THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-001158

Curtis Mills .....Respondent

v.

The South Carolina State Ports Authority .....Appellant

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. **Did the trial court err in refusing the Ports Authority's request to instruct the jury regarding comparative negligence, where the evidence demonstrated that the Plaintiff had a duty to disengage the pins on his truck chassis and keep them disengaged, he breached that duty, and the alleged accident and injuries resulted from those pins being engaged?**

II. **Did the trial court err in denying the Ports Authority's motion for a new trial absolute or, in the alternative, new trial *nisi remittitur*, where the verdict was so excessive compared to the evidence adduced at trial and was so unsupported by the record as to be the result passion, caprice, prejudice, or some other influence outside of the evidence, and the trial court relied on evidence not relevant to the jury's award in concluding otherwise?**

STATEMENT OF THE CASE

Plaintiff Curtis Mills ("Plaintiff") commenced this personal injury action against the South Carolina State Ports Authority ("Ports Authority") on May 7, 2014, in the Court of Common Pleas of Charleston County, South Carolina. (*See generally* May 7, 2014 Summons and Complaint). Plaintiff claimed to have been injured during the removal of a shipping container he delivered to the Ports Authority from his truck. (*See generally id.*) On June 20, 2014, the Ports Authority filed its Answer to the Complaint. (*See generally* June 20, 2014 Answer). In that Answer, the Ports Authority denied liability and alleged the affirmative defenses of Plaintiff's sole or comparative negligence:

> **FIRST AFFIRMATIVE DEFENSE**
>
> The Defendant SCSPA pleads sole negligence in that the Plaintiff herein failed to safely and adequately disengage the pins securing the container on the chassis which is his responsibility, thereby preparing the load for safe lifting by the top handler herein, said failure constituted sole negligence on the Plaintiff thereby precluding any recovery;
>
> **SECOND AFFIRMATIVE DEFENSE**
>
> Comparative negligence that the failure of the Plaintiff to completely disengage the locking mechanisms securing his load to his chassis thus preparing for a clean and safe lift constitutes negligence of an amount greater than any which would be assigned to the SCSPA top handler operator as any allegations of negligence against said operator for his actions occurring in the process of the lifting.

(June 20, 2014 Answer, at 3-4).

On or about April 22, 2016, Plaintiff dismissed this action from the docket pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. (April 22, 2016 Motion to Have Case Stricken from the Docket by Agreement Rule 40(j)). This matter was restored to the docket by the Consent Order to Restore 40(j) on November 2, 2016, at docket No. 2016-CP-10-5892. (November 2, 2016 Consent Order to Restore 40(j)).

After the parties engaged in discovery, this case was tried to a jury from May 29, 2018 through June 1, 2018, the Honorable Kristi Harrington presiding. On May 31, 2018, Judge Harrington instructed the jury on the law, but she *did not* instruct the jury on comparative negligence. (Tr. Transcr., at 473:10-490:14). Following deliberations, the jury found that the Ports Authority's negligence proximately caused injury to Plaintiff and awarded Plaintiff actual damages of $616,710.07. (June 1, 2018, Form 4 and completed Verdict Form). On June 8, 2018, the Ports Authority filed Post-Trial Motions arguing:

- The trial judge should grant a new trial because she failed to instruct the jury regarding comparative negligence;
- The trial judge should grant judgment n.o.v., a new trial, or a new trial *nisi remittitur* because the jury's verdict was excessive and not supported by any evidence presented at trial;
- The trial judge should grant judgment n.o.v. or a new trial under the "thirteenth juror" doctrine because there was no evidence supporting a finding of liability; and
- The trial judge should reduce the verdict to $300,000 under the terms of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-120(a)(1).

(June 8, 2018, Defendant The South Carolina State Ports Authority's Post-Trial Motions). The trial court held oral argument on the Port's Authority's Post-Trial Motions on the same date and (also on the same date) denied, in part, the Post-Trial Motions:

> Post-trial Motions were heard on June 8, 2018. Defendant's Motion for New Trial Upon Failure to Charge Comparative Negligence, Motion for J.N.O.V., New Trial, or New Trial Nisi Remittitur Because the Jury's Verdict Was Excessive and Not Supported by the Evidence, and the Motion for J.N.O.V. or a New Trial Under the "Thirteenth Juror" Doctrine Because There is No Evidence Supporting the Jury's Liability Verdict are denied. The Defendant's Motion to Reduce the Verdict to Reflect the Caps Set Forth in the South Carolina Tort Claims Act is granted with the concession of the Defendant. The verdict is reduced to $300,000.00, pursuant to the South Carolina Tort Claims Act, S.C. Code 15-78-120(a).

(June 8, 2018 Form 4 Order). On or about June 18, 2018, the Ports Authority filed a timely Notice of Appeal. (July 18, 2018 Notice of Appeal.)

