

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

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S.C. SUPREME COURT

Gary Nestler and Julie Nestler Petitioners,

v.

Joseph E. Fields Respondent.

App. Case No: 2019-000707

APPENDIX VOLUME III

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Left Bicipital Groove *Negative*
AC Joint
Left Cross Arm Adduction *Negative*
Sensation
Left *Intact to light touch distally*
Radial Pulse
Left *2+*

Right elbow:

INSPECTION: no ecchymosis, no swelling. WOUNDS: no
wounds noted. PALPATION: non-tender. RANGE OF
MOTION: full range of motion. STRENGTH: 5/5 all groups.
STABILITY: no instability. SENSATION: light touch intact.
VASCULAR: radial pulse 2+.

Left Elbow:

General

Wound *None noted*
Inspection *No ecchymosis, Swelling noted*

Tenderness

Lateral Epicondyle *Positive*
Medial Epicondyle *Positive*
Olecranon *Positive*
Resisted Wrist Extension *Pain with maneuver*
Resisted Finger Extension *Negative*

Range of Motion

Extension *120*
Flexion *100*
Supination *70*
Pronation *70*

Strength

Extension *4*
Flexion *4*
Supination *4*
Pronation *4*

Stability

Varus Stress *Stable*
Valgus Stress *Stable*

Sensation

Left *Diminished Tingling sensation to ulnar nerve distribution*

Radial Pulse

Left *2+*

Right wrist:

WOUND: none noted. PALPATION (BONE): no tenderness.
RANGE OF MOTION: full range of motion. STRENGTH: full
grip strength. STABILITY: no gross instability noted.
TESTS: negative grind first carpometacarpal (CMC).
SENSATION: sensation intact all fingers distally.
VASCULAR: good capillary refill < 3 seconds.

Left Wrist:

General

Wound *None noted*
Swelling *None*

Tenderness

Snuff Box *Negative*

Scaphoid Tubercle *Negative*
Dorsal *Negative*
Volar *Negative*
Modified Watson Test *Negative*
Carpal Tunnel
Tinnels *Negative*
Phalen's *Negative*
Pressure Test *Negative*
Range of Motion
Extension 80
Flexion 80
Ulnar Deviation 20
Radial Deviation 20
Strength
Flexion 5
Extension 5
Grip Strength *Decreased*
Sensation
Left Wrist *Intact to light touch distally*
Radial Pulse
Left 2+

RADIOGRAPHS:

Interpretation _____

Assessments

1. Lateral Epicondylitis - 726.32 (Primary)
2. Cervical disc disease - 722.91
3. Posterior interosseous nerve syndrome - 354.3

Treatment

1. Lateral Epicondylitis

Notes: I recommend that the patient continue working on stretching and range of motion exercises. These abnormal sensory symptoms that he is getting would best be evaluated with an EMG nerve conduction study to assess the cause of them potentially which he is not interested in doing. We could also inject the elbow as well to see if that will help with his range of motion. Patient is not interested in doing those interventions at this point and wants to continue working on the range of motion, strength exercises and modalities to see if that will help to improve. We'll see the patient back in 6 weeks and likely rate and release him at that point.

2. Others

Continue Medications reported as directed by the ordering provider, —, as directed

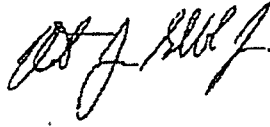
Follow Up

6 Weeks

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderchek MD 07/11/2014

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OSC Mt Pleasant
594 LONE TREE DR
MT PLEASANT, SC 29464-8170
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 07/11/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



NESTLER, GARY S

53 Y old Male, DOB:
Account Number: 00062213130

Home:

Guarantor: NESTLER, GARY S Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER
PCP: Allan D Lieberman, MD
Appointment Facility: OSC Mt Pleasant

05/30/2014

Progress Notes: Robert J Schoderbek MD

Current Medications

Taking FlexRite ---- compounded 1 to 2
pumps Three to Four time a day, stop date
06/19/2014
Taking Medications reported as directed by
the ordering provider -- as directed
Medication List reviewed and reconciled with
the patient

Past Medical History

No Medical History.

Surgical History

No Surgical History documented.

Family History

Denies cardiac, respiratory, gastrointestinal,
genitourinary, and other musculoskeletal
issues in the patient's family.

Social History

Tobacco Use:
Tobacco Use/Smoking: Are you a:
nonsmoker.
Drugs/Alcohol:
Drugs: Denies.
Alcohol Screen: Denies.

Allergies

cumin

Hospitalization/Major

Diagnostic Procedure

No Hospitalization History.

Review of Systems

General/Constitutional:

Fatigue denies. Weakness denies.
Weight change denies.

Musculoskeletal:

.. See HPI for details.

Reason for Appointment

1. OFFICE VISIT

History of Present Illness

Symptom(s):

Patient presents today with complaints of neck, LEFT
clavicle/shoulder, and LEFT elbow pain. Patient was involved in a MVA
on 3/8/14 where he was rear-ended while stopped on Highway 17 N.
He was driving the car and was restrained. He then had a gradual onset
of headache associated with neck pain. He continues to have pain
diffusely about his cervical spine as well as anterior LEFT shoulder and
LEFT elbow. He has a diffuse sense of tingling sensation about the
entire LEFT hand.

Patient states that he continues to have left lateral elbow, forearm,
and arm pain. Some tingling sensation down into the fingers at times.
Patient has been working with the occupational therapist at Charleston
and therapy. He does report some mild improvement in some of the
symptoms in his forearm and elbow. Although he does indicate some
atrophy of his muscles some tingling-type sensations consistent with
PIN nerve compression and issues also associated with lateral
epicondylitis.

Vital Signs

Ht 6 ft 1 in, Wt 195 lbs, BMI 25.72.

Examination

General Examination:

GENERAL APPEARANCE: Well-developed, well-nourished, well
nourished, in no acute distress.

Cervical Spine:

INSPECTION: loss of lordosis. PALPATION: paraspinal
tenderness right and left, left trapezial tenderness. RANGE OF
MOTION: limitation in range of motion along with left lateral bending
and turning. SENSORY EXAM UPPER EXTREMITIES: abnormal
tingling sensation noted extending down the left arm. .

TESTS: positive Spurling's, positive direct compression post triangle.

Right shoulder:

ROM: full ROM. STRENGTH TESTING (OUT OF 5): 5/5 all
RTC groups. PALPATION: no tenderness. STABILITY
TESTS: all stability tests are negative. UPPER EXTREMITY

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 05/30/2014

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EXAM: no motor or sensory deficits, sensation intact to light touch distally with 2-3 second capillary refill.

Left Shoulder Structured:

General

Wound *None noted*

Inspection *No muscle asymmetry, No scapular winging, No atrophy*

Range of Motion

Left Forward Flexion *150*

Left Abduction *140*

Left ER at 90 *80*

Left IR at 90 *50*

Rotator Cuff Strength

Left Abduction *5-*

Left Postition of Jobe *5-*

Left ER *5-*

Left IR *5-*

Left Belly Press *5-*

Impingement

Left Neer *Mildly Positive*

Left Hawkins *Mildly Positive*

SLAP

Left OBriens *Negative*

Left Mimori *Negative*

Bicep

Left Speeds *Negative*

Left Yergasons *Negative*

Instability

Left Apprehension *Negative*

Left Relocation *Negative*

Left Jerk Test *Negative*

Left Anterior Translation *Stable*

Left Posterior Translation *Stable*

Left Anterior Drawer *Good Endpoint*

Tenderness

Left AC Joint *Negative*

Left Bicipital Groove *Negative*

AC Joint

Left Cross Arm Adduction *Negative*

Sensation

Left *Intact to light touch distally*

Radial Pulse

Left *2+*

Right elbow:

INSPECTION: no ecchymosis, no swelling. WOUNDS: no wounds noted. PALPATION: non-tender. RANGE OF MOTION: full range of motion. STRENGTH: 5/5 all groups. STABILITY: no instability. SENSATION: light touch intact. VASCULAR: radial pulse 2+.

Left Elbow:

General

Wound *None noted*

Inspection *No ecchymosis, No swelling*

Patient: NESFILL, GARY S DOB:

Progress Note: Robert J Schoderbek MD 07/30/2014

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Tenderness

Lateral Epicondyle *Positive*

Medial Epicondyle *Negative*

Olecranon *Negative*

Resisted Wrist Extension *Pain with maneuver*

Resisted Finger Extension *Negative*

Range of Motion

Extension *5*

Flexion *120*

Supination *70*

Pronation *80*

Strength

Extension *4*

Flexion *4*

Supination *4*

Pronation *4*

Stability

Varus Stress *Stable*

Valgus Stress *Stable*

Sensation

Left *Intact to light touch distally Possible PIN nerve compression in the archade of frohse with hypersensitivity in the area of the supinator muscle*

Radial Pulse

Left *2+*

Assessments

1. Lateral Epicondylitis - 726.32 (Primary)

2. Cervical disc disease - 722.91

3. Posterior interosseous nerve syndrome - 354.3

Treatment

1. Lateral Epicondylitis

Notes: Patient should continue working with Carolina hand therapy on treatment and modalities for lateral epicondylitis and PIN nerve compression. I do think that the patient has some issues with PIN nerve compression. At some point we may need to get a EMG nerve conduction study to evaluate that if his symptoms do not improve. I also discussed doing an injection today for lateral epicondylitis, which he wants to hold off on doing that because he is showing some mild improvements in his symptoms and function with the therapy that he is doing. I will see the patient back in 6 weeks to see how he is progressing.

2. Others

Continue Medications reported as directed by the ordering provider, -7, as directed

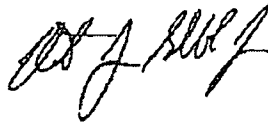
Follow Up

6 Weeks

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 05/30/2014

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Fax: 843-606-8058

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 05/30/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



NESTLER, GARY S

33 Y old Male, DOB:
Account Number: 00002213130

Home:

Guarantor: NESTLER, GARY S Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER
PCP: Allan D Lieberman, MD
Appointment Facility: OSC Mt Pleasant

05/02/2014

Robert J Schoderbek MD

Current Medications

Taking Ibuprofen 800 MG Tablet 1 tablet
every 8 hours, stop date 05/20/2014
Taking FlexRite — compounded 1 to 2
pumps Three to Four times a day, stop date
06/19/2014
Medication list reviewed and reconciled with
the patient

Past Medical History

No Medical History.

Surgical History

No Surgical History documented.

Family History

Denies cardiac, respiratory, gastrointestinal,
genitourinary, and other musculoskeletal
issues in the patient's family.

Social History

Tobacco Use:
Tobacco Use/Smoking Are you a:
nonsmoker.
Drugs/Alcohol:
Drugs: Denies.
Alcohol Screen: Denies.

Allergies

cumin

Hospitalization/Major

Diagnostic Procedure

No Hospitalization History.

Review of Systems

General/Constitutional:

Fatigue denies. Weakness denies.

Weight change denies.

Musculoskeletal:

... See HPI for details.

Reason for Appointment

1. OFFICE VISIT

History of Present Illness

Symptom(s):

Patient presents today with complaints of neck, LEFT
clavicle/shoulder, and LEFT elbow pain. Patient was involved in a MVA
on 3/8/14 where he was rear-ended while stopped on Highway 17 N.
He was driving the car and was restrained. He then had a gradual onset
of headache associated with neck pain. He continues to have pain
diffusely about his cervical spine as well as anterior LEFT shoulder and
LEFT elbow. He has a diffuse sense of tingling sensation about the
entire LEFT hand.

Patient states that he continues to have left lateral elbow, forearm,
and arm pain. Some tingling sensation down into the fingers at times.

Vital Signs

Ht 6 ft 1 in, Wt 195 lbs, BMI 25.72.

Examination

General Examination:

GENERAL APPEARANCE: Well-developed, well-nourished, well
nourished, in no acute distress.

Cervical Spine:

INSPECTION: loss of lordosis. PALPATION: paraspinal
tenderness right and left, left trapezial tenderness. RANGE OF
MOTION: limitation in range of motion along with left lateral bending
and turning. SENSORY EXAM UPPER EXTREMITIES: abnormal
tingling sensation noted extending down the left arm.
TESTS: positive Spurling's, positive direct compression post triangle.

Right shoulder:

ROM: full ROM. STRENGTH TESTING (OUT OF 5): 5/5 all
RTC groups. PALPATION: no tenderness. STABILITY
TESTS: all stability tests are negative. UPPER EXTREMITY
EXAM: no motor or sensory deficits, sensation intact to light touch
distally with 2-3 second capillary refill.

Left Shoulder Structured:

General

Wound None noted

Inspection No muscle asymmetry, No scapular winging, No

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 05/02/2014

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atrophy

Range of Motion

Left Forward Flexion 150

Left Abduction 140

Left ER at 90 80

Left IR at 90 50

Rotator Cuff Strength

Left Abduction 5-

Left Position of Jobe 5-

Left ER 5-

Left IR 5-

Left Belly Press 5-

Impingement

Left Neer *Mildly Positive*

Left Hawkins *Mildly Positive*

SLAP

Left OBriens *Negative*

Left Mimori *Negative*

Bicep

Left Speeds *Negative*

Left Yergasons *Negative*

Instability

Left Apprehension *Negative*

Left Relocation *Negative*

Left Jerk Test *Negative*

Left Anterior Translation *Stable*

Left Posterior Translation *Stable*

Left Anterior Drawer *Good Endpoint*

Tenderness

Left AC Joint *Negative*

Left Bicipital Groove *Negative*

AC Joint

Left Cross Arm Adduction *Negative*

Sensation

Left *Intact to light touch distally*

Radial Pulse

Left 2+

Right elbow:

INSPECTION: no ecchymosis, no swelling. WOUNDS: no wounds noted. PALPATION: non-tender. RANGE OF MOTION: full range of motion. STRENGTH: 5/5 all groups. STABILITY: no instability. SENSATION: light touch intact. VASCULAR: radial pulse 2+.

Left Elbow:

General

Wound *None noted*

Inspection *No ecchymosis, Swelling noted*

Tenderness

Lateral Epicondyle *Positive*

Medial Epicondyle *Negative*

Olecranon *Positive*

Resisted Wrist Extension *Pain with maneuver*

Resisted Finger Extension *Negative*

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schusterbek MD 07/02/2014

Note generated by eClinicalWorks EMR/EMR/Practice Management System

Range of Motion
 Extension 5
 Flexion 120
 Supination 60
 Pronation 80
 Strength
 Extension 4
 Flexion 4
 Supination 4
 Pronation 4
 Stability
 Varus Stress Stable
 Valgus Stress Stable
 Sensation
 Left Intact to light touch distally Possible PIN nerve
 compression in the archade of frohse with hypersensitivity in the area
 of the supinator muscle
 Radial Pulse
 Left 2+

Assessments

1. Lateral Epicondylitis - 726.32 (Primary)
2. Cervical disc disease - 722.91
3. Elbow fracture - 812.40
4. Cervical HNP - 722.0

Treatment

1. Lateral Epicondylitis

Notes: I think that were primarily going with some lateral epicondylitis,
 some flexor forearm extensor muscle tendinitis and a issue with PIN
 nerve compression. I would like to the patient to get into see the
 occupational therapist at Carolina hand therapy to work on some
 stretching, strengthening, and modalities for treatment of lateral
 epicondylitis and PIN compression. We'll see the patient back in 4
 weeks to see how he is doing. If he continues to be symptomatic, then
 we will try an injection into the lateral epicondyle to see if that will help
 him. We may also need to get a EMG-nerve conduction study to
 evaluate for nerve entrapment if his symptoms continue.

Referral To: Therapeutics OT Coastal Physical Therapy

Reason: OT--Eval and treat including ther ex, modalities, ROM,
 stretching, strengthening exercises 2-3x week/6 weeks|lateral
 epicondylitis, PIN entrapment - left elbow|Please call patient to
 schedule

2. Elbow fracture

IMAGING: XR ELBOW COMPLETE, 3 VIEWS MIN.(in house)

Left elbow xrays, 4 views, show no obvious signs of fracture.
 Appropriate alignment noted. No osseus abnormalities noted
 SCHODERBEK, ROBERT J, MD 05/02/2014 04:27:53 PM EDT
 >

3. Others

Continue Medications reported as directed by the ordering provider, --,

Patient: NESLER, GARYS DOB:

Progress Note: Robert J Schoderbek MD 05/02/2014

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as directed

Referral To: Therapeutics OT Coastal Physical Therapy

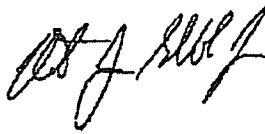
Reason: OT - Eval and treat including ther ex, modalities, ROM, stretching, strengthening exercises 2-3x week/6 weeks | lateral epicondylitis, PIN entrapment - left elbow | Please call patient to schedule

Procedure Codes

73080 X-RAY EXAM OF ELBOW

Follow Up

4 Weeks



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OSC Mt Pleasant
594 LONE TREE DR
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Fax: 843-606-8058

Patient: NFSTL:R, GARY S DOB:

Progress Note: Robert J Schoderbek MD 05/02/2014

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NESTLER, GARY S

53 Y old Male, DOB:
Account Number: 00002214140

Home:

Guarantor: NESTLER, GARY S Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER
PCP: Allan D Lieberman, MD
Appointment Facility: OSC Mt Pleasant

04/04/2014

Robert J Schoderhek MD

Current Medications

Taking Ithuprofen 800 MG Tablet 1 tablet
every 8 hours, stop date 05/20/2014
Taking FlexRite --- compounded 1 to 2
pumps Three to Four time a day, stop date
06/19/2014
Medication List reviewed and reconciled with
the patient

Past Medical History

No Medical History.

Surgical History

No Surgical History documented.

Family History

Denies cardiac, respiratory, gastrointestinal,
genitourinary, and other musculoskeletal
issues in the patient's family.

Social History

Tobacco Use:
Tobacco Use/Smoking Are you a:
nonsmoker.
Drugs/Alcohol:
Drugs: Denies.
Alcohol Screen: Denies.

Allergies

cumin

Hospitalization/Major

Diagnostic Procedure

No Hospitalization History

Review of Systems

General/Constitutional:

Fatigue denies, denies.
Weakness denies, denies. Weight
change denies, denies.

Musculoskeletal:

... See HPI for details, See HPI for
details.

Reason for Appointment

1. OFFICE VISIT

History of Present Illness

Symptom(s):

Patient presents today with complaints of neck, LEFT
clavicle/shoulder, and LEFT elbow pain. Patient was involved in a MVA
on 3/8/14 where he was rear-ended while stopped on Highway 17 N.
He was driving the car and was restrained. He then had a gradual onset
of headache associated with neck pain. He continues to have pain
diffusely about his cervical spine as well as anterior LEFT shoulder and
LEFT elbow. He has a diffuse sense of tingling sensation about the
entire LEFT hand. He has seen me in the past for his LEFT shoulder
that responded to corticosteroid injection. Patient reports that his
elbow is still sore and is still having tingling and numbness. Patient is
here after having an MRI to evaluate for cervical strain/radiculopathy.

Vital Signs

Ht 6 ft 1 in, Wt 195 lbs, BMI 25.72.

Past Orders

Imaging: MR SPINE CERVICAL W/O CONTRAST MRI (Order Date -
03/21/2014)

Notes: MRI CERVICAL SPINE W/O CONTRAST TO EVAL FOR
CERVICAL STRAIN/RADICULOPATHY Imaging Specialist MRI
cervical Spine There is slight reversal of the normal cervical lordosis.
The vertebral body heights and marrow signal are normal. The cervical
spinal cord is normal in signal and morphology. Visualized portions of
the skull base are unremarkable. There is no paraspinal soft tissue
abnormality. C1-2: Evaluated on sagittal views only and appears
normal. C2-3: Mild left neural foraminal narrowing secondary to
uncovertebral and facet hypertrophy. C3-4: Moderate to severe
bilateral neural foraminal narrowing secondary to uncovertebral and
facet hypertrophy. C4-5: Moderate bilateral neural foraminal
narrowing and mild central canal narrowing secondary to
uncovertebral and facet hypertrophy as well as a small posterior disc
osteophyte complex. C5-6: Moderate to severe bilateral neural
foraminal narrowing and moderate central canal narrowing secondary
to uncovertebral and facet hypertrophy as well as a small posterior disc
osteophyte complex. A small superimposed left paracentral disc

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderhek MD 04/04/2014

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protrusion is noted. C6-7: Moderate right and moderate to severe left neural foraminal narrowing and mild central canal narrowing secondary to uncovertebral and facet hypertrophy as well as a left paracentral disc osteophyte complex. C7-T1: Mild left neural foraminal narrowing secondary to uncovertebral and facet hypertrophy.
CONCLUSION: 1. Moderate to severe bilateral neural foraminal narrowing at C3-C4 with possible contact of the bilateral exiting nerve roots. 2. Moderate to severe bilateral neural foraminal narrowing at C5-C6 with possible contact of the bilateral exiting nerve roots. 3. Moderate to severe left neural foraminal narrowing at C6-C7 with possible contact of the exiting left nerve root. 4. Additional mild to moderate degenerative changes as detailed above
 SCHODERBEK, ROBERT J, MD 04/04/2014 08:43:06 AM EDT >
 Clinical Info: MRI CERVICAL SPINE W/O CONTRAST TO EVAL FOR CERVICAL STRAIN/RADICULOPATHY

Examination

General Examination:

GENERAL APPEARANCE: Well-developed, well-nourished, well-nourished, in no acute distress.

Cervical Spine:

INSPECTION: loss of lordosis. **PALPATION:** paraspinal tenderness right and left, left trapezial tenderness. **RANGE OF MOTION:** limitation in range of motion along with left lateral bending and turning. **SENSORY EXAM UPPER EXTREMITIES:** abnormal tingling sensation noted extending down the left arm. **TESTS:** positive Spurling's, positive direct compression post triangle.

Right shoulder:

ROM: full ROM. **STRENGTH TESTING (OUT OF 5):** 5/5 all RTC groups. **PALPATION:** no tenderness. **STABILITY TESTS:** all stability tests are negative. **UPPER EXTREMITY EXAM:** no motor or sensory deficits, sensation intact to light touch distally with 2-3 second capillary refill.

Left Shoulder Structured:

General

Wound *None noted*

Inspection *No muscle asymmetry, No scapular winging, No atrophy*

Range of Motion

Left Forward Flexion *150*

Left Abduction *140*

Left ER at 90 *80*

Left IR at 90 *50*

Rotator Cuff Strength

Left Abduction *4+*

Left Postition of Jobe *4+*

Left ER *4+*

Left IR *4+*

Left Belly Press *4+*

Impingement

Left Neer *Mildly Positive*

Left Hawkins *Mildly Positive*

SLAP

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 04/04/2014

Note generated by eClinicalWorks EHR/PM Software (v. 10.0.0.1000000000)

Left OBriens *Negative*
 Left Mimori *Negative*
 Bicep
 Left Speeds *Negative*
 Left Yergasons *Negative*
 Instability
 Left Apprehension *Negative*
 Left Relocation *Negative*
 Left Jerk Test *Negative*
 Left Anterior Translation *Stable*
 Left Posterior Translation *Stable*
 Left Anterior Drawer *Good Endpoint*
 Tenderness
 Left AC Joint *Negative*
 Left Bicipital Groove *Negative*
 AC Joint
 Left Cross Arm Adduction *Negative*
 Sensation
 Left *Intact to light touch distally*
 Radial Pulse
 Left *2+*

Right elbow:
 INSPECTION: no ecchymosis, no swelling. WOUNDS: no
 wounds noted. PALPATION: non-tender. RANGE OF
 MOTION: full range of motion. STRENGTH: 5/5 all groups.
 STABILITY: no instability. SENSATION: light touch intact.
 VASCULAR: radial pulse 2+.

Left Elbow:
 General
 Wound *None noted*
 Inspection *No ecchymosis, Swelling noted*
 Tenderness
 Lateral Epicondyle *Positive*
 Medial Epicondyle *Positive*
 Olecranon *Positive*
 Resisted Wrist Extension *Pain with maneuver*
 Resisted Finger Extension *Negative*
 Range of Motion
 Extension *10*
 Flexion *120*
 Supination *50*
 Pronation *60*
 Strength
 Extension *4*
 Flexion *4*
 Supination *4*
 Pronation *4*
 Stability
 Varus Stress *Stable*
 Valgus Stress *Stable*
 Sensation
 Left *Intact to light touch distally*
 Radial Pulse

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schodtphrek MD 04/04/2014

Note generated by eClickerWorks EMR/EM Software for the Clinical/Work Unit

Left 2+

Assessments

1. Cervical disc disease - 722.91 (Primary)
2. Elbow fracture - 812.40
3. Cervical HNP - 722.0

Treatment

1. Cervical disc disease

Notes: Refer the patient to Dr. Don Johnson at Southeastern spine Institute for evaluation of cervical spine injury. Patient should continue working with a chiropractor on extension exercises.

2. Elbow fracture

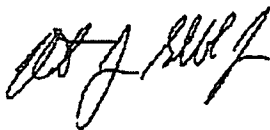
Notes: Patient should continue working on flexion extension supination and pronation exercises for his left elbow. Patient likely has some small acclut type fracture that is not able to be identified on the x-rays, likely a radial head or radial neck fracture. Patient should still limit the amount of lifting that he does with the left upper extremity.

3. Others

Referral To: Donald Johnson Orthopaedic Surgery/Spine
Reason: Eval and treat cervical DDD, disk herniation

Follow Up

4 Weeks



Electronically signed by ROBERT SCHODERBEK MD on
04/06/2014 at 10:04 PM EDT

Sign off status: Completed

OSC MI Pleasant
594 LONE TREE DR
MT PLEASANT, SC 29464-8170
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 04/04/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



NESTLER, GARY S

53 Y old Male, DOB:
Account Number: 0000221940

Home:

Guarantor: NESTLER, GARY S Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER

PCP: Allan D Lieberman, MD

Appointment Facility: OSC Mt Pleasant

03/21/2014

Robert J Schoderbek MD

Current Medications

None

Past Medical History

No Medical History

Surgical History

No Surgical History documented.

Family History

Denies cardiac, respiratory, gastrointestinal, genitourinary, and other musculoskeletal issues in the patient's family.

Social History

Tobacco Use:

Tobacco Use/Smoking Are you a:
nonsmoker.

Drugs/Alcohol:

Drugs: Denies

Alcohol Screen: Denies

Allergies

cumin

Hospitalization/Major

Diagnostic Procedure

No Hospitalization History.

Review of Systems

General/Constitutional:

Fatigue denies. Weakness denies

Weight change denies.

Musculoskeletal:

... See HPI for details.

Reason for Appointment

1. OFFICE VISIT

History of Present Illness

Symptom(s):

Patient presents today with complaints of neck, LEFT clavicle/shoulder, and LEFT elbow pain. Patient was involved in a MVA on 3/8/14 where he was rear-ended while stopped on Highway 17 N. He was driving the car and was restrained. He denies loss of consciousness. He immediately noticed pain at the lateral aspect of the elbow and forearm as well as his mid upper back. He was transported by EMS to East Cooper emergency department and x-rays were obtained of the elbow and forearm that he was told were normal. He then had a gradual onset of headache associated with neck pain. He was subsequently evaluated at Nason Medical Center where he underwent a CT scan of the cervical spine that he was told only show degenerative changes with no fracture. He was placed on Motrin, Flexeril, and Norco. The patient states he has not filled these medications yet. He continues to have pain diffusely about his cervical spine as well as anterior LEFT shoulder and LEFT elbow. He has a diffuse sense of tingling sensation about the entire LEFT hand. He has seen me in the past for his LEFT shoulder that responded to corticosteroid injection. Patient states that all the issues with his left shoulder that we are treating previously had completely resolved.

Patient states that his elbow is still quite painful with limitations in range of motion in supination and extension. He gets shooting pain that extends down his forearm into his fingers and up into his shoulder as well. Patient reports neck pain with limitations in range of motion of the neck.

Vital Signs

Ht 6 ft 1 in, Wt 195 lbs, BMI 25.72.

