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IN THE STATE OF SOUTH CAROLINA) COUNTY OF BERKELEY)	IN THE COURT OF COMMON PLEAS FOR THE 9TH JUDICIAL CIRCUIT CASE NO.: 2021-CP-08-00621
SHIRLEY GUNN, Plaintiff, v. JAVIER DELFIN, individually and as an agent/employee of Orr Contracting, Inc.; and ORR CONTRACTING, INC., Defendants.	**PLAINTIFF'S POST-TRIAL MOTIONS FOR NEW TRIAL & JNOV**

TO: THE HONORABLE COURT AND ALL PARTIES OF RECORD:

It is not often that a trial judge gets black-letter law backwards. But that's what happened here.[1] As everyone but Judge Price (now former Judge Price) knows, the burden of proving affirmative defenses falls on the defendant asserting them.[2] But that is not what Judge Price instructed the jury. Instead, he instructed the jury exactly backwards – he instructed the jury that ***Plaintiff*** bore the burden of ***dis***proving affirmative defenses.[3]

Even after Plaintiff advised Judge Price of the correct law, Price refused to correct his mistake and properly instruct the jury. Worse, Judge Price also *sua sponte* interrupted Plaintiff's closing to give the same backwards recitation of the law to the jury.

Not surprisingly, as a result of Judge Price repeatedly instructing the jury that Plaintiff bore a burden which was actually the Defendant's burden, the jury found that Plaintiff failed to meet her burden. There is no cure for such a fundamental and egregious error as former Judge Price committed but to order a new trial.

[1] Among many other things described below that independently and collectively necessitate a new trial.
[2] This is so well established that nearly ***a hundred years ago*** our Supreme Court said that "It seems unnecessary to cite authorities in support of the postulate that when one pleads an affirmative defense, the burden is on him to prove it." *McCabe v. Sloan,* 184 S.C. 158, 191 S.E. 905, 906 (1937).
[3] Little wonder then that the Bar Association found former judge Price unqualified for the bench. See https://www.live5news.com/2024/06/24/unqualified-lowcountry-judge-bentley-price-vacate-bench-this-week

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As a result of the fundamental mis-instruction of the jury, and because of the numerous additional errors described below, Plaintiff Shirley Gunn (hereinafter, "Plaintiff"), respectfully moves this Court to grant a new trial absolute under Rule 59, SCRCP.

Trial in this case took place on June 24-27, 2024, before now former Ninth Circuit Court Judge Bentley Price. Notably, Judge Price's term ended at the conclusion of this trial.[4] From the very start of the proceedings, during pre-trial motions, in voir dire - and throughout the course of the 4-day trial, until the very end, in charging the jury and even after the jurors had been dismissed to deliberate - Judge Price demonstrated clear bias in favor of Defendants' case and against that of the Plaintiff, which manifested in numerous instances of reversible error. Whether this was driven by former Judge Price's obvious and unbridled contempt for Plaintiff's Counsel, or truly by an astonishing lack of knowledge in matters of civil procedure and evidence and South Carolina law, is unclear. However, it is abundantly clear that former Judge Price's improper actions and rulings throughout the course of trial pervaded the proceedings and denied Plaintiff her rightful day in court, and for the reasons detailed below she should be entitled to a new trial:

1. The Court improperly instructed the jury regarding the burden of proof as it relates to affirmative defenses, and over Plaintiff's multiple objections included an incorrect jury charge to the effect that Defendants bear no burden of proof.

2. The Court allowed Defense Counsel to enter evidence of a prior settlement with a third party in violation of Rule 408.

3. The Court improperly limited the testimony of Plaintiff's expert and refused altogether to allow Plaintiff to present her rebuttal case, or even proffer testimony.

[4] https://www.live5news.com/2024/06/24/unqualified-lowcountry-judge-bentley-price-vacate-bench-this-week.

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4. While this Motion for New Trial and incorporated memorandum will primarily focus on the foregoing three errors, the Court erred in numerous other manners throughout the course of trial to be detailed herein, and for each of these reasons - and because of the effect of cumulative error - the Court must grant a new trial.

Therefore, Plaintiff respectfully asks this Court to grant her Motion for New Trial, to enter an Order granting Plaintiff a new trial absolute, and to grant any other and further relief as may be appropriate.

Plaintiff further reserves the right to (and will) supplement her Motion for New Trial with additional exhibits and supplemental memoranda - including reference to the direct quotes from Judge Price - as the trial transcript, which has already been requested by the Plaintiff, is made available to Plaintiff's Counsel.

