

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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OCT 12 2016

APPEAL FROM THE COURT OF APPEALS

S.C. SUPREME COURT

Trial Judge: The Honorable Edward W. Miller, Circuit Court Judge,
Greenville County Court of Common Pleas

Barbara Gaines.....Petitioner,

v.

Joyce Ann Campbell.....Respondent.

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

PETITIONER'S BRIEF

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STATEMENT OF THE ISSUE ON APPEAL

Whether the Court of Appeals misapplied the Rule 59 standard for granting a new trial absolute, where the Court of Appeals reversed the Circuit Court's Order granting Plaintiff's New Trial Motion under the 13th Juror Doctrine, where the Circuit Court's Order was based on first-hand observations of a three-day jury trial, was supported by substantial evidence, and was not controlled by an error of law.

STATEMENT OF THE CASE

On January 8, 2010, Respondent Joyce Ann Campbell collided with the back of Barbara Gaines car at a stop sign. On March 20, 2012, Petitioner Barbara Gaines filed this action in the Greenville County Court of Common Pleas. The Circuit Court heard the jury trial in this case from

On August 7, 2013, the jury returned a verdict for the Plaintiff in the amount of \$3,941.00, the amount of Barbara Gaines' Emergency Room bill. (Appendix, p. 89). Pursuant to Rule 59, SCRCF, Plaintiff/Respondent Barbara Gaines moved for a New Trial pursuant to Rule 59, SCRCF. The Circuit Court granted Plaintiff's Rule 59 Motion by Order filed on September 19, 2013. (Appendix, pp. 89-92).

On October 23, 2013, Joyce Ann Campbell's counsel filed a Notice of Appeal in the South Carolina Court of Appeals. On June 3, 2014, the Court of Appeals heard oral arguments. On August 19, 2015, the Court of Appeals issued its unpublished decision reversing the Circuit Court's Order granting Plaintiff's Rule 59 Motion for a New Trial. (Appendix, p. 12).

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

FACTS

In her Answer (Appendix, p. 10, ¶¶4-5) and on the witness stand at trial (Appendix. p. 236, lines 11-13), Joyce Ann Campbell admitted negligence in colliding with the back of Barbara Gaines' car on January 8, 2010. Defendant Campbell testified that she estimated her speed at about 35-40 miles per hour before the collision. (Appendix. p. 236, lines 15-18). Defendant Campbell admitted that Barbara Gaines was at a complete stop a Stop Sign at the time of the collision. (See Answer, Appendix, p. 10, ¶4; See also investigating Officer Shivers' trial testimony, Appendix. p. 154, lines 16-18).

At trial, the disputed issues of fact were proximate cause and the amount of damages. (Appendix. p. 360, lines 15-18). At trial, "**The stipulated total of Plaintiff's medical bills was \$77,966.56.**" (Appendix, 89). In addition, Gaines sought general damages for pain and suffering, emotional distress, and permanent injuries. (Appendix, p. 96)

Gaines and her adult daughter Joye Gaines all testified about Gaines's medical history and medical care. Barbara and Joye Gaines each testified that, at the time of trial, Barbara Gaines was 72 years old. Ms. Gaines retired from the Pickens County School District, where she worked at a Special Needs Teachers Aide for many years. (Appendix. p. 163, line 25 - p. 164, line 11). Barbara Gaines lives with daughter Joye, who works as a teacher in Pickens County. (Appendix. p. 262, line 23 - p. 263, line 9).

Gaines testified that the collision caused Gaines to suffer neck injuries that caused neck pain, as well as pain radiating into her right arm and hand. (Appendix. p. 172, lines 5-15). Barbara Gaines testified extensively about neck injuries caused by the wreck and about her pre-existing arthritis and prior neck injuries and complaints. (Appendix. p. 170, lines 4-24). Gaines

testified that she did not have neck pain radiating into her right arm prior to the wreck with Campbell. (Appendix. p. 170, lines 4-24). Gaines and daughter both testified that Gaines suffered from severe neck pain radiating into her right arm after the wreck. (Appendix. p. 170, line 25- p. 171, line 10; Appendix. p. 270, line 22 - p. 271, line 19).

