THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

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SC Court of Appeals

Trial Court Case No. 2015-CP-10-00330
Appellate Case No. 2016-001541

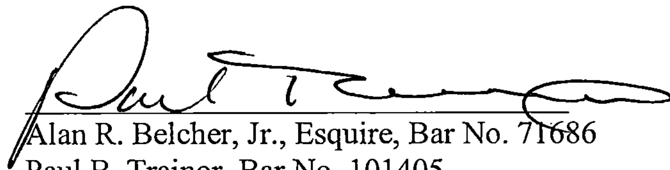
GARY NESTLER AND JULIE NESTLER, Appellants,

v.

JOSEPH E. FIELDS, Respondent.

INITIAL BRIEF OF RESPONDENT

Respectfully submitted,



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Dated: February 16, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii
STATEMENT OF THE CASE 1
FACTS OF THE CASE 2
RESPONDENT'S ARGUMENTS 3

I. APPELLANT'S CONDUCT AND STATEMENTS AT TRIAL, AND HIS FAILURE TO ASSERT TIMELY OBJECTIONS, CONSTITUTE A WAIVER OF APPELLANT'S ARGUMENTS ON APPEAL, AND, EVEN IF APPELLANT PROPERLY PRESERVED THE ISSUES FOR APPEAL, THE EVIDENCE PRESENTED WAS RELEVANT TO THE ISSUE OF DAMAGES 3

A. Appellant's argument that the medical expenses are irrelevant is without merit due to Appellant's own conduct at trial and Appellant's failure to object to the trial court's jury charge regarding actual damages or to the allegedly improper verdict. 4

i. Appellant waived any objection to the relevancy of his medical expenses through his own conduct at trial 4

ii. Appellant failed to object to the jury charge regarding actual damages, and, therefore, waived any argument that he was not seeking recovery of medical expenses 6

B. Even if Appellant had preserved the issue for appeal, Appellant has failed to demonstrate that the trial court abused its discretion in allowing evidence of Appellant's medical expenses 9

C. Appellant's arguments, even if accepted, do not demonstrate an improper verdict, and would create precedent contrary to public policy and South Carolina law 11

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE, AND THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT 14

i. Appellant misconstrues South Carolina law in asserting that a jury is required to award pain and suffering if it awards medical expenses as a form of actual damages 15

ii. The jury, in its sole discretion, reasonably could have discredited or disregarded evidence of Appellant's alleged non-economic damages 18

III. EVIDENCE WAS PRESENTED TO SUPPORT A FAILURE TO MITIGATE JURY CHARGE, AND APPELLANT HAS FAILED TO DEMONSTRATE OR EVEN ALLEGE PREJUDICE RESULTING FROM THE CHARGE 21

CONCLUSION 24

TABLE OF AUTHORITIES

CASES

Bailey v. Peacock, 318 S.C. 13, 455 S.E.2d 690, 692 (1995) 14
Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991) 18
Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) 7
Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) 22
Conner v. City of Forest Acres, 363 S.C. 460, 611 S.E.2d 905 (2005) 9
Doe v. S.B.M., 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997) 3
Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 560 S.E.2d 894 (2002) 6, 8
Elam v. S.C. Dep't of Transp., 361 S.C. 9 602 S.E.2d 772 (2004) 14
Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990) 14
Green v. Greenville County, 176 S.C. 433 180 S.E. 471 (1935) 18
Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539 694 S.E.2d 1 (2010) 18
Howard v. Roberson, 376 S.C. 143 654 S.E.2d 877 (Ct. App. 2007) 14, 15
Jennings v. McCowan, 215 S.C. 404 55 S.E.2d 522 (1949) 13
Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992) 3
State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) 9, 10
State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) 3
State v. Ward, 374 S.C. 606, 649 S.E.2d 145 (Ct. App. 2007) 22
State v. Wright, 269 S.C. 414, 237 S.E.2d 764 (1977) 18
Vaughn v. City of Anderson, 300 S.C. 55, 386 S.E.2d 297 (Ct. App. 297) 6
Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996) 14, 18
Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) 11, 15, 16, 17, 25
Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006) 14

STATUTES

S.C. Code Ann. § 38-77-160 1

COURT RULES

Rule 220(c) SCACR 25
Rule 68 SCRCP 1
Rule 401 SCRE 11
Rule 402 SCRE 11
Rule 403 SCRE 4, 11

STATEMENT OF THE CASE

The present action stems from a motor vehicle accident on March 8, 2014 involving Plaintiff Gary Nestler (hereinafter "Appellant") and Defendant Joseph Fields (hereinafter "Respondent"). Appellant and his wife, Julie Nestler, filed suit against Respondent alleging negligence, carelessness, recklessness, and loss of consortium, seeking recovery of actual and punitive damages. See generally Pls.' Compl; Pls.' Compl. ¶ 11 (filed Jan. 15, 2015).[1] On April 20, 2015, QBE North America timely filed an Answer as Underinsured Motorist Carrier pursuant to S.C. Code Ann. § 38-77-160 on behalf of Respondent. On November 16, 2015, Respondent filed an Offer of Judgment pursuant to Rule 68 of the South Carolina Rules of Civil Procedure for $40,000 (representing $15,000 in UIM funds), which was rejected. See UIM Carrier QBE Insurance Company's Offer of J. to Pls. (filed Nov. 16, 2015).

This case proceeded to a jury trial on April 25, 2016, at which time Plaintiff Julie Nestler withdrew her loss of consortium claim, leaving only Appellant's claim for bodily injuries. Trial Tr. 4:13–23 (April 25, 2016). The jury rendered a verdict for $7,117.50 in actual damages and $0 in punitive damages. Trial Tr. 205:8–13 (April 26, 2016). The trial court granted the parties ten days to submit post-trial motions. Trial Tr. 207:10–11 (April 26, 2016). On May 4, 2016, Respondent submitted its Motion for Setoff and, on May 6, 2016, submitted its Motion for Costs Pursuant to Offer of Judgment. See UIM Carrier QBE North America's Mot. for Setoff (served May 4, 2016); UIM Carrier QBE North America's Mot. for Costs Pursuant to Offer of J. (served May 6, 2016). Also on May 6, 2016, Appellant filed its Motion for New Trial Absolute, identifying twenty-four (24) grounds for a new trial. On June 1, 2016, the trial court granted Respondent's Motion for Setoff. See Order Granting Mot. for Setoff and Satisfying J. (filed June

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[1] Prior to filing suit against Respondent, Plaintiffs settled with Defendant's liability carrier for $20,000 of the available $25,000 policy limits.

