THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

---

Appellate Case No. 2018-001849
Civil Case No. 2016-CP-40-05857

---



Joshua Steven Stone, Respondent,

v.

George Hunter McMaster, Appellant.

---

# FINAL BRIEF OF APPELLANT

---

July 29, 2019

Brian Dumas, Esquire
S.C. Bar No. 1786
Brian Dumas, Attorney LLC
718 Clemson Road
Columbia, South Carolina 29229
(803) 699-4996
Attorney for Appellant

Other Counsel of Record:
D. Reese Williams, III
Yani G. Mouratev
Post Office Box 1390
Columbia, South Carolina 29202-1390
Attorneys for Respondent
(803) 404-6962

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES



## STANDARD OF REVIEW

On appeal from a case tried before a jury in an action at law, the appellate court only has the authority to correct errors of law. *Townes Assocs.*, 266 S.C. 81, 221 S.E.2d 773. Thus, the jury's factual findings will not be disturbed "unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.; see, e.g. Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011); *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E. 2d 653 (2006).

## STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN FAILING TO SPECIFY REASONS AND OR RATIONALE FOR DENIAL OF POST TRIAL MOTIONS, THUS DENYING EFFECTIVE APPELLATE REVIEW.

2. WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE GUILTY PLEA IN THE CRIMINAL PROCEEDING, THUS NOT ONLY ALLOWING IMPERMISSIBLE HEARSAY, BUT ALSO TAINTING MCMASTER'S OPPORTUNITY FOR A FAIR CIVIL TRIAL.

3. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

4. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL ABSOLUTE.

5. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL NISI REMITTITUR

## STATEMENT OF THE CASE

This is an appeal from the circuit court jury trial verdict and the denial of post-trial motions in this case. This matter was commenced by the filing of a Summons and Complaint on September 29, 2016, alleging causes of action for sexual assault, sexual battery and intentional infliction of emotional distress, requesting actual and punitive damages by jury trial. Appellant hereinafter McMaster answered and *inter alia*, denied liability as alleged, and alleged no damages. The matter proceeded to and was tried before a jury on August 27-28, 2017, with the jury rendering a verdict in the amount of $50,000 actual damages and $50,000 punitive damages on August 28, 2017, and that verdict being filed on August 29, 2017. McMaster filed his Motion for JNOV, New Trial Absolute, and New Trial Nisi Remittitur on September 6, 2017, the same being denied by the trial

court on October 5, 2017. The Notice of Appeal was filed October 15, 2017 with the trial court and on October 16, 2017 with this Court.

## STATEMENT OF FACTS

Respondent, hereinafter Stone, brought this action alleging personal injuries arising out of an incident in Columbia, South Carolina on or about May 13, 2014 claiming by the pleadings that Appellant, hereinafter McMaster, committed a sexual assault and battery on him and that those same acts constituted the intentional infliction of extreme emotional distress.

At trial, over McMaster's objection, the Stone was allowed to read the pleadings to the jury. McMaster also moved for the exclusion of McMaster's guilty plea to assault and battery third and any reference to the same in any testimony, based on *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E. 2d 224 (2008). The trial court overruled McMaster's objections. As part of Stone's case, the trial court also allowed the reading of McMaster's deposition into evidence, over McMaster's objections, but removed the transcript of that guilty plea from submission to the jury although the court allowed testimony from the deposition as to the plea and related criminal prosecution. The trial court also overruled McMaster's specific objections as to hearsay concerning the guilty plea, ruling that *Zurcher, supra*, did not apply. McMaster did not appear nor testify.

At trial Stone testified to the incident, his waiting about two (2) hours after the incident attempting to determine what had happened and smoking a cigarette, then his call to his mother, then his call to the police, and his reactions thereafter.

Stone's expert testified that Stone suffered from PTSD due to the incident and recommended treatment of once a week counseling for a six (6) month period. She also testified that some of his effects were permanent. The only other damages testimony was from Stone as to sleeplessness and anxiety, and from his mother as to his seeming to react differently in some situations. A defense witness, *inter alia*, countered the claims of a change in behavior.

