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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Knie, Circuit Court Judge

Civil Action No. 2018-CP-42-00063
Appellate Case No.: 2021-001304

Betty McDade, as Guardian *Ad Litem* for Matthew McDade, Appellant,

v.

Roger Caldwell Respondent.

FINAL BRIEF OF RESPONDENT

Michael T. Coulter (SC Bar #15177)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400

Attorney for Respondent Roger Caldwell

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Secondary Source

I. STATEMENT OF THE ISSUES ON APPEAL

1) DID THE TRIAL COURT CORRECTLY DENY APPELLANT'S MOTION FOR DIRECTED VERDICT?

2) DID THE TRIAL COURT CORRECTLY DENY APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT?

3) DID THE TRIAL COURT CORRECTLY DENY APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE?

II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle-motorcycle accident that occurred on October 16, 2015, in which a motorcycle being operated by appellant, Matthew McDade, (hereinafter referred to as "McDade"), allegedly collided with respondent, Roger Caldwell's, (hereinafter referred to as "Caldwell"), automobile. Just prior to the accident, Caldwell was traveling southbound on Boiling Springs Road and he entered into the center lane to make a left turn. Prior to making the left turn, McDade was traveling on his motorcycle in the opposite direction on Boiling Springs Road. As Caldwell was making the left turn, McDade's motorcycle collided with Caldwell's vehicle resulting in the accident that is the subject of the lawsuit.

On January 8, 2018, McDade filed a lawsuit and asserted claims of negligence, gross negligence, and negligence *per se* against Caldwell. [R. pp. 13 – 15]. Counsel for Caldwell timely filed an Answer to the Complaint and denied liability. [R. pp. 16 – 20].

This matter proceeded to a jury trial before the Honorable Grace Knie on July 21, 2021, in Spartanburg County. However, the trial was unable to continue the next day on July 22, 2021, due to a juror testing positive for Covid-19. The Court and all counsel agreed to postpone and reconvene the trial on August 9, 2021. At the close of McDade's case on August 9, 2021, counsel for McDade moved for a Directed Verdict, which was subsequently denied by the Court. [R. p. 394 Lines 5 – 6]. After deliberating on August 10, 2021, the jury rendered a verdict in favor of Caldwell. [R. pp. 9 – 11]. After publication of the verdict, counsel for McDade asked that the jury be polled and the jury confirmed a unanimous verdict in favor of Caldwell. [R. p. 402 Line 12 – R. p. 403 Line 21].

On August 20, 2021, counsel for McDade filed three-post trial motions and moved for a Judgment Notwithstanding the Verdict ("JNOV"), a New Trial Absolute, and a New Trial Pursuant

to the Thirteenth Juror Doctrine. On August 30, 2021, counsel for Caldwell filed responsive memorandums in opposition to all of McDade's post-trial motions. In its sound discretion, the Court entered an Order denying McDade's post-trial motions. [R. pp. 1 – 5].

III. STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury". Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

When reviewing the trial judge's decision on directed verdict motions or judgment notwithstanding the verdict, an appellate court must apply the same standard that applies to the lower court by viewing the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435, S.E.2d 864 (1993); Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The appellate court may only reverse the denial of a motion for directed verdict or JNOV if no evidence supports the trial Court's ruling. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit

in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice". Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000), citing Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993). The trial court must set aside a verdict only when it is shockingly disproportionate to the injuries suffered and thus indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 175 (Ct. App. 1996). In deciding whether to assess error when a new trial motion is denied, this Court must consider the testimony and reasonable inferences therefrom in the light most favorable to the nonmoving party. Vinson, *supra.*

A trial court may act as a thirteenth juror if it finds the evidence does not warrant the verdict; in doing so, it may grant a new trial. Youmans ex rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 287, 670 S.E.2d 1, 13 (Ct. App. 2008). "The jury's determination of damages is entitled to substantial deference. The denial of a new trial motion is within the discretion of the trial court, and absent an abuse of discretion, it will not be reversed on appeal". Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 309-10, 579 S.E.2d 16,25 (Ct. App. 2002) aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005).

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court". I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000).

A reviewing court may, in its discretion, review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower Court's judgment". Id. at 420, 526 S.E.2d at 723. See also Rule 220(c) SCACR.

IV. ARGUMENT

A. The Trial Court correctly denied the motion for a directed verdict because clear questions of fact existed and the evidence was susceptible of more than one reasonable inference.

