THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2010-CP-08-1801

Levern McCray,.....Respondent,

vs.

Jose W. Valle,.....Appellant,

FINAL APPELLANT'S BRIEF

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STATEMENT OF THE CASE

This appeal arises from an uninsured motorist (UM) wreck case, which the Respondent Levern McCray filed in Berkeley County in 2010. [R. p. 8.] The Complaint listed Jose W. Valle as the named defendant, but the Respondent's attorneys could not locate him, and Valle appeared to have no applicable automobile liability insurance. Thus, the Respondent served the Summons and Complaint on Allstate Insurance Company ("AIC" or "the Appellant"), which had UM coverage on the Respondent's vehicle. AIC filed and served a timely Answer, in which it admitted the defendant driver's simple negligence, but denied both the existence of proximate cause for all claimed damages and the Respondent's entitlement to punitive damages. [R. pp. 16-19.]

The case went to trial before the Honorable Deadra Jefferson on August 13, 2012. During opening statements, the trial attorney for AIC admitted the defendant driver's simple negligence. [R. pp. 72-73.] The attorney also agreed the Respondent was entitled to some form of recovery because some of the claimed physical injuries were undisputed. [R. pp. 72-73.] However, the attorney disputed the amounts and types of damages the Respondent was claiming. [R. pp. 74-76.]

During his case-in-chief, the Respondent presented the testimony of several witnesses who handled a blood sample taken from the defendant driver after the accident. This process culminated in the playing of the videotaped deposition of Heather Dailey, a former SLED technician who tested the blood sample for alcohol levels. Over an objection, Dailey said the test revealed a blood alcohol level of 0.103. [R pp. 333, 487.] Dailey did not testify about what type of impairment, if any, that blood alcohol level would have had on the defendant's ability to operate his vehicle. [R. p. 507.] No other witness presented that type of testimony.

The Respondent also called as a witness the highway patrol officer who responded to the accident scene. The officer was not qualified as an expert in the area of accident reconstruction. [R. pp. 79-85.] Nevertheless, despite an objection by the attorney for AIC, the trial judge permitted the officer to express his opinion that the accident occurred because the defendant's vehicle crossed the center-line. [R. pp. 85-91.] The Respondent was the only other witness to testify regarding the facts of the accident.

The Respondent sustained a broken ankle and incurred medical bills of $47,195.70 as a result of the accident. [R. p. 192.] He also missed six months of work, resulting in $25,198.80 in lost wages. [R. p. 198.] According to economist Oliver Wood,

the present value of the Respondent's total economic losses (including his lost wages) was $73,619. [R. p. 220.]

The two orthopedic specialists who treated the Respondent's ankle injury testified by deposition. Neither of the orthopedists expressed a belief that the Respondent would have future problems or impairments related to that injury. The only testimony of any impairment came from the Respondent's semi-retired personal physician, who had no orthopedic specialization or training. [R. p. 301.] AIC's attorney opposed any testimony regarding impairments by that physician, but the trial judge overruled that objection. [R. p. 298.]

At the close of evidence, AIC's attorney moved for a directed verdict on the issue of punitive damages, arguing the trial judge should not have admitted evidence of the defendant's blood alcohol level. [R. pp. 333-34, 347-48.] The trial judge denied that motion, concluding the result of the blood alcohol test was admissible and provided a basis for an award of punitive damages. [R. pp. 340-45, 347-48.]

Over AIC's objection, the trial judge instructed the jury the defendant's blood alcohol level created an inference the defendant was under the influence of alcohol while driving. [R. pp. 421, 426.] The trial judge based that instruction on §56-5-2950 of the South Carolina Code. [R. p. 421.]

After deliberating for less than two hours, the jury returned a verdict for the Respondent of $500,000 actual damages and $147,000 punitive damages. [R. p. 437.] The trial judge denied AIC's request for ten days to file post-trial motions, and AIC's attorney then moved for JNOV and a new trial absolute or new trial nisi remittitur. [R. pp. 440-41.] AIC's attorney also requested the trial judge to strike or remit the award of

punitive damages. [R. pp. 440-41.] The trial judge denied all of AIC's post-trial motions from the bench. [R. pp. 434-51.] The trial judge subsequently filed a written Supplemental Order denying the motions on September 5, 2012. [R. p. 3.] AIC, acting in the name of the defendant, then served and filed a timely Notice of Appeal on September 17, 2012.

STATEMENT OF THE FACTS

On the morning of December 20, 2008, the Respondent Levern McCray left his home to go to his job operating heavy machinery for a construction company. [R. p. 174.] McCray gave the following account of the accident at trial:

> Where the apartment complex was I turned left and I noticed this vehicle it was coming it was coming around a curb [sic] and as it came around the curb [sic]. It just didn't seem to where it was gonna straighten up to be on it's [sic] side of the road so as it kept coming around. I kept going to the right and it kept following me to the right and the next thing I know it slammed into me.

[R. p. 174, lines 6-13.] There were no other eyewitnesses to the accident besides the named defendant, Jose W. Valle, who was unavailable to testify at trial.

At some point after the collision, Reginald Thomas, a trooper with the South Carolina Highway Patrol, responded to the scene. [R. p. 89.] Trooper Thomas investigated the scene and concluded in his written report that Valle had caused the accident by crossing the center-line. [R. p. 91.] Trooper Thomas also accompanied Valle to the hospital for a blood test because he smelled the scent of alcohol when speaking to Valle. [R. p. 91.] Trooper Thomas could not recall at trial whether Valle was unsteady on his feet, was oriented to his current location, or exhibited any physical signs of impairment or intoxication. [R. p. 91.]

A nurse at the hospital took a blood sample from Valle and presented it to Trooper Thomas. [R. pp. 92-93.] The officer then took the sample to the Highway Patrol's regional headquarters in Charleston, where he turned it over to his supervisor. [R. pp. 93-95.] After that exchange, several highway patrol officers handled the sample until Lance Corporal Clyde Ray Cochrane drove the sample to SLED headquarters in Columbia on December 23, 2008. [R. p. 113.] That was three days after the accident occurred. Roughly one week later, a SLED technician named Heather Dailey performed a test on the sample. [R. pp. 487-88.] The test found a blood alcohol level of .103. [R. pp. 487-88.]

