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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2017-001083
Case No. 2015-CP-40-07181
Opinion No. 5666 (S.C. Ct. App. filed July 17, 2019)

Ex parte: The Travelers Home and Marine Insurance CompanyAppellant,

In Re: William Gresham as Personal Representative of the Estate
of John Corey Stringfellow, Respondent,

v.

Cameron Thomas Stringfellow,Defendant.

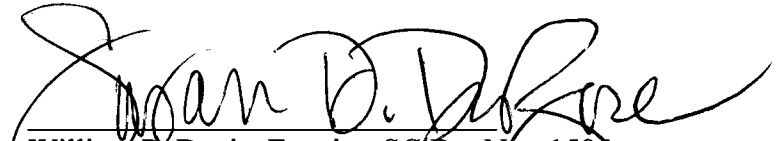
PETITION FOR REHEARING

Pursuant to Rule 221(a), *SCACR*, the above-named Appellant, The Travelers Home and Marine Insurance Company, respectfully petitions for a rehearing of the above-captioned appeal in which the Court filed its Opinion No. 5666 on July 17, 2019. This petition is based on the grounds that (1) this Court misapprehended the case law in holding that an appellate court is limited to overturning a trial judge’s grant of a new trial pursuant to the thirteenth juror doctrine to cases where the trial court’s decision “is wholly unsupported by the evidence”, (2) this Court overlooked case law regarding an appellate court’s duty to review any reasons provided by a trial judge for invoking the thirteenth juror doctrine, (3) this Court failed to address Appellant’s argument that the trial judge’s decision was based on errors of law, and (4) a review of the reasons provided by

the trial judge for invoking the thirteenth juror doctrine in the instant matter reveal that they were wholly unsupported by the evidence and controlled by errors of law.

This Petition is supported by the record in this matter and the memorandum filed contemporaneously herewith.

Respectfully Submitted this 18th day of August, 2019.



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MEMORANUM IN SUPPORT OF PETITION FOR REHEARING

Appellant The Travelers Home and Marine Insurance Company (“Appellant”) has respectfully petitioned this Honorable Court pursuant to Rule 221, SCACR for a rehearing of the above-captioned appeal in which the Court filed its Opinion No. 5666 on July 17, 2019. Appellant submits this memorandum in support of its petition.

ARGUMENT

1. THE COURT OF APPEALS ERRED IN HOLDING THAT IT WAS LIMITED TO OVERTURNING A TRIAL COURT'S GRANT OF A NEW TRIAL BASED ON THE THIRTEENTH JUROR DOCTRINE TO SITUATIONS WHERE THE TRIAL COURT'S DECISION "IS WHOLLY UNSUPPORTED BY THE EVIDENCE" AND FAILED TO ADDRESS APPELLANT'S ARGUMENT THAT THE DECISION WAS CONTROLLED BY ERRORS OF LAW

The Court of Appeals misapprehended the standard of deference accorded to a trial court's use of the thirteenth juror doctrine to grant a new trial. The Court's opinion cites Worrell v. S.C. Power Co., 186 S.C. 306, 195 S.E. 638 (1938) as requiring that it "must uphold a trial court's thirteenth juror decision unless it is 'wholly unsupported by the evidence.'" (Opinion, p. 5). The Court also relies on Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004) to describe the trial court's decision as "inviolable" where there is conflicting evidence on the contested issues in a case. (Opinion, p. 5). However, the Court overlooks the other basis for reversing a trial court's grant of a new trial under the thirteenth juror doctrine. As the Trivelas court states, "a circuit court's order granting or denying a new trial upon the facts will not be disturbed unless its decision is wholly unsupported by the evidence **or the conclusion reached was controlled by an error of law.**" Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004) (emphasis added). *See also* Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). This Court did not apply the appropriate standard of review to the trial court's grant of a new trial based on the thirteenth juror doctrine and failed to address Appellant's detailed arguments regarding the multiple errors of law upon which the trial court's decision was based. *See* App. Brief pp. 18-23 and App. Reply Brief pp.7-11. Therefore, Appellant respectfully requests a rehearing of this appeal.

