THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2018-002095

Jeanne Knollinger,

Appellant,

v.

Ryan Noel Oliver,

Respondent.

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court abuse its discretion when it prohibited Appellant from introducing evidence of an Enterprise investigative report which contained Respondent's description of the accident; when it prohibited Appellant from introducing testimony about a witness's statement heard by both Appellant and Respondent immediately after the collision; and when it prohibited Appellant from introducing evidence and testimony regarding former Defendant Enterprise?

II. Did the trial court err in denying Appellant's Motions for a New Trial and Judgment Notwithstanding the Verdict?

STATEMENT OF THE CASE

Appellant filed the instant action in the Richland County Court of Common Pleas on April 21, 2016, against Respondent and Enterprise Leasing Company – Southeast LLC d/b/a Enterprise Rent-A-Car (herein referred to as "Enterprise"), alleging negligence against Respondent and negligent entrustment against Enterprise for damages Appellant suffered in a motor vehicle collision that occurred on December 11, 2014, with a vehicle owned by Enterprise and driven by Respondent. (*See* R. pp. 10-20). Enterprise retained counsel to represent both itself and Respondent. (*See* R. pp. 21-25). In their joint Answer, Respondent and Enterprise raised the affirmative defenses of Failure to State a Claim, Comparative Negligence, and the alleged Unconstitutionality of Punitive Damages. *See id.* Enterprise additionally made a counterclaim against Appellant for negligence alleging damages sustained by Enterprise's vehicle in the collision. *Id.* Appellant retained counsel for the counterclaim and filed a reply with the affirmative defenses of Comparative/Contributory negligence on September 1, 2016. (R. pp. 26-30).

The parties engaged in discovery and on October 11, 2017, Enterprise filed a motion for summary judgment regarding Appellant's claims of negligent entrustment. (*See* R. pp. 30-46). Additionally, on November 27, 2017, Appellant filed a Motion for Partial Summary Judgment

regarding Respondent's liability. (*See* R. pp. 47-69). The Honorable Deandrea G. Benjamin entered an order denying Appellant's Motion and Granting Enterprise's; however Enterprise remained a party under a general negligence theory. (*See* R. pp. 1-6). As trial approached, Respondent's and Enterprise's counsel inquired as to whether Appellant would agree to a dismissal of Enterprise's Counterclaim pursuant to Rule 40(j), SCRCP, with leave to restore. (*See* R. p. 381). Appellant denied such request, but consented to a Rule 41(a) Dismissal with Prejudice of the same. (*See* R. pp. 70, 382). Additionally, the parties consented to dismiss the remainder of Appellant's claims against Enterprise on August 31, 2018. (*See* R. p. 71).

The case against Respondent was called to trial on September 4, 2018, and on September 5, 2018, the jury entered a verdict in favor of Respondent. (*See* R. pp. 90-309). After the jury's dismissal, Appellant verbally moved for a new trial and judgment notwithstanding the verdict in which the court denied. (R. pp. 308-09). On September 17, 2018, Appellant moved pursuant to Rule 59(e), SCRCP, to alter or amend the court's denial of motions. (R. pp. 76-79). Respondent filed a memorandum in opposition of the same and on October 23, 2018, the court entered judgment denying Appellant's request. (R. pp. 7-9, 80-83). On November 20, 2018, Appellant timely filed a Notice of Appeal and served the same upon Respondent. (R. pp. 84-85).

STATEMENT OF FACTS

On December 11, 2014, Appellant and Respondent were involved in a motor vehicle collision on Garners Ferry Road in Columbia, South Carolina. (R. pp. 10-20). The collision occurred after Appellant established her vehicle on Garners Ferry Road after passing through a yield sign and turning from Pelham Road. (R. pp. 146-48). Respondent, driving a box truck owned by Enterprise, turned left on Garners Ferry Road from a restaurant/private driveway after looking left—the direction in which Appellant was coming—and then diverting his attention to

the right, before pulling out onto Garners Ferry Road. (R. pp. 10-19; 240-41). During the collision, Appellant's vehicle was dragged by Respondent's vehicle across the lanes of Garners Ferry Road, spun around, and came to rest facing the opposite direction in which she was originally traveling. (R. pp. 138-222). Immediately after the collision, both Appellant and Respondent heard an unknown witness yell that Appellant was not okay because Respondent pulled out in front of her. (R. pp. 116-17; *see also* R. pp. 57, 61). Appellant left the scene of the collision in an ambulance and sought medical treatment. (R. pp. 158-59). Respondent was ticketed for failure to yield the right-of-way; however the charge was later dismissed. (R. p. 118).

