

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

D. Garrison Hill, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-23-04585
Appellate Case No. 2013-000666

James L. Dawkins and Delphine Dawkins,Appellant,

v.

Troy Lee Watts, Jr.,Respondents.

RESPONDENTS' FINAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

A. THE TRIAL COURT DID NOT ERR BY REFUSING TO GRANT A NEW TRIAL WHERE NEGLIGENCE WAS ADMITTED, YET THE JURY RETURNED A VERDICT FOR THE DEFENDANT.

i. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL IN THIS UIM CASE TO REFER TO WATTS AS HIS CLIENT WHO DESERVES HIS ONE AND ONLY FAIR DAY IN COURT.

ii. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL TO PRESENT EVIDENCE THAT DAWKINS WAS ON DISABILITY ELEVEN YEARS PRIOR TO THE ACCIDENT.

iii. THE TRIAL COURT DID NOT ERR BY ALLOWING EVIDENCE THAT IN JUNE 2009 DAWKINS MAY HAVE HAD HEALTH INSURANCE.

STATEMENT OF THE CASE

This matter comes before the Court by way of a Summons and Complaint filed by the plaintiffs on July 11, 2011. That Summons and Complaint alleged that Troy Lee Watts, Jr., was negligent, with his negligence resulting in damages being sustained by James L. Dawkins and Delphine Dawkins. (R. pp. 7-9) Ultimately, the Summons and Complaint was served upon Troy Lee Watts, Jr., the primary defendant, and State Farm Mutual Automobile Insurance Company, the underinsured defendant. (R. pp. 10-13) An Answer was filed with regard to both defendants on August 23, 2011. That Answer admitted that Troy Lee Watts, Jr., was negligent. However, the Answer denied that Mr. Watts's negligence resulted in damages to the plaintiffs, and stated that if Plaintiff James L. Dawkins suffered any injury, the same was either preexisting in nature, or nonexistent. (R. pp. 14-17)

Mr. Watts's insurance carrier paid the Dawkinses \$25,000.00, in exchange for a Covenant Not to Execute. This was done prior to the suit being filed. (R. p. 573, line 6 – p. 574, line 1)

The case was then tried, with the jury ultimately rendering a "double verdict" by finding in favor of the defendant, with regard to both plaintiffs. The jury then reinforced its verdict by indicating damages in the amount of zero dollars, with regard to each plaintiff's damages portion of the verdict form. (R. p. 6)

The Dawkinses then filed a motion for a new trial nisi additur, or in the alternative, a motion for a new trial as to damages only. (R. pp. 882-889) The Court denied those motions. Thereafter, Plaintiff James L. Dawkins, only, appealed the order of the Court. (R. pp. 3-5; and, Appellant's Final Brief p. 2, footnote #1)

FACTS

The incident which gives rise to this appeal is an automobile accident which occurred on September 24, 2008. This accident involved Troy Lee Watts, Jr., hitting the side of James L. Dawkins's vehicle. (R. pp. 25-33) Delphine Dawkins was not in the vehicle at the time of the accident. James L. Dawkins brought suit as a result of his alleged injuries, and Delphine Dawkins brought suit as a result of her alleged loss of consortium. (R. pp. 7-9) At this point, there appears to be some misapprehension with regard to the facts as stated by appellant. To clarify, the defendants, Troy Lee Watts, Jr., and State Farm Mutual Automobile Insurance Company, answered the Complaint of the plaintiffs, with their Answer admitting that Mr. Watts was negligent, but denying that his negligence proximately caused any injuries to the plaintiffs. (R. pp. 14-17) In other words, the Answer clearly stated that defense counsel represents both Mr. Watts and State Farm Mutual Automobile Insurance Company. Furthermore, the defendants' Answer specifically stated that Mr. Dawkins's problems were the result of preexisting conditions, or, in the alternative, non-existent. (R. pp. 14-17)

Prior to suit being filed, Mr. Watts's carrier paid the Dawkinses \$25,000.00, in exchange for

a Covenant Not to Execute. (R. p. 573, line 6 – p. 574, line 1)

Following the filing of the defendants' Answer, the parties exchanged discovery. Thereafter, the matter was ultimately scheduled for trial. Prior to the beginning of the trial, the Dawkinses made a motion in limine, wherein they requested that Mr. Watts's counsel be prevented from cross-examining Timothy McHenry, M.D., one of Mr. Dawkins's physicians, with regard to issues of the plaintiff having been on social security disability and/or Medicare. Mr. Watts's counsel consented to this motion and, thereafter, the matter was called before the Court. (R. p. 468, line 12 – p. 469, line 9)

