THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Circuit Case No. 2013-CP-40-7214

Appellate Case No. 2015-001638

Patricia B. Cathey .....Respondent,

v.

Alma Patterson Creighton and William Kinzley ..... Defendants,

Of whom Alma Patterson Creighton is the Appellant.

INITIAL BRIEF OF APPELLANT

TURNER, PADGET, GRAHAM & LANEY, P.A.

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II. WAS THE TRIAL COURT'S ORDER CONTROLLED BY AN ERROR OF LAW WHERE IT RELIED ON INAPPLICABLE CASE LAW AS ITS BASIS TO GRANT A NEW TRIAL?

STATEMENT OF THE CASE

Respondent Patricia B. Cathey initiated this lawsuit against Appellant Alma Patterson Creighton and William Kinzley on November 27, 2013 for damages arising from an automobile accident on December 8, 2010. (Compl. ¶ 8.) Prior to trial William Kinzley was dismissed from the lawsuit with prejudice, and Respondent proceeded to trial against Appellant only. Trial was conducted from December 15, 2014, to December 16, 2014. Liability was not contested. (Answer ¶¶ 3, 10.) The jury returned a verdict for Respondent in the amount of $7,500.00. (Verdict Form.) The verdict was reduced to a judgment and filed with the Richland County Clerk of Court on December 19, 2014. (Id.)

After the verdict, counsel for the Respondent verbally expressed his intent to make a post-trial motion seeking additur of the verdict or a new trial. (Transcript at p. 179, lines 17-25.) Respondent subsequently served a Motion and Memorandum in Support for New Trial *Nisi Additur*, or in the Alternative, for a New Trial Based on the Thirteenth Juror Doctrine, or Alternatively, Request for New Trial on December 22, 2015. (Pl.'s Motion for New Trial.) [1] In response, Appellant filed and served a memorandum in opposition on January 20, 2015. (Memo. in Opposition to New Trial.) Following the submission of the aforementioned briefs, a proposed Order was requested from Respondent's counsel's office. Upon receipt of Respondent's proposed Order on May 27, 2015, Appellant prepared a proposed Order and submitted it on June 2, 2015, (Def.'s Proposed Order.) No hearing was held on Respondent's Motion for New Trial. In an Order filed July 6, 2015, the trial court granted Respondent's motion for a new trial. (Order.) On July 31, 2015, Appellant filed this Notice of Appeal. (Notice of Appeal.)

[1] The Court file does not reflect that Respondent's Motion for New Trial was ever filed.

STATEMENT OF FACTS

Respondent filed the underlying lawsuit alleging negligence on the part of Appellant in relation to an automobile accident on December 8, 2010. Appellant admitted liability in her Answer. (Answer ¶¶ 3, 10.) The only issue at trial was Respondent's damages as a result of an alleged injury to her neck.

Respondent's Complaint sought special damages including past medical costs and future medical costs as well as general damages for pain and suffering and loss of enjoyment of life. (Compl. ¶ 8.) However, at trial, counsel for Respondent did not introduce any evidence of the incurred medical costs. The trial consisted of five witnesses: a witness to the accident (deposition testimony read into the record), the Respondent, the Appellant, Respondent's daughter, and Respondent's friend.

Respondent's first witness was Derek Anderson, whose deposition testimony was read into the record. Mr. Anderson witnessed the accident and his testimony consisted of his observation of the accident and his brief interaction with Respondent following the accident. (Transcript at p. 58, line 19 – p. 68, line 16.) Appellant was then called during plaintiff's case-in-chief and testified that she was at fault for the accident and that she visited Respondent within a week or two of the accident at Respondent's workplace to apologize for causing the accident. (Transcript at p. 76, line 20 – p. 77, line 5.)

