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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

Civil Action No. 2015-CP-10-0330

Gary Nestler and Julie Nestler ..... *Appellant,*

v.

Joseph E. Fields ..... *Respondent.*

FINAL BRIEF OF APPELLANT

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II. WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL ABSOLUTE WHERE THE JURY'S AWARD WAS INCONSISTENT WITH THE EVIDENCE AND CLAIMS PRESENTED, WAS THE RESULT OF THE JURORS' CONFUSION; OR WAS MOTIVATED BY AN IMPROPER PURPOSE.

III. WHETHER THE TRIAL COURT ERRED IN CHARGING THE JURY ON THE ISSUE OF FAILURE TO MITIGATE DAMAGES WHERE DEFENDANT FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THEIR AFFIRMATIVE DEFENSE.

STATEMENT OF THE CASE

On January 15, 2015, Gary Nestler (hereinafter "Mr. Nestler" or "Nestler"), and his wife, Julie Nestler (hereinafter "Mrs. Nestler", or collectively "the Nestlers") brought an action against Joseph E. Fields (hereinafter "Mr. Fields" or "Fields" alleging careless, negligent, and reckless operation of an automobile resulting in a collision. R. 19. The Nestlers further claimed that Mr. Fields conduct directly and proximately caused personal injuries to Mr. Nestler, thus giving rise to claims for personal injury and for loss of consortium. *Id.* The Nestlers, having previously settled their claims with the liability carrier for Mr. Fields prior to filing suit, properly served their Summons and Complaint on QBE Insurance Company. R. 492.

On April 20, 2015, QBE Insurance Company answered the Complaint on behalf of Mr. Fields, pursuant to S.C. Code Ann. § 38-77-160 denying, in large part, the entirety of the Nestlers' Complaint, and setting forth a number of various affirmative defenses. See, Answer. R. 24. Mr. Fields later withdrew five of the affirmative defenses prior to trial. R. 31.

Julie Nestler later withdrew her claim for loss of consortium. R. 61. Trial commenced in the negligence action on April 25, 2016, and the jury reached a verdict on April 26, 2016. R. 58. The judgment was entered on April 29, 2016. R. 1.

On May 6, 2016, Mr. Nestler filed a Motion for New Trial Absolute. R. 39. On July 11, 2016, the Court denied Nestler's motion. R. 2. Mr. Nestler filed a Notice of Appeal and served the same upon the Mr. Fields on July 26, 2016. R. 56.

FACTS

On or about May 8, 2014, Gary Nestler and his then eleven-year-old daughter, Aspen Nestler, were traveling in their vehicle on Hwy. 17 in Mount Pleasant, South Carolina. R. 137. While waiting in traffic to turn into Boone Hall Plantation, Mr. Nestler's vehicle was struck in the rear by the Mr. Fields's vehicle (hereinafter "the collision"). R. 137. As a result of the collision, Mr. Nestler received medical treatment from various medical providers over the course of 2014 and 2015. R. 142 to 156; 157 to 158.

On January 15, 2015, Mr. Nestler filed the above-styled action in the Charleston County Court of Common Pleas for the Ninth Judicial Circuit claiming damages arising from the collision. R. 20. Mr. Nestler alleged that Mr. Fields operated his vehicle in a careless, negligent, and reckless manner, and with the willful and wanton disregard for the safety of others. R. 22. Mr. Nestler claimed damages in the form of noneconomic damages, including past, present, and future pain and suffering, loss of enjoyment of life, diminished capacity, and mental anguish. R. 22 to 23. Nowhere in Mr. Nestler's Complaint, including his demand for relief, is a single reference made to a claim for medical expenses.

A jury trial commenced on or about April 25 and 26, 2016 wherein Mr. Fields admitted his negligence in connection with the collision. R. 58. Thus, the only issues at trial were causation and damages. During the trial, Nestler proffered testimony regarding the past, present, and future damages sustained by Nestler as a direct and proximate

result of Mr. Fields's negligence.

