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

RECEIVED
DEC 20 2017
SC Court of Appeals

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.

FINAL APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

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V. 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.

VI. The Sheriff's Department is entitled to a new trial where the jury's verdict of $500,000.00 in total damages for the plaintiff was the result of passion, caprice, prejudice or some other influence outside the evidence.

STATEMENT OF THE CASE

This case arises out of a collision in which Andrew J. Herring, a reserve officer with Appellant Marion County Sheriff's Department, accidentally struck Respondent Vanessa Blackwell a/k/a Jacqueline Blackwell with his patrol vehicle while Blackwell was walking on a dark highway near Marion, South Carolina.

On February 19, 2015, Blackwell filed her Complaint against Herring, individually and as an employee/agent of the Marion County Sheriff's Department, as well as the Marion County Sheriff's Department in the Court of Common Pleas for Marion County. [R.pp. 15-24; Compl.] Blackwell alleged that both Herring and the Sheriff's Department were negligent in various respects which resulted in the accident and sought actual and punitive damages. [R.pp. 15-24; Id.]

On May 4, 2015, Herring and the Sheriff's Department filed their Answer, denying the material allegations of the Complaint. [R.pp. 25-28; Answer.] Herring and the Sheriff's Department further asserted comparative negligence as an affirmative defense and maintained that Blackwell's "alleged injuries were caused by or contributed to by her own acts or omissions." [R.p. 27; Id. at ¶ 19.]

Simultaneous with their Answer, Herring and the Sheriff's Department also moved to dismiss Herring as a defendant based upon the fact that he was at the time in question an employee of the Sheriff's Department and acting within the scope of his official duties. [R.p. 29; Mtn. to Dismiss.] In addition, the Defendants moved for an order striking punitive damages pursuant to the South Carolina Tort Claims Act which prohibits the recovery of punitive damages. [R.p. 30; Mtn. to Strike.] On August 6, 2015, consent orders were filed dismissing Herring as an individual defendant and

striking Blackwell's demand for punitive damages. [R.pp. 11-14; Consent Orders.] The Sheriff's Department was the sole remaining defendant in the case.

The case came to trial on September 12, 2016 before The Honorable Thomas A. Russo and a jury. [R.p. 41; Tr.] On September 14, 2016, the jury issued a verdict finding that the Sheriff's Department was negligent and that such negligence was a proximate cause of Blackwell's injuries. [R.pp. 9-10; 324, l. 14 – 325, l. 7; Verdict Form; Tr. pp. 353, l. 14 – 354, l. 7.] The jury also found that Blackwell was negligent and that her negligence was a proximate cause of her injuries. [R.pp. 9-10; 325, ll. 7-10; Verdict Form; Tr. p. 354, ll. 7-10.] The jury assigned 35% negligence to Blackwell and 65% to the Sheriff's Department. [R.pp. 9-10; 325, ll. 10-16; Verdict Form; Tr. p. 354, ll. 10-16.] Finally, the jury stated the amount of damages sustained by Blackwell (prior to the reduction of her total damages based on her percentage of fault) was $500,000.00. [R.pp. 9-10; 325, ll. 18-20; Verdict Form; Tr. p. 354, ll. 18-20.]

Based upon the jury's finding of Blackwell's 35% negligence, the Trial Court reduced the damages to $325,000.00 and further ordered that pursuant to the South Carolina Tort Claims Act, the Sheriff's Department would not be liable for any amount of the verdict in excess of $300,000.00. [R.pp. 1; 8; 326, l. 21 – 330, l. 5; Form 4 Order filed January 18, 2017; Order Denying Post-Trial Mtns., p. 6; Tr. pp. 359, l. 21 – 363, l. 5.]

On September 23, 2016, the Sheriff's Department filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for a New Trial, raising multiple grounds for a new trial including (1) the Trial Court's improper admission of medical bills without a proper foundation and without proof that the bills were related to the

injuries from the accident; (2) the Trial Court's failure to admit eyewitness testimony of Blackwell on the roadway five to ten minutes before the accident occurred; (3) the Trial Court's refusal to ask certain requested voir dire questions; (4) improper closing argument by Blackwell's counsel; and (5) an excessive damages award by the jury indicating the verdict was based upon passion, capriciousness, and/or prejudice. [R.pp. 31-32; Post-Trial Mtn.]

On January 18, 2017, the Trial Court entered its Order denying the Sheriff's Department post-trial motions. [R.pp. 1-8; Order.] The Sheriff's Department timely filed and served its Notice of Appeal on February 3, 2017.

STATEMENT OF FACTS

Andrew J. Herring is an assistant supervisor and paramedic employed with the Florence County EMS. [R.pp. 147, ll. 4-16; 165, ll. 8-13; Tr. pp. 142, ll. 4-16; 160, ll. 8-13.] At the time of the incident that occurred in this case on May 17, 2014, Herring was also working as a reserve officer with the Marion County Sheriff's Department. [R.pp. 149, ll. 14-17; 165, ll. 17-23; Id. at pp. 144, ll. 14-17; 160, ll. 17-23.] He worked at the discretion of the sheriff, assisting with special events, the SWAT team, the canine teams, and traffic enforcement needs. [R.p. 149, ll. 18-25; Id. at p. 144, ll. 18-25.] The position was voluntary, and Herring was not paid for his service as a reserve officer with the Sheriff's Department. [R.pp. 150, ll. 1-3; Id. at pp. 145, ll 1-3.] He served as a reserve officer on his days off from the Florence County EMS. [R.pp. 148, ll. 2-11; 150, ll. 4-7; Id. at pp. 143, ll. 2 – 11; 145, ll. 4-7.] Herring completed certain training through the South Carolina Criminal Justice Academy to be certified as a reserve officer. [R.p. 150, ll. 12-25; Id. at p. 145, ll. 12-25.]

On May 17, 2014, Herring was serving as a reserve officer with the Sheriff's Department to assist with the Foxtrot Festival. [R.p. 151, ll. 6-14; Id. at p. 146, ll. 6-14.] The reserve officers working the festival were assigned tasks by the sheriff and the captain of investigations and were primarily tasked with traffic control and maintaining order through the Foxtrot Festival. [R.p. 151, ll. 14-17; Id. at p. 146, ll. 14-17.]

Herring arrived at the Foxtrot Festival around three or four o'clock in the afternoon. [R.p. 151, ll. 18-20; Id. at p. 146, ll. 18-20.] He drove his assigned patrol car, an unmarked silver Charger, to the festival. [R.p. 152, ll. 8-13; Id. at p. 147, ll. 8-13.]

Herring's wife at the time of the incident, Rhiannon Herring, was also working the Foxtrot Festival, but she separately drove their truck to the festival to bring a golf cart that would be used to assist in patrolling the festival. [R.pp. 151, ll. 1-5; 152, ll. 3-18; Id. at pp. 146, ll. 1-5; 147, ll. 3-18.]

Herring worked at the Foxtrot Festival and was released around 9:00 p.m. [R.p. 152, ll. 19-25; Id. at p. 147, ll. 19-25.] He planned to head straight home, driving north on Highway 501. [R.p. 153, ll. 1-22; Id. at p. 148, ll. 1-22.] Herring had a cell phone with him that day and had made telephone calls while working at the festival. [R.pp. 163, l. 24 – 154, l. 4; Id. at pp. 148, l. 24 – 149, l. 4.] Before Herring left, he also telephoned Rhiannon who was leaving in front of him to tell her that he was coming right behind her and would be home in a few minutes. Herring placed this telephone call right before he entered his vehicle to leave. [R.p. 154, ll. 5-15; Id. at p. 149, ll. 5-15.]

