THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 5666 (S.C. Ct. App. filed July 17, 2019)

Ex parte: The Travelers Home and Marine Insurance Company ..... Petitioner,

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

v.

Cameron Thomas Stringfellow, ... Defendant.

PETITION FOR A WRIT OF CERTIORARI

William P. Davis
Susan Drake DuBose
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400 (29204)
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091

and

Carrie H. O'Brien
Sarah Rand-McDaniel
WALKER ALLEN GRICE AMMONS & FOY, LLP
225 E. Worthington Avenue, Suite 200

Charlotte, North Carolina 28203
Phone: (704) 264-0159

Attorneys for Petitioner

Other Counsel of Record:

James M. Griffin
Margaret Nicole Fox
Griffin Davis, LLC
P.O. Box 999
Columbia, SC 29202
(803) 744-0800
Attorneys for Respondent

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was filed on August 1, 2019 and denied by the Court of Appeals on August 5, 2019.

QUESTION PRESENTED

I. Did the Court of Appeals err in affirming the trial court's application of the thirteenth juror doctrine by ignoring the errors of law committed by the trial judge and when ample evidence existed to support the jury's verdict?

STATEMENT OF THE CASE

Respondent William Gresham (hereinafter "Respondent"), acting as the Personal Representative of the Estate of John Corey Stringfellow (hereinafter "Decedent"), filed a Summons and Complaint on December 1, 2015 alleging Defendant Cameron Stringfellow (hereinafter "Defendant") caused the wrongful death of Decedent. The Travelers Home and Marine Insurance Company (hereinafter "Petitioner"), appearing and defending in the name of Defendant[1], admitted Defendant was negligent and reckless but raised comparative negligence, assumption of the risk, and the joint enterprise doctrine as defenses. A jury trial was held in Richland County beginning on January 9, 2017 and ended on January 12, 2017. After hearing all of the evidence, the Court granted Respondent's directed verdict request on the issue of negligence and recklessness but denied Respondent's directed verdict requests regarding comparative negligence and the joint enterprise defense. The court submitted the issue of the comparative negligence between Defendant and Decedent to the jury and also charged the jury regarding the joint enterprise defense. The jury returned a unanimous verdict finding that the

[1] The Estate settled its claim with Travelers as the liability carrier for a total recovery of $300,000 in exchange for a Covenant Not to Execute in favor of the Defendant. The Estate then substituted Patricia Stringfellow for William Gresham as the Personal Representative for purposes of filing this lawsuit. (R. p. 236, lines 9-18).

percentage of negligence attributable to Decedent was 51% and the percentage attributable to Defendant was 49%. Therefore, the Estate was not entitled to recover in the wrongful death action.[2]

After the verdict was returned, but before the jury was discharged, Respondent's counsel orally moved for a judgment notwithstanding the verdict on the ground that Decedent's own negligence could not have exceeded 50% when the Court had directed a verdict that Defendant was reckless. Respondent's counsel also moved at the same time for a new trial pursuant to the thirteenth juror doctrine. The trial court heard the arguments of counsel and took the matter under advisement, requesting that the parties brief the issues within ten (10) days. The trial court then discharged the jury. Respondent served a brief in support of its motion on January 20, 2017 and Petitioner responded.

A hearing was held on March 23, 2017, at which time the trial court denied Respondent's motion for judgment notwithstanding the verdict but granted Respondent's motion for a new trial based on the thirteenth juror doctrine. The formal order was signed on April 20, 2017 and entered on April 28, 2017. Respondent received written notice of the entry of the order on May 1, 2017. On May 2, 2017, Respondent timely served a Notice of Appeal appealing the portion of the order granting Respondent's motion for a new trial in the wrongful death action based on the thirteenth juror doctrine. The appeal was decided without oral argument. The Court of Appeals affirmed the judgment of the circuit court on July 17, 2019. Ex parte: The Travelers Home and Marine Insurance Company v. Cameron Thomas Stringfellow, Opinion No. 5666 (S.C. Ct. App. filed July 17, 2019). The Court of Appeals did not address the issue on appeal regarding the

[2] Respondent also filed a separate survival action that was tried at the same time as the wrongful death action. The jury found that the Decedent had no conscious pain and suffering and therefore no damages were awarded in the survival action. That finding was not appealed.

erroneous conclusions of law upon which the trial court's order was based. A Petition for Rehearing was timely filed and denied by the Court of Appeals on August 5, 2019. Petitioner seeks a writ of certiorari to review the decision.