STATEMENT OF FACTS

Plaintiff, a truck driver, arrived at one of the Ports Authority's terminals on October 4, 2012, to drop off a shipping container. (Tr. Transcr., at 104:2-25.) The Ports Authority agreed that at least one of the pins securing the container, also known as a box, to the truck's chassis was engaged at the time Plaintiff presented his container to Ports Authority employee Greg Spanbauer for removal. As a result, the container did not immediately come loose from the chassis. Beyond this, the parties presented markedly different accounts of the particulars of this lift; Plaintiff claimed his chassis rose up to six feet off the ground and then fell, thereby injuring him, while the Ports Authority's evidence showed the chassis did not rise at all and Plaintiff merely drove forward to release the container. Regardless of which version of events is correct, the fact that the pins were engaged at the time of the lift means one of two things occurred, either of which implies Plaintiff's negligence: (1) Plaintiff did not disengage the pins in the first instance, as required, or (2) Plaintiff failed to ensure that the pins remained disengaged at the time Mr. Spanbauer attempted to lift the box from the chassis, also as required.

Plaintiff's Duty to Remove Pins Securing Container

It was undisputed at trial that truck drivers are solely responsible for ensuring the pins securing their containers are fully disengaged at the time of the container's removal.

For example, Damion Solomon, a friend of Plaintiff's who allegedly witnessed the incident and who testified on Plaintiff's behalf, agreed drivers bear this responsibility. (*Id.* at 184:22-25.) He further explained it is "not uncommon" for the pins to jostle back into place *en route* to the crane if they are removed upon entering the Ports Authority's terminal; in fact, this happens "all the time." (*Id.* at 173:21-174:8; 184:16-21.) Mr. Solomon readily agreed that re-checking the pins just prior to the lift to ensure they remain disengaged is the "safer" practice. (*Id.* at 187:22-23.)

There is nothing preventing a driver from doing so, and Mr. Solomon testified that some drivers actually wait until they arrive at the crane to remove the pins in the first instance. (*Id.* at 188:6-13; 192:10-20.)

Barney Washington is a seventeen-year veteran of the Ports Authority who was trained as an equipment operator by Mr. Spanbauer and was called to testify by both Plaintiff and the Ports Authority. (*Id.* at 145:4-14, 146:21-24.) Like Mr. Solomon, Mr. Washington agreed it is the truck driver's responsibility to ensure the pins remain disengaged, not the crane operator's. (*Id.* at 424:5-11.) Mr. Washington also testified it is "[n]ot unusual" for pins to jostle back into place. (*Id.* at 148:19-24; 149:7-10.) A driver presenting a container for removal represents that it is ready to be lifted and for the crane operator to take possession of it. (*Id.* at 425:23-426:3.) Mr. Washington therefore unequivocally testified that the responsibility for ensuring the pins are removed and the box is safe to lift "is *strictly on the driver*." (*Id.* at 426:4-7 (emphasis added).)

Jarod Brown, who has worked with the Ports Authority for fourteen years and testified in detail about Ports Authority training and terminal operations, also explained that a driver presenting a box for a lift represents it is safe, the crane operator relies on the driver to safely remove the pins and cannot know there is a problem with the pins until after the lift begins, absent some communication from the truck driver. (*Id.* at 344:3-5, 365:24-366:17.)

The Lift Described by Plaintiff

Plaintiff claimed he disengaged all of four pins securing each corner of the container to his chassis upon checking into the terminal. (*Id.* at 105:1-19.) He testified that he then drove to the designated location where Mr. Spanbauer was to remove the container from his chassis. (*Id.* at 105:20-106:6.)

Plaintiff testified that during the lift his entire chassis and the rear wheels of his truck came off the ground with the container. (*Id.* at 105:20-106:15, 129:22-130:8.) Per Plaintiff, Mr. Spanbauer lifted Plaintiff's chassis four to six feet off the ground. (*Id.* at 120:19-23.) Mr. Solomon asserted Mr. Spanbauer lifted Plaintiff's chassis so high that Mr. Solomon could have walked under it. (*Id.* at 169:2-13.) Plaintiff believes Mr. Spanbauer then attempted to "shake the box off" the chassis and "the tires of [his] truck came down hard" with the box no longer attached. (*Id.* at 106:8-21.)

The dramatic lift Plaintiff described necessarily means all four pins were engaged at the time Mr. Spanbauer removed the container from Plaintiff's chassis. (*Id.* at 370:2-18, 423:12-21.) Accepting Plaintiff's testimony that he removed all pins at the gate as true, these pins all must have jostled back into place during the drive to the crane. Yet Plaintiff presented no evidence that he ever checked to ensure the pins remained disengaged at the time of the lift, despite the uncontested evidence from both Plaintiff's and the Ports Authority's witnesses that it was his responsibility to do so. The record therefore contains evidence that Plaintiff breached his duty to ensure the pins are free and lift is safe.

