

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019
Petition for Rehearing Denied March 29, 2019

RECEIVED
APR 29 2019
SC Court of Appeals

Gary Nestler and Julie Nestler.....*Petitioners,*

v.

Joseph E. Fields.....*Respondent.*

App. Case No. 2016-001541

PETITION FOR CERTIORARI

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd, Suite 100
Mount Pleasant, South Carolina 29464
Telephone: (843) 577-6531
Facsimile: (843) 577-0261
COUNSEL FOR THE PETITIONER

Paul B. Trainor, Esquire
Alan Belcher, Esquire
Hall Booth Smith, P.C.
111 W Coleman Blvd Suite 301
Mount Pleasant, South Carolina 29464
(843) 720-3460
COUNSEL FOR THE RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	<i>i</i>
TABLE OF AUTHORITIES.....	<i>i</i>
CERTIFICATE OF COUNSEL	1
QUESTIONS FOR REVIEW	1
STATEMENT OF THE CASE.....	1
LEGAL ARGUMENTS	4
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

<i>Corenbaum v. Lampkin</i> , 215 Cal. App. 4th 1308 (2013).....	6
<i>Howard v. Roberson</i> , 376 S.C. 143, 654 S.E.2d 877 (Ct.App. 2007).....	8, 10
<i>Hyde v. Southern Grocery Stores, Inc.</i> , 197 S.C. 263, 15 S.E.2d 353 (1941).....	18
<i>Johnson v. Hoechst Celanese Corp.</i> , 317 S.C. 415, 453 S.E.2d 908 (Ct.App. 1995).....	8
<i>Johnson v. Parker</i> , 279 S.C. 132, 303 S.E.2d 95 (1983).....	8
<i>Martin v. Soblotney</i> , 502 Pa. 418, 466 A.2d 1022 (1983)	6

<i>Payne v. Wyeth Pharmaceuticals, Inc.</i> , 2008 U.S. Dist. LEXIS 91849, (E.D.Va., 2008).....	6
<i>Todd v. Owen Indus. Prods., Inc.</i> , 315 S.C. 34, 431 S.E.2d 596 (Ct.App. 1993).....	8
<i>Waring v. Johnson</i> , 341 S.C. 248, 533 S.E.2d 906 (Ct.App. 2000).....	8-10

COURT RULES:

South Carolina Rules of Civil Procedure

Rule 59, SCRCP	4
----------------------	---

South Carolina Rules of Evidence

Rule 401, SCRE.....	4-5
Rule 402, SCRE.....	4-5
Rule 403, SCRE.....	4-5

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals.

QUESTIONS FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision to allow the admission of evidence of Petitioner's medical expenses at trial where Petitioner was not seeking an award of medical expenses?
2. Did the Court of Appeals err in affirming the trial court's denial of Petitioner's motion for new trial absolute where the jury's award was inconsistent with the evidence and claims presented, was the result of the jurors' confusion; and, was inconsistent with South Carolina State law?

STATEMENT OF THE CASE

On or about May 8, 2014, Gary Nestler and his then eleven-year-old daughter, Aspen Nestler, were traveling in their vehicle on Hwy. 17 in Mount Pleasant, South Carolina. App. 137. While waiting in traffic to turn into Boone Hall Plantation, Mr. Nestler's vehicle was struck in the rear by the Mr. Fields's vehicle (hereinafter "the collision"). *Id.* As a result of the collision, Mr. Nestler received medical treatment from various medical providers over the course of 2014 and 2015. App. 144-155; 159-160.

On January 15, 2015, Mr. Nestler filed the above-styled action in the Charleston County Court of Common Pleas for the Ninth Judicial Circuit claiming damages arising from the collision. App. 479 Mr. Nestler alleged that Mr. Fields operated his vehicle in a careless, negligent, and reckless manner, and with the willful and wanton disregard for the safety of others. App. 480 Mr. Nestler claimed damages in the form of noneconomic damages, including past, present, and future pain and suffering,

loss of enjoyment of life, diminished capacity, and mental anguish. App. 481. Nowhere in Mr. Nestler's Complaint, including his demand for relief, is a single reference made to a claim for medical expenses. Id.