STATEMENT OF FACTS

This case arises from a motor vehicle accident that occurred in the early morning of May 24, 2013 and resulted in Decedent's death. (R. pp. 614-615). On the evening of May 23, 2013, Patricia and Thomas Stringfellow left their home in Columbia to go to the beach for Memorial Day weekend with their daughter, leaving their teenage sons Cameron, age 18 (Defendant), and Corey, age 16 (Decedent), home alone for the night. (R. p. 136, line 21 – p. 137, line 11). Their home was located in the Wildewood subdivision. (R. p. 270, lines 11-18).

Defendant, his friend Wesley Thompson (hereinafter "Thompson"), and Decedent hung out at the Stringfellow house in the afternoon before Decedent left for soccer tryouts. (R. p. 139, line 11 – p. 140, line 3). Mr. and Mrs. Stringfellow left the house around seven in the evening. (R. p. 139, lines 8-10). Once they left, Defendant and Thompson played video games and started drinking wine they found in the garage. (R. p. 140, lines 4-10). They also poured a flask of Evan Williams bourbon before leaving the house to attend a ten o'clock movie at the Sandhills theatre. (R. p. 141, lines 5-21; p. 142, lines 10-12).

Decedent attended soccer tryouts with his friends Cameron Bohannon (hereinafter "Bohannon") and Dillion Wood (hereinafter "Wood"). (R. p. 101, lines 7-20). Wood drove them to soccer tryouts from Decedent's house, stopping at Chick-Fil-A on the way back. (R. p. 110, lines 10-17). Tryouts ended at 8:30 p.m. and it took 30-45 minutes to get back to Decedent's home. (R. p. 102, line 18 - p. 103, line 4). After soccer tryouts, both Bohannon and Wood testified that they smoked marijuana with Decedent at his house. (R. p. 101, line 7 – p.

102, line 12; p. 104, lines 1-15; p. 110, line 24 - p. 111, line 1). Bohannon did not recall whose marijuana they smoked but admitted he had smoked with Decedent three to five times before. (R. p. 104, line 1 – p. 105, line 9). Wood also testified that he did not know where the marijuana came from but stated that he knew that he did not bring it. (R. p. 113, lines 8-11). After smoking marijuana, Decedent drove Bohannon from the Stringfellow home to Bohannon's house and Wood drove himself home. (R. p. 105, lines 17-24; p. 112, lines 16-18).

Following the movie, Defendant drove Thompson back to the Stringfellow home. (R. p. 143, lines 6-10). They arrived back around midnight. (R. p. 167, lines 1-3). Defendant testified that he believed that Decedent was already home by the time they returned from the movie. (R. p. 143, lines 16-22; p. 167, lines 1-5). Defendant, Thompson, and Decedent then hung out together. (R. p. 167, lines 6-25; p. 223, lines 11-13). Thompson testified that he and Defendant continued drinking when they returned to the house, but that Decedent did not drink with them. (R. p. 204, lines 5-17). Thompson also testified that he does not think they smoked marijuana after the movie. (R. p. 204, lines 18-23). Defendant could not specifically recall whether he smoked marijuana that evening but admitted that he and Decedent both had marijuana in their systems, that he did not smoke any marijuana before the movie, and assumes he smoked marijuana with Decedent and Thompson after the movie. (R. p. 154, line 5 – p. 155, line 15; p. 157, line 16 – p. 158, line 3). Defendant admitted on cross-examination by Petitioner that Thompson had been drinking and "smoking pot" with him that night. (R. p. 174, lines 14-17). Defendant also admitted that he had smoked marijuana with his brother in the past. (R. p. 155, lines 16-18). Defendant initially denied that he had ever drank alcohol with Decedent before but was impeached by his deposition testimony admitting that he and Decedent previously drank alcohol together. (R. p. 155, line 19 - p. 156, line 15). Defendant and Thompson also ingested

part of a Xanax laced "sweet tart" that evening. (R. p. 174, line 18 – p. 175, line 3). Thompson admitted that he was stoned and drunk, which caused his recollection of the events of the night to be "completely fuzzy". (R. p. 222, line 2 – p. 223, line 23).

