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

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.

INITIAL REPLY BRIEF OF APPELLANT

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Appellant The Travelers Home and Marine Insurance Company ("Appellant"), respectfully submits this reply and response to Respondent's Initial Brief. Respondent's brief contains several legal assertions and factual statements that necessitate a response or clarification from Appellant. Appellant respectfully submits this reply for the Court's consideration.

ARGUMENT

I. THE TRIAL COURT ERRED PROCEDURALLY BY HEARING RESPONDENT'S UNTIMELY MOTION FOR A NEW TRIAL WHEN RESPONDENT DID NOT MAKE THE MOTION AFTER THE DISCHARGE OF THE JURY AND DID NOT REQUEST AN ADDITIONAL TEN DAYS WITHIN WHICH TO MAKE HIS POST-TRIAL MOTION.

Rule 59(b) of the South Carolina Rules of Civil Procedure states that "[t]he 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." Rule 59(b), SCRCP. Respondent argues that his motion "was timely because the motion was first made after the jury was discharged and remade within ten (10) days of the jury's discharge as permitted and directed by the Trial Court." (Resp. Brief p. 12). The record, however, reveals that Respondent did not comply with the requirements of Rule 59(b) and the motion for a new trial is therefore procedurally barred.

A. Respondent's motion was made prior to the jury's discharge.

Respondent argues that the jury was discharged prior to his oral motion because the trial judge considered them discharged after they returned the verdict. (Resp. Brief p. 12). Although the trial judge indicated at the post-trial motions hearing that he considers the jury discharged when they return the verdict, he also admitted that he "keeps them":

> THE COURT: Well, a lot of judges, when the jurors return a verdict, they immediately discharge the jury, particularly in criminal cases. And I keep them and let them – because they are usually quite interested. They have invested all that time; they want to know what the sentence is. But they are discharged when

> they return their verdict and I usually invite them to stay. But I always say something to the effect of, Thank you very much."

(Motions Transcript p. 26, line 25- page 27, line 9). The trial transcript shows that, after the reading of the verdict, the trial judge asked the forelady if it was the verdict of the entire jury, to which the forelady responded affirmatively. (Trial Transcript p. 608, lines 2-6). The trial judge made no other statements to the jury before asking if counsel wanted to poll the jury. Counsel declined, although Respondent's counsel requested to view the verdict form. (Trial Transcript p. 608, lines 7-15). There was no thanking of the jury by the trial judge or any invitation to stay. The trial judge then asked counsel if there were any post-trial motions. (Trial Transcript p. 608, line 16). Respondent's counsel answered, stating "Yes, Your Honor. At this time, we would move ..." and argued his motions for a judgment not withstanding the verdict and for a new trial. (Trial Transcript p. 608, line 17 – p. 610, line 25). After Respondent's motions the trial judge addressed the jury, thanking them for their service and ultimately stating "You are done with jury duty" and "Y'all are good to go". (Trial Transcript p. 611-612).

The Order admits that the motion was "promptly made after the jury returned its verdict". (Order, p. 5). Although the trial judge may equate returning a verdict with discharge, these are clearly two separate events and Rule 59(b) makes no reference to the return of the verdict in relation to the timeliness of a motion for a new trial. *See* Rule 59(b), SCRCP. *See also* Green By & Through Green v. Lewis Truck Lines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (holding that a court applying the SCRCP must give the words "their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule") and State v. Dawkins, 32 S.C. 17, 10 S.E. 772 (1890) (recognizing the return of a verdict and discharge as independent events, stating "[a]fter a jury have rendered their verdict, and have been discharged, we know of no authority by which they can be reimpaneled) (distinguished on other grounds by

State v. Myers, 318 S.C. 549, 459 S.E.2d 304 (1995)). Black's Law Dictionary defines "discharge" as "[t]he relieving of a witness, juror, or jury from further responsibilities in a case." Black's Law Dictionary (10th ed. 2004). The trial transcript clearly shows that the jury was not relieved of further responsibilities in this case until **after** the Respondent's untimely motion for a new trial when the trial judge said "You are done with jury duty" and dismissed them. Several cases suggest that a jury is discharged when it is dismissed. *See* State v. Myers, 318 S.C. 549, 459 S.E.2d 304 (1995) (finding jury formally discharged when dismissed to custody of clerk) and Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 274, 670 S.E.2d 1, 5 (Ct. App. 2008) (noting post-trial motions were made "[f]ollowing the dismissal of the jury"). The record is clear that the jury in the instant matter was not dismissed until after Respondent's motion.