Levern McCray sustained a broken ankle as a result of the accident, and he underwent a surgical procedure to repair it. [R. p. 181.] McCray missed the next six months from work, but his treating orthopedists cleared him to return to work as of June 1, 2009. [R. p. 183.] McCray immediately went back to work and even logged a 50-hour work week shortly after his return. [R. pp. 203, 207-08.] The only way his ankle injury affected his work was that McCray began operating a different piece of equipment than he had previously operated because it required less footwork. [R. pp. 200-01.] Furthermore, after being cleared and released by his treating orthopedist, McCray did not seek any further medical treatment until April 7, 2012 – a gap of nearly three years. [R. p. 288.]

ARGUMENT

I. The trial court erroneously charged the jury that the defendant's blood alcohol level created an inference of intoxication because the statute upon which the court relied applies only to criminal cases.

Citing §56-5-2950 of the South Carolina Code, the trial court instructed the jury it could infer the defendant driver was operating his vehicle while under the influence of alcohol due to his blood alcohol concentration ("BAC"). Thus, the charge led the jury to believe it could conclude the defendant driver was intoxicated or impaired based solely on the results of a BAC test. This was not a correct statement of the law for purposes of a civil trial, and the erroneous charge prejudiced the defense of the case. Accordingly, this Court should reverse and remand for a new trial.

(A) Standard of Review

"When an appellate court reviews an alleged error in a jury charge, it 'must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.'" *Ardis v. Sessions*, 383 S.C. 528, 532, 682 S.E.2d 249, 250 (2009) (quoting *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999)). "This holistic approach to jury instructions is linked to the principle of appellate procedure that '[a]n error not shown to be prejudicial does not constitute grounds for reversal.'" *Id.* (quoting *Brown v. Pearson*, 326 S.C. 409, 417, 483 S.E.2d 477, 481 (Ct. App. 1997)).

(B) The jury charge was erroneous.

The relevant portion of the trial court's jury instruction reads as follows:

> I instruct you that code section 56-5-2930 provides that it is unlawful for a person to drive a motor vehicle within this

> state while under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired. I further instruct you ladies and gentlemen that 56-5-2950 subsection B provides as follows, the amount of alcohol in the defendant's blood at the time of the accident as showed by chemical analysis of the defendant [sic] breath or other bodily fluids may be considered by you in deciding whether the defendant was under the influence. If the alcohol concentration was eight one hundredths of one percent or more it may be inferred that the defendant was under the influence. This inference ladies and gentlemen is simply an evidentiary fact to be considered by you along with the other evidence in the case and you may give it the effect[,] value and weight you decide it should receive.

[R. p. 421, lines 1-17 (emphasis added).] As the emphasized language reveals, the trial court told the jury it could infer the defendant driver was operating his vehicle while under the influence based on the results of the blood test. This instruction was erroneous in the context of a civil action.

The relevant statute for purposes of this issue (S.C. Code §56-5-2950) was amended in 2008. The amendment, which became effective February 10, 2009, rewrote portions of the statute and re-designated the subsections. Based on the reference in the jury instructions to "subsection B," it appears the trial court charged the old version of the statute. That version of §56-5-2950 stated, in relevant part:

> (b) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 relating to driving a vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs, the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:
>
> * * *

> (3) If the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

That version of the statute was still in effect at the time of the accident in this case (December 20, 2008). The corresponding section of the current version of S.C. Code §56-5-2950 states:

> (G) In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945, the alcohol concentration at the time of the test, as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following:
>
> * * *
>
> (3) if the alcohol concentration was at that time eight one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.

S.C. Code Ann. §56-5-2950 (emphasis added). The only difference between the two versions of this section (other than the subsection designations) is the current statute's omission of the phrase "relating to driving a vehicle under the influence of alcohol, drugs, or a combination of alcohol and drugs" after the list of applicable code sections. Otherwise, the two versions are identical.

The relevant language for purposes of this appeal appeared in the 2008 version of §56-5-2950, and it still present. Both versions contain this language: "In the criminal prosecution for a violation of Section 56-5-2930, 56-5-2933, or 56-5-2945 ... the alcohol concentration ... as shown by chemical analysis of the person's breath or other body fluids, gives rise to the following ...." Only after giving that introductory statement does the statute proceed to set forth the various alcohol concentrations and the inferences they support.

"In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature. ... If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the Court has no right to impose another meaning." *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009).

Here, the relevant language of §56-5-2950 is plain and unambiguous. The inferences set forth in that statute apply only "[i]n the criminal prosecution for" certain DUI offenses. The statute does not say anything about those inferences being applicable to civil actions. Had the General Assembly intended the inferences to apply to civil cases as well as criminal prosecutions, it would have used a general, all-encompassing phrase such as "in litigation arising from violations of [the DUI statutes]." That is not what the legislature did, however. As enacted, §56-5-2950 is restricted to the "criminal prosecution" of certain listed offenses. Thus, based on its plain language, §56-5-2950 is inapplicable in civil cases, and the trial court erred in charging it to the jury. *See Gulledge v. McLaughlin*, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997) (noting that "the inferences of intoxication in the implied consent statute, S.C. Code Ann. §56-5-2950 (Supp. 1996), are not charged" in civil cases).

For purposes of this issue, it makes no difference that the Respondent was seeking to establish negligence per se by proving a violation of the DUI statutes. The introductory statement of §56-5-2950 does not say the statute's inferences apply to "litigation for a violation of [the DUI statutes]." Rather, it says the inferences apply to "criminal prosecution" of those violations. This means the inferences come into play only in criminal DUI cases. There is simply no other way to read or interpret the statute.

Therefore, the Respondent's attempts to prove negligence per se at trial are irrelevant, and they do not validate the trial court's decision to charge §56-5-2950.