After litigation ensued and during the course of discovery, Appellant had requested numerous documents in possession of Respondent and Enterprise, including information regarding any and all reports about the collision in Enterprise's possession. Prior to Respondent's deposition on May 8, 2017, Enterprise produced some documentation concerning Appellant's request. The parties convened a 30(b)(6) deposition of Enterprise on September 26, 2017. At that time, counsel for Respondent and Enterprise produced numerous pages of documentation in its possession in which it had not previously produced. Among those documents was an Enterprise Accident Report—an internal report taken by Enterprise on December 13, 2014. (*See* R. p. 113). It states "[Respondent] was involved in an accident and pulled out in front of a car and was struck on the drivers [sic] side of the box." (*See* R. p. 69).[1]

Prior to trial, Appellant took the *de bene esse* deposition of Tyler Thiede, a former employee of Enterprise who, while employed with Enterprise, created the report. (R. pp. 111-12;

[1] Appellant had considered filing a motion with the court for the alleged discovery abuse. However, out of professional courtesy, he mistakenly chose not to do so as counsel for Respondent and Enterprise confided she had no idea such documents were in existence until that day as her client had failed to give them to her until that time. (*See* R. pp. 112-13).

see R. pp. 340-80). Thiede testified that, while the report may have contained slight paraphrasing from Respondent, there was no reason to believe that he put any inaccuracies in it and it was a fair and accurate representation of what Respondent told him. *Id.* Additionally, Respondent admitted that the Enterprise report was a "true, correct and genuine copy of the report, generated on or about December 13, 2014, by a person with knowledge of the report, and kept by Enterprise Rent-A-Care in the ordinary course of business." (R. p. 89).

Enterprise later agreed to voluntarily dismiss its counterclaim against Appellant in March of 2018 with prejudice without the exchange of consideration. (*See* R. p. 70). Appellant additionally voluntarily dismissed her negligent claims against Enterprise on August 31, 2018. (R. p. 71).

At trial, Appellant subpoenaed two (2) witnesses of Enterprise and planned to introduce the *de bene esse* Deposition of Tyler Thiede. One of the subpoenaed witnesses described the above-mentioned Enterprise Report as "straightforward" and confirming there was "no reason to think [Enterprise's] own employee embellished" its contents. (R. p. 112). That same witness would testify also that, but for Respondent signing a damage waiver with Enterprise, Enterprise would have filed suit against Respondent for damages to its vehicle but was prohibited from doing so. (*See* R. p. 114). However, over Appellant's objections upon Respondent's motion, Appellant was not permitted to call witnesses of Enterprise. (*See* R. pp. 109-117).

Additionally, Respondent moved in *limine* to prohibit the above discussed Enterprise Report, alleging in its written motion it contained a subjective opinion and not admissible under the business records exception to hearsay. (*See* R. pp. 72-75). Over Appellant's objection, the court granted Respondent's Motion, stating that it was not Respondent's statement, purportedly because Respondent did not sign the same. (*See* R. pp. 111-14). The court in turn did not permit

the introduction of Thiede's *de bene esse* deposition. *Id.* The court held the Enterprise Report was hearsay, not admissible, and prohibited Appellant from impeaching Respondent with the same. *Id.*

The court also granted Respondent's motion to exclude any reference to the unknown witness at the collision that stated Respondent pulled out in front of Appellant over Appellant's argument that such statements fell under the present sense impression and excited utterance exception to hearsay. (R. pp. 116-18). The court ruled that it was not an excited utterance but provided no explanation as to whether it was a present sense impression. *Id.*