2. THE COURT OF APPEALS ERRED IN FAILING TO EXAMINE THE REASONS PROVIDED BY THE TRIAL COURT FOR INVOKING THE THIRTEENTH JUROR DOCTRINE WHICH REVEAL THAT THE CONCLUSIONS OF THE TRIAL COURT ARE UNSUPPORTED BY THE EVIDENCE AND CONTROLLED BY ERRORS OF LAW

The Court of Appeals cites authority for the holding that “a judge is not required to explain the reasons for his decision” to grant a new trial pursuant to the thirteenth juror doctrine. However, the Court overlooks South Carolina case law which provides that, when a trial court does provide an explanation, it is subject to review on appeal. See Lane v. Gilbert, 383 S.C. 590, 681 S.E.2d 879 (2009) and Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008) (reviewing hearing transcript in detail when reviewing circuit judge’s grant of new trial under thirteenth juror doctrine). Although the trial judge in the instant matter was not required to provide the reasons for his ruling, he did so, and they reveal that his conclusions are wholly unsupported by the evidence and controlled by errors of law.

The trial court found that “the jury’s finding that Decedent was fifty-one percent (51%) at fault and Defendant was forty-nine percent (49%) at fault is not supported by the evidence.” (Order, R. p. 9). The trial court based this decision on the fact that Defendant “admitted he was reckless and that his recklessness caused the accident.” (Id.). The trial judge relied on Defendant’s admission of recklessness which “by definition is a higher degree of culpability and responsibility than negligence.” (Order, R. p. 9).

During the post-trial motions hearing, the trial judge stated that “no reasonable jury could reach that decision deciding that the passenger was more at fault than the driver. **And no evidence was presented that would give the jury a basis to make that decision.**” (R. p. 539, lines 21-25) (emphasis added). The trial judge concluded the hearing by granting a new trial under the thirteenth juror doctrine “based on common sense and application of the law and facts of this case”. (R. p. 541, lines 21-23). The transcript of the motions hearing and the Order

clearly reveal that the trial judge's decision to grant a new trial was based on conclusions unsupported by the evidence presented at trial and controlled by errors of law. The evidence presented and the law charged to the jury provided the reasonable basis to make their unanimous decision in this case.

A. The Trial Court's Conclusion of "No Basis" to Support the Jury's Decision is Wholly Unsupported By the Evidence

The transcript of the motions hearing reveals that the trial judge was under the mistaken belief that there was "no way that the jury could reasonably come to the conclusion they came to." (R. p. 539, lines 20-24). The trial judge's conclusion that "no evidence was presented that would give the jury a basis to make [the] decision" that a passenger was more at fault than a driver is completely unsupported by the evidence that was submitted in this case. (R. p. 539, lines 24-25).

The trial judge's holding ignores the evidence presented to the jury regarding Decedent's independent acts of negligence, including assuming the risk, and the evidence supporting imputing the Defendant's admitted recklessness to the Decedent under the joint enterprise doctrine. The trial judge denied Respondent's directed verdict motion on the issue of the Decedent's fault and assumption of the risk and noted, when discussing the verdict form, that "of course the jury can still find that the [decedent] was more than 50 – or 50 percent or more." (R. p. 393, lines 15 – 20; p. 394, lines 4-8. The trial judge also denied the Respondent's motion for a directed verdict on joint enterprise. By denying these motions, the trial court found that there was "material evidence tending to establish the issue in the mind of a reasonable juror". *See Hurd v. Williamsburg County*, 353 S.C. 596, 609, 579 S.E.2d 136, 143 (Ct. App. 2003), *aff'd* 363 S.C. 421, 611 S.E.2d 488 (2005). The jury was subsequently charged on comparative negligence (R. p. 461, line 3 – p. 463, line 11) and the law regarding joint enterprise and the requirements for imputing the negligence of a driver to an occupant of the vehicle. (R. p. 463,

line 12 – p. 465, line 2). As discussed more fully in Appellant’s brief, the evidence supporting the joint enterprise doctrine and assumption of the risk defenses, in addition to the judge’s charges on these issues, provided the jury with the basis to reasonably determine that Decedent’s overall negligence slightly exceeded Defendant’s. *See* App. Brief pp. 12-18.

