

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.: 2017-001803
Case No. 2015-CP-40-07181

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MAR 20 2018

SC Court of Appeals

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

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

v.

Cameron Thomas Stringfellow, Defendant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE TRIAL JUDGE PROPERLY EXERCISE HIS DISCRETION AS THE THIRTEENTH JUROR BY GRANTING A NEW TRIAL AFTER THE JURY FOUND THE DECEASED PASSENGER WAS MORE AT FAULT THAN THE DEFENDANT DRIVER WHO PLED GUILTY TO INVOLUNTARY MANSLAUGHTER AND DUI, WHEN THE UNDISPUTED EVIDENCE ESTABLISHED THAT THE DRIVER, ACTING ON AN URGE, SUDDENLY ACCELERATED TO MORE THAN 90 MPH IN A RESIDENTIAL NEIGHBORHOOD AND STRUCK A PARKED CAR, AFTER BEING WARNED BY THE DECEASED PASSENGER, RESULTING IN THE DEADLY CRASH?**

- II. **WAS RESPONDENT'S RULE 59 MOTION FOR NEW TRIAL TIMELY WHEN THE MOTION WAS FIRST MADE IN OPEN COURT FOLLOWING THE RETURN OF THE JURY'S VERDICT AND SUBSEQUENTLY FILED WITHIN TEN (10) DAYS THEREAFTER AS PERMITTED BY THE TRIAL JUDGE?**

STATEMENT OF THE CASE

Respondent, William Gresham, as Personal Representative of the Estate of Corey Stringfellow ("Corey") commenced an action alleging wrongful death against Defendant Cameron Stringfellow ("Cameron") on December 1, 2015. Appellant The Travelers Home and Marine Insurance Company ("Travelers") as the Underinsured Motorist Carrier defended the action on behalf of Defendant Cameron. A jury trial was held before the Honorable Clifton B. Newman in the Richland County Court of Common Pleas from January 9, 2017 until January 12, 2017. At the conclusion of trial, the jury returned a verdict for Defendant Cameron, finding that Corey was 51% at fault. Respondent made an oral motion for a new trial after the jury returned its verdict and with the Trial Court's permission filed a written motion for new trial eight (8) days later on January 20, 2017. On March 23, 2017, the Trial Court held a hearing on the motion and issued a formal Order

granting the motion for new trial under the thirteenth juror doctrine on April 20, 2017. Appellant Travelers filed a notice of appeal from this Order on May 2, 2017.

FACTS

Corey Stringfellow died at the age of sixteen (16) from injuries suffered in an automobile accident that occurred at approximately 2 a.m. on May 24, 2013. Corey was riding as a passenger in the driver's side back seat of the automobile driven by his older brother, Cameron Stringfellow.

Defendant Cameron, who was eighteen (18), had recently finished his last high school class and was scheduled to graduate from Spring Valley High School the following week. Defendant Cameron and his friend Wesley Thompson, who had also finished his last class and was scheduled to graduate with Cameron, had been celebrating at the Stringfellow's family residence earlier in the evening. Defendant Cameron and Corey's parents, as well as their younger sister, had just departed for the beach for the Memorial Day weekend, leaving them home alone. Cameron and Corey were scheduled to meet their family the next day, after Corey finished classes. (R. 136:1-25; 137:1-19).

Defendant Cameron and Thompson drank wine they found in a box in the garage and then went to a movie. They took a flask of bourbon with them and presumably drank it. After the movie, they went back to Stringfellow residence. Up until this point in the evening, Corey had not been with Defendant and Thompson. (Id. at R. 139:8-140:5; 143:6-22).

Corey had soccer practice earlier in the evening that ended at 8:30 pm. Corey then stopped to get some fast food with two of his friends and went back to his house to play video games with them. Corey and his two friends also smoked an unknown quantity of marijuana after arriving at his home. Both friends described the amount as "not much" and "not a lot" because they had classes the next day. (Id. at R. 102:1-6; 110:24-25; 111:1-10). About thirty (30) to forty (40)

minutes after smoking, Corey drove one friend home and the other friend drove himself home. (R. 105:17-25; 111:7-10).

