THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2018-001849
Case No. 2016-CP-40-0857

Joshua Steven Stone.....Respondent,

v.

George Hunter McMaster.....Appellant.

FINAL BRIEF OF RESPONDENT

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October 16, 2019

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STATEMENT OF THE ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN ISSUING A SHORT-FORM ORDER WHEN THE RECORD PROVIDES SUFFICIENT EVIDENCE FOR THE GROUNDS OF THE RULING.

2. WHETHER THE TRIAL JUDGE PROPERLY ADMITTED THE GUILTY PLEA AS NON-HEARSAY EVIDENCE THROUGH APPELLANT'S DEPOSITION AND THE READING OF THE PLEADINGS.

3. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S JNOV MOTION WHEN THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUSTAIN THE VERDICT.

4. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE UNDER THE THIRTEENTH JUROR DOCTRINE WHEN THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT.

5. WHETHER THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR *NISI REMITTITUR* WHEN THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT.

STATEMENT OF THE CASE

This matter is before this Court by way of appeal from the Court of Common Pleas of Richland County following a jury trial and the denial of post-trial motions in this case. McMaster appeals the jury's verdict and the denial of the post-trial motions.

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. (R. pp. 5-12). Appellant, McMaster, answer and denied liability as alleged. (R. pp. 13-15). The matter proceeded to and was tried before a jury on August 27-28, 2017, with the jury rendering a verdict on August 28, 2017 in the amount of $50,000 in actual damages and $50,000 in punitive damages. The verdict was filed on August 29, 2017. On September 6, 2017, McMaster filed three post-trial motions: a motion for JNOV, a motion for a new trial absolute under the thirteenth juror doctrine, and a

motion for a new trial nisi remittitur. (R. pp. 16-27). Respondent Stone filed a response to McMaster's post-trial motions on September 13, 2018. (R. pp. 28-30). The trial court issued an order denying McMaster's post-trial motions on October 5, 2017. (R. p. 3). The notice of appeal was filed October 15, 2017 with the trial court and on October 16, 2017 with this court.

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. Id. To reverse denial of a motion for new trial under thirteenth juror doctrine, a reviewing court must conclude that the moving party was entitled to a directed verdict at trial. Parker v. Evening Post Pub. Co., 317 S.C. 236, 452 S.E.2d 640 (S.C. App. 1994).

STATEMENT OF THE FACTS

Respondent, Joshua Stone, ("Stone") brought suit against Appellant George McMaster ("McMaster") claiming McMaster groped and fondled his genitals and buttocks in a secluded hallway at The Palmetto Club after pulling down Stone's pants and reaching inside of his boxers. Stone alleged causes of action including sexual assault and battery and intentional infliction of emotional distress. McMaster neither appeared nor testified.

At trial, Stone sought to the read the pleadings and a portion of McMaster's deposition to the jury. McMaster objected on the grounds of inadmissible hearsay under Zurcher v. Bilton, 379 S.C. 132, 666 S.E. 2d 224 (2008) as the pleadings and the deposition referenced McMaster's plea of guilty to assault and battery in the third degree. The trial court overruled McMaster's objection,

concluding Zurcher did not apply and admitted the deposition into evidence under Rule 32(a)(2), SCRCP. In reaching its conclusion, the trial court also considered that McMaster did not appear for trial.

I. Testimony of Joshua Stone.

At trial, Stone testified he went in to work at The Palmetto Club on May 13, 2014 for a midday shift as a bartender, where he attended McMaster at the bar area. The two engaged in what Stone characterized as "idle bar chat" covering topics of clothing and watches (R. p. 73, lines 16-17). McMaster drank approximately ten beers during the four-hour period he was present at the Palmetto Club. During the course of their conversations, Stone testified McMaster appeared flirtatious as he "winked at [Stone] several times" and commented on Stone's "pretty smile." (R. p. 73, lines 10-11). While Stone stated his experience as a bartender rendered McMaster's actions unremarkable, as patrons often engaged him in flirtatious talk, the conversation did raise some "red flags." (R. p. 78, line 19).

At one point in the conversation McMaster noticed Stone was not wearing a belt and his pants were slightly sagging. McMaster then offered Stone his suspenders and helped put them on. Stone testified, "[a]t the time, he wasn't inappropriately touching me, but it was still more touching than just the regular clipping three different clips on, and letting it be at that." (R. p. 73, line 24-p. 74, line 2). Because McMaster was not pleased with the way the suspenders looked, Stone went to the bathroom to adjust them. Stone testified, "[McMaster] followed me back there. I didn't know, but he had followed me back there, and told me to go adjust them lower. So I just adjusted them a little lower, but, [he said] No, lower." (R. p. 74, lines 9-12). Stone then "adjusted them lower, and [McMaster] said, No, Goddamn it, and he throws my pants down to my ankles." (R. p. 74, lines 12-13). Consequently, Stone stated "[he] froze in fear, like shock, [and did not] know

what's going on. I never expected that to happen just from a simple adjust your pants." (R. p. 74, lines 13-16).