Mr. and Mrs. Nestler both testified to Nestler's pain and suffering, mental anguish, loss of enjoyment of life, diminished capacity, and the injurious effects of Mr. Fields's negligent conduct on Nestler both past, present, and future. R. 101-104; 121-122; 137-149; 138-161. Nestler presented evidence by way of his treating physician regarding causation, as well as damages sustained, as well as the nature, extent, and frequency of medical treatment received by Nestler in connection with this accident. R. 268.

Further, Nestler's treating physician testified that there was no additional medical treatment available which would cure Nestler's injuries; thus Nestler would continue to suffer the same damages in the future. Nestler's treating physician also testified as to Nestler's permanent impairment, giving Nestler an overall permanent impairment rating of fifty-three (53%) percent. R. 268.

Mr. Fields argued that Mr. Nestler failed to mitigate his damages. Yet, at trial, Mr. Fields failed to offer any expert testimony which would support their argument that Mr. Nestler's failure to obtain certain medical treatment(s) was the direct and proximate cause of Mr. Nestler's damages. Mr. Fields also failed to proffer any other evidence that Mr. Nestler failed to mitigate their damages.

Prior to the commencement of trial, Counsel for Mr. Nestler notified Counsel for Mr. Fields that Mr. Nestler would not be seeking reimbursement for medical expenses in their prayer for relief. At trial, Mr. Nestler did not include or reference the medical

expenses in their opening statements, nor did he proffer any evidence of same during his case in chief.

On the last day of the trial, prior to the cross-examination of Mr. Nestler, Counsel for Mr. Fields requested a sidebar with the Court regarding several issues he wished to address during cross-examination. While the sidebar is off the record, it is apparent that the issue of medical bills was raised during that conversation based upon the following exchange once the parties were back on the record:

> THE COURT: *All right. So this stuff about medical bills all that?*
>
> MR. TRAINOR: *I'm going to cross [Mr. Nestler] on [the medical bills], but I'm not going to put that up on the screen or anything like that. I think I'm entitled to ask him – I mean, I think that's a – even if they're not making a claim, I think I'm entitled to say you've incurred $7,000.00 in medical bills.*

R. 168. Counsel for Mr. Nestler objected to this line of questioning on the basis that the medical bills were not relevant to any issue before the Court as the amount of the medical bills did not have any tendency to make any material fact in dispute more or less probable. Mr. Nestler also objected that the introduction of the medical bills would likely confuse the issues before the jury. The trial court overruled Nestler's objections and allowed Fields's to cross-examine Nestler on the amount of his medical bills.

During closing arguments, Counsel for Mr. Fields intimated that Nestler was trying to hide his medical bills from the jury in an apparent attempt to cast dispersion on Nestler's credibility. Counsel for Mr. Fields even went so far as to ask the jury to

consider awarding Nestler his medical expenses:

> MR. TRAINOR: *It's odd I introduced in cross-examination the medical bills. I don't think I ever had [to] do that in a case ever. I want you to think about why, why I want you to know that number, $7,117.50. It's because it's a really low number. Because there's not a lot of treatment.*
>
> * * *
>
> *Obviously, we're here to talk about numbers. We've heard a number. What they're asking is for you to render a verdict against the Defendant for $365,000, I think. ... Juries will sit and say, well, we got to factor that in somehow. I mean, surely there's a reason that number exists. That number has no bearing on your decision today. That number has no relevance. It's not evidence....*
>
> *Mr. Field's has admitted that he caused the accident. He was negligent. That doesn't mean that you can't award whatever you want to award. If it's something nominal? Sure. Medical bills, maybe? I don't know. Is it less than that? That's a decision you have to make.*

R. 242 to 243.

During juror deliberations, the jury requested the exact amount of Nestler's medical bills. R. 481. After deliberating for an hour and fifteen minutes, the jury returned a verdict in favor of Nestler—in the exact amount of his medical bills ($7,117.50). R. 1. The jury failed to make any award damages actually claimed by the Mr. Nestler, including past, present, and future pain and suffering, mental anguish, loss of enjoyment of life, and diminished capacity.

