THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2016-CP-40-00910
Appellate Case No. 2017-001750

Darris Hassell,

Respondent,

V.

The City of Columbia,

Appellant.

FINAL BRIEF OF RESPONDENT DARRIS HASSELL

Paul L. Reeves (S.C. Bar # 4674)
REEVES AND LYLE, LLC
P.O. Box 11126
Columbia, South Carolina 29211
Phone: 803-920-0001
Fax: 803-929-0927
Email: paul@reevesandlyle.com

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES AND RULES

STATEMENT OF THE ISSUES ON APPEAL

The Respondent would restate the issues on appeal as follows:

I. Did the Trial Court act within its discretion in denying the City's motion for a new trial and sustaining the jury award of $200,075 in actual damages for false imprisonment, malicious prosecution and negligent supervision as not grossly excessive?

II. Did the Trial Court act within its discretion in denying the City's Rule 60(b) motion for a new trial based on a juror's failure to honestly respond to the court's voir dire where the City did not present probative evidence to meet its burden on all three of the requisite elements?

STATEMENT OF THE CASE

This case arises from an incident on February 29, 2014, when a City of Columbia police officer conducted a traffic stop and arrested Darris Hassell for driving under the influence. Despite the fact that Hassell blew a .0 on the datamaster test, the officer took him to a hospital for a urine sample and then to the detention center. After spending 16 hours in custody until he made bond, and then waiting eight months for a trial, the City summarily dismissed the charges against Mr. Hassell. Only at that time, did Mr. Hassell learn that the City had never had the urine sample tested and that they could not locate any video of the field sobriety test that had supposedly been recorded by the officer.

Mr. Hassell filed a complaint alleging facts to support causes of action for false imprisonment, malicious prosecution, and negligent supervision. [R.p. 37; Amended Complaint, filed March 23, 2016.] The City filed its answer and asserted a general denial. [R.p. 49; Answer to Amended Complaint, filed April 25, 2016.] The case was tried before the Honorable Casey Manning and a jury in Richland County Court of Common Pleas on May 15-18, 2017. The jury

returned verdict finding the City liable on all three cause of action and awarding $200,075 in actual damages. [R.p. 1; Verdict form.]

After the verdict was rendered, the Trial Judge granted 10 days for filing of post-trial motions. The City filed a post-trial motion (and an amended motion) for a new trial on grounds, including an argument that the damage award was grossly excessive.[1] [R.pp. 54, 61; Motions, filed May 30, 2017, May 31, 2017.] A hearing was held on June 2, 2017, and the Trial Court ruled from the bench denying the motion. [R.p. 380; 6.2.17 Tr. 15.] The Trial Court signed a Form 4 Order on June 16, 2017, which was filed on June 27, 2017. [R.p. 2.] Just three days after the Trial Court's order was filed denying the new trial motion, the City filed another post-trial motion under Rule 60(b) seeking a new trial on the ground that one of the jurors had not truthfully answered a voir dire question. [R.p. 68; Motion, filed June 30, 2017.] Without waiting for the Trial Court to rule upon the second post-trial motion, the City filed a notice of appeal on August 8, 2017. The Court of Appeals remanded the case to allow the Trial Court to rule on the Rule 60 motion. A hearing was held on June 28, 2018, after which the Trial Court issued its order filed July 27, 2018, denying the motion. [R.p. 3.] The Plaintiff then filed an amended notice of appeal on July 30, 2018.

The Plaintiff filed a motion for sanctions/attorney fees on August 16, 2018. That motion is still pending because the City moved for the Court of Appeals to stay any action on that motion until after this appeal is finally resolved.

[1] The other issues raised in the motion have not been challenged on appeal in the Statement of the Issues.

STATEMENT OF THE FACTS

Darris Hassell grew up in the Greenview community off of North Main in Columbia, South Carolina. He graduated from Keenan High School and went on to attend Wofford College where he earned a degree in Spanish. Then he pursued a graduate degree at the University of South Carolina, where he earned a Master of Arts in Spanish literature. Upon graduation he was hired by University of South Carolina -Lancaster, where he has taught since 1997. [R.pp. 161-162; Tr. 54-55.]

