THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Milton Kimpson, Circuit Court Judge

Case No.: 2019-CP-40-02129
Appellate Case No.: 2025-001564

Troyce Mack …….....Appellant,

v.

Gregory Parker as Special Administrator for the Estate of David Joseph Rudd, and Delta Plumbing, LLC.....…….....Respondent.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE CASE

Appellant Troyce Mack ("Mack"), was injured in an automobile collision that occurred during the early morning hours of October 19, 2018. (R. pp. 137-38). While it was still dark, Mack was driving to work on Hwy. 378 in Richland County when he struck a vehicle with no hazard lights on that was left in the roadway by David Rudd ("Rudd"), who Mack alleged was working for Respondent Delta Plumbing, LLC ("Delta Plumbing"). (R. pp. 137-38).

Mack filed a lawsuit asserting claims for negligence and negligence per se. Following the death of Rudd, Mack filed a Third Amended Summons and Complaint substituting a Special Administrator for the Estate of David Rudd. (R. pp. 137-42). The matter was tried before a jury in Richland County between March 11 and 13 of 2025. (*See generally* R. pp. 17-117).

Prior to the beginning of the trial, the court denied Mack's Motion in Limine to prevent testimony, argument, or the introduction of evidence related to Mack's traffic court conviction. (R. pp. 119-125; R. pp. 3-4). During the trial, the court improperly allowed evidence of Mack's traffic ticket and conviction from the collision, including cross examination of Mack about the traffic ticket, and repeated references by Respondents to the traffic ticket throughout closing argument. (R. pp. 52-53, 58, 103-04).

Shortly after beginning deliberations, the jury returned a note to the court requesting to know the reason that Mack received a traffic ticket. (R. pp. 109-110). The court proposed that the jury be further instructed about the traffic ticket, over the objection of Mack. (R. pp. 111-113). Counsel for Mack again objected that evidence of the traffic ticket was prohibited by statute. (R. p. 113). The court ultimately brought the jury back in and instructed them about evidence of the traffic ticket. (R. pp. 114-15). The court gave the following curative instruction to the jury:

> "I want to revisit the traffic ticket. Evidence of that traffic conviction cannot be used as evidence of wrongdoing, but was allowed by the Court only for impeachment purposes, meaning related to witness credibility."

(R. pp. 114-15).

Respondents retained an expert accident reconstructionist several years prior to trial. (R. p. 91). Counsel for Mack took the deposition of Respondents' expert in April of 2023 in which the expert explained his opinions. (R. p. 92). In response, counsel for Mack hired a rebuttal expert in 2023. (R. p. 95). Mack's rebuttal expert was deposed nearly two years prior to trial by counsel for Respondents. (R. p. 100). During the trial that took place nearly two years later and after Mack had rested, counsel for Respondents produced a revised graphic from their expert that they intended to use at trial. (R. p. 81). This evidence consisted of an updated CAD (computer-aided design) of the collision scene that had never been produced to counsel for Mack. The CAD revealed a change in the expert's opinion with respect to the speed of Mack.

Despite Appellant's objection, the trial court permitted the jury to see evidence from Respondents' accident reconstruction expert that was disclosed only minutes before being shown to the jury. (R. pp. 78-86). Respondents' expert's revised opinion altered both the pre-impact skid distance for Mack's vehicle and the post-impact travel distance for Respondents' vehicle. (R. pp.

79-81). The expert's revised opinion changed Mack's estimated speed, which was a central issue for Respondents' defense of the case.

During the trial, Mack testified extensively about his broken clavicle and the pain and suffering from the injury. (R. pp. 33-46, 65). Mack also presented photographs of the disfigurement resulting from the injury. (R. p. 118). Stephanie Mack, the wife of Troyce Mack, testified about the pain observed of her husband, his disfigurement, and his psychological injuries. (R. pp. 68-74). There was no dispute or contrary evidence that Mack experienced pain, suffering, mental anguish, and disfigurement as a result of injuries from the violent motor vehicle collision. The jury received instruction from the court that pain and suffering were proper elements of damages. (R. pp. 105-107). The jury also received instruction that mental anguish, anxiety, worry, emotional suffering, emotional upset, and distress were proper elements of damages. (R. p. 107).

