THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

Michael G. Nettles, Circuit Judge

Appellate Court Case No. 2015-002618

Patricia Doller.....Respondent,

v.

Lohr Plumbing, Inc.....Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from the trial court's order granting Respondent a new trial pursuant to the 13th juror doctrine after a jury trial of this matter resulted in a verdict for Appellant, Lohr Plumbing, Inc. (hereinafter referred to as "Lohr"). In addition, Lohr appeals the trial court's denial of Lohr's motion for directed verdict. Other parties to this suit included Cathy Lynn Ritchie (hereinafter referred to as "Ritchie"), who retained Lohr to perform plumbing work on the subject residence prior to its sale to the Respondent, and ReMax realty, Ritchie's real estate agent.

The Respondent filed suit against Ritchie, ReMax and Lohr for fraud, negligence, gross negligence, and negligent misrepresentation. Both Ritchie and ReMax settled with the Respondent prior to trial. Shortly before trial of this case, Respondent moved to amend the Complaint and removed the allegations of fraud against Lohr. The trial proceeded upon the two remaining causes of action of negligence and negligent misrepresentation arising out of Lohr's plumbing work that allegedly resulted in a leak causing water damage and mold growth. In addition to property damage, Respondent also claimed personal injuries arising out of the alleged mold growth.

A trial of this matter occurred in Beaufort County September 1-3, 2015. Motions for directed verdict for each party were made at the close of both the Respondent's and Lohr's respective cases, and all motions were denied by the trial judge. A jury returned a verdict in favor of Defendant Lohr on a verdict form that combined the issues of negligence and proximate cause for each of the two causes of action. The verdict form was reviewed and consented to by all parties prior to submission to the jury. Respondent moved for a new trial after the verdict was read, again upon the same grounds for her motion for directed verdict, and the trial judge

permitted additional time for motions to be filed. Arguments upon Respondent's motion for JNOV, 13th Juror, and New Trial Absolute were heard on November 19, 2015 in Beaufort County, and the order granting Respondent's motion for new trial based upon the thirteenth juror doctrine was entered on November 25, 2015. This appeal followed.

FACTS

This is a hybrid personal injury and construction defect claim arising out of a water leak in the Respondent's residence, located at 55 James F. Byrnes Street in Beaufort, SC. The Respondent purchased the subject property from Ritchie on or about November 10, 2010. A home inspection performed prior to the purchase indicated the presence of polybutylene piping, which was required by the Respondent's homeowners insurance company to be removed before it would issue a policy to the Respondent. Ritchie retained Lohr to remove and replace most of the polybutylene piping within the home. However, Ritchie did not want to cut into certain sections of walls in order to replace the old shower valves within the walls. As a result, Lohr was required to leave the old shower valves and approximately three feet of non-pressurized polybutylene pipe in each bathroom; all other polybutylene pipe was removed (R. p. 220, lines 12-25).

After this work was completed, and at the request of a closing attorney, a letter was requested of Lohr to indicate the polybutylene piping had been removed, and one was prepared and signed by Lohr's office manager (R. p. 220, lines 18-25; R. p. 221, lines 1-9; R. p. 226 lines 18-25; R. p. 227, lines 1-10). According to Mr. Doran, these letters are not routinely prepared by Lohr, but only if one is requested (R. p. 224, lines 11-23).

Approximately one year later, on or about November 30, 2011, the Respondent discovered water beneath the wood floor in the master bedroom, and contacted Lohr. Upon

investigation, a Lohr employee located a slow leak at a joint between a new pex pipe and the old valve located within the wall between the master bedroom and master bathroom; no leak occurred within any of the polybutylene piping attached to the valve. The wood flooring within the master bedroom, as well as some drywall, suffered water damage. Lohr's employee capped the line and turned off the water to prevent further leaking (R. p. 229, lines 5-14). Brett Doran, owner of Lohr's, visited the house one or two days later and recommended that Respondent contact a water removal company to first dry the water (R. p. 230, lines 12-20), and then began to obtain estimates for repair of the floor and drywall (R. p. 234, lines 9-23). However, within a week, the Respondent refused entry to her home by any person or entity on behalf of Lohr, and further refused to respond to telephone calls and messages (R. p. 245, lines 20-25; R. p. 246, lines 1-3; R. p. 315, lines 16-17; R. p. 321, lines 4-16).

The Respondent claimed that, as a result of the leak, mold formed within the residence. The Respondent moved out of her home by December 17, 2011, and took no steps to perform any repairs to the damage or to otherwise abate any alleged mold within her home (R. p. 322, lines 1-16). As of the date of the trial of this matter, September 1-3, 2015, the Respondent had not performed any repairs to the residence (R. p. 334, lines 8-11; R. p. 335, lines 15-25; R. p. 336, lines 1-6).