Herring left the festival and traveled northbound on Highway 501 toward his residence. [R.pp. 154, l. 24 – 155, l. 3; Id. at pp. 149, l. 24 – 150, l. 3.] Herring described to the jury what occurred as he was driving home in the dark on Highway 501 that evening and how he struck something in the roadway which turned out to be Blackwell:

> I saw a very lowly area, very dark area. There was a vehicle coming towards me with bright lights on, you know, and in the patrol car the windows are dark and you can't see very well. I had my headlights on, and I was traveling at a normal rate of speed. When the car was coming to me at that point in time there was something in the, I couldn't tell what it was, I couldn't tell. ***It was a dark, whatever it was I couldn't see. I went to swerve to the left to avoid missing whatever was in the road*** almost hitting an oncoming car, and I tried to maneuver between what I was unsure what it was and this car without hitting that car head on.
>
> Well, when I was struck, at that point in time I didn't know what it was, whether it was a deer or anything, I didn't have a clue. And I went past it.

> As soon as it hit my car I couldn't tell what it was and I heard a noise on the side of my car so I drove, immediately slowed down at that point in time, and went up to the next driveway to turn around to come back to see what it was.
>
> When I come back around I immediately called my wife, look, I hit something, I'm not sure what it was, I'll call you back in a little bit because I was right behind my wife. And I turned around and I come back. When I pulled up to the area, didn't drive off the roadway, pulled up to the area, then I turned my blue lights on. And when I turned my blue lights on in the area I thought whatever it was may be – I got out and that's when I noticed that there was a pedestrian right there laying on the side of the road.

[R.pp. 155, l. 5 – 156, l. 11; Id. at pp. 150, l. 5 – 151, l. 11 (emphasis added).]

Herring's telephone call to his wife which he placed after he struck something in the road and while turning around to pull over lasted only around 15 seconds. Herring called her to advise his wife why he would not be home right after she arrived. [R.p. 156, ll. 17-23; Id. at p. 151, ll. 17-23.]

Herring reiterated during his testimony that Blackwell was in the roadway when he accidentally struck her. [R.pp. 156, ll. 12-14; 157, ll. 12-13; 170, ll. 1-21; 171, ll. 18-24; 172, ll. 1-4; Id. at pp. 151, ll. 12-14; 152, ll. 12-13; 165, ll. 1-21; 166, ll. 18-24; 167, ll. 1-4.] After he turned around and pulled over to investigate, Herring saw Blackwell located on the edge of the grass off the road. [R.p. 156, ll. 14-16; Id. at p. 151, ll. 14-16.]

After Herring pulled over, got out of his patrol car, and realized he had struck a pedestrian, he asked Blackwell if she was okay. Herring went back to his vehicle to call for assistance, including his supervisor, the fire chief, and other individuals with whom he worked. He also radioed dispatch. [R.pp. 156, l. 24 – 158, l. 8; Id. at pp. 151, l. 24 – 153, l. 8.]

Herring assisted Blackwell, using his knowledge as a paramedic. When she tried to stand up, he advised her to remain seated. Herring noticed Blackwell had a big gash in the back of her leg. He tried to determine if she had any identification on her but could not find any. Blackwell advised him that she was headed to the Foxtrot Festival. Herring asked Blackwell why was she in the roadway but he did not recall her answering. At that point, Herring was worried about trying to provide Blackwell with the care she needed and assisting her in lying down. Herring tried to keep Blackwell still to prevent her from further injuring herself. Herring again testified that he had notified EMS and all the appropriate authorities and made the recommendation that Blackwell needed to go to Florence because of her injuries. [R.pp. 158, l. 13 – 159, l. 21; 163, l. 15 – 164, l. 10; Id. at pp. 153, l. 13 – 154, l. 21; 158, l. 15 – 159, l. 10.]

The EMS unit was about six to ten minutes away and arrived to the scene within a short period of time. Herring's EMS supervisor, Terry Miles, as well Trooper John Ellis and Herring's wife also arrived to the scene. [R.pp. 159, l. 22 – 160, l. 14; Id. at pp. 154, l. 22 – 155, l. 14.]

Herring informed Trooper Ellis what had occurred and stated to Trooper Ellis that he had been traveling down the road at a normal rate of speed and that there was an object in the road. There was no lighting, and Herring could not see what the object was in the road. The lights from the oncoming car hindered his ability to see even more so he swerved to the left to try to avoid hitting what was in the roadway. Herring told Trooper Ellis he was unfortunately unable to miss what was in the road and struck it. It all happened in a "split second." Herring advised Trooper Ellis that it was not until he

turned around and parked to investigate that he realized he had struck a pedestrian. [R.pp. 160, l. 15 – 161, l. 14; Id. at pp. 155, l. 15 – 156, l. 14.]

The speed limit in that area was 55 miles per hour. Herring estimated that he was going 55, maybe 56. [R.p. 161, ll. 15-21; Id. at p. 156, ll. 15-21.] Herring further testified that he was not on his cell phone when the accident occurred. [R.p. 164, ll. 13-15; Id. at p. 159, ll. 13-15.]

Trooper John Ellis with the South Carolina Highway Patrol was working the night of May 17, 2014 and received a call concerning the accident. [R.pp. 181, l. 2 – 183, l. 1; Id. at pp. 180, l. 2 – 182, l. 1.] Trooper Ellis was called because the Highway Patrol investigates accidents involving law enforcement under South Carolina law (other than accidents involving the Highway Patrol itself). [R.pp. 183, l. 6 -184, l. 8; Id. at pp. 182, l. 6 – 183, l. 8.]

Trooper Ellis testified he received a call about the accident around 9:18 p.m. or 9:19 p.m. and was on the scene by 9:47 p.m. [R.pp. 184, l. 9 – 185, l. 11; Id. at pp. 183, l. 9 – 184, l. 11.] When he arrived, he observed a silver Charger sitting in the road with its blue lights on as well as other vehicles with their blue lights activated. Blackwell had already been transported to a medical facility in Florence and was not at the site. [R.pp. 185, l. 16 – 186, l. 14; Id. at pp. 184, l. 16 – 185, l. 14.]

Trooper Ellis questioned Herring about the accident. Herring advised Trooper Ellis that he had been traveling north going home from the Foxtrot Festival. An oncoming vehicle was traveling south with its lights on impeding Herring's ability to see, and Herring struck something in the road. Herring told Trooper Ellis that he turned around and found Blackwell. [R.p. 186, ll. 14-22; Id. at p. 185, ll. 14-22.]

Trooper Ellis took photographs at the scene and of the silver Dodge Charger Herring was driving which belonged to Marion County. [R.pp. 187, l. 5 – 189, l. 3; Id. at pp. 186, l. 5 – 188, l. 3.] The photographs of the vehicle showed an impact point right before the passenger side rear tire. They also showed that the passenger side mirror was gone. There was a rough mark of some type on the window and the door. Below the wheel well was dried mud but there was no mud on the tire or the rim which indicated to Trooper Ellis that Herring did not drive through a mud hole on the side of the road or somewhere else. The tire was clean. There was no grass anywhere on the car. [R.pp. 189, l. 4 – 190, l. 6; 373-374; 376; 379; Id. at pp. 188, l. 4 – 189, l. 6; D. Exs. 3, 4, 6, and 9 (Photographs).]

Trooper Ellis also viewed the overall scene, including where debris from the vehicle was located. He had Herring point out to him where Blackwell had come to rest. Herring pointed out an area just off the road, semi in the ditch and semi out of the ditch. The ditch was a small drainage ditch. [R.p. 190, ll. 7-15; Tr. p. 189, ll. 7-15.] The only debris Trooper Ellis found was a small part of either the lens cover or the mirror in the road and another small piece of debris from the vehicle just off the road in the grass. [R.pp. 190, l. 15 – 192, l. 10; 375; 377-378; Id. at pp. 189, l. 15 – 191, l. 10; D. Exs. 5, 7, and 8 (Photographs).]