Michael Bitonti, a friend of Respondent for eight years prior to the accident, then testified concerning his perception of how the accident impacted Respondent's ability to participate in physical activity, cycling in particular. (Transcript at p. 78, line 14 – p. 88, line 4.) He testified generally that Respondent did not move as well after the accident and that her ability to cycle and participate in other physical activities was diminished after the accident. (Id.) He acknowledged on cross examination that he was aware that

Respondent had a knee replacement surgery at some point after the accident. (Transcript at p. 87, line 9 – p. 88, line 2.) Respondent's daughter, Barbara Cathey, also testified as to how the accident impacted Respondent's ability to perform physical activities. (Transcript at p. 89, line 7 – p. 95, line 14.) She testified that she was aware of two surgeries to Respondent's left knee, but testified that Respondent's diminished ability to cycle was the result of ongoing pain in Respondent's neck and was unrelated to the knee surgeries. (Transcript at p. 94, line 2 – p. 95, line 13.)

Respondent testified last. She testified concerning the accident, her subsequent treatment for neck pain, and how neck pain following the accident impacted her life. (Transcript at p. 96, line 4 – p. 119, line 15.) According to her testimony, Respondent's treatment consisted of going to the hospital following the accident, "over two months" of physical therapy, and "numerous" visits to her family doctor. (Transcript at p. 99, line 21 – p. 100, line 17.)

Respondent admitted to two knee replacement surgeries on her left knee (an original and corrective), surgeries to repair meniscus tears on both knees, and a surgery to remove a bunion on her foot, all of which occurred after the accident but were unrelated to the accident. (Transcript at p. 111, line 13 – p. 114, line 22.) She testified that each surgery required a recovery period and prescription pain medication. (Transcript at p. 114, line 23 – p. 115, line 5.)

No documentary evidence was admitted during the course of the trial, and there was no testimony from Respondent, her medical providers or any other witnesses regarding the dollar amount of Respondent's medical damages. Counsel for Respondent, as part of the closing arguments in the case, argued the value of Respondent's future pain

and suffering and future loss of enjoyment of life. Counsel for Appellant argued that Respondent had failed to carry her burden of proof with respect to the claimed damages. The jury returned a verdict of $7,500.00. (Verdict Form.)

After trial, Respondent served Appellant with a Motion for New Trial *Nisi Additur*, or in the Alternative, for a New Trial based on the Thirteenth Juror Doctrine, or Alternatively, Request for New Trial. (Motion for New Trial.) The trial court granted the Respondent's motion and ordered a new trial. This appeal followed.

ARGUMENT

Under the "thirteenth juror" doctrine, a trial court may grant a new trial absolute when it finds the evidence does not justify the verdict. Vinson v. Hartley, 324 S.C. 389, 402, 477 S.E.2d 715, 722 (Ct. App. 1996) (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). Under this doctrine, the trial court has no obligation to explain the reasons for its ruling. (Id.) However, when the court does explain its rationale, as in the instant case, it is well-established that the Court of Appeals will review the reasons provided by the trial court. See Lane v. Gilbert Constr. Co., 383 S.C. 590, 597-600, 681 S.E.2d 879, 883-84 (2009) (reviewing the trial court's rationale for granting a new trial despite the fact the trial court granted the new trial under the thirteenth juror doctrine and was not required to provide any reasons for the outcome); Gaines v. Campbell, Unpublished Opinion No. 2015-UP-432, 2015 S.C. App. Unpub. LEXIS 513 (2015) ("As discussed above, the trial court is not required to explain its rationale for granting a new trial under the thirteenth juror doctrine. However, if the trial court chooses to do so, this court will review the reasons provided by the trial court.")[2]; Youmans v. S.C. Dep't of Transp., 380 S.C. 263, 282, 287-88, 670 S.E.2d 1, 10, 13 (Ct. App. 2008) (holding that despite the discretion given the trial court by the thirteenth juror doctrine, it could not grant a new trial based on the brevity of the jury deliberations).

"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." Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996) (quoting Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265

[2] Although Gaines was unpublished and therefore does not have precedential effect, Appellant notes that Gaines is a recent case with analogous facts to the instant case, suggesting that improper invocation of the Thirteenth Juror Doctrine is deserving of clarification by this Court.

(1990)). Here, both criteria are satisfied, as the trial court's Order is wholly unsupported by the evidence and controlled by errors of law.

I. THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL IS WHOLLY UNSUPPORTED BY THE EVIDENCE.

The reasons provided by the trial court for granting a new trial are reviewable by this Court. Each of the subsections below address specific findings within the trial court's Order that are wholly unsupported, or directly contradicted, by the evidence presented at trial. It is plain from a review of the record that the trial court abused its discretion in finding that the jury's award was inadequate and granting a new trial, and therefore the trial court's Order should be reversed.

A. The trial court's finding that the jury did not award damages for pain and suffering is not supported by the record.

The trial court reasoned that the verdict was inadequate based on the erroneous finding that the jury did not award damages for pain and suffering to Respondent – "the jury failed to consider Plaintiff's pain and suffering in reaching its verdict." (Order at 5.)

The jury awarded Respondent $7,500 in damages at trial on $0 presented in medical bills. No exhibits of any kind whatsoever were offered into evidence. Plaintiff failed to offer any medical bills, medical records, or any other documentation supporting her case. It is indisputable from the record that no witness offered any testimony suggesting any numerical valuation of Plaintiff's damages.

Because there was no evidence offered as to medical bills, lost wages, or any other special or economic damages, the trial court lacked any basis for concluding that

the jury's award failed to consider all appropriate categories of damages.[3] Without knowing how the jury's award was apportioned between general and special damages, the trial court had no evidentiary basis to conclude that "the jury failed to consider Plaintiff's pain and suffering in reaching its verdict." (Order at 5.) Accordingly, granting a new trial on this basis was without evidentiary support and an abuse of discretion.

B. The trial court's finding that Respondent's witnesses provided uncontroverted testimony concerning her damages is not supported by the record.

The trial court supported its conclusion that the verdict was inadequate by finding that Respondent submitted "uncontroverted" witness testimony concerning her damages. (Order at 5.) With respect to the first of these witnesses, the Order states that "Derek Anderson, an unbiased eye witness to the accident, testified by deposition that Plaintiff's injuries required her to be taken to the hospital by ambulance." (Order at 5.) The trial testimony does not support this finding. Mr. Anderson testified that after witnessing the accident, he went to check on Respondent to make sure she was alright. He specifically disclaimed being a medical expert and provided no testimony concerning her condition other than that she appeared to be "in shock" and "shaken up" (Transcript at p. 61, line 8), and that "she indicated that there was no immediate – no immediate threat to her wellbeing". (Transcript at p. 67, lines 8-10). The testimony at trial continued as follows:

> Q: Okay. In total, how long were you sort of at the scene of the accident?
> A: From the time of impact through – and my discussion with the police officer, I would say I was probably there for 10 minutes.
>
> Q: In that 10 minutes, did you ever observe Ms. Cathey get out of her car?
> A: No, I did not.
>
> Q: Do you know if an ambulance came to her?

[3] The Verdict Form simply contained one line for "actual damages". (See Verdict Form.)

A: I was informed that an ambulance came after I left.

Q: Okay. By whom were you informed of that?
A: By Mr. Fedor.

(Transcript at p. 65, line 15 – p. 66, line 1.) (emphasis added). It is clear from the transcript that Mr. Anderson was merely a witness to the accident and provided no testimony concerning damages other than his observations of Respondent immediately after the accident. The assertion in the Order that Mr. Anderson "testified . . . that Plaintiff's injuries required her to be taken to the hospital by ambulance" is wholly unsupported by the evidence.

The Order continues by referencing the "uncontroverted" testimony of Respondent's "daughter and friend" – referring to Barbara Cathey and Michael Bitonti. (Order at 5.) While both witnesses did testify that they believed Respondent's neck pain impacted her ability to cycle and perform other activities, their testimony as to the cause of Respondent's diminished physical capabilities was not "uncontroverted". The jury learned on cross-examination of these witnesses that the witnesses were also aware Respondent had a knee replacement surgery – unrelated to the accident – at some point after the accident. (Transcript at p. 87, lines 9-14; p. 93, line 15 – p. 94, line 15.) In other words, to the extent that Respondent's "daughter and friend" offered testimony establishing that injuries from the accident impacted Respondent's ability to engage in physical activity, there was testimony establishing an alternative cause for Respondent's physical limitations that was wholly unrelated to the accident.

