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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2024-000511

Tracy Campbell and Daniel Campbell, ...Appellants,

v.

Brian Keith Newman and Kimberly Norman, ...Respondents.

INITIAL BRIEF OF APPELLANTS

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2. **Whether the Circuit Court erred in refusing to allow cross-examination of Respondent Newman with regard to similar habitual conduct and similar past conduct.**
3. **Whether the Circuit Court erred in refusing to grant a new trial *nisi additur* when there was evidence the damages awarded by the jury were grossly inadequate as to the claims of loss of consortium and medical expenses.**
4. **Whether the Circuit Court erred in refusing to grant a new trial absolute when there was evidence the damages awarded by the jury were the result of some improper motive or were grossly inadequate.**

STATEMENT OF THE CASE

This action arises out of a motor vehicle wreck that occurred on June 14, 2018, when Respondent Brian Newman collided into the rear end of the Appellants' vehicle, resulting in injuries to Appellant Tracy Campbell (hereinafter, Appellant Tracy) and substantive damage to their vehicle. Brian Newman had been operating the vehicle of Respondent Kimberly Norman when he collided into the Campbells' vehicle. The wreck caused serious injury to Appellant Tracy and resulted in a loss of consortium claim made by her husband, Appellant Daniel Campbell (hereinafter, Appellant Daniel).

Appellants filed suit against Brian Newman and Kimberly Norman on November 13, 2019, alleging three causes of action: negligence and gross negligence against Brian Newman; negligent entrustment against Kimberly Norman; and loss of consortium. (Complaint, generally). Appellant Tracy's first cause of action against Brian Newman sounded in negligence and gross negligence proximately resulting in Appellant Tracy's damages and injuries. (Complaint, ¶¶ 6-9). The Appellants argued that there was evidence showing Brian Newman violated a statute that proximately caused the damages she suffered. (Complaint, ¶¶ 7-8). Appellant Tracy sought an award of damages and punitive damages under the theory that the causative violation of a statute was evidence of recklessness sufficient to justify punitive damages. (Complaint, ¶ 10). Appellant Tracy sought actual and punitive damages as well as damages for pain and suffering. (Complaint, ¶ 10). Appellant Daniel, as the spouse of Appellant Tracy, alleged loss of consortium as a result of Brian Newman's negligence and gross negligence. (Complaint, ¶ 16). Appellants did not proceed with the cause of action for negligent entrustment as the Respondent Kimberly Norman passed away prior to trial. (Tr. 15:6-12).

Progressive Direct Insurance Company filed a Notice of Appearance and Answer of Defendants on November 26, 2019. (Answer of Defendants, generally).

Pursuant to Rule 40(j), SCRCP, the parties agreed to strike the 2019 action from the docket with allowance to restore the case to the active docket. (Consent Order Pursuant to Rule 40(J), SCRCP, filed June 1, 2021). The consent order tolled the statute of limitations if the case was restored within one year. (*Id*.) On May 9, 2022, the court restored the case to the active docket after a timely motion was made. (Consent Order Restoring Case to Docket Pursuant to Rule 40(J), filed May 9, 2022). The order restoring the case assigned a new docket number to the action, 2022-CP-24-00431. (*Id*.).

This case came to trial on May 30, 2023, and concluded on June 1, 2023, upon the jury deliberating and reaching a verdict. (Verdict Form, dated June 1, 2023).

During the course of the trial, the trial court allowed Appellants to recall Respondent Newman for 1) impeaching his testimony on when he ceased driving and on why he ceased driving and 2) establishing Respondent Newman's culpability. (Tr. 195:24-25, 196:1-197:18). The trial court ruled that under Rule 609, SCRE, Appellants could not impeach Respondent Newman with evidence that he had been convicted of a crime but limited this ruling to "impeachment of credibility." (Tr. 199:10-20). The trial court allowed cross-examination of Respondent Newman outside the presence of the jury. (Tr. 200:13-23). Following the recall testimony of Respondent Newman, the trial court ruled that the post-accident events from 2019 through 2021 were not relevant and that the events of "2007, 2008, whatever they amount to here" were too remote in time to be relevant. (Tr. 216:3-19).

Counsel for Brian Newman made a motion for directed verdict on punitive damages. (Tr. 276:12-20). The court granted the motion for directed verdict. (Tr. 278:20-24). The verdict form memorialized the decision of the jury in finding for Appellant Tracy, plaintiff, and awarding her $50,000.00 in actual damages. (*Id*.). The jury also agreed with the claim of Appellant Daniel,

found for the plaintiff, and awarded him $0.00; however, the jury also disagreed with the claim of Appellant Daniel and found for the defendant. (*Id*.).