Examination

General Examination:

GENERAL APPEARANCE: Well-developed, well-nourished, well nourished, in no acute distress.

Mini Mental Status Exam:

ORIENTATION: patient is alert and oriented to person, place and time.

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 03/21/2014

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Cardiology Exam:

Peripheral Pulses: normal.

Psychiatry:

ATTITUDE: cooperative.

Gait and Station:

Gait normal. Station normal.

Cervical Spine:

INSPECTION: normal contour. PALPATION: paraspinal tenderness right and left, left trapezial tenderness. RANGE OF MOTION: limitation in range of motion along with left lateral bending and turning. SENSORY EXAM UPPER EXTREMITIES: abnormal tingling sensation noted extending down the left arm.

TESTS: positive Spurling's, positive direct compression post triangle.

Right shoulder:

ROM: full ROM. STRENGTH TESTING (OUT OF 5): 5/5 all RTC groups. PALPATION: no tenderness. STABILITY TESTS: all stability tests are negative. UPPER EXTREMITY EXAM: no motor or sensory deficits, sensation intact to light touch distally with 2-3 second capillary refill.

Left Shoulder Structured:

General

Wound *None noted*

Inspection *No muscle asymmetry, No scapulary winging, No atrophy*

Range of Motion

Left Forward Flexion *150*

Left Abduction *140*

Left ER at 90 *80*

Left IR at 90 *50*

Rotator Cuff Strength

Left Abduction *4+*

Left Position of Jobe *4+*

Left ER *4+*

Left IR *4+*

Left Belly Press *4+*

Impingement

Left Neer *Negative*

Left Hawkins *Negative*

SLAP

Left OBriens *Negative*

Left Mimori *Negative*

Bicep

Left Speeds *Negative*

Left Yergasons *Negative*

Instability

Left Apprehension *Negative*

Left Relocation *Negative*

Left Jerk Test *Negative*

Left Anterior Translation *Stable*

Left Posterior Translation *Stable*

Left Anterior Drawer *Good Endpoint*

Tenderness

Left AC Joint *Negative*

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderbek MD 03/21/2014

Note generated by eClinicalWorks EHR/PAI software (www.eClinicalWorks.com)

Left Bicipital Groove *Negative*
AC Joint
Left Cross Arm Adduction *Negative*
Sensation
Left *Intact to light touch distally*
Radial Pulse
Left *2+*

Right elbow:

INSPECTION: no ecchymosis, no swelling. WOUNDS: no
wounds noted. PALPATION: non-tender. RANGE OF
MOTION: full range of motion. STRENGTH: 5/5 all groups.
STABILITY: no instability. SENSATION: light touch intact.
VASCULAR: radial pulse 2+.

Left Elbow:

General

Wound *None noted*
Inspection *No ecchymosis, Swelling noted*

Tenderness

Lateral Epicondyle *Positive*
Medial Epicondyle *Positive*
Olecranon *Positive*
Resisted Wrist Extension *Pain with maneuver*
Resisted Finger Extension *Negative*

Range of Motion

Extension *20*
Flexion *100*
Supination *40*
Pronation *70*

Strength

Extension *4*
Flexion *4*
Supination *4*
Pronation *4*

Stability

Varus Stress *Stable*
Valgus Stress *Stable*

Sensation

Left *Intact to light touch distally*
Radial Pulse

Left *2+*

Right wrist:

WOUND: none noted. PALPATION (BONE): no tenderness.
RANGE OF MOTION: full range of motion. STRENGTH: full
grip strength. STABILITY: no gross instability noted.
TESTS: negative grind first carpometacarpal (CMC).
SENSATION: sensation intact all fingers distally.
VASCULAR: good capillary refill < 3 seconds.

Left Wrist:

General

Wound *None noted*
Swelling *None*

Tenderness

Snuff Box *Negative*

Patient: NESBITT, GARY S DOB:

Progress Note: Robert J Schoderbek MD 03/21/2014

Not graded by eClinicalWorks EHR/EMR Software (www.eClinicalWorks.com)

Scaphoid Tubercle *Negative*
Dorsal *Negative*
Volar *Negative*
Modified Watson Test *Negative*
Carpal Tunnel
Tinnels *Negative*
Phalens *Negative*
Pressure Test *Negative*

Range of Motion
Extension 80
Flexion 80
Ulnar Deviation 20
Radial Deviation 20

Strength
Flexion 5
Extension 5
Grip Strength *Decreased*

Sensation
Left Wrist *Intact to light touch distally*
Radial Pulse
Left 2+

Right hand:

SENSATION: light touch intact all fingers and thumb.
SENSATION: light touch intact to all fingers and thumb.
GRIP: strong. PINCH: strong. PHALEN: negative.
TINEL'S: negative. ALLEN'S: negative. THUMB
OPPOSITION normal. CERVICAL SYMPTOMS negative.
INSPECTION: no skin changes, no swelling. WOUNDS: none
present. PALPATION: non-tender throughout.
STRENGTH: full grip strength. VASCULAR: good capillary refill <
3 seconds.

Full range of motion, and strength.

Left hand:

SENSATION: tingling sensation extending into the fingers.
GRIP: moderate. PINCH: moderate. PHALEN: negative.
TINEL'S: negative. ALLEN'S: negative. 2 POINT
DISCRIMINATION Abnormal. THUMB OPPOSITION normal.
CERVICAL SYMPTOMS positive for cervical radiculopathy.
STRENGTH: decreased secondary to pain. INSPECTION: no skin
changes, no swelling. WOUNDS: none present.
VASCULAR: good capillary refill < 3 seconds. PALPATION: non-
tender throughout.

Full range of motion, and strength.

RADIOGRAPHS:

Interpretation _____.

Assessments

1. Cervical strain - 847.0 (Primary)
2. Elbow pain - 719.42
3. Elbow fracture - 812.40

Treatment

1. Cervical strain
Start FlexRite compounded, -----, 1 to 2 pumps, to affected area, Three

Patient: NESTLER, GARYS DOB:

Progress Note: Robert J Schoderbek MD 03/21/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

IMAGING: MR SPINE, CERVICAL W/O CONTRAST MRI

Notes: The patient reports that the x-rays and CT scan of the cervical spine showed some degenerative changes but nothing significant and no fractures noted. With the symptoms that he currently has within a cervical spine extending down into his left upper extremity including the shoulder, arm and hand. I think that an MRI of his neck is needed to make sure there is no soft tissue injury like a herniated disc or something to that extent they could be causing the patient's current symptoms. We will evaluate the MRI of his cervical spine and get him to see a spine specialist if needed.

Notes: Even though the x-rays of his elbow do not show any obvious fractures noted he does have a fat pad sign and elbow, which can be indicative of either a significant muscle strain or a small, occult-type fracture that is not visualized. He needs to be very gentle with his left upper extremity with no significant lifting more than 5 pounds. I want him to work on gentle range of motion exercises of his elbow to include supination, pronation, flexion and extension.

3. Outliers
Start Ibuprofen Tablet, 800 MG, 1 tablet, Orally, every 8 hours, 30 day (s); 90 Tablet, Refills 01

2 Weeks

207 2667

Sign off status: Completed

OSC Mt Pleasant

Progress Note: Robert J Schuderbek MD 07/21/2011

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594 LONEFREE DR
MT PLEASANT, SC 29464-8170
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, GARY S DOB:

Progress Note: Robert J Schoderhek MD 03/21/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

ROPER
ST. FRANCIS
PHYSICIAN PARTNERS
PCP: Allan D Lieberman, MD

NESTLER, GARY S

53 Y old Male, DOB:
Account Number: 00002213130

Home:
Guarantor: NESTLER, GARY S Insurance: B US OUT OF
STATE W PPO Payer ID: PAPER

Appointment Facility: OSC Mt Pleasant

03/11/2014

Appointment Provider: ERIN N WATROBSKI, PA

Current Medications

None

Past Medical History

No Medical History.

Surgical History

Denies Past Surgical History

Family History

Denies cardiac, respiratory, gastrointestinal, genitourinary, and other musculoskeletal issues in the patient's family.

Social History

Tobacco Use:
Tobacco Use/Smoking
Are you a nonsmoker
Drugs/Alcohol:
Drugs: Denies
Alcohol Screen: Denies

Allergies

none

Hospitalization/Major

Diagnostic Procedure

Denies Past Hospitalization

Review of Systems

General/Constitutional:
Fever denies: Medication

Compliance admits.

Allergy/Immunology:

Cough denies

Endocrine:

Glucose denies.

Respiratory:

Sleep Apnea denies, Asthma denies.

Cardiovascular:

Chest pain denies. Cardiac pacemaker or defibrillator denies. Blood clots denies.

Gastrointestinal:

Reason for Appointment

1. NEW PATIENT. Neck, LEFT clavicle, and LEFT elbow pain

History of Present Illness

Symptom(s):

What: Neck, LEFT clavicle, LEFT elbow
How: Motor vehicle collision
When: March 8, 2014
Where: Mt. Pleasant, SC
Patient presents today with complaints of neck, LEFT clavicle, and LEFT elbow pain. On the above stated date the patient states he was involved in a motor vehicle collision where he was rear-ended while stopped on Highway 17 N. He was driving the car and was restrained. He denies loss of consciousness. He immediately noticed pain at the lateral aspect of the elbow and forearm as well as his mid upper back. He was transported by EMS to East Cooper emergency department and x-rays were obtained of the elbow and forearm that he was told were normal. He then had a gradual onset of headache associated with neck pain. He was subsequently evaluated at Nason Medical Center yesterday and underwent a CT scan of the cervical spine that he was told only show degenerative changes with no fracture. He was placed on Motrin, Flexeril, and Norco. The patient states he has not filled these medications yet. He continues to have pain diffusely about his cervical spine as well as anterior LEFT shoulder and LEFT elbow. He has a diffuse sense of tingling sensation about the entire LEFT hand. He has seen Dr. Schoderbek in the past for his LEFT shoulder that responded to corticosteroid injection. He had no complaints of LEFT shoulder pain just prior to this accident.

Vital Signs

Ht 6 ft 1 in, Wt 195 lbs, BMI 25.72.

Examination

General Examination:

GENERAL APPEARANCE: alert, in no acute distress.
HEAD: atraumatic, normocephalic.
NECK: neck supple.
CHEST: normal shape and expansion.
ABDOMEN: normal.

Lower Extremity:

Patient: NESTLER, GARY S DOB:

Progress Note: ERIN N WATROBSKI, PA 03/11/2014

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GERD denies. Stomach ulcers denies.
Hematology:
Clotting disorder denies.
Peripheral Vascular:
Varicose veins denies.
Neurologic:
Balance difficulty denies.
Dermatology:
Psoriasis denies.

RANGE OF MOTION: unremarkable
INSPECTION: unremarkable.
GAIT: normal.
Extremities neurovascularly intact.
Shoulder / Upper arm:
SHOULDER: left.
INSPECTION: mild anterior soft tissue swelling, skin intact, no ecchymosis
RANGE OF MOTION: limited PROM due to pain anteriorly, tolerated to 100 degrees of flexion/abduction.
VASCULAR: no vascular compromise.
STRENGTH: normal rotator cuff at neutral.
PALPATION: no tenderness upon palpation.
DROP ARM TEST: negative.
No anterior, inferior, or posterior instability.

Elbow / Arm:

ELBOW: left.
INSPECTION: no ecchymosis, no swelling, skin intact.
PALPATION: tenderness over lateral epicondyle.
RANGE OF MOTION: tolerates flexion to 140 degrees and extension to 10 degrees.
STRENGTH: within normal limits.
NEUROVASCULAR EXAM: unremarkable.

Cervical Spine/Neck:

C SPINE EXAM: normal lordotic curvature.
RANGE OF MOTION OF NECK: limited in all directions due to pain.
SENSATIONS: reported diffuse tingling throughout entire left hand.
PARASPINAL MUSCLE SPASM: present bilaterally.

Lumbar Spine/Lower back:

INSPECTION: normal lordotic curvature of spine
LUMBAR ROM within functional limits.

Assessments

1. Cervical strain - 847.0 (Primary), DOI: 3/8/14
2. Shoulder contusion - 923.00, DOI: 3/8/14, Left shoulder
3. Elbow contusion - 923.11, DOI: 3/8/14, Left elbow
4. Shoulder pain - 719.41
5. Elbow pain - 719.42

Treatment

1. Cervical strain

Pt Instructions: I was able to review the patient's cervical spine CT scan which showed degenerative disc disease at C5-C7. Most likely this was aggravated from his motor vehicle collision. I also feel he sustained contusions to his elbow and shoulder. I feel he would benefit from a course of physical therapy as listed in the note. He was encouraged to continue Motrin as directed to diminish his inflammatory symptoms. He may also utilize the Norco and Flexeril as previously prescribed. Should his neck symptoms persist, we discussed the possibility of proceeding with an MRI scan of the cervical spine in the future to followup with a spine specialist. The patient may progress his physical

Patient: NESTLER, GARY S DOB:

Progress Note: ERIN NAVATROBSKI, PA 03/11/2014

Note: all reported (S) & (C) on this note are EMR/PM but were not documented in the EMR

activities as discomfort allows.

Referral To: Physical Therapy Olympic Physical Therapy

Reason: Cervical strain with DDD C5-C7, left shoulder/elbow/forearm contusion/strain from MVC: PT eval and treat 2-3x/week for 4 weeks for modalities, cervical ROM, cervical traction, left UE ROM/strengthening and flexibility, education for HEP

2. Shoulder pain

IMAGING: XR CLAVICLE COMPLETE(in house)

2 views of the LEFT clavicle were obtained and reviewed. X-rays revealed anatomic alignment of the sternoclavicular and acromioclavicular joints with no evidence of fracture.

WATROBSKI, ERIN N, PA 03/11/2014 05:01:45 PM EDT >

3. Elbow pain

IMAGING: XR ELBOW 2 VIEWS(in house)

AP and lateral x-rays of the LEFT elbow were obtained and reviewed. X-rays revealed no evidence of elbow joint effusion or fracture with anatomic alignment. WATROBSKI, ERIN N, PA 03/11/2014 05:02:03 PM EDT >

Procedure Codes

73000 X-RAY COLLAR BONE (SIM 30152)

73070 X-RAY ELBOW (SIM 30160)

Follow Up

prn

Appointment Provider: ERIN N WATROBSKI, PA

E. N. Watrobski, PA-C

Electronically signed by ERIN WATROBSKI PA on 03/11/2014 at 05:03 PM EDT

Sign off status: Completed

Patient: NESTLER, GARY S DOB:

Progress Note: ERIN N WATROBSKI, PA 03/11/2014

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OSC Mt Pleasant
594 LONE TREE DR
MT PLEASANT, SC 29464-8170
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, CARYS DOB:

Progress Note: ERIN N WATROBSKI, PA 03/11/2014

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

 ROPER
ST. FRANCIS
PHYSICIAN PARTNERS
PCP: Allan D Lieberman, MD

NESTLER, GARY

52 Y old Male, DOB:
Account Number: 00002211130

Home: [REDACTED]
Guarantor: NESTLER, GARY Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER

Appointment Facility: Orthopaedic Specialists Of Chas

10/01/2013

Robert J Schoderbek MD

Current Medications

None

Past Medical History

No Medical History.

Surgical History

Denies Past Surgical History

Family History

Denies cardiac, respiratory, gastrointestinal,
genitourinary, and other musculoskeletal
issues in the patient's family.

Allergies

N.K.D.A.

Hospitalization/Major

Diagnostic Procedure

Denies Past Hospitalization

Review of Systems

General/Constitutional:

Fatigue denies. Weakness denies.

Weight change denies.

Musculoskeletal:

.. See HPI for details.

Reason for Appointment

1. OFFICE VISIT. Bicep Tendon Tenosynovitis

History of Present Illness

Symptom(s):

Pt presents today with complaint of left shoulder and right wrist pain. Patient states that the left shoulder has gotten more symptomatic over the past few months. His shoulder will hurt with it placed in different positions and lifting activities. The patient is very active in relation sport activities and his symptoms seem to be present after sporting activities. Patient reports the pain as stabbing pain when his shoulder is placed in certain position and a dull on a more regular basis. Patient did some conservative measures, after the last visit, but continues to have some pain in his left shoulder. Most of the pain is in the anterior aspect of the shoulder. Patient also reports some limitations in range of motion in his shoulder as well.

Examination

General Examination:

GENERAL APPEARANCE: Patient is alert and oriented to person, place and time. Well-developed, well-nourished, in no acute distress.

Cervical Spine:

INSPECTION: normal contour.

PALPATION: non-tender.

RANGE OF MOTION: full range of motion.

MOTOR EXAM UPPER EXTREMITIES: 5/5 all groups bilaterally.

SENSORY EXAM UPPER EXTREMITIES: normal bilaterally.

TESTS: negative Spurling's, negative direct compression post triangle.

Right shoulder:

INSPECTION: no muscle asymmetry, no scapular winging, no atrophy.

ROM: full ROM.

STRENGTH TESTING (OUT OF 5): 5/5 all RTC groups.

PALPATION: no tenderness.

STABILITY TESTS: all stability tests are negative.

UPPER EXTREMITY EXAM: NVI distally.

ACTIVE ROM: full ROM.

TESTS: negative Neer and Hawkin's sign, negative Speed and yergesons sign, negative Obriens.

Patient: NESTLER, GARY DOB:

Progress Note. Robert J Schoderbek MD 10/01/2013

Note generated by: eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

WOUNDS: None noted.

Left Shoulder Structured:

General

Wound *None noted*

Inspection *No muscle asymmetry, No scapular winging, No atrophy*

Range of Motion

Left Forward Flexion *160*

Left Abduction *150*

Left ER at 90 *80*

Left IR at 90 *50*

Rotator Cuff Strength

Left Abduction *5*

Left Postition of Jobe *5-*

Left ER *5*

Left IR *5*

Left Belly Press *5*

Left Lift off *4+*

Impingement

Left Neer *Negative*

Left Hawkins *Negative*

SIAP

Left OBriens *Positive-More pain with ER than IR*

Left Mimori *Negative*

Bicep

Left Speeds *Positive*

Left Yergasons *Negative*

Instability

Left Apprehension *Negative*

Left Relocation *Negative*

Left Jerk Test *Negative*

Left Anterior Translation *Stable*

Left Posterior Translation *Stable*

Left Anterior Drawer *Good Endpoint*

Tenderness

Left AC Joint *Negative*

Left Bicipital Groove *Positive*

Left Parascapular Muscles *Negative*

Clavicle *Negative*

AC Joint

Left Cross Arm Adduction *Negative*

Sensation

Left *Intact to light touch distally*

Patient: NESTLER, CARY DOB:

Progress Note: Robert J Schoderbek MD 10/01/2013

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

Radial Pulse
Left 2+

Assessments

1. Bicipital tenosynovitis - 726.12 (Primary)
2. Adhesive capsulitis - 726.0

Treatment

1. Bicipital tenosynovitis

PROCEDURE: INJ TENDON SHEATH/LIGAMENT (20550)

Normal

PROCEDURE: DEPO MEDROL 40 MG Normal

Treatment Notes: Inject the left shoulder biceps tendon today to see if we can calm down the inflammation associated with biceps tendinitis. What the patient working on stretching exercises for his mild adhesive capsulitis in the shoulder. If things do not improve with conservative measures, then we can get him set up for an intra-articular injection into the patient's shoulder to see if that will help the symptoms. patient will contact me if he continues to have any problems with his shoulder.

2. Adhesive capsulitis

Treatment Notes:.

3. Others

Treatment Notes:.

Procedures

Shoulder Joint Injection:

Side Left.

Technique Bicipital Groove Injection- After discussing with the patient the benefits and risks of an injection, the anterior aspect of the shoulder was prepped under sterile conditions with Betadine prep. I then injected 4mL of 0.5% Marcaine, and 1 ml. being 40 mg of Depo-Medrol into the Bicipital Groove. The injection site was sterily dressed. The patient tolerated the procedure well.

Post-procedure Post-injection instruction were reviewed with the patient.

Procedure Codes

20550 INJ TENDON SHEATH/LIGAMENT

J1030 INJ METHYLPRDNISOLONE ACTAT 40 MG

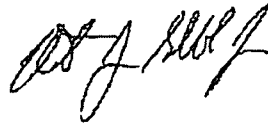
Follow Up

patient will contact me

Patient: NESTLER GARY DOB:

Progress Note: Robert J Schoderbek MD 10/01/2013

Date generated: 10/01/2013 5:00 PM Software: eChartDoctor.com



Electronically signed by ROBERT SCHODERBEK MD, MD on
10/01/2013 at 09:05 AM EDT

Sign off status: Completed

Orthopaedic Specialists Of Chas
2003 HENRY TECKLENBURG DR
CHARLESTON, SC 29414-5742
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, GARY DOB:

Progress Note. Robert J Schoderbek MD 10/01/2013

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

 **ROPER
ST. FRANCIS**
PHYSICIAN PARTNERS
PCP: Allan D Eieherman, MD

NESTLER, GARY

52 Y old Male, DOB:
Account Number: 00002213130

Home:

Guarantor: NESTLER, GARY Insurance: BCBS OUT OF
STATE W PPO Payer ID: PAPER

Appointment Facility: OSC Mt Pleasant

03/29/2013

Progress Notes: Robert J Schoderbek MD

Current Medications
None

Past Medical History
No Medical History

Surgical History
No Surgical History documented.

Family History
No Family History documented.

Social History
Tobacco Use:
Tobacco Use/Smoking
Are you a nonsmoker
Drugs/Alcohol:
Drugs: Denies
Alcohol Screen: Denies

Allergies
N.K.D.A.

**Hospitalization/Major
Diagnostic Procedure**
No Hospitalization History.

Review of Systems
General/Constitutional:
Fatigue denies. Fever denies.
Chills denies. Headache denies Weight
change denies.
Ophthalmologic:
Change in vision denies.
Endocrine:
Thyroid problem denies.
Respiratory:
Shortness of breath denies. Sleep
Apnea denies. Asthma denies.
Cardiovascular:
Leg/ankle Swelling denies; Chest
Pain denies. Blood clots in lungs denies.
Dizziness denies
Gastrointestinal:

Reason for Appointment
1. NEW PATIENT

History of Present Illness
Symptom(s):

Pt presents today with complaint of left shoulder and right wrist
pain. Patient states that the left shoulder has gotten more symptomatic
over the past few months. His shoulder will hurt with it placed in
different positions and lifting activities. The patient is very active in
relation sport activities and his symptoms seem to be present after
sporting activities. Patient reports the pain as stabbing pain when his
shoulder is placed in certain position and a dull on a more regular
basis. Patient reports right wrist pain in the anatomic snuff box that
started hurting a few weeks ago. His symptoms seemed to occur with
grasping and stretching activities.

Examination

General Examination:

GENERAL APPEARANCE: Patient is alert and oriented to person,
place and time. Well-developed, well-nourished, in no acute distress.

Mini Mental Status Exam:

ORIENTATION: patient is alert and oriented to person, place and
time.

Cardiology Exam:

Peripheral Pulses: normal.

Psychiatry:

ATTITUDE: cooperative.

Gait and Station:

Gait normal.

Station normal.

Cervical Spine:

INSPECTION: normal contour.

PALPATION: non-tender.

RANGE OF MOTION: full range of motion.

MOTOR EXAM UPPER EXTREMITIES: 5/5 all groups bilaterally.

SENSORY EXAM UPPER EXTREMITIES: normal bilaterally.

TESTS: negative Spurling's, negative direct compression post
triangle.

Right shoulder:

INSPECTION: no muscle asymmetry, no scapular winging, no

Patient: NESTLER, GARY DOB:

Progress Note: Robert J Schoderbek MD 03/29/2013

Printed by: eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)

Reflux denies. Abdominal
pain denies
Hematology:
Bleeding problems denies.
Anemia denies.
Musculoskeletal:
... See HPI for details.
Genitourinary:
Difficulty urinating denies.
Incontinence denies.
Neurologic:
Seizures denies. Weakness denies.
Numbness denies. Balance
difficulty denies.
Psychiatric:
Depression denies. Anxiety denies.
Dermatology:
Skin rash denies. Poor wound
healing denies.

atrophy.
ROM: full ROM.
STRENGTH TESTING (OUT OF 5): 5/5 all RTC groups
PALPATION: no tenderness.
STABILITY TESTS: all stability tests are negative.
UPPER EXTREMITY EXAM: NVI distally.
ACTIVE ROM: full ROM.
TESTS: negative Neer and Hawk's sign, negative Speed and
yergesons sign, negative Obriens.
WOUNDS: None noted.
Left Shoulder Structured:
General
Wound *None noted*
Inspection *No muscle asymmetry, No scapular winging, No
atrophy*

Range of Motion
Left Forward Flexion *180*
Left Abduction *170*
Left ER at 90 *90*
Left IR at 90 *60*
Left IR at 0 *110*

Rotator Cuff Strength
Left Abduction *5*
Left Position of Jobe *5-*
Left ER *5*
Left IR *5*
Left Belly Press *5*
Left Lift off *4*

Impingement
Left Neer *Negative*
Left Hawkins *Negative*

SIAP
Left Obriens *Positive-More pain with ER than IR*
Left Mimori *Negative*

Bicep
Left Speeds *Mildly Positive*
Left Yergasons *Negative*

Instability
Left Apprehension *Negative*
Left Relocation *Negative*
Left Jerk Test *Negative*
Left Anterior Translation *Stable*
Left Posterior Translation *Stable*
Left Anterior Drawer *Good Endpoint*

Tenderness
Left AC Joint *Negative*

Patient: NESLER, GARY DOB:

Progress Note: Robert J Schoderbek MD 04/29/2013

Note generated by eClinicalWorks EHR/EM Software (www.eClinicalWorks.com)

Left Bicipital Groove *Mildly Positive*
Left Parascapular Muscles *Negative*
Clavicle *Negative*

AC Joint
Left Cross Arm Adduction *Negative*

Sensation
Left *Intact to light touch distally*

Radial Pulse
Left *2+*

RADIOGRAPHS:

Interpretation _____.

Left wrist:

PALPATION (BONE): no tenderness.
RANGE OF MOTION: full range of motion.
STRENGTH: full grip strength.
STABILITY: no gross instability noted.
SENSATION: sensation intact all fingers.
VASCULAR: good capillary refill < 3 seconds.

Right Wrist:

General
Wound *None noted*
Swelling *None*

Tenderness
Snuff Box *Positive*
Scaphoid Tubercle *Negative*
Dorsal *Positive*
Volar *Negative*
Modified Watson Test *Negative*

Carpal Tunnel
Tinnels *Negative*
Phalens *Negative*
Pressure Test *Negative*

Range of Motion
Extension *80*
Flexion *80*
Ulnar Deviation *20*
Radial Deviation *20*

Strength
Flexion *5*
Extension *5*
Ulnar Deviation *5*
Radial Deviation *5*
Grip Strength *Full*

Sensation
Right *Intact to light touch distally*

Patient: NESILER, GARY DOB:

Progress Note: Robert J Schoderbek MD 03/29/2013

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Radial Pulse
Right 2+

Assessments

1. Bicipital tendinitis - 726.12 (Primary)
2. Shoulder pain - 719.41
3. Wrist pain - 719.43
4. Wrist tendonitis - 726.4

Treatment

1. Bicipital tendinitis

Start Mobic Tablet, 15 MG, 1 tablet, Orally, Once a day, 30 day(s), 30,
Refills 1

Initiate physical therapy to work on rotator cuff strengthening exercises and modalities for biceps tendinitis left shoulder. The patient was provided with a Futura wrist splint for the right wrist. Therapy should also be working on tendinitis of his wrist as well. I'll be in contact with the patient next 4-6 weeks to see how he is progressing. If he continues to have shoulder pain and we will get him set up for a cortisone injection in his biceps tendon.