On the evening of February 18, 2014, Professor Hassell had been working at the Thomas Cooper Library on the USC main campus in Columbia until approximately 1:00 am on the morning of February 19, 2014. He stopped at a 24-hour fast-food restaurant on his way home, but his evening took a horrible turn when he was stopped by a Columbia City police officer after leaving the restaurant at approximately 1:30 am. He was pulled over outside the entrance to the emergency room at Palmetto Baptist after he made a left turn from Taylor Street onto Sumter Street. [R.pp. 164-165; Tr. 57-58.]

The officer claimed that Professor Hassell had made an illegal turn[2] and that he smelled of alcohol when he approached him. The officer administered roadside sobriety tests, placed the Professor under arrest, put him in handcuffs, and took him to the police station where a breathalyzer test was administered. Professor Hassell blew a .0, and the officer also testified that he did not find any alcohol in the car or about the clothing of Professor Hassell. [R.p. 217; Tr. 110.] Thus, there was no evidence to support the officer's testimony that he smelled alcohol. Nonetheless, the officer still insisted that the Professor was impaired because his eyes supposedly

[2] As to the improper turn, the officer claimed that the Professor turned from the inside/lane 1 on Taylor Street into the outside/lane 2 of Sumter street. [R.p. 214; Tr. 107.]

were glassy and twitchy and his speech was slurred. Professor Hassell was transported by the officer to Palmetto Richland Hospital in handcuffs and provided a urine sample. Then, the Professor was taken back to the police station for transport to the Alvin Glen Detention Center where he was held until approximately 6:00 pm that evening when he finally was released on bond.

Two months later in April, the Professor reported to municipal court for his hearing and requested a jury trial. Then after waiting another six months, the Professor again reported to court in October at which time the City dismissed the charges. It was only then that the Professor learned for the first time that the City had never had the urine sample tested and that the video taken of the field sobriety test had disappeared.

The officer testified that he was not aware that under department rules, it was his responsibility to deliver the sample to SLED for testing. [R.pp. 232-233; Tr. 125-26.] The officer also testified that his in-car camera was working during the field sobriety test, and that he properly tagged it for uploading, but he did not know what happened to it. [R.p. 227; Tr. 120.] While video of the officer's field tests had disappeared, there was a video recording of the administration of the datamaster test just 30 minutes after arrest, which had been maintained by SLED, that was shown to the jury in this case. [R.p. 213; Tr. 106. Exhibit P-3 (Datamaster Test Video).] The officer admitted that Professor Hassell's speech and demeanor had not changed from the scene at the time of that video which demonstrates that Professor Hassell was not slurring his speech and his motor functions were not impaired. [R.pp. 172-173; Tr. 65-66; Exhibit P-3 (Datamaster Test Video).]

More detailed facts regarding the arrest and detention, and circumstances of the damages and injuries suffered by Professor Hassell will be set forth below in the response to the City's contention that the jury award is grossly excessive.

ARGUMENT

I. Rule 59 Motion for a New Trial -- The Trial Court did not abuse its discretion in denying the City's motion for a new trial on the amount of the jury's damage award.

Standard of Review of Motion for New Trial on Excessiveness of Damages Award

The law grants a trial court discretion to grant a new trial absolute when a jury award awards "merely" excessive damages. Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct.App.1996). If the amount of the jury's verdict is "grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives," then the trial court must grant a new trial absolute. *Id.*

On challenge to the amount of an award, the jury's determination of damages is entitled to substantial deference. "In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." Vinson v. Hartley, 477 S.E.2d at 723. The grant or denial of new trial motions rests within the sound discretion of the trial judge and his decision will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. Graham v. Town of Latta, S.C., 417 S.C. 164, 182–83, 789 S.E.2d 71, 80 (Ct. App. 2016).

"One cannot easily or with any mathematical certainty place a value on the amount of a person's pain and suffering." Smalls v. S.C. Dep't of Educ., 339 S.C. 208, 218, 528 S.E.2d 682, 687 (Ct. App. 2000). "The trial court, which heard the evidence and is more familiar with the evidentiary atmosphere at trial, possesses a better-informed view of the damages than this court." Wright v. Craft, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006) (citation omitted). On review,

"great deference is given to the trial judge, especially in the area of intangible elements of damages." Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993).