While hanging out with Defendant and Thompson, who were both drinking alcohol and possibly smoking marijuana, Decedent began searching for a source to provide more marijuana to smoke that night. (R. p. 157, line 20 - p. 158, line 3; p. 165, lines 10-20; p. 204, lines 5-17). Although Defendant testified that it was his idea to get more marijuana, he also testified that everyone went along with it. (R. p. 164, lines 3-9). Thompson initially testified that he was the one who started the search for the source and that Decedent was just "tagging along". (R. p. 224, line 23 – p. 225, line 2). However, he also testified that the cell phone records show that Decedent made calls to find someone to sell the marijuana. (R. p. 218, lines 2-12). The address where they were going to purchase the marijuana was texted to both Decedent's and Defendant's phones at 1:22 a.m. (R. p. 165, lines 3-9; p. 216, lines 16-19). Thompson eventually admitted that Decedent made the phone call to locate the marijuana on Decedent's phone. (R. p. 218, lines 2-12). Defendant testified on direct examination by the Respondent that "somebody" got the number for the contact to purchase weed but stated that he did not do it. (R. p. 144, lines 10-14). On cross-examination by Appellant Defendant ultimately admitted that Decedent arranged the deal to buy the marijuana. (R. p. 165, lines 10- 20; p. 180, line 7 - p. 181, line 3).

After receiving the address where the marijuana was located by text, Defendant, Decedent and Thompson decided to leave the Stringfellow home to purchase more marijuana at approximately 1:30 a.m. (R. p. 144, lines 1-19; p. 168, lines 6-10; p. 216, lines 16-19). Both Defendant and Thompson testified that they all three left the house together to go buy marijuana. (R. p. 143, line 23- p. 144, line 4; p. 206, lines 14-18). Defendant drove his mother's BMW

without her permission instead of his own vehicle. (R. p. 141, lines 22-25; p. 161, lines 15-22). Decedent willingly entered the car driven by Defendant. (R. p. 180, lines 7-11).

Thompson testified that he smoked marijuana at the house where they went to purchase the marijuana and that Decedent also could have, but he did not witness it. (R. p. 224, lines 7-17). After purchasing the marijuana, they all left to go back to the Stringfellow house. (R. p. 207, lines 6-7). Defendant drove past the house and then drove the BMW at a high rate of speed reaching over ninety miles per hour. (R. p. 91, lines 12-14; p. 146, lines 4-15). Although he initially testified twice on direct examination by Respondent that he did not announce his intention to drive fast to the other occupants of the car, Defendant was impeached by his prior deposition testimony in which he stated that he thought he had told them of his intention to drive fast. (R. p. 125, lines 14-20; p. 146, lines 4-9; p. 182, line 10 - p. 183, line 8). Defendant swiped a car parked along the street which sent the BMW crashing into a tree. (R. p. 146, line 19 – p. 147, line 1; Plaintiff's Exhibit 1; R. pp. 545-556). EMS was dispatched at 2:39 a.m. and found Decedent unresponsive and unconscious. (Plaintiff's Exhibit 18, R. p. 581).

Following the accident, Decedent and Defendant both tested positive for THC in their systems, with Decedent's level being higher than Defendant's. (Defendant's Exhibit 104, R. pp. 598-604). Defendant testified that THC is the active ingredient in marijuana. (R. p. 154, lines 13-22). Defendant was charged and pled guilty to involuntary manslaughter and driving under the influence of alcohol. (Plaintiff's Exhibits 19 and 20, R. pp. 584-585). His blood alcohol level was .186. (Defendant's Exhibit 104, R. p. 602). The Stringfellows paid for Defendant's criminal attorney and wrote a letter to the sentencing judge requesting leniency. (R. p. 315, lines 13-17; p. 340, line 11- p 341, line 2).