Alternatively, the evidence suggests Plaintiff never disengaged his pins at the gate to begin with, if his description of the lift is correct. Mr. Brown testified that it is "unlikely" all four pins re-engaged between the gate and the crane and that he has never seen that happen in his seventeen years of experience with the Ports Authority. (*Id.* at 369:7-16.) When the pins do manage to jostle back into the place, they move minimally and typically only in the front, as the back pins must be twisted into place. (*Id.* at 421:20-422:7.) If only the front pins are engaged, which is the most likely "jostle back" scenario, the lift will be lopsided as the rear of the container will come off the chassis but the front will not. (*Id.* at 422:16-423:11.) A container with only the front pins engaged

could not lift an entire chassis four to six feet off the ground. (*Id.* at 369:17-370:18.) If Plaintiff's testimony about the lift is accepted, this evidence implies it was *not* the result of the pins re-engaging. Instead, all four pins would have to have been engaged because Plaintiff never disengaged *any* of them in the first instance when he entered the Ports Authority's terminal. This too is a violation of Plaintiff's duty as a truck driver presenting a load for lifting.

The Lift Described by the Ports Authority

While the Ports Authority did not dispute that at least some pins remained engaged on Plaintiff's container at the time of the lift, it sharply disputed Plaintiff's version of events. Mr. Spanbauer testified that the back pins on Plaintiff's chassis were unlocked but the front ones were fully engaged. (*Id.* at 301:22-302:12.) When only the front pins are engaged, the lift appear to be normal at first. (*Id.* at 354:16-355:1.) Mr. Spanbauer recalled that the back of Plaintiff's container rose approximately two feet at an angle during the lift. (*Id.* at 303:5-304:3.) Before Mr. Spanbauer could lower the box, Plaintiff drove forward in an apparent attempt to slide the front pins out, causing his truck "bounce" as they disengaged from the container. (*Id.* at 304:4-23; *see also id.* at 419:3-15 (testimony of Mr. Washington confirming that the truck will bounce if it drives forward during a lift with the front pins still engaged).) Tellingly, neither Mr. Solomon nor Mr. Spanbauer could recall a chassis coming off of the ground during a lift as Plaintiff (and even Mr. Solomon) described. (*Id.* at 171:8-11, 311:7-12.) Mr. Brown further testified that lifting an entire chassis four to five feet off the ground is "[v]ery, very unlikely" and that he "do[es]n't see how it could happen." (*Id.* at 369:17-370:1.)

This evidence suggests Plaintiff presented his container for a lift with only the front pins still engaged.[1] This could result from these pins re-engaging, which Plaintiff failed to check, or from Plaintiff failing to disengage them initially. In that regard, the evidence revealed a dangerous practice among truck drivers of *intentionally* leaving the front pins engaged. (*Id.* at 304:7-305:23, 364:9-365:23.) Drivers utilize this practice solely for their own convenience, and they will try to "time it just right" and drive forward once the lift takes the pressure off the front pins. (*Id.* at 310:18-24, 364:9-365:23.) It is a dangerous and unsafe practice for a driver to have a container lifted off his chassis with the pins engaged if the driver does not alert the crane operator ahead of time. (*Id.* at 306:19-307:4.) Whether Plaintiff failed to remove the front pins at the gate, failed to re-check them prior to the lift, or intentionally left them engaged, the evidence shows he breached his duty.

Evidence of Plaintiff's Claimed Damages

Following the lift, Plaintiff claimed he drove forward out of the path of crane, exited his truck, and waived his hands in an unsuccessful attempt to alert Mr. Spanbauer. (*Id.* at 106:22-109:10. *But see id.* at 302:13-17 (Mr. Spanbauer recalling he watched Plaintiff drive away and then sit in his truck for approximately half an hour).) Plaintiff ultimately called Port Police to report the incident. (*Id.* at 110:9-16.) Plaintiff never received any report of damage to his truck as

[1] The evidence also showed it is impossible to "shake" a container off a chassis. Mr. Solomon agreed the use of hydraulic equipment means a crane operator is "not really going to have a sudden shake." (*Id.* at 169:14-22.) The crane equipment moves too slowly and does not have sufficient range of motion to "shake" a container off of an attached chassis. (*Id.* at 313:14-314:1, 315:12-16, 356:16-357:3, 417:18-418:4.) Mr. Washington explained that the Ports Authority does not "jiggle" containers on a chassis and he has never witnessed it. (*Id.* at 148:3-5, 417:25-418:4.) Similarly, Mr. Brown explained "there is absolutely nothing the [crane] operator can do to disengage" the rear pins if they are stuck. (*Id.* at 362:22-366:8.) Thus, Mr. Spanbauer could not shake the container loose (if a shake is even possible) with all four pins engaged, as would be the case if Plaintiff's recall of the lift is correct).

a result of this incident. (*Id.* at 139:13-20.) Neither did his airbags rupture following the alleged four to six-foot drop of his truck and chassis. (*Id.* at 131:2-3.) Plaintiff refused an ambulance several times at the scene. (*Id.* at 302:22-23.)

