

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2017-001083
Case No. 2015-CP-40-07181

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SC Court of Appeals

Ex parte: The Travelers Home and Marine Insurance Company.....Appellant,

In Re: William Gresham as Personal Representation of the
Estate of John Corey Stringfellow,Respondent,

v.

Cameron Thomas Stringfellow,Defendant.

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL BASED ON THE THIRTEENTH JUROR DOCTRINE WHERE THE MOTION WAS UNTIMELY AND THE TRIAL COURT'S DECISION IS UNSUPPORTED BY THE EVIDENCE AND CONTROLLED BY ERRORS OF LAW?

STATEMENT OF THE CASE

Respondent William Gresham (hereinafter "Respondent"), acting as the Personal Representative of the Estate of John Corey Stringfellow (hereinafter "Decedent"), filed a Summons and Complaint on December 1, 2015 alleging Defendant Cameron Stringfellow (hereinafter "Defendant") caused the wrongful death of Decedent. Appellant The Travelers Home and Marine Insurance Company ("Appellant"), appearing and defending in the name of Defendant¹, admitted Defendant was negligent and reckless but raised comparative negligence, assumption of the risk, and the joint enterprise doctrine as defenses. A jury trial was held in Richland County beginning on January 9, 2017 and ended on January 12, 2017. After hearing all of the evidence, the Court granted the Plaintiff's directed verdict request on the issue of negligence and recklessness but denied the Plaintiff's directed verdict requests regarding comparative negligence and the joint enterprise defense. The court submitted the issue of the comparative negligence between Defendant and Decedent to the jury and also charged the jury regarding the joint enterprise defense. The jury returned a unanimous verdict finding that the percentage of negligence attributable to Decedent was 51% and the percentage attributable to

¹ The Estate had settled its claim with Travelers as the liability carrier for \$295,000 in exchange for a Covenant Not to Execute in favor of the Defendant. The Estate also received \$5,000 in medical payments coverage from the Travelers policy for a total recovery of \$300,000. The Estate then substituted Patricia Stringfellow for William Gresham as the Personal Representative for purposes of filing this lawsuit. (Trial Transcript p. 291, lines 9-18).

Defendant was 49%. Therefore, the Estate was entitled to no recovery in the wrongful death action.²

After the verdict was returned, but before the jury was discharged, Respondent's counsel orally moved for a judgment notwithstanding the verdict on the ground that Decedent's own negligence could not have exceeded 50% when the Court had directed a verdict that Defendant was reckless. Respondent's counsel also moved at the same time for a new trial pursuant to the thirteenth juror doctrine. The trial court heard the arguments of counsel and took the matter under advisement, requesting that the parties brief the issues within ten (10) days. The trial court then discharged the jury. Respondent served a brief in support of its motion on January 20, 2017 and Appellant responded. A hearing was held on March 23, 2017, at which time the trial court denied Respondent's motion for judgment notwithstanding the verdict, but granted Respondent's motion for a new trial based on the thirteenth juror doctrine. The formal order was signed on April 20, 2017 and entered on April 28, 2017. Appellant received written notice of the entry of the order on May 1, 2017. On May 2, 2017 Appellant timely served a Notice of Appeal appealing the portion of the order granting Respondent's motion for a new trial in the wrongful death action based on the thirteenth juror doctrine.

FACTS

This case arises from a motor vehicle accident that occurred in the early morning of May 24, 2013 and resulted in Decedent's death. (Complaint, p. 1-2). On the evening of May 23, 2013, Patricia and Thomas Stringfellow left their home in Columbia to go to

² Respondent also filed a separate survival action that was tried at the same time as the wrongful death action. The jury found that the Decedent had no conscious pain and suffering and therefore no damages were awarded in the survival action. That finding was not appealed.

the beach for Memorial Day weekend with their daughter, leaving their teenage sons Cameron, age 18 (Defendant), and Corey, age 16 (Decedent), home alone for the night. (Trial Transcript p. 191, line 21 – p. 192, line 11). Their home was located in the Wildewood subdivision. (Trial Transcript p. 349, lines 11-18).

Defendant, his friend Wesley Thompson (hereinafter “Thompson”), and Decedent hung out at the house in the afternoon before Decedent left for soccer tryouts. (Trial Transcript p. 194, line 11- p. 195, line 3). Mr. and Mrs. Stringfellow left the house around seven in the evening. (Trial Transcript p. 194, lines 8-10). Once they left, Defendant and Thompson played video games and started drinking wine they found in the garage. (Trial Transcript p. 195, lines 4-10). They also poured a flask of Evan Williams bourbon before leaving the house to attend a ten o’clock movie at the Sandhills theatre. (Trial Transcript p. 196, lines 5-21; p. 197, lines 10-12).

