THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Trial Court Case No. 2015-CP-10-00330
Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019
Petition for Rehearing Denied March 29, 2019

GARY NESTLER AND JULIE NESTLER, Petitioners,

v.

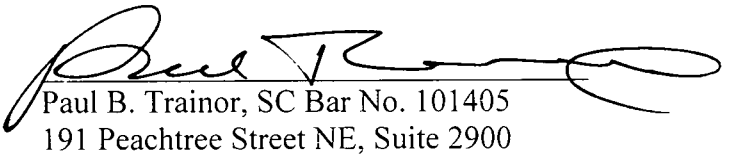
JOSEPH E. FIELDS, Respondent.

Appellate Case No. 2019-000707

Respondent's Return Brief to Appellants' Petition for Writ of Certiorari

Respectfully submitted,

HALL BOOTH SMITH, PC



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Dated: May 28, 2019

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND AND TRIAL

The present appeal stems from a motor vehicle accident on March 8, 2014 involving Plaintiff Gary Nestler (hereinafter "Appellant") and Defendant Joseph Fields (hereinafter "Respondent"). On January 15, 2015, Appellant and his wife, Julie Nestler, filed suit against Respondent alleging negligence and loss of consortium, seeking recovery of actual and punitive damages. See generally App. 23-25.[1] On April 20, 2015, QBE North America timely filed an Answer as Underinsured Motorist (UIM) Carrier pursuant to S.C. Code Ann. § 38-77-160 on behalf of Respondent. App. 26-32. On November 16, 2015, Respondent filed an Offer of Judgment pursuant to Rule 68, SCRCP for $40,000 (representing $15,000 in UIM funds), which was rejected.[2] See App. 34-36.

This case proceeded to a jury trial on April 25, 2016, at which time Plaintiff Julie Nestler withdrew her loss of consortium claim, leaving only Appellant Gary Nestler's claim for bodily injuries. App. 63-66. Respondent admitted simple negligence, leaving damages as the sole issue for the jury's determination. App. 63-66. Appellants focused on the alleged impact on Mr. Nestler's civic duties, his professional duties, and his family life. See App. 82-89. In contrast, Respondent argued that the evidence did not support the claimed injuries and damages. App. 89-

[1] Appellants' Complaint sought recovery for "great physical harm and injury . . . considerable medical treatment, both past and future . . . and has been otherwise injured and damaged, all to his detriment." App. 24-25. Contrary to Appellants' assertion in their Petition, the record is bare of any indication that Appellants "would not be seeking reimbursement for medical expenses in their prayer for relief." Appellants' Pet. for Writ of Cert., p. 2 (Apr. 29, 2019).

[2] Prior to filing suit against Respondent, Plaintiffs settled with Defendant's liability carrier for $20,000 of the available $25,000 policy limits.

93. At no point did Appellants advise the jury they were not seeking damages for medical expenses, nor did Respondent address same during opening statements.[3]

On the second day of trial, Respondent's counsel advised the trial court and Appellants that he had just become aware of a prior lawsuit filed by Appellants wherein Mr. Nestler alleged permanent neck injuries after previously denying any such injuries or claims in discovery. App. 169-170. During the discussion of Respondent's intention to impeach Mr. Nestler with this evidence, the Court inquired about Mr. Nestler's medical expenses, at which time Respondent argued that the amount of medical expenses was relevant for the jury's determination of Mr. Nestler's damages, and further advised that he intended to cross-examine Mr. Nestler on the amount of his medical bills since Appellants had failed to tender same into evidence during direct examination. App. 170-171. After the trial court declared that Mr. Nestler's medical expenses were relevant to the sole issue of damages, Appellant's counsel stated, "If they're going to put them in then we would ask that we modify the [jury] charge. We can talk about that later on to include charge or [sic] medical bills." App. 171-172.[4] Respondent cross-examined Mr. Nestler on the amount of his medical expenses, but did not introduce the bills into evidence.

During closing arguments, Appellants' counsel referenced Mr. Nestler's medical expenses, arguing to the jury:

> The issue came up as to medical bills. And it's not an issue that we were throwing around or pushing around because I don't believe that they're representative of anything. The fact that he got $7100 in medical bills, what does that really have to do with the fact that for the rest of your life your [sic] going to be in pain?
> . . .

[3] Appellants did not file a pre-trial Motion in Limine seeking to preclude evidence of Mr. Nestler's medical expenses.