The first witness to offer testimony was Timothy McHenry, M.D. His testimony was given to the jury via *de bene esse* videotape. Dr. McHenry told the jury that Mr. Dawkins had preexisting degenerative changes in his neck and back. However, he stated that Mr. Dawkins was not having symptoms from those degenerative issues, prior to the automobile accident with Mr. Watts. As such, he opined that the accident had exacerbated Mr. Dawkins's neck and back problems. (R. p. 368, lines 8-17 and R. p. 374, lines 4-12) Dr. McHenry also told the jury that Mr. Dawkins would require neck and back surgery, at some point in the future. (R. p. 368, line 22 – p. 369, line 5) He then described the types of surgeries and the follow up treatment that the repair of Mr. Dawkins's problems would necessitate. Again, all of Dr. McHenry's testimony was prefaced upon the fact that Mr. Dawkins's neck and back problems were asymptomatic and/or doing well prior to the accident with Mr. Watts taking place and those problems were now so severe as to require surgery. Again, the date of that accident was 9/24/2008. (R. pp. 7-9)

Upon cross-examination, records were produced which revealed that Mr. Dawkins had received back surgery in 1985. (R. p. 383, lines 13-16) Furthermore, Mr. Dawkins was receiving steroid injections to his back on 5/5/1997, as a result of an automobile accident which occurred in

1997. (R. p. 383, line 23 – p. 384, line 19) It was then noted that the plaintiff was suffering from chronic low back pain on 6/30/2003. (R. p. 387, line 21 – p. 388, line 1) Thereafter, Mr. Dawkins advised a medical provider that he suffered from long-standing back problems, with his back issues being exacerbated by cold weather, on 11/14/2003. (R. p. 388, lines 2-7) The plaintiff was then being actively diagnosed with low back pain on 11/17/2003. (R. p. 388, line 24 – p. 389 line 16) Just as important, the plaintiff's active complaint of low back pain had been in existence since 1983. (R. p. 389, lines 17-23) In other words, at this point, his back had been an issue for twenty years. Furthermore, it was noted that the plaintiff continued to have an active diagnosis of back pain on 1/8/2004. (R. p. 390, lines 9-13) Mr. Dawkins then suffered a bout of elevated blood pressure, secondary to back pain, on 3/31/2004. (R. p. 390, lines 14-23) The plaintiff then continued with an active diagnosis of back pain on 05/06/2004. (R. p. 391, lines 5-8) He then went to a doctor wherein he was complaining of low back pain on 09/15/2004. (R. p. 391, line 25 – p. 392, line 22) Mr. Dawkins's active diagnosis of a low back problem continued to persist on the following dates: 10/04/2004; 11/15/2004; 12/14/2004; and, 01/14/2005. (R. p. 392, line 23 – p. 394, line 13) He was then having pain in his hip and leg on 01/18/2005. (R. p. 394, line 14 – p. 395, line 6) Thereafter, the plaintiff continued his active diagnosis regarding low back issues on 02/28/2005; 04/25/2005; 06/02/2005; 11/02/2005; 01/31/2006; 04/21/2006; and, 06/20/2006. (R. p. 395, line 7 – p. 399, line 20) He then specifically complained of low back pain on 09/21/2006. (R. p. 399, lines 21-25) Thereafter, he again complained specifically of low back pain on 06/28/2007. (R. p. 400, lines 4-22) Furthermore, Mr. Dawkins had an MRI performed on his low back on 06/12/2007, with those results being essentially identical to the ones from an MRI performed after the automobile accident in question. (R. p. 401, lines 1-22; R. p. 403, line 20 – p. 404, line 24; and, R. p. 438, lines 17-23) He then continued to complain of low back pain which was radicular in nature, on

09/13/2007. (R. p. 405, line 13 – p. 407, line 12) It was then noted that the plaintiff's back was causing him to have problems with sitting and intimacy on 9/26/2007. (R. p. 407, line 13 – p. 408, line 4) Thereafter, on 1/14/2008, he reported ongoing problems with lumbar neuritis. (R. p. 408, lines 5-25) He then had continued issues with lumbar neuritis on 01/28/2008. (R. p. 408, lines 5-25) Furthermore, the plaintiff was still reporting issues with low back pain on 3/10/2008. (R. p. 409, lines 15-19) Indeed, Mr. Dawkins was taking the prescription medication Celebrex as late as 08/26/2008. (R. p. 409, lines 20-22) Again, please recognize that the automobile accident in question occurred on 09/24/2008. In other words, contrary to what the doctor thought he understood, Mr. Dawkins had been suffering from a longstanding condition, which was producing symptoms and, in fact, requiring treatment, up to the time of the accident in question.

It is also important to note that Dr. McHenry also opined that surgery would be needed because of Mr. Dawkins's ongoing low back problems. (R. p. 368, line 22 – p. 369, line 11 and R. p. 374, line 24 – p. 375, line 11) At this point, it is important to note that the records revealed that Mr. Dawkins did not complain of a back injury at the scene. (R. p. 649, line 25 – p. 650, line 15) Just as important, records were then presented, via cross-examination, that Mr. Dawkins had canceled his physical therapy appointments on 11/21/2008 and 12/03/2008. (R. p. 416, lines 6-11) It was then noted that the plaintiff was not participating appropriately in his home exercise program on 12/10/2008, (R. p. 416, lines 12-14) and that he canceled another physical therapy appointment on 12/16/2008. (R. p. 417, lines 7-9) He was then discharged from physical therapy, due to his noncompliance, on 1/20/2009. (R. p. 417, line 10 – p. 418, line 8) Furthermore, on 03/23/2009 and 05/26/2009, he was cleared to have back surgery. (R. p. 419, lines 2-10) However, the proposed back surgery was never done. (R. p. 547, line 5 – p. 548, line 17) In fact, on 10/23/2009, he went to a medical provider and told them he was feeling much better. (R. p. 422, line 21 – p. 423, line 9)

