THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
In the Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24-01236
Appellate Case No.: 2012-213600

Jennifer Harmon Scott .... Appellant,

vs.

Allen L. Fortner and Jason C. Griffin .... Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE COURT CORRECTLY FIND APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT REGARDING LIABILITY WHERE RESPONDENTS ADMITTED TO CAUSING A LADDER TO FALL AND SOME TESTIMONY INDICATED APPELLANT SHOWED SIGNS OF INJURY AFTER THE INCIDENT?

II. DID THE COURT CORRECTLY FIND APPELLANT WAS NOT ENTITLED TO A DIRECTED VERDICT AS TO RESPONDENTS' COMPARATIVE FAULT DEFENSE?

III. DID THE COURT PROPERLY DENY APPELLANT'S POST TRIAL MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL ABSOLUTE AND NEW TRIAL PURSUANT TO THE THIRTEENTH JUROR DOCTRINE WHERE THE JURY FOUND (A) APPELLANT DID NOT MEET HER BURDEN OF PROVING RESPONDENTS WERE NEGLIGENT, AND (B) APPELLANT DID NOT MEET HER BURDEN OF PROVING REPONDENTS' NEGLIGENCE PROXIMATELY CAUSED APPELLANT TO SUFFER INJURY?

STATEMENT OF THE CASE

On December 13, 2011, Appellant filed a Second Amended Summons and Complaint against both Respondents. (R. pp. 38-44) (2nd Am. Compl.). In the Second Amended Complaint, Appellant alleges that while conducting a repair at a house Appellant rented from Respondent Fortner, Respondents were negligent in causing a ladder to fall on Appellant. (Id.) (Id.). In their Answer to the Second Amended Complaint dated February 15, 2012, Respondents denied any negligence and denied causing Appellant's alleged injuries. Further, Respondents asserted a defense of comparative negligence. (R. pp. 45-50) (Ans. to 2nd Am. Compl.).

The trial in this case took place on October 3rd and 4th, 2012. At the close of Respondents' case, Appellant made a motion for directed verdict on Respondents' defense of comparative negligence and a motion for directed verdict on the issue of liability alleging there was some evidence of duty, a breach of that duty, causation and some injury. (R. p. 293, line 22 – p. 299, line 11) (Tr. 219:22 – 225:11). The Honorable Frank R. Addy, Jr., denied Appellant's motion for directed verdict on the issue of comparative negligence because he found there was some evidence from which a jury might reasonably conclude Appellant contributed to the ladder falling. (R. p. 296, line 16 – p. 299, line 11) (Tr. 222:16 – 225:11). The trial judge also denied the motion for directed verdict on liability and allowed the issues of negligence, proximate cause, and damages to be decided by the jury. (R. p. 293, line 22 – p. 299, line 11) (Tr. 219:22 – 225:11).

On October 4, 2012, at 4:05 p.m. the jury began their deliberations (R. p. 323, lines 15-17) (Tr. 249:15-17). At approximately 4:25 p.m., the jury submitted a written

question stating "If we answered no to number one, are we done?" (R. p. 323, line 18 – p. 325, line 6; R. p. 447) (Tr. 249:18 – 251:6; Court's Ex. 4). The first question on the verdict form asked, "Did Plaintiff meet her burden of proving that Defendants were negligent and that the Defendants' negligence proximately caused her injuries?" (R. pp. 448-449) (Judgment/Verdict Form). At 4:27 p.m., the trial judge called the jury back to the courtroom and answered that their deliberations would be concluded if they found Appellant failed to meet her burden of proof that Respondents were negligent and that their negligence proximately caused her injuries. (R. p. 325, line 7 – p. 326, line 18) (Tr. 251:7 – 252:18). The trial judge also specifically told the jury that because the hour was late, they could break for the evening and return the following day to continue deliberations, but that the length of their deliberations was within their control. (Id.) (Id.). At 4:46 p.m., the jury returned a verdict for the defense. (R. p. 326, line 21 – p. 330, line 7; R. pp. 448-449) (Tr. 252:21 – 256:7; Judgment/Verdict Form).

The court granted Appellant's request for ten (10) days to submit any post-trial motions. (R. p. 330, line 8 – p. 331, line 6) (Tr. 256:8 – 257:6). On October 15, 2012, Appellant submitted post-trial motions for judgment notwithstanding the verdict, new trial absolute, and a new trial under the thirteenth juror doctrine. (R. pp. 51-60) (Post-Trial Mot.). Respondents filed a brief in opposition on October 23, 2012. (R. pp. 61-65) (Mem. in Opp'n to Post-Trial Mot.).