When ruling on a motion for a directed verdict, the trial court is concerned with the existence or non-existence of evidence, not its weight. Stave v. Condrey 349 S.C. 184, 562 S.E. 2d 320 (S.C. App. 2002). When ruling on a motion for a directed verdict, the trial court must view all evidence and all reasonable inferences in the light most favorable to the nonmoving party, and if the evidence is susceptible of more than one reasonable inference, the trial court should submit the case to the jury. Unlimited Servs., Inc., v. Macklen Enters. Inc., 303 S.C. 384, 386, 401 S.E.2d 153, 154 (1991). Comparing the negligence of two parties is ordinarily a question of fact for the jury. Creech S.C. Wildlife & Marine Res. Dept., 328 S.C. 24, 32, 491 S.E. 2d 571, 575 (1997). The Supreme Court has been "reticent" to endorse directed verdicts in cases involving comparative negligence. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "The appellate court will reverse the circuit Court's ruling on a directed verdict motion only when **no** evidence supports the ruling or the ruling is controlled by an error of law". Fay v. Grand Strand Reg'l Med. Ctr., 412 S.C. 185, 193, 771 S.E.2d 639, 644 (2015) (citing Law v. S.C. Dep't of Corr., 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006)) (emphasis added).

McDade has failed to prove or show that the evidence presented before the jury was not susceptible of more than one reasonable inference. McDade has also failed to show that the ruling

denying the motion for directed verdict was controlled by an error of law. Instead, he relies on the baseless assertion that the statements made by Caldwell's counsel during opening and closing statements somehow "proved" that Caldwell was negligent. [Appellant's Brief, p. 7-8]. It is a basic and rudimentary fact that statements made by counsel during opening and closing statements are not evidence. In fact, Judge Knie reiterated this point to the jury prior to the parties' opening statements. [R. p. 123, Lines 17 – 25]. To support his argument, McDade is hanging his hat on statements that are not evidence and continues to ignore the abundance of actual evidence and testimony that was presented before the jury that tended to show that more than one reasonable inference could be drawn from the evidence presented. For example, Caldwell **denied liability** for the accident throughout his examination by counsel for McDade.

> Q: Okay Mr. Caldwell, in opening your lawyer said that you had some fault for this wreck. Do you accept some responsibility for this wreck?
>
> A: I'm not – I don't think so.
>
> Q: You don't?
>
> A: No.

[Id. at R. p. 162, Lines 17 – 22].

> Q: Well, do you think you did anything wrong when you turned left in front of oncoming traffic ---
>
> A: After ---
>
> Q: ---without having the right of way?
>
> A: After I seen it was clear, no.

[Id. at R. p. 163, Lines 6 – 10].

Additionally, testimony was elicited regarding McDade having admitted during his deposition to traveling at a speed of 70 miles an hour immediately before the collision. [Id. at R.p. 163, Line 19 – R.p. 140, Line 2]. This testimony could have allowed the jury to reasonably believe that McDade was liable for his own injuries because he traveling at an accelerated speed, violating

the speed limit. As the case law cited above states, comparing the negligence of two parties is a question for the jury to decide. Creech S.C., *supra*.

At the time of McDade's motion for a directed verdict, clear questions of fact existed which were properly submitted for the jury to determine. As such, the motion for directed verdict was properly denied and the Trial Court's Order should be affirmed.

B. The Trial Court correctly denied McDade's Motion for Judgement Notwithstanding the Verdict because ample evidence and testimony existed to support the jury's finding.

When ruling on a Motion for JNOV, a trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Pye v. Estate of Fox. 369 S.C. 555, 56 3,633 S.E.2d 505, 509 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a JNOV motion should be denied. Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). On JNOV motions, the trial court does not have "the authority to decide credibility issues or to resolve conflicts in the testimony or evidence". Thomas v. Dootson, 377 S.C. 293, 297, 659 S.E.2d 253, 255 (Ct. App. 2008) ("[I]t is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve".). When considering a motion for JNOV, a trial judge is concerned with the existence of evidence and not its weight. State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct. App. 1996). Therefore, a jury's verdict should **not** be overturned if **any** evidence exists that sustains the factual findings implicit in its decision. Id. (emphasis added). A jury verdict should be upheld when it is possible, so as to carry out the effect of the jury's clear intention. Billups v. Leliuga, 303 S.C. 36, 39. 398 S.E.2d 75, 76 (Ct. App. 1990).

