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,

v.

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

FINAL BRIEF OF RESPONDENT

RECEIVED
DEC 05 2013
SC Court of Appeals

Pamela R. Mullis
Mullis Law Firm
Post Office Box 7757
Columbia, S.C. 29202
(803) 799-9577

COUNSEL FOR RESPONDENT

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,

v.

Jose W. Valle,..Appellant,

FINAL BRIEF OF RESPONDENT

Pamela R. Mullis
Mullis Law Firm
Post Office Box 7757
Columbia, S.C. 29202
(803) 799-9577

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities.......ii

Statement of the Issues on Appeal.......1

Statement of the Case.......2

Statement of Facts.......2

Argument:

I. The trial judge properly admitted the relevant evidence of the Defendant driver's blood alcohol content of .103; had there been any error in admission of this evidence, Defendant waived any right to argue that such error was prejudicial or reversible given the Defense's judicial admission that the driver was "drunk" and driving "under the influence" at the time he caused the accident.......16

II. The trial judge properly charged the jury as to the permissive inference of impairment provided in S.C.Code Ann. Section 56-5-2950; had there been any error in the jury charge on this issue, Defendant waived any right to argue that such error was prejudicial given the Defense's judicial admissions that the driver was "drunk" and driving "under the influence" at the time he caused the accident.......26

III. The trial judge properly allowed the testimony of the investigating officer as to the facts of the accident which he observed at the scene.......29

IV. The trial judge properly refused to grant a new trial or new trial nisi remittitur where the jury's award of actual damages was supported by the evidence.......32

V. The trial judge properly submitted the issue of punitive damages to the jury and properly found, upon review, the punitive damages award issued by the jury was reasonable, supported by the evidence, and consistent with due process.......39

A. Punitive damages are properly awarded in South Carolina where the evidence establishes the defendant was in violation of an applicable statute and guilty of negligence *per se*.......39

B. The trial judge properly conducted a review of the punitive damages award pursuant to the *Gore* guideposts and correctly refused to remit the award.......40

Conclusion.......47

TABLE OF AUTHORITIES

CASES:

Austin v. Specialty Transp. Services, Inc.,
358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004)....................45

Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)....................33

BMW of N. Am. v. Gore,
517 U.S. 559, 568, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)....................40, 41, 45, 46

Clark v. Cantrell,
339 S.C. 369, 529 S.E.2d 528 (2000)....................28, 32, 40

Cody P. v. Bank of America, N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct.App. 2011)....................42

Curtis v. Blake,
392 S.C. 494, 709 S.E.2d 79 (Ct.App. 2011)....................38, 45

Floyd v. Floyd,
365 S.C. 56, 615 S.E.2d 465 (Ct.App.2005)....................22

Frazier v. Badger,
361 S.C. 94, 603 S.E.2d 587 (2004)....................22

Gibson v. Wright,
403 S.C. 32, 43, 742 S.E.2d 49, 55 (Ct.App. 2013)....................21

Gulledge v. McLaughlin,
328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997)....................24, 25, 29

Hall v. Wal-Mart Stores East,
447 F.Supp.2d 604 (W.D.Va. 2006)....................21

Hartfield v. Getaway Lounge & Grill, Inc.,
388 S.C. 407, 697 S.E.2d 558 (2010)....................18, 27, 28

James v. Horace Mann Ins. Co., 371 S.C. 187, 638 S.E.2d 667 (2006)....................40

Jefferson v. Synergy Gas, Inc.,
303 S.C. 479, 401 S.E.2d 427 (Ct.App.1991)....................28

Jenkins v. Few,
391 S.C. 209, 705 S.E.2d 457 (Ct. App. 2010)....................32

Johnson v. Horry Co. Solid Waste Authority,
389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010) 23

Kennedy v. Griffin,
358 S.E.2d 152, 595 S.E.2d 248 (Ct. App. 2004)....................24

Lee v. Bunch,
373 S.C. 654, 647 S.E.2d 197 (2007)....................24

McPeters v. Yeargin Const. Co., Inc.,
290 S.C. 327, 350 S.E.2d 208 (Ct.App.1986) 33

Mitchell v. Fortis Ins. Co,
385 S.C. 570, 686 S.E.2d 176 (2009) 40, 43

National Grange Mut. Ins. Co. v. Butler,
253 S.C. 325, 170 S.E.2d 371 (1969) 22

Oscanyan v. Winchester Repeating Arms Co.,
103 U.S. 261, 263, 26 L.Ed. 539 (1881) 19

Rush v. Blanchard,
310 S.C. 375, 426 S.E.2d 802 (1993)....................32

Sample v. Gulf Ref. Co.,
183 S.C. 399, 191 S.E. 209 (1937)....................39

State v. Dunlap,
353 S.C. 539, 579 S.E.2d 318 (2003) 21

State v. Trotter,
322 S.C. 537, 473 S.E.2d 452 (1996) 22

State Farm v. Campbell,
538 U.S. 408, 123 S.Ct. 1513 (2003) 41, 43

Steele v. Dillard,
327 S.C. 340, 486 S.E.2d 278 (Ct.App.1997)....................33

Todd v. Joyner,
385 S.C. 509, 685 S.E.2d 613 (Ct.App. 2008)....................32

United States v. Blood,
806 F.2d 1218 (4th Cir.1986) 19

Vinson v. Hartley,
324 S.C. 389, 477 S.E.2d 715 (Ct.App. 1996)....................32

Whisenant v. James Island Corp.,
277 S.C. 10, 281 S.E.2d 794 (1981) 32

Wilkes v. Moses,
291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987) 44

Wise v. Broadway,
315 S.C. 273, 433 S.E.2d 857 (1993) 40

OTHER:

S.C. Code Ann. Section 56-5-2950..1, 22, 25, 26, 27, 28

Rule 701, SCRE...29

1B J. Moore & J. Lucas, Moore's Federal Practice ¶ 0.405[8] (2d ed. 1984)........................19

STATEMENT OF THE ISSUES ON APPEAL

I. The trial judge properly admitted the relevant evidence of the Defendant driver's blood alcohol content of .103; had there been any error in admission of this evidence, Defendant waived any right to argue that such error was prejudicial or reversible given the Defense's judicial admissions that the driver was "drunk" and driving "under the influence" at the time he caused the accident.

II. The trial judge properly charged the jury as to the relevant inference of impairment provided in S.C.Code Ann. Section 56-5-2950; had there been any error in instructing the jury charge on this issue, Defendant waived any right to argue that such error was prejudicial or reversible given the Defense's judicial admissions that the driver was "drunk" and driving "under the influence" at the time he caused the accident.

III. The trial judge properly allowed the testimony of the investigating officer as to the facts of the accident which he observed at the scene; had there been any error in admission of this evidence, Defendant waived any right to argue that such error was prejudicial or reversible given the Defense's judicial admissions that the driver was "drunk" at the time he crossed the center line to cause the collision.

IV. The trial judge properly refused to grant a new trial or new trial nisi remittitur where the evidence of Plaintiff's injuries and losses amply supported the jury's award of damages.

V. The trial judge correctly refused to strike or reduce the punitive damages award where the award was supported by the evidence and consistent with the law.

STATEMENT OF THE CASE

This car wreck case was brought to trial before the Honorable Deadra L. Jefferson and a jury on August 13, 2012. Plaintiff, Levern McCray's, cause of action for negligence against the Defendant, Jose Valle, resulted in a jury verdict in favor of Plaintiff in the amount of Five Hundred Thousand dollars actual damages and One Hundred Forty-Seven Thousand dollars punitive damages. Post trial motions were heard and properly denied.

STATEMENT OF FACTS

On the morning of December 20, 2008, at approximately 5:30 a.m., Plaintiff, Lavern McCray, was driving himself to work when his vehicle was hit head-on by drunk driver, Jose Valle. Plaintiff testified he saw a vehicle coming around a curve in his lane and, as the vehicle approached, it seemed the vehicle was not going to straighten up and get on his own side of the road. Plaintiff testified, "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 11-13). Thus, before the crash, Plaintiff saw headlights coming towards him in his lane and he tried to avoid a collision with the oncoming vehicle by slowing down and pulling to the side of the road. However, the other vehicle continued to drive toward Plaintiff until the vehicles slammed into each other.

Plaintiff recalled that, after the accident, his car was sitting on his side of the road and the other vehicle, driven by Defendant, Jose Valle, was flipped upside down beside his car. After the impact, Plaintiff remembered that Valle was walking around his truck because Plaintiff could see his feet. Plaintiff was trapped inside his own vehicle because the two cars were jammed together. Plaintiff testified his door would not open and, when he tried to push open the door, his leg went out on him and he couldn't get out. However, Jose Valle did not come over to Plaintiff's car to speak to him or to check on him. Plaintiff testified, "I could see his feet

walking by the car and he walks around the car and then he walk around for awhile and he just came and laid down, like this, behind his vehicle on the road there." (R. pp. 175, line 23 – p. 176, line 1). Plaintiff testified he was trapped in the car for a couple of hours until he was extricated using the "jaws of life." Plaintiff was taken by ambulance to the hospital where he complained of pain in his neck, head, left ankle, leg, knee, arm, and hand. Scans and x-rays were taken; Plaintiff had surgery to repair his left ankle, after which he was in the hospital for two or three days and he was out of work for approximately the next six months.

After his surgery, Plaintiff was not able to get around or take care of himself. Therefore, his wife's sister came to stay with Plaintiff and his wife in order to help care for Plaintiff. Plaintiff's friend, Michael Lewis, helped Plaintiff get home from the hospital, helped him get around, helped him attend his doctor's appointments, and he has since cut Plaintiff's grass and kept his yard up. (R. p. 242). At the time of trial, some three and a half years after the accident, Plaintiff continued to have pain in his right shoulder, neck, back, left ankle, and knee. (R. p. 188). Plaintiff described his continuing ankle pain: "It just still hurts me all the time, but sometimes I have pain that just run up my leg they just occur when they get ready....sharp pain it just like pain just run up my leg." (R. p. 194). Plaintiff testified that he had had a prior neck injury in 2001, but he recovered from that injury with no lasting effects. Since this accident, Plaintiff has had aching pain in his neck along with the pain in his ankle, knee, hip, chest, and shoulder. In contrast, immediately prior to the accident, Plaintiff was not having pain in these areas; he indicated that, prior to the accident he was "doing good" and not having pain in his neck, chest, shoulder, ankle or knee. (R. 187, line 1-188, line 9). Plaintiff testified the pain medication did not take away his pain completely and he soon stopped taking the pain medications because, if he took the medication, he could not work. (R. p. 195).