Upon arriving back at the Stringfellow residence after the movie, Defendant Cameron and Thompson continued drinking. Corey was not drinking with them. Defendant Cameron then decided that he wanted to smoke marijuana, but neither he nor Thompson had any. (Id. at R. 157:8-11; 163:19-22; 164:3-7; 204:14-23). Thompson contacted a friend of his who knew someone selling marijuana, and they arranged to meet at Thompson's friend's residence. (Id. at R. 204:24-25; 205:1-11). Defendant Cameron testified that only he and Wesley planned to buy marijuana, and they simply "made" Corey ride with them. (Id. at R. 164:10-18; 166:6-10).

Defendant Cameron drove to Thompson's friend's residence, with Thompson and Corey. Thompson testified that Defendant Cameron's driving seemed fine on the way to the friend's house and on the return drive back to the Stringfellow's residence. (Id. at R. 206:19-25; 207:1-11). However, upon arriving back at the Stringfellow residence, Defendant Cameron drove past his residence rather than parking in the driveway. (Id. at R. 207:12-13).

Defendant Cameron, who was driving his mother's new BMW 7 series luxury sports car without permission, "suddenly got this urge to go fast." (R. 145:17). He testified that "I knew there was a straight-away [*sic*] in the back of our neighborhood, so I just kept going through and went back there and just gunned it." (Id. at R. 145:14-21; 146:10-12). Defendant Cameron made this decision alone, without prompting from either Thompson or Corey and did not inform either Thompson or Corey of his plan. (Id. at R. 146:7-9; 208:8-11).

Defendant Cameron suddenly accelerated up to 94 mph on this back straightaway and struck a parked car, lost control of the vehicle, went up an embankment that launched the vehicle

into the air, struck two trees, and crashed to the ground. (R. 91:12-15; 121:23-25; 122-127; 132:9-25; 133:8-25; 134:1-2).

Corey, who was seated in the back seat, warned Defendant Cameron about the parked car, but Defendant struck it nevertheless. (Id. at R. 146:21-23; 208:15-19). Those were the last words Corey ever spoke. He died from injuries that he suffered in the accident.

After the accident, Defendant was arrested and his blood was tested. The toxicology report for Defendant reflected he had a BAC of .186 and a THC level of 4. Corey did not have any alcohol in his blood and had a THC level of 6.5. There was no expert testimony presented as to what THC levels of 4.0 and 6.5 mean. Defendant testified that he did not recall smoking marijuana any time prior to the accident. Corey smoked “not much” marijuana around 9 p.m. on May 23, 2013, about five (5) hours before the accident. (R. 598-604).

The evidence was undisputed that Corey did not have any knowledge of how much alcohol Defendant consumed the night of the accident. Corey was not present when Defendant and Thompson drank alcohol at the Stringfellow residence prior to attending the movie nor was Corey present at the movie when Defendant and Thompson presumably drank bourbon. There is no evidence that Corey knew that Defendant had consumed any marijuana.

Furthermore, despite the promise made by Traveler’s counsel in its opening statement to the jury that the defense would present testimony that Defendant was obviously drunk, and stumbling at Thompson’s friend’s residence, and that people warned Corey that Defendant should not drive, Travelers did not offer any such evidence at trial. (R. 77:5-25). Rather, there was absolutely no evidence presented of Defendant’s behavior and whether he appeared as intoxicated

as his blood level might suggest. In fact, the defense did not offer any evidence from a toxicologist as to the effects of a BAC of .186 or the effects of a THC of 4.0.¹

At trial, Defendant admitted to all of the material allegations in the Complaint. (R. 121:23-124:1). Defendant also admitted that he is liable to the Estate of Corey Stringfellow for actual and punitive damages. (Id. at R. 124:2-14). Furthermore, Defendant testified that Corey could not have known that Defendant was going to “floor it.” (Id. at R. 126:7-11). Defendant denied taking any directions from Corey as to the manner in which he was driving, and he denied that Corey had an equal right to control and manage the vehicle. (Id. at R. 126:20-25).

After the accident, Defendant pled guilty to involuntary manslaughter and DUI. As a result of the plea and Defendant’s testimony at trial, the Trial Court granted a directed verdict on Plaintiff’s claim that Defendant was reckless and that this recklessness proximately caused the death of Corey. Travelers’ counsel likewise conceded that Plaintiff was entitled to a directed verdict on recklessness.

