IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)
Appellate Case No. 2013-002347

Barbara Gaines ..... Petitioner

v.

Joyce Ann Campbell ..... Respondent

RESPONDENTS BRIEF

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STATEMENT OF THE CASE

This matter comes before the Court by way of a Summons and Complaint filed by Barbara Gaines, the plaintiff. The complaint was filed on March 20, 2012. The Summons and Complaint alleged that Joyce Ann Campbell, the defendant, was negligent in driving her automobile, which caused an accident on January 8, 2010. The negligence arose as a result of the fact that Ms. Campbell's vehicle hit the rear of Ms. Gaines's vehicle. (Appendix. pp. 94-97) Ms. Campbell answered Ms. Gaines's complaint on April 16, 2012. At that time, Ms. Campbell conceded that she was negligent. However, she denied that she caused any longstanding injury to Ms. Gaines. Furthermore, she alleged that Ms. Gaines suffered from a preexisting or post-existing injury.

Finally, Ms. Campbell alleged that Ms. Gaines had failed to mitigate her damages. (Appendix, pp. 98-100)

Discovery then proceeded, and the matter was ultimately called for trial on August 5, 2013. 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. (Appendix. 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). (Appendix. 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. (Appendix. p. 331, lines 5-24) The jury then deliberated, and, thereafter, returned a verdict for the emergency room bill only. (Appendix. p. 304, lines 12-25; and, p. 93)

Ms. Gaines then made a motion for a new trial, or, in the alternative, a new trial additur. The formal hearing with regard to that request took place on August 15, 2013. At the conclusion of the hearing, the Court issued an oral ruling granting a new trial based upon the thirteenth juror doctrine. The Court's Order was formally executed on September 18, 2013. Ms. Campbell received written notice of the entry of that order on September 23, 2013. (Appendix. pp. 89-92) Ms. Campbell then filed a notice of intent to appeal the Court's Order on October 23, 2013. On November 27, 2013, the Appellate Court forwarded a letter, wherein it requested that both parties submit a memorandum addressing the issue of appealability of the Court's Order. On December 6, 2013, Ms. Campbell

filed a memorandum addressing the issue of appealability.

Ultimately, the Court of Appeals heard the case and, on August 19, 2015, unanimously reversed the Circuit Court's decision to grant a new trial. The reversal hinged on the fact that the Circuit Court granted a new trial based upon the thirteenth juror doctrine, and gave reasons for the same. Those reasons being incorrect.

FACTS

The documents, photographs, and testimony from independent witnesses elicited facts as follows:

As early as July 23, 1987, Ms. Gaines was at a hospital for neck therapy treatments. By July 24, 1987, Ms. Gaines was on medical disability for a neck injury which occurred in the course of her then-employment. (Appendix. p. 204, line 1-p. 209, line 5) In 1999, Ms. Gaines filled out a health questionnaire for the Jervey Eye Group, wherein she indicated that she was having arthritis in her spine. (Appendix. p. 207, lines 11-19) On July 23, 1999, she told Dr. Beth Brown that she had a history of a neck injury which was the result of falling while performing a cartwheel. (Appendix. p. 207, line 20-p. 208, line 2) On June 17, 2002, she was at Piedmont Orthopedics, wherein she filled out a document stating that she was suffering from pain in her joints or bones, swelling of her joints, arthritis, and stiffness. (Appendix. p. 208, line 3-p. 210, line 20) On August 25, 2006, Ms. Gaines told a doctor at Adult Medical Specialists of Easley that she had injured her shoulder about two weeks prior, and since that injury, had experienced trouble moving her upper arm, as well as pain in her neck. (Appendix. p. 211, lines 7-24) On August 29, 2006, she went to see Dr. Anne Claire Edwards, wherein she indicated that she was having neck pain. (Appendix. p. 211, line 25-p. 212, line 9) Ms. Gaines then went to Dosher Physical Therapy on August 30, 2006, wherein she indicated that she was a sixty-five year old female who had been referred to physical therapy with a

six-week history of left shoulder pain, with that left shoulder pain occurring especially with overhead movement. She also reported neck pain that had been in existence longer than the shoulder issue, as well as feeling stiff, achy, and tight. (Appendix. p. 212, line 10-p. 214, line 4) On September 01, 2006, Ms. Gaines reported to the same physical therapist that one of her problems was neck tightness. (Appendix. p. 214, lines 9-13) On September 07, 2006 she was back at the physical therapist's office, and noted that her neck tightness that was not getting better. (Appendix. p. 214, lines 14-25) On September 13, 2006, she advised the physical therapists that her arm, shoulder, and neck pain were better. However, this could have been attributed to the fact that her pain typically occurred in the mornings. Furthermore, it was noted that her neck might not have been as tight. (Appendix. p. 214, lines 14-15) On September 18, 2006, it was noted that her neck and shoulder were tight. (Appendix. p. 215, lines 1-4) On October 11, 2006, it was also noted that her neck was much better. (Appendix. p. 215, lines 5-9) However, by October 13, 2006, she reported that her shoulders weren't not too bad, until her neck became stiff. (Appendix. p. 215, lines 10-14) On October 18, 2006, she continued with complaints of cervical spine pain. (Appendix. p. 215, line 15-p.216, line 2) On April 05, 2007, Ms. Gaines filled out a document wherein she specifically noted that her medical history included neck problems. (Appendix. p. 216, lines 3-17) On April 05, 2007, she engaged physical therapy a second time, wherein she noted a history of left and right carpel tunnel syndrome, neck problems, diabetes, and arthritis. (Appendix. p. 216, line 18-p. 217, line 20) On September 01, 2009, she went to Dr. Mark Baker of Easley Family Practice and Internal Medicine. At that point, it was noted that the patient had pain and stiffness in her upper trapezius and cervical spine muscles. (Appendix. p. 217, line 21-p. 220, line 23) On August 27, 2009, she went to Dr. Lisa G. Harding's office, wherein she indicated that, in addition to other medications, she was taking Cymbalta and Tylenol Arthritis. (Appendix. p. 532, lines 3-25; and,