Appellants timely filed a post-trial motion captioned as Plaintiffs' Notice of Motion and Motion for New Trial Absolute and New Trial Based on the Thirteenth Juror Doctrine (hereinafter, the Motion for New Trial. (Motion for New Trial, p.1). Appellants argued that the trial court erred in failing to allow the jury to consider punitive damages because Brian Newman's admission of violating a statute created a question of fact for the jury to decide. (Motion for New Trial, pp.1-3). Appellants argued that the trial court erred in refusing to allow cross-examination of Brian Newman as to his similar habitual conduct and prior conduct "that contradicted his testimony after he attempted to mitigate his admission of liability." (Motion for New Trial, pp.3-5). Appellants further argued a new trial was appropriate under the thirteenth juror doctrine because there was evidence that: 1) the favorable verdict as to Appellant Daniel was grossly insufficient because the jury returned damages in an amount of $0.00; and 2) the favorable verdict as to Appellant Tracy was based on matters beyond the evidence in the record, was woefully inadequate, and contradicted undisputed evidence. (Motion for New Trial, pp.6-7).

Respondent Newman filed a memorandum in opposition (hereinafter, the Memorandum in Opposition) to the Motion for New Trial, arguing, *inter alia*, that the jury's verdict was supported by substantial evidence in the record. (Defendant Brian Keith Newman's Memorandum in Opposition to Plaintiff's Motion for New Trial *Nisi Additur* or in the Alternative New Trial Absolute, p.6) (hereinafter, the Memorandum in Opposition). Further, Respondent Newman contended that evidence related to a defendant's financial condition was "background information" and is routinely provided to the jury "as with any plaintiff." (Memorandum in Opposition, p.9). On the question of punitive damages, Respondent Newman

alleged the "plaintiff's attorney argued that the defendant's lack of a license was a negligent act which raised to the level of reckless conduct" and "did not, by clear and convincing evidence, establish sufficient evidence of recklessness to support that punitive damages be presented to the jury." (Memorandum in Opposition, p.10).

The trial court denied Appellants' Motion for New Trial on February 29, 2024, after considering "the Memorandums . . ., hearing arguments from counsel, and having recollected the occasion." (Order Denying Plaintiffs' Motion for New Trial *Nisi Additur* or New Trial Absolute, p.1). This appeal followed.

STATEMENT OF THE FACTS

On the evening of June 14, 2018, Tracy Campbell and her husband of twenty-eight years, Daniel Campbell, were driving together after having dinner with their two adult children. (Tr. 95:16-25, 96:7-12, 98:18-21; 239:7-23). Daniel Campbell was driving the vehicle back home but needed to stop on the way at the grocery store, a Food Lion. (Tr. 99:3-22; 239:22-25, 240:5). As the Campbells were approaching to turn onto Florida Avenue, they were violently struck from the rear by "a powerful impact." (Tr. 99:23-25; 100:1-2; 245:9-22). Testimony indicated the Campbells were pushed "into oncoming traffic, the left side of the road and down the embankment and up it and landed on the other side of the embankment." (Tr. 100:4-6; 245:15-25). The Campbells suffered a second impact from "the car hitting the . . . hill from the ditch." (Tr. 245:18-25). The airbags were deployed during the collision. (Tr. 100:7-12; 246:1-10).

Tracy testified to the physical effects of the collision and impact, noting that she "hit the . . . passenger side armrest and door panel with [her] . . . right side of [her] body" . . . . "from [her] waist down on [her] right side." (Tr. 101:3-17). After the initial impact, Tracy testified to being in shock and "just, I was hurting." (Tr. 101:17). When Tracy tried to get out of the car, her legs gave out and she had to sit back down. (Tr. 101:18-23). Daniel testified that "[Tracy] wasn't able

to get out of the vehicle. Her hip was giving her pretty much" and "[s]he wasn't able to stand up." (Tr. 249:14-16, 22-25). When EMS arrived, the narrative noted Tracy complained of having pain to her lower back and could move her lower extremities without problems. (Tr. 152:8-18; Def. Exh. 2). She consented to EMS transport to South Hospital along with her husband because of the pain she was in. (Tr. 102:17-23, 109:20; 254:10-25).

While at the hospital, medical records evidenced Tracy complained of "neck back pain, bilateral hip pain, and left lower rib pain. Patient's ambulatory unable to walk with a limp . . . [patient] believes with the limp from that chronic disc disease in her back." (Tr. 109:13-17). She felt sore in her right hip and ribs and didn't know what was going on with her body. (Tr. 109:23-25, 110:1-2). Tracy's hip had bruising and swelling, which was evidenced by a photo taken a day or two after the collision. (Tr. 110:23-25, 111:1-12; Pla. Exh. 1). Daniel testified the bruising on her hip persisted for about three to four weeks after the collision and discoloration that lasted months. (Tr. 255:7-12).