The trial court originally intended to instruct the jury on sexual assault and sexual battery, however, after McMaster's objection to the same as not being causes of action under South Carolina law the trial court instructed on assault, battery and intentional infliction of emotional distress. After deliberation the jury sent a question to the court asking about Stone's attorney's fees and costs. The court instructed the jury that it could not answer the question. The jury returned a verdict for Stone in the amount of $50,000 actual damages and $50,000 punitive damages.

ARGUMENTS

McMaster would argue that from the moment the trial court allowed evidence of the criminal plea, the civil trial was tainted. Further, McMaster would argue that there was never any testimony of fear of bodily injury contemporaneous with the original incident, thus no assault, no testimony of any bodily injury at or near the time of the alleged battery, therefore no battery, and no testimony sufficient to constitute the tort of intentional infliction of extreme emotional distress, such that, but for the allowing of the objected to reading of the pleadings, which included an impermissible reference to the guilty plea and criminal matter, the introduction

over objection of certain portions of the deposition of McMaster, and the introduction over objection of the criminal prosecution, the evidence was insufficient to go to the jury or to support the verdict. Even if the evidence was sufficient to support a verdict, the damages awarded are not supported by the evidence, and a new trial should have been granted or at least a nisi remitter ordered as to the damages.

1. THE TRIAL COURT ERRED IN FAILING TO SPECIFY REASONS AND OR RATIONALE FOR DENIAL OF POST TRIAL MOTIONS, THUS DENYING EFFECTIVE APPELLATE REVIEW.

McMaster would submit as an initial matter that this Court should reverse and or vacate and remand to the trial court the denial of the post-trial motions on the grounds that the order denying the same fails to specify the grounds for the denial of the post-trial motions. In *Sorin Equipment Co. Inc., v. The Firm, Inc.*, 323 S.C. 359 at 363, 474 S.E. 2d 819 at 821-822 (Ct. App. 1996, cert. den. 1997) the trial court, in ruling on the appeal of the granting of judgment notwithstanding the verdict on fraud and the ruling granting a new trial on damages, issued an order that stated, and the Court of Appeals ruled

"The judge's order stated:

> The verdict is contrary to the weight of the evidence, is not supported by the evidence and is grossly excessive and unreasonable.

**822 It contained no factual findings nor evidentiary conclusions.

A trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence. *O'Neal v. Bowles,* 314 S.C. 525, 431 S.E.2d 555 (1993). The judge must set out the reasons for granting or denying new trial motions based on inadequacy or excessiveness of the verdict. *Cf. Pelican Bldg. Ctrs. of Horry–Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673

(1993) (compelling reasons must be given justifying invading the jury's province in this matter).

In the case now before this Court, McMaster moved before the trial court, with the trial court holding in its denial of the motions "After carefully considering McMaster's Motions for Judgment Notwithstanding the Verdict, New Trial Absolute and New Trial Nisi Remittitur, I conclude McMaster's Motions should be denied." (R. p. 3).

The remedy for such a summary dismissal of the post-trial motions without a statement as to the reasons or rationale for the decision is clear and is stated in *Doe v. Howe*, 367 S.C. 432, 626 S.E. 2d 25 (Ct. App. 2005, *cert. den.* 2007), as to a denial of reconsideration without explanation as:

Doe followed up with a post-hearing Rule 59(e) motion in which he contended, among other things, he could pursue a cause of action for breach of fiduciary duty without establishing that he would have succeeded on the underlying claim on which the legal malpractice action was based. The trial judge denied Doe's motion in a summary order without further discussion of Doe's right to maintain an action for breach of fiduciary duty.

In *Bowen v. Lee Process Systems Co.*, this court stated the following regarding the trial court's responsibility when issuing a summary judgment order:

> On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order ****33** outlining its rationale, we simply cannot perform our designated function.[25]

Considering all the relevant circumstances, we do not fault the trial judge for his summary handling of Doe's post-hearing motion. We are mindful of the demands on trial judges, especially when back-to-back scheduling of nonjury matters occurs. We also recognize that, early on in the present case, the trial judge, in a conscientious effort to prevent a potential conflict of interest from tainting his decision, instructed his law clerk not to participate in the proceedings, thereby relinquishing ***448** assistance that would normally have been available to adjudicate a difficult and emotionally driven lawsuit. Moreover, in all fairness to the trial judge, we acknowledge that, after our decision in *Bowen,* we stated in *Clark v. South Carolina Department of Public Safety* that "there is no blanket requirement that the trial court set forth a separate explanation on all of its rulings on post-trial motions."[26]

