THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2010-CP-21-2170

Susan Anne Bell Lynch, ... Appellant/Respondent,

v.

Carolina Self Storage Centers, Inc. ..... Respondent/Appellant.

RESPONDENT'S BRIEF OF RESPONDENT/APPELLANT

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Respondent/Appellant would restate the issues on appeal as follows:

I. DID THE TRIAL COURT CLEARLY ABUSE ITS DISCRETION WITH RESPECT TO ITS EVIDENTIARY RULINGS?

II. WAS THE TRIAL COURT'S DECISION TO DENY LYNCH'S POST-TRIAL MOTIONS WHOLLY UNSUPPORTED BY THE EVIDENCE OR OTHERWISE CONTROLLED BY AN ERROR OF LAW?

III. DOES THE CUMULATIVE ERROR DOCTRINE APPLY TO THIS CASE?

STATEMENT OF THE CASE

Appellant/Respondent Susan Anne Bell Lynch ("Lynch") commenced this action against Respondent/Appellant Carolina Self Storage, Inc. ("CSS") by the filing of a Summons and Complaint on July 26, 2010. Lynch sought damages arising from an injury she sustained while an invitee upon CSS's premises on July 31, 2008. CSS filed an answer on August 23, 2010, and interposed the defenses of comparative negligence, assumption of the risk, waiver, and estoppel. It also asserted a counterclaim for breach of contract based upon language contained in the lease agreement between the parties by which Lynch had rented a self-storage unit from CSS.

In its initial interrogatory answers, CSS listed Dan Comfort as a witness and provided an address of "New Jersey." Comfort managed CSS' store location where the accident occurred, but he had left CSS' employment as of the date that the lawsuit was filed.

CSS noticed Comfort's deposition by telephone on March 1, 2012. (R. p. 30.) The deposition was to take place on March 2, 2012 at his place of employment in Burlington, Massachusetts. Lynch filed a motion for a protective order to prevent CSS

from taking the deposition. (R. p. 31.) That motion was denied and the deposition was allowed to proceed.[1] (R. p. 234, lines 3-14.) Comfort testified in his deposition that he had never lived in New Jersey. (R. p. 237, lines 2-3.) He also testified that he took some photographs of Lynch's bandaged foot after the alleged injury and that Jay Wallace, one of CSS's principals, told him to "get rid of" those pictures. (R. p. 270, line 9 – p. 271, line 17.) Rather than do that, Comfort put the photographs in a drawer at the office of CSS's store where the accident occurred. (R. p. 271, lines 23-24.) The pictures were never located after the litigation commenced and were never produced in discovery. (R. p. 376, line 24 – p. 382, line 10.)

The case was called to trial on March 5, 2012. During *voir dire*, the trial court posed the following questions to the jury venire:

> (1) "Is there any member of the jury panel related by blood, connected by marriage or have [sic] a close personal or social relationship with any of the attorneys involved in this case?" (R. p. 51, lines 4-7.)
>
> (2) "Does any member of the jury panel have any type of business relationship . . . with the law firms [involved in the case]? (R. p. 53, lines 11-15.)
>
> (3) "Is there any member of the jury panel that knows of any reason whatsoever why they should not sit on a jury in this case with particular emphasis being placed on your ability to be fair and impartial to both the plaintiff and the defense?" (R. p. 57, lines 18-22.)

During the trial, Lynch attempted to introduce into evidence two of CSS's answers to Lynch's interrogatories. (R. p. 246, line 13 – p. 247, line 19.) These answers concerned CSS's representations regarding the location of witness Dan Comfort and a list of photographs in CSS's possession, which did not include the photographs Comfort testified that he took. CSS objected on the grounds of Rules 401 and 403, *SCRE*. That

[1] No written order was ever issued announcing the court's decision on this motion.

objection was sustained. (R. p. 248, lines 2-10.) Dan Comfort's deposition was read to the jury, although his testimony as to whether CSS knew how to contact him and whether he had ever lived in New Jersey were ruled out of evidence. (R. p. 235, lines 6-14.) At the conclusion of the trial, the court gave the jury a charge on spoliation of evidence. (R. p. 548, lines 2-8.)

Additionally, Lynch sought to introduce evidence that CSS served Lynch with an eviction notice on the same day that she brought her expert witness to inspect the premises.[2] (R. p. 70, line 10 – p. 71, line 18.) CSS again objected on the basis of Rules 401 and 403, *SCRE*. (R. p. 71, line 20 – p. 72, line 24.) The trial court initially withheld its ruling on the objection (R. p. 73, lines 15-21) and later sustained the objection, finding such evidence irrelevant to the issue of CSS's alleged negligence. (R. p. 213, line 24 – p. 214, line 5.)