In this case, the trial judge concluded that “no evidence was presented that would give the jury a basis to make [the] decision” that a passenger was more at fault than the driver in an accident. (R. p. 539, lines 20-25). The trial court failed to consider the Decedent’s cumulative negligence when examining the evidence as the thirteenth juror. The reasonable explanation for the verdict is that the jury found the joint enterprise doctrine applied, imputed the Defendant’s recklessness to the Decedent, and then added a separate allocation for the Decedent’s independent acts of negligence to reach a total percentage of negligence attributable to the Decedent that exceeded Defendant’s. *See Berberich v. Jack*, 392 S.C. 278 at 289, 709 S.E.2d 607 at 613 (2011) (stating that purpose of comparative negligence scheme is to allow jury to “evaluate **overall culpability** of each party”) (emphasis added). Since the trial court’s conclusion that no evidence was presented that provides a basis for the jury’s verdict is not supported by the record then the order granting the new trial should be reversed. *See Youmans ex rel. Elmore v. S.C. Dep’t of Transp.*, 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (reversing grant of new trial as thirteenth juror on grounds that trial court’s finding that there was no evidence to support jury’s finding regarding comparative negligence was not supported by the record).

B. The Trial Court’s Conclusion of “No Basis” to Support the Jury’s Decision was Controlled by Errors of Law

Additionally, the record also reveals that the trial court’s decision to grant a new trial based on the thirteenth juror doctrine was based on several errors of law. First, the trial court incorrectly concluded that a passenger’s negligence can never exceed the negligence of a driver. The trial judge stated at the post-trial motions hearing that he knew that a passenger could be

fifty percent comparatively negligent, but questioned whether a passenger could be fifty-one percent comparatively negligent. (R. p. 532, lines 22-23). He then found that a passenger could not be more negligent than a driver. Despite Respondent's attempts to limit this statement to the facts of this particular case, the trial judge did not make any qualifications and stated it as general proposition of law. There is no law in South Carolina that a passenger's negligence cannot exceed a driver's. In fact, South Carolina allows for the comparison of all forms and levels of negligence, including imputed and independent acts of negligence, in the comparative negligence analysis. *See Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) and App. Brief pp. 21-22.

Furthermore, the trial judge's statements and order also reveal his belief that the Defendant's admitted recklessness, "by definition a higher degree of culpability and responsibility than negligence" (Order, R., p.9), outweighed any negligence of the Decedent as a matter of law. However, South Carolina's comparative negligence system allows for the comparison of ordinary negligence to recklessness. *See Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011) (involving plaintiff who was found to have been 75% negligent despite the defendant's admitted recklessness). Noting the "broad spectrum of conduct" to be considered by a jury to "evaluate the overall culpability of each party", the South Carolina Supreme Court has specifically rejected the argument that a jury should be instructed that "heightened degrees of wrongdoing should be accorded greater weight than ordinary negligence." *Id.*, 392 S.C. at 294, 709 S.E.2d at 616. Therefore, Defendant's admission of recklessness does not prevent a jury from finding the Decedent's negligence exceeded the Defendant's under South Carolina law.

"[A]ll forms of conduct amounting to negligence in any form" are to be compared under South Carolina's comparative negligence system. *Berberich*, 392 S.C. at 293, 709 S.E.2d at 615 (stating that purpose of comparative negligence scheme is to allow jury to "evaluate overall culpability of each party"). This determination necessarily includes an analysis of a party's

independent acts of negligence in addition to any negligence imputed to the party by the acts of another. In the instant matter, the jury was presented with evidence and law to reasonably impute all of Defendant's recklessness to Decedent under the joint enterprise doctrine. The jury was also presented with evidence and law to support an additional allocation for Decedent's own negligence, which explains the slightly greater percentage of negligence attributed to the Decedent. Therefore, the trial judge's holding that Defendant's recklessness cannot outweigh Decedent's negligence as a passenger is not in line with South Carolina law and does not account for the joint enterprise and assumption of the risk defenses that were presented and charged to the jury.

The fact that the trial judge's decision was controlled by an error of law is also revealed in his statements regarding the jury's deliberations. At the post-trial motions hearing in this case and immediately before granting a new trial, the trial judge speculated regarding the quality of the jury's deliberations, stating:

[A]s to the new trial based on the 13th juror, it seems to me as if, in addition to there being no reasonable basis for which the jury could come to that conclusion basically, the jurors seemingly—or I can't speculate what they decided, **but they didn't apply the law or were confused by the law or just didn't apply it** or just decided they they didn't want to be involved on the process. And they decided they were not going to—that despite the evidence they were going to do the jury nullification, of sorts.