Trooper Ellis did not find any tire tracks or marks on the side of the road which indicated that Herring did not run off the road. The only way Trooper Ellis believed the accident could have happened was if Blackwell was actually in the roadway. [R.pp. 192, l. 11 – 193, l. 10; Tr. pp. 191, l. 11 – 192, l. 10.]

Trooper Ellis observed the scene for about forty-five minutes and left to travel to Florence to visit Blackwell at McLeod Regional Medical Center. [R.pp. 194, ll. 16-22; Id. at p. 193, ll. 16 – 22.] Trooper Ellis spoke with Blackwell and she admitted to him that she was in the roadway. [R.pp. 194, l. 23 – 196, l. 11; Id. at pp. 193, l. 23 – 195, l. 11.]

Kamadie Campbell was working with the Marion County EMS on the night of May 17, 2014 and responded to a call he received around 9:00 p.m. regarding the accident. [R.pp. 205, l. 6 - 207, l. 22; Id. at pp. 204, l. 6 – 206, l. 22.] When he arrived, he noticed a vehicle on the side of the road and the patient, Blackwell, lying down. [R.pp. 207, l. 23 – 208, l. 3; Id. at pp. 206, l. 23 – 207, l. 3.] When Campbell arrived, Blackwell was located right on the side of the road, near the ditch, but not in the ditch. [R.p. 209, ll. 6-15; Id. at p. 208, ll. 6-15.] Campbell recalled that Blackwell was wearing dark clothing. [R.pp. 211, l. 24 – 212, l. 6; Id. at 210, l. 24 – 211, l. 6.] Campbell assessed Blackwell and observed a left leg tibia fracture with an open wound. [R.p. 208, ll. 1-18; Id. at p. 207, ll. 1 – 18.] Campbell reported that Blackwell was conscious. [R.p. 210, ll. 10-12; Id. at p. 209, ll. 10-12.] Campbell transported Blackwell to McLeod Regional Medical Center. [R.p. 209, ll. 16-18; Id. at p. 208, ll. 16-18.]

Blackwell's sister, Wendy Arthur, testified at trial and described Blackwell's mental health issues, including Blackwell's nervous breakdown and diagnosis with schizophrenia in the 1990s. Because of her disability, Blackwell was not able to work. [R.pp. 95, l. 16 – 96, l. 9; 98, l. 15 – 99, l. 2; 111, l. 21 – 101, l. 1; Id. at pp. 84, l. 16 – 85, l. 9; 87, l. 15 – 88, l. 2; 100, l. 21 – 101, l. 1.] Arthur acknowledged that Blackwell often times had trouble getting her stories straight or remembering with accuracy an event

which happened to her. [R.p. 112, ll. 22-25; Id. at p. 101, ll. 22-25.] According to Arthur, Blackwell was seeing physicians at Advanced Medical Care prior to the accident for her medical issues and continued after the accident to seek treatment at Advanced Medical Care. [R.p. 113, ll. 1-10; Id. at p. 102, ll. 1-10.] Advanced Medical Care had prescribed Blackwell medication for her schizophrenia. [R.p. 113, ll. 11-13; Id. at p. 102, ll. 11-13.]

Arthur further testified that Blackwell walked on Highway 501 on a daily basis. [R.pp. 99, l. 22 – 100, l. 1; 101, ll. 2-26; Id. at pp. 88, l. 22 – 89, l.1; 90, ll. 2-6.] Arthur stated that Blackwell told her how the accident occurred and said that Blackwell claimed that she was "walking in the grass and the car swerved over and ran her over." According to Arthur, Blackwell never said she was in the road. [R.p. 120, ll. 18-23; Id. at p. 109, ll. 18-23.] Arthur conceded that on the day of the accident, Blackwell had not taken her medication for her schizophrenia. [R.pp. 113, l. 11 – 114, l. 10; Id. at pp. 102, l. 11 – 103, l. 10.]

Blackwell also testified at trial. [R.pp. 121, l. 6 – 122, l. 2; Id. at pp. 110, l. 6 – 111, l. 2.] She stated that the accident occurred while she was walking back home after attending the Foxtrot Festival. [R.pp. 122, l. 2 – 123, l. 23; Id. at pp. 111, l. 2 - 112, l. 23.] She claimed that she was walking in the grass when she was struck by the patrol vehicle and was 100 percent sure she was walking in the grass when the accident occurred. [R.pp. 123, l. 24 – 124, l. 21; Id. at pp. 112, l. 24 – 113, l. 21.] Blackwell admitted that she had not taken her medication for schizophrenia on the day of the accident. [R.p. 126, ll. 22-25; Id. at p. 115, ll. 22-25.] The only food Blackwell had all day on the date of the accident was breakfast in the morning and a soda at the Foxtrot

Festival. [R.p. 127, ll. 1-17; Id. at p. 116, ll. 1-7.] She further testified that she was walking with her back to the traffic when the accident occurred. [R.pp. 127, l. 24 – 128, l. 1; Id. at pp. 116, l. 24 – 117, l. 1.] After she was struck by the patrol vehicle, Blackwell stood up and walked over to the location where she came to rest. [R.p. 129, ll. 12-23; Id. at p. 118, ll. 12-23.]

The McLeod Emergency Department Medical Chart documents that Blackwell was brought into the emergency department awake and alert. The medical chart further notes that Blackwell stated she was walking across the street when she was struck by a motor vehicle. [R.p. 360; D. Ex. 1 (ED Med. Chart).] Blackwell suffered no head injury; however, consulting physicians reported that Blackwell acted odd and delusional. [R.pp. 363-372; D. Ex. 1 (History Physical Report; Consultation Reports).]

The History Physical Report from McLeod Regional Medical Center also noted that aside from her leg injuries, Blackwell was suffering from other medical conditions such as hypokalemia (low potassium), hypocalcemia (low calcium), and hypoalbuminemia (low albumin) with questionable malnutrition. Dr. Jason Benjamin O'Dell recommended Blackwell undergo management for these metabolic abnormalities. [R.p 364; D. Ex. 1 (History Physical Report).]

Likewise, Dr. Eric L. Kerley also made the following medical observation about Blackwell: "She has significant malnutrition and claims she is not eating well. Her albumin is dangerously low and her calcium is still low even when corrected for the low albumin. She has low potassium as well." [R.p. 370; D. Ex. 1 (Consultation Report of Kerley).] Dr. Kerley recommended that due to Blackwell's "[s]evere protein calorie malnutrition," he would have "Nutrition" see her and would plan for supplements. [R.p.

370; Id.] He further prescribed treatment for her "markedly low" calcium and recommended checks and replacement of her potassium and magnesium levels. [R.pp. 370-371; Id.]

ARGUMENT

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 Trial Court erred in admitting into evidence medical bills for Blackwell through her sister without requiring Blackwell to establish any foundation or evidence that the bills were related to the injuries sustained by Blackwell in the accident. Furthermore, the admitted medical bills lacked sufficient detail for a jury to determine what treatments and charges were related to the injuries caused by the accident. The lack of a proper foundation for the admission of the medical bills and the absence of adequate identification of the charges related to Blackwell's injuries from the accident requires a new trial.