Decedent attended soccer tryouts with his friends Cameron Bohannon (hereinafter “Bohannon”) and Dillion Wood (hereinafter “Wood”). (Trial Transcript p. 156, lines 7-20). Wood drove them to soccer tryouts from Decedent’s house, stopping at Chick-Fil-A on the way back. (Trial Transcript p. 165, lines 10-17). Tryouts ended at 8:30 p.m. and it took 30-45 minutes to get back to Decedent’s home. (Trial Transcript p. 156, line 23 - p.157, line 2). After soccer tryouts, both Bohannon and Wood testified that they smoked marijuana with Decedent at his house. (Trial Transcript p.156, line 7 – p. 157, line 12; p. 159, lines 1-15; p. 165, line 24 - p. 167, line 1). Bohannon did not recall whose marijuana they smoked but admitted he had smoked with Decedent three to five times before. (Trial Transcript p. 159-160, line 9). Wood also testified that he did not know where the marijuana came from but stated that he knew that he did not bring it. (Trial

Transcript p. 168, lines 8-11). After smoking marijuana, Decedent drove Bohannon from the Stringfellow home to Bohannon's house and Wood drove himself home. (Trial Transcript p. 160, lines 17-24; p.167, lines 16-18).

Following the movie, Defendant drove Thompson back to the Stringfellow home. (Trial Transcript p. 198, lines 6-10). They arrived back around midnight. (Trial Transcript p. 222, lines 1-3). Defendant testified that he believed that Decedent was already home by the time they returned from the movie. (Trial Transcript p. 198, lines 16-22; p. 222, lines 1-3). Defendant, Thompson, and Decedent then hung out together. (Trial Transcript, p. 222, lines 12-16; p. 278, lines 11-13). Thompson testified that he and Defendant continued drinking when they returned to the house but that Decedent did not drink with them. (Trial Transcript p. 259, lines 5-17). Thompson also testified that he does not think they smoked marijuana after the movie. (Trial Transcript p. 259, lines 18-23). Defendant could not specifically recall whether he smoked marijuana that evening but admitted that he and Decedent both had marijuana in their systems, that he did not smoke any marijuana before the movie, and assumes he smoked marijuana with Decedent and Thompson after the movie. (Trial Transcript p.209, line 5 – p. 210, line 15; p. 212, line 16 – p. 213, line 3). Defendant admitted on cross-examination by Appellant that Thompson had been drinking and “smoking pot” with him that night. (Trial Transcript p. 229, lines 14-17). Defendant also admitted that he had smoked marijuana with his brother in the past. (Trial Transcript p. 210, lines 16-18). Defendant initially denied that he had ever drank alcohol with Decedent before but was impeached by his deposition testimony admitting that he and Decedent previously drank alcohol together. (Trial Transcript p. 210, line 19 - p. 211, line 15). Defendant and Thompson also ingested part of a Xanax

laced “sweet tart” that evening. (Trial Transcript p. 229, line 18 – p. 230, line 3). Thompson admitted that he was stoned and drunk, which caused his recollection of the events of the night to be “completely fuzzy”. (Trial Transcript p. 277, line 2 – p. 278, line 23).

While hanging out with Defendant and Thompson, who were both drinking alcohol and possibly smoking marijuana, Decedent began searching for a source to provide more marijuana to smoke that night. (Trial Transcript p. 212, line 20 - p. 213, line 3; p. 220, lines 10- 20; p. 259, lines 5-17). Although Defendant testified that it was his idea to get more marijuana, he also testified that everyone went along with it. (Trial Transcript p. 219, lines 3-9). Thompson initially testified that he was the one who “started the search for the source” and that Decedent was just “tagging along”. (Trial Transcript p. 279, line 23- p. 280, line 2). However, he also testified that the cell phone records show that Decedent made calls to find someone to sell the marijuana. (Trial Transcript p. 273, lines 2-12). The address where they were going to purchase the marijuana was texted to both Decedent’s and Defendant’s phones at 1:22 a.m. (Trial Transcript p. 200, lines 3-9; p. 271, lines 16-19). Thompson eventually admitted that Decedent made the phone call to locate the marijuana on Decedent’s phone. (Trial Transcript p. 273, lines 2-12). Defendant testified on direct examination by the Respondent that “somebody” got the number for the contact to purchase weed but stated that he did not do it. (Trial Transcript p. 199, lines 10-14). On cross-examination by Appellant Defendant ultimately admitted that Decedent arranged the deal to buy the marijuana. (Trial Transcript p. 220, lines 10- 20; p. 235, line 7 - p. 236, line 3).

After receiving the address where the marijuana was located by text, Defendant, Decedent and Thompson decided to leave the Stringfellow home to purchase more marijuana at approximately 1:30 a.m. (Trial Transcript p. 199, lines 1-19; p. 223, lines 6-10; p. 271, lines 16-19). Both Defendant and Thompson testified that they all three left the house together to go buy marijuana. (Trial Transcript p. 198, line 23- p. 199, line 4; p. 261, lines 14-18). Defendant drove his mother's BMW without her permission instead of his own vehicle. (Trial Transcript p. 196, lines 22-23). Decedent willingly entered the car driven by Defendant. (Trial Transcript p. 235, lines 7-11).

Thompson testified that he smoked marijuana at the house where they went to purchase the marijuana and that Decedent also could have, but he did not witness it. (Trial Transcript p. 279, lines 7-17). After purchasing the marijuana they all left to go back to the Stringfellow house. (Trial Transcript p. 262, lines 6-7). Defendant drove past the house and then drove the BMW at a high rate of speed reaching over ninety miles per hour. (Trial Transcript p. 123, lines 12-14; p. 201, lines 4-15). Although he initially testified twice on direct examination by Respondent that he did not announce his intention to drive fast to the other occupants of the car, Defendant was impeached by his prior deposition testimony in which he stated that he thought he had told them of his intention to drive fast. (Trial Transcript p. 180, lines 14-20; p. 201, lines 4-9; p. 237, line 10 - p. 238, line 8). Defendant swiped a car parked along the street which sent the BMW crashing into a tree. (Trial Transcript p. 201, line 19 – p. 202, line 1; Plaintiff's Exhibit 1). EMS was dispatched at 2:39 a.m. and found Decedent unresponsive and unconscious. (Plaintiff's Exhibit 18).