Using a special verdict form with itemized damages, the jury returned a verdict of $16,545.34, found that Mack was 50% at fault for the collision, and awarded $0.00 for pain, suffering, mental anguish, loss of enjoyment of life, and disfigurement. (R. pp. 14-16, 116-17). Mack filed a Motion for New Trial Absolute and Motion for New Trial on March 21, 2025. (R. pp. 126-30). The trial court denied Mack's Motion on July 7, 2025. (R. pp. 9-13). This appeal followed.

STATEMENT OF FACTS

An important issue in this case is whether Mack was traveling at excessive speed when he encountered Rudd's vehicle, which was left in a travel lane on a four-lane highway with a 45 mph speed limit without hazard lights activated. If Mack was traveling at or near the speed limit, he proved through expert human factors testimony that the poor lighting conditions and lack of hazard

lights on Rudd's vehicle made it impossible for him to perceive that the truck was stopped in the roadway in time for him to avoid the collision. (R. p. 67).

On October 19, 2018, at approximately 4:40 a.m., Rudd was driving a vehicle owned by Delta Plumbing on U.S. Highway 378 in Richland County, South Carolina. (R. p. 138; pp. 21, 76-77, 102). Rudd claims that he struck a deer, and the Delta Plumbing truck was left parked and unoccupied in the roadway without activation of any of the truck's hazard lights. (R. p. 138; R. pp. 26, 28, 33, 57, 75).

Shortly after Rudd's vehicle was left parked in the roadway, Mack approached while driving a vehicle the same direction on Highway 378. (R. p. 138; R. p. 26). Mack was driving to work and carrying a co-worker as a passenger. (R. pp. 23-24). Given the dark conditions and the absence of hazard lights on Rudd's vehicle, which was stopped in the travel lane, Mack struck the rear of Rudd's vehicle. (R. p. 138; R. pp. 24-30). Mack suffered injuries, including a fractured clavicle that left him with a permanent deformity. (R. p. 138; R. pp. 32-33, 37- 38, 64, 72).

All evidence demonstrated that Mack was not traveling at an excessive speed, except the opinion of Respondents' expert accident reconstructionist, who testified that Mack was traveling above 90 miles per hour at the time he pressed the brakes. (R. p. 90). Mack testified that he left his Sumter home at 4:00 AM to travel to work at Schneider Electric on Garners Ferry Road for his 5:00 AM shift. (R. p. 22). Mack was 2.5 miles from work when the collision occurred at 4:43 AM, with 17 minutes remaining before his shift—plenty of time to arrive without speeding. (R. p. 31). Mack testified that the speed limit had just dropped from 60 mph to 45 mph in the area where the collision occurred. (R. p. 26). He further testified that he was traveling close to the speed limit before the wreck. (R. p. 27).

Trooper Marlin, the investigating officer, testified that he did not measure the length of skid marks or post-impact distance of the Rudd truck. (R. pp. 65-66). Trooper Marlin further estimated the post-impact movement of Rudd's vehicle was 10-15 feet. (R. p. 101). Mack's rebuttal witness testified that the evidence available to and considered by Respondents' expert was insufficient to determine Mack's exact speed. Mack's expert reconstructionist also testified that, based on the collision damage, it was more likely that Mack was traveling approximately 40-45 miles per hour. (R. p. 101).

With the sole exception of Respondents' accident reconstruction expert, all evidence indicated Mack was not speeding excessively. This makes the trial judge's clearly erroneous decisions to allow both evidence of Mack's traffic citation and Respondents' expert's belatedly disclosed revised opinion particularly prejudicial to Mack.