Tracy continued to experience pain in her hip and saw her family doctor on June 22, 2018, where Dr. Anderson Funke indicated ongoing "Hip pain -- . . . Hip hurts not getting better, sharp pain, hurts to walk, put pressure against back pain is stable and not affected by it." (Tr. 110:5-18; Pla. Exh. 15). Dr. Funke's medical records indicated Tracy continued to experience "[m]arked tenderness right (inaudible) person and hip stiff some" and that she had a "[c]ontusion of right hip." (Tr. 112:5-10, 112:18-22; Pla. Exh. 15). The bruising on her hip persisted for a while, "between two and three weeks." (Tr. 111:23-25, 112:1-4). Daniel testified that the problems got a lot worse the longer it went on and "it gradually got worse and worse and worse." (Tr. 256:13-21).

Tracy testified that she had a degenerative condition related to her back that had existed prior to the motor vehicle collision in 2018, at least since 2011. (Tr. 105:12-24; 153:10-14). Tracy testified her worry immediately after the collision was that the powerful impact had aggravated her back condition, which Daniel corroborated. (Tr. 106:17-19; 249:17-21). Tracy consulted with her doctor, Dr. McLaughlin, at the Spine Center to evaluate about any problems she may have from the collision, which were satisfactorily ruled out. (Tr. 106:20-25; 107:1-4).

By July 12, 2018, Dr. McLaughlin noted Tracy's "back pain really has not gotten much worse" but that after the accident Tracy "started experience right leg pain . . . localized as to the right hip area with radiation posterior." (Tr. 113:2-15; Pla. Exh. 16). Tracy was referred by her family doctor to an orthopedic doctor, Dr. Anthony Timms, who she treated with on July 16, 2018. (Tr. 113:16-25, 114:1-23; Pla. Exh. 17).

Dr. Timms noted Tracy complained of "pain of right hip" and had a "[c]ontusion of right hip" with "exquisite tenderness over the lateral hip in the area of the trochanteric bursa." (Tr. 114:2-14; Pla. Exh. 17). Tracy complied with the recommendations of Dr. Timms to receive an injection of a "local anesthetic steroid mixture" to calm the hip down dramatically; however, the injection "did nothing." (Tr. 114:11-21, 115:11-25, 116:1; Pla. Exh. 18). On October 24, 2018, Tracy saw Dr. Timms, who noted complaints of "enlarging increasingly painful mass in [hip] area." (Tr. 115:11-18; Pla. Exh. 18). Tracy testified the mass on her hip "was getting bigger. I -- I couldn't -- I don't know why, but it was getting bigger and it was painful and I -- you couldn't put pressure on it. You couldn't touch it without it being painful." (Tr. 115:19-22). Dr. Timms noted an "[e]nlarging mass right hip MRI with contrast to assess this mass, this will need to be delayed until her lumbar fusion is healed because of the presence of hardware." (Tr. 116:2-9; Pla. Exh. 18). As a result of the back surgery for her degenerative disc condition, Tracy had to wait

for her back to heal before being able to undergo the MRI. (Tr. 116:8-12). Tracy saw Dr. Timms again on February 4, 2019, who suggested another injection even though it had not helped before. (Tr. 116:13-25; Pla. Exh. 19). Tracy came back to Dr. Timms on April 8, 2019, after the injection and to review the MRI findings. (Tr. 117:6-24; Pla. Exh. 20). Dr. Timms did not have an explanation for the persistent discomfort or persistent swelling; Tracy testified the pain continued and the swelling had not reduced. (Tr. 118:1-10; Pla. Exh. 20).

During the recovery process after her back surgery, Tracy testified her back surgeon wanted her to walk to help heal, which she did. (Tr. 119:1-9). Tracy would walk until she had to rest as a result of the pain she felt from her hip, a pain she described as "a numbness pain, a numbing pain." (Tr. 120:2-10). In contrast, Tracy testified that the pain she experienced from her back condition went away after the back surgery including the radicular pain into her leg. (Tr. 121:22-25, 122:1-8).

Tracy returned to Dr. Funke, her family doctor, on August 16, 2019, complaining of ongoing "pain with her right hip." (Tr. 122:18-25, 123:1-6; Pla. Exh. 21). Dr. Funke noted Tracy's MRI showed "some gluteus medias tendonitis as well as some fluid and the trochanteric bursa. . . . [Tracy]'s not getting a lot better, she's still having a lot of pain in this area. . . . The pain in her leg is sharp as well as dull." (*Id*.). Tracy confirmed in testimony that this pain was in her "general right hip." (Tr. 123:2). Dr. Funke referred Tracy to Sports Medicine, whom Tracy saw on August 29, 2019. (Tr. 123:3-10; Pla. Exh. 22).