On November 21, 2012, the trial court issued a written order denying Appellant's post-trial motions. (R. pp. 13-19) (Order Den. Post-Trial Mot.). The trial court concluded the question of liability was properly submitted to the jury because there was some evidence where the jury could infer the Respondents were not negligent and instead acted

reasonably and with due care. (R. p. 17) (Id. p. 5). Further, the trial court found there was some evidence that the incident with the ladder was not the proximate cause of Appellant's claimed injuries and that proximate cause was a proper issue for the jury to consider. (R. pp. 17-18) (Id. p. 5-6). Last, the trial court stated there was some evidence of comparative negligence in that Appellant placed the ladder against the wall and that the position of the ladder contributed to it falling. (R. p. 18) (Id. p. 6). The trial court denied the motion for a new trial under the thirteenth juror doctrine because it was not convinced the jury's verdict was unsupported by the evidence presented. (R. pp. 18-19) (Id. p. 6-7). The court specifically cited conflicting evidence that relied primarily on a determination of the credibility of witnesses, making the trial court "hesitant to set aside a jury's verdict absent more compelling circumstances." (R. p. 19) (Order Den. Post-Trial Mot. p. 7). On December 7, 2012, Appellant filed a Notice of Appeal. (R. pp. 66-74) (Notice of Appeal).

STATEMENT OF THE FACTS

Sometime before January 8, 2009, Appellant requested that her landlord, Respondent Fortner, repair a hot water heater at the house Appellant rented from him at 107 Alice Avenue in Ninety-Six, South Carolina. (R. p. 100, lines 12-22; p. 108, line 23 – p. 109, line 1; p. 110, lines 17-22; p. 137, lines, 20-22; p. 139, line 25 – p. 140, line 1) (Tr. 26:12-22; 34:23-35:1; 36:17-22; 63:20-22; 65:25-66:1). Respondent Fortner handled most of the routine maintenance on the house he owned and rented to Appellant. (R. p. 100, lines 17-19; p. 108, lines 13-15) (Tr. 26:17-19; 34:13-15). On this particular date, respondent Fortner asked his friend and employee Respondent Griffin to assist in

repairing the hot water heater. (R. p. 100, lines 20-24; p. 111, lines 4-8) (Tr. 26:20-24; 37:4-8).

The house consisted of two (2) bedrooms, one (1) bathroom, a living room, kitchen, and small laundry room/utility room addition on the back. (R. p. 109, lines 8-16) (Tr. 35:8-16). In the laundry room/utility room, Appellant had positioned a ladder upright against the wall so that it blocked the circuit breaker panel. (R. p. 99, lines 16-22; p. 119, lines 16-19; p. 138, lines 18-22) (Tr. 25:16-22; 45:16-19; 64:18-22). Appellant had placed the ladder in the house approximately two weeks to a month prior. (R. p. 142, line 25 – p. 143, line 4; p. 165, lines 2-14) (Tr. 68:25-69:4; 91:2-14). Importantly, Respondents had not brought the ladder into the house, it was not required for the repair of the hot water heater, and it was already present in the house when Respondents arrived. (R. p. 113, lines 13-22; p. 127, line 18 – p. 128, line 1) (Tr. 39:13-22; 53:18-54:1). In fact, Respondents had to work around the ladder to do the repair, as it was necessary to access the circuit breaker to turn off the electricity to the hot water heater while it was under repair. (R. p. 129, lines 3-13) (Tr. 55:3-13).

Appellant was also in the laundry room/utility room at the same time Respondent Griffin accessed the circuit breaker to turn the power back on once the repair was complete. (R. p. 102, lines 5-10; p. 112, lines 11-13; p. 126, line 25 – p. 127, line 2; p. 129, lines 3-23) (Tr. 28:5-10; 38:11-13; 52:25-53:2; 55:3-23). Respondent Griffin bumped the ladder while reaching between the ladder and the wall to flip the breaker switch, and the plastic top of the ladder struck Appellant in her arm and face. (R. p. 102, lines 5-24; p. 119, lines 20-24; p. 121, line 23 – p. 122, line 1; p. 128, line 24 – p. 129, line 6; p. 130, lines 17-23; p. 144, line 17 – p. 145, line 2; p. 171, line 23 – p. 172, line 1)

(Tr. 28:5-24; 45:20-24; 47:23-48:1; 54:24–55:6; 56:17-23; 70:17-71:2; 97:23-98:1). Respondent Griffin also testified that he caught the ladder at about the same time it impacted Plaintiff. (R. p. 122, lines 2-6; p. 130, lines 2-12) (Tr. 48:2-6; 56:2-12).