At trial, Appellant testified about how the collision occurred and her resulting injuries. (*See* R. pp. 138-192). Additionally, Appellant called Christopher Wright, Appellant's son, who arrived at the scene after the collision. (*See* R. pp. 209-221). Wright testified as to his observations at the scene of the collision, including that a trail of vehicle debris crossed all lanes of Garners Ferry Road to the entrance of the driveway from which Respondent turned. *Id.* Additionally, he testified as to the effects the collision had on his mother. *Id.* Appellant also called the investigating officer of the collision, Officer Allen Brinson, Jr., to testify as to his observations of the scene of the collision. (*See* R. pp. 193-208). He too testified that the trail of debris caused by the collision crossed all the lanes of Garners Ferry Road towards the driveway from which Respondent turned. *Id.* Respondent was the only witness to testify on his behalf, and he also confirmed that the collision in question occurred after Appellant's vehicle was fully established on Garners Ferry Road. (R. pp. 226-251). He also revealed that, immediately prior to pulling his vehicle in the roadway, he looked in the opposite direction from which Appellant was approaching and confirmed that it was not safe to do. *Id.*

During closing statements, counsel for Respondent requested that the jury put themselves "in the position of [Respondent]." (R. p. 281). The court sustained Appellant's objection.[2] *Id.* The jury found Respondent was not negligent in causing the collision. (R. p. 305). After the jury was dismissed, the lower court denied Appellant's Motions for New Trial and Judgment Notwithstanding the Verdict and her Motion to Alter and Amend the same. For the following reasons, this Court should reverse the lower court's decision.

ARGUMENT

I. The trial court abused its discretion by prohibiting Appellant from introducing various pieces evidence and testimony at trial.

The trial court committed reversible error by excluding evidence and testimony Appellant sought to introduce at trial. Lower courts have "sound discretion in deciding whether to admit or exclude evidence. . . ." *Sullivan v. Davis*, 317 S.C. 462, 465, 454 S.E.2d 907, 909 (Ct. App. 1995) (citations omitted). However, the court's decision to exclude evidence may be disturbed "upon a showing of a manifest abuse of discretion accompanied by probable prejudice." *Burke v. Republic Parking Sys., Inc.*, 421 S.C. 553, 558, 808 S.E.2d 626, 628 (Ct. App. 2017), *reh'g denied* (Jan. 11, 2018) (citations omitted). An abuse of discretion occurs when excluding evidence if "the conclusions of the trial court *either lack evidentiary support* or are *controlled by an error of law*." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (emphasis added). Additionally, "[d]etermining whether prejudice exists depends on the circumstances and the materiality and prejudicial character of the error must be determined from its relationship to the entire case." *Burke* at 558, 808 S.E.2d at 628 (citations omitted). Prejudice "means there is a

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[2] After closing arguments, counsel for Appellant asked for a bench conference with the court to request a curative instruction regarding opposing counsel's Golden Rule argument violation. The court denied the request; however, the request is not noted in the trial transcript, but is confirmed in Respondent's Response to Appellant's Motion to Alter and Amend; Order Denying Appellant's Motion. (*See also* R. p. 284).

reasonable probability *the jury's verdict was influenced by the wrongly . . . excluded evidence.*" *Id.* (citations omitted) (emphasis added).

Here, the trial court erred by prohibiting the Appellant from introducing various evidence and testimony at trial. Specifically, the court erred by excluding references to Enterprise's Vehicle Accident Report. The lower court also abused its discretion by prohibiting the Appellant from presenting testimony from both Appellant and Respondent concerning an unknown witness stating that Respondent's vehicle pulled out in front of Appellant's vehicle. Additionally, the lower court erred by excluding testimony of Enterprise's Counterclaim against Appellant and testimony from Enterprise employees.

A. The lower court erred by prohibiting any reference to the Enterprise Vehicle Accident Report including evidence from Enterprise employees' regarding the same.

The lower court erred by excluding the Enterprise Vehicle Accident Report and finding that the report was hearsay not subject to any exceptions due to the statement in the report not being "[Respondent's] statement." (R. p. 113). The language in the report at issue was not hearsay, but rather a statement of Respondent pursuant SCRE 801(d). Additionally, the report itself was admissible under the business records exception to hearsay. Lastly, the court at the very least, erred in prohibiting Appellant from impeaching the Respondent with the report.

1. The trial court committed reversible error by finding the language in the report was not the statement of Respondent and not a hearsay statement pursuant to South Carolina Rule of Evidence 801(d).

The Enterprise Report was and is a statement by Respondent against his own interest and is not hearsay pursuant to Rule 801(d), SCRE. As such, the trial court erroneously excluded the report as hearsay. Specifically, when the court reached its erroneous decision, it noted that the report is "not [Respondent's] statement" presumably because Respondent did not sign the report,

even though Respondent's counsel never denied that it was not the statement of Respondent. (R. pp. 112-13).