Morevover, the jury learned later, during Respondent's testimony, that in addition to a total knee replacement, Respondent had a subsequent "corrective" surgery to her left knee, surgeries to repair a torn meniscus in both knees, and foot surgery – all after the

accident, all unrelated to the accident, and all of which required a recovery period and prescription medications. (Transcript at p. 111, line 16 – p. 115, line 5.) In addition to finding that these unrelated medical conditions could have accounted for the physical limitations Respondent was claiming, the jury could have discounted the testimony of the "daughter and friend" on the basis that they were apparently unaware of any of the conditions beyond the knee replacement surgeries.[4]

The Court's instructions to the jury made clear that it was the jury's province to make determinations as to the credibility of the witnesses. The trial court instructed the jury,

> Now, to determine the facts of this case, you would have to evaluate the credibility, which believes the believability of each witness. Now, some of the things you may consider as you decide whether or not to believe a witness's testimony about a particular matter include, what was the manner and appearance of the witness who testified? What he or she straightforward or hesitant in answering? Was the testimony of a witness consistent or inconsistent? How did the witness come to know the facts that he or she testified to and what was his or her ability to know these facts? Is there some reason that a witness would want to give testimony which would help our hurt one side or the other? In other words, was the witness bias or prejudice? And was the testimony of a witness strengthened or weakened by other testimony or evidence?
>
> Now, you can believe as much or as little of each witness's testimony as you think proper. You may believe the testimony of a single witness against that of many witnesses or just the opposite. Of course, you do not determine the truth merely by counting the number of witnesses presented by each side. Throughout this process, you have but one objective, to seek the truth regardless of its source.

(Transcript at p. 166, line 24 – p. 67, line 21.) See also Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (quoting Terwilliger v. Marion, 222 S.C. 185, 188,

[4] At trial, counsel for Appellant specifically asked Respondent's daughter and friend if they were aware of any other medical conditions of Respondent that affected her ability to perform physical activities, and both testified they were not aware of anything other than the left knee replacement surgeries. (Transcript at p.87, line 24 – p. 88, line 4; p. 95, lines 4-14.)

72 S.E.2d 165, 166 (1952)) ("Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide. The fact that evidence is not contradicted by direct evidence does not render it undisputed, as there still remains the question of its inherent probability and the credibility of the witnesses or his interest in the result.")

Thus, according to well-established principles underlying the jury trial system, encapsulated in the trial court's own charge to the jury, the jury was entitled to discredit some or all of the testimony of the Respondent's "daughter and friend". In fact, the jury was provided with ample grounds to do just that based on subsequent testimony of Respondent concerning the litany of lower leg issues that afflicted her. At a minimum, the fact that the Respondent's daughter and friend were not even aware of the existence of meniscus surgeries and a foot surgery undermines their credibility in testifying that Respondent's neck pain is what prevented her from engaging in physical activities.

C. The trial court's finding that Respondent proved the extent and value of her damages in excess of what the jury awarded is not supported by the record.

Based on the absence of any evidence of the amount of economic damages, and the disputed evidence concerning Respondent's noneconomic damages, there is absolutely no evidentiary support for the trial court's finding that Plaintiff proved "[t]he extent and value of her damages, . . . ", (Order at 6), beyond the $7,500 that was awarded. The Respondent herself, in addition to having an obvious financial stake in the outcome of the case, testified to five surgeries between her knees and foot, all of which occurred after the car accident at issue and none of which were related to the accident. (Transcript

at p. 111, line 16 – p. 114, line 22.) She testified that she has not sought treatment for her neck since October 2012, (Transcript at p. 110, lines 2-15), and she admitted that her knee replacement surgery impacted her ability to cycle, (Transcript at p. 111, lines 13-15). Additionally, the following exchange took place during her cross-examination concerning the impact of her other medical conditions:

> Q: And did those knee problems cause you some difficult with your activities of daily living?
> A: Little bit.
>
> Q: Cause you discomfort?
> A. Little bit.
>
> Q: Well, I assume they caused you more than a little bit –
> A: They did.
>
> Q: --of discomfort? Right. Because you took pain medicine, right?
> A: Yes
>
> Q: And you had injections, shots into your knees, correct?
> A: Yes
>
> Q: And you actually had the entire knee replaced, correct?
> A: Yes.
>
> Q: And then you had that repaired, too, correct.
> A: Yes.
>
> Q: All Right. So it was causing more than a little bit of pain?
> A: It was. I tend to minimize.