The case was submitted to the jury, which returned a verdict for Lynch that was reduced by fifty percent (50%) in light of the jury's comparative negligence determination. Lynch moved for a new trial *nisi additur*, a new trial absolute, and/or a post-trial evidentiary hearing regarding alleged juror misconduct. CSS moved for judgment notwithstanding the verdict. The Court denied these motions by order filed May 18, 2012.

Lynch appealed from the verdict and from the order denying her post-trial motions on May 26, 2012.

[2] The eviction had no effect upon Lynch's expert's inspection of the premises.

ARGUMENTS

I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WITH RESPECT TO ITS EVIDENTIARY RULINGS.

A. CSS's interrogatory answers and portions of Dan Comfort's deposition were properly excluded from evidence pursuant to Rules 401 and 403, SCRE.

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law the trial court's ruling will not be disturbed on appeal." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007) (*quoting Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005)). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Jamison* at 268, 644 S.E.2d at 765 (*citing Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005)). Moreover, "[t]o warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling *and the resulting prejudice*, i.e., there is a *reasonable probability* the jury's verdict was influenced by the wrongfully admitted or excluded evidence." *Id.* (emphasis added). Rule 33(d) of the *South Carolina Rules of Civil Procedure* provides that interrogatory answers *may* be used [at trial] *to the extent permitted by the South Carolina Rules of Evidence*. Rule 33(d), *SCRCP* (emphasis added). Although interrogatory answers may be introduced as evidence, a court is not required to admit them where an evidentiary rule bars their admission.

Rule 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, *SCRE.*

Evidence that is not relevant to a claim or defense in an action is inadmissible.

In the present case, one of CSS's interrogatory answers and the excluded portions of Dan Comfort's testimony were not relevant under Rule 401 because they had no tendency to make any fact of consequence more or less probable. They only pertained to Comfort's location after the litigation commenced. To the extent that CSS' negligent or even intentional misstatement of its understanding of Comfort's whereabouts in its discovery responses had some bearing upon CSS's credibility, the evidence became largely immaterial once CSS noticed Comfort's deposition.[3] The trial court therefore properly weighed the excluded evidence's probative value against its potential for causing unfair prejudice to CSS under Rule 403, *SCRE*. In the same vein, Lynch cannot carry her burden of showing prejudice, as Comfort's testimony was preserved for trial irrespective of the erroneous interrogatory response.

Lynch also sought to introduce CSS's interrogatory answer regarding the existence of any photographs in CSS's possession as further proof that it did not have, or had refused to produce, the photographs taken by Dan Comfort of Lynch's bandaged foot. The exclusion of this evidence was likewise not prejudicial to her case. The jury heard that: (1) CSS did not contest Lynch's allegations as to the manner of injury and the fact that she sustained an injury upon CSS's premises (R. p. 599, lines 1-12); (2) Comfort took photographs of Lynch's bandaged foot (R. p. 155, lines 7-10; p. 264, lines 1-5); (3) CSS's principal, Jay Wallace, instructed Comfort to "get rid of" those photographs[4] (R. p. 271, lines 12-20); and (4) Glenda Painter, Comfort's successor at the Florence store, could not find the photographs he took (R. p. 377, lines 6-16). The jury also received a

[3] As Lynch's counsel pointed out to the trial judge, the testimony was helpful to Lynch's case.
[4] Wallace denied giving any such intruction to Comfort. (R. p. 423, lines 5-7.)

spoliation charge. (R. p. 548, lines 2-8.)

In the end, the jury returned a verdict in Lynch's favor, although that verdict did not include any amount of punitive damages. Lynch is hard-pressed to show that the verdict would have been any different if the discovery responses and excluded portions of Comfort's testimony had been admitted. This Court has long held that in circumstances of lost or destroyed evidence, the Court should instruct the jury that it may reasonably infer that such evidence would have been harmful to the party that failed to preserve it. *Welsh v. Gibbons*, 211 S.C. 516, 46 S.E.2d 147 (1948) (*citing Wingate v. Postal Telegraph & Cable Co.*, 204 S.C. 520, 30 S.E.2d 307 (1944). Lynch received that very instruction here. There was no prejudice, even to Lynch's punitive damage claim, as she was able to make great use of the missing photographs and Comfort's testimony about the instructions he received from Wallace in the course of her closing argument. (R. p. 598, line 20 – p. 599, line 20.)