Rule 801(d) states that "[a] statement is not hearsay if – [t]he statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity. . . ." Nothing in 801(d) requires that the statement be signed by a party in some way, and Appellant could not find a single South Carolina case requiring the same. Indeed, courts have permitted statements by party opponents without holding there must be a signature of the party. *See S.C. Dep't or Revenue v. Meenaxi, Inc.*, 417 S.C. 639, 655-56, 790 S.E 792, 800-01 (Ct. App. 2016). In *Meenaxi*, this Court found that a party's statements referenced in an investigative report generated by the South Carolina Law Enforcement Division (herein referred to as "SLED") admissible as statement offered against a party. *Id.* While the *Meenaxi* opinion did not mention whether the report was signed by the party, the Court did not state it was a requirement and permitted the introduction of that party's language in the report under 801(d) and the report itself under the business records exception to hearsay. *Id. See also infra* I.A.2. Moreover, Courts have stated a writing, "[a]lthough unsigned . . . would be competent evidence *if it shows any admission against interest* on the part of the [party]." *Wilkinson v. Wilkinson*, 192 S.C. 497, 7 S.E.2d 447, 451 (1940) (emphasis added).

Here, the lower court erroneously determined the report was not Respondent's statement because he did not sign it. However, the evidence in the record disputes this conclusion. First, as Appellant informed the trial court, Tyler Thiede—the former Enterprise employee who created the report—testified the "information [in the report] came from [Respondent] . . ." and that "[i]t was a fair and accurate representation of what [Respondent] told him." (R. pp. 111-12). While the court was correct to acknowledge that Thiede, if had given the opportunity, would

testify that the report at issue was paraphrased, he confirmed that the report was Respondent's "own words[,]" and that this report was "more detailed" than reports he had completed in the past, and that the substance of the report came from Respondent. (R. p. 113; 366-68). In any event, Enterprise management confirmed that the report was "straightforward" and there was "no reason to think [Enterprise's] own employee embellished" the contents of the same. (R. p. 112). As counsel for Respondent represented Enterprise as well during the scope of this litigation, Respondent should not be able to argue that this statement is not Respondent's, as it was confirmed to be his statement by counsel's other clients in this action. For the trial court to reach the conclusion that the report was not admissible because it was not Respondent's statement was not only against the proposed testimony and evidence in the record offered by Appellant, but also based upon an error of law in that there is no precedent that a statement is inadmissible based upon whether a party signed the same.

In addition, the court's decision to exclude the report undoubtedly prejudiced Appellant. The main issue at trial was a dispute of the facts in determining how the collision occurred, namely, whether Respondent pulled out in front of the Appellant. Indeed, the report at issue specifically states that Respondent informed Enterprise the facts of the collision were that he "was involved in an accident when his truck pulled out in front of another vehicle." (R. p. 111; *see also* R. p. 69). As Appellant has continuously stated that Respondent pulled out in front of her, which he has continued to deny, and the jury returned a verdict in favor of Respondent, "a reasonable probability [exists] that the jury's verdict was influenced by the . . . lack [of the excluded evidence]." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 261, 644 S.E.2d 755, 761-62 (Ct. App. 2007). Accordingly, the trial court committed reversible error in excluding the Respondent's statement on the accident report.

2. The trial court committed reversible error in not admitting the Enterprise Report under the Business Records Exception to Hearsay.

By not permitting the admission of the Enterprise Accident Report under 803(6), SCRE, the lower court committed reversible error. According to this exception, hearsay evidence is not excluded if it is:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . . Rule 803(6), SCRE.

"However, subjective opinions and judgments found in business records are not admissible." *Duncan v. Ford Motor Co.*, 385 S.C. 119, 137, 682 S.E.2d 877, 886 (Ct. App. 2009); Rule 803(6), SCRE. Purely factual observations, however, are not considered subjective opinions or judgments. *State v. Key*, 277 S.C. 214, 216, 284 S.E.2d 781, 783 (1981). In *Key*, the court stated that medical records detailing the path of bullet in a gunshot wound victim were observations that provided no subjective opinion and were no different "from a report describing the location of damage to a motor vehicle." *Id.* In addition, as discussed above, this court in *Meenaxi* permitted the introduction of a SLED report containing statements of a party opponent under the business records exception to hearsay as those statements were not subjective opinions, but rather, information in which that party opponent informed the SLED officer. 417 S.C. at 656, 790 S.E.2d at 801.