Blackwell introduced the medical bills through the testimony of her sister Wendy Arthur. [R.pp. 95, l. 16 - 96, l. 9; 108, l. 24 – 109, l. 18; Tr. pp. 84, l. 16 – 85, l. 9; 97, l. 24 – 98, l. 18.] The Sheriff's Department objected to the admission of the medical bills based upon a lack of foundation, the lack of testimony as to the reasonableness and necessity of the treatment, and the lack of testimony that the charges contained in the medical bills were proximately caused by the accident. [R.pp. 109, ll. 19-25; 135, l. 13 – 136, l. 4; 217, ll. 12-18; Id. at pp. 98, ll. 19-25; 126, l. 13 – 127, l. 4; 225, ll. 12-18.] The Trial Court overruled the Sheriff's Department objection and allowed the admission

of the medical bills into evidence. [R.pp. 110, ll. 1-9; 337-356; Id. at p. 99, ll. 1-9; P. Ex. 6 (Medical Bills).] Following the jury's verdict, the Sheriff's Department moved for a new trial based upon the erroneous admission of the medical bills which the Trial Court denied. [R.pp. 31-32; 4-5; Post-Trial Mtn, pp. 1-2; Order.]

The medical bills entered into evidence by Blackwell totaled $110,849.92 with dates of service ranging from May 17, 2014 – December 11, 2014. [R.pp. 337-356; P. Ex. 6.] Blackwell's Medical Bills Summary lists bills from six different medical facilities: McLeod Regional Medical Center ($100,058.00); Advanced Medical Associates ($1,704.00); Carolina's Hospital-Marion ($3,469.92); Florence Radiology ($1,943.00); Marion County EMS ($875.00); and Medical Anesthesia Consultants, LLC ($2,800.00).[1] [R.p. 338; Id. at p. 2.]

The attached medical bills contain little to no detail regarding the medical services provided to Blackwell. [R.pp. 337-356; Id.] For example, the medical bill from Advanced Medical Associates contains no description of the services provided other than that the services were provided from June 12, 2014 through December 11, 2014. [R.pp. 341-345; Id. at pp. 5-9.] Arthur testified at trial that Blackwell had been seeing

[1] The exhibit located in the Trial Court's file pertaining to the medical bills contains several inconsistencies. For example, the Medical Bills Summary shows an amount of $3,469.92 in charges from Carolina's Hospital-Marion but the attached coversheet found within the exhibit for Carolina's Hospital-Marion lists an amount of $4,678.36. The attached bills from Carolina's Hospital-Marion correspond to neither amount. [R.pp. 338; 346-349; P. Ex. 6, pp. 2, 10-13.] Blackwell claims $1,943.00 in charges from Florence Radiology but the attached medical bill only reflects $1,707.00 in charges. [R.pp. 338; 351-352; Id. at pp. 2, 15-16.] Likewise, Blackwell claims $2,800.00 in charges from Medical Anesthesia Consultants, LLC but the attached medical bill is for $1,920.00. [R.pp. 338; 354-355; Id. at pp. 2, 18-19.] Finally, within the exhibit are coversheet summaries claiming charges from CNRA and MRMC-CBO which are not shown on the Medical Bills Summary and for which there are no medical bills attached. [R.pp. 338; 350; 356 Id. at pp. 2, 14, 20.] These inconsistencies in the medical bills exhibit may have led to jury confusion.

Advanced Medical Associates for her medical issues prior to the accident and continued to see them after the accident and that Advance Medical Associates was the facility where Blackwell was prescribed medication for her schizophrenia. [R.pp. 113, ll. 1-13; Tr. p. 102, ll. 1 – 13.] The bill from Advanced Medical Associates, which contains charges for services provided more than six months after the accident, does not provide any detail for a factfinder to determine whether Advanced Medical Associates provided services to Blackwell which were related to her accident injuries or whether the services it rendered to Blackwell were for her pre-existing medical issues for which she was already being treated for by its physicians. [R.pp. 341-345; P. Ex. 6, pp. 5-9.] Blackwell presented no testimony at trial to explain how this bill related to the injury from her accident.

As another example, there is a bill from Carolina's Hospital – Marion for an emergency department visit on June 5, 2014, but there is no evidence from the face of the bill or the trial testimony that this emergency visit was related to the accident which occurred on May 17, 2014. [R.p. 349; Id. at p. 13.]

In addition, the History Physical Report from McLeod Regional Medical Center noted that aside from her leg injuries, Blackwell was suffering from other medical conditions such as hypokalemia (low potassium), hypocalcemia (low calcium), and hypoalbuminemia (low albumin) with questionable malnutrition. The physician, Dr. O'Dell, recommended Blackwell undergo management for these metabolic abnormalities. [R.p. 364; D. Ex. 1.] Dr. Kerley also observed Blackwell was suffering from significant malnutrition with dangerously low levels of albumin, markedly low calcium, and low potassium and recommended treatments for her condition. [R.pp. 370-371; D. Ex. 1] The

medical bills entered into evidence do not distinguish between services rendered for Blackwell's injuries from the accident and for services rendered for her significant malnutrition issues which would have been pre-existing and unrelated to the accident.

While the admission of the evidence is within the trial court's discretion, the appellate court may reverse the trial court's ruling to admit evidence if it constitutes an abuse of discretion amounting to an error of law. R&G Const., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000). An abuse of discretion occurs when the trial court's ruling admitting evidence is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

"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., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." Id. "[T]he admission of incompetent evidence having some probative value upon a material issue of fact in the case is ordinarily presumed to be prejudicial." Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988); see also Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 413-14, 764 S.E.2d 249, 254-55 (Ct. App. 2014).

The South Carolina Supreme Court's opinion in Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991) requires reversal of the Trial Court's admission of Blackwell's medical bills. In Carlyle, the decedent, who was paralyzed from the waist down and incontinent, was admitted to the hospital for treatment of extensive decubitus, commonly known as bedsores. While being treated at the hospital, a condom catheter

was incorrectly placed on the decedent's penis which led to the need for a penile reconstruction at another medical facility. Ultimately, the decedent suffered from multiple infections and pneumonia and died. The estate of the decedent brought a wrongful death and survival action against the initial treating hospital. Id. at 188-91, 407 S.E.2d at 630-32.

At trial, the parties disputed whether the penile injury and reconstruction was a contributing cause of the decedent's death. The jury awarded damages on both the wrongful death and survival causes of action to the decedent's estate, and the hospital appealed. Id.

The hospital argued that that the trial court erred in admitting into evidence a bill from the medical facility which performed the penile reconstruction containing charges for the penile reconstruction and treatment of the bedsores without establishing any foundation for the portion related to the penile reconstruction. The Supreme Court agreed and reversed and remanded the survival action for a new trial.[2] Id. at 193-94, 407 S.E.2d at 633.

In reversing, the Supreme Court recognized that while the admission of evidence is a matter left to the trial court's discretion, evidence presented must nevertheless "be sufficient to enable the factfinder to make a determination with reasonable certainty or accuracy." Id. at 193, 407 S.E.2d at 633. The "existence, causation nor amount of damages can be left to conjecture, guess or speculation." Id. (internal citation omitted). The Supreme Court further observed the general inadmissibility of medical bills not

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[2] The evidentiary issue on appeal only involved the survival cause of action. The verdict in the wrongful death action was affirmed on appeal. Carlyle, 305 S.C. at 193-94, 407 S.E.2d at 633.

clearly identified as being connected with the negligence resulting in the plaintiff's injuries:

> Medical bills not clearly identified by medical testimony, or otherwise, as being connected with the tortious act which resulted in injuries under litigation 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. (citing 22 Am.Jur.2d *Damages* § 933 (1988)).