1, 2016). On July 11, 2016, the trial court denied Appellant's Motion for New Trial Absolute and granted Respondent's Motion for Costs. See Order Denying Pls.' Mot. for New Trial, and Granting Defendant's Mot. for Costs (filed July 11, 2016). Subsequently, Appellant filed the present appeal on July 26, 2016.

FACTS OF THE CASE

Respondent generally accepts the facts as outlined in Appellant's initial brief. In his Complaint, Appellant sought to recover for "great physical harm and injury . . . considerable medical treatment . . . and has been otherwise injured and damaged, all to his detriment." Pls.' Compl. ¶ 11. At trial, Respondent admitted simple negligence, leaving only damages for the jury's determination. Trial Tr. 5:6–7 (April 25, 2016).

Julie Nestler offered testimony regarding Appellant's alleged damages. Trial Tr. 43:1–47:15 (April 25, 2016). Appellant also presented the video deposition of Dr. Robert Schoderbek. Trial Tr. 49:16–17 (April 25, 2016). Dr. Schoderbek offered testimony regarding his personal and professional relationship with Appellant, opinions regarding the subjectivity of pain, reasons for referring patients to other providers, and the numerous referrals and recommendations to Appellant. See generally Pls. Ex. 3. Appellant also testified at trial regarding his alleged damages. Trial Tr. 59:5–146:9 (April 26, 2016). During cross-examination, Appellant was asked about his medical treatment and expenses. Trial Tr. 128:15–130:10 (April 26, 2016). Appellant was also asked questions regarding a prior claim for bodily injuries that he failed to disclose in discovery. Trial Tr. 114:13–120:18 (April 26, 2016).

During deliberation, the jury submitted two questions to the parties, initially requesting to see copies of the medical bills, and then requesting the total amount of medical expenses. Ct. Ex. 1, 2. In response to the first question, the parties responded by advising the jury that the

medical bills were not entered into evidence, and declined to provide the medical bills. Ct. Ex. 1. As to the second question, the parties agreed to provide the total amount of Appellant's medical expenses. Ct. Ex. 2. Thereafter, the jury rendered an award for Appellant for $7,117.50.

RESPONDENT'S ARGUMENTS

I. APPELLANT'S CONDUCT AND STATEMENTS AT TRIAL, AND HIS FAILURE TO ASSERT TIMELY OBJECTIONS, CONSTITUTE A WAIVER OF APPELLANT'S ARGUMENTS ON APPEAL, AND, EVEN IF APPELLANT PROPERLY PRESERVED THE ISSUES FOR APPEAL, THE EVIDENCE PRESENTED WAS RELEVANT TO THE ISSUE OF DAMAGES[2]

Appellant strongly contends throughout his post-trial motion and initial brief on appeal that he did not seek recovery for medical expenses, while preserving all remaining actual, non-economic damages.[3] Appellant first argues that his medical expenses had no bearing on his alleged non-economic damages, and identifies numerous cases, all from other jurisdictions other

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[2] As a preliminary matter, Respondent contends that Appellant failed to preserve this issue for appeal by failing to assert a contemporaneous objection when evidence of Appellant's medical expenses was introduced. "[O]bjections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal." Parr v. Gaines, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992). "[A] contemporaneous objection is necessary in all trials . . . to properly preserve errors for our direct appellate review." State v. Torrence, 305 S.C. 45, 71, 406 S.E.2d 315, 329 (1991). "A contemporaneous objection is required to properly preserve an error for appellate review." Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 881 (Ct. App. 1997). "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." Id. (emphasis added).

At trial, the undersigned counsel advised the trial court that it intended to cross-examine Appellant on the amount of his medical bills, but also advised that the actual bills would not be entered into evidence or shown to the jury. Trial Tr. 111:16–22 (April 26, 2016). At that time, Appellant contended that the medical bills were not relevant. Trial Tr. 111:23–24 (April 26, 2016). After the trial court ruled that it would permit the introduction of the amount of medical expenses, Appellant's counsel stated, "If they're going to put them in then we would ask that we modify the charge. We can talk about that later on to include charge or [sic] medical bills." Trial Tr. 113:3–5 (April 26, 2016).

Subsequently, the undersigned counsel cross-examined Appellant on medical expenses from various providers. Trial Tr. 128:20–130:10 (April 26, 2016). Appellant failed to assert an objection contemporaneously with the offering of evidence regarding Appellant's medical expenses during cross-examination and, therefore, failed to preserve the issue for appeal. The remainder of Respondent's brief addresses Appellant's arguments in the event this Honorable Court concludes that a contemporaneous objection was not required.

[3] Despite Appellant's repeated assertions that he was not seeking recovery for medical expenses, the record is conspicuously bare of any such disclaimer. If Appellant so clearly did not seek recovery of medical expenses, as he claims on appeal, the record would be littered with references supporting such contention. However, there is not one statement by Appellant or his counsel to this effect. To the contrary, the record is littered with statements by Appellant's counsel suggesting that they were, in fact, seeking recovery for medical expenses. As one example, Respondent respectfully directs this Honorable Court to Appellant's closing arguments, Trial Tr. 157:14–176:20; 187:20–190:12 (April 26, 2016), where counsel made several references to medical bills, but failed to advise the jury (or the court) that his client was not seeking recovery for medical expenses.

than South Carolina—and none of which are binding on this Honorable Court—to justify his contention. This argument ignores the well-established principle that medical expenses are a form of actual damages, and can be relevant to a plaintiff's overall claim for damages. Appellant further contends that the improper admission of Appellant's medical expenses led to jury confusion and, therefore, was prejudicial under Rule 403, SCRE. Appellant fails to recognize that the alleged jury confusion, if there was any, could have been avoided or cured by Appellant, but that Appellant waived any objection throughout the course of trial.