Appendix. p. 536, line 1-p. 538, line 1) Indeed, by September 11, 2009, her doctor was continuing to prescribe Cymbalta, a medication capable of aiding nerve and muscle problems, as well as Tylenol Arthritis, an arthritic medication. However, Ms. Gaines's doctor then added Ultram, an opiate-type of pain medication, to Ms. Gaines's medical regimen. (Appendix. p. 538, line 2-p. 539, line 20) On November 30, 2009, she was still taking the Tylenol Arthritis, Ultram, and Cymbalta. (Appendix. p. 539, line 21-p. 540, line 18)

On January 8, 2010, Ms. Gaines and Ms. Campbell were involved in the automobile accident which gives rise to this lawsuit. That accident resulted in very little visible damage to either party's vehicle. (Appendix. pp. 100-106; A. p. 190, line 12-p. 194, line 12; A. p. 241, line 17-p. 242, line 22; A. p. 338, lines 3-22; and, A. p. 154, line 5-p. 166, line 2) In fact, Ms. Gaines testified that she told the investigating police officer that she did not know if she were injured at the time of the accident. (Appendix. p. 167, lines 21-24; A. p. 156, lines 3-12; and, A. p. 243, line 23-p.244, line 6) Furthermore, after the investigation's conclusion, both Ms. Gaines and Ms. Campbell drove away from the scene of the accident. (Appendix. p. 198, line 23-p. 199, line 1; and, A. 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. (Appendix. p. 541, line 2-p. 543, line 16) Her respiratory rate was checked and found to be sixteen. (Appendix. 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. (Appendix. 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, denied any dizziness, and, most important, denied any 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, with no spasms, and no stiffness. She did have pain when moving her neck. However, that pain was 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. Regardless, she never complained of right arm pain. Furthermore, her neck was x-rayed, and the radiologist determined that she had severe degenerative changes in the same. However, no acute abnormalities were noted. (Appendix. 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 so as to receive blood work. During that visit, she made no request to see her doctor. (Appendix. p. 552, line 21-p. 553, line 13)

On February 8, 2010, Ms. Gaines returned to her doctor, wherein her complaints were listed in this order: 1) hot flashes; 2) skin problems; 3) moles; and, 4) right arm pain. That doctor 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. (Appendix. p. 553, line 14-p. 558, line 10)

As a result, Ms. Gaines was sent for an MRI. Again, the MRI was to be performed as a result of Ms. Gaines's complaint of right arm numbness and weakness. The radiologist who interpreted that MRI indicated that Ms. Gaines suffered from severe bone spurring, a congenitally small spinal canal, and severe spinal canal stenosis. (Appendix. p. 558, line 11-p. 563, line 7)

The findings of this MRI ultimately resulted in Mr. Gaines being referred to a neurosurgeon. Indeed, the neurosurgeon then placed her into physical therapy. In fact, on May 04, 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. (Appendix. p. 484, line 6-p. 485, line 16) Thereafter, On June 07, 2011, Ms. Gaines underwent surgery to her neck, so as to have the bone spur that was pinching her nerve removed. (Appendix. p. 431, line 24-

p. 432, line 5; and, A. p. 434, lines 1-18) The removal of Ms. Gaines's disc was simply to allow the surgeon to gain access to Ms. Gaines's spur. 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. (Appendix. p. 563, line 4-p. 566, line 1; and, A. p. 180, lines 13-15)

The facts as elicited by Ms. Gaines are as follows:

Ms. Gaines testified that the impact to her automobile was as if a bomb had gone off. (Appendix. 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. (Appendix. p. 166, lines 10-18) Ms. Gaines did concede that she told Ms. Campbell that she did not know if she were injured, while at the scene. (Appendix. p. 166, line 25-p. 167, line 1) Furthermore, Ms. Gaines agreed that she told the officer who investigated the accident the same. (Appendix. 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. (Appendix. p. 198, line 23-p. 199, line 1) Thereafter, she presented to the emergency room, wherein she was ultimately released. (Appendix. 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 said surgery, she experienced no recurrence of the symptoms that were in existence prior to the same. (Appendix. p. 180, lines 13-15)