First and foremost, in McDade's brief, he falsely and repeatedly represents to this Court that Caldwell "outwardly" admitted during his trial testimony he was at fault for the accident. [Appellant's brief, p. 11]. This is flatly untrue and a cursory reading of the trial transcript clearly illustrates that throughout his testimony, Caldwell repeatedly denied being at fault for the accident. [R.p. 162, Lines 17 – 22]. Caldwell further denied unsafely turning left in front of oncoming traffic. [Id. at R.p. 143, Lines 13 – 16]. Caldwell also testified that the road was clear and he had "plenty of time" to make his left turn. [Id. at R.p. 149, Lines 4 – 10]. McDade's mischaracterization of the testimony does not prove that the finding by the jury was reached as a result of "bias, passion, confusion, or other improper purpose". Moreover, not only did Caldwell testify and deny liability during the trial, testimony and evidence was presented that supported the fact that McDade was traveling at an excess speed immediately prior to the accident ultimately causing his own injuries. In particular, Caldwell testified that when McDade's motorcycle hit his vehicle, the impact was severe enough to cause the metal frame to bend on his vehicle and the motorcycle broke in half. [Id. at R.p. 183, Line 13 – p. 185, Line 4]. During cross-examination, McDade's accident reconstruction expert, Jerry McDevitt, testified that to cause a motor vehicle frame to bend is a very "large delta-v collision". [Id. at R.p. 217, Lines 17–22]. Although Mr. McDevitt was relying on cell phone pictures to testify as to his opinion on the matter, he admitted that there was no evidence that Caldwell attempted to accelerate quickly to beat traffic. [Id. at R.p. 224, Lines 22-25]. He further admitted that Caldwell was traveling at the "appropriate speed" in attempting to make the left turn. [Id. at R.p. 225, Lines 1-5]. This testimony supports the jury's finding that Caldwell was not negligent.

Second, as the plaintiff in the lawsuit, it was McDade's burden to prove that Caldwell was negligent and was the proximate cause of McDade's injuries. However, after hearing the parties'

testimony, McDade's accident reconstruction expert testimony, and viewing the evidence presented by both parties, the jury was simply not convinced, and thus, McDade was unable to meet his burden. Based upon the foregoing, it is entirely reasonable that the jury found that Caldwell was not negligent and instead, McDade was traveling at a speed far in excess of the posted speed limit at the time of the accident, proximately causing his own injuries.

As the finders of the fact, the jury is "imbued with broad discretion in determining credibility or believability of witnesses". Small v. Pioneer Machinery, Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997). It is clear that there was more than enough evidence that existed to create factual disputes regarding liability and whether or not Caldwell was negligent, which was an issue for the jury to resolve. As the law cited above provides, the standard is that all inferences are to be drawn in support of the jury's determination. The jury, based on a reasonable analysis of the facts presented during trial, returned a verdict in favor of Caldwell. Therefore, given the amount of evidence that existed, the Trial Court's order denying McDade's Motion for JNOV should be affirmed.

C. The Trial Court correctly denied McDade's Motion for New Trial Absolute and the jury verdict should not be disturbed because McDade had not been declared incompetent at the time of his deposition or at trial, the Trial Court did not abuse its discretion in limiting the testimony of Betty McDade as a reply witness, counsel for McDade Violated Pre-Trial Orders and the Curative Instructions regarding traffic citations were necessary given the violation of pre-trial Orders, and McDade failed to properly preserve matters regarding statements made by Respondent related to the expert's testimony during closing argument.

"The granting or denial of a new trial upon the facts rests within the discretion of the trial judge". South Carolina State Highway Dep't v. Clarkson. 267 S.C. 121, 126. 226 S.E.2d 696, 697 (1976). South Carolina's thirteenth juror doctrine is a vehicle by which a trial court may grant a new trial absolute when it finds the evidence does not justify the verdict. Trivelas v. S.C.D.O.T.,

357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct. App. 2004) (citing Norton v. Norfolk S. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). A jury verdict should be upheld when it is possible, so as to carry out the effect of the jury's clear intention. Billups v. Leliuga, 303 S.C. 36, 39. 398 S.E.2d 75, 76 (Ct. App. 1990).

i. Dr. Craig Williams, M.D. and McDade's Competency

First, in McDade's brief, in effort to support his argument that there was ample [sic] evidence of Appellant's mental condition throughout the discovery process, counsel states that "Appellant's treating physicians were listed as witnesses".. [See Appellant's brief, p. 12]. However, a review of the witness list provided in discovery shows that Dr. Williams was not specifically listed as a witness, nor was he specifically listed to testify as an expert. [R.pp. 741-748]. Counsel for McDade actually conceded this same point during trial. [R.p. 377, Lines 1-3].