Thereafter, on 03/01/2010, his musculoskeletal system was examined and found to be without spinal tenderness or instability, and with full range of motion and normal rotation. (R. p. 423, line 10 – p. 427, line 11) He then returned to a medical provider on 09/08/2010, wherein he made no mention of neck or low back issues. (R. p. 427, lines 12-15) Mr. Dawkins then visited an emergency room on 09/23/2010, wherein he specifically denied having back pain, and the emergency room's examination of the same corroborated the absence of an issue. Furthermore, the emergency room conducted a neurological review of his body, wherein they found that he had no radiating pain. (R. p. 427, line 16 – p. 429, line 12) The plaintiff then returned to the hospital on 10/16/10, wherein his gait was noted to be normal, and his back examination indicated a normal back, without tenderness. (R. p. 431, line 4 – p. 432, line 5) He then went to a different medical provider on 03/23/2011, wherein he denied any acute back exacerbations. (R. p. 432, lines 6-9) He then suffered a severe slip and fall incident on 06/21/2011. (R. p. 433, line 11 – p. 434, line 2) In essence, the doctor was of the opinion that the plaintiff needed low back surgery secondary to his ongoing complaints of pain. However, the medical records actually indicated the opposite. In other words, Mr. Dawkins's recorded complaints of low back pain had essentially ceased to exist.

Furthermore, Dr. McHenry's opinion with regard to Mr. Dawkins's neck issue was also given prior to his cross-examination. At this point it is important to note the records indicate that Mr. Dawkins did not complain of a neck injury at the accident scene. (R. p. 608, line 13 – p. 609, line 17) During Mr. Dawkins's cross-examination, records were presented which made it manifest that Mr. Dawkins was sent to physical therapy, after the accident in question, for problems with his low back and shoulder. In other words, he was not being seen for a neck issue. On 11/19/2008, a physical therapist stated that the plaintiff's symptoms were not consistent with any form of appropriate referral pattern, and were scattered from the lower extremity to the upper extremity. (R.

p. 446, line 24 – p. 447, line 4) Mr. Dawkins then cancelled physical therapy on 11/21/2008 and 12/03/2008. It was then noted that he was not complying with his home therapy program on 12/10/2008. (R. p. 447, lines 5-16) He then cancelled physical therapy on 12/16/2008. (R. p. 447, lines 17-19) Thereafter, he was discharged from physical therapy on 01/20/2009, as a result of his noncompliance. (R. p. 447, lines 20-22) He was then cleared to receive neck surgery on 05/26/2009. (R. p. 447, line 23 – p. 448, line 13) Thereafter, on 09/09/2009, the numbness in his fingers had improved in comparison to his prior condition. In fact, his musculoskeletal system was examined, and found to be without joint swelling, muscle aches, joint pain/pain in multiple joints, or weakness. (R. p. 448, line 14 – p. 449, line 12) He was then examined by Dr. McHenry on 09/09/2009, wherein it was noted that he did not appear to be in any acute distress, and his motor strength in his arms and legs was found to be five of five, which is a normal finding. (R. p. 449, lines 11-19) Thereafter, on 10/23/2009, he went to a medical provider so as to follow up regarding numerous medical issues. At that point, Mr. Dawkins stated that he was feeling much better. (R. p. 449, line 20 – p. 450, line 4) Then, on 03/01/2010, his neck was examined and found to have full range of motion, normal rotation, and no instability. (R. p. 450, lines 5-21) On 9/23/10, he specifically told a medical provider that he did not have any complaints with regard to his neck. (R. p. 450, line 23 – p. 451, line 21) He then went to the hospital on 10/16/2010, wherein he did not make any complains with regard to his neck. Indeed, their examination of his neck and upper extremities indicated that he had normal range of motion. (R. p. 451, lines 7-21) Thereafter, Mr. Dawkins went to an appointment with Dr. McHenry, the testifying physician, on 06/21/2011. Dr. McHenry noted that he was not having significant neck pain at that time. (R. p. 452, lines 4-13) He then went back to the hospital on 06/22/2011, wherein he specifically denied any complaint of neck pain. In fact, the hospital's examination of his neck and upper extremities indicated that his range of

motion was normal. (R. p. 452, line 14 – p. 454, line 17) In other words, his recorded neck problems and upper extremity problems had essentially resolved.