Medical records from Sports Medicine indicated Tracy was evaluated for "evaluation of right hip pain" and "right hip pain, been ongoing for a year since motor vehicle collision in June, 2018." (Tr. 123:11-25, 124:1-3; Pla. Exh. 22). Tracy received an ultrasound guided injection at Sports Medicine, which did not improve her pain once it wore off. (Tr. 124:4-14, 124:15-25,

125:1-4; Pla. Exh. 24). Tracy testified that her pain continued in her hip for years after the collision, even though the pain in her back had resolved post-surgery. (Tr. 127:1-25, 128:1-3; Pla. Exhs. 26-27).

Tracy consulted with Dr. Loging, an orthopedic surgeon in Newberry, who recommended surgery. (Tr. 134:9-25). Dr. Loging evaluated Tracy for "complaints of pain . . . in the right hip that occurs during activities. Onset was sudden with injury, which occurred on [June 14, 2018]. Injury occurred during motor vehicle accident. . . . [Tracy] has a large deformity over the right hip, which is very painful to her." (Tr. 136:23-25, 137:1-16; Pla. Exh. 28). Tracy underwent surgery with Dr. Loging on June 22, 2021. (Tr. 135:1-2; 140:1-3). The surgery helped Tracy in that the "mass was gone . . . I could walk better. I still have a limp, but I could walk better." (Tr. 136:5-10). Tracy testified there was some lingering pain, but "it got better". (Tr. 138:10-15). This was corroborated by Daniel even though she "has a limp now that she didn't have before." (Tr. 263:9-22). As a result of the incision, Tracy has a visible and sizable scar from the surgery. (Pla. Exhs. 3, 4).

Tracy's recovery period following this surgery was substantial, requiring six months of missed work before being released from physical therapy. (Tr. 140:24-25, 141:1-7). Tracy stated the back surgery was an easier recovery than the hip surgery since she was required to be "non-weightbearing for six weeks" following surgery. (Tr. 142:15-23; 143:2-8).

As a result of the accident, Tracy incurred medical bills and expenses related to treatment of her accident-related injuries, which were admitted as Plaintiffs' 14 through 27. (Tr. 105:7-8). Tracy testified the total medical expenses up to the date of trial was $57,272.52. (Tr. 141:25, 142:1-9; Pla. Exh. 29).

Tracy testified to the ongoing effects on both her social life and on her employment. Tracy Campbell testified that prior to the collision, she enjoyed riding the motorcycle, going camping, and spending time together with her husband. (Tr. 98:7-11). Even after her back surgery had healed, the pain in Tracy's hip still required her to change her daily life. (Tr. 128:4-25, 129:1-9). Tracy struggled to help her daughter with her wedding in September 2019 because of the ongoing pain in her hip: "Physically, I would -- I would have to sit and -- and because I can't stand in one spot for a long period of time, so I would have to sit and rest or let my leg rest anyway." (Tr. 129:10-24). Tracy testified that she is no longer able to do as many activities with her husband as she used to such as dancing at a work function; engaging in amorous activities; and traveling medium- to long-distances. (Tr. 98:12-14; 131:1-133:17).

Tracy testified as to her physical and mental condition at the time of trial, noting she does not walk the same way, does not walk normal; has a substantial and visible scar, which weighs on Tracy's decisions such as not wearing revealing clothes; and is self-conscious about the injury and scar, to the point of not allowing her grandchildren to sit on her left leg. (Tr. 144:2-25). She and her husband no longer hike, do not tent camp, and have reduced their time together motorcycling on the road. (Tr. 145:1-25, 146:6-11). Daniel testified that they "used to do a lot of camping, a lot of hiking" because they both loved waterfalls so they would travel together on a small road bike. (Tr. 236:11-24). Even a drive of six, seven miles down the road posed an impediment to Daniel and Tracy traveling together. (Tr. 258:17-23). On her relationship with her husband, Tracy testified "My husband is afraid to touch me now because he's afraid that he's going to hurt me and that affects me and that affects him and that affects our relationship personally." (Tr. 132:15-20). Tracy and her husband did not experience this prior to the collision. (Tr. 132:21-25; 260:14-25). Daniel testified that he continues to feel hesitant to initiate sexual

activity as a result of the injuries and pain his wife suffered from during the course of her recovery. (Tr. 260:14-25; 264:23-265:4). Daniel Campbell testified to the pain and suffering he witnessed his wife struggle with after the collision in 2018 as well as to the effect the injury had, and continues to have, on their relationship as a married couple. (Tr. 235:9-239:6). Daniel and Tracy had been married twenty-eight years at the time of trial. (*Id*.).

James F. Brown, a Sergeant with the South Carolina Department of Highway Patrol testified as to the traffic collision report, form TR310, which Sergeant Brown reviewed for "accuracy [to]ensure that all the . . . required blocks are completed and everything is, is correct on face value." (Tr. 228:20-25, 229:1-23; 230:23-25, 231:1-6). Sergeant Brown testified that the traffic collision report indicated Respondent Newman was not transported by EMS from the scene and he was not injured. (Tr. 231:15-18).