(C) The jury charge was prejudicial.

Charging §56-5-2950 was not only erroneous, but also prejudicial because it allowed the jury to conclude the defendant was guilty of driving under the influence based on nothing more than an inapplicable inference. The Respondent presented no admissible evidence the defendant driver was intoxicated or impaired at the time of the accident. The only "evidence" on that point consisted of the following: (1) the Respondent's testimony that the defendant's vehicle crossed the center-line; (2) the investigating officer's testimony that the defendant smelled of alcohol; and (3) the results of the blood alcohol test. As discussed below, none of those things established intoxication or impairment on the defendant's part.

First, even if one accepts the Respondent's testimony about how the accident occurred, that does not constitute evidence of impairment. Granted, crossing the center-line of a roadway might be an indication of impairment in some circumstances, but only when there is other evidence linking that conduct to the effects of alcohol or drugs. For example, while the Supreme Court concluded in *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007), that crossing the center-line was sufficient evidence of impairment, this was because an expert testified such conduct was a likely result of the amount of alcohol the driver had in his system. Thus, crossing the center-line was not in and of itself evidence of impairment. It assumed that status only after the expert testimony created a nexus between impaired motor skills and crossing the center-line. In the present case, there was no evidence linking the cause of the accident (i.e. crossing the center-line) to impairment

or intoxication. This means any conclusion the defendant was under the influence based on the testimony that he crossed the center-line would necessarily have resulted from speculation.[1]

Second, the officer's testimony that he smelled alcohol on the defendant was not sufficient evidence of impairment. While this testimony is evidence of alcohol consumption by the defendant, it does not establish intoxication. A person can smell of alcohol and not be intoxicated, and the officer did not observe any conduct that would suggest the defendant was drunk. For example, the officer did not testify to any slurred speech or failed sobriety tests, and he said he could not recall whether the defendant was steady on his feet. Consequently, the smell of alcohol was not evidence of impairment, as opposed to mere consumption of alcohol.

Even if one considers the crossing of the center-line and the smell of alcohol in tandem, it does not establish impairment or intoxication. There is still a missing link between those two things. The smell of alcohol suggests the defendant had been drinking to some unknown extent, and crossing the center-line shows he did not have proper control of his vehicle when the accident occurred. But there was no evidence to show the defendant's consumption of alcohol was the reason for that lack of proper control. Again, the Respondent did not present any expert or other testimony to establish a link between certain levels of drinking and improper driving such as crossing the center-line. The Respondent merely argued the defendant crossed the center-line because he had been drinking, without offering any further explanation. This type of argument has a surface-

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[1] Numerous other things could cause a driver to become distracted and allow his or her vehicle to cross over into the wrong lane. For example, a driver could look down to answer a cellphone or change the radio station. Thus, crossing the center-line by itself cannot be sufficient evidence of impairment or intoxication.

level appeal, but it is not legally sufficient. Otherwise, evidence of any alcohol consumption or drug use would be always be relevant and admissible, and this is not the law of South Carolina. *See, e.g., Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004) (reversing the trial court's decision to admit evidence showing the presence of marijuana in a driver's system where there was nothing to link any alleged drug use with the conduct that caused the accident).

Finally, the result of the blood test was not independently sufficient to prove intoxication.[2] The test produced a blood alcohol concentration ("BAC"). Standing alone, however, that BAC was just a number thrown at the jury. The former SLED technician who performed the test was not qualified to give, and did not offer, any testimony about the potential impairing effects of the BAC. No other witnesses gave testimony to fill that gap. As a result, the jury received only a number that, by itself, meant nothing to them.

This is where the prejudice in charging §56-5-2950 becomes most apparent. The Respondent did not present any evidence to demonstrate the defendant's BAC meant he was intoxicated or driving under the influence of alcohol. Yet, the trial court essentially did that work for Respondent. By instructing the jurors they could infer the defendant was driving under the influence of alcohol based on the BAC, the trial court excused the Respondent's failure to prove impairment or intoxication. In other words, the erroneous charge gave the jury a basis for finding a violation of the DUI statutes where none otherwise existed. As a result, the trial court's decision to charge the inapplicable statute was highly prejudicial to the defense of the case, particularly on the issue of punitive

[2] As a threshold matter, the trial court should not have admitted evidence of the blood test result. The Appellant presents its arguments on this issue in Section II of this brief.

damages. For this reason, the Court should reverse the result below and remand for a new trial.

II. The trial court erred in admitting the result of the defendant's blood alcohol test because there was not sufficient independent evidence of impairment.

Over the Appellant's objection, the trial court allowed the Respondent to play the portion of a video deposition in which a former SLED technician testified about the result of the defendant's blood alcohol test. The defense objected on two grounds: (1) failure to prove a complete chain of custody, and (2) the lack of any independent evidence connecting the BAC to a degree of impairment in terms of operating a vehicle. Assuming for the sake of this argument the Respondent established an acceptable chain of custody, the admission of the blood test result was still reversible error based in the second ground. Therefore, this Court should reverse and remand for a new trial.

An appellate court should reverse a trial court's decision to admit or exclude evidence when that decision constitutes an abuse of discretion amounting to an error of law. *Judy v. Judy*, 384 S.C. 634, 641, 682 836, 839 (Ct. App. 2009). "An abuse of discretion occurs when the judge's decision is controlled by an error of law or is without evidentiary support." *City of Florence v. Jordan*, 362 S.C. 227, 230, 607 S.E.2d 86, 88 (Ct. App. 2004).

Here, the trial court erred in admitting the blood test result because there was no evidence in the record to link that number to any degree of impairment.[3] Under South Carolina law, a party must establish that connection in order to support admission of evidence regarding alcohol or drug use. At the very least, the party seeking to admit such

[3] Indeed, the only thing creating any nexus between the defendant's BAC level and impairment was the inference set forth in S.C. Code §56-5-2950, which the trial court improperly charged to the jury.

evidence must demonstrate the alcohol or drug use led to the improper driving that caused the accident. A review of the leading cases on this issue illustrates this point.

