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STATEMENT OF ISSUES ON APPEAL

1. DID THE OPPOSING COUNSEL ERR IN MISINFORMING THE JURY ON HOW THE PERMANENT IMPAIRMENT RATING SCALES IS CALCULATED?
2. DID THE JURY ERR AS A MATTER OF LAW BY POSING THE QUESTION CONCERNING INSURANCE PAYMENTS OF MEDICAL BILLS?
3. DID COUNSEL FAIL TO ADEQUATELY REPRESENT APPELLANT BY NOT OBJECTING TO THE JURY'S INSURANCE QUESTION?
4. DID COUNSEL FAIL TO ADEQUATELY REPRESENT APPELLANT BY ARBITRARILY OFFERING NO REBUTTAL?

STATEMENT OF THE CASE

On February 17, 2015, Taliah Shabazz, Appellant, brought this action charging damages, against Bertha Rodriguez. This case is one of admitted liability to which the defendant admits to. This case was tried on June 13, 2016, and resulted in a mistrial on June 14, 2016. This case was tried again on August 29 and August 30, 2016; judgment was entered on August 31, 2016.

On May 8, 2012, Taliah Shabazz was injured in an auto accident and incurred permanent bodily impairment injuries as a result of this accident. Shabazz had reportedly reached maximum medical improvements (MMI).

On August 29 and August 30, 2016, the case was tried by a jury which only awarded her \$12,500.00 in actual damages; said jury award was less than the medical expenses incurred as a result of the accident. On September 29, 2016, Appellant received a letter of offer from her counsel where the defense counsel had made an offer in the amount of \$30,000.00 to settle (See letter - Attachment A). On November 8, 2016, Shabazz filed a Notice of appeal.

FACTS

This case arises out of an automobile accident that occurred on May 8, 2012, in the State of South Carolina. Taliah Shabazz, plaintiff, was driving south on Highway 321 going towards Interstate 20 into Columbia, South Carolina. The defendant, Bertha Rodriguez, pulled out across, in front of the plaintiff, from a private driveway on the right-hand side, attempting to make a left turn going North. As the plaintiff tried to avert a collision, the defendant's car crossed in front of her and was T-boned, going into the median of the Highway; Defendant was given a ticket for "failure to yield right-of-way" (T.p. 6) causing a collision. As a result of the accident, Taliah Shabazz was injured and sustained permanent bodily injuries and being 19 years of age at the time, was taken to Palmetto Health Richland Hospital where she was treated for soft tissue injury to her shoulder and neck. Shabazz sustained a high level energy injury to her shoulder and neck (T.p. 116). She was placed in organized physical therapy and tried some topical modalities, cervical traction, topical massage, periscapular strengthening and placed on anti-inflammatory medication (T.p. 116).

Defendant admitted to liability for the accident. The first jury trial resulted in a mistrial. On August 29 and August 30, 2016, a two-day trial was held and the jury returned a verdict and awarded \$12,500 actual damages (T.p. 168); which Shabazz contends was not enough to cover her medicals and attorney fees. This award allowed nothing for future medicals/pain and suffering for this permanent impairment which Shabazz sustained; therefore putting Shabazz in worse condition than she was before the accident. This jury award was far below the offer extended to Shabazz after the trial (See letter from attorney).

ARGUMENT:

1. BECAUSE OPPOSING COUNSEL MISSTATED THE RATING SCALES OF HOW PERMANENT IMPAIRMENT IS CALCULATED, THE JURY WAS MISINFORMED.

Prior to closing arguments, the Court instructed the jury that “Unlike the opening statements, these final remarks will be true arguments, that is each side will emphasize certain portions of the evidence and try to persuade you to agree with their version of the facts.” (T.p. 43) Appellant’s counsel informed the jury that “We know she didn’t have the headaches before the wreck. We know the doctor has told us that he thinks they are caused her wreck and her injuries subsequent to that wreck. And I would argue to you that more than makes the scales tip slightly in her favor. There’s really no evidence to the contrary except speculating that maybe they’re not. But all of the evidence you’ve heard says that they are.” (T.p. 143)

During closing, opposing counsel stated “The permanent injury that her neurologist mentioned in the deposition is that she’s going to have aches and pain from now -- you know, now and then. She’s going to have headaches every now and then. And he gave her an impairment rating. I’m not going to bore you, but I do want to explain these things to you so you have this information when you get back there to deliberate (T.p. 152). Appellant contends that by defendant counsel’s own statement, she acknowledged that Appellant’s headaches stemmed from the accident of May 8, 2012.