[4] Respondent maintains that this request for a jury charge instructing the jury that actual damages included medical expenses constitutes a waiver of Appellants' initial objection to the admissibility of same. See App. 112-115 (charge conference wherein Appellants did not object to the jury charge on actual and economic damages).

> It's why we weren't putting it out there. It's why we weren't issuing it. But it came up and it's fine that it came up. So, you know, $7100 of bills. You've got that information. Do with it as you may. . . .

App. 234 (emphasis added). Throughout the entirety of trial—from opening statements through closing arguments—neither Appellants nor Appellants' counsel advised the jury that they were not claiming medical expenses as a form of actual damages. Consistent with the parties' requests, the trial court charged the jury on actual damages, which included "expenses incurred for necessary medical treatment[.]" App. 255 (emphasis added); see also App. 488 (copy of jury charge on actual damages). Appellants consented to the written charges being given to the jurors during deliberations. App. 262.

During deliberations, the jury asked for a copy of the medical bills, to which the parties jointly responded that "[t]he actual bills were not admitted into evidence – only the amount of the bills was." App. 482. In response, the jury asked, "[c]an you confirm the amount of the medical bills[] is $7,100 the correct amount?" App. 483. The parties jointly advised that $7,117.50 was the correct amount. App. 483. The jury rendered a verdict for $7,117.50 in actual damages and $0 in punitive damages. App. 5; 264. Appellants' counsel never sought to address the verdict while the jury was still empaneled. App. 266.

II. APPELLATE PROCEDURAL HISTORY

Appellants filed a Notice of Appeal with the South Carolina Court of Appeals on July 26, 2016. App. 58. On July 10, 2017, Appellants filed their Final Brief which contained three (3) enumerations of error on appeal. See App. 503-04. Specifically, Appellants argued that the trial court erred by: (1) allowing Respondent to introduce evidence of Gary Nestler's medical

expenses; (2) denying Plaintiff's Motion for New Trial Absolute; and (3) charging the jury on the issue of failure to mitigate damages. App. 504.[5]

The South Carolina Court of Appeals held oral arguments on November 8, 2018 and ultimately affirmed the trial court's rulings on each asserted enumeration of error. See generally App. 559-563. With regard to Appellants' first enumeration of error, the Court of Appeals noted that it could reverse evidentiary rulings only where there was an abuse of discretion by the trial court, and concluded that there was "no reason [the jury] should be kept ignorant of the cost of Nestler's medical treatment in determining the facts." App. 560-61. As to Appellants' second enumeration of error, the Court of Appeals conducted a detailed analysis regarding the myriad credibility issues presented during trial, such as evidence of Nestler's prior lawsuit alleging permanent injuries that was not disclosed during discovery, despite Nestler's testimony that he had a semi-photographic memory, and Nestler's request to increase his impairment rating by four (4) times in an effort to resolve the lawsuit. App. 562-63. Finally, the Court of Appeals rejected Appellants' third enumeration of error, holding that "[m]ost of the mitigation evidence came from Nestler's own doctor", and it was for the jury to determine the reasonableness of Nestler's choices. App. 561.

Appellants filed their Petition for Rehearing on February 14, 2019, which was denied on March 29, 2019. App. 564-574. Appellants' Petition for Writ of Certiorari was filed with this Honorable Court on April 29, 2019 and served on the undersigned counsel that same day.

LEGAL ARGUMENTS

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF MR. NESTLER'S MEDICAL EXPENSES

[5] Appellants' Petition does not challenge the Court of Appeals' ruling on the jury charge regarding mitigation of damages and, therefore, such issue has been abandoned on appeal and is not addressed herein.

Contrary to Appellants' suggestion that this case presents a novel issue of law, this case presents only the oft-answered question of whether the trial court abused its discretion in admitting evidence over an objection on the grounds of relevance under Rules 401, 402 and 403, SCRE.

"Evidence is relevant if it tends to make more or less probable a fact in issue." State v. Gillian, 373 S.C. 601, 612, 646 S.E.2d 872, 878 (2007) (citing Rule 401, SCRE). "All relevant evidence is admissible." Rule 402, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence, and his decision will be reversed only if there is a clear abuse of discretion." State v. Alexander, 303 S.C. 377, 380, 401 S.E.2d 146, 148 (1991); see also Samples v. Mitchell, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (1997) (holding that relevance is extremely broad in the context of discovery). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) (emphasis added).