In addition to alleged property damages to the master bedroom, the Respondent also claimed personal injuries as a result of alleged mold exposure. Specifically, Respondent claimed that as a result of alleged mold exposure, she suffered a severe reaction in the form of a rash covering her entire body (R. p. 261, line 25; R. p. 262, lines 1-2). She further claimed that this rash appeared shortly after she handled portions of the wood floor that she removed (R. p. 257, lines 14-17). However, Respondent had a long history of psoriasis (R. p. 262, line 25; R. p. 263,

lines 1-20), including diagnoses of guttate psoriasis approximately one week before discovery of the leak and again in December of 2011 (R. p. 308, lines 2-9; R. p. 323, lines 21-25; R. p. 324, lines 1-16; R. p. 325, lines 2-14). Finally, Respondent claimed that a hospital stay beginning January 4, 2012 and lasting through January 6, 2012 was the result of alleged mold exposure (R. p. 336, lines 12-25; R. p. 337, lines 1-7; R. p. 341, lines 9-21).

Medical testimony was offered by both the Respondent's own treating physician, Dr. Phillip Cusuamno, and Lohr's expert physician, Dr. David Amrol (associate professor of clinical internal medicine and allergy and immunology division director for the University of South Carolina School of Medicine). Dr. Amrol testified that mold exposure does not cause or exacerbate psoriasis (R. p. 465, lines 23-25; R. p. 466, lines 1-4; R. p. 475 lines 8-20), and Respondent acknowledged as much (R. p. 262, lines 6-13); he also testified that he saw no evidence in Respondent's medical records that she was allergic to mold (R. p. 483, line 25; R. p. 484, lines 1-4). Dr. Cusumano and Dr. Amrol both testified that strep bacteria can cause a psoriasis flare (R. p. 390, lines 19-25; R. p. 391, lines 1-23; R. p. 392, lines 20-24; R. p. 469, lines 16-25; R. p. 470, lines 1-14). According to Dr. Cusumano and Dr. Amrol, it was likely that the Respondent's skin eruption was the result of strep bacteria (R. p. 474, lines 11-25; R. p. 475, lines 1-7). Bacteria, not fungus, respond to antibiotics (R. p. 394, lines 21-25; R. p. 395, lines 1-17). By the beginning of February 2012, the rash was about 99% improved (R. p. 394, lines 10-14).

At the trial of this case, in addition to her own testimony, Respondent presented via video recording the testimony of Dr. Alan Lieberman, who provided medical testimony regarding the Respondent's alleged medical condition. For reasons unknown, the testimony of Dr. Lieberman was not included in the transcript. Therefore, reference will be made to Dr. Lieberman's

deposition transcript. [1] Respondent was referred to Dr. Lieberman by her attorney (R. p. 635, lines 10-12). Respondent also presented live testimony of Dr. Ernest Chiodo, a medical doctor who had not treated Respondent or visited her home but had allegedly reviewed her medical records (R. p. 122, lines 14-25). Respondent also presented the testimony of Mike Gibson regarding alleged repairs to the home, and testimony of James Doller and Richard Guffey who were fact witnesses.

Respondent also called Mr. Doran in her case in chief. He testified that he is a master plumber (R. p. 218, lines 17-18), that he is the owner of Lohr Plumbing (R. p. 218, lines 15-16), and that Lohr Plumbing was retained by Ritchie to perform pipe replacement work (R. p. 219, lines 19-25). When this leak was discovered, Lohr was called, responded and located and stopped the source of the leak (R. p. 228, lines 2-9). Mr. Doran did not actually see the leak, but was told by his employee it was a slow drip (R. p. 229, lines 5-14). Mr. Doran personally visited the house within a few days after the leak had been stopped, and advised that he wanted to fix the leak for the Respondent (R. p. 231, lines 10-16). At no point was any testimony elicited from Mr. Doran or any other witness that indicated whether the leak was the result of a negligent act or omission on behalf of Lohr.

In addition to Dr. Cusumano and Dr. Amrol, Lohr presented the testimony of Ken Warren (an industrial hygienist who inspected the Respondent's residence), Leith Webb (a general contractor who prepared a proposed estimate for repairs), and Mr. Doran. Mr. Warren provided testimony regarding a possible scope of work for the repairs to the Respondent's home, while Mr. Webb testified about the cost to execute said work.

[1] Dr. Lieberman's expertise was challenged by Lohr. Ultimately, Dr. Lieberman was qualified only in the field of pediatrics. The jury did not hear any testimony from Dr. Lieberman regarding his qualification or practice in environmental medicine. See R. pp. 60-63.