BACKGROUND

1. The Court improperly instructed the jury as to the burden of proof in relation to affirmative defenses, and over Plaintiff's objection included an incorrect jury charge to the effect that Defendants bear no burden of proof.

During Plaintiff's closing argument, the Court interrupted Plaintiff's Counsel to instruct the jury that Plaintiff's Counsel was wrong about the Defendants bearing the burden of proof in relation to affirmative defenses. "They could sit over there and play Uno, they have no burden." Thereafter, the Court would not charge that a defendant carries the burden of proof on affirmative defenses, and in fact charged the opposite. (It is also worth noting that the charged affirmative defenses of "sole negligence of third party" and "intervening negligence of third party" were both late additions, neither of which were included in the Defendants' initial charge submission and were raised last minute. Additionally, Defendants did not plead intervening negligence in their Answer.) Plaintiff's Counsel addressed the matter again before the charge, asking for the standard affirmative

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defense charge, which the Court then denied. From there, Plaintiff's Counsel addressed the matter once more after the charge - while also citing binding and precedential South Carolina caselaw to that effect, to be further discussed in the Argument section of this memorandum - and was denied by the Court again. At that point, upon Plaintiff's Counsel instructing former Judge Price as to the caselaw and requesting that the jury be brought back in so the error could be corrected, Judge Price insisted that "it's not going in, it would only confuse them (the jury) at this point, and that's my ruling." Judge Price then gave the jury a copy of the jury charges containing the incorrect and incomplete charge on affirmative defenses and the burden of proof for the jury to take back to the jury room.

2. The Court repeatedly allowed Defense Counsel to enter evidence of a prior settlement with a third party in violation of Rule 408.

Judge Price first read the caption to the jury during voir dire and included a settled Defendant despite being informed in chambers that the Defendant had settled, was dismissed, and had been removed from the caption before trial. Judge Price was reminded of his error after voir dire. Nevertheless, Defense Counsel then showed the jury a copy of a previous iteration of the Summons and Complaint containing reference to and naming in the caption a settled and since dismissed third party during the Defendants' opening statement. When Plaintiff's Counsel objected, the objection was overruled. This was after Defendants themselves submitted a Motion *in Limine* to prohibit "mention of settlement negotiations and insurance policies," which directly quoted South Carolina Rule of Civil Procedure 408 regarding the inadmissibility of settlements and settlement negotiations, and which was stipulated to by Plaintiff on the record prior to the start of trial. Defense Counsel then continued to bring up the dismissed Defendant, Audrey Lundy, and the fact that there had been a settlement throughout the course of trial - including, according to Plaintiff's Counsel's notes, on July 26 shortly before noon, but also on other occasions throughout

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the trial during witness testimony, and lastly during Defendants' closing argument - to argue that because Lundy was included in the original pleadings that was evidence that Lundy was actually at fault. Of course, pleadings are not evidence and should not be used as such. Each time this happened, Plaintiff's Counsel objected; each time, Plaintiff's Counsel was overruled.

3. The Court improperly limited the testimony of Plaintiff's expert and refused altogether to allow Plaintiff to present her rebuttal case, or even proffer the testimony.

At the beginning of trial, the Court ruled that both experts could testify to their findings based on the evidence presented, but not comment during their testimony on the other expert's opinions despite the fact that Plaintiff's expert (Ken Richardson) was first retained to point out the errors in Defendant's expert's (Darin Dux) methodology (which he had done so successfully prior to trial that Defendant's expert submitted a report disclosing an entirely different model of tractor at issue). During the testimony of the Plaintiff's expert, Ken Richardson, the Court did not allow Mr. Richardson to the testify regarding the various theories and opinions of Mr. Dux, but later *did* allow Mr. Dux to testify to the same matters for which the Court had limited Mr. Richardson's testimony. When Plaintiff's Counsel then requested to present a rebuttal case including Mr. Richardson, former Judge Price denied Plaintiff's request to present a rebuttal case altogether. When Plaintiff's Counsel then insisted on at least being allowed to proffer the rebuttal testimony, Judge Price refused to even allow the proffer.

