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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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SC Court of Appeals

Appellate Case No. 2016-001541

Gary Nestler & Julie Nestler *Appellants,*

v.

Joseph E. Fields *Respondent*

APPELLANTS' PETITION FOR REHEARING

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ARGUMENT FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Gary Nestler (“Appellant”) hereby petitions for a rehearing of this Court’s Opinion No. 5621, dated January 30, 2019 (“Opinion”) affirming the Circuit Court’s admission of the amount of Appellant’s medical bills, charging the jury on mitigation, and denying Appellant’s motion for a new trial. The Appellate Court overlooked or misapprehended several key points of law which are discussed below.

I. The admission of the amount of Appellant’s medical bills into evidence by the trial court was in direct contravention to the S.C. Rules of Evidence.

At the trial in this matter, Appellant elected not to seek reimbursement of his medical expenses in connection with the collision. Accordingly, when Respondent attempted to bring in the amount of medical bills on cross-examination, Appellant objected to their admission under Rules 401, 402, and 403, SCRE.

The Court held there was “no error in admission of the amount of [Appellant’s] medical bills” despite there being “no authority in our state discussing the issue of whether a party seeking actual damages for personal injury may prevent the introduction of his actual medical bills by the other party” because “under the specific facts here we cannot say the risk of unfair prejudice substantially outweighed the probative value of the billed amount.”

The Court’s Opinion misapprehends or overlooks the proper application of the South Carolina Rules of Evidence in this matter. Specifically, the Opinion of the Court

provides no analysis of the evidence's relevancy—the most fundamental touchstone of admissibility. See, Rules 401 and 402, SCRE. The Court must first address this question prior to even reaching a Rule 403 analysis.

“All relevant evidence is admissible ... [e]vidence which is **not relevant is not admissible.**” Rule 402, SCRE. “‘Relevant evidence’ means evidence having any tendency to make the existence of **any fact that is of consequence to the determination of the action more probable or less probable** than it would be without the evidence.” Rule 401, SCRE.

In the present case, liability was admitted by Respondent, and therefore, the only issue at trial was the amount of Appellant's damages. Appellant elected not to claim medical expenses as an element of his damages at trial. Therefore, evidence of the total dollar amount of medical bills incurred does not tend to **make any fact of consequence in determining the action more or less probable.** This evidence fails to satisfy the definition of “relevant evidence” and is therefore wholly inadmissible. A trial court's ruling which directly contravenes the South Carolina Rules of Evidence and is an abuse of discretion controlled by an error of law that warrants reversal by this Court.

Assuming, *in arguendo*, there were any relevance to this evidence rendering it admissible under Rule 402, then a Rule 403 analysis would be proper. This Court noted in its Opinion that “the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding **matter of scant or cumulative probative**

force, dragged in by the heels for the sake of its prejudicial effect.") United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979). This is *precisely* the situation in the case at bar: there is **no probative value** in the total dollar amount of medical bills incurred because that figure in no way causally related to, representative of, or useful in making a determination of Plaintiff's non-economic damages.

As briefed extensively by the Appellant, damages for pain and suffering are unliquidated, have no market price, and are wholly unrelated to the amount of a Plaintiff's medical expenditures. See, e.g. Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983) ("[T]here is no logical or experiential correlation between the monetary value of medical services required to treat a given injury and the quantum of pain and suffering endured as a result of that injury"); Corenbaum v. Lampkin, 215 Cal. App. 4th 1308 (2013) ([The desire to use] the amount of economic damages as a point of reference ... is not a valid justification for the admission of evidence that is otherwise inadmissible and that is not relevant); Payne v. Wyeth Pharmaceuticals, Inc., 2008 U.S. Dist. LEXIS 91849 (E.D. Va. Nov. 12, 2008) (Substantial possibility of jury confusion by introducing medical bills to prove pain and suffering as jurors may be tempted to treat the medical bills as recoverable special damages. Furthermore, introduction would be overly cumulative as pain and suffering may already be amply demonstrated by other, more probative evidence, such as the testimony of [Plaintiff] and his doctors.)

As noted during oral arguments, some injuries such as the loss of a limb, may

have (relatively) modest medical bills associated with the treatment, yet the effect of the injury on a Plaintiff's life is without a doubt profound. Conversely, there are many procedures which may be very expensive, yet are completely devoid of pain.

However, the trial judge made clear that this was precisely the basis for which the evidence was being admitted. (*“Obviously, the argument that I hear hundreds of times is your damages couldn't have been very much if your medical bills weren't very much... just because you didn't put them in doesn't mean that they can't put them [in] for the purpose of showing that the damages weren't very substantial.”*) R. 169.

In applying the “abuse of discretion” standard¹, it is clear that this evidence was only “dragged in by the heels for the sake of its prejudicial effect.” Respondent's **only** motivation in introducing these figures is drive down the value of Plaintiff's case in the juror's estimation by “anchoring” or “benchmarking” their deliberations to a very small, wholly irrelevant figure of unclaimed damages.

Any argument that the amount of medical bills incurred was offered into evidence for another purpose is at best, disingenuous. For example, Respondent's argument that he brought them into evidence to show “there wasn't much treatment” does not hold much weight in light of the fact that: (1) the medical bills themselves were not admitted into evidence; (2) the expenditures weren't even presented in an

¹ As noted by both the Appellant and the Opinion of the Court, this question has never been addressed before in this State. Arguably, given that this matter is a novel issue of law, the Appellate Court would be free to decide this question with no particular deference to the lower court. See, S.C. Const., art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -330; § 14-8-20; On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

itemized list to the jurors; (3) the evidence did not describe, state the nature of, scope or duration of any of Appellant's medical treatment. It was simply an arbitrary dollar figure, put before the jury to either confuse them or to give them an improper consideration in determining Appellant's non-economic damages.

