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

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
(S.C. Ct. App. Op. No. 2012-UP-270)

National Grange Mutual Insurance Company, ... Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, ... Defendants,

of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and Susan F. Clark are . . . . . Appellants.

PETITION FOR CERTIORARI OF THE CLARKS

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Petitioners the Clarks respectfully request that this Court review the decision of the Court of Appeals. The Clarks request that, on review, this Court reverse the trial judge's order granting the plaintiff a new trial. In the alternative, the Clarks request that this Court require a complete opinion by the Court of Appeals so that orderly review may again be sought.

The grounds for this request are further stated below and are that the form of the decision of the Court of Appeals violates the requirements of the South Carolina Constitution, statute, the Appellate Court Rules, and order of the South Carolina Supreme Court. The further grounds are that the decision erroneously adopts one universal scope and standard of irreversibility for review of all grants of new trial. This is contrary to South Carolina Supreme Court precedent, but there is also a jumble of case law making the distinctions between some of the standards nearly unintelligible. The decision overlooks substantially all the particular issues presented on appeal, which include the error of disregarding the result of a jury trial for completely untenable reasons.

In the interest of brevity, this petition is directed primarily to the important reasons why review by certiorari should be granted, rather than to all the further argument and citation which would be presented in briefing once review is granted. It is regretted that the full briefing cannot be provided now as an inducement to review the matter.

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I. Certification by Counsel for Petitioner that a Petition for Rehearing was Made and Finally Ruled Upon by the Court of Appeals

By his signature below, counsel so certifies; to wit, it was made May 17, 2012 and ruled upon July 26, 2012.

II. The Questions Presented for Review, Expressed in the Terms and Circumstances of the Case, but Without Unnecessary Detail

1. Was the intermediate appellate court's practice of issuing an unpublished memorandum decision in a case with nine (9) issues on appeal, and thus declaring it to be without precedential value, unconstitutional or contrary to sound public policy?

2. Did the South Carolina Appellate Court Rules or applicable statute allow the Court of Appeals to issue a "memorandum" decision?

3. Did the South Carolina Appellate Court Rules or applicable statute allow the Court of Appeals to issue an unpublished decision?

4. Did the South Carolina Appellate Court Rules or applicable statute allow the Court of Appeals to issue a decision without precedential value?

5. Was the Court of Appeals required to issue an opinion in writing, stating every point distinctly stated in the case which was necessary for decision, along with the reason for the Court of Appeals' decision?

6. Did the "any evidence" standard and scope of review adopted by the Court of Appeals for reviewing the grant of new trial conflict with the scope and standard of review required by South Carolina Supreme Court precedent?

7. Does the "any evidence" standard and scope of review apply to all kinds of grants of new trial by a trial judge?

8. What are the true limits and characteristics of application of the "Thirteenth Juror Doctrine"?

9. In the instant case, was new trial actually granted under the "Thirteenth Juror Doctrine"?

10. When a trial judge actually states his reasons for granting new trial, is there any reason to refuse to review them?

11. Was it an abuse of discretion for the trial judge to tailor a jury instruction to allow the jury to grant less than all relief sought, and then grant new trial on the basis that the jury did so?

12. Was it error, and therefore an abuse of discretion, for the trial judge to base his grant of new trial on liability being uncontested, when the instant case was one of contested liability?

13. Was it error for the trial judge to color his grant of new trial with comments as to whether evidence of the defense was "credible" when the basis of the plaintiff's motion was that

there was "no dispute" as to liability or damages?

14. To the extent the trial Judge granted a new trial based on insufficiency of evidence rather than upon the reasons stated in his order, was it error to do so when insufficiency of evidence of bad faith was not raised by the plaintiff as a ground for directed verdict or JNOV?

15. Was it a failure to exercise discretion, and therefore an abuse of discretion, for the trial judge to color his grant of new trial with comments that the evidence of bad faith was not "credible," without discussing whether he meant bad faith as he defined it for the jury, without identifying the evidence referred to, without stating anything about it that was believed to be not credible, and without discussing it in any way?

16. Was it error, when considering and granting new trial, for the trial judge not to consider the greater weight of the evidence while viewing the evidence and the inferences to be drawn from it in the light most favorable to the nonmoving party, the defendants, and to measure the sufficiency of the evidence against the law charged to the jury?

17. Was disregarding the results of the completed jury trial under the circumstances, a violation of due process under the State and federal constitutions, and a violation of the right to trial by jury under the State constitution?

III. Concise Statement of the Case, Containing the Facts Material to the Consideration of the Questions Presented

In 2007, Plaintiff National Grange sued a glass contractor, the Clarks, and two other couples, for approximately a million dollars under an indemnity agreement.

The Clarks raised the defense of bad faith. (R.pp. 22-25.) The case was tried in 2009 to an attentive jury for about three days. (R.pp. 566-567.) The trial included much evidence and argument about the propriety of the actions and inactions of National Grange. (E.g., R.pp. 533-536, 118-120, 180-181, 153, 305-306, 273-277, and 293-295.) These exchanges included the assertion that National Grange repudiated the payment and performance bonds it issued and refused to pay on the bonds from the first time a claim was made. (R.p. 534.)