By video depositions taken for use at trial, Gaines offered the expert opinions of her primary care physician Dr. Lisa Harding (Appendix. p. 504 - 579), and her neurosurgeon Dr. Christie Mina. (Appendix. p. 411 - 502). Both Dr. Harding and Dr. Mina testified regarding their investigation of Gaines's injuries. Based on Gaines's reported symptoms, Dr. Harding ordered a cervical MRI. (Appendix. p. 515, lines 16-23). Dr. Harding testified that Dr. Harding suspected a herniated disk at the C5-6 level in Gaines's neck. (Appendix. p. 515, lines 16-23). Dr. Harding testified that she referred Gaines to Piedmont Neurosurgical and Spine for evaluation and specialized care by a neurosurgeon. (Appendix. p. 516, lines 5-16).

Both Dr. Harding and Dr. Mina described the affected anatomical area of the Gaines's right arm and hand as the "C6 Distribution". (Appendix. p. 529, lines 5-17; Appendix. p. 431, lines 4-17). Both doctors described the nature of the medical diagnosis of "C6 Radiculopathy", a condition whereby a pinched nerve in the neck causes causing pain and sensory changes in the affected area of the neck, arm, and hand. (Dr. Mina- Appendix. p. 431, line 24- p. 433, line 25; Dr. Harding- Appendix p. 519, lines 14 - 21).

Dr. Mina testified regarding Gaines's neurosurgical treatment. Dr. Mina testified about Gaines's neck surgery, an "anterior cervical discectomy and fusion" surgery designed to relieve pressure on Gaines's C6 nerve root. (Appendix. p. 435, line 11- p. 441, p. 8). Gaines introduced medical art of the surgical procedure at Dr. Mina's video deposition. (Appendix, p. 108).

Gaines and her neurosurgeon Dr. Mina both testified that Gaines had a near complete resolution of her symptoms following the surgery. (Appendix. p. 180, line 13-15; Appendix. p. 441, line 22- p. 442, p. 18).

Both Dr. Harding and Dr. Mina testified that, to a reasonable degree of medical certainty, Gaines's C6 radiculopathy was caused by the wreck with Campbell. (Dr. Mina- Appendix p. 443, line 10 - p. 444, line 6; Dr. Harding- Appendix. p. 529, lines 5-21). Dr. Mina further testified that to a reasonable degree of medical certainty, Gaines's anterior cervical discectomy and fusion surgery was necessitated by neck injuries caused by the wreck on January 8, 2010. (Appendix. p. 443, line 18- p. 444, line 1).

Campbell's counsel vigorously cross-examined both Dr. Harding and Dr. Mina. When Dr. Mina's opinion differed from the report issued by the Emergency Room radiologist, Campbell's counsel pursued this line of questioning:

2 Q. So as far as you're concerned, the ER doctors are
3 quacks?

4 A. I beg your pardon?

5 MR. PEACE:

6 I'm going to object to that question --

7 EXAMINATION RESUMED BY MR. McGARR:

8 Q. You said more --

9 WITNESS:

10 I'll object to that question, too.

11 MR. PEACE:

12 -- as being argumentative.

13 EXAMINATION RESUMED BY MR. McGARR:

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 means 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.
24 Q. Okay. So, Doctor, the bottom line is everything I've
25 shown you and anything else I could show you, you
1 would end up saying no, this automobile accident
2 caused this surgery; is that correct?
3 A. No. I'm certain that if you could show me some other
4 evidence that was consistent with a C-6 radiculopathy
5 that pre-existed this -- this automobile accident,
6 then -- then I might reconsider.

(Appendix. p. 498, line 2 - p. 499, line 8).

Without such evidence, of course, Dr. Mina declined to change her opinion that, to a reasonable degree of medical certainty, the wreck with the Campbell caused Gaines's neck injuries and C6 radiculopathy. The Circuit Court noted that, while the Campbell does not have the burden of proof, Campbell did not introduce any evidence or testimony contrary to the expert opinions of Dr. Mina and Dr. Harding that Gaines's C6 radiculopathy was caused by the wreck on January 8, 2010. (Appendix. p. 394, line 11, p. 396, line 15). Accordingly, the Circuit Court found that the record did not contain evidence which would support the jury's verdict in the amount of \$3,941.00. (Appendix. p. 92).