Following the accident, Decedent and Defendant both tested positive for THC in their systems, with Decedent's level being higher than Defendant's. (Defendant's Exhibit 104). Defendant testified that THC is the active ingredient in marijuana. (Trial Transcript p. 209, lines 13-22). Defendant was charged and pled guilty to involuntary manslaughter and driving under the influence of alcohol. (Plaintiff's Exhibits 19 and 20). His blood alcohol level was .186. (Defendant's Exhibit 104). The Stringfellows paid for Defendant's criminal attorney and wrote a letter to the sentencing judge requesting leniency. (Trial Transcript p. 394, lines 13-17; p. 428, line 11- p 429, line 2).

Decedent had a history of consuming alcohol and smoking marijuana. (Trial Transcript p. 159, line 21 – p. 160, line 1; p. 210, line 16 - p. 211, line 15; p. 295, line 14 – p. 297, line 6; Defendant's Exhibit 1). There was evidence of drug paraphernalia and marijuana references on Decedent's phone. (Defendant's Exhibits 39, 40, 42, 43, 44, 45, 47; Trial Transcript p. 386, line 11 - p. 392, line 17). Evidence was also presented that Decedent's parents were aware of Decedent's prior drug and alcohol use despite testimony to the contrary. (Defendant's Exhibits 1, 9, 10, 50; Trial Transcript p. 365, line 14 – p. 377, line 2; p. 433, line 14 – p. 436, line 8).

At the trial of the case Defendant sat with the Plaintiff and his parents, the beneficiaries of the lawsuit, over the objection of Appellant's counsel. (Trial Transcript p. 15 - p. 20; p. 94, lines 6-7; p. 288, lines 3-4). Defendant testified on behalf of the Plaintiff and admitted that he drove under the influence of alcohol and drugs, was impaired, and was liable for the accident. (Trial Transcript p. 172; p. 178, line 16 - p. 179, line 14). Defendant also admitted that a defense raised on his behalf was that Decedent assumed the risk of injuries from the accident. (Trial Transcript p. 180, lines 2-12).

Evidence was presented that Decedent had his own vehicle and had driven it earlier in the evening after smoking pot. (Trial Transcript p. 224, lines 2-13; p. 236, lines 8-20). Defendant admitted that Decedent could have driven his own vehicle to purchase the marijuana and that Decedent made the decision to get in the car with a driver who was inebriated. (Trial Transcript p. 236, lines 8-20). Defendant also admitted that nobody riding in the car, including Decedent, complained regarding his driving or objected to the high rate of speed before the accident. (Trial Transcript p. 201, lines 2-3; p. 230, line 20 – p. 231, line 3).

ARGUMENT

I. THE TRIAL COURT ERRED BY GRANTING RESPONDENT'S UNTIMELY MOTION FOR A NEW TRIAL.

As an initial matter, Respondent's motion for a new trial was not timely. This issue was raised in Appellant's Response to Plaintiff's Post-Trial Motions and discussed at the motions hearing. (Response to Plaintiff's Post-Trial Motions p. 4; Transcript of Motions Hearing p. 26, lines 11- 23; p. 37, line 25 - p. 39, line 4). The trial court ruled that the "challenge to the timeliness of the motion for new trial under the thirteenth juror doctrine is without merit." (Order p. 5).

Rule 59(b) of the South Carolina Rules of Civil Procedure clearly provides the time frame within which a motion for a new trial shall be made:

Time for Motion. The motion for a new trial shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. In non-jury actions the motion shall be made not later than 10 days after the receipt of written notice of the entry of judgment or of the filing of an order disposing of the action, if no judgment has been entered.

Rule 59(b), SCRPC. Respondent's motion was orally made by counsel prior to the discharge of the jury and no motion was made after the discharge of the jury. (Trial

Transcript p. 605, line 13 - p. 612, line 20). The trial court's Order states that it "granted counsel's request for leave to file formal motions and briefs within ten (10) days" and references a request by Respondent's counsel for "ten days (10) days leave to file formal motions and briefs." (Order p. 4 and p. 5). However, the trial transcript clearly indicates that the trial judge took the motion under advisement and only allowed ten days to "brief the issue" raised. (Trial Transcript p. 610, lines 6-25). There is absolutely no reference or request by Respondent's counsel regarding filing formal motions:

MR. GRIFFIN: . . . And then after that, Your Honor, we would request a new trial based on the 13th juror doctrine as a result of the Court's findings of directed verdict on recklessness and that this verdict was against the weight of the evidence and the result of confusion or passion or prejudice.

THE COURT: It's an interesting issue. You know, these issues are pretty complex. And I think I will take the matter under advisement and give you all an opportunity to brief the issue and will address that later.

MR. GRIFFIN: Thank you, Your Honor.

MS. O'BRIEN: Your Honor, how much time do we have to brief the issue?

THE COURT: How much time you need?

MS. O'BRIEN: No more than ten days.

THE COURT: Mr. Griffin?

MR. GRIFFIN: That's fine.