(Transcript at p. 116, line 21 – p. 17, line 15.)

Based on this testimony, the jury could have easily doubted, or discredited altogether, Respondent's self-interested testimony that it was neck pain from a car accident that was limiting her physical activity. Moreoever, the fact that she admitted she had not sought treatment for her neck since October 2012, more than two years prior to trial, could have been interpreted by the jury as further indication that Respondent was

exaggerating her neck injury. Contrary to the findings of the trial court[5], there were ample grounds for the jury to question the legitimacy of Respondent's testimony concerning the scope and extent of her neck injury. See Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996) ("Simplistically put, credibility of witnesses was for the jury to determine. The jury could have determined that the medical bills testified to by Vinson were not the result of the accident which gave rise to this suit."); Boozer v. Boozer, 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988) (affirming denial of plaintiff's new trial motion based on inadequacy of verdict where jury could have determined that a portion of medical bills testified to by plaintiff – but not introduced – were not the result of the accident which gave rise to suit).

In the absence of any evidence of the cost of Respondent's medical treatment, the jury was left with very little evidence – only the contested testimony of Respondent and her daughter and friend – concerning Respondent's damages. Counsel for Appellant underscored this "predicament" during closing arguments, which focused largely on the argument that Respondent had not carried her burden of proving her damages:

> So where does that leave us? Ms. Cathey is entitled to some verdict in this case, she is. Ms. Creighton is at fault. She was hurt to some degere. She went – took an ambulance to the hospical. That's not unreasonable. It's what I would exept (sic) from an accident like this. The problem is she hasn't proven much more than that. She has provent that she went to the hospital, that she went to the family doctor a couple of times, we don't know when, and that the family doctor sent her for some therapy. And she testified that was probably in the March 2011 time frame, which is December, January, February, March, three months or so later. So three to four months after the accident. And then from that point on, there's no

[5] In finding that Respondent's neck pain was "debilitating to the point where Plaintiff can no longer participate in her life activities such as bike riding and knitting", (Order at 6), the trial court plainly failed to consider the ample evidence of alternative causes for the physical limitations claimed by Respondent. See Gaines v. Campbell, Unpublished Opinion No. 2015-UP-432, 2015 S.C. App. Unpub. LEXIS 513 (2015) (reversing grant of new trial under analogous facts and holding, "[b]ecause the trial court failed to consider these other possible causes of Gaines's injury when weighing the evidence as the thirteenth juror, we find its order was controlled by an error of law.")

> discussion of any active treatment, no more therapy, no injuections, no prescription medication. No more discussion of any active treatment and no doctor who's come in here to tell you otherwise.
> ....
> So you have to ask yourself, what is that worth? It's sort of hard to figure out because they didn't give you any medical bills. They haven't said what the EMS cost or what the hospital cost, what the family doctor cost, what the physical therapist cost.... You can try to value the three or four months there where she was having problems, try to put some value on that, what is that worth. It's difficult to do. I understand the predicament that you're in.

(Transcript p. 153, line 21 – p. 155, line 7.)

In rebuttal, Respondent's counsel responded to the absence of medical bills and defendant's burden of proof argument:

> The medical bills, my opponent argued those. Why didn't we introduce them? He could have asked her about those on the stand. He could have said wasn't this the bill. She didn't have to prove anything. We didn't put them in because they're so darn small, they don't matter in a case like this. But you know from her testimony and from the other testimony, she was going to doctors. She was going to the hospital. She was going to physical therapy. But according to him, those should have been done. Those should been put into evidence. We don't need those. We've got another incident, her body that she testified to. And they didn't have one iota of testimony about that. He says use common sense. I, too, ask you to use common sense. Do you think those little bills for this case? No. Her life is this case. And he's trying to beat a dead horse. He knew he had to have a doctor up here to prove. This was an absolute hideous thing to say she has no pain, she has no damage to her neck. The neck is a fragile thing, especially in a 70-year-old. And they didn't show anything that we said was wrong.

