THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Angela Youmans as Personal Representative of the Estate of Deonte Elmore, Appellant,

v.

South Carolina Department of Transportation, Respondent.

Appeal From Allendale County
John C. Few, Circuit Court Judge

Opinion No. 4437
Heard September 17, 2008 – Filed September 24, 2008

REVERSED

Robert N. Hill, of Newberry, and Mark B. Tinsley, of Allendale, for Appellant.

Marshall H. Waldron, Jr., of Bluffton, for Respondent.

ANDERSON, J.: Deonte Elmore was killed after his car skidded off a wet road and flipped in the median. His mother, Angela Youmans, initiated wrongful death and survival actions against the South Carolina Department of Transportation (DOT) alleging it was negligent in failing to maintain the highway to avoid rutting and not properly maintaining the median's slope. A jury awarded Youmans nine million dollars on the wrongful death claim and two million dollars for the survival action. The circuit judge reduced the judgment by the South Carolina Tort Claims Act caps. Ten months later, the circuit judge granted a new trial pursuant to the thirteenth juror doctrine in an order stating justice had not prevailed due to (1) the brief jury deliberations and (2) because there was "no evidence to support the jury's determination that Deonte was not negligent at all in losing control of his car." We reverse.

FACTUAL/PROCEDURAL BACKGROUND

On October 17, 2003, Deonte Elmore was the driver and sole occupant in a single-vehicle rollover accident on Highway 301, in Allendale County. The sixteen year old high-school student did not survive.

After attending a football game, Deonte dropped off a friend and began to drive home in his Honda Accord. His mother, Angela Youmans, was returning home after the game and saw her son's car at a stop sign. She called Deonte on his cell phone and discovered he was going the same way. Deonte followed behind his mother, but Youmans drove faster and lost sight of his lights after going around a curve.

Behind Deonte on Highway 301 was Willie Elmore (Elmore), a distant relative who knew Youmans but did not know Deonte at the time. Elmore testified Deonte was traveling without apparent problems in the right, "slow" lane at approximately forty-five to fifty miles per hour. The posted speed limit in the area is sixty miles per hour. After easing past Deonte, Elmore heard a bang and looked in his rear view mirror to see lights "flashing up." The Honda had left the highway, entered the median, and flipped a number of times. Elmore turned around, returned to the site, and found a moaning Deonte lying in the road. Youmans, meanwhile, arrived at her house, heard the loud noise, and became nervous thinking Deonte had enough time to arrive. Unable to reach him on his cell phone, Youmans backtracked down the road until she came upon the scene.

In May 2004, Youmans filed wrongful death and survival actions against DOT. In the complaint, Youmans alleged Highway 301 was severely rutted and Deonte lost control due to water pooled from the evening's rain. Additionally, Youmans asserted a dramatic drop-off in the median caused the Honda to roll. She claimed DOT was negligent for failing to maintain the roadway and the median's slope. DOT answered with a general denial, asserted immunities under the South Carolina Tort Claims Act, and pled the defense of comparative negligence.

The actions were consolidated for trial. Past and present DOT engineers asseverated DOT's duties to (1) inspect and cure any roads pooling water; (2) maintain median slopes to design specifications; and (3) the importance of a median's slope angle in allowing a stray driver to recover and avoid rollovers; Lorraine Williams, the current Resident Maintenance Engineer for Allendale County, admitted the median slope where Deonte wrecked deviated from the specifications. The DOT employees stated they had received no reports or complaints concerning the stretch of Highway 301 at issue. Elmore, who lives in the area, testified it had been raining the night of the wreck. He knew the road to hold water and, at the time of the accident, he said it held "enough to make a car sway." The friend who Deonte had dropped off prior to the wreck told the court Deonte always wore a seat belt, wore a seat belt that evening, and did not use drugs or alcohol. Youmans called an expert in accident reconstruction whose studies indicated the median's slope caused the car to bottom out and contributed to the rollover's severity. He estimated Deonte left the road traveling at forty-seven miles per hour. Although he could not state conclusively Deonte hydroplaned, he reported finding depressions on the road capable of collecting enough water to create the hazard. Officer James Oliver Freeman of the Allendale County Sheriff's Office was a responder to the crash site. He testified that when he arrived there was water "laying still on top of the road."