2. Shoulder pain

Diagnostic Imaging:XR SHOULDER 2 VIEWS MIN. Left shoulder AP, Neer, Axillary, Scapular -Y views with a comparison Scapular-Y view of the contralateral shoulder were performed. Radiographs show a concentric position of the humeral head in relation to the glenoid with no signs of osteoarthritis of the glenohumeral joint. Coracoclavicular distance appears to be normal. AC joint shows no signs of osteoarthritis. Type II acromion noted. Apical lung fields appear to be clear. No other osseous abnormalities noted SCHODERBEK, ROBERT J, MD 03/29/2013 01:53:11 PM EDT >

Referral To:Sullivan's Island Sports Plus PT Physical Therapy

Reason:PT 2-3x week for 6 weeks. Left shoulder bicep tendonitis, Right Wrist PT modalities

3. Wrist pain

Diagnostic Imaging:XR WRIST 2 VIEWS Right Wrist 3 views shows all carpal bones line up appropriately. The signs of fractures noted. No osseous abnormalities noted SCHODERBEK, ROBERT J, MD 03/29/2013 01:53:39 PM EDT >

Procedure Codes

73030 X-RAY EXAM OF SHOULDER

73100 X-RAY EXAM OF WRIST

Follow Up

we'll contact the patient

Patient: NESFLER, GARY DOB:

Progress Note, Robert J Schoderbek MD 03/29/2013

Note generated by aCuraWorks EMR/PM Software (www.aCuraWorks.com)



Electronically signed by ROBERT SCHODERBEK MD, MD on
04/05/2013 at 10:15 AM EDT

Sign off status: Completed

OSC Mt Pleasant
594 LONE TREE DR BLDG 6,
MT PLEASANT, SC 29464-8170
Tel: 843-958-2500
Fax: 843-606-8058

Patient: NESTLER, GARY DOB:

Progress Note: Robert J Schoderbek MD 03/29/2013

Note generated by eClinicalWorks EMR/PM Software (www.eClinicalWorks.com)



Telephone Physician

Answered by

SCHODERMAN, ROBERT J.

Message Please read my previous notes to physician to help identify failure and respond please to me at this point. I do feel that the patient is improving slowly in relation to the exam

OSC Mt Pleasant 594 LONE TREE DR BUILDING 6 MT PLEASANT, SC 29464-8170 Tel: 843-958-2500 Fax: 843-606-8058		Robert J Schoderbek MD Orthopedic Surgery
Patient: NESTLER, GARY S DOB: Sex: Male Address: Phone:	01/03/2016	
Ordered Date: 03/29/2013 Assessments: Wrist pain Lab: XR WRIST 2 VIEWS(In house) Fasting: No Specimen: Clinical Info: Right Wrist		
Name Result: Received Date: Notes:	Value Right Wrist 3 views shows all carpal bones line up appropriately. The signs of fractures noted. No osseous abnormalities noted SCHODERBEK, ROBERT J, MD 03/29/2013 01:53:39 PM EDT >	Reference Range

Patient Name: NESTLER, GARY S , DOB: 01/20/1961

OSC Mt Pleasant 594 LONE TREE DR BUILDING 6 MT PLEASANT, SC 29454-8170 Tel: 843-958-2500 Fax: 843-606-8058		ERIN N WATROBSKI, PA Orthopedic Surgery
Patient: NESTLER GARY S DOB: Sex: Male Address: Phone:	01/03/2016	
Ordered Date: 03/11/2014 Assessments: Elbow pain Lab: XR ELBOW 2 VIEWS(In house) Fasting: No Specimen: Clinical Info: 2 views, left		
Name Results: Received Date: Notes:	Value AP and lateral x-rays of the LEFT elbow were obtained and reviewed. X-rays revealed no evidence of elbow joint effusion or fracture with anatomic alignment. WATROBSKI, ERIN N, PA 03/11/2014 05:02:03 PM EDT >	Reference Range

Patient Name: NESTLER, GARY S , DOB: 01/20/1961

OSC Mt Pleasant 594 LONE TREE DR BUILDING 6 MT PLEASANT, SC, 29464-8170 Tel: 843-958-2500 Fax: 843-606-8058		ERIN N WATROBSKI, PA Orthopedic Surgery
Patient: NESTLER, GARY S DOB: Sex: Male Address: Phone:	01/03/2016	
Ordered Date: 03/11/2014 Assessments: Shoulder pain Lab: XR CLAVICLE COMPLETE(In house) Fasting: No Specimen: Clinical Info: 2 views, left		
Name Result: Received Date: Notes:	Value 2 views of the LEFT clavicle were obtained and reviewed. X-rays revealed anatomic alignment of the sternoclavicular and acromioclavicular joints with no evidence of fracture. WATROBSKI, ERIN N, PA 03/11/2014 05:01:45 PM EDT >	Reference Range

Patient Name: NESTLER, GARY S , DOB: 01/20/1961

OSC Mt Pleasant 594 LONE TREE DR BUILDING 6 MT PLEASANT, SC 29464-8170 Tel: 843-958-2500 Fax: 843-606-8058		Robert J Schoderbek MD Orthopedic Surgery
Patient: NESTLER, GARY S DOB: Sex: Male Address: Phone:	01/03/2016	
Ordered Date: 05/02/2014 Assessments: Elbow fracture Lab: XR ELBOW COMPLETE, 3 VIEWS MIN.(in house) Fasting: No Specimen: Clinical Info: left, 3 views		
Name Result: Received Date: Notes:	Value 	Reference Range
Left elbow xrays, 4 views, show no obvious signs of fracture. Appropriate alignment noted. No osseous abnormalities noted. SCHODERBEK, ROBERT J, MD 05/02/2014 04:27:53 PM EDT >		

Patient Name: NESTLER, GARY S , DOB: 01/20/1961

Imaging Specialists

1241 Woodland Avenue Mt. Pleasant, SC 29464 Phone: 843-881-4020 Fax 843-881-7515

PATIENT NAME: GARY NESTLER
GENDER: Male
EXAM DATE: 03/28/2014
MRN: NMC222840
DATE OF BIRTH:
REFERRING DR: SCHODERBEK JR, MD, ROBERT
CC:

CONTRAST: none

PROCEDURE: MRI CERVICAL SPINE W/O CONTRAST

INDICATIONS:
847.0

TECHNIQUE:

The patient was studied on a Siemens Open 3T Verio MRI System at Imaging Specialists of Charleston. Multiple sequences and imaging planes were obtained.

COMPARISON:
None

FINDINGS:

There is slight reversal of the normal cervical lordosis. The vertebral body heights and marrow signal are normal. The cervical spinal cord is normal in signal and morphology. Visualized portions of the skull base are unremarkable. There is no paraspinal soft tissue abnormality.

C1-2: Evaluated on sagittal views only and appears normal.

C2-3: Mild left neural foraminal narrowing secondary to uncovertebral and facet hypertrophy.

C3-4: Moderate to severe bilateral neural foraminal narrowing secondary to uncovertebral and facet hypertrophy.

C4-5: Moderate bilateral neural foraminal narrowing and mild central canal narrowing secondary to uncovertebral and facet hypertrophy as well as a small posterior disc osteophyte complex.

C5-6: Moderate to severe bilateral neural foraminal narrowing and moderate central canal narrowing secondary to uncovertebral and facet hypertrophy as well as a small posterior disc osteophyte complex. A small

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R. 435

Imaging
Specialists

1241 Woodland Avenue Mt. Pleasant, SC 29464 Phone: 843-881-4020 Fax 843-881-7515

PATIENT NAME: GARY NESTLER
GENDER: Male
EXAM DATE: 03/28/2014
MRN: NMC222840
DATE OF BIRTH:
REFERRING DR: SCHODERBEK JR, MD, ROBERT
CC:

CONTRAST: none

superimposed left paracentral disc protrusion is noted.

C6-7: Moderate right and moderate to severe left neural foraminal narrowing and mild central canal narrowing secondary to uncovertebral and facet hypertrophy as well as a left paracentral disc osteophyte complex.

C7-T1: Mild left neural foraminal narrowing secondary to uncovertebral and facet hypertrophy.

CONCLUSION:

1. Moderate to severe bilateral neural foraminal narrowing at C3-C4 with possible contact of the bilateral exiting nerve roots.
2. Moderate to severe bilateral neural foraminal narrowing at C5-C6 with possible contact of the bilateral exiting nerve roots.
3. Moderate to severe left neural foraminal narrowing at C6-C7 with possible contact of the exiting left nerve root.
4. Additional mild to moderate degenerative changes as detailed above.

Aron D. Rosenthal, MD

03/28/2014 02:27 PM

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R. 436



1106 Cluck Dawley Blvd., Suite 200 Mt. Pleasant, SC 29464

Patient Name: Gary S Nestler

Encounter Date: 4/9/2014

Date of Birth:

Account Number: 760770

Chief Complaint: Cervical pain with radiation to the right upper extremity.

History of Present Illness: This is a 53-year-old white male who was involved in a motor vehicle accident 03/08/14. He was hit from behind by a pickup truck and has had symptoms ever since. He reports he had no issues prior to this accident. He describes his complaints as 50% neck 50% arm pain primarily burning in nature radiating through the cervical spine, mid back and left upper extremity.

His symptoms are aggravated by sitting, standing, rising from sitting, walking, lying on his side or back, driving, coughing or sneezing. He gets relief with sitting perfectly upright. He has had evaluation of his left shoulder due to limited elbow range of motion, trouble with supination and limited shoulder range of motion.

He has seen Dr. Robert Schoderbek who referred him to us today for further evaluation of the neck. He has had chiropractic adjustments with minimal relief. He has had physical therapy treatment with temporary relief as well. He has not had any previous cervical injections or prior cervical surgery.

Past Medical History: Unremarkable per patient report. He reports he may have had a mild concussion after the accident 03/08/14. Otherwise he has no medical conditions.

Current Medications: Hydrocodone 5 mg-acetaminophen 325 mg tablet Oral, cyclobenzaprine 10 mg tablet Oral, ibuprofen 600 mg tablet Oral, flurbiprofen (bulk) Powder Misc, Ibuprofen 800 mg tablet Oral.

Drug Allergies: No known allergies.

Family History: Unknown per patient report.

Personal and Social History: He has never had a blood transfusion. He denies drinking alcohol. He denies presently or past smoking. He is currently employed but has been out of work for about a week due to his symptoms.

Review of Systems: Musculoskeletal: Neck pain, stiffness; Neurological: Numbness, headache. All other systems are negative. He reports no bowel or bladder incontinence, fevers, chills, sweats, chest pain, shortness of breath, dizziness or vision changes. His primary care physician is Dr. Allan Ueberman. He is referred by Dr. Robert Schoderbek.

Physical Examination: This is a 53-year-old white male in no acute distress. He is 6 feet 1 inch and weighs 195 pounds. He is alert and oriented x3 with full affect. Skin: No lesions or dysvascular skin changes. Cardiovascular: 2+ radial pulses bilaterally. Musculoskeletal: He is right handed. He has weakness in his left grip strength about 3+ to 4/5. He has increased pain with all left upper extremity exams including biceps, triceps and deltoid exam, although this strength

1 of 2
DICTATED, NOT READ

Patient Name: Nestler, Gary S
DOB:

seems to be symmetrical. He is neurologically intact.

Imaging: AP, lateral, flexion and extension plain film x-rays were updated today and show degenerative changes with spondylosis noted at 5-6 and 6-7. There are no apparent acute fractures.

Patient is accompanied by a cervical MRI scan dated 03/28/14 which shows disc herniation at the C5-6 level. He does not have any abnormal cord signal changes.

No EMG nerve conduction testing.

Diagnosis Codes:
722.0 DISPLACED CERVICAL INTERVERT DISC
723.1 CERVICALGIA

Impression: Probable cervical strain, status post motor vehicle accident 03/18/14.

Treatment Plan: This patient is referred to us by orthopedist, Dr. Rob Schoderbek. I have reviewed his MRI from 03/28/14. I do not see any indication of need for surgical intervention. I do not see any significant disc herniation or neural impingement. I would suggest he continue with nonoperative treatment to include physical therapy and chiropractic. I would be glad to see him back at any point in the future.

The patient is instructed to return if pain or symptoms arise.

Donald R. Johnson, II, MD

Seen By: Donald R. Johnson, II, MD

Date: 4/15/2014
DRJ/CEB/jbe

X-RAY REPORT:
AP, lateral, flexion and extension plain film x-rays were updated today and show degenerative changes with spondylosis noted at 5-6 and 6-7. There are no apparent acute fractures.

CC: Robert Schoderbeck, MD

2 of 2
DICTATED, NOT READ

R. 438

PATIENT PRODUCT AGREEMENT & RX
DO NOT COVER BARCODE

ORTHOPAEDIC SPECIALISTS OF CHARLEST

DJO
HealthCare Services



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2213130

ORDER #
PREAUTHORIZATION #

1 PRESCRIPTION HPC 1-13908 79-87037 CELLULOSE GELATIN, ALB, L		2 Doctor Name <u>Schneider 6879</u> Doctor NPI # _____ By my Signature, I am prescribing the item listed above, in my judgment, the above-prescribed item is medically indicated and necessary and consistent with current accepted standards of medical practice and treatment of this patient's physical condition. 3 Doctor's Signature _____ NO SIGNATURE STAMPS FOR MEDICARE Date <u>3/29/2013</u> MUST BE ON OR BEFORE DATE OF SERVICE	
Patient Last Name <u>Wishler</u> MI _____ Patient First Name <u>GARY</u>		4 Patient Diagnosis ICD-9 Code # <u>729.13</u> (MANDATORY) LIMB: RIGHT ☒ LEFT ☐ N/A ☐ REQUIRED Date of Injury _____ Required for all injury claims.	

BILL ONLY ☐		5 PATIENT INFORMATION (MANDATORY) BLOCK LETTERS ONLY		7 WORKER'S COMP ☐ AUTO ☐	
Billing Address _____ Apt. # _____ City _____ State _____ Zip _____ Phone (Home) (____) _____ - _____ (WK) (____) _____ - _____ Sev ☐ M ☐ F Patient SSN _____ Date of Birth _____ Relationship to Insured _____ ☐ Self ☐ Spouse ☐ Child Emergency Contact _____ Relationship _____ Phone (____) _____ - _____		Claim No. _____ Employer Name _____ Employer Address _____ City _____ State _____ Zip _____ Employer Phone (____) _____ - _____ Adjustor Name _____ Adjustor Phone (____) _____ - _____		6 PRIMARY INSURANCE INFORMATION Guarantor's Name _____ Insurance Co. Name _____ Address _____ City _____ State _____ Zip _____ Phone (____) _____ - _____ Policy # _____ Group # _____ INSURANCE CARD ATTACHED ☐ Date of Birth _____	
		SECONDARY INSURANCE INFORMATION Guarantor's Name _____ Insurance Co. Name _____ Address _____ City _____ State _____ Zip _____ Phone (____) _____ - _____ Policy # _____ Group # _____ INSURANCE CARD ATTACHED ☐ Date of Birth _____			

8 I permit a copy of this authorization to be as valid as the original. I agree to use all products only in the manner for which they were intended and not to attempt to make any modifications or changes of any kind or description in the product. These products are prescription only. These products are to be used only as directed by my Health Care Provider. I agree that DJO LLC is not responsible for defects in, or damages caused by, non-DJO, LLC products.

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I authorize DJO, LLC, or its Business Partners to deliver and administer as necessary, the product and treatment prescribed by my Health Care Provider, and I acknowledge that I have received the product and such services. I authorize DJO, LLC, or its Business Partners, to submit a claim for such product to my insurer on my behalf, and I assign the benefits payable by my insurer for such product to DJO, LLC, or its Business Partners. I authorize my Health Care Provider and DJO, LLC, or its Business Partners, to release any of my medical information required for my insurer to process the claim. I understand that I am responsible for, and I agree to pay, any portion of the amount due for such product not paid by my insurer, whether resulting from deductibles, co-pay, or otherwise. I acknowledge that I have received and understand my Patient Rights and Responsibilities and the CMS supplier standards on the reverse side of this form. I also acknowledge that I have received and understand the information included on the last of form entitled "Important Information About The Medical Product You Are About To Receive."

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Cardholder _____ Card Number _____ Cardholder Signature _____	Amount _____ Expiration Date _____

R. 439

GARY S WESTLER
 GUA#: 0210-1993
 GARY S WESTLER
 SEX: M DOB: 08/22/11
 REF DR: 09:50A Appt Type: OV
 Phys#:0080331 Phys Name: SCHODERBERG, ROBERT
 Reason: left elbow
 Pri Ins: BCSS OUT OF STA
 Sec Ins:
 Copay:
 Pt Bal: 0.00
 Pharmacy: CVS

MSR: 49168560
 PTF: 22-13-13:0
 TC: PT

PH: (841)-478-0927
 AGE: 53 years
 Chart ID: No Chart Found

DxCode POS	Dx Cd	Dx Description
07/11/2014	72632	LATERAL EPICONDYLITIS
07/11/2014	72291	DISC DISORD NEC&NOS-CERV
07/11/2014	J543	RANTAL NERVE LESION
05/02/2014	81240	CUSD FX LOW HUMERUS NOS
05/02/2014	7220	CERV DISC DISPLACEMENT
01/21/2014	8470	NECK SPRAIN
Global POS	PROV	DATA GlobalDate PhysName

0

Flex 120 -2

Ext 10 -1

Sup - 70

Prv 70 -1

4%

None motor

Radial 30% .25% 7.5%

.25
 .30
 .00

Ulnar 7K20 1.5%

9.0

13% → 8%



Coastal Therapeutics PA

5. Long Point Road
Suite 270
Mount Pleasant, SC 29464
Phone: 843.884.4783
M-F 8:00 am - 5:30 pm

Upper Extremity Re-evaluation and Progress Note

Patient: Curry Neetler Physician: Dr Schoderbek Date: 6/20/14
Diagnosis: CUB Tarsal epicondylitis, PIN entrapment
Date of Onset: 3/20/14 Date of Surgery: _____

Right	Left	6/20/14	5/27/14
AROM	FROM	AROM	FROM
Shoulder Flex/Ext			
Abd			
ER/IR			
Elbow Ext/Flex	71/38°	25/110	
Forearm Sup/Pro			
Wrist Ext/Flex			
RD/UD			
Index MP			
PIP			
DIP			
Long MP			
PIP			
DIP			
Ring MP			
PIP			
DIP			
Small MP			
PIP			
DIP			
Thumb MP			
IP			
Radial Abduction			
Adduction			
Opposition			

Grip Strength	Right	Left
#1		
#2		
#3		
#4		
#5		
Pinch		
Thumb Index		
3-few Chuck		
Lateral		

Static 2-point Discrimination										
	Thumb		Index		Long		Ring		Small	
	R	U	R	U	R	U	R	U	R	U
Right										
Left										

Comments: Dr Schoderbek, Curry has been seen in therapy for pain modulation & ROM exercises, approximately 4 days ago he extended his forearm to open a car door and felt/heard a pop. He had a significant increase in pain since that happened. His ROM has improved but he still lacks full extension. We would like to continue to further address ROM and initiate gentle strengthening per physician's recommendations.

Continue Therapy with Physician's recommendations: therapy per your approval
Continue Therapy as recommended in above progress note. gentle strengthening per physician's recommendations
Frequency: 1-3 times Duration: 8 weeks
Discontinue Therapy.

Physician's Signature: _____

(Please fax back 843-884-1479) 8-11-14



Coastal Therapeutics PA

590 Long Point Road
Suite 270
Mount Pleasant, SC 29464
Phone: 843.884.4783
M-F 8:00 am - 5:30 pm

Upper Extremity Re-evaluation and Progress Note

Patient: Gary Neather Physician: Dr. Schoderbek Date: 5/12/14
Diagnosis: Lateral epicondylitis, PIN entrapment
Date of Onset: 3/8/14 Date of Surgery: _____

Right	Left	5/2/14	5/15/14
AROM	FROM	AROM	FROM
Shoulder Flex/Ext			
Abd			
ER/IR			
Elbow Ext/Flex	25/110	20/90	
Forearm Sup/Pro			
Wrist Ext/Flex			
RD/UD			
Index MP			
PIP			
DIP			
Long MP			
PIP			
DIP			
Ring MP			
PIP			
DIP			
Small MP			
PIP			
DIP			
Thumb MP			
IP			
Radial Abduction			
Adduction			
Opposition			

Grip Strength	Right	Left
#1		
#2		
#3		
#4		
#5		
Pinch		
Thumb Index		
Jaw Clench		
Lateral		

Static 2-point Discrimination										
	Thumb		Index		Long		Ring		Small	
	R	U	R	U	R	U	R	U	R	U
Right										
Left										

Comments: Dear Dr. Schoderbek - Gary has been seen in therapy 3 visits with the focus of therapy on pain relief and improving ROM. As a result his elbow flexion has slightly improved but extension has slightly decreased. He continues to report a significant amount of pain in the elbow & forearm. He was issued a wrist extension splint to rest the forearm extensors. His pain is interfering.
 o Continue Therapy with Physician's recommendations: with functional use of UE.
We will continue to work on pain relief & improve ROM per your approval.
 o Continue Therapy as recommended in above progress note. Thank you,
 Frequency: 2-3 times Duration: 12 weeks
 o Discontinue Therapy. Joanne McTavish MD

Physician's Signature: _____

(please fax back 843-884-1979)



Coastal Therapeutics PA

570 . . . Point Road
 Suite 170
 Mount Pleasant, SC 29464
 Phone: 843.884.4783
 M-F 8:00 am - 5:30 pm

Upper Extremity Re-evaluation and Progress Note

Patient: Graynestler Physician: Dr. Schuderbek Date: 5/27/14
 Diagnosis: Central epicondylitis, PIN entrapment
 Date of Onset: 3/8/14 Date of Surgery: _____

Right	Left	5/27/14	5/15/14
AROM	FROM	AROM	FROM
Shoulder Flex/Ext			
Abd			
ER/IR			
Elbow Ext/Flex	25/110	20/90	
Forearm Sup/Pro			
Wrist Ext/Flex			
RD/UD			
Index MP			
PIP			
DIP			
Long MP			
PIP			
DIP			
Ring MP			
PIP			
DIP			
Small MP			
PIP			
DIP			
Thumb MP			
IP			
Radial Abduction			
Adduction			
Grasping			

Grip Strength	Right	Left
#1		
#2		
#3		
#4		
#5		
Flash		
Thumb Index		
3-Jaw Chalk		
Latent		

Static 2-point Discrimination										
	Thumb		Index		Long		Ring		Small	
	R	U	R	U	R	U	R	U	R	U
Right										
Left										

Olympic Physical Therapy, LLC

Kent Holden Jr., PT

Leo M. Albano, PT

March 14, 2014

To: Dr. Schodartek
Re: PT patient- Gary Nestler

DOB:

From: Beth A. Marks, MSPT

Dr. Schodartek,

Thank you for your recent physical therapy referral of patient Gary Nestler, who was initially seen here at Olympic Physical Therapy on March 14, 2014 with a diagnosis of cervical strain with DDD C5-C7. Strain due to rear-end MVA. Patient reports paresthesia in left hand, soreness in left LE, sore in neck, slight HA. Sleep is interrupted. Difficulty with inspiration with pain on posterior ribs left > right.

On examination, he presented with the following:

1. Self-rated pain: 3/10- best, 4.5/10- average, 7-8/10- worst
2. Initial observations: forward head, forward shoulders, stiff gait
3. ROM: WFL except cervical AROM: ext 10 degrees with pain, flexion 6 degrees with pain, left rotation 30 degrees with pain, right rotation 28 degrees with pain, left LP 6 degrees with pain, right LP 13 degrees with pain.
4. Strength: WFL except power grip R/L 60 psi: 10 psi, forward trunk flexion to mid-shin
5. Sensation: Intact to light touch; altered left hypersensitive entire upper quarter
6. Special tests: sharp purser (-), Spurling (+), C5-T1 myotomes decreased, L1-S2 myotomes decreased L > R
7. Palpation/Joint Mobility: TTP- C2-C7 SP, left UT, sub occipitals, infra

Patient is a 53 y/o male referred to Olympic Physical Therapy and presents with head, neck, BUE, and BLE pain S/P rear-end MVA. He presents with global tenderness and hypersensitivity left > right, decreased ROM, and decreased strength left > right. Patient would benefit from skilled PT to address dysfunction, increase ROM, and increase strength. Patient has an excellent rehab prognosis as long as he is compliant with his PT program.

STG to be met by 4/14/14 in order to promote function, prevent future injury, and increase independence with ADL's:

1. Independent HEP
2. 30 degrees of total sagittal AROM (flexion and extension)

LTG to be met by 5/14/14 in order to restore prior level of function:

1. 75 degrees rotation AROM bilateral without pain
2. 65 psi grip strength bilateral

Plan: Treatments here at Olympic PT 2-3 x/week x 6-8 weeks in order to achieve above listed short and long term goals. Specific focus will be therapeutic exercises, home program, manual therapy, modalities as indicated and functional retraining.

Best Regards,

Nathan Mansell / Beth A. Marks, MSPT
Nathan Mansell, SPT/Beth A. Marks, MSPT

1478 Long Grove Drive
Mount Pleasant, SC 29464
Phone: 843-216-3534 • Fax: 843-216-3576

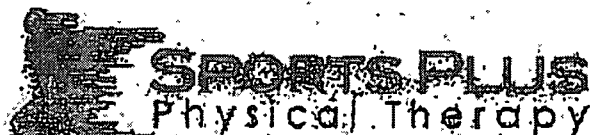
Located in Seaside Farms, Just off the IOP Connector

PAGE 02/02

OLYMPIC

03/26/2014 05:52PM 0432163576

R. 444

Physician Follow-Up / Re-Evaluation / DischargeDate: 8/16/13Patient's DOB: _____ Reporting Period Dates: 4/1/13 - 4/11/13Patient's Name: Gary Nestler Physician: R. SchoderbekDiagnosis: ① Elbow / bicep tendinitis Number of Visits: 3② wrist pain

Patient's treatment has consisted of:

PT evaluation, C, E-stim, ultrasoundObjective Measurements/Progress: Last visit, no pain + Pt wanted to
try on his own - did not return p.Assessment/Progress: ↓Plan/Goals/Reason for DC: D/C - Pt did not return + preferred to do
exs on his own.

Thank you very much for this referral. Please feel free to contact our clinic if you have any questions or concerns regarding this patient's treatment.

New Physician's orders or written comments: _____ Frequency & Duration: _____

Therapist signature: [Signature] Physician signature: [Signature] 8-11-13

306 Station 22-1/2 Street • Sullivan's Island, SC 29482 • Phone (843) 883-0064 • Fax (843) 883-0064 • www.csmi.org



306 Station 22 1/2 Street
Sullivan's Island, SC 29482
Phone: (843) 883-0054
Fax: (843) 883-4064

PHYSICAL THERAPY EVALUATION

Patient: Nestler, Gary
Date: 04/01/2013
Date of Birth:
Physician: Dr. Schneiderbek
Diagnoses: Left shoulder pain and right wrist pain.

SUBJECTIVE:

The patient states that he injured his left shoulder approximately 4 weeks ago while pulling some luggage out of a compartment on an airplane. He states that he injured his right radial wrist approximately 2 weeks ago while doing something that required a pulling and twisting motion. His current pain rating is approximately 2-3/10 at worst.

MAJOR COMPLAINTS: Currently consists of increased pain in the left shoulder with any overhead reaching or attempt at exercise or sports. He complains of increased right wrist pain with any overuse of the wrist.

ASSISTIVE DEVICE: The patient presents to therapy today wearing a right wrist splint. He states he has been wearing this as much as possible for the last week or so.

MEDICATION: Currently taken includes Motrin.

OCCUPATION: Consultant.

HOBBIES: Include basketball, football, and tennis.

DIAGNOSTIC TESTS: The patient states that he has had x-rays taken of the left shoulder and the right wrist. Both of which were negative per patient's report.

OBJECTIVE:

ROM: The patient has full active range of motion in bilateral shoulders and throughout his right wrist. He does report pain in his anterior left shoulder with internal rotation and in his right wrist with ulnar deviation.

SPECIAL TESTS: Negative Speed's test of the left shoulder. Positive Hawkins-Kennedy of the left shoulder. Negative empty can of the left shoulder. Negative Finkelstein's test of the right wrist.

STRENGTH: Not tested.

PALPATION: The patient is point tender at the snuff box of the right wrist and at the left bicipital groove.