Respondent Newman testified that he does not drive anymore because he had epilepsy and did not want to have a seizure and kill somebody. (Tr. 79:2-11). Respondent Newman knew he had an epileptic condition by age seven and this was the reason he had not obtained a driver's license in twenty-five or thirty years. (Tr. 79:12-21). Respondent Newman was sixty years of age at the time of trial and required glasses; however, could not recall when he last had an eye exam or been evaluated by the highway department for his vision. (Tr. 89:1-23). Further, Respondent Newman would only drive to "absolutely . . . help somebody out." (Tr. 80:1-4; 82:11-13). This was the only reason Respondent Newman would drive even though he lost his license, and he knew he had an epileptic condition. (Tr. 80:8-10).

A majority of Respondent Newman's testimony may be distilled to: "I have no recollection. I told you I -- I had a major seizure about two months back and I remember about 5 percent of my whole past life, period." (Tr. 81:4-9).

STANDARD OF REVIEW

In reviewing the trial court's denial of a new trial, the appellate court will defer to the discretion of the trial court unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Norton v. Nortfolk S. Ry.*, 350 S.C. 473, 567 S.E.2d 851 (2002); *Youmans ex rel. Estate of Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008). The appellate court must consider the testimony and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). The trial court may consider motions for a new trial absolute or for a new trial *nisi additur*. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

In reviewing the denial of a new trial absolute, "the verdict reached must be so 'grossly excessive' as to clearly indicate the influence of an improper motive on the jury." *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000) (internal citations omitted). Improper motive on the part of the jury includes "passion, caprice, prejudice, or other considerations not reflected by the evidence" that "affected the amount awarded." *Id*. When the question is the existence or absence of supportive evidence, an order granting a new trial is subject to appellate review for a consideration of that question of law only. *S.C. Dep't of Highways & Pub. Transp. V. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980).

When the award by the jury is inadequate, the trial judge has the discretion to grant a new trial *nisi additur*. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995). In reviewing the denial of a new trial *nisi additur*, the appellate court must review the record to assess whether the trial court abused its discretion amounting to an error of law. *Pelican Bldg. Ctrs. of Horry-Gerogetown,*

Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 672 (1993); *Waring v. Johnson*, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000).

"The admission of evidence is within the sound discretion of the trial judge, and absent a clear abuse of discretion amounting to an error of law, the trial court's ruling will not be disturbed on appeal." *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). "To warrant reversal based on the . . . exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly . . . excluded evidence." *Conner v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005); *see also Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 175 S.E.2d 805 (1970).

"In an appeal from the grant of a directed verdict, [the appellate court] must like the trial court . . ., view the evidence in a light most favorable to the non-movant." *Miller v. FerrellGas, L.P., Inc.*, 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011) (citing *J.T. Baggerly v. CSX Transp. Inc.*, 370 S.C. 362, 368, 635 S.E.2d 97, 100 (2006)). "When viewed in that light, if there is any evidence that may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury." *Id*. "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." *J.T. Baggerly*, at 368, 635 S.E.2d at 100–01 (internal citation omitted). "In order to make such a review, this Court must determine the elements of the action alleged and whether any evidence existed on each element." *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 446, 385 S.E.2d 821, 824 (1989) (internal citation omitted).

The appellate court may reverse the trial court's decision regarding jury instructions upon a showing of an abuse of discretion. *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008); *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000); *see also Keaton ex rel. Foster v. Greenville Hosp.*

Sys., 334 S.C. 488, 514 S.E.2d 570 (1990) ("'In reviewing jury charges for error, [the appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.). The appellant bears the burden of demonstrating the trial court's jury instructions were erroneous and prejudicial. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008); *see also Pittman v. Stevens*, 364 S.C. 337, 613 S.E.2d 378 (2005).

The appellate court may reverse when trial defects result in such error that is "material and prejudicial." *Visual Graphics Leasing Corp. v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993); *see also Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000); *La Salle Bank Nat'l Ass'n v. Davidson*, 386 S.C. 276, 688 S.E.2d 121 (2009). When the combination of such trial defects and errors are individually insignificant, the cumulative effect of each error may "prevent[] a party from receiving a fair trial." *State v. Johnson*, 334 S.C. 78, 512 S.E.2d 795 (1999); *State v. Freeman*, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995). *But see Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (questioning whether cumulative error doctrine applies in civil cases).

ARGUMENT

I. The trial court erred in refusing to charge the jury with punitive damages because there were questions of fact for the jury to consider and decide.

The trial court erred in misapplying the law "that causative violation of a statute constitutes *evidence* of recklessness, requiring submission of the issue to the jury." *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993). Instead, the trial court denied the jury charge by misapplying the *Gamble* factors applicable to the trial court's review only after the jury awards punitive damages. *Gamble v. Stevenson*, 305 S.C. 104, 112-13, 406 S.E.2d 350, 354 (1991). "A trial court must charge the current and correct law." *Welch v. Epstein*, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (2000) (citing *McCourt by and through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995)).