Dr. James D. Spearman repaired Plaintiff's fractured ankle. The orthopaedic surgeon testified from his records that Plaintiff was admitted to the hospital for surgical repair of the ankle fracture and his complaints included a laceration to the hand, neck pain, cervical pain, lower leg pain, knee pain, and chest pain. Dr. Spearman confirmed that, in the emergency room, in response to Plaintiff's pain, CT scans were taken of Plaintiff's spine, neck, and head, along with x-rays of his knee, thoracic spine, abdomen, pelvis, and left ankle. Dr. Spearman testified that Plaintiff had a "really bad break to his ankle." (R. 462, *Depo p. 14 lines 16-19*). The doctor indicated, "...with his fracture, his foot was taken out to the lateral or outside part of his leg and the ankle joint was essentially dislocated or pushed out beyond the limits of the condition of the two upper leg bone[s]." (R. 462, *Depo. p. 14 lines 11-15*). Dr. Spearman indicated the injury:

> "...[T]ore the ligaments on the medial side and then the ligament between the two bones. So, from a standpoint of forces, the force applied to the inside part of his foot pushed his foot outwards and, sequentially, the ligaments on the inside part of his ankle tore, allowing his foot to move further, which then sheered the ligament between the bones, and then the forces traveled up and actually split the fibula up above the ankle joint."

(R. p. 462, *Depo p. 14 line 20- p. 15 line 4*). The doctor explained that, due to the severity of the break, Plaintiff's ankle had to be screwed back together using a plate. The plate used has seven holes and seven screws, with one extra long screw going through the plate and traversing across the tibia, for a total of seven screws and a plate in Plaintiff's fractured ankle. The doctor further testified a part of Plaintiff's tibia was torn loose and held in place by the long screw so it could heal. Dr. Spearman testified *if* the leg heals, the healing usually takes from eighteen months to two years. (R. 463, *Depo p. 18 lines 20-21*).

Dr. Spearman testified Plaintiff also complained of pain in his right shoulder and continued pain in his neck. The doctor indicated, from the x-rays, there was a question of

whether Plaintiff had sustained a fracture of the glenoid, so that an MRI was recommended. (R. 464, *Depo. p. 22 lines 9-13*). Dr. Spearman further recalled that, in the beginning, besides the ankle fracture, Plaintiff was noted to have some knee pain and, as of January 29, 2009, Plaintiff had decreased strength and sensation over the anterior portion of his leg. Dr. Spearman opined these symptoms were most likely due to an injury of the nerve that was higher up than his ankle because "a fracture of his ankle, even though it was severe, would not cause damage to the nerve that got the front part of his leg or the nerves that affect the muscles in the leg. He had this injury to his knee or pain around his knee, it could very well have been a bruise-type injury to his, to one of the nerves that traverse the knee, and, at that point in time, it wasn't severe enough and it was early enough that I thought we should wait to see whether it resolved on its own or whether we needed to do studies to see if he had pinched nerves further up." (R. 464, *Depo. p. 23 lines 5-22*).

Dr. Spearman testified that, three and a half years after the accident, there were several things that could cause continued pain in Plaintiff's ankle and leg:

> [O]ne being that he never did adequate rehab, so he never got his strength and range of motion returned. Two would be that because his ankle injury was so severe with the fracture dislocation that I talked about earlier, there's more than likely damage within the joint to the articular surfaces, and so he has a traumatic arthritis with cartilage that has been injured and thereby continues to be painful and continues to cause swelling in the joint, which decreases his range of motion.

(R. 465, *Depo. p. 25 line 16-p. 26 line 1*). Dr. Spearman testified surgery was an option to try to improve the limited range of motion. He indicated that arthroscopic debridement could be performed to remove any dead or injured cartilage or "cartilage that's floating around" along with a release of scar tissue that had formed in the ankle joint. (R. 465, *Depo. p. 26 lines 5-11*).

Dr. Spearman explained Plaintiff initially had knee pain after the accident and, his ankle's being immobilized, stiff, and unbending, had translated to increased stress about the knee which can cause pain just from a change in the gait. Dr. Spearman opined that the immobilization of the ankle and the change in gait could also be the cause of the pain in the hip, leg and back. He explained, "Certainly, if somebody has some mild degenerative changes in the lumbar spine and then their gait is altered, they'll have problems with pressure on the nerves simply from having a change in gait, and then they can get pain all the way down their leg from problems with their back, basically." (R. 465, *Depo. p. 27 lines 6-12*). The doctor indicated numbness in Plaintiff's leg could be from a back injury or from a direct injury to the nerves in the leg. (R. 465, *Depo. p. 28 lines 17-18*). Dr. Spearman explained that the injury itself and the fact Plaintiff had a significant injury to the actual joint surfaces was the "most likely cause for him to develop a traumatic arthritis with degenerative changes." (R. 465, *Depo. p. 27 lines 20-22*). Dr. Spearman testified to a reasonable degree of medical certainty, Plaintiff could have residual ankle pain from the fracture, he could have residual knee pain from the injury, and he could have continuing complaints of pain in his extremity related to a gait abnormality from the injury he received. (R. 466, *Depo. p. 30 line 20-p. 31 line 2*).

After he saw Plaintiff on January 29, 2009, Dr. Spearman transferred Plaintiff's care to Dr. Brett Smith, an orthopaedic surgeon with the Moore Clinic in Columbia. Dr. Smith testified that, after the initial period of complete immobility, Plaintiff was in a high boot. However, he indicated the boot is not pleasant to walk in, so he allows his patients to also use a crutch or a cane. Dr. Smith testified that in April 2009, he took the additional long screw out of Plaintiff's leg. (R. p. 528, *Depo. p. 31, lines 4-5)*. However, Dr. Smith testified, after a course of physical therapy, Plaintiff had achiness, stiffness, and soreness. The doctor indicated these symptoms

were very common as a result of scar tissue that develops in the ankle after this type of trauma. (R. p. 530, *Depo. p. 41, lines 6-10*).

Plaintiff returned to Dr. Smith in March 2012, complaining of ankle pain and pressure on the front of his foot. Dr. Smith testified that Plaintiff's physical examination revealed swelling, stiffness, and loss of a few degrees of range of motion resulting from the severe injury. Most of Plaintiff's tenderness was along the joint line where Dr. Smith indicated there was a lot of scar tissue and inflammation that builds up in the joint after trauma. Dr. Smith indicated the big concern was post-traumatic arthritis. He indicated that years down the road, the cartilages can be damaged during an injury and "you don't know it at the time because everything looks okay, but the damage has already been done at the cellular level and can change." (R. p. 532, *Depo. p. 49 lines 6-9*). Dr. Smith testified that, after comparing Plaintiff's 2012 films to those taken in 2009, there were arthritic changes present and he saw an osteophyte starting to form on the front lip of Plaintiff's tibia which would require watchful waiting. (R. p. 533, *Depo. p. 50 line 10 – p. 52 line 21*).

In 2012, Dr. Smith recommended an injection to attempt to decrease the inflammation around the scar tissue in Plaintiff's ankle in order to decrease his discomfort. Dr. Smith testified the scar tissue, inflammation, and arthritic changes in Plaintiff's ankle were all due to the car accident on December 20, 2008. (R. 533, *Depo. p. 53 lines 14-25*). The doctor testified if all conservative measures, including shots, medications, physical therapy and bracing failed to help Plaintiff, he would consider an arthroscopic debridement procedure. (R. 535, *Depo. p. 58 lines 11-16*). Dr. Smith testified the Plaintiff's condition would, more likely than not, get progressively worse with age. Dr. Smith testified that only time would tell if Plaintiff's condition

would worsen so that the pain and dysfunction increased; however, he confirmed the arthritis was not going to get better. (R. p. 535, *Depo. p. 59 line3 – p. 60 line 5*).

At the time of the accident, Plaintiff, Levern McCray, was a 55 year-old construction worker/heavy equipment operator. Plaintiff worked on the family farm in Lynchburg, South Carolina until he graduated from high school in Sumter. After a seven year stint in the United States Marine Corps, Plaintiff found work in construction. In 1983, Plaintiff went to work for BE&K Construction as a laborer, eventually starting to operate heavy equipment. Plaintiff worked from one job site to another over his years with BE&K, becoming certified to operate numerous types of heavy equipment, including big cranes, a backhoe, a front end loader, a bulldozer, and a forklift. He testified that he was a supervisor on a job with a mini-excavator and a skid steer. (R. 172, lines 1-4). In 2007, KBR bought BE&K; however, Plaintiff continued to work for the company. He explained, after twenty years with a company it would have been hard to make a change because a new company would not know him and they would not want to trust an unknown worker with "high dollar" pieces of equipment. (R. p. 171 lines 16-20).

After the accident in December 2008, Plaintiff returned to work in June of 2009. However, he did not return to the job he was working at the time of the accident; instead, Plaintiff was sent to North Carolina to run a heavy crane. The job site in North Carolina was about a ten acre site and Plaintiff had to walk around the site his first day back at work. After that first day, Plaintiff's ankle hurt him so badly that he told the superintendant he could not handle that job because there was "just too much walking." (R. p. 199 lines 18-20). Plaintiff recalled the project superintendent had wanted him to supervise backfilling at the job site but, "I told him I'd be the supervisor...when I came in the next morning, I told him I couldn't make it my ankle was hurting me too bad when I went home that night." (R. 198 line 25 – p. 199 line 3).

At the time of trial, Plaintiff was working; however, he indicated, although he was supposed to be operating a dump truck, one of the guys at work had switched assignments so Plaintiff could run the backhoe instead. Plaintiff indicated that, operating the backhoe required occasional use of his left foot to hold on a steep incline, but that was not often. In contrast, operating the dump truck would have required Plaintiff to use his left foot more because it has a standard clutch. (R. p. 201 lines 2-5). Plaintiff testified he went back to see Dr. Smith because his ankle was bothering him. He recalled that Dr. Smith gave him a shot and an ankle brace. Plaintiff testified he wore the brace, but "it don't do anything for the pain it just helps reinforce my ankle." (R. p. 209, lines 8-19).

As a result of this accident, Plaintiff is no longer able to operate hydraulic cranes. Plaintiff explained he would rather run a crane than a dump truck: "Cranes pay more and it's not as much work in them. You operate that crane you may make something two, four, or five lifts. Sometimes if you swinging iron you may work all day, but other than that you just pick up say a fifty thousand pound thing and set it in place. You sit there and hold until these guys bolt it up or whatever. You just sit there like that all day but if you operating dirt equipment you sitting there steady digging all day." (R. p. 197, lines 2-9). Because of his injuries, Plaintiff is no longer able to operate cranes and he has sustained a loss of income just based on his inability to run cranes.