The order at issue in *Clark,* however, had been issued pursuant to post-trial motions following a

hearing on the merits. Of even greater significance is the fact that the reasoning behind the denial of the post-trial motions was discernible from the record on appeal. In contrast, we are unable to glean any "stated grounds" in this case from either the order denying reconsideration or the record on appeal as to why the trial judge rejected Doe's arguments concerning his breach of fiduciary duty claim. At this point, we can only speculate about the reason the trial judge determined Doe could not proceed on this claim. Despite a number of possible explanations[27] as to why the trial judge held as he did, we are ***449** reluctant to pass judgment on his ruling based on mere conjecture as to how he reached his decision.

****34** We therefore vacate the dismissal of the breach of fiduciary duty cause of action and remand the matter to the trial judge for an order "identifying the facts and accompanying legal analysis on which [he] relied"[28] to enable a meaningful appellate review of this issue.

McMaster submits that such a summary denial of the post-trial motions is an error of law that does not provide for adequate relief by appellate review, and as such, this matter should be reversed and or vacated and remanded to the trial court for a full setting out of reasons for the denial of the post-trial motions.

2. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE GUILTY PLEA IN THE CRIMINAL PROCEEDING, THUS NOT ONLY ALLOWING IMPERMISSIBLE HEARSAY, BUT ALSO TAINTING MCMASTER'S OPPORTUNITY FOR A FAIR CIVIL TRIAL.

The trial court, over the objection of McMaster, allowed the reading to the jury of the pleadings (R. p. 47, line 18- p. 50, line 25) This allowed the jury to hear impermissible hearsay from the onset of the trial under *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E. 2d 224 (2008). Specifically, *Zurcher* held that:

"fn 3. Only guilty pleas to "a crime punishable by death or imprisonment in excess of one year" are admissible under the hearsay exception found in SCRE 803(22), SCRE. Therefore, it appears that Zurcher's guilty plea to simple assault and battery, a misdemeanor carrying a $500 fine or 30 days imprisonment, *see* S.C.Code Ann. §§ 22–3–540, –560 (2007), was inadmissible hearsay evidence in the first instance. Because Zurcher neither objected at trial nor appealed the issue on grounds of

hearsay, this Court need not address the matter."

In this case, McMaster clearly objected on the hearsay ground stated in *Zurcher*, the Court overruled the objection, then proceeded to allow the Complaint to be read to the jury (R. pp. 6-7, R. p. 48, line11- p. 52, line 15), which contaminated the trial from the outset. Later, the trial court further compounded the error, by allowing testimony as to the guilty plea and the criminal proceedings into evidence by a reading of the deposition of McMaster into evidence (R. p. 31- p. 46, and R. p. 53, line 19 – p. 71, line 9).

McMaster was harmed by the admission into evidence that was clearly an error of law, and thus an abuse of discretion. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E. 2d 373 (2005). To warrant reversal, an error must result in prejudice to the appealing party. *State v. Commander,* 396 S.C. 254, 721 S.E.2d 413 (2011). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson,* 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001).

McMaster cannot imagine a more prejudicial situation in a civil trial than having the jury informed, not only by the reading of a pleading containing the inadmissible material, but also the reading of criminal proceedings to the jury, in a civil case, subsequent to a guilty plea that is not admissible into evidence. For these reasons, McMaster requests a reversal on the basis of the allowance into evidence of the guilty plea to the magistrate court offense.

3. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

As to the assault claim, the trial court allowed, over the objection of McMaster, Stone to read into evidence the pleadings (R. p. 48 – p. 52, line 15), thus allowing the jury to hear a claim of two torts, sexual assault and sexual battery, not recognized under S.C. civil law, and which for that reason, were later not allowed to go to the jury in that form. The trial court ultimately and too late recognized the error and attempted to correct the same when it allowed the assault and battery causes of action to go to the jury without the "sexual" adjective (R. p. 121, line 6-p. 124, line 18). Unfortunately, the damage had been done. The trial court had also further compounded the error by allowing into evidence, over the objection of McMaster portions of the criminal proceedings into evidence by the reading of the Complaint and the introduction of the deposition (R. pp. 5-12 and R. p. 107, line 17-p. 111, line 25), thus further compounding the error and confusing the jury as to the same.