THE COURT: Ten days.

MS. O'BRIEN: Thank you, Your Honor.

(Trial Transcript p. 610, lines 6-25).

In fact, Respondent's own Motion¹ For Judgment Notwithstanding The Verdict Or In The Alternative For A New Trial contains a footnote in the caption next to the word "Motion" that confirms the untimeliness of the motion under Rule 59(b), SCRCP. The

footnote admits that “Plaintiff previously made an oral motion for jnov and for a new trial immediately following the jury’s verdict” and that “[t]he court thereafter invited the parties to brief these motions within ten (10) days of the verdict.” (Motion¹ For Judgement Notwithstanding The Verdict or in the Alternative for a New Trial p. 1 fn. 1).

A court applying the South Carolina Rules of Civil Procedure must give the words “their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule.” Green By & Through Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). *See also* Maxwell v. Genez, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (holding if “a rule’s language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced”); Stark Truss Co. v. Superior Const. Corp., 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (stating that “[w]hen the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning”). The motion for a new trial in the instant matter was premature and untimely under the clear language of Rule 59(b), SCRCF. In Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994) the South Carolina Supreme Court reversed a trial judge’s grant of a new trial motion for noncompliance with this rule, holding that “a party must make a motion for a new trial promptly after the jury is discharged or request ten days within which to make the motion”. As the trial transcript clearly indicates, Respondent made no motion after the jury was discharged and did not request ten days to make motions. (Trial Transcript p. 611 – p. 613, line 1). The plain language of Rule 59(b) should be enforced pursuant to the authorities cited herein and the Order granting a new trial should be reversed on the grounds that Respondent’s motion for a new trial was not timely.

II. THE TRIAL COURT ERRED BY GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL BASED UPON THE THIRTEENTH JUROR DOCTRINE.

Even if the motion for a new trial was properly made, which Appellant disputes, the trial court erred in granting a new trial based on the thirteenth juror doctrine. Generally, “the ‘thirteenth juror’ doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds the evidence does not justify the verdict.” Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995). The effect of the doctrine is the same as if the jury failed to reach a verdict. Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990). However, “[d]espite the discretion given a judge by the thirteenth juror doctrine when a party moves for a new trial, it does not allow the court to overstep the boundaries of the doctrine *in toto*.” Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008). A trial judge’s determination to grant a new trial premised upon the thirteenth juror doctrine will be reversed when the decision is “wholly unsupported by the evidence or the conclusion was controlled by an error of law.” Id., 380 S.C. at 270, 670 S.E.2d at 4.

Although a trial judge is not required to provide the parties with the basis for his decision when granting a motion for a new trial under the thirteenth juror doctrine, in this case the trial judge set forth his reasons in the Order granting a new trial and the transcript of the motions hearing. The trial judge’s decision was based on his belief that “the jury’s finding that the Decedent was fifty-one percent (51%) at fault and the Defendant was forty-nine percent (49%) at fault is not supported by the evidence.” (Order p. 6). The trial judge relied on Defendant’s admission of recklessness which “by

definition is a higher degree of culpability and responsibility than negligence.” (Order p.

6). The Order states:

[t]he jury’s finding that the negligence of the Decedent exceeded that of the Defendant, whom admitted and was found to be reckless, on the basis that the Decedent contributed to his death by riding as a passenger in the vehicle is clearly against the fair preponderance of the evidence. The Court therefore concludes that a new trial in the wrongful death action should be granted pursuant to the thirteenth juror doctrine.

(Order p. 6).

During the post-trial motions hearing, the trial judge mentioned that he sat as an acting justice on a Supreme Court case during the trial of the instant matter that also involved drinking, driving, and smoking marijuana.³ (Motions Transcript p. 27 line 24 – p. 28 line 23; Trial Transcript p. 455, lines 8 – 17; p. 456, lines 8-20). In that case, according to the trial judge, the jury found an apportionment of 50/50 between the driver and the passenger for comparative negligence or else a case was cited where there was a 50/50 apportionment. (Motions Transcript p. 27, line 24 – p. 28, line 23). The trial judge concluded, “[s]o we know it can be 50/50. But can it be 51/49 is the question?” (Motions Transcript p. 28, lines 22-23). The trial judge stated:

[a]fter the admission by [the Defendant] that he was reckless and basically concluding through his testimony that it was all his fault . . . and I directed a verdict on that issue.

You know, I see no way that the jury could reasonably come to the conclusion they came to, no reasonable jury could reach that decision deciding that the passenger was more at fault than the

³ Upon information and belief, the case referenced was Donze v. General Motors, LLC, 420 S.C. 8, 800 S.E.2d 479 (2017). This case involved a certified question from the district court regarding whether comparative negligence is a defense in a crashworthiness case filed by a passenger plaintiff against a car manufacturer. For the purposes of the opinion the Court assumed the imputation of the driver’s negligence to the passenger under the joint enterprise doctrine and found that comparative negligence is not a defense in a crashworthiness case.

driver. And no evidence was presented that would give the jury a basis to make that decision. . .

As to the new trial based on the 13th Juror, it seems to me as if, in addition to there being no reasonable basis for which the jury could come to that conclusion, basically, the jurors seemingly -- or I can't speculate what they decided, but they didn't apply the law or were confused by the law or just didn't apply it or just decided they didn't want to be involved in this process. And they decided they were not going to -- that despite the evidence they were going to do the jury nullification, of sorts.