The next person called to testify was Penny Cates, a certified life care and medical costs projection expert. She testified that Mr. Dawkins's neck and back surgeries would cost \$222,416.00. (R. p. 542, lines 13-25) However, upon cross-examination, it was apparent that Mr. Dawkins had been cleared to receive neck and back surgery in 2009. However, he did not complete that surgery in 2009, 2010, 2011, 2012, or 2013. (R. p. 543, line 19 – p. 545, line 10) Ms. Cates then had to concede that absent the surgery in question actually being performed, the cost figure she gave the jury would not be incurred. (R. p. 548, line 9 – p. 551, line 9)

Mr. Dawkins then offered his testimony, wherein he told the jury that the automobile accident in question caused him to suffer from pain that was primarily located in his neck, left shoulder, and low back. (R. p. 558, lines 8-14) Surprisingly, he told the jury that he did not have surgery on his neck or back because he did not have the ability to pay for the same. (R. p. 557, line 25 – p. 558, line 7 and R. p. 566, line 12 – p. 567, line 13) However, upon cross-examination, Mr. Dawkins had to concede that he had been scheduled for surgery in the month of May 2009. (R. p. 585, lines 13-16) Just as important, records were produced revealing that, he was in possession of a Blue Cross Blue Shield insurance card, which had an issue date through 01/01/2008. (R. p. 585, line 22 – p. 586, line 4) He then had to concede that he completed a document on 11/12/2008, wherein he listed Blue Cross Blue Shield as his insurance provider. (R. p. 586, lines 5-20) On 12/22/2008, he again listed Blue Cross Blue Shield as his insurance carrier. (R. p. 586, line 21 – p. 588, line 3) Thereafter, while he was going through the pre-clearance procedures for surgery, records were produced where he, again, presented his Blue Cross Blue Shield information. This took place on or about 06/08/2009. (R. p. 588, line 4 – p. 590, line 23) Furthermore, on 07/07/2009, he confirmed

that he had insurance coverage, and that he would pay the difference left over from what his insurance policy would not cover, regarding his surgery. (R. p. 590, line 24 – p. 591, line 6) Indeed, he then stated that he had access to \$10,000.00 in 2009. (R. p. 591, lines 7-9) In essence, Mr. Dawkins could have funded his surgery, if he so chose.

Mr. Dawkins then told the jury that he would tell a medical provider of his ongoing neck problems, from the date of the accident until the time of the trial, if he were to see one. (R. p. 608, lines 9-12) However, he had to admit that the EMS report from the date of the accident in question, made no mention of neck issues. (R. p. 608, line 13– p. 609, line 17) He then failed to mention a neck problem when he initially went to see his general practitioner. (R. p. 609, lines 18-25) Thereafter, on 10/23/2009, he stated that he felt much better. (R. p. 610, line 1 – p. 611, line 5) He was then at the hospital on 09/23/2010, wherein he informed them that he was having no neck pain. (R. p. 611, line 6 – p. 612, line 14) He then returned to the hospital on 10/16/2010, where his upper extremities were examined and found to be normal. (R. p. 613, lines 4-14) He then went to see Dr. McHenry on 06/21/2011, wherein he did not complain of muscle aches, joint pain, or pain in multiple joints. In fact, on that date, he specifically told Dr. McHenry that he was not having significant neck pain. (R. p. 614, line 5 – p. 615, line 25) Indeed, on 06/22/2011, he visited the hospital, wherein he specifically denied a neck problem, and his neck was found to be normal upon examination. The same was true with regard to his shoulders and arms. (R. p. 616, lines 1-18) Simply stated, records were produced which revealed that he went to numerous doctors wherein his neck and upper extremity issues were not mentioned.

Mr. Dawkins then had to concede that there were three occasions wherein he could have accurately informed medical providers as to when his low back problems actually began. (R. p. 619, lines 6-8) On each such occasion, he stated that his low back problems began on 09/24/2008,

the date of the accident in question. (R. p. 619, line 9 – p. 623, line 12) However, Mr. Dawkins then had to concede that his medical records indicated that he was having low back problems as far back as 1985, when he actually received surgery for the same. (R. p. 622, lines 8-24) He then had to concede that he was receiving steroid injections for his back on 05/05/1997. These injections were being done as a result of a complaint that arose from an automobile accident which occurred at some point during that time frame. (R. p. 623, line 25 – p. 624, line 18) Indeed, he had to admit that at one point, his low back problems were severe enough to have caused him to be placed on social security disability. (R. p. 633, line 7 – p. 635, line 20) He was then complaining of chronic low back pain on 06/03/2003. (R. p. 635, line 21 – p. 636, line 5) He then complained of low back problems that were exacerbated by cold weather on 11/14/2003. (R. p. 636, lines 6-12) He then continued to complain of low back pain on 11/17/2003, wherein he stated that his back issues had been in existence for approximately twenty years. (R. p. 636, line 13 – p. 637, line 4) Furthermore, Mr. Dawkins visited medical providers with regard to low back issues on the following dates: 01/08/2004; 03/31/2004; 05/06/2004; 09/15/2004; 10/04/2004; 11/15/2004; 12/14/2004; 01/14/2005; 01/18/2005; 02/28/2005; 06/02/2005; 01/31/2006; 04/21/2006; 06/22/2006; 06/28/2007; 07/12/2007; 08/27/2007; 09/13/2007; 09/26/2007; 01/14/2008; 01/28/2008; and, 03/10/2008. (R. p. 637, line 5 – p. 645, line 1) Indeed, he was utilizing the prescription medication Celebrex on 8/26/2008. (R. p. 409, lines 20-22 and R. p. 644, line 23 – p. 645, line 1) Again, please recognize that the accident in question took place on 9/24/2008. (R. p. 645, lines 2-4) In other words, on three separate occasions, Mr. Dawkins did not accurately inform medical providers as to when his low back problem actually began.