Decedent had a history of consuming alcohol and smoking marijuana. (R. p. 104, line 21 – p. 105, line 1; p. 155, line 16 - p. 156, line 15; p. 240, line 14 – p. 242, line 6; Defendant's Exhibit 1, R. p. 586). There was evidence of drug paraphernalia and marijuana references on Decedent's phone. (Defendant's Exhibits 39, 40, 42, 43, 44, 45, 47, R. pp. 589-595; p. 307, line 11 - p. 313, line 17). Evidence was also presented that Decedent's parents were aware of Decedent's prior drug and alcohol use despite testimony to the contrary. (R. p. 286, line 14 – p. 298, line 2; p. 345, line 14 – p. 348, line 8; Defendant's Exhibits 1, 9, 10, 50, R. pp. 586-588, R. p. 596).

At the trial of the case, Defendant sat with the Plaintiff and his parents, the beneficiaries of the lawsuit, over the objection of Petitioner's counsel. (R. p. 50; pp. 51-55; p. 64, lines 6-7; p. 233, lines 3-4). Defendant testified on behalf of the Plaintiff and admitted that he drove under the influence of alcohol and drugs, was impaired, and was liable for the accident. (R. p. 117; p. 123, line 16 - p. 124, line 14). Defendant also admitted that a defense raised on his behalf was that Decedent assumed the risk of injuries from the accident. (R. p. 125, lines 2-12). Evidence was presented that Decedent had his own vehicle and had driven it earlier in the evening after smoking pot. (R. p. 169, lines 2-13; p. 181, lines 8-20). Defendant admitted that Decedent could have driven his own vehicle to purchase the marijuana and that Decedent made the decision to get in the car with a driver who was inebriated. (R. p. 236, lines 8-20). Defendant also admitted that nobody riding in the car, including Decedent, complained regarding his driving or objected to the high rate of speed before the accident. (R. p. 146, lines 2-3; p. 175, line 20 – p. 176, line 3).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S APPLICATION OF THE THIRTEENTH JUROR DOCTRINE WHEN IT IGNORED THE ERRORS OF LAW COMMITTED BY THE TRIAL JUDGE AND WHERE AMPLE EVIDENCE EXISTED TO SUPPORT THE JURY'S VERDICT.

The Court of Appeals failed to apply the correct standard of review for new trial granted pursuant to the thirteenth juror doctrine, disregarded the trial judge's errors of law, and ignored key evidence that supported the jury's verdict. For these reasons, the Court of Appeal's decision must be reversed, and the jury's verdict reinstated.

A. The Court of Appeals Misapplied the Standard of Review By Failing to Review the Trial Court's Legal Conclusions

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine "entitles the judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" Lane v. Gilbert Constr. Co., 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (citing Norton v. Norfolk Southern Railway Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). A circuit court's order granting or denying a new trial motion will not be disturbed "unless its decision is wholly unsupported by the evidence **or the conclusions reached are controlled by an error of law.**" Id. (emphasis added); see also Cody P. v. Bank of Am., N.A., 395 S.C. 611, 623, 720 S.E.2d 473, 479-80 (Ct. App. 2011); Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004).

The Court of Appeals' analysis of the order for a new trial in this case was limited to determining evidentiary sufficiency and completely ignored its duty to review errors of law committed by the trial judge. The Court's opinion cited Worrell v. S.C. Power Co., 186 S.C.

306, 195 S.E. 638 (1938), as requiring it to "uphold a trial court's thirteenth juror decision unless it is 'wholly unsupported by the evidence.'" (Opinion, p. 5). The court also relied 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). Nowhere in the opinion did the Court of Appeals address Petitioner's detailed arguments regarding the multiple errors of law upon which the trial court's decision was based.

The incomplete standard of review applied by the Court of Appeals conflicts with several decisions of this Court holding that a decision to grant a new trial under the thirteenth juror may be overturned where it is influenced by errors of law. See Lane, 383 S.C. 590, 681 S.E.2d 879 (2009); Norton, 350 S.C. 473, 567 S. E.2d 851 (2002); Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990). The Court of Appeals committed a clear error of judgment in the conclusion it reached. Therefore, this issue is appropriate for review by this Court pursuant to Rule 243(b)(3), SCACR.