But I'm going to grant the new trial based on 13th Juror Law and adopt the Plaintiff's argument with regard to that.

(Motions Transcript p. 35, line 16 – p. 36, line 16). The trial judge concluded the hearing by granting a new trial under the thirteenth juror doctrine “based on common sense and application of the law and facts of this case”. (Motions Transcript p. 37, lines 21-23). The transcript of the motions hearing and the Order clearly reveal that the trial judge's decision to grant a new trial was unsupported by the evidence presented at trial and controlled by errors of law.

A. The trial court's decision to grant a new trial premised on the thirteenth juror doctrine is wholly unsupported by the evidence presented at trial.

The trial court's justification for granting a new trial was that “the jury's finding that Decedent was fifty-one percent (51%) at fault and Defendant was forty-nine percent (49%) at fault is not supported by the evidence.” (Order p. 6). The trial court based this decision on the fact that Defendant “admitted he was reckless and that his recklessness caused the accident.” (*Id.*). The transcript of the motions hearing reveals that the trial judge was under the mistaken belief that there was “no way that the jury could reasonably come to the conclusion they came to.” (Motions Transcript p. 35, lines 20-24). The trial

judge's conclusion that "no evidence was presented that would give the jury a basis to make [the] decision" that a passenger was more at fault than a driver is completely unsupported by the evidence that was submitted. (Motions Transcript p. 35, lines 24-25).

The trial court found the evidence presented at trial was sufficient to charge the jury on comparative negligence, assumption of the risk⁴, and joint enterprise, all three defenses that factor into a jury's analysis and consideration of comparative negligence. (Trial Transcript p. 571, line 3 – p. 575, line 3). It appears that the jury also had a physical copy of these charges in the jury room with them during deliberations. (Trial Transcript p. 581, lines 10-11). Appellant raised the issue of these affirmative defenses as an explanation for the verdict to the trial court in its Response to Plaintiff's Post-Trial Motions and at the motions hearing. (Response to Plaintiff's Post-Trial Motions p. 5; Motions Hearing Transcript p. 11, lines 11-17; p. 16, line 18 - p. 17, line 20). However, in granting the new trial motion, the trial court failed to acknowledge that the evidence presented in support of these affirmative defenses provided the jury with the basis to find that Decedent's negligence exceeded Defendant's.

1. Decedent's Independent Negligence

Evidence was presented regarding Decedent's independent acts of negligence, including assumption of the risk. The evidence was undisputed that Decedent smoked marijuana earlier in the evening with his friends. (Trial Transcript p. 160, lines 17-24; p.167, lines 16-18). The evidence also indicated that Decedent was likely the source of

⁴ Both parties submitted proposed separate charges for assumption of the risk but neither of the charges were included in the jury instructions. Appellant requested that the jury be brought back in and given the assumption of the risk charge, which the Court declined to do. (Trial Transcript p. 587-595). Appellant's proposed charge was made Court's Exhibit 2.

the marijuana they smoked. (Trial Transcript p. 159 lines 1-11; p.168, lines 8-11). Although Defendant's testimony was conflicting regarding whether he and Decedent smoked marijuana together that evening, he admitted that they had in the past and he ultimately stated that he assumes he smoked marijuana with Decedent and Thompson that evening. (Trial Transcript p. 209, line 5 – p. 210, line 18; p. 212 – p. 213, line 3). Furthermore, Decedent was tested for marijuana after the accident and his level was higher than Defendant's. (Defendant's Exhibit 104).

The undisputed evidence shows that Decedent entered the car willingly with the inebriated Defendant after witnessing him drinking and made no complaints regarding Defendant's driving or the high rate of speed before the accident. (Trial Transcript p. 201, lines 2-3; p. 229, lines 14-17; p. 230, line 20 – p. 231, line 3; p. 235, lines 7-11). Furthermore, both Defendant and Thompson ultimately testified that it was Decedent who orchestrated locating the marijuana that they left the safety of the Stringfellow house to purchase. (Trial Transcript p. 220, lines 10-20; p. 235, line 7 – p. 236, line 3; p. 273, lines 2-12). Decedent also willingly got in the car with Defendant a second time when leaving the party after purchasing more marijuana and within minutes of the accident. (Trial Transcript p. 262, lines 2-7). Defendant also testified that Decedent knew that he should not get in the car with someone who was drinking and should not drive drunk or impaired. (Trial Transcript p. 233, line 25 – p. 234, line 9). Defendant further testified that Decedent had his own vehicle and could have driven his Jeep but purposefully chose to ride with Defendant that night. (Trial Transcript p. 236, lines 4-20).