Stone further testified, "one of the managers came around the corner, saw—saw my face, turned around, and walked away. [McMaster] proceeded to start tucking my shirt into my boxers with his hand cuffed .... And he touched my butt and then he reached up under my boxers." (R. p. 74, lines 17-21). Stone noted, "[he] wore the loose boxers, not the tight boxers at the time, and [McMaster] touched my balls and grabbed the shirttail and pulled it – pulled it down. When he was done, he told me to pull my pants up and he walked away." (R. p. 74, line 25-p. 75, line 1). When asked to be more specific about how McMaster touched his genitals, Stone testified, "[McMaster] specifically grabbed my right testicle when he reached up. He – he – he grabbed it." (R. p. 75, lines 10-13). Ultimately, Stone "pulled [his] pants up, trying to figure out what had just happened." He asked his manager if he could take a break to collect his thoughts. When Stone returned, he found McMaster had left without finishing his beer or paying his tab. Stone testified he called his mother to tell her what happened and based on her advice and his general impression that The Palmetto Club was not going to take action on the incident, Stone called the police and filed a statement with Investigator Sumter that same evening.

As a result of the incident, Stone testified his appetite decreased, he had persistent dreams over the incident, and he suffered from ongoing mental distress as a result of being subjected to McMaster's actions. (R. p. 76, lines 6-18). Stone also testified the incident caused him to question his manhood and the event established a perpetual angst over his personal assessment in not being able to defend himself. Id. He stated he sought counseling and attended four sessions of therapy but ultimately stopped going because he found it was difficult to recount the incident and preferred to cope with the concomitant issues by speaking to family members.

Stone testified he was twenty-one years old at the time of the incident and was a student of the University of South Carolina, studying Hospitality Management. As training or preparation in his field of study, he had been employed at the Palmetto Club for two-years, working in various capacities as a server, bartender, and trainer. Stone testified The Palmetto Club is perceived as a fairly prestigious establishment where members are chosen by invitation only and admitted pursuant to a minimum vote by board members. While Stone testified that he had not had any prior encounter with McMaster, he had generally heard McMaster's name mentioned around the private club.

II. Testimony of Dr. Jennifer Savitz

Dr. Jennifer Savitz, a licensed professional counselor, was called as an expert witness. She testified she had the opportunity to evaluate Stone and administered an MMPI II (a personality inventory test) and a Lan III (a mental health evaluation). (R. p. 94, lines 4-8). Dr. Savitz testified Stone suffered from PTSD due to the incident and also diagnosed Stone with an anxiety disorder. (R. p. 94, lines 24-25). In her professional opinion, Dr. Savitz believed Stone could benefit from six-months of counseling; however, she believed Stone would experience PTSD and anxiety symptoms for the duration of his life. (R. p. 95, line 16-p. 96, line 2).

III. Testimony of Valerie Stone

Stone's mother, Valerie Stone, testified she received a call from Stone on the night of the incident, informing her that Stone had been "molested" at work by a member and that he did not know what to do (R. p. 101, lines 5-16). She stated that she advised Stone to call the police and make a report when it became apparent to her the Palmetto Club was not going to provide assistance to Stone regarding the incident. Valerie Stone was asked about her observations as to the effect the incident had on Stone. She testified she had observed Stone lose trust with people,

lose his dignity, and found he had become significantly more "closed-off" than before. (R. p. 106, lines 5-8). She also testified Stone exhibits symptoms of PTSD: "I have seen him at work, and a patron will reach up to touch his shoulder, like to say thank you, and see him flinch away from them." (R. p. 106, lines 9-11). Regarding his personality change, Valerie Stone testified her son "used to be very outgoing, he is not now. I have just seen a big change in him." (R. p. 106, lines 11-12).

IV. Testimony of Rebecca Rue

Rebecca Rue, Stone's ex-girlfriend was called by McMaster as a witness. Her testimony involved details regarding her relationship with Stone and information surrounding Stone's actions and demeaner prior to and after the incident occurred. Specifically, Rebecca Rue testified she had a somewhat tumultuous relationship with Stone that sometimes resulted in violence. She testified that Stone exhibited anger and violence before the date of the incident. (R. p. 113, lines 7-9). On direct examination, she was asked about giving a statement to Stone's attorney some time after the incident took place. In the statement Rebecca Rue claimed Stone exhibited "*more* anxiety, *more* anger, *more* angst, and he was being *more* aggressive to [her] and his family" after the incident took place. (R. p. 116, lines 21-23) (emphasis added). She claimed, however, that as their relationship continued over the course of four years, she regarded these attributes as general personality traits of Stone's that appeared to her to have existed prior to the date of the incident.