One of the most recent decisions in this area is *Johnson v. Horry Co. Solid Waste Authority*, 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010). There, the plaintiff's decedent ("Johnson") was driving her vehicle alone around 4:00 am when she ran off the side of the road and over-corrected, causing the vehicle to roll over. At some later time, one of the defendant's employees arrived at the scene driving a garbage truck. The employee saw Johnson's vehicle, but did not see her standing near it. After feeling a bump, the employee pulled over and discovered Johnson lying in the road. Johnson's personal representative brought a wrongful death suit against the County.

At trial, the County attempted to introduce the following evidence: (1) Johnson's blood alcohol level was 0.14, (2) there were traces of marijuana and cocaine in Johnson's blood, (3) a state trooper who was head of the Pee Dee Region's Major Accident Investigation Team believed the original roll-over accident occurred because Johnson was driving under the influence, and (4) the County's expert believed Johnson's intoxication affected her judgment, perhaps causing her to stand too near the roadway after her original accident. The trial judge excluded all of that evidence, concluding there was no evidence solidly connecting Johnson's impairment to the second accident (i.e. the one involving the garbage truck). After a verdict for the plaintiff, the County appealed.

This Court affirmed, agreeing that the most important factor was the absence of any link between the alleged intoxication and the second accident. As the Court explained:

> Taking the second accident independently, the County presented no evidence Decedent's intoxication contributed

> to her being struck by the County's truck. In attempting to establish the link between intoxication and the second accident, no expert testimony was proffered for the trial court's consideration regarding how her judgment would have been impaired with respect to staying out of the road.

389 S.C. at 536, 698 S.E.2d at 839. The absence of any such "connecting" evidence was a sufficient basis to support the trial judge's decision. *Id.*

This Court reached a similar result in *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004). The defendant in *Kennedy* was attempting to make a left turn in an 18-wheeler truck when the plaintiff's vehicle collided with the 18-wheeler's rear set of tires. An eyewitness' testimony and the physical evidence at the scene indicated the plaintiff inexplicably waited until just before the collision to apply his brakes. At a hospital after the accident, the medical staff took a blood sample from the plaintiff, which revealed marijuana in his system. The defendant successfully offered that test result into evidence at trial. After a defense verdict, the plaintiff appealed, arguing the trial judge erred in admitting the blood test result.

The Court reversed and remanded for a new trial. In support of its decision, the Court noted the evidence – either direct or circumstantial – did not show when the plaintiff used marijuana or how much he used. More importantly for present purposes, the Court also concluded there was no testimony or other evidence connecting the presence of marijuana in the plaintiff's system to any kind of impairment that caused the accident. While it was certainly possible that marijuana in the plaintiff's system impaired his judgment or reaction time, causing him to wait too long to apply the brakes, there was no evidence to support that theory. Thus, as the Court explained, "[u]nder these

circumstances, evidence of the mere presence of marijuana, without further indication of impairment, could mislead the jury." 358 S.C. at 128, 595 S.E.2d at 251.

The rationale followed in *Johnson* and *Kennedy* also applies here. The missing link in those cases was the absence of any testimony causally connecting the results of the blood tests to the accidents. There was evidence of alcohol and drug use, and even a suggestion of intoxication in *Johnson*, but there was no testimony showing how the alcohol or drug use contributed – or even could have contributed – to the accidents. That type of explanatory evidence is missing from the present case as well. The Respondent offered the result of the defendant's blood test and testified the defendant crossed the center-line to cause the accident. But the Respondent did not present any expert or other testimony to explain how or why the defendant's BAC would cause him to cross the center-line. Just as in *Johnson* and *Kennedy*, the record contains nothing to bridge that gap. As a result, those cases support the Appellant's position.

Furthermore, *Johnson* and *Kennedy* demonstrate the Respondent cannot rest on assumptions to fill in the missing pieces of his case. The Respondent's trial argument was essentially that the defendant's BAC meant he was clearly intoxicated, which, in turn, explained why he crossed the center-line. However, the plaintiff in *Johnson* had an even higher BAC, and that could not support any assumption or inference that impaired judgment caused her to stand too close to the road. In addition, the plaintiff in *Kennedy* waited too long to apply his brakes for no apparent reason, but the jury could not just assume it was because he had marijuana in his system. Therefore, the Respondent could

not simply present evidence of the BAC and crossing the center-line and rely on the jury to connect the two.[4]

Although the Respondent might attempt to rely on *Lee v. Bunch*, 373 S.C. 654, 647 S.E.2d 197 (2007) or *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997), those cases are distinguishable. In *Lee*, there was evidence that the plaintiff caused the accident by crossing the center-line on his motorcycle, and that he had alcohol in his system at the time. Significantly, though, there was also expert testimony explaining how the amount of alcohol in the plaintiff's system could impair his driving skills, leading him to cross the center-line. The existence of that expert testimony was central to the Supreme Court's decision that the trial judge properly admitted evidence of the plaintiff's alcohol consumption and blood alcohol level.

In *Gulledge*, the trial court admitted evidence of the blood alcohol level of the plaintiff's decedent. After an adverse verdict, the plaintiff appealed, arguing in part that the result of the decedent's blood test was inadmissible because there was no testimony linking that BAC to a specific degree of impairment. This Court affirmed the decision to admit the evidence because it believed there was sufficient evidence in the record the plaintiff was driving under the influence (i.e. "fresh" beer cans and a cooler found near the plaintiff's vehicle at the accident scene). Significantly, the corroborating evidence also included testimony by a medical technologist that the plaintiff's BAC was 0.166, and that "a BAC of .4 or .5 would be inconsistent with life." 328 S.C. at 511, 492 S.E.2d at

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[4] Here, it should be noted again the trial court aided the Respondent's cause by improperly charging the "inference" statute (S.C. Code §56-5-2950). The inference listed for BACs over 0.08 would allow a jury to connect the dots between the test result and an impairment, but only in criminal cases. As explained above, the statute is not applicable in civil cases.