At the conclusion of the Respondent's case in chief, the Respondent and Lohr each moved for directed verdict upon the causes of action for negligence and negligent misrepresentation (R. pp. 352-367). Both motions were denied as the trial court determined that a scintilla of evidence existed to prevent his granting the same (R. pp. 366-367). At the close of Lohr's evidence, both parties again renewed their respective motions for directed verdict, and both were again denied as being questions for the jury to decide (R. pp. 487-489).

After closing and charging the jury, the jury was provided a verdict form that read as follows:

"I. Negligence

(1) Did the Plaintiff prove by a preponderance of the evidence that defendant, Lohr Plumbing, Inc., was negligent and that the negligence was one of the proximate causes of the alleged injury?

_____Yes _____No

(2) If yes, determine actual damages.

$_____dollars (numerical)

$_____dollars (cursive)

II. Negligent Misrepresentation

(1) Did the Respondent prove by a preponderance of the evidence that the defendant, Lohr Plumbing, Inc., uttered a negligent misrepresentation and that the negligent misrepresentation was one of the proximate causes of the injury?

(2) If yes, determine actual damages.

$_____dollars (numerical)

$_____dollars (cursive)" (R. pp. 730-731)

Respondent did not object to this verdict form. As indicated, the jury returned a verdict in favor of Lohr on each cause of action. After the jury was dismissed, Respondent moved for

judgment notwithstanding the verdict, stating that she believed the question for the jury was not whether Lohr had proximately caused injuries, but rather how much would the jury award for such damages (R. p. 577, lines 20-25; R. pp. 578-584), and further reasserting the grounds upon which she based her motion for directed verdict (that she believed she had established a duty on behalf of Lohr to Respondent, a breach of that duty, and that said breach proximately caused her damages) (R. p. 580, lines 13-16). The trial court, however, indicated that proximate cause was left to the jury to decide (R. p. 580, lines 17-23).

The trial court permitted Respondent to file a written motion for new trial, and invited the Respondent to include argument regarding whether a new trial could be granted pursuant to the thirteenth juror doctrine. Respondent's motion again relied upon the same grounds upon which she moved for directed verdict (R. pp. 26-30). Lohr, on the other hand, argued that ample evidence existed to support the jury's verdict, that Respondent had not carried her burden of proof but rather proved—if anything—something less than negligence and was instead making an argument based upon negligence per se, breach of warranty, or even res ipsa loquiter, the former two of which were not plead nor charged and the latter of which is not recognized in South Carolina (R. pp. 31-37). Lohr further argued that the verdict, as rendered by the jury, was clear and unambiguous but, due to the general nature of the verdict form, no one could tell whether the jury determined the Respondent had not proven negligence or that the jury had determined that there were no damages proximately caused by negligence of Lohr. Despite these arguments, the trial court granted Respondent's motion for new trial based upon the thirteenth juror doctrine, and this appeal followed.

Lohr will be arguing against precedent within its brief and, if this Court determines oral argument would be beneficial, will move to argue against precedent at that time.

STANDARD OF REVIEW

The thirteenth juror doctrine in South Carolina is a vehicle by which a trial judge may grant a new trial if he finds "the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "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." *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990), citing *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976). "In considering a motion for a new trial, the trial judge must look to see if evidence justifies the jury verdict." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 681 S.E.2d 879 (2009), citing *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002). "When an order granting new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order." *South Carolina Department of Highways and Public Transportation v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980).

"When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). "A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict." *Welch*, citing *Crossley v. State Farm Mut. Auto. Ins. Co.*, 307 S.C. 354, 415 S.E.2d 393 (1992). In ruling on a motion for directed verdict or JNOV, a trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Welch*, citing *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d

142 (1999), further citations omitted. "The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt." *Welch*, citing *Steinke, supra.*

ARGUMENT

I. **The trial court erred in granting a new trial pursuant to the thirteenth juror doctrine**

The trial court's order indicated that the new trial was granted pursuant to the thirteenth juror doctrine, and recognized that, in determining whether to grant the new trial, it is only to "concern itself with whether the evidence justifies the verdict and cannot second guess the jury's actions or motives for its verdict." (R. pp. 1-2). It is Lohr's position that, in exercising its role as thirteenth juror, the trial court here abused its discretion in granting a new trial pursuant to the thirteenth juror doctrine because it appears it did not determine whether the evidence presented justified the jury's verdict but did consider the jury's motives for its verdict. It is Lohr's further position that the trial court's order is wholly unsupported by the evidence and, as such, the jury's verdict in favor of Lohr must be reinstated.

