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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2012-CP-07-4139
APPELLATE CASE NO. 2015-002618

Patricia Doller, Respondent,

v.

Lohr Plumbing, Inc. Appellants.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

Patricia Doller ("Doller") brought this action against Lohr Plumbing, Inc. ("Lohr") and others in 2012. The complaint was amended twice, leaving only Lohr as a defendant. A three-day trial commenced on September 1, 2015 and concluded on September 3, 2015. The jury returned a defense verdict. Upon motion by the plaintiff, the trial judge granted a new trial absolute under the Thirteenth Juror Doctrine by order dated November 22, 2015 and filed November 30, 2015. Lohr filed its notice of appeal on December 23, 2015.

THE FACTS

Doller purchased the house at 55 James F. Byrnes Street, Beaufort, South Carolina (R. p. 249, l. 7-24) in 2010 (R. p. 2525, l. 2-3). The home inspection revealed polybutylene pipe. (R. p. 250, l. 2-12.) The Seller agreed to remove the polybutylene pipe, and hired Lohr to repipe the house. (R. p. 250, l. 13-22.) Lohr removed the polybutylene pipe and replaced it with pex pipe. (Supp. R. pp. 733-734.) Lohr did not remove all the polybutylene pipe. (R. p. 227, l. 2-10; R. p. 228, l. 21-25.)

Doller was married to James Doller. (R. p. 207, l. 3-9.) However, he was working out of state. (R. p. 167, l. 17-19.) About a year after the closing, James Doller and their daughter came to visit Doller. (R. p. 167, l. 17-p. 168, l. 1.) Doller weighed about 95 lbs. (R. p. 168, l. 15-20.) Her husband weighed much more, and he discovered that there was water under the master bedroom floor because he could feel it when he walked on it. (R. p. 168, l. 10-20.)

The master bathroom abuts one wall of the master bedroom, and the new pipe is inside the common wall. (R. p. 706; R. p. 182, l. 1-7; R. p. 705; R. p. 183, l. 14-20.) Doller called Lohr, who discovered and fixed a slow leak from which the water was coming. (R. p. 227, l. 24-p. 228, l. 1.) Doller and a friend removed part of the flooring in the master bedroom, with Doller carrying the wood to the garage. (R. p. 187, l. 9-18.) When Doller's hands became bright red during the process (R. p. 187, l. 8-p. 188, l. 3; R. p. 257, l. 14-20) they stopped removing the floor. (R. p. 257, l. 23-p. 268, l. 2). Over the course of a week, Doller developed a severe rash over her entire body (R. p. 258, l. 10-p. 259, l. 4), and finally moved out of the house (R. p. 190, l. 13-21).

Doller sought medical help from several doctors (R. p. 267, l. 6-16), but the treatments were ineffective (R. p. 269, l. 25-p. 271, l. 18). After about a month and a half, Doller was treated at the hospital (R. p. 271, l. 19-p. 2272, l. 13), and the rash slowly disappeared (R. p. 272, l. 14-p. 273, l. 13).

Doller had the house inspected and obtained a report regarding the cost of remediating the mold in the house. (R. p. 143, l. 22-p. 144, l. 12.) Lohr obtained an estimate of the cost of remediation (R. p. 238, l. 5-15), but did not share that with Doller. (R. p. 241, l. 2-8.)

At trial, Lohr admitted that it held itself out as an expert in plumbing and that it was supposed to install the pipes so that they do not leak (R. p. 218, l 17-p. 219, l. 10). Lohr admitted that it knew the pipe replacement was so that the house could be sold. (R. p. 224, l. 3-p. 225, l. 17.) In fact, Lohr wrote a letter to the closing attorney. (R. p. 704.) Lohr admitted that the leak was its fault and that it should pay to get the damage fixed. (R. p. 231, l. 15-23.) Lohr admitted that the house was damaged by the leak. (R. p. 230, l. 13-p. 231, l. 2; R. p. 234, l 9-p. 235, l. 6.)