(Transcript at p. 159, lines 5-24) (emphasis added). Respondent's counsel also expressly acknowledged that the case turned on the jury's assessment of the credibility of Respondent's witnesses with respect to pain and suffering and loss of enjoyment of life: "They say we didn't follow the burden of proof. **If you don't think we followed it, if you think Pat [Respondent] is lying (indicating), get out there and find zero.**" (Transcript at p. 158, lines 14-17) (emphasis added). It is difficult to understand how

Respondent's counsel can suggest to the jury that it return a verdict of $0 if it does not believe Respondent's testimony and then seek relief from the court for a verdict which suggests that the jury likely believed some, but not all, of Respondent's claims.

Given the testimony offered, the arguments of counsel, and the Court's jury charge, a reasonable jury could easily weigh the evidence and conclude that Plaintiff's diminished athletic ability, pain and suffering, and loss of enjoyment of life resulted from the extensive and ongoing problems Plaintiff had with both her knees and foot, not from any injury sustained in the car accident. The jury did not "fail[] to properly consider and follow the instructions of the court in its deliberations" as found by the trial court, (Order at 7), but rather did precisely what the judge instructed concerning assessing the credibility of witnesses and weighing the evidence. Thus, the jury's determination that Plaintiff be compensated in the amount of $7,500.00 for her claimed damages is more than adequate in light of the evidence presented at trial. There is absolutely no evidentiary support for the trial court's conclusion that the award of $7,500 was "grossly inadequate and contrary to the fair preponderance of the evidence". (Order at 6-7.)

For the reasons stated herein, the trial court's Order was wholly unsupported by the evidence, and the trial court abused its discretion in granting a new trial.

II. THE TRIAL COURT'S ORDER IS CONTROLLED BY AN ERROR OF LAW BECAUSE IT RELIES ON INAPPLICABLE CASE LAW AS ITS BASIS TO GRANT A NEW TRIAL.

In its Order granting a new trial, the trial court improperly applied the standard for a new trial under the Thirteenth Juror doctrine and as such was controlled by an error of law. Section II.A. of the Order, titled "THE JURY'S AWARD WAS INSUFFICIENT BASED ON A CASE LAW REVIEW OF DAMAGES VERDICTS," undertakes a

review of case law in support of the court's conclusion that the Respondent was entitled to a new trial.

As addressed more fully in Section B, *supra*, the "thirteenth juror" doctrine "entitles the trial 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 S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002) (quoting Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). Thus, the trial court's decision must be supported exclusively by the record and the evidence presented at trial, as the court is taking the place of a thirteenth juror and must make its decision based on consideration of the same evidence that the jury used to make its decision. See Folkens, 300 S.C. at 255, 387 S.E.2d at 267 (citing S.C. Dep't of Highways & Pub. Transp. v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980)).

Based on this standard, it was an error of law for the trial court to find the "jury's award was insufficient based on a case law review of damages verdicts." (Order at 3.) The trial court's review and analysis of prior appellate decisions involving different facts and circumstances is clearly outside the scope of the evidence presented to the jury and should have no bearing on its ruling on a motion for new trial upon the facts.

Moreover, even if it were appropriate to base its ruling on a comparison to other cases, the cases cited by the trial court are not analogous to the factual and evidentiary situation that the jury in this case was presented with. In fact, these cases actually serve to illustrate the key element missing from the evidence in the trial of the instant case: evidence establishing the amount of economic damages.

The first case cited by the trial court is Taylor v. Devore, 253 S.C. 393, 171 S.E.2d 158 (1969). In that brief opinion, the South Carolina Supreme Court upheld the trial court's decision to grant a new trial, finding that "[i]t is clear that [the trial court's] order was based solely upon a consideration of the evidence." Id. Taylor failed to detail any of the damages in the case, or otherwise explain the basis for the grant of a new trial. As such, it is unclear how citation to Taylor serves to support the trial court's decision to grant a new trial in the present case. However, Taylor plainly underscores the fact that the trial court must rely only on the evidence presented to the jury in arriving at its decision.

