THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2016-002268

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Taliah Shabazz,.....Appellant,

v.

Bertha Rodriguez,.....Respondent.

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# INITIAL RESPONDENT'S BRIEF

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## STATEMENT OF THE ISSUES ON APPEAL

I. Should this Court reject the Appellant's first stated appellate issue, where her attorney failed to make any objection to the challenged closing argument, and where the argument was proper in any event?

II. Should this Court reject the Appellant's second stated appellate issue, where her attorney did not object, and in fact consented, to the trial judge's answer to the jury's question, and where that answer was proper?

III. Should this Court reject the Appellant's third and fourth stated appellate issues, which are based solely on her disappointment with the performance of her attorney at trial?

IV. Has the Appellant waived any appellate review of the denial of her motion for a new trial *nisi additur*, where she failed to present any arguments on that issue in her Appellant's Brief?

## STATEMENT OF THE CASE

This appeal stems from an automobile accident case, which was tried to a jury verdict in August of 2016. The Respondent Bertha Rodriguez admitted fault for the accident prior to trial, and the only remaining issue was the amount of damages sustained by the Appellant Taliah Shabazz.

The case first came to trial before the Honorable Jocelyn Newman on June 13, 2016, but when the jury could not reach a unanimous verdict, the judge declared a mistrial on June 14, 2016. The case was again called to trial on August 29, 2016, this time before the Honorable Casey Manning.

At both trials, the Respondent admitted fault for the accident, but defended on the issue of the Appellant's claimed damages. Although the Respondent's attorney did not dispute some of the Appellant's initial medical treatments, she argued that treatments a year later, as well as complaints of continuing headaches long after the accident, were not causally related and should not be awarded. The Respondent's attorney also elicited testimony from the Appellant's pain management physician that called any causal link to the accident into doubt. Specifically, the physician testified that he believed it was unlikely a person suffering from migraines as severe as those the Appellant claimed would wait a full year before reporting them or seeking treatment for them. Other evidence showed the Appellant did not receive any treatments for severe headaches until nearly a year after the accident.

After closing arguments to which neither side made any objections, the trial judge submitted the case to the jury. During the deliberations, the jury sent a question to the trial judge asking whether health insurance had paid for some of the Appellant's bills. The trial judge consulted with the attorneys for both sides and then brought the jury back to the courtroom. He told the jurors they could not consider anything other than the evidence presented during the trial and that they should disregard the question they raised and return to deliberations as if the question had never been asked. [Trial Transcript, p. 166.] Neither party objected to the trial judge's answer and instructions to the jury.

The jury returned to its deliberations and eventually returned a verdict for the Appellant in the amount of $12,500. Counsel for the Appellant requested and received ten days to file post-trial motions. Within that timeframe, the Appellant's attorney filed a motion seeking a new trial absolute or a new trial *nisi additur*. [Post-Trial Motion.] The

trial judge denied that motion in an Order filed on October 10, 2016. [Order.] The Appellant then commenced this *pro se* appeal.

## STATEMENT OF THE FACTS

The Respondent and the Appellant were involved in an automobile accident on May 8, 2012. [Complaint.] The Respondent inadvertently failed to yield the right of way while pulling out of a private drive, which caused the two vehicles to collide. [Complaint.]

After the accident, the Appellant went to Palmetto Health Richland Hospital, where she treated for soft tissue shoulder and neck pain. [Trial Transcript.] The Appellant followed up this initial medical attention with visits to her primary care physician at Waverly Family Practice, where she continued to treat for soft tissue shoulder pain issues. [Trial Transcript.] The Appellant then sought additional treatment for her shoulder with Dr. Kevin Nahigian at Carolina Shoulder & Knee Specialist. [Trial Transcript.] Dr. Nahigian referred her to physical therapy, which she participated in for six months. [Trial Transcript.]

Almost a full year after the accident, the Appellant began complaining of chronic migraine headaches and sought treatment with, Dr. Eleanya Ogburu-Ogbonnaya, a pain management specialist. [Trial Transcript.] The Appellant continued to treat with Dr. Ogburu-Ogbonnaya for a period of time. [Trial Transcript.] There was no indication that the Appellant had experienced or complained of any migraine headaches prior to seeing Dr. Ogburu-Ogbonnaya.