At the conclusion of the trial, the jury returned a verdict of $16,545.34 and found that Mack was 50% at fault for the collision, and awarded $0.00 for pain, suffering, mental anguish, loss of enjoyment of life, and disfigurement despite the uncontroverted evidence that Mack had suffered these specific damages. (R. pp. 14-16).

STANDARD OF REVIEW

The admissibility of evidence is within the discretion of the trial court. *Johnson v. Sam English Grading, Inc.,* 412 S.C. 433, 448, 772 S.E.2d 544, 551 (Ct. App. 2015). "An abuse of discretion occurs when the ruling is based on an error of law or factual conclusion that is without evidentiary support." *Id.* at 448, (citing *Menne v. Keowee Key Prop. Owners' Ass'n, Inc.,* 368 S.C. 557, 568, 629 S.E.2d 690, 696 (Ct. App. 2006)).

"Determining the proper interpretation of a statute is a question of law . . . ." *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Questions of

statutory interpretation are questions of law, which are subject to de novo review and may be decided by this Court without any deference to the court below. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018).

"Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015).

ARGUMENTS

This appeal presents three instances of reversible error. A disputed issue in this case was whether Mack was traveling at excessive speed when he encountered Rudd's vehicle. Through committing the first two errors discussed below, the trial judge prohibited the jury from fairly considering this primary issue. First, this Court should reverse and remand for a new trial because the trial court erred in allowing prohibited evidence of Mack's traffic ticket and conviction. Additionally, or in the alternative, this Court should reverse and remand for a new trial because the trial court erred in allowing Respondents' expert to publish and discuss evidence that was not produced to counsel for Mack. Specifically, years after declaring Respondents' opinions, counsel failed to disclose significantly amended opinions until after Mack had presented his case-in-chief. Finally, this Court should reverse and remand for a new trial because the jury verdict of $0.00 for clearly compensable damages is shockingly disproportionate and indicates passion, caprice, prejudice, or other considerations not reflected by the evidence.

I. The trial court erred in allowing evidence of Mack's traffic ticket and conviction, which is barred by S.C. Code Ann. § 56-5-6160.

The trial court allowed extensive evidence and references of Mack's traffic conviction. That was error. The allowance of this testimony and argument is inconsistent with established law and in violation of a statute that absolutely bars such evidence. S.C. Code Ann. § 56-5-6160

provides that "[n]o evidence of conviction of any person for any violation of this chapter shall be admissible in any court in any civil action." Despite the clear prohibition of any evidence concerning Mack's traffic court conviction, the trial court allowed cross-examination concerning the conviction and multiple references to the conviction in the closing argument of Respondents. The trial court gave specific jury instructions regarding both the traffic ticket and the underlying statutory law upon which the ticket was issued.

"An abuse of discretion occurs when the circuit court's rulings 'either lack evidentiary support or are controlled by an error of law.'" *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 635, 760 S.E.2d 399, 407 (2014) (citing *Graves v. CAS Med. Sys., Inc.,* 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012)). "Questions of statutory interpretation are questions of law" that this Court reviews de novo. *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012). "Evidence which is not relevant is not admissible." Rule 402, S.C.R.E.

The prohibition of traffic violation conviction evidence in civil actions has remained intact since 1949. Despite being in effect for nearly 80 years, case law discussing § 56-5-6160 is sparse, presumably because the statute plainly disallows such evidence. The South Carolina Supreme Court has noted that § 56-5-6160 serves as a specific exception to the rule that a person criminally convicted is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction. *Doe v. Doe*, 346 S.C. 145, 551 S.E.2d 257 (2001); *see also Lovett v. Southeastern Freight Lines*, 276 S.C. 151, 276 S.E.2d 533 (1981) (ruling evidence of the underlying traffic conviction inadmissible). Because the statute plainly prohibits such traffic convictions in civil matters, there has logically not been a need for extensive appellate review of the issue. § 56-5-6160 is a known, accepted, rigid bar on the evidence the trial court permitted in this case.