Plaintiff loosely averred on direct examination that he missed "[l]ike, nine weeks or more" of work "because of this medical treatment" he received following the lift. (*Id.* at 116:6-11.) When pressed during cross examination on his failure to file tax returns, he revealed for the first time that he did not work in 2013 "[a]fter my accident." (*Id.* at 141:22-142:6.) Dr. Timothy Zgleszewski, one of Plaintiff's treating physicians, testified that he cleared Plaintiff to return to work on February 24, 2014. (*Id.* at 239:8-240:3.) There is no evidence Plaintiff remained unable to work after that date or that he did not return to work after being cleared by his doctor. To the contrary, Plaintiff's counsel admitted in closing arguments that Plaintiff "wants to work," "[h]e went back to work as soon as can," and "[h]e's working now with pain." (*Id.* at 459:24-25.)

There is scant evidence as to the wages Plaintiff lost while out of work. The only testimony in this regard is Plaintiff's statement that he lost "[l]ike, right about 12,000-something dollars" during the "[l]ike, nine weeks or more" of work he missed. (*Id.* at 116:6-15.) Plaintiff offered no documentary evidence supporting his calculation of lost wages.

The Jury Charge, the Jury's Verdict, and the Trial Court's Denial of the Ports Authority's Post-Trial Motions

In light of the evidence demonstrating Plaintiff either did not disengage the pins in the first instance or confirm that they had not re-engaged, as was his duty, the Ports Authority requested that the court instruct the jury on the doctrine of comparative negligence. (*Id.* at 436:17-18). The Ports Authority's Proposed Jury Instructions included a request for an explicit, detailed, nearly two-page long jury instruction on comparative negligence. (Def.'s Proposed Jury Instr. ¶ 5).

Plaintiff has not suggested that this instruction was inaccurate or misstated the law of comparative negligence in any way.

Counsel for the Ports Authority argued after the close of evidence that the jury should be instructed on comparative negligence because there was evidence from which the jury could conclude that Mr. Mills was negligent in failing to confirm that the pins were disengaged before allowing the container to be lifted. (Tr. Transcr., at 438:13-448:2). The Ports Authority's counsel expressly recounted the evidence showing that "either [Plaintiff] didn't disengage them at the gate or they jostled back into place. And with the pins fully engaged, the probability is he didn't pull them." (*Id.* at 447:20-23.)

The trial court engaged in a lengthy dialogue with counsel regarding the appropriateness of a comparative negligence charge. (*Id.* at 436:18-448:6.) During that discussion, the trial court improperly injected a theory of "last clear chance" that had not been argued by the Plaintiff, the court ultimately agreed was improper, and Plaintiff's counsel agreed to not reference. (*Id.* at 445:20-446:25.) The court nevertheless decided Plaintiff's negligence could be present only *after* Mr. Spanbauer had engaged and lifted the chassis. (*Id.* at 440:3-444:3, 445:20-24). This finding was incorrect, disregarded the uncontroverted evidence that Plaintiff's obligation to remove the pins arose prior to the Ports Authority's actions, and ignored that the chassis allegedly lifting off the ground *is* the evidence that Plaintiff did not properly fulfill his duty under the circumstances and was therefore negligent. The trial court accordingly did not instruct the jury on comparative negligence, noting the Ports Authority's exception. (*Id.* at 448:5-6.) The Ports Authority unsuccessfully renewed its request for a comparative negligence instruction after the trial court charged the jury. (*Id.* at 490:23-491:1.)

Plaintiff did not request any lost wages, whether past or future, in his closing argument. (*Id.* at 456:7-462:10, 472:8-473:8.) The jury awarded Plaintiff $616,710.07. (June 1, 2018 Form 4 and completed Verdict Form). In a handwritten note, the jury itemized the components of its damage calculation as follows:

- $50,157.07 "Bills"
- $12,000 "9 week" "comp" for "Oct-Dec-2012" time "out of work"
- $80,888.00 "14 months (cleared)"[2]
- $398,665.00 "lost of wages" (also described by the jury as "lost wages till ret.")[3]
- $75,000 (unexplained).

(*See* Court's Tr. Ex. 9).[4]

The Ports Authority timely filed its Post-Trial Motions on June 8, 2018. (June 8, 2018 Defendant the South Carolina State Ports Authority's Post-Trial Motions). As is relevant to this appeal, the Ports Authority moved for a new trial based on the trial court's failure to charge the jury on comparative negligence, a new trial absolute because the jury's verdict was grossly excessive, or in the alternative, a new trial *nisi remittitur* to reduce the damages to only those proven at trial. (*Id.* at 2-8.) At the hearing on the Ports Authority's Post-Trial Motions, the trial

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[2] The jury calculated this total by annualizing Plaintiff's "$12,000 in lost wages over nine weeks" testimony, and applying that figure to the fourteen-month period of time Plaintiff was "out" from January 2013 (presumably after the initial nine weeks) through February 2014 when he was "cleared to work." (Court's Tr. Ex. 9.)

[3] This figure resulted from the jury annualizing Plaintiff's lost wages, multiplied by an "Inefficiency" factor of 25%, and then multiplying that sum by twenty-three for his "years retirement" beginning from February 2014. (Courts Tr. Ex. 9.)