STANDARD OF REVIEW

"In an action at law on appeal of a case tried by a jury, this court may only correct errors of law. The factual findings of the jury will not be disturbed unless no evidence reasonably supports the jury's findings." Watson v. Ford Motor Co. TRW, Inc., 389 S.C. 434, 444, 699 S.E.2d 169, 174 (2010) (citing Townes Associates, Ltd. V. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)).

"In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence." Hurd v. Williamsburg County, 353 S.C. 596, 609, 579 S.E.2d 136, 143 (Ct. App. 2003). "This Court can only reverse the trial court when there is no evidence to support the ruling below." Id. "[I]f the evidence as a whole is susceptible of more than one reasonable inference, the case must be submitted to the jury." Id. at 609; 579 S.E.2d at 142-143. Last, "[w]hen reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010).

Similarly, "[i]n reviewing a motion for judgment notwithstanding the verdict, the trial court must view the evidence and its inferences in the light most favorable to the non-moving party." Sorin Equipment Co., Inc. v. The Firm, Inc., 323 S.C. 359, 365, 474 S.E.2d 819, 823 (Ct. App. 1996). "The jury's verdict must be upheld if there is *any*

evidence to sustain the factual findings implicit in the verdict." Id. (emphasis added). "The trial court must deny a motion for directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt." RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P., 399 S.C. 322, 332, 732 S.E.2d 166, 171 (2012). "Moreover, 'a motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.'" Id.

"A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715,723 (Ct. App. 1996). "The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Id. at 405, 477 S.E.2d at 723. In deciding whether to assess error to a court's denial of a motion for new trial, the appellate court again "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Id.

"Under the 'thirteenth juror' doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict." Id. at 402, 477 S.E.2d at 722. "A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of the law." Id. at 403, 477 S.E.2d at 722.

LAW/ANALYSIS

I. The Court correctly denied Appellant's directed verdict motion on liability because there was evidence in the record where the jury could reasonably infer both that Respondents were not negligent and the Respondents' conduct was not the proximate cause of the alleged injuries.

"The elements for a cause of action for the tort of negligence are: (1) a duty owed to the plaintiff by the defendant, (2) a breach of that duty by the defendant, and (3) damages proximately resulting from the breach of duty." Hubbard v. Taylor, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (Ct. App. 2000). "The question of negligence is a mixed question of law and fact." Burnett v. Family Kingdom, Inc., 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). First, the court must resolve, as a matter of law, whether the law recognizes a particular duty." Id. "If the court determines there is no duty, the defendant is entitled to a judgment as a matter of law." Id. "However, if a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred." Id. There is evidence in the record that supports a reasonable inference that the Respondents did not breach a duty and there was no negligence.

"Negligence is the failure to use due care," or "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The record contains sufficient evidence that the Respondents acted with due care and with reasonableness, which is enough to allow the jury to decide the question of whether Respondents breached a duty.[1] Respondents had been working in and around the ladder for thirty to

[1] On Page 7 of Appellant's Initial Brief, Appellant takes the trial judge's statement during trial that, "I do find… that [Appellant] has demonstrated competent evidence that [Respondents] acted negligently" out of context. The trial judge made this statement in context of denying Respondents' Motion for Directed Verdict, properly ruling that the jury should decide all the issues in this case.