V. Verdict and post-trial matters.

Prior to closing arguments McMaster requested a jury charge of assault and battery instead of any reference to sexual assault or sexual battery. The trial court agreed to charge the jury accordingly and did so at the conclusion of the trial. (R. p. 130, lines 2-19). The jury returned a verdict of $50,000 in actual damages and $50,000 in punitive damages. Both McMaster and Stone

declined individual polling of the jurors. (R. p. 142, lines 23-25). The trial court granted McMaster ten days to file any post-trial motions.

ARGUMENTS

I. THE TRIAL COURT'S RULING ON APPELLANT'S POST-TRIAL MOTIONS IS SUFFICIENTLY SUPPORTED BY THE EVIDENCIARY RECORD, PERMITTING EFFECTIVE APPELLATE REVIEW.

McMaster argues this court should reverse and remand the denial of appellant's post-trial motions on the basis the Order lacks specificity in detailing the grounds for denial. Pursuant to Rule 52, SCRCP and Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014) (overruling Bowen v. Lee Process Systems Co. 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000))., a trial judge may properly issue a summary order, especially when the grounds for the ruling are deducible from the record.

Rule 52, SCRCP states, "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or *any other motion* except as provided in Rule 41(b)." (emphasis added). Rule 41(b) is inapplicable in this matter as it involves matters of involuntary dismissal. In Woodson, the South Carolina Supreme Court cited Rule 52, SCRCP for the proposition that findings of facts and conclusions of law on motions are not required for appellate review. 406 S.C. 517, 527, 753 S.E.2d 428, 433 (2014) ("We agree it is better practice – and in most cases common practice as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order … such findings and conclusions are not required for appellate review."). Furthermore, under Youmans ex rel. Elmore v. S.C. Dep't of Transp., a trial court is not obligated to specify the grounds in a ruling under the thirteenth juror doctrine. 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008) ("We have also refused to require

trial judges to explain the reasons for the ruling.") (quoting Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)).

Appellant cites Sorin Equipment Co., Inc. v. The Firm, Inc., 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996) and Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) for the sweeping proposition that a trial-court order must invariably contain specific evidentiary and legal support. The applicability of Sorin and Howe is, however, tenuous at best.

In Sorin, the jury found in favor of Sorin on three causes of action in a bifurcated trial. The trial court granted The Firm's motion for JNOV on two of the causes of action, then granted The Firm's motion for a new trial on the issue of damages only for the third cause of action. The trial judge issued a cursory order stating, "[t]he verdict is contrary to the weight of the evidence, is not supported by the evidence and is grossly excessive and unreasonable." Sorin, 323 S.C. at 363, 474 S.E.2d at 821. On appeal, the parties disagreed about whether the judge granted a new trial absolute or a new trial under the thirteenth juror doctrine. The Court of Appeals determined, "in light of the trial judge's express wording and the absence of facts on which his decision is based, we believe he intended to invoke the thirteenth juror doctrine." Sorin, 323 S.C. at 365, 474 S.E.2d at 822 (explaining "[it] is not necessary to justify the ruling with factual findings" under the thirteenth juror doctrine).

In reaching its conclusion, the Court of Appeals in Sorin, went into an exposition of the varying legal theories underpinning an order for a new trial absolute versus those under the thirteenth juror doctrine. Concerning a new trial absolute, the Court, in dicta, erroneously cited Pelican Bldg. for the proposition that "a judge must set out the reasons for granting *or denying* new trial motions based on inadequacy or excessiveness of the verdict." Sorin, 323 S.C. at 363, 474 S.E.2d at 822 (citing 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 providence in this matter) (emphasis added). While Appellant attaches particular significance to Sorin's citation of Pelican Bldg., the Court's decision in Pelican Bldg. is devoid of any supporting authority to that effect. In fact, in Pelican Bldg., the Court of Appeals found the trial court erred in granting a new trial precisely because the record reflected there was sufficient evidence to sustain the jury's verdict. In actuality, Pelican Bldg. stands for the proposition of exercising caution in *granting* a motion for a new trial when the evidence presented at trial squarely falls within the providence of the jury.

In Doe v. Howe, the trial court denied Doe's post-hearing Rule 59(e) motion in a summary order without further discussion of Doe's right to maintain an action for his breach of fiduciary claim. 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005). Relying heavily on Bowen v. Lee Process Systems Co. (*overruled by* Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014)), the Court of Appeals reversed for identification of the facts and accompanying legal analysis, in accordance with its decision in Bowen. Id. at 449. Central to the Court's holding was the inability to deduce from the record any basis for the trial court's ruling:

> 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."
>
> 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 argument concerning his breach of fiduciary duty claim.