Ultimately, the Appellant incurred a little over $16,000 in medical bills. However, when the bills for the treatments by Dr. Ogburu-Ogbonnaya are excluded, the total amount is reduced by almost half, to around $8,800.

## STANDARD OF REVIEW

"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." *Stevens v. Allen*, 336 S.C. 439, 446, 520 S.E.2d 625, 628-29 (Ct. App. 1999).

## ARGUMENT

### I. The Appellant failed to object to any of the closing arguments presented by the Respondent, which were proper in any event.

The Appellant's first issue is not preserved for appellate review. As this Court has explained:

> It is a fundamental principle that a contemporaneous objection is required at trial to properly preserve an error for appellate review. ... The proper course to be pursued when counsel makes an improper argument is for opposing counsel to *immediately* object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.

*State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) (emphasis in original). Here, counsel for the Appellant never objected to any portion of the Respondent's attorney's closing argument, either contemporaneously or after the argument. Under established law, therefore, no issues involving the Respondent's closing argument are preserved for review, and this Court should decline to address the Appellant's first issue on appeal.

Yet, even if the Court reaches the merits of the Appellant's first issue, the end result is the same. There is a clear and legitimate reason why the Appellant's attorney did not object to the closing argument: There was nothing improper or objectionable about it. Rather, as demonstrated below, the closing argument was well within the proper scope of vigorous representation of her client by the Respondent's attorney.

The Appellant appears to argue that because the Respondent's counsel acknowledged the treating physician's deposition testimony regarding the Appellant's headaches, the Respondent conceded the headaches were causally connected to the automobile accident. However, the Appellant has cited no authority for the proposition that merely referencing a witness' testimony constitutes a concession as to the truth or accuracy of that testimony, and the Respondent respectfully asserts that is not the law of South Carolina. It is perfectly acceptable to cite or even quote a witness' testimony during a closing argument for the purpose of challenging it. This is precisely what the Respondent's attorney did, and even a cursory review of the closing argument makes this abundantly clear.

The Appellant further argues that the Respondent's attorney presented false information in the closing argument. This allegation is completely untrue. During her closing, the Respondent's attorney referred to statements made by the treating physician during his deposition[1] with regard to the impairment rating he issued to the Appellant. The following exchange occurred in that deposition:

> Q: And what is an impairment rating?
>
> A: Impairment rating is assessment of patient's long term procedural disability, something like that. You know, that –

[1] The doctor's deposition was read into the record at trial. [Trial Transcript.]

whatever it's like from their normal state as to being a problem.

* * *

Q: And it looks like you assigned 2 percent UEI.

A: Upper extremity.

Q: All right, and converts to 1 percent WPI?

A: Whole body.

[Depo. of Dr. Ogburu-Ogbonnaya, p 18, line 22 – p. 20, line 3.]

Dr. Ogburu-Ogbonnaya referenced the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition, as the authority upon which he relied in issuing the impairment rating. [Depo. of Dr. Ogburu-Ogbonnaya, p. 19, lines 13-20.] While the class within which the Appellant's impairment rating falls only provides ratings from 1% through 13%, the impairment rating chart in its entirety provides ratings from 0% through 100%.

Accordingly, the Respondent's counsel did not "knowingly present false evidence to the jury" as the Appellant suggests. Rather, the Respondent's attorney informed the jury of the range of percentages as they appear on the impairment rating chart. She then called the jury's attention to Dr. Ogburu-Ogbonnaya's testimony that he had given the Appellant an impairment rating of 1% for her whole body impairment and 2% for her upper extremity. The Respondent's attorney never suggested or even implied that the impairment ratings were anything other than what the doctor said; she merely argued that those ratings were not sufficiently serious to warrant a significant damages award.

Therefore, the jury was not misinformed regarding the Appellant's impairment ratings. The jury heard evidence concerning those ratings directly from the physician

who issued them. By attempting to minimize the weight or impact of those ratings, the Respondent's attorney was only doing her job – i.e. "emphasiz[ing] certain portions of the evidence [to] try to persuade [the jury] to agree with their version of the facts," as the court instructed the jury. [Trial Transcript, p. 43, lines 20-22.]