Also, during closing, opposing counsel misinformed the jury per the calculations for permanent impairment rating, stating to the jury that “He gave her an impairment rating for her entire body and one for her upper extremity. And to explain that, the American Medical

Association defines impairment in relevant part as a loss of body function in an individual with a health condition, disorder or disease. Her neurologist defined impairment as a patient's long term procedural disability. Essentially, how the person is affected on the scale of one percent to 100 percent. Dr. Ogburu, the Plaintiff's neurologist, gave her a one percent impairment rating for her entire body, one percent on a scale of one to 100. For her upper extremity, he gave her an impairment rating of two percent on the scale of one to 100." (T.p. 152-153).

Appellant contends that the information given by opposing counsel was highly prejudicial and served to minimized the level of her injuries, using on a scale of 1% to 100%, instead of the 1% to 13% impairment scale. Justice cannot be administered smoothly if lawyers are allowed to routinely lie to the court or knowingly present to the court false evidence.

Chewing v. Ford Motor Co. 354 S.C. 72, 579 E.E.2d 605, 611 (2003). In the case of Calhoun: Calhoun had altered the court date on his copies of his citation in an effort to convince the magistrate to reopen his traffic citation case. Calhoun later admitted to the actions and implicitly acknowledged that he had lied to the ODC and unfairly impugned the prosecuting officer's integrity. Calhoun was also found to have violated Rule 3.3 - a lawyer shall not knowingly make a false statement of material fact or law to a tribunal or offer evidence that the lawyer knows to be false; Rule 8.4(a) - violating the Rules of Professional Conduct; Rule 8.4(d) - engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and Rule 8.4(e) - a lawyer shall not engage in conduct that is prejudicial to the administration of justice. *In the matter of Calhoun*, 347 S.C. 444, 556 S.E.2d 392 (2001).

The American Medical Association's (AMA) chart depicts Appellant's shoulder injuries as a Class 1, Grade B-2 SOFT TISSUE "Shoulder contusion or crush injury with healed minor

soft tissue or skin injury.” As shown, this chart only allows a percentage of 1% to 13% impairment for upper extremity injury, with the impairment rating capped at 3%, when dealing with soft tissue injuries. This appears to indicate that the impairment rating of 2% to 13% depicts a 15% upper extremity impairment as opposed to the language of 1% to 100% impairment rating that depicts a 2% upper extremity impairment. The AMA Guide does not depict a higher rating of 14% to 100% for soft tissue injuries. Nor does the AMA depict an impairment rating of one % to 100 per cent for soft tissue injuries. American Medical Association Guide to the Evaluation of Permanent Impairment, 6th Edition, published 2008, Chapter 3, Table 5-5, pg. 401; *South Carolina. Rules of Professional Conduct*.

Calhoun also violated the Rules for Lawyer Disciplinary Enforcement, specifically, Rule 7(a)(1) - violating the Rules of Professional Conduct; Rule 7(a)(5) - engaging in conduct tending to pollute the administration of justice or to bring the legal profession into disrepute; and Rule 7(a)(6) - violating the oath of office taken upon admission to practice law in the State. *In the matter of Calhoun*, 347 S.C. 444, 556 S.E.2d 392 (2001); *Gregory S. Forman, P.C. Ethics Opinions Every South Carolina Attorney Should Know* (March 2011).

