THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2018-CP-32-02102

Court of Appeals Case No. 2020-000638

Gerald Nelson, Appellant,

v.

Christopher S. Harris and Charles L. Baughman, Sr. d/b/a K&B Towing, LLC Respondents.

FINAL REPLY BRIEF OF APPELLANT

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1. Appellant properly preserved the issue of the jury charge instruction for appellate review.

A. Appellant requested a charge on the issue of insurance during the *in camera* charging conference which was denied by the Court.

Respondents' arguments regarding the preservation of the issue of the jury instruction are misplaced because the record demonstrates Appellant's request for a charge to the jury and subsequent denial by the trial court. Respondents argue Appellant failed to preserve the issue by not objecting following the *in camera* charge conference. However, the record demonstrates that the trial court denied Appellant's request for a charge on the specific issue of insurance during the *in camera* charge conference, and immediately following the charge conference, referenced any "additional" changes or exceptions to the charges. Tr. 295:5-6.[1] (R. 140). This ruling was placed on the record by the trial court. The trial court also made Appellant's request to charge on the issue of insurance an exhibit to the proceeding.

The purpose of the concept of issue preservation is to ensure the trial court had an opportunity to consider the issue and rule upon it. *City of Columbia v. Myers*, 278 S.C. 288, 294 S.E.2d 787 (S.C. 1982), citing *Bowers v. Watkins Carolina Express, Inc.*, 259 S.C. 371, 376, 192 S.E.2d 190 (S.C. 1972). This is not a hyper-technical analysis. Rather, the appellate court looks to see whether the trial court had an opportunity to rule on the issue. In the instant case it is clear from the record that the trial court had an opportunity to consider Appellant's request to charge the jury on insurance and denied the request. *See* Tr. 295:5-6 (R. 140).

The record reflects that the trial court placed the requested charge into the record as a

[1] THE COURT: Ok, for the record, any *additional* charges or exceptions, objections to the charge? (emphasis added).

court’s exhibit, presumably for the purpose of appellate review by this Court. Tr. 279:7-9 (R. 130) (“the Plaintiff has three requests to charge that I did not agree to charge that have been made a Court’s exhibit.”) In spite of the obvious ruling by the trial court regarding the requested charge and the Court’s marking of the proposed charge as a Court’s exhibit, Respondents attempt to say that it was not enough to preserve the issue for review by this court. The context of the objection demonstrates that Appellant raised the issue to the trial court and that the request was denied. *Busillo v. City of N. Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013) ("It is possible ... that the context of the proceeding may make the specific ground for the objection sufficiently apparent to the trial court...."); *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (S.C. 1997) (“in the context Seller’s objections were specific enough to allow the trial judge to understand and rule upon the alleged error”).

Continued argument by Appellant on the trial court’s ruling was not necessary to preserve this issue for appellate review, as the Court acknowledged that the Appellant took exception with the Court’s refusal to charge the jury on insurance.

B. Appellant renewed his request for a charge on insurance at the time of the question by the jury.

Appellant further preserved the issue of the insurance jury charge following the jury’s specific question to the trial court regarding the payments made by any insurance company. The transcript shows that Appellant renewed his argument for the specific charge on insurance, previously denied in the charging conference, following the jury’s question to the Court. Tr.

295:18-296:5.[2] (R. 140-141). Again, the trial court denied Appellant's request on the record. Tr. 296:6-10 (R. 141).

Therefore, the trial court was given the opportunity to consider the issue and denied Appellant's request and the issue has been preserved for review by this Court.

C. Notwithstanding the fact the issue had been properly raised and ruled upon during trial thereby preserving the issue for review, Appellant again raised the issue of the insurance charge to the jury within his post-trial motions.