The reading of the Complaint to the jury also included the guilty plea to the criminal charge that was inadmissible hearsay under *Zurcher*. But for the inadmissible conviction being allowed before the jury, there was insufficient evidence to allow the assault and the battery causes of action to go to the jury. McMaster properly moved for a dismissal on that basis, the same was denied, but for a modification of wording, and those causes of action were submitted to the jury.

As to the intentional infliction of extreme emotional distress, the evidence

submitted by Stone simply does not meet the standard by law as related in *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981).

McMaster timely filed his motion for judgment notwithstanding the verdict, which was denied by a Form 4 order without a hearing (R. pp. 1-4).

When considering a motion for judgment notwithstanding the verdict, the trial judge cannot disturb the actual findings of a jury unless a review of the record discloses no evidence which reasonably supports them. *Horry County v. Laychur*, 315 S.C., 364, 367, 434 S.E.2d 259, 261 (1993). The judge must view the evidence in the light most favorable to the nonmoving party. *Id.* at 367, 434 S.E. 2d at 261. If more than one reasonable inference exists, the jury verdict should stand. *Id.* at 367, 434 S.E. 2d at 261. Finally, an appellate court will only reverse the trial court's grant of or denial of a motion for judgment notwithstanding the verdict "when there is no evidence to support the ruling or when the ruling is governed by an error of law." *Watson v. Ford Motor Co.*, 389 S.C. 434, 455, 699 S.E. 2d 169, 180 (2010).

The evidence as to the causes of action put forth by Stone in Stone's witness's testimony was that essentially, McMaster had given Stone a pair of suspenders as his pants were drooping while at work, the pants were still drooping because the suspenders were not adjusted correctly, that McMaster then followed Stone into an area of the restaurant, claimed to be helping Stone adjust the suspenders, then jerked down the pants and while adjusting the suspenders, touched or brushed against Stone's private parts (R. p. 72, line 8- p. 75, line 9). Stone also testified that one of his supervisors walked in and witnessed the incident but walked

away (R. p. 74, line 17-18). The only other evidence as to the incident itself was the objected to and highly prejudicial introduction into evidence of the guilty plea to Assault and Battery Third Degree, a Magistrate Court offense, which was admitted over McMaster's objection as related above, and the reading of McMaster's deposition into evidence, again as related above.

Finally, the testimony of Stone himself admits that in the three written statements he gave prior to this suit being filed, he never claimed he was groped or grabbed by McMaster (R. p. 81, line 10- p. 82, line 19). He also admitted that on the night in question, he was already thinking about how much money his claim would be worth (R. p. 92, lines 8-11). This was confirmed by his then girlfriend (R. p. 114, line 19- p. 115, line 19)

Therefore, viewing the evidence in the light most favorable to Stone, there is no evidence in the record from which a reasonable juror could determine that there was an assault, battery or intentional infliction of emotional distress, but for the introduction of the deposition testimony of McMaster concerning the guilty plea to a misdemeanor, and related testimony from Stone as to the same and further no evidence supporting the damages directly related to assault, battery or intentional infliction of emotional distress. McMaster's motion for judgment notwithstanding the verdict should be granted because the record is simply void of any factual support as to all of the elements of any of the three (3) causes of action alleged, therefore this matter is an issue of law for the judge and not an issue of fact for the jury. McMaster further alleges that the only method by which the jury could have

found for Stone would have been based upon the introduction into evidence, over McMaster's objection, of extensive testimony as to the guilty plea and the related matters concerning the same. McMaster would further submit that Stone through his mother, made references to "influence" or "family" so as to be suggestive of some improper influence on the part of McMaster, but introduced no evidence of any influence being made upon any party nor witness to this action (R. p. 102, line 12- p. 105, line 9).

Based on the aforementioned reasons, McMaster requests that this Court reverse the denial of his motion for judgment notwithstanding the verdict, set aside the verdict for Stone, and grant judgment in favor of McMaster.

4. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL ABSOLUTE.

Under Rule 59 of the South Carolina Rules of Civil Procedure, the grant or denial of new-trial motions rests within the discretion of the circuit court. *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, S.E.2d 54, 56 (Ct. App. 2009). "The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E. 265, 267 (1990). The seminal case describing the thirteenth juror doctrine is *Worrell v. S.C. Power Co.*, 186 S.C. 306, 195 S.E.2d 638 (1938), which provides:

Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the

Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.

