THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-CP-40-00910

Darris Hassell, ... Respondent,

v.

City of Columbia ..... Appellant.

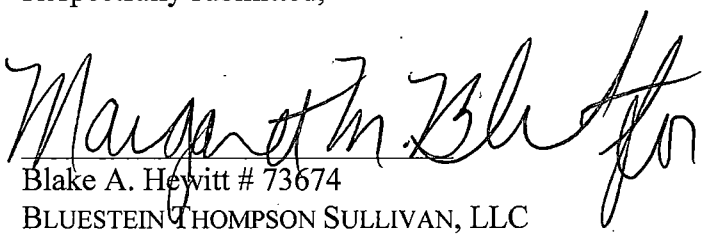
SECOND AMENDED NOTICE OF APPEAL

City of Columbia previously noticed its appeal from the verdict of May 19, 2017, from the order denying Defendant's motion for new trial dated June 16, 2017 and filed June 27, 2017, and from the order of July 27, 2018 denying a motion for new trial based upon alleged juror misconduct.

The circuit court recently amended its order of July 27, 2018 to correct the omission of a page from that order. The amended order was entered August 22, 2018 and is attached. The City of Columbia appeals this order in addition to the orders previously identified.

/Signature page attached

Respectfully submitted,



August 24, 2018

Blake A. Hewitt # 73674
BLUESTEIN THOMPSON SULLIVAN, LLC
Post Office Box 7965
Columbia, South Carolina 29202
blake@bluesteinattorneys.com
(803) 779-7599

Attorney for Appellant

Other Counsel of Record:

Paul L. Reeves, Esquire
Reeves and Lyle, LLC
PO Box 11126
Columbia, SC 29211
paul@reevesandlyle.com
(803) 929-0001

Attorney for Respondent

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Darris Hassell, Plaintiff, vs. City of Columbia, Defendant.	)	C/A NO.: 2016-CP-40-0910 ORDER TO CORRECT FILING

It appears that on July 27, 2018, the Order denying Defendant's Motion for a New Trial was filed. Subsequent to the filing of this Order, the parties alerted the Court that page nine (9) was erroneously omitted during the filing.

Pursuant to Rule 60(a), SCRCP, the Court files the attached amended Order correcting the omission of page nine (9).

AND IT IS SO ORDERED.

L. Casey Manning
Presiding Judge of the Fifth Judicial Circuit

Columbia, South Carolina
August 24, 2018

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	C/A NO.: 2016 -CP-40-0910
)	
Darriss Hassell,)	
)	
Plaintiff,)	
)	
vs.)	**ORDER**
)	
City of Columbia,)	
)	
Defendant.)	
)	

On June 30, 2017, the City of Columbia (hereinafter referred to as the City) motioned pursuant to S.C.R.Civ.P. 60(B)(2), for a new trial on the grounds of juror misconduct. A jury had rendered a verdict against the City on May 18, 2017. The City moved for a new trial based upon the City's allegation that it came upon "after discovered evidence" of juror misconduct that could not have been known at or near the time of the seating of the juror or during the trial.

PROCEDURAL HISTORY

On June 30, 2017 the defendant, the City of Columbia, motioned pursuant to S.C.R. Civ. P. 60(B)(2) for a new trial alleging that the City came upon "after-discovered evidence" of juror misconduct (hereinafter, this motion shall be referred to as the "60(B)" motion). The 60(B) motion is the third post-trial motion filed by the City. The City filed a Motion for New Trial within the time frame allowed by this Court after the verdict was rendered on May 18, 2017. The City then filed an Amended Motion for a New trial outside the applicable time frame. This Court heard the timely filed post-trial motion and denied the motion. The Court denied the Amended Motion for a New Trial because the Motion was not timely filed.

The court questioned the appearance of Mr. Hewitt as there was no order substituting trial counsel, Natalie Ham. Natalie Ham was the attorney of record at the trial. She filed the first two post-trial motions and argued those motions before this Court. She has not been relieved as counsel for the City.