This Court's opinion in *Camlin v. Bi-Lo, Inc., Store No. 2*, 311 S.C. 197, 428 S.E.2d 6 (Ct. App. 1993), which Lynch offers as support for her position, is distinguishable. In *Camlin*, the defendant initially denied in its interrogatory answer that it had any knowledge of any person who may have taken a picture of the accident scene. *Id.* at 199, 428 S.E.2d at 7. The plaintiff later discovered that the defendant's store manager did take a picture of the scene on the day of the accident. *Id.* At trial, the defendant relied on the picture of which it had previously denied knowledge as substantive proof that the plaintiff was contributorily negligent. *Id.* The plaintiff was thereafter allowed to introduce the defendant's interrogatory answer as substantive evidence to attack the photo's authenticity. *Id.*

In *Camlin*, the authenticity of the photograph that was introduced by the defendant was clearly at issue, and the defendant's interrogatory answer was directly relevant to attacking it. *Id.* at 200, 428 S.E.2d at 7. Consequently, the trial court rightly found that the plaintiff could introduce the interrogatory answer. *Id.* By contrast, in the case at bar, the two interrogatories Lynch sought to introduce related to the location of a witness who was deposed before trial and the existence of photographs depicting her injuries, which CSS admitted were taken but that it no longer had in its possession. (R. pp. p. 245, line 19 – p. 246, line 11.) CSS did not take any contrary positions at trial to which its interrogatory answers and the excluded portions of Comfort's deposition would have been relevant for credibility purposes.

Finally, failure to make or cooperate in discovery is an issue properly brought before the trial court. *See* Rule 37, *SCRCP.* "The imposition of sanctions is generally entrusted to the sound discretion of the trial judge." *Barnette v. Adams Bros. Logging, Inc.*, 355 S.C. 588, 594, 586 S.E.2d 572, 575 (2003) (*citing Halverson v. Yawn*, 328 S.C. 618, 493 S.E.2d 883 (Ct. App. 1997)). "A trial judge's exercise of his discretionary powers with respect to sanctions imposed in discovery matters will not be disturbed on appeal absent a clear abuse of discretion." *Id.* "The burden is on the party appealing from the order to demonstrate that the trial court abused its discretion." The trial court noted that it was within its discretion to admit the interrogatory answers as a sanction against CSS for failing to supplement its discovery responses. *See* Rules 26 and 33, *SCRCP.* (R. p. 235, lines 6-10.) However, it correctly determined that discovery issues are not "an issue to inflame the jury about or attempt in punitive issues for the jury to make a decision on. If [the parties are] not complying with discovery, that's an issue for

[the Court] to handle." (*Id.* at 10-12.)

For these reasons, the trial court's exclusion of CSS's interrogatory answers regarding the location of Dan Comfort and list of photographs in its possession, along with the portions of Comfort's deposition testimony that related to his location, was a proper exercise of his discretion. Even if the exclusion was erroneous, Lynch has offered no evidence of prejudice or a basis from which to conclude that there is a reasonable probability that the jury's verdict would have been different had the trial court ruled in her favor. The trial court's rulings should therefore be affirmed.

B. The trial court properly excluded documentation of Lynch's eviction.

The trial court excluded several documents from evidence, including a Lease Termination Letter (R. p. 710), Intent to Vacate Notice (R. p. 711), Message re: Expert Witness (R. p. 798), and Unit Vacating Checklist (R. p. 799) (collectively the "Lease Termination Documents"), on the grounds of Rule 401 and 403, *SCRE.* These documents were properly excluded from evidence because they were not relevant to establishing CSS's alleged negligence. Rather, they related to transactions between the parties more than a year after Lynch's accident. Moreover, any probative value of the documents was substantially outweighed by the danger of unfair prejudice to CSS as well as the potential to confuse the jury regarding the issues in the trial.

A trial court has broad discretion to admit or deny evidence on the grounds of relevancy. *See Jamison v. Ford Motor Co.*, 373 S.C. 248, 268, 644 S.E.2d 755, 765 (Ct. App. 2007). A trial court's ruling admitting or excluding evidence is subject to an abuse of discretion standard. *Id.* "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." *Id.* (*citing Conner v.*

City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005)). In this case, the trial court properly exercised its discretion in excluding the Lease Termination Documents from evidence. Even if the ruling was erroneous, it should not be reversed because Lynch cannot show that she was prejudiced.

Lynch argues that she should have been allowed to introduce the Lease Termination Documents because of their purported relevance to punitive damages. (R. p. 70, line 18 – p. 71, line 18.) Lynch submits that CSS wrongfully terminated her in retaliation for bringing an expert to the premises for an inspection pursuant to Rule 34, *SCRCP*. (*Id.*) Even if this were the case, she fails to show some nexus between CSS's action and the question of whether its conduct on the day of the accident was in some way reckless, wanton or willful. No such nexus exists.