In charge conferences during trial, the trial judge agreed there "certainly" was a good faith and fair dealing argument. (R.p. 369, lines 18-19.) However, he was concerned that the jury not believe it was required to apply bad faith as a total bar to liability. (R.pp. 355-358.) The trial

judge eventually tailored the instructions to not specifically address whether bad faith had to be applied as an all-or-nothing defense. (R.pp. 371-375; cf. R.pp. 460 and 466.)

The lawyers made their closing arguments to the jury in reliance upon the conferences and the expected jury instructions. See Rule 51, SCRCP. The judge then instructed the jury as previously discussed on the law they should apply in reaching their decision. (R.pp. 421-422.) Specifically, the jury was not instructed that a finding of bad faith would bar National Grange from all recovery. The jury was not instructed that a finding of any liability of the Clarks to National Grange would require an award of all damages claimed by National Grange.

The jury returned a general verdict in favor of National Grange for $10,000. This was approximately 10% of the damages sought by National Grange.

Some weeks later, the trial judge granted National Grange a whole new trial on the grounds of jury misconduct.

The misconduct, according to the trial judge, was constituted by the jury finding something for National Grange, but not awarding National Grange substantially all the damages National Grange sought. The trial judge relied on a case regarding inadequate damages awards in cases where liability is admitted. The judge's stated reasoning was that this action by the jury "[went] beyond a merely conservative award and suggest[ed] the jurors were motivated by improper considerations." (R.p.3.) The judge also stated that "the jury failed to follow the Court's instructions in returning their verdict." (R.pp. 4-5.) The trial judge did not identify which of his instructions the jury actually failed to follow.

The Clarks moved unsuccessfully for reconsideration.

The Clarks appealed in January of 2010. The Clarks fully briefed the scope and standard of review. They set out distinctly, nine (9) issues presented for decision on appeal. These issues included whether it was error for the trial judge to conclude that the jury committed misconduct

by returning a verdict which was consistent with a finding on the defense of bad faith as a partial bar to liability. The Clarks contended that the jury's finding was in fact consistent with both the jury instructions and the charge conference statements of the judge, that bad faith was not a total bar to liability.

The Clarks also raised the distinct point on appeal that the judge was confused and erred in granting new trial because he relied on a case involving admitted liability, when in the instant case, liability was contested and allowed to be apportioned, and therefore, the order granting new trial should be reversed.

In May of 2012, without oral argument, the Court of Appeals issued a one-paragraph summary affirmance of the trial judge, "pursuant to Rule 220(b)(1), SCACR," not addressing the particular issues presented on appeal.

The Court of Appeals cited two cases dealing with scope of review and designated its own opinion as "unpublished." The opinion did not identify the author or the panel deciding the appeal. The opinion was issued "per curiam," but "concurred in" by a panel. In its opinion, the Court of Appeals adopted a scope of review not briefed or argued by the parties. Under this standard, according to the opinion, any grant of new trial may be affirmed if "evidence exists" to support the trial judge's decision. No evidence was discussed.

The Clarks petitioned for rehearing with oral argument and suggested rehearing en banc.

The Clarks raised new issues presented for the first time by the Court of Appeals' decision. The Clarks argued that the form of the decision violated the Appellate Court Rules. Rule 220(b)(1) is not available to the Court of Appeals. The decision did not identify the particular issues presented to the court. Rather, the decision summarily disposed of the appeal in a "memorandum" decision which was unpublished, lacked sufficient detail for meaningful public use and scrutiny, and was sheltered from precedential effect.

The Clarks also argued that the "any evidence" standard of review adopted by the Court of Appeals was not applicable to the case. The Clarks argued that, therefore, the Court of Appeals had literally overlooked every single issue presented to be decided on appeal. The Clarks reiterated the reasons why the trial court should be reversed.

Rehearing was denied.

The Court of Appeals did not address the question of whether its written decision should identify the distinct questions presented on appeal. The court stated that nothing had been overlooked and denied the petition for rehearing with no discussion.

The Clarks now petition in August of 2012 for certiorari from this Court.

IV. Direct and Concise Argument in Support of Granting Certiorari

The Clarks are now faced with showing "special and important" reasons why the as yet unpublished, one-paragraph, per curiam, "memorandum" decision of the Court of Appeals should be reviewed. Rule 242(b), SCACR.

The first important reason to review the decision of the Court of Appeals is that on request for rehearing, the Court of Appeals did not even provide a response to the argument that the form and designation of its decision violated the requirements of the Appellate Court Rules. These particular rules are based on statute enacted by the General Assembly pursuant to the State Constitution.

Artificially limiting the impact, and therefore, the reviewability, of an intermediate appellate decision is illegal, threatens the integrity of the judicial system, and undermines our whole system of government. Entirely artificial limitations on the impact of the decision should therefore be disregarded. The United States Supreme Court recently reached a similar conclusion in issuing a rule change in 2006 for the federal courts.

The second important reason to review the decision of the Court of Appeals is that it sets an erroneous precedent which erases all other existing standards of review of grants of new trial; it erroneously establishes one meaningless standard of irreversibility for all cases, no matter what reasoning is stated by the trial court. This, too, undermines our entire judicial system by making the right to jury trial nearly frivolous.

The third important reason to review the decision is that it affirmed the Circuit Court in granting new trial for completely untenable reasons, and it is unconstitutional and unfair to subject the Clarks or any other litigant to the expense, risk, and time of another trial for such reasons.

As discussed further below, the reasons for certiorari are compelling.