Nesler, Gary

04/01/2013

ASSESSMENT:

The patient's signs and symptoms are consistent with mild right De Quervain's tenosynovitis and mild long head bicep tendinitis.

GOALS: To be met by discharge:

1. The patient will regain full and pain-free active range of motion of his left shoulder and right wrist.
2. The patient will exhibit 5/5 strength throughout all left shoulder groups and all right wrist groups without exacerbation of symptoms.
3. The patient will be able to return to exercise and sport activities without limitations and without increased pain.
4. The patient will be independent with a home exercise program and control of symptoms.

PLAN:

Continue treatment 3 x per week. Treatment will include therapeutic exercise, manual therapy, ultrasound, electrical stimulation, heat, iontophoresis, and ice.

Thank you for this referral.

Michael Meseck, MPT, OMT-C
Michael Meseck, MPT



Physician's Signature

ruk/mv/mn



Instructions to Viewing Images

Enter the following web address:

<https://imageportal.nasonmedical.com/>

You will be prompted to enter the Code and Key below:

Patient Name: NESTLER, GARY

Code: 881353

Key: CWFRPSOLYS

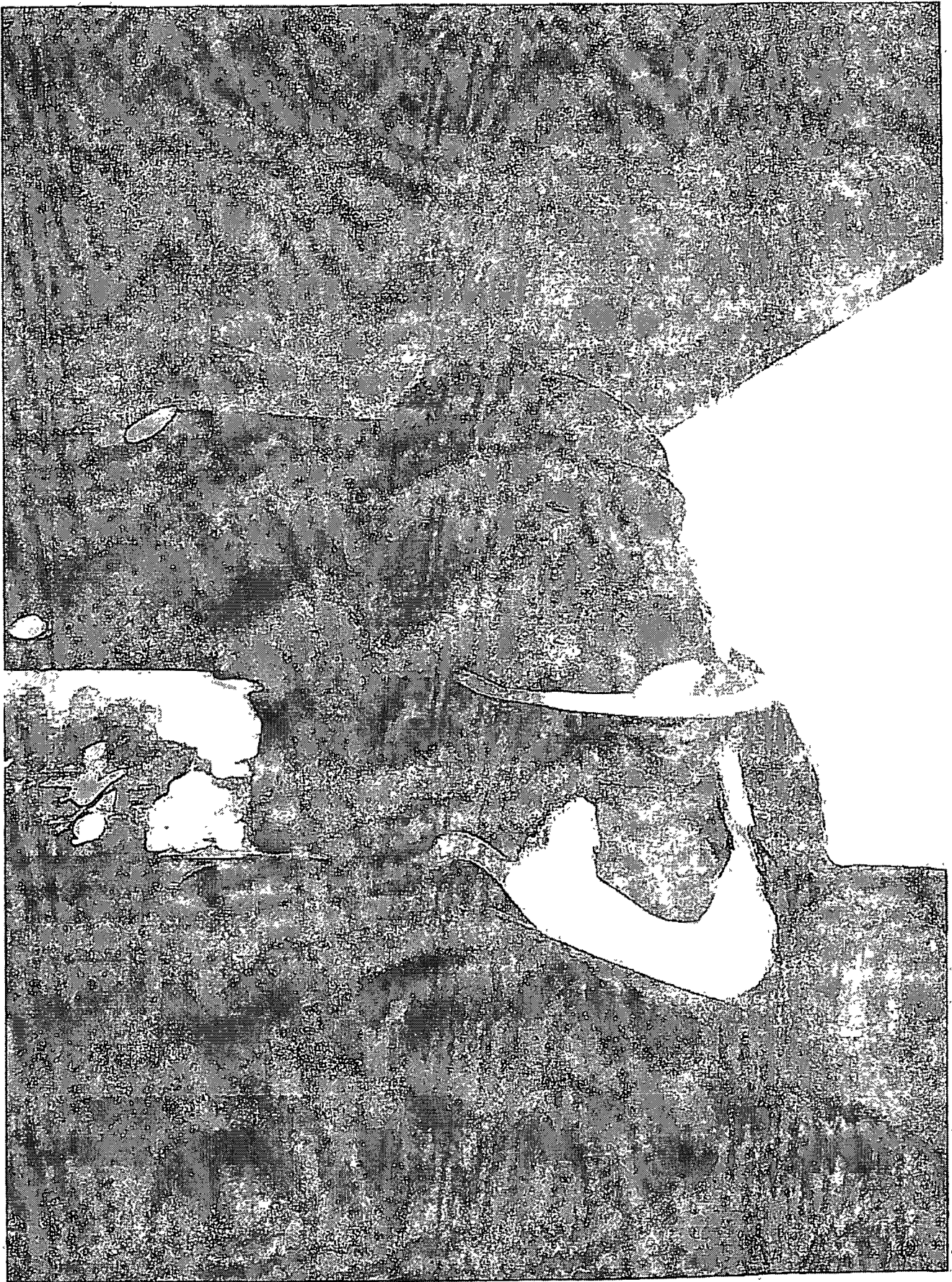
Procedure: CT C-SPINE

Date: 03/10/14

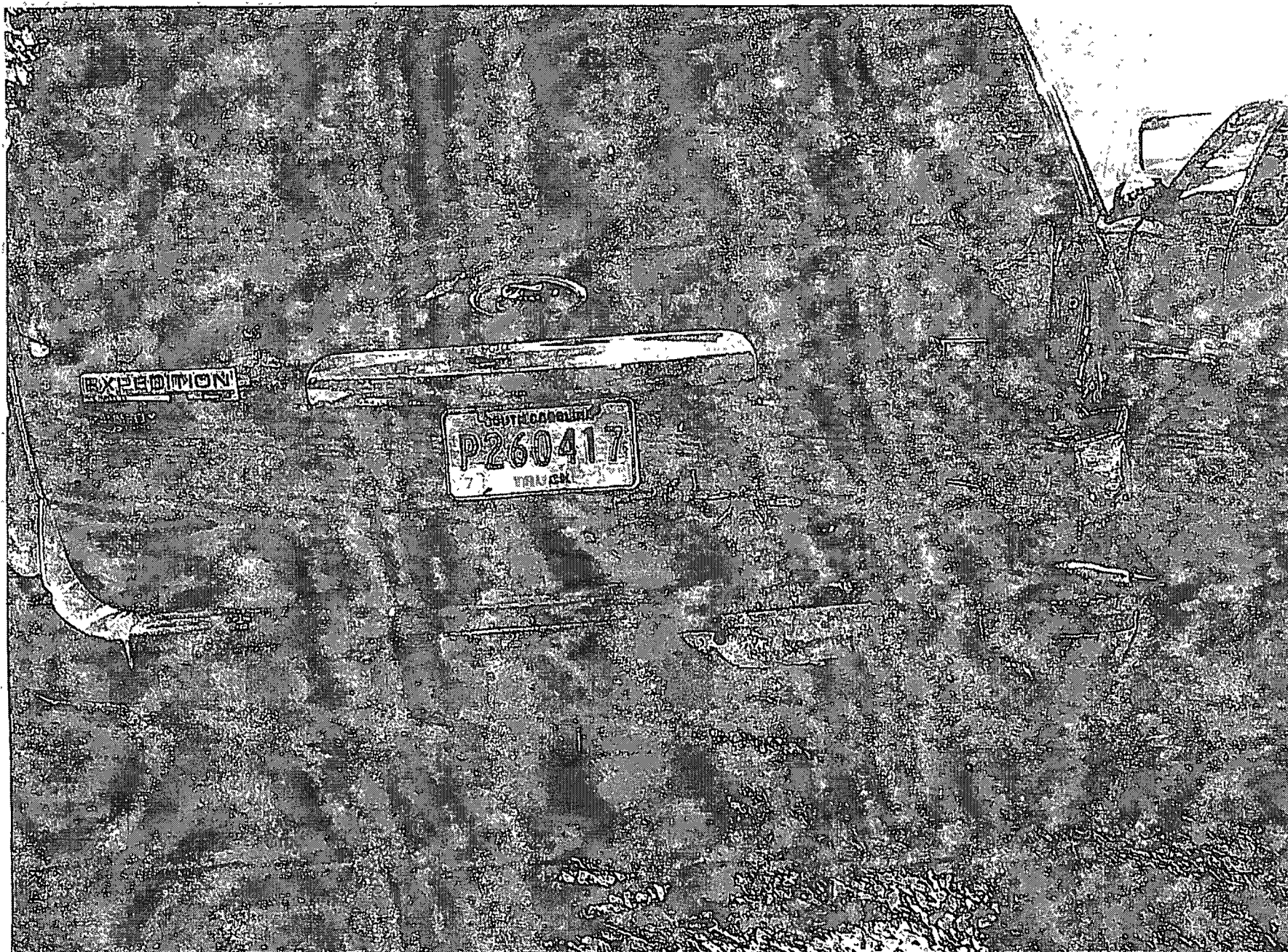
Once you click submit you will have the option to Download Exe, Download Zip with or without viewer. If you have security issues with your computer you will need to select Download Zip with images and viewer, select run and extract images to a folder. If there are no security issues with computer you can select Download Exe and run or save the program. Agree with the terms and conditions and Images will appear. Images can only be viewed on a Windows PC and can not be viewed on a MAC computer. The code and key are valid for 60 days, if you need to access your Images after 60 days please call the facility and request a new code and key.

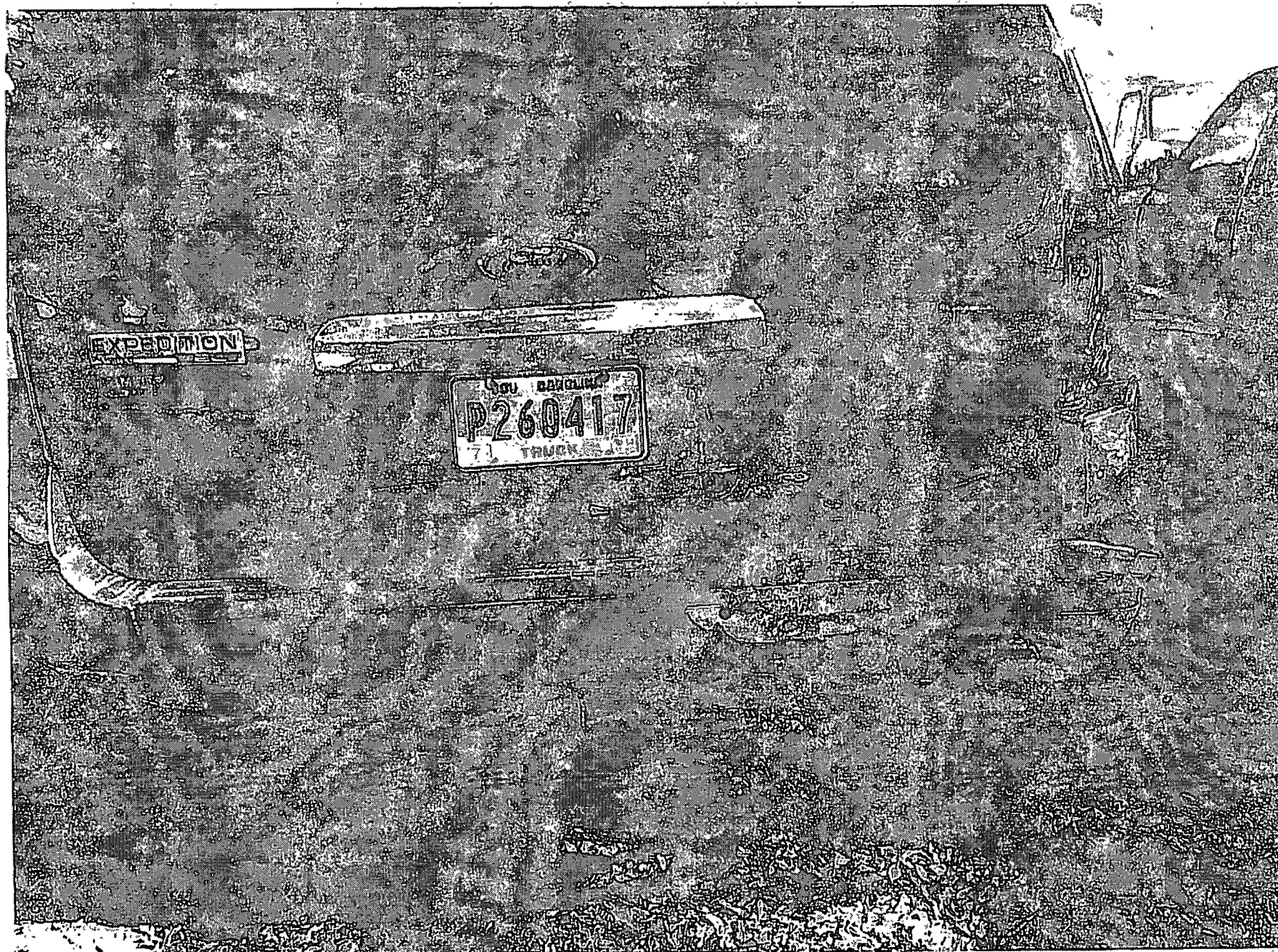
If you have any problems, please do not hesitate to call the Imaging Department at Nason Medical Center @ 843-300-3500 and ask to speak with an Imaging Technologist.

Thank you for choosing Nason Medical Center, we look forward to satisfying your medical needs in the future.



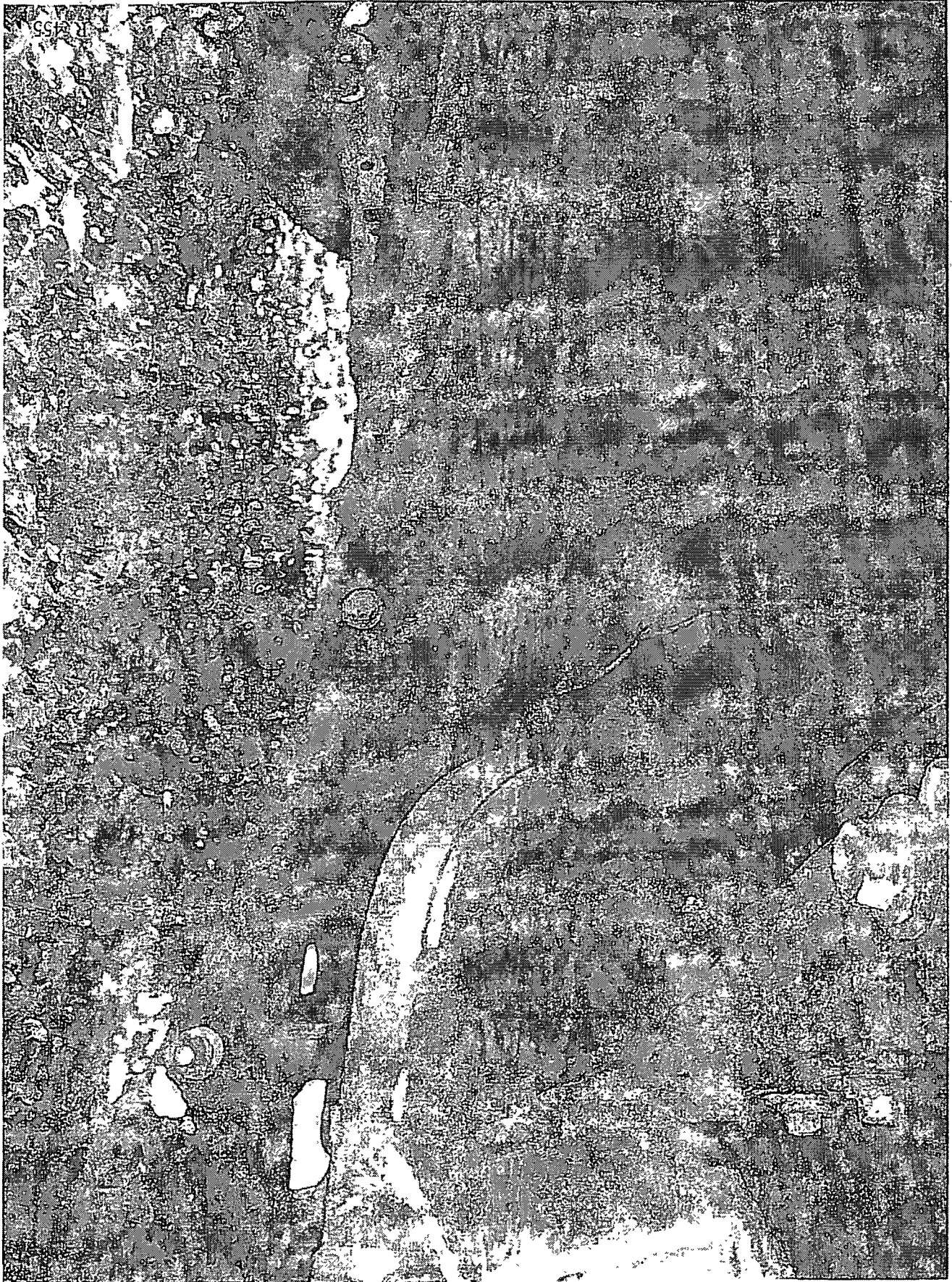


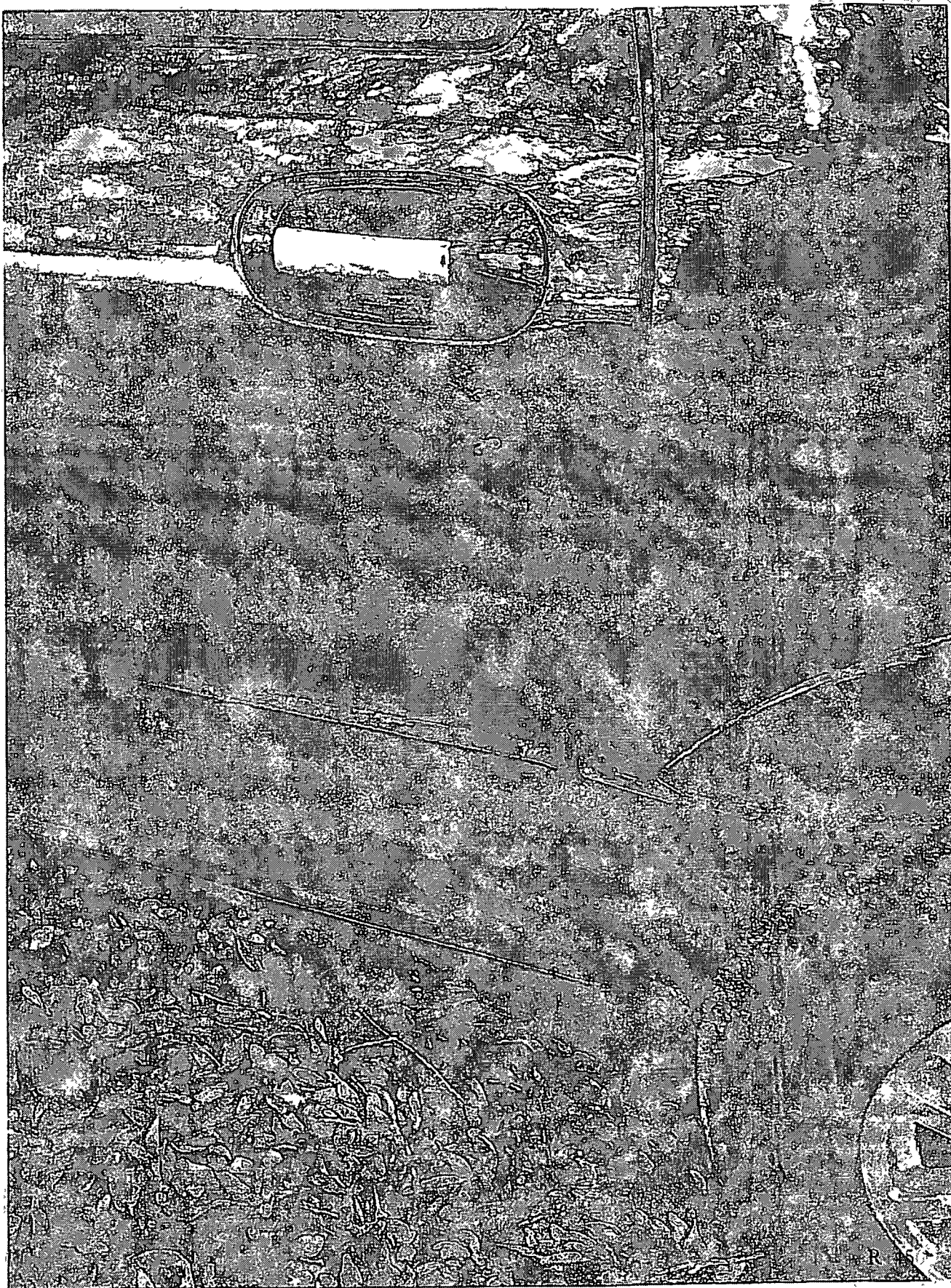






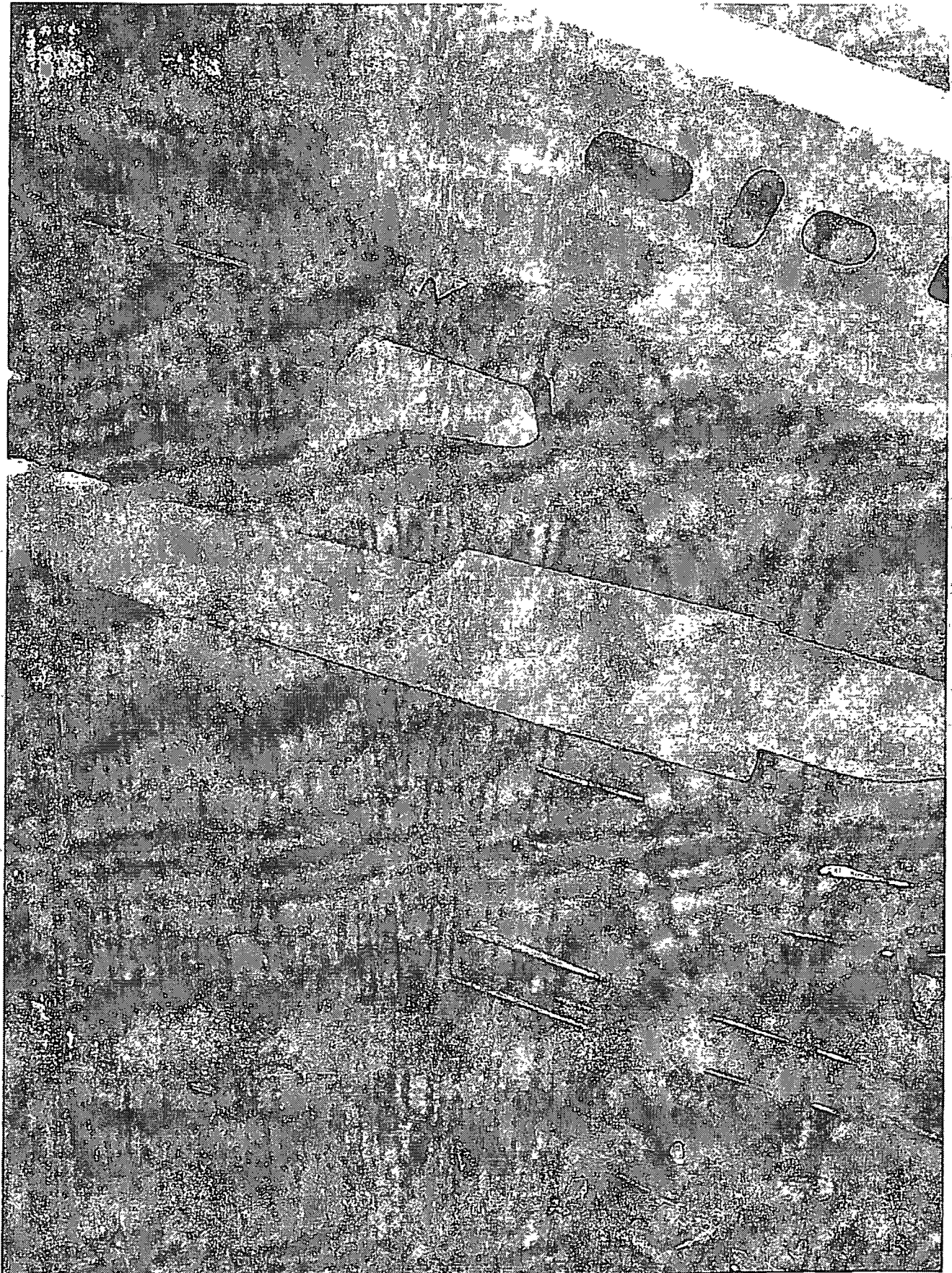




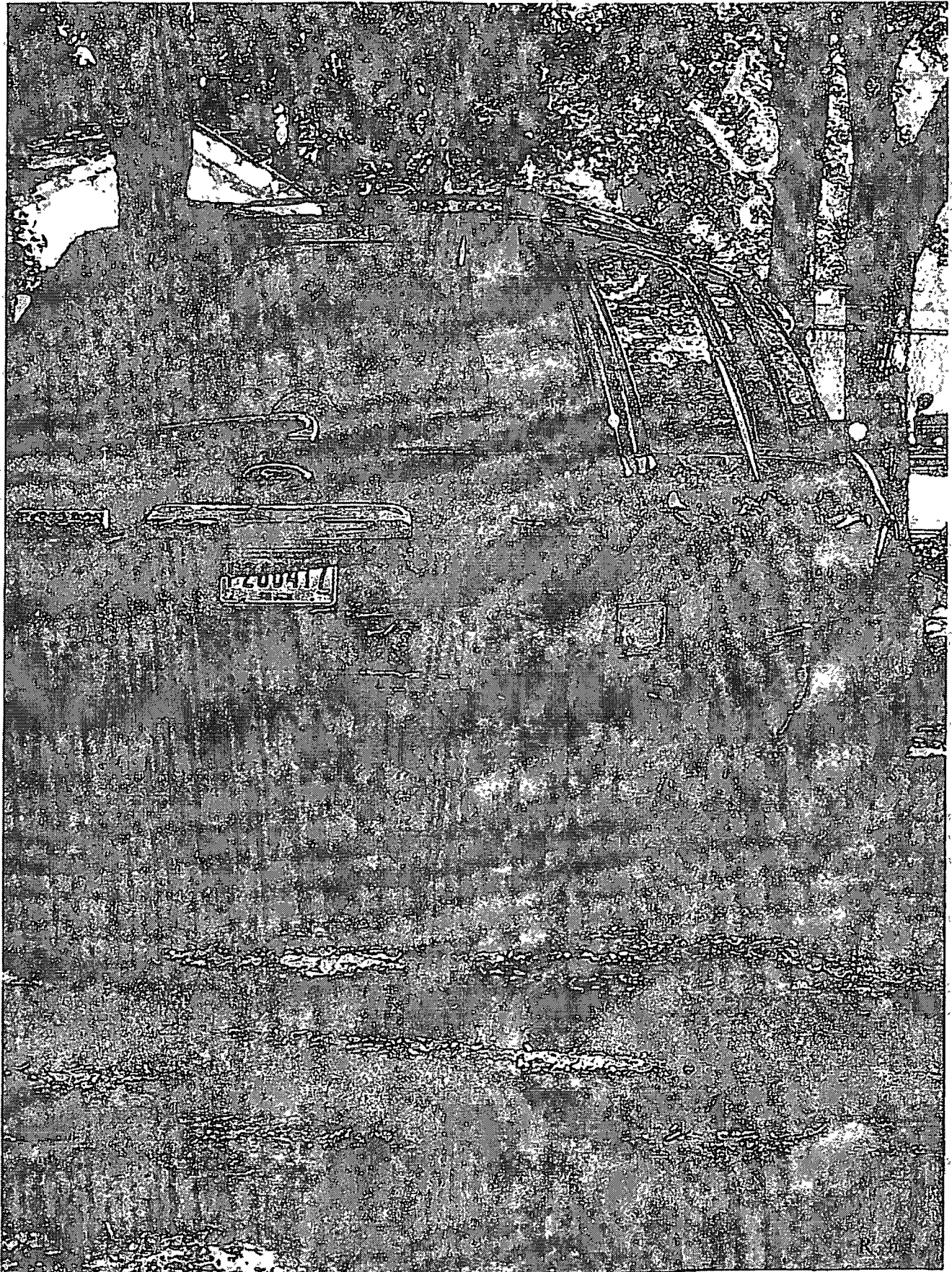












STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CIVIL ACTION NO.: 2015-CP-10-00330
GARY NESTLER and JULIE NESTLER,	)	
	)	PLAINTIFF'S, GARY NESTLER,
Plaintiffs,	)	ANSWERS TO DEFENDANT'S
	)	UNDERINSURED CARRIER, QBE
vs	)	INSURANCE COMPANY, FIRST SET
	)	OF INTERROGATORIES
JOSEPH E. FIELDS,	)	
	)	
Defendant.	)	

**TO: DEFENDANT, JOSEPH E. FIELDS, ALAN R. BELCHER, JR., ESQUIRE, AND
PAUL B. TRAINOR, ESQUIRE, COUNSEL FOR DEFENDANT**

The above named Plaintiff, Gary Nestler, by and through his undersigned counsel and pursuant to Rule 26 and Rule 33 of the South Carolina Rules of Civil Procedure hereby answers Defendants' First Set of Standard Interrogatories as follows:

GENERAL COMMENTS

1. These Answers are based upon information presently known to Plaintiff. Because discovery and investigation into the matters at issue in this litigation is ongoing, Plaintiff reserves the right to supplement these Answers as appropriate.