Upon cross examination, Ms. Gaines was forced to admit that, when given photographs of her vehicle during her deposition, it was evident that her vehicle suffered very little visible damage. (Appendix. pp. 101-103; A. p. 191, line 12-p. 194, line 12; A. p. 241, line 17-p. 242, line 22; A. p. 154, line 5-p. 156, line 2; and, A. 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. (Appendix. p. 169, lines 13-19; A. p. 210, lines 2-16; and, A. p. 543, line 17-p. 556, line 4; and, A. p. 562, line 5-

p. 563, line 7) Ms. Gaines then had to confirm that during her deposition testimony, she indicated that she had never been treated for neck pain, prior to the automobile accident in question. (Appendix. p. 202, lines 1-4) Furthermore, she was forced to acknowledge that, during her direct examination, she told the jury that she had been to the Piedmont Orthopedic Clinic before the accident with regard to a shoulder problem, only. (Appendix. p. 202, lines 5-9) Last, Ms. Gaines had to admit that, during direct examination, she told the jury that she had never been on disability because of a neck issue. (Appendix. p. 164, lines 18-22; and, A. 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 spite of Ms. Gaines's prior testimony regarding her neck, her medical records indicate a very different story. For example, Ms. Gaines was at a hospital engaging in neck therapy treatments as early as July 23, 1987. It was then 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, 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 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. She then reported, on September 18, 2006, 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. (Appendix. p. 199, 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 had added an opiate-type of pain medication. On November 30, 2009, she continued to take Tylenol Arthritis, Ultram, a synthetic opiate, and Cymbalta. (Appendix. p. 532, line 13-p. 540, line 18) She was then involved in the accident which gives rise to this lawsuit on January 8, 2010.

Ms. Gaines also stated, during her deposition, 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. (Appendix. p. 483, line 21-p. 484, line 5) However, it is abundantly clear that she re-injured her neck on August 4, 2010. 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." (Appendix. p. 484, line 6-11) Obviously, her deposition testimony was incorrect. Just as important, one of her expert witnesses, Dr. Harding, unequivocally stated that the mulching incident could have created the need for Ms. Gaines's neck surgery. (Appendix. p. 566, lines 11-16; and, A. p. 567, lines 8-10)

Dr. Mina, one of Ms. Gaines's experts, testified that, to a reasonable degree of medical certainty, the automobile accident caused Ms. Gaines to require an operation to remove the bone spur. (Appendix. 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. (Appendix. p. 420, lines 11-17) She then questioned the reliability of the emergency room records. (Appendix. p. 455, line 12-p. 459, line 3; A. p. 486, line 1-p. 490, line 6; and, A. 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. (Appendix. p. 491, line 16-p. 498, line 22) She then testified that there existed no possibility that the mulching incident could have been the catalyst that ultimately facilitated Ms. Gaines's need for surgery. (Appendix. p. 497, line 9-p. 498, line 1) This testimony was given despite the fact that the mulching incident occurred eight months after the accident with Ms. Campbell, and ten months prior to her date of surgery.

Dr. Harding, Ms. Gaines's second expert, offered testimony. Unfortunately, most of this testimony 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 easily be able diagnose a pinched nerve.(Appendix. p. 556, line 1-p. 558, line 10) Furthermore, Dr. Harding never questioned the need to independently read radiologic films. (Appendix. 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 proper evaluations of its patients. (Appendix. p. 541, line 2-p. 552, line 13) In fact, she, unlike Dr. Mina, admitted that Ms. Gaines's need for surgery could have been created by the mulching incident. (Appendix. p. 566, line 21-p. 568, line 3)

ARGUMENTS

A. THE CIRCUIT COURT ABUSED ITS DISCRETION WHEN IT GRANTED A

NEW TRIAL, BASED UPON THE THIRTEENTH JUROR DOCTRINE, AS A RESULT OF THE FOLLOWING MISAPPREHENSIONS OF LAW.

A Circuit Court Judge has the power to grant a new trial by utilizing the Thirteenth Juror Doctrine. However, this power may be exercised only when the verdict is, "shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 635, 529 S.E.2d 758, 761 (S.C. 2000). "The Trial Judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the Court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives" *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (S.C.App. 1996). However, a jury's determination of damages is entitled to substantial deference. *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (S.C.App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (S.C. 2009). Just as important, the decision to grant or deny a new trial motion rests within the discretion of the Circuit Court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Brinkley v. S.C. Dep't of Corrs.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (S.C.App. 2009). However, if a court grants a new trial, by use of the thirteenth juror doctrine, or any other rule, and provides reasons for its decision, then those reasons must be reviewed. If the court rationale contains misapprehensions of law or fact then the court's order must be reversed. *Lane v. Gilbert Const. Co. Ltd.*, 383 S.C. 590, 597-600; 681 S.E. 2d 879, 883-884 (S.C. 2009); *Youmans v. S.C. Dept. Of Transp.*, 380 S.C. 263, 282, 287-88; 670 S.E.2d 1, 10, 13. (S.C. App. 2008).

In essence, a court that "abuses its discretion," a term that sounds extraordinarily harsh, is

simply misapprehending the facts or the law. However, if a court applies reasons for its decision and misapprehends those reasons, it has abused its discretion and the same's new trial order must be reversed.

I. THE CIRCUIT COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT DEFENDANT MUST PRESENT AN EXPERT SO AS TO CONTRADICT AN OPPOSING EXPERT'S TESTIMONY.

The Circuit Court's order granting a new trial cited a number of reasons for its decision. A general reason noted was as follows: "Plaintiff's new trial motion centered on the testimony of her two medical expert witnesses who each opined that this motor vehicle accident more probably than not, to a reasonable degree of medical certainty, was the cause of the injury to the Plaintiff which necessitated the disputed spinal surgery. Both witnesses were presented at trial through the use of de bene esse video depositions. Defendant did not present any evidence to refute these experts and relied solely on McGarr's cross-examination of the witnesses to contest the proximate cause issue. No objections were made at the trial as to the admission of either deposition and no objections were made at trial as to the content of either deposition" In essence, the Court's opinion was influenced by its belief that a defendant, when confronted with a proximate cause issue, must present an expert to refute the testimony of a plaintiff's expert.