"Courts must sustain verdicts when a logical reason for reconciling them can be found." *Vinson v. Jackson*, 317 S.C. 166, 452 S.E.2d 16 (Ct. App. 1994), citing *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967), further citations omitted; see also *Lorick & Lowrance v. Julius H. Walker & Co.*, 153 S.C. 309; 150 S.E. 789 (1929). "In considering a motion for a new trial, the trial judge must look to see if the evidence justifies the jury verdict." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 681 S.E.2d 879 (2009), citing *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002). A review of the record clearly reveals ample evidence exists to support the jury's verdict.

As indicated above, a trial court must look to see if the evidence justifies the jury verdict. In doing so, it should consider the role of judge and jury. "Judging the credibility of the

testimony of witnesses is a function of the jury, not the court, as is the weight to be given to such testimony." *Brown v. Stewart*, 348 S.C. 33, 557 S.E.2d 676 (Ct.App. 2001). "As a general rule, the jury is free to accept or reject in whole or in part the testimony of any witness, including an expert witness." *Sauers v. Poulin Brothers Homes, Inc.*, 328 S.C. 601 at 605, 493 S.E.2d 503 at 505 (Ct.App. 1997). Thus, prior to the trial court granting the Respondent's motion for new trial pursuant to the thirteenth juror doctrine, the trial court should have determined whether the evidence could have sustained the jury's verdict since the jury is the finder of fact.

Lohr's position is that the Respondent did not meet her burden of proof regarding either of her causes of action, and therefore the jury's verdict was justified. Thus, the trial court's decision to grant a new trial pursuant to the thirteenth juror doctrine is wholly unsupported by the evidence. Further, Lohr asserts that the testimony upon which both Respondent and the trial court rely is not sufficient to establish a claim for negligence or negligent misrepresentation; rather, it appears the trial court relied upon testimony as proof of a cause of action not plead by the Respondent or charged to the jury in making its decision to grant a new trial pursuant to the thirteenth juror doctrine. In doing so, the trial court committed legal error in granting a new trial, and the order of the trial court should be reversed.

1. Negligence

In order to prove a cause of action for negligence, a plaintiff must prove the defendant owed a duty to the plaintiff, the defendant breached that duty through a negligent act or omission, and that the breach proximately caused the plaintiff damages. "To show proximate cause, a plaintiff must show both causation in fact and legal cause." *Roddey v. Wal-Mart Stores East*, 415 S.C. 580, 784 S.E.2d 670 (2016). "If there is anything tending to create distrust in his [or her] truthfulness, the question must be left to the jury." *Sauers,* 328 S.C. 601 at 606, 493

S.E.2d 503 at 505 (Ct.App. 1997), citing *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct.App. 1991). Lohr maintains that the Respondent failed in meeting her burden of proof of each of the elements of negligence, primarily because both Respondent and at least one of her experts gave the jury ample reasons to 'create distrust in [their] truthfulness.' Therefore, they were under no obligation to find in the Respondent's favor. Thus, in weighing the evidence presented to the jury, the trial court should have determined that the jury's verdict was supported by the testimony and evidence, and therefore denied the motion for new trial. Additionally, the trial court's decision to grant the new trial is not supported by this testimony, and the verdict for Lohr should be reinstated.

Testimony that "is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interest of the witness in the result of the litigation." *Sauers*, 328 S.C. 601 at 606, 493 S.E.2d 503 at 505, (Ct.App. 1997), citing *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct.App. 1991). Next, even if an expert's uncontradicted testimony does establish a party's negligence as a matter of law, it does not necessarily establish that party's liability as a matter of law. "Negligence is actionable only if it is a proximate cause of the injury." *Sauers,* 328 S.C. 601 at 607, 493 S.E.2d 503 at 506 (Ct.App. 1997), citing *Hanselman v. McCardle*, 275 S.C. 46, 267 S.E.2d 531 (1980) and *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996).

In *Sauers*, the Sauers sued Poulin (a general contractor) for construction defects. In turn, the general contractor sued its subcontractors for indemnity. The Sauers settled with Poulin, and the case went to trial on Poulin's indemnity claim against Moore, a subcontractor. Poulin called an expert who provided testimony regarding the standard of care and industry standards for the subcontractor, testified that the subcontractor breached that standard of care and that damages

resulted from that breach. This testimony was not refuted by Moore's own expert or Moore himself. The jury returned a verdict in favor of Moore, and Poulin appealed. The Court of Appeals affirmed the trial court's denial of a new trial because it recognized that the jury was not required to believe uncontradicted testimony. Further, the Court of Appeals pointed out that the jury had plenty of reason to question the testimony of the expert, since that expert had received the contract for repair on the Sauers' home. Thus, "the expert's potential bias and interest in the litigation provided the jury with a reason to distrust his testimony." *Sauers*, 328 S.C. 601 at 607, 493 S.E.2d 503 at 505 (Ct.App. 1997).