Setting aside the fact that Appellants never informed the jury that they were allegedly not seeking recovery for medical expenses, and the fact that Appellants waived any such objection before the evidence was presented, Appellants have presented no binding case law in South Carolina to overturn the trial court's broad discretion in applying an even broader evidentiary rule. Instead, the cases relied upon by Appellants in support of their contention are contrary to South Carolina law and were decided in a context wholly inconsistent with same. Specifically,

each case relied upon by Appellants was decided in a state where there were statutory limitations or prohibitions relating to the admissibility of medical expenses.

Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983) provides no guidance for the present appeal. Pennsylvania enacted a No-fault Act which prohibited by statute a claim for economic damages (including medical expenses), and permitted a claim for non-economic damages only where certain conditions were satisfied. Id. at 421. There, the plaintiff attempted to introduce his medical bills incurred from the subject accident, but the trial court excluded same. Id. at 420. The plaintiff was attempting to circumvent a statutory prohibition on the admissibility of his medical expenses, and the Supreme Court of Pennsylvania upheld the exclusion based on that prohibition. South Carolina has no corresponding statutory prohibition on the admissibility of medical expenses and, therefore, this Honorable Court is not faced with having to disregard a state statute in deciding the admissibility of evidence in the present appeal.

In Corenbaum v. Lampkin, 215 Cal. App. 4th 1308 (2013), the California Court of Appeals found the trial court erred when it excluded from evidence the full amounts billed for the plaintiffs' past medical care. Id. at 1333. There, the preliminary error was the admission of the full amounts billed because state law limited a plaintiff's recovery for past medical bills only to an amount that the medical providers accepted as full payment or to the extent that plaintiff was still required to pay. Id. at 1324. Thus, the trial court improperly admitted evidence of the full amount of bills, rather than applying the limitations on same. In reversing the trial court ruling, the Court declared that the full amount of medical bills was inadmissible because it was irrelevant as to all of the following determinations: (1) a plaintiff's damages for past medical expenses; (2) a plaintiff's damages for future medical expenses; (3) an expert's opinion on the reasonable value of future medical care; and (4) a plaintiff's non-economic damages. Id. at 1328-

1333. It has not been argued, nor would South Carolina law support, that medical expenses in this State are irrelevant to determining past medical expenses, future medical expenses or an expert's opinions on the value of future care. Appellants seek to have this Honorable Court disregard the context in which Corenbaum was decided and apply a foreign state's ruling which runs afoul of South Carolina law.

Similarly, Payne v. Wyeth Pharm., Inc., No. 2:08cv119, 2008 U.S. Dist. LEXIS 91849 (E.D. Va. Nov. 12, 2008) offers no support for Appellants' position. There, the trial court declared that the plaintiff's medical expenses were not a recoverable damage because they were previously discharged in bankruptcy. The plaintiff sought to circumvent this prohibition by arguing that his bills were relevant to support non-economic damages. As the court noted, "there is a substantial possibility of jury confusion if the medical bills were introduced to prove pain and suffering" because "[t]he jury may be tempted to treat the medical bills as recoverable special damages rather than to only assess the medical bills as evidence that [plaintiff] experienced pain and suffering." Id. at *7. Therefore, the court declined to admit evidence of plaintiff's medical expenses because the defendant would be prejudiced by the possibility that jurors would award damages prohibited under state law.

In stark contrast, there are cases from numerous other jurisdictions concluding that the amount of medical expenses is, in fact, relevant to the jury's determination of non-economic damages. In Chapman v. Mazda Motor of America, Inc., 7 F. Supp. 2d 1123 (D. Mont. 1998), the court admitted the amount of the plaintiff's past medical expenses because "[t]hey may bear on the necessity of future needs and provide a foundation for a life care plan" and because "[t]hey are relevant to prove the nature and extent of [the plaintiff's] injuries. Id. at 1125. Similarly, in Brice v. Nat'l R.R. Passenger Corp., 664 F. Supp. 220 (D. Md. 1987), the court