[4] The court explained how and when it received Court's Exhibit 9 during the hearing on Plaintiff's Post-Trial motions. (Post-Trial Transcr., at 11:15-12:2.)

court espoused its patently erroneous but continued belief that there is no duty on a truck driver to ensure the pins are fully disengaged at the time of the lift:

> The testimony indicated the duty to ensure the safe lift was upon the crane operator and there was no testimony to indicate the duty was on the truck driver to exit the truck and ensure the pins were disengaged immediately prior to the lift.
>
> While testimony was presented that this may be a safer method or preferred method there was no testimony to indicate it was the duty of the truck driver at the time of the incident.

(Post-Trial Tr., at 9:10-18.) The court accordingly denied this motion. (*Id.* at 8:7-9:19.)

As to damages, the Ports Authority agreed Plaintiff is entitled to recover his medical bills and "some form of compensation for whatever he can show from the period of this accident until February [2014] when he was released to go back to work." (*Id.* at 13:10-13.) The Ports Authority specifically argued at the hearing that Plaintiff is not entitled to the over $398,000 in projected future wages after February 2014 because there was no evidence of Plaintiff's inability to work beyond that date. (*Id.* at 13:14-20.) The court denied the Ports Authority's motion for a new trial absolute and alternative motion for new trial *nisi remittitur* on two apparent grounds. First, the court found the Ports Authority did not object its jury charge on future lost wages.[5] (*Id.* at 20:7-15.) Second, the court inappositely referenced evidence that "[P]laintiff was going to be in a lifetime of pain potentially facing surgeries" and denied the motions "[b]ased upon the testimony as a whole." (*Id.* at 21:1-5.)

[5] The trial court struck Plaintiff's request for lost wages because Plaintiff did not offer a sufficient documentary foundation for them. (Tr. Transcr., at 434:4-436:6). The court nevertheless inadvertently included some language in its charge regarding lost wages. (*Id.* at 482:24-484:2.) Candidly, the Ports Authority did not object to what appears to be the accidental inclusion of this language. Plaintiff's counsel too was under the impression that the trial court did not charge on lost wages. (*See id.* at 491:2-6.) This is distinct from the jury's imposition of damages for future wages that Plaintiff never requested and conceded did not exist.

The court thereafter entered a written order denying these motions without further explanation but reducing the verdict to $300,000 pursuant to the South Carolina Tort Claims Act. (June 8, 2018 Form 4.)

ARGUMENT

I. Standard of Review

A. Failure to Instruct the Jury on Comparative Negligence

Under South Carolina law, an appeal alleging an error in the instruction of the jury is reviewed under an abuse of discretion standard. *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 414, 717 S.E.2d 765, 770 (Ct. App. 2011). "A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence." *State v. Lee-Grigg*, 347 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

B. Denial of New Trial Absolute/New Trial *Nisi Remittitur*

On appeal, this Court reviews the denial of a new trial absolute or new trial *nisi remittitur* for abuse of discretion. *See McAlhaney v. McElveen*, 413 S.C. 299, 303, 775 S.E.2d 411, 413 (Ct. App. 2015). The trial court abuses its discretion when it denies a new trial absolute or *nisi* if the verdict is grossly in adequate or excessive "so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). The denial of a new trial *nisi remittitur* will be reversed where the decision is controlled by an error of law or a new trial absolute should have been granted. *Knoke v. S.C. Dept. of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996).

II. The Court Should Reverse and Remand Because the Trial Judge Erred in Refusing to Instruct the Jury Regarding Comparative Negligence

This Court should reverse the jury's verdict and the trial judge's denial of the Ports Authority's motion for a new trial because the trial court erroneously refused to instruct the jury on comparative negligence, a legal theory that the Ports Authority raised in the pleadings and that the evidence fully supports. At trial, the Ports Authority introduced substantial evidence establishing Plaintiff breached his duty to either disengage the locking pins securing the container

to his trailer at the outset or check to ensure that they were not inadvertently returned to the engaged position before the load was positioned for removal and lifted from his chassis. This is sufficient evidence to support the inference that Plaintiff acted in a negligent manner, and the jury should have had the opportunity to consider his comparative negligence. Therefore, the trial judge erred when she refused to instruct the jury regarding comparative negligence.

"It is well settled that jury instructions should be confined to the issues raised by the pleadings and supported by the evidence and *where an issue is implicitly suggested by the pleadings and supported by the evidence, the trial judge is obligated to instruct the jury concerning it.*" *Ellison v. Parts Distributors, Inc.*, 302 S.C. 299, 301, 395 S.E.2d 740, 741 (Ct. App. 1990) (emphasis added). "'When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.'" *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 142, 697 S.E.2d 644, 652 (Ct. App. 2010) (*quoting Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000)).

"'Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error.'" *Carroll v. Smith-Henry, Inc.,* 281 S.C. 104, 106, 313 S.E.2d 649, 650 (Ct. App. 1984) (*quoting Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770, 771-72 (Ct. App. 1983)). "[W]hen general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Brown v. Smalls*, 325 S.C. 547, 555, 481 S.E.2d 444, 448–49 (Ct. App. 1997). For the reasons that follow, the Court should have instructed the jury on comparative negligence.