Respondent cites State v. Myers, 318 S.C. 549, 459 S.E.2d 304 (1995) in support of his argument that whether a jury is discharged is a factual issue and that the jury in the instant case was "tacitly" discharged when he made his motion. However, Myers actually supports Appellant's position that the jury was not discharged at the time of Respondent's motion. The issue on appeal in Myers was whether a jury could be reassembled after being formally discharged. The Supreme Court of South Carolina held that despite the fact that the judge had "dismissed the jury to the custody of the clerk", formally discharging them, the jury could be recalled and reassembled because the jury had "remained an essentially undispersed unit, and was subjected to no outside influence during the two minute interval between discharge and reassembly." Myers, 318 S.C. at 552, 459 S.E.2d at 305. In the instant matter, there was no formal discharge by the judge, there was no dispersing of the jury, and there was no "outside influence" as the jury was still sitting in the jury box.

In its opinion, the Myers court quoted the Summers v. United States, 11 F.2d 583 (4th Cir. 1926) decision. The Summers case also involved a formal discharge of a jury by the judge, who explicitly stated "You are now discharged." Summers, 11 F.2d at 585. The Summers court recognized that a jury is usually discharged by an announcement by the court to the effect that the jury is "discharged" but noted that without an announcement a jury could be "tacitly" discharged if they were allowed to mingle with bystanders after rendering their verdict. However, the court noted,

> [o]n the other hand, it may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any other business.

Summers v. United States, 11 F.2d 583 at 586 (4th Cir. 1926).

Prior to Respondent's motion in the instant matter no words of discharge to the jury were spoken by the court, the jury remained in the jury box as an "undispersed unit" within the court's control, the jury had no chance to mingle or talk about the case with other people, and the very case the jury was impaneled on was being discussed by the court and counsel. Even had the trial judge formally discharged the jury in the instant matter, which the transcript clearly indicates he did not, Summers and Myers dictate that the jury would still have been undischarged at the time of Respondent's motion. Respondent also suggests that his motion was timely because, by arguing the untimely post-trial motion in front of the jury, the jury could no longer be reconvened and was therefore discharged. (Resp. Brief pp. 12-13). This argument's circular reasoning is unpersuasive and admits that, at the time the motion was made, the jury was not discharged.

B. Respondent failed to request ten days within which to file post-trial motions.

Although the trial court's order indicates that the judge "granted counsel's request for leave to file formal motions and briefs within ten (10) days" (Order p. 4) and that "Plaintiff's counsel requested ten (10) days leave to file formal motions and briefs" (Order p. 5), a review of the trial transcript clearly shows that no such request was ever made. After the verdict was published but before the jury was discharged the court engaged in the following colloquy with counsel:

> 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.

(Trial Transcript p. 610, lines 6-25). There is absolutely no request by Respondent's counsel seeking additional time to file formal motions. The judge indicated that he was taking the motions under advisement and the ten day time frame is referenced solely in relation to the judge's inquiry regarding how much time the parties would need to comply with his request that they submit written briefs on the motions that were made. Furthermore, the request for ten days to submit briefs was actually made by counsel for Appellant. Respondent's counsel made no

requests to the court. Respondent's Motion[1] For Judgment Notwithstanding The Verdict Or In The Alternative For A New Trial 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." (Motion[1] For Judgement Notwithstanding The Verdict or in the Alternative for a New Trial p. 1 fn. 1).

The South Carolina Supreme Court held in Boone v. Goodwin, 314 S.C. 374, 444 S.E.2d 524 (1994) that in order to comply with Rule 59(b), SCRCP "[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." The record in the instant matter is clear that Respondent's motion was made prior to the discharge of the jury and Respondent's counsel did not make a request seeking ten days within which to make motions. Respondent's brief does not address Boone, in which the Court reversed a trial court's order granting a new trial on the grounds that the plaintiff failed to move for a new trial until two days after the jury verdict despite the fact that the trial judge entertained and granted the untimely motion. The Court held that the motion did not comply with Rule 59(b) and the order granting a new trial was reversed. The Boone decision makes it clear that the trial judge's acceptance of an untimely motion is irrelevant to the determination of its timeliness. Furthermore, Rule 6(b), SCRCP explicitly prohibits the court from adjusting the time period provided in Rule 59.