fifty minutes and had accessed the circuit breaker once before, working around the ladder that had been placed by the Appellant. (R. p. 112, lines 4-10; p. 117, line 25 – p. 118, line 5; p. 119, lines 8-10; p. 126, lines 21-24) (Tr. 38:4-10; 43:25-44:5; 45:8-10; 52:21-24). It was reasonable for Respondent Griffin to reach behind the ladder when the ladder's steps blocked the circuit panel. (R. p. 121, lines 18-22) (Tr. 47:18-22). Respondent Griffin testified that he flipped the breaker back on, pulled his hand from behind the ladder, and when he realized the ladder began to fall he caught the ladder as soon as it "got to" Appellant. (R. p. 122, lines 2-6; p. 130, lines 2-14) (Tr. 48:2-6; 56:2-14). The fact that Griffin merely "bumped" the ladder creates an inference that the real cause of its falling was its precarious position rather any act or omission by the Respondents. (R. p. 102, lines 22-24; p. 128, line 24 – p. 129, line 6) (Tr. 28:22-24; 54:24-55:6). Last, Appellant cannot establish negligence as a matter of law simply on the theory that the very fact of an injury indicates a failure to exercise due care. See Snow v. City of Columbia, 305 S.C. 544, 554, 409 S.E.2d 797, 803 (Ct. App. 1991) (holding South Carolina does not recognize *res ipsa loquitur*).

Second, there is evidence in the record that supports an inference that Respondents' conduct was not the proximate cause of Appellant's injuries. "Ordinarily, the question of proximate cause is one of fact for the jury." Bailey v. Segars, 346 S.C. 359, 367, 550 S.E.2d 910, 914 (Ct. App. 2001). "The trial court's sole function regarding the issue is to determine whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." Id. "Only in *rare or exceptional cases* may the issue of proximate cause be decided as a matter of law." Id. (emphasis added). This case is not one of those rare or exceptional cases because there is clearly more than

one inference as to whether the Respondents' conduct was the proximate cause of Appellant's injuries. "If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury." Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 147-48, 352 S.E.2d 488, 493 (Ct. App. 1986).

First, there was evidence that any contact with Appellant's face or nose was minor. The evidence in the record shows the ladder contacted Appellant's arm before it hit her face (R. p. 144, line 17 – p. 145, line 2; p. 171, line 23 – p. 172, line 1) (Tr. 70:17-71:2; 97:23-98:1). Respondent Griffin testified that he actually caught the ladder as it hit Appellant. (R. p. 122, lines 2-6; p. 130, lines 2-12) (Tr. 48:2-6; 56:2-12). Respondent Fortner said Appellant had a "small scratch right on the bridge of her nose." (R. p. 115, lines 9-10) (Tr. 41:9-10). Respondent Griffin testified that there was a "little scratch across the top of [Appellant's] nose" and "a little nick" (R. p. 134, lines 7-13) (Tr. 60:7-13). Appellant admitted she was able to stop the bleeding with a band-aid (R. p. 146, lines 5-7; p. 173, lines 9-20) (Tr. 72:5-7; 99:9-20).

Despite evidence of only a minor impact of the ladder to Appellant's nose, Appellant claimed the ladder caused multiple severe injuries, including facial pain (R. p. 145, lines 16-17; p. 148, lines 10-12; p. 149, lines 8-9; p. 149, lines 19-22; p. 150, lines 20-23; p. 151, lines 1-3; p. 155, lines 15-22) (Tr. 71:16-17; 74:10-12; 75:8-9; 75:19-22; 76:20-23; 77:1-3; 81:15-22), confusion (R. p. 146, lines 19-24) (Tr. 72:19-24), swelling in mouth (R. p. 146, lines 19-24) (Tr. 72:19-24), headaches (R. p. 149, lines 6-7; p. 149, lines 19-24; p. 149, line 25 – p. 150, line 1; p. 151, lines 1-6; p. 152, lines 10-14; p. 155, line 15 – p. 156, line 1; p. 271, lines 5-22) (Tr. 75:6-7; 75:19-24; 75:25-76:1; 77:1-6;

78:10-14; 81:15-82:1; 197:5-22), neuralgia (R. p. 150, lines 5-15) (Tr. 76:5-15), migraine headaches (R. p. 153, lines 15-19; pp. 276-279) (Tr. 79:15-19; 202-205), memory loss (R. p. 357, lines 1-5; p. 358, lines 5-13) (Court's Ex. 1 (Fuller tr.) 7:1-5; 8:5-13; Court's Ex. 2 (Fuller video), permanent neuralgia (R. p. 155, lines 15-20) (Tr. 81:15-20), permanent nerve damage (R. p. 155, lines 15-20) (Tr. 81:15-20), post-concussion syndrome (R. p. 187, lines 17-23) (Tr. 113:17-23) and scarring (R. p. 148, lines 1-4) (Tr. 74:1-4). Further, Appellant claimed Seventeen Thousand Three Hundred Forty Five and 76/100 [$17,345.76] Dollars in medical bills related to those injuries. (R. p. 154, lines 7-16; p. 155, lines 13-14) (Tr. 80:7-16; 81:13-14). The disconnect between a minor mechanism of injury and significant medical damages at least provides some inference and basis for the jury to question whether Respondents were in fact the proximate cause of those injuries.

In Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1992), the evidence showed a "slight" collision between two vehicles, testimony of severe injuries (which was uncontradicted), and bills for treatment totaling about $14,000.00. See Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1992). Even with uncontradicted testimony about injuries, this Court noted questions about the probability of the testimony and the credibility of the witness and found that "the jury had the right to find that she was not injured, and we do not have the right to second-guess the jury." Id. at 198, 410 S.E.2d at 596. Similarly, in denying Appellant's post-trial motions, the trial judge said testimony conflicted and credibility of witnesses was in question. (R. p. 19) (Order, p. 7). As in Black v. Hodge, our case was properly given to the jury.

The trial court properly decided that there was evidence in the record that the Appellant's claimed injuries were not caused by Respondents but instead were either pre-

existing or resulted from some other independent cause. First, there was evidence presented that Appellant previously suffered from headaches with visual disturbances (R. p. 372, lines 1—12; p. 377, lines 13-25) (Court's Ex. 1 (Fuller Tr.) 22:1-12, 27:13-25; Court's Ex. 2 (Fuller video)).[2] Further, Appellant admitted a history of chronic sinusitis with associated headaches (R. p. 168, lines 11-18) (Tr. 94:11-18). Last, Appellant acknowledged a previous severe concussion (R. p. 174, line 13 – p. 175, line 4; p. 374, line 19 – p. 375, line 12) (Tr. 100:13–101:4; Court's Ex. 1 (Fuller Tr.) 24:19-25:12; Court's Ex. 2 (Fuller video)).

There was evidence in the record that the objective medical tests at the emergency room were inconsistent with the plaintiff's subjective complaints of pain and other problems. At the emergency room (the day after the ladder incident), Appellant had three CT Scans (head, cervical spine, and face) (R. p. 175, line 13-20; pp. 347-348) (Tr. 101:13-20; Defendants Exs. 6 & 7). All these scans were normal or unremarkable (R. p. 175, lines 13-20; p. 380, line 3 – p. 381, line 10; p. 385, lines 6-17; p. 426, lines 12-21) (Tr. 101:13-20; Court's Ex. 1 (Fuller Tr.) 30:3-31:10, 35:6-17; Court's Ex. 2 (Fuller video); Court's Ex. 3 (Ergle video); Ergle Tr. 18:12-21). Moreover, a MRI of Appellant's head on June 30, 2009, was unremarkable. (R. p. 381, line 20 – p. 382, line 3) (Court's Ex. 1 (Fuller Tr.) 31:20-32:3; Court's Ex. 2 (Fuller video)). This provides evidence or an inference that the injuries complained of were caused by some event or condition other

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[2] Video depositions of two of Appellant's treating physicians were played for the jury. The video deposition of Dr. Sean D. Fuller was played for the jury, and the video was marked as Court's Exhibit 2. (R. p. 268, lines 1-3; p. 289, lines 6-16) (Tr. 194:1-3; 215:6-16). The trial transcript does not include the testimony, but the transcript of Dr. Fuller's testimony was marked as Court's Exhibit 1.(R. p. 230, line 19 – p. 231, line 2) (Tr. 156:19-157:2). The video deposition of Dr. John Ergle was played for the jury, but the testimony was not transcribed in the trial transcript. (R. p. 288, line 19 – p. 289, line 3) (Tr. 214:19-215:3). The transcript of Dr. Ergle's video deposition was not made a court's exhibit.

than a trauma incident the day prior, casting doubt on the veracity of Appellant's subjective complaints.