In the presentation of the case at bar, Respondent called an expert, Dr. Chiodo, who was presented to provide testimony regarding the Respondent's personal injuries as well as property damages. Though Dr. Chiodo testified regarding multiple credentials, he also testified that he had not seen, met, or treated the Respondent or visited her home (R. p. 122, lines 14-25). He also was not aware of whether or why the home had not been remediated (R. p. 125, lines 21-25; R. p. 126, lines 1-2). Dr. Chiodo did not bring a file with him for his testimony (R. p. 120, lines 21-25; R. p. 121, lines 1-11). In addition, he testified that his fee for providing testimony was fifty thousand dollars ($50,000.00) (R. p. 130, lines 8-25; R. p. 131, lines 1-13).

Respondent herself also testified in her case in chief and, under cross examination, several exaggerations and outright untruths were presented to the jury. For example, the fact that Respondent lied about her marital situation during her deposition was revealed (R. p. 338, lines 11-25, R. p. 339, lines 1-3), and she further testified at trial that she did not take photographs for trial, though in her deposition testimony she testified she had taken photographs for that purpose (R. p. 318, lines 1-11, R. p. 319, lines 7-25, R. p. 320, lines 1-25). Respondent also stated that she wanted to repair her home and had no choice but to do so (R. p. 256, lines 2-5), but admitted

that she did not undertake any steps to do so until obtaining a repair estimate after her deposition in May of 2014 (R. p. 322, lines 1-16). She also testified that she did not feel repairs were her responsibility (R. p. 334, lines 8-11; R. p. 335, lines 15-25; R. p. 336, lines 1-6). Additionally, it was revealed that rather than permit Lohr further entry to her home, or even contact another company to perform repairs, she contacted a lawyer (R. p. 321, lines 2-16). Respondent further quibbled about the timeline of her medical treatment even after being presented with records of the same (R. p. 325, lines 1-14; R. p. 329, lines 1-10; R. pp. 330-333). For example, although she claimed that her skin erupted immediately after touching the wood, it is clear from the medical records and medical testimony that Respondent had been experiencing an outbreak for some time prior to the discovery of the leak, and that this outbreak specifically involved her hands and feet (R. p. 380, lines 2-25; R. pp. 381-382; R. p. 383, lines 1-6).

As in the *Sauers* case, the jury in the present case had ample reason to distrust both the Respondent and her expert. Dr. Chiodo certainly had reason to supply testimony that was favorable to the Respondent even though he had not met her, treated her or seen her home. Likewise, the jury had reason to doubt the Respondent's own credibility regarding not only her personal injuries but also her alleged property damage, given the untruths and exagerations revealed while on the witness stand.

Further, even though Mr. Doran stated he wanted to repair the leaks, he did not at any time admit that Lohr's acted negligently. Further, no standard of care was presented by the Respondent via statute, industry standard or even company policy was entered into evidence. "An appellate court must view the circuit court's statements as a whole to determine its reasoning." *Trivelas v. S.C.D.O3.T.*, 57 S.C. 545, 593 S.E.2d 504 (Ct.App. 2004), citing *State v. Evans,* 354 S.C. 579, 584, 582 S.E.2d 407, 410 (2003). "Judgments are to be construed as other

instruments, and the determanitive factor is the intention of the court, considering the judgment in its entirety." *Trivelas*, citing *Eddins v. Eddins*, 304 S.C. 133, 135, 403 S.E.2d 164, 166 (Ct.App. 1991). The trial court, during the hearing on Respondent's Motion for New Trial, commented as follows:

> "...One of the things that causes me some consternation is that the jury, obviously, didn't pay attention to the evidence because for whatever reason, they came back with a defense verdict when the defendant admitted that he had some responsibility. I think that a reasonable jury could have concluded, based on the evidence, that there was no relation between the personal injuries and any negligence. I just think that the way it came out, that would be a reasonable outcome. My question is, because they came back with a complete defense verdict, does that mean that their judgment was so flawed that all of it needs to be overturned? In my mind, your client was less than a pleasant person. I think that she was somewhat offensive and I think that maybe the fact they came back with a defense verdict might be an indication they just didn't like your client. What do you think about whether or not I could grant a new trial with regard to property damage and not on the personal injury aspect of it?" (R. p. 693, lines 4-21).

The testimony provided by Mr. Doran did not rise to the level of admission of negligence, nor did it establish a standard of care or a breach. Mr. Doran was not proffered as an expert nor qualified by the trial court as such. Therefore, the trial court committed reversible error in relying on this testimony in support of a new trial.