Turning to the case before it, the Supreme Court noted the medical bill submitted by the estate showed no apportionment for the cost of either the penile reconstruction or the treatment of pre-existing bedsores. The Supreme Court held that the admission of the bill into evidence "without a proper foundation upon which the jury could arrive at a determination with reasonable accuracy" was error as a matter of law. It also found the plastic surgeon's testimony that 60 to 70 percent of decedent's care was allocated to treatment for the penile reconstruction was insufficient to allow a jury to determine charges and apportion damages for the penile injury. Carlyle, 305 S.C. at 193, 407 S.E.2d at 633.

"[T]he lack of a proper foundation for admission of the [medical bill] and the absence of adequate identification of charges related to the penile reconstruction allowed the jury to arrive at a verdict through surmise, conjecture, or speculation." Id. The trial court's error in admitting the medical bill without requiring a proper foundation mandated a new trial for the hospital on the survival cause of action. Id.; 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.").

As described, Blackwell's medical bills entered into evidence by the Trial Court contained little to no detail about the services provided and charges incurred and show no apportionment for the costs of treatments related to the injuries sustained in the accident and for costs of treatments for pre-existing or other unrelated medical conditions, including her schizophrenia and malnutrition. [R.pp. 337-356; P. Ex. 6.] This is especially true for the bill from Advanced Medical Associates where Blackwell was already being seen prior to the accident and where she was seen for months following the accident. [R.pp. 341-345; 113, ll. 1-13; Id. at pp. 5-9; Tr. p. 102, ll. 1 – 13.] This bill contains no description about the charges incurred. [R.pp. 341-345; P. Ex. 6, pp. 5-9.]

In addition, Blackwell was treated for her malnutrition issues during her hospital stay but there was no testimony distinguishing which charges were for the treatment of her injuries sustained in the accident versus treatment for unrelated, pre-existing conditions. [R.pp. 364-370-371; 340; D. Ex. 1; P. Ex. 6, p. 4.]

The bills entered into evidence also contain charges for services rendered months after the accident. [R.pp. 341-349; P. Ex. 6.] Blackwell presented no testimony at trial that these charges were related to the accident.

As in Carlyle, the medical bills entered in the evidence and the testimony presented in Blackwell's case provided no adequate identification of the charges related to treatment for Blackwell's injuries sustained in the accident. Blackwell suffered from pre-existing medical conditions and was additionally diagnosed at the hospital with significant malnutrition issues unrelated to the accident for which the physicians

recommended further treatment, making the need for clear identification of which medical bills were connected to the injuries from the accident imperative. Wendy Arthur's mere testimony that she received the medical bills from Blackwell's attorney was not sufficient to allow a jury to determine which charges were related. [R.pp. 108, l. 24 – 110, l. 16; 117, ll. 8-18; Tr. pp. 97, l. 24 – 99, l. 16; 106, ll. 8-18.] See Carlyle, 305 S.C. at 193, 407 S.E.2d at 633 (finding that even plastic surgeon's testimony as to percent of decedent's care allocated to treatment at issue in trial was not sufficient to allow a jury to determine which charges on the medical bill were related to the pertinent treatment).

Blackwell did not establish any foundation for the admission of the medical bills and this lack of a proper foundation allowed the jury to arrive at its verdict through surmise, conjecture, and speculation. Cf. Ellis, 323 S.C. at 131, 473 S.E.2d at 798 (noting trial court specifically required the plaintiff to prove which medical bills were directly related to the plaintiff's quadriplegia.). The Trial Court's admission of the medical bills into evidence without obliging Blackwell to establish the required foundation was an error of law under the principles set forth in Carlyle.

The Sheriff's Department was prejudiced by the Trial Court's admission of the incompetent medical bills. The admission of incompetent evidence having some probative value upon a material issue of fact is presumed prejudicial. Mali v. Odom, 295 S.C. 78, 84, 367 S.E.2d 166, 170 (Ct. App. 1988); see also Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 413-14, 764 S.E.2d 249, 254-55 (Ct. App. 2014). There also existed a reasonable probability that the jury's verdict was influenced by the admission of these medical bills given the amount of the jury's damages award and the fact this award most probably included the total amount of the medical bills erroneously entered into

evidence. Blackwell's counsel urged the jury in his closing statement to award as damages the full amount of the medical bills. [R.pp. 256, l. 22 – 257, l. 7; Tr. pp. 279, l. 22 – 280, l. 7.] See Fowler, 410 S.C. at 413-14, 764 S.E.2d at 254-55 (determining reasonable probability that jury was influenced by improper admission of evidence where plaintiff's counsel referred to the improperly admitted evidence during closing statement and inferred the jury should rely upon this evidence).

Based upon the Trial Court's improper admission of Blackwell's medical bills which lacked a proper foundation and adequate detail for a jury to determine which charges were related to the injuries sustained in the accident and the resulting prejudice arising from this improper evidence, the Sheriff's Department is entitled to a new trial.

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 addition to the lack of a proper foundation for a jury to determine which medical bills were related to the injuries sustained in the accident, Blackwell's medical bills were also improperly admitted through Blackwell's sister, Wendy Arthur, who could not adequately testify as to the reasonableness and necessity of the medical bills. [R.p. 109, ll. 19-23; 31; Tr. p. 98, ll. 19-23; Post-Trial Mtn., p. 1.]

It is well settled that a plaintiff seeking to recover for the reasonable value of medical services must establish that the medical expenses claimed were reasonable and necessary. Haselden v. Davis, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003); see also Covington v. George, 359 S.C. 100, 597 S.E.2d 142 (2004). While expert testimony may not always be required to establish the reasonableness and necessity of medical bills, the layperson testifying must have extensive enough common knowledge or experience to

testify as to such matters and lay the proper foundation for the admission of such evidence. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 147, 719 S.E.2d 703, 707 (Ct. App. 2011).

Blackwell's sister, Wendy Arthur, did not demonstrate that she had sufficient knowledge of the reasonableness and necessity of Blackwell's medical bills for Blackwell to properly admit the medical bills into evidence through Arthur. Arthur conceded that she did not personally receive the medical bills on behalf of Blackwell; instead, Arthur was only given the medical bills through Blackwell's attorney. [R.p. 117, ll. 8-18; Tr. p. 106, ll. 8-18.] There was no testimony that Arthur had any responsibility for the medical bills or had any personal knowledge of their contents to prove the reasonableness of the costs of treatment and the necessity of such treatments. The improper introduction of the medical bills through Arthur left the jury with no basis to determine whether the bills were reasonable and necessary and instead the jury was left to speculate as to those matters.

The Trial Court thus erred in admitting the medical bills claimed by Blackwell through her sister, Wendy Arthur, who could not provide a competent foundation for the admission of the medical bills and who could not testify as to the reasonableness of the expenses or the medical necessity of the care provided. As such, the Sheriff's Department is entitled to 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.

The Trial Court erred by excluding eyewitness testimony of Blackwell walking in the roadway only minutes prior to the accident. At trial, the Sheriff's Department

proffered the testimony of Rhiannon Herring. [R.pp. 139, l. 13 – 144, l. 2; Tr. pp. 130, l. 13 – 135, l. 2.] Rhiannon Herring is a current employee of the Sheriff's Department and was employed with the Sheriff's Department on May 17, 2014, the date of the accident. [R.pp. 140, ll. 3-11; Id. at p. 131, ll. 3 – 11.] She was married to and residing in the same residence as Andrew Herring during the time of the accident although they were divorced by the trial date. [R.p. 140, ll. 12-19; Id. at p. 131, ll. 12-19.]

Rhiannon worked the Foxtrot Festival on May 17, 2014. [R.p. 140, ll. 20-21; Id. at p. 131, ll. 20-21.] She and Andrew drove to the festival in separate vehicles because she needed to take her personal truck to pull a golf cart which she planned to use to patrol the festival. [R.pp. 140, l. 22 – 141, l. 3; 152, ll. 3-18; Id. at pp. 131, l. 22 – 132, l. 3; 147, ll. 3-18.]