For these reasons, even if it addresses the Appellant's first issue, the Court should affirm the denial of the post-trial motion.[2]

## II. The Appellant failed to object to the trial judge's answer to the jury's question about health insurance, and even if there had been an objection, the answer was proper.

During the jury's deliberations, as often happens now in personal injury trials, the jury sent the judge a question as to whether or not any health insurance had paid some of the Appellant's medical bills. The judge conferred with the attorneys of record and then brought the jury back to the courtroom, where he told the jurors the following:

> Now, the last thing I said to you was your decision cannot be based on passion, prejudice, emotion or something not found in the evidence. Not found in the evidence. Nothing outside of this courtroom you can consider. If it's not in the evidence, you can't consider it. This question you can't consider. You need to wipe it out of your mind and begin over as if you never asked me this question because it's not in the evidence.
>
> I'm not upset, but this is the rules that we all have to play by. And in order to be fair to both sides, you have to dissuade yourself of this question, start as if you never asked me the question, blank sheet of paper, began [sic] again with that in mind. Only what's from this witness stand, the exhibits, the arguments of the lawyers and the charge I gave you on the law. You can't consider anything else at all. It will be unfair to the Plaintiff, unfair to Ms.

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[2] Here, it should be noted that the actual motion for a new trial did not raise this issue as a supporting ground. Thus, it is not at all clear that the Appellant would be entitled to raise this issue on appeal even if there had been a contemporaneous objection, which there was not.

> Rodriguez and everybody else involved. Those are the rules and I don't make them up. And I'm not yelling at you, but it's important enough to explain. Wipe that out and out of your mind and begin over.
>
> If you can't wipe it out of your mind and begin over, Mr. Foreman, it's your duty to let me know, okay?

[Trial Transcript, p. 166, line 5 – p. 167, line 1.]

After giving that answer, the judge gave the attorneys for both sides an opportunity to put any challenges to the answer on the record. The judge specifically asked the attorneys if they had any "exceptions or additions" to the answer he gave the jurors, and both attorneys replied that they did not. [Trial Transcript, p. 167, lines 8-11.] Thus, the jury was allowed to continue its deliberations, which resulted in a verdict a relatively short time later.

In order to preserve an issue for appellate review during a trial, a party must make a contemporaneous objection to the challenged testimony, arguments or instructions. *See, e.g., Moore v. Florence Sch. Dist. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994) (absence of a contemporaneous objection to an argument by opposing counsel meant the issue was not preserved for appellate review). Here, the Appellant's attorney did not object to the judge's answer to the jury. When asked if he had any issues with that answer, the attorney responded, "No, Your Honor." [Trial Transcript, p. 167, line 10.] As a result, this issue is not preserved for review, and the Court should not consider it.

Furthermore, the *pro se* Appellant actually presents the issue as an error by the jury, rather than by the judge. The Appellant's Brief does not contain any argument that the judge's answer was inappropriate or amounted to an error of law. Nor does the Appellant's Brief cite any authority to support such a proposition. Thus, to any extent the

issue of the judge's answer might otherwise be preserved for review, it has now been waived. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." (quoting *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct. App. 1993)).

Even if the Appellant could procedurally argue that the jury made some sort of error in asking its question, an alleged error of this sort on the part of a jury is not an appropriate ground for appellate review. *See generally Vinson v. Hartley*, 324 S.C. 389, 410, 477 S.E.2d 715, 726 (Ct. App. 1996) (neither a trial court nor an appellate court can "second guess" a jury's factual findings). Judges and attorneys almost never know the bases for a jury's decision. Indeed, our system allows jurors to refuse to answer questions about their deliberations so that the jurors can conduct those deliberations with full candor, unafraid of any reprisals or reprimands. The necessary result of this right to juror privacy is a level of uncertainty about the deliberations for everyone else. This is a price our system has chosen to pay.

There is no way for anyone (other than the actual jurors) to know how much or how little the subject of the jury's question factored into its deliberations. Again, this is how our legal system is designed. As a result, all anyone can evaluate is how the judge responded to what the jury asked. Here, that answer was accurate, fair and non-prejudicial to either party. The judge told the jury it was only to consider the evidence in reaching a decision and that it was to disregard the subject matter raised in the question. The judge even went beyond that and gave the jurors the opportunity to let him know if they could not follow that instruction. This was all the judge was required to do and,

really, all he could do.[3] Therefore, even if this issue is considered, it does not provide any basis for reversal, the Court should affirm the result below.