Please note, Mr. Dawkins did not complain of a back problem at the scene of the accident, despite all of the above preexisting problems. (R. p. 649, line 25 – p. 650, line 15)

It is also important to note that Mr. Dawkins continued to be employed after the accident. In fact, he made no lost wage claim, whatsoever. (R. p. 553, line 25 – p. 554, line 2 and R. p. 664, lines 2-11)

Following Mr. Dawkins, Delphine Dawkins was called to testify. Ms. Dawkins told the jury that her observation of Mr. Dawkins suggested that he became a changed person after the accident in question. (R. p. 673, line 1 – p. 675, line 12) However, during cross-examination, Ms. Dawkins had to admit that she was not living with Mr. Dawkins, as of 11/12/2008. Again, please note that our accident took place on 09/24/2008. Furthermore, Ms. Dawkins stated that she and Mr. Dawkins had gotten married in April of 2008, and were still living separately, potentially as late as April of 2009. (R. p. 675, line 17 – p. 680, line 22) She then told the jury that their rationale for living in different homes was the result of the fact that they did not have enough money to combine households, thus requiring them to occupy two homes. (R. p. 677, lines 4-10) This separate living arrangement placed Ms. Dawkins's ability to observe Mr. Dawkins into question.

Finally, Mr. Watts testified that he caused the accident. However, he told the jury that when he went to check on Mr. Dawkins, Mr. Dawkins was initially fine. (R. p. 685, line 23 – p. 687, line 18) Again, there appears to be some confusion regarding appellants' understanding of these facts. Mr. Watts did not admit responsibility for an ambulance ride, emergency room visit, or any other related treatment. In fact, Mr. Watts actually stated that he had questions as to how Mr. Dawkins could have been injured, given the type of accident that transpired. (R. pp. 25-33; R. p. 592, line 2 – p. 593, line 20; and, R. p. 687, line 15 – p. 688, line 5)

Both parties then presented their respective closing arguments. Plaintiffs' counsel presented a case for an award of \$21,680.21 in past medical expenses, and \$223,416.00 in future medical expenses. (R. p. 697, line 15 – p. 698, line 7) Defense counsel presented a case for a verdict for the

defendant. (R. p. 707, line 23 – p. 708, line 6) Ultimately, after deliberation, the jury returned two verdicts for the defendant, one with regard to each plaintiff. (R. p. 741, lines 3-9 and R. p. 6)

After the verdicts were rendered, the Court asked the jury if it maintained its decision. In response, all twelve jurors affirmed the verdicts. (R. p. 741, lines 10-13)

The Court then asked the Dawkinses if they would like to hold the jurors, pending motions. This request was declined. (R. p. 741, lines 14-20) After the jurors were released, Mr. and Ms. Dawkins made a motion for a new trial nisi additur, and a motion for a new trial on damages only. (R. pp. 882-889) Both of those motions were properly denied.

ARGUMENTS

A. THE TRIAL COURT DID NOT ERR BY REFUSING TO GRANT A NEW TRIAL WHERE NEGLIGENCE WAS ADMITTED, YET THE JURY RETURNED A VERDICT FOR THE DEFENDANT.

Mr. Dawkins is somewhat confused as to the facts regarding this issue. The jury was presented with the evidence noted above, and returned its verdict for the defendant against both of the Dawkinses. Please remember that the defendants never admitted liability for any damages to the plaintiffs. The Dawkinses then asked the Trial Court to grant them a new trial nisi additur, or, in the alternative, a new trial as to damages only. These requests were properly denied.

The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Umhoefer v. Bollinger*, 298 S.C. 221, 379 S.E.2d 296 (Ct.App.1989). See also *Boozer v. Boozer*, 300 S.C. 282, 387 S.E.2d 674 (Ct.App. 1988) (Court of Appeals has no power to review trial court's ruling unless it rests on the basis of fact wholly unsupported by evidence or is controlled by error of law). In deciding whether to assess

error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inference to be drawn therefrom in the light most favorable to the nonmoving party. *Umhoefer*, supra. While the trial judge may not impose his will on a party by substituting his judgement for that of the jury, he may give the party an option in the way of additur or remittur, or, in the alternative, a new trial. *Jones v. Ingles Supermarkets, Inc.*, 293 S.C. 490, 361 S.E.2d 775 (Ct.App. 1987). The consideration of a motion for a new trial nisi additur requires the trial judge to consider the adequacy of the verdict in the light of the evidence presented. *Patterson v. Reid*, 319 S.C. 183, 456 S.E.2d 436 (Ct.App. 1995). The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). Accordingly, great deference is given to the trial judge. *Id.* Finally, the denial of a motion for a new trial nisi is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

In short, the evidence demanded a verdict in favor of the defendant. The Trial Court correctly refused the plaintiffs' motions, and there was no abuse of discretion. Indeed, to have ruled otherwise would have been an abuse of the Trial Court's discretion.