Additionally, there was testimony that some of Appellant's alleged damages could not have been caused by trauma at all. Testimony from one of the treating physicians, Dr. John Ergle, said migraine headaches were not caused by trauma. (R. p. 432, line 10 – p. 433, line 3) (Court's Ex. 3 (Ergle video); Ergle Tr. 24:10-25:3). Moreover, evidence showed that Appellant suffered from chronic sinusitis both before and after the ladder incident which is a condition that can cause headaches and inflammation (R. p. 388, lines 16-18; p. 168, lines 11-18; p. 216, lines 1-12; p. 429, lines 16-19; p. 431, line 20 – p. 432, line 7) (Court's Ex. 1 (Fuller Tr.) 38:16-18; 94:11-18; 142:1-12; Court's Ex. 2 (Fuller video); Court's Ex. 3 (Ergle video); Ergle Tr. 21:16-19; 23:20-24:7). The jury heard testimony Appellant also had a history of high blood pressure, which can also cause headaches. (R. p. 371, lines 9-15; p. 388, lines 9-12) (Court's Ex. 1 (Fuller Tr.) 21:9-15; 38:9-12; Court's Ex. 2 (Fuller video)). This provided additional evidence that any headaches and facial pain were not caused by Respondents and were instead a result of unrelated medical conditions. Last, Dr. Ergle discusses diagnosing Appellant with cerebrovascular disease and hypoplasia (restrictions of arteries to brain), and he said these issues are not caused by trauma. (R. p. 427, line 8 – p. 429, line 15) (Court's Ex. 3 (Ergle video); Ergle Tr. 19:8-21:15). With evidence of these other unrelated causes for Appellant's claimed injuries, it was reasonable for the jury to infer that plaintiff's claimed injuries and damages had a cause separate from the ladder incident with Respondents.

"The *damages allegedly sustained* must be shown to have been proximately caused, i.e. causally connected, to the breach of duty in order to warrant a recovery." Horne v. Beason, 285 S.C. 518, 521, 331 S.E.2d 342, 344 (1985) (emphasis added). In fact, the Appellant never submitted medical bills related to a scratch on the nose. The "damages allegedly sustained" were much more extensive. At trial, Appellant's counsel asked her, "So based on the ladder striking you in the face is what you have testified to what injuries do you believe you have sustained [sic]?" (R. p. 155, lines 15-17) (Tr. 81:15-17). Appellant replied, "I believe that I have permanent neuralgia, a permanent nerve damage in my face and that it causes me pain" along with "debilitating" headaches. (R. p. 155, line 15 – p. 156, line 17) (Tr. 81:15-82:17). With evidence these "damages allegedly sustained" were not causally related, the trial court properly allowed the jury to decide the issue of proximate cause.

The only injury that is uncontroverted is that the Appellant suffered a scratch or laceration on her nose. Appellant now argues that because the nose scratch was clearly established, Appellant is entitled to directed verdict on liability and damages and that the trial court should have given her a damages hearing to determine the amount of damages. First, this ignores evidence for which the jury could reasonably infer that the Respondents did not breach a duty and were not negligent in the first place. Second, evidence of some kind of injury does not in itself prove causation of a host of other injuries or damages.

Appellant's reliance on Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 504 S.E.2d 347 (Ct. App. 1998) is misplaced. First, in Collins, the defendant admitted negligence in exchange for plaintiff's agreement not to seek punitive damages. See Id. at 296, 504 S.E.2d at 351. No such admission was made in our case. Second, in Collins this

Court outlined evidence clearly showing serious injuries after the defendant tractor-trailer collided with an ambulance carrying Collins, causing an obviously serious collision. The Court ruled there was only one reasonable inference that Collins was injured. Our case lacks admitted negligence and it lacks any serious mechanism of injury. Instead, our case record contains conflicting evidence of serious injury, minimum impact of a ladder, and unclear etiology of the alleged injuries. Last, and most important, in the Collins case, "there was no reasonable basis for questioning the credibility of the witnesses." Id. at 304, 504 S.E.2d at 355. In our case, there was significant challenge to Appellant's credibility.