A. Appellant's argument that the medical expenses are irrelevant is without merit due to Appellant's own conduct at trial and Appellant's failure to object to the trial court's jury charge regarding actual damages or to the allegedly improper verdict.

i. Appellant waived any objection to the relevancy of his medical expenses through his own conduct at trial

Although Appellant informed the court and Respondent, for the first time during the course of litigation, and off the record, that he was not seeking recovery for medical expenses more than halfway through the trial, Appellant's conduct and statements during trial suggests otherwise. See Trial Tr. 112:4–5 (April 26, 2015). After the trial court instructed the parties that it would allow Appellant to be cross-examined on his medical expenses, Appellant's counsel stated, "[w]e can talk about that later on to include charge or [sic] medical bills." Trial Tr. 113:3–5 (April 26, 2016). This concession to "include a charge [for] medical bills" came immediately after Appellant's objection, which constitutes a waiver of that objection. Then, during closing arguments, Appellant's counsel stated:

> The issue came up as to medical bills. And it's not an issue that we were throwing around or pushing around because I don't believe that they're representative of anything. The fact that he got $7100 in medical bills, what does that really have to do with the fact that for the rest of your life your [sic] going to be in pain?

> . . .
>
> It's why we weren't putting it out there. It's why we weren't issuing it. But it came up and it's fine that it came up. So, you know, $7100 of bills. You've got that information. Do with it as you may. . . .
>
> . . .
>
> Why wouldn't we show the medical bills? The medical bills as we discussed earlier, they don't play a role in determining what happened to his life. The $100,000 in medical bills, $500,000 in medical bills or $500 in medical bills, they don't equate to how this affected him. They don't affect to the damages that he's had as a result of this wreck. They don't play a role. . . .

Trial Tr. 175:10–24; Trial Tr. 190:1–7 (April 26, 2016) (emphasis added). Appellant had every opportunity to advise the jury that his client did not seek recovery for medical expenses, but instead instructed the jury to "do with it as [they] may" regarding the "$7100 of bills". Trial Tr. 175:10–24 (April 26, 2016).

During deliberations, the jury requested a copy of the medical bills. Ct. Ex. 1. The parties responded by stating, "The actual bills were not admitted into evidence—only the amount of the bills was." Ct. Ex. 1. The jury then submitted a second question, asking, "Can you confirm the amount of the medical bills? Is $7100 the correct amount?" Ct. Ex. 2. The parties responded, stating "$7,117.50 was the amount." Ct. Ex. 2. Not only did Appellant not object to these inquiries, he consented to providing to the exact amount of medical expenses.

Appellant, twice in closing, referenced "$7100" in medical expenses, without advising that he was allegedly not making a claim for medical expenses, then provided the jury with the exact amount of expenses, which was equal to the jury verdict. Appellant's arguments on appeal are based solely off the premise that he never asserted a claim for medical expenses, when the record unequivocally demonstrates otherwise.

ii. Appellant failed to object to the jury charge regarding actual damages, and, therefore, waived any argument that he was not seeking recovery of medical expenses

"[The South Carolina Supreme Court] has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence." Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). "[A party's] failure to challenge the verdict upon being given an opportunity to do so results in a waiver." Id. "Failure to object to [a] charge at trial waives any alleged error in the charge." Vaughn v. City of Anderson, 300 S.C. 55, 60, 386 S.E.2d 297, 300 (Ct. App. 297).

While Appellant's statements, and statements by Appellant's counsel, during trial undoubtedly, and justifiably, led the jury to believe that Appellant was claiming medical expenses as actual damages, Appellant's failure to object to the jury charge regarding actual damages constitute a complete waiver of the relevancy issue.

At the close of the first day of trial, Appellant's counsel requested the trial court to provide the jury charges to the parties. Trial Tr. 52: 23–25 (April 25, 2016). On the morning of the second day of trial, the trial court provided counsel the jury instructions, and Appellant brought up two issues with jury charges—Respondent's request for a failure to mitigate charge, and a charge regarding insurance. Trial Tr. 53:13–56:22 (April 26, 2016). Appellant did not object to the charge regarding actual damages, or that the proposed charge included medical expenses as a form of actual damages.[4] At the close of Respondent's case, Appellant's counsel

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[4] In the trial court's discussion of the admissibility of the medical expenses, Appellant's counsel stated, "If they're [Respondent] going to put them in we would ask that we modify the charge. We can talk about that later on to include charge or [sic] medical bills." Trial Tr. 113:3–5 (April 26, 2016) (emphasis added). There is no clearer example of a waiver than requesting a charge related to the evidence being admitted over an objection.

stated, "We wanted to redress the verdict form, the charges as it relates to the mitigation. But that's it." Trial Tr. 147 23–25 (April 26, 2016). When asked by the trial court "What are your jury charge issues", Trial Tr. 148:4–5 (April 26, 2016), Appellant's counsel made a lengthy argument in opposition to the failure to mitigate charge, Trial Tr. 148:6–150:23 (April 26, 2016), but made no objection to the charge for actual damages. Appellant's counsel again addressed the jury charges immediately before closing arguments, but only in reference to Appellant's life expectancy. See Trial Tr. 156:10–17 (April 26, 2016).