If the above were not true, the following still applies. The jury was presented with evidence that Mr. Dawkins had suffered from longstanding, preexisting conditions. Furthermore, he initially claimed to be uninjured when he spoke to Mr. Watts, after the accident. Thereafter, when Mr. Dawkins did claim an injury, it did not include his neck or back. He then proceeded to go to physical therapy, wherein the physical therapist essentially stated that Mr. Dawkins appeared to be alleging an injury that did not exist. He was then discharged from physical therapy for being noncompliant. Thereafter, he was scheduled for a surgery that he never actually received. This was

done despite the fact that he had the ability to pay for the surgery. Thereafter, his complaints seemed to diminish and/or resolve completely.

Counsel for appellant is correct in so far as all of this information was produced without the use of an expert on behalf of the defendant. However, one must recognize that a defendant is not required to produce an expert when contradicting the testimony of a plaintiff and/or his or her expert or experts.

Appellant is incorrect when characterizing the Jury's verdict. The jury was presented with the evidence, and actually returned a verdict as follows:

1. We the jury, by unanimous consent find:

\$ 0 actual damages.

✓ for defendant, Troy Lee Watts, Jr., and,

2. We the jury, by unanimous consent find:

\$ 0 actual damages.

✓ for defendant, Troy Lee Watts, Jr.

In essence, please recognize that the jury did not simply return a verdict for zero damages. In fact, it found for the defendant and underscored the decision by awarding zero damages to both plaintiffs.

Once the jury returned its verdict, the Court asked the Dawkinses if they wanted to hold the jurors so as to make motions. The Dawkinses declined this request.

The issues associated with the defendant having to bring its own expert is settled in the law. "A jury can disregard an expert's opinion, entirely, if the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence. An expert witness's testimony is to be given no greater weight than that of other witnesses simply because the witness

is an expert, and a jury does not have to accept an expert's opinion even though it is uncontradicted." *Berkeley Elec Coop., Inc. v. South Carolina Public Serv. Comm'n* 304 S.C. 15, 402 S.E.2d 674 (S.C. 1991). In fact, the Court of Appeals has issued a ruling exactly on this point. The case in question is *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (S.C.App. 1996). The *Vinson* Court ruled that a defendant need not bring any experts of it's own. In fact, the *Vinson* Court specifically approved the type of cross-examination of experts and lay people as was done in this case. Furthermore , our courts have also given us guidance in cases where the jury has actually returned a verdict where liability was established, yet zero damages were awarded to the plaintiff. Again, contrary to the assertion of the appellant, this case involved defendants who admitted negligence only. Regardless, in *Stevens v. Allen*, 242 S.C. 47, 536 S.E.2d 663 (S.C. 2000) the jury was presented with a factually inconsistent verdict. In that case, Stevens had brought suit against Allen, wherein is was alleged that Allen was driving a vehicle which caused the death of Stevens. The jury returned a verdict stating both Stevens and Allen were fifty percent negligent, yet it awarded Stevens zero damages. The Trial Court was then asked to resubmit the verdict to the jury, as the verdicts were inconsistent. The court denied that motion. The Court of Appeals then reversed the Trial Court, and the matter ultimately went before the Supreme Court. The Supreme Court then told us that a court, when presented with an inconsistent verdict, and after an objection is raised by the party suffering as a result of the inconsistent verdict, is to resubmit the matter to the jury. Thereafter, the Court must inform the jury that it must return a verdict in favor of the defendant, or award the plaintiff at least some nominal amount of damages. After the jury returns its revised verdict, it is within the provence of the Trial Court to order a new trial nisi or a now trial absolute.

Again, this case has no issue of an inconsistent verdict. The jury found for the defendant

with regard to both plaintiffs, and underscored that fact by putting a "0" in the actual damages portion of the verdict form column. Even if it could be argued that the verdicts were inconsistent, the proper means for resolving that inconsistency is to ask the court to resubmit the case to the jury, and have the same direct the jury to render a verdict for defendant or the plaintiff in at least a nominal amount. The Court gave the Dawkinses this opportunity, and the Dawkinses stated that the jurors could leave. Just as important, the Dawkinses never objected to the form of the verdict, nor did they mention an inconsistency. Under these circumstances, the Court has no choice but to allow the allegedly inconsistent verdict to stand. Again, one must raise the objection and make the request at a time wherein the matter can be appropriately addressed. In essence, the Dawkinses failed to preserve the alleged inconsistency for appeal and, as such, cannot raise the same at this time.