820-21. This testimony provided at least some guidance for the jury in determining whether the plaintiff's BAC created an impairment or caused him to be "under the influence" of alcohol.

In both *Lee* and *Gulledge*, there was more than just a BAC and a vehicular accident. The records in those cases also included testimony providing at least some link between the BACs and impairments that caused or contributed to the accidents. As previously discussed, that kind of connecting, explanatory evidence is missing here. The Respondent did not present any testimony, expert or otherwise, to show how or why the defendant's blood alcohol level caused him to cross the center-line. Therefore, *Lee* and *Gulledge* are distinguishable, and this case is much closer to *Johnson* and *Kennedy*.

The current record includes testimony by the Respondent that the defendant's vehicle crossed the center-line and testimony by the investigating officer that he smelled alcohol on the defendant after the accident. Those two things were not sufficient to warrant admission of the blood alcohol test result. Admitting that test result without any corresponding evidence connecting the BAC to a specific impairment invited the jury to reach a verdict based on speculation, especially when the Respondent relied on a "drunk driving" theme throughout the trial. Thus, the decision to admit that evidence was reversible error, and the Appellant is entitled to a new trial.

III. The trial court erred in allowing the investigating officer to give an opinion as to the facts of the accident because he was not qualified as an expert.

Over the Appellant's objection, the trial court permitted the investigating highway patrol officer (Reginald Thomas) to testify as to his opinion of how the accident occurred.

That decision was clearly erroneous under controlling South Carolina law, and this Court should reverse and remand for a new trial.[5]

During Trooper Thomas' testimony, the following exchange occurred:

> Q: Ok, was Mr. Valle operating his vehicle on the wrong side of the roadway?
>
> A: Yes he was.
>
> Q: As far as you can tell?
>
> A: Yes he was.

[R. p. 91, lines 9-13.] Trooper Thomas did not actually witness the accident, which means this testimony necessarily constituted his opinion about the cause of the accident. Furthermore, the trial court never qualified Trooper Thomas as an expert. Indeed, the court believed he could offer an opinion as a lay witness.

"A police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert." *State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985). *See also Gulledge v. McLaughlin*, 328 S.C. at 508, 492 S.E.2d at 818 ("a long line of South Carolina decisions has excluded the opinions of investigating police officers in automobile accident cases"). Thus, the trial court erred in allowing Trooper Thomas to give opinion testimony about how the accident occurred.

In *Gulledge v. McLaughlin*, *supra*, and *Jackson v. Price*, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986), this Court concluded it was error for a trial court to allow an investigating officer to give opinion testimony, but nevertheless affirmed because the

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[5] The standard of review for this issue is the same as that applicable to the one discussed in Section II of this brief. A statement of the standard of review appears above on page 13.

error was harmless. While the Respondent might attempt to rely on those cases here, an important difference exists between those cases and the one at bar. In both *Gulledge* and *Jackson*, the Court found the erroneously admitted officer testimony was merely cumulative, as eyewitnesses also testified about the facts of the accident. Significantly, at least one corroborating witness in each case was an independent witness (i.e. not one of the parties). This meant there was neutral testimony about how the accident occurred, which rendered the officers' opinions superfluous. Here, on the other hand, there were no independent eyewitnesses. The only testimony about how the accident occurred, other than Trooper Thomas', came from the Respondent. Thus, Trooper Thomas' testimony bolstered the Respondent's own version of the accident. Neither *Gulledge* nor *Jackson* contemplated this type of scenario. As a result, those cases are distinguishable.

It is also irrelevant for purposes of this issue that the Appellant admitted simple negligence at trial. The reason is that the Respondent did not merely use his testimony of the defendant crossing the center-line to prove fault for the accident. The Respondent also intended that testimony to serve as evidence of the defendant's intoxication. As discussed in the previous section, even with that testimony it was error for the trial court to admit the blood alcohol test results. But without the testimony, even the Respondent would have to concede there would be no basis for admitting any evidence of the BAC.

This brings the importance of the "center-line" testimony into sharp focus. By corroborating the Respondent's account of the accident, Trooper Thomas was not only validating that version of the facts, but also giving credence to the Respondent's attempts to characterize the defendant as a "drunk driver." Stated another way, Trooper Thomas' opinion testimony put a de facto official stamp of approval on the Respondent's theory of

the case. Consequently, the decision to admit that testimony was prejudicial in addition to being plainly erroneous.

The trooper's testimony serves as another example of an error by the trial court that aided the Respondent's attempts to pursue punitive damages under a "drunk driving" theory. The Respondent offered no evidence to show the defendant's blood alcohol level could – let alone would – have caused him to cross the center-line while driving, but the trial court's erroneous jury charge permitted the jury to infer that connection. Similarly, the trial court improperly allowed a police officer to corroborate testimony by the Respondent, upon which the Respondent based his arguments for admitting the result of the blood alcohol test. Therefore, the decision to allow the trooper's testimony, like the decision to charge S.C. Code §56-5-2950, was reversible error, and this Court should reverse and remand for a new trial.

IV. The trial court erred by not granting a new trial or new trial nisi remittitur because the evidence did not support the excessive amount of the damages award.

In addition to the grounds discussed above, the Appellant moved for a new trial for several other reasons. The trial court erred in failing to grant a new trial on at least one of these bases, and this Court should reverse and remand for a new trial.

(A) New Trial Absolute

"A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. ... The circuit court should grant a new trial absolute on the excessiveness of the verdict only if the amount is so grossly inadequate or excessive as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives." *Swicegood v. Lott*, 379 S.C. 346, 355, 665 S.E.2d 211, 215-16 (Ct. App. 2008). "When a

verdict is 'grossly excessive and the amount awarded is so shockingly disproportionate to the injuries as to indicate that the jury acted out of passion, caprice, passion, or other consideration not founded on the evidence, it becomes the duty of this Court, as well as the trial court, to set aside the verdict.'" *Sanders v. Prince*, 304 S.C. 236, 238, 403 S.E.2d 640, 642 (1991) (quoting *Small v. Springs Indus.*, 292 S.C. 481, 487, 357 S.E.2d 452, 455 (1987)).