admitted evidence of the plaintiff's medical expenses, stating, "[t]he amount of medical expenses incurred by plaintiff as a result of the incident involved in this case is relevant to the determination of the full extent and nature of plaintiff's injuries." Id. at 224. The Supreme Court of Mississippi likewise noted the relevance of a plaintiff's medical expenses, stating, "jurors have a right to know what services and/or goods were provided for the charges made. This can serve as an aid in their deliberations with respect to the seriousness and extent of the injuries complained of." McGee v. River Region Med. Ctr., 59 So.3d 575, 581 (Miss. 2011) (internal quotations omitted). The Supreme Court of Alaska also found that medical expenses were relevant to non-economic damages, holding that that "evidence of the amount of medical bills is relevant to the severity of a plaintiff's injury[.]" Luther v. Lander, 373 P.3d 495, 502 (Alaska 2016). The Virginia Supreme Court expressly ruled that medical expenses were relevant to a claim for non-economic damages "because they tended to establish the probability of [plaintiff's] claim that she experienced pain and suffering as a result of the accident. Evidence of the medical bills also was relevant to establish the inconvenience that [plaintiff] experienced because of [defendant's] negligence. These subjects were directly related to the central issue before the jury, the extent of [plaintiff's] damages." Barkley v. Wallace, 267 Va. 369, 373-74, 595 S.E.2d 271, 274 (2004) (emphasis added). Finally, the Georgia Supreme Court has held that medical bills are admissible when a plaintiff presents a claim for pain and suffering "to show the seriousness of the injury", even where they are not claimed as damages. See Warren v. Ballard, 266 Ga. 408, 410, 467 S.E.2d 891, 893 (1996); College Park Cabs, Inc. v. Justus, 227 Ga. App. 66, 67, 488 S.E.2d 88, 89 (1997) (holding that trial court did not err by admitting evidence of medical expenses even where those expenses should not have been awarded as damages).

Mr. Nestler refused to follow his physician's recommendations and received only minimal care and treatment for his alleged injuries. Consistent with the Court of Appeals opinion, attorneys and courts should be "confident in the jurors' ability to weigh evidence and must presume they followed their instructions by applying the facts to the law of damages." App. 561. It is not Respondent's burden, nor was it the trial court's burden, to enunciate all conceivable purposes for which medical expenses may be relevant in any particular case. Appellants cannot sincerely argue that medical expenses are irrelevant in every scenario, yet suggest to this Honorable Court that a plaintiff should be able to pick and choose when his or her expenses are relevant based on whether such evidence is favorable. The jury is entitled to consider "evidence having **any** tendency to make the existence of **any** fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE (emphasis added). Appellants could have argued that evidence of medical expenses was not relevant to their non-economic damages, or directly advised the jury that they were not seeking recovery of medical expenses. Instead, however, Appellants' counsel instructed the jury to "[d]o with it as you may." App. 234. The appellate process is not a mechanism by which a party can seek redress for a trial strategy that did not result in a favorable outcome, and the trial court did not abuse its broad discretion in admitting the amount of Mr. Nestler's medical expenses.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE TRIAL COURT'S DENIAL OF APPELLANTS' MOTION FOR NEW TRIAL

Appellants' Petition on this enumeration of error is solely a recitation of the arguments made to the Court of Appeals. In essence, Appellants argued that they should be granted a new

trial based on (1) their motion for new trial absolute; (2) the thirteenth juror doctrine; or (3) the trial court's refusal to order a new *nisi additur*.[6]

"Traditionally, in South Carolina, circuit court judges have the authority to grant a new trial upon the judge's finding that justice has not prevailed." Vinson v. Hartley, 324 S.C. 389, 404, 477 S.E.2d 715, 722 (Ct. App. 1996). "A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." Folkens v. Hunt, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990). "A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate"; however, "[t]he jury's determination of damages . . . is entitled to substantial deference." Vinson, at 404, 477 S.E.2d at 723 (emphasis added). "Compelling reasons must be given to justify invading the jury's province by granting a new trial to adjust damages." Wright v. Craft, 372 S.C. 1, 35, 640 S.E.2d 486, 505 (Ct. App. 2006).

"When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). To warrant a new trial, the verdict must be so grossly excessive as to clearly indicate the influence of an improper motive on the jury. Wright, at 35, 640 S.E.2d at 505. "The 'thirteenth juror' doctrine is not used when the trial judge has found the verdict was inadequate or unduly liberal and, therefore, is not a vehicle to grant a new trial *nisi additur*." Howard v. Roberson, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007) (quoting Bailey v. Peacock, 318 S.C. 13, 14–15, 455 S.E.2d 690, 692 (1995)).

