THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM MARION COUNTY
COURT OF COMMON PLEAS
THE HONORABLE THOMAS A. RUSSO
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2017-000210
CIVIL ACTION NO. 2015-CP-33-140

Vanessa Blackwell, a/k/a
Jacqueline Blackwell,

RESPONDENT,

versus

Andrew J. Herring, Individually, and as an employee/agent of Marion County Sheriff's Department; and Marion County Sheriff's Department,

DEFENDANTS,

Of which Marion County Sheriff's Department is the

APPELLANT.

INITIAL REPLY BRIEF

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STATEMENT OF ISSUES IN REPLY

I. The Sheriff's Department is entitled to a new trial because the Trial Court erred as a matter of law by admitting into evidence the plaintiff's medical bills which lacked a proper foundation upon which a jury could determine with reasonable accuracy which charges were related to the injuries sustained in the accident.

II. The Sheriff's Department is entitled to a new trial because the plaintiff's sister, through whom the plaintiff introduced the plaintiff's medical bills, lacked the ability to provide a proper foundation as to the reasonableness and necessity of the medical bills.

III. The Sheriff's Department is entitled to a new trial because the Trial Court erred as a matter of law in excluding eyewitness testimony that the plaintiff was walking in the roadway minutes before she was struck by the patrol vehicle.

IV. The Sheriff's Department is entitled to a new trial because the plaintiff's counsel's remarks during reply closing argument, which urged the jury to deliver justice to the plaintiff because of a cover-up and concealment of wrongful misconduct by the Sheriff's Department, impermissibly appealed to the passions of the jurors, went beyond the evidence presented at trial and the reasonable inferences therefrom, and so infected the trial with unfairness as to have denied the Sheriff's Department a fair trial.

ARGUMENT IN REPLY

I. The Sheriff's Department is entitled to a new trial because the Trial Court erred as a matter of law by admitting into evidence the plaintiff's medical bills which lacked a proper foundation upon which a jury could determine with reasonable accuracy which charges were related to the injuries sustained in the accident.

The Supreme Court's opinion in Carlyle v. Tuomey Hosp., 305 S.C. 187, 193-94, 407 S.E.2d 630, 633 (1991) requires a proper foundation to be laid by a plaintiff before medical bills may be admitted into evidence. This requires adequate identification of charges connected to the allegedly tortious conduct to avoid a jury reaching a verdict through surmise, conjecture, or speculation. Id. at 193, 407 S.E.2d at 633. If the medical bills are "not clearly identified by medical testimony, or otherwise, as being connected with the tortious act," such bills are "generally held inadmissible, especially where there is evidence that plaintiff was treated for a condition unrelated to the injuries sustained in the accident." Id. (internal citation omitted). At trial and in the Appellant's Brief, the Sheriff's Department challenged the lack of a proper foundation for the admissibility of all medical bills[1] submitted by Blackwell into evidence. The lack of a proper foundation requires a new trial under the precedent set forth in Carlyle.

In her Respondent's Brief, Blackwell attempts to deflect this Court from the controlling principle in Carlyle. First, Blackwell contends because some (although not all) of the medical bills were itemized, this limited itemization was sufficient to allow a jury to determine the precise costs of the medical bills related to Blackwell's injuries

[1]In Blackwell's Respondent's Brief, she suggests that the Sheriff's Department did not take issue with all the medical bills. The Sheriff's Department has challenged the admission of the entire medical bills exhibit [R.pp. ___; P. Ex. 6.] In its Appellant's Brief, the Sheriff's Department specifically referenced a few of the medical bills to demonstrate the lack of a proper foundation. In any event, the lack of a proper foundation for the admissibility of any medical bill would require a new trial.

from the accident. The itemization on some of the medical bills was not useful to the jury, however, in the absence of any testimony, whether from an expert or lay witness, identifying each line item as being connected with Blackwell's injuries from the accident. cf. Ellis v. Oliver, 323 S.C. 121, 131, 473 S.E.2d 793, 798 (1996) (finding medical bills were properly admitted into evidence where the trial court required plaintiff's expert "to go line-by-line over the bills to determine which items were, in his opinion, directly related to [patient's] quadriplegia.").