Additionally, it is clear that the trial court was of the opinion that the evidence indicated Respondent had not met her burden of proof regarding alleged personal injuries. Because the verdict form read as a general verdict for each cause of action—that is, negligence and proximate cause were subsumed in one question for each cause of action (see above)—it is impossible to determine upon what basis the jury returned a verdict in favor of Lohr. "Where a case is submitted to the jury on two or more issues and a general verdict is returned, the verdict will be upheld if it is supported by at least one issue." *Dropkin v. Beachwalk Villas Condo. Ass'n*, 373 S.C. 360, 644 S.E.2d 808 (Ct.App. 2007), citing *Anderson v. West*, 270 S.C. 184, 188, 241 S.E.2d 551, 553 (1978). Thus, because the trial court believed evidence existed to support the

jury's finding that the Respondent did not meet her burden of proving damages associated with her alleged personal injuries, and because the issue of negligence and proximate cause were included in one question (and further did not distinguish damages), the trial court erred as a matter of law in granting a new trial pursuant to the thirteenth juror doctrine.

The trial court also erred in apparently considering whether evidence was presented to prove a cause of action not plead or charged to the jury. Here, Respondent argued that she met her burden of proof for negligence. She relies upon Mr. Doran's statement that he "accepted responsibility" for the repairs resulting from the leak. However, what both Respondent and the trial court did not consider are the actual causes for a leak, which could include a negligent act or omission on behalf of Lohr or a product failure. It does not follow from Mr. Doran's statement that he wanted to repair the damage that Lohr's was somehow negligent. Although Respondent asserts that Lohr "conceded" the existence of a duty, the breach of the same, and damages, that position is simply not borne out by a review of the testimony. Respondent provided no evidence of any negligent act; had she wished to proceed upon a theory of breach of warranty or negligence per se, she could have moved the trial court to amend the pleadings to conform to the evidence or requested a charge on those causes of action. She did not. Therefore, the trial court erred in granting a new trial by relying on proof of a cause of action not alleged nor charged.

2. Negligent Misrepresentation

In order to recover on a claim of negligent misrepresentation, a claimant must prove the following elements: (1) a false representation by a defendant to a plaintiff; (2) a pecuniary interest by the defendant in making the statement; (3) a duty of care owed by the defendant to see that truthful information was communicated to the plaintiff; (4) the defendant breached the duty by failing to exercise due care; and (5) the plaintiff justifiably relied on the representation.

Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010), citing *West v. Gladney*, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct.App. 2000). Here, the alleged negligent misrepresentation arises from Lohr's presentation of the letter described above regarding the polybutylene piping.

"In contradistinction with trespass and other direct injuries for which the complainant is awarded nominal damages if he should fail to plead and prove actual damages, deceit belongs to that class of tort of which pecuniary loss generally constitutes part of the cause of action. If the respondents suffered no actual damage from the fraud, there is no cause of action and they cannot recover even nominal damages." *Daniels v. Colman,* 253 S.C. 218, 228, 169 S.E.2d 594 (1969). Respondent claimed that she could not have closed on the home had she known any polybutylene pipes remained (R. p. 251, lines 19-21). She did not offer testimony that she lost value on the home, or that she lost her homeowners insurance. Rather, as discussed above, the Respondent refused to permit Lohr or anyone on its behalf to attempt repairs, nor has she ever attempted repairs. Further, Respondent offered no evidence that the leak occurred in any polybutylene pipe left in the home. Therefore, since the record is devoid of any credible evidence supporting the Respondent's cause of action for negligent misrepresentation, particularly with regard to damages associated therewith, the trial court erred in granting a new trial on this cause of action because the decision is wholly unsupported by the record.

II. The Trial Court Erred in Failing to Grant Lohr's Motion for Directed Verdict

As indicated, Lohr moved at the conclusion of the Respondent's case and again at the close of all evidence for a directed verdict upon Respondent's causes of action for negligence and negligent misrepresentation. Specifically, Lohr argued that Respondent failed to meet her burden of proving that any negligence on behalf of Lohr resulted in a condition that proximately

caused her personal injuries and further argued that Respondent had failed to prove all elements of the cause of action of negligent misrepresentation (R. pp. 352-367; R. pp. 487-489).

"When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000), citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). In ruling on a motion for directed verdict or JNOV, a trial court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Welch*, citing *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999), further citations omitted; see also *Lynch v. Toys 'R' Us-Delaware*, 375 S.C. 604, 654 S.E.2d 541 (Ct.App. 2007).

For the same reasons set forth above, the trial court erred in failing to grant Lohr a directed verdict. Respondent failed to meet her burden of proof for each element, particularly with regard to proximate cause and damages. Only one reasonable conclusion could have been reached from the testimony offered: that Respondent did not suffer damages as a result of any negligence of Lohr. Therefore, Lohr is entitled to a directed verdict.