The second case cited in the Order, Cartin v. Keller Bldg. Products, touches on the evidentiary basis for a decision to grant a new trial, but only indirectly. 299 S.C. 152, 382 S.E.2d 922 (1989). The Supreme Court did not directly analyze the trial court's finding that the nominal damages merited a new trial. Cartin does, however, serve to illustrate the type of evidence that a trial court should rely on in making the decision to grant a new trial. In Cartin, the plaintiff "proved medical specials in excess of $7,000, [and] provided testimony that he had sustained a 20% permanent physical impairment...." Id. at 153-54, 382 S.E.2d at 922. However, upon consideration of those damages, the jury returned a verdict of only one dollar. Id. at 154, 382 S.E.2d at 923. The Supreme Court approved of the granting of a new trial under these circumstances. When compared to the instant case, the facts in Cartin show why the trial court's Order granting a new trial was in error. Whereas in Cartin the plaintiff proved medical special damages, Respondent did not present any evidence of the amount of her special damages at trial. Similarly, no medical testimony regarding any impairment was presented to the jury. Despite the lack of such evidence, the jury nevertheless returned a verdict of $7,500 in

favor of Respondent. Thus, the trial court's citation to Cartin actually underscores the key failing in Respondent's presentation of her case; reliance on Cartin in the trial court's Order constituted an error of law.

The trial court's order also cites Dillon v. Frazier, 383 S.C. 59, 678 S.E.2d 251 (2009). In Dillon the plaintiff incurred medical bills for the treatment of injuries sustained in a car accident and filed a lawsuit seeking compensation for those damages. Id. at 62-63, 678 S.E.2d at 252. In addition to the medical bills, the plaintiff sought damages for past and future lost wages. Id. at 63, 678 S.E.2d at 252. The jury returned an unexpectedly low verdict and the plaintiff sought a new trial. Id. at 65, 678 S.E.2d at 253. The trial court granted the plaintiff's motion for additur but denied the plaintiff's motion for a new trial absolute. The South Carolina Supreme Court determined that the plaintiff was entitled to a new trial absolute.

As in Cartin, the Supreme Court's decision in Dillon was grounded in its review of the evidence presented to the jury at trial. Specifically, the plaintiff's undisputed special damages for medical care and lost wages amounted to $30,026. Dillon, 383 S.C. at 64, 678 S.E.2d at 253. The Supreme Court found that "[t]he jury's award of $6,000 in the face of over $30,000 in undisputed damages is grossly inadequate and demonstrates that the verdict was actuated by improper motivation. No plausible reason for the amount of the verdict has been advanced." Id. at 65, 678 S.E.2d at 253.

In Dillon, the trial court and the Supreme Court were able to consider undisputed evidence of the amount of plaintiff's economic damages. Comparison of those damages to the jury's verdict led to the conclusion that the verdict was improper and warranted a new trial. However, in the instant case, undisputed evidence of Respondent's damages is

conspicuously absent from the trial record. Indeed, no medical costs were even submitted to the jury to enable the trial court or any appellate court to undertake a comparison of the proven damages to the jury's verdict.

Finally, in the last section of the Order, the trial court relies upon Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), a case involving the grant of a new trial *nisi additur*. The key fact in Waring was that the jury returned a verdict of $23,237.28 – the exact amount of the plaintiff's medical bills. Id. at 255, 533 S.E.2d at 910. In affirming the grant of *nisi additur*, the appellate court reasoned that since the jury returned with a verdict in the exact amount, "to the penny", of the plaintiff's medical expenses, it necessarily "failed to consider [the plaintiff's] pain and suffering." Id. at 255, 533 S.E. at 912.