In post-trial motions it is not necessary to raise to the trial court an issue it has already considered and ruled upon. Rather, for the purpose of issue preservation, post-trial motions are to obtain a ruling on an issue the trial court has not considered and ruled upon. *Elam v. S.C. Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004). However, even were it necessary for Appellant to raise the issue of the insurance charge in post-trial motions, he did so. Appellant specifically argued that "Plaintiff's counsel requested for a third time that the jury be charged regarding insurance." *See* Plaintiff's Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute, filed January 27, 2020, p.3 (R. 148). The trial court subsequently denied Appellant's post-trial motions. Therefore, the record in this matter clearly demonstrates the Appellant preserved for consideration the trial court's refusal to charge the jury regarding South Carolina's prohibition on their consideration of insurance during deliberations.

[2] THE COURT: Okay. We got a note from the Forelady, which asks, "We need to know what insurance has paid for/from both parties. And it's juror number 36, who is the Forelady. And the Plaintiff has requested a charge on insurance. I've declined to do that. I think, Ms. Mosier, you want to have that marked as a Court's exhibit, as well? MS. MOSIER: Yes, Your Honor. It's already been marked. We're renewing our desire to have it charged."

2. The jury's question regarding insurance required a specific charge prohibiting the consideration of insurance payments rather than a general charge telling them to only consider evidence in the record.

A. The breadth of the general instruction failed to provide meaningful guidance to the jury's specific question regarding insurance and thereby prejudice Appellant during deliberations.

As noted in Appellant's brief, the purpose of a jury charge is to instruct the jury panel on the state of the law in South Carolina. *State v. Stukes*, 416 S.C. 493, 787 S.E.2d 480 (S.C. 2016). While the jurors are the finders of fact, the trial court is tasked with educating the jurors on what the law both requires them to consider and prohibits them from considering. *State v. Leonard*, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (S.C. 1987) ("Jury instructions should be designed to enlighten the jury and aid it in arriving at a correct verdict."). In essence, the Court's instruction to the jury acts as a gatekeeper to foreclose improper considerations by the jury during deliberations.[3] As the parties discussed with the Court pre-trial, Rule 411 of the *South Carolina Rules of Evidence* prohibits introduction of evidence concerning whether a person was or was not insured against

[3] During pre-trial motions, Respondents argued vociferously against the introduction of any evidence regarding insurance even for the Appellant's requested purpose of showing an improper delegation of a non-delegable duty to conduct a background investigation before hiring a driver. Tr. 51:5-9 (R. 61). In fact, Respondents' own arguments discuss the tenacity with which South Carolina has guarded against the introduction of such testimony. *Id.* Despite these arguments the Respondents now take the position that Respondent Baughman's testimony, coupled with the specific question asked by the jurors during deliberations, did not require a specific instruction to the jury or form the foundation of the trial court granting a new trial.

liability. Respondents argued that the sole reason for introducing insurance into the case was to prejudice the Respondent. Tr. p. 49: 16-18 (R. 59). Yet, when the jury's note asked how much had already been paid to the Plaintiff by insurance, it became clear that the jury was considering liability and possibly health insurance payments made to and for the benefit of the Appellant. Such discussions are outside the permissible scope of the jury's deliberations as a matter of law, but instead of unequivocally guiding the jury away from resting its verdict on impermissible grounds, the trial court allowed deliberations to continue with a general instruction to only consider the evidence it heard in trial. Stated differently, the jury suspected payment from an insurer to the Appellant prior to trial, and the Court's nonspecific return note failed to put an end to such improper speculation. The parties and the Court were affirmatively put on notice that the jury was considering evidence prohibited by Rule 411 in reaching their verdict, and this was a powerful reason to instruct the jury on the proper legal standard to apply.

The trial court should have taken that opportunity to unequivocally admonish the jury against any and all consideration of insurance payments from any source as a topic upon which they cannot rest their verdict in any way. The trial court's choice to deny the Appellant's requested jury charge in the face of the jury's admitted consideration of insurance resulted in legal prejudice to the Appellant which this Court has the power to correct by ordering a new trial.