The trial court denied Mack's Motion in Limine for the prohibition of any reference or evidence of the traffic ticket or traffic conviction associated with the incident pursuant to S.C. Code Ann. § 56-5-6160. (R. p. 4). Consequently, and over objection, Respondents were allowed to cross examine Mack about the traffic ticket he received from the incident:

Q: Okay, Mr. Mack…tell me a little about – about that ticket you received for driving a vehicle a greater speed than was reasonable under conditions?

A: Yes, sir.

Q: And was that magistrate court? Small court, like a city court?

A: Yes. Yes.

Q: And there, did you testify?

A: No, sir.

Q: Okay. And did you go in, and did you plead guilty to the charge, or did you just pay the ticket?

A: No, sir, I didn't plead guilty. I just paid the ticket.

Q: Okay. And again, what was your reasoning, if you don't believe that you're at fault at all, for paying the ticket?

A: Well, as I said earlier, I - - I didn't know there was any other option besides paying the ticket, so - - because I didn't want to get in trouble about, you know, not paying the ticket, I just went ahead and paid the fine.

(R. pp. 52-53).

Counsel for Mack again voiced an objection to the court allowing evidence and cross examination about the traffic ticket and conviction under § 56-5-6160. (R. p. 58). During closing argument, Respondents were permitted to extensively reference the traffic ticket and citation.

> That just doesn't make sense to me, why he would pay that ticket and not fight it.
>
> * * * *
>
> Or would a more believable explanation be that he was either distracted or traveling too fast for conditions, which he pled to - - well, paid the ticket for. And you - - you heard plaintiff's counsel say that, you know, my clients are avoiding responsibility for this accident. But Mr. Mack, despite paying that ticket, despite the evidence here, he said he bore no responsibility for this accident. So just keep that in mind. And the citation that the ticket was based off. It's going to be in your jury charges.

(R. pp. 103-104).

Naturally, Respondents pounced at the opportunity to use this forbidden and unfairly prejudicial evidence to their advantage, having been gifted a tool that was sure to confuse and mislead the jury. The clear legislative intent of disallowing the evidence in a civil action quickly manifested in a predictable and prejudicial fashion to Mack. Shortly after beginning deliberations, the jury submitted a question to the court concerning the traffic ticket: ("So the jury has a question, and the foreperson says the jury would like to know what the ticket Mr. Mack received was for."). (R. p. 108). Counsel for Mack again objected to the admission of the ticket, and was informed by the court that "the bell has been rung." (R. p. 110). To the great prejudice of Mack, the court summoned the jury back to the courtroom and gave the instruction that Mack was given a ticket for driving too fast for conditions. (R. p. 110). With the damage already done, Respondents then conceded that under § 56-5-6160 "***no tickets are supposed to come in***…." (R. p. 113).

Respondents were successful in backdooring evidence of the traffic ticket by persuading the court it was being used for impeachment. However, Mack never disputed that he had received a traffic ticket and paid the resulting fine. The record before the trial court did not support any use of the evidence for impeachment purposes. Although the court was aware of this fact, it nevertheless ruled that the traffic ticket was admissible and allowed Respondents to reference and

use the prohibited evidence throughout the course of the trial. This was unquestionably improper, in violation of the clear statutory prohibition, and highly prejudicial to Mack. The note by the jury demonstrated their clear confusion as deliberations quickly devolved into discussion over a traffic ticket instead of the elements of negligence, applicable statutes, and common law principles contained in the charge.

An exclusion of the evidence under Rule 403, SCRE, is harmonious with the statutory prohibition of traffic convictions in civil actions. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury…." Rule 403, SCRE. The jury's note about the traffic ticket, the need for additional instruction by the court, and the resulting comparative negligence finding against Mack all cement that any probative value of the traffic ticket was substantially outweighed by the very prejudice and confusion that ensued.