*Worrell*, 186 S.C. at 313-14, 195 S.E.2d at 641.

The jury's verdict was not only excessive, but the record is replete with evidence the jury should not have heard or considered in its verdict. This is coupled with the fact that the jury obviously ignored the charges as were presented by the Court.

**A. Assault, battery and intentional infliction of extreme emotional distress**

The court instructed the jury on assault based on Stone's allegations that McMaster committed an assault. The elements of assault are (1) conduct of McMaster which places the Stone (2) in reasonable fear of bodily harm. There was no testimony as to these elements.

Words alone do not make McMaster liable for assault unless, together with other acts or circumstances, they put Stone in reasonable apprehension of imminent harmful or offensive contact with his person. Stone must reasonably believe that an offensive or harmful contact is about to occur. He must have a reasonable apprehension. There must be just and reasonable ground for the fear. A vain or idle threat is not sufficient. The conduct must be of such nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness, so as to influence his conduct; or it must appear that the person against whom the threat is made was peculiarly susceptible to fear, and that the person making the

threat knew and took advantage of the fact that he could not stand as much as an ordinary person.

An assault may occur without a battery. This happens when the defendant acts as if he is about to commit an offensive act and he appears to have the present capacity to do the act. Assault differs from battery in that assault does not involve a touching of the victim. *See In re McGee*, 278 S.C. 506, 299 S.E.2d 334 (1983); *Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 72 S.E.2d 453 (1952)(there is a well-recognized distinction between criminal assault and civil action for assault and battery; in civil actions, intent, while pertinent and relevant, is not essential element); *City of Gaffney v. Putnam*, 197 S.C. 237, 15 S.E.2d 130 (1941); *Brooker v. Silverthorne*, 111 S.C. 553, 99 S.E. 350 (1919); *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 456 S.E.2d 429 (Ct. App. 1995); *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984); 6 Am. Jur. 2d *Assault and Battery* §§ 1, 97 (1999); 6A C.J.S. *Assault and Battery* §§ 2, 4 (1975); Michael G. Sullivan, *Elements of Civil Causes of Action* 15-19 (2000). *See also State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283 (2000)(assault is attempted battery or unlawful attempt or offer to commit violent injury upon another person, coupled with present ability to complete attempt or offer by a battery); *State v. Mims*, 286 S.C. 553, 335 S.E.2d 237 (1985); *State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. 2001).

There never was any testimony as to any fear of bodily injury, thus the evidence submitted was insufficient to the jury to make a finding of assault. Further, due to the admission over objection of the complaint, and the evidence of the guilty plea to the misdemeanor charge of assault and battery third degree, McMaster would submit that the jury confused the standards and elements between the criminal matter and the civil matter and disregarded the Court's actual instructions given prior to deliberations.

As to the battery claim, a battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree. It is unnecessary that the contact be by a blow, as any forcible contact is sufficient. Physical injury is not an element of a battery. While there must be a touching, any forcible contact will suffice regardless of its degree.

Generally speaking, a battery is the unlawful touching or striking of another by the aggressor himself or by any substance put in motion by him, done with the intention of bringing about a harmful or offensive contact which is not legally consented to by the other, and not otherwise privileged. It is sometimes defined as any injury done to the person of another in a rude, insolent, or revengeful way. A battery may occur without an assault. In other words, the plaintiff who is struck from behind without being aware of the attacker, has an action for battery. *See Herring v. Lawrence Warehouse Co.*, 222 S.C. 226, 72 S.E.2d 453 (1952); *Smith v. Smith*, 194 S.C. 247, 9 S.E.2d 584 (1940); *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Jones by Robinson v. Winn-Dixie Greenville, Inc.*, 318 S.C.

171, 456 S.E.2d 429 (Ct. App. 1995); *Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748 (Ct. App. 1984); 6 Am. Jur. 2d *Assault and Battery* § 98 (1999) (slightest touching of another, or of anything attached to his person, if done in a rude, insolent, or angry manner, may be actionable as assault and battery).