In the instant matter, Respondent made a motion for a new trial before the jury was discharged and did not request ten days within which to make post-trial motions. As the record clearly indicates, the parties were given ten days to brief the motion that was improperly made. Rule 59(b) strictly limits the time frame for motions for a new trial. Respondent's motion was untimely under the plain language of the rule and the order granting it should be reversed.

II. THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL IS WHOLLY UNSUPPORTED BY THE EVIDENCE AND CONTROLLED BY ERRORS OF LAW.

In the event that Respondent's motion is found to comply with Rule 59(b), SCRCP, which Appellant disputes, the trial court's order granting a new trial based on the thirteenth juror doctrine should be reversed. As fully set forth in Appellant's brief, the trial court's order is unsupported by the evidence and controlled by errors of law. *See* App. Brief pp. 11-24. The trial court found 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." (Order p. 6). At the hearing, the trial judge stated that "no reasonable jury could reach that decision deciding that the passenger was more at fault than the driver. And no evidence was presented that would give the jury a basis to make that decision." (Motions Transcript p. 35). However, evidence and law giving the jury a reasonable basis to make their decision was presented.

The statement of facts in the trial court's order and Respondent's brief, both prepared by counsel for Respondent, contain several factual assertions that are not supported by the record. The Order states that "[t]he evidence was undisputed that the Decedent was not present when Defendant and Thompson consumed alcohol both at the Stringfellow residence and while attending a local movie." (Order p. 3). Respondent's brief states that "[t]he evidence was undisputed that Corey did not have any knowledge of how much alcohol Defendant consumed the night of the accident" and that there was "no evidence that Corey knew that Defendant had consumed any marijuana." (Resp. Brief p. 4). These statements ignore the testimony that Decedent was hanging out with Defendant and Thompson at the Stringfellow residence after

they returned from the movie while they were drinking alcohol and, Defendant assumes, smoking marijuana. (Trial Transcript p. 212, line 20 - p. 213, line 3; p. 259, lines 5-17). Defendant also testified it was possible he smoked pot with both Decedent and Thompson that night. (Trial Transcript, p. 210, lines 8-18).

Respondent's brief also mischaracterizes the testimony regarding the search for a source for marijuana, stating that Thompson arranged it and Decedent was not part of the plan, completely overlooking all the testimony regarding Decedent's active role in this process. (Resp. Brief p. 3 and p. 9). Defendant testified that Decedent made the phone calls and arranged the deal to buy more marijuana. (Trial Transcript p. 220, lines 10-20; p. 235, line 7 - p. 236, line 3). Thompson also ultimately admitted on cross-examination that Decedent made the calls to locate the marijuana and the address for where the marijuana was located was texted to Decedent's phone. (Trial Transcript p. 273, lines 2-12; p. 271, lines 16-19; p. 273, lines 2-12). The evidence regarding Defendant's and Decedent's THC levels was introduced without any objection by Respondent's counsel. (Trial Transcript p. 456, lines 7-14 and Defendant's Ex. 104).

Respondent claims that Defendant and Thompson made Decedent ride with them when Defendant's testimony was clear that Decedent was not forced but willingly entered the vehicle driven by Defendant. (Trial Transcript p. 235, lines 7-11). Thompson also testified that they "were all hanging out together" and "we were all going, and then [Decedent] just got in the car with us." (Trial Transcript p.261, lines 17-18; p. 278, lines 11-13). Respondent also asserts that Defendant did not announce his intentions to drive fast to anyone in the vehicle, which he did testify to on direct examination, but Respondent fails to mention that Defendant was impeached on cross-examination by his prior deposition testimony in which he stated that he thought he had told the occupants of his intention to drive fast but was not sure. (Trial Transcript p. 180, lines

14-20; p. 201, lines 4-9; p. 237, line 10 - p. 238, line 8). Respondent also fails to recognize that opening and closing arguments are not considered evidence and the record clearly shows that the jury was specifically instructed on this issue. (Trial Transcript p. 88, lines 19-22; p. 569, lines 15-19; p. 570, line 18 – p. 571, line 2). Furthermore, there was no objection by Respondent's counsel to Appellant's opening argument. (Trial Transcript pp. 102-111).