2. Additional information responsive to Defendants' Interrogatories may be contained in the documents produced by Plaintiff and in the documents produced by Defendants to Plaintiff.

GENERAL OBJECTIONS

1. Plaintiff objects to these discovery requests to the extent they call for responses that would disclose privileged information, including information protected by the attorney-client privilege, attorney work product doctrine, confidential business information or trade secret privileges or any other applicable privileges.

2. Plaintiff objects to these discovery requests to the extent they request information, documents, things, facts, opinions, or any other matter prepared in anticipation of litigation or for trial, including such trial preparation materials relating to expert witnesses, which is outside the scope of discovery permitted by SCRCP 26(b).

3. Plaintiff objects to each discovery request to the extent that it pertains to (a) events, items, or incidents other than those which are involved in the instant suit; (b) the business or personal relationships of Plaintiffs with anyone other than those involved in the matters involved in the instant suit; (c) conditions or damages that are not alleged to have occurred as a result of the subject matter of the instant suit; and (d) circumstances beyond the time period relevant to this action. Such information and/or documents are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. In addition, requests for such information or documents pertaining to such extraneous subject matters are overly broad as to time, scope, and subject matter, and would be unduly burdensome to produce.

4. Plaintiff objects to the discovery requests to the extent that they state or imply any admission by Plaintiffs with regard to any factual or legal matter.

5. Plaintiff reserves the right to supplement her responses as additional information or documents become known.

6. Plaintiff's responses to these discovery requests are made subject to all applicable objections and privileges, and Plaintiff does not intend to waive any objection or privilege by responding hereto.

ANSWERS TO INTERROGATORIES

1. Set forth the names and addresses of all persons known to the Plaintiff and/or counsel to be witnesses concerning the facts of the case and indicate whether or not written or

recorded statements have been taken from the witness, who has possession of such statements, and set forth a summary sufficient to inform the this party of the important facts known to or observed by such witness.

ANSWER: Dr. Gary Nestler
17 22nd Ave.
Isle of Palms, SC 29451

Dr. Nestler is a Plaintiff in this matter. If called as a witness, he is expected to testify to all relevant matters within his knowledge regarding the facts and allegations of the case, and with particularity regarding the injuries he sustained and the facts and circumstances surrounding the motor vehicle collision that occurred on March 8, 2014 in Mount Pleasant, South Carolina. There are no written or recorded statements at this time, other than to extent discovery documents in Plaintiff's possession can be deemed to contain statements, which are produced herewith.

Mrs. Julie Nestler
17 22nd Ave.
Isle of Palms, SC 29451

Mrs. Nestler is a Plaintiff in this matter. If called as a witness, she expected to testify to all relevant matters within her knowledge regarding the injuries sustained by her husband in the accident that occurred on March 8, 2014 in Mount Pleasant, South Carolina. There are no written or recorded statements at this time, other than to extent discovery documents in Plaintiff's possession can be deemed to contain statements, which are produced herewith.

Ms. Aspen Nestler
17 22nd Ave.
Isle of Palms, SC 29451

Ms. Nestler is the daughter of the Plaintiffs in this matter. If called as a witness, she is expected to testify to all relevant matters within her knowledge regarding the accident sustained by her father that occurred on March 8, 2014 in Mount Pleasant, South Carolina. There are no written or recorded statements at this time, other than to extent discovery documents in Plaintiff's possession can be deemed to contain statements, which are produced herewith.

Joseph E. Fields
930 Hunt Dr.
Huger, SC 29450

Mr. Fields is the Defendant in this matter. Upon information and belief, if called as a witness, he is expected to testify to all matters within his knowledge pertaining to the facts of the case. Upon information and belief, no written or recorded statement has been taken at this time.

Plaintiff expressly reserves the right to call the following persons as witnesses without further notice to the other parties:

- a. All persons identified by any other party through written discovery responses or depositions in this case.
- b. All medical providers.
- c. All police officers and/or emergency personnel/first responders involved in the matter.
- d. All person deposed as witnesses in this case by any party.
- e. Rule 30(b)(6) witnesses for any party in this case or any third-party deposed in this case.
- f. Records custodian witnesses for any party in this case or third-party from whom records are subpoenaed.
- g. Any witness for rebuttal or response to any party's expert witness.

Additionally, discovery is ongoing, and the Plaintiff reserves the right to supplement this Answer at a later date.

2. Identify each and every individual who has given you a statement of any kind, whether verbal, written, signed, unsigned, recorded, or otherwise, concerning the facts and allegations contained of in the Complaint, and for each state the date thereof, by whom the statement was obtained, subject matter thereof and, if recorded or memorialized, in whose possession, custody and/or control the statement is at this time.

ANSWER: Please see answer to Interrogatory No. 1.

3. Set forth a list of photographs, diagrams, sketches, incident reports or other prepared documents in possession of the party that relate to any claims(s) or defense(s) in the case.

ANSWER: Please see attached documents.

- (a) Accident Report;
- (b) Summary of Damages;
- (c) Medical Reports; and
- (d) Medical Expenses.

4. Identify each person whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, state the substance of the findings and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and attach to your Answers any written report made by the expert concerning these findings and opinions.

ANSWER: All medical providers are subject to be called to testify to their observations, diagnosis, opinions and treatment.

5. Name all physicians, persons, hospitals and clinics that have examined or treated you for any injury, disability or substantial illness for the ten years immediately preceding the incident, and give the approximate dates and nature of such examinations and treatments.

ANSWER:

	Provider	DOS	Bill
1.	Charleston Co. EMS	03/08/2014	\$409.00
2.	East Cooper Regional Medical Center	03/08/2014	\$850.50
3.	Nason Medical Center	03/10/2014	\$912.00
4.	Orthopedics of Charleston	03/08/14-04/15/14	\$738.00
5.	Olympic Physical Therapy	03/14/14 – 04/04/14	\$530.00
6.	Imaging Specialists	04/02/14	\$1,234.00
7.	Southeastern Spine Institute	04/09/2014	\$481.00
8.	Chiropractic USA		\$1,305.00

6. State with precision the nature of any injuries, whether bodily or mentally, suffered by you as a result of this incident, setting forth which injuries, if any, you contend are permanent, and describe in detail any symptoms, handicaps, or other physical or mental complaints which you presently have as a result of the incident.

ANSWER: See attached medical reports and report addressing permanent impairment.

7. Set forth a complete list of all hospitals, clinics, medical providers or persons of any healing art that have rendered treatment or care to you with regard to the injuries you have allegedly incurred as a result of the incident.

ANSWER:

	Provider	DOS	Bill
1.	Charleston Co. EMS	03/08/2014	\$409.00
2.	East Cooper Regional Medical Center	03/08/2014	\$850.50
3.	Nason Medical Center	03/10/2014	\$912.00
4.	Orthopedics of Charleston	03/08/14-04/15/14	\$738.00
5.	Olympic Physical Therapy	03/14/14 – 04/04/14	\$530.00
6.	Imaging Specialists	04/02/14	\$1,234.00
7.	Southeastern Spine Institute	04/09/2014	\$481.00
8.	Chiropractic USA		\$1,305.00

8. If you contend that a previous injury or condition was aggravated by the incident, (a) describe the nature and extent of the pre-existing condition and name all physicians, persons, hospitals and clinics who examined or treated you therefore prior to the incident complained of herein, with the approximate dates of such examination or treatment; and (b) if any disability or permanency rating of the prior condition was made, state the per centum or amount thereof, by whom made, and the part(s) of the body to which applicable.

ANSWER: N/A

9. List each item of damage which you claim, itemizing all charges, expenses and losses, including amount paid or incurred by you, stating to whom paid or owed, and attach to

your Answers copies of all bills or estimates relating thereto. As to each item of damage which you claim, state its dollar value, how it is calculated, and the date it was incurred or is expected to be incurred.

ANSWER:

	Provider	DOS	Bill
1.	Charleston Co. EMS	03/08/2014	\$409.00
2.	East Cooper Regional Medical Center	03/08/2014	\$850.50
3.	Nason Medical Center	03/10/2014	\$912.00
4.	Orthopedics of Charleston	03/08/14-04/15/14	\$738.00
5.	Olympic Physical Therapy	03/14/14 – 04/04/14	\$530.00
6.	Imaging Specialists	04/02/14	\$1,234.00
7.	Southeastern Spine Institute	04/09/2014	\$481.00
8.	Chiropractic USA		\$1,305.00

10. State whether or not you have ever received any injury in any accident or incident prior or subsequent to the date of the incident complained of. If so, state the details, including date, place of incident, names and addresses of the parties involved, nature of the injury sustained and names and addresses of your physicians(s) and hospital(s); and identify all documents referring or relating to such injury.

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. Moreover, Plaintiff would object that the Interrogatory does not relate to any claims or defense. Additionally, Plaintiff is not the putative at fault and, therefore, has no liability coverage that would relate to this matter. Subject to, and with waiving said objection, Plaintiff would respond to the Interrogatory as follows:

As to prior: None.

As to subsequent: None.

11. State whether you ever filed or asserted any claim for injuries, including workers' compensation claims and social security disability claims, prior or subsequent to the date of the incident complained of, and give full details, including the name and address of each person, firm, corporation or employer, and their insurance companies, if any, against which each claim

was made or asserted, as well as the name of the Court, Commission, Board or other body, if any, in which you filed suit or claim, with the date of filing, case name, and Court as to each proceeding.

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. Moreover, Plaintiff would object that the Interrogatory does not relate to any claims or defense. Additionally, Plaintiff is not the putative at fault and, therefore, has no liability coverage that would relate to this matter. Subject to, and with waiving said objection, Plaintiff would respond to the Interrogatory as follows:

As to prior: None.

As to subsequent: None.

12. State whether you have ever been assigned a disability rating at any time by any person; if so, state the rating assigned, the injury for which the rating was assigned, the date it was assigned, and identify the person, organization, commission or board which assigned the rating and all documents which set forth the rating.

ANSWER: See medical records.

13. If you contend that, as a result of the incident, your injuries resulted in any loss of time, income, earnings or loss of earning capacity from any business, occupation or employment, give precise details, stating the amount claimed as earnings, your duties and position, the exact dates on which you were prevented from pursuing your work, your rate of pay or earnings during such time, the method by which you compute the amounts and figures used in your computation, and the identity of your employer(s).

ANSWER: N/A

14. If you used or consumed by any means any alcoholic beverages, sedatives, tranquilizers or other drugs or medicines within eight hours preceding this incident, identify the nature and amount of each, and state when and where obtained and consumed.

ANSWER: None.

15. If you contend that Defendant, Joseph E. Fields, should have taken some action not taken, or should have refrained from taking some action taken regarding the incident described in the Complaint, set forth in detail such contention.

ANSWER: Please see Complaint.

16 If you contend that any person not a party to this cause of action acted or erred in such a manner as to have caused or contributed to any of the injuries or damages alleged in your Complaint, set forth in detail all facts upon which you rely.

ANSWER: N/A

17. Please indicate whether you have received any payments for damages allegedly arising from the allegations contained in this lawsuit. In your response, please include:

- (a) The amount of your recovery; \$20,000;
- (b) The person or entity and address from which said recovery was obtained;
GEICO Insurance 1 GEICO Center Macon, GA 31296
- (c) The names and addresses of the attorneys involved in the claim, if any.

Daniel S. Slotchiver
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401

18. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the incident and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. Moreover, Plaintiff would object that the Interrogatory does not relate to any claims or defense. Additionally, Plaintiff is not the putative at fault and, therefore, has no liability coverage that would relate to this matter.

19. Set forth all previous motor vehicle accidents in which you have been involved and specify whether you were the operator of the motor vehicle, a passenger in the motor vehicle or a pedestrian. In your response, please include:

- (a) The date of each accident;
- (b) The names of all parties involved in the accident;
- (c) A description of how the accident occurred and any injuries sustained therein by you or any other party;
- (d) Whether anyone involved in said accident made any claims against any other party to the accident for personal injury or property damage.
- (e) Whether suit was filed in any of these accidents;
- (f) Whether you settled or received any money, compensation or judgments against any party to any such law suit above-described, and if so, what amount.

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. This information taken as a whole is totally irrelevant to the subject matter of this litigation, and as such, would not be admissible, nor reasonably lead to admissible evidence. Subject to, and with waiving said objection, Plaintiff would respond to the Interrogatory as follows:

20. Please set forth a list of all prior moving violations you have received in the past ten years.

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. This information taken as a whole is totally irrelevant to the subject matter of this litigation, and as such, would not be admissible, nor reasonably lead to admissible evidence.

21. Set forth a detailed description of the circumstances surrounding the incident, including information two hours prior to and immediately after, including where you were driving to and from; your location in relation any traffic light, your estimation of distance from the traffic light; and any actions you took immediately prior to, and following the incident.

ANSWER: Please see attached Accident Report dated 03/08/14 and the Complaint.

22. Do you contend the Defendant made any admissions or statements against interest? If your answer is anything than an unequivocal "no," please provide the following information for each admission or statement:

- a. The substance of the admission or statement;
- b. The time, date and place it was made;
- c. The name of the person who made it; and,
- d. The name, address and telephone numbers of each person present when it was made.

ANSWER: Yes, see attached Police Report.

- (a) Defendant told Police Officer that he was not paying attention and that when he noticed Plaintiff's vehicle stopped then he tried to stop but did not have enough space.
- (b) 08:36 hours, 03/08/14, US HWY 17 in Mount Pleasant, S.C. vicinity Intersection of US HWY 17 and Long Point Rd.
- (c) Defendant, Joseph E. Fields
- (d) Joseph E. Fields
930 Hunt Dr.
Huger, S.C. 29450
(843) 754-0161

Police Officer (Badge No. 2809); Name unreadable on Police Report

23. Set forth and describe in detail the weather and road conditions at the time and location of the incident.

ANSWER: Please see attached Accident Report dated 03/08/14.

24. Set forth the facts and any proofs upon which you rely upon to support your contentions as alleged in Paragraph 9 of your Complaint.

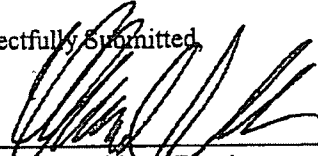
ANSWER: Please see attached Police report, medical reports & other documentation.

25. When you first saw the Defendant's vehicle, how far was the Defendant's vehicle from the point of impact with your vehicle?

ANSWER: Plaintiff would object that the Interrogatory is not reasonably calculated to lead to admissible evidence. Moreover, Plaintiff would object that the Interrogatory does not relate to any claims or defense. Additionally, Plaintiff is not the putative at fault and, therefore, has no liability coverage that would relate to this matter. Subject to, and with waiving said objection, Plaintiff would respond to the Interrogatory as follows:

Unknown.

Respectfully Submitted,



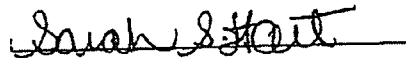
Daniel S. Slotchiver, Esquire
Slotchiver & Slotchiver, LLP
44 State Street
Charleston, SC 29401
S.C. Bar Number 15129
Email: dan@slotchiverlaw.com
Phone: (843) 577-6531
ATTORNEY FOR PLAINTIFF

Charleston, South Carolina
August 7, 2015

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the **PLAINTIFF'S, GARY NESTLER'S, ANSWERS TO DEFENDANT'S FIRST SET OF INTERROGATORIES** has been served upon the following by sending a copy via electronic mail and depositing a copy of the same, enclosed in a postpaid wrapper properly addressed and mailed USPS first class mail to the following:

Alan R. Belcher, Jr., Esquire
Paul B. Trainor, Esquire
40 Calhoun Street, Suite 550
Charleston, SC 29401


Sarah S. Hart
Paralegal to Daniel S. Slotchiver

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

GARY NESTLER AND JULIE NESTLER,
Plaintiff(s)

vs.

JOSEPH E. FIELDS,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2015 - CP - 10 - 0330

(Please Print)

Submitted By: DANIEL S. SLOTCHIVER

Address: SLOTCHIVER & SLOTCHIVER, LLP

44 STATE STREET, CHARLESTON, SC 29401

SC Bar #: 15129

Telephone #: 843-577-6531

Fax #: 843-577-0261

Other: kristen@slotchiverlaw.com

E-mail: dan@slotchiverlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|---|--|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199) | Torts - Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299) | Torts - Personal Injury
☐ Assault/Slander/Label (300)
☐ Conversion (310)
☒ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☒ Personal Injury (350)
☐ Other (399) | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499) |
| Inmate Petitions
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599) | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899) | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620) | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Other (699) | | |

Submitting Party Signature:

Date: January 14, 2015

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2015-CP-10-0330

GARY NESTLER and JULIE NESTLER,)

Plaintiffs,)

vs.)

JOSEPH E. FIELDS,)

Defendant.)

SUMMONS

(Motor Vehicle Accident Negligence)
Jury Trial Demand

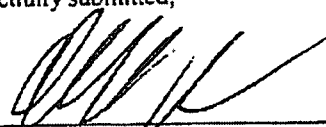
2015 JAN 15 PM 2:04
J. ARSTRONG
CLERK OF COURT

FILED

TO THE ABOVE-NAMED DEFENDANT AND HIS ATTORNEY

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is served upon you herewith, and to serve a copy of your answer to said Complaint on the subscriber at his office, Slotchiver & Slotchiver, L.L.P., within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for judgment by default to be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,



Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, L.L.P.
44 State Street
Charleston, SC 29401
(843) 577-6531
dan@slotchiverlaw.com

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina

January 14, 2015

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO. 2015-CP-10- 0330

GARY NESTLER and JULIE NESTLER,)
))
Plaintiffs,)
))
vs.)
))
JOSEPH E. FIELDS,)
))
Defendant.)

COMPLAINT
(Motor Vehicle Accident Negligence)
Jury Trial Demanded
FILED
2015 JUN 15 PM 2:04
BY J. H. ARMSTRONG
CLERK OF COURT

NOW COMES THE PLAINTIFF, above-named, complaining of the Defendant, above-named, to allege and show under this honorable Court as follows:

1. The Plaintiffs, Gary Nestler and Julie Nestler, are residents and citizens of the County of Charleston, State of South Carolina.
2. The Defendant, Joseph E. Fields, is upon information and belief a resident and citizen of the County of Charleston, State of South Carolina.
3. The Plaintiff, Gary Nestler, was, on or about the 8th day of March, 2014, the owner and operator of a 2012 Ford bearing State of South Carolina license tag number P260417, which motor vehicle was involved in the collision hereinafter described
4. That on or about the 8th day of March, 2014, at the time of the collision hereinafter described, the Defendant, Joseph E. Fields, was the owner and operator of a 1988 Nissan bearing South Carolina license tag 4404EZ

FOR A FIRST CAUSE OF ACTION
(Motor Vehicle Accident)

5. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through five as if restated herein verbatim.
6. That on the 8th day of March, 2014, at approximately 8:36 a.m., the Plaintiff was the operator of the aforesaid motor vehicle, which was traveling north bound on US Hwy 17 in Mount Pleasant, South Carolina.

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

7. That at the aforesaid time and place, the Defendant, Joseph E. Fields, was traveling north bound on US Hwy 17 in Mount Pleasant, South Carolina, when suddenly, and without any warning, Defendant was distracted and inattentive, careless, negligent, and reckless as he crashed into the rear of the Plaintiff's motor vehicle with great force, resulting in the Plaintiff sustaining serious and painful injuries as are hereinafter more fully described.

FOR A SECOND CAUSE OF ACTION
(Negligence)

8. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through eight as if restated herein verbatim.

9. That the Defendant was careless, negligent and reckless at the time and place aforesaid in the following particulars, to-wit:

- a) in failing to maintain a proper lookout;
- b) in failing to keep the motor vehicle under control;
- c) in failing to sound his horn or give any warning;
- d) in failing to stop, slow down, or yield the right-of-way;
- e) in failing to use that degree of care or caution which an ordinarily prudent person would have exercised under the same or similar circumstances; and
- f) in being otherwise careless, negligent and reckless.

ALL of which were the direct and proximate cause of the injuries and damages suffered by the Plaintiff herein, said acts being in violation of the dictates of ordinary prudence and the statutory laws of the State of South Carolina in such cases made and provided.

FOR A THIRD CAUSE OF ACTION
(Personal Injury)

10. The Plaintiff repeats and reiterates the allegations contained in paragraphs one through ten as if restated herein verbatim.

11. That as a direct and proximate result of the aforesaid acts of the Defendant, the Plaintiff suffered great physical harm and injury, all of which has caused him extreme pain

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
40 STATE STREET
CHARLESTON, SC
29401 2810

and suffering and considerable medical treatment, both past and future. The Plaintiff has suffered and will suffer a loss of enjoyment of life, and has been otherwise injured and damaged, all to his detriment.

FOR A FOURTH CAUSE OF ACTION
(Loss of Consortium)

12. The Plaintiffs repeat and reiterate the allegations contained in paragraphs one through twelve as if restated herein verbatim.

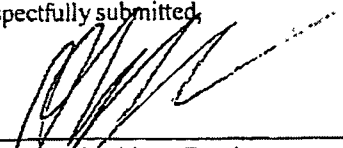
13. As a direct and proximate result of Defendant's negligence as described above, Plaintiff, Julie Nestler, suffered a loss of the services, society, and companionship of her lawful husband, Gary Nestler, with whom she is and was living with at the time of the events in question.

14. As a further direct and proximate result of the Defendants negligence, Plaintiff, Donna Mack, suffered damages for the expenses of care and treatment of her husband, Gary Nestler.

15. Defendant owes a duty of due care to the Plaintiff, Julie Nestler, which Defendant failed to meet, thereby causing substantial damage to said Plaintiff.

WHEREFORE, the Plaintiff prays for judgment against the Defendant on the First, Second, Third and Fourth Causes of Action in a sum that will fully and fairly compensate them for actual and punitive damages as a jury may deem appropriate, together with the costs of this action.

Respectfully submitted,


Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, L.L.P.
44 State Street
Charleston, SC 29401
(843) 577-6531
dan@slotchiverlaw.com

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina
January 14, 2015

SLOTCHIVER
&
SLOTCHIVER,
L.L.P.
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON, SC
29401-2810

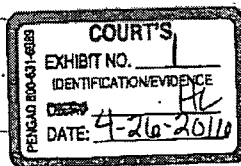
Jury requests a copy of
the medical bills.

Chen

Foreman

The ACTUAL Bills were
NOT ADMITTED INTO
EVIDENCE - ONLY THE
AMOUNT OF THE Bills
WAS

Roy Goy



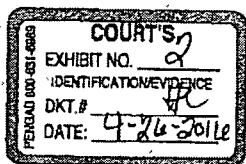
Can you confirm the
amount of the medical
Bills? ~~is~~ IS \$7100 the
correct amount?

Ch

Foreman

\$7,117.50 was
the amount.

By [Signature]



STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Gary Nestler and Julie Nestler,

Plaintiffs,

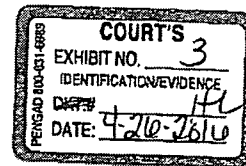
v.

Joseph E. Fields

Defendant.

IN THE COURT OF COMMON PLEAS
2015-CP-10-0330

JURY CHARGES



Duty of Judge

- I remind you that, during this trial, you and I have certain duties to perform.
- As the trial judge, it is my responsibility to preside over the trial of this case, and I also have the duty to rule on the admissibility of the evidence offered during this trial.
- You are to consider only the evidence before you. You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record in this case, and any stipulations of counsel.
- I have the additional duty to charge you the law applicable to this case. It is your duty as jurors to accept and apply the law as I now state it to you. If you think you have any idea as to what the law is or what the law ought to be and it does not agree with what I tell you the law is, you must forget that idea because you are sworn to accept the law and apply the law exactly as I state it to you.

Judges of the Facts

- Jurors are the sole judges of the facts.
- A trial judge cannot state, comment on, or make any statement to a trial jury about the facts in a case.

- The law does not allow me to have an opinion about the facts in this case.
- This is a matter solely for you, the jury, to determine.
- As jurors, it is your duty to determine the effect, value, weight, and truth of the evidence presented during this trial.

Credibility of Witnesses

- You must determine the credibility of witnesses who have testified in this case.
- Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.
- In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. If you reject part, you may still accept the remainder of a witness' testimony.
- You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may consider the appearance and demeanor of a witness while on the witness stand.
- You are not bound to decide the case based on the number of witnesses a side produces.
- The fact that testimony is not contradicted directly does not necessarily render it undisputed. You may consider the inherent probability of the testimony and the credibility of witnesses.
- Un-contradicted testimony is not binding upon you. You have the right to consider it in light of all the circumstances and give it such weight, if any, that you think it deserves.

Burden of Proof

- In a civil case, the Plaintiff has the burden of proof.
- The burden of proof is proof by a preponderance of the evidence.
- A preponderance of the evidence simply means the greater weight of the evidence.
- It is evidence, which, when viewed as a whole, shows that the fact sought to be proved is more likely true than not true.
- The preponderance of the evidence is not determined by the number of witnesses. Instead, it must be determined by the greater weight of all of the evidence.

Direct and Circumstantial Evidence

- There are two types of evidence that are generally presented during a trial—direct evidence and circumstantial evidence. Direct evidence directly proves the existence of a fact and does not require deduction. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact.

Deposition Testimony

- Certain testimony has been presented into evidence by deposition.
- A deposition is testimony taken under oath before the trial and preserved in writing or by mechanical or electronic means, such as video or audio tape recording. You are to consider that testimony as if the witness had given it in court.

Expert Witness

- Ordinarily people cannot testify as to their opinion about something in Court.
- An exception is made for expert witnesses.
- They are experts because of experience of education or specialized training in some area.
- They may give their opinion and state their reasons for their opinion.
- You can give an expert's testimony as much or as little weight as you think it deserves.

- If you don't think it's based upon sufficient education or experience, or you conclude the expert's opinions are not sound or outweighed by other evidence, you may disregard the opinion entirely.
- You are not compelled to blindly accept an expert's opinion.
- You have the right to consider the testimony in light of all the circumstances and give it such weight (if any) as you think it is entitled to.

Negligence - Admitted

- The plaintiff claims that the defendant was negligent and should compensate the plaintiff for the injuries the plaintiff suffered as a result of the defendant's negligence. In order to prove that the defendant was negligent, the plaintiff must prove by a preponderance, or greater weight, of the evidence the following things.
- Negligence is normally proven by showing one party owed the other a duty, there was a breach of that duty, and that the party suffered injuries as a proximate cause of the breach of that duty.
- The defendant has admitted he is at fault for the accident that occurred between himself and the plaintiff. Therefore, the plaintiff does not have to prove the defendant owed him a duty and that she breached that duty.
- However, the defendant contests the amount of damages the plaintiff claims he has suffered.
- Therefore the plaintiff must prove by a preponderance, or greater weight, of the evidence that he suffered damages as a result of the defendant's breach of duty, and the amount of his damages.
- Finally, the plaintiff must prove by a preponderance, or greater weight, of the evidence that the damages were proximately caused by the defendant's breach of duty.