Applicable Law on Damages for False Arrest and Malicious Prosecution

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." Law v. S.C. Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (quoting Parrott v. Plowden Motor Co., 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)); *see* jury charge R.p. 346, Tr. 239.

"To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." Law, 629 S.E.2d at 651; *see* jury charge R.p. 342, Tr. 235.

The City admitted that mistakes were made. [R.p. 155; Tr. 48.] The officer admitted that he broke department rules when he failed to take the urine sample to SLED for testing. [R.p. 216, 222; Tr. 109, 115.] A Deputy Chief for the City testified that the officer had violated protocol in handling the urine sample and in-car video, and that the failure to preserve the in-car video was a violation of law as well as department protocol. [R.p. 259; Tr. 152.] According to the Deputy Chief, those actions amounted to bad faith. [R.p. 259; Tr. 152/14-19.] The Deputy Chief also testified that reasonable supervision would have included knowing what happened to the urine sample and the video; however, the City never made any inquiry about either the missing video or the urine sample.[3] [R.pp. 258-260; Tr. 151-53.]

[3] There was testimony that the officer had never conducted a urine test before and he did not know what he was doing, he called his supervisor for advice at several points; but no supervisor

The jury found the City liable on all three causes of action: false arrest/imprisonment, malicious prosecution and negligent supervision. The jury's verdict on liability is not challenged on appeal. Thus, as a matter of law, the City acted without probable cause with malice in arresting Professor Hassel, and he was unlawfully restrained. At trial, the City argued that Professor Hassell got the justice he deserved when the charges were dropped and his record was expunged:

- "Charges were dismissed. Mr. Hassell's record has been expunged. That is justice, guys. That's how it works." [R.p. 320/3-4; Tr. 213/3-4.]
- "He got what he deserved with regards to the charges from that night. And -- and I believe that -- that -- that's great for Mr. Hassell." [R.p. 320/17-19; Tr. 213/17-19.]
- Mr. Hassell doesn't get any money today, but he's already gotten his record expunged, the charges were dismissed." [R.p. 326/9-11; Tr. 219/9-11.]
- "He got his charges dismissed, he got his record expunged." [R.p. 333/6-7; Tr. 226/6-7.]

However, under the law, Professor Hassell is entitled to monetary, compensatory damages for the false imprisonment and malicious prosecution. The jury was charged that recoverable damages included pecuniary loss, deprivation of liberty, loss of time, pain and suffering, humiliation, embarrassment, mental anguish, fright, nervousness, indignity, and injury to reputation. [R.pp. 342-45; Tr. 235-38.] The City took no exception to the jury charge on damages. Considering the testimony and reasonable inferences to be drawn therefrom in the light most favorable to Professor Hassell, the Trial Court who presided over the trial and heard the witnesses acted within his discretion in denying the City's motion for a new trial and sustaining the jury's award of damages.

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ever showed up at the hospital. And, no one checked up behind him. [R.pp. 220-224; Tr. 113-17.]

Factual Evidence of Intangible Damages Suffered by Plaintiff

In assessing whether the jury's verdict was improperly motivated, the Trial Court had heard the compelling evidence regarding Professor Hassell's character and reputation. The judge and jury saw a decent, upstanding citizen: a college professor who had never in all his life drank alcohol because of a personal, moral conviction. [R.pp. 163/20- 164/1; Tr. 56/20- 57/1.] The officer actually admitted that Professor Hassell was polite and respectful, and compliant and cooperative during the entire humiliating incident: He was "probably one of the most respectful people I've arrested." [R.p. 231/6-7; Tr. 124/6-7. See also R.pp. 219, 167-68, 195; Tr. 112, 60-61, 88.]

The judge and jury also heard Professor Hassell's account of the emotional pain and humiliation he suffered as a result of the wrongful arrest and prosecution. The record shows that the field tests were administered in a public area and Professor was handcuffed in view of spectators congregated near the emergency room at Palmetto Baptist. [R.p. 169/16-20; Tr. 62/16-20.] Professor Hassell testified that he was embarrassed at being arrested, and embarrassed at being handcuffed. [R.p. 175; Tr. 68.] Professor Hassell also testified that he felt helpless and embarrassed at being paraded through the Palmetto Richland hospital in handcuffs for a urine test. He also felt helpless and embarrassed at being forced to urinate with his hands cuffed and with the police officer watching. [R.p. 182; Tr. 75.] Professor Hassell testified that his reputation is important to him, and he felt that the arrest and being paraded in front of people placed him in a bad light. [R.p. 190; Tr. 83.]