Lewis James Welch, Jr. came to South Carolina in 2008 to supervise construction of the Dupont plant. At the time of his deposition, Welch was the Project Superintendent, supervising the entire site, including the riggers, the iron workers, and the heavy equipment operators. (R. p. 453, *Depo. p. 5*). Welch supervised Plaintiff as he ran a large hydraulic crane in March of 2008. Welch described the work of a crane operator: "Climbing up the steps to get up into the seat. I have been an equipment operator off and on my whole life. It's a muscular thing where you have

to grab the hands and pull up and put a lot of pressure on your legs." (R. p. 453, *Depo. p. 7*). Welch recalled supervising Plaintiff operating a crane six to seven days a week; he testified he was satisfied with Plaintiff's performance and never had any reason to reprimand Plaintiff.

Welch explained that Plaintiff was a Gold Key employee, i.e., an individual recognized as having worked for the company for a long time with a record as an excellent employee. Gold Key employees receive a higher rate of pay than other employees on the job. (R. p. 453, *Depo. p. 8*). Welch testified Plaintiff was paid ten percent more than all other individuals on site and that he had an extra week of vacation. Welch confirmed that, prior to his accident, Plaintiff did his job well and without complaint; he was a hard worker, well respected, and he had helped to train other laborers to be equipment operators. However, Welch confirmed Plaintiff cannot now work as a foreman for him because of his physical condition. (R. p. 456, *Depo. p. 16, lines 4-7; p. 20*).

Welch testified Plaintiff had attempted unsuccessfully to work as foreman on the construction site in North Carolina in June of 2009 before he hired him back to work at the Dupont site. (R. p. 455, *Depo. p. 13,* R. p. 456, *Depo. p. 20*). Welch indicated Plaintiff returned as an equipment operator, but he was no longer operating a crane - - he was operating dirt equipment, in part, because it was hard for Plaintiff to get around. Welch testified he had previously observed Plaintiff operating cranes and working on the site before he was injured and he has now seen him working with his injuries. Welch testified Plaintiff now has a "hard time' walking and bending. Welch testified, but for his injuries, Plaintiff "would have probably been my foreman." (R. 455, *Depo. p. 5, lines 11-23).* He explained he would have set up Plaintiff to be an operator-foreman because of his experience. However, Welch indicated Plaintiff now could not be his foreman because he could not physically perform the essential functions of the physically demanding foreman job which required a lot of walking. Welch explained, "And it's

foot pounding, stair climbing. I mean, our building's probably got a thousand steps going up to the top levels, and there's no way Mr. Vern -- we got the elevators running now, but before that you had to climb the steps." (R. 455, *Depo. p. 15, line 21-p. 16, line 7).* Welch testified the difference between Plaintiff's pay as an operator and what he would have been paid as a foreman would be in the neighborhood of five dollars an hour working an average of sixty hours a week. (R. p. 455, *Depo p. 16 lines 8-12*).

Prior to his retirement from construction work, Leon Goodman worked with Plaintiff for some twenty years. He recalled that Plaintiff was a good worker who did a good job. Mr. Goodman testified he had originally given Plaintiff an opportunity to learn how to run a piece of equipment and Plaintiff went on from there to become certified in heavy equipment. Goodman recalled that Plaintiff started out with a dump truck, then he started operating a rubber tire backhoe and from there he went to a dozer and into a front-end loader track hoe. (R. 130, lines 12-14). When asked why Plaintiff stopped working for him, Mr. Goodman explained there was great demand for Plaintiff's services:

> Everybody wanted him to work for them. He was, I don't know, I just think it was a gift because they don't come along like that too often. I've seen too many been around a lot of them and after he went to working and everybody, you know, see how he would do and everybody would want him to work and pull him away from me.

(R. p. 130 line 24 - p. 131 line 4). Goodman testified that, when he saw Plaintiff after the accident, he "wasn't the same boy I knew." (R. p. 132, line 24). Mr. Goodman still sees Plaintiff twice a month. He indicated Plaintiff has problems with his feet and, although Plaintiff used to be "pretty swift," he now moves with a limp. (R. 133, lines 18-24).

Marvin Mosely is a heavy equipment operator. He testified he is currently certified to operate nine or ten different pieces of heavy equipment. Mr. Mosely testified he has known

Plaintiff since he was four or five years old, that Plaintiff first taught him to tie his shoes, and that he was then the person who taught Mosely to operate heavy equipment. (R. 118, lines 4-10). Mr. Mosely recalled that, on the job, they called Plaintiff "Superman," because he was able to run so much of the equipment. (R. p. 118, lines 12-13). However, Mosely testified that since the accident, Plaintiff is no longer considered "Superman," explaining: "...but now, since he's been in this accident, he hurt his feet he can't do the climbing the way he used to could do. So, he's done lost a lot of his certifications..." (R. p. 118, lines 12-17). Mr. Mosely explained it was his assignment to run the backhoe, but he had had to give that task to Plaintiff because plaintiff is not able to maneuver around as much, but he was assigned to drive the dump truck. Mosely indicated the dump truck is a standard shift and that, since the accident, Plaintiff is unable to press the dump truck pedals. Therefore, Mr. Mosely traded assignments; he drives the dump truck and Plaintiff the backhoe. (R. 118). Mosely testified that Plaintiff had lost a lot of his certifications "because he was running a lot of different cranes and the cranes, you know, they consistent you climbing up high. You know, they sit so high and he can't climb up because you know he got to put pressure on his feet to get up there and getting down off it, you know, you always have to keep a three point contact at all times with the machine." (R. p. 125, lines 15-20). Mr. Mosely confirmed Plaintiff can no longer climb the cranes so that he has lost those certifications.

Mr. Mosely testified, since the accident, there has been a big change in Plaintiff. Mosely explained that Plaintiff gets along differently now and he has a problem with walking. He recalled, before the accident, Plaintiff was able to get around better and more quickly "than a whole lot of young people." (R. 120, lines 9-12). Mosely recalled that, at safety meetings, the workers stand, but that, because of his injuries, Plaintiff now has to sit down to rest from

standing. Mosely indicated Plaintiff sometimes stumbles and almost falls as the result of the injuries to his feet. Mosely testified Plaintiff complained "all the time" about his leg and ankle hurting him. Mr. Mosely testified the foreman job requires a lot of walking and maneuvering through the plant. (R. p. 121, lines 1-3). He testified, if not for the accident and injuries, he would have expected Plaintiff to be a foreman because he had the skill, the know-how, and everything necessary to be a supervisor. (R. p. 134, lines 7-10).

Harry James White, Sr. was Plaintiff's neighbor and family friend growing up. After a short retirement from operating a full press steel plant for over twenty years, Mr. White went into construction welding. When he went into construction, Mr. White started talking to Plaintiff because Plaintiff was "real knowledgeable" about construction and Plaintiff helped him out. White saw Plaintiff after the accident because they attend the same church; he agreed there is a "very noticeable" difference in Plaintiff since he was injured. He testified Plaintiff is no longer able to operate his tractor because of the clutch and two brakes, and that Plaintiff has, therefore, left his tractor at Mr. White's house. (R. pp. 156-158).

Nathan Washington testified he has known Plaintiff most of his life. He recalled that, before the accident, plaintiff was active and physically fit. He testified Plaintiff would run three miles and back every day. However, Mr. Washington testified, since the accident, he has not seen plaintiff running at all and he now walks with a limp. (R. p. 230, lines 9-16).

Dr. Green B. Neal had been treating the Plaintiff since the mid-1990s and he saw him soon after the accident, on December 30, 2008. Dr. Neal recalled that, prior to the accident in December 2008, Plaintiff had no significant medical or orthopaedic problems. However, after the car accident, Plaintiff's primary complaints were related to his left leg, ankle, knee, foreleg, foot, hip, shoulder, and lower back. Plaintiff complained of joint pains, swelling, stiffness, and

pain. (R. 279). Dr. Neal explained Plaintiff had been walking with crutches when he was unable to put weight on the broken ankle. Dr. Neal indicated, "It puts him basically on one leg and this causes a rotational tilt deformity of the pelvis when you walk like that. As you walk more, the more exaggeration of the LS area that this movement occurs and you develop pain." (R. p. 286 lines 5-9). Plaintiff also complained to Dr. Neal of difficulties with constipation and rectal pain as the result of the narcotics prescribed for his injuries and that his injuries and medications had affected Plaintiff's relations with his wife. (R. pp. 280-281).

Dr. Neal recalled Plaintiff also reported problems with poor memory. Dr. Neal confirmed the initial E.R. records included a report of Plaintiff's sustaining head trauma in the accident on December 20, 2008, and that a CT scan was performed. Dr. Neal specifically recalled Plaintiff had actually gotten lost coming to his office despite the fact that he had been coming to that office location for some five years and he had been there twice in the preceding month. (R. 284). Dr. Neal indicated Plaintiff told him he had had trouble remembering things in the past and that he did poorly in school, but this was the first time he had ever gotten lost. After performing basic testing, Dr. Neal determined Plaintiff had an acute memory problem for which he was referred to a neurologist.

When Dr. Neal saw Plaintiff on April 7, 2012, he was having pain and stiffness in his neck as well as continued pain in his lower back, knee, ankle, left foot, and hip. Dr. Neal explained that a gap in time between his appointments with Plaintiff was due to the fact that Dr. Neal had attempted to retire so he was not available to treat Plaintiff in the interim. (R. pp. 288-289). In April, 2012, Plaintiff complained of limitation of joint movement, loss of muscle strength, painful joint stiffness, tenderness, cramps and muscle spasms as well as insomnia, numbness, tingling, and weakness in the arms and legs. (R. 290). Dr. Neal testified he observed

swelling in Plaintiff's leg; he recalled a comparison of Plaintiff's legs showed swelling in his left leg. Dr. Neal indicated both swelling and muscle spasms are objective findings and that he had actually, physically, put his hands on Plaintiff to feel the muscles in spasm. (R. 292).