Jury charges that fail to provide adequate guidance to the jurors during deliberation are inherently prejudicial. The case of *State v. Stukes,* is informative in this analysis. In that case the South Carolina Supreme Court found that a specific instruction was necessary when the jury asked a specific direct question regarding the credibility of a victim and statutory provisions regarding corroboration. Instead of providing a specific response to the jury's query, the trial court "merely recharg[ed] credibility." The Supreme Court held "the trial court's decision to merely recharge credibility, as opposed to answer the question in the negative, did nothing to inform the jury on this issue." *Stukes*, at 500, 483. The *Stukes* Court found this was error and prejudicial to the appellant in that matter.

The same issue is presented in this case. Appellant's request to charge on the issue of insurance would have provided clear and definitive guidance to the jury regarding the state of the law. During closing argument Respondents agreed that Appellant was owed a monetary verdict,[4] and when it became clear that the jury was factoring in insurance payments in reaching the amount of its verdict, the trial court should have redirected deliberations away from forbidden territory. The trial court's failure to charge the jury on insurance as requested by Appellant substantially prejudiced the Appellant and requires this Court remand the case for a new trial.

3. Appellant did not elicit testimony from Respondent regarding insurance, rather Respondent provided a non-responsive statement regarding the existence of insurance.

During motions *in limine,* Appellant argued to the Court that due to Respondent K&B Towing's 30(b)(6) testimony that it does not perform its own background checks, but rather relies on its insurance company to do so, the jury should be made aware that Respondent's insurance company performed a non-delegable duty. Tr. 37:16-22 (R. 52). This evidence related to the allegations of negligent hiring by Respondent K&B's. Appellant argued that it is important for the jury to hear that Respondents' insurance company was the entity relied upon to avoid guesswork or speculation as to why the Appellant did not sue another company. Tr. 39:18-41:17 (R. 54-56). The trial court initially held this ruling in abeyance and recognized the need to evaluate

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[4] Tr. 265:17-20 (R. 125) "I told you at the outset of this case, everybody's got a right to go get checked out after an accident. Certainly, the jury, it's your job to determine what's reasonable and necessary."

"situations where it is permissible to use the word, insurance, with some sort of curative instruction." Tr. p. 45:7-12 (R. 57).

The trial court ultimately ruled, as the Respondents, including Respondent Baughman, sat at counsel table to hear, that the jury did not need to hear that the Defendant company delegated the responsibility of deciding whether to hire drivers to its insurance company, but rather instructed the parties to merely refer to a "third party." Tr. 127:1-5 (R. 101). Despite this, shortly thereafter Respondent Baughman got on the stand and testified regarding insurance.[5] While the mention did not garner either the attention of the parties' counsel or the court,[6] it may have caught the jury's attention and provides an explanation as to the jury's question during deliberations as to the amount of insurance paid by/for each party. In their brief, Respondents repeatedly refer to Respondent Baughman's unsolicited and unresponsive testimony bringing up insurance was a "passing reference" but this is in stark contrast to its vehement opposition to the mere mention of the word insurance during pre-trial motions. During the pre-trial motions *in limine,* Respondents' counsel vigorously argued, "I fail to see any reason that the word, insurance, has to be mentioned there.

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[5] Q: Do you know if anyone off the street can operate a tow truck that is as large as yours without any special training? A: Not without training. There's not an insurance corporation no where that would touch them. You cannot insure them." Tr. 168:19-24 (R. 108).

[6] Respondent now seems to claim that it purposely did not object to the mention of insurance at trial, however, in pretrial conference the Respondent remarked, 'Your Honor, it's very common in our State for the word, insurance, to be mentioned to warrant a mistrial. It is that serious and I've seen it personally a number of times and I'm sure you have where insurance accidentally came out some way through a trial and a mistrial resulted. It is – and it's an issue our courts take very seriously." Tr. 50:2-6 (R. 60).