The verdict in the present case satisfies that standard. The Respondent claimed medical bills of $47,195.70 and total economic losses of $73,619. The verdict of $647,000 was almost five-and-a-half times the specials sought by the Respondent. This ratio, coupled with the numerous legal errors by the trial court that advanced the Respondent's "drunk driving" theme, constitutes a shockingly excessive verdict, which warrants a new trial.

At trial, defense counsel effectively conceded the Respondent's entitlement to his claimed medical bills ($47,195.70) and lost wages ($25,198.80). Defense counsel also did not dispute some relatively small amount for the loss of future earnings element included in economist Oliver Wood's report. While those uncontested damages supported a verdict for the Respondent, they did not justify the excessive amount of damages the jury awarded. A brief examination of the record demonstrates this point.

There is no dispute the Respondent sustained an injury in the accident (i.e. a broken ankle requiring surgical repair). It is also clear the Respondent missed six months of work while recovering from that surgery. Yet, the Respondent's treating orthopedists believed the surgery was successful and led to a full recovery, and the Respondent admitted he went back to work full-time as soon as the orthopedists cleared him for duty.

[R. pp. 458-69, 519-39.] Shortly after returning to his job, the Respondent was able to work 50-hour weeks. [R. pp. 203, 207-08.] The only indication of any effect on his work were the facts that the Respondent began operating a different piece of equipment than before and declined to pursue a supervisory position with his company. Those things could not justify the excessive damage award.

Similarly, the medical evidence did not support the amount of damages. As indicated above, the Respondent's treating orthopedic specialists believed he made a full recovery and had no permanent injuries. They released the Respondent several months after the accident, and the Respondent never returned to see them. In fact, the record revealed the Respondent did not seek any medical treatments for anything purportedly related to the accident for almost three years after the orthopedists released him. At that point, he went not to an orthopedic specialist, but to his old family physician who was semi-retired and had not seen the Respondent in years. Although that doctor assigned all sorts of impairment ratings to various parts of the Respondent's body, the doctor admitted he was not a specialist in orthopedics and had no training in that field. The doctor also attempted to diagnose some sort of brain-related injury, despite the absence of even a shred of neurological evidence to that effect.

In short, the family doctor's testimony regarding impairment ratings was inherently incredible and was not worthy of any consideration. Indeed, defense counsel at trial objected to the doctor's testimony on that basis. Yet, even if a reasonable jury could have credited some of the doctor's testimony, his opinions would not justify the kind of excessive verdict the jury reached. Taken as a whole, the record evidence did not support any conclusion the Respondent would have future medical problems or

complications arising from the accident. To the contrary, the record demonstrates the Respondent was more or less fully healed and back at work six months after the accident occurred. Given that evidence, a verdict of more than five times the amount of the claimed specials was grossly excessive.

The Respondent's "drunk driving" theme also invited the jury to reach a verdict based on passion, caprice, and prejudice rather than on the evidence. Despite offering no evidence of impairment (as opposed to the blood alcohol test result), the Respondent's attorney repeatedly told the jury the case was about a "drunk driver" who was not present at trial.[6] This inflamed the jury and took the focus away from the Respondent's claimed damages and put it on the defendant's conduct. Coupled with the lack of evidentiary support for such an excessive verdict, this tactic demonstrates the jury based its verdict on considerations outside the evidence. As a result, the trial court erred in failing to grant relief to the Appellant, and this Court should reverse and remand for a new trial.

(B) New Trial Nisi Remittitur

A trial court has the authority to grant a new trial *nisi remittitur* when it finds the amount of the verdict to be merely excessive. *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008). "Compelling reasons, however, must be given to justify invading the jury's province in this manner." *Id.* at 183, 662 S.E.2d at 442-43. Nevertheless, "[t]he circuit court has wide discretionary power to reduce the amount of a verdict which, in its judgment, is excessive." *Id.* at 183-84, 662 S.E.2d at 443. When considering whether a verdict is excessive for purposes of a new trial *nisi remittitur*, the

[6] The defendant driver's absence was particularly problematic because this was an uninsured motorist case, and defense counsel could not explain his role or the defendant's absence without improperly bringing the issue of insurance into the trial.

trial court should consider punitive damages as well as actual damages. *Id.* at 184, 662 S.E.2d at 443. "The denial of a motion for a new trial nisi is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 189, 638 S.E.2d 667, 670 (2006).

Even if the Court concludes the $647,000 verdict was not grossly excessive for purposes of a new trial absolute, it should still find the verdict to be "merely" excessive. As discussed above, the record does not support the amount of the jury's verdict. The Respondent recovered from his injury, returned to work after six months, and continues to work full-time to this day. Although the Respondent's family doctor claims he has permanent impairments, the Respondent went nearly three years without seeking any medical treatments after his orthopedic specialists released him. Given those facts, which the Respondent did not dispute, no reasonable jury could have awarded more than five times the amount of the Respondent's medical bills and claimed economic losses.

While juries have broad discretion in determining the amounts of damages to award, that discretion is not limitless. Judicial intervention is necessary when juries abuse their discretion by awarding excessive verdicts. *See, e.g., South Carolina Farm Bur. Mut. Ins. Co. v. Love Chevrolet, Inc.*, 324 S.C. 149, 478 S.E.2d 57 (1996) (affirming the trial court's decision to grant a new trial unless the plaintiff agreed to a 50% reduction of the punitive damages award); *Wachovia Bank N.A. v. Beane*, 397 S.C. 612, 725 S.E.2d 715 (Ct. App. 2012) (reversing and remanding for the trial court to grant a new trial where the verdict was excessive because the record evidence did not support it). The present case also calls for judicial intervention, and the trial court erred in not granting a new trial nisi remittitur.