When he was transported to the detention center, Professor Hassell continued to feel embarrassed, hopeless, ashamed. [R.p. 184; Tr. 77.] He was fingerprinted, placed in an overcrowded, cold and rough holding cell which made him feel disgusted. [R.pp. 184-186; Tr. 77-79.]

Professor Hassell testified that he was embarrassed, helpless and humiliated to have to make a phone call to his aunt to explain that he had been arrested, and he hated for his mother to find out. [R.p. 191; Tr. 84.] He also testified about his embarrassment from having to discuss the situation with the Academic Dean, his Division Chair, and his student assistant at USC-Lancaster. [R.p. 193; Tr. 86.] Each conversation was embarrassing, but fortunately, Professor Hassell was so respected that his co-workers did not believe that he had been driving under the influence and his employment with the University did not suffer. However, the fact that the Professor's sterling reputation stood firm does not let the City off the hook from compensating him for the false imprisonment and malicious prosecution.

The jury was charged that the Professor could recover for his loss of time. Fortunately, Professor Hassell did not lose his job, but he did miss work on February 19th while he was detained for 16 hours. The City/officer did not inform the Professor that the urine sample had not been tested and the video had been lost, so the Professor was forced to make a court appearance in April at which time he requested jury trial. [R.pp. 187-188; Tr. 80-81.] The City still did not admit the loss of the evidence and he had to return to court again in October. [R.p. 225; Tr. 118.]

On questioning by the City, Professor Hassell testified that his annual salary was $48,000 per year.[4] [R.p. 207; Tr. 100.] During closing argument, Plaintiff's counsel suggested that the jury could award Professor Hassell four, or even five, times his annual salary. The City attorney acknowledged that she did not know what would be a reasonable amount to give Professor Hassel for his false arrest: "How much does he get for that (false arrest)? What's a reasonable amount? I don't know." [R.p. 327/4-5; Tr. 220/4-5.] The City's attorney proceeded to ramble on about the

[4] Professor Hassell testified that he had to spend $75 to retrieve his car that had been towed. [R.p. 209; Tr. 102.] Which undoubtedly explains the amount of $200,075.

medical bills for the labor and delivery of her baby and about an expensive bill from a geneticist for tests on her baby who had a rare condition. She even talked about how unreasonable it was when her husband got only a $10 per diem when he played football for USC under Coach Holtz.

Apart from the inane digressions about her personal finances, the City attorney offered the jury a series of speculations about how to calculate Professor Hassell's damages abased on this annual salary. Her hypotheticals ranged from $23 per hour for the 16 hours he was in custody to $200 per hour for those 16 hours in detention, and she finally proffered that even $400 per hour was reasonable in her personal assessment. The City attorney acknowledged that Professor Hassell might be entitled to something for his trips to court -- "Now, I think that's worth something. I don't know how much that's worth. ... "I think it's probably worth something. I'll leave that for you guys to decide." [R.pp. 332/23-333/2; Tr. 225/23 - 226/2.] The City attorney expressed her opinion that Professor Hassell was not entitled to anything for the eight months that he was forced to suffer through waiting for the charges to be resolved: "Now, the time that he spent waiting for the charge to be dismissed, eight months or was it nine months that he spent waiting? I don't think he gets paid for that. That's unreasonable. That's a windfall, that's not justice: He got his charges dismissed, he got his record expunged." [R.p. 333/3-7; Tr. 226/3-7.] In the end, the City attorney told the jury: "I'm just asking you to be reasonable. Don't be the geneticists, okay?" [R.p. 334/23-24; Tr. 227/23-24.]