The trial court ruled that "[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 a [sic] riding as a passenger in the vehicle is clearly against the fair preponderance of the evidence". (Order p.6). This holding completely ignores the evidence presented to the jury regarding Decedent's independent acts of negligence in assuming the risk and the evidence supporting imputing the Defendant's admitted recklessness to the Decedent under the joint enterprise doctrine. As discussed more fully in Appellant's brief, the evidence supporting the joint enterprise doctrine and assumption of the risk defenses, in addition to the judge's charges on these issues, provided the jury with the basis to make this allocation and to reasonably determine that Decedent's overall negligence slightly exceeded Defendant's. *See* App. Brief pp. 13-19.

Respondent's brief does not address nor dispute the affirmative defenses presented to the jury other than to suggest that it is not proper to identify the "logical rationale" for the jury's verdict that the trial judge failed to acknowledge because that is not the standard of review. (Resp. Brief p. 10). The trial judge stated in open court that "no reasonable jury could reach that decision deciding that the passenger was more at fault than the driver. And no evidence was presented that would give the jury a basis to make that decision." (Motions Transcript p. 35). The trial judge then held:

> 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 ....

(Motions Transcript p. 36). Pointing out that evidence and law were in fact presented to the jury that provides a reasonable basis for their verdict clearly falls within the standard of review and reveals that his decision was wholly unsupported by the evidence and/or controlled by errors of law. Despite the trial judge's speculation to the contrary, the jury was provided with evidence and instructed on law that fully supports their unanimous verdict and it should be reinstated.

The trial judge's decision to grant a new trial was also based on an incorrect conclusion of law that a passenger's negligence can never exceed the negligence of a driver. The trial judge stated at the motions hearing that he knew that a passenger could be fifty percent comparatively negligent, but the question was whether a passenger could be fifty-one percent comparatively negligent. (Motions Transcript p. 28, lines 22-23). He found that a passenger could not be more negligent than a driver. Despite Respondent's attempts to limit this statement to the facts of this particular case, the trial judge did not make any qualifications and stated it as general proposition of law. There is no law in South Carolina that that a passenger's negligence cannot exceed a driver's. *See* App. Brief pp. 22-23. Furthermore, the trial judge also appeared to be under the impression that, as a matter of law, the Defendant's admitted recklessness outweighed any negligence of Decedent. South Carolina's comparative negligence system allows for the comparison of all forms and degrees of negligence and, therefore, Defendant's admission of recklessness does not prevent a jury from finding the Decedent's negligence exceeded the Defendant's. *See* App. Brief pp. 19-22.

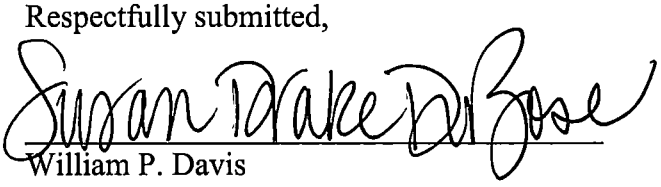
Respondent's brief cites a line of cases holding that a written order controls to the extent that there is an inconsistent prior oral ruling to imply that it is not proper to examine the motions

hearing transcript in the instant matter. (Resp. Brief p. 11) However, there is no inconsistent prior oral ruling in this case. The trial judge ruled at the post-trial motions hearing to grant a new trial based on the thirteenth juror doctrine and provided his reasons for doing so at the hearing. He then requested that Respondent's counsel prepare an extensive written order with the reasons he had stated. (Motions Transcript p. 37). The transcript of the motions hearing details the basis for the trial judge's ruling and is not inconsistent with the written order. *See* Badeaux v. Davis, 337 S.C. 195, 522 S.E.2d 835 (1999) (finding no inconsistency in judge's comments from bench and written order). *See also* Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008) (reviewing hearing transcript in detail when reviewing circuit judge's grant of new trial under thirteenth juror doctrine). Although the trial judge was not required to provide the reasons for his ruling, he did so, and they reveal that his ruling is wholly unsupported by the evidence and controlled by errors of law.

CONCLUSION

Based on the arguments and authorities set forth above and in Appellant's Brief, the order of the court below should be reversed and the jury's verdict reinstated.

Respectfully submitted,



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January 29, 2018

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PROOF OF SERVICE

I, Susan Drake DuBose, Attorneys for Appellant, hereby certify that, on this 29th day of January 2018, I have served the following with the foregoing Initial Reply Brief of Appellant by mailing copies of same by United States Mail, postage prepaid, to counsel of record at the addresses shown below:

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