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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUE ON APPEAL

I. **DID THE TRIAL JUDGE PROPERLY EXERCISE HIS DISCRETION AS THE THIRTHEENTH JUROR BY GRANTING A NEW TRIAL AFTER THE JURY FOUND THE DECEASED PASSENGER WAS MORE AT FAULT THAN THE DEFENDANT DRIVER WHO PLED GUILTY TO INVOLUNTARY MANSLAUGHTER AND DUI, WHEN THE UNDISPUTED EVIDENCE ESTABLISHED THAT THE DEFENDANT, ACTING ON AN URGE, SUDDENLY ACCELERATED TO MORE THAN 90 MPH IN A RESIDENTIAL NEIGHBORHOOD AND STRUCK A PARKED CAR, AFTER BEING WARNED BY THE DECEASED PASSENGER, RESULTING IN THE DEADLY CRASH?**

STATEMENT OF THE CASE

Respondent, William Gresham, as Personal Representative of the Estate of Corey Stringfellow ("Corey") commenced an action alleging wrongful death against Defendant Cameron Stringfellow ("Cameron") on December 1, 2015. Appellant The Travelers Home and Marine Insurance Company ("Travelers") as the Underinsured Motorist Carrier defended the action on behalf of Defendant Cameron. A jury trial was held before the Honorable Clifton B. Newman in the Richland County Court of Common Pleas from January 9, 2017 until January 12, 2017. At the conclusion of trial, the jury returned a verdict for Defendant Cameron, finding that Corey was 51% at fault. Respondent made an oral motion for a new trial after the jury returned its verdict and, with the Trial Court's permission, filed a written motion for new trial eight (8) days later on January 20, 2017. On March 23, 2017, the Trial Court held a hearing on the motion and issued a formal Order granting the motion for a new trial under the thirteenth juror doctrine on April 20, 2017. Appellant Travelers filed a notice of appeal from this Order on May 2, 2017.

On July 17, 2019, the South Carolina Court of Appeals unanimously affirmed Judge Newman's order granting a new trial. Travelers filed a Petition for Rehearing on August 5, 2019.

On August 7, 2019, the Court of Appeals denied the Petition in a unanimous decision. Travelers filed this Petition for Writ of Certiorari on September 4, 2019.

FACTS

Corey Stringfellow died at the age of sixteen (16) from injuries suffered in an automobile accident that occurred at approximately 2 a.m. on May 24, 2013. Corey was riding as a passenger in the driver's side back seat of the automobile driven by his older brother, Cameron Stringfellow.

Defendant Cameron, who was eighteen (18), had recently finished his last high school class and was scheduled to graduate from Spring Valley High School the following week. Defendant Cameron and his friend Wesley Thompson, who had also finished his last class and was scheduled to graduate with Cameron, had been celebrating at the Stringfellow's family residence earlier in the evening. Defendant Cameron and Corey's parents, as well as their younger sister, had just departed for the beach for the Memorial Day weekend, leaving them home alone. Cameron and Corey were scheduled to meet their family the next day after Corey finished classes. (R. 136:1-25; 137:1-19).

Defendant Cameron and Thompson drank wine they found in a box in the garage and then went to a movie. They took a flask of bourbon with them and presumably drank it. After the movie, they went back to Stringfellow residence. Up until this point in the evening, Corey had not been with Defendant and Thompson. (Id. at 139:8-140:5; 143:6-22).

Corey had soccer practice earlier in the evening that ended at 8:30 pm. Corey then stopped to get some fast food with two of his friends and went back to his house to play video games with them. Corey and his two friends also smoked an unknown quantity of marijuana after arriving at his home. Both friends described the amount as "not much" and "not a lot" because they had classes the next day. (Id. at 102:1-6; 110:24-25; 111:1-10). About thirty (30) to forty (40) minutes

after smoking, Corey drove one friend home and the other friend drove himself home. (R. 105:17-25; 111:7-10).

Upon arriving back at the Stringfellow residence after the movie, Defendant Cameron and Thompson continued drinking. Corey was not drinking with them. Defendant Cameron then decided that he wanted to smoke marijuana, but neither he nor Thompson had any. (Id. 157:8-11; 163:19-22; 164:3-7; 204:14-23). Thompson contacted a friend of his who knew someone selling marijuana, and they arranged to meet at Thompson's friend's residence. (Id. 204:24-25; 205:1-11). Defendant Cameron testified that only he and Wesley planned to buy marijuana, and they simply "made" Corey ride with them. (Id. at 164:10-18; 166:6-10).

