JAMES B. LYBRAND, JR.
McDONALD, McKENZIE, RUBIN,
MILLER AND LYBRAND, LLP
P. O. Box 58
1704 Main Street – 2nd Floor (29201)
Columbia, SC 29202
P: 803. 223.6156
F: 803. 929-3530
Attorneys for Appellant

December 31, 2015