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[6] Appellants did not move for a new trial *nisi additur* and should not be permitted to raise this argument, or case law supporting a possible new trial *nisi additur*, for the first time on appeal.

A. THE COURT OF APPEALS AND TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR NEW TRIAL ABSOLUTE BECAUSE THE JURY VERDICT WAS CONSISTENT WITH SOUTH CAROLINA LAW AND THE EVIDENCE PRESENTED

Appellants continue to misrepresent the law of this State by contending a jury is "required" to award pain and suffering where it makes an award for medical expenses. To the contrary, there is absolutely no case law dictating what jurors are required to do when rendering an award for damages. Appellants incorrectly interpret Howard, 376 S.C. 143, 654 S.E.2d 877 and Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) for their untenable proposition in pursuit of a new trial.

In Howard, the jury awarded the plaintiff an amount equal to the plaintiff's medical expenses and lost wages, but the award did not reflect an award for pain and suffering. Howard, 376 S.C. at 148, 654 S.E.2d at 879. The trial court granted the plaintiff a new trial solely on the issue of damages based on the thirteenth juror doctrine, stating that the failure to award pain and suffering was "contrary to the fair preponderance of the evidence [and] . . . [t]he Plaintiff suffered obvious injuries which obviously had to be painful." Id. at 148, 654 S.E.2d at 880. In overturning the trial court's ruling, the Court of Appeals found that the trial court erred in granting a new trial on the issue of damages alone under the thirteenth juror doctrine. Id. at 157, 654 S.E.2d at 884. The Court of Appeals unequivocally stated, "[t]he thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages." Id. at 156, 654 S.E.2d at 884 (emphasis added). Nowhere in the Howard opinion did the Court of Appeals "require" a jury to award pain and suffering where the award encompasses only actual damages.[7]

[7] The plaintiff in Howard made a motion for a new trial *nisi additur*, arguing that the jury ignored the law as it related to pain and suffering. Howard, 376 S.C. at 148, 654 S.E.2d at 879. Similarly, Appellants in the present case argue that the jury failed to follow the court's instructions on pain and suffering, and failed to award non-economic damages based on evidence presented. The proper method for dealing with this issue would have been to file a

In fact, Howard lends support to Respondent's argument that the trial court properly declined to grant a new trial—pursuant to Howard, it would have been error for the trial court to grant a new trial based on the thirteenth juror doctrine because Appellants' damages were the sole issue at trial. See R. p. 66, lines 12–19 (identifying where Appellant's counsel admitted the only issue for jury determination was damages).

Appellants also misguidedly cite Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) for the proposition that a jury award of only economic damages, without an award for non-economic damages, is improper. In Waring, this Honorable Court affirmed the trial court's decision to grant a new trial *nisi additur* where the trial court granted *additur* in the amount of $40,000. There, the plaintiff was involved in a motor vehicle accident in August 1992 and began a course of treatment spanning over five years. The plaintiff presented to numerous physicians, including a neurologist at the request of a physician, and subsequently underwent a spinal surgery. Waring, 341 S.C. at 251–56, 533 S.E.2d at 908–11. After the jury awarded the amount of Waring's medical bills, Waring moved for a new trial *nisi additur* or, alternatively, a new trial absolute. Waring, 341 S.C. at 255, 533 S.E.2d at 910. The trial court denied Waring's motion for a new trial absolute, but granted the motion for a new trial *nisi additur*. Waring, 341 S.C. at 255, 533 S.E.2d at 910. The Court of Appeals upheld the *additur*, strongly considering the fact that Waring sought medical treatment for years following the accident, and "took advantage of every recommendation of her physicians . . . ." Waring, 341 S.C. at 260, 533 S.E.2d at 912.

Both Howard and Waring are significantly distinguishable from the present case, and operate to defeat, rather than bolster, Appellants' arguments on appeal. Howard demonstrates

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motion for new trial *nisi additur* which was not done and, therefore, was not preserved for appeal. Regardless, the trial court addressed this issue and properly declined to grant an *additur* in light of the conflicting evidence.

that it would have been error for the trial court in the present case to grant a new trial based on thirteenth juror doctrine where damages were the only issue for the jury's determination. Similarly, Waring stands for the proposition that a trial court may, in its discretion, award an *additur* where the evidence supports same, and supports the trial court's denial of a new trial absolute in this case.