DOT called Allendale County Fire Chief Rodney Brett Stanley, Jr., who traveled on Highway 301 when responding to the accident. He did not remember water on the

roadway that particular evening, but admitted on cross examination the road holds water at times. Donald Roberts, an expert called by DOT, contended the slope of the road would not allow standing water. Roberts stated "I wasn't able to determine why the vehicle lost control. I was able to rule out the road as being a cause."

At the end of the evidence, Youmans' motion for a directed verdict on DOT's comparative negligence defense was overruled. The trial court denied DOT's motions for directed verdict on the liability issue. The jury was charged on comparative negligence, including Deonte's duties to keep a proper lookout, drive at a reasonable speed, avoid collisions, and use due care. A five question verdict form to be filled out by the jury was explained by the judge.

At 3:45 PM on June 8, 2006, the jury was sent out to begin deliberations. Shortly thereafter, the forelady submitted a request for a copy of descriptions the trial judge had read concerning grief and sorrow, loss of companionship, and mental shock. The jury returned with a verdict at 4:45 PM. On the verdict form, the jury indicated DOT was negligent and this negligence was the proximate cause of Deonte's injuries. In response to the question asking if Deonte was negligent and whether the negligence was the proximate cause of his injuries, the jury answered "No." Damages for the wrongful death action were awarded in the amount of nine million dollars and two million dollars on the survival claim.

Immediately following the jury's discharge, the circuit judge asked if there would be any motions to which the parties responded affirmatively. DOT's motion for judgment notwithstanding the verdict was denied. The judge asked DOT if they were going to move for a remittitur and a new trial to which DOT answered "Yes". When court resumed the next morning, arguments on the motions were heard. At the conclusion, the motion for a new trial absolute was denied with the judge explaining the verdict was not so excessive to shock the conscience of the court. He told the parties he would take under advisement the question of a new trial under the thirteenth juror doctrine and get a ruling out "as soon as I can." Later that day, the judgment was entered on a form that explained:

> The jury returned verdicts of $2,000,000 on the survival claim, and $9,000,000 on the wrongful death claim. Because judgments must be entered at the statute cap of $300,000 each, the parties agree it is not necessary to rule on the Defendant's motion for a new trial nisi remittitur. I find the amount of the verdict, while very generous, is not so grossly excessive that it shocks the conscience of the Court, and so I deny the motion for a new trial absolute. I am taking the motion for a new trial under the 13th juror doctrine under advisement. In the meantime, judgment shall be entered in each case in favor of the plaintiff for $300,000.

Nearly ten months later, in an order dated April 10, 2007, the circuit judge granted DOT's motion for a new trial under the thirteenth juror doctrine. The judge reiterated that DOT had moved for a new trial absolute, new trial nisi, and a new trial under the thirteenth juror doctrine. He agreed with DOT that no evidence supported the jury's determination that Deonte was free of negligence. However, the order most heavily relied upon the judge's conclusion the jury could not have given the case full deliberation in forty minutes. Thus, he determined "justice has not prevailed."

ISSUE

Did the circuit court judge err in granting DOT a new trial under the thirteenth juror doctrine due to the length of the jury's deliberations?

STANDARD OF REVIEW

"Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.' " Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 479, 567 S.E.2d 851, 854 (2002); Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990); S.C. State Hwy. Dep't v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); Vinson v. Hartley, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996); Soren Equip. Co., Inc. v. The Firm, Inc., 323 S.C. 359, 364, 474 S.E.2d 819, 822 (Ct. App. 1996). This Court's "review is limited to consideration of whether evidence exists to support the trial court's order." Folkens, 300 S.C. at 255, 387 S.E.2d at 267; Vinson, 324 S.C. at 403, 477 S.E. 2d at 722. "As long as there is conflicting evidence, this Court has held the trial judge's grant of a new trial will not be disturbed." Norton, 350 S.C. at 479, 567 S.E.2d at 854. Further, in an appeal of an order granting a new trial pursuant to the thirteenth juror doctrine, the appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993) (citing Gray v. Davis, 247 S.C. 536, 148 S.E.2d 682 (1966)).

LAW/ANALYSIS

I. THE RAISON D'ÊTRE OF THE THIRTEENTH JUROR DOCTRINE

Yeomans contends the trial court erred in granting a new trial pursuant to the thirteenth juror doctrine. We agree.