A. The intermediate appellate court's issuing an unpublished memorandum decision in a case with nine (9) issues on appeal, and thus declaring the decision to be without precedential value, violated the Appellate Court Rules, statute, and order of the Supreme Court, and was unconstitutional or contrary to sound public policy. (Questions 1-5)

The Court of Appeals was not allowed to issue a memorandum decision "pursuant to Rule 220(b)(1)."

A "memorandum" decision does not separately state the court's reasoning on the several issues presented on appeal.[1]

In South Carolina, only the Supreme Court can issue memorandum decisions. Rule 220(b)(1), SCACR. By its own convention, in 1993, the Supreme Court issued memorandum decisions only sparingly, even in the limited instances authorized by rule. In Re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993).

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[1] Rule 220(b), SCACR requires that all decisions address every distinct point in the appeal, and state the reasoning on each point. Rule 220(b)(1), in providing a limited exception, uses the term "memorandum opinion" to describe an opinion that does not comply with this requirement.

An "unpublished" decision, while possibly available on the internet, is not published in "the Official Reports" or designated for inclusion in a hard-bound volume.[2] Only memorandum decisions can be unpublished decisions. Rule 220(b)(1), SCACR.

Only unpublished decisions are declared by rule to be without precedential value. Rule 220(b)(1), SCACR; Rule 268(d)(2), SCACR.

Only unpublished decisions are declared by rule to be uncitable – that is, forbidden to be cited or argued by counsel. Rule 268(d)(2), SCACR.

Therefore, the Court of Appeals is not allowed by rule to issue uncitable opinions.

In the instant case, the Court of Appeals erroneously issued a memorandum decision and designated it unpublished. This is not a legitimate basis for regarding or declaring the decision to be without precedential effect or to be uncitable, and should not affect the prospects for review.

The Supreme Court and the Court of Appeals are treated differently under Rule 220(b) and (c), SCACR with respect to issuing orders which disclose the issues raised on appeal, providing reasoning, and standing by the decision as precedent applicable to other people as well.

This difference is vital to the orderly functioning of the "Unified Judicial System" of Art. V. § 1 of the 1895 Constitution of the State, is essential to meaningful opportunity for review of erroneous decisions by the Court of Appeals, and is essential to public confidence in the trial and appellate processes in this State. The difference is also largely required by statute, as something not a matter of mere administration, and not even a matter of mere procedure.[3]

To an extent, these issues were factors involved in a 2006 rule change by the United States Supreme Court addressing unpublished, nonprecedential and uncitable opinions in the

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[2] See Rule 220(a), SCACR, and S.C. Code Ann.§§ 14-3-810, 820 and 830.

[3] See S.C. Code Ann. §§ 14-3-940 and 950.

federal intermediate courts of appeal and trial courts.[4]

The Court of Appeals' decision violates the South Carolina rules in all three particulars – it does not disclose the issues raised on appeal (and thus the issues decided or skipped), it does not provide reasoning on the issues, and it tends to evade review by asserting that it will not affect anyone else as a precedent. The present configuration of the South Carolina Constitution, statutes and court rules protects against this situation.

"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220(b), SCACR; S.C. Code Ann. §18-9-280 (1985); id., §14-8-250 (Supp. 1992).

Rules 220(b)(1) and 220(b)(2) provide limited exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a memorandum opinion. Rule 220(b)(1) provides four exceptions, which are only for use of the Supreme Court, and not for the intermediate Court of Appeals.[5]

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[4] See Federal Rule of Appellate Procedure 32.1 (abolishing, in the wake of over a decade of protest, the uncitability of unpublished decisions from 2007 forward). Quick references, with links, for the background and status of Fed. R. App. P. 32.1 are currently available at the URL, http://www.nonpublication.com/32.1.HTML . The protest over the practice of allowing obscure or oblique staff-generated summary opinions, and not requiring them to be published, not allowing citation of them, and not regarding them as law applicable to others has generated more writing than can be conveniently cited, including over 150 presentations, law review articles and journal articles. These include 155 resources, which even in a readable footnote, would require about twelve pages to list; these can be directly accessed by links found at the URL, www.nonpublication.com/ARTICLES.HTML .

[5] None of these four exceptions would apply in this case even if available to the Court of Appeals. The exceptions pertain to findings of fact in a bench trial, JNOV, findings of fact of administrative agencies, and complete absence of error of law. Rule 220(b)(1), SCACR; S.C. Code Ann. §18-9-280 (1985).

In 1993, the Supreme Court of South Carolina issued an order not arising from an

Rule 220(b)(2) provides the one exception to the requirement that the Court of Appeals state its reasoning on each issue. The limited exception is made for "a point which is manifestly without merit." Rule 220(b) (2), SCACR; S.C. Code Ann. § 14-8-250 (Supp.1992). None of the nine distinct points presented by the Clarks to the Court of Appeals were identified by the Court of Appeals in its decision, and none were identified as manifestly without merit – they all presented precedent and instances of clear and pertinent error by the Circuit Court. The Court of Appeals' opinion did not, as contemplated by the rule, identify for its readers, the several points involved, and skip one point or a few; the court did not identify any of the nine points, and skipped them all. This did not comply with the rules or statute.

The requirements of Rule 220(b) and (c), SCACR derive from statutes passed by the South Carolina legislature, and the statutes, in turn, are based on authority in the South Carolina Constitution. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. V, § 25, S.C. Code Ann. § 14-8-250, and S.C. Code Ann. § 18-9-280.