The adjudication of a traffic ticket, in a criminal court, grounded in hearsay and unqualified determinations, with a separate burden of proof, quite obviously would cause prejudice and confusion in a later civil action. "Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence . . . ." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008). The jury's note and subsequent added instruction from the court about the traffic ticket establish that its verdict was influenced by the challenged evidence.

Since 1949, courts in South Carolina have correctly prohibited the use of traffic convictions in civil actions. By repeatedly permitting Respondents to cross-examine, reference, argue, and introduce evidence of Mack's traffic court conviction, the trial court abused its discretion, allowed evidence barred by Rule 403, and disregarded 75 years of precedent and the clear prohibition by § 56-5-6160 of such evidence. The legislative intent of barring such evidence in a civil proceeding

is clear given the different burdens of proof, criminal implication, and evidentiary differences. The ruling by the trial court allows "impeachment" to swallow the statute. The exception for "impeachment" becomes so broad it eliminates the statutory protection, effectively nullifying what the legislature intended to protect.

Any evidence of Mack's traffic court conviction was absolutely barred by statute, yet the trial court allowed Respondents to flood the jury with repeated references to the prohibited evidence. The trial court committed reversable error in allowing evidence of Mack's traffic ticket and conviction. This Court should therefore reverse and remand the matter for a new trial.

II. The trial court erred in allowing Respondents' expert to publish and discuss evidence that had never been provided to Appellant.

Mack was ambushed by Respondents with exhibits prepared by their expert accident reconstructionist that were allowed to be published to a jury only minutes after being turned over for the first time. During the trial, the court erred by allowed evidence from Respondents' expert accident reconstructionist, over objection, that was withheld until the day it was produced and published to the jury. (R. pp. 78-86). This evidence consisted of an updated CAD (computer-aided design) of the collision scene that had never been produced to counsel for Mack. Respondents' expert was retained on the case several years prior to trial. (R. p. 91). The revised CAD differed materially from the original version by purporting to show the final resting place of Rudd's truck, though this placement lacked evidentiary support (R. pp. 79-80). Furthermore, Respondents' expert revised his calculation of Mack's skid marks from 68 feet to 108.4 feet, but failed to disclose this updated measurement to Mack's counsel until moments before testifying. (R. p. 87).

Respondents had a duty to disclose the existence of the computer aided design prepared by their accident reconstructionist with graphics of the collision site. Rule 26(b)(1), SCRCP. Parties

bear an ongoing obligation to update their discovery responses regarding expert witnesses, specifically: the identity of each expert expected to testify, the subject matter they will address, and the substance of their testimony. Rule 26(e), SCRCP. The trial court abused his discretion in allowing Respondents' expert to use the graphic and publish the same to the jury. The proper sanction was for the court to disallow the late produced evidence.

In deciding what sanction to impose for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. *Samples v. Mitchell*, 495 S.E.2d 213, 216, 329 S.C. 105, 112 (Ct. App. 1997). "A failure to exercise that discretion amounts to an abuse of that discretion." *Id.,* citing *Fontaine v. Peitz,* 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."). "The exercise of discretion is then to follow a thought process that begins with the trial court's clear understanding of the applicable law, continues with the court's sound analysis of the situation before it in light of the law, and ends with the trial court's ruling that follows the law and is supported by the facts and circumstances. *Morris v. BB&T Corp.,* 438 S.C. 582, 587, 885 S.E.2d 394, 397 (2023). "The trial court's recognition of its responsibility to exercise discretion will be apparent when the record indicates the court followed such a thought process." *Id.*

Counsel for Mack informed the trial court that she had not received a copy of the computer animated design created by Respondents' experts until a few moments before the expert was set to testify. (R. p. 78). Moments later, Respondents' counsel revealed to Mack's counsel that the expert's calculations had been revised as well. Counsel for Respondents did not dispute that the CAD had not been previously produced. (R. p. 79). Respondents confirmed that the revised CAD

provided graphics and information showing distance, speed, vehicle positioning, and signage. (R. p. 79). Respondents further confirmed that the CAD provided updated positioning concerning the vehicles, a pivotal issue in the case. (R. p. 79). When taking the deposition of Respondents' expert and eliciting the expected opinions, Mack had been provided with a different version of the CAD. (R. p. 79). Additionally, Mack's rebuttal expert did not receive a copy of the revised CAD until Respondents' mid-trial production.