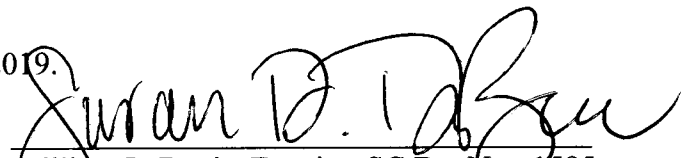
(R. p. 540, lines 3 – 13)(emphasis added). The record proves that there was a reasonable basis for the jury's verdict under South Carolina law. The jury in the instant matter was presented with evidence and instructed on law that fully supports their unanimous verdict and it should be reinstated. Additionally, granting a new trial due to suspicions regarding the quality of deliberations is improper. *See Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 670 S.E.2d 1, 10 (Ct. App. 2008) (holding it was improper for the trial court to use the

thirteenth juror doctrine to grant a new trial based upon the quality of jury deliberations and reversing order).

CONCLUSION

For the reasons set forth herein and in its Petition for Rehearing, Appellant respectfully requests that the Court of Appeals reconsider its opinion and reverse the trial court's grant of a new trial based on the thirteenth juror doctrine.

Respectfully submitted this ^{15th} day of August, 2019.



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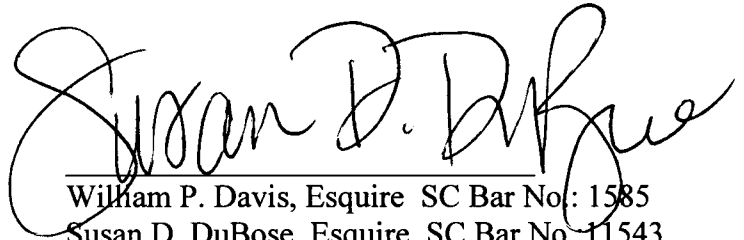
Cameron Thomas Stringfellow,Defendant.

PROOF OF SERVICE

I, Susan Drake DuBose, of Baker, Ravenel & Bender, L.L.P., Attorneys for Appellant, hereby certify that, on this 1ST day of August 2019, I have served the Appellant's Memorandum in Support of Petition for Rehearing on Respondent's counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondent's counsel at the address shown below:

James M. Griffin, Esquire
Margaret Nicole Fox, Esquire
Griffin Davis, LLC
P.O. Box 999
Columbia, SC 29202

(signature on following page)



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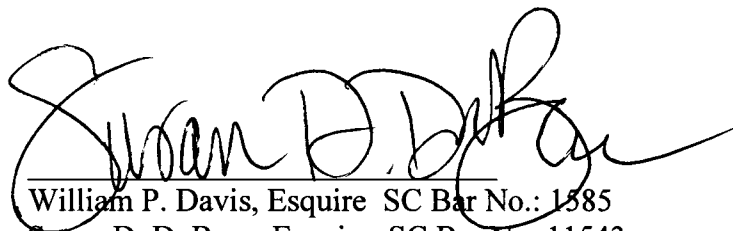
Cameron Thomas Stringfellow,Defendant.

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I, Susan Drake DuBose, of Baker, Ravenel & Bender, L.L.P., Attorneys for Appellant, hereby certify that, on this 1ST day of August 2019, I have served Appellant's Petition for Rehearing on Respondent's counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondent's counsel at the address shown below:

James M. Griffin, Esquire
Margaret Nicole Fox, Esquire
Griffin Davis, LLC
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(signature on following page)



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August 1, 2019

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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Appellant Case No.: 2017-001083
Our File No.: 7746.2121

Dear Ms. Kitchings:

Please find enclosed for filing in the above-referenced matter the following:

- Original (unbound) and six (6) copies of the Appellant The Travelers Home and Marine Insurance Company's Petition for Rehearing and original Proof of Service.
- Original (unbound) and six (6) copies of the Appellant The Travelers Home and Marine Insurance Company's Memorandum in support of Petition for Rehearing and original Proof of Service.

I have enclosed a check in the amount of \$50.00 to cover the filing fee for the Petition for Rehearing. I have also included two (2) copies of each of the above-referenced documents, which I would appreciate you clocking in and returning to me via the courier delivering same.

By copy hereof, I am serving same upon counsel for Respondent. Thank you for your help in this matter. Please contact me if you have any questions or issues.

Sincerely Yours,


Susan Drake DuBose

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SDD:wh
Enclosures

cc w/encl.: James M. Griffin, Esquire **Via U.S. Mail**
Carrie H. O'Brien, Esquire **Via U.S. Mail**