CSS's decision to evict Lynch from her storage unit did not prevent her expert from entering upon the premises to conduct tests. In fact, it had no impact upon the course of discovery whatsoever. If anything, it merely foreclosed the possibility that Lynch could enter the premises without CSS's knowledge or unaccompanied by CSS's representatives.[5] This effect is not germane to Plaintiff's negligence cause of action.[6]

Even if the Lease Termination Documents were somehow relevant to the case, that relevance was significantly outweighed by the documents' potential to mislead and confuse the jury with regard to issues in the case. In fact, it can hardly be said that they had any probative value, but the jury could have been easily inflamed by this evidence, leading to an improper adjustment of the damages award.

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[5] This had occurred on at least one occasion prior to the expert's inspection, when Lynch and her counsel filmed the door at issue in the case without CSS' knowledge. (R. p. 72, lines 3-9.)

[6] The trial court granted summary judgment as to CSS's counterclaim for breach of contract, to which this evidence might have related. (R. p. 112, line 22 – p. 116, line 6; p. 116, line 22 – p. 117, line 13.)

Unquestionably, a landowner has the right to exclude other individuals or entities from its property. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980) ("It is true that one of the essential sticks in the bundle of property rights is the right to exclude others"); *South Carolina Elec. and Gas Co. v. Hix*, 306 S.C. 173, 410 S.E.2d 582 (Ct. App. 1991) ("At common law, owner in peaceable possession of real property has [a] right to exclude all others from his property . . . ."). CSS's exercise of a legally-recognized property right cannot form the basis for Lynch's request for punitive damages, especially where there was no resulting prejudice to Lynch.

The trial court did not err or abuse its discretion in excluding the Lease Termination Documents from evidence. Its ruling should be affirmed.

II. THE DENIAL OF LYNCH'S POST-TRIAL MOTIONS WAS CORRECT.

A. The denial of Lynch's motion for new trial *nisi additur* was an appropriate exercise of the trial court's discretion.

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial *nisi*." *Waring v. Johnson*, 341 S.C. 248, 256, 533 S.E.2d 906, 910 (Ct. App. 2000) (*citing Bailey v. Peacock*, 318 S.C. 13, 455 S.E. 2d 690 (1995)). However, the court must have "compelling reasons" in order "to invade the jury's province" with respect to awarding damages to an aggrieved party. *Id.* A trial court's order granting or denying a new trial *nisi* will not be reversed absent an abuse of discretion, defined as "findings . . . wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Id.* (*citing Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996)). "The granting of new trials upon the ground of inadequacy of damages occurs less frequently than the granting of new trials upon the ground of excessive damages, probably because detection of inadequacy

of damages is not as easy as is detection of excessiveness." *Waring*, 341 S.C. at 258, 533 S.E.2d at 911; 58 Am. Jur. 2d *New Trial* § 403 (1989).

Because the jury's verdict in this case coincided with the amount of medical expenses Lynch claimed as a consequence of her injury, two of this Court's prior opinions are particularly instructive. In *Waring*, this Court affirmed the trial court's grant of a new trial *nisi additur* where the jury awarded "exactly the amount of [the plaintiff's] medical expenses, to the penny." 341 S.C. at 260, 533 S.E.2d at 912. However, in *Todd v. Joyner*, 385 S.C. 509, 518, 685 S.E.2d 613, 618 (Ct. App. 2008), this Court affirmed the trial court's denial of a new trial *nisi additur* on the same facts. In both *Waring* and *Todd* the trial courts dealt with the issue of whether to award a new trial *nisi additur* where the jury awarded the aggrieved party the exact amount of its claimed medical expenses; however, the courts came to opposite conclusions based on the facts in each record. In both cases, this Court instructed: "The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." *Waring* at 257, 533 S.E.2d at 911; *Todd* at 517, 685 S.E.2d at 618. Ultimately, this Court refused to reverse either trial courts' decision, giving "great deference . . . to the trial judge." *Waring* at 257, 533 S.E.2d at 911; *Todd* at 517, 685 S.E.2d at 618.

A trial judge may deny a motion for new trial *nisi additur* where the record "supports the amount that the jury did award, irrespective of the manner in which it may have calculated its award." *Todd* at 517-18, 685 S.E.2d at 618 (*citing Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997)[7]). In this case, the trial court did not

[7] *Citing Craven v. Cunningham*, 292 S.C. 441, 357 S.E.2d 23 (1987) (trial court's decision not to grant a new trial *nisi* will not be disturbed unless the amount of a verdict is either so grossly excessive or

abuse its discretion in denying Lynch's motion based on the underlying facts in the record. In *Waring*, the defendant did not contest whether the plaintiff's medical expenses were occasioned by the accident that was the subject of the lawsuit. 533 S.E.2d at 912-13. However, in *Todd*, as in the present case, the defendant challenged the causal connection between the accident and the claimed damages. This Court cited this factor as justifying the jury's verdict in *Todd*. *See Todd* at 518, 685 S.E.2d at 618. In the present case, one of CSS's primary defenses was that Lynch would not have incurred much of her medical treatment in the absence of her failure to follow the advice of her physicians. (R. p. 207, line 15 – p. 208, line 1; p. 208, line 13 – p. 209, line 12; p. 209, line 18 – p. 210, line 15; p. 412, line 1 – p. 413, line 5.)