Punitive damages may be awarded in South Carolina when specifically prayed for in the complaint, only after compensatory or nominal damages have been awarded, and only when the plaintiff "proves by clear and convincing evidence that his harm was the result of the defendant's willful, wanton, or reckless conduct." S.C. Code Ann. § 15-32-520(C-D). The statute vests in the jury the authority to determine if a defendant is liable for punitive damages and, if liable, the amount of punitive damages. S.C. Code Ann. § 15-32-520(E). The general assembly authorized the jury to "consider all relevant evidence, including, but not limited to: the defendant's degree of culpability; . . . the duration of the conduct, the defendant's awareness, and any concealment by the defendant; [and]the existence of similar past conduct . . . ." S.C. Code Ann. § 15-32-520(E)(1, 4-5). Here, the trial court incorrectly removed from the jury the question of punitive damages and proceeded with a post-verdict review pursuant to *Gamble* and *Epstein*.

The South Carolina Supreme Court in *Gamble* "developed an eight factor **post-verdict review which trial courts are required to conduct** to determine if a punitive damages award

comports with due process." *Epstein*, 342 S.C. at 306, 536 S.E.2d at 422 (citing *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354). The trial court must conduct this review only after "[t]he trial judge correctly submitted to the jury the issue regarding [the defendant's] recklessness." *Epstein*, 342 S.C. at 307, 536 S.E.2d at 422. In granting the motion for directed verdict on punitive damages, the trial court misidentified *Gamble* and *Epstein* as applicable and found:

> "One nothing pre-accident that would justify punitive damages. No evidence of any of the prior situations of his driving and having a seizure." (Tr. 278:4-6).
>
> "The nature and extent of the harm to the plaintiff, it was an automobile accident where a person was injured. And that's . . . the extent of that." (Tr. 278:8-10).
>
> "Nothing to indicate that defense should be punished in my opinion. Duration of the conduct was very, very short. It was a quick, it was automobile accident, quick impact, no evidence of Mr. Newman's ability to pay." (Tr. 278:13-17).

This was error as the law requires a post-verdict review only after the jury returns a verdict. The appropriate test is whether the violation of a statute was causally linked, in fact and proximately, to the injury. *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (Ct. App. 1994). By utilizing the incorrect test, the trial court prejudiced the Appellants as they were denied a jury charge on the question of punitive damages even though there existed a question of fact for only the jury to determine.

Proximate causation is ordinarily a fact question for the jury. *Davenport v. Cotton Hope Plantation*, 333 S.C. 71, 508 S.E.2d 565 (1998); *Oliver v. S.C. Dep't of Highways & Pub.*

Transp., 309 S.C. 313, 422 S.E.2d 128 (1992). "The causative violation of a statute constitutes negligence *per se* and is evidence of recklessness and willfulness, **requiring the submission of the issue of punitive damages to the jury**." *Wise v. Broadway*, 315 S.C. 273, 433 S.E.2d 857 (1993) (emphasis added) (citing *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978); *Shearer v. DeShon*, 240 S.C. 472, 126 S.E.2d 514 (1962). In contrast to the argument of counsel in support of his motion for directed verdict on punitive damages, Appellants did present evidence of reckless conduct. (Tr. 276:17-20). In reviewing a directed verdict, if any of the evidence may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury. *Miller v. FerrellGas, L.P.*, 392 S.C. 295, 709 S.E.2d 616 (2011).

Appellants demonstrated that Respondent Newman violated a statute, which created a question of fact as to whether the statutory violation was the proximate cause of the injuries. Respondent Newman's counsel even conceded in their motion for directed verdict "the fact that [Brian Newman] may not have had a license" at the time of the collision. (Tr. 276:12-20). Respondent Newman testified he did not have a license to operate a motor vehicle and had not been licensed in "25, 30 years". (Tr. 79:16-21; 80:5-7). Counsel for Respondent Newman stated in opening arguments that his client's license was under suspension at the time of the accident: "Did he have a license? He was under suspension and had been for quite some time." (Tr. 73:20-21). The trial court further admitted evidence that Respondent Newman was charged on the day of the collision with driving under suspension (DUS) and was convicted. (Tr. 226:22-24). This established a question of fact for the jury to consider whether or not the violation of the statute proximately caused the Appellants' injuries.

In the proffered testimony of Respondent Newman, he conceded that he only drove out of necessity. (Tr. 203:9-19). Also, he would drive if there was some emergency or if he wanted to buy groceries. (Tr. 203:25-204:1-2; 215:5-21). Further, Respondent Newman could not recall anything related to his persistent conduct of driving under suspension, let alone the reason for driving on numerous occasions, to wit: November 15, 2007; May 27, 2008; January 16, 2019, when he was found to be in possession of methamphetamine; August 19, 2021; April 12, 2021; and April 22, 2021. (Tr. 207:16-208:16; 214:5-9; 215:1-7). Respondent Newman only stopped driving "the last time [he] got caught or whatever. . . . I don't drive anymore." (Tr. 213:1-3).