Proximate Cause

- Proximate cause is something that produces a natural chain of events which, in the end, brings about the injury. It is the direct cause of the injury.

- To prove that the defendant's negligence proximately caused the plaintiff's injury, the plaintiff must first prove causation in fact. This is proven by showing that the injury would not have occurred but for the defendant's negligence.
- The plaintiff must also prove legal cause. Legal cause is proven by showing that the injury was foreseeable. This means that the injury occurred as a natural and probable consequence of the defendant's negligence. The plaintiff must prove that some injury from the defendant's negligence was foreseeable, but does not have to prove that the particular injury that occurred was foreseeable. However, the defendant cannot be held responsible for things which could not be expected to happen.
- Proximate cause does not mean the only cause. The defendant's act can be a proximate cause of the plaintiff's injury if it was at least one of the direct, concurring causes of the injury.

Actual Damages

- If you decide that the plaintiff is entitled to a verdict, your next step would be to decide how much money the defendant should be required to pay.
- Actual damages are to compensate the plaintiff for the plaintiff's injuries or loss and to put the plaintiff, as near as possible, in the same position that the plaintiff was in before the incident occurred. In other words, actual damages would be the actual losses and expenses which the plaintiff has suffered because of the defendant's negligence.

Personal Injuries

- The plaintiff must prove that expenses caused by the injury were necessary and reasonable.
- Actual damages for a plaintiff who has been physically injured include pain and suffering -- both past and future -- as well as mental anguish, impairment of health or physical condition, and disfigurement.

- In determining the amount of compensation for personal injuries, it is proper to consider past and present aspects of the injury. This would include physical and mental pain and suffering, expenses incurred for necessary medical treatment, the loss of enjoyment of life suffered as a result of the injury, and any other losses which are reflected by the character of the injury.

Pain & Suffering

- Pain and suffering compensates the plaintiff for physical discomfort and emotional response to the sensation of pain caused by the injury itself. There is no definite standard by which to compensate the plaintiff for pain and suffering. You have the authority to determine the amount, if any, to be allowed for pain and suffering, using calm and reasonable judgment to ensure that the damages are just and reasonable in light of the testimony and evidence presented in the case.

Loss of Enjoyment of Life

- Loss of the capacity to enjoy life is also a proper element of damages provided you find it results from the defendant's negligence. You may award damages to the plaintiff to compensate him for any limitations he may suffer from his inability to participate in and derive pleasure from the normal activities of daily life. You may consider his inability to pursue his talents, recreational interests, hobbies, or avocations.
- Loss of enjoyment of life damages compensate the plaintiff not only for the subjective knowledge that he can no longer enjoy all of life's pursuits, but also for the objective loss of his ability to engage in these activities.

Prospective Damages

- The injured party may recover for those future damages that are reasonably sure to result from the injuries. The principle underlying compensation for future damages is that only one action can be brought and, therefore, only one recovery had. It is proper to include in the

estimate of future damages compensation for attention to the plaintiff's ordinary business, future medical expenses, and pain and suffering which will, with reasonable certainty, result.

- A plaintiff is never entitled to recover conjectural or speculative damages. But if you find the plaintiff is entitled to a verdict for actual damages, your verdict should include an amount to cover any past, present, and future damages which were proximately caused by the defendant. Any future damages must be reasonably certain to occur in the future as a result of the defendant's acts. Actual damages need not be proven to a mathematical certainty or be based on evidence of the precise amount of damages the plaintiff has suffered. Instead, the evidence must allow you to determine what amount of damages is fair, just, and reasonable.

Future Damages

- Any future damages must be reasonably calculated to have resulted from the alleged injury or damage sustained in this case. Future damages must be reduced to their present cash value.

Life Expectancy Table

- If you find that the plaintiff was permanently injured as a result of the defendant's actions, you must then decide how, if at all, that injury will affect the rest of the plaintiff's life. A person's life expectancy is determined by a life expectancy table which is a part of the laws of this state. The life expectancy table is only an estimate of the probable average remaining length of the life of all persons in our state of a given age. The plaintiff is a 55 year old male with a life expectancy, according to the life expectancy table, of 25 years. This fact is to be considered by you along with any other facts and circumstances in evidence bearing on the plaintiff's life expectancy including habits and health at the time of injury in deciding the amount of damages to be awarded to the plaintiff.

Duty to Mitigate Damages

- When the plaintiff is injured or damaged by the wrongful act of another person, it is the duty of the plaintiff to reasonably try to avoid and lessen the damages. Those damages which may be avoided by the use of reasonable efforts, care, and prudence by the plaintiff cannot be the proximate result of the defendant's wrongful act. Therefore, the plaintiff cannot recover for damages which reasonably might have been avoided.
- The efforts required by the plaintiff must be determined by the rules of common sense and fair dealing and what a person of ordinary reason and prudence would do under the same circumstances. The plaintiff is not required to use unreasonable efforts or great expense to avoid and lessen the damages. The defendant has the burden of proving a failure to lessen damages on the part of the plaintiff by the preponderance, or greater weight, of the evidence.
- The plaintiff is required to use reasonable care and diligence to reduce the seriousness of the injuries caused by the defendant. This duty includes making a reasonable attempt to see a doctor and to take part in a physical therapy program.
- If you find that the plaintiff failed to do this, the plaintiff may recover damages for the injuries themselves, but not damages for the aggravation of the injuries.

Adverse Inference

- When a party fails to disclose evidence during the discovery process, you may infer that the evidence which was not provided by that party would have been adverse to that party.

Punitive Damages

- If you award actual damages, you may also consider an award of punitive damages. Punitive damages are intended to punish the defendant for extraordinary and outrageous misconduct and to prevent the defendant and others from committing similar acts in the future. Punitive damages can only be awarded when conduct of the defendant has been something more than

mere negligence. The evidence must establish the defendant's acts were reckless, willful and wanton, meaning there was a conscious failure to exercise due care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.

- Recklessness means a conscious failure to use reasonable care. A person who is negligent acts carelessly. However, a person who acts recklessly, willfully, and wantonly is not only careless, but is also aware that he is being careless.
- If you find that the defendant's conduct was willful, wanton, or reckless, you may award the plaintiff punitive damages. To support an award of punitive damages, the plaintiff must prove by clear and convincing evidence that the conduct complained of included a consciousness of wrongdoing at the time of the conduct.
- Preponderance, or greater weight, of the evidence, which requires only proof which persuades you that a party's claim is more likely true than not true. On the other hand, clear and convincing proof is not as high a standard as the burden of proof in criminal cases, which is proof beyond a reasonable doubt. Clear and convincing proof leaves no substantial doubt in your mind. It means that the evidence is not ambiguous, doubtful, equivocal or contradictory. Convincing means persuading by proof or argument, causing one to believe in the truth of what is asserted. Clear and convincing proof establishes in your mind, not only that the fact is probable, but that it is highly probable.
- Before awarding punitive damages, you must consider and weigh four elements which may be pertinent to the facts of this case:
- You must first consider the relationship between any punitive damage award and the harm caused. Any penalty imposed should take into account the reprehensibility of the conduct, the harm caused, the defendant's awareness of the conduct's wrongfulness, the duration of the conduct, and any concealment. Thus, any penalty imposed should bear a relationship to the

nature and extent of the conduct and the harm caused, including the compensatory damage award made by you.

- Secondly, any penalty imposed should take into account, as a mitigating factor, any other penalty that may have been imposed or which may be imposed for the conduct involved, including any criminal or civil penalty or any other punitive damages award arising out of the same conduct.
- Next, you should consider whether the award of and the amount of any punitive damages award may deprive the defendant of any profits derived from the improper conduct and whether the ill-gotten profits should be properly awarded to the plaintiff.
- Finally, any award of punitive damages must be limited to punishment and, thus, may not effect economic bankruptcy. To this end, the defendant's ability to pay any punitive damage award should be considered. However, the economic bankruptcy factor is not an absolute bar to an award of punitive damages.

Verdict

- Your verdict must be unanimous.

SLOTCHIVER & SLOTCHIVER, L.L.P.

ATTORNEYS AT LAW

EST. 1959

IRVIN J. SLOTCHIVER
DANIEL S. SLOTCHIVER
STEPHEN M. SLOTCHIVER
ANDREW J. McCUMBER

44 STATE STREET
CHARLESTON, SC 29401-2810
TELEPHONE (843) 577-6531
FACSIMILE (843) 577-0261

April 1, 2015

CHARLESTON COUNTY CLERK OF COURT

Court of Common Pleas
100 Broad Street, Ste 106
Charleston, SC 29401

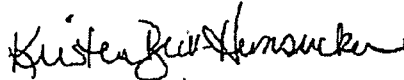
Re: Gary Nestler, et al. v. Joseph E. Fields
Case No.: 2015-CP-10-0330

Dear Sir/Madam:

Enclosed please find for filing the original and three (3) copies of an Acceptance of Service for the UTM carrier with regard to the above captioned matter. Please file the original and return the certified copies to me in the enclosed pre-addressed, stamped envelope.

In the event you have any questions, or, if I need to provide anything further with reference to this request, please do not hesitate to contact me.

Sincerely,



Kriston Beck-Hunsucker
Paralegal to Daniel S. Slotchiver

:kmb

Enclosure(s)



South Carolina
Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105
Telephone: (803) 737-6160

March 30, 2015

2015-CP-10-330

NIKKI R. HALEY
Governor

RAYMOND G. FARMER
Director

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
SOUTHERN PILOT INSURANCE COMPANY
c/o CT Corporation System
2 Office Park Court, Suite 103
Columbia, SC 29223-0000

Dear Sir

On March 30, 2015, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim. POLICY/CLAIM NUMBER PAU1604623/200303N. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process. When replying, please refer to File Number 157860, Gary Nestler, et al. v. Joseph E. Fields, 2015-CP-10-00330.

By

David E. Belton
Senior Associate General Counsel
(803)737-6132

Sincerely Yours,

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC. Daniel S. Slotchiver
44 State Street
Charleston, SC 29401-2810

2015 APR -6 PM 3:33
JULIE J. ARHSTADT
CLERK OF COURT
BY

FILED

R. 493

APPENDIX A

Defendant's Trial Exhibit No. 4: Summons & Complaint (ID Only)

A copy of the Summons & Complaint from the case at bar was erroneously included as Defendant's Trial Exhibit No. 3 in the Record on Appeal. The Summons and Complaint referenced in the trial transcript as "Defendant's Exhibit No. 3" (for identification purposes only) was actually a copy of the Summons and Complaint from the case Nestler v. Ackerman (2003-CP-10-5026), which is attached hereto in this Appendix A.

#03-016612- \$100

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO 03-CP-10-5026

GARY NESTLER AND JULIE
NESTLER,

Plaintiff,

vs

THOMAS ACKERMAN,

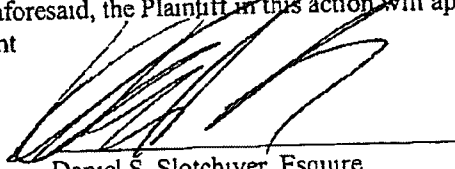
Defendant

SUMMONS

(Negligence)
(Jury Trial Request)

TO THE DEFENDANT ABOVE NAMED

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his office at 44 State Street, Charleston, South Carolina, 29401, within thirty (30) days after service thereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint


Daniel S. Slotchiver, Esquire
SLOTCHIVER & SLOTCHIVER, L L P
44 State Street
Charleston, SC 29401
(803) 577-6531

ATTORNEY FOR PLAINTIFF

Charleston, South Carolina

Dated 12/1, 2003

SLOTCHIVER
&
SLOTCHIVER
LLP
ATTORNEYS AT LAW
44 STATE STREET
CHARLESTON SC
29401-2810

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
GARY NESTLER and JULIE)
NESTLER,)

Plaintiffs,)

vs)

THOMAS ACKERMAN,)

Defendant)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO 03-CP-10- 5026

COMPLAINT

(Negligence)
(Jury Trial Request)

NOW COMES THE PLAINTIFFS, above-named, complaining of the Defendant, above-named, to allege and show under this honorable Court as follows

AS AND FOR A FIRST CAUSE OF ACTION

(Negligence)

- 1) Plaintiffs are residents and citizens of the State of South Carolina, County of Charleston
- 2) The Defendant, Thomas Ackerman, is a resident and citizen of the State of South Carolina, County of Charleston
- 3) That on May 13, 2003 the Defendant, Thomas Ackerman, was the operator of a 2002 Ford bearing SC Tag 536 PTE, owned by Clifton Ackerman
- 4) That on May 13, 2003, at approximately 1 25 p m while heading southbound on Ashley Phosphate Road in North Charleston, South Carolina, the Plaintiff, Gary Nestler, was the owner and operator of a 2000 Chevrolet, SC Tag P2604
- 5) That on the same date, time, and place as mentioned above, the Plaintiff, Gary Nestler, was travelling, when, suddenly and without warning, by and through the negligence, carelessness, recklessness, wilfulness and wantonness of the Defendant, without keeping a proper lookout, and without having the vehicle under proper control, struck the Plaintiff's vehicle, resulting in injuries and damage to the Plaintiff as hereinafter set forth

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6) That the negligence, carelessness, recklessness, wilfulness and wantonness of the Defendant caused the aforementioned occurrence and consisted, among other things, of the following

- a) In failing to maintain control of the vehicle,
- b) In failing to keep a proper lookout,
- c) In operating the vehicle in an unsafe manner under the circumstances,
- d) In failing to keep the vehicle under proper and reasonable control,
- e) In failing to exercise that degree of care which a reasonable prudent person would have exercised under the same or similar circumstances,
- f) In failing to use horn as warning,
- g) In failing to equip her motor vehicle with adequate and safe brakes, and if so properly equipped, in failing to utilize them properly,
- h) In failing to take any evasive action by any means, to avoid striking the Plaintiff, and
- i) In failing to properly observe the road and traffic conditions

7) That by reason of and consequence of the negligence, carelessness, recklessness, wilfulness and wantonness of the Defendant, and as a direct and proximate result thereof, Plaintiff's vehicle was struck by the Defendant's vehicle, resulting in multiple injuries to the Plaintiff, Gary Nestler, including permanent injuries to various parts of his body, particularly to his neck, back and other areas.

8) That as a further result of said accident Plaintiff was required to undergo medical treatment and may in the future be required to obtain further medical treatment

9) That Plaintiff was incapacitated and was prevented from attending his regular affairs and duties, has been required to expend large sums of money for medical treatment, physicians, nurses, medical care and other medical needs, has suffered and will suffer great pain in mental

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anguish, has been deprived of the enjoyment of persons and like circumstances and has been otherwise damaged, all to his detriment

AS AND FOR A SECOND CAUSE OF ACTION

(Loss of Consortium)

10) The Plaintiffs repeat and reiterate the allegations contained in paragraphs one through nine as if restated herein verbatim

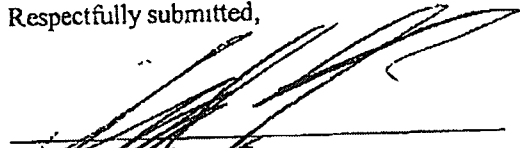
11) As a direct and proximate result of Defendant's negligence as described above, Plaintiff, Julie Nestler, suffered a loss of the services, society, and companionship of her lawful husband, Gary Nestler, with whom she is and was living with at the time of the events in question

12) As a further direct and proximate result of the Defendant's negligence, Plaintiff, Julie Nestler suffered damages for the expenses of care and treatment of her husband, Gary Nestler

13) Defendant owes a duty of due care to the Plaintiff, Julie Nestler, which Defendant failed to meet, thereby causing substantial damage to said Plaintiff

WHEREFORE, the Plaintiffs pray for judgment against the Defendant, its agents and servants, on the First and Second Causes of Action in a sum that will fully and fairly compensate them for actual and punitive damages as a jury may deem appropriate, together with the costs of this action

Respectfully submitted,


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ATTORNEY FOR PLAINTIFFS

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Dated 12/1/03, 2003

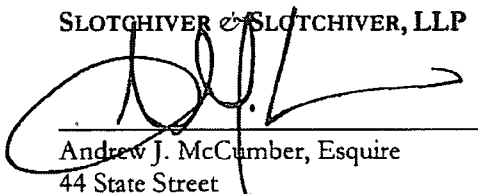
Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted this 1st day of June, 2017.

By:

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JUN 07 2017

SC Court of Appeals

5)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

Civil Action No. 2015-CP-10-0330

RECEIVED

JUL 10 2017

SC Court of Appeals

Gary Nestler and Julie Nestler Appellant,

v.

Joseph E. Fields Respondent.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

Civil Action No. 2015-CP-10-0330

Gary Nestler *Appellant,*

v.

Joseph E. Fields *Respondent.*

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE TRIAL COURT ERRED IN ALLOWING DEFENDANT TO INTRODUCE EVIDENCE OF PLAINTIFF'S MEDICAL EXPENSES.
- II. WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'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; OR WAS MOTIVATED BY AN IMPROPER PURPOSE.
- III. WHETHER THE TRIAL COURT ERRED IN CHARGING THE JURY ON THE ISSUE OF FAILURE TO MITIGATE DAMAGES WHERE DEFENDANT FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THEIR AFFIRMATIVE DEFENSE.

STATEMENT OF THE CASE

On January 15, 2015, Gary Nestler (hereinafter "Mr. Nestler" or "Nestler"), and his wife, Julie Nestler (hereinafter "Mrs. Nestler", or collectively "the Nestlers") brought an action against Joseph E. Fields (hereinafter "Mr. Fields" or "Fields" alleging careless, negligent, and reckless operation of an automobile resulting in a collision. R. 19. The Nestlers further claimed that Mr. Fields conduct directly and proximately caused personal injuries to Mr. Nestler, thus giving rise to claims for personal injury and for loss of consortium. *Id.* The Nestlers, having previously settled their claims with the liability carrier for Mr. Fields prior to filing suit, properly served their Summons and Complaint on QBE Insurance Company. R. 492.

On April 20, 2015, QBE Insurance Company answered the Complaint on behalf of Mr. Fields, pursuant to S.C. Code Ann. § 38-77-160 denying, in large part, the entirety of the Nestlers' Complaint, and setting forth a number of various affirmative defenses. See, Answer. R. 24. Mr. Fields later withdrew five of the affirmative defenses prior to trial. R. 31.

Julie Nestler later withdrew her claim for loss of consortium. R. 61. Trial commenced in the negligence action on April 25, 2016, and the jury reached a verdict on April 26, 2016 R. 58. The judgment was entered on April 29, 2016. R. 1.

On May 6, 2016, Mr. Nestler filed a Motion for New Trial Absolute. R. 39. On July 11, 2016, the Court denied Nestler's motion. R. 2. Mr. Nestler filed a Notice of Appeal and served the same upon the Mr. Fields on July 26, 2016. R. 56.

FACTS

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. R. 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"). R. 137. As a result of the collision, Mr. Nestler received medical treatment from various medical providers over the course of 2014 and 2015. R. 142 to 156; 157 to 158.

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. R. 20. 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. R. 22. 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. R. 22 to 23. Nowhere in Mr. Nestler's Complaint, including his demand for relief, is a single reference made to a claim for medical expenses.

A jury trial commenced on or about April 25 and 26, 2016 wherein Mr. Fields admitted his negligence in connection with the collision. R. 58. 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. R. 101-104; 121-122; 137-149; 138-161. 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. R. 268.

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. R. 268.

Mr. Fields argued that Mr. Nestler failed to mitigate his damages. Yet, at trial, Mr. Fields failed to offer any expert testimony which would support their argument that Mr. Nestler's failure to obtain certain medical treatment(s) was the direct and proximate cause of Mr. Nestler's damages. Mr. Fields also failed to proffer any other evidence that Mr. Nestler failed to mitigate their damages.

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.

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. 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.*

R. 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.

R. 242 to 243.

During juror deliberations, the jury requested the exact amount of Nestler's medical bills. R. 481. 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). R. 1. 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.

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, SCRCP. The Court denied Nestler's Motion and Mr. Nestler subsequently filed this appeal. R. 4.

LEGAL ARGUMENTS

I. THE TRIAL COURT ERRED IN ALLOWING DEFENDANT TO INTRODUCE EVIDENCE OF PLAINTIFF'S MEDICAL EXPENSES.

"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. "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.

"Pain and suffering is recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed." *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 54 (1962) *citing Campbell v. Hall et al.*, 210 S.C. 423, 43 S.E.2d 129 (1947); *Boan v. Blackwell* 43 S.C. 498; 541 S.E.2d 242 (2001). "Damages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial Judge." *Harper*, 239 S.C. at 548. "Pain and suffering have no market price ... [and] are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured." *Id.*

It is the duty of the trier of fact in deciding these damages to consider the

evidence in light of their own life experience and make a judgment on that basis as to what is reasonable under the circumstances. The amount of economic damages which might also have been sustained by the Plaintiff in the case has no relationship to that decision making process and makes no issue for determination either more or less probable.

Appellant cannot locate a single South Carolina decision ruling directly on the issue of whether medical expenses are relevant in determining the amount of non-economic damages sustained. However, the Supreme Court of this State has held on at least one occasion that the determination of economic and non-economic damages ought to be two very separate and distinct decisions. *See, Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001) ("A separate charge on hedonic [non-economic] damages will minimize the risk that a jury will under- or over-compensate an injured person for her non-economic losses. While there are cases in which it is difficult to segregate the various components of these types of damages, we conclude that a separate charge will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts.")

A deeper analysis into the underlying issue can be found in a review of opinions from other States' courts who have confronted the issue. The prevailing view appears to be that there is simply no link between medical expenses and non-economic damages.

In the case of *Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308 (2013), the California Court of Appeals examined the issue at length:

One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering. No method is available to the jury by which it can objectively evaluate such damages, and no witness may express his subjective opinion on the matter.

... Translating pain and anguish into dollars can, at best, be only an arbitrary allowance, and not a process of measurement, and consequently the judge can, in his instructions, give the jury no standard to go by; he can only tell them to allow such amount as in their discretion they may consider reasonable.... The chief reliance for reaching reasonable results in attempting to value suffering in terms of money must be the restraint and common sense of the jury....'

Lawyers have used the amount of economic damages as a point of reference in their argument to a jury, or in settlement discussions, as a means to help determine the amount of noneconomic damages. We need not comment on this practice except to state that **it can provide no justification for the admission of evidence that is otherwise inadmissible and that is not relevant** We conclude that evidence of the full amount billed is not admissible... for the purpose of proving noneconomic damages.

Corenbaum, 215 Cal. App. 4th 1308, 1332 (2013) (*internal citations omitted*) (**emphasis added**)

Likewise, in the case of *Martin v. Soblotney*, 502 Pa. 418, 466 A.2d 1022 (1983), the Pennsylvania Supreme Court reached a similar conclusion:

It is well established that the fundamental consideration in determining the admissibility of evidence is whether the proffered evidence is relevant to the fact sought to be proved. ... In the instant case [Plaintiff's] medical bills were offered to establish the total amount of money he expended on medical treatment for his injuries on the theory that such figure would aid the jury in determining the amount to award him for pain and suffering. Our inquiry, therefore, must focus on the evidentiary question as to whether the dollar amount of the medical services provided is probative of the degree and extent of [Plaintiff's] pain and suffering.

It is immediately apparent that **there 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

The *Martin* court noted that the amount of medical bills is not an adequate indicator for the jury to consider in awarding hedonic damages, as there are far too many variables involved:

First, the mere dollar amount assigned to medical services masks the difference in severity between various types of injuries. A very painful injury may be untreatable, or, on the other hand, may require simpler and less costly treatment than a less painful one. The same disparity in treatment may exist between different but equally painful injuries. Second, given identical injuries, the method or extent of treatment sought by the patient or prescribed by the physician may vary from patient to patient and from physician to physician. Third, even where injury and treatment are identical, the reasonable value of that treatment may vary considerably depending upon the medical facility and community in which care is provided and the rates of physicians and other health care personnel involved. Finally, even given identical injuries, treatment and cost, the fact remains that pain is subjective and varies from individual to individual.¹

Thus the fact that a particular amount of money was expended to treat an injury bears no logical correlation to the degree of pain and suffering which accompanied the injury to the plaintiff in question, forces the conclusion that such evidence possesses no probative value in a determination as to the appropriate monetary compensation to be awarded. Evidence of the cost of medical services is therefore irrelevant and, consequently must be held to be inadmissible for that purpose.

Martin v. Soblotney, 502 Pa. 418, 466 A.2d 1022 (1983) (*internal citations omitted*) (emphasis added); *See, also Carlson v. Bubash*, 639 A.2d 458, 462 (Pa. Super. Ct. 1994)

In one decision out of the Eastern District of Virginia, the District Court, relying

¹ It is worth noting that the factors enumerated by the *Martin* court are nearly identical to the reasoning proffered by Counsel for the Plaintiff during his closing argument in an attempt to ameliorate the harm which had been created by the erroneous admission of the medical expenses.

on the *Carlson* decision, also held that medical bills were inadmissible for purposes of proving pain and suffering:

[A] single figure representing the total amount of an individual's medical bills does not demonstrate the number of times the person received treatment or the nature of the treatment. ... In some instances, one noninvasive diagnostic test can cost as much as many visits to a physical therapist or chiropractor. Therefore, the medical bills have no tendency to establish [Plaintiff]'s claim that he experienced pain and suffering as a result of the accident. The Court accordingly holds that the medical bills are inadmissible

Even if the Court were to conclude the medical bills are relevant and admissible .. **there is a substantial possibility of jury confusion if the medical bills were introduced to prove pain and suffering.** The jury may be **tempted to treat the medical bills as recoverable special damages** rather than to only assess the medical bills as evidence that Payne experienced pain and suffering.

The jury may also be confused by the medical bills' characterization of the treatment Payne allegedly underwent because the treatment is described in the bills in summary, imprecise terms. ... Furthermore, introduction of the medical bills into evidence would be overly cumulative: **whatever tendency they would have to prove pain and suffering may already be amply demonstrated by other, more probative evidence, such as the testimony of [Plaintiff] and his doctors.**

Payne v. Wyeth Pharmaceuticals, Inc., 2008 U.S. Dist. LEXIS 91849, (E.D.Va., 2008)

(internal citations omitted) (emphasis added)

In the present case, Counsel for Nestler objected to any cross-examination of Nestler on the amount of medical bills, or the introduction of same to the jury on the basis that the medical bills were not relevant to any issue in dispute, and further, that there was a danger the introduction of same would confuse the issues before the jury. The trial court overruled this objection, adopting a position wholly incongruent with the

law of this state and the rules of evidence by holding that unclaimed economic damages were a proper consideration for the jury in forming a non-economic damage awards:

MR. SLOTCHIVER: *I think [examining Nestler on the medical expenses] is not relevant to the issue. What [the Defense] is trying to do is they're trying to lower the bar of his damages. The amount of medical bills have nothing to do with the damages he sustained. It's irrelevant. We elected not to put them in. We're not asserting a claim for loss for medical bills.*

THE COURT: *I disagree. I mean, the fact you didn't ask to put it in doesn't mean that it is not relevant. And it's the basis for their cross-examination. If you didn't have any medical bills or they were small, then 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.*

MR. SLOTCHIVER: *Your honor, I would respectfully disagree.*

THE COURT: *Well, you can. And you can appeal if you think I'm wrong. But it's coming in for that reason.*

MR. SLOTCHIVER: *To show what the medical bills were?*

THE COURT: *To show what the medical bills were. Normally, people put them in. But 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. They're used for that purpose in almost every trial.*

R. 168 to 169; cf. *Boan v. Blackwell*, 343 S.C. 498, 541 S.E.2d 242 (2001) (“[A] separate charge [for non-economic damages] will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts.”)