Per Andrew's testimony, Rhiannon left the festival around 9:00 p.m. in the evening to return home only minutes before he left. [R.pp. 153, l. 23 – 154, l. 12; Id. at pp. 148, l. 23 – 149, l. 12.] While Rhiannon was traveling home on Highway 501, she observed a black female walking in the roadway. [R.p. 141, ll. 4-13; Id. at p. 132, ll. 4 – 13.] The black female was walking northbound on Highway 501, the same direction in which Rhiannon was headed. The black female's back was to Rhiannon. [R.p. 142, ll. 16-20; Id. at p. 133, ll. 16-20.] Rhiannon drove on to her house. [R.p. 141, ll. 14-15; Id. at p. 132, ll. 14-15.]

When she got back to her house, she received a telephone call from Andrew. He had already tried to call her once, but she did not answer the first call. When she answered the second call, Andrew advised her that he had been in an accident. Rhiannon

testified that she received this telephone call only five to ten minutes after observing the black female in the roadway. [R.pp. 141, l. 16 – 142, l. 8; Id. at pp. 132, l. 16 - 133, l. 8.]

Eventually, Rhiannon went to the scene of the accident. While at the accident scene, Rhiannon determined that the accident involved a black female who was hit. [R.p. 142, ll. 9-15; Id. at p. 133, ll. 9-15.]

The Trial Court excluded Rhiannon's testimony, ruling it was not relevant as to where Blackwell was in the roadway prior to the accident and that the prejudicial effect outweighed the probative value of Rhiannon's testimony. [R.pp. 144, l. 3 – 145, l. 3; 5-6; Id. at pp. 135, l. 3 – 136, l. 3; Order on Post-Trial Mtns, pp. 3-4.]

The Trial Court's exclusion of Rhiannon's eyewitness account of Blackwell walking in the roadway only minutes prior to the accident is reversible error. While the admission or exclusion of evidence is generally within the sound discretion of the trial court, the trial court's decision may be overturned on appeal due to an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or a factual conclusion that is without evidentiary support. See Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 25-26, 609 S.E.2d 506, 509 (2005); Wright v. Craft, 372 S.C. 1, 33-34, 640 S.E.2d 486, 503-04 (Ct. App. 2006). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the rulings and the resulting prejudice, i.e., that there is a reasonable probability that the jury's verdict was influenced by the challenged evidence or lack thereof." Fields, 363 S.C. at 26, 609 S.E.2d at 509.

The exclusion of Rhiannon's testimony was both erroneous and prejudicial to the Sheriff's Department. Blackwell testified that she was walking in the grass while she

was headed home from the Foxtrot Festival. [R.pp. 123, l. 6 – 124, l. 2; Id. at pp. 112, l. 6 – 113, l. 2.] She further averred that she was one hundred percent sure she was in the grass when she was struck by the patrol vehicle. [R.p. 124, ll. 18-21; Id. at p. 113, ll. 18-21.] Wendy Arthur, Blackwell's sister, testified that Blackwell told her she was "walking in the grass and the car swerved over and ran her over." Arthur claimed Blackwell never said she was in the road. [R.p. 120, ll. 18-23; Id. at p. 109, ll. 18-23.] Rhiannon's testimony would have called into question the accuracy of Blackwell's testimony that she was walking in the grass and was never in the roadway and weighed upon the reliability and credibility of Blackwell's testimony that she was "a hundred percent sure" that she was in the grass when the accident occurred.

The threshold task in ruling upon the admissibility of evidence is to determine whether the evidence is relevant. "Evidence is relevant and admissible if it has 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." Elledge v. Richland/Lexington Sch. Dist. Five, 352 S.C. 179, 185, 573 S.E.2d 789, 792 (2002); Rules 401, 402, SCRE.

The issue the jury was required to assess in this case was the degree to which Blackwell contributed to the accident by her own negligence and whether the accident was due solely to her negligence or at a minimum whether her negligence exceeded any alleged negligence of Andrew Herring. While Rhiannon did not observe the accident, she observed Blackwell walking in the roadway only minutes prior. Rhiannon was driving just ahead of Andrew. Rhiannon's testimony regarding the actions of Blackwell in the minutes prior to the accident clearly help establish facts in dispute – whether

Blackwell was walking in the roadway when the accident occurred – and further the inquiry at hand.

The fact that Rhiannon did not witness the accident is of no consequence to the relevancy and admissibility of her testimony. In State v. Jenkins, 249 S.C 570, 571, 155 S.E.2d 624, 625 (1967), the defendant was convicted of reckless homicide after he struck a nine year old boy with his automobile while driving. The defendant objected to the admission of the testimony of three witnesses as to the manner of his driving and his rate of speed approximately fifteen minutes prior to the accident. The defendant contended that the testimony of these witnesses, who did not observe the accident, was too remote in point of time to be relevant and that the admission of their testimony was prejudicial. The South Carolina Supreme Court rejected the defendant's argument and approved of the trial court's admission of the eyewitness testimony fifteen minutes prior to the accident, ruling that "the evidence was not too remote, in point of time, to be relevant as going to show the condition and mental attitude of [the defendant] at the time of the accident itself. Id. at 575-76, 155 S.E.2d at 627.

Following Jenkins, the Supreme Court again found the admission of eyewitness testimony of a defendant's behavior prior to the accident even though such witnesses did not observe the accident to be proper and relevant testimony. DeLee v. Knight, 266 S.C. 103, 221 S.E.2d 844 (1975). In DeLee, the defendant was convicted of involuntary manslaughter after driving a school van type bus, overloaded with young children, when it left the road, ran into some trees, and overturned resulting in the death of a passenger. Id. at 106-08, 221 S.E.2d at 845.

Two witnesses had observed the bus a few minutes prior to the accident. One testified she passed the bus about eight tenths of a mile from the accident while going in the opposite direction and observed the bus crossing the center line and speeding. Id. The other witness followed the defendant for over a mile and stated that the defendant was speeding and weaving from one side of the road to the other. This particular witness was behind the defendant until they reached an intersection about one mile from the accident. At the intersection, the witness continued straight while the defendant turned without giving a signal or stopping at the stop sign. Id.

The defendant argued that the testimony of these two witnesses should have been excluded as being too remote to have substantial probative value. The Supreme Court noted that according to the defendant, "the only relevant testimony would have been an eyewitness account of the wreck . . . ." Id. at 108-09, 221 S.E.2d at 845.

The Supreme Court rejected the argument that only firsthand witnesses of an accident can provide relevant testimony as to a party's conduct at the time of an accident. Following the reasoning of Jenkins, the Supreme Court held that the testimony of the two witnesses was not so remote as to lead to conjecture or speculation. Id. at 109, 221 S.E.2d at 109; see also State v. Nathari, 303 S.C. 188, 193-94, 399 S.E.2d 597, 601 (Ct. App. 1990) (testimony that driver was "veering lazily back and forth on the road" approximately one and one half miles away from the accident scene was not too remote because it was circumstantial evidence that the driver was under the influence at the time of the accident).