Dr. Neal recalled that, on May 5, 2012, Plaintiff had aching pain parallel to the sole of his foot and throughout the ankle joint as well as continued pain in his lower back, neck, hip, knee, leg, ankle, and shoulders. Dr. Neal indicated Plaintiff had sustained overuse syndrome in his right and left shoulders as the result of his walking with crutches. (R. p. 294 lines 16-18). Dr. Neal recalled Plaintiff complaining that rectal pain woke him at night and both Plaintiff and his wife reporting that Plaintiff's memory problems were worsening. Dr. Neal indicated he was reluctant to prescribe pain medications because of the rectal pain and the danger pain medications would lead to worsened constipation. Dr. Neal also recalled Plaintiff did not take prescription pain medications unless he absolutely had to because he didn't like the way they made him feel and because the medications interfered with his ability to work. Dr. Neal indicated Plaintiff really should not have been working with heavy equipment while taking pain medications. (R. 295).

Dr. Neal gave his expert opinion that Plaintiff's broken ankle, knee injury, hip pain, shoulder pain, neck pain, lower back pain, and memory loss were all causally related to the car accident on December 20, 2008. Dr. Neal indicated he had referred Plaintiff to a neurologist to evaluate the injury to his brain and that that evaluation was ongoing. However, Dr. Neal opined Plaintiff had a 25% permanent impairment to the cervical spine; 30% to the right shoulder, 15% to the left shoulder, 28% to the lower back; 20% to the right thumb; 38% to the left knee; 28% to the left leg; 20% to the left foot; 55 % to the left ankle, 52% to the brain, and 5% to the chest. Dr. Neal explained these ratings of permanent impairment, except for the rating to the brain,

were based upon the injuries and resulting loss of motion, spasms, need for continuing medications, swelling, and hardware still present in his ankle joint. (R. 299).

Dr. Oliver Wood was qualified as an economic expert in the evaluation of economic loss in personal injury cases. Dr. Wood detailed the losses to Plaintiff professionally because he is unable to work as a foreman, estimating that Plaintiff had lost at least $5,000 annually. Dr. Wood also testified Plaintiff is now able to perform only four hours per month devoted to personal or family activities such as housework, laundry, and yard care, whereas, before the accident, Plaintiff performed an average of six hours around the house and yard. Dr. Wood agreed that most people do not get paid for such personal services; however, he explained,

"No, but they have economic value and if you don't do them, you'll find you're in the hole." (R. p. 225, lines 14-16). Dr. Wood testified the value of Plaintiff's future loss of employment, discounted to present value, was $29,009 and his estimated financial loss is $73,619. However, Dr. Wood agreed, assuming from the testimony of Plaintiff's supervisor that Plaintiff had lost as much as $5 an hour because he is unable to work as a supervisor and he worked an average of sixty hours a week, that Plaintiff had actually lost some $15,000 a year. (R. p. 221).

ARGUMENT

I. The trial judge properly admitted the relevant evidence of the Defendant driver's blood alcohol content of .103; had there been any error in admission of this evidence, Defendant waived any right to argue that such error was prejudicial or reversible given the Defense's judicial admission that the driver was "drunk" and driving "under the influence" at the time he caused the accident.

Defendant incorrectly argues the trial judge committed reversible error in admitting evidence of the Defendant driver's blood alcohol content of .103 in the absence of independent evidence connecting the BAC to a certain degree of impairment in terms of operating a vehicle. The plain answer to this complaint is that the statutory inference of impairment itself connects

the BAC "to a degree of impairment in terms of operating a vehicle." However, Plaintiff must first respond to Appellant's argument that the judge erred in admitting evidence showing he was driving under the influence and his driving was impaired at the time of the collision by pointing out that Defense Counsel conceded the Defendant driver was "drunk" and driving under the influence of alcohol at the time of the accident during his opening statement.

Plaintiff had made a motion *in limine* to admit the results of Jose Valle's blood alcohol content (BAC) testing performed on blood drawn at the hospital after the accident. The trial judge indicated she would rule on the motion when the BAC evidence was submitted. Defense Counsel acknowledged he understood that the judge was not making a ruling at that point as to the admissibility of evidence of the driver's BAC. In opening, Counsel for Plaintiff told the jury the evidence would show that the Defendant driver, Jose Valle, was intoxicated at 5:30 in the morning on December 20, 2008, when he drove his vehicle across the center line into Plaintiff's lane. Counsel asserted the evidence would show the Defendant's vehicle struck Plaintiff's vehicle head on, resulting in both vehicles crashing off the road. Counsel explained the evidence would show that the intoxicated driver emerged from the crash, wandered around the accident site, and then went to sleep in the roadway - - all without ever checking on Plaintiff who was injured and trapped in his vehicle. (R. pp. 66-67).

During his opening statement, Defense Counsel agreed Jose Valle was "drunk" when he caused the accident. Defense Counsel told the jury:

> ...[Y]ou're going to hear from the plaintiff, he's going to get on the witness stand and he's going to tell you that he was on his way to work at five o'clock in the morning and a car crossed the center line and hit him head on and he's going to tell you about some of the pains that he's having in his ankle due to the injury to it. I agree, I will agree to all that.

(R. p. 72, line 23-p. 73, line 5). Thus, Defense Counsel admitted that the Defendant driver's car crossed the center line and hit plaintiff's vehicle head on. Defense Counsel further told the jury on opening:

> The Plaintiff's lawyer just said that my defenses are going to be that the Defendant wasn't that drunk and that wasn't that serious of an injury; that's not true. I think he was drunk and I think that he, these are serious injuries, but again what we disagree about is a fair number to compensate the plaintiff for the injury that he had as a result of this accident.

(R. p. 75, lines 14-21). Thus, Defense Counsel admitted that the Defendant driver was "that drunk" at the time he crossed the center line and hit Plaintiff's vehicle head-on. In fact, Defense Counsel asserted in opening that the only real disagreement between the parties was as to what was a fair number to compensate Plaintiff for the admittedly "severe" injuries sustained and the pain he was having at the time of trial. (R. p. 75, lines 17-21).

Despite having conceded in opening the Defendant was drunk and driving under the influence of alcohol at the time he caused the accident, Defendant argued throughout the trial and, now on appeal, that the trial judge erred in admitting evidence that the Defendant driver's BAC result was .103. Appellant's argument is the BAC was erroneously admitted because such testing is conducted pursuant to a criminal statute and such test results are inadmissible in a civil case. Appellant argues the permissive inference of impairment set out by statute is inapplicable in a civil case. To the contrary, the Supreme Court held in *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 697 S.E.2d 558 (2010), that evidence of blood alcohol content was properly admitted in a civil case. The Court held in that civil case: "[S]o long as a sufficient chain of custody exists to authenticate the evidence in a civil case, this type of evidence is admissible." Thus, the trial court properly admitted the BAC result in this civil case.

The admission of evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion. *Hartfield*, 388 S.C. at 413, 697 S.E.2d at 561. The admission of the BAC result was a decision made within the sound discretion of the trial judge and her decision was proper and free of error as a matter of law. However, had there been any error or impropriety attached to the admission of the BAC result, Defendant waived the right to complain about any such supposed error and any such error would be harmless where the defense admitted on opening that Jose Valle was "drunk" at the time he crossed the center line and drove head-on into Plaintiff's vehicle. Had the trial judge erred in admitting the BAC results, such error would be harmless or invited error, admitted through the door opened by Defense Counsel's judicial admission in opening argument.

A clear and unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party. *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 263, 26 L.Ed. 539 (1881). This doctrine forbids a party from asserting inconsistent positions in judicial proceedings. The doctrine is borne of "a universal judicial reluctance to permit litigants to `play fast and loose' with courts of justice according to the vicissitudes for self-interest" as well as a desire "to protect...the judicial process from abuse." 1B J. Moore & J. Lucas, Moore's Federal Practice ¶ 0.405[8] (2d ed. 1984). The principle that an admission of counsel during trial "may dispense with proof of facts for which witnesses would otherwise be called" has been recognized by the Supreme Court since the 1881 decision in *Oscanyan*. A court's power to act "upon facts conceded by counsel is as plain as its power to act upon the evidence produced." *United States v. Blood*, 806 F.2d 1218 (4th Cir.1986). Consistent with the principles announced in Oscanyan, the Fourth Circuit held that, "a clear and

unambiguous admission of fact made by a party's attorney in an opening statement in a civil or criminal case is binding upon the party." Blood, 806 F.2d at 1221.

The Fourth Circuit found in *Blood*, that the *Oscanyan* holding stands for the principle that "any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof." Blood, 806 F.2d at 1222. Here, where Counsel's opening statement clearly admitted the Defendant was drunk and driving under the influence, Counsel's statement was an unequivocal statements of fact - - not theory, constituting a judicial admission. Thus, the fact that Jose Valle was driving under the influence of alcohol was established by Counsel's statement as if shown "by the clearest proof."

Defense Counsel's opening statement clearly and unambiguously foreclosed the issues as to whether the Defendant driver was drunk and under the influence when he caused this head-on collision by crossing the center line. In fact, Defense Counsel corrected the predictions made by Plaintiff's Counsel in opening that the Defense would deny the Defendant was drunk when he caused the accident by driving head-on into Plaintiff's vehicle. Defense Counsel assured the jury he had no intention of disputing that Jose Villa was drunk at the time of the accident. The clear thrust of Defense Counsel's opening statement was to strategically concede the unavoidable issues surrounding Defendant's liability in order to focus the jury's attention on the issue of damages.. However, Defense Counsel's statement on opening had the effect of taking the issue of the driver's drunkenness and impairment at the time of the accident out of the jury's consideration. Counsel's statements were judicial admissions which the trial judge could take into account in making her evidentiary rulings. The trial judge ruled the BAC result would be admitted after the Defense had conceded before the court and the jury that the driver was drunk and under the influence of alcohol at the time of the accident. Under these circumstances, the

judge committed no error in admitting the BAC result and, if her decision had been erroneous, the Defense waived the right to raise or rely on any such error on appeal.

Defendant may seek to rely on the general rule that the purpose of opening statements is for the parties to broadly outline the case and that Counsel's statements are not evidence. In fact, the trial judge instructed the jury prior to opening statements that what counsel for each party said was not evidence. However, as the Court in Hall v. Wal-Mart Stores East, 447 F.Supp.2d 604 (W.D.Va.2006) explained:

> [T]he rule governing judicial admissions and the rule governing the general purpose of opening statements are not mutually exclusive...judicial admissions and evidence are legally distinct. Admissions obviate the necessity of the jury making a factual determination as to the facts which are settled. When a court instructs the jury that what counsel says in opening statements is not evidence the court is essentially instructing the jury that, as far as the issues they are to decide, they should not be swayed by what counsel says. But when counsel clearly and unambiguously tells a jury in its opening statement that there is an element in the plaintiff's case which they need not decide because neither party disputes its existence, the instruction is inapplicable because the facts have been admitted.