South Carolina's constitutionally and statutorily recognized judicial tradition of written appellate decisions, followed for all people as legal precedents, under the doctrine of stare decisis[6], was already in the forefront of fairly recent measures taken by the United States Supreme

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advocated appeal, nor listed in the Court Register pursuant to S.C. Code Ann. § 14-3-940(a), nor submitted to the legislature pursuant to S.C. Code Ann. §§ 14-3-940(b) and 14-3-950. In the order, the Court advised of its opinion as to what level of detail was sufficient to prevent a Court of Appeals decision from constituting a memorandum decision disallowed by statute and rule. In re Memorandum Decisions by Court of Appeals (S.C. Sup. Ct. dated Dec. 18, 1993). The order required at least a detailing of the issues by number, and required reasoning – even if brief – allocated to each issue. In the instant case, the opinion of the Court of Appeals did not comply with the order. This simply means that the decision was a prohibited memorandum decision. If the opinion had complied with the order, the opinion would not have been a memorandum decision, and it therefore would not have been eligible to be unpublished and it would not have been uncitable.

[6] Stare decisis ("letting the decision stand," and following it as precedent in future cases) has clearly been part of the English Common Law for centuries. See, e.g., Bradley Stewart

Court with related issues in the federal appellate judicial system. Neither the South Carolina Constitution nor the statute authorize as an expedient, bulk intermediate appellate resolution by unpublished fiat.

Objections to uncitability and deprivation of precedential value in other jurisdicitons have been based on First Amendment grounds, due process grounds, violation of Article III powers, pure logic, public policy, and loud outcry.[7]

Chilton, "Star Trek" and Stare Decisis: Legal Reasoning and Information Technology, 8(1) Journal of Criminal Justice and Popular Culture, 25-36 (2001).

Historians may differ on which are the most substantial reasons for the development of stare decisis in England, but it is pretty clear that stare decisis is not simply part of the Common Law. Rather, stare decisis is the cause and the mother of the Common Law, building, reconciling and recording the Common Law and distinguishing the Common Law from Roman Codes and Civil Law starting after the Norman Conquest in 1066.

By statute, South Carolina adopted and continued "in full force and effect," "[a]ll, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State" in the same manner as before this adoption. S.C. Code Ann. §14-1-50 (1976).

The South Carolina Constitution recognizes legal and judicial tradition based on precedent, equal application of laws, and limits on judicial lawmaking or abrogation of law. The Constitution specifically contemplates the publication of the decisions of the Supreme Court and Court of Appeals. See S.C. Const. (1895) Art. V, § 9 (1985 Act No. 9), S.C. Const. Art. I, § 3, S.C. Const. Art. I, § 23, id., Art. I, § 9, id., Art. I, § 8, id., Art. I, § 7, S.C. Const. Art. V, § 25.

Pursuant to authority in the Constitution, the General Assembly prescribed laws pertaining to the issuance and publication of decisions and pertaining to rulemaking and lawmaking by the Supreme Court. See S.C. Code Ann. § 14-3-810, S.C. Code Ann. § 14-3-820, S.C. Code Ann. § 14-3-830, S.C. Code Ann. § 14-3-940, S.C. Code Ann. § 14-3-950, S.C. Code Ann. § 14-8-250, and S.C. Code Ann. § 18-9-280.

[7] One citizen formed his own organization, Committee for the Rule of Law, and commented as follows:

> Having experienced a huge loss of property pursuant to an appellate decision containing 12 obvious misstatements of law, the correction of any one of which would have required a different result, I can tell this committee that I would have found the decision much easier to accept had the idiocy of the opinion been law for all. Then I could have been certain that those who depend on the contract law of California would have stood for me. Because of no-citation rules, no one cared. No one else should ever again stand so alone before an American judiciary.

FRAP 32.1 is essential to preserve the integrity of not only our judicial system, but our

Designating an erroneous opinion as unpublished and "without precedential effect" perpetuates the likelihood of similar mistakes by shielding the opinion from examination and correction. This effect is heightened if the opinion also does not identify the issues which were raised on appeal. Such a measure should not be allowed to lessen the prospects of further judicial review on the grounds that, as an unpublished decision, the opinion is unlikely to do much further harm.[8]

In the instant case, the public might be astounded to learn that, if it is truly the law of South Carolina, in an error-free trial with no jury misconduct, the judge can always throw out the result and state untenable reasons for doing so, and be free from virtually any review or correction. For all the foregoing reasons (and many more which could be briefed), it was wrong for the Court of Appeals to issue a memorandum decision and designate it as unpublished, and its act of doing so should be reviewed.

B. The "any evidence" standard and scope of review adopted by the Court of Appeals for reviewing the grant of new trial conflicted with the scope and standard of review required by South Carolina Supreme Court precedent. (Questions 6-10)

The Court of Appeals stated that its review of the grant of new trial was "limited" to determining whether there was "evidence" in support of the trial judge's grant of new trial. The Court of Appeals indeed indicated this was the universal standard of review in any appeal of the grant of new trial.

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entire system of government.

Kenneth J. Schmier's comment on Proposed Fed. R. App.P. 32.1 to the Appellate Rules Committee. (Available currently by link in http://www.nonpublication.com/32.1.HTML .)

[8] This is reminiscent of the problems with, and exceptions to, the "mootness" doctrine, in which appellate courts are still willing to review matters "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).