Howe, 367 S.C. at 448, 626 S.E.2d at 33 (emphasis added).

Appellant's post-trial motions mirror the arguments that were raised and ruled upon at trial. Subsequent to Appellant's directed verdict motion, in which he argued Petitioner failed to establish the elements for all three causes of action, the trial court determined "there's testimony in the record that, if believed by the jury, could result in a finding in favor of the Plaintiff." (R. p. 112, lines 9-11). Upon Appellant's objection for allowing Punitive damages, the trial court determined, "[t]he issue of the punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful or wanton." (R. p. 117, lines 4-8). The trial court also heard and ruled on Appellant's arguments for exclusion of the deposition and plea testimony. (R. p. 53, line 19-p. 70, line 4). While Appellant argued a new trial should have been granted under the thirteenth juror doctrine, Sorin held the thirteenth juror doctrine does not require a complete exposition because "the circumstances are as though the judge, as the thirteenth juror, 'hangs' the jury." Sorin, 323 S.C. at 364, 474 S.E.2d at 822. Unlike Sorin, however, the trial court did not take the matter out of the province of jury. Considering the trial court's prior rulings on the sufficiency of the evidence, the record is replete with evidence of the trial court's propriety in denying Appellant's motion in summary form and in leaving the matter squarely within the province of the jury. Notwithstanding, Appellant's arguments for reversal and remand for a more complete ruling should be denied in light of Woodson, *supra,* and Rule 52, SCRCP.

II. THE TRIAL JUDGE PROPERLY ADMITTED THE GUILTY PLEA AS NON-HEARSAY EVIDENCE THROUGH APPELLANT'S DEPOSITION AND THE READING OF THE PLEADINGS.

Appellant contends the trial court erred in allowing Respondent to read the pleadings to the jury and in allowing Petitioner to publish Appellant's deposition. Specifically, Appellant argues the guilty plea to assault and battery constitutes inadmissible hearsay under Rule 803(22), SCRE

and should have been excluded under Zurcher v. Bilton, 379, S.C. 132, 666 S.E.2d 224 (2008). Citing no additional authority, Appellant presumably seeks error regarding the publishing of the Deposition on the same grounds. Because McMaster's guilty plea constitutes a party admission under the South Carolina Rules of Evidence, it was properly admitted as non-hearsay evidence.

Under Rule 43(g), SCRCP, "[c]ounsel for any party may read his pleadings to the jury or make a statement to the jury of the facts alleged in the pleadings ...." Pursuant to Rule 32(a)(2), SCRCP, "[t]he deposition of a party... may be used by an adverse party *for any purpose*." (emphasis added). Moreover, Rule 801(d)(2), SCRE excludes as hearsay any admissions made by a party-opponent. Historically, South Carolina courts have determined guilty pleas are admissible as a party admission. Samuel v. Mouzon, 282 S.C. 616, 320 S.E.2d 482 (1984) (holding, "a judgment on a plea of guilty may be received in evidence as an admission"); Green v. Boney, 233 S.C. 49, 61, 103 S.E.2d 732, 738 (1958) ("defendant's guilty plea to involuntary manslaughter... constituted an admission of at least negligence in the operation of defendant's automobile and was clearly admissible); Globe & Rutgers Fire Ins. Co. v. Foil, 189 S.C. 91, 96, 200 S.E. 97, 100 (1938) ("the principle is well established that in an action for damages for assault and battery, the plaintiff may prove that the defendant pleaded guilty in the criminal prosecution for the same assault").

Federal Courts have also ruled on the admissibility of misdemeanor guilty pleas as a party admission. Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992) (while "a guilty plea to a misdemeanor charge made by a non-party is hearsay...by application of FRE 803(22)...where a guilty plea to a misdemeanor charge is made by a party, such an out of court statement is not hearsay by virtue of FRE 801(d)(2)(A)") (citing United States v. Gotti, 641 F.Supp. 283 (E.D.N.Y. 1986); Hinshaw v. Keith, 645 F.Supp 180 (D. Me. 1986); Romine v. Parman, 831 F.2d 944 (10th Cir. 1987); Rain v. Pavkov, 357 F.2d 506 (3d Cir. 1966)).