The Court allowed the parties ten (10) days to submit all post-trial motions, and Mr. Nestler filed a Motion for New Trial Absolute, pursuant to Rule 59, SCRCP. The Court denied Nestler's Motion and Mr. Nestler subsequently filed this appeal. R. 4.

LEGAL ARGUMENTS

I. THE TRIAL COURT ERRED IN ALLOWING DEFENDANT TO INTRODUCE EVIDENCE OF PLAINTIFF'S MEDICAL EXPENSES.

"All relevant evidence is admissible ... [e]vidence which is not relevant is not admissible." Rule 402, SCRE. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

"Pain and suffering is recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed." *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962) *citing Campbell v. Hall et al.*, 210 S.C. 423, 43 S.E.2d 129 (1947); *Boan v. Blackwell* 43 S.C. 498; 541 S.E.2d 242 (2001). "Damages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial Judge." *Harper*, 239 S.C. at 548. "Pain and suffering have no market price ... [and] are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured." *Id.*

It is the duty of the trier of fact in deciding these 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. The 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.

Appellant cannot locate a single South Carolina decision ruling directly on the issue of whether medical expenses are relevant in determining the amount of non-economic damages sustained. However, the Supreme Court of this State has held on at least one occasion that the determination of economic and non-economic damages ought to be two very separate and distinct decisions. *See, Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001) ("A separate charge on hedonic [non-economic] damages will minimize the risk that a jury will under- or over-compensate an injured person for her non-economic losses. While there are cases in which it is difficult to segregate the various components of these types of damages, we conclude 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."

A deeper analysis into the underlying issue can be found in a review of opinions from other States' courts who have confronted the issue. The prevailing view appears to be that there is simply no link between medical expenses and non-economic damages.

In the case of *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308 (2013), the California Court of Appeals examined the issue at length:

> One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter.
>
> ... Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable.... The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury....'
>
> Lawyers have used the amount of economic damages as a point of reference in their argument to a jury, or in settlement discussions, as a means to help determine the amount of noneconomic damages. We need not comment on this practice except to state that **it can provide no justification for the admission of evidence that is otherwise inadmissible and that is not relevant** .... We conclude that evidence of the full amount billed is not admissible... for the purpose of proving noneconomic damages.

Corenbaum, 215 Cal. App. 4th 1308, 1332 (2013) (*internal citations omitted*) (**emphasis added**)

Likewise, in the case of *Martin v. Soblotney*, 502 Pa. 418, 466 A.2d 1022 (1983), the Pennsylvania Supreme Court reached a similar conclusion:

> It is well established that the fundamental consideration in determining the admissibility of evidence is whether the proffered evidence is relevant to the fact sought to be proved. ... In the instant case [Plaintiff's] medical bills were offered to establish the total amount of money he expended on medical treatment for his injuries on the theory that such figure would aid the jury in determining the amount to award him for pain and suffering. Our inquiry, therefore, must focus on the evidentiary question as to whether the dollar amount of the medical services provided is probative of the degree and extent of [Plaintiff's] pain and suffering.
>
> It is immediately apparent that **there is no logical or experiential**

> **correlation between the monetary value of medical services** required to treat a given injury and **the quantum of pain and suffering endured as a result of that injury**.