The Circuit Court's statement is absolutely correct. Two doctors testified for the Plaintiff, without objection from either party. The Defendant produced no experts to counter the opinions of the Plaintiff's experts. However, the credibility of the statements given by the experts was clearly the issue in question.

To the best of the undersigned's knowledge, the above-noted issue was first addressed by a court in 1935. At that time, our Supreme Court held that, "the fact that the evidence was 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 witness or his interest in the result." *Green v. Greenville County*, 176 S.C. 433, 439, 180 S.E. 471, 474 (S.C. 1935). Indeed, by 1952, the issue was unequivocally settled. At that time, our Supreme Court dealt with a Trial Court's jury charge that consisted of the following: "I charge you in that connection that the testimony of the witnesses, although uncontradicted, is not binding upon you. You have a right to determine it in the light of all circumstances and give it such weight as you think it is entitled to." Our Supreme Court, when dealing with that charge, reiterated, "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 witness or his interest in the result." *Terwilliger v. Marion*,222 S.C. 185, 188, 72 S.E. 2d 165 (S.C. 1952). By 1991, a case, almost identical in every respect to the case being presented to the Court today, was reviewed by the Court of Appeals. *Black v. Hodge*, 306 S.C. 196, 196, 410 S.E. 2d 595 (S.C.App. 1991). In *Black*, the Plaintiff alleged substantial injuries from an admittedly minor collision. No witness directly contradicted the Plaintiff's testimony or that of the doctor she called to testify on her behalf. Nevertheless, the jury returned a verdict for the defendant. In affirming the verdict, the Court held that the jury does not have to believe uncontradicted testimony. In fact, the Court stated, "Ms. Black makes several arguments on appeal, but the essential issue is whether the jury is required to accept her uncontradicted testimony that she was injured. Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no." Our Court of Appeals encountered yet another essentially identical case in 1996. Indeed, that matter was cited by the Circuit Court in its order granting a new trial. The case in question is *Vinson v. Hartley*, 324 S.C. 389, 405, 477 S.E.2d 715, 723 (S.C.App. 1996). *Vinson* was also involved in a low impact

automobile accident. Mr. Vinson then testified, as did his dentist. Defense counsel simply cross examined both witnesses, and, in the process, discredited their respective reliability. However, defense counsel did not present other witnesses to independently refute the testimony of the plaintiff's witnesses. When reviewing the appeal, our Court referred to*Black* and *Terwilliger*, so as to explain that the Circuit Court need not have granted a new trial, as a trier of fact must not always believe uncontradicted testimony.

The Court of Appeals unanimously agreed with the above. However, it found that the Circuit Court was merely recounting the events of the trial when discussing this issue. While correct, the Circuit Court's preoccupation with the lack of an opposing expert was so severe as to cause it to make additional misapprehensions of law which necessitated a reversal of the Circuit Court's Order, and necessitates a continued concurrence with the Order of the Court of Appeals.

II. THE CIRCUIT COURT MISAPPREHENDED THE LAW IN BELIEVING THAT CROSS EXAMINING AN EXPERT AMOUNTS TO PITTING WITNESSES.

The Circuit Court then rooted its decision to grant a new trial on the basis of this reason. To wit, the Court stated, "this Court finds that much of McGarr's cross-examination of Dr. Mina (Plaintiff's neurosurgeon who performed the surgery) was objectionable and should have been excluded. McGarr repeatedly and argumentatively questioned Dr. Mina about the veracity of other witnesses. Not only did McGarr continually ask Dr. Mina to comment on the Plaintiff's credibility using collateral sources, but McGarr went so far as to ask Dr. Mina if she was calling the Emergency Room physician's 'quacks'. This question was in clear violation of South Carolina's long-standing and basic rule prohibiting the 'pitting' of witnesses."

Dr. Mina unequivocally stated that the bone spur, which she removed from Ms. Gaines's neck, was not created or aggravated by the automobile accident in question. However, based upon

the history given to her by Ms. Gaines, she was capable of ascertaining that Ms. Gaines had suffered from a severe flexion-extension injury, which, in turn, inflamed the nerve that abutted the bone spur. In order resolve that inflammation, the bone spur had to be removed. Unfortunately, Ms. Gaines provided a history to Dr. Mina wherein she indicated that the impact from the accident in question was so significant that it caused her to be knocked out. This, according to Dr. Mina, created a significant flexion-extension injury mechanism, and confirmed her opinion that the nerve abutting the bone spur was inflamed as a result of the automobile accident.

Given the above matters of fact, discussing the emergency room records became absolutely essential. This was in part due to the fact that the emergency room records clearly indicated that Ms. Gaines never lost consciousness as a result of this automobile accident. Indeed, the fact that the automobile accident was: a) low impact by nature; and, b) resulted in no loss of consciousness, meant that there was no real mechanism for which Ms. Gaines could have suffered the aforementioned flexion-extension injury. Additionally, Dr. Mina's disparaging statements with regard to an emergency room's ability to obtain a proper history and/or perform a proper exam were, at best, rather curious.

Furthermore, Dr. Mina agreed as to the importance of having an accurate history of her patient's problems, prior to the incident in question. Indeed, she affirmed that it would be difficult, given the facts of the case before the Court, to connect an incident to an injury, absent the patient giving an accurate and proper history.