Hall, 447 F.Supp.2d at 608 -611 (W.D.Va.,2006).

This jury had no need to decide whether or not Jose Valle was drunk, driving under the influence, and driving while impaired at the time of the accident; these issues of fact were undisputed by either party. Defense Counsel clearly and unambiguously removed the evidentiary issue of the driver's drunkenness from the jury's consideration by judicial admission. Therefore, Defendant waived any right to argue that the BAC evidence was wrongly admitted to his prejudice. Having conceded Jose Valle was "drunk" at the time of the accident, the defense opened the door to admission of the BAC evidence so any supposed error in admission of that

evidence was harmless, invited error. *See State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003)(Dunlap had waived his right to argue that the admission of his prior convictions for impeachment purposes would be prejudicial by informing the jury of the existence of his prior criminal record during his opening statement). *See also Gibson v. Wright*, 403 S.C. 32, 43, 742 S.E.2d 49, 55 (Ct.App. 2013)(If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the matter and provide more information to the fact-finder.); *National Grange Mut. Ins. Co. v. Butler*, 253 S.C. 325, 170 S.E.2d 371 (1969)(Where plaintiff in action for actual and punitive damages for destruction of automobile admitted nonownership of automobile, her action fell by judicial admission); *State v. Trotter*, 322 S.C. 537, 473 S.E.2d 452 (1996)(a trial court commits no error in allowing the State to introduce evidence where the defendant opened the door to its admission); *Frazier v. Badger,* 361 S.C. 94, 104, 603 S.E.2d 587, 592 (2004)("A litigant cannot complain of prejudice by reason of an issue he has placed before the court." The door-opening doctrine applies in both criminal and civil cases.) *Floyd v. Floyd*, 365 S.C. 56, 615 S.E.2d 465 (Ct.App. 2005). Appellant waived any right to argue admission of the evidence of his blood alcohol content was prejudicial error by informing the jury on opening that he was "drunk" at the time of the accident.

Appellant's argument on brief asserting the admission of evidence of the BAC was reversible error is without merit as a matter of law and substance: Appellant argues the judge erred in admitting the BAC result because there was no expert testimony submitted to link the number .103 to a particular degree of impairment in terms of driving. However, the inference provided by statute permits the jury to infer Jose Valle was driving under the influence without expert explanation of the inference. In fact, Appellant acknowledges by footnote that the

Defendant's BAC level itself permitted the jury to infer Jose Valle was driving impaired and under the influence of alcohol. Appellant agrees the inference from Section 56-5-2950 "would allow a jury to connect the dots between the test result and an impairment." (Brief of Appellant p. 17). In addition to the statutory inference of intoxication, Jose Valle smelled of alcohol, behaved drunkenly, and drove into the headlights of an oncoming vehicle. Nevertheless, Appellant argues the BAC result was erroneously admitted and that, without that evidence, the circumstances failed to link the driver's intoxication to his driving under the influence.

Appellant first relies upon *Johnson v. Horry Co. Solid Waste Authority,* 389 S.C. 528, 698 S.E.2d 835 (Ct. App. 2010), to support his argument that evidence of a BAC result is properly excluded where there is no testimony linking the driver's intoxication and his impaired driving. However, in *Johnson*, the issue was actually not the intoxication of a driver. Instead, the BAC result at issue in *Johnson* was submitted to support the County's expert testimony that Johnson's intoxication affected her judgment and could have led to her decision to stand too near the roadway after an accident so that she was crushed by a passing garbage truck. Johnson's BAC was excluded on the basis that there was insufficient evidence showing her BAC of 0.14 would have caused her to misjudge where she could safely stand on the side of the road. The Court of Appeals affirmed exclusion of Johnson's BAC result, explaining there had been no link established between Johnson's intoxication and her failure to stay completely out of the road, leading to the second accident. Horry County was not allowed to introduce Johnson's BAC result where there was no statutory inference available because Johnson was not driving at the time of the second accident. There is no statutory inference arising from a particular blood alcohol content as to the impairment of a person's judgment of what is a safe place to stand. The lack of a legislative inference relevant to the *Johnson* case is understandable given that there is

no overwhelming public policy against drunken roadside standing where such conduct endangers the drunken person, but not the public at large. The *Johnson* decision plainly provides no support for Appellant's position where *Johnson's* BAC result was not excluded from consideration relevant to whether Johnson was driving under the influence of alcohol because she was not driving at the time of the accident at issue, so that there was no statutory inference for the jury to apply.

Appellant next cites *Kennedy v. Griffin*, 358 S.E.2d 152, 595 S.E.2d 248 (Ct. App. 2004), in which Kennedy's vehicle collided with Griffin's rear tires; the evidence indicated Griffin had delayed application of his brakes; and Griffin's blood sample revealed marijuana in his system. The trial judge's exclusion of Griffin's positive marijuana result was affirmed by the Court of Appeals on the basis that the "mere presence of marijuana without further indication of impairment" would be misleading. *Kennedy* provides no support for Appellant's position. While there is no statutory inference of impairment permitted from the mere presence of marijuana in the blood, Section 56-5-2950 does provide a permissive inference that a driver with a BAC over .08 is driving under the influence.

Appellant's stated reliance upon the decision in *Lee v. Bunch* 373 S.C. 654, 647 S.E.2d 197 (2007), is particularly curious. Appellant argues that, in *Lee*, the existence of expert testimony as to how the amount of alcohol in the driver, Lee's, system could have impaired his driving, was central to the Supreme Court's finding that the trial judge had properly admitted the BAC result. Actually, Lee's BAC was only .036, well below the statutory limit. Therefore, this result gave rise to no inference of impairment so the testimony as to the possible effects of such a BAC level was necessary to avoid confusing or misleading the jury. In contrast, here, there was no need for explanatory testimony or circumstantial evidence where Jose Valle's BAC was

above the statutory limit, giving rise to the inference of driving under the influence, which inference was properly included in the jury instructions.

Appellant finally argues the decision in *Gulledge v. McLaughlin,* 328 S.C. 504, 492 S.E.2d 816 (Ct. App. 1997), supports his position that the BAC result was improperly admitted. To the contrary, the *Gulledge* Court affirmed the admission of Gulledge's BAC result. Gulledge had objected to the evidence of BAC on the grounds of relevancy, contending an analysis of BAC is by itself insufficient to submit the issue of driving under the influence (DUI) to the jury. The Court of Appeals held, to the contrary, that the result was properly admitted, explaining:

> Obviously, the fact that the plaintiff was driving under the influence would be "of consequence to the determination of the action," in an automobile accident case where contributory negligence was pled. Even more obviously, evidence of BAC tends to make the existence of this fact more or less probable, and thus evidence of BAC can be relevant.

Plainly, the holding of *Gulledge* contradicts Appellant's position as to the relevance and admissibility of BAC results in a civil case. However, different from this case, in Gulledge, the jury was not charged with the statutory inferences permitted from particular levels of blood alcohol content. In fact, the *Gulledge* Court indicated there was some question as to whether the lab result alone was properly admitted where the inference of intoxication from Section 56-5-2950 was *not* charged. The Court noted that, in *Gulledge*, neither party sought to have the jury instructed as to the statutory inference, based upon the belief the inference was "not applicable in a civil case." However, the Court decided, even in the absence of a proper charge as to the inference permitted from the BAC result or any evidence as to the effects of a particular BAC upon a human's impairment, there was no reversible error in admission of the test result given that there was circumstantial evidence of driving under the influence. The Court further found that admission of the BAC was not prejudicial error even without instruction as to the statutory

inference because the toxicologist had explained BAC "to some degree which at least allowed the jury to conclude Gulledge had alcohol in his bloodstream and this, when combined with the beer cans, the cooler, and the circumstances of the accident, were sufficient for the jury to conclude Gulledge was impaired from alcohol consumption."

Here, the jury was able to infer and conclude that Jose Valle was impaired by alcohol consumption from (1) the judicial admission of Defense Counsel; (2) the circumstances of the accident, including Valle's crossing the center line and driving into the headlights of an oncoming vehicle; (3) the circumstantial evidence of impairment, including smelling of alcohol and behaving drunkenly at the scene; and (4) the BAC result of .103, along with the jury instruction as to the permissive inference of impairment from Section 56-5-2950. The trial judge properly admitted the BAC result; Appellant's argument that the trial judge erred in admitting the BAC result is without merit.

II. The trial judge properly charged the jury as to the permissive inference of impairment provided in S.C. Code Ann. Section 56-5-2950; had there been any error in the jury charge on this issue, Defendant waived any right to argue that such error was prejudicial given the Defense's judicial admissions that the driver was "drunk" and driving "under the influence" at the time he caused the accident.

Appellant argues the trial judge erroneously charged the jury as to the permissive inference rising from a BAC level over .08 and that the charge was prejudicial because Plaintiff had presented no *admissible* evidence that the Defendant driver was intoxicated or impaired at the time of the accident. (Brief of Appellant p. 10). Actually, Plaintiff presented ample admissible evidence from which the jury could conclude and infer Jose Valle was driving under the influence; however, as indicated, Defense Counsel admitted in opening not just that the Defendant driver, Jose Valle, had been drinking, but that he was intoxicated, under the influence

of alcohol, and "drunk" at the time of the accident. Therefore, had there been any error in the judge's decision to charge the jury the permissive inference of impairment, such would be harmless in light of the defense's judicial admission. (See Issue I).

Appellant argues the trial judge erroneously charged the jury with the inference of impairment provided in S.C. Code Ann. Section 56-5-2950, because that is a criminal statute and this was a civil case. Our Supreme Court rejected the argument that a jury charge on the permissive inference was improper in a civil case in *Hartfield, supra,* ruling a jury may properly infer that a bar patron was under the influence of alcohol, within the meaning of the DUI statute. *Getaway* had argued the trial judge's instruction on the inference of impairment from the DUI statute was error because it was not relevant or admissible in a civil case. The Supreme Court disagreed, explaining: "... it should be permissible for a trial judge to charge on the permissive inference of intoxication under our criminal statutes." *Hartfield, supra.* Thus, the charge as given was relevant in a civil case and the trial court committed no error in charging the permissible inference.