Second, the accident that is the subject of this action occurred over six (6) years ago on October 16, 2015. McDade's deposition was conducted over three (3) years ago on November 7, 2018. At the time of his deposition, counsel for McDade did not move or go through any procedural steps in order to declare McDade incompetent such that he could not testify. Instead, counsel waited until the day of trial to move and request the Court deem him incompetent to testify at trial, as well as exclude his prior deposition testimony. However, even the first day of trial, counsel failed to present evidence, including any medical record, to the Court that declared McDade incompetent the day of his deposition, over three years ago, or declared McDade incompetent such that he was unable to testify during the trial. Therefore, at that time, the Court properly denied the motion regarding the same. [R.p. 108].

Almost three weeks later on August 9, 2021, **and after counsel for McDade rested his case**, counsel renewed his previous motion regarding the competency of McDade. [R.p. 372, Line 9 – p. 374, Line 21]. In effort to support his motion, counsel for McDade provided a letter dated July 29, 2021 from Dr. Craig Williams, M.D. [Id.]. However, and although this letter was received more than ten (10) days prior to trial resuming, counsel failed to provide the letter to the Court or to counsel for Caldwell for their review. Importantly, and even if the letter had been timely presented, the letter provided by Dr. Williams did not declare McDade incompetent at the time of his deposition, nor did it declare him incompetent such that he could not testify at trial. [R.p. 614]. Moreover, and although he allegedly was subpoenaed for trial, Dr. Williams was not present to testify as to the contents of the letter. Therefore, the letter was inadmissible hearsay. SCRE 801.

Finally, McDade's argument that it could be "inferred" that Dr. Williams was a rebuttal witness does not make sense. [Appellant's Brief, p. 13]. At the time he renewed his motion and presented Dr. Williams as a witness, (although, again, Dr. Williams was not actually present at trial), and the letter, **McDade had rested his case**. Caldwell's counsel had not yet presented his case. When counsel for Caldwell did put on his case for the defense, the issue of competency was not raised. The issue of competency was only raised during McDade's case in chief, whereby he elicited testimony from Betty McDade and Thomas McDade regarding the same. Generally, a party is allowed to present rebuttal evidence as part of the case in chief where the issue is clearly **raised as a matter of defense, either by the pleadings or the opponent's opening statement**. Am. Jur. 2d, Trial § 148. *See* Kramer v. Kramer, 323 S.C. 212, 473 S.E.2d 846 (Ct. App. 1996). (emphasis added).

Therefore, absent an abuse of discretion, the Trial Court's Order denying McDade's Motion for New Trial Absolute should be affirmed and the jury's verdict should be upheld.

ii. The trial Court did not abuse its discretion when limiting the reply testimony of Betty McDade.

Reply testimony should be limited to rebuttal of matters raised in defense; it should not be used to complete plaintiff's case in chief. Daniel v. Tower Trucking Co., 205 S.C. 333, 32 S.E.2d 5 (1944). Admission of reply testimony is within the discretion of the trial judge, and Court's decision will not be disturbed on appeal absent a showing of abuse of discretion. Vernon v. Provident Life & Accident Ins. Co., 266 S.C. 208, 222 S.E.2d 501 (1976); Ford v. A.A.A. Highway Express, 204 S.C. 433, 29 S.E.2d 760 (1944).

First, in McDade's brief, he states that he called Betty McDade as a **rebuttal witness** with the intention to "highlight the inconsistencies from Appellant's deposition testimony that Respondent did not elicit in his examination of Appellant". [Appellant's Brief, p. 14]. However, Betty McDade was actually called as a **reply witness** during trial.

Mr. Willey: Reply witness.

Ms. McCumber: It's for my reply witness.

[R.p. 412, Lines 10-11].

During McDade's brief testimony during trial, he testified about the speed he was traveling at the time of the accident, which he stated was 70 miles per hour. [Id., R.p. 388, Line 2 – p. 389, Line 21]. He did not testify that he was incompetent during his deposition or unable to testify due to memory loss. [Id.]. Counsel for McDade did not cross-examine him and did not ask any further questions regarding his deposition. [Id. at R.p. 388, Line 24 – p. 390, Line 2]. At that time, counsel for Caldwell rested.