At the conclusion of the evidence, Respondent moved for a directed verdict arguing that there was no evidence to support that Decedent was at fault or assumed any

risk. (Trial Transcript p. 481, lines 2-7). A directed verdict is proper “[w]hen the evidence yields only one inference ... [h]owever, if the evidence as a whole is susceptible of more than one reasonable inference, the case must be submitted to the jury.” Hurd v. Williamsburg County, 353 S.C. 596 at 609, 579 S.E.2d 136 at 142-143 (Ct. App. 2003), *aff’d* 363 S.C. 421, 611 S.E.2d 488 (2005). The trial judge denied the directed verdict motion and noted, when discussing the verdict form, that “of course the jury can still find that the [decedent] was more than 50 – or 50 percent or more.” (Trial Transcript p. 503, lines 15 – 20; p. 504, lines 4-8). The jury was charged on comparative negligence. (Trial Transcript p. 571, line 3 – p. 573, line 11). Although the trial judge did not give a separate charge regarding assumption of the risk, even after the Appellant’s objection where it was previously agreed upon in in the charge conference and yet was failed to be charged, the jury was instructed that a factor they could consider in deciding comparative negligence percentages was whether the party’s conduct “was gauged with an awareness of the danger involved and the magnitude of the risks”. (Trial Transcript p. 479, lines 6-24; p. 572, lines 17-23; p. 587-595). The evidence and law provided the jury with a reasonable basis to find that the Decedent was independently negligent and assumed the risk of his injuries.

2. Negligence Imputed to Decedent

The defense of joint enterprise was also raised in Defendant’s Answer. (Answer ¶ 24). The uncontroverted evidence presented during trial was that all three boys left the Stringfellow residence and entered the vehicle for the same mission and with the sole purpose of purchasing more marijuana. (Trial Transcript p. 198, line 23- p. 199, lines 1-19; p. 223, lines 6-10; p. 261, lines 14-18; p. 271, lines 16-19). Although Defendant

denied on direct examination by Respondent that Decedent had an equal right to control the vehicle, evidence was presented to the contrary.⁵ (Trial Transcript p. 181, lines 20-25). The evidence indicated that both Decedent and Defendant had the same right to drive the vehicle since Defendant was driving their mother's BMW without her permission. (Trial Transcript p. 196, lines 22-23). Decedent was a licensed driver and had in fact driven his vehicle after smoking marijuana earlier in the evening. (Trial Transcript p. 160, lines 17-24; p.167, lines 16-18). There was absolutely no evidence presented that Decedent objected to the Defendant driving and the evidence indicated that Decedent did not protest the high rate of speed before the accident. (Trial Transcript p. 201, lines 2-3; p. 230, line 20 – p. 231, line 3).

Respondent's counsel moved for a directed verdict on the defense of joint enterprise at the conclusion of Appellant's case. (Trial Transcript p. 481, line 9 - p. 485, line 24; p. 490, line 15 - p. 492, line 2). The trial judge denied the motion, specifically stating that "it appears that this joint enterprise law exists such that it should be an issue for the jury's determination". (Trial Transcript p. 503, lines 20-23). By denying the motion for a directed verdict on joint enterprise the trial judge found that there was "material evidence tending to establish the issue in the mind of a reasonable juror". *See Hurd v. Williamsburg County*, 353 S.C. 596, 609, 579 S.E.2d 136, 143 (Ct. App. 2003), *aff'd* 363 S.C. 421, 611 S.E.2d 488 (2005). The jury was subsequently charged on the law regarding joint enterprise and the requirements for imputing the negligence of a driver to an occupant of the vehicle. (Trial Transcript p. 573, line 12 – p. 575, line 2).

⁵ The jury was charged by the judge that they were to be the "sole judges" of the credibility and believability of the witnesses and could consider their demeanor, potential bias, prejudice, and contradictions in their testimony in making their evaluation of the evidence. (Trial Transcript p. 570, lines 5-17).

The evidence and law presented regarding joint enterprise provided the jury with a basis to reasonably impute all of the Defendant's admitted recklessness to the Decedent.

3. Decedent's Combined Negligence

The thirteenth juror doctrine is only appropriate when the trial court finds that "the evidence does not justify the verdict." Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995). If the trial court's conclusion that no evidence supports the jury's verdict is not supported by the record then the order granting the new trial should be reversed. *See Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (reversing grant of new trial as thirteenth juror on grounds that trial court's finding that there was no evidence to support jury's finding regarding comparative negligence was not supported by the record). In this case, the trial judge concluded that "no evidence was presented that would give the jury a basis to make [the] decision" that a passenger was more at fault than the driver in an accident. (Motions Transcript p. 35, lines 20-25). The trial judge's holding is not supported by the record. The jury was presented with evidence and instructed on law that supports their verdict.

By denying the directed verdict motions on comparative negligence and the joint enterprise defense, the trial court found that there was sufficient evidence presented on these issues to submit them to the jury and subsequently charged them on the applicable laws. These defenses provided the basis for the jury's verdict. The reasonable explanation for the verdict is that the jury found the joint enterprise doctrine applied, imputed the Defendant's recklessness to the Decedent, and then added a separate allocation for the Decedent's independent acts of negligence to reach a total percentage of negligence attributable to the Decedent that exceeded Defendant's. *See Berberich v.*

Jack, 392 S.C. 278 at 289, 709 S.E.2d 607 at 613 (2011) (stating that purpose of comparative negligence scheme is to allow jury to “evaluate **overall culpability** of each party”) (emphasis added).

The trial court’s finding that there is no reasonable basis to support the jury’s apportionment of negligence is wholly unsupported by the evidence and law. The degrees of negligence attributed to Defendant and Decedent were questions of fact for the jury that were fully supported by the evidence. See Hurd v. Williamsburg County, 363 S.C. 421, 611 S.E.2d 488 (2005) (“[t]he determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn.”). Therefore, this Court should find that the use of the thirteenth juror doctrine by the trial court to grant a new trial was error. The trial court is simply substituting his own view of what the relative percentages of fault should (or rather should not) have been for those of the twelve impartial Richland County jurors who reached a unanimous verdict finding that the Decedent’s overall negligence slightly exceeded Defendant’s.