The charge issued by the trial judge in *Hartfield* and explicitly approved by the Supreme Court for issuance in a civil case is strikingly similar to that charged by the trial judge here. The trial judge charged the jury:

> 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 extant 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's 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 gentleman, 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). The judge in Hartfield similarly charged the jury:

> Now, in this state at the time there was a permissive inference that a person was under the influence of alcohol when that person has a blood alcohol level of .10 percent or greater. Now, you have to determine if it's been established at the time that the alcohol was served and the person was intoxicated. Now, this inference is just an inference to be taken by you along with any other evidence of intoxication that you find in the case.

Hartfield, 388 S.C. at 413, 697 S.E.2d at 561. Therefore, the jury charge as to the permissive inference of intoxication given here has been approved by the Supreme Court and there was no error as a matter of law. "Where there is evidence from which the jury can reasonably infer one is in violation of a statute, that evidence will support a charge of that statute." *Jefferson v. Synergy Gas, Inc.*, 303 S.C. 479, 401 S.E.2d 427 (Ct.App.1991). A trial judge's decisions on jury instructions will not be reversed on appeal absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

Ironically, Appellant argues, "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." (Brief of Appellant p. 12). To the contrary, although the trial judge did properly charge the jury as to the permissive inference of driving under the influence; if anything eased Plaintiff's burden to prove the driver was driving under the influence, it was the defense admission that the driver was "drunk" and driving under the influence at the time he caused this accident.

The judge's well-reasoned decision to include in her jury instructions the law relevant to the permissive inference from Section 56-5-2950 was correct and proper as a matter of law. However, even had there been any error in the charge as to the permissive inference of

intoxication, Defendant opened the door to admission of the evidence of his BAC and the permissive inference so that Defendant waived the right to complain about any error in issuing the charge; any error was invited and harmless. *See* Issue I. Defendant's argument that the trial judge committed reversible error in charging the jury is wholly without merit.

III. The trial judge properly allowed the testimony of the investigating officer as to the facts of the accident which he observed at the scene.

Appellant argues the trial judge erred in permitting Officer Reginald Thomas, the investigating highway patrol officer, to testify as to his observations from the scene of the accident. Appellant argues the officer should not have been permitted to offer an expert opinion as to the cause of the accident. However, Officer Thomas actually was not qualified as an expert and, in fact, he did not offer an expert opinion. Plaintiff had called the officer to testify as an expert witness and proposed asking him to provide his expert opinion. However, the trial judge found that it was not necessary to qualify the officer as an expert or to have him offer an expert opinion. After taking the officer's testimony by proffer, the trial judge ruled:

> I am denying the request to qualify him as an expert. I do not believe he needs to be an expert to testify if the testimony follows along the lines of what has just been elicited from the witness. His testimony does not require scientific, technical, or specialized knowledge. He has not testified he employed any methods or measurement or otherwise or any other technical specialized knowledge for his testimony. His testimony comes within Rule 701 which is the opinion of a lay witness.

(R. pp. 85-86). The trial judge explained that she found the officer was testifying factually as a lay witness pursuant to Rule 701, SCRE, indicating: "I would find for the record that he is testifying to an impression drawn from collected observed facts." (R. p. 87). The officer was properly allowed to testify factually as to his observations from the accident scene. Rule 701, SCRE provides, "Lay witnesses are permitted to offer opinion testimony when such testimony is

rationally related to the witness's perception, does not require special knowledge, and may assist the jury's understanding of the witness's testimony." *See Gulledge, supra*; *State v. Blurton*, 342 S.C. 500, 537 S.E.2d 291(Ct. App. 2000), *rev'd on other grounds* 352 S.C. 203, 573 S.E.2d 802 (2002). Conclusions or opinions of lay witnesses should be rejected only when they are superfluous in the sense that they will be of no value to the jury. *Small v. Pioneer Machinery, Inc.* 329 S.C. 448, 494 S.E.2d 835 (Ct.App. 1997); *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996).

Officer Thomas testified Jose Valle's vehicle was found upside down on the wrong side of the center line, having struck Plaintiff's vehicle head-on. However, the officer explained he based this observation not on his experience or any expert knowledge, but simply on the fact that he saw Valle's car wrecked, on the wrong side of the road, in Plaintiff's lane, after the accident. (R. p. 91). Thus, the officer did not base this testimony on any expert knowledge beyond the common knowledge that a vehicle which ends up on the wrong side of the center line at some point crossed the center line. Officer Thomas testified he was referring to his handwritten notes of the events and his investigation of this accident on December 20, 2008. The officer testified he saw the two vehicles and saw the position of the vehicles in relation to the roadway. The officer further indicated that Jose Valle smelled of alcohol at the scene. Thus, Officer Thomas testified to two direct observations made at the scene: (1) Jose Valle was driving on the wrong side of the road at the time of the head-on collision and (2) Jose Valle smelled of alcohol at the scene of the accident. (R. 91). Neither of these factual assertions was a statement of expert opinion and neither of these facts was disputed at trial.

Therefore, there was no error in the judge's admission of the trooper's testimony as to his observations. However, had the judge's decision to admit the trooper's testimony been

erroneous, such error would have been invited and harmless in light of the Defense's judicial admissions that Jose Valle did, indeed, cross the center line and cause the head-on collision and that he was drunk at the time. As indicated, Defense Counsel conceded by judicial admission in opening the Defendant was driving under the influence of alcohol when he crossed the center line and hit plaintiff head-on, causing serious injuries. (R. p. 72, line 23-p. 73, line 5; p. 75, line 15-p. 76, line 2); *See* Issue I. Where the two basic facts testified to by Officer Thomas were that Jose Valle crossed the center line and that he smelled of alcohol after the accident, any error in the admission of this evidence was invited and harmless.

Appellant acknowledges the trial judge did not qualify the trooper as an expert because she believed he could offer his testimony as a lay witness. Nevertheless, Appellant persists in arguing the officer should not have been allowed to give expert opinion testimony. Appellant argues the officer's testimony was prejudicial because, in indicating that Valle was driving on the wrong side of the road at the time of the accident, it served to bolster Plaintiff's account of the accident. As indicated, the Plaintiff's description of the accident was consistent with all evidence and it was unchallenged at trial. Under these circumstances, the officer's testifying factually as to what he saw at the scene was proper, admissible, and not prejudicial error.

Appellant further argues the officer's confirming the facts of the accident improperly served to give "credence to the Respondent's attempts to characterize the Defendant as a 'drunk driver.'" (Brief of Appellant p. 20). Again, had the admission of the officer's testimony been in any way erroneous, such error was invited and harmless given the defense admission that the Defendant crossed the center line and that he was "drunk" at the time. Appellant's argument that the admission of Officer Thomas' testimony was prejudicial error is wholly without merit.

IV. The trial judge properly refused to grant a new trial or new trial nisi remittitur where the jury's award of actual damages was supported by the evidence submitted.

Actual damages are awarded to a litigant in compensation for his actual loss or injury. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. *Clark, supra.* To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. However, "proof with mathematical certainty of the amount of loss or damage is not required." *Whisenant v. James Island Corp.*, 277 S.C. 10, 281 S.E.2d 794 (1981).

A trial judge has considerable discretion regarding the amount of damages; the credibility of witnesses is for the jury to determine. *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct.App. 1996). The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than the appellate Court. Accordingly, great deference is given to the trial judge. "While the granting of a motion for new trial or new trial *nisi* rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages." *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993). To this end, the trial court must offer compelling reasons for invading the jury's province by granting a new trial motion. *Id.*

The consideration of a motion for a new trial *nisi* requires the court to consider the adequacy of the verdict in light of the evidence presented." *Todd v. Joyner*, 385 S.C. 509, 685 S.E.2d 613 (Ct.App. 2008). In reviewing the denial of a directed verdict motion, the appellate court employs the same standard as the trial court; the Court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party and will reverse the trial judge only when there is no evidence to support the verdict. *Jenkins v. Few*, 391 S.C. 209,

705 S.E.2d 457 (Ct. App. 2010). The appellate court's task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award. *Austin v. Stokes-Craven Holding Corp.* 387 S.C. 22, 691 S.E.2d 135 (2010); *McPeters v. Yeargin Const. Co., Inc.,* 290 S.C. 327, 350 S.E.2d 208 (Ct.App.1986). A trial court does not abuse its discretion in denying a motion for new trial where the record supports the verdict. There is no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated that the jury could have awarded a larger verdict. *Steele v. Dillard,* 327 S.C. 340, 486 S.E.2d 278 (Ct.App.1997).

After the jury verdict awarding Plaintiff $500,000.00 in actual damages was delivered, Defense Counsel moved for a new trial or new trial *nisi remittitur*. Defense Counsel argued that the verdict was contrary to the evidence and grossly excessive so as to be the result of passion, prejudice, or caprice. (R. p. 441). However, the trial judge properly denied Appellant's motions for a new trial absolute and for new trial *nisi remittitur*. The trial judge rightly indicated that where the evidence sustained the factual findings implicit in the verdict, she was required to affirm. Noting the jury's determination of damages was entitled to substantial deference, the trial judge properly found the verdict would stand where the verdict was supported by the evidence and not grossly excessive. The trial judge observed from the evidence submitted, "[T]here's nothing in the record that indicates that this verdict was actuated by caprice, passion, prejudice or some arbitrary factor that is outside the evidence of the case." (R. p. 446, lines 12-15).

Where the jury's award of actual damages was supported by the evidence, the judge properly denied the motions for new trial and new trial *nisi remittitur*. The actual damages included Plaintiff's medical bills of $47,195.70; his lost wages of $25,198.80; future economic

losses of at least $73,619; physical injuries to multiple body parts; significant permanent impairments; loss of future earning capacity, pain and suffering, and loss of enjoyment of life. Actually, the primary basis for Appellant's argument that the jury's award of actual damages was excessive and shockingly disproportionate is the defense disagreement with the evidence submitted by Plaintiff which supported the award. Appellant challenges the evidence submitted, indicating the jury mistakenly accepted the evidence submitted by Plaintiff.

Appellant argues on appeal the trial judge should have granted a new trial because she should have found that the jury was wrong to accept and credit the evidence which established that Plaintiff has sustained actual damages including physical injuries to multiple body parts, significant permanent impairment, loss of earnings, loss of future earning capacity, pain and suffering, and a loss of enjoyment of life. Appellant incorrectly argues the trial judge was required to grant a new trial where the verdict was excessive because the jury should not have credited the testimony of Plaintiff, Dr. Neal, Mr. Welch, Mr. Mosely, Mr. Goodman, Mr. White, or Dr. Wood as to Plaintiff's disabilities, permanent impairment, and economic losses. However, such argument must be rejected, where the trial judge was required to view the evidence in the light most favorable to Plaintiff and given that the trial judge was not permitted to second guess the jury's evidentiary findings.