After Ms. Ham's appearance at the post-trial motions, Dana Thye filed an appearance on behalf of the City of Columbia. Ms. Thye filed the 60(B) motion on June 30, 2017, approximately 44 days after the trial. The City did not seek an order substituting counsel regarding Ms. Thye. Subsequent to Ms. Thye's appearance on behalf of the City, a Notice of Appearance was filed on December 1, 2017 on behalf of Teresa A. Knox and W. Michael Hemlepp, Jr, both appearing for the City. Again, no order substituting counsel was provided to this Court. John Nichols filed a Notice of Intent to Appeal the verdict behalf of the City with the Clerk of Court for Richland County. Subsequent to Mr. Nichols' appearance, Mr. Hewitt filed a Notice of Appearance on behalf of the City. The City presented no order substituting trial counsel.

Present for the hearing was the plaintiff by and through his counsel of record, Paul L. Reeves and Todd Lyle. Mr. Hewitt appeared for the City. Ms, Hamm did not appear.

LEGAL ANALYSIS

It does not always follow, as a rule of law, that a new trial should be granted when after trial there is discovered the presence of a relative on the jury. There would be no room for the exercise of discretion if a new trial followed as a matter of law." *Smith v. Quattlebaum*, 76 S.E.2d 154, 157 (S.C. 1953). Generally, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion. *State v. Smith*, 316 S.C. 53, 55, 447 S.E.2d 175, 176 (1993). Where a new trial motion is based upon allegations that a juror gave misleading and incomplete

answers on *voir dire*, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion. *State v. Kelly*, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998). See also *Knowlton v. Greenwood Indep. Sch. Dist.*, 957 F.2d 1172, 1177 (5th Cir.1992) (A denial of a new trial based on alleged jury misconduct is reviewed for an abuse of discretion.) The granting or refusing of a motion for a mistrial lies within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. *State v. Harris*, 340 S.C. 59, 63, 530 S.E.2d 626, 627–28 (2000). The trial court is in the best position to determine the credibility of the jurors; therefore, the appellate Courts grant broad deference on this issue. *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co.*, Inc., 384 S.C. 441, 446, 682 S.E.2d 489, 492 (S.C. 2009).

It is the duty of the trial Judge to ascertain the qualifications of the jurors, and when the discharge of this responsibility is thwarted by mischance, or otherwise, it is within the Court's inherent power to remedy the situation, when brought to his attention, even after *sine die* adjournment of court, by the granting of a new trial, if, in its discretion, necessary. *Smith* (S.C. 1953). In this case the Court quoted the trial judge as he considered the motion for new trial:

> I am clearly of the opinion that the plaintiff, under the testimony and the law in this case, was entitled to the verdict which was rendered. The testimony fully supported the verdict as rendered by the jury.... It is my opinion that a just verdict was rendered in this case and that the ends of justice will be served by not disturbing the verdict rendered.
>
> *Id.* at 391, 157.

The *Smith* Court went on to state "[I]f respondent's right to a verdict was a close issue, or questionable, then undoubtedly Judge Pruitt would have ordered a new trial, even though he concluded the juror was impartial. . . ." *Id.* In a civil matter a defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct . . . does not *ipso*

facto justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors. *Vestry* at 447, 493. (S.C. 2009).

S.C. Code Ann. §14-7-1030 states that "objections to jurors called to try prosecutions, actions, issues, or questions arising out of actions or special proceedings in the various courts of this State, if not made before the juror is impaneled for or charged with the trial of the prosecution, action, issue, or question arising out of an action or special proceeding, is waived, and if made thereafter is of no effect. This section provides objections to jurors not made prior to impanelment are waived. If an objection is made after impanelment, the objecting party must demonstrate he could not have discovered the ground for the objection through due diligence. Southern Welding Works, Inc. v. K & S Constr. Co., 286 S.C. 158, 162, 332 S.E.2d 102, 105 (Ct.App.1985); see Thompson v. O'Rourke, 288 S.C. 13, 14, 339 S.E.2d 505, 506 (1986). Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286, 289 (S.C. App. 1993). See also the due diligence requirement of S.C.R.Civ.P. 60(B)(2).