For example, because Blackwell was diagnosed with significant malnutrition and treatment was recommended and prescribed for her malnutrition issues, it is unclear from the McLeod Regional Medical Center bill whether charges for items such as pharmacy, drugs, IV solutions, supplies, and laboratory were solely related to Blackwell's injuries from the accident or whether these charges were related to the diagnosis and treatment of her severe malnutrition. [R.pp. ___; ___; P. Ex. 6, pp. 3-4; D. Ex. 1., pp. 5, 11, 12 (prescribing treatment for the severe malnutrition such as planning for Nutrition Department to see Blackwell, planning for supplements, checking magnesium and potassium levels and replacing as needed, and treating low calcium levels).]

As another example, the bill from Carolina's Hospital – Marion contains an itemized charge for an emergency department visit on June 5, 2014 but there was no testimony at trial connecting this emergency department visit with Blackwell's injuries sustained in the accident on May 17, 2014. [R.pp. ___; P. Ex. 6, pp. 10, 13.]

In both of the above examples, the lack of any testimony at trial as to the relationship between the itemized charges to Blackwell's May 17, 2014 accident leaves a jury to completely speculate whether the charges are damages arising from the accident.

The bill from Advanced Medical Associates, a provider Blackwell was already seeing for her schizophrenia prior to the accident, is not itemized at all and provides no detail as to its services provided to Blackwell from June 12, 2014 through December 11, 2014. [R.pp. ___; Id. at pp. 5-9.] In her Respondent's Brief, Blackwell claims this bill represents her visits for follow-up treatment as a result of her ankle fracture. Yet there was no testimony at trial that Blackwell visited Advanced Medical Associates for treatment related to the injuries she sustained in the May 17, 2014 accident. Wendy Arthur, Blackwell's sister, gave no specific testimony regarding which medical providers Blackwell visited for follow-up treatment after the accident. Instead, Arthur's testimony, which Blackwell cites to as providing the necessary foundation for the admission of this medical bill, only vaguely references appointments which Blackwell had after the accident:

Q:	You would have brought her back and forth to those appointments and those types of things?
Arthur:	Yeah.
. . .	
Arthur:	When she's complaining I had to take her back to the doctor a couple of months ago 'cause she was complaining about some pain around that where the ankle got crushed at.

[R.pp. ___; ___; Tr. pp. 98, ll. 11-13; 107, l. 25 – 108, l. 3.]

The above testimony from Arthur does not indicate which providers Blackwell may have seen after the accident and certainly does not explain how all eight visits at Advanced Medical Associates were connected to the accident. This imprecise testimony does not satisfy requirements of Carlyle that a proper foundation sufficient to allow a

factfinder to make a determination with reasonable certainty or accuracy be laid prior to the admission of medical bills into evidence. Carlyle, 305 S.C. at 193, 407 S.E.2d at 633.

Additionally, in her Respondent's Brief, Blackwell conclusively states without any citation to the Record that bills from CNRA and MRMC-CBO are physician charges related to the hospital bills and claims because of this, the bills were properly admitted into evidence. These bills, however, were not shown on the Medical Bills Summary submitted by Blackwell into evidence and there were no attached bills for these alleged charges. [R.pp. ___; P. Ex. 6, pp. 2, 14, 20.] Blackwell points to no trial testimony regarding these alleged bills and no witness established any foundation for the admissibility of these particular bills.

The lack of a proper foundation and the absence of adequate identification of charges related to Blackwell's May 17, 2014 accident was an inherent problem with each medical bill submitted by Blackwell because there was no witness at trial who could or did connect each medical charge to the accident. The Trial Court therefore erred in admitting Blackwell's medical bills without a proper foundation.

Blackwell suggests that the holding of Carlyle only applies if the plaintiff's underlying or non-related medical issue is serious. Not only did the Supreme Court not include such a qualification in its holding that medical bills may only be admitted into evidence upon a proper foundation, but Blackwell's underlying malnutrition issues were characterized by the physicians as "abnormal[ ]", "significant," "dangerously low," and "severe." [R.pp. ___; D. Ex 1, pp. 5, 11.] In addition, Blackwell had been suffering from schizophrenia for years resulting in her inability to work and her need to visit

Advanced Medical Associates both before and after the accident. [R.pp. ___; ___; ___; Tr. pp. 87, l. 15 – 88, l. 2; 100, l. 21 – 101, l. 1; 102, ll. 1 – 13.] Because Blackwell was suffering from multiple medical issues, it was all the more imperative that Blackwell establish that the medical bills were related to the accident prior to their admission. Blackwell's suggestion that the Sheriff's Department could have merely cross-examined Blackwell's witnesses at trial about which medical charges were related to the accident does not resolve the legal issue at hand because, as explained below in Section II, Blackwell did not present any witness with knowledge of the contents of the medical bills.