"Under the comparative negligence doctrine, a plaintiff may only recover damages if his own negligence is not greater than that of the defendant." *Trivelas v. SCDOT*, 357 S.C. 545, 549, 593 S.E.2d 504, 506 (Ct. App. 2004); *Thomasko v. Poole,* 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002); *Bloom v. Ravoira,* 339 S.C. 417, 422, 529 S.E.2d 710, 712–13 (2000). "'The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her negligence.'" *Ritter & Assocs., Inc. v. Buchanan Volkswagen, Inc.*, 405 S.C. 643, 651, 748 S.E.2d 801, 805 (Ct. App. 2013) (*quoting Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011)). "Generally, under a less than or equal to comparative negligence rule, 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." *Trivelas*, 357 S.C. at 549-550, 593 S.E.2d at 506; *Brown,* 325 S.C. at 559, 481 S.E.2d at 451; *accord Creech v. South Carolina Wildlife and Marine Res. Dept.,* 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997) (holding comparison of plaintiff's negligence with that of defendant is question of fact for jury). Therefore, under the comparative negligence doctrine, if the jury determined that Plaintiff's own negligence was 50.1% responsible for this accident, Plaintiff could not recover. "Ordinarily, the negligence of a party is a question of fact for the jury." *See Brown v. Smalls*, 325 S.C. 547, 558, 481 S.E.2d 444, 450 (Ct. App. 1997).

There is no dispute the Ports Authority timely and properly raised comparative negligence in its answer and requested that the jury be instructed on that issue. (*See* June 20, 2014 Answer, at 3-4; Tr. Transcr., at 436:17-448:6). Furthermore, the record is replete with uncontradicted evidence demonstrating Plaintiff was under a duty to properly disengage all four pins on the container prior to the lift when he came into the gate at the port and ensure that the pins did not thereafter re-engage prior to the lift, and crane operators rely on drivers to complete this important

step. (*E.g., id.* at 184:22-25, 187:22-23, 344:3-5, 365:24-366:17, 424:5-11, 425:23-426:7.) Plaintiff's and the Ports Authority's witnesses were unanimous in their agreement on this point. Not only is this the driver's responsibility, it is *strictly* his. (*Id.* at 426:4-7.) The trial court therefore simply was wrong when it found no evidence demonstrating the driver bears this duty. *See Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007) ("Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another.").

Furthermore, the evidence shows Plaintiff breached his duty. In order for the incident to occur at all, one or more locking pins on Plaintiff's chassis necessarily were engaged. For Plaintiff's version of events to be true (and for his truck to be lifted entirely from the ground), all four pins must have been engaged. (Tr. Transcr., at 370:2-18, 423:12-21.) Because the evidence shows it is unlikely that all four pins re-engaged *en route* to the crane, the jury could conclude Plaintiff breached his duty and *never* disengaged them in the first instance. (*See id.* at 369:7-16.) Even if he had disengaged them at the outset, there is no evidence Plaintiff checked to ensure they had not jostled back into place, as is common, thereby also breaching his duty. The jury could have relied upon Plaintiff's breach to conclude he was comparatively negligent and that his conduct contributed to his injuries.

The result is the same even if Mr. Spanbauer's recollection of the lift is correct. He testified only the front pins were engaged at the time of the lift. (*Id.* at 301:22-302:12.) Here as well, this means Plaintiff either did not remove them upon checking into the terminal or neglected to ensure they did not subsequently re-engage. Indeed, there even was evidence suggesting Plaintiff may have *intentionally* left the front pins engaged. (*Id.* at 304:7-305:23, 310:18-24, 364:9-365:23.) Regardless, the evidence shows Plaintiff breached his duty. The jury could then conclude that this breach contributed to Plaintiff's injuries.

The Ports Authority therefore was entitled to a comparative negligence instruction and the trial court erred to failing to instruct the same. In concluding otherwise, the trial court effectively adopted the version of "last clear chance" our Supreme Court firmly rejected twenty years ago. Last clear chance allows a negligent plaintiff to recover where "the defendant discovers or could have discovered the plaintiff's peril had he exercised due diligence, and thereafter fails to exercise reasonable care to avoid injuring the plaintiff." *Rothrock v. Copeland*, 305 S.C. 402, 405, 409 S.E.2d 366, 368 (1991). Last clear chance and the now-rejected doctrine of contributory negligence were mutually exclusive—there could be no contributory negligence proximately causing the plaintiff's injury if the defendant had the last clear chance to avoid the harm. *Spahn v. Town of Port Royal*, 330 S.C. 168, 171-72, 499 S.E.2d 205, 206-07 (1998). As a result of the adoption of comparative fault, however, our Supreme Court held last clear chance "remains a factor for the jury's consideration in comparing the parties' fault, but that it does not totally relieve a plaintiff of his or her negligence." *Id.* at 173, 499 S.E.2d at 208. Thus, whether the plaintiff was unable to extricate himself from the peril is a factor the jury may consider but does not automatically absolve the plaintiff of his own negligence. *Id.* at 174, 499 S.E.2d at 208.