So it's not only not probative, Your Honor, but it's just purely – not probative and only prejudicial." Tr. 51:5-9 (R. 61).

Respondents' mercurial position on insurance aside, the real issue is not the testimony by Respondent Baughman but rather the trial court's response to a specific and well-defined question from the jury asking about insurance. This question should have been met with a clear and well-defined instruction to not consider insurance in their deliberations. The trial court's refusal to provide a specific response to the specific question resulted in the jurors improperly considering insurance, which substantially and unfairly prejudiced the Appellant.

While now the Respondent seems to argue that it heard the mention of insurance and intentionally failed to raise it, the Appellant did not, and now recognizes having reviewed the transcript that insurance was in fact in evidence before the jury via Respondent Baughman who was seated at counsel table to hear the judge's instruction. It must be noted that Respondent Baughman's mention of the word "insurance" is ultimately not the reason for Appellant's appeal. Instead, Appellant urges that the trial court erred in failing to give an instruction to the jury on the issue of insurance as requested, repeatedly, by Appellant. Presuming Baughman never testified about insurance and the jury came back with the question raised here, the trial court should still have specifically instructed the jury not to consider insurance during their deliberations. When during deliberations the jury asks a direct and clear question regarding insurance payments, this warrants a direct and clear instruction from the Court that consideration or speculation as to any amounts paid by any insurer – automobile or health insurer – are expressly forbidden. The trial court's refusal to provide a direct instruction in response to this question was prejudicial to the Appellant and constituted reversible error.

4. Respondent's brief fails to address Appellant's arguments regarding Respondents' offer of judgment and valuation of the Appellant's injuries.

Missing from Respondents' brief is any response to the issue of case valuation raised by Appellant in regard to the offer of judgment made by Respondents prior to trial. As noted in the Appellant's brief, Respondents filed an offer of judgment in this matter for thirty thousand dollars ($30,000.00). That valuation stands in stark contrast to the verdict from the jury trial in the amount of eighteen thousand five hundred dollars ($18,500.00), which was subsequently reduced by an additional two thousand six hundred forty-four dollars and nine cents ($2,644.09) by the order on Respondents' motion for costs and reduction of jury verdict filed on April 1, 2020. A mathematical analysis shows the recovery before reduction at a mere 61.6% of the offer of judgment. After further reduction by the Respondents' motion for costs based upon the offer of judgment, the verdict owed to Appellant was a mere fifteen thousand eight hundred fifty-five dollars and ninety-one cents ($15,855.91) or 52.8% of the offer of judgment.

That the jury's verdict is so far below the Respondents' offer of judgment helps demonstrate that the jury did not receive the guidance it needed in reaching a verdict based on admissible evidence.

5. Defendant's own trial exhibits help corroborate over $10,000 in lost wages suffered by the Plaintiff, and Respondent's arguments regarding the lost wages testimony improperly fails to account for other factors described by Appellant which affected his income.

Mr. Nelson testified that he earned 26 or 27 dollars an hour and worked an average of 42 hours a week. He also testified he missed about 51 or 52 days of work. Tr. 87:1-9 (R. 77). He further testified he missed between 11 and 12,000 in lost wages. On cross examination, he testified he went out of work on January 28th and returned around April 8th. Tr. 92:1-6 (R. 81). This is in harmony with Dr. Corey Hunt's testimony that he wrote Appellant out of work for 10 weeks. Hunt Depo Tr. 15:3-8 (R. 41).

Respondents argue that Appellant's lost wage argument is uncorroborated; however, it was the Respondents that introduced Appellant's W-2s into evidence. The W-2 shows that Appellant earned $59,404 in 2015. Tr. 94:6-12 (R. 83); Defendant's Exhibit 1. Respondents also introduced Mr. Nelson's W-2 the year of the crash, showing that he earned $56,015. Tr. 96:12-14 (R. 84). Respondents further introduced Mr. Nelson's subsequent tax returns showing an increase in his pay, but also elicited testimony from Appellant illuminating that Appellant was not just paid for merit, but other factors. Appellant testified "we had different change in pay scales. And, of course, you're paid on the route you have." Tr. 103: 20-22 (R. 87).