As the trial court and Court of Appeals summarized in great detail, Appellants' case was riddled with evidence permitting the jury to question Appellants' credibility and claim for damages. During trial, Mr. Nestler testified that he "pride[d] [himself] of actually having somewhat of a photographic memory." App. 156. During cross-examination, Mr. Nestler expressly denied ever suffering any neck injuries, other than an injury in 2013 when he hurt his shoulder, and also denied ever receiving any injury due to an accident. App. 166-167; 173-174. However, Mr. Nestler was impeached with a prior lawsuit he filed wherein he alleged permanent neck injuries stemming from a motor vehicle accident. App. 175-179. Furthermore, Mr. Nestler's treating orthopedist, Dr. Schoderbek, was Mr. Nestler's personal and professional friend. App. 298. Dr. Schoderbek testified that he altered Mr. Nestler's alleged impairment rating 16 months after Mr. Nestler stopped treating because Mr. Nestler "was ready to be done with this [lawsuit]." App. 333. Mr. Nestler made this request only six weeks after his deposition, and one month after mediation. App. 334. The record as a whole revealed that Mr. Nestler failed to follow multiple and repeated recommendations from Dr. Schoderbek during the course of his treatment that were intended solely to improve Mr. Nestler's condition.

While Appellants continue to argue to this Honorable Court that there was "substantial testimony and evidence presented regarding non-economic damages", there was equally substantial evidence casting serious doubt on the veracity of Appellants' claimed damages. As

the Court of Appeals noted, it was for the jury to resolve any credibility disputes, and it "could have found serious credibility gaps in Nestler's damages evidence." App. 563. Appellants have failed to identify a single case where a motion for new trial absolute was granted when considering a factually similar scenario as presented in this action. Furthermore, Appellants' reliance on the thirteenth-juror doctrine is misplaced because "[p]rocedurally, the trial court cannot use [the thirteenth juror] doctrine as a vehicle to grant a plaintiff a new trial on the issue of damages alone." Howard, at 157, 654 S.E.2d at 884. Finally, the conflicting evidence regarding Appellants' credibility supported the trial court's refusal to grant a new trial *nisi additur*.

B. THE JURY'S VERDICT WAS NOT INDICATIVE OF JUROR CONFUSION AND DID NOT WARRANT A NEW TRIAL

"[The South Carolina Supreme Court] has repeatedly held that a party should not be permitted to sit idly by while a verdict erroneous in form is being returned and witness its receipt without objection and later, after the jury has been discharged, claim advantage of the error, thus invited by acquiescence." Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). "[F]ailure to challenge the verdict upon being given an opportunity to do so results in a waiver." Id. at 554. Although a party may assert a valid objection to some issue of law, their subsequent actions can constitute a waiver of that objection. See, e.g. State v. Dicapua, 373 S.C. 452, 455-56, 646 S.E.2d 150, 152 (Ct. App. 2007), aff'd State v. Dicapua, 383 S.C. 394, 680 S.E.2d 292 (2009) (holding that the defendant waived prior motion in limine when the defendant failed to object to evidence during the course of trial) (citing Martelly v. State, 230 Md. 341, 348, 187 A.2d 105, 108 (1963) ("It is settled law that . . . [a party] is bound by the actions and concessions of counsel, and that even constitutional rights may be waived in the course of trial.")); Security Mgmt., Inc. v. Schoolfield Furniture Indus., Inc., 275 S.C. 466, 468,

272 S.E.2d 638, 639 (1980) (holding that a party may waive a jurisdictional objection by subsequent actions).

Appellants argue that the jurors' verdict was the result of confusion "as their award was for an amount of damages not claimed by Petitioner." App. 522; Appellants' Pet. for Writ of Cert., p. 9. However, to accept Appellants' argument requires this Honorable Court to disregard the entire record on appeal and interpose its own opinions in place of the jury's verdict. Appellants rely on a single reference to an off-the-record conference outside the presence of the jury in support of their contention. See App. 246-247. A thorough analysis of the entire record reveals that Appellants' argument has no merit. Specifically, the following summarizes Appellants' actions after their initial objection:

1. Appellants advised the court that they were requesting a jury charge for medical expenses as a form of actual damages (App. 171-172.);
2. Appellants consented to the jury charge identifying past medical expenses as a form of actual damages (App. 206-209; App. 488);
3. Appellants consented to the written jury charges being given to the jury during deliberations (App. 262);
4. Appellants told the jury to "do with it what they may" regarding the amount of Mr. Nestler's medical expenses (App. 234); and
5. Appellants consented to answering both jury questions relating to the amount of medical bills (App. 483).[8]

[8] Appellants' draw attention to the fact that the jury asked two questions regarding the medical bills and expenses. However, Appellants conspicuously ignore the fact that they consented to answering those questions. Had Appellants truly sought to recover only non-economic damages, Appellants certainly would have objected to answering either question. Instead, they agreed to provide the jury the exact amount of medical expenses, yet claim on appeal that the verdict was the result of juror confusion.