In conclusion, the jury's verdict was not inconsistent. That fact is why no objections were raised, and why no requests to make the verdict consistent were made. Consequently, the Court then properly refused to grant the Dawkins' post trial motions.

I. THE TRIAL COURT DID NOT ERR BY ALLOWING DEFENSE COUNSEL TO REFER TO WATTS AS HIS CLIENT WHO DESERVES HIS ONE AND ONLY FAIR DAY IN COURT.

Again, despite the appellant's assertion, defense counsel represented both Mr. Watts and State Farm Mutual Automobile Insurance Company. This information was clearly set forth in the Answer to the Complaint, and it did not change at any point during the course of litigation. Even if this were not the case, and defense counsel only represented the underinsured carrier, State Farm Mutual Automobile Insurance Company, South Carolina's law clearly allows the underinsured carrier to appear and defend in the name of the underinsured motorist. Again, defense counsel

represented Mr. Watts, and that representation was apparent from the moment the Answer was filed.

S.C. Code Ann. Section 38-77-160 states, in pertinent part, “The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.”

To preserve an issue for appellate review, the issue must have been raised to and ruled upon by the Trial Court. *Durham v. Vinson*, 360 S.C. 369, 602 S.E.2d 360 (S.C. 2004). An issue not raised at trial is waived on appeal. If counsel fails to make an offer of proof regarding excluded evidence, there is nothing to review on appeal. In the absence of any indication that the excluded testimony would have benefitted the appellant, the error is harmless. *State v. Harris*, 311 S.C. 162, 427 S.E.2d 209 (S.C. App. 1993).

Again, no misrepresentation as to Mr. Watts’s status existed. Mr. Watts was represented by defense counsel. This was made evident by and through defense counsel’s Answer, (R. pp. 14-17) and in Mr. Watts’s opening statement. The Dawkinses did not object to the opening statement. (R. p. 505, line 12 – p. 506, line 3 and R. p. 511, lines 6-22) In fact, the issue first appeared during the cross-examination of Mr. Watts. At that point, plaintiffs’ counsel stated to Mr. Watts, “Now, at the beginning of the case, Mr. McGarr said that this was Troy’s day in court. He was referring to you?” Mr. Watts then responded affirmatively. Plaintiffs’ counsel then stated, “...and he, (meaning McGarr), referred to you as his client?” In response to that question, Mr. Watts again answered affirmatively. (R. p. 691, line 24 – p. 692, line 4) Thereafter, the attorneys then engaged in a bench conference, after which point the “issue” was never presented again, secondary to the fact that Mr. Watts was represented by defense counsel. (R. p. 692, lines 5-25) Furthermore, even if Mr. Watts were not represented by defense counsel, it would have been incumbent upon the Dawkinses to raise that issue before the Court, and on the record. If the court had ruled, and had ruled against the

Dawkinses, then they would have needed to proffer the testimony for which they felt was important. In the case before the Court, none of this occurred. In essence, even if Mr. Watts were not Mr. McGarr's client, issues associated with the lack of an attorney-client relationship were not preserved for appeal.

Again, Mr. Watts was and remains defense counsel's client. Regardless of whether or not Mr. Watts was defense counsel's client, an underinsured defendant has the right to appear and defend in the name of Mr. Watts, as set forth by the laws of South Carolina.

Finally, even if all of the above were not true, this "issue" was not preserved for appeal, and is not properly before the Court.

ii. THE TRIAL COURT ERRED BY ALLOWING DEFENSE COUNSEL TO PRESENT EVIDENCE THAT DAWKINS WAS PREVIOUSLY ON DISABILITY.

Unfortunately, Mr. Dawkins is again confused as to this issue. A motion in limine was made to prevent defense counsel from questioning Mr. Dawkins's medical expert with regard to Mr. Dawkins having been or being on disability. Defense counsel then explained that he was under the misapprehension that Mr. Dawkins was on disability at the time he was being treated by the medical expert. This turned out to be incorrect, and defense counsel volunteered to remove that line of questioning from the expert's deposition. During that motion in limine, there was no mention of removing Mr. Dawkins's disability status, secondary to the previous severity of his low back pain. (R. p. 468, line 12 – p. 469, line 9) Unfortunately, during direct and cross-examination, Mr. Dawkins, surprisingly, indicated that he had experienced back problems, prior to the automobile accident in question. However, those back problems were not as severe as they were after the accident. When the issue of prior disability was about to be presented, plaintiffs' counsel made a motion to exclude that evidence. The Court then had defense counsel proffer the questions that he

would be asking. Thereafter, the Court agreed that the issue of disability was relevant, and would not confuse the jury. Defense counsel then asked Mr. Dawkins if he had, in fact, stated that his problems were more severe after the automobile accident than they had been before the accident. Mr. Dawkins replied affirmatively. As such, defense counsel asked Mr. Dawkins if his prior back problems had, at one point, caused him to be disabled to the point that he was incapable of working in any capacity, and on total and permanent disability. Mr. Dawkins again responded affirmatively.