Both Doller and Lohr entered evidence of the cost of remediation. (R. p 145, l. 7-10; R. p. 728.) Doller also entered evidence of the loss of use and asked the jury for compensation for her personal injury. (R. p. 289, l. 17-p. 290, l. 9; R. p. 727.) The jury returned a defense verdict. (R. p. 574, l. 11-25.) Doller moved for judgment notwithstanding the verdict, for a new trial absolute, and for the Court to grant a new trial under the Thirteenth Juror Doctrine. (R. p. 577, l. 22-p. 578, l. 11; R. p. 582, l. 19-24.) The Court denied the first two motions but granted a new trial under the Thirteenth Juror Doctrine. (R. pp. 1-2 ("Final Order").)

While Judge Nettles did not specify his reasoning when he issued the Final Order, he did articulate the facts at the end of the trial. As he saw the case:

> MR. TUPPER: I would say, Your Honor, that, again, it was up to the jury to listen to the witnesses.
> THE COURT: Well. I understand that you are saying that. But obviously the -- I understand your position is that it is a factual question, but how about the fact that there was no dispute, that there was indeed some liability there. Your client said that I caused the leak and I was accepting responsibility for it.

(R. p. 579)

Lohr started to argue that there was a credibility issue. The trial court disposed of that argument by saying:

> MR. TUPPER: Your Honor, the jury had to judge the credibility of the testimony. With all due respect I think --
> THE COURT: As far as the credibility, you would maintain that your client is credible and that he did say that he caused the leak and he was going to accept responsibility for it?
> MR. TUPPER: Certainly. Correct.

(R. pp. 579-580)

The trial court also expressed its understanding that granting a new trial is a rare thing.

> THE COURT: I have been on the Bench for right at ten years and I have never once disturbed a jury verdict. And I think that this probably might be the one that needs to be done. Of course, I did allow it to go to the jury. I think as a practical matter it is generally a good idea to do that. But I didn't think that the jury would drop the ball in such a way. I'm not going to make a ruling on it here today. I'm going to reconvene at a later date and time. And I don't know whether I'm going to -- I'm going to check with court administration, I might come back down here or I might have y'all -- invite y'all up to Florence, but sometime in the next -- sometime within the next month we are going to get together and we are going to have a full hearing on the motion for a new trial, the motion for a verdict not withstanding the verdict.
> And I'm going to ask that y'all, particularly you Mr. Robinson, look at the concept of the 13th juror and what I have the authority to do.

(R. pp. 581-582).

ARGUMENTS

1. THERE IS EVIDENCE THAT SUPPORTS THE GRANTING OF A NEW TRIAL.

Negligence requires that the defendant owes the plaintiff a duty, that the defendant breached that duty, that the plaintiff was damaged, and that the defendant's breach was the proximate cause of the plaintiff's damages. (Graham v. Town of Latta, -- S.C. --, 789 S.E.2d 71 (Ct. App. 2016).). In the instant case, Mr. Doran, the president of Lohr, admitted that Lohr held itself out as an expert in plumbing, and that Lohr should install the piping in such a manner that it did not leak. He admitted that Lohr failed to install the piping so that it did not leak, and he admitted that Lohr was responsible for and should pay to fix the leak and the resulting damage.

"Where a person holds himself out as specially qualified to perform work of a particular character, there is an implied warranty that the work which he undertakes shall be of proper workmanship and reasonable fitness for its intended use." (Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951)). Lohr admitted that it should install the pipe so that it did not leak. Lohr knew the repairs it was making were to make the house fit for sale. Therefore, Lohr owed a duty to Doller to install the pipe in such a manner that it did not leak.

Lohr confessed that it breached its duty. Lohr also confessed that the breach was the proximate cause of the physical damage to the property. There is a question of fact as to whether Lohr's breach caused Doller's personal injury, but that is not relevant to this analysis. Had the jury decided that Lohr was negligent, there is no way to determine what damages the jury may have awarded.

Having confessed that it had a duty, that it breached the duty, and that the breach caused damages to Doller, and having introduced its own estimate of what those damages were, Lohr cannot be heard to complain that the Court abused its discretion when it awarded a new trial.

2. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION.