Without explaining what kind of "evidence" would "support" a grant of new trial and without identifying any such evidence it found, the Court of Appeals indicated there was some, and affirmed, without examining the reasons given by the trial judge or giving any further opinion on the nine arguments made on appeal.

Review of some case law indicates that the type of evidence referred to by the Court of Appeals was any conflicting evidence on the merits which would have kept the Clarks from being entitled to a complete directed verdict in their favor – i.e., a scintilla of evidence which would support any small disagreement with the jury verdict.

To the extent this is the scope or standard of review in other cases, it was not the standard of review in this one. The Court of Appeals also certainly was not "limited" in its review, so as to prevent consideration of the confused reasons given by the trial judge.

The error lies in the Court of Appeals seeming to treat the grant of new trial, and perhaps all grants of new trial, as being under the "thirteenth juror doctrine." The error further lies in the Court of Appeals limiting the review of thirteenth juror doctrine cases so that the reviewing court must refuse to examine the reasoning of the trial judge even when he states his reasoning and even when it indicates he is guided by error.

The decisions of the South Carolina Supreme Court have provided consistently for decade after decade that, although the trial court has wide discretion in granting new trial, the discretion is not unfettered, and that a grant of new trial will be reversed if there is an abuse of discretion. Defining "abuse of discretion" so as to make it unshowable is to make these precedents mere lip service, and makes decisions unreviewable.

With regard to review of grant of a new trial, it is well established that such an order is reviewed for abuse of discretion, which is found when the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. State v.

Simmons, 279 S.C. 165, 303 S.E.2d 857 (1983); Hyload, Inc. v. Pre-engineered Products, Inc., 308 S.C. 277, 417 S.E.2d 622 (Ct. App. 1992); Umhoefer v. Bollinger, 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989).

An abuse of discretion does not necessarily denote ill will, Norris v. Clinkscales, 47 S.C. 488, 25 S.E. 797 (1896), and occurs when the decision reached by a circuit judge was influenced by an error of law. Bettis v. Busbee, 283 S.C. 502, 323 S.E.2d 536 (Ct. App. 1984). An abuse of discretion also occurs when the circuit judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised. Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). An abuse of discretion may be found when the trial judge's "ruling may appear to have been made on grounds and for reasons clearly untenable." Norris, 47 S.C. at 499, 25 S.E. at 801.

An abuse of judicial discretion, appearing in the record as a matter of law, warrants setting aside the grant of a new trial. Watford v. South Carolina State Highway Dept., 269 S.C. 130, 236 S.E.2d 558 (1977) (citing Jones v. Thomas and Hill, Inc., 265 S.C. 66, 216 S.E.2d 871 (1975) and Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966)).

A trial judge may not invade the province of the jury or substitute his verdict for theirs. Watford (citing Turner v. Carey, 227 S.C. 298, 87 S.E.2d 871 (1955)).

Where the trial judge's reasons for granting a new trial are without evidentiary support, the new trial order is erroneous as a matter of law. Watford (citing South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976)).

As stated in Brabham v. Southern Asphalt Haulers, Inc., 223 S.C. 421, 76 S.E.2d 301 (1953):

> The Court must respect the verdict of the jury in fact as well as in pretense or theory and must not interfere or substitute its own judgment for that of the jurors. One is entitled to the constitutional privilege of the fair judgment of the jury rather than that of the Court and this Court will not interfere with the verdict of a jury simply because it is greater than its own estimate; only where the verdict is so

> grossly excessive as to shock the conscience of the Court and clearly manifest that it was the result of caprice, passion, partiality, prejudice, corruption or other improper motives, will this Court intervene.

Id. at 430, 76 S.E.2d at 306, cited in Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993). The same principles apply to grossly inadequate verdicts. Toole v. Toole, 260 S.C. 235, 195 S.E.2d 389 (S.C. 1973).

"Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge. His exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to error of law." Toole v. Toole, 260 S.C. at 239 (citing Williams v. Williams, 246 S.C. 158, 142 S.E.2d 858).

Toole v. Toole further describes the standard as follows:

> '[A] verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence.' Watson v. Paschall, 100 S.C. 281, 84 S.E. 531, 532; Nelson v. Charleston & W.C.R. Co., 231 S.C. 351, 98 S.E.2d 798. There are numerous cases holding that a verdict is capricious when it is without any rational basis in the evidence and/or the instructions of the court. 6 Words and Phrases, p. 218 et seq. Regardless of the terminology used, the test which guides this Court in the exercise of its power and duty to set aside a verdict on the ground of either excessiveness or inadequacy is whether the verdict is so shockingly so as to manifestly show that the jury was actuated by considerations not founded on the evidence and/or the instructions of the court. More often than not it would be impossible to determine precisely the nature of such improper considerations.

Toole v. Toole, 260 S.C. at 240.

Every reasonable presumption should be exercised in favor of the validity of a general verdict. Gold Kist, Inc. v. The Citizens and Southern National Bank, 286 S.C. 272, 333 S.E.2d 67, 333 S.E. 2d 667 (Ct. App. 1985).

The Court of Appeals therefore erred when it applied an artificially limited, "any evidence" standard of review as a universal standard. The Court of Appeals further erred in declining to even examine the Circuit Court's confused reasoning in assessing whether an abuse of discretion

occurred, and erred in declining to even consider whether the Circuit Court's decision was controlled by error of law.