The trial court's understanding of comparative negligence embraced the old last clear chance rule by myopically focusing only on what Plaintiff could have done to avoid the accident *after* Mr. Spanbauer began to lift the container. (Tr. Transcr., at 440:3-442:20.) The following exchange is particularly illustrative of the court's view:

> THE COURT: Okay. At that point, what did the Plaintiff do that makes him negligent?
>
> MR. STONEY: He failed to make certain that the pins were disengaged.
>
> THE COURT: And how would he have done that once the crane is on top of the box?

MR. STONEY: He would have done that before the crane –

THE COURT: No. No. No. Once the crane is on the box, what does he – what did he do that was negligent?

. . . .

THE COURT: So from the time the crane touches the box, he can't get out of the truck. But your crane could have dropped it down. Once the crane touches the box, he can't do anything. He would have endangered everybody getting out of the truck.

MR. STONEY: Yes, if he –

THE COURT: Yes. And so that's – right there, that's where the comparative negligence is. So, they may find that he's – that you're not negligent, but the injury was caused by the falling. Not by the lifting, but by the falling.

(*Id.* at 440:3-442:20.)

The trial court believed Plaintiff's perceived inability to extricate himself from the situation necessarily defeated contributory negligence. This directly contradicts the Supreme Court's decision in *Spahn* and ignores Plaintiff's own actions imperiling himself to begin with. While Plaintiff's ability to remove himself from the peril may be factor for the jury to consider, it is not—as the trial court believed—dispositive. The trial court's reference to last clear chance during the charge conference, which it later disavowed in word but not in application, illustrates the court's thinking. (*See id.* at 445:20-446:23.) Ironically, the trial court's rejection of comparative negligence deprived the jury of its ability to consider the very evidence the court found controlling. The trial court also improperly weighed the evidence, as it necessarily rejected Mr. Spanbauer's testimony that Plaintiff's chassis was not lifted at all and Plaintiff simply drove forward to release the container in finding Plaintiff was helpless once the lift began.

The trial court therefore should have instructed the jury on comparative negligence and allowed the jury to decide this issue.[6] Therefore, this Court should reverse the trial court's verdict and judgment and the trial judge's denial of the Ports Authority's Post-Trial Motions.

III. The Court Erred in Denying the Ports Authority a New Trial or a New Trial *Nisi Remittitur* Because the Jury's Verdict Was Excessive and Without Evidentiary Support

The trial court further erred in denying the Ports Authority a new trial absolute or new trial *nisi remittitur* because the jury's calculation of damages was excessive and not supported by any evidence.

"'Generally, in order for damages to be recoverable, the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.'" *Collins Entertainment, Inc. v. White*, 363 S.C. 546, 559, 611 S.E.2d 262, 269 (Ct. App. 2005) (*quoting Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981)). While the law does not require "[p]roof with mathematical certainty," the amount of damages cannot "be left to conjecture, guess or speculation." *Id.*

A trial court may grant a new trial absolute when a verdict is so excessive that it may be the result of unfair influences:

> "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004) [(further citation omitted)]. "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice,

[6] Charging comparative negligence under these facts would also be consistent with the South Carolina Tort Claims Act, which preserves the Ports Authority's sovereign immunity with respect to "an act or omission of a person other than an employee." S.C. Code Ann. § 15-8-60(20). The Ports Authority does not have authority to waive this limitation. *See Wright v. Colleton Cnty. School Dist.*, 301 S.C. 282, 287-88, 391 S.E.2d 564, 568 (1990). Requiring the reduction of the jury's verdict to account for Plaintiff's fault ensures the Ports Authority is not liable for losses caused by non-employees, such as Plaintiff, in violation of the Tort Claims Act.

> or some other influence outside the evidence, the trial judge must grant a new trial absolute." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted) (*quoting O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)).

Proctor v. S.C. Dep't of Health & Envtl. Control, 368 S.C. 279, 320–21, 628 S.E.2d 496, 518 (Ct. App. 2006).

Alternatively, if a new trial absolute is not warranted, a trial court may grant a new trial *nisi remittitur* and reduce the verdict:

> The trial court has wide discretionary power to reduce the amount of a verdict which in his or her judgment is excessive. [Citation omitted.] Indeed, when the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by the granting of a new trial nisi remittitur. [Citation omitted.] A motion for new trial nisi remittitur asks the trial court in its discretion to reduce the verdict because it is merely excessive, although not motivated by considerations such as passion, caprice or prejudice.

Welch v. Epstein, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). "A new trial nisi is one in which a new trial will be granted unless the party opposing it complies with a condition set by the court." *Proctor*, 368 S.C. at 319-21, 628 S.E.2d at 518. "'A motion for a new trial *nisi* because of excessiveness of the verdict contemplates not the striking down of the verdict in toto, but remission of part of it and the granting of a new trial in default thereof.'" *Howard v. Roberson*, 376 S.C. 143, 155, 654 S.E.2d 877, 883 (Ct. App. 2007) (*quoting Elliott v. Black River Elec. Coop.*, 233 S.C. 233, 104 S.E.2d 357, 372 (1958)).