Discussion of the Appropriate Review of the Jury's Award

As noted above, the law recognizes that valuation of intangibles is not ascertainable from a mathematical perspective, and the law also gives wide latitude to the jury and great deference to the trial judge in an assessment of intangible damages. In the case of Fennell v. Littlejohn, 240

S.C. 189, 198, 125 S.E.2d 408, 414 (1962)[5], the Court discussed damages for humiliation, embarrassment and mental anguish (and loss of consortium) and noted that they are "incapable of accurate measurement. There is no legal yardstick by which to determine them and courts are generally reluctant to disturb an assessment of damages by the jury under such circumstances." The Court further stated: "There is no market value for injured feelings; and the value of money in comparison with the value of the state of mind of which a man may be deprived by the wrongful invasion of his rights is a matter as to which reasonable men may, and do, differ widely." Id.; see also Ritter v. Stanton, 745 N.E.2d 828, 845 (Ind. Ct. App. 2001) (mental pain is not readily susceptible to quantification; thus, the jury is given very wide latitude in determining these kinds of damages).

Judge Manning sat through the trial, observed the witnesses, and did not find that the jury's award of $200,075 was grossly excessive for the humiliating and embarrassing experience that Professor Hassell suffered through. At the post-trial hearing on June 2, 2017, the Court succinctly expressed his ruling upholding the jury's verdict:

> THE COURT: The case was tried because the issue probably goes to your heart, and I thought we had a fair jury. The jury elected a foreperson. I think they considered the facts and the law and made a decision that they were comfortable with. I don't think it was excessive. I think both sides received a fair trial, so it's my intention and I feel -- I felt then and I feel now that both sides received a fair trial with a fair jury that made a fair verdict.

Nothing in this record or the case law supports the City's attempt to convince this Court to second-guess the jury or the trial judge.

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[5] This opinion was superseded by statute (S.C. Code 15-3-150) on an unrelated issue of a cause of action for criminal conversation as stated in Russo v. Sutton, 310 S.C. 200, 204, 422 S.E.2d 750, 753 (1992).

The City offers several reported appellate decisions for comparison as evidence of the excessiveness of this verdict. Lynch v. Toys ""R" Us-Delaware, Inc., 375 S.C. 604, 654 S.E.2d 541 (Ct. App. 2007); Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008); Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 763 S.E.2d 615 (Ct. App. 2014). While the Court has noted that a comparison approach can be helpful in reviewing verdicts for excessiveness, but each case must be evaluated individually on its distinctive facts. Lucht v. Youngblood, 266 S.C. 127, 136, 221 S.E.2d 854, 858 (1976). None of the case referenced by the City offer a fair comparison to judge this jury's verdict.

First, as to the case of Lynch v. Toys ""R" Us-Delaware, Inc., the City draws a comparison to a jury award of actual damages in the amount of $50,000 on causes of action for malicious prosecution and false imprisonment. Respondent would ask the Court to take notice that the Court of Appeals opinion cited by the City was vacated when the appeal was dismissed on joint motion of the parties, 384 S.C. 511, 682 S.E.2d 824 (2009). Thus, that verdict which was not judged excessive cannot be fairly compared.

Similarly, there is no fair comparison to be made to the verdict in Solanki v. Wal-Mart Store No. 2806, because in that case there was no verdict against the defendant on false imprisonment or malicious prosecution, rather the verdict was for a negligence cause of action. Moreover, the verdict of actual damages for $50,000, was not even challenged; rather, it was the verdict of $225,000 for punitive damages that was reviewed on appeal. The Court found that there was sufficient evidence to create a jury issue on gross negligence and that the award was reasonably related to the harm suffered.

In Swicegood v. Lott, the defendant challenged the jury's award of $150,000 actual damages on a cause of action for abuse of process. However, the trial court did not consider the

amount grossly excessive and the appellate court affirmed. Ultimately, none of the cited opinions support the City's argument that this Court should override the trial judge's assessment of the reasonableness of the jury's award and reach a conclusion that the jury's verdict was grossly excessive.