B. The Trial Court Committed Multiple Errors of Law In Granting a New Trial Under The Thirteenth Juror Doctrine

The Court of Appeals correctly stated "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 ignored this Court's precedent granting appellate review when a trial court chooses to provide an explanation. See Lane, 383 S.C. 590, 681 S.E.2d 879 (2009) (reviewing trial judge's statements for legal error before affirming trial court's grant of a new trial under the thirteenth juror doctrine); 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); Trivelas, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004)

(reviewing statements made by court at motions hearing in addition to order granting 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 a review of his Order and the transcript of the motions hearing reveal that his conclusions are controlled by errors of law and wholly unsupported by the evidence. The Court of Appeals did not review the reasons provided by the trial court, in conflict with a prior decision of this Court, rendering this issue appropriate for review pursuant to Rule 243(b)(3), SCACR.

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." Id. On this point, the Order states:

> The jury's finding that the negligence of the Decedent exceeded that of the Defendant, whom admitted and was found to be reckless, on the basis that the Decedent contributed to his death by riding as a passenger in the vehicle is clearly against the fair preponderance of the evidence. The Court therefore concludes that a new trial in the wrongful death action should be granted pursuant to the thirteenth juror doctrine.

Id.

During the post-trial motions hearing, the trial judge mentioned that he sat as an acting justice on a Supreme Court case during the trial of the instant matter that also involved drinking,

driving, and smoking marijuana.[3] (R. p. 531, line 24 – p. 532, line 23; R. p. 354, lines 8 – 17; p. 355, lines 8-20). In that case, according to the trial judge, the jury found an apportionment of 50/50 between the driver and the passenger for comparative negligence or else a case was cited where there was a 50/50 apportionment. (R. p. 531, line 24 – p. 532, line 23). The trial judge concluded, "[s]o we know it can be 50/50. But can it be 51/49 is the question?" (R. p. 532, lines 22-23). The trial judge stated:

> [a]fter the admission by [the Defendant] that he was reckless and basically concluding through his testimony that it was all his fault . . . and I directed a verdict on that issue.
>
> You know, I see no way that the jury could reasonably come to the conclusion they came to, 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. . .
>
> As 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 didn't want to be involved in this process. And they decided they were not going to – that despite the evidence they were going to do the jury nullification, of sorts.
>
> But I'm going to grant the new trial based on 13th Juror Law and adopt the Plaintiff's argument with regard to that.

[3] Upon information and belief, the case referenced was Donze v. General Motors, LLC, 420 S.C. 8, 800 S.E.2d 479 (2017). This case involved a certified question from the district court regarding whether comparative negligence is a defense in a crashworthiness case filed by a passenger plaintiff against a car manufacturer. For the purposes of the opinion the Court assumed the imputation of the driver's negligence to the passenger under the joint enterprise doctrine and found that comparative negligence is not a defense in a crashworthiness case.

(R. p. 539, line 16 – p. 540, line 16). 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 reveal that the trial judge's decision to grant a new trial was controlled by several errors of law and unsupported by the evidence. The evidence presented and the law charged to the jury provided the basis to make their unanimous decision in this case.

1. **There is no law that a passenger's negligence cannot exceed a driver's negligence**

First, the trial court incorrectly concluded that a passenger's negligence can never exceed the negligence of a driver. At the post-trial motions hearing, the trial judge stated he knew 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 a general proposition of law. There is no law in South Carolina that a passenger's negligence cannot exceed that of a driver.

In Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011), a jury found plaintiff 75% negligent despite the defendant's admitted recklessness. The plaintiff sought a declaration from this Court, among other things, that his negligence could not be a defense to reckless conduct and that there exists heightened degrees of wrongdoing for which juries must give greater weight. This Court held that "a jury may compare all forms of negligence as part of its assessment of fault" and that "[t]he relative significance of each party's conduct and its overall contribution to the plaintiff's injury are accounted for in the offsets inherent in our comparative negligence system."

Indeed, the notion that one party could be barred from being more negligent than another nullifies the comparative negligence system our state has adopted. The trial judge, therefore, erred in granting a new trial on the nonexistent legal basis that a passenger cannot be more negligent than a driver.

2. Defendant's admitted recklessness did not bar the jury from finding Decedent fifty-one percent negligent

The trial judge's statements and order also reveal his erroneous 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. This Court's opinion in Berberich directly contradicts the trial judge's basis for granting a new trial. This Court made clear that "comparative negligence encompasses the comparison of ordinary negligence with heightened forms of misconduct such as recklessness, willfulness, and wantonness." Berberich, 392 S.C. at 292, 709 S.E.2d at 614. Noting the "broad spectrum of conduct" to be considered by a jury to "evaluate the overall culpability of each party", this Court has specifically rejected the argument 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. However, the trial judge's decision to grant a new trial was based on his conclusion, contrary to South Carolina law, that recklessness "by definition" exceeds negligence as a matter of law.