## III. The Court should reject the Appellant's third and fourth stated issues because they deal solely with the Appellant's disappointment with the performance of her attorney at trial.

The Appellant argues that her trial attorney erred in failing to object to the jury's question about health insurance[4] and in deciding not to present any rebuttal to the Respondent's closing argument. As an initial matter, the Respondent disputes the notion that the Appellant's former attorney erred in either of these respects. The type of question the jury asked is a commonplace occurrence in contemporary personal injury trials, and the judge gave his version of the "textbook" answer to such a question. Thus, there was no reason for him to object to the answer or to seek any other possible form of relief. Similarly, there was no error in the strategic decision not to present a rebuttal during closings, as the attorney fully covered all the issues in his primary closing argument.

On a more basic level, the Appellant's complaints about her former attorney's trial performance are not a proper basis for appellate review. Just as second-guessing juries is not the business of appellate courts, questioning the decisions made by attorneys in the heat of trial is not a proper focus of appeals. This is why there is no civil court equivalent of Post-Conviction Relief ("PCR") actions.

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[3] If questions of this nature, in and of themselves, were grounds for mistrials or reversals, it would become very difficult, at best, to try personal injury cases with any sense of finality.

[4] Presumably the Appellant means the attorney erred in failing to object to the judge's answer to the question. There was no real procedural mechanism for the attorney to object to the question itself.

To the extent a former client has legitimate complaints about his or her former attorney's performance (at trial or at any other juncture of the litigation process), the law provides methods and forums to address such claims. But those methods and forums do not include an appeal of a jury verdict in the underlying case. In such situations, the appellate court's job is to review and correct legal errors. This is not what the Appellant is asking the Court to do in her third and fourth issues. Therefore, the Court should decline to address those issues.

Furthermore, the Appellant cannot credibly argue that she was deprived of a fair opportunity to present her claims to a jury. Her attorney submitted all of her claimed medical bills into evidence and had the deposition of a treating physician read into the record. He argued that the plaintiff was entitled to a substantial amount of damages, and he did everything within reason to achieve that result for his client. Unfortunately for the Appellant, the jury simply viewed the value of her case differently than she did. That result, however, does not mean anything was wrong with the trial itself.

Undoubtedly there were some things about this trial that another attorney (or even another judge, for that matter) might have handled in a different way. But such hindsight, even if legitimate, does not mean the trial was unfair. Fairness and perfection are two very different things. As this Court has noted, "[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials." *Aakjer v. Spagnoli*, 291 S.C. 165, 177, 352 S.E.2d 503, 511 (Ct. App. 1987).

Accordingly, even if the Court were to address these complaints, there would be no basis for reversing the result of the trial, and an affirmance would be warranted.

## IV. The Appellant has waived any challenge to the trial judge's decision to deny her motion for a new trial *nisi additur.*

The primary basis of the Appellant's new trial motion was a request for a new trial *nisi additur* based on the alleged insufficiency of the jury's verdict. On appeal, however, the Appellant has made no mention of that request. The Appellant has not listed this as an issue on appeal, and she has not presented any arguments or authorities addressing the issue in her brief. As a result, the Appellant has failed to appeal the trial judge's decision on this issue, which is now the law of the case. *See First Union National Bank of South Carolina v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) ("Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. The unchallenged ruling, right or wrong, is the law of the case and requires affirmance."). Nevertheless, in an abundance of caution, the Respondent will present its substantive arguments in support of the trial judge's decision.

"When the jury's verdict is inadequate or excessive, the trial judge has the discretionary power to grant a new trial nisi." *Waring v. Johnson*, 341 S.C. 248, 256-57, 533 S.E.2d 906, 910-11 (Ct. App. 2000). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Id.* (emphasis added). Furthermore, "[t]he jury's determination of damages . . . is entitled to substantial deference." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003). "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, 527, 431 S.E.2d 555, 556 (1993).