While the lower court did not state its reasoning for not permitting the introduction of the Enterprise Report other than it was allegedly not Respondent's statement as he had not signed it,

the report should have been permitted under the business records exception to hearsay. From the outset, Respondent previously admitted that the Enterprise Report at issue was "a true, correct and genuine copy of the report, generated on or about 12/13/2014, by a person with knowledge of the report, and kept by Enterprise Rent-A-Car in the ordinary course of business." (R. p. 89).

In addition, Respondent's argument that the report "includes a subjective opinion about fault, the report should be excluded" is unavailing. (R. pp 74). Indeed, as noted above, the report contains "a fair and accurate representation of what [Respondent] told" Mr. Thiede. (R. p. 112). Respondent's own cross-examination of Mr. Thiede in the *de bene esse* deposition confirms there is no subjective opinion as to fault from this report as Mr. Thiede states that he was "not attempting to imply who was at fault for the damage to the vehicle." (R. p. 336). Instead, like *Key,* Mr. Thiede was only inputting his factual observations, that is, the description in which Respondent told him regarding how the collision in question occurred.

Appellant is perplexed that Respondent's counsel would state that this report provides a subjective opinion. This report was taken in the ordinary course of business by an employee of Enterprise—whom counsel represented in this litigation. Moreover, management for Enterprise confirmed the report is "straightforward". (R. p. 112). If Respondent's counsel truly believes that the report provides a subjective opinion of fault, rather than the "straightforward" facts of the collision in question, it begs the question of how, in good faith, did Enterprise file a counterclaim against Appellant with this report in its possession.

In any event, because the Enterprise Report contains the factual observations of the statements Respondent made to Mr. Thiede, the lower court should have permitted Appellant to introduce the same under the business records exception as in *Meenaxi.* As discussed above, as

there was a factual dispute as to how the collision occurred, the court committed prejudicial error in its prohibiting of the report's introduction.

3. The trial court abused its discretion in prohibiting Appellant from using the accident report to impeach Respondent at trial.

The trial court committed reversible error in prohibiting Appellant from impeaching the Respondent with the Enterprise Report. At the beginning of trial, during the discussion of the report with the court, Appellant's counsel requested to have the ability to utilize the Enterprise Report to impeach the Respondent, to which the court denied stating it was "not his statement." (R. p. 113). "South Carolina has, however, always followed the traditional rule that inconsistent statements are admissible to impeach a witness' credibility." *Hunter v. Staples*, 335 S.C. 93, 99, 515 S.E.2d 261, 264-65 (Ct. App. 1999) (citations omitted). This is because "the credibility of a party witness *is always* in issue." *Cornwell v. Plummer*, 265 S.C. 587, 591, 220 S.E.2d 879, 881 (1975) (emphasis added). In *Cornwell*, the South Carolina Supreme Court reversed a trial court's decision in refusing to allow the impeachment on cross-examination of a party with the party's tax returns as the returns included inconsistent statements to which the party previously testified. *Id.*

At trial, Respondent testified that prior to the collision when he first pulled onto the roadway to make a left hand turn, Appellant was not anywhere on that road, and that he "had ample time to successfully make" the left hand turn. (R. p. 231). Respondent also testified that "the road [was] clear for [Respondent] to pull – for [Respondent] to pull out onto the road." (R. p. 250). However, as noted above, this is in contradiction with the Enterprise Report, in that Respondent informed Enterprise that the accident occurred when he "pulled out in front of another vehicle." (R. p. 111; *see also* R. p. 69).

By tying Appellant's hands in holding that Appellant could not cross-examine Respondent with the report, it restrained Appellant from exposing Respondent's inconsistent statements. Although the lower court held that the statement was not Respondent's, as more fully discussed above, the record establishes that was in error. Moreover, like *Cornwell*, in the present case Appellant was not permitted to cross examine Respondent with the report which contained a "vital issue. . ." and such denial was "plainly prejudicial." *Cornwell*, 265 S.C. at 592, 220 S.E.2d at 881. Accordingly, as Appellant was not permitted to impeach Respondent with his prior inconsistent statements, this court should reverse the lower court's decision and remand for a new trial.

B. The trial court erred in prohibiting the introduction of the testimony of the unknown witness's statement that Respondent pulled out in front of Appellant.