The following excerpt from Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996), outlines South Carolina jurisprudential history concerning the thirteenth juror doctrine:

> The seminal case stating the "thirteenth juror" doctrine is Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). Worrell states:
>
> > Nor does it follow that because under the law the trial judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial judge is the thirteenth juror, possessing the veto power to the Nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.

Worrell, 186 S.C. at 313-14, 195 S.E. at 641.

A review of the "thirteenth juror" doctrine was undertaken by the appellate entity in Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990):

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.
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> A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.

Folkens, 300 S.C. at 254-55, 387 S.E.2d at 267 (citations omitted).

The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984). Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed. Todd v. Owen Indus. Prods., Inc., 315 S.C. 34, 431 S.E.2d 596 (Ct. App. 1993). Similarly, the judge may 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," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

Vinson, 324 S.C. at 402, 477 S.E.2d at 702.

In Norton v. Norfolk Southern Railway Company, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002), the South Carolina Supreme Court explained, "the thirteenth juror doctrine is so named because it entitles a trial court to sit, in essence, as the thirteenth juror when [it] finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" (citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). The supreme court further held, "[T]he result of the 'thirteenth juror' vote by the judge is a new trial rather than an adjustment to the verdict . . . ." Id. In essence, the judge, as the thirteenth juror, can hang the jury and start the trial anew.

Our supreme court recently affirmed a court of appeals' decision upholding the grant of a new trial absolute under the thirteenth juror doctrine. Trivelas v. S.C. Dep't of Transp., 357 S.C. 545, 551-52, 593 S.E.2d 504, 508 (2004). The supreme court reasoned the grant was warranted because justice was not served by the jury's verdict, and the evidence did not justify the result. Id. at 552, 593 S.E.2d at 508. The Trivelas court held granting a new trial under the thirteenth juror doctrine has the same effect as if the jury failed to reach a

verdict, and the trial court is not required to give reasons for granting a new trial. Id. at 553, 593 S.E.2d at 508 (citing Folkens, 300 S.C. at 254, 387 S.E.2d at 267).

"The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi additur." Bailey v. Peacock, 318 S.C. 13, 14-15, 455 S.E.2d 690, 692 (1995); see also Pinckney v. Winn-Dixie Stores, Inc., 311 S.C. 1, 4-5, 426 S.E.2d 327, 329 (Ct. App. 1992).

II. THE THIRTEENTH JUROR DOCTRINE/SUA SPONTE BY THE COURT

Youmans contends the circuit court raised the thirteenth juror doctrine on its own initiative. Therefore, she complains the circuit court violated the ten day time limit provided by Rule 59(d) of the South Carolina Rules of Civil Procedure when it granted a new trial ten months after the entry of judgment. Rule 59(d) states:

> **On Initiative of Court.** Not later than 10 days after entry of judgment, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

This Court traffics in a milieu of precedential conundrums, but comes to the ineluctable conclusion based on the trial record in the case sub judice that the thirteenth juror doctrine was properly before the circuit court. Following the dismissal of the jury, the circuit court and counsel for the parties engaged in the following colloquy:

Court: All right. Are there going to be any motions?

Youmans: Yes, your honor.

DOT: Certainly, we want a judgment for an outstanding verdict.

Court: I deny the motion for judgment notwithstanding the verdict.

DOT: I would like the ten days to re-file on the motions.

Court: I want to hear them now.

DOT: Well, for a minute, I'm beyond what was offered here.

Court: You are going to move for a remittitur? Are you moving for a new trial also?

DOT: Yes, I am.

...

The court broke for the night and continued the discussion the next morning:

DOT: The defendant respectfully moves for a new trial absolute.

Court: Okay.

DOT: The grounds I would cite are: one, the defendant believes the court should have bifurcated the trial and tried the issues of liability and damages separately. Secondly, the defendant urges, would say that the court should have granted the negligence per se or, at least, allowed evidence on the negligence per se issue. Thirdly, that the evidence was insufficient to send the evidence to the jury at least on the conscious pain and suffering issue. And fourth, that a new trial absolute is required given the verdict. The defendant would support and find that the verdict was a result of improper considerations, namely reflect their intent to punish which is not part of this trial and should have been on the verdict form compensation, only.