The trial court charged the jury on actual damages, stating, "actual damages would be the actual losses and expenses which the plaintiff suffered because of the defendant's negligence. The plaintiff must prove that the expenses caused by the injury were reasonable and necessary." Trial Tr. 196:4–8 (April 26, 2016) (emphasis added); see also Trial Tr. 196:14–18 (April 26, 2016) ("[Actual damages] would include physical and mental pain and suffering, expenses incurred for necessary medical treatment, the loss of enjoyment of life suffered as a result of the injury, and any other losses which are reflected by the character of the injury.") (emphasis added)). Additionally, the trial court included a charge for non-economic damages, including pain and suffering, loss of enjoyment of life, future damages, and permanent injury. Trial Tr. 195:23–199:2 (April 26, 2016).[5] Appellant did not object to providing a written copy of the charges to the jury, even after being prompted by the trial court. Trial Tr. 203:14–24 (April 26, 2016).

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[5] Appellant cites Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) for the proposition that the South Carolina Supreme Court has held that the determination of economic and non-economic damages ought to be two separate decisions, and quotes language that "a separate charge will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts." Appellant's Initial Br., p. 9 (filed Dec. 15, 2016). It is critical to note that: (1) Appellant never requested any specific charges related to non-economic damages or objected to any charges related to damages; and (2) the trial court gave a thorough charge on the issue of non-economic damages, including pain and suffering, loss of enjoyment of life, future damages, and permanent injury. Trial Tr. 195:23–199:2 (April 26, 2016). The trial court, in accordance with Boan, properly charged the jury on non-economic damages. However, Appellant now disingenuously argues for a new trial on the basis of jury confusion.

The record is clear that, while Appellant initially objected to the introduction of medical expenses, once the trial court overruled the objection, Appellant made every effort to recover medical expenses as a form of damages. After making his initial argument against introduction of the medical expenses, Appellant advised the court that he wanted to include a charge for medical bills. Subsequently, Appellant spent a significant amount of time in closing (and rebuttal) discussing medical bills, referencing the "$7,100" in bills on two occasions, yet never once suggesting that Appellant was not claiming medical expenses as damages. At the request of the jury to confirm the "7,100" in medical bills, Appellant agreed to provide the jury with the exact amount of expenses. Appellant never objected to the jury charge regarding actual damages, which included medical expenses as an item of actual damages, and even agreed to provide those charges to the jury during deliberations.

Despite all of this, Appellant relies upon one statement, made by Respondent's counsel during an off-the-record conversation, as the basis for his entire argument that the medical expenses were not relevant to the present action. See Appellant's Initial Br., p. 6.[6] In the same vein, Appellant argues that the jury "failed to make any award damages [sic] actually claimed by [him] . . . " and that "there was no evidence in the record proffered by the Plaintiff to support the award by the jury for medical bills when they were not claimed as damages . . . ." Pls.' Mot. for New Trial Absolute, ¶ 14, 15. However, our Supreme Court has held time and again that a party must raise the issue of a presumptively improper verdict while the jury is still empaneled, and "failure to challenge the verdict upon being given an opportunity to do so results in a waiver." Dykema, 348 S.C. at 554, 560 S.E.2d at 896.

[6] Appellant contends, without any binding legal authority, that the medical expenses are irrelevant because they "creat[e] a false-correlative link between [Appellant's] medical bills and his non-economic damages." Appellant's Initial Br., p. 14. Surely, Appellant would not make this same argument if Appellant's medical expenses were unusually high.

Appellant seeks to have his cake and eat it, too. Appellant, after his initial objection, then waived any objection by failing to "disclaim" medical expenses as recoverable damages in closing; failing to object to the jury charge that included medical expenses as actual damages; failing to object to production of the charges to the jury during deliberations; and failing to object to providing the jury the amount of medical expenses in response to the jury's inquiry during deliberations. These actions unequivocally constitute a waiver of any objection, and Appellant cannot now claim error on appeal. Based on the foregoing reasons, Appellant failed to properly preserve this issue and the arguments he now asserts on appeal, and Respondent respectfully requests this Honorable Court to affirm the trial court's ruling.

B. Even if Appellant had preserved the issue for appeal, Appellant has failed to demonstrate that the trial court abused its discretion in allowing evidence of Appellant's medical expenses

"The admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 378, 580 S.E.2d at 794 (emphasis added). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice . . . ." Id. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 378, 580 S.E.2d at 793–94. "To warrant reversal based on the admission or 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 admitted or excluded evidence." Conner v. City of Forest Acres, 363, S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

Only once the trial commenced, and after Appellant had the opportunity to hear Respondent's theory of the case during opening statements, did Appellant object to the introduction of medical expenses.[7] Respondent sought to introduce Appellant's relatively low medical expenses to demonstrate that Appellant did not seek treatment for a significant period of time, nor did Appellant follow the recommendations of his physicians that were intended to benefit him. Appellant seems to take issue with Respondent's theory of the case on appeal, but took no issue with it at trial until after a verdict was rendered. As the trial court correctly opined, medical bills are used "in almost every trial" for the purpose of showing that a plaintiff did or did not suffer substantial damages. Trial Tr. 112:21–25 (April 26, 2016). Appellant's argument, in essence, is that, since he chose not to introduce his own medical expenses, they are irrelevant when used to counter or cast doubt on his alleged damages. Indeed, it was Appellant's strategy to not introduce his own medical expenses, but his refusal to do so does not render the expenses irrelevant. Not only were the medical expenses relevant to Appellant's claim for damages, but they were relevant to establish a failure to mitigate defense. Appellant's medical expenses were entirely relevant to the whether he exhausted all treatment options, and to the extent of the treatment actually received that was intended to remedy his alleged injuries.

Appellant has failed to identify the "exceptional circumstances" or error of law that exist to reverse the trial court's decision to admit evidence of Appellant's medical expenses. See State v. Adams, 3544 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) Simply because Appellant chose not to introduce his own medical expenses does not render them irrelevant, and the appellate process is not intended to afford a party who is unhappy with the outcome a second bite

[7] Appellant could have addressed this issue in pre-trial motions, but was silent on this issue.

at the apple. Appellant's medical expenses were relevant under Rules 401, 402, and 403, SCRE, and Respondent respectfully requests this Honorable Court to affirm the trial court's ruling.