The trial judge correctly determined credibility of witnesses to be a real issue in this case. (R. p. 19) (Order Denying Post-Trial Motions, p. 7). "Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the *credibility of the witness* has been questioned, the matter is properly left to the jury to decide." Ross v. Paddy, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) (emphasis added). Evidence in the record challenged Appellant's credibility and called into question whether Appellant suffered from the alleged injuries and damages. Shortly after the ladder incident, Appellant applied to enter the massage therapy program at Piedmont Technical College. As part of the college application, she had to complete a medical questionnaire. (R. p. 158, line 19 – p. 160, line 15; pp. 344-346) (Tr. 84:19 – 86:15; Defense Exs. 3, 4, and 5). On August 21, 2009, she listed her medical conditions as "chronic IBS", "dysfunctional thyroid", "depression", and "anxiety." (R. p. 159, lines 8-19) (Tr. 85:8-19). When asked why she neglected to list facial pain or headaches, she said, "Well, I probably should have put them there but for some reason I just didn't." (R.

p. 160, lines 16-25) (Tr. 86:16-25). Moreover, the application had a section for her treating physician at the time, Dr. Sean D. Fuller, to complete. (R. p. 161, lines 2-13) (Tr. 87:2-13). Dr. Fuller also neglected to mention facial pain, neuralgia, headaches, or post-concussion syndrome. (R. p. 394, line 19 – p. 396, line 21) (Court's Ex. 1 (Fuller Tr.) 44:19-46:21; Court's Ex. 2 (Fuller video)).

II. It was proper for the court to deny Appellant's Motion for Directed Verdict on Respondents' comparative negligence defense, as there was some evidence in the record that Appellant placed the ladder in a precarious position and assumed the risk by remaining nearby while Respondents worked.

The court properly denied Appellant's motion for directed verdict and allowed the defense of comparative negligence because there was some evidence in the record that could create an inference of comparative negligence. "Because the term is relative and dependent on the facts of a particular case, comparing the negligence of the parties is ordinarily a question of fact for the jury." Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "For these reasons, this Court is reticent to endorse directed verdicts in cases involving comparative negligence." Id.

First, there is testimony that Appellant placed the ladder in its position and that it had not been moved for approximately two weeks to a month (R. p. 113, lines 13-22; p. 127, line 18 – p. 128, line 1; p. 141, lines 15-17; p. 142, line 25 – p. 143, line 4; p. 165, lines 2-14) (Tr. 39:13-22; 53:18-54:1; 67:15-17; 68:25-69:4; 91:2-14). Next, there was testimony that the ladder was closed, "standing upright against the wall" and "propped up against the wall, leaning against the wall." (R. p. 105, lines 8-19) (Tr. 31:8-19). Respondent Griffin agreed that the ladder "was a little more straight up than it should have been." (R. p. 123, line 25 – p. 124, line 5) (Tr. 49:25-50:5). Appellant herself

acknowledged the ladder was leaning with the step side toward the wall. (R. p. 164, line 24, - p. 165, line 1) (Tr. 90:24-91:1). This provides the inference that the ladder's feet were not firmly placed on the floor and was up on its points. Moreover, Appellant testified the ladder was sitting in the utility room/laundry room where the floor was "bowed" and "unleveled." (R. p. 141, line 18 – p. 142, line 14) (Tr. 67:18-68:14). Appellant said she had to "wedge" the ladder "so it wouldn't slide on that unleveled floor." (R. p. 142, lines 11-14) (Tr. 68:11-14.) Solely from the testimony that the ladder was standing straight up on its points and could slide or move on an unlevel floor, the jury could reasonably infer the ladder was not as stable as it could have been had it been opened with the feet firmly planted on the floor.[3]

Last, Appellant was in the house and doing laundry in close proximity to the Respondents as they worked. (R. p. 141, lines 1-9; p. 144, lines 8-21; p. 112, lines 11-16; p. 126, line 25 – p. 127, line 2) (Tr. 67:1-9; 70:8-21; 38:11-16; 52:25-53:2). Her testimony that she could not have caused the ladder to fall because she "was nowhere near the ladder" is obviously inconsistent with the testimony that she was in the falling ladder's path. (R. p. 152, lines 8-9) (Tr. 78:8-9). Appellant clearly "freely and voluntarily exposed [herself] to a known danger which [she] understood and appreciated." Cole v. Raut, 378 S.C. 398, 404-405, 663 S.E.2d 30, 33 (2008). This provides evidence for the

[3] In her Initial Brief, Appellant appears to argue that her placement of the ladder cannot be evidence of comparative negligence because the possibility of the ladder falling was too remote. (Appellant's Initial Brief, p. 9). However, Appellant's citation in support of that contention, Snipes v. Piggly Wiggly St. Andrews, Inc., 269 S.C. 479, 238 S.E.2d 167 (1977) is misplaced. This was a case discussing whether a storeowner had a duty to protect its customers from criminal attacks from third persons. Moreover, the Piggly Wiggly case has been abrogated by Bass v. Gopal, Inc., 395 S.C. 129, 716 S.E.2d 910 (2011).

jury to reasonably infer that the Appellant assumed the risk[4] of injury when she continued to do laundry and chores in a tight space with the Respondents as they worked.