It is well-recognized in this state that "the jury [is] simply not required to believe [all of the] evidence" presented at trial. *Steele v. Dillard*, 327 S.C. at 344, 486 S.E.2d at 280 (*citing Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) (uncontradicted testimony is not equivalent to undisputed testimony, as "[t]here remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation")). While the question of whether Lynch actually sustained the injuries and underwent the treatment that she claimed was not disputed at trial, the causal connection between some of her injuries and treatment and the accident was hotly contested. (R. p. 207, line 15 – p. 208, line 1; p. 208, line 13 – p. 209, line 12; p. 209, line 18 – p. 210, line 15; p. 412, lines 1-5; p. 604, line 24 – p. 607, line 14.)

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inadequate that it must be deemed the result of the jury's disregard of the relevant facts and the trial court's instructions); *Easler v. Hejaz Temple*, 285 S.C. 348, 329 S.E.2d 753 (1985) (denial of a motion for a new trial *nisi* is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion).

Considering the entire record, the trial court correctly exercised its discretion in refusing to interfere with the jury's verdict. The award was supported by the evidence. Accordingly, the trial court's order denying Lynch's Motion for New Trial *Nisi Additur* should be affirmed.

B. Lynch's motion for a new trial absolute, or, alternatively, for a hearing to inquire into the extent of juror misconduct, had no competent evidentiary basis.

"As a general rule, juror testimony may not be the basis for impeaching a jury verdict." *State v. Hunter*, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). Lynch correctly asserts that Rule 606(b) of the *South Carolina Rules of Evidence* prescribes the limited circumstances in which juror testimony will be deemed competent. However, she has failed to carry her burden of showing that the jury's verdict was tainted by improper influence and/or bias and has likewise failed to show that the verdict resulted from the alleged misconduct. The trial court's order denying Lynch's Post-Trial Motion for New Trial Absolute should be affirmed.

A court should not delve into juror deliberations except in unusual circumstances which jeopardize the parties' right to a fair trial. To date, South Carolina has recognized two "unusual circumstances" that permit juror testimony to be considered competent. In *Hunter*, the South Carolina Supreme Court held that allegations of racial prejudice by members of a jury involve principles of "fundamental fairness," so that juror testimony as to such matters was considered competent. 320 S.C. at 88, 463 S.E.2d at 316. In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), the Court held that a second exception to the rule regarding incompetency of juror testimony arises in the event of premature jury deliberations. In this case, there were no allegations of racial prejudice, other than Juror

Cole's gratuitous reference to the race of three jurors who disagreed with her own view of the evidence. Moreover, Lynch has not alleged premature deliberations. Because neither of the recognized unusual circumstances exist that would justify deeming Juror Cole's affidavit competent evidence, Lynch's motion has no evidentiary basis.[8]

South Carolina common law is replete with examples of juror misconduct that do not implicate due process concerns. *See e.g., State v. Zeigler*, 364 S.C. 95, 610 S.E.2d 859 (Ct. App. 2005) (affirming trial court's decision not to receive sworn juror testimony where defendants alleged jury improperly considered the defendants' decision not to take the stand). In *State v. Franklin*, 341 S.C. 555, 534 S.E.2d 719 (Ct. App. 2000), this Court held that a juror's testimony that she was treated harshly by the other jurors during deliberations did not implicate due process concerns. The Court commented:

> [W]e emphasize that the exception to the general rule against review of internal jury deliberations carved out in *Hunter* is a narrow one, limited by our supreme court to those few situations which implicate due process raising a question of fundamental fairness. A jury verdict which is based upon racial discrimination fits within this definition. But the integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made.
>
> The nature of the jury process can be intimidating to those who dislike confrontation and debate. It is all the more difficult in a criminal case, where jurors are most likely to feel the weight of their decision. In the setting of a confined deliberation room, it is understandable that some jurors become very sensitive to the outward manifestations of anger or animosity exhibited by other jurors who do not share the same point of view. Needless to say, not every juror is well versed in the art of gentle persuasion.

Id. at 562, 534 S.E.2d at 720.

The South Carolina Supreme Court has been steadfast in upholding the rule that

[8] CSS recognizes that Nicholas Lewis' affidavit was competent evidence, but as explained below, standing alone it is not evidence of any misconduct.

juror affidavits which offer nothing more than general assertions and speculation as to the effect of juror remarks on the jury's deliberation are not competent evidence. *See Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008). In *Schumpert*, the Court advised trial courts to "exercis[e] a degree of caution before entertaining such evidence in an attack on a jury's verdict." *Id.* at 69, 661 S.E.2d at 372.