The Plaintiff would offer the following cases as more comparable. In Caldwell v. K-Mart Corp., 306 S.C. 27, 32, 410 S.E.2d 21, 24 (Ct. App. 1991), a jury awarded the plaintiff $75,000 actual damages on a cause of action for false imprisonment which the Court did not find was grossly excessive based on evidence that she was detained in the store for approximately fifteen minutes on suspicion of shoplifting, but she was not searched and she was not arrested. If $75,000 for a 15-minute detention [that is a rate of $300,000 per hour] was not found to be grossly excessive, then certainly the $200,075 award for at least the 16 hours of detention should not be considered grossly excessive. The Respondent would note that the Court has stated that in making comparison of awards in older cases, recognition must be given to inflation. Lucht v. Youngblood, 221 S.E.2d at 858. So, on further contemplation, that $75,000 would be worth approximately $137,000 in 2017[6]. Using the City's hourly rate logic, based on the 15-minute detention, the Court essentially upheld a verdict that awarded $548,000 per hour. By comparison, the $200,075 could by no means be considered grossly excessive.

In Westbrook v. Hutchison, 195 S.C. 101, 10 S.E.2d 145 (1940), the defendants were found liable for false imprisonment for detaining an 11-year-old boy in their home and questioning him for approximately 1½ hours about an alleged theft, but they never took him to the sheriff or pressed any criminal charges. The jury awarded the child $3000, and in denying the new trial motion, the trial judge stated: "It is true that human liberty is difficult of admeasurement in dollars and cents,

[6] https://www.calculator.net.

but this difficulty is brought about by reason of its great value, and I cannot say that Three Thousand ($3,000.00) Dollars is excessive under the facts here..." Id. at 152. In affirming the trial judge's ruling, the Court referenced authority that still stands as good law today:

> We think the following language contained in the opinion in the case of *Currie v. Davis, Agent*, 130 S.C. 408, 126 S.E. 119, 123, is quite applicable here: "The assessment of unliquidated damages for an injury of this character cannot proceed by rule and must rest in the sound discretion of the jury, controlled by the discretionary power of the circuit judge, in the tribunal appointed by law to try the facts. There is no market value for injured feelings. The value of money in comparison with the value of the normally self–satisfied state of mind of which a man may be deprived by a wrongful invasion of his rights, a trampling upon the sensitive tentacles of his personal dignity, a public aspersion upon his manhood, or by abusive treatment of any character, is a matter as to which reasonable men may, and do, differ widely. The verdict was approved by the circuit judge as an award of compensatory damages. His conclusion cannot be held erroneous as a matter of law."

Id. at 151. Accounting for inflation, that $3000 would be worth approximately $52,000[7] in 2017, and based on a 1½ hour detention, it would amount to approximately $ 34,000 per hour. Comparison at that rate does not compel a conclusion that the $200,075 award for 16 hours of incarceration is grossly excessive as a matter of law.

Inexplicably, the City attacks the size of the verdict with a contention that there is no colorable claim for negligent supervision. [Appellant's brief, p. 13.] The City did not make a JNOV motion on this point, and the City's Statement of the Issues does not present an issue challenging the sufficiency of the evidence to support the negligent supervision cause of action. Rule 208(b)(1)(B), S.C.A.C.R. ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Buckson v. State, 423 S.C. 313, 321, 815 S.E.2d 436, 441 (2018) ("our law provides that issues must be raised in the Statement of Issues on Appeal"). However, in fact, the record shows that the City's Deputy Chief provided testimony regarding the

[7] https://www.calculator.net.

officer's violations of Department rules in the handling of the urine sample and the video, but he also testified that reasonable supervision required that the Department know what happened to those pieces of evidence but that was not accomplished. [R.pp. 260-61; Tr. 153-54.] In any event, under the two-issue rule, the findings of liability on the other two causes of action for false imprisonment and malicious prosecution would sustain the evidentiary basis for the jury's award. Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 420, 472 S.E.2d 253, 254 (1996)("when a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of action"); see also Sierra v. Skelton, 307 S.C. 217, 414 S.E.2d 169 (Ct.App.1991) (trial court's decision affirmed where jury returned a general verdict, and appellant only raised abuse of process issue, but failed to raise defamation issue).