If a true and accurate history is truly important with regard to relating an incident to an injury, that history should then be discussed. This is particularly true, given the fact that Ms. Gaines's testimony with regard to her prior neck history, which was given while she was under oath, was largely, if not completely,false. The issue of "pitting witnesses" should also be placed in

context. To wit, the following:

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

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

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

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strike you as extremely surprising that someone who

had been hit so hard that they were knocked out failed to tell the police officer they were injured and fails to tell the hospital that they were knocked out?

WITNESS CONTINUES:

A. If there was a significant head injury, then it might not be unusual. Because the patient right after the accident, right after a blow to the head, might be confused.

Q. I understand. But by the time she has gotten to the emergency room, she's specifically denying being knocked out.

A. But again she could be confused at this point in time. This is immediately after the accident.

Q. Don't' you think if she's able to tell you that she presents following a motor vehicle collision, the onset was just prior to arrival, the collision was a rear impact, the patient was the driver, there were safety mechanisms including seat belt - - that if she's able to give that much detail, that she probably

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should be able to remember, if she knows what's hurting her, that she had been knocked out? I mean, it would be very unusual to have that much detail and not remember being knocked out.

A. Well, but is this the patient herself giving the information? Because according to this, History Source says "patient and family." So a lot of this may be obtained from family members

Q. But the bottom line is, wouldn't you think that if the family members were there and she had been knocked out, that someone would have told the hospital?

A. Again, there might have been confusion right after the accident.

Q. But nonetheless, this hospital note makes no mention of her being knocked out. In fact, it specifically denies hat she was knocked out.

A. That's - -

A. That's what the note says. Where the source of that information comes from, I don't know.

Q. Okay, so at least with regard to what was stated on the day of this accident when she goes to the emergency room, the opposite of what she told us in

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

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

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Q. Except if we go and we look back under those - - under that theory, then why didn't she have radiating pain at the hospital the day of the accident?
A. I can't - - I wasn't there the day of - -
Q. But they don't describe - -
A. At the hospital, - -
Q. - - radiating pain.
A. - - so I can't speak to that.
Q. But, the records that we saw, she doesn't refer to radiating pain going into her right arm at the hospital; did she?
A. Well, I'd have to look back at them to see.
Q. Can we do that?
A. There's no specific mention made of arm pain here.

Q. In fact, if we actually go through the ER records, she's not complaining of arm pain. She's not complaining of radiating pain. She's not complaining of chest pain. She's not complaining of low back pain. She's essentially complaining of head and neck pain; is that correct?
A. Correct.
Q. So if there was a C - - a C5-6 issues, it wasn't presenting itself at the emergency room; was it?
A. Well, it's not mentioned in these notes. But again,

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

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she said no; is that correct?
Then let's read them together.
Q. Does it state, Doctor, that her chief complaint was that she was rear ended this p.m.? Patient complains of low back pain and headache. Patient complains of

nausea also.
A. I'm sorry. I'm on a different page, evidently.
Q. Are you not on the ER visit?
A. This says ED visit. Where on the page, are we?
Q. Are you not at the History of Present Illness?
A. Okay, can you read what you were reading again?
Q. Okay, just above that, Chief Complaint. "Rear ended

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

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A. I'm sorry?
Q. You would get more accurate information, not less. Would that be correct?
A. No, not necessarily.
Q. So two head are not better than one?
A. Not necessarily.

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Q. And even though she was doing better and she had these post-existing events, they couldn't have had anything

to do with that surgery?
A. I'm sorry. Could you restate?
Q. Even though she's had these post-existing events, those could have nothing to do with this surgery?
A. I'm sorry. What's a post-existing event?
Q. Mulching.
A. A pre-existing event?
Q. Post-existing, something that took place after the accident. She was mulching and started having trouble again.
A. Well, the trouble that she's describing with the mulching does not fit with a C-6 radiculopathy in the upper right extremity.
Q. If that's the case, the it doesn't fit with a C-6 radiculopathy when she went to the hospital either; does it?
A. Well, that's - - again, that's documentation form the emergency room visit, the reliability of which is unclear. And I wasn't there at that time to question

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or examine the patient.
Q. So as far as you're concerned, the ER doctors are quacks?
A. I beg your pardon?
Q. You said more - -
Q. You said, more than once, that you don't think the emergency room records are reliable.
A. Correct. That does not mean that the emergency room doctor is a quack. That mean that the records here, the history that's obtained from the patient and family, is not necessarily exactly what happened or what the patient was feeling at the time.
Q. Okay, and that's because two heads are never better than one?
A. That has nothing to do with it. (Mina Depo. pp. 45-49; 75-80; and, 87-88)

Unfortunately, the law with regard to the cross-examination of expert witnesses is well settled. Indeed, the rules of evidence applicable to this trial were adopted on September 3, 1995. Rule 705 was incorporated during that adoption. Rule 705 states that during an expert's testimony, "The expert in any event may be required to disclose the underlying facts or data on cross-

examination." This rule was more fully set forth in the case of *State v. Sclocumb*, 366 S.C. 619, 521 S.E.2d 507 (S.C.App. 1999). In that case, the Court stated, "Under this provision (Rule 705) a cross-examiner is permitted 'to ask the expert to reveal otherwise inadmissable, underlying information to the jury.' On cross-examination, in the process of probing the witness's qualifications, experience, biases, and assumptions, opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, the cross-examiner may explore whether, and if so, how, the nonexistence of any fact, data, or opinion, or the existence of a contrary version of the fact, data, or opinion supported by the evidence would affect the expert's opinion. Similarly, the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry, subject to the requirements of Fed. R. Evid. 403, the cross-examiner is not limited to facts finding support in the record." The Court went on to say that "Rule 703 creates a shield by which a party may enjoy the benefit of inadmissable evidence by wrapping it in an expert's opinion; Rule 705 is the cross-examiner's sword, and, within very broad limits, he may wield it as he or she likes." Id.