Discussing the Thirteenth Juror Doctrine in Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996), the Court of Appeals held, quoting South Carolina Department of Highways & Public Transportation v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980), that "[w]hen an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order." *Accord* Lane v. Gilbert Constr. Co., 383 S.C. 590, 681 S.E.2d 879 (2009). Accordingly, an abuse of discretion can only occur if there is no evidence to support the trial Court; if there is any evidence to support the trial Court's granting a new trial, the reviewing court must uphold that ruling.

In the instant case, Lohr admitted that it had a duty, breached that duty, and that the breach was the proximate cause of damage suffered by Doller. Admissions by the defendant are compelling evidence. Accordingly, the trial judge did not abuse his discretion.

3. THE APPEALS COURT CANNOT REVERSE THE GRANTING OF A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE IF THERE IS NO ABUSE OF DISCRETION.

A. The standard is that, if there is any evidence to support the trial court, then the grant of a new trial must be upheld.

The Vinson court also held that "[a] trial [court]'s order granting or denying a new trial [under the thirteenth juror doctrine] will not be disturbed unless [its] decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Id. Here, there is no error of law. There is evidence that Lohr conceded it owed Doller a duty, that it breached its duty, and that Doller suffered damages as a proximate cause of the breach. Lohr cannot reasonably argue that it secured an estimate to fix the water damage but the water damage was not caused by the leak. Indeed, it did not so argue. Because there is evidence supporting the grant of a new trial under the Thirteenth Juror Doctrine, the grant must be upheld.

B. The standard argued by Lohr is the wrong standard.

Lohr argues that this court should be looking at whether there is evidence to support the jury's verdict. That argument is fatally flawed.

Lohr's argument hinges on cases discussing the granting of a new trial absolute or a new trial nisi. Neither of those grants are controlled by the standard controlling grants of a new trial under the Thirteenth Juror Doctrine. The grant of a new trial absolute is governed by whether there is any evidence to support the jury's verdict. "When ruling on motions for directed verdict and JNOV, the trial court and this [c]ourt must view the evidence and the inferences reasonably drawn therefrom in the light most favorable to the party opposing the motions." Pike v. S.C. Dep't of Transp., 332 S.C. 605, 610, 506 S.E.2d 516, 518 (Ct.App. 1998) *aff'd as modified*, 343 S.C. 224, 540 S.E.2d 87 (2000).

The grant of a new trial nisi is governed by whether the verdict is so large or so small as to shock the court's conscience. "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, 404, 477 S.E.2d 715, 723.

In contrast, the exercise of the court's discretion under the Thirteenth Juror Doctrine is governed by the any evidence standard with respect to the court's decision, not the jury's decision.

> Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. . . This Court's review is limited to consideration of whether evidence exists to support the trial court's order. As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed.

Lane v. Gilbert Constr. Co., 383 S.C. 590 597 - 98, 681 S.E.2d 879, 883 (2009). Lohr has it backwards.

Lohr also argues that the plaintiff failed to prove her case. Again, Lohr is arguing the wrong standard. Surely, as the court queried and as Lohr admitted, no one is contesting Lohr's credibility. Having itself conceded all the elements of negligence, Lohr's argument that the plaintiff's testimony was somehow not credible is simply not relevant. Lohr conceded all the elements of negligence. After that, the only question remaining should have been: how much were the damages.

4. LOHR WAS NOT ENTITLED TO A DIRECTED VERDICT.

Lohr argues that it was entitled to a directed verdict on both the negligence and negligent misrepresentation claims. The standard for directed verdict is that "A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability." Lane.

The negligence claim is discussed above. Despite Lohr's assertions, there is ample evidence that Lohr was negligent. Accordingly, a direct verdict for Lohr does not lie.

The elements of a negligent misrepresentation are that (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement;(3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff;(4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as a direct and proximate result of his reliance on the defendant's representation. Carolina Chloride, Inc. v. Richland County, 394 S.C. 154, 714 S.E.2d 869 (2011).