The *Martin* court noted that the amount of medical bills is not an adequate indicator for the jury to consider in awarding hedonic damages, as there are far too many variables involved:

> First, the mere dollar amount assigned to medical services masks the difference in severity between various types of injuries. A very painful injury may be untreatable, or, on the other hand, may require simpler and less costly treatment than a less painful one. The same disparity in treatment may exist between different but equally painful injuries. Second, given identical injuries, the method or extent of treatment sought by the patient or prescribed by the physician may vary from patient to patient and from physician to physician. Third, even where injury and treatment are identical, the reasonable value of that treatment may vary considerably depending upon the medical facility and community in which care is provided and the rates of physicians and other health care personnel involved. Finally, even given identical injuries, treatment and cost, the fact remains that pain is subjective and varies from individual to individual.1
>
> Thus the fact that a particular amount of money was expended to treat an injury bears no logical correlation to the degree of pain and suffering which accompanied the injury to the plaintiff in question, forces the conclusion that such evidence possesses no probative value in a determination as to the appropriate monetary compensation to be awarded. **Evidence of the cost of medical services is therefore irrelevant and, consequently must be held to be inadmissible for that purpose.**

Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983) (*internal citations omitted*) (**emphasis added**); *See, also Carlson v. Bubash*, 639 A.2d 458, 462 (Pa. Super. Ct. 1994)

In one decision out of the Eastern District of Virginia, the District Court, relying

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1 *It is worth noting that the factors enumerated by the Martin court are nearly identical to the reasoning proffered by Counsel for the Plaintiff during his closing argument in an attempt to ameliorate the harm which had been created by the erroneous admission of the medical expenses.*

on the *Carlson* decision, also held that medical bills were inadmissible for purposes of proving pain and suffering:

> [A] single figure representing the total amount of an individual's medical bills does not demonstrate the number of times the person received treatment or the nature of the treatment. ... In some instances, one noninvasive diagnostic test can cost as much as many visits to a physical therapist or chiropractor. Therefore, the medical bills have no tendency to establish [Plaintiff]'s claim that he experienced pain and suffering as a result of the accident. The Court accordingly holds that the medical bills are inadmissible ....
>
> Even if the Court were to conclude the medical bills are relevant and admissible ... **there is a substantial possibility of jury confusion if the medical bills were introduced to prove pain and suffering**. The jury may be **tempted to treat the medical bills as recoverable special damages** rather than to only assess the medical bills as evidence that Payne experienced pain and suffering.
>
> The jury may also be confused by the medical bills' characterization of the treatment Payne allegedly underwent because the treatment is described in the bills in summary, imprecise terms. ... Furthermore, introduction of the medical bills into evidence would be overly cumulative: **whatever tendency they would have to prove pain and suffering may already be amply demonstrated by other, more probative evidence, such as the testimony of [Plaintiff] and his doctors.**

Payne v. Wyeth Pharmaceuticals, Inc., 2008 U.S. Dist. LEXIS 91849, (E.D.Va., 2008) (*internal citations omitted*) (**emphasis added**)

In the present case, Counsel for Nestler objected to any cross-examination of Nestler on the amount of medical bills, or the introduction of same to the jury on the basis that the medical bills were not relevant to any issue in dispute, and further, that there was a danger the introduction of same would confuse the issues before the jury. The trial court overruled this objection, adopting a position wholly incongruent with the

law of this state and the rules of evidence by holding that unclaimed economic damages were a proper consideration for the jury in forming a non-economic damage awards:

> MR. SLOTCHIVER: *I think [examining Nestler on the medical expenses] is not relevant to the issue. What [the Defense] is trying to do is they're trying to lower the bar of his damages. The amount of medical bills have nothing to do with the damages he sustained. It's irrelevant. We elected not to put them in. We're not asserting a claim for loss for medical bills.*
>
> THE COURT: *I disagree. I mean, the fact you didn't ask to put it in doesn't mean that it is not relevant. And it's the basis for their cross-examination. If you didn't have any medical bills or they were small, then obviously, the argument that I hear hundreds of times is your damages couldn't have been very much if your medical bills weren't very much.*
>
> MR. SLOTCHIVER: *Your honor, I would respectfully disagree.*
>
> THE COURT: *Well, you can. And you can appeal if you think I'm wrong. But it's coming in for that reason.*
>
> MR. SLOTCHIVER: *To show what the medical bills were?*
>
> THE COURT: *To show what the medical bills were. Normally, people put them in. But just because you didn't put them in doesn't mean that they can't put them [in] for the purpose of showing that the damages weren't very substantial. They're used for that purpose in almost every trial.*

R. 168 to 169; *cf. Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001) ("[A] separate charge [for non-economic damages] will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts."

