THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case Nos. 2011-CP-04-03728, 2011-CV-04-10102020

Galina S. Mitiaglo,

Appellant,

v.

William F. Voyles,

Respondent.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

After a trial in Magistrate Court on a personal injury action, a jury found that Appellant was 50 percent at fault for the subject motor vehicle accident and failed to award damages to the Appellant. (Record at 14-15, 20). Appellant filed a timely motion for reconsideration and argued that the court should grant a new trial *nisi additur* as the jury's verdict was not based on evidence adduced at trial and was otherwise arbitrary and capricious. (Record at 31-34). This motion was denied. (Record at1-2). On July 30, 2012, Appellant referenced an appeal from Magistrate Court before the Honorable R. Lawton McIntosh. (Record at 10-19, 23-27). Appellant argued that the Circuit Court determine that the jury's determination of fault was arbitrary and capricious. (Id.) The Circuit Court affirmed the ruling of the Magistrate Court. (Record at 29-30). This appeal followed.

FACTS

The case below involves a motor vehicle accident and the ensuing personal injury

action filed by Appellant in order to recover damages caused by the Respondent. (Record at 3-6). A jury trial commenced, which elicited the following relevant facts. Appellant, a 50 year old Russian immigrant, was struck while in her vehicle in the ALDI parking lot after Respondent backed up at such a rate of speed to hit appellant without warning. (Record at 11). Respondent marked a picture at trial (with an "x"), showing to the jury uncontroverted evidence that he struck appellant in her travel lane, as he emerged from a parking space. (Record at 12, 18). The picture indicated that Respondent hit Appellant over halfway into her lane. (Record at 11-12). The evidence established that Appellant attempted to speed up in an unsuccessful attempt to avoid the Respondent. (Record at 12). Respondent's vehicle struck Appellant's when it hit her back tire as she nearly got out of the way of his vehicle. *Id.* At trial, the jury heard direct testimony that the Respondent immediately stated to the Appellant that he was sorry. *Id.* Appellant testified with the interpretation assistance of her daughter. (Record at 15). Following deliberations, the jury found that Appellant was 50 percent at fault for the collision and failed to award Appellant damages under a theory of comparative negligence. (Record at 11).

ARGUMENTS

I. WHETHER THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT THE TRIAL COURT'S RULING WAS NOT ARBITRARY AND CAPRICIOUS.

The Circuit Court erred when it failed to reverse the arbitrary and capricious ruling obtained by the jury trial before the Magistrate Court. The standard of review as to reversing the factual finding of a jury verdict is to correct errors of law. "[A] factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). In making this review, this Court will view the evidence and the inferences that can be drawn from it in the light most favorable to the prevailing party, in this case, the Respondent. *Swinton Creek Nursery v. EFC*, 334 S.C. 469, 476, 514 S.E.2d at 130 (1999); *see also Erickson v. Jones Street Publishers*, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). Thus, this Court may only reverse a jury finding if it finds that no reasonable juror could find, from the evidence adduced at trial that Appellant was at fault. Here, nothing in the evidence supports the jury's determination that the accident was Appellant's fault. As Appellant maintained her lane, Respondent failed to maintain proper control of his vehicle, and backed into her. Appellant testified that Respondent's vehicle struck her at such a rate of speed to cause $3,000.00 of property damage.1 There was uncontroverted evidence that Appellant attempted to avoid the accident and that Respondent maintained he was sorry for causing the accident. Thus, the jury's verdict assessing 50 percent fault must have been a result of prejudice, rather than evidence.

1 Property damage was not before the jury.

The Circuit Court had the discretion to reverse the arbitrary and capricious ruling of the jury; but, erred in affirming the ruling of the Magistrate Court. The only way that Appellant contributed to the accident was by being in her vehicle in the wrong place at the wrong time, as Respondent attempted to exit a parking space. Appellant argued before the Circuit Court just that and that the verdict was grossly inadequate to what occurred prior to the accident and that it had to be compassion, prejudice, or something of that nature, some other outside influence. Appellant argued before the Circuit Court that the jury did not follow the law wherein they were charged to determine whether Respondent maintained proper control of his vehicle. According to the law and the facts he did not. The Circuit evaluated the denial of the motion for a new trial below, and should have reversed the trial court's ruling on Appellant's motion after it was clear that the jury erred in its award. A trial judge may increase a jury award if it appears to the court that the verdict was arrived at using . The record did not support a 50 percent fault determination, whereas discussed above, Appellant attempted to avoid the accident wherein the Defendant did not. The jury did not hear any evidence that Appellant contributed to the accident, and as such the role of the trial court was to right this wrong. While deference must be afforded to jury verdicts which follow the law, the granting of a motion for a new rests within the discretion of the trial court. See *Evans v. Taylor Made Sandwich Co.*, 337 S.C. 95, 100, 522 S.E.2d 350, 352 (Ct. App. 1999). While a judge must offer compelling reasons for invading the jury's province by granting a motion for a