The trial court took from the jury this determination because the trial court feared that "if I were to award punitive to damage in -- in this case, it would almost be like I would need to charge it in just about every automobile accident case." (Tr. 275:10-13). This fear is misplaced as "[v]iolation of the statute, thus, is not conclusive of liability." *Whitlaw v. Kroger Co.*, 306 S.C. 51, 54, 410 S.E.2d 251, 253 (1991). The evidence offered by the Appellants demonstrates that in this case, a jury charge of punitive damages was warranted. "The issue of punitive damages must be submitted to the jury if more than one reasonable inference can be drawn from the evidence as to whether the defendant's behavior was reckless, willful, or wanton." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (2000) (citing *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984); *Hawkins v. Pathology Assocs. Of Greenville*, 330 S.C. 92, 498 S.E.2d 395 (Ct. App. 1998). As set forth above, there was sufficient evidence to deny the motion for directed verdict and there was clear and convincing evidence to support the jury charge of punitive damages. *Anonymous v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 374 n. 2, 496 S.E.2d 17, 18 n. 2 (1998) ("Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.").

The trial court erred by refusing to charge the jury with a question of punitive damages when there was sufficient evidence of Brian Newman's recklessness and willfulness.

II. The trial court erred in refusing to allow the cross-examination of Respondent Newman on similar past conduct and on whether his testimony was contradictory.

In ensuring a punitive damage award is proper, the statute requires the jury to consider "the existence of similar past conduct." S.C. Code Ann. § 15-32-520(E)(5). The trial court erred when refusing to allow the jury to consider the evidence of Respondent Newman's habitual violations of the same duty he violated on June 14, 2018, which necessarily was relevant to the question of punitive damages.

Determining the propriety of punitive damage awards may require an assessment of the defendant's "habitual or customary violations of a duty" through "[t]estimony of previous traffic violations." *Sturcken v. Richland Oil Co.*, 248 S.C. 355, 364, 150 S.E.2d 341, 345 (1966). In *Sturcken*, the Supreme Court upheld a ruling by the trial court to allow the jury to consider the "past driving record of defendant's driver" over objection when "properly confined by the trial judge solely to the issue of willfulness and punitive damages." *Id*. (citing *Williams v. Johnson*, 244 S.C. 406, 137 S.E.2d 410 (1964).

In *Williams*, the Supreme Court collected cases enunciating the rule "that where there is an allegation of a wilful violation of a duty, evidence of habitual violations of the same duty is admissible on the issue of wilfulness." *Williams v. Johnson*, 244 S.C. 406, 410, 137 S.E.2d 410, 412 (1964).

> The purpose of the allegations objected to by the defendant in the present case was to enable the plaintiff to show by competent testimony on the trial of the case the defendant's willfulness through

> habitual violation of the law and failure to perform its duty, and was not to prove or show any probability of negligence on the part of the defendant in the violation of such known duties on the occasion of the alleged injury to the automobile.

Jennings v. Nw. R. Co. of S.C., 138 S.C. 385, 136 S.E. 639, 640 (1927). This comports with the constitutional nature of "punitive damages awards . . . measured against (1) the degree of the defendant's reprehensibility or culpability; (2) the relationship between the penalty and the *harm* to the victim caused by the defendant's actions; and (3) the sanctions imposed in other cases for comparable misconduct." *Gov't Emps. Ins. Co. v. Poole*, 424 S.C. 1, 8, 817 S.E.2d 283, 287 (2018) (emphasis in original) (internal citation omitted). This necessarily requires consideration of evidence that the trial court denied Appellants from giving to the jury. (Tr. 220:25-221:5, 222:4-13).

The evidence of Respondent Newman's prior conduct "did not tend to prove negligence on this particular occasion" but was offered under the punitive damages factor. *Kirkland v. Augusta-Aiken Ry. & Elec. Corp.*, 97 S.C. 61, 81 S.E. 306, 307–08 (1914) (citing *Mason v. S. Ry. Co.*, 58 S.C. 70, 36 S.E. 440, 441 (1900); *Mack v. S.-Bound R. Co.*, 52 S.C. 323, 29 S.E. 905, 906 (1898)). Appellants urged the trial court to allow cross-examination on Respondent Newman's prior conduct "because that is one of the factors that [the plaintiffs] have to go into as to punitive damages." (Tr. 218:13-14). Instead of limiting the evidence to the culpability of the Defendant, the trial court declined to allow this testimony to be given to the jury and erred in so doing.

III. The trial court erred in refusing to grant a new trial *nisi additur* when there was uncontroverted evidence that the jury verdict was inadequate and controlled by considerations not reflected by the evidence.