Secondly, the defendant would move for a new trial and nisi remittitur and ask the court to reduce the verdicts to the statutory caps.

Court: All right. The motions for a new trial that relate to my evidentiary rulings and my decisions not to bifurcate the trial are denied. Now, then you had one more motion for a new trial absolute and I'm not sure I understood what that motion was.

DOT: I asked that you grant a new trial because the verdict was a result of improper considerations, namely, that due to the short amount of time the jury was out and the note they sent out evidence that they considered—it seemed to me they sailed right past liability and went right straight to damages. The tenor of their note indicated to me that they were looking—looked every way possible to add money and punish the defendant, the DOT, rather than compensate for the loss. I think that's improper consideration.

Court: All right. To the extent that your motion is based on the speculative hypothesis that the jury might have intended to punish the defendant rather than award compensation, I deny that motion.

DOT: In addition, the amount of the judgment is shocking and has to be based on improper considerations. It's way too much.

Court: All right. Well, let's focus on that motion. You have anything to argue?

. . .

Court: We're looking at the legal question of whether or not this verdict can stand under a motion for a new trial absolute based on the amount of the verdict.

Youmans: Yes, I'm sure they appreciate that. And that gets to why I'm having a hard time grasping procedurally what we're talking about, because we know that, if we look at Smalls, that the amount of the damages is not the judgment,

it's not the verdict. The verdict is $600,000.00. $300,000.00 for the wrongful death and $300,000.00 for survival action and (DOT's counsel) agrees with that.

Court: Well, if we were looking at it from the standpoint of a remittitur, you would be correct. And let's talk about this because I think that if—if, I think what the law tells us, that if the verdict is within the range of reasonableness and—or short of the range of shocking the [conscience], then the only thing that the court can do, if anything, is to reduce it. We can't eliminate it and start over. However, if the verdict rises to the level that it shocks the [conscience] because of its amount, then the only thing the court can do is to start over with a new trial. Can't reduce it. And where that line is, of course, is subject to the discretion of the individual judge on the one hand and to a review for abuse of discretion by the appellate court on the other. So, I don't think we're talking about—if all we're talking about is whether or not I can or should reduce this verdict to $600,000.00 or $300,000.00 or whatever it's going to be, then that's an easy question. We can go ahead and do that and move on. But that's not what the motion is. The motion is that this verdict is so excessive—and I'm just stating what the motion is, I'm certainly not indicating any view one way or the other when I say that, but the motion is, if the amount of the verdict is so grossly excessive that it shocks the [conscience] of the court and clearly indicates that the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motive, then that's the motion. And if that's what it is, then I don't think the cap comes into play because the decisions of the supreme court tell us that if that is what it is, I've got to grant a new trial. And so, that's our focus, I think, is whether or not the amount of the verdict is so excessive as to shock the [conscience] of the court and clearly indicate that it is the result of some improper motive. Now, I will tell you, I will say, that I think the verdict is huge . . . . [M]y initial impression is that this is a very large verdict . . . . But that's my initial impression and I that's where I think the focus of my inquiry must be, is simply whether or not the amount of the verdict is so grossly excessive that it shocks the [conscience] of the court. Now, the question about how long they deliberated and other things, I mean, I think that comes up under, I think, under the—if there's a motion on a new trial based on the thirteenth juror doctrine, that's where those arguments become relevant, right now I think we're just talking about the amount of the verdict.

Youmans: And judge, this is more a procedural issue, but as I understood the court's ruling yesterday, I think you wanted the defendant to make new trial motions at that time. Well. 59B says, either you have to make an amend or at the court's discretion. You didn't exercise your discretion or make an amend on anything concerning the issue and so I would say that on this basis it is untimely.

Court: Well, I never like anybody to get tripped up on a procedural step like what you're saying. He made motion for a new trial and when I hear a motion for a new trial I'm hearing that the three bases that I have for a motion for a new trial: motion for *nisi* remittitur, motion for a new trial absolute and motion for a new trial based on the thirteenth juror doctrine. So, that's what I've been thinking about as I have gone through the last—well, overnight, last night

and today.

. . .