Defendant Cameron drove to Thompson's friend's residence, with Thompson and Corey. Thompson testified that Defendant Cameron's driving seemed fine on the way to the friend's house and on the return drive back to the Stringfellow's residence. (Id. at 206:19-25; 207:1-11). However, upon arriving back at the Stringfellow residence, Defendant Cameron drove past his residence rather than parking in the driveway. (Id. at 207:12-13).

Defendant Cameron, who was driving his mother's new BMW 7 series luxury sports car without permission, "suddenly got this urge to go fast." (R. 145:17). He testified that "I knew there was a straight-away [*sic*] in the back of our neighborhood, so I just kept going through and went back there and just gunned it." (Id. at 145:14-21; 146:10-12). Defendant Cameron made this decision alone, without prompting from either Thompson or Corey and did not inform either Thompson or Corey of his plan. (Id. at R. 146:7-9; 208:8-11).

Defendant Cameron suddenly accelerated up to 94 mph on this back straightaway and struck a parked car. He lost control of the vehicle and it went up an embankment that launched the

vehicle into the air, striking two trees before crashing to the ground. (R. 91:12-15; 121:23-25; 122-127; 132:9-25; 133:8-25; 134:1-2).

Corey, who was seated in the back seat, warned Defendant Cameron about the parked car, but Defendant struck it nevertheless. (Id. at 146:21-23; 208:15-19). Those were the last words Corey ever spoke. He died from injuries that he suffered in the accident.

After the accident, Defendant was arrested and his blood was tested. The toxicology report for Defendant reflected he had a BAC of .186 and a THC level of 4. Corey did not have any alcohol in his blood and had a THC level of 6.5. There was no expert testimony presented as to the import of THC levels of 4.0 and 6.5. Defendant testified that he did not recall smoking marijuana any time prior to the accident. Corey smoked "not much" marijuana around 9 p.m. on May 23, 2013, about five (5) hours before the accident. (Id. at 598-604).

The evidence was undisputed that Corey did not have any knowledge of how much alcohol Defendant consumed the night of the accident. Corey was not present when Defendant and Thompson drank alcohol at the Stringfellow residence prior to attending the movie nor was Corey present at the movie when Defendant and Thompson presumably drank bourbon. There is no evidence that Corey knew that Defendant had consumed any marijuana.

Furthermore, despite the promise made by Traveler's counsel in its opening statement to the jury that the defense would present testimony that Defendant was obviously drunk, and stumbling at Thompson's friend's residence, and that people warned Corey that Defendant should not drive, Travelers did not offer any such evidence at trial. (Id. at 77:5-25). Rather, there was absolutely no evidence presented of Defendant's behavior and whether he appeared as intoxicated

as his blood level might suggest. In fact, the defense did not offer any evidence from a toxicologist as to the effects of a BAC of .186 or the effects of a THC level of 4.0.[1]

At trial, Defendant admitted to all of the material allegations in the Complaint. (R. 121:23-124:1). Defendant also admitted that he is liable to the Estate of Corey Stringfellow for actual and punitive damages. (Id. at R. 124:2-14). Furthermore, Defendant testified that Corey could not have known that Defendant was going to "floor it." (Id. at126:7-11). Defendant denied taking any directions from Corey as to the manner in which he was driving, and he denied that Corey had an equal right to control and manage the vehicle. (Id. at 126:20-25).

After the accident, Defendant pled guilty to involuntary manslaughter and DUI. As a result of the plea and Defendant's testimony at trial, the Trial Court granted a directed verdict on Plaintiff's claim that Defendant was reckless, and that this recklessness proximately caused the death of Corey. Travelers' counsel likewise conceded that Plaintiff was entitled to a directed verdict on recklessness.

As a result of the directed verdict ruling, the factual issues presented to the jury were limited to whether Corey was negligent, and if so, whether such negligence proximately caused his death. The jury was asked to apportion fault if they found that Corey was negligent and his negligence proximately caused his death. If Corey's portion of fault was 50% or less, then the jury was instructed to award compensable damages and that it may also award punitive damages. (Id. at 472:14-474:9); *see also* (Id. at 12-13).

After a few hours of deliberation, the jury sent a note asking if it could award zero damages or must the jury award compensatory damages. (R. 606). The Trial Court instructed the jury that,

[1] In fact, defense counsel's toxicology expert testified in his deposition that the THC threshold for impaired driving in states that have legalized marijuana is 5.0. (R. 26).

depending on their answers to the questions presented on the verdict form, they could not award zero damages and must award compensatory damages. (R. 492:3-493:24). Then, after a few more hours, the jury returned a verdict finding that Corey was 51% at fault and Defendant was 49% at fault. (R. 12-13).