A jury trial commenced on or about April 25 and 26, 2016 wherein Mr. Fields admitted his negligence in connection with the collision. App. 63-64. Thus, the only issues at trial were causation and damages. During the trial, Nestler proffered testimony regarding the past, present, and future damages sustained by Nestler as a direct and proximate result of Mr. Fields's negligence.

Mr. and Mrs. Nestler both testified to Nestler's pain and suffering, mental anguish, loss of enjoyment of life, diminished capacity, and the injurious effects of Mr. Fields's negligent conduct on Nestler both past, present, and future. Nestler presented evidence by way of his treating physician regarding causation, as well as damages sustained, as well as the nature, extent, and frequency of medical treatment received by Nestler in connection with this accident.

Further, Nestler's treating physician testified that there was no additional medical treatment available which would cure Nestler's injuries; thus, Nestler would continue to suffer the same damages in the future. Nestler's treating physician also testified as to Nestler's permanent impairment, giving Nestler an overall permanent impairment rating of fifty-three (53%) percent.

Prior to the commencement of trial, Counsel for Mr. Nestler notified Counsel for Mr. Fields that Mr. Nestler would not be seeking reimbursement for medical expenses in their prayer for relief. At trial, Mr. Nestler did not include or reference the medical expenses in their opening statements, nor did he proffer any evidence of same during his case in chief. App. 82.

On the last day of the trial, prior to the cross-examination of Mr. Nestler, Counsel for Mr. Fields requested a sidebar with the Court regarding several issues he wished to address during cross-examination. App. 166. While the sidebar is off the record, it is apparent that the issue of medical bills was raised during that conversation based upon the following exchange once the parties were back on

the record:

THE COURT: *All right. So this stuff about medical bills all that?*

MR. TRAINOR: *I'm going to cross [Mr. Nestler] on [the medical bills], but I'm not going to put that up on the screen or anything like that. I think I'm entitled to ask him – I mean, I think that's a – even if they're not making a claim, I think I'm entitled to say you've incurred \$7,000.00 in medical bills.*

App. 168. Counsel for Mr. Nestler objected to this line of questioning on the basis that the medical bills were not relevant to any issue before the Court as the amount of the medical bills did not have any tendency to make any material fact in dispute more or less probable. Mr. Nestler also objected that the introduction of the medical bills would likely confuse the issues before the jury. The trial court overruled Nestler's objections and allowed Fields's to cross-examine Nestler on the amount of his medical bills.

During closing arguments, Counsel for Mr. Fields intimated that Nestler was trying to hide his medical bills from the jury in an apparent attempt to cast dispersion on Nestler's credibility. Counsel for Mr. Fields even went so far as to ask the jury to consider awarding Nestler his medical expenses:

MR. TRAINOR: *It's odd I introduced in cross-examination the medical bills. I don't think I ever had [to] do that in a case ever. I want you to think about why, why I want you to know that number, \$7,117.50. It's because it's a really low number. Because there's not a lot of treatment.*

* * *

Obviously, we're here to talk about numbers. We've heard a number. What they're asking is for you to render a verdict against the Defendant for \$365,000, I think. ... Juries will sit and say, well, we got to factor that in somehow. I mean, surely there's a reason that number exists. That number has no bearing on your decision today. That number has no relevance. It's not evidence....

Mr. Field's has admitted that he caused the accident. He was negligent. That doesn't mean that you can't award whatever you want to award. If it's something nominal? Sure. Medical bills, maybe? I don't know. Is it less than that? That's a decision you have to make.

App. 246-247.