B. The trial court’s decision to grant a new trial premised upon the thirteenth juror doctrine was controlled by errors of law.

The transcript of the motions hearing and the Order reveal that the trial judge’s grant of a new trial based on the thirteenth juror doctrine was based on conclusions controlled by several errors of law and, therefore, should be reversed.

1. Comparative negligence allows for the comparison of all forms of negligence

The trial court found that because Defendant admitted to acting recklessly during the accident, “a higher degree of culpability and responsibility than negligence”, then it

was impossible for the jury to find the negligence of Decedent, a passenger, outweighed the recklessness of Defendant. (Order p. 6). However, that is not the law in South Carolina. In Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011), where the plaintiff was found to have been 75% negligent despite the defendant's admitted recklessness, the Supreme Court held that a plaintiff's ordinary negligence may be compared to a defendant's recklessness. Noting the "broad spectrum of conduct" to be considered by a jury to "evaluate the overall culpability of each party" under comparative negligence, the Court ultimately held:

[U]nder our comparative negligence system, all forms of conduct amounting to negligence in any form, including, but not limited to, ordinary negligence, gross negligence, and reckless, willful, or wanton conduct, may be compared to and offset by any conduct that falls short of conduct intended to cause injury or damage. By this method, each party's relative fault in causing the plaintiff's injury will be given due consideration. A trial court should instruct the jury on the definitions of these various terms, in addition to ordinary negligence, when so requested by a party

Berberich, 392 S.C. at 293–94, 709 S.E.2d at 615. The Supreme Court made it clear that all degrees of negligence could be compared by the jury when apportioning fault under a comparative negligence system, specifically holding that "comparative negligence encompasses the comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness." Id., 392 S.C. at 292, 709 S.E.2d at 614. The Court also specifically rejected the argument that the jury should be instructed that "heightened degrees of wrongdoing should be accorded greater weight than ordinary negligence." Id., 392 S.C. at 294, 709 S.E.2d at 616. Therefore "a jury may compare all forms of negligence as part of its assessment of fault." Id.

Respondent's counsel even acknowledged that the jury could compare negligence to recklessness while discussing jury charges with the Court during the trial of the case, stating: "And I agree that they can compare simple negligence against gross negligence or recklessness. I think the law allows a jury to make that adjustment ..." (Trial Transcript p. 474, lines 11-14). Later, Respondent's counsel reiterated that "the law is you can compare, you know, all forms of fault, gross negligence, recklessness, and negligence." (Trial Transcript p. 513, lines 14-17).

In this case, the jury was instructed on the definitions of the various forms of negligence. (Transcript p. 571 – 573, line 11; p. 576, line 20 – p. 577, line 15). Based on the uncontroverted evidence presented regarding assumption of the risk, the jury could have reasonably concluded that Decedent's own conduct by choosing to ride in a vehicle with a driver he knew to be inebriated rose to levels above simple negligence and that his negligence exceeded Defendant's. *See infra* pp. 14-16. In Ardis v. Griffin, 239 S.C. 529, 123 S.E.2d 876 (1962) the South Carolina Supreme Court found that a passenger who "knowingly entrust[s] his safety to a driver who is intoxicated is guilty of a conscious failure to exercise due care." The Supreme Court further held that this failure "to exercise due care for his own safety **would constitute willfulness and recklessness**" and bars the passenger's recovery. Ardis, 239 S.C. at 534, 123 S.E.2d at 878 (holding that passenger precluded from recovery where he knew driver under influence when entered vehicle) (emphasis added). Even if the jury found Decedent only to be simply negligent, the jury could still find, as the Berberich court made clear, that this simple negligence exceeded Defendant's admitted recklessness.

Furthermore, “all forms of conduct amounting to negligence in any form” are to be compared under South Carolina’s comparative negligence system. Berberich, 392 S.C. at 293, 709 S.E.2d at 615 (stating that purpose of comparative negligence scheme is to allow jury to “evaluate overall culpability of each party”). This determination necessarily includes an analysis of a party’s independent acts of negligence in addition to any negligence imputed to the party by the acts of another. In the instant matter, the jury was presented with evidence and law to reasonably impute all of Defendant’s recklessness to Decedent under the joint enterprise doctrine. The jury was also presented with evidence and law to support an additional allocation for Decedent’s own negligence, which explains the slightly greater percentage of negligence attributed to the Decedent. Therefore, the trial judge’s holding that Defendant’s recklessness cannot outweigh Decedent’s negligence as a passenger is not in line with South Carolina law and does not account for the joint enterprise and assumption of the risk defenses that were presented and charged to the jury.