As with the other cases cited in the Order, Waring is readily distinguishable from the case at bar. Most notably, in Waring the jury was presented with documentation of the plaintiff's economic damages in the form of the plaintiff's medical bills. The jury in that case then returned a verdict containing only those economic damages – "to the penny". In the instant case, the jury was presented with no such evidence. Accordingly, unlike in Waring, the trial court had no basis to conclude that the jury failed to consider Respondent's noneconomic damages. See Section I.A., supra.

The trial court's decision to grant a new trial should have been limited to the evidence presented to the jury, and it was an error of law for the trial court to rely on the aforementioned cases in granting Respondent a new trial. Indeed, the cited case law does nothing more than shine a light on the error committed by the trial court. Each of the cited cases involved a discrete amount of proven economic damages that the trial and

appellate courts could compare to the jury's verdict to determine whether the evidence justified the verdict. That was not the scenario confronting the trial court in this case. Rather, the scenario was no evidence of any amount of economic damages, whether contested or uncontested, to which the verdict could be compared. The trial court's reliance on inapplicable case law in ordering a new trial was an error of law and an abuse of discretion which warrants reversal of the court's Order.

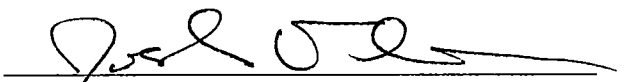
CONCLUSION

The basis for a new trial pursuant to the "thirteenth juror" doctrine must be predicated upon a finding that the evidence does not justify the verdict. In the instant case the record is so devoid of undisputed evidence that it was impossible for the trial court to rule that the evidence presented by Respondent did not justify the verdict. Respondent failed to introduce any evidence of the amounts actually charged or incurred for her medical treatment. The only basis for damages provided to the jury was testimonial evidence from Respondent and other lay witnesses. Appellant did not concede or stipulate to any amount of Respondent's damages at trial. As to non-economic damages, Appellant elicited testimony from Respondent concerning five knee and foot surgeries that were admittedly unrelated to the accident at issue, thereby providing the jury with a compelling alternative explanation for the noneconomic damages Respondent alleged were a result of the accident. The trial court specifically, and correctly, instructed the jury that they were not required to believe the testimony of any witness and that they could put as much or as little weight on witness testimony as they saw fit.

Respondent was awarded more than nominal damages for her alleged injuries. As such, the trial court's ultimate conclusion that the verdict was "grossly inadequate and contrary to the fair preponderance of the evidence" is not supported by the record. There

was no basis for the trial court's Order abrogating the decision of the jury. For these reasons, Appellant Alma Patterson Creighton respectfully asks this Court to reverse the trial court's order granting a new trial and reinstate the jury's verdict.

TURNER, PADGET, GRAHAM & LANEY, P.A.



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March 9, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 09 2016
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Circuit Case No. 2013-CP-40-7214

Appellate Case No. 2015-001638

Patricia B. Cathey .....Respondent,

v.

Alma Patterson Creighton and William Kinzley ..... Defendants,

Of whom Alma Patterson Creighton is the Appellant.

PROOF OF SERVICE

I certify this 9th day of March 2016 that I have served a copy of Appellant's Initial Brief upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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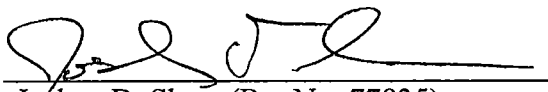
March 9th, 2016

By: 

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March 9, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Patricia B. Cathey v. Alma Patterson Creighton and William Kinzley
Case No. 2015-001638
Our File No. 1464.7321

Dear Ms. Kitchings:

Enclosed please find the following documents for filing on behalf of the *Appellant* (Alma Patterson Creighton):

1. Appellant's Initial Brief with Proof of Service
(unbound original and one copy for return)

2. Appellant's Designation of Matter for the Record as with Proof of Service
(unbound original and one copy for return)

Please file the originals in your office and return a clocked copy of each to us via our courier. Thank you for your assistance in this matter, and please do not hesitate to contact me should you have any questions.

With kind regards, I am

Very truly yours,
TURNER, PADGET, GRAHAM & LANEY, P.A.

Joshua D. Shaw

JDS/kcc
Enclosures

cc: J. Lewis Cromer, Esquire
David A. Fedor, Esquire