The trial court properly excluded Juror Cole's affidavit, deeming it inadmissible under Rule 606(b), *SCRE*, and properly denied Lynch's Motion for New Trial Absolute to the extent that it relied on Juror Cole's incompetent affidavit. The affidavit did not give rise to allegations of external misconduct; rather, the affidavit raised the issue of internal juror misconduct. *Compare State v. Galbreath*, 359 S.C. 398, 597 S.E.2d 845 (Ct. App. 2004) (holding information supplied by juror during deliberations based on juror's personal experience is not an external influence on the jury). The allegations made in Juror Cole's affidavit did not fall within the narrow exceptions to the rule of juror incompetency, rendering the motion bereft of evidentiary support.

C. Had the motion for new trial absolute been based upon competent evidence, the trial court would have nonetheless been compelled to deny it because Lynch failed to show prejudice.

Even if Juror Cole's affidavit was deemed competent under Rule 606(b), *SCRE*, the trial court still would have been constrained to deny Lynch's motion for new trial absolute. "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 and Church Wardens of*

Church of Holy Cross v. Orkin Exterminating Company, Inc., 384 S.C. 441, 447, 682 S.E.2d 489, 493 (2009) (*citing* C.J.S. *New Trial* § 54 (1998)). In the present case, Lynch failed to show that any misconduct prejudiced the jury's deliberations. Accordingly, the trial court should be affirmed.

Lynch argues that the jury's deliberations were tainted by one juror's dislike for Lynch and her counsel. She bases this argument on Juror Cole's assertion that another juror said "she could not stand Kevin Barth and Ms. Sue Lynch was getting nothing." (R. p. 43.) Lynch attempted to substantiate Juror Cole's affidavit by way of Nicholas W. Lewis' affidavit, in which Mr. Lewis averred that Lynch's counsel's law firm had previously represented one juror's ex-husband. (R. p. 44.) Lynch urged the trial court, and now urges this Court, to read the affidavits together and assume that the same juror that expressed dislike for Lynch's counsel was the very juror whose ex-husband had been represented by counsel's firm in a domestic relations proceeding. Lynch asks the Court to assume too much. Neither of the affidavits provides the Court with enough facts to give rise to a reasonable inference of either misconduct or resulting prejudice.

Specifically, Juror Cole's affidavit fails to provide the name of the juror with the alleged bias or prejudice and gives no reasons for the juror's dislike of Lynch or her counsel. Lewis' affidavit fails to give details of the domestic litigation or how that might have given rise to the alleged prejudice. It does not indicate how long ago the representation occurred, the result of the litigation, or anything else about the case. Together, these affidavits do not provide sufficient evidence of juror misconduct or resulting prejudice. The unnamed juror described by Juror Cole could have developed

her dislike of Lynch and her counsel based solely upon what she saw and heard at trial. Having such a reaction is not misconduct under any circumstances.

Lynch also asserts that the juror identified by Mr. Lewis committed misconduct by failing to disclose her prior dealings with Lynch's counsel's firm, irrespective of whether she harbored a bias against him. A trial court's ruling as to allegations that a juror gave misleading or incomplete answers during *voir dire* will be affirmed absent a prejudicial abuse of discretion. *State v. Galbreath*, 359 S.C. at 402, 597 S.E.2d at 847. South Carolina courts have developed a two-part test to determine whether a juror's failure to disclose a potential bias warrants granting a new trial. *See State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001); *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375 (2004). First, the court must determine if the juror concealed information during *voir dire*. If so, the court must then determine whether the concealed information would have been a material factor in the use of a litigant's peremptory strikes. *Sparkman* at 496, 596 S.E.2d at 377.

> With regard to the initial determination of whether a juror's concealment is intentional, the South Carolina Supreme Court has held: [I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Woods, 550 S.E.2d at 284. "[W]hether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." *Id.*

For example, in *Galbreath*, 359 S.C. at 403, 597 S.E.2d at 847, this Court held that a juror's failure to reveal a relationship with the victim of a crime that was the

subject of the trial was unintentional because the juror responded to the *voir dire* questions truthfully. The trial court asked if jurors were close personal friends or business associates of the potential witnesses, and the information supplied by the appellant revealed, at most, a remote connection between the juror and the victim's family. *Id.* at 404, 597 S.E.2d at 848.