Rhiannon's testimony, that Blackwell was walking in the roadway only five to ten minutes prior to the accident, is, like the courts have held in Jenkins, DeLee, and Nathari,

relevant and probative as to Blackwell's conduct only minutes later at the time of the accident. The Trial Court's belief that Rhiannon had to witness the accident for her testimony to be relevant has been explicitly rejected by this State's appellate courts. Rhiannon's testimony would at a minimum have been circumstantial evidence that Blackwell was still walking in the roadway minutes later at the time of the accident. Rhiannon's testimony would have corroborated Andrew's testimony that he struck Blackwell in the roadway and Blackwell's statements to medical personnel that she was walking across the street when she was struck by a vehicle. [R.p. 360; D. Ex. 1 (ED Med. Chart).] In a case that was largely "he said versus she said," Rhiannon's testimony that Blackwell was walking in the roadway minutes prior to the accident would have aided the jury in assessing the accuracy and validity of the parties' accounts of the accident. The Trial Court erred in determining that Rhiannon's testimony was not relevant.

The Trial Court further erred in ruling that the prejudicial effect of Rhiannon's testimony outweighed its probative value. Evidence, while relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest decision on an improper basis." State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009). "Unfair prejudice does not mean the damage to a defendant's [or plaintiff's] case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." State v. Dennis, 402 S.C. 627, 636, 742 S.E.2d 21, 26 (Ct. App. 2013) (internal citation omitted). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional

one." State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001). "All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." Dennis, 402 S.C. at 636, 742 S.E.2d at 26 (internal citation omitted) (emphasis in original).

Therefore, the mere fact that evidence will be detrimental to a party's case does not constitute unfair prejudice. Rhiannon's testimony does not have any undue tendency to suggest a decision on an improper basis and does not serve to inflame the passions of the jury. Rather, Rhiannon's testimony, which the Sheriff's Department sought to admit at trial, would illuminate the jury's fact-finding inquiry. Blackwell would have been free to challenge this evidence upon its presentation, provide rebuttal testimony, and present arguments which may have persuaded the jury to give this evidence less weight in deliberation.

On the other hand, Rhiannon's testimony was crucial to the Sheriff's Department's ability to attempt to prove how the accident occurred and whether Blackwell was solely negligent or at a minimum whether her negligence was greater than any alleged negligence of Andrew Herring. The Trial Court's exclusion of Rhiannon's testimony was manifestly prejudicial to the Sheriff's Department. Furthermore, this evidence was not the type that would confuse the jury and, in fact, was more likely to assist the jury in rendering a decision founded on the relevant legal principles. The Trial Court erred in concluding that the probative value of the evidence was outweighed by unfair prejudice because the evidence was not unfairly prejudicial to Blackwell under the meaning of "unfair prejudice" pursuant to South Carolina law.

The Trial Court abused its discretion and erred as a matter of law in determining that Rhiannon's testimony that she observed Blackwell walking in the roadway minutes prior to the accident was not relevant and unfairly prejudicial to Blackwell. Under the controlling principles of South Carolina law, the evidence was relevant and did not have any undue tendency to suggest a decision to the jury on an improper basis. The Sheriff's Department was prejudiced by the exclusion of Rhiannon's testimony because there was a reasonable probability that the jury's verdict was influenced by the lack of the challenged evidence. Accordingly, the Sheriff's Department is entitled to a new trial because the Trial Court improperly excluded Rhiannon's testimony.

IV. The Sheriff's Department is entitled a new trial because the Trial Court committed prejudicial error in refusing to inquire the jury panel on voir dire examination as to whether any juror had certain encounters with the Sheriff's Department or held any strong opinions about the Sheriff's Department or certain practices of law enforcement.

At trial, the Sheriff's Department requested the following voir dire questions of the jury:

- Have you or anyone in your immediate family ever had a dispute with the Marion County Sheriff's Department? If yes, then describe the dispute.

- Do any of you have strong opinions concerning law enforcement officers (police) operation of their vehicles? If yes describe that opinion.

- Do any of you have any strong opinions either for or against the Marion County Sheriff's Department? If yes describe that opinion.

- Have any of you or a family member ever been arrested by the Marion County Sheriff's Department?

[R.pp. 380-381; Court's Ex. 1 (Defendant's Voir Dire).]

These questions were designed to detect whether any juror had any bias against law enforcement or the Sheriff's Department which would prevent such juror from deciding the case based on the evidence presented at trial. The Trial Court refused to ask these questions of the jury. [R.pp. 45, l. 14 – 61, l. 22; 62, l. 18 – 63, l. 8; Id. at pp. 5, l. 14 – 21, l. 22; 30, l. 18 – 31, l. 8.] Following the jury's verdict, the Sheriff's Department moved for a new trial based upon the Trial Court's error in failing to ask all of the requested voir dire questions which the Trial Court denied. [R.pp. 31-32; 6; Post-Trial Mtn., pp. 1-2; Order.]

Section 14-7-1020 of the South Carolina Code requires the trial court, on motion of either party in the suit, to "examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . ." The manner of voir dire is within the discretion of the trial court, and a trial court is generally not required to ask all voir dire questions submitted by a party. Wall v. Keels, 331 S.C. 310, 317-18, 501 S.E.2d 754, 757 (Ct. App. 1998).

Nonetheless, parties in a case, through the trial court, "'have a right to question jurors on their voir dire examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge.'" Id. at 318, 501 S.E.2d at 758 (quoting State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982)); see also State v. Coaxum, 410 S.C. 320, 327, 764 S.E.2d 242, 245 (2014) ("To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice

against a party . . . ."). To facilitate informed use of peremptory strikes, parties may submit voir dire questions for the trial court to pose to the jury pool to "probe for the hidden prejudices of the jurors" that might not otherwise be discovered. Butler v. City of Camden, 352 F.3d 811, 815 (3d Cir. 2003).

The Sheriff's Department proposed four voir dire questions to elicit any bias of the potential jurors against law enforcement and the Sheriff's Department. The Trial Court barred all inquiry into this subject matter and denied the Sheriff's Department the ability to ascertain facts about the jurors and their attitude toward law enforcement and the Sheriff's Department which would have enabled the Sheriff's Department to intelligently invoke its peremptory strikes. See id. at 816 (observing reversal of lower courts generally required where the lower court barred all inquiry into a relevant subject matter designed to elicit a disqualifying prejudice of a juror).

In a case that essentially boiled down to a swearing contest between a law enforcement officer of the Sheriff's Department and Blackwell over whether she was in the roadway or not at the time the accident occurred, especially in light of the Trial Court's exclusion of other eyewitness testimony spotting Blackwell in the roadway minutes before the accident, it was crucial that the Sheriff's Department determine during voir dire whether the prospective jurors harbored any ill will toward law enforcement or the Sheriff's Department. In Butler, the United State Court of Appeals recognized that a majority of federal courts of appeals have held that lower courts may commit error when failing to examine the jury pool for potential law enforcement bias when requested by counsel. Id. at 816.

There was no basis for the Trial Court's refusal to ask the Sheriff's Department requested voir dire questions. Given the current climate surrounding law enforcement, the Trial Court should have posed the Sheriff's Department's requested voir dire questions to the jury pool to have enabled the Sheriff's Department to discover any juror bias against it or certain practices of law enforcement. There would have been no harm done in asking the requested questions to the jury pool. Rather, the refusal of the Trial Court to ask the questions significantly hindered and prejudiced the Sheriff's Department's ability to intelligently exercise its peremptory strikes. See Walls, 331 S.C. at 312-22, 501 S.E.2d at 755-60 (in case involving motorist who was injured in a collision with an employee of an electric cooperative, the trial court's limitation of voir with respect to possible bias of potential jurors who were also cooperative members amounted to an abuse of discretion and warranted a new trial); see also Southern Bell Tel. & Tel. Co. v. Shepard, 262 S.C. 217, 204 S.E.2d 11 (1974) (in action arising out of collision between motorcyclist and automobile owned by telephone company and operated by its employee, motorcyclist entitled to a new trial where trial court failed to comply with request to inquire on voir dire as to whether any juror was stockholder in defendant corporation or its parent corporation).