As with the "new trial absolute" issue, the Respondent's "drunk driving" theme is also relevant here. The excessive verdict indicates the jury gave a premium to the Respondent because it believed he was the victim of a drunk driver. The jury should never have been in a position to reach such a conclusion because the trial court erred in admitting the result of the blood alcohol test and opinion testimony by the investigating officer. The trial court compounded those errors by charging the jury an inapplicable inference of intoxication. Nevertheless, even if the jury had properly been able to consider those things, they would only have been relevant to the issue of punitive damages. The defendant's conduct in causing the accident had no bearing on the question of actual damages, but this jury plainly took the defendant's actions into account. There is no other rational or reasonable explanation for a $500,000 award of actual damages based on the record evidence and the nature of the Respondent's injury.

For all of these reasons, the Appellant is entitled to a new trial nisi remittitur. The trial court erred in failing to grant that relief, and this Court should reverse and remand with instructions to grant a new trial nisi remittitur to the Appellant.

(C) Thirteenth Juror Doctrine

"In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine 'entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts.' ... As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009). A trial judge does not have to set forth specific reasons for a decision to grant a new trial based on the

thirteenth juror doctrine. *Id.* However, a trial judge will typically grant a new trial under this doctrine based upon a conclusion that the evidence does not support the jury's verdict. *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005).

Here, while the evidence supported a verdict in the Respondent's favor, it did not justify the excessive amount of damages the jury awarded. As discussed above, the Respondent did not have the type or duration of physical injury to support an award of $647,000. Even when considering the Respondent's claimed financial losses, that verdict is still excessive and unwarranted. Again, the Respondent was entitled to fair compensation – defense counsel said as much at trial – but the $647,000 verdict goes far beyond "fair" and enters the realm of the unreasonable. In short, the record does not support the type of huge verdict rendered in this case, and the trial court should have used its authority under the thirteenth juror doctrine to grant a new trial. The failure to do so was error, and this Court should reverse and remand for a new trial.

V. The trial court erred in failing to strike or reduce the punitive damages award because the amount of the jury's award was unconstitutional.

After conducting a post-trial review, the trial court allowed the punitive damages awards to stand. Although the court used the correct legal standards in reviewing those awards, it reached erroneous conclusions. As discussed below, this was not a case that justified a punitive damages award of such size. Therefore, this Court should reverse the trial court's decision not to grant the Appellant any form of relief.

(A) Standard of Review

"In evaluating the constitutionality of a punitive damages award, [the appellate court] conduct[s] a de novo review." *Jenkins v. Few*, 391 S.C. 209, 221, 705 S.E.2d 457, 463 (Ct. App. 2010).

(B) No Support for Punitive Damages

As a threshold matter, the trial court should not have submitted the issue of punitive damages to the jury in the first place. Punitive damages are not recoverable absent clear and convincing evidence of intentional or reckless conduct by a defendant. *See Duncan v. Ford Motor Co.*, 385 S.C. 119, 138, 682 S.E.2d 877, 886 (Ct. App. 2009). This clear and convincing standard is the highest burden of proof found in civil law. *Id.*

The trial court believed punitive damages were recoverable because of the Respondent's claims of negligence per se. To pursue that claim, the Respondent relied on allegations the defendant was driving under the influence. As discussed elsewhere in this brief, however, the Respondent did not present sufficient admissible evidence to support any conclusion that an alcohol-related impairment caused the accident. Stripped of the inadmissible blood alcohol test results, the record demonstrates nothing more than the defendant causing a motor vehicle accident – an action for which the Appellant admitted simple negligence. Thus, nothing properly in the record supported a valid punitive damages claim. *See Longshore v. Saber Security Services, Inc.*, 365 S.C. 554, 564, 619 S.E.2d 5, 11 (Ct. App. 2005) (reversing punitive damages award against security company, where evidence showed that internal corporate policies and agency regulations were violated, but the company's conduct still could not reasonably be construed as anything more than negligent).

(C) Punitive Damages Review

The South Carolina Supreme Court set forth the standards that currently govern post-trial reviews of punitive damages awards in *Mitchell v. Fortis Ins. Co.*, 385 S.C. 570, 686 S.E.2d 176 (2009). There, the Court held trial courts should consider the following three elements when evaluating punitive damages awards: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the award to the actual or potential harm suffered by the plaintiff; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *Id.* at 587, 686 S.E.2d at 185-86. Applying these three factors to the present case, it is clear this Court should set aside the award of punitive damages or reduce it significantly.

(1) Reprehensibility

The degree of reprehensibility involved in a defendant's conduct is "'perhaps the most important indicium of the reasonableness of a punitive damages award.'" *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (quoting *BMW of North America v. Gore*, 517 U.S. 559, 565 (1996)). When analyzing this factor, a trial court should consider whether:

> (i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evidenced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than a mere accident.

Id. In the present case, all of these considerations support the Appellants' position.

The Respondent sustained a physical injury, but it was one that doctors were able to treat successfully. Other than the facially defective impairment ratings attempted by the Respondent's retired family doctor, there was nothing to indicate any permanent

injuries or disabilities. The Respondent also claimed economic losses, but the jury's award of actual damages more than compensated for them. Therefore, the first factor does not support such a large punitive damages award.

On the second factor, the Respondent relied on allegations of drunk driving to show an "indifference to or reckless disregard for" the safety of others. Again, though, the Respondent did not properly prove that the defendant was driving under the influence. The trial court should not have admitted the Respondent's evidence on that issue, and this Court should not consider that evidence when reviewing the punitive damages award.

Third, the Respondent was not financially vulnerable. The Respondent had steady employment at the time of the incident, and he returned to his job as soon as his physical injury healed. Simply put, there is no evidence the defendant targeted the Respondent for mistreatment due to any perceived financial vulnerability. This factor is, therefore, irrelevant here.

The fourth factor also favors the Appellant because there is no evidence this incident was part of any pattern of repeated conduct. Nothing in the record indicates the defendant had been involved in previous accidents, let alone ones involving allegations of alcohol. As a result, there is no basis for concluding this accident was anything other than an isolated incident.