On the other hand, *State v. Miller,* 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012), a case cited by Lynch, is factually distinguishable from this case. In *Miller*, a juror failed to disclose in a criminal trial that she had been a witness for the same solicitor's office in a previous case. *Id.* This Court determined that a juror's history of testifying for one of the parties had a tendency to make the juror biased for or against the parties in the subsequent case. The Court noted that the purpose of the relevant *voir dire* question "was to identify potential jurors who may be biased for or against . . . prosecutors, defense attorneys, or law enforcement officials." *Id* at 51, 727 S.E.2d at 34.

A review of the *voir dire* proceeding in this case reveals no question posed to the jury venire that should have elicited a response concerning a potential juror's participation in domestic litigation where her ex-spouse was represented by Lynch's counsel's firm at some point in the past. Unlike the *Miller* case, in which a juror failed to respond to a *voir dire* question directly implicating her situation, in this case, the juror had no such opportunity.

As the *voir dire* transcript shows, the trial court asked: "Is there any member of the jury panel *related* by blood, connected by marriage or have [sic] a close personal or social relationship with any of the attorneys involved in this case[?]" (R. p. 51, lines 4-7 (emphasis added).) The court additionally asked whether "any member of the jury panel

ha[d] any type of business relationship . . . with the law firms" involved in the case. (R. p. 53, lines 10-15.) Neither of these questions sought the information set forth in Lewis' affidavit. *Cf. State v. Guillebeaux*, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004) and *Smith v. State*, 375 S.C. 507, 654 S.E.2d 523 (2007) (juror's failure to disclose alleged relationship was not intentional where question that would have elicited information concerning relationship with witness was not asked). Even though other jurors may have responded to these questions by revealing their involvement in litigation with counsels' firms, the juror at issue could have reasonably interpreted the questions as not relating to her situation. Thus, the trial court's inquiry properly concluded, as there can be no inference of bias from an innocent failure to disclose information. *State v. Woods*, 345 S.C. at 589, 550 S.E.2d at 285.

Moreover, as in *Galbreath*, the trial court in this case asked whether "any member of the jury panel . . . knows of any reason whatsoever why they should not sit on a jury in this case with particular emphasis being placed on your ability to be fair and impartial to both the plaintiff and the defense?" (R.. p. 57, lines 18-22.) No juror responded. (*Id.* at line 23.) In *Galbreath*, this Court noted that a juror's "decision not to respond to this question suggests that she felt she could be an impartial and fair juror." *Id.* at 404, 597 S.E.2d at 848. Likewise, the juror in this case with alleged prejudice against Lynch and Lynch's counsel may have felt that her previous experience with Lynch's counsel's law firm, however tenuous, would have no effect upon her ability to be fair to both sides of the case.

Lynch also argues that she was prejudiced by one juror's comments during deliberations to the effect that Lynch did not need money because she "had a large bank

account and did not need the money." This testimony clearly goes to the heart of Rule 606, *SCRE*, which expressly prohibits the introduction of juror testimony regarding both the content and effect of statements occurring during the jury's deliberations. *See Shumpert v. State*, 378 S.C. at 67, 661 S.E.2d at 371. Testimony concerning Lynch's perceived need for money does not implicate fundamental fairness. *Cf. Schumpert* (finding juror allegations not serious enough where affidavit speculated as to what may have confused other jurors or influenced their votes without providing any specific factual support).

Finally, as the trial court properly concluded, Lynch has failed to carry her substantial burden of showing that the alleged juror misconduct prejudiced Lynch with respect to the ultimate jury determination. Reading Juror Cole's affidavit broadly in the light most favorable to Lynch, it appears that the juror who expressed dislike for Lynch's counsel was staunchly opposed to rendering a verdict in Lynch's favor for any amount. However, the verdict Lynch received would indicate that any bias held by this unnamed juror was overborne during the deliberations. *Cf. State v. Grovenstein*, 335 S.C. 347, 352, 517 S.E.2d 216, 218 (1999) (holding juror misconduct does not entitle a party to a new trial unless such misconduct affects the verdict). Lynch has therefore failed to prove prejudice resulting from the alleged juror misconduct and the trial court's decision denying Lynch's Motion for New Trial Absolute should be affirmed.

D. No post-trial evidentiary hearing was warranted.

The trial court properly denied Lynch's alternative request to conduct an evidentiary hearing to determine whether the jury's deliberations were tainted by misconduct and/or bias toward Lynch and her counsel. Rule 606(b), *SCRE*, provides the

general rule that jury verdicts will not be disrupted absent evidence of "extraneous prejudicial information . . . improperly brought to the jury's attention or whether any outside influence . . . improperly brought to bear upon any juror."