(1) Lohr admitted that it did not remove all the polybutylene pipe from the house. (R. p. 228, l. 10-25), despite the assertion that all the pipe was removed in Plaintiff's Exhibit 1. While Lohr may not have known that Doller was the purchaser, it knew the removal and the letter were required for someone to purchase the house. If follows that Lohr's false representation was made to the purchaser, in this case, Doller.

(2) Lohr had a pecuniary interest in writing the letter that was Plaintiff's Exhibit 1 because Lohr does "hundreds" of these piping changes (R. p. 223, l. 20-22) and Lohr writes them "[j]ust to please the customer" (R. p. 224, l. 11-23).

(3) Lohr knew the polybutylene removal was performed so the house could close, so it had a duty of care, if it spoke at all, to speak the truth. Freightliner, L.L.C. v. Whatley Contract Carriers, L.L.C., 932 So. 2d 883, 895 (Ala. 2005); Mackenzie v. Miller Brewing Co., 608 N.W.2d 331, 368 (Wis. Ct. App. 2000); Marketing West, Inc. v. Sanyo

Fisher (USA) Corp., 7 Cal. Rptr. 2d 859, (Cal. App. 2d Dist. 1992); State ex rel. Nebraska State Bar Ass'n v. Douglas, 416 N.W.2d 515, 530 (Neb. 1987); Jordan v. Flynt, 240 S.E.2d 858, 863 (Ga. 1977); Russ v. Brown, 529 P.2d 765, 766 (Idaho 1974); Swedeen v. Swedeen, 134 N.W.2d 871, 878 (Minn. 1965); Great Plains Christian Radio, Inc. v. Cent. Tower, Inc., 399 F. Supp. 2d 1185, 1196 (Dist. KS 2005); Zimpel v. Trawick, 679 F. Supp. 1502, 1509 (W.D. Ark. 1988); Nader v. Allegheny Airlines, Inc., 445 F. Supp. 168, 175 (D.D.C. 1978); First Virginia Bankshares v. Benson, 559 F.2d 1307, 1313 (5th Cir. 1977), cert. denied, 435 U.S. 952 (1978).

(4) Lohr did not exercise due care because it knew the letter was not truthful.

(5) Doller was justified in relying upon the letter to proceed with the closing because Lohr did the work. The work was concealed in the wall (see Plaintiff Exhibit 1) so there was no way for Doller to independently check.

(6) Doller testified that she would not have closed had she known the polybutylene pipe was still in the house. (R. p. 251, l. 19-24.) She had to abandon the house because of the mold. (R. p. 190, l. 18-p. 191, l. 9; R. p. 268, l. 10-13.) She suffered loss a monetary loss because she has had to continue to pay the mortgage while not using the house. (R. p. 286, l. 17-42).

Because Doller presented evidence that Lohr had negligently misrepresented the removal of all the polybutylene, Lohr's motion for a directed verdict was correctly denied. Because Lohr admitted facts establishing the elements of negligence, Lohr's motion for a directed verdict was correctly denied.

5. THE THIRTEENTH JUROR DOCTRINE SHOULD NOT BE ABOLISHED OR OTHERWISE MODIFIED.

A. Why there should be a Thirteenth Juror Doctrine.

An analysis of the efficacy of the Thirteenth Juror Doctrine requires a review of first principles. It is important that the judicial system be seen to dispense "justice" and to operate in such a manner as to provide fundamental fairness. Jeremy M. Miller, *The Science of Law: The Maturing of Jurisprudence into Fundamental Principles of Fairness*, 13 Western State University Law Review No 2, 367, 379 (1986); see, e.g., Hipp v. S.C. DMV, 381 S.C. 323, 673 S.E.2d 416 (2009); Coggeshall v. Reprod. Endocrine Assocs., 376 S.C. 12, 655 S.E.2d 476 (2007).

Because juries are composed of imperfect people, fundamental fairness requires that there be some method to correct manifest errors a jury may make. In South Carolina, there are three methods available, depending upon the type and extent of the error. A judge can order judgment notwithstanding the verdict (judgment non obstante veredicto or JNOV), a new trial nisi, or a new trial under the Thirteenth Juror Doctrine, depending on the type of error to be corrected.