Whether any member of the jury pool had any encounters with the Sheriff's Department that would have potentially caused such member to hold any bias against the Sheriff's Department or whether any member of the jury pool had any strong opinions against the Sheriff's Department or certain practices of law enforcement could have only been determined by the Trial Court questioning the jury pool on these subjects. By not asking the questions requested by the Sheriff's Department, the Trial Court prevented the

Sheriff's Department from identifying potentially biased jurors. Given the lack of any reasoning by the Trial Court for declining to ask the Sheriff's Department's requested voir dire questions and the importance of the questions to the Sheriff's Department, the Trial Court's refusal to comply with the requested voir dire is reversible error and mandates a new trial.

V. 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.

During Blackwell's reply closing argument, her counsel made an impassioned plea to the jury to bring justice to Blackwell by not letting the Sheriff's Department get away with a cover-up and concealment of misconduct:

> One thing that we do know is that this is the greatest civil justice system in the world that we have because this is probably one of the only countries where little miss somebody like little Ms. Jackie can come in here in front of the twelve of you and go up against with a Marion County reserve sheriff deputy, the guy who as we heard after the wreck was able to call his wife to come out to the scene, his boss to come out to the scene. He was able to get the favorable highway patrolman who came out of the scene and said after five minutes you're free to go, you're fine. He was able to get in the medical records, you know, and EMS thing that, oh, she must have been drunk, even though she wasn't drunk. He's able to do all those things after the wreck and leading up to the trial, but none of that matters now.
>
> None of that matters in here because in our civil justice system the twelve of you have the final decision. The twelve of you are the only ones that can help Ms. Jackie get justice in this case. It doesn't matter about all the strings he was able to pull and about all those things he was able to do. 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.pp. 290, l. 4 – 291, l. 7; Tr. pp. 313, l. 4 – 314, l. 7 (emphasis added).]

The Sheriff's Department objected to the argument as improper and not addressed to the facts of the case. The Trial Court overruled the Sheriff's Department's objection. [R.p. 291, ll. 8-12; Id. at p. 314, ll. 8-12.]

The remarks made by Blackwell's counsel during closing suggesting a cover-up and concealment of wrongful conduct by Herring and the Sheriff's Department and urging the jury to bring justice for this cover-up were not based upon or supported by the evidence, were calculated to arouse the jury's passions or prejudices, and went beyond the outer boundaries of proper closing argument.

"It is improper for counsel to make a closing argument to the jury ... calculated to arouse passion or prejudice." Branham v. Ford Motor Co., 390 S.C. 203, 234, 701 S.E.2d 5, 21 (2010) (internal citation omitted); see also Hoeffner v. The Citadel, 311 S.C. 361, 366, 429 S.E.2d 190, 193 (1993) ("Arguments by counsel which invite the jury to base its verdict on considerations not relevant to the merits of the case are improper."); Walls v. Keel, 331 S.C. 310, 320, 501 S.E.2d 754, 759 (Ct. App. 1998) ("It is improper to make a closing argument calculated to unfairly arouse the jury's compassion or prejudice or to appeal to jurors' personal biases."); Dunn v. U.S., 307 F.2d 883, 885-86 (5th Cir. 1962) ("It is improper for counsel to express his personal opinion or to state facts of his own knowledge, not in evidence, and not part of the evidence to be presented; or to make unwarranted inferences or insinuations calculated to prejudice the defendant."); cf. State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996) ("A solicitor's closing argument must not appeal to the personal biases of the jurors. In addition, the argument

may not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it.").

"The test for granting a new trial on the basis of improper closing argument by opposing counsel is whether the complaining party was prejudiced to the extent that he or she was denied a fair trial." Scoggins v. McClellion, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct. App. 1996).

The remarks made during the reply closing argument of Blackwell's counsel were purposefully designed to inflame and prejudice the jury. It is unmistakable that these remarks relied heavily upon false allegations of a cover-up and concealment of evidence by Herring and the Sheriff's Department. There was no such evidence of any cover-up in the record. Blackwell's counsel even made outrageous allegations during his reply that Herring had EMS alter its medical records to include observations of alcohol use by Blackwell. There was absolutely no evidence of any such conduct presented at trial. [R.pp. 205, l. 16 – 213, l. 7; 357-359; Tr. pp. 204, l. 16 – 212, l. 7; P. Ex. 7 (EMS Report) (see testimony of Marion County EMS employee Kamadie Campbell stating that he never talked with Herring at the accident scene [R.p. 209, ll. 19-22; Tr. p. 208, ll. 19-22] and made his own observations regarding the smell of alcohol on Blackwell [R.p. 210, ll. 10-14; Id. at p. 209, ll. 10-14.]]

Blackwell's counsel's blatant distortion of the evidence in the record during his reply closing went beyond the bounds of a proper closing argument and conveyed the impression to the jury that Blackwell's counsel had more evidence than that presented to the jury. See Tappeiner v. State, 416 S.C. 239, 785 S.E.2d 471 (2016) (reversing defendant's conviction for the solicitor's improper comments during oral argument which

both mispresented the evidence adduced at trial and improperly appealed to the jurors' emotions). The reply closing argument invited the jury to base its verdict on passion rather than reason – goading the jury to give Blackwell justice for misconduct of Herring and the Sheriff's Department for which there was absolutely no supporting evidence in the record. The reply closing argument denied the Sheriff's Department a fair trial; therefore, the Sheriff's Department is entitled to a new trial.

VI. The Sheriff's Department is entitled to a new trial where the jury's verdict of $500,000.00 in total damages for the plaintiff was the result of passion, caprice, prejudice or some other influence outside the evidence.

The jury determined the total amount of damages sustained by Blackwell (prior to any reduction for comparative negligence or statutory maximums) was $500,000.00. [R.pp. 10; 325, ll. 18-20; Jury Verdict, p. 2; Tr. p. 354, ll. 18-20.] Following the trial, the Sheriff's Department moved for a new trial because the amount of the jury's damages reflected it was based upon passion, capriciousness, and/or prejudice which the Trial Court denied. [R.pp. 31-32; 7; Post-Trial Mtn., pp. 1-2; Order, p. 5.]

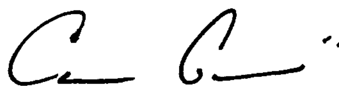
"A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. . . . The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive . . . and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives. . . . The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." Vinson v. Harley, 324 S.C. 389, 404-05, 477 S.E.2d 715, 723 (Ct. App. 1996) (internal citations omitted).

In this case, Blackwell presented evidence of approximately $110,000.00 in medical bills (which the Sheriff's Department has challenged), but did not present any evidence of any future medical bills. [R.pp. 337-356; P. Ex. 6.] There were no lost wages because Blackwell did not work prior to the accident and there was no indication at trial that she was to begin working. [R.pp. 98, l. 19 – 99, l. 2; 111, l. 21 – 112, l. 1; Tr. pp. 87, l. 19 – 88, l. 2; 100, l. 21 – 101, l. 1.] While Blackwell certainly suffered pain from her injury, the high damages award, combined with the improper reply closing argument that Herring and the Sheriff's Department engaged in a cover-up and concealment of misconduct for which the jury must punish, no doubt indicates that the verdict was rendered on some other basis than the evidence presented at trial or included damages intended to punish the Sheriff's Department even though punitive damages were disallowed. Accordingly, the Trial Court erred in denying the motion for a new trial by the Sheriff's Department based upon the jury's excessive damages award.

CONCLUSION

For the reasons set forth herein, 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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December 20, 2017.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

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