During juror deliberations, the jury requested the exact amount of Nestler's medical bills. App. 482-483. After deliberating for an hour and fifteen minutes, the jury returned a verdict in favor of Nestler—in the exact amount of his medical bills (\$7,117.50). App. 5. The jury failed to make any award damages actually claimed by the Mr. Nestler, including past, present, and future pain and suffering, mental anguish, loss of enjoyment of life, and diminished capacity. *Id.*

The Court allowed the parties ten (10) days to submit all post-trial motions, and Mr. Nestler filed a Motion for New Trial Absolute, pursuant to Rule 59, SCRC. App. 41. On July 11, 2016, the Court denied Nestler's motion. App. 6. Mr. Nestler filed a Notice of Appeal and served the same upon the Mr. Fields on July 26, 2016. App. 58. The Court of Appeals heard oral arguments on the matter on November 8, 2018 and issued an opinion on January 30, 2019. Petitioner filed a Petition for Rehearing, which was denied on March 29, 2019.

LEGAL ARGUMENTS

1. THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S DECISION TO ALLOW A DEFENDANT TO INTRODUCE EVIDENCE OF PLAINTIFF'S MEDICAL EXPENSES WHERE NO MEDICAL EXPENSES WERE BEING CLAIMED.

The present matter involves the novel issue of whether a Plaintiff's medical expenses are admissible at trial when the Plaintiff is not seeking reimbursement of same as damages in connection with their suit. At the trial in this matter, Petitioner elected not to seek reimbursement of his medical expenses in connection with the collision. Accordingly, when Respondent attempted to bring in the amount of medical bills on cross-examination, Petitioner objected to their admission under Rules 401, 402, and 403, SCRE.

The Appellate Court held there was "no error in admission of the amount of [Petitioner's] medical bills" despite there being "no authority in our state discussing the issue of whether a party seeking actual damages for personal injury may prevent the introduction of his actual medical bills by the other party" because "under the specific facts here we cannot say the risk of unfair prejudice

substantially outweighed the probative value of the billed amount.”

The Appellate Court’s Opinion erred in its application of the South Carolina Rules of Evidence in determining whether the trial court abused their discretion in allowing the admission of the evidence. Specifically, the Court failed to address the preliminary issue of evidence’s relevancy—the most fundamental touchstone of admissibility. See, Rules 401 and 402, SCRE. As previously noted throughout the briefing in this matter, the Court must first address the question of relevancy prior to even reaching a Rule 403 analysis.

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

In the present case, liability was admitted by Respondent, and therefore, the only issue at trial was causation and the amount of Petitioner’s damages. Petitioner elected not to claim medical expenses as an element of his damages at trial. Therefore, evidence of the total dollar amount of medical bills incurred does not tend to **make any fact of consequence in determining the action more or less probable.** Rule 401, SCRE. This evidence fails to satisfy the definition of “relevant evidence” and is therefore wholly inadmissible. Rule 402, SCRE. A trial court’s ruling which directly contravenes the South Carolina Rules of Evidence and is an abuse of discretion controlled by an error of law that warrants reversal by the Appellate Court.

Assuming, *in arguendo*, there was any relevance to this evidence rendering it admissible under Rule 402, only then would a Rule 403 analysis would be proper. The Appellate Court noted in its Opinion that “the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding **matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.**”) United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979). This is *precisely*

the situation in the case at bar: there is **no probative value** in the total dollar amount of medical bills incurred because that figure in no way is causally related to, representative of, or useful in making a determination of Plaintiff's non-economic damages.

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

During oral arguments in the Appellate Court, it was noted that some injuries, such as the loss of a limb, may have (relatively) modest medical bills associated with the treatment, yet the effect of the injury on a Plaintiff's life is without a doubt profound. Conversely, there are many procedures which may be very expensive, yet are completely devoid of pain, or are used to treat ailments or conditions which have no pain associated with the underlying condition. (e.g. cosmetic removal of an unsightly scar).

It is important to note that the trial judge in this matter made it abundantly clear that this was precisely the basis for which the evidence was being admitted. (“*Obviously, the argument that I hear hundreds of times is your damages couldn't have been very much if your medical bills weren't very much... just because*”)

you didn't put them in doesn't mean that they can't put them [in] for the purpose of showing that the damages weren't very substantial.") App. 171.