The City also contends that the jury's verdict was improperly influenced by the Plaintiff's closing argument – "There was also a plea for the jury to amplify its verdict on the perceived need to make the City 'care,' 'pay attention,' and 'show up.'" [Appellant's brief, p. 15.] However, the City did not make any objection to the closing argument and cannot use that to collaterally attack the size of the verdict. [See R.p 315-16; Tr. 208-09.] Scott v. Porter, 340 S.C. 158, 166, 530 S.E.2d 389, 393 (Ct. App. 2000) (failed to make a contemporaneous objection to any of the alleged inflammatory comments); *compare* Toyota of Florence, Inc. v. Lynch, 314 S.C. 257, 263, 442 S.E.2d 611, 615 (1994) (new trial justified only in flagrant cases where a vicious, inflammatory argument results in clear prejudice). Urging the jury to make the City care does not rise to level of vicious or inflammatory argument to impeach the jury's damage award to gain a new trial, particularly, where the jury also was told that they could not award punitive damages. [R.p. 314; Tr. 207.]

Contrary to the City's contentions, Professor Hassell deserved more than just dismissal of the charges and expungement of his arrest records, and he presented evidence of his emotional pain, humiliation, and embarrassment as well as loss of liberty and time. Substantial deference is due the judgment of the jury who heard that evidence of the intangible damages sufficient support the award. The presiding Trial Judge who also heard the testimony was not shocked by the amount of the verdict and saw no evidence of any improper motive in the size of the verdict. Accordingly, the Trial Judge acted within his discretion in denying the City's motion for a new trial. For these reasons, the judgment on the jury verdict should be affirmed.

II. Rule 60(b) Motion for a New Trial -- The Trial Court did not abuse its discretion in denying the City's motion for a new trial on the juror's failure to honestly respond to a voir dire question.

Standard of Review of a Motion for New Trial on Disqualification of a Juror

On a motion for a new trial based upon the disqualification of a juror, the moving party must prove three elements:

> (1) the fact of disqualification;
>
> (2) the grounds for disqualification were unknown prior to verdict; and
>
> (3) the moving party was not negligent in failing to learn of the disqualification before verdict.

Long v. Norris & Assocs., Ltd., 342 S.C. 561, 570, 538 S.E.2d 5, 10 (Ct. App. 2000) (citing Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894 (1989)); *see also* Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505 (1986); Spencer v. Kirby, 234 S.C. 59, 64, 106 S.E.2d 883, 886 (1959) (same statement of three elements).

"The granting of a new trial based on a juror's failure to honestly respond to the court's voir dire remains within the sound discretion of the trial court. A circuit judge's decision to issue such

an order will not be reversed absent an abuse of discretion." Long v. Norris & Assocs., Ltd., 342 S.C. 561, 568, 538 S.E.2d 5, 9 (Ct. App. 2000) (citations omitted).

The Lack of Probative Evidence on all Three Elements

Three days after the Trial Court's order was filed denying the City's first new trial motion, the City filed another motion for a new trial on the ground of after-discovered evidence that during voir dire, the juror (who became the jury foreman) had intentionally concealed the fact of his arrest by the Columbia Police Department.

The trial transcript shows that during voir dire, the Court inquired: "Now, have you or a close family member ever been arrested by a City of Columbia police officer? Have you or a member of your family ever been arrested by the City? If so, please stand." [R.p. 127/2-5; Tr. 20/2-5.] The juror who became the jury foreman did not stand. An incident report submitted with the motion shows that the individual had been stopped for not wearing a seatbelt and arrested for driving with a suspended driver's license. [R.p. 073; Motion Ex. A.]

The City argues that the incident report establishes that the juror intentionally concealed his arrest and that evidence alone is sufficient to require a new trial. However, the Trial Court denied the motion because the City failed to establish the three requisite elements.

ONE: "The fact of disqualification" – the Trial Court found:

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

The City argues that the juror's failure to respond to the voir dire question was de facto evidence of intentional concealment which mandates a new trial, citing State v. Woods, 345 S.C. 583,550 S.E.2d 282 (2001), and Thompson v. O'Rourke, supra. However, the Respondent maintains that those opinions cannot negate the third element. The Court has repeatedly enumerated that there are THREE elements that must be proven on a motion for new trial such as presented in this case. Spencer v. Kirby; Gray v. Bryant; Thompson v. O'Rourke;) Long v. Norris & Assocs., Ltd.. The Respondent maintains that the Trial Court's finding on the first element was correct, and further submits that even if the incident report evidences a basis for disqualification, that single element is not sufficient to automatically mandate a new trial because as the Trial Court found, the City failed to present any evidence on elements two or three.

TWO: "The grounds for disqualification were unknown prior to verdict."