Next, as briefly sated above, counsel for McDade called Betty McDade as a reply witness with the intention to **"highlight the inconsistencies from Appellant's deposition testimony that Respondent did not elicit in his examination of Appellant**". [Appellant's Brief, p. 14]. This

matter was taken up before the Court and counsel for Caldwell argued that the "credibility" of McDade was not in the parameters of reply. [R.p. 412, Line 18 – p. 413, Line 4]. The Court agreed and in her sound discretion, instructed counsel for McDade to limit the examination to the discussion of speed. [Id. at R.p. 413, Line 23 – p. 414, Line 10].

> The Court: Okay. I, I – but, but, again, the subject of it was, of course, leading up to the speed.
>
> Ms. McCumber: Right.
>
> The Court: All right.
>
> Ms. McCumber: Of course, yeah.

[Id. at R.p. 414, Lines 2-6].

After counsel for McDade agreed to understand the Court's instructions as to the parameter of the examination, counsel continued to attempt to elicit other testimony, including testimony regarding McDade's memory and cognitive issues. [Id. at R.p. 415, Line 25 – p. 416, Line 8]. In fact, counsel for McDade attempted this out of bounds examination on at least five (5) occasions, which resulted in objections on behalf of Caldwell, all of which were appropriately sustained pursuant to the Court's previous instructions. [Id. R.p. 416, Line 13 – p. 419, Line 4].

The Trial Court did not abuse its discretion when ruling and limiting the examination of Ms. McDade. Daniel, *supra*. Further, McDade was not prejudiced by this limitation because during his case in chief, counsel for McDade elicited testimony from other witnesses regarding McDade's alleged cognitive issues. Therefore, the Order denying McDade's Motion for New Trial Absolute should be affirmed.

iii. Counsel for McDade did not move for a curative instruction or object to the jury charges as it relates to statements made by Caldwell during closing arguments regarding the expert's testimony and therefore, it is not an issue properly preserved for appeal.

When an objection to improper remarks of counsel during closing argument is made in a timely fashion, the trial judge should rule on the objection, and if necessary, instruct counsel to desist from making further improper remarks, and charge the jury to disregard the statements in reaching a verdict. McElveen v. Ferre, 299 S.C. 377, 385 S.E.2d 39 (Ct. App. 1989). If these are taken and the objecting party is not satisfied with the curative instruction given, an additional objection and request for further instruction should be made. Id. Without the additional objection, any error in the closing argument of opposing counsel is not preserved for review on appeal. Id. *See also* Kalchthaler v. Workman, 316 S.C. 499, 450 S.E.2d 621 (Ct. App. 1994) (because Kalchthaler's lawyer voiced no complaint about the sufficiency of the trial judge's curative instructions given in response to the lawyer's objection to improper closing argument, and because he requested neither additional instructions addressed to the jury nor an admonition addressed to opposing counsel, appellate review of the issues directed at the trial judge's failure to give curative instructions and to admonish opposing counsel is unavailable).

While McDade's counsel did initially object during Caldwell's closing argument as it related to statements about the expert's testimony, counsel for McDade failed to move and request that a curative instruction be provided to the jury. Further, following the jury charge, counsel for McDade made only two objections, neither of which involved a request for curative instructions regarding the statements made about the expert's testimony. [R.p. 394, Line 5 – p. 395, Line 25]. Therefore, McDade failed to preserve the issue for appeal. McElveen, *supra.*

iv. The curative instruction regarding the issuance of ticket citations was properly provided to the jury pursuant to the pre-trial order.

Because a trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient *or* move for a mistrial to preserve an issue for review. State v. George, 323 S.C. at 510, 476 S.E.2d at 912; State v. Patterson, 337 S.C. at 226, 522 S.E.2d at 850 (Ct. App. 1999).

McDade argues that the curative instruction regarding the presence or absence of the ticket, prejudiced him. [Appellant's Brief, p. 17]. Prior to the beginning of trial, counsel for Caldwell submitted a motion *in limine* as it related traffic citations issued and references to the same made during trial. After taking the motion under advisement, the Court granted Caldwell's motion. [R.p. 100, Lines 8-21]. Counsel for McDade acknowledged the Court's ruling. [Id. at R.p. 101, Lines 4-18]. Despite the Court's ruling and the acknowledgement of the same, counsel for McDade ignored the Court's ruling and proceeded to ask Matthew Franks, the investigating officer on scene after the accident, about traffic citations.