Based on the overwhelming weight of the evidence and testimony offered at trial, Barbara Gaines argued that the jury's verdict of \$3,941.00 was grossly inadequate and is unsupported by the evidence in this case. After considering the 3-day jury trial in this case, as well as the several Memoranda and oral arguments for and against Gaines's Rule 59 Motions, the Circuit Court properly exercised its discretion in granting Gaines's Rule 59 Motion for a New Trial Absolute. Therefore, this Court should reverse the Court of Appeals, affirm the Circuit Court, and remand this case for a New Trial.

ARGUMENT

Under the "Thirteenth Juror" Doctrine, the Circuit Court has Discretion to Grant New Trials where the Circuit Court Finds that the Jury's Verdict is Grossly Inadequate and Unsupported by the Evidence

In granting Gaines' Rule 59 Motion, the Circuit Court concluded:

Considering the evidence and testimony offered at trial in this Case, this Court finds that the evidence does not support the jury's verdict. I am invoking the "Thirteenth Juror Doctrine". The only competent evidence admitted at trial requires a verdict that compensates the Plaintiff [Gaines], at a minimum, for the medical bills and expenses incurred as a result of the spinal surgery. This Court finds that an award of damages for only the emergency room bills in the value of \$3,941.00 is grossly inadequate and unsupported by the evidence in this case. Therefore, this Court grants a New Trial Absolute.

Appendix, p. .92. The Court of Appeals disagreed, concluding:

Although the trial court correctly determined that [Campbell's attorney] questioning Dr. Mina regarding Gaines' veracity was improper, we find the trial court's new trial order was controlled by an error of law. . . The trial court's determination that Campbell could not cross-examine Gaines's experts on other possible causes of Gaines injury and its finding that Campbell violated Rule 43(I) by personally appealing to the jury were incorrect. Furthermore, if the trial court had believed Campbell's hypothetical questions were permissible, it could have considered other "possible" causes of Gaines's injury when it weighed the evidence as the thirteenth juror. Based on the foregoing reasons, the trial court's order is **REVERSED**.

Appendix, p. 21. As discussed below, this Court should reverse the Court of Appeals' 8/19/15 Opinion and affirm the Circuit Court's order.

The Court of Appeals' 8/19/15 Opinion fails to understand that **"The matter of granting a new trial on the grounds stated is left under our law to the discretion of the trial judge, who hears the evidence, sees the witnesses, and who is in much better position than this court to judge of the righteousness of verdicts."** *Worrell v. South Carolina Power Co.*, 195 S.E. 638, 642 (1938)(quoting *Byus v. Eason*, 178 S.C. 175, 179, 180, 182 S.E. 442, 444

(1935)(bold added). In the present case, the Court of Appeals improperly substituted its own opinion for the discretion of the Circuit Court. Therefore, this Court should reverse the Court of Appeals' 8/19/15 Opinion and affirm the Circuit Court's order.

Rule 59(a), SCRCP, provides that "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action **in which there has been a trial by jury, for any of the reasons for which new trial have heretofore been granted in actions at law in the courts of this State**" (bold added). This Court has long recognized that "**South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions.**" *Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 477, 567 S.E.2d 851, 854 (2002)(bold added). In the present case, the Circuit Court properly applied the "thirteenth juror" doctrine in the present case. Therefore, this Court should reverse the Court of Appeals' 8/19/15 Opinion, affirm the Circuit Court's Order, and remand for a New Trial.

In *Lane v. Gilbert Const. Co., Ltd.*, this Court summarized the 13th Juror Doctrine as follows:

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

383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009)(bold added).