C. Appellant's arguments, even if accepted, do not demonstrate an improper verdict, and would create precedent contrary to public policy and South Carolina law

Appellant contends that the jury awarded only medical expenses, which was a form of damages that were not claimed, and, therefore, demonstrates juror confusion.[8] However, Appellant's contention is purely speculative—Appellant did not submit a special interrogatory to the jury, and there is no evidence that the verdict is reflective of an award for medical expenses. As Appellant points out, "It is the duty of the trier of fact in deciding [non-economic damages] to consider the evidence in light of their own life experience and make a judgment on that basis as to what is reasonable under the circumstances." Appellant's Initial Br., p. 8–9. However, Appellant also contends, without binding legal authority, that "[t]he amount of economic damages which might also have been sustained by the Plaintiff in the case has no relationship to that decision making process and makes no issue for determination either more or less probable." Id. at 9.

Respondent is cognizant of this Honorable Court's decision in Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), where it declared "patently untenable" Johnson's argument that an award of damages equal to the medical expenses was partly medical expenses and partly pain and suffering. Id. at 260, 533 S.E.2d at 912. However, the present case is immediately distinguishable under Appellant's own argument. Here, Appellant argues that he did not claim medical expenses as a form of damages, and that the jury was required to use its own judgment in determining non-economic damages. As the trial court correctly charged,

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[8] As previously argued, Appellant's contention requires this Honorable Court to accept (1) that Appellant "disclaimed" medical expenses as a form of damages, and (2) that the medical expenses were irrelevant.

"[t]here is no definite standard by which to compensate a plaintiff for pain and suffering." Trial Tr. 196:21–22 (April 26, 2016).

Respondent does not contend that the award reflects a combination of economic and non-economic damages. Rather, Respondent contends that the jury could have reasonably concluded, in light of the evidence presented, that Appellant's non-economic damages were equal to the amount of medical expenses, and awarded only a figure for non-economic damages. Jurors often have no basis for determining what is "reasonable" for pain and suffering, and may have simply relied upon the medical expenses as a reasonable amount for non-economic damages. Appellant assumes that the award consists only of an award for medical expenses, yet declines to acknowledge that the jury, with no basis other than those expenses, may have concluded Appellant's non-economic damages to be equal to that figure.

Appellant's argument, if accepted, would open Pandora's box with regard to jury awards. Following Appellant's argument, an award of $14,235 (twice the amount of medical expenses) would be improper, and appealable, because the economic and non-economic awards appear correlated. Similarly, any exact multiple of the medical expenses would be improper and appealable under Appellant's theory. Appellant would have this Honorable Court establish precedent that any award for non-economic damages purportedly linked to the medical expenses is improper and worthy of a new trial. In the present action, it is not far-fetched (but equally speculative) to believe that the jury awarded only one multiple of the medical expenses as non-economic damages, particularly where Appellant contends that he was not making a claim for medical expenses. Trial courts would be required to charge juries that they could not render a verdict equal to the medical expenses, or any exact multiple thereof, thereby destroying the jury's discretion in determining reasonable damages. Moreover, a plaintiff, like Appellant in this case,

could simply disclaim medical expenses at any time during trial, and then appeal an award that appears, however tangentially, to be compensation for those expenses. This would open the appellate floodgates and necessarily lead to court conjecture and speculation for any verdict that appears even remotely related to the medical expenses.

Moreover, an award for less than the medical expenses would be worthy of a new trial under Appellant's theory. If the jury in the present action awarded an amount less than the medical expenses, Appellant could argue that there was no award for pain and suffering where they "found Plaintiff's medical expenses to be reasonable and necessary . . . ." Appellant's Initial Br., p. 16. This would lead to trial courts, and this Honorable Court, to routinely speculate as to what damages a jury actually awarded, and whether any portion of the award constituted an award for non-economic damages. Taking this argument to its logical conclusion, trial courts would be required to charge juries that, if they award any amount for medical expenses, they must award some amount for pain and suffering.

Appellant seeks to have this Honorable Court declare that there cannot be any apparent correlation between economic and non-economic damages, and any award that appears to link the two is improper, and worthy of a new trial. However, Appellant's entire argument inherently requires speculation as to the jury's award. It has long been said that the court "is unwilling to substitute its judgment for that of the jury and place a value of its own thereon", and Respondent respectfully requests this Honorable Court to refrain from speculating as to the jury's award and affirm the trial court's rulings. Jennings v. McCowan, 215 S.C. 404, 428, 55 S.E.2d 522, 532 (1949).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE, AND THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT

"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." Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 723 (Ct. App. 1996). "A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Folkens v. Hunt, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate"; however, "[t]he jury's determination of damages . . . is entitled to substantial deference." Vinson, at 404, 477 S.E.2d at 723 (emphasis added). "Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." Wright v. Craft, 372 S.C. 1, 35, 640 S.E.2d 486, 505 (Ct. App. 2006). "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 26, 602 S.E.2d 772, 781 (2004). To warrant a new trial, the verdict must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury. Wright, at 35, 640 S.E.2d at 505. "The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial nisi *additur*." Howard v. Roberson, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007) (quoting Bailey v. Peacock, 318 S.C. 13, 14–15, 455 S.E.2d 690, 692 (1995)).

i. Appellant misconstrues South Carolina law in asserting that a jury is required to award pain and suffering if it awards medical expenses as a form of actual damages[9]

The undersigned counsel has been unable to find any legal authority supporting Appellant's contention that South Carolina courts "have held as a matter of law that where a jury has found Plaintiff's medical expenses to be reasonable and necessary, they are ***required*** to award pain and suffering, and may not simply award just the exact amount of the medical bills." Appellant's Initial Br., p. 16 (emphasis in original). Appellant cites Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007) and Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) as support for this contention.

In Howard, the jury awarded the plaintiff an amount equal to the plaintiff's medical expenses and lost wages, but the award did not reflect an award for pain and suffering. Howard, 376 S.C. at 148, 654 S.E.2d at 879. The trial court granted the plaintiff a new trial solely on the issue of damages based on the thirteenth juror doctrine, stating that the failure to award pain and suffering was "contrary to the fair preponderance of the evidence [and] . . . [t]he Plaintiff suffered obvious injuries which obviously had to be painful." Id. at 148, 654 S.E.2d at 880.