In the present case, Nestler did not claim losses for medical expenses incurred as a result of the collision. Nestler's claims included past, present, and future pain and

suffering, loss of enjoyment of life, diminished capacity, and mental anguish. The amount of economic damages which might also have been sustained by the Plaintiff – whether ten dollars or ten million dollars – is in no way relevant to determining that issue as the amounts do not "tend to make any fact in dispute more or less probable." Rule 402, SCRE.

Further, as was noted by the *Payne* court, any probative value the medical expenses may have in determining the issue of non-economic damages (which Appellant contends is nil), is substantially outweighed by the possibility of jury confusion especially in that a "jury may be tempted to treat the medical bills as recoverable special damages"—the exact result of the present case. Appellant would contend there is no clearer example of jury confusion than a jury award for damages the Plaintiff did not even claim. *Payne v. Wyeth Pharmaceuticals, Inc.*, 2008 U.S. Dist. LEXIS 91849, (E.D.Va., 2008)

Accordingly, the trial court ought to have to have excluded any testimony or evidence of the medical expenses. The expenses did not tend to make any material fact in dispute more or less probable. The expenses were not claimed as damages by Nestler. Finally, the introduction of same served only to unfairly prejudice Nestler by creating a false-correlative link between his medical bills and his non-economic damages, thus minimizing the severity of his injuries and confusing the jury into awarding damages not claimed by Nestler. Accordingly, this Court ought to REVERSE the trial court's ruling and REMAND this case to the lower court for new trial on damages.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL ABSOLUTE WHERE THE JURY'S AWARD WAS INCONSISTENT WITH THE EVIDENCE AND CLAIMS PRESENTED, WAS THE RESULT OF THE JURORS' CONFUSION; OR WAS MOTIVATED BY AN IMPROPER PURPOSE.

Under the "thirteenth juror" doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. *See, Gastineau v. Murphy*, 323 S.C. 168, 181, 473 S.E.2d 819, 827 (Ct. App. 1996); *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

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. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). *See also, Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality,

corruption or some other improper motives. *See, Cock-n-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996); *McCourt by and Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993);

Our State's 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. *See, generally, Howard v. Roberson*, 376 S.C. 143, 157, 654 S.E.2d 877, 884 (Ct. App. 2007), *See, also, Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000) (award damages for pain and suffering is grounds for a new trial *nisi additur*).

In the case at bar, the jury's verdict in the exact amount of medical expenses sustained by Nestler lead to a number of conclusions, all of which would warrant granting of Nestler's Motion for New Trial Absolute: (1) The jury reached a decision which was inconsistent with the claims presented as medical expenses were not claimed damages by Nestler and there was extensive testimony regarding Nestler's non-economic damages;[2] (2) The jury has reached an award which reflected the jury's confusion as they awarded an amount of damages ***not claimed*** by Nestler; and/or, (3) The verdict is

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2 *The trial transcript reveals substantial testimony and evidence presented regarding non-economic damages and the profound effect of Mr. Nestler's injuries on his day to day life including: Mr. Nestler's testimony regarding his diminished ability to work as he once was able to (R. 121-122 & 158-161); Nestler's testimony regarding his pain, suffering, and trauma suffered during and after the collision (R. 137-149); and, his wife's testimony as to the impact his injuries have had on his family life (R. 101-104). This was presented along with the medical testimony of Dr. Schoderbek (R. 268), which included the 53% overall impairment rating of Mr. Nestler.*

based upon an improper motive such as defense counsel's insinuations that Nestler was hiding the medical bills from the jury.