Furthermore, South Carolina's comparative negligence system allows for the comparison of "all forms of conduct amounting to negligence in any form". Berberich, 392 S.C. at 293, 709 S.E.2d at 615 (stating that the purpose of the comparative negligence scheme is to allow a 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 both 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 resulted in a greater percentage of negligence attributed to the Decedent. Therefore, the trial judge's finding that Defendant's recklessness necessarily outweighed any negligence the jury could have attributed to Decedent is a conclusion based on an error of law and also does not account for the joint enterprise and assumption of the risk defenses that were presented and charged to the jury. The trial judge thus erred in granting a new trial on the nonexistent legal basis that the jury could not find Decedent's negligence outweighed that of Defendant's.

3. Speculation regarding a jury's deliberations is not grounds for a new trial

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 and immediately before granting a new trial, the trial judge speculated about 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 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).

Granting a new trial due to suspicions regarding the quality of deliberations is improper. See Youmans, 380 S.C. at 282, 670 S.E.2d at 10 (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). Furthermore, it is well established that a jury is presumed to follow instructions and apply the law as charged. See Richardson v. Marsh, 481 U.S. 200, 206, 107 S. Ct. 1702, 1707 (1987) (There is an "almost invariable assumption of the law that jurors follow their instructions".); Miranda C. v. Nissan Motor Co., 402 S.C. 577, 589-90, 741 S.E.2d 34, 41 (Ct. App. 2013). It was improper for the trial judge to grant a motion for new trial on the baseless assumption that the jury's deliberation and verdict were flawed as a matter of law.

The law allows a judge to grant a new trial as the thirteenth juror only if "the evidence does not justify the verdict," but he must do so "**solely upon the facts.**" Norton, 350 S.C. at 478, 567 S.E.2d at 854 (emphasis added). The trial judge in this matter based his grant of a new trial on erroneous **law**. Because the trial judge erroneously applied the above legal fallacies to the jury's verdict as the bases for granting a new trial, the Court should reinstate the unanimous jury verdict.

C. Ample Evidence Existed to Support the Jury's Verdict

The trial judge's conclusions that the jury could not "reasonably come to the conclusion they came to" and that "no evidence was presented that would give the jury a basis to make [the] decision" is wholly unsupported by the evidence that was submitted in this case. (R. p. 539, lines 20-25). The trial judge ignored 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.

Interestingly, the trial judge's findings at the post-trial motions hearing *contradict* those he made during trial. When he denied Respondent's directed verdict motion on the issue of the Decedent's fault and assumption of the risk, the judge said, "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. (R. p. 393, lines 20 – 23). By denying these motions, the trial court necessarily 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). These charges reflect the trial judge's recognition that evidence existed that could justify a verdict on those issues.

Despite these trial findings, the judge later concluded that "**no evidence** was presented that would give the jury a basis to make [the] decision" that a passenger was more culpable than the driver in an accident. (R. p. 539, lines 20-25) (emphasis added). 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 determine that Decedent's overall negligence exceeded Defendant's.

The undisputed evidence shows that Decedent entered the car willingly with the inebriated Defendant after witnessing him drinking and made no complaints regarding Defendant's erratic driving before the accident. (R. p. 146, lines 2-3; p. 174, lines 14-17; p. 175, line 20 – p. 176, line 3; p. 180, lines 7-11). Furthermore, both Defendant and Thompson

ultimately testified that it was Decedent who orchestrated the "marijuana run" requiring them to leave the safety of the Stringfellow house. (R. p. 165, lines 10-20; p. 180, line 7 – p. 181, line 3; p. 218, lines 2-12). Decedent also willingly got in the car with Defendant a second time when leaving the party after purchasing more marijuana and within minutes of the accident. (R. p. 207, lines 2-7). Evidence was presented that Decedent knew he should not get in the car with someone who was drinking and should not drive drunk or impaired. (R. p. 178, line 25 – p. 179, line 9). Defendant also testified that Decedent had his own vehicle and could have driven his Jeep, but purposefully chose to ride with Defendant that night. (R. p. 181, lines 4-20).