Under various bases for granting new trial, the trial judge is required to state his reasoning. For example, a grant of new trial absolute on the grounds that the verdict is inadequate requires a "finding" that the verdict is "grossly inadequate so as to shock the conscience of the court" and "clearly indicates the figure reached was a result of passion, caprice, prejudice, partiality, corruption or some other improper motives." Vinson v. Hartley, 324 S.C. 389 at 404, 477 S.E.2d 715 at ___ (Ct. App. 1996). The review of his decision requires a review of his "findings" and his "conclusions." Id. at 405.[9]

As another example, when a trial judge grants a new trial nisi additur on the grounds that the verdict is merely too conservative, the judge "must distinguish between [an] award that [is] merely unduly...conservative and [an] award that [is] actuated by passion, caprice, or prejudice." Id. at 406. If he proceeds to grant the new trial nisi on such mere inadequacy, "[c]ompelling reasons, however, must be given." Id. 324 S. C. at 406.

One narrow circumstance leads to a review by an appellate court being restricted to examining whether there is no evidence to support a trial judge's grant of new trial. This occurs only when the trial judge's decision is based on the "thirteenth juror doctrine," the judge does not have to state the reasons for his decision, and the judge in fact does not do so. S.C. Dept. of Hwys. v. Mooneyham, 275 S.C. 205, 269 S.E.2d 329 (1980)(if the case is one in which the only question is the existence or absence of supportive evidence, the order is subject to the appellate

[9] The common sense quantum and quality of evidence necessary to "support" such a finding would be enough to at least shock the reviewing court's conscience a little, based on the charges given to the jury.

court's review "for a consideration of that question only").[10] Thus, even for thirteenth juror cases, the Court of Appeals is in error when it implies that review is always limited so as to prevent examination of the reasoning of the trial judge.[11]

The Court of Appeals' abbreviated opinion cited two cases which provided for the scope of review of the grant of a new trial. Both of these cases recited to the ability of an appellate court to reverse the grant of new trial if the grant was "wholly unsupported by the record or the result of an abuse of discretion." The second case, however, Lane v. Gilbert Construction Co., 383 S.C. 59, 681 S.E.2d 879 (2009), goes on to further restrict the review, stating that the court's review was "limited to consideration of whether evidence exists to support the trial court's order." The basis for this incorrectly perceived restriction requires examination of prior precedent.

Upon closer review, Lane reveals itself to be a case applying the standard of review under "thirteenth juror doctrine." This doctrine is one which has withstood repeated appellate scrutiny in South Carolina, including challenges to its fairness and constitutionality.[12] The rationale of the

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[10] While it has been stated without precision that a judge does not have to state his reasons for granting "a new trial," Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990), the authority for such a statement is always confined to thirteenth juror doctrine cases. See Folkens, and S.C. Dept. of Hwys. v. Mooneyham 275 S.C. 205, 269 S.E. 2d 329 (1980).

[11] Mooneyham was similarly cited in later cases without carrying forward the obvious qualification that review is only limited when the trial judge is not required to provide reasons, does not do so, and there is nothing else to review. The "any evidence" standard of review is limited to thirteenth juror cases. Id. Even in thirteenth juror cases, that standard does not actually prevent review of other matters if they are present. The limitation only applies in instances where the trial judge does not, in fact, state his reasoning. The misstatement, by generalization, of the standard appears to have begun sometime after Mooneyham, in which the Court observed "When the question is, thus, the existence or absence of supportive evidence such an order is subject to our review for a consideration of that question only." (Emphasis added.) Thus, the review is not always so confined, and the Court of Appeals' statement that it is, was erroneous.

[12] In Lane the Court upheld the thirteenth juror doctrine as not unconstitutional, noting that the doctrine was "well-established" and that under "strict scrutiny" of the doctrine as it

doctrine is that the judge sits as a fictional thirteenth juror, and that if he disagrees with the decision of the jury solely "upon the facts" i.e., just as if he were one of the properly charged, properly behaving jurors taking his own view of the case, he can refuse to agree with the other twelve jurors, thus keeping the decision from being unanimous, hanging the jury, and requiring a new trial. Vinson.

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affected the "fundamental right" of jury trial, the doctrine was reasonably "narrowly tailored." However, the jumble of caselaw and the doctrine's seemingly multi-purposed inclusion by trial courts as a basis for new trial make the narrowness of the doctrine doubtful today. Lane is based on Norton v. Norfolk Southern, 350, S.C. 473, 567 S.E.2d 851 (2002), which in turn is based on Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990), which is based on S.C. State Hwy. Dept. v. Townsend, 265 S.C. 253, 217 S.E.2d 778 (1975). However, Townsend is inconsistent with both Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690 (1995), and Youmans v. S.C. Dept. of Transportation, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), and apparently overruled by Bailey. For example, Townsend states, in 1975, that the trial judge may use the thirteenth juror doctrine to grant a new trial nisi, whereas Bailey states in 1995 that this is an improper use of the doctrine and it does not apply to decisions to grant new trial nisi. Youmans states the same in 2008.