2. There is no law that a passenger’s negligence cannot exceed a driver’s negligence

The trial judge’s decision to grant a new trial was based on the conclusion that a passenger’s negligence cannot exceed the negligence of a driver. While discussing the jury’s allocation at the motions hearing he stated: “So we know it can be 50/50. But can it be 51/49 is the question?” (Motions Transcript p. 28, lines 22-23). The trial judge incorrectly concluded as a matter of law that the answer to his question was “no”. There is no authority in South Carolina supporting this conclusion. In fact, as discussed above, South Carolina allows for the comparison of all forms and levels of negligence, including imputed and independent acts of negligence, in the comparative negligence analysis. *See*

Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011). To the extent that the trial judge is relying on Ardis v. Griffin, 239 S.C. 529, 123 S.E.2d 876 (1962), which states the general principle that a passenger who voluntarily and knowingly entrusts his safety to an intoxicated driver “is equally at fault with the driver and is precluded from recovery”, his reliance on this case for his conclusion is misguided. Ardis was decided prior to the adoption of comparative negligence and dealt solely with the issue of assumption of the risk. In the instant matter, there was evidence by which the jury could impute all of Defendant’s admitted recklessness to Decedent under the joint enterprise doctrine and additional evidence of Decedent’s own independent acts of negligence in assuming the risk, which arguably also rose to the level of recklessness, that supports the jury’s greater allocation of negligence to the Decedent.

3. Speculation regarding a jury’s deliberations is not grounds for a new trial

“Despite the discretion given a judge by the thirteenth juror doctrine, it does not allow the court to overstep these boundaries *in toto*. Additionally, granting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.” Youmans ex rel. Elmore v. S.C. Dep’t of Transp., 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (holding it was improper for the trial court to use the thirteenth juror doctrine to grant a new trial based upon the quality of jury deliberations and reversing order). At the post-trial motions hearing in this case and immediately before granting a new trial, the trial judge speculated regarding the quality of the jury’s deliberations, stating:

[A]s to the new trial based on the 13th juror, it seems to me as if, in addition to there being no reasonable basis for which the jury could come to that conclusion basically, the

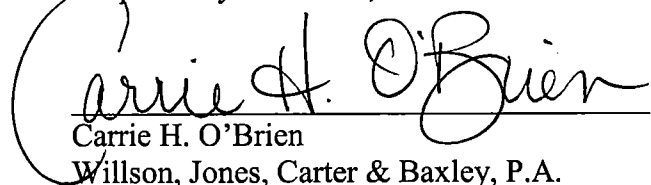
jurors seemingly—or I can't speculate what they decided, but they didn't apply the law or were confused by the law or just didn't apply it or just decided they they didn't want to be involved on the process. And they decided they were not going to—that despite the evidence they were going to do the jury nullification, of sorts.

(Motions Hearing Transcript p. 36, lines 3 – 13). As previously established, the record proves that there was a reasonable basis for the jury's verdict. *See infra* pp. 13-19. The trial judge's speculation regarding the jury's deliberations is without evidentiary support and an improper ground for a new trial under Youmans. The jury in the instant matter was presented with evidence and instructed on law that fully supports their verdict and it should be reinstated.

CONCLUSION

Based on the arguments and authorities cited above, the trial court's order granting a new trial should be reversed and the jury's verdict reinstated on the grounds that the motion for a new trial was not timely and did not comply with the plain language of Rule 59(b), SCRPC. Alternatively, the trial court's order should be reversed and the jury's verdict reinstated because the trial judge's decision is not supported by the evidence and is controlled by multiple errors of law.

Respectfully submitted,



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Attorneys for Appellant

November 8, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2017-001083
Case No. 2015-CP-40-07181

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SC Court of Appeals

Ex parte: The Travelers Home and Marine Insurance Company. Appellant,

In Re: William Gresham as Personal Representation of the
Estate of John Corey Stringfellow Respondent,

v.

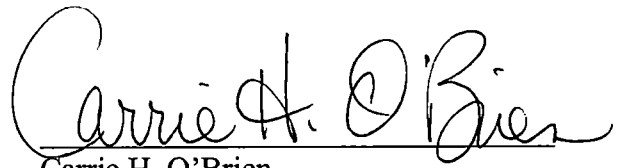
Cameron Thomas Stringfellow Defendant.

PROOF OF SERVICE

I, Carrie H. O'Brien, of Willson, Jones, Carter & Baxley, P.A., Attorneys for Appellant, hereby certify that, on this 8th day of November 2017, I have served the following with the foregoing Initial Brief of Appellant and Designation of Matter to be Included in Record on Appeal by mailing copies of same by United States Mail, postage prepaid, to counsel of record at the addresses shown below:

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(signature on following page)



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November 8, 2017

Hand Delivery

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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SC Court of Appeals

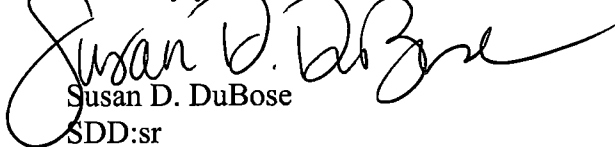
Re: Ex Parte: The Travelers Home and Marine Insurance Company, Appellant
In Re: Williams Gresham as Personal Representative of the Estate of John Corey Stringfellow, Respondent, v. Cameron Thomas Stringfellow, Defendant
Appellant Case No.: 2017-001083
Our File No.: 7746.2121

Dear Ms. Kitchings:

Enclosed herein for filing on behalf of Carrie H. O'Brien, counsel of record for Appellant, please find the original and one (1) copy of Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Proof of Service thereof. Please return a clocked copy of each document to me via the courier delivering same.

By copy hereof, the same is being served upon counsel for Respondents.

Sincerely yours,


Susan D. DuBose
SDD:sr

Enclosures

cc w/encl.: James M. Griffin, Esquire
Carrie H. O'Brien, Esquire