Appellant relies solely on Zurcher v. Bilton for the proposition that the trial court erred in allowing the reading of the pleadings and the deposition to the jury. 379 S.C. 132, 666 S.E.2d 224 (2008). Specifically, Appellant claims the Zurcher Court "held" only crimes punishable by death or imprisonment in excess of one year are admissible under Rule 803(22), SCRE. However, the Court in Zurcher specifically held that because of his guilty plea, "Zurcher was estopped from denying liability for the assault in the subsequent civil action." Zurcher, 379 S.C. at 137, 666 S.E.2d at 227. Appellant claims footnote 3 establishes the holding in Zurcher. In footnote 3, the court explained that Zurcher did not object to or appeal the issue of hearsay and therefore the Court did not need to address the matter. Zurcher, 379 S.C. at 138, 666 S.E.2d at 227. In its explanation within footnote 3, the Court stated it appeared the misdemeanor charge *would have* constituted inadmissible hearsay under Rule 803(22), SCRCP. Id (noting Zurcher could have avoided the matter altogether by pleading *nolo contendere* as *nolo* pleas are inadmissible in any civil or criminal proceedings). However, as the Court explained, the issue was never argued nor briefed. Id. Therefore, footnote 3 constitutes dictum and is not binding on this Court.

As Appellant notes, "[t]o warrant reversal, an error must result in prejudice to the appealing party. (Appellant Br. at 7) (citing, State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011)); See also, State v. Wilson, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case."); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of "a manifest abuse of discretion accompanied by probable prejudice."); State v. Blackburn, 271 S.C. 324, 329, 247

S.E.2d 334, 337 (1978) (the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence).

Based on the authority cited above, the admission of McMaster's guilty plea into evidence was proper because it constitutes non-hearsay evidence as a party admission. Subject to the trial court's discretion, McMaster's admission was published to the jury. Taken into evidentiary context, Respondent presented more than sufficient evidence to sustain a conviction on the causes of action alleged, notwithstanding admission of the guilty plea (see Section III, below, for further details of the testimony presented at trial). Therefore, this Court should affirm the trial court's ruling and deny Appellant's request for remand.

III. THE TRIAL COURT PROPERLY DENIED APPELLANTS JNOV MOTION, AS THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO SUSTAIN THE VERDICT.

Appellant argues but for the submission of McMaster's guilty plea, "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." (emphasis added) (Appellant Br. at 10). The testimonial evidence submitted through Joshua Stone, Valerie Stone, Dr. Savitz, and Rebecca Rue establishes the jury had sufficient evidence to enter a verdict. Furthermore, the jury was presented with ample evidence to consider the submission of the causes of action. Therefore, the trial court did not err in denying Appellants JNOV motion.

a) Appellant's JNOV motion was properly denied because sufficient evidence was presented for the jury to consider its weight and credibility.

In Burns v. Universal Health Services, Inc. the Court of Appeals set forth the standard of review on a motion for judgment notwithstanding the verdict:

> In ruling on a motion for JNOV, the trial judge cannot disturb the factual finding of a jury unless a review of the record discloses no evidence which reasonably supports them. In making this determination, the judge must view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable

> to the nonmoving party. The trial court must deny the motion when the evidence yields more than one inference or its inferences are in doubt.
>
> In deciding a motion for JNOV, the trial judge is concerned with *the existence of evidence, not its weight.* When considering a JNOV motion, neither an appellate court, nor the trial court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence.
>
> *A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict.* If more than one inference can be drawn from the evidence, the grant of a JNOV is improper and the case must be left to the jury's determination. The verdict will be upheld if there is any evidence to sustain the factual finding implicit in the jury's verdict. The appellate court will reverse the trial court's ruling on a JNOV motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law.

361 S.C. 221, 232, 603 S.E.2d 605, 611 (Ct. App. 2004) (internal citations omitted) (emphasis added).

At trial, Stone testified he was working at an establishment generally catering to well-known, perhaps affluent patrons. At the time, he was relatively young (21 years old) and a student at the University of South Carolina. Stone testified one of these patrons (McMaster), who's name was circulated around the club, appeared to show Stone particular attention in the form of flirtatious conduct. While Stone testified the initial adjustment of his loaned suspenders did not result in inappropriate touching, it was sufficient to raise some apprehension. Stone also testified McMaster had roughly ten beers to drink. In this context, Stone abruptly found McMaster had followed him to the bathroom. In a secluded hallway, McMaster then pulled Stone's pants down and uninvitedly inserted his hand through the bottom of Stone's boxers. While McMaster was reaching within Stone's boxers, the testimonial evidence established McMaster grabbed and brushed his hands against Stone's testicles and buttocks. Stone specifically testified he froze in fear and was in shock from the incident. As a result, Stone claimed he suffered from lingering mental, emotional, and physical effects. Specifically, Stone testified his appetite decreased, he had

enduring dreams over the incident, and he suffered from ongoing mental distress as a result of being subjected to McMaster's actions.