As a result of the directed verdict ruling, the factual issues presented to the jury were limited to whether Corey was negligent, and if so, whether such negligence proximately caused his death. The jury was asked to apportion fault if they found that Corey was negligent and his negligence proximately caused his death. If Corey’s portion of fault was 50% or less, then the jury was instructed to award compensable damages and that it may also award punitive damages. (Id. at R. 472:14-474:9); see also (R. 12-13).

After a few hours of deliberation, the jury sent a note asking if the jury could award zero damages or must the jury award compensatory damages. (R. 606). The Trial Court instructed the

¹ In fact, defense counsel’s toxicology expert testified in his deposition that the THC threshold for impaired driving in states that have legalized marijuana is 5.0. (R. 26).

jury that, depending on their answers to the questions presented on the verdict form, they could not award zero damages and must award compensatory damages. (R. 492:3-493:24). Then, after a few more hours, the jury returned a verdict finding that Corey was 51% at fault and Defendant was 49% at fault. (R. 12-13).

After the verdict was published, the Trial Judge asked whether the parties wished to poll the jury. Neither party requested polling. Immediately thereafter, the Trial Judge asked if there were any post-trial motions. In response, counsel for Respondent moved for judgment notwithstanding the verdict and for a new trial, under the thirteenth juror doctrine. (R. 498:7-24; 500:6-11). After counsel argued post-trial motions, the Trial Court stated:

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.

(Id. at R. 500:12-16).

The Trial Judge asked how much time was needed to submit written briefs and both counsel requested ten (10) days. The Trial Judge then granted the parties ten (10) days to brief the post-trial issues. (Id. at R. 500:18-25). Eight (8) days later, Respondent filed and served a written Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial in both the wrongful death and survival actions. (R. 23-32).

At the post-trial motions hearing, the Trial Judge addressed Travelers' claim that the post-trial motions were "premature," because the jury had not been "discharged." The Trial Judge explained that the jury was discharged when it rendered a final verdict. Judge Newman stated:

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—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 the verdict...

(R. 530:25-531:7).

Judge Newman further explained,

I will include in my ruling that [the post-trial motion] was clearly timely based on the Court---the motions being made at the conclusion of the case. Upon return of the verdict he made a motion, then requested additional time, and the Court granted that request....I was actually shocked to see a motion claiming that it was not timely.

(R. 542:8-16).

Appellant asserted that the motion was premature, rather than untimely. To this argument, Judge Newman responded:

Oh premature. Well, if you all want to spend some time with the Supreme Court figuring out when is a verdict a verdict, you know, when is the jury discharged, because the jury is sitting here that means they were still serving on the jury. Good luck getting involved with something like that. That sounds like a waste of time to me.

(Id. at R. 542:19-25).

The Trial Court subsequently issued a written order granting Respondent's motion for a new trial on the wrongful death action and denying the motion as to the survival action. (R. 4).²

The Trial Court's Order also addresses the timeliness of the post-trial motion:

The Plaintiff's post-trial motions were promptly made after the jury returned its verdict, their service had been concluded, and upon direction by the Court. Furthermore, the Court requested additional briefing and Plaintiff's counsel requested ten (10) days leave to file formal motions and briefs, which the Court granted.

(Id. at R. 8).

² Judge Newman concluded that the verdict on the survival action was supported by the lack of evidence of conscious pain and suffering. Id.

ARGUMENT

I. THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION AS THE THIRTEENTH JUROR BY GRANTING A NEW TRIAL AFTER THE JURY FOUND THE DECEASED PASSENGER WAS MORE AT FAULT THAN THE DEFENDANT DRIVER WHO PLED GUILTY TO INVOLUNTARY MANSLAUGHTER AND DUI.

South Carolina's "thirteenth juror" doctrine is well established as the standard for granting a new trial in state-law actions. *Norton v. Norfolk S. Ry. Co.*, 567 S.E.2d 851, 854 (S.C. 2002); *Folkens v. Hunt*, 387 S.E.2d 265, 267 (S.C. 1990); *Sorin Equip. Co. v. The Firm, Inc.*, 474 S.E.2d 819, 822 (S.C. Ct. App. 1996). "South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton*, 567 S.E.2d at 854 (quoting *Folkens*, 387 S.E.2d at 267). In ruling on a new trial motion as the thirteenth juror, the trial judge may weigh the evidence and rely on his or her view of the circumstances. *Sorin Equip. Co.*, 474 S.E.2d at 822. As the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Norton*, 567 S.E.2d at 854.