In the present case, Nestler did not claim losses for medical expenses incurred as a result of the collision. Nestler's claims included past, present, and future pain and

suffering, loss of enjoyment of life, diminished capacity, and mental anguish. The amount of economic damages which might also have been sustained by the Plaintiff – whether ten dollars or ten million dollars – is in no way relevant to determining that issue as the amounts do not “tend to make any fact in dispute more or less probable.” Rule 402, SCRE.

Further, as was noted by the *Payne* court, any probative value the medical expenses may have in determining the issue of non-economic damages (which Appellant contends is nil), is substantially outweighed by the possibility of jury confusion especially in that a “jury may be tempted to treat the medical bills as recoverable special damages”—the exact result of the present case. Appellant would contend there is no clearer example of jury confusion than a jury award for damages the Plaintiff did not even claim. *Payne v. Wyeth Pharmaceuticals, Inc.*, 2008 U.S. Dist. LEXIS 91849, (E.D.Va., 2008)

Accordingly, the trial court ought to have excluded any testimony or evidence of the medical expenses. The expenses did not tend to make any material fact in dispute more or less probable. The expenses were not claimed as damages by Nestler. Finally, the introduction of same served only to unfairly prejudice Nestler by creating a false-correlative link between his medical bills and his non-economic damages, thus minimizing the severity of his injuries and confusing the jury into awarding damages not claimed by Nestler. Accordingly, this Court ought to REVERSE the trial court’s ruling and REMAND this case to the lower court for new trial on damages.

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'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; OR WAS MOTIVATED BY AN IMPROPER PURPOSE.

Under the "thirteenth juror" doctrine, a trial judge may grant a new trial absolute when he finds the evidence does not justify the verdict. *See, Gastineau v. Murphy*, 323 S.C. 168, 181, 473 S.E.2d 819, 827 (Ct. App. 1996); *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975). The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984).

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).

The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality,

corruption or some other improper motives. See, *Cock-n-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996); *McCourt by and Through McCourt v. Abernathy*, 318 S.C. 301, 457 S.E.2d 603 (1995); *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993);

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*).

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; and/or, (3) The verdict is

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 (R. 121-122 & 158-161); Nestler's testimony regarding his pain, suffering, and trauma suffered during and after the collision (R. 137-149); and, his wife's testimony as to the impact his injuries have had on his family life (R. 101-104). This was presented along with the medical testimony of Dr. Schoderbek (R. 268), which included the 53% overall impairment rating of Mr. Nestler.

based upon an improper motive such as defense counsel's insinuations that Nestler was hiding the medical bills from the jury.

However, assuming *in arguendo*, that the reasons stated above 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).

Accordingly, this Court erred as a matter of law in denying Nestler's motion for new trial because the jury's award of damages in the exact amount of Nestler's medical bills was inconsistent with the evidence and claims presented and reflected the juror's apparent confusion or bias, prejudice, or other similar improper motive. Further, the jury's award of the exact amount of Nestler's medical expenses without an award of non-economic damages fails as a matter of law. The trial court ought to have exercised his authority to grant a new trial to ensure as justice has most assuredly not prevailed in the present case.

III. THE TRIAL COURT ERRED IN CHARGING THE JURY ON THE ISSUE OF FAILURE TO MITIGATE DAMAGES WHERE NO TESTIMONY WAS PRESENTED TO SUPPORT DEFENDANT'S CLAIM.

An appellate court will not reverse the trial judge's decision absent an abuse of discretion. *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. *Id.* The refusal to grant a

requested jury charge that states a sound principle of law applicable to the case at hand is an error of law. *Id.* at 390, 529 S.E.2d at 539. The law to be charged must be determined from the evidence presented at trial. *State v. Pittman*, 647 SE 2d 144 - SC: Supreme Court (2007).

A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages. *McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 354 S.E.2d 405 (Ct.App.1987). The burden of proving a lack of due diligence in minimizing the damages rests with the Defendant. *Hyde v. Southern Grocery Stores, Inc.*, 197 S.C. 263, 15 S.E. (2d) 353 (1941).

In the present case, Fields alleged several affirmative defenses, including the failure to mitigate his damages. However, at trial, Fields failed to proffer any evidence of same during the course of the trial. As such, Nestler objected on a number of occasions to the inclusion of a jury charge regarding mitigation of damages.

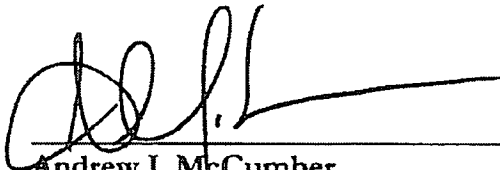
While Fields cross-examined Nestler's testifying physician regarding Nestler's course of treatment, Fields failed to proffer any causational evidence or counter expert medical testimony to support this affirmative defense. Fields's failure to present any evidence which would show that Nestler's failure to engage in certain course(s) of treatment(s) caused Nestler to endure more damages than he would have had he undergone the treatment (i.e. medical testimony from expert) should have precluded Defendant from receiving the benefit of a jury charge regarding mitigation of damages.

Accordingly, the Court's decision to allow the jury charge regarding the mitigation of damages with no evidence to support a charge for same was an abuse of discretion and this Court should REVERSE the trial court's decision and REMAND this case for further proceedings on damages.

CONCLUSION

For all of the foregoing reasons stated herein, and in consideration of the logical and legal support thereof, this Court should REVERSE the judgment of the circuit court, and REMAND the case at bar to the trial court for a new trial to determine damages sustained by Nestler.

Respectfully submitted this 6th day of July, 2017.

By: 

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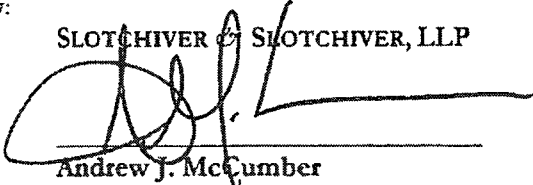
COUNSEL FOR THE APPELLANT

Certificate of Counsel

The undersigned hereby certifies that this Final Brief of the Appellant is being submitted in conformance with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted this 6th day of July, 2017.

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July 7, 2017

VIA REGULAR MAIL:

THE HONORABLE JENNY ABBOTT KITCHINGS
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JUL 10 2017

SC Court of Appeals

RE: Gary Nestler and Julie Nestler v. Joseph Fields
Appeal Case No.: 2016-001541
Case No.: 2016-CP-10-0330

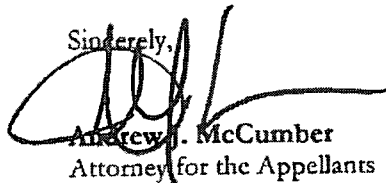
Dear Ms. Kitchings:

Enclosed you will please find fifteen (15) copies of the Appellants' Final Brief with regard to the above-referenced matter. Also enclosed, you will find two (2) copies of a Certificate of Service on the Final Brief. You will please return one clocked copy to my office in the self-addressed, postage paid envelope also included herein.

Please note that I have copied all counsel of record to this correspondence pursuant the South Carolina Appellate Rules.

I thank you advance for your time and attention to this matter, and please do not hesitate to let me if the Court requires anything further from us in this regard.

Sincerely,



Andrew J. McCumber
Attorney for the Appellants

AJM/ssh
Enclosure(s) as stated.

cc: Paul B. Trainor, Esquire (*via regular mail & email*)
Court Administration (*via regular mail*)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

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MAY 09 2017

Trial Court Case No. 2015-CP-10-00330
Appellate Case No. 2016-001541

SC Court of Appeals

GARY NESTLER AND JULIE NESTLER,

Appellants,

v.

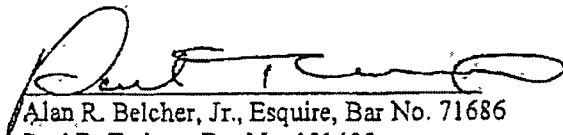
JOSEPH E. FIELDS,

Respondent.

FINAL BRIEF OF RESPONDENT

Respectfully submitted,

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Dated: May 9, 2017

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STATEMENT OF THE CASE

The present action stems from a motor vehicle accident on March 8, 2014 involving Plaintiff Gary Nestler (hereinafter "Appellant") and Defendant Joseph Fields (hereinafter "Respondent"). Appellant and his wife, Julie Nestler, filed suit against Respondent alleging negligence, carelessness, recklessness, and loss of consortium, seeking recovery of actual and punitive damages. See generally R. pp. 25–26.¹ On April 20, 2015, QBE North America timely filed an Answer as Underinsured Motorist Carrier pursuant to S.C. Code Ann. § 38-77-160 on behalf of Respondent. On November 16, 2015, Respondent filed an Offer of Judgment pursuant to Rule 68 of the South Carolina Rules of Civil Procedure for \$40,000 (representing \$15,000 in UIM funds), which was rejected. See R. pp. 36–37.

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's claim for bodily injuries. R. p. 65, lines 13–23. The jury rendered a verdict for \$7,117.50 in actual damages and \$0 in punitive damages. R. p. 266, lines 8–13. The trial court granted the parties ten days to submit post-trial motions. R. p. 268, lines 10–11. On May 4, 2016, Respondent submitted its Motion for Setoff and, on May 6, 2016, submitted its Motion for Costs Pursuant to Offer of Judgment. See R. pp. 39–42; R. pp. 56–58. Also on May 6, 2016, Appellant filed its Motion for New Trial Absolute, identifying twenty-four (24) grounds for a new trial. R. pp. 44–49. On June 1, 2016, the trial court granted Respondent's Motion for Setoff. See R. pp. 17–18. On July 11, 2016, the trial court denied Appellant's Motion for New Trial Absolute and granted Respondent's Motion for Costs. See R. pp. 5–15. Subsequently, Appellant filed the present appeal on July 26, 2016.

¹ Prior to filing suit against Respondent, Plaintiffs settled with Defendant's liability carrier for \$20,000 of the available \$25,000 policy limits.

FACTS OF THE CASE

Respondent generally accepts the facts as outlined in Appellant's initial brief. In his Complaint, Appellant sought to recover for "great physical harm and injury . . . considerable medical treatment . . . and has been otherwise injured and damaged, all to his detriment." R. pp. 25-26. At trial, Respondent admitted simple negligence, leaving only damages for the jury's determination. R. p. 66, lines 12-18.

Julie Nestler offered testimony regarding Appellant's alleged damages. R. p. 104, line 1-p. 108, line 15. Appellant also presented the video deposition of Dr. Robert Schoderbek. R. p. 110, lines 16-17. Dr. Schoderbek offered testimony regarding his personal and professional relationship with Appellant, opinions regarding the subjectivity of pain, reasons for referring patients to other providers, and the numerous referrals and recommendations to Appellant. See generally R. pp. 272-371. Appellant also testified at trial regarding his alleged damages. R. p. 120, line 5-p. 207, line 9. During cross-examination, Appellant was asked about his medical treatment and expenses. R. p. 189, line 15-p. 191, line 10. Appellant was also asked questions regarding a prior claim for bodily injuries that he failed to disclose in discovery. R. p. 175, line 13-p. 181, line 18.

During deliberation, the jury submitted two questions to the parties, initially requesting to see copies of the medical bills, and then requesting the total amount of medical expenses. R. pp. 487-488. In response to the first question, the parties responded by advising the jury that the medical bills were not entered into evidence, and declined to provide the medical bills. R. p. 487. As to the second question, the parties agreed to provide the total amount of Appellant's medical expenses. R. p. 488. Thereafter, the jury rendered an award for Appellant for \$7,117.50.

RESPONDENT'S ARGUMENTS

I. APPELLANT'S CONDUCT AND STATEMENTS AT TRIAL, AND HIS FAILURE TO ASSERT TIMELY OBJECTIONS, CONSTITUTE A WAIVER OF APPELLANT'S ARGUMENTS ON APPEAL, AND, EVEN IF APPELLANT PROPERLY PRESERVED THE ISSUES FOR APPEAL, THE EVIDENCE PRESENTED WAS RELEVANT TO THE ISSUE OF DAMAGES²

Appellant strongly contends throughout his post-trial motion and initial brief on appeal that he did not seek recovery for medical expenses, while preserving all remaining actual, non-economic damages.³ Appellant first argues that his medical expenses had no bearing on his alleged non-economic damages, and identifies numerous cases, all from other jurisdictions other than South Carolina—and none of which are binding on this Honorable Court—to justify his contention. This argument ignores the well-established principle that medical expenses are a form of actual damages, and can be relevant to a plaintiff's overall claim for damages. Appellant further contends that the improper admission of Appellant's medical expenses led to jury

² As a preliminary matter, Respondent contends that Appellant failed to preserve this issue for appeal by failing to assert a contemporaneous objection when evidence of Appellant's medical expenses was introduced. "[O]bjections to the admission of evidence must be made when evidence is presented at trial to preserve error for appeal." *Parr v. Gaines*, 309 S.C. 477, 481, 424 S.E.2d 515, 518 (Ct. App. 1992). "[A] contemporaneous objection is necessary in all trials . . . to properly preserve errors for our direct appellate review." *State v. Torrence*, 305 S.C. 45, 71, 406 S.E.2d 315, 329 (1991). "A contemporaneous objection is required to properly preserve an error for appellate review." *Doe v. S.B.M.*, 327 S.C. 352, 356, 488 S.E.2d 878, 881 (Ct. App. 1997). "The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object." *Id.* (emphasis added).

At trial, the undersigned counsel advised the trial court that it intended to cross-examine Appellant on the amount of his medical bills, but also advised that the actual bills would not be entered into evidence or shown to the jury. R. p. 172, lines 16–22. At that time, Appellant contended that the medical bills were not relevant. R. p. 172, lines 23–24. After the trial court ruled that it would permit the introduction of the amount of medical expenses, Appellant's counsel stated, "If they're going to put them in then we would ask that we modify the charge. We can talk about that later on to include charge or [sic] medical bills." R. p. 174, lines 3–5.

Subsequently, the undersigned counsel cross-examined Appellant on medical expenses from various providers. R. p. 189, line 20–p. 191, line 10. Appellant failed to assert an objection contemporaneously with the offering of evidence regarding Appellant's medical expenses during cross-examination and, therefore, failed to preserve the issue for appeal. The remainder of Respondent's brief addresses Appellant's arguments in the event this Honorable Court concludes that a contemporaneous objection was not required.

³ Despite Appellant's repeated assertions that he was not seeking recovery for medical expenses, the record is conspicuously bare of any such disclaimer. If Appellant so clearly did not seek recovery of medical expenses, as he claims on appeal, the record would be littered with references supporting such contention. However, there is not one statement by Appellant or his counsel to this effect. To the contrary, the record is littered with statements by Appellant's counsel suggesting that they were, in fact, seeking recovery for medical expenses. As one example, Respondent respectfully directs this Honorable Court to Appellant's closing arguments, R. p. 218, line 14–p. 237, line 20; p. 248, line 20–p. 251, line 12, where counsel made several references to medical bills, but failed to advise the jury (or the court) that his client was not seeking recovery for medical expenses.

confusion and, therefore, was prejudicial under Rule 403, SCRE. Appellant fails to recognize that the alleged jury confusion, if there was any, could have been avoided or cured by Appellant, but that Appellant waived any objection throughout the course of trial.

A. Appellant's argument that the medical expenses are irrelevant is without merit due to Appellant's own conduct at trial and Appellant's failure to object to the trial court's jury charge regarding actual damages or to the allegedly improper verdict.

i. Appellant waived any objection to the relevancy of his medical expenses through his own conduct at trial

Although Appellant informed the court and Respondent, for the first time during the course of litigation, and off the record, that he was not seeking recovery for medical expenses more than halfway through the trial, Appellant's conduct and statements during trial suggests otherwise. See R. p. 173, lines 4–5. After the trial court instructed the parties that it would allow Appellant to be cross-examined on his medical expenses, Appellant's counsel stated, "[w]e can talk about that later on to include charge or [sic] medical bills." R. p. 174, lines 3–5. This concession to "include a charge [for] medical bills" came immediately after Appellant's objection, which constitutes a waiver of that objection. Then, during closing arguments, Appellant's counsel stated:

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?

...

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. ...

...

Why wouldn't we show the medical bills? The medical bills as we discussed earlier, they don't play a role in determining what happened to his life. The \$100,000 in medical bills, \$500,000 in medical bills or \$500 in medical bills, they don't equate to how this affected him. They don't affect to the damages that he's had as a result of this wreck. They don't play a role. . . .

Trial Tr. R. p. 236, lines 10–24; R. p. 251, lines 1–7 (emphasis added). Appellant had every opportunity to advise the jury that his client did not seek recovery for medical expenses, but instead instructed the jury to "do with it as [they] may" regarding the "\$7100 of bills". R. p. 236, lines 10–24.

During deliberations, the jury requested a copy of the medical bills. R. p. 487. The parties responded by stating, "The actual bills were not admitted into evidence—only the amount of the bills was." R. p. 487. The jury then submitted a second question, asking, "Can you confirm the amount of the medical bills? Is \$7100 the correct amount?" R. p. 488. The parties responded, stating "\$7,117.50 was the amount." R. p. 488. Not only did Appellant not object to these inquiries, he consented to providing to the exact amount of medical expenses.

Appellant, twice in closing, referenced "\$7100" in medical expenses, without advising that he was allegedly not making a claim for medical expenses, then provided the jury with the exact amount of expenses, which was equal to the jury verdict. Appellant's arguments on appeal are based solely off the premise that he never asserted a claim for medical expenses, when the record unequivocally demonstrates otherwise.

- ii. **Appellant failed to object to the jury charge regarding actual damages, and, therefore, waived any argument that he was not seeking recovery of medical expenses**

"[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). "[A party's] failure to challenge the verdict upon being given an opportunity to do so results in a waiver." Id. "Failure to object to [a] charge at trial waives any alleged error in the charge." Vaughn v. City of Anderson, 300 S.C. 55, 60, 386 S.E.2d 297, 300 (Ct. App. 1989).

While Appellant's statements, and statements by Appellant's counsel, during trial undoubtedly, and justifiably, led the jury to believe that Appellant was claiming medical expenses as actual damages, Appellant's failure to object to the jury charge regarding actual damages constitute a complete waiver of the relevancy issue.

At the close of the first day of trial, Appellant's counsel requested the trial court to provide the jury charges to the parties. R. p. 113, lines 23–25. On the morning of the second day of trial, the trial court provided counsel the jury instructions, and Appellant brought up two issues with jury charges—Respondent's request for a failure to mitigate charge, and a charge regarding insurance. R. p. 114, line 13–p. 117, line 22. Appellant did not object to the charge regarding actual damages, or that the proposed charge included medical expenses as a form of actual damages.⁴ At the close of Respondent's case, Appellant's counsel stated, "We wanted to redress the verdict form, the charges as it relates to the mitigation. But that's it." R. p. 208, lines 24–25. When asked by the trial court "What are your jury charge issues", R. p. 209, lines 4–5, Appellant's counsel made a lengthy argument in opposition to the failure to mitigate charge, R. p. 209, line 6–p. 211, line 23, but made no objection to the charge for actual damages. Appellant's

⁴ In the trial court's discussion of the admissibility of the medical expenses, Appellant's counsel stated, "If they're [Respondent] going to put them in we would ask that we modify the charge. We can talk about that later on to include charge or [sic] medical bills." Trial Tr. 113 3–5 (April 26, 2016) (emphasis added). There is no clearer example of a waiver than requesting a charge related to the evidence being admitted over an objection.

counsel again addressed the jury charges immediately before closing arguments, but only in reference to Appellant's life expectancy. See R. p. 217, lines 10–17.

The trial court charged the jury on actual damages, stating, "actual damages would be the actual losses and expenses which the plaintiff suffered because of the defendant's negligence. The plaintiff must prove that the expenses caused by the injury were reasonable and necessary." R. p. 257, lines 4–8 (emphasis added); see also R. p. 257, lines 14–18 ("[Actual damages] would include physical and mental pain and suffering, expenses incurred for necessary medical treatment, the loss of enjoyment of life suffered as a result of the injury, and any other losses which are reflected by the character of the injury.") (emphasis added)). Additionally, the trial court included a charge for non-economic damages, including pain and suffering, loss of enjoyment of life, future damages, and permanent injury. R. p. 256, line 23–p. 260, line 2.⁵ Appellant did not object to providing a written copy of the charges to the jury, even after being prompted by the trial court. R. p. 264, lines 14–24.

The record is clear that, while Appellant initially objected to the introduction of medical expenses, once the trial court overruled the objection, Appellant made every effort to recover medical expenses as a form of damages. After making his initial argument against introduction of the medical expenses, Appellant advised the court that he wanted to include a charge for medical bills. Subsequently, Appellant spent a significant amount of time in closing (and rebuttal) discussing medical bills, referencing the "\$7,100" in bills on two occasions, yet never

⁵ Appellant cites Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001) for the proposition that the South Carolina Supreme Court has held that the determination of economic and non-economic damages ought to be two separate decisions, and quotes language that "a separate charge will clarify for the jurors the issues they should consider in awarding money for injuries which are not readily reducible to specific amounts." It is critical to note that: (1) Appellant never requested any specific charges related to non-economic damages or objected to any charges related to damages; and (2) the trial court gave a thorough charge on the issue of non-economic damages, including pain and suffering, loss of enjoyment of life, future damages, and permanent injury. R. p. 256, line 23–p. 260, line 2. The trial court, in accordance with Boan, properly charged the jury on non-economic damages. However, Appellant now disingenuously argues for a new trial on the basis of jury confusion.

once suggesting that Appellant was not claiming medical expenses as damages. At the request of the jury to confirm the "7,100" in medical bills, Appellant agreed to provide the jury with the exact amount of expenses. Appellant never objected to the jury charge regarding actual damages, which included medical expenses as an item of actual damages, and even agreed to provide those charges to the jury during deliberations.

Despite all of this, Appellant relies upon one statement, made by Respondent's counsel during an off-the-record conversation, as the sole basis for his argument that the medical expenses were not relevant to the present action.⁶ In the same vein, Appellant argues that the jury "failed to make any award damages [sic] actually claimed by [him] . . . " and that "there was no evidence in the record proffered by the Plaintiff to support the award by the jury for medical bills when they were not claimed as damages" R. p. 46, ¶ 14, 15. However, our Supreme Court has held time and again that a party must raise the issue of a presumptively improper verdict while the jury is still empaneled, and "failure to challenge the verdict upon being given an opportunity to do so results in a waiver." Dykema, 348 S.C. at 554, 560 S.E.2d at 896.

Appellant seeks to have his cake and eat it, too. Appellant, after his initial objection, then waived any objection by failing to "disclaim" medical expenses as recoverable damages in closing; failing to object to the jury charge that included medical expenses as actual damages; failing to object to production of the charges to the jury during deliberations; and failing to object to providing the jury the amount of medical expenses in response to the jury's inquiry during deliberations. These actions unequivocally constitute a waiver of any objection, and Appellant cannot now claim error on appeal. Based on the foregoing reasons, Appellant failed to properly

⁶ Appellant contends, without any binding legal authority, that the medical expenses are irrelevant because they "creat[e] a false-correlative link between [Appellant's] medical bills and his non-economic damages." Surely, Appellant would not make this same argument if Appellant's medical expenses were unusually high

preserve this issue and the arguments he now asserts on appeal, and Respondent respectfully requests this Honorable Court to affirm the trial court's ruling.

B. Even if Appellant had preserved the issue for appeal, Appellant has failed to demonstrate that the trial court abused its discretion in allowing evidence of Appellant's medical expenses

"The admission or exclusion of evidence is left to the sound discretion of the trial judge." State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). "A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances." Id. at 378, 580 S.E.2d at 794 (emphasis added). "A court's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice" Id. "An abuse of discretion occurs when the trial court's ruling is based on an error of law." Id. at 378, 580 S.E.2d at 793–94. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005).

Only once the trial commenced, and after Appellant had the opportunity to hear Respondent's theory of the case during opening statements, did Appellant object to the introduction of medical expenses.⁷ Respondent sought to introduce Appellant's relatively low medical expenses to demonstrate that Appellant did not seek treatment for a significant period of time, nor did Appellant follow the recommendations of his physicians that were intended to benefit him. Appellant seems to take issue with Respondent's theory of the case on appeal, but took no issue with it at trial until after a verdict was rendered. As the trial court correctly opined,

⁷ Appellant could have addressed this issue in pre-trial motions, but was silent on this issue

medical bills are used "in almost every trial" for the purpose of showing that a plaintiff did or did not suffer substantial damages. R. p. 173, lines 21–25. Appellant's argument, in essence, is that, since he chose not to introduce his own medical expenses, they are irrelevant when used to counter or cast doubt on his alleged damages. Indeed, it was Appellant's strategy not to introduce his own medical expenses, but his refusal to do so does not render the expenses irrelevant. Not only were the medical expenses relevant to Appellant's claim for damages, but they were relevant to establish a failure to mitigate defense. Appellant's medical expenses were entirely relevant to the whether he exhausted all treatment options, and to the extent of the treatment actually received that was intended to remedy his alleged injuries.

Appellant has failed to identify the "exceptional circumstances" or error of law that exist to reverse the trial court's decision to admit evidence of Appellant's medical expenses. See State v. Adams, 354 S.C. 361, 378, 580 S.E.2d 785, 794 (Ct. App. 2003) Simply because Appellant chose not to introduce his own medical expenses does not render them irrelevant, and the appellate process is not intended to afford a party who is unhappy with the outcome a second bite at the apple. Appellant's medical expenses were relevant under Rules 401, 402, and 403, SCRE, and Respondent respectfully requests this Honorable Court to affirm the trial court's ruling.

C. Appellant's arguments, even if accepted, do not demonstrate an improper verdict, and would create precedent contrary to public policy and South Carolina law

Appellant contends that the jury awarded only medical expenses, which was a form of damages that were not claimed, and, therefore, demonstrates juror confusion.⁸ However, Appellant's contention is purely speculative—Appellant did not submit a special interrogatory to the jury, and there is no evidence that the verdict is reflective of an award for medical expenses.

⁸ As previously argued, Appellant's contention requires this Honorable Court to accept (1) that Appellant "disclaimed" medical expenses as a form of damages, and (2) that the medical expenses were irrelevant.

As Appellant points out, "It is the duty of the trier of fact in deciding [non-economic damages] to consider the evidence in light of their own life experience and make a judgment on that basis as to what is reasonable under the circumstances." However, Appellant also contends, without binding legal authority, that "[t]he amount of economic damages which might also have been sustained by the Plaintiff in the case has no relationship to that decision making process and makes no issue for determination either more or less probable."

Respondent is cognizant of this Honorable Court's decision in Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), where it declared "patently untenable" Johnson's argument that an award of damages equal to the medical expenses was partly medical expenses and partly pain and suffering. Id. at 260, 533 S.E.2d at 912. However, the present case is immediately distinguishable under Appellant's own argument. Here, Appellant argues that he did not claim medical expenses as a form of damages, and that the jury was required to use its own judgment in determining non-economic damages. As the trial court correctly charged, "[t]here is no definite standard by which to compensate a plaintiff for pain and suffering." R. p. 257, lines 21–22.

Respondent does not contend that the award reflects a combination of economic and non-economic damages. Rather, Respondent contends that the jury could have reasonably concluded, in light of the evidence presented, that Appellant's non-economic damages were equal to the amount of medical expenses, and awarded only a figure for non-economic damages. Jurors often have no basis for determining what is "reasonable" for pain and suffering, and may have simply relied upon the medical expenses as a reasonable amount for non-economic damages. Appellant assumes that the award consists only of an award for medical expenses, yet declines to

acknowledge that the jury, with no basis other than those expenses, may have concluded Appellant's non-economic damages to be equal to that figure.