On appeal, however, this Honorable Court found that the trial court erred in granting a new trial on the issue of damages alone under the thirteenth juror doctrine. Id. at 157, 654 S.E.2d at 884. In doing so, this Honorable Court unequivocally stated, "[t]he thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages." Id. at 156, 654 S.E.2d at 884 (emphasis added). Nowhere in the Howard opinion does this Honorable Court "require" a jury to award pain and suffering where the award encompasses only actual

[9] Although Appellant contends that the verdict is solely for medical expenses, this assertion is purely speculative, and Respondent respectfully directs this Honorable Court to Respondent's argument in Section I(C), supra.

damages.[10] In fact, Howard lends support to Respondent's argument, not Appellant's, that the trial court, in is discretion, properly declined to grant a new trial—under Howard, it would have been error for the trial court to grant a new trial based on the thirteenth juror doctrine where only damages were at issue. See Trial Tr. 5:12–13 (April 25, 2016) (identifying where Appellant's counsel admitted the only issue for jury determination was damages).

Appellant also misguidedly cites Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) for the proposition that a jury award of only economic damages, without an award for non-economic damages, is improper. In Waring, this Honorable Court affirmed the trial court's decision to grant a new trial *nisi additur* where the trial court granted *additur* in the amount of $40,000. There, the plaintiff was involved in a motor vehicle accident in August 1992 and began a course of treatment spanning over five years. The plaintiff presented to numerous physicians, including a neurologist at the request of a physician, and subsequently underwent a spinal surgery. Waring, 341 S.C. at 251–56, 533 S.E.2d at 908–11. After the jury awarded the amount of Waring's medical bills, Waring moved for a new trial *nisi additur* or, alternatively, a new trial absolute. Waring, 341 S.C. at 255, 533 S.E.2d at 910. The trial court denied Waring's motion for a new trial absolute, but granted the motion for a new trial *nisi additur*. Waring, 341 S.C. at 255, 533 S.E.2d at 910. This Honorable Court upheld the *additur*, strongly considering the fact that Waring sought medical treatment for years following the accident, and "took

[10] The plaintiff in Howard made a motion for a new trial *nisi additur*, arguing that the jury ignored the law as it related to pain and suffering. Howard, 376 S.C. at 148, 654 S.E.2d at 879. However, Appellant never made a Motion for New Trial *nisi additur* and, therefore, that option is not available to Appellant on appeal, and should not be considered by this Honorable Court. This distinction is critical because, had the court had the option of granting an *additur*, and actually granted such a motion, Respondent would have had the option of accepting the *additur* or receiving a new trial absolute. In essence, Appellant argues that the jury failed to follow the court's instructions on pain and suffering, and failed to award non-economic damages based on evidence presented. The proper method for dealing with this issue would have been to file a motion for new trial *nisi additur*, which Appellant did not do, and, therefore, failed to preserve this issue on appeal.

advantage of every recommendation of her physicians . . . ." Waring, 341 S.C. at 260, 533 S.E.2d at 912.

Both Howard and Waring are significantly distinguishable from the present case, and operate to defeat, rather than bolster, Appellant's arguments. Despite Appellant's reliance on Howard, that ruling clearly demonstrates that it would have been error for the trial court to apply the thirteenth juror doctrine in granting a new trial on the sole issue of damages. Furthermore, the evidence presented in the case at bar is not nearly as compelling as those contained in Waring. Here, Appellant refused to adhere to the referrals and recommendations of his physicians, and received sporadic medical treatment for a period of only a few months.[11] Moreover, and most importantly, the trial court in Waring denied the plaintiff's motion for a new trial absolute, but granted a the motion for a new trial *nisi additur*. Appellant failed to move for a new trial *nisi additur*, which was the method by which the plaintiffs in Howard and Waring sought to correct an allegedly inadequate verdict that did provide an award for non-economic damages. As this Honorable Court stated, "Procedurally, the trial court cannot use [the thirteenth juror] doctrine as a vehicle to grant a plaintiff a new trial on the issue of damages alone. Instead, the trial court should have ruled on [Plaintiff's] motion for new trial *nisi additur*, and in its discretion, increased damages for pain and suffering." Howard, at 157, 654 S.E.2d at 884. Appellant did not move for a new trial *nisi additur*, and cannot seek this remedy for the first time on appeal.[12]

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[11] The course of treatment and Appellant's compliance with recommended treatment is markedly different from the plaintiff in Waring. For a detailed description of the numerous physician recommendations and referrals Appellant refused to follow, see infra, pp. 23–24.

[12] In its Order denying Appellant's Motion for New Trial Absolute, the trial court addressed the issue of a new trial *nisi additur*. However, Appellant never made any such motion, whether explicitly or by reference. See Pls.' Mot. for New Trial Absolute.

Appellant contends that the jury's award is inconsistent with the claims and evidence presented because Appellant was not claiming medical expenses as damages, and there was extensive testimony regarding Appellant's non-economic damages. Appellant's Initial Br., p. 16. As the trial court correctly found, the jury "was not 'actuated by improper motivation,' nor confused about its duties[]", and there was evidence "which may have cast doubt on the credibility of [Dr. Schoderbek's testimony and Appellant's testimony] and the extent of the plaintiff's injuries." Order Den. Pls.' Mot. for New Trial, p. 7.

ii. The jury, in its sole discretion, reasonably could have discredited or disregarded evidence of Appellant's alleged non-economic damages.[13]

"The assessment of witness credibility is within the exclusive province of the jury." State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). "[A] jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury." Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (citing Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991)); see also Green v. Greenville County, 176 S.C. 433, 439, 180 S.E. 471, 473 (1935) ("It was peculiarly the province of the jury under the facts of this case to pass upon the credibility of the statements testified to by the plaintiff, who was an interested witness, and directly affected by the result of the trial."). It is solely for the jury to determine "the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of litigation." Vinson v. Hartley, 324 S.C. 389, 410, 477 S.E.2d 715, 723 (Ct. App. 1996).