The jury was charged on comparative negligence. (R. p. 461, line 3 – p. 463, line 11). The charge instructed the jury that a factor they could consider in deciding comparative negligence percentages was whether the party's conduct "was gauged with an awareness of the danger involved and the magnitude of the risks".[4] (R. p. 369, lines 6-24; p. 462, lines 17-23; pp. 477-485). The evidence and law provided the jury with a reasonable basis to find that the Decedent was independently negligent and assumed the risk of his injuries.

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, 392 S.C. at 289, 709 S.E.2d at 613 (2011) (stating that the purpose of the comparative negligence scheme is to allow a jury to "evaluate **overall culpability** of each party") (emphasis added).

[4] The trial judge refused to give a separate assumption of the risk charge, despite the fact that he previously agreed to do so during the charge conference.

Because the trial court's conclusions are not supported by the record, the order granting the new trial should be reversed and the jury's verdict reinstated. 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).

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this court to grant the petition for a writ of certiorari.

Respectfully submitted,

William P. Davis
Susan Drake DuBose
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400 (29204)
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091

and

Carrie H. O'Brien
Sarah Rand-McDaniel
WALKER ALLEN GRICE AMMONS & FOY, LLP
225 E. Worthington Avenue, Suite 200
Charlotte, North Carolina 28203
Phone: (704) 264-0159

Attorneys for Petitioner

September 4, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Opinion No. 5666 (S.C. Ct. App. filed July 17, 2019)

Ex parte: The Travelers Home and Marine Insurance Company .....Petitioner,

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

v.

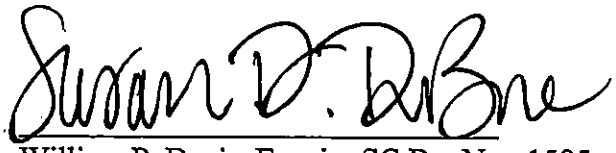
Cameron Thomas Stringfellow, ...Defendant.

PROOF OF SERVICE AND FILING

I certify that I have served Petitioner's Petition for Writ of Certiorari and a copy of the Appendix upon Respondent by hand-delivering a copy of same on September 4, 2019, to his attorneys of record at their office at the address shown below:

James M. Griffin, Esquire
Margaret Nicole Fox, Esquire
Griffin Davis, LLC
4408 Forest Drive, Suite 300
Columbia, SC 29206

I further certify that I have filed Petitioner's Petition for Writ of Certiorari with the Clerk of the South Carolina Court of Appeals.



William P. Davis, Esquire SC Bar No.: 1585
Susan D. DuBose, Esquire SC Bar No.: 11543
Baker, Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400 (29204)
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803) 799-9091; Fax: (803)779-3423
wdavis@brblegal.com; sdubose@brblegal.com

and

Carrie H. O'Brien, Esquire
Sarah Rand-McDaniel, Esquire
Walker Allen Grice Ammons & Foy, LLP
225 E. Worthington Avenue, Suite 200
Charlotte, North Carolina 28203
Phone (704) 264-0159
carrie@walkerallenlaw.com

Attorneys for Petitioner

BAKER RAVENEL BENDER
ATTORNEYS AT LAW

Susan D. DuBose
sdubose@brblegal.com
(803) 343-3868 – direct dial

September 4, 2019

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

Re: Ex Parte: The Travelers Home and Marine Insurance Company, Appellant
In Re: Williams Gresham as Personal Representative of the Estate of John Corey Stringfellow, Respondent, v. Cameron Thomas Stringfellow, Defendant
Appellant Case No.: 2017-001083
Our File No.: 7746.2121

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter is a copy of Petitioner The Travelers Home and Marine Insurance Company's Petition for Writ of Certiorari. I have enclosed an additional copy which I would appreciate your clocking in and returning to me via my courier.

By copy hereof, I am serving a copy of same upon counsel for Respondent.

Sincerely,

Susan Drake DuBose
Enclosure
cc w/encl.: James M. Griffin, Esquire **Via Hand Delivery**
Carrie H. O'Brien, Esquire **Via U.S. Mail**