The trial court overruled Mack's objection to the evidence. (R. pp. 78-86). Respondents' expert had been retained for nearly three years at the time the material was turned over, in court and only moments before being published to the jury. (R. p. 91). "The entire thrust of the discovery rules involves full and fair disclosure, 'to prevent a trial from becoming a guessing game or one of surprise for either party.'" *Samples, quoting State Highway Dep't v. Booker*, 260 S.C. 245, 252, 195 S.E.2d 615, 619 (1973).

Pretrial disclosure of evidence serves to prevent surprise and ensure decisions based on the merits following a complete and fair hearing. *Reed v. Clark*, 277 S.C. 310, 286 S.E.2d 384 (1982). This disclosure obligation continues throughout trial, and when new information emerges during proceedings, the trial court has discretion to admit or exclude such evidence. *Id.* In exercising this discretion, the trial judge must consider: (1) the reason the evidence was not disclosed earlier, (2) the purpose of the new information, and (3) potential prejudice to the opposing party. *Id.* The discovery rights established by the Rules of Civil Procedure provide trial attorneys with essential tools for trial preparation. The "rights of discovery provided by the rules give the trial lawyer the means to prepare for trial, and when these rights are not accorded, prejudice must be presumed." *Downey v. Dixon*, 294 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). "Unless the party who has failed to submit discovery can show lack of prejudice, reversal is required." *Id.* This is

particularly true where the court fails to impose sanctions or imposes only minimal sanctions that do not serve as meaningful deterrents to future discovery violations. *Id*.

In *Clark v. Cantrell*, the South Carolina Supreme Court established that when evaluating the admissibility of computer animated demonstrative evidence, trial courts should consider whether the animations and underlying data were timely disclosed to allow the opposing party sufficient time for analysis. *Clark v. Cantrell*, 339 S.C. 369, 384, 529 S.E.2d 528, 536 (2000). The Court emphasized that untimely disclosure can impair an opponent's ability to challenge the animation's accuracy or effectively cross-examine the experts responsible for its creation. *Id*.

Counsel for Respondents offered no excuse for their failure to disclose the updated CAD and revised expert opinions. Respondents' expert confirmed that he had sent the updated CAD to counsel for Respondents the week prior to trial. (R. p. 93). The late produced expert material was obviously prejudicial as it was a different version than the graphic produced much earlier in the case. Further, the withheld material displayed to the jury a recreation of the Respondents' version of events, and captured a depiction of the expert's opinions and proposed diagram of the scene. (R. pp. 84-85). Mack objected to the use and publishing of the exhibit. (R. p. 86). Respondents' expert admitted that the material had only been provided to Mack that day, and that the prior version contained inaccuracies. (R. p. 92).

Mack's rights of discovery were clearly not protected. Mack was ambushed by pivotal and influential expert graphics shared with the jury that were withheld until only moments before the expert took the witness stand. Mack's counsel had taken the deposition of Respondents' expert nearly two years before trial, using a prior version of the CAD, and was faced with a jury being shown a graphic containing critical information about the collision.

The revised CAD reflected material changes to both the pre-impact skid marks of Mack's vehicle as well as the post-impact distance traveled by Rudd's truck. The CAD depicted the measurements upon which Mack's speed calculation was based. Altering the CAD during trial materially prejudiced Mack's ability to effectively challenge the Respondents' expert. Moreover, Mack's rebuttal expert witness had based his testimony on the earlier version of the graphic. This last-minute disclosure prevented Mack's rebuttal expert from adequately preparing his testimony to challenge Respondents' expert, further compounding the prejudice. Mack was ambushed, and the prejudicial impact of the expert material is indisputable. In allowing use and publishing of the expert material, the trial court abused its discretion.