After the verdict was published, the Trial Judge asked whether the parties wished to poll the jury. Neither party requested polling. Immediately thereafter, the Trial Judge asked if there were any post-trial motions. In response, counsel for Respondent moved for judgment notwithstanding the verdict and for a new trial, under the thirteenth juror doctrine. (R. 498:7-24; 500:6-11). After counsel argued post-trial motions, the Trial Court stated:

> It's an interesting issue. You know these issues are pretty complex. And I think I will take the matter under advisement and give you all an opportunity to brief the issue and will address that later.

(Id. at 500:12-16).

The Trial Judge asked how much time was needed to submit written briefs and both counsel requested ten (10) days. The Trial Judge then granted the parties ten (10) days to brief the post-trial issues. (Id. at 500:18-25). Eight (8) days later, Respondent filed and served a written Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial in both the wrongful death and survival actions. (R. 23-32).

The Trial Court announced at the hearing on the post-trial motion that it was granting Respondent's motion for a new trial on the wrongful death action and denying the motion as to the survival action. Subsequently, the Trial Court issued a written order granting Respondent's motion

for a new trial on the wrongful death action and denying the motion as to the survival action. (R. 4).[2]

ARGUMENT

I. TRAVELERS' PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE TRIAL JUDGE PROPERLY EXERCISED HIS DISCRETION AS THE THIRTHEENTH JUROR BY GRANTING A NEW TRIAL AFTER THE JURY FOUND THE DECEASED PASSENGER WAS MORE AT FAULT THAN THE DEFENDANT DRIVER WHO PLED GUILTY TO INVOLUNTARY MANSLAUGHTER AND DUI.

South Carolina's "thirteenth juror" doctrine is well established as the standard for granting a new trial in state-law actions. *Norton v. Norfolk S. Ry. Co.,* 567 S.E.2d 851, 854 (S.C. 2002); *Folkens v. Hunt,* 387 S.E.2d 265, 267 (S.C. 1990); *Sorin Equip. Co. v. The Firm, Inc.,* 474 S.E.2d 819, 822 (S.C. Ct. App. 1996). "South Carolina's thirteenth juror doctrine is so named because it entitles the trial 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.'" *Norton*, 567 S.E.2d at 854 (quoting *Folkens*, 387 S.E.2d at 267). In ruling on a new trial motion as the thirteenth juror, the trial judge may weigh the evidence and rely on his or her view of the circumstances. *Sorin Equip. Co.,* 474 S.E.2d at 822. As the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Norton,* 567 S.E.2d at 854.

The Supreme Court explained in *Folkens,*

> The effect is the same as if the jury failed to reach a verdict.... When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

387 S.E.2d at 267 (citing *S.C. State Highway Dep't v. Townsend,* 217 S.E.2d 778, 781 (S.C. 1975)).

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[2] Judge Newman concluded that the verdict on the survival action was supported by the lack of evidence of conscious pain and suffering. Id.

Where the verdict is contrary to the fair preponderance of the evidence, the trial judge not only has the discretion but also has the duty to grant a new trial. *Jessup v. Hansen*, 344 S.E.2d 618, 620 (S.C. Ct. App. 1986). A trial judge's order granting or denying a new trial upon the facts is reviewed for an abuse of discretion and will not be disturbed unless the decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Folkens,* 387 S.E.2d at 267. Appellate review is limited to the consideration of whether evidence exists to support the trial court's decision to grant a new trial. *Id.*

Judge Newman's decision to exercise his discretion as the thirteenth juror and grant a new trial is not "wholly unsupported by the evidence" or controlled by an error of law. The evidence was undisputed that Defendant was reckless and that his reckless conduct caused Corey's death. On this point, the defense conceded. The only questions presented to the jury were the amount of comparative fault, if any, and damages. (R. 458:23-475:16).

Judge Newman ruled the evidence did not support the jury's finding that Corey was more at fault than Defendant Cameron. (R. 9). This ruling is clearly supported by the factual record and was not an abuse of discretion.

Defendant admitted that he was liable to the Estate of Corey Stringfellow for actual and punitive damages. (R. 124:2-14). Defendant testified that he acted on an urge to go fast; he did not announce his intentions to anyone in the vehicle; and the decision to drive recklessly was his alone. (Id. at 145:17; 146:8-9; 208:8-11). Defendant Cameron and Thompson both testified that up until Defendant got the urge to gun it, Defendant had not been driving recklessly. (Id. at 142:8-9; 145:22-146:3; 206:19-25; 207:7-11). Defendant further testified that from his perspective Corey could not have known that he was about to floor the BMW sports car through the quiet Wildwood neighborhood. (Id at 126:7-11).