The jury had no reason to believe that Appellants were not claiming medical expenses as a form of actual damages. Any alleged juror confusion was purely the result of Appellants own trial strategy and failure to preserve their purported objection. Rather than seeking to correct the allegedly improper verdict while the jury was still available, Appellants allowed the jury to be dismissed and asserted the alleged impropriety in post-trial motions. Even assuming Appellants' argument to be meritorious, any such juror confusion or error was completely harmless. Appellants have strenuously argued that the jury did not award any non-economic damages, and that the verdict for only the medical expenses is evidence of juror confusion. Taking those arguments as true, the inevitable conclusion is that, had the jury been told it could not award medical expenses as damages, it would have rendered a defense verdict.

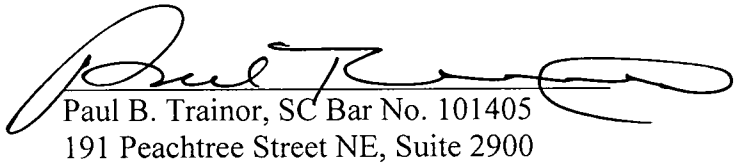
CONCLUSION

The present appeal presents nothing other than a request for this Honorable Court to revisit the trial court's well-established broad discretion to admit relevant evidence. Appellants have presented no binding authority to support their arguments and conspicuously avoided reference to abundant case law contrary to their appeal. The trial court did not abuse its discretion in admitting evidence of Mr. Nestler's medical expenses, regardless of whether Appellants only sought non-economic damages. Furthermore, the trial court did not err in denying Appellants' motion for new trial because there was ample evidence for the jury to discredit Appellants' claimed damages, and because the thirteenth juror doctrine cannot be exercised where, as here, the only issue was Appellants' damages. Any purported juror confusion was solely the result of Appellants' actions throughout trial, constituting a waiver of any prior objection, resulting, at best, in harmless error.

Based on the foregoing, Respondent respectfully requests this Honorable Court to DENY Appellants' Petition for Writ of Certiorari and decline to review the Appellate Court's well-reasoned and correct decision.

Respectfully submitted,

HALL BOOTH SMITH, PC



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Attorneys for Respondent Joseph E. Fields

Dated: May 28, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAY 29 2019
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Trial Court Case No. 2015-CP-10-00330
Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019
Petition for Rehearing Denied March 29, 2019

GARY NESTLER AND JULIE NESTLER, Petitioners,

v.

JOSEPH E. FIELDS, Respondent.

Appellate Case No. 2019-000707

PROOF OF SERVICE

I certify that I have served ***Respondent's Return Brief to Appellants' Petition for Writ of Certiorari*** upon Appellants by depositing a copy of same in the United States Mail, First Class postage prepaid, May 29, 2019, addressed to Appellants' attorneys of record, addressed as follows, and by hand delivery on May 29, 2019 to the following:

Andrew J. McCumber, Esquire
Daniel S. Slotchiver, Esquire
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751 Johnnie Dodds Boulevard
Suite 100
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Respectfully submitted,

HALL BOOTH SMITH, PC

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Attorneys for Respondent Joseph E. Fields

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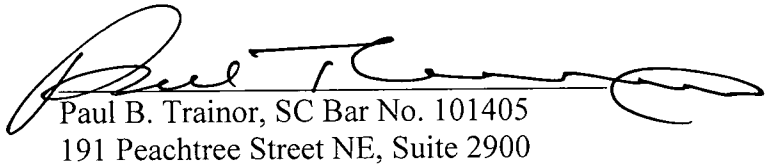
CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that the Respondent's Return Brief to Appellants' Petition for Writ of Certiorari is in compliance with Rules 211(b) and 242, SCACR.

Respectfully submitted,

HALL BOOTH SMITH, PC



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