"[T]he integrity of the jury system is jeopardized any time a court finds it necessary to intrude into the internal deliberation process. Such an inquiry should not be lightly made." *State v. Franklin*, 341 S.C. 555, 562, 534 S.E.2d 716, 720 (Ct. App. 2000). "The trial court has broad discretion in assessing allegations of juror misconduct, and should declare a mistrial only when absolutely necessary." *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Company, Inc.*, 384 S.C. 441, 447, 682 S.E.2d 489, 447 (2009). Reiterating this position, the South Carolina Supreme Court cited *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) for the following public policy:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might vindicate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct . . . [and] the result would be to make what was intended to be a private deliberation the constant subject of public investigation . . .. [T]he argument in favor of receiving such evidence is not only very strong, but unanswerable—when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For, while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most pernicious arts and tampering with jurors. The practice would be replete with dangerous consequences. It would lead to the grossest fraud and abuse and no verdict would be safe.

Schumpert, 378 S.C. 62, 69-70, 661 S.E.2d 369, 373 (2008).

The cases cited by Lynch are distinguishable from the facts here, because they involve outside influences affecting the jury's deliberation. *See State v. Elgin*, 398 S.C.

39, 726 S.E.2d 231 (Ct. App. 2012) (defendant introduced evidence that one juror spoke to her mother about the trial proceedings while the case was pending and juror's mother told her that defendant was not guilty but was being framed for the victim's murder); *State v. Bantan*, 387 S.C. 412, 692 S.E.2d 201 (Ct. App. 2010) (defendant submitted evidence that juror recounted comments made by outsider that defendants were being "targeted by the police"); *Vestry v. Orkin Exterminating Co., Inc.*, 373 S.C. 200, 644 S.E.2d 735 (Ct. App. 2007), *rev'd* 384 S.C. 441, 682 S.E.2d 489 (2009) (plaintiff introduced evidence that juror communicated with at least three outsiders about the case after being instructed not to discuss the case). In all three of these cases, the trial court considered alleged influences upon the jury from outside sources—the very situation that Rule 606(b), *SCRE*, carves out of its juror incompetency rule. Here, Lynch has submitted no evidence that jurors spoke with others about the case or that any outside influence was improperly introduced by a juror to the jury as a whole.

It was Lynch's burden to come forward with competent evidence of juror misconduct and resulting prejudice. She failed to do so, and the trial court had no obligation to haul the jurors back to court to be questioned on unsubstantiated allegations. The trial court correctly noted that "[t]his practice would indeed be 'replete with dangerous consequences . . .'" (R. p. 14.) For these reasons, the trial court's denial of Lynch's post-trial motions should be affirmed.

III. THE CUMULATIVE ERROR DOCTRINE DOES NOT APPLY.

The cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial. *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999) (*citing*

Tennant v. Marion Health Care Foundation, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The cumulative effect of the errors must affect the ultimate outcome of the trial. *Id.* CSS notes that this doctrine is typically applied in the criminal context as a safety valve for harmless error analysis. *See Harris v. State*, 970 So. 2d 151 (Miss. 2007). In *Tennant*, cited by the Supreme Court in adopting the doctrine in South Carolina, the West Virginia Supreme Court indicated that the doctrine should only be used "sparingly," and only if there are some errors in the record. 459 S.E.2d at 395.

In order to prevail on her cumulative error analysis, Lynch "must demonstrate more than error in order to qualify for reversal . . . . Instead, the errors must adversely affect [her] right to a fair trial." *Johnson* at 93, 512 S.E.2d at 803. There are no errors in this record that prejudiced Lynch. The trial court carefully exercised the discretion accorded to it under the law, and Lynch received a favorable verdict, although perhaps not as fulsome as she would have preferred. *Cf. State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995) (fourteen instances of trial judge interrupting defense counsel, making unsolicited comments, interjecting his opinion and arbitrarily limiting cross-examination deemed sufficient to apply cumulative error doctrine as basis for grant of new trial). The cumulative error doctrine simply has no application here.

CONCLUSION

For the reasons set forth above, CSS respectfully requests that this Court affirm the trial court's denial of Lynch's motions.

Respectfully submitted,

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June 13, 2013.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2010-CP-21-2170

Susan Anne Bell Lynch, ...Appellant-Respondent,

v.

Carolina Self Storage Centers, Inc.,.....Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Brief of Respondent/Appellant, Reply Brief of Respondent/Appellant, and Respondent's Brief of Respondent/Appellant comply with Rule 211(b) of the *South Carolina Appellate Court Rules*.

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PROOF OF SERVICE

I certify that I have served the Appellant's Brief of Respondent/Appellant, Reply Brief of Respondent/Appellant, and Respondent's Brief of Respondent/Appellant on Appellant/Respondent, Susan Anne Bell Lynch, by depositing a copy of each document in the United States Mail, postage prepaid, on June 13, 2013, addressed to her attorney of record, Kevin M. Barth, Esquire, Ballenger, Barth, Hoefer & Lewis, LLP, P.O. Box 107, Florence, SC 29503.

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