Moreover, "**The judge is not required to explain the reasons for his decision.**" *Lane v. Gilbert Const. Co.*, 383 S.C. 590, 598, 681 S.E.2d 879, 883 (2009). In *Folkens v. Hunt*, this

Court likewise recognized that:

This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. **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 upon the facts.** *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). **The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome.** Similarly, because the result of the “thirteenth juror” vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). In the present case, the Circuit Court “hung” the jury because the Circuit Court found that the verdict was not supported by the evidence. The Circuit Court’s Order “hanging” the jury is clearly supported by the expert witnesses’ testimony introduced at trial. Therefore, this Court should reverse the Court of Appeals’ 8/19/15 Opinion, affirm the Circuit Court’s order, remanding this case for a New Trial.

Regarding appellate review of an order granting a new trial, the *Lane v. Gilbert Const.*

Co., Ltd. Court went on to explain that:

Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Norton*, 350 S.C. at 478, 567 S.E.2d at 854. **This Court's review is limited to consideration of whether evidence exists to support the trial court's order.** *Id.* at 478–79, 567 S.E.2d at 854. **As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed.** *Id.*

383 S.C. 590, 597-598, 681 S.E.2d 879, 883 (2009)(bold added); *see also Norton v. Norfolk So. Ry. Co.*, 350 S.C. 473, 478-479; 567 S.E.2d 851, 854 (2002). In the present case, the Circuit Court’s Order specifically identified the testimony of Plaintiff’s two expert witnesses, Dr.

Harding and Dr. Mina, as the evidence supporting the Circuit Court's order granting a new trial. Because the Circuit Court's order is supported by evidence offered at trial, the Court of Appeals committed an error of law by reversing the Circuit Court's order granting a new trial. Therefore, this Court should reverse the Court of Appeals' 8/19/15 Opinion and affirm the Circuit Court's order.

In *Folkens v. Hunt*, this Court likewise stated the rule as that:

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

300 S.C. 251, 254-255, 387 S.E.2d 265, 267 (1990)(bold added). The *Folkens* Court then considered whether the trial court's ruling was "not wholly unsupported by the evidence":

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

Folkens v. Hunt, 300 S.C. 251, 255, 387 S.E.2d 265, 267-68 (1990)(bold added).

In the present case, the Circuit Court's Order is clearly supported by the evidence introduced at trial, including the testimony of Plaintiff's treating physicians, Dr. Lisa Harding

(Board Certified in Internal Medicine, Appendix, p. 510), and neurosurgeon Dr. Christie Mina (Board Certified in Neurological Surgery, Appendix, p. 502). Therefore, this Court should reverse the Court of Appeals' 8/19/15 Opinion, affirm the Circuit Court's order, and remand this case for a new trial.

Moreover, the Circuit Court's Order was not "controlled by an error of law." Indeed, after reviewing applicable law, the Court of Appeals 8/19/15 Opinion specifically found that **"the Circuit Court correctly determined it was improper to question Dr. Mina on the veracity of Gaines's deposition statements."** Appendix, p. 17. The Court of Appeals committed an error of law by substituting its own opinion for the discretion of the the Circuit Court. Therefore, this Court should reverse the Court of Appeals, affirm the Circuit Court, and remand this case for a new trial.

CONCLUSION

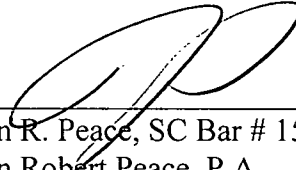
In the present case, the Circuit Court properly exercised its discretion under the "Thirteen Juror" doctrine. The Circuit Court's Order granting a new trial is supported by the substantial evidence. Based on the testimony of Gaines' treating physicians, the Circuit Court found that the jury's verdict of \$3,941.00 was grossly inadequate and warranted a New Trial Absolute.

Accordingly, the Court of Appeals committed an error of law by reversing the Circuit Court.

Therefore, this Court should reverse the Court of Appeals, affirm the Circuit Court, and remand this case for a new trial.

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Respectfully Submitted,



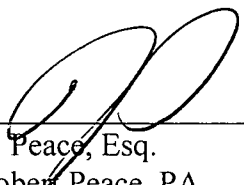
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October 6, 2016

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Certificate of Counsel

The undersigned counsel for Petitioner Barbara Gaines hereby certifies that the Petitioner's Final Brief complies with Rule 211(b), SCACR.

A handwritten signature in black ink, appearing to be 'J. R. Peace', written over a horizontal line.

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