Appellant's brief makes no mention of the extensive credibility issues raised at trial that could have led a jury to disregard the evidence regarding Appellant's alleged damages, and

[13] As previously mentioned, Appellant's argument necessarily requires this Honorable Court to speculate as to the nature of the jury's award. Respondent contends that it is not the court's responsibility to determine what form of damages were awarded in the present action, but only whether the award is supported by the evidence.

ignores well-established precedent that the jury, not the trial court or the parties, is responsible for weighing evidence and credibility.

For instance, during cross-examination, Appellant was impeached with evidence that he failed to disclose during discovery a prior motor vehicle accident and lawsuit where he claimed permanent bodily injuries. Contrary to Appellant's discovery responses, and his testimony at trial, Appellant was presented with a prior Complaint where he alleged permanent injuries, and was represented by his current counsel for that claim. See Def. Ex. 3, ¶ 7. Notably, Appellant's wife was also a plaintiff in the prior lawsuit. Def. Ex. 3.

Additionally, there were ample issues raised during Dr. Schoderbek's testimony. Dr. Schoderbek testified that he and Appellant were "friends" prior to treatment related to the subject accident. Pls.' Ex. 3, 6:24–25. Dr. Schoderbek's records contained recommendations that Appellant take various courses of action, including seeing a neurologist, undergoing an EMG, and receiving an injection. He stated:

> Q. Okay. And despite these four discussions and four entries, you are now telling me you didn't believe it would be of any benefit?
>
> A. Well, I can offer recommendations on patients and it's their decision if they want to have that evaluation or not.

Pls.' Ex. 3, 47:2–7. In August 2014, Dr. Schoderbek assessed Appellant with an 8% whole person impairment, which did not reference any alleged nerve damage. Pls.' Ex. 2, p. 22. Sixteen months later, in December 2015, without any treatment between, Dr. Schoderbek revised his whole person impairment rating to 32%. Pls.' Ex. 2, p. 17. When asked why various range of motion measurements were missing from his records, Dr. Schoderbek testified that he "just didn't put it in the note." Pls.' Ex. 3, p. 53:16–20. Dr. Schoderbek also changed his opinions regarding which nerves may be affected between August 2014 and December 2015:

Q. After that, that's -- that's August 22, 2014. Sixteen months later you then have a new impairment rating of, what was it, 53 percent [upper extremity impairment]?

A. Yes, I believe so.

Q. And at that time it's no longer the radial and ulnar nerves. It's the ulnar and medial nerves; is that correct?

A. Yes. That's what I wrote.

Q. You didn't mention the radial nerve at that time?

A. No, I did not.

Q. You didn't mention the medial nerve in your August 22nd entry, did you?

A. No, I did not.

Pls.' Ex. 3, 57:23–58:11. Furthermore, Dr. Schoderbek believed that Appellant sought a new impairment rating solely for the purpose of trying to "resolve" the present action:

Q. I see. So he came -- he came back to you for a revised permanent impairment in hopes of resolving this litigation?

A. That's my understanding.

. . .

Q. Are you aware that that last visit was approximately six weeks after Mr. -- Mr. Nestler's deposition?

A. No, I did not.

Pls.' Ex. 3, 63:23–64:1; 64:9–12.

Finally, Dr. Schoderbek admitted that it was not advisable for Appellant to discontinue physical therapy, and admitted that his records reflecting "extensive" physical therapy was an exaggeration:

Q. So a patient at their -- at their leisure can -- you would -- you would say that that's an acceptable course of action?

A. I wouldn't say it's always acceptable, but it happens.

. . .

Q. From what I can tell Mr. Nestler went to nine visits of physical therapy. Is that extensive in your mind?

A. I wouldn't say extensive. I'd say he went to -- he went to some therapy, but I wouldn't say extensive. I guess I -- I guess I didn't fully realize he had only gone to nine visits.

Q. Did he mislead you on that?

A. No, he said he was doing therapy and -- he had done some therapy, but it's also doing a lot of stuff on his own as well.

Q. So the word extensive is an exaggeration?

A. No, it's not -- yes, extensive is an exaggeration.

Pls.' Ex. 3, 76:25–77:14; Pls.' Ex. 2, p. 17 ("Patient has done an extensive amount of conservative treatment . . . .").

The jury is the sole judge of credibility, and the jury was charged that it could "believe the [] testimony of a witness in its entirety or you can reject the testimony of a witness in its entirety." Trial Tr. 191:21–23 (April 26, 2016). There was ample evidence that would allow the jury to discredit the testimony of the witnesses, and it was not within trial court's province to weigh credibility or evidence, or to speculate as to what the jury did or did not consider, and Respondent respectfully requests this Honorable Court to decline to engage in the type of conjecture that Appellant seeks on appeal.

III. EVIDENCE WAS PRESENTED TO SUPPORT A FAILURE TO MITIGATE JURY CHARGE, AND APPELLANT HAS FAILED TO DEMONSTRATE OR EVEN ALLEGE PREJUDICE RESULTING FROM THE CHARGE

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." Id. "If any evidence supports a requested jury charge, the trial court should grant the

request." State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (emphasis added). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

In support of its contention, Appellant argues that Respondent "failed to proffer any causational evidence or counter expert medical testimony to support this affirmative defense." Appellant's Initial Br., p. 18. Appellant further argues that Respondent failed to show that Appellant's failure to engage in additional treatment caused Appellant to suffer more damages. Id. Respondent has not found, nor has Appellant provided, any legal authority requiring expert causational evidence or counter medical testimony to support a failure to mitigate charge. Rather, the law is quite clear that, where any evidence exists to support a charge, the charge should be given to the jury. Ward, at 614, 649 S.E.2d at 149.