The Appellate Court held that there was "no reason [the jury] should be kept ignorant of the cost of [Appellant's] medical treatment" ... and that "part of the advocate's art is persuading jurors how such evidence should be interpreted." However, Appellant respectfully contends that had our Courts intended for the advocate to be the mechanism for ensuring that jurors did not consider improper evidence, the S.C. Rules of Evidence would not exist. Rather, it is the judge, in his role as "gatekeeper" who should ensure that inadmissible evidence is never put before the jury. Watson v. Ford Motor Co., 699 S.E.2d 169, 389 S.C. 434 (2010) No matter how skilled the trial lawyer may be, there are some bells which simply cannot be unring.

For the reasons herein stated, it is the position of the Appellant that the trial court abused their discretion and failed in their duty as gatekeeper. As this issue appears to be overlooked or apprehended by the Appellate Court's Opinion, Appellant respectfully requests this Court to GRANT the petition for rehearing.

II. Appellant's motion for new trial should have been granted as the jury's award was inconsistent with claims presented, reflected the jurors' confusion, and is in compatible with South Carolina law.

The Court's Opinion misapprehends or overlooks the issue of whether a judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion.

Johnson v. Parker, 279 S.C. 132, 303 S.E.2d 95 (1983); Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).

In the case at bar, the jury's verdict warranted granting of Appellant's Motion for New Trial in that the jury reached a decision which was inconsistent with the claims presented and reflected the juror's confusion as their award was for an amount of damages not claimed by Appellant. The jurors' only questions during deliberations were to specifically request a copy of the medical bills. After learning that the bills themselves were not in evidence, the jurors then requested the amount of medical bills incurred. Their questions made it abundantly clear that their intention was to award damages which were not even claimed by the Appellant. Credibility concerns of the Appellant aside, an award which was clearly inconsistent with the claims presented at trial, or which reflected the jurors' confusion over their understanding of the claims warrants a new trial.

Secondly, the Court's Opinion misapprehends or overlooks the issue of whether a new trial ought to have been awarded based on the juror's failure to award any damages, however nominal, for pain and suffering. Our State's courts have held as a matter of law that where a jury has found Plaintiff's medical expenses to be reasonable and necessary, they are ***required*** to award pain and suffering, and may not simply award just the exact amount of the medical bills. *See, generally, Howard v. Roberson*, 376 S.C. 143, 157, 654 S.E.2d 877, 884 (Ct. App. 2007), *See, also, Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000) (jury's verdict for the exact amount

of medical bills without also awarding hedonic damages fails as a matter of law.) Under these circumstances the trial court ought to have exercised his authority to grant a new trial.

CONCLUSION

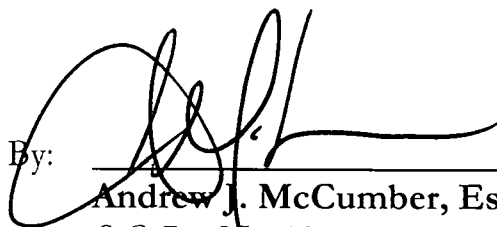
For all of the foregoing reasons stated herein, and in consideration of the logical and legal support thereof, this Court should GRANT the Appellant's petition for rehearing.

SUGGESTION FOR REHEARING *EN BANC*

Although the Courts generally do not favor rehearing a matter *en banc*, Appellant respectfully submits that consideration by the full court is necessary to secure or maintain uniformity of its decisions given the conflicting rulings between this Opinion and other controlling precedent of the State, and that this proceeding involves a question of exceptional importance in that it contains a novel issue of evidentiary law which is being litigated throughout the State at the trial court level; and, that the decision of this Court fundamentally impacts a Plaintiff's right to remain master of their Complaint.

Respectfully submitted this **14th** day of **February, 2019**.

(signature contained on the following page)

By:  _____

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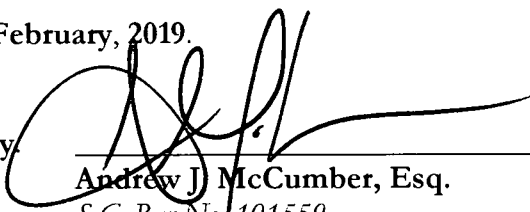
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this **Petition for Rehearing** is being submitted in conformance with the requirements of Rule 211(b), SCACR.

Respectfully submitted this **14th** day of **February, 2019.**

By  _____
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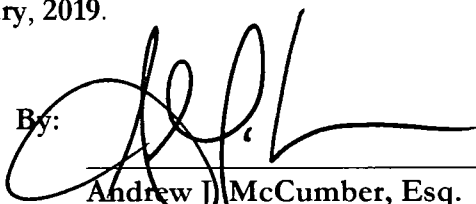
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CERTIFICATE OF SERVICE

I certify that I have served the **Appellants' Petition for Rehearing** on the Respondent, Joseph E. Fields by mailing a copy of same on **February 14, 2019** to their attorney of record, at their office address as follows: Hall Booth Smith, P.C., 40 Calhoun Street, Suite 550, Charleston, South Carolina 29401.

Respectfully submitted this **14th** day of **February, 2019**.

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