A party seeking a new trial based upon the disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification before verdict. *Gray v. Bryant*, 379 S.E.2d 894, 896 (S.C. 1989). The burden is on the moving party. *Id.* During argument, the City relied upon *Long v. Norris and Associates* 342 S.C. 561, 536 S.E.2d 5 (Ct. App. 2000) as one of the controlling cases on the issue of juror misconduct. *Long*, a case from the Court of Appeals, affirmed the necessity of the moving party to prove the three elements set forth in *Gray*.

The analysis of the City's motion must begin with Rules 59 and 60(b) S.C.R.Civ.P. *Gray* at 286, 895. Both rules are relevant to the analysis of the timeliness of the City's position. *Id.* Rule 59, S.C.R. Civ.P., requires that a motion for a new trial be made no later than ten days after entry of judgment. Rule 59 does not provide any procedure by which a party can amend a motion for a new trial or add new grounds after the expiration of the ten-day period. *Id.* at 286, 895. *Gray* holds that Rules 59 and 60(b) must be read together, as Rule 60(b), S.C.R. Civ.P., reads in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... (2) newly discovered evidence which by ***due diligence*** could not have been discovered in time to move for a new trial under Rule 59(b);
>
> *Id.* at 286, 895. [Emphasis added]

DISCUSSION

1. John Doe was not disqualified from service as a juror simply because of his prior arrest.

The City presented insufficient information to allow this Court to find that the juror was unqualified. The mere fact that John Doe had been arrested by the City at some point prior to the juror selection for this trial would not have necessarily excluded him from jury service. Assuming the juror heard and understood the question and answered that he had been arrested for a traffic ticket from the City, this Court would have followed with questions to determine whether the juror could remain impartial and render a fair verdict for both parties. If the juror voiced impartiality and lack of prejudice, the juror would have remained in the pool of prospective jurors as evidenced by the following.

The trial record supports this circumstance. During juror *voire dire*, Juror 183 came forward in response to the Court's question, "[N]ow, have you or a close family member ever been arrested by a City of Columbia police officer?" (Trial Transcript p.20). Juror 183 indicated that a close family member had been "arrested by the County and the City." *Id.* The Court then inquired about whether Juror 183 would be able to be a fair juror in this case. Juror 183 affirmed his/her fairness and was placed in the pool for selection. The decision to disqualify a juror is within the sound discretion of the trial judge. *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d at 624 (there is no abuse of discretion for disqualifying jurors when the jurors have stated they are able to give the parties a fair trial).

John Doe was not disqualified by virtue of his prior history and affirmed under oath his duty to render a just verdict. *Wilson v. Childs* 315 S.C. 431, 434 S.E.2d 286 (S.C. App. 1993) ("Moreover, in response to a *voir dire* question, [the juror in question] stated he could give both parties an impartial trial.... *Wilson* at 436, 290). Here, the City has produced no evidence for this Court to find the juror disqualified. The City's trial counsel did not appear at the motions hearing. No information was produced regarding the circumstances surrounding why the juror did not respond and whether the juror heard and understood the question. There is no evidence presented by the City to show disqualification. The Court finds that the City has provided insufficient evidence to show this juror was or would have been disqualified.

2. **The grounds for the City's objection to the juror were known or could have been known to the City**

The first exhibit to the City's motion was a document which appears to be from the Alvin S. Glenn Detention Center showing information regarding the detention of juror John Doe. This

information appears to have been created at or near the time of the arrest of John Doe, on or about May 21, 2016. The information is presented as a screen shot from an internet source.