III. The Thirteenth Juror Doctrine Should be Abolished or Otherwise Revised

The thirteenth juror doctrine in South Carolina is a vehicle by which a trial judge may grant a new trial if he finds "the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). In *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E.2d 638 (1938), the Court of Appeals described the trial judge as "possessing the veto power to the Nth degree." Additionally, this Court has indicated in numerous opinions that it has had opportunity to review the thirteenth juror doctrine but has declined to revise it or overturn the

same. See *Folkens,* supra; *Norton V. Norfolk S. Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002). However, there have also been compelling dissenting opinions that call for the revision of this doctrine.

Unlike other modes for granting new trials, a trial court exercising its role as thirteenth juror is not required to provide any reasons for its decisions, the justification for the same being that a hung jury is not required to provide reasons for not reaching a decision. However, if a trial court grants judgments notwithstanding the verdict, or new trials *nisi*, they must provide "compelling reasons" for invading the jury's province. *Curtis v. Blake*, 392 S.C. 494, 709 S.E.2d 79 (Ct.App. 2011), citing *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct.App. 2006); *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). New trials may be granted if a jury's verdict is outrageously high or low, of if the verdict reflects a jury's confusion (for example, a finding in favor of the plaintiff with zero dollars in damages).

Additionally, it is difficult to reconcile the rationale behind the thirteenth juror doctrine, since it permits one individual to completely overturn the decision of twelve others who, according to our system, are the ones charged with finding the facts and passing upon the credibility of witnesses. It is further difficult to reconcile the doctrine with the fact that a trial judge may invoke this doctrine if he fails to grant a directed verdict, as the results are not the same; in one, the party against whom the directed verdict is rendered may at least have written reasons upon which to appeal, while the party who has succeeded at trial but loses a motion for new trial pursuant to the thirteenth juror doctrine is faced with no real potential for success at the appellate level and must also re-try a case that was fairly decided (assuming no obvious irregularities, such as jury tampering).

It is Lohr's position that South Carolina's thirteenth juror doctrine should be abolished because it serves no purpose, vests too much authority in one individual without requiring any accountability, serves to primarily benefit the party seeking compensation in its application, because other avenues exist for granting new trials, and because there is no judicial economy in these decisions. In the alternative, Lohr would request that this Court revise this doctrine to require specific findings of a tribunal prior to overriding a jury's decision.

A survey of the cases addressing the thirteenth juror doctrine has resulted in interesting results. The vast majority involve scenarios where a jury has returned a verdict in favor of a defendant, or occasionally a plaintiff (if the claim is the verdict too low, but the trial court has properly granted new trial pursuant to the doctrine by not setting forth any reasons for the new trial), the plaintiff moves for a new trial, the trial court grants the new trial based upon the thirteenth juror doctrine, and the trial court's decision to grant a new trial pursuant to the thirteenth juror doctrine is affirmed. Please see the following: *Sellars v. Collins*, 212 S.C. 26, 46 S.E.2d 176 (1948); *Turner v. Carey*, 223 S.C. 477, 76 S.E.2d 671 (1953); *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967); *S.C. Highway Dep't v. Clarkson*, 267 S.C. 121, 266 S.E.2d 696 (1976); *S.C. Dep't of Highways & Public Transportation v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980); *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Buxton v. Thompson Dental Co.*, 307 S.C. 523, 415 S.E.2d 844 (Ct.App. 1992); *Todd v. Owen Indus. Prods.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App. 1993) ; *McEntire v. Mooregard Exterminating Servs.*, 353 S.C. 629, 578 S.E.2d 746 (Ct.App. 2003); *Trivelas v. S.C.D.O.T.*, 357 S.C. 545, 593 S.E.2d 504 (Ct.App. 2004); *Lane v. Gilbert*, 383 S.C. 590, 681 S.E.2d 879 (2009). Two additional cases where the grant of a new trial to the party seeking damages is affirmed on appeal are unpublished and therefore not included herein.

On one occasion the granting of a new trial to a defendant pursuant to the thirteenth juror doctrine has been affirmed. See *Morrison v. S.C. State Highway Dep't,* 181 S.C. 258, 187 S.E. 344 (1936). Finally, there have been three occasions where a new trial granted in favor of a plaintiff (where the jury verdict was returned for the defendant, or the plaintiff but the verdict has been too low) has been overturned and the original verdict reinstated; however one of these decisions is unpublished, and will not be referenced herein. Please see *Mims v. Coleman*, 248 S.C. 235, 149 S.E.2d 623 (1966); *Watford v. S.C. State Highway Dep't*, 269 S.C. 130, 236 S.E.2d 558 (1977).