Court: I've already ruled when I denied the motion for judgment notwithstanding the verdict that the evidence is sufficient to support the verdict. There's no doubt in my mind about that. That based on the testimony and the record, the evidence the jury could have reasonably found that this death was 100% the fault of the Highway Department and 0% of the fault of Deonte but there's—I mean, there's several things that trouble me about it. First of all I think that getting to that point is a complicated analysis and they got there in almost no time. The jury deliberated for a total of about 30 minutes, I mean 45 minutes. About 30 minutes after they started deliberating, they came out with that question . . . .

About 5 minutes after I gave them that, they came back with the verdict so, it raises a question in my mind of whether or not the jury actually spent some quality time deliberating over the liability questions in the case, which I think, regardless of everything we just talked about, I think everything we just talked about illustrates my point, which is not who should or should not win but the liability questions were difficult. And I'm troubled by it and I think the law requires me to study whether or not the verdict here is based on a true and legitimate deliberation over all issues. If they had come back after two minutes with a defense verdict and then it might be the same way.

. . .

Court: I just don't think in light of all that that I can say that this verdict is so excessive it shocked the conscience of the court. So I'm going to deny the motion for a new trial absolute based on the excessiveness of the amount of the verdict. Which leaves me with the motion for a new trial that would have been made under the thirteenth juror doctrine. Now, let's straighten this out. Do you contend that that motion has either not been made or is not properly before me or has not been argued in such a way that I discussed a few minutes ago or do you have any procedural position to take regarding my ruling on that motion?

Youmans: Judge, I think that it was not raised. That it was not before you within ten days of the verdict. You have the discretion to consider any motion that could have been raised. And so, certainly, you can consider it.

Court: Right. Okay. All right. Well, I'm going to take that question under advisement. I'm going to think about it. And mainly, as I said, I'm going to focus on whether or not I feel the jury sufficiently deliberated on what I see as a complicated set of liability issues in the amount of time that they took. So I'm going to take it under advisement and I'll get a ruling out as soon as I can.

. . .

Court: If either of you want to share with me any of your thoughts or you

> legal research on the questions of what is the role of the court in second guessing or in considering the quality of the jury's deliberation on a certain subject, then I'd be happy to see that.
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> . . .

Youmans: And that's in the context of the thirteenth juror doctrine?

> Court: Yes. And I could just grant a new trial without even explaining my self if I wanted to under that doctrine. But I'm telling you and I want the record to reflect why—where I'm focusing and I think that the law requires the jury to deliberate. They can't just go in and say "Well, what do you think?" Now, there are some situations where the evidence is so clear one way or the other, that we don't question a verdict that is very quick. In fact, I had a verdict in a DUI case down in Beaufort where the jury deliberated for six minutes. And that was literally from the time they left the courtroom to the time the bailiff came back to say that the jury had reached a verdict. And no body ever called in a vote because the evidence was so clear that the defendant was intoxicated while driving. But here, as I said, I think there are complicated legal issues . . . .
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> . . .
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> Court: [T]he law requires the jury to deliberate. And in fact, it's implicit in the instructions. In the instructions, it's implicit in the role of a jury and it's implicit in the fact that there are 12 minds that have to come together as one decision. We also know that the inner workings of a jury are for the jury. No body gets in there and says you have to do it this way.

In granting a new trial based on the thirteenth juror doctrine, the circuit judge neither acted on his own initiative for purposes of Rule 59(d) nor did he rely upon grounds not in DOT's original motion. DOT expressed concern with the length of jury deliberations and sufficiency of evidence when asking for a new trial. Though DOT did not expressly request a new trial pursuant to the thirteenth juror doctrine, the circuit judge clarified that he considers three bases when presented with a motion for a new trial: new trial nisi remittitur, new trial absolute, and new trial pursuant to the thirteenth juror doctrine. The circuit judge categorized DOT's quality of deliberation concern as a matter relevant under the thirteenth juror doctrine.

A colliquefaction of the judicial and/or counsel statements persuades this Court that the thirteenth juror doctrine was posited to the circuit court for arbitrament.

III. LENGTH OF JURY DELIBERATIONS AND THE THIRTEENTH JUROR DOCTRINE

In his order granting a new trial, the circuit judge stated his agreement with DOT that no evidence supported the jury's decision that Deonte was free of negligence. However, the quiddity and hypostasis of the order is the court's concernment and advertence to "the quality and length of the jury's deliberations." In the order, the judge stated:

> "Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." Vinson v.