Taking the evidence submitted in the light most favorable to Plaintiff, the jury's verdict was unquestionably supported by the evidence and it was a reasonable estimation of what it would take to make this plaintiff whole. The jury apparently understood the effect orthopaedic injuries have on a manual laborer. Before the accident, Plaintiff had, despite doing poorly in school, been able to rely upon his physical abilities and quickness to assure his success and acceptance in his chosen vocation working construction and operating heavy equipment.

However, the injuries to his ankles, feet, knees, legs, and back have changed everything. When he returned to work with injuries, it was immediately apparent to Plaintiff, his co-workers, his friends, and his bosses that he was no longer "Superman." In fact, far from the reliable, capable, operator who could be trusted to run any piece of equipment and to quickly and nimbly move about the largest of construction sites, with his injuries, Plaintiff is no longer able to do the climbing, reaching, and pedal-mashing required to operate much of the heavy equipment he had previously been certified to run. He is no longer able to move around the equipment or the construction site quickly or easily. Plaintiff is now unable to do the walking and standing required of a supervisor on the large construction sites which had been his workplace for some twenty years. The sites are too big, the physical demands too great, and the equipment too difficult to operate and too expensive to trust to an operator with physical limitations.

Appellant argues Plaintiff must not have sustained any occupational losses because he went back to working long hours six months after the accident. To the contrary, as the evidence established, from the time of his accident, Plaintiff has sustained a series of occupational reversals. Where, before the accident, Plaintiff eagerly accepted new challenges and responsibilities at work and achieved outstanding success for which he was awarded with the respect of his supervisors and co-workers and higher pay, he is now forced to refuse supervisory work and the attendant pay raise because he is not physically able. Plaintiff has been forced to rely on his co-workers' taking pity on him so that they cover for his weaknesses and even switch assignments so he is able to keep working despite his disability. One by one Plaintiff has seen the impressive list of heavy equipment certifications he had achieved dwindle to the point where this former crane operator is no longer able to operate even a dump truck.

Certainly, Plaintiff went back to work and he works long hours; however, things have changed. Plaintiff remains a "Gold Key" employee, but he is no longer the operator who could be relied upon to achieve anything he put his mind to. After his return to work with injuries, the focus became Plaintiff's limitations and what he was no longer able to do. The witnesses testified Plaintiff now moves slowly with a pronounced limp. He is no longer qualified to perform the work of a supervisor - - a position of responsibility and significantly higher pay of which he was assured before he was injured. Plaintiff, Mr. Welch, Mr. Goodman, and Dr. Wood all testified to the vocational and economic price Plaintiff has paid for his injuries. However, as he has struggled to maintain his position, working long hours performing physical labor, Plaintiff has also paid the price for his labor with constant and significant pain.

Although Appellant is impressed with and he repeatedly references the long hours Plaintiff puts in at work, he refuses to accept the fact that those long hours are now difficult and painful. In fact, Appellant assumes, and he urges the Court to assume, that the pain and suffering resulting from Plaintiff's injuries was minimal and only temporary. However, Plaintiff's continued pain and suffering is an element of actual damages which the jury obviously and properly did not overlook. The jury properly considered and accepted the evidence presented which established that Plaintiff now has and he will continue to have constant pain, stiffness, and swelling, on a daily basis for the rest of his life. This pain and his limitations have dramatically affected the way Plaintiff functions at work and at home. In fact, Plaintiff has had a significant and compensable loss of enjoyment of life as the result of his injuries.

Appellant concedes on appeal that Plaintiff sustained "serious" injuries and, in fact, in opening, the Defense agreed that Plaintiff continued to have ankle pain at that time. Defense Counsel indicated in opening. "...plaintiff's going to tell you ....about some of the pains that

he's having in his ankle due to the injury to it. I agree, I will agree to all that." (R. p. 73, lines 3-5). However, having conceded the physical injuries and continued pain, Appellant nevertheless argues Plaintiff's injuries had completely healed so he should have no further difficulties, limitations, or pain. To the contrary, the testimony of this credible Plaintiff as to his continued pain, swelling, and stiffness was confirmed by the lay testimony and by the medical evidence and expert medical opinion. It was the stated opinion of the orthopaedic surgeons who treated Plaintiff that pain, stiffness, and swelling continuing years after the accident, were more likely than not due to the traumatic injury and resulting scar tissue and arthritis from the accident. Both orthopaedic surgeons testified any continued problems are related to scar tissue or traumatic arthritis. (R. p. 465, *Depo pp. 25-26*; R. p. 530, *Depo p. 41*; R. p. 533, *Depo. p. 53*). Dr. Smith confirmed that, while the arthritis resulting from the ankle fracture could remain the same, it also could worsen and it will certainly not improve. (R. p. 535, *Depo. p. 59 lines 3-8*; *p. 60 lines 4-8*).

Dr. Neal gave his expert opinion that Plaintiff has significant permanent impairment. Dr. Neal assigned ratings of 25% to the cervical spine; 30% to the right shoulder, 15% to the left shoulder, 28% to the lower back; 20% to the right thumb; 38% to the left knee; 28% to the left leg; 20% to the left foot; 55% to the left ankle, 52% impairment to the brain, and 5% to the chest. Appellant argues that Dr. Neal's opinions as to permanent impairment were "facially incredible," arguing his opinion was not worthy of respect because Dr. Neal has now retired and because he is not an orthopaedic surgeon. However, Appellant's objection to Dr. Neal's being qualified was overruled and Appellant took no appeal from that ruling. (R. p. 277). Notably, Appellant did not depose Dr. Neal and did not submit an opposing expert as to impairment.

The evidence established that Dr. Neal is amply and particularly qualified to render an expert opinion as to permanent impairment. Dr. Neal performed evaluations for the South

Carolina Department of Vocational Rehabilitation Disability for some forty years during which time he evaluated "a host of people with traumatic injuries." Dr. Neal explained that an internist, as opposed to an orthopaedic doctor, is uniquely qualified to give permanent impairment ratings: "Orthopaedics generally follow patients until they have done whatever surgery is necessary to correct their problem. After that point, they release them back to the care of the internists. We take care of patients for the rest of their lives. So, we get to see the impact of a disability to a greater extent than does an orthopaedic surgeon." (R. pp. 275- 276). As he explained, Dr. Neal, as an internist, is actually better qualified to provide an opinion as to the long-term limitations resulting from Plaintiff's injuries. Dr. Neal was properly qualified as an expert in the evaluation of permanent impairment and he testified that Plaintiff has significant permanent impairments as the result of undisputed physical injuries.

Given that the evidence established that Plaintiff's actual damages include physical injuries to multiple body parts; significant permanent impairment; loss of earnings, loss of future earnings, pain and suffering, and a loss of enjoyment of life, the jury's award of actual damages was unquestionably supported by the evidence. Appellant's disagreement with the jury's decision and award is irrelevant where the decision was supported by the evidence.

Loss of enjoyment of life is a compensable element, separate and apart from pain and suffering, of a damages award. "Damages for 'loss of enjoyment of life,' compensate for the limitations, resulting from the Defendant's negligence, on the injured person's ability to participate in and derive pleasure from the normal activities of daily life or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations." *Curtis v. Blake*, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct.App. 2011). Here, Plaintiff sought damages for lost wages, medical bills, permanent physical impairment, pain and suffering, inability to work, and for his

inability to perform or enjoy household tasks and activities of daily life such as mowing the grass, driving his tractor, sleeping, and enjoying time with his wife as a result of his injuries and continued pain. Plaintiff was therefore entitled to an award of actual damages for all his losses, including his loss of enjoyment of life.

Defendant failed to show any reason, much less any compelling reason, to justify a reduction of the damages award in this case. Therefore, the trial judge properly denied the post-trial motions for new trial absolute and for new trial *nisi remittitur*.

V. The trial judge properly submitted the issue of punitive damages to the jury and properly found, upon review, the punitive damages award issued by the jury was reasonable, supported by the evidence, and consistent with due process.

A. Punitive damages are properly awarded in South Carolina where the evidence establishes the Defendant was in violation of an applicable statute and guilty of negligence *per se*.

Appellant first argues the judge erred in failing to charge the jury that Plaintiff was not entitled to punitive damages as a matter of right. However, the trial judge properly refused to instruct the jury as requested where such instruction is incorrect as a matter of law. In fact, where the jury determines the defendant is in violation of an applicable statute and guilty of negligence *per se*, the plaintiff is entitled to submission of the issue of punitive damages as a matter of law. In *Sample v. Gulf Ref. Co.*, 183 S.C. 399, 191 S.E. 209 (1937), our Supreme Court held there was no error in charging the jury that it would have a duty to award punitive damages if it found the plaintiff's rights "had been consciously, willfully, and recklessly violated." 183 S.C. at 410, 191 S.E. at 214.

Appellant argues the award of punitive damages is unconstitutional in South Carolina. To the contrary, punitive damages are allowed in South Carolina in the interest of society, in the nature of punishment, and as a warning and example to deter the wrongdoer and others from

committing like offenses in the future. Moreover, they serve to vindicate a private right by requiring the wrongdoer to pay money to the injured party. *Mitchell v. Fortis Ins. Co,* 385 S.C. 570, 686 S.E.2d 176 (2009); *Clark, supra.* Contrary to Appellant's argument, the evidence submitted established the Defendant driver was negligent *per se* where both his driving under the influence and his crossing the center line were in violation of statute. In *Wise v. Broadway,* 315 S.C. 273, 433 S.E.2d 857 (1993), the South Carolina Supreme Court held, "The causative violation of a statute constitutes negligence *per se* and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury." The Defendant was provably and admittedly in violation of causative statutes when he drove while under the influence and when he crossed the center line; therefore, the issue of punitive damages was properly submitted to the jury.

B. Upon properly conducting a review of the punitive damages award, following the *Gore* guideposts, the trial judge correctly refused to remit the award.

The process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Therefore, the trial judge was required to determine whether the award of punitive damages was consistent with due process. *James v. Horace Mann Ins. Co.,* 371 S.C. 187, 638 S.E.2d 667 (2006). In *Mitchell, supra*, the Court held that an appellate court must conduct a *de novo* review of a trial court's application of the "guideposts" set out in *BMW of N.Am. v. Gore*, 517 U.S. 559, 116, S.Ct. 1589 (1996) to determine whether an award is consistent with due process: (1) the degree of reprehensibility of defendant's conduct; (2) disparity between the actual damages awarded and punitive damages award, whether the award is reasonably related to the harm resulting or likely

to result from such conduct; and (3) the difference between the award and the civil penalties imposed in comparable cases.