In his deposition used at trial, Dr. Schoderbek was asked several questions regarding the purpose for referring a patient for additional medical treatment, and admitted it would be detrimental for a patient to not follow a physician's recommendations:

Q: How often do you refer patients to physical therapy or occupational therapy or outside treatment?

A. Daily basis.

Q. Okay. What's the purpose for you doing that?

A. Try to get people feeling better so they can go back and do all the fun things they want to do.

. . .

Q. Okay. And so the most important reason you refer anyone to another provider is to make them better?

A. Yes, it is.

. . .

Q. Okay. Do you say it's detrimental if a patient does not follow a physician's recommendation?

A. Yes, I believe it is detrimental.

Pls.' Ex. 3, 30:19–22; 31:11–14; 32:3–6.

Appellant was referred to physical therapy, two to three times per week, for six to eight weeks, and he attended three visits despite being told he would have an excellent prognosis if he was compliant with physical therapy. Pls.' Ex. 3, 70:15–71:16. He was referred to additional therapy at a second provider, two to three times per week, for six weeks, and he attended five visits, at which time Appellant was discharged for failure to return. Pls.' Ex. 3, 73:12–74:10. When presented with the fact that Appellant presented to physical therapy less than one-third of the recommended amount, Dr. Schoderbek again conceded that this course of action was not advisable:

Q. And you agree that it may be detrimental if a patient does not follow a medical provider or physician's recommendations.

A. It could be, yes.

Q. It could be. And your recommendation was two to three times a week for six weeks. And he went for five visits and you don't see a problem with that?

A. Obviously you wish patients to go as much as will help them. I don't always have control of patients' lives and their direction and thought process there. But you know, we would like them to go as much as we would recommend . . .

Pls.' Ex. 3, 75:11–23. Not only did Appellant refuse to comply with physical therapy recommendations, he refused to see a neurologist as recommended; refused to undergo a nerve

conduction study despite four recommendations; and refused a steroid injection despite four recommendations. Pls.' Ex. 3, 68:22-69:5; 46:21-23; 29:8-12.

It is unquestionably clear that Dr. Schoderbek made numerous recommendations and referrals to Appellant, for the paramount reason of getting him better, and agreed that it would be detrimental for a patient, such as Appellant, to refuse to follow those recommendations and referrals. This testimony surely satisfies the "any evidence" standard that Appellant failed to take a reasonable course of action, as recommended by physicians, to treat his alleged symptoms.[14]

Based on the foregoing, the trial court properly submitted to the jury a failure to mitigate charge and, even if this charge were deemed improper, Appellant has not argued or demonstrated that he was prejudiced by the same.

CONCLUSION

Appellant has failed to demonstrate that the trial court abused its discretion in any manner. Appellant's argument rests entirely upon the proposition that Appellant did not seek recovery for medical expenses at trial, and a verdict for an amount equal to the medical expenses is, therefore, improper. Appellant asserts this premise as unquestionable fact, yet ignores that the record is conspicuously bare of support for this contention. While Appellant may have objected to the introduction of the medical expenses, and half-heartedly (off the record) claimed he was not seeking recovery for medical expenses, the record unequivocally demonstrates that Appellant waived his objection, and did, in fact, seek medical expenses as actual damages. Even if this Honorable Court were to accept Appellant's argument, such a ruling would create dangerous

[14] Even if this Honorable Court were not convinced that the evidence supported a charge for failure to mitigate damages, Appellant has failed to demonstrate—or even argue on appeal—that he was prejudiced by the jury charge, and has failed to satisfy its burden on appeal in regards to this issue.

precedent against public policy by requiring courts to routinely speculate as to the nature and rationale for a jury's award, which would surely lead to innumerable appeals.

Moreover, the scarce law that Appellant cites in support of his argument that juries are "required" to award non-economic damages actually supports Respondent's position. Howard states, as a matter of law, that a trial court cannot use the thirteenth juror doctrine to grant a new trial only on the issue of damages, which was the only issue presented in this case. Moreover, this Honorable Court concluded that the trial court must address the issue of awards purportedly lacking non-economic damages by ruling, in its discretion, on a motion for new trial *nisi additur*, which was never made in the present action. Similarly, the trial court denied the plaintiff's motion for a new trial absolute in Waring, and this Honorable Court merely affirmed the grant of a new trial *nisi additur*, which was in the trial court's discretion.

Finally, the trial court properly charged the jury on Appellant's failure to mitigate because there was evidence to support the charge. As has been held time and again, any evidence is sufficient to support a charge, and there was ample testimony from Appellant's own physician with regard to Appellant's failure to follow recommendations intended to improve his alleged injuries. Moreover, Appellant has failed to argue or demonstrate that he suffered prejudice as a result of the charge.

In conclusion, Respondent respectfully requests this Honorable Court to affirm the trial court's denial of Appellant's Motion for New Trial Absolute and grant of Respondent's Motion for Setoff and Costs pursuant to Rule 220(c), SCACR, and to award costs and fees, along with post-judgment interest, to Respondent as permitted by the South Carolina Rules of Appellate Procedure.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr., Circuit Court Judge

Trial Court Case No. 2015-CP-10-00330
Appellate Case No. 2016-001541

GARY NESTLER AND JULIE NESTLER, Appellants,

v.

JOSEPH E. FIELDS, Respondent.

PROOF OF SERVICE

I certify that I have served the **Initial Brief of Respondent** upon the Appellants by depositing a copy of same in the United States Mail, First Class postage prepaid, on February 16, 2017, addressed to Appellants' attorneys of record, addressed as follows:

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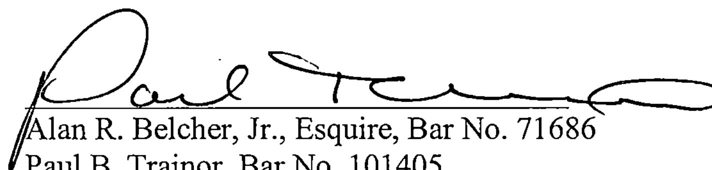
Respectfully submitted,



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