In applying the "abuse of discretion" standard¹, it is clear that the admission of this evidence was controlled by an error of law, as it was not relevant, and to the extent it was relevant in any sense, it was only "dragged in by the heels for the sake of its prejudicial effect." Respondent's **only** motivation in introducing these figures was drive down the value of Plaintiff's case in the juror's estimation by "anchoring" or "benchmarking" their deliberations to a very small, wholly irrelevant figure of unclaimed damages.

Any argument that the amount of medical bills incurred was offered into evidence for another purpose is at best, disingenuous. For example, Respondent's argument that he brought them into evidence to show "there wasn't much treatment" does not hold much weight in light of the fact that: (1) the medical bills themselves were not admitted into evidence; (2) the expenditures weren't even presented in an itemized list to the jurors; (3) the evidence did not describe, state the nature of, scope or duration of any of Petitioner's medical treatment. It was simply an arbitrary dollar figure, put before the jury to either confuse them or to give them an improper consideration in determining Petitioner's non-economic damages.

The Appellate Court held that there was "no reason [the jury] should be kept ignorant of the cost of [Petitioner's] medical treatment" ... and that "part of the advocate's art is persuading jurors how such evidence should be interpreted." However, as Petitioner respectfully contended in their Petition for Rehearing, had our Courts intended for the advocate to be the mechanism for ensuring that jurors did not consider improper evidence, the S.C. Rules of Evidence would not exist. Rather, it is the judge, in his role as "gatekeeper" who should ensure that inadmissible evidence is never put

¹ As noted by both the Petitioner and the Opinion of the Court, this question has never been addressed before in this State. Arguably, given that this matter is a novel issue of law, the Appellate Court would be free to decide this question with no particular deference to the lower court. See, S.C. Const., art. V, §§ 5 and 9; S.C. Code Ann. §§ 14-3-320 and -

before the jury. Watson v. Ford Motor Co., 699 S.E.2d 169, 389 S.C. 434 (2010) No matter how skilled the trial lawyer may be, there are some bells which simply cannot be unrung.

For the reasons herein stated, it is the position of the Petitioner that the trial court abused their discretion and failed in their duty as gatekeeper. The Appellate Court failed to properly address this novel issue of law and to correctly apply the South Carolina Rules of Evidence in connection with same. Accordingly, Petitioner respectfully requests this honorable Court to GRANT the Petition for Writ of Certiorari and review the Appellate Court's Order affirming the trial court.

2. THE APPELLATE COURT ERRED IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL ABSOLUTE AS THE JURY'S AWARD WAS INCONSISTENT WITH THE EVIDENCE AND CLAIMS PRESENTED, AND WAS THE RESULT OF THE JURORS' CONFUSION; AND WAS IN DIRECT CONTRAVENTION OF SOUTH CAROLINA LAW.

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. *Todd v. Owen Indus. Prods., Inc.*, 315 S.C. 34, 431 S.E.2d 596 (Ct.App.1993). Similarly, the judge may grant a new trial if the verdict is inconsistent and reflects the jury's confusion. *Johnson v. Parker*, 279 S.C. 132, 303 S.E.2d 95 (1983). *See also, Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 453 S.E.2d 908 (Ct.App.1995) (under "thirteenth juror doctrine," trial court may grant new trial if judge believes verdict is unsupported by evidence and, similarly, new trial may be granted if verdict is inconsistent and reflects jury's confusion).

Our State's courts have held as a matter of law that where a jury has found Plaintiff's medical expenses to be reasonable and necessary, they are required to award pain and suffering, and may not simply award just the exact amount of the medical bills. *See, generally, Howard v. Roberson*, 376 S.C. 143, 157, 654 S.E.2d 877, 884 (Ct. App. 2007), *See, also, Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000) (award damages for pain and suffering is grounds for a new trial *nisi additur*).

330; § 14-8-20; On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

In the case at bar, the jury's verdict in the exact amount of medical expenses sustained by Nestler lead to a number of conclusions, all of which would warrant granting of Nestler's Motion for New Trial Absolute: (1) The jury reached a decision which was inconsistent with the claims presented as medical expenses were not claimed damages by Nestler and there was extensive testimony regarding Nestler's non-economic damages;² (2) The jury has reached an award which reflected the jury's confusion as they awarded an amount of damages not claimed by Nestler. Even if these two reasons were not sufficient for the granting of a motion for new trial, the jury's verdict for the exact amount of medical bills without also awarding hedonic damages fails as a matter of law. *See, generally, Waring*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000).