> Q: All right. And you were able to complete your investigation based on what you heard from the Defendant and the witness at the scene along with observing the scene, correct?
>
> A: Yes, Sir.
>
> Q: All right. And you did not write Mr. McDade a ticket –
>
> Mr. Coulter: Judge?

[R.p. 322, Lines 2-9].

Out of the presence of the jury, the Court heard from counsel about the objection and counsel for Caldwell moved for a mistrial. At that time, the Court instructed counsel for McDade not to "play games" and reiterated her previous ruling, which excluded evidence and testimony related to citations or tickets. [Id. at R.pp. 288-298]. After a brief recess, the Court denied Caldwell's Motion for a Mistrial and instead, decided to give a curative instruction to the jury that they are not to consider the question that was asked concerning a ticket. [Id. at R.p. 331 Lines 14-

24]. At that time, counsel for McDade stated that he "did not have a problem with the curative instruction with them not considering the question..." [Id. at R.p. 332, Lines 5-12].

> Mr. Willey: May I be heard?
>
> The Court: Yes, sir. But, Mr. Willey, please understand, sir, that this is extremely serious.
>
> Mr. Willey: I understand.
>
> The Court: Yes, sir.
>
> Mr. Willey: And I would just ask for the record that if we are going to include that the question was improper and not allowed under the rules that I would just ask what rule it violates so that the record is clear. **I don't, I don't have a problem with curative instruction with them not considering the question.** But I think when the Court is instructing them that I did something improper, that I have a -- I, I would like to know –
>
> The Court: Sir, I'm not going to say that your asking – I'm going to say that Mr. Willey did something that was improper. I am going to say that it is not proper for them to consider that at all.
>
> Mr. Willey: Okay.
>
> The Court: Do you understand?
>
> I, I would never, ever put it like that.
>
> Mr. Willey: Okay.
>
> The Court: Okay.
>
> Mr. Willey: Thank you.

[Id. at R.p. 331, Line 25 – p. 332, Line 22]. (emphasis added).

At that time a proper curative instruction was provided to the jury regarding the question dealing with the issuance of a ticket. [Id. at R.p. 333, Line 22 – p. 334, Line 8]. Following the curative instruction, counsel for McDade did not object or move for a mistrial to preserve the issue for review. George, *supra.*

Counsel for McDade violated the Court's Order again during his closing statement, which prompted an objection from Caldwell. [R.p. 332]. The objection was taken up with the Court and not in the presences of the jury. [Id at R.pp. 333-341]. Upon hearing arguments from counsel, the

Court brought the jury back into the court room, and provided a curative instruction regarding any mention of officers and tickets, which was consistent with and pursuant to her prior rulings and pre-trial order. [Id. at R.p. 341 Line 24 – p. 342, Line 12]. Counsel for McDade did not object to the curative instruction at this time nor did he move for a mistrial.

Finally, the curative instructions regarding traffic citations and tickets only came after counsel for McDade violated the court's pre-trial ruling on more than one occasion during trial. McDade cannot claim prejudice as a result of his own disregard of the Court's rulings. Therefore, absent abuse of the Court's discretion, having not objected following the curative instructions and preserving the error, the Court's Order Denying McDade's Motion for New Trial Absolute should be affirmed.

V. CONCLUSION

The Trial Court correctly denied Appellant McDade's Motion for Directed Verdict. The Trial Court also correctly denied Appellant McDade's Motion for Judgment Notwithstanding the Verdict. Finally, the Trial Court Correctly denied Appellant McDade's Motion for New Trial Absolute and the jury verdict should not be disturbed. Therefore, Respondent Caldwell respectfully requests the Trial Court's Order/Verdict Form and the Trial Court's Order dated October 8, 2021, be affirmed.

[signatures on following page]

Respectfully Submitted by:

CLARKSON, WALSH & COULTER, P.A.

Michael T. Coulter (SC Bar #15177)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400
mcoulter@clarksonwalsh.com

Attorney for Respondent

Greenville, SC
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THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Knie, Circuit Court Judge

Civil Action No. 2018-CP-42-00063
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Betty McDade, as Guardian *Ad Litem* for Matthew McDade, Appellant,

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Roger Caldwell Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

Michael T. Coulter (SC Bar #15177)
1164A Woodruff Road (29607)
PO Box 6728
Greenville, SC 29606
T: 864.232.4400
Attorney for Respondent