The "any evidence" standard (already frequently the subject of misapplication) makes the standard of review of the appellate court the diametric opposite of the standard of decision of the trial court. With regard to whether to grant a new trial, the trial judge must view the evidence and all reasonable inferences which can be drawn therefrom in the light most favorable to the nonmoving party. Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984). A judge considering whether to grant a new trial may not substitute his or her own judgment for that of the jury. Jones v. Ingles Supermarkets, Inc., 293 S.C. 490, 360 S.E.2d 775 (Ct. App. 1987); Watford; Turner; Brabham. Yet, some posit that, in reviewing the decision under the purported "any evidence" standard, the appellate court would only look to see if there was some small amount of evidence against the nonmoving party, and against the decision of the jury. This standard of review would be the opposite of the standard of decision of the lower court. This seems hardly "well-established."

Folkens also incorporates contradictory elements. The trial judge granted new trial "as a thirteenth juror." The Supreme Court denied the appellant permission to argue that a trial judge should be required to state findings or reasons for granting a new trial under the thirteenth juror doctrine. The Folkens court states that its "review is limited to the consideration of whether evidence exists to support the trial court's order." (Emphasis added.) Yet, the Folkens court also states that a trial judge's grant of new trial under the doctrine may be overturned if "the conclusion reached was controlled by an error of law." The Folkens court, after reviewing the record and finding some factual support for the grant of new trial, added: "We also find that the conclusion reached was not controlled by error of law." The review, was, therefore, not limited to "any evidence." And pursuant to Mooneyham, it the review should not have been so limited.

Exercise of the "thirteenth juror doctrine" is supposed to be limited to instances in which the trial judge finds "the evidence does not justify the verdict" and grants a new trial solely "upon the facts." Norton v. Norfolk Southern Railway Co., 350 S.C. 473, 567 S.E. 2d 851 at 854 (2002). The case law requires that the judge exercising the thirteenth juror doctrine find that "the evidence does not justify the verdict," and that his decision to grant new trial be based "solely upon the facts." Vinson.

Taken together with all the other descriptions of this doctrine, and defenses of it, "solely upon the facts" means: not involving any dereliction, confusion, passion, caprice, prejudice or improper consideration by the jury; not involving a trial error by the trial judge; not involving improper conduct or argument by counsel; not involving interference with or intrusion into the trial process by others; and only involving a difference of factual conclusion based the law charged.

The thirteenth juror doctrine is not based upon "improper considerations" by the jury. Rather, it is based upon a simple difference "on the facts." See Vinson v. Hartley ("upon the facts," not upon findings regarding the jury's behavior or disposition). In the instant case, the Circuit Court's order was based on determinations that the "jurors were motivated by improper considerations" and that the "jury failed to follow the court's instructions in returning their verdict." (Record at 45.) There is a different, existing, scope of review for that.

Thirteenth juror doctrine new trial orders often are very difficult to overturn on appeal because, under the fiction of the judge being a juror, he is not required to provide any reasoning at all for his decision. Vinson; Folkens; Mooneyham. Because of the power of the judge to act as a "thirteenth juror," without stating his reasons beyond his disagreement with the verdict solely upon the facts, it must be presumed that the trial judge "recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality." Worrell

v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). As Professor Flanagan has said in his discussion of Rule 59 in South Carolina Civil Procedure, the decision to grant a new trial under the thirteenth juror doctrine borders on being "irreversible."[13] James F. Flanagan, South Carolina Civil Procedure, p.467 (1996).

When the trial judge appreciates his responsibility and proceeds to grant a new trial on the sole basis of the thirteenth juror doctrine, identifies it as the basis, and does not state his reasons beyond "differing with the jury on the facts," it should be his only basis. It is not a fair and impartial exercise of discretion to decide a matter by "checking all the boxes" supplied by the word processor and basing the decision on "every basis that might be applicable."[14]

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[13] Thus, although the judge's decision to grant a new trial as a "thirteenth juror" is "within his discretion," and can be reviewed "for an abuse of discretion," if the judge does not have to supply any reasoning at all, and does not do so, it is impossible to determine whether he has in fact exercised any discretion at all – indeed it is difficult to determine whether he has acted only upon whim, bias, or complete misunderstanding.

Although a judge granting a new trial under the thirteenth juror doctrine does not have to state his reasoning, when he does so, his reasons are reviewable. Watford v. S.C. State Hwy. Dept., 269 S.C. 130, 236 S.E.2d 558 (1977). When his reasons are "without evidentiary support, the new trial is erroneous as a matter of law." Id. (citing S.C. State Hwy. Dept. v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976)).

[14] Contrary to the original foundations of the thirteenth juror doctrine, some cases, such as Lane, are decided by the appellate court on the basis of being thirteenth juror doctrine cases (thus purportedly allowing a dismissive scope of review), when the underlying facts indicate that the trial judge was deciding to grant a new trial based upon non-thirteenth-juror-doctrine considerations, such as finding things "shocking to the conscience," observing that the damages award was at odds with the jury charges given to the jury, observing the results of affirmative defenses such as comparative negligence, etc. These cases cannot actually be considered as proper applications of the thirteenth juror doctrine and the accompanying standard of review, because they would seem to render all grants of new trial – on whatever basis – in practical effect, completely unreviewable.

As a logical extension of this principle, in any case in which there is any dispute of any material fact, the trial judge would be allowed to always throw out the result and make the parties try the case again. He could do so without stating that he was acting as a thirteenth juror. He could do so without stating that he is making the decision solely upon the facts. He could do so while actually providing multiple incongruent and specious reasons for his decision. These untenable reasons would then be ignored by the appellate court in looking for some other theoretical, and not actual, basis on which the new trial might have been able to have been granted

Yet, not every grant of new trial is based on the thirteenth juror doctrine. It was not the basis in the instant case.