The City offered no evidence as to how this information was found, who found the information and when, during the exercise of due diligence the information could have been found. There are no affidavits or other evidence upon which the City relies to show that it could not have known of this juror's arrest and present such information to the Court's attention prior to the verdict or within the time frame for post-trial motions.

The Court has considered the two exhibits attached to the City's motion. The first exhibit is from the Alvin S. Glenn Detention Center. Unfortunately, the Court is left with no information regarding the facts surrounding the City's ability to know of this document in a timely manner, the difficulty in knowing of the document and what, if any, due diligence did the City exercise regarding the knowing of this document and the information contained therein.

The Court notes that the document shows information that could have led a reasonable attorney to determine that the juror and the arrestee could be one and the same, had the City exercised reasonable diligence in reviewing the jury prior to the verdict. It is logical to determine that if the City found this document to support its motion, it follows that the City could have known of this document in time to file an objection, as it appears to have been available for almost one year prior to jury selection. *Bryant* holds that the moving party could not have known about the grounds for the alleged misconduct prior to the verdict. *Gray* at 288, 896.

The second exhibit to the City's motion is an incident report from the arrest of John Doe by the City. This information appears to have come from the City's police department records. The City provided no evidence as to who found this document, how the document came to be

found and whether the document could have been found prior to the verdict. The City failed to show whether due diligence requires the City to review its own records for information related to jurors who may be selected to try a case where the arrest by one of its officers is legal. The City presented no information from trial counsel or any other sources relevant to whether such information could have been easily accessed or whether it would have be burdensome to do so.

The Court would point out that it can be reasonably inferred that the ticket by which John Doe came to be arrested would have also been docketed within the City of Columbia Municipal Court records. The City failed to provide any evidence about the number of places within the City's records the information about John Doe could have been housed; however, it follows that there are at least two file repositories where the information regarding John Doe may have been found. Regardless, the City failed to provide any evidence as whether Doe's records could have been accessed and how that process would have been accomplished. The City failed to address whether the search of its records was burdensome, how much time, if any, would be necessary to review the records, and whether the records were assessed by trial counsel or why she could not access these records. All of these questions were left unanswered by the City.

The information presented in the incident report appears to be more than sufficient to identify the juror. The identifying information would have led a reasonable attorney to determine that the juror and the arrestee could be one and the same, had the City exercised reasonable diligence in reviewing the its records. If the City found these records for purposes of this motion, then it follows that with due diligence, the same information was available prior to the verdict. *Id.* See also S.C.R.Civ.P. 59(b) (Rule 59(b) requires that any "after discovered evidence" must newly discovered evidence which by due diligence could not have been discovered in time to move for a

new trial under Rule 59(b). S.C.R.Civ.P. 59(b)). *Bryant* holds that the moving party could not have known about the grounds for the alleged misconduct prior to the verdict. Gray at 288, 896.

Plaintiff pointed out that the information regarding John Doe was available to anyone with an internet connection. John Doe's interaction with the City was available via the Richland County Public Records Index, using only the information set forth on the Clerk of Court's juror list. The Plaintiff pointed out the use of Public Index is easily accessible and free of costs. The City did not refute this assertion with any evidence. This Court is left with little or no evidence upon which to find the City could not have known about this juror's alleged misconduct prior to the verdict.

3. **The City was negligent in failing to learn of the alleged misconduct before the verdict.**

The City has the burden of proving each of the elements required by *Gray.* The City did not have Trial Counsel present for this hearing to show what, if anything, the City did regarding the due diligence performed by the City regarding the issues surrounding juror John Doe. There are no affidavits and no documentary evidence from any source or witness that touch on why the City could not have known of the juror's misconduct. The City found the documents related to the juror; however, the City failed to show why these documents could not have been found prior to, during, or within ten days after the verdict. The City has failed to provide sufficient evidence that would show the City was not negligent in failing to know of the misconduct. The Court makes this finding for the reasons and basis set forth in Number Two above.