In this case, there was no evidence put forth by Stone as to clearly set forth a claim for battery when Stone himself has admitting to "being flirty", he accepted a set of suspenders from McMaster, Stone did not adjust the suspenders properly, and McMaster's alleged actions thereafter (R. p. 78, line 3- p. 84, line 10). The claimed actions of McMaster were such that Stone himself took almost two (2) hours, according to his testimony, to determine what he then, two (2) hours later, claimed happened, and to decide what to do, only after a call relating the event to his mother and never once stating any reaction of offensiveness at the time of the alleged battery. Further, once again, the admission of the guilty plea as to the criminal assault and battery allowed the jury to simply substitute that plea for their own independent judgment and reasoning.

The intentional infliction of extreme emotional distress, also known as the tort of outrage, is defined as one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. *See Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776 (1981); Restatement (Second) of Torts § 46 (1965).

There never was any bodily injury from the actions of McMaster by the testimony of Stone or his witnesses, other than that of the plea. If the jury found the McMaster was guilty of the causes of action that went to the jury, the most the jury should have awarded would have been actual damages intended to make Stone whole again or to compensate for losses. Stone was not entitled to a windfall. As to an appropriate damages award, Stone testified to the effect on him (R. p. 76, line 3- p. 77, line 16). His expert testified as to her findings (R. pp. 94-100) the most the jury could have possibly gleaned from the testimony was 6 months of weekly counseling, with a per session amount of $150.00 per session for a total of $3600 as to total cost of counseling, with Stone only attending 4 sessions again associated with the plea in the criminal matter. The evidence was that other than those 4 sessions, Stone has attended no counseling. The actual verdict for damages as it stands provides a tremendous windfall for Stone as he will receive an actual damages judgment for almost 14 times the actual cost of therapy, when Stone has admitted in his testimony to no adverse effects on his social life, educational advancement, and employment advances (R. p. 85, line 19- p. 90, line 15).

**B. The jury heard and considered testimony and evidence which should have been excluded.**

By virtue of the Court's rulings as to the reading of the pleadings, and the admission of the deposition testimony as to the plea, and other testimony as to the plea, Stone and Stone's counsel presented evidence on these issues to the jury. The jury heard and improperly considered this evidence in its deliberation, as is evident

in the actual and punitive damages award. Further, over McMaster's objections, Stone, through his mother tried to interject family relations of McMaster into evidence, with not one piece of evidence of any sort, trying to suggest by such interjection that an improper influence had been made on McMaster's behalf in this matter. The jury obviously believed that some sort of "influence" or "protection" of McMaster had taken place and awarded Stone far in excess of any rational relationship to the damages actually suffered. This is even more clear by the jury disregarding the far more traumatic family history of Stone in terms of assessing causation to the damage being claimed by Stone. The jury likely believed that it was, as Stone's counsel suggested throughout this case, sending a message to "those in power" (R. p. 125, lines 15-19).

**C. The evidence in the record fails to support such an exorbitant and punitive award.**

Finally, the record simply does not support a verdict of $50,000 actual and $50,000 punitive damages. Stone's expert witness only testified as to damages of $3,600 at best. Stone testified as to sleeplessness and anxiety but introduced no evidence of medical costs incurred or to be incurred other than those from the expert. Actual damages are awarded to a litigant in compensation for his actual loss or injury. Actual damages are such as will compensate the party for injuries suffered or losses sustained. They are such damages as will simply make good or replace the loss caused by the wrong or injury. Actual damages are damages in satisfaction of, or in recompense for, loss or injury sustained. The goal is to restore the injured

party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. The basic measure of actual damages is the amount needed to compensate the plaintiff for the losses proximately caused by the defendant's wrong so that the plaintiff will be in the same position he would have been in if there had been no wrongful injury. Actual damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. The existence, causation, or amount of damages cannot be left to conjecture, guesswork or speculation. *See Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991); *Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 393 S.E.2d 162 (1989); *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981)(in order for damages to be recoverable, evidence should enable jury to determine amount thereof with reasonable certainty and cannot be left to conjecture, guess, and speculation); *Piggy Park Enters., Inc. v. Schofield*, 251 S.C. 385, 162 S.E.2d 705 (1968); *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 134 S.E.2d 206 (1964); *Hutchison v. Town of Summerville*, 66 S.C. 442, 45 S.E. 8 (1903)(actual damages are when the wrongful act has caused loss or injury which can be assessed in money; universal and cardinal principle being that the person injured shall receive compensation commensurate with his loss or injury and no more); *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008); *Proctor v. Dep't Health & Environmental Control*, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006); *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004);

*Carrigg v. Blue*, 283 S.C. 494, 323 S.E.2d 787 (Ct. App. 1984); 22 Am. Jur. 2d *Damages* §§ 24, 25 (2003); *Black's Law Dictionary* 390 (6th ed. 1990).