2. BECAUSE THE JURY RAISED THE ISSUE OF INSURANCE PAYMENTS FOR MEDICAL BILLS IT ERRED AS A MATTER OF LAW.

The jury posed the question “Has the cost of the first year’s appointments before the neurology appointments began already been covered by Ms. Rodriguez’s Insurance?” Appellant contends that the jury considered the matter of insurance during its deliberations, which is error as a matter of law. Although the Court instructed the jury that “Nothing outside of this

courtroom you can consider. If it's not in evidence, you can't consider it. This question you can't consider. You need to wipe it out of your mind and began over as if you never asked me this question because it's not in the evidence.' The Court further stated "And in order to be fair to both sides, you have to dissuade yourself of this question, start as if you never asked me the question, blank sheet of paper, began again with that in mind."(T.p. 166)

The question of insurance posed by the jury was highly prejudicial to the Appellant. The question was outside the scope of the testimony and evidence presented during the trial proceedings. Appellant contends that the jury had preconceived insurance concerns during its deliberation. Although the Court instructed the jury to dissuade itself and start over, it is highly improbable that the jury would be able to disregard its preconceived thoughts and or concerns about some type of insurance payments. The Appellant is guaranteed the rights to an impartial jury. An impartial jury is a jury that is free of bias and that decides the case solely on the evidence before it. The Sixth Amendment to the U.S. Constitution.

3. BECAUSE APPELLANT'S COUNSEL FAILED TO OBJECT TO THE INSURANCE QUESTION POSED BY THE JURY HE FAILED TO ADEQUATELY REPRESENT APPELLANT.

Appellant's Counsel failed to object to the issue of the insurance question posed by the jury; nor did counsel ask for a mistrial due to the jury posed question. Appellant contends that counsel's failure to represent was such that it fell below an objective standard of reasonableness.

Strickland v. Washington 466 U.S. 668 (1984); Alexander v. State 303 S.C. 539, 402, S.E.2d 484 (1999); The Sixth Amendment to the Constitution; State v. Pittman 373 S.C. 527, 544, 647,

S.E.2d 144, 154 (2007). The posing of question of insurance should have resulted in a mistrial, because the jury had preconceived concerns of insurance. Irreparable harm has been inflicted upon Appellant due to the jury's question of insurance. The constitutional standards of fairness requires that a have a panel of impartial, indifferent jurors. U.S. Constitution Sixth Amendment: State v. Bell, 302 S.C. 18, 393 S.E.2d, 364, Cert. Denied, 498 U.S. 88, 111 S.Ct. 227, 112 L.Ed.2d, 182 (1990).

4. BECAUSE THE APPELLANT'S COUNSEL ARBITRARILY OFFERED NO REBUTTAL, HE FAILED TO ADEQUATELY REPRESENT APPELLANT.

Counsel further failed to adequately represent Appellant when he did not provide or give a rebuttal in closing arguments. "THE COURT: Mr. Lee. MR. LEE: I believe they've heard everything from me. THE COURT: Beg your pardon? MR. LEE: They've heard everything from me." (T.p. 155) Appellant's counsel had the last opportunity to persuade the jury that because there were permanent injuries, Appellant should be entitled to a favorable decision for medicals, present and future, pain and suffering, and loss of enjoyment of life due to permanent impairment sustained that resulted from the automobile accident of May 8, 2012. It was Counsel's duty is to zealously represent his client with faithfulness, competence, diligence, good judgment and prompt communication, and he failed to do so. Attorney's Oath Mandated by Rule 402(k), SCACR.

Citing the Interest of S.S., counsel was ineffective in termination of mother's parental rights proceeding. Counsel made no opening statements, failed to cross-examine the state's witnesses, failed to present evidence in mother's favor, and counsel made no closing argument.

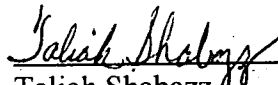
Counsel's only affirmative acts, which was the questioning the mother's credibility about her allegations that counsel had not communicated with her, were harmful to the mother. "In other words, not only did mother lack an advocate in the courtroom, but her own attorney appeared to take an adversarial position against her." "Counsel's conduct was deficient and prejudiced." In the Interest of S.S., 360 P.3d 16 (Utah Ct. App. 2015).

Appellant contends that but for counsel ineffective performance, the result of the proceeding would have been different. Counsel's ineffective performance greatly affected the outcome of the case. Hill v. Lockhart 474 U.S. 52 (1985). Appellant further contends that counsel's ineffective or lack of performance prejudiced the Appellant such as to deprive her of a fair outcome of the case. The Sixth Amendment to the Constitution.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and grant a new trial as well as grant expenses and costs incurred.

Respectfully submitted,



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