In the present case, there were no reasons – compelling or otherwise – for the trial judge to invade the jury's province. Although the Respondent admitted fault for the

accident, the nature and extent of the damages proximately caused by that accident were disputed issues. Specifically, the parties sharply disagreed about whether the accident caused the headaches that the Appellant began complaining of almost a year after the accident. The treating physician initially gave an opinion that the headaches were causally related to the accident, but later admitted that this belief was based on what the Appellant told him about when the headaches began. The doctor further said it would be unlikely a person with severe headaches would wait a year to seek treatment. In addition, the Appellant testified that her rigorous school course work created significant stress, which is a known cause of headaches.

Based on that evidence, the jury had to decide between two competing theories of causation. The Appellant claimed the accident caused all of her medical treatments and led to all of her medical bills (roughly $16,000). The Respondent countered that the headaches and resulting treatments were not related to the accident and that the medical bills to consider amounted to about one-half of the total. The jury's role was to resolve this dispute and return the verdict it felt was appropriate. This is exactly what the jury did.

The verdict ($12,500) was sufficient to cover the costs of the non-headache medical treatments with an additional amount for pain. If the jury accepted the Respondent's arguments on causation, which it clearly did, then the amount of the verdict was reasonable and well within the jury's discretion. Thus, there was a rational basis for the amount of the verdict, and the trial judge acted properly in letting it stand.

As discussed above, the Appellant has not presented any arguments on the additur issue in her brief. In the lower court, however, the Appellant appeared to rely on an

argument that the verdict was inadequate because it did not cover all of her claimed medical expenses.[5] Such an argument, without more, is insufficient to justify disturbing the verdict. This Court has repeatedly found that verdicts for less than the amount of medical bills are valid and should be upheld when the scope and amount of damages were disputed at trial. *See, e.g., Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010) (trial court erred in granting additur due to the verdict being substantially lower than the medical bills, where the defendant challenged causation of some of the claimed medical damages); *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003) (trial court erred in granting additur where the only stated reason for granting the motion was the verdict being lower than the medical bills, and the amount of proximately caused damages was in dispute).

As this precedent demonstrates, the Appellant was not automatically entitled to receive a verdict that covered all of her claimed medical bills. The Respondent challenged nearly half of that total amount and elicited evidence to support her view of the case. Under those circumstances, a verdict for less than the total medical bills was a real possibility and a risk the Appellant assumed by taking the case to trial. Her disappointment with the verdict is understandable, but it does not provide any basis for reversing the result below.

Again, the Court need not reach the merits of this issue because the Appellant has abandoned it. Yet, even if the Court were to consider this issue, the end result would be the same. The trial court acted well within its discretion in denying the motion for a new

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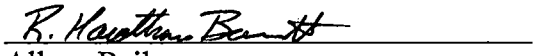
[5] The Appellant also appears to rely, at least in part, on a post-trial settlement offer extended by the Respondent. However, that settlement offer has no bearing on this appeal, and any documentation of it should not be included in the Record on Appeal or considered by this Court.

trial *nisi* additur, and the record supports that decision. Therefore, regardless of whether the Court deems this issue abandoned or addresses the merits, the Court should affirm the result in the trial court.

## CONCLUSION

Based on the arguments and authorities set forth above, the Court should affirm the denial of the Appellant's new trial motion and allow the jury's verdict to stand.

Respectfully submitted,



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v.

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**PROOF OF SERVICE**

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The undersigned, an attorney in this matter for the Respondent, certifies that I have this **22nd day of May, 2017**, served copies of the **Initial Respondent's Brief** and **Respondent's Designation of Matter to be Included in the Record on Appeal** upon the *pro se* Appellant by causing them to be deposited in the United States mail with sufficient postage, addressed to: Taliah Shabazz; 62 U.S. Highway 321 S; Winnsboro, SC 29180.

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May 22, 2017

**Via Hand Delivery**

The Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
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Re: Taliah Shabazz v. Bertha Rodriguez
Appellate Case No. 2016-002268
Our File No. 1464.7551

Dear Ms. Kitchings:

Enclosed are the originals and one copy each of the Initial Respondent's Brief , the Respondent's Designation of Matter to be Included in the Record on Appeal, and the Proof of Service. Please file the originals and return the stamped copies to our courier. Thank you for your kind assistance.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

R. Hawthorne Barrett

RHB
Enclosures

cc: Taliah Shabazz, Pro Se