The lower court erroneously excluded the testimony regarding the witness whom both Appellant and Respondent heard state that Respondent pulled out in front of Appellant. Appellant argued that such statement fell under the present sense impression and excited utterance exceptions to hearsay pursuant to 803(1) and (2), SCRE. (R. p. 116). In excluding the statement, the lower court simply stated the statement is "not an excited utterance" and that Appellant did not "know who the person" who made the statement. (R. p. 117).

Before the Rules of Evidence were adopted, South Carolina provided a *res gestae* exception to hearsay. *State v. Burroughs*, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997). This exception permitted the admission of a hearsay statement that "was substantially contemporaneous with the litigated transaction and was the spontaneous utterance of the mind while under the active, immediate influence of the event." *Id.* (citations omitted). Before the South Carolina Rules of Evidence were implemented, "it [was] apparent that the former *res gestae* exception largely combined the current requirements of subsections (1) and (2)" meaning

that "a statement that satisfied one subsection but not the other would not have been admissible under the former *res gestae* exception, but is now admissible under the Rules." *Id.* at 499, 492 S.E.2d at 413; *see also* Reporter's Note, Rule 803, SCRE ("Subsections (1) and (2): These subsections constitute a change in South Carolina law. Previously, a statement had to meet the conditions of both subsections (1) and (2) before it would be admissible under the res gestae exception to the hearsay rule.").

Rule 803(1) permits the introduction of a hearsay "statement describing or explaining an event or condition made while the declarant was perceiving the event *or immediately thereafter*." (emphasis added). Further, Rule 803(2) permits the introduction of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

Additionally, courts have permitted the introduction of statements of unknown witnesses. For example, in *State v. Hill*, the Supreme Court held that "[t]he hearsay statement of an unknown bystander [was] admissible under the excited utterance exception only when the circumstances which surround it would affect the declarant in a way that assures its spontaneity and, therefore, its reliability for trustworthiness." 331 S.C. 94, 99-100, 501 S.E.2d 122, 125 (1998). Moreover, this Court has found that statements strikingly similar to the present have been permitted under the *res gestae* exception to hearsay. In *York v. Charles*, this Court determined that it was permissible for a defendant to testify as to an unknown witness' account that the motor vehicle collision was "clearly the other man's fault." 132 S.C. 230, 128 S.E. 29, 31 (1925). In addition, the Court has found three elements "a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance." *State v. Hendricks*, 408 S.C. 532, 759 S.E.2d 434, 437-38 (Ct. App. 2014)

(citations omitted). These are that "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." *Id.* (citations omitted).

Here, the court erroneously found the unknown declarant's statement inadmissible because "no one knows who the person is." (R. p. 117). As stated above, South Carolina permits the introduction of statements of unknown declarants. Moreover, the statement perceived is admissible under 803(1) as it was a present sense impression. Respondent erroneously argued that "there's no testimony as to how far after the accident" the statement was made and that "this [was] the exact kind of thing the hearsay rule is intended to guard against." (R. p. 117). On the contrary, Respondent previously testified that after approaching Appellant's vehicle immediately after the collision, he heard this statement. (R. p. 61, 117). Appellant confirmed hearing the same directly after the collision. (R. pp. 57, 116-17). Accordingly, the statement of the unknown witness fell under the present sense impression under 803(1), SCRE.

In addition, there is evidence on the record that the statement meets the three elements as noted in *Hendricks*. It cannot be disputed that the statement regarding Appellant not being okay because Respondent pulled out in front of her does not relate to a startling event or condition, namely the motor vehicle collision in question. Second, the record reflects that the unknown witness made this statement while under the stress of the excitement. Indeed, Respondent previously testified that the unknown witness "yell[ed]" this statement. (R. p. 61). Moreover, Respondent himself felt this stress exuded by the unknown witness as he testified after hearing the statement that he "step[ed] away" because he felt like he was "the bad guy right now." *Id.*

Respondent's previous testimony confirmed the elements of the excited utterance exception to hearsay. As such, the court should have permitted testimony of the same at trial as in *York*.