Several cases have been published wherein new trials granted pursuant to the thirteenth juror doctrine have been overturned, but those cases involve a misapplication of the doctrine (for example, a new trial is granted pursuant to the doctrine but is based upon improper considerations, such as the length of jury deliberations or based solely upon the amount of a verdict, see *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995); *Scoggins v. McClellion*, 321 S.C. 264, 468 S.E.2d 12 (Ct.App. 1996); *Youmans v. SCDOT*, 380 S.C. 263, 670 S.E.2d 1 (Ct.App. 2008)).

Essentially, the thirteenth juror doctrine, in application, primarily benefits the party seeking damages. That party may not always be the plaintiff (see *Clarkson* and *Mooneyham,* supra). Regardless, clearly there is a disparate impact in the application of this doctrine. Further, it appears that the less information provided by a trial court in its order granting a new trial pursuant to this doctrine, the more likely the order will be affirmed. It is extremely likely that had the trial judges in *Peacock, McClellion* and *Youmans* (supra) not provided reasons for their grant of the new trials their orders would have been affirmed.

Lohr would urge the Court to revisit the purpose of the thirteenth juror doctrine and determine whether it still has a valid place in our current judicial system. Lohr would assert that this doctrine is outdated, and susceptible to abuse. As it is, parties who believe they have not received justice have multiple tools with which to appeal; likewise, a trial court has vehicles with which to right jury verdicts that appear influenced by passion or prejudice, or those verdicts that appear to be fraught with jury confusion. However, each of those vehicles requires the trial court to set forth the reasons for which it is invading the jury's province. This is because our jury trial system is sacred, and invading a jury's province is a drastic measure. If meddling with the monetary award of a jury requires compelling reasons, a grant of a new trial based upon the decision of only one person (when twelve others have unanimously concurred) should certainly require equally compelling reasons.

Alternatively, Lohr would urge this Court to adopt the dissenting opinion in the *Mooneyham* case, which would overrule all cases holding a trial judge does not need to make specific findings or set forth reasons to support orders granting new trials absolute and new trials nisi based on the facts. *Mooneyham*, 275 S.C. 205 at 214, 269 S.E.2d 329 at 334 (1980). In *Mooneyham*, the minority states that its opinion "was prepared for the adoption of the entire court", but that a majority took a "contrary view". *Mooneyham*, 275 S.C. 205 at 208, 269 S.E.2d 329 at 331 (1980). The minority opines in pertinent part as follows:

> "When a trial judge grants a new trial outright, or a new trial *nisi*, based on the facts, he undertakes to disagree with and, in effect, repudiate the collective thinking and findings of the jury, whose basic duty it is to evaluate the evidence in every case. The judge exercises a tremendous authority. It should be exercised seldom and with much caution. The judge is not permitted to substitute his judgment for that of the jury. Before the authority to grant a new trial on the grounds that evidence is contrary to the preponderance of the evidence is exercised, the judge should have a strong conviction that an injustice has occurred. In reaching that conclusion, he should keep in mind that the credibility of the witnesses is normally for the triers of the fact.

> Notwithstanding former rulings of this court, some of which are in agreement and some of which are in conflict with the view we now take, hereafter motions for new trials absolute and new trials nisi shall be granted or refused as a matter of discretion by the trial court, which discretion will be subject to review on appeal. This court undertakes to correct errors of law; an abuse of discretion is an error of law. A party should not be subjected to a new trial granted as a result of such error. The drastic nature of the relief granted in such cases demands that a review of the ruling should be available.
>
> Having concluded that such motions and orders involve a matter of discretion reviewable upon appeal, we think that an intelligent review requires an order setting for the factual and legal reasons for the trial judge for granting the motion. Otherwise, the court is left to grope in the dark in search of the basis of the order. Orders granting new trials and new trials *nisi* without substantiating reasons may be summarily reversed. While a detailed order should be issued when the motion is granted, a detailing order is not required when such motions are overruled. Orders overruling such motions do not involve drastic action on the part of the judge."
>
> *Mooneyham*, 275 S.C. 205 at 213, 269 S.E.2d 329 at 333 (1980).

Clearly, the minority (which apparently was the majority until the inexplicable change of heart) recognized the inherent issue with the thirteenth juror doctrine: it offers a drastic remedy with no accountability. As shown above, the overwhelming parties who benefit from its application are those seeking compensation. It is unfathomable why more, instead of less, transparency in our courts would be favored.

CONCLUSION

Based upon the above, Lohr asserts that the trial court's grant of a new trial pursuant to the thirteenth juror doctrine is wholly unsupported by the evidence, is controlled by an error of law and must be reversed. Further, Lohr urges the Court to abolish the thirteenth juror doctrine, or to revise its use and application to require the trial court to set forth specific findings and reasons for invading the jury's province and providing such a drastic remedy. For these reasons, and any others that may be presented at oral argument, Lohr requests this Court to reverse the trial court's order granting a new trial pursuant to the thirteenth juror doctrine.

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