Appellant also presented Dr. Corey Hunt's video deposition testimony to corroborate Appellant's lost wages. Following the crash, Dr. Hunt instructed Appellant to stay out of work from January 28, 2016 until the completion of physical therapy on April 7, 2016. Hunt Depo. Tr. 14:18-25 (R. 40); Hunt Depo Tr. 15:1-2 (R. 41). Dr. Hunt confirmed that the total time that he asked Appellant to remain out of work was ten (10) weeks. Hunt Depo. Tr. 15:3-4 (R. 41). Dr. Hunt further explained that Appellant had a physically demanding job and that Appellant would not have been able to perform his typical job duties due to serious back pain. Hunt Depo. Tr. 15:4-8 (R. 41). Dr. Hunt ultimately opined that, to a reasonable degree of medical certainty, it was necessary for Appellant to remain out of work until he completed treatment in April. Hunt Depo. Tr. 15:16-20 (R. 41).

In closing argument, Appellant addressed head-on the argument that he was only out approximately $3,000 in wages. Appellant provided the jury with a roadmap to justify the over $10,000 in lost wages he claimed. Appellant pointed out in closing that Dr. Hunt wrote him out of work for 10 weeks, and that if one divides Appellant's wage by 42, he earned $1,333.71 a week. Tr. 260, 5-13 (R. 122). Appellant showed that had Appellant worked all 52 weeks at his hourly rate of $25 an hour, he would have earned approximately $69,353, which is the amount of money he brought home the year after this incident. Tr. 260:13-25 (R. 122). Respondents did not refute or even address Appellant's lost wages in closing. In conclusion, Respondent's contention that Appellant's W-2's reveal a loss of $3,389 is a misstatement. To the contrary, the figure last mentioned to the jury was $10,000[7], which, when added to the *undisputed*[8] amount of medicals totaling $8,008.58 comprises $18,000.[9] Tr. 262:12-18 (R. 123).

Also in his rebuttal at closing Appellant showed the jury Dr. Hunt's actual deposition transcript where Dr. Hunt opines that Appellant's pain became symptomatic due to the collision, and that the only re-cross by Respondents was that he was basing his opinion on Appellant's reporting of pain. Tr. 275:6-19 (R. 127). Appellant also reminded the jury that Dr. Hunt based his opinion, too, on having been Appellant's primary care doctor for years before the incident as well, and that Appellant was not as flexible or strong as he was following the collision for a period of time. Tr. 276:25-277:7 (R. 128-129). In sum, Appellant's claimed lost wages were corroborated by Respondents' own exhibits and Appellant's primary care physician, and no response thereto was provided for the jury to consider during closing.

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[7] Transcript 262:12-18 (R. 123).

[8] Respondent's Brief at p. 12.

[9] In closing, Appellant's counsel said, "We would submit to you, there is ample evidence to demonstrate that more likely than not, a hit caused by a tow truck that big to this car that caused as much damage as it did, it is reasonably certain and foreseeable to have caused $8,000 dollars in medical expenses and over $10,000 in lost wages in the 10 weeks of work he missed."

CONCLUSION

For the foregoing reasons, the record demonstrates that the issues Appellant raises have been preserved on appeal and are appropriate for the Court's consideration at this time. Further, the record in this matter demonstrates Appellant is entitled to a new trial absolute based upon the trial court's abuse of discretion in not specifically charging the jury on insurance, particularly when it became clear that the jury was speculating as to matters outside the proper scope of jury deliberations. The Court's failure to do so resulted in legal prejudice that this Court has the power to remedy by granting Mr. Nelson a new trial.

Respectfully submitted,

_s/ Melissa G. Mosier_______________________

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