Defendant and Thompson also testified that it was their plan to go buy marijuana and Corey was not part of this plan. (Id. at 164:10-18; 167:6-10). Rather, Defendant "made" Corey ride along and because Corey was the little brother, he did what Defendant asked. (Id. at 164:16-18). Defendant also testified that Corey did not have an equal right to control the operation of the BMW and did not in fact attempt to control the vehicle. (R. 126:20-25).

Judge Newman's decision to grant a new trial was based solely upon the lack of evidence supporting the jury's verdict. The Order explicitly 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 is clearly against the fair preponderance of the evidence." (Id. at 9). Judge Newman not only had the discretion to grant a new trial under the thirteenth juror doctrine, but an obligation to do so based upon this record. *Jessup*, 344 S.E.2d at 620.

Travelers attempts to establish a logical rationale for the jury's verdict by arguing that the jury could have imputed Cameron's recklessness to Corey and then added Corey's negligence to arrive at 51%. App. Int. Br. at 16-19. The standard of review is not whether this Court can engage in the type of construct suggested by Travelers to support the jury's finding. Rather, the standard of review is whether the Trial Judge's decision to exercise discretion to grant a new trial as the thirteenth juror is wholly unsupported by the evidence. *Folkens*, 387 S.E.2d at 267. Here, the evidence overwhelmingly supports Judge Newman's decision.

Appellant Travelers also argues that the lower court's decision to grant a new trial was controlled by errors of law. First, Travelers argues that Judge Newman somehow misapplied the law of comparative negligence, which allows jurors to compare all forms of negligence. App. Int. Br. 19-22. Judge Newman clearly recognized that the jury had the right to allocate fault, as this is

exactly what the Trial Court instructed the jury. (R. 462:11-465:2). Judge Newman, however, correctly concluded that the evidence presented at trial does not support the jury's finding that Corey's negligence or recklessness exceeded Defendant's reckless conduct. (R. 9).

Travelers also argues that Judge Newman ruled as a matter of law that the negligence of a passenger can never exceed the negligence of an at fault driver. App. Int. Br. at 22- 23. Travelers misconstrues Judge Newman's ruling. The Trial Court's ruling was based solely upon the evidence presented to the jury at this trial and is not the result of the application of a legal principle that a passenger could never be more at fault than a driver.

Lastly, Travelers argues that comments made by Judge Newman at oral argument indicated that the Trial Court granted a new trial based upon speculation as to what the jury was thinking. Id. at 23-24. The Trial Court's written Order contains no such speculation and clearly awards a new trial based upon the evidence presented; nothing more and nothing less. Additionally, the Trial Court's written Order, not its oral statements made in response to counsel's argument, is the final order. *First Union Nat'l Bank of S.C. v. Hitman*, Inc., 411 S.E.2d 681, 682 (S.C. Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) ("No order is final until it is written and entered."); *Ford v. State Ethics Comm'n*, 545 S.E.2d 821, 823 (S.C. 2001) ("Until written and entered, the trial judge retains discretion to change his mind and amend his oral ruling accordingly."); *Badeaux v. Davis*, 522 S.E.2d 835, 839 (S.C. Ct. App. 1999) ("A judge is not bound by a prior oral ruling and may issue a written order which is in conflict with the oral ruling."); *Parag v. Baby Boy Lovin*, 508 S.E.2d 590, 592 (S.C. Ct. App. 1998) ("To the extent the written order may conflict with the prior oral ruling, the written order controls.").

CONCLUSION

The factors governing this Court's consideration of a Petition for Writ of Certiorari in Rule 242, SCACR, do not support review of the Court of Appeals' decision. There are simply no special or important reasons for this Court to hear this case. There are no novel questions of law. There was not a dissent in the decision of the Court of Appeals. Lastly, the decision of the Court of Appeals is not in conflict with the prior decisions of this Court.

Rather, the issue in this appeal is whether the experienced trial judge properly exercised his discretion as the thirteenth juror by granting Respondent's timely motion for a new trial. The Court of Appeals correctly affirmed Judge Newman's order.

Respectfully submitted,

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PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Griffin Davis LLC, attorneys for Respondent, do hereby certify that I have served a copy of the foregoing **Return to Petition for Writ of Certiorari** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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