The trial court ought to have exercised his authority to grant a new trial as justice has most assuredly not prevailed in the present case. The jury's verdict warranted granting of Petitioner's Motion for New Trial in that the jury reached a decision which was inconsistent with the claims presented and reflected the juror's confusion as their award was for an amount of damages not claimed by Petitioner. The jurors' only questions during deliberations were to specifically request a copy of the medical bills. After learning that the bills themselves were not in evidence, the jurors then requested the amount of medical bills incurred. Their questions made it abundantly clear that their intention was to award damages which were not even claimed by the Petitioner. While the Appellate Court raised credibility concerns of the Petitioner, these concerns alone do not justify an award which was inconsistent with the claims presented at trial. Further, such an award reflects the jurors' confusion over their understanding of the claims presented. The Appellate Court erred in affirming this decision where the evidence on the Record indicates that the decision by the jury was the product of their confusion in the claims being presented at trial.

² The trial transcript reveals substantial testimony and evidence presented regarding non-economic damages and the profound effect of Mr. Nestler's injuries on his day to day life including: Mr. Nestler's testimony regarding his diminished ability to work as he once was able to (pp. 64-65 & 101-104); Nestler's testimony regarding his pain, suffering, and trauma suffered during and after the collision (pp. 80-92); and, his wife's testimony as to the impact his injuries have had on his family life (pp. 44-47). This was presented along with the medical testimony of Dr.

Further, the Appellate Court erred in affirming the trial court's decision where the jury's verdict is inconsistent with South Carolina law. Our State's courts have held as a matter of law that where a jury has found Plaintiff's medical expenses to be reasonable and necessary, they are required to award pain and suffering, and may not simply award just the exact amount of the medical bills. *See, generally, Howard v. Roberson*, 376 S.C. 143, 157, 654 S.E.2d 877, 884 (Ct. App. 2007), *See, also, Waring v. Johnson*, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000) (jury's verdict for the exact amount of medical bills without also awarding hedonic damages fails as a matter of law.) Under these circumstances the Appellate Court erred in affirming the trial court's decision not to award a new trial when the verdict of the jury was in direct contravention to the South Carolina law. Accordingly, Petitioner respectfully requests this honorable Court to GRANT the Petition for Writ of Certiorari and review the Appellate Court's Order affirming the trial court.

CONCLUSION

For all of the foregoing reasons stated herein, and in consideration of the logical and legal support thereof, this Court should GRANT the Petition for Writ of Certiorari and review the Appellate Court's decision.

Respectfully submitted this 29th day of April, 2019.

By: 

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, South Carolina 29464
Telephone: (843) 577-6531
Facsimile: (843) 577-0261
COUNSEL FOR THE PETITIONER

Schoderbek (See, Deposition Transcript), which included the 53% overall impairment rating of Mr. Nestler.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019
Petition for Rehearing Denied March 29, 2019

RECEIVED
APR 29 2019
SC Court of Appeals

Gary Nestler and Julie Nestler*Petitioners,*

v.

Joseph E. Fields*Respondent.*

App. Case No. 2016-001541

CERTIFICATE OF SERVICE

I certify that I have served the **Petition for Certiorari** and **Appendix** on the Respondent, Joseph E. Fields, by delivering a copy of same, via U.S. Mail, on April 29, 2019, addressed to their attorney of record, as follows:

Paul B. Trainor, Esquire
Hall Booth Smith, P.C.
111 W Coleman Blvd Suite 301
Mount Pleasant, South Carolina 29464

Respectfully submitted this 29th day of April, 2019.

By: _____

Andrew J. McCumber, Esquire
Slotchiver & Slotchiver, LLP
751 Johnnie Dodds Blvd., Suite 100
Mount Pleasant, SC 29464
Counsel for the Petitioner