Obviously, one cannot pit a lay witness against another lay witness. In fact, it would be improper to ask a lay witness whether or not another lay witness had told the truth. Indeed, it would be equally improper to cross-examine a lay witness and ask him or her to explain why other witnesses testified contrary to the witness on the stand. However, by at least 1995, expert witnesses, particularly medical doctors, can be examined with regard to the ability of their patient to be a

proper "historian." Of note would be the frequency with which Justices have been forced to read transcripts with the following lines of questioning: "Doctor, in order to properly diagnose the patient, you first have to take their history, correct? The next question is, invariably, "And if the history is wrong, your diagnosis and/or ability to connect an injury to a particular incident is made much more difficult, am I correct?"

The sword, described above, allows a cross-examining attorney to present contrary versions of fact, so as to explore whether those contrary facts would affect an expert's opinion. The fact that Ms. Gaines was noted to be fully conscious in the emergency room records fits squarely withing this admissible form of cross-examination. That same sword allows an expert to be examined with regard to his or her patient's ability to give a proper history. This is particularly evident when the patient's history is given under oath. Moreover, the cross-examiner's sword allows an expert's biases and fairness to be questioned. Few statements could be more illuminating with regard to an expert's bias and/or lack of fairness, than an expert making disparaging remarks toward her colleagues, to the extent that Dr. Mina disparaged the emergency room doctors whose data contradicted her own version of her patient's history.

The Court of Appeals determined that pitting did exist in a very select 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, the Court of Appeals 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.

In essence, when viewed as a whole, the Circuit Court misapprehended the law with regard

to "pitting" and should be reversed. At the very least, and as stated by the Court of Appeals, the Circuit Court should have ignored, not highlighted the alleged "pitting," as the same was harmless. As such, the Circuit Court's Order should continue to be reversed.

III. THE CIRCUIT COURT MISAPPREHENDED THE LAW IN ITS BELIEF THAT AN EXPERT CANNOT BE CROSS EXAMINED BY ASKING IF OTHER THINGS COULD HAVE POSSIBLY CREATED THE PROBLEM IN QUESTION.

The Trial Court then bolstered its decision to grant a new trial by citing yet a second reason. The Court stated, "Additionally, McGarr repeatedly requested Dr. Mina to state her opinion concerning the proximate cause of the injury which necessitated the surgery. McGarr asked Dr. Mina if it was 'possible' for a disputed intervening event to have caused the necessity for the surgery." In pertinent part, the Court felt that, at the end of Dr. Mina's testimony, "the law in South Carolina requires that opinion testimony by medical experts must be to a reasonable degree of medical certainty and more probably than not. There is no distinction made as to who the questioning party is."

The Court of Appeals unanimously stated the following regarding the Circuit Court's thinking on the issue:

"In this case, Campbell asked both of Gaines's experts witnesses whether it was possible an injury Gaines sustained while mulching her yard after the car accident could have been the reason for Gaines's surgery, to which one expert replied, 'It's possible.' Campbell also asked that expert whether it was possible the car accident had nothing to do with the surgery, but instead Gaines's arthritis had necessitated the surgery, and the expert again replied, 'It's possible.' At the close of Gaines's case, Campbell moved for a directed verdict. After denying the motion, the trial court informed Campbell she 'had the opportunity to present evidence to show that your claims of the

other two or three things that you think possibly could have caused this injury, you could have put evidence–you could have brought evidence in, if it existed. It further stated, 'But you cannot use–you can't come in here and try to use your opponent's expert and not live up to the same standard. You can't require him to have more probably than not to a reasonable degree of medical certainty and you just mere possibility."

"During a hearing on Gaines's motion for a new trial, Campbell's attorney stated that the jury could have found that Gaines's surgery occurred as the result of a "natural...worsening of [her] pre-existing" condition. The trial court responded, "Was there any evidence in the record to show that? The only opinion testimony was that this accident caused it." When Campbell referenced the mulching accident that occurred in between the car accident and the surgery, the trial court referred to the mulching accident as "[a] disputed supposed intervening cause where there was no testimony to what [it] consider[ed] to be the required standard to say that it more probably than not caused it." It is clear the trial court failed to consider the testimony elicited on cross-examination when granting Gaines's new trial motion as it found the evidence that required a verdict to compensate Gaines for her surgery to be "[t]he only competent evidence admitted at trial."

"In its new trial order, the trial court found this type of questioning "objectionable" and stated it "should have...been excluded." However, we believe Campbell was permitted to pose hypothetical questions to the expert witnesses to challenge the experts' testimony that the car accident necessitated the surgery. *See Ala. Power Co.*, 96 So. At 348 (permitting cross-examination of the expert witness on other possible causes of the plaintiff's medical conditions). These questions were supported by the evidence as Campbell produced medical records in which Gaines complained of arthritis and described suffering an injury when she fell while mulching. *See Brown*, 286 S.C. at 326, 333 S.E.2d at 352 (stating hypothetical question must be based on facts supported

by the evidence).

"Thus, this finding by the trial court was erroneous. Because 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. *See Vinson,* 324 S.C. at 403, 477 S.E.2d at 722 ("A trial [court's] order granting or denying a new trial upon the facts will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.")."