B. The types of judicial relief available in South Carolina.

When there is no evidence to support the jury's verdict but damages are clear, logically, the verdict is ruled by passion or prejudice, or possibly by confusion. In that case, there is nothing for the court to do except grant a verdict notwithstanding the fact that the jury has reached a verdict, i.e., JNOV. When the jury verdict is either too generous or too parsimonious, usually the parties just have to live with the verdict. However, when the generosity or the parsimony is so out of balance with the evidence that the verdict shocks the trial judge's conscience, he can order a new trial nisi, ruling that the plaintiff take either more or less, depending on the circumstances, or else be

subject to the vagaries of a new trial. When the evidence points to one verdict and the jury finds the opposite, the trial judge can "hang" the jury by operation of the Thirteenth Juror Doctrine, thereby ordering a new trial absolute.

The first two corrective measures speak to verdicts that are correctable by judgment. In both of those cases, the trial judge is empowered to order a verdict. In the first case (JNOV), the judge orders a verdict and that is the end of that trial, with a new one to follow. In the second case (new trial nisi), the trial judge gives the parties the option of agreeing with his determination of how much should be paid or subjecting themselves to a new trial. In the third case, when the jury reaches a determination that is contrary to the evidence in such a manner that the verdict is wrong but the extent of damages is a substantial question of fact, the first two methods do not provide an adequate remedy. In that case, a new trial is required. The Thirteenth Juror Doctrine addresses that third case.

C. The Lohr arguments are fundamentally flawed.

Lohr argues that (i) the Thirteenth Juror Doctrine should be abolished because there are other methods to correct the erroneous verdict, or (ii) that there should be some other standard governing the review of the Thirteenth Juror Doctrine. Lohr believes that (iii) the Thirteenth Juror Doctrine favors the person seeking damages.

(i) The Thirteenth Juror Doctrine should not be abolished.

As set forth above, the three different modes of correcting jury errors address three very different fact patterns. If the Thirteenth Juror Doctrine were abolished, there would be no method to correct the fact pattern it addresses. A trial judge faced with a verdict that is plainly wrong but where damages are not clear would either have to let the

verdict stand or arbitrarily fix the damages. To allow such a judicial result would put great stress on the trial judge, who would either have to countenance a manifestly unjust result or have to arbitrarily pick a number for damages. The law should not be unjust, nor should it be arbitrary.

(ii) The current standard is the proper standard.

The theory behind the Thirteenth Juror Doctrine is that the judge assumes the role of a thirteenth juror. Jurors never have to give reasons for their decision. Accordingly, if the Court is going to act as thirteenth juror, it would be anomalous in the extreme to require that juror to give reasons when the other 12 do not. Further, if the thirteenth juror does give reasons, then the reviewing court will need to try the case all over again. That is not the case with respect to JNOV or a new trial nisi, because the standard of review in those matters is the "any evidence supporting the jury" standard. The reviewing court need only look to see if there is any evidence to support the jury; if so, then the new trial or JNOV is overruled and the jury verdict reinstated. Likewise, the thirteenth juror is acting as a juror; it is the thirteenth juror's vote that hangs the jury, so the reviewing court looks to see if there is any evidence supporting that decision. If so, that decision stands.

(iii) The Thirteenth Juror Doctrine does not favor plaintiffs.

Lohr admits that sometimes the Thirteenth Juror Doctrine favors the defendant. Lohr brief at page Lohr cites only 14 cases in which the Thirteenth Juror Doctrine was at issue. Of those 14 cases, two were overturned on appeal, and one favored the plaintiff. Research reveals that there are at least 28 Thirteenth Juror Doctrine cases in South Carolina, dating back to at least 1938.[1] Of those 28 cases, 7 were overturned for either

[1] Recognized in Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938);

abuse of discretion or errors of law, 1 was partially overturned, and 3 others favored the plaintiff. In short, 40% favored the defendant and 60% favored the plaintiff. This is hardly an overwhelming reason to abolish a remedy that prevents fundamental unfairness.