Dr. Savitz testified she administered a MMPI II and a LAN II test, which indicated Stone suffered from an anxiety disorder and PTSD. She further testified Stone exhibited lingering anger as a result of the incident. While Dr. Savitz indicated Stone could perhaps decrease his symptoms of PTSD through six months of counseling therapy, his symptoms would, nevertheless, persist throughout the remainder of his life. Valerie Stone, Joshua Stone's mother, testified she had observed Stone lose trust with people, lose his dignity, and found he had become significantly more "closed-off" than before. She also observed Stone would flinch when tapped on the shoulder by a customer and had become significantly less outgoing. As a witness for Appellant, Rebecca Rue testified to giving a statement to Stone's attorney some time after the incident took place, in which she claimed Stone exhibited "*more* anxiety, *more* anger, *more* angst, and he was being *more* aggressive to [her] and his family." (R. p. 116, lines 21-23) (emphasis added).

The testimony of the four witnesses clearly presents an existence of evidence upon which the jury could have reached a verdict. In contrast, Appellant presented little to no evidence refuting Respondents case. McMaster neither appeared nor testified to refute his conduct constituted anything other than what was alleged. Appellant's sole witness was Rebecca Rue. While Rebecca Rue attempted to backpedal the claims she made in her statement to Appellant's counsel, her testimony ultimately goes to credibility; a matter left to the sole province of a jury. See Burns, *supra.* The judge, therefore, properly submitted the case to the jury for a determination of the weight of the evidence.

b) The jury was presented with sufficient evidence on the causes of actions for assault, battery, and the intentional infliction of emotional distress.

An assault is an attempt or offer, with force or violence, to inflict bodily harm on another or *engage in some offensive conduct*. Mellen v. Lane, 377 S.C. 261, 276, 659 S.E.2d 236, 244 (Ct. App. 2008) (citing, In re McGee, 278 S. C. 506, 507, 299 S.E.2d 334, 334 (1983) (emphasis added); Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 230, 317 S.E.2d 748, 754–755 (Ct.App.1984) ("[A]n assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant."). Furthermore, 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. Brooker v. Silverthorne, 111 S.C. 553, 559, 99 S.E. 350, 351 (1919) (citing Grimes v. Gates, 47 Vt. 594, 19 Am. Rep. 129 (1874)).

The circumstances of the incident as described in Stone's testimony clearly indicate Stone was placed in reasonable apprehension of harmful or offensive contact with his person, or was placed in a situation where he reasonably believed some offensive conduct would be forced upon him. The jury was well within reason in concluding McMaster raised the specter of some offensive conduct or contact when he followed Stone towards the bathroom and pulled Stone's pants down in the secluded hallway. The natural and probable trepidation one would experience in such a situation is the apprehension of a subsequent battery; a fact unfortunately later established during trial. Indeed, Stone testified he was frozen in fear and shock. The jury possessed adequate evidence to consider assault as a claim against McMaster. Therefore, Appellant's JNOV motion was properly denied.

"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." Mellen v. Lane, 377 S.C. 261, 277, 659 S.E.2d 236, 244 (Ct. App. 2008)

(citing Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 230, 317 S.E.2d 748, 754 (Ct.App.1984).

> 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.

Mellen v. Lane, 377 S.C. 261, 277, 659 S.E.2d 236, 244 (Ct. App. 2008) (citing Smith v. Smith, 194 S.C. 247, 259, 9 S.E.2d 584, 589 (1940). Physical injury is not an element of battery. Id. While there must be a touching, any forcible contact, irrespective of its degree, will suffice. Id. Furthermore, while pertinent and relevant, intent is not an essential element of assault and battery in civil actions. Id.

The evidence presented by Stone that McMaster brushed his buttocks and grabbed his testicles was uncontroverted. It is self-evident the jury had enough evidence to consider battery as a claim against McMaster.

The Court in Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778–79 (1981) (internal citations omitted) established the standard for recovery under a claim of intentional infliction of emotional distress:

> Specifically, in order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community, (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that 'no reasonable man could be expected to endure it. Although severe emotional distress is usually manifested by shock, illness or other bodily harm, such objective symptomatology is not an absolute prerequisite for recovery of damages for intentional ... infliction of emotional distress.

If a person of ordinary prudence would be conscious that his conduct constitutes an invasion of another's rights, his conduct is reckless. Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011) (citing Rogers v. Florence Printing Co., 233 S.C. 567, 577, 106 S.E.2d 258, 263 (1958).