4. In addition to the foregoing three errors, the Court erred in numerous other manners, and for each of these reasons individually - and because of the effect of cumulative error - this Court must grant a new trial:

a. The Court refused to include any of Plaintiff's proposed voir dire.

b. The Court, over Plaintiff's objection, permitted recross by Defense Counsel during the testimony of Defendant Orr that was outside the scope of Plaintiff Counsel's redirect, and, after

overruling Plaintiff Counsel's objection, then also refused Plaintiff Counsel another opportunity to question the Defendant.

c. At the conclusion of Plaintiff's case, the Court improperly granted Defendants' motion for directed verdict on the issues of negligence *per se*, gross negligence and punitive damages.

d. The Court improperly allowed Defendants' witness, Darin Dux, to be qualified as an expert in multiple fields. Further, whereas testimony by Ken Richardson, the Plaintiff's expert, was improperly limited, the Court not only allowed Dux - whom the Plaintiff voir dired, objected to his qualification, and filed a motion to exclude and limit his testimony, all of which were overruled and denied - to be qualified as an expert when he should not have been, but also allowed Dux to testify to the very same matters for which Richardson's testimony was improperly limited and excluded. The Court then went so far as to cut short Plaintiff Counsel's cross examination of Dux, insisting Dux had a "flight to catch" back to Iowa, which the Court later admitted during closing arguments was not accurate, and that he (Judge Price) had just made it up. (Lastly, as was earlier discussed, the Court improperly denied Plaintiff the opportunity to present her rebuttal case, and refused to even allow Plaintiff's Counsel to proffer Mr. Richardson's rebuttal testimony.)

e. At the conclusion of Defendants' case, Plaintiff made a motion for directed verdict on each element: Damages, causation, breach and duty. Plaintiff's motion was denied and should not have been, when clearly duty and damages were uncontroverted at the very least.

f. In addition to incorrectly charging the jury as to the burden of proof on affirmative defenses, the Court also refused to permit several of Plaintiff's proposed jury charges, preserved as Court's Exhibit 6, including: Violation of Internal Policy; Negligence *Per Se*; Violation of Industry Standard; Recklessness, Willfulness & Wantonness; Failure to Render Aid; Failure to

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Yield; Stopping, Standing or Parking on State Highways; Putting Foreign Substances in Highways; Obstructions in Highways; and Spoliation, despite that Defendants took photos and spoliated them.

g. The Court incorrectly denied Plaintiff's Motion for Directed Verdict as to Defendants' negligence for having failed to comply with the operator manual of the subject Bush Hog, failing to comply with Defendant Orr Contracting's Safety Manual, the SC DOT regulations, and for having entered the roadway, all of which Defendants admitted during trial. Defendants attempted to argue that the subject Bush Hog was allowed to enter the roadway, but could not point to anything in support thereof, and - given that the vehicle in which Plaintiff was a passenger otherwise had the right of way in her lane of travel - were thus negligent in doing so. Accordingly, Plaintiff's Motion for Directed Verdict as to Defendants' negligence on those issues should have been granted - seeing as they admitted it - and would go to proximate cause, constituting yet another reversible error.

The Court should fix that error by granting Plaintiff's Motion for Judgment Notwithstanding the Verdict, now.

ARGUMENT

1. The Court improperly instructed the jury as to the burden of proof in relation to affirmative defenses, and over Plaintiff's objection included an incorrect jury charge to the effect that Defendants bear no burden of proof.

During trial, both before and after the jury was charged incorrectly as to affirmative defenses and the burden of proof as it relates to the same, Plaintiff's Counsel objected and requested that the standard jury charge as to affirmative defenses consistent with South Carolina law be included. Each time, Plaintiff's objections and requests were overruled and denied.

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On the record, Plaintiff's Counsel instructed former Judge Price as to the burden of proof for affirmative defenses in South Carolina, citing binding and precedential caselaw on the issue, including from *Pike v. S.C. Dept. of Transp.*:

> This, in our opinion, flies in the face of the well-established rule that the party pleading an affirmative defense "has the burden of proving it." Hoffman v. Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963); accord McCabe v. Sloan, 184 S.C. 158, 162, 191 S.E. 905, 906 (1937) **("It seems unnecessary to cite authorities in support of the postulate that when one pleads an affirmative defense, the burden is on him to prove it."). (emphasis added)**

Pike v. S.C. Dept. of Transp, 343 S.C. 224, 540 S.E.2d 87 (S.C. 2000). In another case, *Ross v. Paddy*, the Court held that the lower court's failure to give a requested instruction that the defendant bore the burden to prove as to the defendant's affirmative defense constituted reversible error:

> The trial judge is required to charge the current and correct law. Brown, 325 S.C. 54, 481 S.E.2d 444 (Ct.App. 1997). Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence. Id. Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error. Id. Moreover, when general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error. Id. at 555, 481 S.E.2d 449 (citing Jones v. Ridgely Communications, Inc., 304 S.C. 452, 405 S.E.2d 402 (1991)); Burns v. South Carolina Comm'n for the Blind, 323 S.C. 77, 448 S.E.2d 589 (Ct.App. 1994). . . Because we conclude comparative negligence is an affirmative defense, the trial court erred in not charging the jury that Paddy had the burden of proving Ross' negligence.