The Supreme Court explained in *Folkens*,

The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

387 S.E.2d at 267 (citing *S.C. State Highway Dep't v. Townsend*, 217 S.E.2d 778, 781 (S.C. 1975)).

Where the verdict is contrary to the fair preponderance of the evidence, the trial judge not only has the discretion but also has the duty to grant a new trial. *Jessup v. Hansen*, 344 S.E.2d 618, 620 (S.C. Ct. App. 1986). A trial judge's order granting or denying a new trial upon the facts is reviewed for an abuse of discretion and will not be disturbed unless the decision is wholly

unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Folkens*, 387 S.E.2d at 267. This Court's review is limited to the consideration of whether evidence exists to support the trial court's decision to grant a new trial. *Id.*

Judge Newman's decision to exercise his discretion as the thirteenth juror and grant a new trial is not "wholly unsupported by the evidence" or controlled by an error of law. The evidence was undisputed that Defendant was reckless and that his reckless conduct caused Corey's death. On this point, the defense conceded. The only questions presented to the jury were the amount of comparative fault, if any, and damages. (R. 458:23-475:16).

Judge Newman ruled the evidence did not support the jury's finding that Corey was more at fault than Defendant Cameron. (R. 9). This ruling is clearly supported by the factual record and was not an abuse of discretion.

Defendant admitted that he was liable to the Estate of Corey Stringfellow for actual and punitive damages. (R. 124:2-14). Defendant testified that he acted on an urge to go fast; he did not announce his intentions to anyone in the vehicle; and the decision to drive recklessly was his alone. (*Id.* at R. 145:17; 146:8-9; 208:8-11). Defendant Cameron and Thompson both testified that up until Defendant got the urge to gun it, Defendant had not been driving recklessly. (*Id.* at R. 142:8-9; 145:22-146:3; 206:19-25; 207:7-11). Defendant further testified that from his perspective Corey could not have known that he was about to floor the BMW sports car through the quiet Wildwood neighborhood. (*Id.* at R. 126:7-11).

Defendant and Thompson also testified that it was their plan to go buy marijuana and Corey was not part of this plan. (*Id.* at R. 164:10-18; 167:6-10). Rather, Defendant "made" Corey ride along and because Corey was the little brother he did what Defendant asked. (*Id.* at R. 164:16-

18). Defendant also testified that Corey did not have an equal right to control the operation of the BMW and did not in fact attempt to control the vehicle. (R. 126:20-25).

Judge Newman's decision to grant a new trial was based solely upon the lack of evidence supporting the jury's verdict. The Order explicitly states "the 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 is clearly against the fair preponderance of the evidence." (R. 9). Judge Newman not only had the discretion to grant a new trial under the thirteenth juror doctrine, but an obligation to do so based upon this record. *Jessup*, 344 S.E.2d at 620.

Travelers attempts to establish a logical rationale for the jury's verdict by arguing that the jury could have imputed Cameron's recklessness to Corey and then added Corey's negligence to arrive at 51%. App. Int. Br. at 16-19. The standard of review is not whether this Court can engage in the type of construct suggested by Travelers to support the jury's finding. Rather, the standard of review is whether the Trial Judge's decision to exercise discretion to grant a new trial as the thirteenth juror is wholly unsupported by the evidence. *Folkens*, 387 S.E.2d at 267. Here, the evidence overwhelmingly supports Judge Newman's decision.

Appellant Travelers also argues that the lower court's decision to grant a new trial was controlled by errors of law. First, Travelers argues that Judge Newman somehow misapplied the law of comparative negligence, which allows jurors to compare all forms of negligence. App. Int. Br. 19-22. Judge Newman clearly recognized that the jury had the right to allocate fault, as this is exactly what the Trial Court instructed the jury. (R. 462:11-465:2). Judge Newman, however, correctly concluded that the evidence presented at trial does not support the jury's finding that Corey's negligence or recklessness exceeded Defendant's reckless conduct. (R. 9).

Travelers also argues that Judge Newman ruled as a matter of law that the negligence of a passenger can never exceed the negligence of an at fault driver. App. Int. Br. at 22- 23. Travelers misconstrues Judge Newman's ruling. The Trial Court's ruling was based solely upon the evidence presented to the jury at this trial and is not the result of the application of a legal principle that a passenger could never be more at fault than a driver.