However, assuming *in arguendo*, that the reasons stated above were not sufficient for the granting of a motion for new trial, the jury's verdict for the exact amount of medical bills without also awarding hedonic damages fails as a matter of law. *See, generally, Waring,* 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000).

Accordingly, this Court erred as a matter of law in denying Nestler's motion for new trial because the jury's award of damages in the exact amount of Nestler's medical bills was inconsistent with the evidence and claims presented and reflected the juror's apparent confusion or bias, prejudice, or other similar improper motive. Further, the jury's award of the exact amount of Nestler's medical expenses without an award of non-economic damages fails as a matter of law. The trial court ought to have exercised his authority to grant a new trial to ensure as justice has most assuredly not prevailed in the present case.

III. THE TRIAL COURT ERRED IN CHARGING THE JURY ON THE ISSUE OF FAILURE TO MITIGATE DAMAGES WHERE NO TESTIMONY WAS PRESENTED TO SUPPORT DEFENDANT'S CLAIM.

An appellate court will not reverse the trial judge's decision absent an abuse of 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.* The refusal to grant a

requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial. *State v. Pittman*, 647 SE 2d 144 - SC: Supreme Court (2007).

A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages. *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 354 S.E.2d 405 (Ct.App.1987). The burden of proving a lack of due diligence in minimizing the damages rests with the Defendant. *Hyde v. Southern Grocery Stores, Inc.*, 197 S.C. 263, 15 S.E. (2d) 353 (1941).

In the present case, Fields alleged several affirmative defenses, including the failure to mitigate his damages. However, at trial, Fields failed to proffer any evidence of same during the course of the trial. As such, Nestler objected on a number of occasions to the inclusion of a jury charge regarding mitigation of damages.

While Fields cross-examined Nestler's testifying physician regarding Nestler's course of treatment, Fields failed to proffer any causational evidence or counter expert medical testimony to support this affirmative defense. Fields's failure to present any evidence which would show that Nestler's failure to engage in certain course(s) of treatment(s) caused Nestler to endure more damages than he would have had he undergone the treatment (i.e. medical testimony from expert) should have precluded Defendant from receiving the benefit of a jury charge regarding mitigation of damages.

Accordingly, the Court's decision to allow the jury charge regarding the mitigation of damages with no evidence to support a charge for same was an abuse of discretion and this Court should REVERSE the trial court's decision and REMAND this case for further proceedings on damages.

CONCLUSION

For all of the foregoing reasons stated herein, and in consideration of the logical and legal support thereof, this Court should REVERSE the judgment of the circuit court, and REMAND the case at bar to the trial court for a new trial to determine damages sustained by Nestler.

Respectfully submitted this **6th** day of **July, 2017.**

By: _____

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Certificate of Counsel

The undersigned hereby certifies that this Final Brief of the Appellant is being submitted in conformance with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this **6th** day of **July, 2017**.

By:

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July 7, 2017

VIA REGULAR MAIL:

THE HONORABLE JENNY ABBOTT KITCHINGS
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RE: Gary Nestler and Julie Nestler v. Joseph Fields
Appeal Case No.: 2016-001541
Case No.: 2016-CP-10-0330

Dear Ms. Kitchings:

Enclosed you will please find fifteen (15) copies of the Appellants' Final Brief with regard to the above-referenced matter. Also enclosed, you will find two (2) copies of a Certificate of Service on the Final Brief. You will please return one clocked copy to my office in the self-addressed, postage paid envelope also included herein.

Please note that I have copied all counsel of record to this correspondence pursuant the South Carolina Appellate Rules.

I thank you advance for your time and attention to this matter, and please do not hesitate to let me if the Court requires anything further from us in this regard.

Sincerely,

Andrew J. McCumber
Attorney for the Appellants

AJM/ssh
Enclosure(s) as stated.

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