Similar to the Enterprise Report, the court's exclusion of testimony regarding the unknown witness exclaiming that the Respondent pulled out in front Appellant was prejudicial. As stated above, the main issue at trial was a dispute of facts regarding the collision. The unknown witness undoubtedly stated that it occurred when Respondent pulled out in front Appellant. This is the position that Appellant has consistently maintained, through Respondent's continued denial, and is supported not only by this unknown witness, but also supported by the former Defendant Enterprise's records. Respondent cannot dispute that such statement, which disputes his testimony, would not have an effect on the jury's deliberations and verdict. Accordingly, this Court should find that the trial court abused its discretion and committed prejudicial error in the exclusion of this testimony.

C. The lower court committed reversible error by not permitting Appellant to call witnesses of former defendant Enterprise, and discuss Enterprise's former counterclaim.

The lower court abused its discretion by prohibiting Appellant from calling witnesses of former defendant Enterprise. Rule 402 of the South Carolina Rules of Evidence states that "[a]ll relevant evidence is admissible. . . ." Further, "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Additionally, Rule 43 of the South Carolina Rules of Civil Procedure permits the reading of pleadings to the jury.

In the present case, Appellant, for nearly a year and a half, was forced to defend the counterclaim initiated by former defendant Enterprise, who also defended Respondent in this

matter. It is not disputed that Appellant was claiming damages as a result of this collision. *See* Complaint. Having to defend the counterclaim for over a year and a half, when she the evidence revealed she did not cause the collision, caused Appellant mental anguish and evidence of the same is certainly relevant. (*See* R. p. 111). Indeed, as counsel informed the court, because Respondent was renting a truck from Enterprise, it was foreseeable suffering damages such as this. *Id.* By not permitting Appellant to read her pleadings, including but not limited to her response to the counterclaim, was a violation of Rule 43 and also an abuse of discretion.

Additionally, the lower court abused its discretion by not permitting testimony from the Enterprise witnesses. As discussed and conceded by Respondent's counsel, Respondent was defended by Enterprise in this action due to a rental contract executed by Respondent. However, employees of its company, including a manager subpoenaed for trial, previously testified that the only reason Enterprise did not pursue Respondent for damages was due to him signing said waiver. (R. p. 111). This testimony would undermine Respondent's theory of this case, in that, its own defense did not seriously believe that Respondent was not at fault for the collision. It is certainly relevant that Enterprise, who was defending Respondent, dismissed its claim against Appellant with no consideration, as it implies that Enterprise does not believe Respondent was not at fault.

Respondent's argument that Enterprise would be akin to an insurance company is convenient but also unavailing. Undoubtedly, the Enterprise witnesses and the above-discussed Enterprise Report would have been permitted if the counterclaim was not dismissed. Presumably, Respondent wanted to dismiss the counterclaim against Appellant in hopes of keeping this damaging testimony and evidence from the jury. By claiming Enterprise was akin to an insurance company, while also counterclaiming and litigating against Appellant but later

dismissing that claim, is akin to Enterprise wanting to have its cake and eat it too and by doing so, effectively manipulating the court from what the jury would see.

The prohibition of the introduction of the Enterprise witnesses and pleadings was prejudicial in that the jury was not able to see what the Appellant was forced to experience as a result of this collision, Enterprise's own belief about how the collision occurred, and who the responsible parties were after what Respondent informed them. As a result, this court should find the lower court abused its discretion and remand for a new trial.

II. The lower court erred in denying Appellant's Motion for New Trial and Judgment Notwithstanding the Verdict because the jury's verdict was grossly inadequate, was unsupported by evidence, was the result of the jurors' confusions, and the result of an error of law.

The lower court's denial of Appellant's Motion for New Trial and Judgment Notwithstanding the Verdict was in error. Under the thirteenth juror doctrine, "a trial court may grant a new trial when [it] finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990); *Trivelas v. S.C.D.O.T.*, 357 S.C. 545, 593 S.E.2d 504 (Ct. App. 2004). As the thirteenth juror, the trial judge is "presumed to recognize and appreciate this responsibility and exercise its discretion with fairness and impartiality." *Worrell v. S.C. Power Co.*, 186 S.C. 306, 313-14, 195 S.E. 638, 641 (1938). Similarly, the trial judge, as the thirteenth juror, is "charged with the duty of seeing that justice is done" and may grant a new trial when it is "necessitated on the basis of the facts in the case." *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996) (citing *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984)).