The City failed to perform due diligence in discovering juror misconduct and now attempts to have this Court grant relief for the City's negligence in inadequately defending this matter. The City failed to adequately review the abundant, public information relevant to prospective jurors

and now claims prejudice even though such prejudice was brought about by its own negligence. *Gray* at 288, 896.

The City relied primarily upon the *Long* case to support the finding of juror misconduct and the grant of a new trial. *Long* affirmed that the burden was on the moving parting to show juror misconduct. *Long* affirmed the moving party must show 1) juror disqualification 2) that the moving party could not have known of the misconduct and 3) the moving party was not negligent in not knowing of the juror misconduct. *Long* at 570, 10. Otherwise *Long* is distinguishable from this case, in part due to the defendant in that matter presenting sufficient evidence regarding the three elements necessary for the Court to grant a new trial. The City, as outlined above, had failed to present sufficient evidence to support the grant of a new trial.

CONCLUSION

Based upon the presentation by the City and the Plaintiff, this Court makes the following findings of fact based upon a preponderance of evidence:

1. The City has the burden of proof as to the showing juror misconduct as set forth in *Gray v. Bryant*, 298 S.C. 285, 379 S.E.2d 894 (1989).
2. The City did not have Trial Counsel of record present at the hearing and she produced no evidence by affidavit;
3. Mr. Hewitt has not properly appeared as Counsel of Record for the City, as no Order has been entered as required by S.C.R.Civ.P. Rule 11.
4. Regardless of the whether Mr. Hewitt has made a proper appearance as Counsel of Record for the City, pursuit to S.C.R.Civ.P. Rule 11, this Court has given proper consideration to the evidence, or lack thereof, presented by the City;

5. The City did not meet the burden of proof as to any of the three elements of *Gray;*
6. The City did not provide any evidence that the juror was disqualified.
7. This Court further finds that even if the juror had been found to be disqualified, the City failed to show the remaining elements of *Bryant.*
8. The City did not provide any evidence to demonstrate that it could not have known of the juror's misconduct prior to or during trial.
9. The City did not provide sufficient evidence to refute that it was negligent in failing to discover the juror's misconduct.
10. The City failed to address with any competent evidence as to why it did not or could not review the City's records relevant to the juror in question from the City of Columbia Police Department and the City of Columbia Municipal Court files or the records from the Richland County Public Index.
11. The City failed to address the issue of the City's exercise of due diligence related to the allegation of juror misconduct;
12. Accordingly, the City's motion for a new trial pursuant to S.C.R.Civ.P 60(B)(2) is denied.

AND IT IS SO ORDERED.

_____
The Honorable L. Casey Manning
Trial Judge

Columbia, South Carolina

_____, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-CP-40-00910

Darris Hassell, ... Respondent,

v.

City of Columbia ..... Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Second Amended Notice of Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Paul L. Reeves, Esquire
Reeves and Lyle, LLC
PO Box 11126
Columbia, SC 29211

August 24, 2018

Erin Bridges

BLUESTEIN ATTORNEYS

BLUESTEIN THOMPSON SULLIVAN, LLC
BLUESTEINATTORNEYS.COM

August 24, 2018

VIA HAND DELIVERY
The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Darris Hassell v. City of Columbia
Appellate Case No.: 2017-001750

Dear Ms. Kitchings:

The circuit court recently entered an order under Rule 60(a), SCRCP to correct a clerical mistake in one of the orders that has been appealed in this case. I am enclosing a copy of that order as well as an amended notice of appeal.

Thank you for your attention to this matter. Please do not hesitate to contact me if you have any questions or need any additional information.

Yours sincerely,

Blake A. Hewitt by emb w/ express permission
BLUESTEIN THOMPSON SULLIVAN, LLC

BAH:emb
Enclosures
cc: Paul L. Reeves, Esquire
W. Mike Hemlepp, Esquire