The excessive and speculative and punitive nature of the verdict awarded is plain on its face when a jury awards almost 14 times the cost of treatment recommended by the expert witness, and Stone has put forth no evidence of incurring any medical costs or damages. The testimony presented by Stone on the issue of damages is clearly inconsistent with the damages awarded by the jury. To permit this verdict to stand would be tantamount to requiring no standards for an award of actual damages.

As to punitive damages, the same were allowed over the objection of McMaster, based on Stone's claim that McMaster had violated a statute. Once again, the evidence and testimony as to the guilty plea to a violation of a statute served to undermine any semblance of a fair trial to McMaster, in a case where under *Zurcher, supra*, the same should not have been allowed into evidence, and played upon and to the sympathy for Stone, and with extreme prejudice to McMaster.

For these reasons and in the interest of justice, Stone requests that the Court utilize the thirteenth juror doctrine to order a new trial absolute.

5. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL NISI REMITTITUR.

"A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is 'merely excessive,' although not motivated by considerations such as passion, caprice or prejudice." *Hunter v. Staples*, 335 S.C.

93, 105, 515 S.E. 2d 261, 268 (Ct. App. 1999). If the amount of the verdict is so grossly excessive as to shock the conscience of the court and to result from caprice, passion, prejudice, partiality, corruption, or some other improper motive, the trial judge should grant a new trial absolute." *Rush v. Blanchard*, 310 S.C. 301, 457 S.E.2d 603 (1994). The party moving for a new trial *nisi* must demonstrate compelling reasons to justify invading the jury's province by granting a new trial. *Pelican Bldg. Ctrs. V. Dutton,* 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993). In considering a motion for new trial *nisi remittitur*, the trial judge should consider the adequacy of the verdict in light of the evidence presented. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006).

In the present case, the jury returned a verdict for McMaster in an amount of more 14 times the alleged damages suffered by Stone in addition to adding an identical punitive damages award. As stated above, the jury ignored the court's instructions on the causes of action and considered testimony and evidence which should have been excluded and should have been disregarded. Even if the court finds that an award of $50,000 is not so excessive that it "shocks the conscience" standard required for a new trial *nisi remittitur*, the evidence in the record is simply inadequate to support such an award. Appellant would ask this Court to look at the analysis in *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E. 2d 758 (Ct. App. 2000) and apply the analysis therein in this case to correct the error of the trial court in this case in denying a reduction in the verdict amount based on the low direct dollar damages and the intangible nature of the damages, and to grant a new

trial *nisi remittitur* for the grounds set forth herein.

CONCLUSION

For the reasons set forth herein and based on the applicable principles of law, McMaster respectfully requests the court grant its Motion for Judgment Not Withstanding the Verdict, set aside the jury verdict, and render judgment for McMaster. In the alternative, Stone requests that his Motion for New Trial Absolute based on the Thirteenth Juror Doctrine or for New Trial Nisi Remittitur be granted for the compelling reasons shown herein and within and subsequent memorandum appropriately submitted to the Court prior to or at the hearing set in this matter.

RESPECTFULLY SUBMITTED,

Brian Dumas, Esquire
S.C. Bar No. 1786
Brian Dumas, Attorney LLC
718 Clemson Road
Columbia, South Carolina 29229
(803) 699-4996
Attorney for Appellant

July 29, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

---

Appellate Case No. 2018-001849
Civil Case No. 2016-CP-40-05857

---



Joshua Steven Stone, Respondent,

v.

George Hunter McMaster, Appellant.

---

**CERTIFICATE OF COUNSEL IN FINAL BRIEF**

---

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

Brian Dumas, Esquire. SC Bar No. 1786
Brian Dumas, Attorney LLC
718 Clemson Road
Columbia, South Carolina 29229
(803) 699-4996
Attorney for Appellant

July 29, 2019