The jury was presented with sufficient evidence to consider the cause of action of intentional infliction of emotional distress. Stone's testimony established the factual predicate of the events described on the day of the incident. The jury heard McMaster had approximately ten beers within a four-hour period; that McMaster followed Stone into a secluded hallway and pulled Stone's pants down to his ankles; and that McMaster then reached underneath Stone's boxers and grabbed his genitals. The testimony indicated the incident took place at Stone's workplace, in a respectable establishment that caters to private patrons. The evidence was uncontroverted. While McMaster could have argued his actions constituted something other than what was purported, he neither appeared nor testified. Perhaps prudent, McMaster neither argued his actions constituted anything other than atrocious or utterly intolerable behavior, nor that his actions constituted something other than an invasion of Stone's rights. Furthermore, all four witnesses testified to Stone's lingering mental and physical manifestations of emotional distress. Based on the evidence presented, the jury was well within their province to consider whether McMaster recklessly inflicted emotional distress upon Stone and whether his conduct against Stone satisfied the objective criteria under the cause of action. Therefore, the trial court properly denied Appellant's JNOV motion.

IV. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE UNDER THE THIRTEENTH JUROR DOCTRINE BECAUSE THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT.

Appellant argues the trial court erred in denying a new trial absolute under the thirteenth juror doctrine on the following grounds: (1) The evidence presented was insufficient to support a

verdict on the three causes of action to the jury; (2) the jury verdict was excessive; (3) the jury "obviously" ignored the charges as were presented by the court (Appellant Br. at 12); (4) the jury heard improper evidence; and (5) the punitive award was exorbitant.

As to grounds (1) and (4), Petitioner would point the Court to the sections above, establishing the evidence was sufficient for submission to the jury (Section III) and that the submission of the guilty plea was proper (Section II). As to grounds (2) and (5), the thirteenth juror doctrine is not a vehicle for assessing the amount of the verdict. Therefore, the trial court did not err in denying Appellant's motion as to the purported excessiveness of the verdict. To the extent Appellant relies on a different legal theory, the damages were fully supported by the evidence (as discussed in more detail below). As to ground (3), Appellant makes the single assertion the jury ignored the charges without any supporting sections under the present heading. To the extent a response is required, Respondent would submit that the jury was given the correct law on the causes of action and no evidence is presented to suggest the jury did not follow the law. Friedman v. Fludas, 122 S.C. 153, 115 S.E. 200 (1922) (no error may be predicated on failure of court to give charge which was not requested).

a) The trial court did not err in denying Appellant's motion for a new trial under the thirteenth juror doctrine because the jury's verdict on all three causes of action was supported by the evidence.

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.2d 265, 267 (1990). The Court in Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 272–73, 670 S.E.2d 1, 5–6 (Ct. App. 2008) (internal citation omitted) set forth the basis for granting or denying a motion for a new trial absolute under the thirteenth juror doctrine:

> The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion.

To reverse denial of a motion for new trial under thirteenth juror doctrine, a reviewing court must conclude that the moving party was entitled to a directed verdict at trial. Parker v. Evening Post Pub. Co., 317 S.C. 236, 452 S.E.2d 640 (S.C. App. 1994). "Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.'" Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 271, 670 S.E.2d 1, 4 (Ct. App. 2008) (citing Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); Folkens, 300 S.C. at 254–55, 387 S.E.2d at 267.). "The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial *nisi additur*." Youmans, 380 S.C. at 273–74, 670 S.E.2d at 6 (citing Bailey v. Peacock, 318 S.C. 13, 14–15, 455 S.E.2d 690, 692 (1995); Pinckney v. Winn–Dixie Stores, Inc., 311 S.C. 1, 4–5, 426 S.E.2d 327, 329 (Ct.App.1992)).

On appeal, the Court's "review is limited to consideration of whether evidence exists to support the trial court's order." Youmans, 380 S.C. at 271, 670 S.E.2d at 5 (citing Folkens, 300 S.C. at 255, 387 S.E.2d at 267. The Appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." Youmans, 380 S.C. at 271, 670 S.E.2d at 5 (citing Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993)).

As discussed in Section III, evidence was presented at trial upon which the jury could have properly based a verdict on the three causes of action. Similarly, the evidence wholly supports the

trial court's discretionary order denying a new trail under the thirteenth juror doctrine because the jury possessed the requisite evidence to reach a verdict. Therefore, Appellants motion was properly denied, and the trial court did not err in refusing to "hang the jury."

b) Consideration of the purported improper evidence does not warrant the grant of a new trial absolute under the thirteenth juror doctrine.

Without citation to any legal authority, Appellant argues the trial court erred in denying a new trial under the thirteenth juror doctrine based upon the reading of the pleadings and admission of the deposition testimony. Assuming arguendo, the thirteenth juror doctrine is the appropriate vehicle for seeking error on this basis, Appellant has not met the burden of proving he would have been entitled to a directed verdict under Parker, *supra*, or that the trial court exhibited a manifest error of law in determining the evidence justified the verdict. For the reasons outlined in Section II, above, the plea and deposition were admitted without error. Notwithstanding the admission of the plea and deposition, the testimonial evidence presented was sufficient to sustain the verdict independently. Therefore, the trial court properly denied Appellants motion for a new trial.