A trial judge may also grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). *See also Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995) (under "thirteenth juror doctrine,"

a new trial may be granted if verdict is inconsistent and reflects jury's confusion). In addition, a trial court has the authority to grant a new trial when the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Similarly, the trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. *Vinson v. Hartley*, 324 S.C. at 404 (citing *Cock-n-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996); *McCourt by & Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993); *O'Neal v. Bowles*, 310 S.C. 483, 431 S.E.2d 555 (1993)). Further, the failure of the trial judge to grant a new trial when the verdict is grossly inadequate amounts to an abuse of discretion and on appeal the appellate court will grant a new trial absolute. *Weir v. Citicorp Nat'l Servs., Inc.*, 312 S.C. 511, 435 S.E.2d 864 (1993).

Here, the jury's verdict in favor of Respondent leads to several conclusions, all of which would require the granting of Appellant's Motions for a New Trial and Judgment Notwithstanding the Verdict. First, the jury's verdict is inconsistent with the evidence presented at trial and reflects the juror's confusion. Both Appellant and Respondent testified that the collision in question occurred on Garners Ferry Road, after Respondent pulled out of a private driveway, and after Appellant's vehicle was fully established on Garners Ferry Road. (*See* R. pp. 154-54 (Appellant testifying that the wreck occurred on Garners Ferry Road after her vehicle was fully established on the Road); R. pp. 247-48 (Respondent confirming Appellant was fully established on Garners Ferry Road when collision occurred)). Moreover, Respondent conceded that, prior to exiting the private driveway onto Garners Ferry Road, he diverted his attention to

the opposite direction in which Appellant was approaching. (*See* R. pp. 140-41 (Respondent confirmed that he "looked away from the direction [Appellant] was coming last" directly before pulling onto Garners Ferry Road and that it was not safe to do the same)).

Officer Brinson and Christopher Wright, both who observed the scene after the collision, testified that there was a long trail of Appellant's vehicle debris leading from the driveway of the restaurant from which Respondent was exiting towards the median of Garner's Ferry Road. (*See* R. pp. 197-98; 202-03 (Officer Brinson confirming lots of vehicle debris scattered throughout the lanes of Garners Ferry Road towards the private drive from where Respondent exited); R. pp. 213-14 (Christopher Wright explaining "there was like a scrape mark on the ground all the way from the right lane almost to the driveway to the, the [private drive] . . . [and] [Appellant] got spun, and it drug [her vehicle]. There's debris probably 40-feet.")). Additionally, Wright confirmed that there was debris leading towards the private drive from where Respondent exited, and that he picked up debris at the end of the curb from that driveway. (R. p. 214).

The testimony from all witnesses at trial could only reach one logical conclusion: that Appellant established herself on Garners Ferry Road after Respondent negligently diverted his attention from that direction and then pulled out in front of her. Additionally, the testimony of Officer Brinson and Wright confirm that the point of impact of the collision occurred in the lane closest to the private drive from which Respondent was exiting, and that Respondent dragged Appellant's vehicle across the lanes of Garners Ferry Road and to the median.

In addition, the verdict reflects the jurors' confusion due to Respondent's counsel's improper motive in his Golden Rule argument in closing. Respondent's counsel, in closing, informed the jury that "[he] want[ed] [the jury] to finally put [themselves] in the position of [Respondent]." (R. p. 281). Such statements invited the jury to think about how they would feel,

if those jurors would be potentially liable for damages, due to that juror's negligence. Accordingly, such improper request essentially asked, "the jury to base its verdict on passion rather than reason" and denied Appellant a fair trial. *See Branham v. Ford Motor Co.*, 309 S.C. 203, 235, 701 S.E.2d 5, 22 (2010).

When viewing the evidence presented at trial, together with Respondent's counsel's improper closing arguments, the jury's verdict reflects that it was based on confusion, a result of passion, and other improper motives. Because of this, this Court should reverse the lower court's decision in denying Appellant's Motion for New Trial and Judgment Notwithstanding the Verdict as justice has most assuredly not prevailed in the present case.

CONCLUSION

For the forgoing reasons, Appellant respectfully requests that this Court reverse the lower court's decision and remand for a new trial.

Respectfully submitted,

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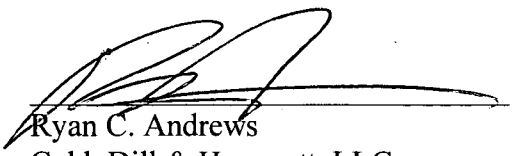
Counsel for Appellant certifies that this Final Brief is being submitted in conformance with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this 3rd day of December, 2019.



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