The trial court committed an error of law by ruling the awards were not "actuated by passion, caprice, or prejudice" or "some other improper motives." (Order Denying Motion, pp.1-2). While the trial court has broad discretion, it is not absolute: "The reviewing court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993) (internal citation omitted). Here, the trial court ignored the jury's confusion as to collateral source payments for Appellant Tracy's medical expenses and the trial court ignored the loss of consortium evidence. This was an error of law because where there is no conflicting testimony or where there is no evidence upon a material matter, the question presented is one of law; if the evidence is contradictory, the question is one of fact. *Guerin v. Hunt*, 118 S.C. 32, 110 S.E. 71 (1921).

The jury's verdict as to Appellant Tracy is inadequate as the jury found in her favor on the claims for actual damages, pain and suffering, future pain and suffering, mental suffering or permanency, yet awarded her a sum less than the medical expenses of $57,272.25. *Bailey v. Peacock*, 318 S.C. 13, 455 S.E.2d 690 (1995) ("If an award is merely inadequate . . . , the trial judge alone has the discretion to grant a new trial *nisi additur*."). The jury, in deliberations, submitted a question to the trial court regarding Appellant Tracy's medical expenses. (Tr. 337:10-338:6; Court's Exh. 1). The trial court responded with the following instruction: "Ladies and gentlemen, with respect to your question that I have marked as Court's Exhibit number 1, the plaintiff has alleged her medical expenses are $57,272.52. With respect to medical expenses, that is the only thing you are to consider." (*Id*.). Though there was conflicting evidence about the nature and scope of Tracy's injuries due to the pre-existing degenerative disc disease, the evidence as to her medical expenses was directly related to the hip injury and was not

contradicted. The trial judge confirmed this after the close of testimony: "I think it's been my understanding . . . that even though the . . . back has been discussed a lot, but any compensation for . . . anything related to the . . . back is not an issue before the jury." (Tr. 293:15-24). The jury's verdict was inadequate as it was unsupported by the evidence and demonstrates the verdict was tainted by improper motive or considerations beyond the evidence.

The jury's verdict as to Appellant Daniel is grossly insufficient as the jury found for Appellant Daniel yet ignored all uncontroverted evidence demonstrating the loss of companionship and consortium in awarding him the sum of $0.00. The trial court, in denying the motion for a new trial *nisi additur* noted that the loss of consortium award "appears to have been supported by the facts presented." (Order Denying Motion, p.3). The facts adduced at trial regarding Appellant Daniel's loss of the comfort and care of his spouse were uncontroverted and, even though the extent of those damages were a question of fact for the jury to decide, an award of $0.00 is not capable of being supported by the evidence.

IV. The trial court erred in refusing to grant a new trial absolute when there was uncontroverted evidence that the jury verdict was inadequate and controlled by considerations not reflected by the evidence.

South Carolina's thirteenth juror doctrine is a well-established standard for the granting of a new trial. *See Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990). "Under the 'thirteenth juror doctrine,' a trial judge may grant a new trial absolute when [they] find[] the evidence does not justify the verdict." *Haselden v. Davis*, 341 S.C. 486, 534 S.E.2d 295 (Ct. App. 2000). Stated differently, a trial judge may grant a new trial under the thirteenth juror doctrine if the judge determines the verdict "is contrary to the fair preponderance of the evidence." *Dent v. Redd*, 270 S. C. 585, 243 S.E.2d 460, 460 (1978); *Vinson v. Hartley*, 324 S.C. 389, 404, 477 S.E.2d 715

(Ct. App. 1996) ("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."). Unlike a motion for directed verdict, the trial judge need not view the evidence in the light most favorable to the opposing party. *McEntire v. Mooregard Exterminating Servs. Inc.*, 353 S.C. 629, 578 S.E.2d 746 (Ct. App. 2003).

"South Carolina's thirteenth juror doctrine is so named because it entitles the trial judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" *Norton v. Norfold Southern Ry. Co.*, 350 S.C. 473, 576 S.E.2d 851 (2002) (quoting *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990)). In fact, as the "thirteenth juror," the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. *Id*. As the South Carolina Supreme Court explained in *Folkens*:

> The effect is the same as if the jury failed to reach a verdict . . . When the 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.

Id. Here, the jury's verdict is clearly against the preponderance of the evidence. Appellants presented more than sufficient evidence as to the actual damages of Appellant Tracy in the form of medical bills in the amount of $57,272.52. The jury's verdict awarding less than that sum while still finding for Appellant Tracy indicates the jury considered inappropriate factors such as collateral source payments as opposed to the uncontroverted evidence before them.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court reverse the circuit court's order and grant Appellants' motion for a new trial *nisi additur*, or, in the alternative, a new trial absolute as the Appellants are prejudiced by the errors raised and by the cumulative effect of those aforesaid errors.

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