Unfortunately, the Circuit Court's misapprehension of the law with regard to this issue, caused the Court to incorrectly invoke the Thirteenth Juror Doctrine, and grant a new trial. That misapprehension of law amounts to an abuse of discretion, which necessitates the continued reversal of the Court's Order.

IV. THE CIRCUIT COURT MISAPPREHENDED THE LAW IN BELIEVING THAT A CLOSING ARGUMENT WITH NO DIRECT APPEAL TO ANY SPECIFIC JUROR ACTUALLY VIOLATES THE RULE OF APPEALING TO THE JURY.

The Trial Court further based its decision to grant a new trial with regard to a third rational. The Court stated, "McGarr also violated SCRCP Rule 43(i) in his closing argument. McGarr personally addressed and personally appealed to the jury in his closing remarks. The comments in McGarr's closing included: '...I know that my Greenville County Jurors are going to be fair and decent to me.' 'And, you're bright enough and have the brains enough to know that what I said on Monday.' 'And you guys are not so foolish or dumb.' 'When you have heard the evidence yourself, are you guys just not bright enough to remember?' While these indiscretions are not objected to by Peace, the Court finds them to have prejudiced the outcome of the trial."

It is important to remember that the South Carolina Rules of Civil Procedure were adopted

on September 3, 1995. This would include Rule 43(i). Rule 43(i) states, in pertinent part: "Counsel should not address or refer to by name, any member of the jury to which he is addressing, or otherwise personally appeal to any member thereof." This rule was designed to prevent any attorney from addressing the jury, via one of the following examples: "Mr. Smith, as you know...." "You are a nurse and you heard." "Sir, in the blue tie, you must understand." Simply stated, the rule is designed to prevent an attorney from personally appealing to and/or intimidating an individual juror. It is not designed to prevent an attorney from discussing an issue with the jury, collectively.

There is no dispute that the statements cited in the Court's Order were made. However, the following additional statements were made by Ms. Gaines's counsel: 1) "Good afternoon ladies and gentlemen. My name is John Peace. I was introduced to you earlier today during jury selection during jury selection. Like the judge said, we really couldn't hold jury trials without you, obviously. You are the main event. You are the ultimate deciders of all issues of fact." 2) "So when you are in the jury room thinking, 'well, what is pain and suffering worth?' I can already tell you, I mean, Judge Miller's instructions is going to be, there is no market price for pain and suffering, it's not bought and sold. And there is no fixed amount that should be charged for it. You, in the exercise of your common sense, need to decide what its worth in this case, for this lady, under these circumstances. This is the individualized justice because this is the case that has been presented to you as the jury." 3) "Ladies and gentlemen, this is my closing argument. We are going to have these figures in the jury room with you. Which are the medical fees. It's also Dr. Mina's reśumé. We are going to have this medical log so that you can look more closely at it. You are going to see the hardware as it is today, you can see the course of treatment starting with MRI's right after the wreck. And you can see up close what Dr. Mina showed you in her testimony yesterday. Ultimately, I want you to go back to the jury room, after you have been instructed on the law and deliberate

carefully. Discuss it amongst yourselves, use your common sense. But based, on the evidence that has been put before you in this trial, I would suggest that the only logical result would be a verdict for Barbara Gaines in the amount well in excess of the medical bills in this case. I thank you in advance for your hard work. Depending on what Mr. McGarr may say to you, I also have the right to respond to that. So I may be back here in just a moment and have a brief overview before you deliberate."; 4) "Ladies and gentlemen, I know you have been living with this case for a few days and you are ready to get on with your job. It won't take a lot of time, but I've got to tell you, its hard to sit here and listen to somebody accuse me of being disingenuous when he is calling Barbara Gaines a liar. You listened to her, you listened to her daughter, and you listened to her doctors. And I leave it to you to decide who is telling the truth as far as her injuries."; and, 5) "So ladies and gentlemen, I am going to sit down and let the Judge instruct you all on the law. Please use your common sense. And weigh this for what it is and bring back a verdict that speaks the truth for both of these parties. I appreciate it." The Circuit Court ignored those statements.

The Circuit Court order also failed to view McGarr's statements in their true context. For example, in his opening statements, Ms. Campbell's counsel (McGarr) 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 closing, 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?"**

The Court of Appeals unanimously stated the following regarding this issue:

"In the instant case, the trial court took exception to several comments by Campbell's attorney, including (1) "I request jury trials in Greenville County because when I do, I know that my Greenville County jurors are going to be fair and decent to me. And be honest with themselves with regard to what a case is about."; (2) "[Y]ou're bright enough and have the brains enough to know that that's what I said on Monday."; and (3) "[Y]ou guys are not so foolish or dumb and it's disingenuous to pretend like you are, that you didn't hear that the doctor says, She's got a bone spur that is squishing on that nerve that's causing a problem and makes it go down her arm."

"We find Campbell is correct in her assertion that the above statements do not violate Rule 43(i). Counsel did not "address or refer to by name any member of the jury" nor did he "personally appeal to any member." Rule 43(i), SCRCP. Furthermore, while counsel's statement that his "Greenville County jurors are going to be fair and decent to [him]" could possibly be construed as "unfairly calculated to around passion or prejudice," *see Gathers*, 282 S.C. at 231, 317 S.E.2d at

755, the trial court subsequently instructed the jury to "consider the evidence calmly and with measured reason, without passion, prejudice, bias or emotion." A similar instruction was deemed to have cured any error from the statements made during closing arguments in *Gathers*. *See id.* At 231-32, 317 S.E.2d at 755-56 (finding that plaintiff's attorney's statement during closing arguments in which he told the jury not to "think too hard with your head but to think with your heart" was cured by the trial court's instruction that the jury "cannot act through emotion" but needed to "weight the evidence and do what is just"). Accordingly, the trial court's finding was in error."