Moreover, in the thousands of cases which have been heard in the Circuit Courts of South Carolina since 1938, only 28 Thirteenth Juror Doctrine cases have been appealed. While there is no convenient way to determine how many verdicts have been

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Strickland v. Prince, 247 S.C. 497, 148 S.E. (2d) 161 (1966); Robinson v. Fuller, 249 S.C. 342, 154 S.E. (2d) 431 (1967); Rowe v. Frick, 250 S.C. 499, 159 S.E. (2d) 47 (1968); Sellers v. Sears Roebuck & Co., *252 S.C. 271, 166 S.E.2d 1 (1969)*; Taylor v. Devore, 253 S.C. 393, 171 S.E.2d 158 (1969); Able v. Young, 259 S.C. 362, 191 S.E.2d 781 (S.C. 1972); South Carolina Dep't of Highways & Public Transp. v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980); Watson v. Pendleton, 294 S.C. 155, 363 S.E.2d 234 (S.C. Ct. App. 1987); 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 (S.C. Ct. App. 1992) (overruled on other grounds); Todd v. Owen Indus. Prods., 315 S.C. 34, 431 S.E.2d 596 (S.C. Ct. App. 1993); McEntire v. Mooregard Exterminating Servs., 353 S.C. 629, 578 S.E.2d 746 (S.C. Ct. App. 2003); Trivelas v. S.C.D.O.T., 357 S.C. 545, 593 S.E.2d 504 (S.C. Ct. App. 2004); Lane v. Gilbert Constr. Co., 383 S.C. 590, 681 S.E.2d 879 (2009) Partially overturned Mims v. Coleman, 248 S.C. 235, 149 S.E.2d 623 (1966);

Damages only Mason v. Gossett, 303 S.C. 466, 401 S.E.2d 425 (S.C. Ct. App. 1991); Pinckney v. Winn-Dixie Stores, 311 S.C. 1, 426 S.E.2d 327 (S.C. Ct. App. 1992).

Plaintiff granted relief in underlying case Morrison v. South Carolina State Highway Dep't, 181 S.C. 258, 187 S.E. 344 (S.C. 1936); Aakjer v. Spagnoli, 291 S.C. 165, 352 S.E.2d 503 (S.C. Ct. App. 1987); Sorin Equip. Co. v. Firm, Inc., 323 S.C. 359, 474 S.E.2d 819 (S.C. Ct. App. 1996)

Abuse of discretion: wrong standard used by trial judge: Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (S.C. 1995); Scoggins v. McClellion, 321 S.C. 264, 468 S.E.2d 12 (S.C. Ct. App. 1996); Abuse of discretion: grounds not advanced at trial: Southern R. Co. v. Coltex, Inc., 285 S.C. 213; 329 S.E.2d 736 (1985).

Error of law: used state instead of federal doctrine: Watford v. South Carolina State Highway Dep't, 269 S.C. 130, 236 S.E.2d 558 (1977); Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 567 S.E.2d 851; Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C. Ct. App. 2007); Youmans v. S.C. DOT, 380 S.C. 263, 670 S.E.2d 1 (S.C. Ct. App. 2008)

overturned by use of the Doctrine, the number is undoubtedly very small. In this case, for example, the trial court has been on the bench for 10 years and this is the only case in which he has employed the Thirteenth Juror Doctrine. (R. p. 581, l. 23-25.)

CONCLUSION

The trial court properly granted a new trial under the Thirteenth Juror Doctrine because there was evidence to support the grant and the trial judge did not commit an error of law. Lohr was not entitled to a directed verdict because there was evidence to support Doller's claims. The Thirteenth Juror Doctrine should continue as it is presently understood because it promotes fundamental fairness.

Respectfully submitted,

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Lohr Plumbing, Inc. Appellants.

RESPONDENT'S BRIEF CERTIFICATION

The undersigned certifies that this Final Brief conforms to the requirements of Rule 211(b) of the Appellate Court Rules, **EXCEPT that I have changed a reference to the trial transcript on Page 1 to Supp. R. pp. 7330734 and on Page 3 to R. p. 145,l. 7-10 as set forth in a motion filed November 18, 2016 and added reference to the law review article in the Table of Authorities which was inadvertently left out in the initial brief.**

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