The City stated in its motion that the juror's arrest record was discovered subsequent to the return of the verdict in this matter, when the Defendant City tried contacting jurors for the purpose of evaluating appeal. [R.p. 069; Motion, p. 2.] However, the City did not offer any evidence to support that proposition.[8] The City's trial counsel did not sign the motion and no affidavit was submitted from her supporting that account, nor did she appear at the hearing. The unsworn proffer by an attorney that was not at trial does not meet that burden, and in the absence of any probative evidence from trial counsel, the City's motion was properly denied.

THREE: "The moving party was not negligent in failing to learn of the disqualification before verdict." Third, but perhaps most significantly, is the lack of any evidence from trial

[8] Plaintiff's counsel questioned the logic of why the City just happened to discover the criminal incident report while contacting jurors to decide about appeal options. [R.p. 398; 6/27/17 Tr. 17.]

counsel to prove that she was not negligent in failing to learn of the juror's arrest before verdict. The fact that the trial counsel did not offer any evidence – by affidavit or court appearance – was glaring and significant.

In the absence of any evidence from trial counsel, the incident report itself evidences an arrest by the City's own Police Department. That report certainly was readily accessible to the City's attorney, but more striking is the fact that the incident report is a matter of public record freely accessible to anyone on the internet.[9] [R.p. 19.]

The City argues that it was under no obligation to conduct any background check on the jurors, citing Long v. Norris & Associates. In Long, the trial court had "found due diligence did not require Defendants to incur the significant expenses related to assembling information on every jury pool member's finances and credit history." In this case, minimum diligence should have encompassed checking the public database or the City's own records. With all due respect to the Court of Appeals opinion in Long, the City cannot eschew any efforts to assess qualifications of the prospective jurors. The well-established precedent requires that the City prove that it was not negligent in failing to learn of the disqualification before verdict. If the party has no obligation to conduct any investigation of prospective jurors, then the third element is rendered meaningless.

The Respondent submits that this case is more comparable to Spencer v. Kirby, where the Court held that the movant was not entitled to a new trial because of the movant's failure to make any showing beyond the fact that the juror had not answered truthfully. The Court noted that no showing had been made as to elements two and three, namely, there was not showing that the juror's lie was unknown before the verdict or that they were not negligent in failing to make

[9] The Trial Court also questioned why the City was not aware of the arrest from the Clerk's master list prepared for every Monday of a trial docket. [R.p. 402; 6/27/17 Tr. 21.]

discovery of the disqualification before the verdict. More specifically, the information that a juror had served on the grand jury was a matter of public record which would have been evident if the attorney had "exercised ordinary care as to the qualifications of the jurors." 106 S.E.2d at 886. The *Spencer* court stated: "One will not be permitted to take his chances upon a favorable verdict and upon disappointment have the verdict set aside upon a technicality." Id. Here, the same could be said, and in addition, it could be said that the City should not be permitted to take the time to make a post-trial motion, and then scramble for yet another ground for relief from the jury's judgment when the trial court denies the new trial motion.[10]

The circumstances in this case are virtually the same in that there was no showing as to elements two or three. The City's trial attorney did not appear in person or by affidavit and there is no evidence as to when and how the information was "discovered." As the Trial Court found, the City made no effort to produce any evidence that its trial counsel did not know of the juror's arrest before the verdict. Likewise, there was no evidence presented that the City was not negligent in failing to discover the juror's arrest before the verdict. Beyond the fact that the juror had been arrested by the City's own police department, the public database could easily have provided that information.

[10] Of note, although the order was not filed in the Clerk's Office until June 27, 2017, the Trial Judge had ruled from the bench on June 2, 2017, and signed a Form 4 order on June 16, 2017.

CONCLUSION

Based on the foregoing, the Record will show that the Trial Court acted within its discretion, and this Court should affirm the denial of both new trial motions.

Respectfully submitted,

Paul L. Reeves (S.C. Bar # 4674)
Reeves and Lyle, LLC
P.O. Box 11126
Columbia, South Carolina 29211
Phone: 803-920-0001
Fax: 803-929-0927
Email: paul@reevesandlyle.com

ATTORNEY FOR PLAINTIFF/RESPONDENT

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Certification of Counsel

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

Paul L. Reeves