The jury returned a verdict in the precise amount of $616,710.07. The parties and this Court do not need to speculate about how the jury arrived at that number. The jury attached to its verdict — and the trial court made Court's Exhibit 9 — the calculations underlying its verdict. In that handwritten document, the jury identified the following components of its "total [a]ctual damages": (a) lost wages through February 2014 ($92,888); (b) future lost wages beginning in

February 2014, comprising the bulk of the verdict ($398,665); (c) medical bills ($50,157.07); and (d) an unknown component of $75,000. (*See* Court's Tr. Ex. 9).

This verdict, as explained in writing by the jury, is facially excessive and is not supported by the record. The "lost wages" components of the verdict — especially the calculation of lost wages after February 2014 — are wholly without evidentiary support and constitute excessive speculation. Plaintiff did not present a scintilla of evidence supporting any specific measure of damages, aside from his medical bills. He presented no competent evidence documenting alleged lost wages or lost earning capacity, aside from ambiguous and indefinite testimony that he believed he lost "[l]ike, right about 12,000-something dollars" from missing "[l]ike, nine weeks or more" of work spanning from October 4, 2012, the date of the incident, to approximately December 2012. (Tr. Transcr., at 116:9-15). Thus, despite the jury's return of a verdict reflecting approximately $490,000 in lost wages/earning capacity for over twenty-four years, the only actual evidence presented related to a claimed loss of $12,000 in wages over nine weeks.

Even more inexplicable is the fact that the jury awarded a lifetime of lost wages despite Plaintiff never asking for them, his treating physician clearing Plaintiff to return to work in February 2014, and his counsel conceding in closing arguments that Plaintiff returned to work as soon as he could and was currently working at the time of trial. (Tr. Transcr., at 141:12-15, 239:8-240:3.) He presented no evidence documenting that he was unable to work in another job. He presented no evidence of his actual impairment. He presented no evidence as to how many years he anticipated working. He presented no evidence of his vocational abilities after the accident. He presented no evidence from a vocational rehabilitation or other expert supporting his alleged inability to work and the amount of harm he suffered. Plaintiff offered absolutely no evidence as to future lost wages and no testimony that he was remained unable to work after being cleared by

his treating physician in February 2014. The trial court's speculative observation that there is evidence Plaintiff will be in a lifetime of pain does not mask the fact that Plaintiff returned to work and continued working at the time of trial, or entitle Plaintiff to recover hundreds of thousands of dollars in dollars in non-existent lost wages for the rest of his presumed working life. (*See* Post-Trial Tr., at 21:1-5.)

The jury's deliberate and concerted effort to award Plaintiff a large sum of money for harms Plaintiff admitted he has not suffered demonstrates their decision was the result of passion, caprice, prejudice, and improper influences beyond the evidence, or perhaps even a desire to punish the Ports Authority. The jury converted Plaintiff's vague testimony of missing nine weeks of work into Plaintiff being totally disabled and unable to ever work again. There also is no indication as to the provenance of the $75,000 balance of the jury's award or for what it is intended to compensate. The jury's award is sheer speculation, unsupported and indeed directly contradicted by the record, and necessarily the result of improper motives and influences. Furthermore, the trial court's focus on Plaintiff's pain when denying the Ports Authority's request for *remittitur*, as opposed to searching for evidence of future lost earning potential, was an error of law. A new trial therefore is warranted.

For the foregoing reasons, this Court should reverse the trial judge's denial of the Ports Authority's request for a new trial.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's denial of Appellant The South Carolina State Ports Authority's Post-Trial Motions and should vacate or reverse the jury's verdict and judgment in this matter.

December 13, 2018

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-001158

Curtis Mills .....Respondent

v.

The South Carolina State Ports Authority .....Appellant

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant South Carolina State Ports Authority on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 13, 2018, addressed to his attorneys of record:

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REPLY TO SOUTH CAROLINA OFFICE

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December 13, 2018

2207.135
The Honorable Jenny Abbott Kitchings, Clerk
The South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Curtis Mills v. South Carolina State Ports Authority
Appellate Case No. 2018-001158

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of each of the following:

(1) Initial Reply Appellants Brief of Appellants/Respondents;
(2) Appellant/Respondent' s Designation of Record; and
(3) Proofs of Service.

We would appreciate if you would file the original documents and return the filed, stamped copies to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving copies of the enclosures upon counsel of record.

Sincerely,

Randell C. Stoney, Jr.

RCSjr/jgc
Enclosures (as stated)

cc (w/enclosures): **VIA U.S. MAIL**
Ladson F. Howell, Jr., Esq.

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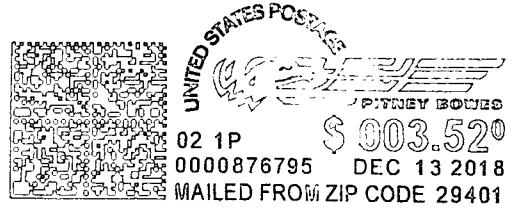

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