Appellant also attempts to suggest Valerie Stone interjected some apparition of McMaster's familial relations and that the jury was thereby improperly influenced in its award. However, the extent of Valerie Stone's testimony regarding McMaster was simply that she became more concerned for her son after she learned the incident involved the brother of then Lieutenant Governor, Henry McMaster. (R. p. 105, lines 2-9). Appellant's argument on this issue contains no legal analysis and presupposes the jury awarded Stone excessive damages in light of Valerie Stone's background testimony. Considering there was substantial evidence to uphold the verdict, the trial court did not err in denying a new trial based on this testimony. Nor may it be deemed, in the totality of the evidence, that Valerie Stone's testimony shifted the evidence so far as to warrant a conclusion by the trial court that justice did not prevail. Alternatively, admission of the evidence

was harmless as it created no discernable impact on the totality of the evidence presented at trial. See, State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006) (The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of "a manifest abuse of discretion accompanied by probable prejudice."); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is harmless where the evidence is merely cumulative to other evidence). Consequently, Appellant's request for a new trial under the grounds stated above should be denied.

c) The jury's award of damages was not grossly excessive or exorbitant in light of the evidence offered at trial.

Appellant contends the trial court erred in sustaining the jury's return of $50,000 in actual damages and $50,000 in punitive damages. Appellant does not cite any particular legal theory for a new trial absolute on the issue of damages and generally avers the amounts returned by the jury are excessive and speculative in light of Stone's medical expenses. Furthermore, under Youmans, *supra*, the thirteenth juror doctrine does not allow a new trail based on an assessment of damages. Notwithstanding, the jury's verdict was commensurate with the evidence establishing Stone suffered significant, ongoing manifestations of mental and emotional distress.

The decision to grant a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and ordinarily will not be disturbed on appeal. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635–36, 529 S.E.2d 758, 761–62 (Ct. App. 2000). An abuse of discretion occurs if the trial court's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Id. In deciding whether to assess error when a new trial motion is denied, the appellate court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. Id. The trial court must

set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. Id. In other words, to warrant a new trial absolute, the verdict reached must be so "grossly excessive" as to clearly indicate the influence of an improper motive on the jury. Id.

Actual or compensatory damages include compensation for all injuries which are naturally the proximate result of the alleged wrongful conduct of the defendant. Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 312, 594 S.E.2d 867, 874 (Ct. App. 2004). 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. Id. Damages are proximately caused if they are the foreseeable result of the defendant's tortious act. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 179–80, 463 S.E.2d 636, 639 (Ct. App. 1995). Proximate cause is a question of fact for the jury. Parr v. Gaines, 309 S.C. 477, 484, 424 S.E.2d 515, 520 (Ct. App. 1992).

While Stone incurred relatively minor medical expenses arising out the incident, all four witnesses testified to the long-term effects McMaster's actions had on Stone. Specifically, Stone testified his appetite decreased, he had persistent dreams over the incident, and he suffered from ongoing mental distress as a result of being subjected to McMaster's actions. Stone also testified the incident caused him to question his manhood and the event established a perpetual angst over his personal assessment in not being able to defend himself. Dr. Savitz, perhaps most notably, diagnosed Stone with PTSD and an anxiety disorder. She testified Stone's symptoms of PTSD and anxiety would continue indefinitely. Valerie Stone also testified she observed Stone lose trust with people, lose his dignity, and found he had become significantly more "closed-off" than before. She

also observed Stone would flinch when tapped on the shoulder by a customer at work and had become significantly less outgoing. Rebecca Rue also claimed Stone exhibited an increase in his anxiety after the incident and that Stone experienced more anger and angst. She also noted Stone was being more aggressive to her and his family.

Therefore, the testimony and the inferences established in a light most favorable to Stone indicate the jury's verdict was not shockingly disproportionate to the injuries suffered and does not support an inference that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded.

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL *NISI REMITTITUR*.

"The trial judge *alone* has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive." O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993) (emphasis original). The denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. Id.

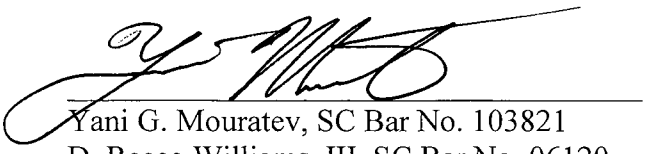
For the reasons set forth in the previous section, the trial court did not err in denying in denying Appellant's motion for a new trial *nisi remittitur*.

CONCLUSION

For the reasons set forth herein and based on the applicable principles of law, Respondent respectfully requests the Court to affirm the trial court's ruling on Appellant's post-trial motions and requests the Court to sustain the jury verdict returned in favor of Joshua Stone.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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