The instant case was also not a grant of new trial in which the Circuit Judge was not required to state his reasons. In the instant case, the trial judge did state his reasons. In the instant case, the Circuit Court's stated reasons are inconsistent with exercise of the thirteenth juror doctrine, and in any event are wholly without support in the record and guided by error of law. The basis given was gross inadequacy of the verdict because of juror impropriety including failure to follow instructions. Yet the jury was allowed to first apportion liability before determining damages, and the jury was only asked to return a general form of verdict, and did so. This requires reasons and facts and allows review. Vinson.

C. The distinctly stated bases for reversal of the trial judge in the appeal all demonstrated an abuse of discretion by the trial judge, by being wholly unsupported in the record and by being controlled by error of law. (Questions 11-16)

Because the Court of Appeals did not decide any of the particular issues presented and also applied the wrong scope and standard of review, the Clarks have devoted much of this petition to seeking review of those matters. Space limitations on this petition prevent lengthy discussion of the importance of reviewing the nine issues originally presented on appeal under the correct standard of review. These matters have already been briefed below without specific rulings being made thereon. They and can be briefed again upon grant of certiorari. The important reasons for reviewing the matters, in short, are that they deal with the denial of jury trial, which is a "fundamental right." Lane.

It was an abuse of discretion for the trial judge to tailor a jury instruction to allow the jury

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by some other judge not influenced in his reasoning by illogical leaps.

to grant less than all relief sought, and then grant new trial on the basis that the jury did so. It was an abuse of discretion because these are grounds and reasons which are untenable. Norris. There was no evidence whatsoever in the record that the jury disregarded the instructions given to it; the verdict was consistent with allocation of liability before considering damages, as allowed by the charge and specifically contemplated by the trial judge in the charge conferences. The record also contained ample evidence of bad faith, as defined by the judge in his charges, as a basis for reducing liability.

It was error, and therefore an abuse of discretion, for the trial judge to base his grant of new trial on liability being uncontested, when the instant case was one of contested liability. It was an abuse of discretion because the trial judge was controlled by error of law. Bettis. It was an abuse of discretion because there is no support in the record whatsoever for a view of the case as one of uncontested liability. It was an error to apply to a case of contested liability, which case also involved the possibility of apportionment of liability, rules for the adequacy of "damages" in cases of uncontested liability.

It was error for the trial judge to color his grant of new trial with comments as to whether evidence of the defense was "credible" when the basis of the plaintiff's motion was that there was "no dispute" as to liability or damages. It was error because objection to the sufficiency of evidence cannot be raised for the first time in a motion for new trial. Peay v. Ross, 292 S.C. 535, 357 S.E.2d 482 (Ct. App. 1987). It was also error because in considering new trial, the trial judge cannot substitute his judgment for that of the jury. Jones; Watford.

It was a failure to exercise discretion, and therefore an abuse of discretion, for the trial judge to color his grant of new trial with comments that the evidence of bad faith was not "credible," without discussing whether he meant bad faith as he defined it for the jury, without identifying the evidence referred to, without stating anything about it that was believed to be not

credible, and without discussing it in any way. It was an abuse of discretion because failure to exercise discretion is an abuse of discretion. Fontaine v. Peitz.

To the extent the trial Judge granted a new trial based on insufficiency of evidence rather than upon the reasons stated in his order, it was error to do so when insufficiency of evidence of bad faith was not raised by the plaintiff as a ground for directed verdict or JNOV. Peay v. Ross.

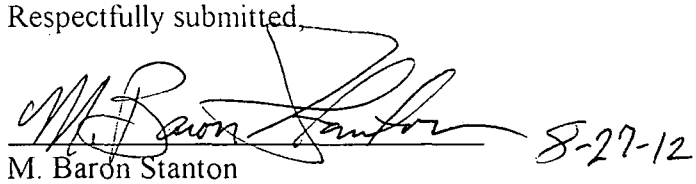
It was error, when considering and granting new trial, for the trial judge not to consider the greater weight of the evidence while viewing the evidence and the inferences to be drawn from it in the light most favorable to the nonmoving party, the defendants, and to measure the sufficiency of the evidence against the law charged to the jury. Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984), and see Jones and Watford.

D. Disregarding the results of the completed jury trial under the circumstances was a violation of due process under the State and federal constitutions, and a violation of the right to trial by jury under the State constitution. (Question 17)

The only thing preventing the Circuit Court's grant of new trial from being a violation of the South Carolina Constitution's right to jury trial, would be compliance with intelligible rules of law pertaining to grant of new trial. See and compare Brabham and Lane. If the deprivation is held to be without the need for intelligible case law delineation of when and under what circumstances it will occur, without any need for statement of reasons for the deprivation, and without any possibility of review, it is also a violation of due process under the State and federal constitutions.

For the foregoing reasons and more, the Court of Appeals' decision should be reviewed, and the Circuit Court, reversed.

Respectfully submitted,



8-27-12

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07–CP-40-8435
(S.C. Ct. App. Op. No. 2012-UP-270)

National Grange Insurance Company . . . . . Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, ... Defendants,

of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and Susan F. Clark are . . . . . Appellants.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on Aug. 27, 2012, 2012, served the foregoing Petition for Certiorari upon the Respondents by causing copies thereof to be mailed with proper postage to the addresses indicated below:

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