new trial, such reasons exist here. See *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). The jury's verdict must have been based on evidence outside the record, and arrived at by failing to follow the law. Thus, the Circuit Court erred when it failed to reverse the ruling of the Magistrate Court.

II. WHETHER THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT NEGLIGENCE WAS NOT PROVEN BY A PREPONDERANCE OF THE EVIDENCE.

The Circuit Court erred when it failed to reverse the Magistrate Court's denial of Appellant's motion for a new trial based on the fact that negligence on the part of the Respondent was proven by a preponderance of evidence. In South Carolina, the appellate court reviews the grant or denial of a new trial motion for an abuse of discretion and will not reverse the trial court's decision unless it is controlled by an error of law or is not supported by the evidence. *Duncan v. Hampton County Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999). The Supreme Court has also noted that when reviewing the grant or denial of a new trial, the appellate court will not weigh the conflicting evidence, but if there were no conflicts in the evidence, then the court could reverse an order granting a new trial as an error of law amounting to an abuse of discretion. *South Carolina State Highway Dep't v. Clarkson*, 267 S.C. 121, 127, 226 S.E.2d 696, 697-98 (1976). Here, there was no conflict in the evidence at trial and as such Appellant was entitled to an award of damages. The jury's 50/50 verdict was

inconsistent with the evidence of the case which showed that the Respondent caused and soley contributed to the accident. Since there was no conflict in the evidence, the trial judge's decision is not sacrosanct, and should have been overruled on appeal in the Circuit Court.

The jury was charged to determine whether Respondent failed to keep his vehicle under proper control so as to be able to slow down, stop, or turn such vehicle in order to avoid colliding with Appellant. *See* Tr. at p. 3. As clearly, Respondent failed to do so, when he backed his vehicle into the lane of Appellant's, and into her vehicle, the Circuit Court should have reversed the ruling from the Magistrate Court and granted Appellant a new trial in order to make a proper determination of liability. Liability encompasses all elements of a negligence claim, including damages proximately caused by the alleged negligence. "To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty." *Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996). Respondent breached his duty of care to the Appellant, although the jury found her partially liable. Appellant's actions were not negligent, rather a reasonable reaction to Respondent's careless operation of his vehicle.

A new trial may be granted to all or any of the parties and on all or part of the issues even in an action in which there has been a trial by jury. The Supreme Court has

endorsed the viability of the "thirteenth juror" doctrine. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). In *Folkens*, the court explained the thirteenth juror doctrine is a "vehicle by which the trial court may grant a new trial absolute when [the court] finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts." *Id.* (citing *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). It is the Appellant's contention that the apportion of any comparative negligence based on the facts at trial, was not justified and the amount of the verdict was inadequate. The lower court abused its discretion in denying Appellant's motion for a new trial to the extent that an error of law resulted. *See Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 438 (Ct. App. 1995). The collision was proximately caused by the negligence, recklessness, carelessness, willfulness and wantonness of the defendant in the operation of his automobile. The violation of a statute is negligence per se and is evidence of recklessness and willfulness. The Appellant did not contribute to the collision in the operation of her vehicle. Accordingly, there are adequate grounds for invading the province of the jury and employing the "thirteenth juror" doctrine. Thus, the Circuit Court erred when it failed to reverse the Magistrate Court's denial of Appellant's motion for a new trial.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court and grant Appellant a new trial.

Respectfully submitted,

October 30, 2013

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FORM 16
CERTIFICATE OF COUNSEL IN FINAL BRIEF

THE STATE OF SOUTH CAROLINA
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Galina S. Mitioglo, ...Appellant,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 25, 2013

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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William F. Voyles, Respondent.

PROOF OF SERVICE

I certify that I have served the Motion to Reinstate, Record on Appeal, and Final Brief in the above-referenced matter case on Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on October 31, 2013, addressed to his attorney of record, Wilson S. Sheldon, 200 E. Broad St. #250 Greenville, South Carolina 29601.

October 31, 2013

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