The trial court's two evidentiary errors directly contributed to the jury's finding that Mack was 50% at fault. By admitting evidence of Mack's traffic citation and conviction in violation of S.C. Code Ann. § 56-5-6160, the court allowed the jury to consider legally inadmissible proof of Mack's negligence that carried substantial prejudicial weight. This error was compounded when the court permitted Respondents' expert to testify using opinions that were deliberately withheld from Mack until trial day, denying Mack any meaningful opportunity to prepare a rebuttal or challenge the expert's new conclusions. Together, these errors created an unfairly tilted playing field: the jury heard inadmissible evidence suggesting Appellant's fault while also hearing surprise expert testimony that Appellant could not effectively counter. The cumulative effect of these errors almost certainly influenced the jury's decision to assign half the fault to Mack. This Court should therefore reverse and remand the matter for a new trial.

III. The jury's verdict of $0.00 for damages compensable under the law is shockingly disproportionate and indicates prejudice or other considerations not reflected by the evidence.

Despite uncontroverted evidence of pain, disfigurement, suffering, mental anguish, and loss of enjoyment of life sustained by Mack from the collision, the jury returned a verdict of $0 for these damages. The verdict of zero dollars was inconsistent and cannot stand. "The trial [court] must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007). The trial court erred by failing to grant Mack's Motion for New Trial Absolute following a shocking, grossly inadequate verdict representative of prejudice, partiality, corruption, and improper motive.

"The grant or denial of new trial motions rests within the discretion of the [trial] court, and its decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence, or the conclusions reached are controlled by error of law." *Swicegood v. Lott*, 379 S.C. 346, 355-56, 665 S.E.2d 211, 216 (Ct. App. 2008). "This [c]ourt has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law." *Vinson v. Hartley*, 324 S.C. 389, 406, 477 S.E.2d 715, 723-24 (Ct. App. 1996). The trial court must set aside a verdict when it is shockingly disproportionate to the injuries suffered and indicates that passion, caprice, prejudice, or other considerations not reflected by the evidence affected the amount awarded. *Id.* The failure of the trial court to grant a new trial absolute in this situation amounts to an abuse of discretion. *Weir v. Citicorp Nat'l Servs., Inc.* 312 S.C. 511, 435 S.E.2d 864 (1993). A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

Mack provided undisputed evidence that he suffered a broken clavicle and experienced pain and suffering from the injury. (R. p. 33-46, 64). Photographs of the disfigurement resulting from the injury were admitted into evidence. (R. p. 118). Mack testified that he was given pain medication at the hospital and provided with a sling to take pressure off his broken clavicle. (R. p. 33). Mack testified that his pain level was a 10 at the hospital and he was experiencing very high pain. (R. p. 33). Mack testified he was unable to pick up his children, including a newborn child. (R. p. 34). Mack testified that he suffered through sleep disruption because of the injury. (R. p. 34).

Mack also provided testimony about his medical treatment, including physical therapy he attended to "decrease the pain" and "discomfort." (R. p. 35). Mack testified that his clavicle was misaligned after it healed, but that he declined to have surgery because of the significant risks, including the potential for nerve damage. (R. pp. 36-37). Mack testified about photographic evidence of his clavicle that showed displacement of the bone and the permanent deformity. (R. pp. 37-38). Mack confirmed that the deformity was still present and visible under his clothing. (R. pp. 37-38).

Mack testified that he suffered from significant pain for several months after the collision. (R. p. 45). Mack further testified that he still suffered residually from pain and discomfort, especially when trying to pick up his children. (R. pp. 43-44). Mack testified that his present pain increases with the change in weather conditions, and when he wears a seatbelt. (R. p. 43-44). Mack testified that his mental health suffered significantly for several months after the collision. (R. pp. 45-46). Mack testified that his injuries affected his ability to do his job. (R. p. 62). Mack testified that he had suffered permanent physical injuries due to the displaced clavicle. (R. p. 64).