Ross v. Paddy, 340 S.C. 428, 532 S.E.2d 612 (S.C. Ct. App. 2000). Nevertheless, former Judge Price refused to include a standard charge to the effect that a defendant carries the burden of proof as it relates to an affirmative defense.

Despite Plaintiff's multiple objections and requests, despite Plaintiff's Counsel citing authority on this issue - and, frankly, even though it's axiomatic the negligence of third parties is an affirmative defense, and it's axiomatic that a defendant has the burden of proof for affirmative defenses - former Judge Price flatly refused to instruct the jury with this charge.

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2. The Court repeatedly allowed Defense Counsel to enter evidence of a prior settlement with a third party in violation of Rule 408.

Despite numerous objections by Plaintiff's Counsel, the Court repeatedly allowed Defense Counsel to enter evidence of a prior settlement with a third party, offered to prove liability, in violation of Rule 408 of the South Carolina Rules of Evidence, which reads as follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.
>
> *This rule is identical to the federal rule. It is generally the rule in South Carolina that evidence relating to settlements is not admissible to prove liability. Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960); see also Woodward v. Southern Railway, 88 S.C. 453, 70 S.E. 1060 (1911) (evidence of disclosures made by either party to the other, directly or indirectly, in negotiations for a compromise is not admissible). Evidence of an offer to compromise may be admissible for some other purpose. Meehan v. Commercial Casualty Ins. Co., 166 S.C. 496, 165 S.E. 194 (1932) (evidence of offers of compromise made by alleged agent of a party admissible for purpose of proving agency).*

S.C. R. Evid. 408. This too constitutes reversible error and warrants the granting of a new trial.

3. The Court improperly limited the testimony of Plaintiff's expert and refused altogether to allow Plaintiff to present her rebuttal case, or even proffer testimony.

The Court improperly limited the testimony of Plaintiff's expert and flatly refused to allow Plaintiff to present her rebuttal case (or even proffer the testimony), despite Rule 611 of the South Carolina Rules of Evidence clearly defining that it is a right of a party to call a witness in rebuttal:

> A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. **This rule shall not limit the right of any party to recall a witness in rebuttal. (emphasis added)**

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S.C. R. Evid. 611. Again, the Court, over Plaintiff's multiple requests, plainly denied Plaintiff this right. When Plaintiff then asked to proffer the rebuttal testimony, Judge Price refused to even allow that. For this reason, as well, reversible errors exists to warrant a new trial.

4. In addition to the foregoing three errors, the Court erred in numerous other manners, and for each of these reasons individually - and because of the effect of cumulative error - this Court must grant a new trial:

Plaintiff maintains that each of these errors individually justifies a new trial. But even if the Court disagrees, the cumulative effect of these compounded errors certainly demands a new trial. *See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 10, 466 S.E.2d 727, 732 (1996) (implying that cumulative error analysis applies to civil cases). Any objective observer present in the courtroom for the duration of this trial, with or without a law degree, could plainly see that Plaintiff's case was enormously disadvantaged due to former Judge Price's apparent contempt directed toward Plaintiff's Counsel, and - whether a result of that contempt, or truly just the product of garden variety incompetence and a lack of knowledge as to basic matters of evidence and civil procedure - the multitude of rulings that were made against the Plaintiff, despite being inconsistent with established South Carolina law. Such prejudice requires a new trial.

CONCLUSION

Therefore, Plaintiff respectfully asks this Court to grant her Motion for New Trial, to enter an Order granting Plaintiff a new trial absolute, and/or judgment notwithstanding the verdict, and to grant any other and further relief as may be appropriate. Plaintiff reserves the right to supplement her post-trial motions with additional exhibits and memoranda including the trial transcript, which has been requested by the Plaintiff, once the same is made available to Plaintiff's Counsel.

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Dated: July 7, 2024

Respectfully Submitted,

POULIN | WILLEY | ANASTOPOULO

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