It is well settled that the admission and rejection of testimony are matters largely within the trial court's sound discretion, the exercise of which will not be disturbed on appeal absent an abuse of that discretion. *Burrows v. Worsham*, 352 S.C. 382, 574 S.E.2d 215 (S.C.App. 2002). A trial judge's decision regarding the comparative, probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 195 (S.C. 2007).

Mr. Watts alleged, in his Answer, that Mr. Dawkins's problems, if in existence, were preexisting in nature. As such, the nature and extent of Mr. Dawkins's preexisting conditions, including his back condition, would have been probative, regardless. However, it became extremely relevant when Mr. Dawkins told the jury that his preexisting conditions were insignificant compared to the problems he had suffered since the automobile accident. Mr. Dawkins then clearly testified that he continued to work after the automobile accident in question. However, it was made clear that a number of years before the accident, Mr. Dawkins's low back problems were so severe that he was disabled and incapable of working in any capacity whatsoever. Obviously, a jury cannot determine if someone has a preexisting condition, nor can it determine if a witness is credible, if it does not have this type of contextual evidence.

As a result, the Court correctly determined that the low back disability issue was relevant,

probative, and not prejudicial. The Court was absolutely correct. As such, the Court did not abuse its discretion.

iii. THE TRIAL COURT ERRED BY ALLOWING EVIDENCE THAT IN JUNE 2009 DAWKINS MAY HAVE HAD HEALTH INSURANCE.

During direct examination, Mr. Dawkins was asked if he and his doctor had discussed surgical intervention. Mr. Dawkins confirmed that surgery had been discussed, and that it had been determined that he needed surgery on his neck and low back. However, and somewhat surprisingly, he then advised the jury that he lacked the necessary funds required to pay for those surgeries. Upon cross-examination, this question was raised again. In response, Mr. Dawkins again stated that he did not have the money to pay for neck and back surgery. It is important to remember that this statement was being made in January of 2013. The automobile accident in question took place in September of 2008, and Mr. Dawkins had been cleared to receive neck and back surgery by no later than May 26, 2009. The Trial Court then heard Mr. Dawkins's objections. None of these objections were related to the documents then being presented. It then required defense counsel to proffer the questions that would be asked. The Court thereafter ruled that, given the fact that Mr. Dawkins stated that he did not have the ability to pay for the surgeries in question, defense counsel would be allowed to discuss the fact that Mr. Dawkins had health insurance and access to at least \$10,000.00, at the time the surgeries were supposed to have been performed.

An identical matter was brought to the Court's attention in a *Bonaparte v. Floyd*, 291 S.C. 427, 354 S.E.2d 40 (S.C.App. 1987). In *Bonaparte*, Bonaparte testified on direct examination that she neglected follow up visits with her surgeon, Lutz, and her psychiatrist, Dr. Rosen, because she was financially unable to continue seeing them. The trial judge permitted opposing counsel to cross-examine Bonaparte regarding her medical insurance coverage, so as to impeach her testimony.

Bonaparte then alleged that the issue of medical insurance should not have been admitted, due to the lack of a sufficient foundation, and because it violated the collateral source rule. The Appellate Court unequivocally stated that such evidence had relevance to the testimony of the witness, and, as such, was admissible. In other words, the Court has stated that insurance and other collateral sources are admissible if a witness is alleging that he or she does not have the ability to pay for medical treatment. The same is true if a witness has received funds from a prior claim. This is seen in the case of *Rauch v. Zayas*, 284 S.C. 594, 327 S.E.2d 377 (S.C.App. 1985).

Obviously, under normal circumstances, collateral sources may not be brought to a jury's attention. However, if a witness opens the door by saying he or she could not pay for treatment secondary to a lack of funds, then collateral sources which could have been used for such payment are relevant and admissible. Again, the Trial Court's ruling on this issue was absolutely correct.

CONCLUSION

In conclusion, the Trial Court should be commended for ruling correctly on the issues properly set forth. Were it not for the appellants' misapprehension of both the facts and what was actually presented to the court, this matter probably would not have been appealed. Again, the Trial Court correctly ruled on the issues presented. Furthermore, it was incapable of ruling on the issues which are only now being presented. The Court then sent the matter to the jury. Consequently, the jury returned a rational and well-considered decision. As a result, the appellants' request should be denied. Given that there is no evidence of passion, caprice, prejudice, partiality, corruption, or other improper motive, the Court had no alternative but to let the jury's verdict stand.

Respectfully submitted,



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September 19, 2014

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

D. Garrison Hill, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-23-04585
Appellate Case No. 2013-000666

James L. Dawkins and Delphine Dawkins,Appellant,

v.

Troy Lee Watts, Jr.,Respondents.

PROOF OF SERVICE

I certify that I served the Respondents' Final Brief; and, a corresponding Proof of Service on James L. Dawkins and Delphine Dawkins by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to their attorney's of record, Donald R. Moorehead, Esq. at his office at 880 South Pleasantburg Drive, Suite A-3, Greenville, SC 29607 and, Cynthia B. Patterson, Esq. at P.O. Box 6786, Columbia, SC 29260 on September 23, 2014.

September 23, 2014



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