Finally, Blackwell argues that the Sheriff's Department suffered no prejudice from any erroneous admission of the medical bills because it would have only been a small amount were which erroneously admitted. As the Sheriff's Department has shown in both this brief and its Appellant's Brief, there was no foundation for any of the medical bills submitted by Blackwell and a number of issues with the bills. Prejudiced is presumed when incompetent evidence having a probative value upon a material issue of fact – here, Blackwell's damages – is admitted at trial. Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988). The jury was also asked by Blackwell's counsel to award the full amount of the medical bills. [R.pp. ___; Tr. pp. 279, l. 22 – 280, l 7.] Because the medical bills were improperly admitted into evidence without a proper foundation, the jury's verdict was no doubt improperly influenced by the wrongly admitted medical bills. Accordingly, the Sheriff's Department requests this Court to grant it a new trial based upon the Trial Court's improper admission of the medical bills.

II. The Sheriff's Department is entitled to a new trial because the plaintiff's sister, through whom the plaintiff introduced the plaintiff's medical bills, lacked the ability to provide a proper foundation as to the reasonableness and necessity of the medical bills.

In response to the Sheriff Department's argument that Blackwell's sister, Wendy Arthur, was not qualified to adequately testify as to the reasonableness and necessity of the medical bills, Blackwell argues that any lay person could conclude that Blackwell's leg fracture was caused by the collision. This response does not address the pertinent legal question. The Sheriff's Department does not dispute that Blackwell suffered a leg injury from the accident. The question is whether the medical expenses claimed by Blackwell for the leg injury were reasonable and necessary. Subsumed in this question is whether the medical charges were related to and connected with the leg injury sustained in the accident.

At trial, Arthur demonstrated no knowledge of these particulars for Blackwell to admit the medical bills into evidence through Arthur. While Arthur may have assisted Blackwell with transportation and some of Blackwell's daily living needs, these acts did not indicate that Arthur had knowledge of whether the medical bills were reasonable, necessary, and related to the accident. Arthur admitted at trial that she only received the medical bills through Blackwell's attorney. [R.p. ___; Tr. p. 106, ll. 14-18.] There was no evidence Arthur was financially responsible for the medical bills or had any personal knowledge of the contents of the bills. Further, Arthur's testimony that she brought Blackwell back and forth to appointments without testifying as to any specifics of these appointments as to when they occurred, which medical providers were seen, or services provided during the appointments does not render Arthur qualified to testify as to the reasonableness and necessity of the medical bills. [R.p. ___; Id. at p. 98, ll. 11-13.]

Arthur did not meet the threshold requirements to testify as to whether the medical bills were reasonable and necessary, and therefore, the medical bills could not be properly entered into evidence through Arthur. Accordingly, the Trial Court's error in admitting the medical bills through Arthur requires a new trial.

III. The Sheriff's Department is entitled to a new trial because the Trial Court erred as a matter of law in excluding eyewitness testimony that the plaintiff was walking in the roadway minutes before she was struck by the patrol vehicle.

Blackwell implores this Court to find that the only testimony that would be relevant and have bearing on the issue of whether Blackwell was in the roadway at the time of the accident would be from those individuals who actually witnessed the accident. Such is not the law of South Carolina as the Supreme Court has rejected such a strict rule. DeLee v. Knight, 266 S.C. 103, 108-09, 221 S.E.2d 844, 845 (1975).

Blackwell further argues that the admission into evidence of Rhiannon Herring's testimony that she observed Blackwell walking in the roadway minutes prior to the accident would open the floodgates to allow the admission of testimony from anyone who had seen Blackwell walking down Highway 501 at any time on the day of the accident. Blackwell's presumption does not account for the exclusion of evidence based upon remoteness in time to the accident. Rhiannon's observation of Blackwell in the roadway minutes prior to the accident was not remote in time and was relevant to the Sheriff's Department's case for the reasons explained in the Appellant's Brief. The Trial Court's refusal to admit Rhiannon's testimony at trial entitles the Sheriff's Department to a new trial.