Lastly, Travelers argues that comments made by Judge Newman at oral argument indicated that the Trial Court granted a new trial based upon speculation as to what the jury was thinking. Id. at 23-24. The Trial Court's written Order contains no such speculation and clearly awards a new trial based upon the evidence presented, nothing more and nothing less. Additionally, the Trial Court's written Order, not its oral statements made during argument, is the final order. *First Union Nat'l Bank of S.C. v. Hitman, Inc.*, 411 S.E.2d 681, 682 (S.C. Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) ("No order is final until it is written and entered."); *Ford v. State Ethics Comm'n*, 545 S.E.2d 821, 823 (S.C. 2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."); *Badeaux v. Davis*, 522 S.E.2d 835, 839 (S.C. Ct. App. 1999) ("A judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling."); *Parag v. Baby Boy Lovin*, 508 S.E.2d 590, 592 (S.C. Ct. App. 1998) ("To the extent the written order may conflict with the prior oral ruling, the written order controls.").

II. RESPONDENT'S RULE 59 MOTION FOR NEW TRIAL FIRST MADE IN OPEN COURT FOLLOWING THE RETURN OF THE JURY'S VERDICT AND SUBSEQUENTLY FILED WITHIN TEN (10) DAYS THEREAFTER AS REQUESTED BY THE TRIAL JUDGE WAS TIMELY.

Despite the lower court's admonition that challenging the timeliness of the post-trial motion on appeal is a "waste of time," Travelers nevertheless argues that the post-trial motion was both premature and late. App. Int. Br. at 8-10. As to being premature, Travelers contends that

Respondent made the motion prior to the jury being discharged. As to being late, Travelers contends that Respondent's filed motion made within ten (10) days of the jury being discharged was late because the Trial Court did not grant permission for the Respondent to file the motion within ten (10) days.

Respondent's 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. Judge Newman explained that in his view the jury was discharged once the jury returned a final verdict and that his practice is to keep the jurors in the courtroom to view the post-trial proceedings because they are interested and invested in the process. (R. 530:25-531:7).

The issue of whether a jury is discharged is a factual question. The South Carolina Supreme Court in *State v. Myers*, 459 S.E.2d 304, 305 (S.C. 1995) explained, "[i]t is not so much what is said in passing as what is actually done and acted upon that determines the question of discharge." *Id.* The issue in *Myers* was whether a jury that had received "formal discharge" instructions could reassemble to continue deliberating after questions were raised about its verdict during post-trial motions. The Supreme Court recognized that a jury may be tacitly discharged without receiving formal instructions and would not be permitted to continue deliberating because of outside interference. *Id.* The Court also concluded that a jury could continue deliberating even after being "formally discharged" if, after such announcement, the jury remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others. *Id.*

Here, after the jury verdict was published and the parties given an opportunity to poll the jurors, the Trial Court asked whether Respondent wished to make any post-trial motions. The jury was still sitting in the jury box, but as Judge Newman explained, they had been tacitly discharged. Once the jury was exposed to Respondent's post-trial motions argument, the jury could not have

reconvened for further deliberations. Their work was completed. The Trial Judge further explained in his Order that Respondent was granted ten (10) days in which to file any written motions and briefs. (R. 7-8). Respondent thereafter filed a written motion within ten (10) days from the jury's discharge with the Trial Court's permission. (R. 23-32).

The Trial Court correctly ruled that Respondent's post-trial motion was timely made and correctly observed that pursuing this issue on appeal is a waste of time.

CONCLUSION

Judge Newman properly exercised his discretion as the thirteenth juror by granting Respondent's timely motion for a new trial. Respondent therefore requests that this Court affirm the Trial Court's Order and remand this case for a new trial.

Respectfully submitted,



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March 20, 2018

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.: 2017-001803
Case No. 2015-CP-40-07181

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

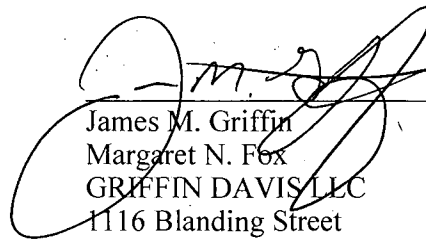
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR and with the August 13, 2007 Order of the South Carolina Supreme Court.



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