Mack's wife, Stephanie Mack, testified that her husband appeared to be in a lot of pain and in agony from his injuries. (R. pp. 68-69). Mrs. Mack testified that her husband experienced stress from the incident, was withdrawn, tossed and turned in bed, and appeared to be carrying a heavy weight from the trauma. (R. p. 69). Mrs. Mack also testified that her husband's clavicle did not completely heal and is still protruding. (R. p. 72). Mrs. Mack testified that her husband suffered from pain for months after the incident, and still experienced pain from his injuries. (R. pp. 73-74).

The jury received credible and uncontroverted testimony, including photographs, from Mack and his wife about pain, disfigurement, loss of enjoyment of life, and psychological injuries. Respondents did not dispute that Mack experienced *any* proximately caused pain. Respondents did not dispute that Mack experienced proximately caused disfigurement. Respondents did not dispute that Mack experienced *any* proximately caused mental anguish or loss of enjoyment of life. In fact, the jury found that Respondent Rudd's negligence was a proximate cause of Mack's injuries. (R. p. 14). Shockingly, the jury awarded $0 for these undisputed, proximately caused damages, even after being instructed that these losses were all proper elements of damages. (R. pp. 105-107).

Mack is entitled to compensation for his pain, suffering, disfigurement, loss of enjoyment of life, and mental anguish directly resulting from the wrongful acts of the Respondents. "Pain and suffering is recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed." *Harper v. Bolton*, 124 S.E.2d 54, 57, 239 S.C. 541, 547 (1962). "Separate damages are given for mental anguish where the evidence shows…that the injured person suffered shock, fright, emotional upset, and/or humiliation as the result of the defendant's negligence." *Boan v. Blackwell*, 343 S.C. 498, 501, 541 S.E.2d 242 (2001). Loss of

enjoyment of life is a basis for damages. *Id*. "Loss of enjoyment of life damages compensate the individual not only for the subjective knowledge that one can no longer enjoy all of life's pursuits, but also for the objective loss of the ability to engage in these activities." *Id.* Mack was further entitled to compensation for permanent disfigurement caused by the Respondents. *See, Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962); *Bonaparte v. Floyd*, 354 S.E.2d 40, 291 S.C. 427 (Ct. App. 1987).

The jury received extensive, undisputed testimony that Mack suffered pain, permanent disfigurement, was unable to participate in the normal activities of daily life, and experienced a significant impact on his mental health, causing him to be withdrawn, anxious, stressed, frustrated, self-conscious, and suffer an emotional toll. (R. pp. 33-46, 62, 64, 68-74). Respondents did not dispute, question in cross-exam, nor argue in closing that Mack was injured, suffered pain, and had disfigurement because of injuries in the collision. Respondents did not offer any witnesses to refute Mack's injuries.

Mack is "entitled to recover all damages proximately resulting from the negligent acts of the defendant…." *Watson v. Wilkinson Trucking Company,* 136 S.E.2d 286, 291, 244 S.C. 217, 228 (1964). There was no conflicting evidence that Mack experienced pain, suffering, and disfigurement from injuries in the collision. The jury's award of $0.00 in damages for pain, suffering, loss of enjoyment of life, permanent disfigurement, and mental anguish is shocking, grossly inadequate, the result of prejudice or influence outside of the evidence, and required the trial court to grant a new trial. The lower court abused its discretion in denying the motion for a new trial absolute and this Court should therefore reverse and remand the matter for a new trial.

CONCLUSION

In sum, Appellant was prejudiced by the lower court's allowance of testimony and argument absolutely barred by S.C. Code Ann. § 56-5-6160. The lower court further erred by allowing Respondents to ambush Appellant by publishing and discussing materials from its expert that were not produced prior to trial. Finally, the lower court erred by failing to grant a new trial absolute following a jury verdict that was shockingly disproportionate and indicative of prejudice, passion, caprice, partiality, or other improper motives.

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