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 was cured and made 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 Court of Appeals ruling was correctly deferential. However, when viewing this issue, in full context, it is apparent that the Circuit Court misapprehended this issue also. As such, the reversal of its Order should be maintained.

V. THE CIRCUIT COURT'S MISAPPREHENSION OF THE LAW RESULTED IN A MISAPPREHENDING OF FACTS.

The Circuit Court's final rationale for granting a new trial is stated as follows: "The only

competent evidence admitted in trial requires a verdict that compensates the Plaintiff, at a minimum, for the medical bills and expenses incurred as the result of the spinal surgery. This Court finds an award of damages for only the emergency room bills in their value of $3,941.00 is grossly inadequate and unsupported by the evidence in this case."

This conclusion fails to take into consideration Ms. Gaines's longstanding preexisting issues with regard to her neck. This conclusion also fails to take into consideration that the pain medications Ms. Gaines had been utilizing were being increased just prior to the occurrence of the automobile accident in question. Additionally, this conclusion fails to take into consideration the minor nature of this automobile accident. Moreover, it fails to consider the credibility issues associated with the plaintiff and a number of the plaintiff's witnesses. Furthermore, it does not consider the fact that Ms. Gaines's neck was doing better up until the point wherein she mulched her yard. At that point, her neck issues were exacerbated and, thereafter, surgery was performed. Indeed, this conclusion fails to consider the fact that Ms. Gaines simply grew older, and, a defendant cannot be held responsible for the natural progression of the aging process, and the worsening of conditions associated therewith.

As stated above, almost identical versions of this case have previously been tried and discussed on appeal, *Black v. Hodge*, *Vinson v. Hartley*. In fact, *Vinson* was appealed because the Trial Court refused to invoke the Thirteenth Juror Doctrine, in spite of the plaintiff's attorney request that the same be done. Furthermore, the Court of Appeals upheld the Trial Court's refusal of that request.

To grant a new trial in the case before you, after citing *Vinson*, is clear evidence that the Circuit Court simply misapprehended the Rules of Evidence and Rules of Civil Procedure and, as a result, the facts of the matter. For that reason, the Circuit Court abused its discretion, and its Order

granting a new trial should be reversed.

CONCLUSION

To summarize, the jury was presented with a plaintiff that had a longstanding history of neck problems. Indeed, those neck issues were of a progressive nature, and were worsening in concurrence with the Plaintiff's natural aging process. In the meantime, the Plaintiff was involved in a low impact automobile accident. The same Plaintiff confirmed that, at the scene of this low impact accident, she advised the investigating officer who inquired as to her health that she did not know if the accident had caused her any injury. Moreover, she then drove away from the scene of that accident. Thereafter, she ultimately went to the hospital, wherein she was examined. While at the hospital, she did not complain of pain radiating into her arm. One month later, she went to her family physician's office, wherein she reported arm pain. However, that arm pain, by all accounts, was associated with and caused by a bone spur located in the Plaintiff's neck. That very bone spur had been in existence well before the automobile accident in question occurred. Regardless, the Plaintiff was then treated to improvement, until a point some time later, wherein she mulched her yard, and, during that process, re-injured her neck. Thereafter, the bone spur was surgically removed, and the Plaintiff's neck and arm symptoms were resolved.

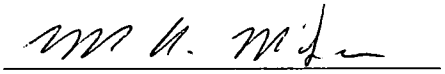
The jury then heard testimony from Ms. Gaines and a number of Ms. Gaines's witnesses. The credibility of all those witnesses was ultimately subjected to grave suspicion during the course of cross-examination.

In consideration of all the above, it was suggested to the jury that it award the Plaintiff an amount commensurate with the emergency room bill that she incurred on the date of the accident. After deliberating, the jury logically and fairly returned a verdict in the amount of the emergency room bill. There is no competent evidence to suggest that this verdict was shockingly

disproportionate to the injuries suffered, or affected by passion, caprice, or prejudice.

In conclusion, the Circuit Court misapprehended multiple laws. Those misapprehensions of law led to misapprehensions of fact. In the course of these errors, the Circuit Court erroneously granted a new trial based upon the Thirteenth Juror Doctrine. These errors represent a clear abuse of the Circuit Court's discretion. As a result, the Court of Appeals, heard the matter, agreed with the Respondent, and unanimously reversed the Circuit's Order granting a new trial. That decision was sound, accurately reflected the law and facts and should be upheld.

Respectfully submitted,



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November 26, 2016

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2012-CP-23-1971
Opinion No. 2015-UP-432 (S.C. Ct. App. Filed August 19, 2015)
Appellant Case No. 2015-002347

Barbara Gaines.....Petitioner,

v.

Joyce Ann Campbell.....Respondent.

PROOF OF SERVICE

I certify the I have served the Responders Brief; Certificate of Compliance; and corresponding Proof of Service on Barbara Gaines by depositing a copy of it in the United States Mail, postage prepaid, on November 28, 2016, addressed to her attorney of record, John R. Peace, Esq., John Robert Peace, P.A., PO Box 8087, Greenville, SC 29604-8087.

November 26, 2016

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