Next, even if the court did err in denying Appellant's motion for directed verdict on the issue of comparative negligence, it was a harmless error. In reviewing the jury's verdict form, the jury answered "no" to Question Number 1. (R. pp. 448-449) (Judgment/Verdict Form). In doing so, the jury did not even reach question #3 dealing with comparative negligence. Their question to the trial court during their deliberations indicates that the jury did not even address the comparative negligence question because they clearly decided that Respondents were not negligent and that they did not proximately cause Appellant's injuries. Whether or not the court erred in charging the jury on comparative negligence is harmless error, because comparative negligence was not even considered in their verdict.

III. The Court correctly denied Appellant's motions for judgment notwithstanding the verdict, new trial absolute and new trial pursuant to the thirteenth juror doctrine because there was evidence in the record where the jury could reasonably infer both that Respondents were not negligent and the Respondents' conduct was not the proximate cause of the alleged injuries.

Because the grounds for Appellant's motion for judgment notwithstanding the verdict are the same as her motion for directed verdict, Respondents reassert the reasoning above that viewing the evidence in the light most favorable to Respondents, there is some evidence to sustain the verdict, and the trial court's decision to deny the motion for JNOV should be affirmed. Likewise, the trial court's denial of Appellant's

[4] In Davenport v. Cotton Hope Plantation Horizontal Property Regime, 333 S.C. 71, 508 S.E.2d 565, the court held assumption of the risk had been subsumed by South Carolina's adoption of comparative negligence. "Secondary assumption of the risk" arises when plaintiff "knowingly encounters a risk created by the defendant's negligence" and it can involve either unreasonable *or* reasonable conduct on the part of the plaintiff. Id. at 82, 508 S.E.2d at 571.

motion for new trial absolute and new trial pursuant to the thirteenth juror doctrine was neither "wholly unsupported by the evidence" nor were the conclusions "controlled by an error of law." Boozer v. Boozer, 300 S.C. 282, 283, 387 S.E.2d 674, 675 (Ct. App. 1988) (holding "[t]he denial of a motion for a new trial absolute...is a matter within the sound discretion of the trial judge" and the appellate court has "no power to review his ruling unless it rests on a basis of fact wholly unsupported by the evidence or is controlled by an error of law").

Appellant sets forth a theory that the trial judge allowed both the issues of comparative negligence and negligence to go to the jury in the hope that the jury would find some shared responsibility with most of the responsibility lying with Respondents. (Appellant's Initial Brief, p. 12). Appellant believes that when that anticipated apportionment did not occur, the trial judge should have granted a new trial. (Id.) There is no basis in fact or in the record for this theory, and there is no evidence this was the trial judge's reasoning when he properly allowed the jury to decide this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Court affirm the decision of the trial court entering judgment in its favor on all claims.

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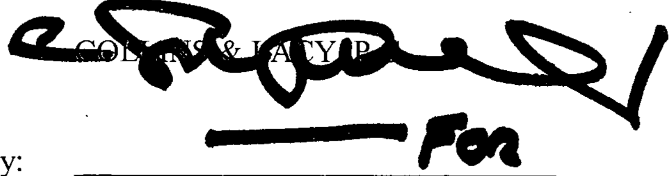
Respectfully submitted,



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FINAL BRIEF OF RESPONDENTS

Greenville, South Carolina

July 3, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
In the Court of Common Pleas

Frank R. Addy, Jr., Circuit Court Judge

Case No. 2010-CP-24-01236
Appellate Case No.: 2012-213600

Jennifer Harmon Scott .... Appellant,

vs.

Allen L. Fortner and Jason C. Griffin .... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR and the August 13, 2007 Order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Identifiers and Other Sensitive Information in the Appellate Court Filings."

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PROOF OF SERVICE

I hereby certify that I served the Final Brief of Respondents upon Appellant by placing a copy in the United States mail, postage prepaid, to counsel of record, Jon E. Newlon, McCravy, Newlon & Sturkie Law Firm, P.A., 1629 ByPass 72 NE, Greenwood, South Carolina 29649, on July 3, 2013.

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