As to the fifth factor, the defendant did not act with any intentional malice, trickery, or deceit. Taking the evidence in the light most favorable to the Respondent, the harshest reasonable conclusion (even using the improperly admitted evidence) is that the defendant drove his car with alcohol in his system and caused an accident. There was no premeditated malice or deceit by the defendant. There was only a poor decision and/or

poor control of his vehicle by the defendant. Either way, the conduct was neither malicious nor fraudulent, and it does not warrant the amount of punitive damages imposed in this case.

Stated simply, the defendant's conduct did not involve the degree of reprehensibility to support such a large punitive damages award. The jury obviously concluded that the defendant should not have been driving and that he caused a serious accident, but there is no evidence the defendant acted out of any malicious intent. Thus, this case does not justify an award of punitive damages, and it certainly does not warrant the excessive amount of punitive damages the jury awarded. For this reason, this Court should reverse the punitive damages award, or in the alternative, the Court should reverse and remand with instructions to reduce that awards.

(2) Ratio

This factor requires the trial court to "consider the disparity between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award." *Mitchell*, 385 S.C. at 587-88, 686 S.E.2d at 185. In essence, the trial court can compare the actual damages award to the punitive damages award to determine whether the amount of punitive damages award is constitutionally excessive. *See State Farm v. Campbell*, 538 U.S. 408 (2003). Neither the United States Supreme Court nor the South Carolina Supreme Court has established any bright-line rules for what ratios pass constitutional muster. *Id.*; *see also Mitchell*, *supra.*

At first glance, the ratio in this case might not seem to be out of line, as the punitive damages are less than the award of actual damages. Before skipping past this factor, however, it is important to note the excessive nature of those actual damages. The

jury awarded $500,000 in actual damages, an exorbitant amount for the type of injury and damages involved this case. Thus, the Appellant respectfully submits the amount of the actual damages award skews the overall numbers, and the ratio factor is misleading in this case.

(3) Comparative Civil Penalties

For this factor, "the court should consider the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 186. "When identifying 'comparable cases' a court may consider: the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant's conduct; the ratio or actual or potential harm to the punitive damages award; and other factors the court may deem relevant." *Id.* at 588-89, 686 S.E.2d at 186.

The cases cited and relied upon in the trial court's Order are distinguishable from the present case. In *Wilkes v. Moses*, 291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987), the Court upheld a verdict of $700,000 in actual damages and $300,000 in punitive damages, but the evidence demonstrated the plaintiff had continuing severe pain and scarring from the injuries sustained in the accident. There was also expert testimony about the need for future surgery. Furthermore, the defendant in that case had a blood alcohol level more than twice as high as the current defendant's and also fled the scene of the accident. Thus, the circumstances in *Wilkes* were very different than those in the case at bar.

If anything, the facts in *Durham v. Clements*, 295 S.C. 504, 367 S.E.2d 174 (Ct. App. 1988), actually support the Appellant's position. The plaintiff in *Durham* had approximately $46,000 in medical bills – roughly the same amount as the Respondent

here. This Court upheld a jury award of $45,861.69 in actual damages and $150,000 in punitive damages. While the punitive damages award in *Durham* was in line with the jury's award in the present case, the total damages in *Durham* demonstrate the excessive nature of the verdict here. Clearly there is a significant difference between a total verdict of $195,861.69 and a total verdict of $647,000.

Finally, the injuries involved in *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004), were far more severe than those the Respondent sustained. The plaintiff in *Austin* had four surgeries as a result of his accident-related injuries, and expert testimony showed he would require additional surgeries every other year for the rest of his life. The plaintiff was also permanently disabled in terms of being able to work. Here, on the other hand, the Respondent had a single surgery (with no evidence of any future procedures being necessary), and he returned to full-time work six months after the accident and is still working today. In short, the present case has nothing in common with *Austin*, other than the fact that both cases involved motor vehicle collisions. Therefore, the trial court's reliance on *Austin*, as well as the other cases cited in the Order, was misplaced.

(4) Additional Factor

Although it is not listed as a factor in the *Mitchell* test, the nature of the proceedings below should also be considered in this case. The Respondent made every effort to turn the trial into a condemnation of driving under the influence. While he certainly sought actual damages for his injury and lost wages, the Respondent focused considerable attention on punitive damages. This is normally a plaintiff's prerogative, of course, but in this case, the trial court allowed the Respondent to rely upon inadmissible

evidence to further that effort. The trial court admitted the result of a blood alcohol test without requiring the Respondent to present evidence linking the BAC level to the cause of the accident (i.e. without demonstrating that a driver with that BAC level would be impaired and/or likely to cross the center-line). To make matters worse, the trial court then charged an inapplicable criminal statute that allowed the jury to infer the link the Respondent had failed to establish. The end result was a finding of driving under the influence and a large punitive damages award.

Under these circumstances, the punitive damages award violates the Appellant's due process rights. The Appellant should not be required to pay a punitive damages award the jury based on improperly admitted evidence, let alone such a large award. Due process requires a fair trial in order to impose punitive damages, and the trial court's errors deprived the Appellant of a fair trial in this case. Therefore, the Court should reverse and remand with instructions to strike or reduce the punitive damages award.

CONCLUSION

From the outset, the Appellant admitted the defendant driver caused the accident and the Respondent was entitled to fair compensation for his injury. The Appellant's position remains the same even now. But the result of the trial did not constitute fair compensation. It was an excessive verdict that arose from numerous errors by the trial court, which allowed the Respondent to fan the flames of passion and prejudice by making the case about driving under the influence. Had the trial court required the Respondent to present proper and requisite evidence of an impairment that caused the accident, the issues on appeal might be different. As matters stand, however, the Appellant is entitled to relief from the excessive and unreasonable verdict. Therefore,

this Court should reverse and remand with instructions to grant a new trial or new trial nisi remittitur.

Respectfully submitted,

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RULE 211(b) CERTIFICATION

The undersigned, an attorney for the Appellant, certifies that this Final Appellant's Brief complies with the requirements of Rule 211(b), SCACR.

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