IV. The Sheriff's Department is entitled to a new trial because the plaintiff's counsel's remarks during reply closing argument, which urged the jury to deliver justice to the plaintiff because of a cover-up and concealment of wrongful misconduct by the Sheriff's Department, impermissibly appealed to the passions of the jurors, went beyond the evidence presented at trial and the reasonable inferences therefrom, and so infected the trial with unfairness as to have denied the Sheriff's Department a fair trial.

Blackwell contends the Sheriff's Department did not preserve for appellate review its objection to Blackwell's counsel's reply closing argument. Upon the remarks made by Blackwell's counsel improperly suggesting a cover-up by the Sheriff's Department and insinuating facts that could not be derived from the evidence presented, the Sheriff's Department immediately objected to the argument as improper and beyond the facts of the case. The Trial Court quickly overruled the objection. [R.pp. ___; Tr. pp. 313, l. 4 – 314, l. 12.]

No further objection, including any post-trial motion, was required to preserve this argument for appellate review. Church v. McGee, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) ("Post-trial motions are not necessary to preserve issues that have already been ruled on; they are used to preserve those that have been raised to the trial court but not yet ruled on by it."). On appeal, the Sheriff's Department has specifically argued that the remarks made during Blackwell's reply closing argument went beyond the evidence presented at trial – the very objection made by the Sheriff's Department during trial.

Blackwell additionally argues that her counsel's closing argument was at all times supported by the evidence on the record. As already shown by the Sheriff's Department in its Appellant's Brief, there was absolutely no evidence at trial of any cover-up by the Sheriff's Department and no evidence that Andrew Herring was able to alter medical

records to allege alcohol use by Blackwell. These were blatantly scurrilous allegations not supported by any of the evidence presented at trial.

Lastly, Blackwell now tries to back away from her counsel's insistent urging to the jury to not let a cover-up happen, claiming that the reply closing argument was mischaracterized and Blackwell never meant for the jury to believe the Sheriff's Department was engaged in a cover-up or wrongful conduct. Yet, the very words pleaded to the jury were: "The twelve of you get to look at this evidence and you get to decide whether this is gonna be the type of community where people can go around look, driving, looking on their cell phones, running people over, covering it up and getting away with it – ." [R.p. ___; Id. at p. 314, ll. 2-7.] Blackwell directly asked the jury to decide if it was going to render a verdict in favor of Blackwell or if it would let the Sheriff's Department, the only other party in the case, get away with a cover-up. This inflammatory argument which had no basis in the evidence presented at trial incited the jury as the finder of fact not to review the evidence as it saw fit, as Blackwell claims, but rather prodded the jury to find for Blackwell as a way of teaching a lesson to the Sheriff's Department. This improper reply closing argument denied the Sheriff's Department a fair trial, and a new trial is required.

CONCLUSION

For the reasons set forth herein and in the Appellant's Brief, Appellant Marion County Sheriff's Department respectfully requests this Court to reverse the jury's verdict and remand for a new trial.

Respectfully submitted,

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November 6, 2017.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant, Marion County Sheriff's Department, do hereby certify that I have this date served the foregoing Initial Reply Brief, dated November 6, 2017, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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Dated: November 6, 2017.

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November 6, 2017

The Honorable Jenny Abbott Kitchings
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Re: ***Blackwell v. Marion County Sheriff's Department***
Appellate Case No. 2017-000210
RPR File No.: 149-211

Dear Ms. Kitchings:

Enclosed for filing is the original Initial Reply Brief of Appellant, Marion County Sheriff's Department, in the above-referenced matter, along with our original Certificate of Service.

By copy of this letter, we are this day serving a copy of our Initial Reply Brief on counsel for the Respondent.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

Carmen V. Ganjehsani

CVG/lmi
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cc: Eric M. Poulin, Esquire
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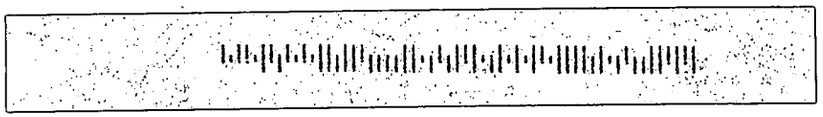

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