The trial judge properly conducted a post-verdict review of the punitive damages award, to determine whether the award violated due process, specifically identifying evidence in the record to support each of the factors outlined. From this review, the judge found the punitive damages award was reasonable; not the result of passion, prejudice, or improper influence; and not in violation of the guarantee of due process. (R. 1-7). The evidence submitted supports the judge's finding the punitive damages award was reasonable and comported with due process:

1. Reprehensibility of Appellant's Misconduct:

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award...This principle reflects the view that some wrongs are more blameworthy than others." *Gore*, 517 U.S. at 565, 116 S.Ct. at 1589. When judging the reprehensibility of a defendant's conduct, the Court should consider whether: (i) the harm caused was physical as opposed to economic; (ii) the tortuous conduct evinced 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 mere accident. *State Farm v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513 (2003).

Here, the trial judge found the first *State Farm* factors particularly relevant. The Defendant's conduct admittedly caused serious physical harm to Plaintiff, with injuries to his left leg, left foot, left knee, left ankle, neck, right shoulder, lower back, right thumb, chest, and brain as a direct result of the accident caused by the Defendant's negligence *per se*. The injury to Plaintiff's ankle required orthopedic surgery and the insertion of screws and a plate - - some of

which remain in his leg. Plaintiff's health has significantly deteriorated as a result of the accident so that Plaintiff continues to suffer significant physical harm. The testimony of Plaintiff, his co-workers, family, and friends showed that, prior to the accident, Plaintiff was fit and physically able, but since the accident, he has trouble walking; trouble bending over; he walks with a pronounced limp; he is unable to perform certain family services; and he is unable to perform supervisory work or to operate heavy equipment that requires extensive walking or a lot of leg and foot work. The evidence established Plaintiff has difficulty performing his job as the result of his inability to use his feet and ankles as a result of his injuries. The accident affected Plaintiff by causing marked deterioration in his memory and the physical limitations resulting from the accident have affected Plaintiff's relationship with his wife. Thus, here, the harm caused was both physical and economic, supporting a higher degree of reprehensibility.

Second, and most importantly, Defendant's conduct in driving while intoxicated evinced an indifference to and a reckless disregard for the health and safety of others. When evaluating the degree of a defendant's reprehensibility in a post-trial review of an award, the defendant's reprehensibility is enhanced where it involves a reckless disregard for the health or safety of people. *Cody P. v. Bank of America, N.A.* 395 S.C. 611, 720 S.E.2d 473 (Ct.App. 2011). Here, the trial judge aptly observed,

> On a score of 1 to 10 when you look at reprehensibility of conduct in public policy, driving while impaired probably ranks up there as number eight. So I think when you talk about reprehensibility of conduct there can really be no good faith argument that someone driving impaired...his conduct was certainly reprehensible."

(R. p. 448, lines 14-22). Third, Plaintiff, as a manual laborer, was financially vulnerable to any injury which interfered with his health and mobility. Predictably, Plaintiff's physical injuries from this accident resulted in an inability to work for some six months with a corresponding lack

of income and future economic losses. Thus, under all relevant factors, the trial judge properly found that Defendant's conduct, in violation of statute, was highly reprehensible so as to authorize the punitive damages award.

2. Disparity between the actual damages awarded and punitive damages award; award reasonably related to the harm resulting or likely to result from such conduct:

Courts must ensure that punitive damages are both reasonable and proportionate to the amount of harm to the plaintiff and the general damages recovered. *Campbell*, 538 U.S. at 426, 123 S.Ct at 1513. In determining reasonableness, courts may consider whether the award is reasonably related to the harm resulting or likely to result from such conduct. *Mitchell*, 385 S.C. at 588, 685 S.E.2d at 185. A trial judge may compare the actual damages award to the punitive damages award in order to determine whether the punitive damages award is constitutionally excessive. *Mitchell*, 385 S.C. at 593, 606 S.E.2d at 188.

The harm likely to result from drunk driving - - serious physical injury and financial loss - - is precisely the harm sustained by plaintiff. Further, the punitive damages award was only 29.4% of the actual damages award. Therefore, the award was reasonably related to the harm actually caused and not excessive; this factor provides no support for Appellant's argument that the punitive damages award was excessive or violative of the guarantee of due process. Where the punitive damages award was less than the actual damages award and it was reasonably related to the harm actually suffered and to the harm likely to result from the Defendant's reprehensible conduct, the trial judge properly found the award consistent with due process and not excessive.

3. Difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases:

In addressing the punitive damages award as compared to comparable awards, the trial judge referenced several cases in which the punitive damages awarded were comparable to those awarded here, noting this verdict was proportional and well within the acceptable range. Appellant argues the cases cited by the trial judge are distinguishable or that a comparison actually supports the defense argument. However, Appellant's attempt to distinguish the cases referenced by the trial judge is again based upon Appellant's disagreement with the jury's crediting the supporting evidence. However, the trial judge was required to conduct the comparison to other awards taking the evidence in the light most favorable to Plaintiff.

Appellant argues the circumstances in *Wilkes v. Moses*, 291 S.C. 504, 354 S.E.2d 403 (Ct. App. 1987), were "very different" because there the evidence demonstrated that Wilkes had continuing pain from the accident injuries while, in contrast according to Appellant, Plaintiff had no continuing pain but, instead, his injuries had fully healed with no lasting results. Of course, the evidence presented by Plaintiff established that he actually continues to suffer pain and limitation as the result of his injuries and that he will more likely than not suffer pain from scar tissue and arthritis at the injury site for the rest of his life. Appellant's argument that the punitive damages award was excessive is unavailing where it is unsupported by evidence but is based solely on disagreement with the jury's accepting the evidence as presented by Plaintiff.

Appellant further argues the injuries in *Austin v. Specialty Transp. Services, Inc.*, 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004), were more severe than those sustained by Plaintiff and, therefore, the trial judge erred in relying upon *Austin* for comparison. To the contrary, the

trial judge properly referenced *Austin* as comparable and as supporting the reasonableness of the punitive damages award where the award of punitive damages in *Austin* was some 2.5 times the actual damages awarded. The Court in *Austin* approved the punitive damage award, noting the award was a single-digit multiplier and comported with due process, so that the punitive damage awards were not excessive. *Austin* was a comparable case; although the injuries there were even more severe than those sustained by Plaintiff; the damages awarded to Austin of over two and a half million dollars likewise appropriately exceeded those awarded Plaintiff. The trial judge properly compared this case to *Austin* where both cases involved physical injuries and punitive damages awards that involved no more than a one digit multiplier.

Curtis v. Blake, *supra*, is a comparable case in which the Court of Appeals found a trial judge's denial of post-trial motions was supported by the evidence and not controlled by legal error despite the fact the punitive damages award was roughly one hundred times the actual damages. The Court held, in view of all the evidence presented, the Defendant had failed to show compelling reasons that would justify a reduction by the trial judge. Similarly, here, in view of all the evidence presented, particularly where the damages awarded as punishment were less than a third of the actual damages awarded to compensate Plaintiff for his injuries and losses, there was no indication the award was the product of passion, prejudice, or improper influence. Therefore, the court should find that the trial judge, upon properly following the three *Gore* guideposts, correctly found there was no reason, much less any compelling reason, which would justify a reduction of the punitive damages award. This Court should find Appellant's argument that the punitive damages award was unreasonable, excessive, or in violation of the guarantee of due process to be without merit.

4. Additional Factor – Nature of Proceedings Below:

Appellant suggests that the Court consider a fourth factor, not identified by the United States Supreme Court in *Gore*. Appellant argues that "the nature of the proceedings below" should be considered in determining whether the punitive damages award was proper. Appellant explains that "the nature of the proceedings below" he believes relevant to the punitive damage award is that the Plaintiff was unfairly allowed to prove and to condemn the Defendant's driving under the influence which resulted in Plaintiff's injuries. Appellant again argues to no effect that the trial judge erred in admitting evidence of the driver's BAC and in charging the jury as to the statutory inference of intoxication. (*See* Issues I and II).

Appellant decries the "drunk driving theme" of this trial, arguing that he should not be required to pay a punitive damages award based on "unfair" evidence that he caused this accident while driving under the influence of alcohol. Thus, Appellant's argument is not that the punitive damages award was excessive taking the evidence in the light most favorable to Plaintiff; instead, Appellant's argument is that he should not have to pay punitive damages because he disagrees with the trial judge's evidentiary rulings and with the fact that the jury was allowed to consider his reprehensible conduct in reaching its decision. Such argument is irrelevant to the reasonableness of the punitive damages award. There is no element of the punitive damages review set out by the Courts which would encourage a court to overrule a jury's punitive damages award because the jury's award reasonably punishes the defendant for his reprehensible conduct. To the contrary, the reprehensibility of Jose Valle's conduct in driving drunk was the critical issue before the jury in assessing punitive damages.

Plaintiff had no control over the accident and he had no control over the fact that "drunk driving" was at issue during this trial - - those matters were controlled by Defendant when he

decided to drink and drive. Contrary to Appellant's argument, this trial was fair and the relevant evidence was properly admitted and considered by the jury in awarding reasonable punitive damages. The trial judge's denial of the motion to strike or reduce the punitive damages award should be affirmed as reasonable, justified by the evidence, and consistent with due process.

CONCLUSION

The jury verdict and the award of actual and punitive damages should be affirmed.

Respectfully submitted,

December 5, 2013

Pamela R. Mullis
Mullis Law Firm
Post Office Box 7757
Columbia, S.C. 29202
(803) 799-9577

COUNSEL FOR RESPONDENT

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

RECEIVED
DEC 0 5 2013
SC Court of Appeals

Case No. 2010-CP-08-1801

Levern McCray, ...Respondent,

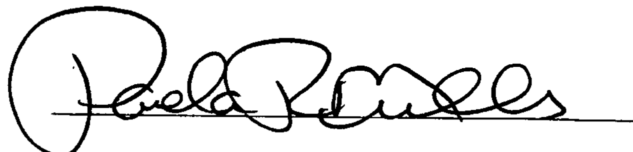
v.

Jose W. Valle,...Appellant,

CERTIFICATE OF COUNSEL

Counsel for Respondent certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

December 5, 2013



Pamela R. Mullis
Mullis Law Firm
Post Office Box 7757
Columbia, S.C. 29202
(803) 799-9577

COUNSEL FOR RESPONDENT