Appellant's argument, if accepted, would open Pandora's box with regard to jury awards. Following Appellant's argument, an award of \$14,235 (twice the amount of medical expenses) would be improper, and appealable, because the economic and non-economic awards appear correlated. Similarly, any exact multiple of the medical expenses would be improper and appealable under Appellant's theory. Appellant would have this Honorable Court establish precedent that any award for non-economic damages purportedly linked to the medical expenses is improper and worthy of a new trial. In the present action, it is not far-fetched (but equally speculative) to believe that the jury awarded only one multiple of the medical expenses as non-economic damages, particularly where Appellant contends that he was not making a claim for medical expenses. Trial courts would be required to charge juries that they could not render a verdict equal to the medical expenses, or any exact multiple thereof, thereby destroying the jury's discretion in determining reasonable damages. Moreover, a plaintiff, like Appellant in this case, could simply disclaim medical expenses at any time during trial, and then appeal an award that appears, however tangentially, to be compensation for those expenses. This would open the appellate floodgates and necessarily lead to court conjecture and speculation for any verdict that appears even remotely related to the medical expenses.

Moreover, an award for less than the medical expenses would be worthy of a new trial under Appellant's theory. If the jury in the present action awarded an amount less than the medical expenses, Appellant could argue that there was no award for pain and suffering where they "found Plaintiff's medical expenses to be reasonable and necessary" This would lead to trial courts, and this Honorable Court, to routinely speculate as to what damages a jury

actually awarded, and whether any portion of the award constituted an award for non-economic damages. Taking this argument to its logical conclusion, trial courts would be required to charge juries that, if they award any amount for medical expenses, they must award some amount for pain and suffering.

Appellant seeks to have this Honorable Court declare that there cannot be any apparent correlation between economic and non-economic damages, and any award that appears to link the two is improper, and worthy of a new trial. However, Appellant's entire argument inherently requires speculation as to the jury's award. It has long been said that the court "is unwilling to substitute its judgment for that of the jury and place a value of its own thereon", and Respondent respectfully requests this Honorable Court to refrain from speculating as to the jury's award and affirm the trial court's rulings. Jennings v. McCowan, 215 S.C. 404, 428, 55 S.E.2d 522, 532 (1949).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL ABSOLUTE, AND THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT

"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, 723 (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, 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, 26, 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)).

A. Appellant misconstrues South Carolina law in asserting that a jury is required to award pain and suffering if it awards medical expenses as a form of actual damages⁹

The undersigned counsel has been unable to find any legal authority supporting Appellant's contention that South Carolina 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." Appellant's Initial Br., p. 16 (emphasis in original). Appellant cites Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007) and Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000) as support for this contention.

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

⁹ Although Appellant contends that the verdict is solely for medical expenses, this assertion is purely speculative, and Respondent respectfully directs this Honorable Court to Respondent's argument in Section I(C), supra.

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.

On appeal, however, this Honorable Court 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. In doing so, this Honorable Court 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 does this Honorable Court "require" a jury to award pain and suffering where the award encompasses only actual damages.¹⁰ In fact, Howard lends support to Respondent's argument, not Appellant's, that the trial court, in its discretion, properly declined to grant a new trial—under Howard, it would have been error for the trial court to grant a new trial based on the thirteenth juror doctrine where only damages were at issue. See R. p. 66, lines 12–19 (identifying where Appellant's counsel admitted the only issue for jury determination was damages).

Appellant also misguidedly cites 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

¹⁰ 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. However, Appellant never made a Motion for New Trial *nisi additur* and, therefore, that option is not available to Appellant on appeal, and should not be considered by this Honorable Court. This distinction is critical because, had the court had the option of granting an *additur*, and actually granted such a motion, Respondent would have had the option of accepting the *additur* or receiving a new trial absolute. In essence, Appellant argues 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 motion for new trial *nisi additur*, which Appellant did not do, and, therefore, failed to preserve this issue on appeal.

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. This Honorable Court 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, Appellant's arguments. Despite Appellant's reliance on Howard, that ruling clearly demonstrates that it would have been error for the trial court to apply the thirteenth juror doctrine in granting a new trial on the sole issue of damages. Furthermore, the evidence presented in the case at bar is not nearly as compelling as those contained in Waring. Here, Appellant refused to adhere to the referrals and recommendations of his physicians, and received sporadic medical treatment for a period of only a few months.¹¹ Moreover, and most importantly, the trial court in Waring denied the plaintiff's motion for a new trial absolute, but granted a the motion for a new trial *nisi additur*. Appellant failed to move for a new trial *nisi additur*, which was the method by which the plaintiffs in Howard and Waring sought to correct an allegedly inadequate verdict that did provide an award for non-economic damages. As this Honorable Court stated, "Procedurally, the trial court cannot use [the thirteenth

¹¹ The course of treatment and Appellant's compliance with recommended treatment is markedly different from the plaintiff in Waring. For a detailed description of the numerous physician recommendations and referrals Appellant refused to follow, see infra, pp. 23–24

juror] doctrine as a vehicle to grant a plaintiff a new trial on the issue of damages alone. Instead, the trial court should have ruled on [Plaintiff's] motion for new trial *nisi additur*, and in its discretion, increased damages for pain and suffering." Howard, at 157, 654 S.E.2d at 884. Appellant did not move for a new trial *nisi additur*, and cannot seek this remedy for the first time on appeal.¹²

Appellant contends that the jury's award is inconsistent with the claims and evidence presented because Appellant was not claiming medical expenses as damages, and there was extensive testimony regarding Appellant's non-economic damages. As the trial court correctly found, the jury "was not 'actuated by improper motivation,' nor confused about its duties[]", and there was evidence "which may have cast doubt on the credibility of [Dr. Schoderbek's testimony and Appellant's testimony] and the extent of the plaintiff's injuries." R. p. 11.

B. The jury, in its sole discretion, reasonably could have discredited or disregarded evidence of Appellant's alleged non-economic damages.¹³

"The assessment of witness credibility is within the exclusive province of the jury." State v. Wright, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977). "[A] jury is not required to accept uncontradicted witness testimony, as credibility is a question for the jury." Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 549, 694 S.E.2d 1, 6 (2010) (citing Black v. Hodge, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991)); see also Green v. Greenville County, 176 S.C. 433, 439, 180 S.E. 471, 473 (1935) ("It was peculiarly the province of the jury under the facts of this case to pass upon the credibility of the statements testified to by the plaintiff, who was an interested witness, and directly affected by the result of the trial."). It is solely for the jury to determine

¹² In its Order denying Appellant's Motion for New Trial Absolute, the trial court addressed the issue of a new trial *nisi additur*. R. p. 12-13. However, Appellant never made any such motion, either expressly or by reference. See R. p. 43-49

¹³ As previously mentioned, Appellant's argument necessarily requires this Honorable Court to speculate as to the nature of the jury's award. Respondent contends that it is not the court's responsibility to determine what form of damages were awarded in the present action, but only whether the award is supported by the evidence

"the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of litigation." Vinson v. Hartley, 324 S.C. 389, 410, 477 S.E.2d 715, 723 (Ct. App. 1996).

Appellant's brief makes no mention of the extensive credibility issues raised at trial that could have led a jury to disregard the evidence regarding Appellant's alleged damages, and ignores well-established precedent that the jury, not the trial court or the parties, is responsible for weighing evidence and credibility.

For instance, during cross-examination, Appellant was impeached with evidence that he failed to disclose during discovery a prior motor vehicle accident and lawsuit where he claimed permanent bodily injuries. Contrary to Appellant's discovery responses, and his testimony at trial, Appellant was presented with a prior Complaint where he alleged permanent injuries, and was represented by his current counsel for that claim. See Def. Ex. 3, ¶ 7.¹⁴ Notably, Appellant's wife was also a plaintiff in the prior lawsuit. See Def. Ex. 3.

Additionally, there were ample issues raised during Dr. Schoderbek's testimony. Dr. Schoderbek testified that he and Appellant were "friends" prior to treatment related to the subject accident. R. p. 278, lines 24–25. Dr. Schoderbek's records contained recommendations that Appellant take various courses of action, including seeing a neurologist, undergoing an EMG, and receiving an injection. He stated:

Q. Okay. And despite these four discussions and four entries, you are now telling me you didn't believe it would be of any benefit?

A. Well, I can offer recommendations on patients and it's their decision if they want to have that evaluation or not.

¹⁴ Appellant did not include in the Record this prior Complaint that was submitted to the trial court. Upon information and belief, Appellant intends to supplement the Record in accordance with Rule 212, SCACR.

R. p. 319, lines 2–7. In August 2014, Dr. Schoderbek assessed Appellant with an 8% whole person impairment, which did not reference any alleged nerve damage. R. p. 395. Sixteen months later, in December 2015, without any treatment between, Dr. Schoderbek revised his whole person impairment rating to 32%. R. p. 390–391. When asked why various range of motion measurements were missing from his records, Dr. Schoderbek testified that he "just didn't put it in the note." R. p. 325, lines 16–20. Dr. Schoderbek also changed his opinions regarding which nerves may be affected between August 2014 and December 2015:

Q. After that, that's -- that's August 22, 2014. Sixteen months later you then have a new impairment rating of, what was it, 53 percent [upper extremity impairment]?

A. Yes, I believe so.

Q. And at that time it's no longer the radial and ulnar nerves. It's the ulnar and medial nerves; is that correct?

A. Yes. That's what I wrote.

Q. You didn't mention the radial nerve at that time?

A. No, I did not.

Q. You didn't mention the medial nerve in your August 22nd entry, did you?

A. No, I did not.

R. p. 329, line 23–p. 330, line 11. Furthermore, Dr. Schoderbek believed that Appellant sought a new impairment rating solely for the purpose of trying to "resolve" the present action:

Q. I see. So he came -- he came back to you for a revised permanent impairment in hopes of resolving this litigation?

A. That's my understanding.

...

Q. Are you aware that that last visit was approximately six weeks after Mr. -- Mr Nestler's deposition?

A. No, I did not.

R. p. 335, line 23–p. 336, line 1; R. p. 336, lines 9–12.

Finally, Dr. Schoderbek admitted that it was not advisable for Appellant to discontinue physical therapy, and admitted that his records reflecting "extensive" physical therapy was an exaggeration:

Q. So a patient at their -- at their leisure can -- you would -- you would say that that's an acceptable course of action?

A. I wouldn't say it's always acceptable, but it happens.

...

Q. From what I can tell Mr. Nestler went to nine visits of physical therapy. Is that extensive in your mind?

A. I wouldn't say extensive. I'd say he went to -- he went to some therapy, but I wouldn't say extensive. I guess I -- I guess I didn't fully realize he had only gone to nine visits.

Q. Did he mislead you on that?

A. No, he said he was doing therapy and -- he had done some therapy, but it's also doing a lot of stuff on his own as well.

Q. So the word extensive is an exaggeration?

A. No, it's not -- yes, extensive is an exaggeration.

R. p. 348, lines 8 – 12; R. p. 348, line 25–p. 349, line 14; R. p. 372 ("Patient has done an extensive amount of conservative treatment . . .").

The jury is the sole judge of credibility, and the jury was charged that it could "believe the [] testimony of a witness in its entirety or you can reject the testimony of a witness in its entirety." R. p. 252, lines 21–23. There was ample evidence that would allow the jury to discredit the testimony of the witnesses, and it was not within trial court's province to weigh credibility or evidence, or to speculate as to what the jury did or did not consider, and

Respondent respectfully requests this Honorable Court to decline to engage in the type of conjecture that Appellant seeks on appeal.

III. EVIDENCE WAS PRESENTED TO SUPPORT A FAILURE TO MITIGATE JURY CHARGE, AND APPELLANT HAS FAILED TO DEMONSTRATE OR EVEN ALLEGE PREJUDICE RESULTING FROM THE CHARGE

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." Id. "If any evidence supports a requested jury charge, the trial court should grant the request." State v. Ward, 374 S.C. 606, 614, 649 S.E.2d 145, 149 (Ct. App. 2007) (emphasis added). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

In support of its contention, Appellant argues that Respondent "failed to proffer any causational evidence or counter expert medical testimony to support this affirmative defense." Appellant further argues that Respondent failed to show that Appellant's failure to engage in additional treatment caused Appellant to suffer more damages. Id. Respondent has not found, nor has Appellant provided, any legal authority requiring expert causational evidence or counter medical testimony to support a failure to mitigate charge. Rather, the law is quite clear that, where any evidence exists to support a charge, the charge should be given to the jury. Ward, at 614, 649 S.E.2d at 149.

In his deposition used at trial, Dr. Schoderbek was asked several questions regarding the purpose for referring a patient for additional medical treatment, and admitted it would be detrimental for a patient to not follow a physician's recommendations:

Q: How often do you refer patients to physical therapy or occupational therapy or outside treatment?

A. Daily basis.

Q. Okay. What's the purpose for you doing that?

A. Try to get people feeling better so they can go back and do all the fun things they want to do.

...

Q. Okay. And so the most important reason you refer anyone to another provider is to make them better?

A. Yes, it is.

...

Q. Okay. Do you say it's detrimental if a patient does not follow a physician's recommendation?

A. Yes, I believe it is detrimental.

R p. 302, lines 19-22; R. p. 303, lines 11-14; R. p. 304, lines 3-6.

Appellant was referred to physical therapy, two to three times per week, for six to eight weeks, and he attended three visits despite being told he would have an excellent prognosis if he was compliant with physical therapy. R. p. 342, line 15-p. 343, line 16. He was referred to additional therapy at a second provider, two to three times per week, for six weeks, and he attended five visits, at which time Appellant was discharged for failure to return. R. p. 345, line 12-p. 346, line 10. When presented with the fact that Appellant presented to physical therapy less than one-third of the recommended amount, Dr. Schoderbek again conceded that this course of action was not advisable:

Q. And you agree that it may be detrimental if a patient does not follow a medical provider or physician's recommendations.

A. It could be, yes.

Q. It could be. And your recommendation was two to three times a week for six weeks. And he went for five visits and you don't see a problem with that?

A. Obviously you wish patients to go as much as will help them. I don't always have control of patients' lives and their direction and thought process there. But you know, we would like them to go as much as we would recommend . . .

R. p. 347, lines 11–23. Not only did Appellant refuse to comply with physical therapy recommendations, he refused to see a neurologist as recommended; refused to undergo a nerve conduction study despite four recommendations; and refused a steroid injection despite three recommendations. R. p. 340, line 23–p. 341, line 5; R. p. 318, lines 21–p. 319, line 2; R. p. 340, lines 12–18.

It is unquestionably clear that Dr. Schoderbek made numerous recommendations and referrals to Appellant, for the paramount reason of getting him better, and agreed that it would be detrimental for a patient, such as Appellant, to refuse to follow those recommendations and referrals. This testimony surely satisfies the "any evidence" standard that Appellant failed to take a reasonable course of action, as recommended by physicians, to treat his alleged symptoms.¹⁵

Based on the foregoing, the trial court properly submitted to the jury a failure to mitigate charge and, even if this charge were deemed improper, Appellant has not argued or demonstrated that he was prejudiced by the same.

CONCLUSION

Appellant has failed to demonstrate that the trial court abused its discretion in any manner. Appellant's argument rests entirely upon the proposition that Appellant did not seek recovery for medical expenses at trial, and a verdict for an amount equal to the medical expenses

¹⁵ Even if this Honorable Court were not convinced that the evidence supported a charge for failure to mitigate damages, Appellant has failed to demonstrate –or even argue on appeal—that he was prejudiced by the jury charge, and has failed to satisfy its burden on appeal in regards to this issue.

is, therefore, improper. Appellant asserts this premise as unquestionable fact, yet ignores that the record is conspicuously bare of support for this contention. While Appellant may have objected to the introduction of the medical expenses, and half-heartedly (off the record) claimed he was not seeking recovery for medical expenses, the record unequivocally demonstrates that Appellant waived his objection, and did, in fact, seek medical expenses as actual damages. Even if this Honorable Court were to accept Appellant's argument, such a ruling would create dangerous precedent against public policy by requiring courts to routinely speculate as to the nature and rationale for a jury's award, which would surely lead to innumerable appeals.

Moreover, the scarce law that Appellant cites in support of his argument that juries are "required" to award non-economic damages actually supports Respondent's position. Howard states, as a matter of law, that a trial court cannot use the thirteenth juror doctrine to grant a new trial only on the issue of damages, which was the only issue presented in this case. Moreover, this Honorable Court concluded that the trial court must address the issue of awards purportedly lacking non-economic damages by ruling, in its discretion, on a motion for new trial *nisi additur*, which was never made in the present action. Similarly, the trial court denied the plaintiff's motion for a new trial absolute in Waring, and this Honorable Court merely affirmed the grant of a new trial *nisi additur*, which was in the trial court's discretion.

Finally, the trial court properly charged the jury on Appellant's failure to mitigate because there was evidence to support the charge. As has been held time and again, any evidence is sufficient to support a charge, and there was ample testimony from Appellant's own physician with regard to Appellant's failure to follow recommendations intended to improve his alleged injuries. Moreover, Appellant has failed to argue or demonstrate that he suffered prejudice as a result of the charge.

In conclusion, Respondent respectfully requests this Honorable Court to affirm the trial court's denial of Appellant's Motion for New Trial Absolute and grant of Respondent's Motion for Setoff and Costs pursuant to Rule 220(c), SCACR, and to award costs and fees, along with post-judgment interest, to Respondent as permitted by the South Carolina Rules of Appellate Procedure.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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
Appellate Case No. 2016-001541

RECEIVED

MAY 09 2017

SC Court of Appeals

GARY NESTLER AND JULIE NESTLER,

Appellants,

v.

JOSEPH E. FIELDS,

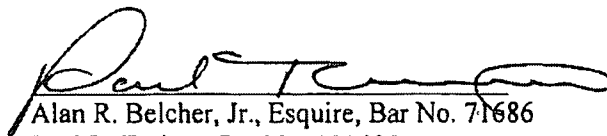
Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certify that the Final Brief of Respondent is in compliance with Rule 211(b), SCACR.

Respectfully submitted,

HALL BOOTH SMITH, PC



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Telephone: (843) 720-3460

Attorneys for Respondent Joseph E. Fields

Dated: May 9, 2017



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
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V. CLAIRE ALLEN
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January 30, 2019

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Re: Gary Nestler v. Joseph Fields
Appellate Case No. 2016-001541

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: The Honorable Roger M. Young, Sr.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Gary Nestler and Julie Nestler, Appellants,

v.

Joseph E. Fields, Respondent.

Appellate Case No. 2016-001541

Appeal From Charleston County
Roger M. Young, Sr., Circuit Court Judge

Opinion No. 5621
Heard November 8, 2018 – Filed January 30, 2019

AFFIRMED

Andrew Joseph McCumber, of Slotchiver & Slotchiver,
LLP, of Mount Pleasant, for Appellants.

Alan Ross Belcher, Jr., of Hall Booth Smith, PC, of
Mount Pleasant, and Paul Barry Trainor, of Hall Booth
Smith, PC, of Atlanta, Georgia, both for Respondent.

HILL, J.: A jury awarded Gary Nestler* \$7,117.50 actual damages for personal injuries sustained as a result of a car wreck caused by Joseph Fields. Fields admitted he was at fault in causing the wreck and Nestler's injuries, so the trial concerned only the amount of Nestler's damages. Nestler did not introduce the \$7,117.50 amount of his medical bills into evidence, but the trial court overruled his relevance objection when Fields offered them. The trial court also overruled

* Julie Nestler withdrew her claim for loss of consortium at trial.

his objection to charging the jury the law regarding mitigation of damages. The trial court denied Nestler's motion for new trial. Nestler appeals, arguing the trial court erred in admitting the amount of his medical bills, charging the jury on mitigation, and denying his new trial motion. We affirm the well-reasoned rulings of the skilled trial judge.

I.

A. Admission of the Amount of Nestler's Medical Bills

Nestler claimed injuries including cervical strain, left elbow contusion, tennis elbow, and a permanent impairment rating of 53% for his left upper extremity, which translated to a 32% impairment rating for the whole person. Nestler testified to his consistent pain, the limited range of motion of his left arm, and loss of his ability to engage in and enjoy life like he had before the wreck. His wife related how his injuries hampered his previously active lifestyle.

Nestler's trial strategy focused on his pain and suffering. In objecting to admission of the amount of his medical bills, he argued the amount was irrelevant to the jury's determination of how much he should be compensated for his loss, and any probative value it had was substantially outweighed by the danger of unfair prejudice. See Rules 401, 402, and 403, SCRE. Nestler reasoned his medical expenses bore no relation to the magnitude of his damages, and allowing the jury to learn of the amount of his expenses would mislead them into believing his pain and suffering could not be extensive. See *Corenbaum v. Lampkin*, 156 Cal. Rptr. 3d 347, 365 (Ct. App. 2015) ("[T]he full amount billed is not admissible for the purpose of . . . proving noneconomic damages."); *Martin v. Soblotney*, 466 A.2d 1022, 1025 (Pa. 1983) ("[T]here is no logical or experiential correlation between the monetary value of medical services . . . and the quantum of pain and suffering endured as a result of that injury.").

We may only reverse a trial court's evidentiary rulings if they constitute an abuse of discretion, meaning they rest on an error of law or inadequate factual support. *Morin v. Innegrity, LLC*, 424 S.C. 559, 575, 819 S.E.2d 131, 140 (Ct. App. 2018). We can find 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. We see no error in the admission of the amount of Nestler's medical bills. Under the specific facts here we cannot say the risk of unfair prejudice substantially outweighed the probative value of the billed amount. Rule 403, SCRE; *United States v. McRae*, 593 F.2d 700, 707 (5th Cir.

1979) ("Unless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, 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."). We are confident in the jurors' ability to weigh evidence and must presume they followed their instructions by applying the facts to the law of damages. We see no reason they should be kept ignorant of the cost of Nestler's medical treatment in determining the facts. What they did with that evidence was largely up to them; as the trial court noted, part of the advocate's art is persuading jurors how such evidence should be interpreted. Different cases may warrant different procedural measures, including bifurcation, special verdict forms or limiting instructions.

B. Jury Instruction on Mitigation of Damages

Nestler claims the jury should not have been charged that he had a duty to mitigate his damages because there was no evidence any mitigation would have been successful. To warrant reversal, it must not only have been an error for the judge to have instructed the jury on mitigation, but the error must have prejudiced Nestler. *See Sulton v. HealthSouth Corp.*, 400 S.C. 412, 416, 734 S.E.2d 641, 643 (2012) ("An erroneous jury instruction constitutes grounds for reversal only if the appellant can show prejudice from the erroneous instruction.").

The jury heard evidence that Nestler's treating doctor prescribed extensive physical therapy, a nerve conduction study, and other recommended treatments. It also learned Nestler attended only a fraction of the physical therapy and did not pursue the other options because he believed they would have been futile. Nestler maintains this evidence is not enough to support a mitigation charge because without an expert opinion that his failure to complete the prescribed treatments would have lessened or reduced his pain and suffering and other damages, a mitigation charge licensed the jury to speculate.

We disagree. Most of the mitigation evidence came from Nestler's own doctor. The doctor's testimony about the physical therapy and other treatment he recommended to Nestler was an expert opinion that carried with it the inference Nestler claims was absent, i.e. that the doctor would not have recommended the treatment unless he believed to a reasonable degree of medical certainty it would have helped. Nestler testified his doctor told him he could stop the physical therapy if it was not working. But as the trial court pointed out, the reasonableness of Nestler's choices was up to the jury. *See McClary v. Massey Ferguson, Inc.*, 291 S.C. 506, 510–11, 354 S.E.2d 405, 407–08 (Ct. App. 1987) ("The

reasonableness of actions to mitigate damages is ordinarily a question for the jury.").

C. Denial of New Trial

Nestler maintains he is entitled to a new trial because, despite the extensive evidence as to his permanent impairment, pain and suffering, and other non-economic damages, the jury only awarded him the amount of his medical bills. The record reveals Nestler moved for a new trial absolute and a new trial based on the thirteenth juror doctrine, which the trial court denied. The trial court also declined to order a new trial *nisi*.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *See Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015). "When the verdict indicates that the jury was unduly liberal or conservative in its view of the damages, the trial judge *alone* has the power to [alter] the verdict by the granting of a new trial *nisi*." *Id.* (emphasis and alteration in original). "However, when the verdict is so grossly excessive or inadequate that the amount awarded is so shockingly disproportionate to the injuries as to indicate the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence, it becomes the duty of the trial judge and this Court to set aside the verdict absolutely." *Id.*

As we have noted, Nestler's trial strategy was to not seek specific recovery of his actual medical expenses but to focus on the extent of his pain and suffering and the permanency of his injuries. The trial court was persuaded the verdict was not inadequate or otherwise unjust. We agree. The jury had before it evidence that, if believed, undercut Nestler's credibility. As Fields' counsel brought out on cross, Nestler boasted a semi-photographic memory, but could not recall a prior lawsuit he had brought alleging permanent injuries to his neck and back arising from a different car wreck. Nestler did not disclose the lawsuit in discovery, and the trial court instructed the jury they could infer the information withheld would have been unfavorable to Nestler. Fields also assailed the veracity of Nestler's permanency rating, bringing to light that the doctor's initial 8% impairment rating for the entire person shot up to 32% after Nestler (his good friend) asked him to revisit it in an effort to resolve this case. The jurors' reaction to this inconsistency may have been like hearing the thirteenth stroke of a clock "which not only is itself discredited but

casts a shade of doubt over all previous assertions." A.P. Herbert, *Uncommon Law* 28 (new ed. 1969).

Juries do not have to accept even uncontradicted testimony, much less testimony that contradicts itself. See *Black v. Hodge*, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991) ("The fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation."). The jury could have found serious credibility gaps in Nestler's damages evidence.

Drawing reasonable inferences from the evidence in the light most favorable to Fields, we find the trial court did not abuse its discretion in denying his motion for a new trial absolute. For the same reasons, we affirm the trial court's denial of Nestler's motion for a new trial under the thirteenth juror doctrine. *Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 551, 593 S.E.2d 504, 507 (Ct. App. 2004) ("[T]hirteenth juror doctrine allows the circuit court judge to grant a new trial absolute when the judge finds the evidence does not justify the verdict."); see also *Howard v. Roberson*, 376 S.C. 143, 156–57, 654 S.E.2d 877, 884 (Ct. App. 2007) ("The thirteenth juror doctrine is not the proper vehicle for ordering a new trial on a singular issue such as damages.").

Finally, the trial court did not abuse its discretion in deciding not to order a new trial *nisi additur*. Although some cases have held a trial court abuses its discretion when it refuses to grant a new trial *nisi additur* when the jury's verdict is less than a party's medical bills, see, e.g., *Patterson v. Reid*, 318 S.C. 183, 186–87, 456 S.E.2d 436, 438 (Ct. App. 1995) (finding the trial court's grant of a new trial *nisi additur* was not an abuse of discretion when jury awarded \$500.54 in actual damages but plaintiff incurred \$6,339.40 in medical expenses), or fails to account for pain and suffering, see *Waring v. Johnson*, 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000), the trial court here found no compelling reason to impose its will on the parties and invade the jury's domain. We must accord the trial court's decision "great deference," and respect its superior position to gauge credibility and the field of evidence. *Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) ("[G]reat deference is given to the trial judge, especially in the area of intangible elements of damages.").

AFFIRMED.

KONDUROS and MCDONALD, JJ., concur.

89058

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

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SC Court of Appeals

Gary Nestler & Julie Nestler *Appellants,*

v.

Joseph E. Fields *Respondent*

APPELLANTS' PETITION FOR REHEARING

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Attorneys for the Respondent

ARGUMENT FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Gary Nestler ("Appellant") hereby petitions for a rehearing of this Court's Opinion No. 5621, dated January 30, 2019 ("Opinion") affirming the Circuit Court's admission of the amount of Appellant's medical bills, charging the jury on mitigation, and denying Appellant's motion for a new trial. The Appellate Court overlooked or misapprehended several key points of law which are discussed below.

I. The admission of the amount of Appellant's medical bills into evidence by the trial court was in direct contravention to the S.C. Rules of Evidence.

At the trial in this matter, Appellant 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, Appellant objected to their admission under Rules 401, 402, and 403, SCRE.

The Court held there was "no error in admission of the amount of [Appellant'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 Court's Opinion misapprehends or overlooks the proper application of the South Carolina Rules of Evidence in this matter. Specifically, the Opinion of the Court

provides no analysis of the evidence's relevancy—the most fundamental touchstone of admissibility. See, Rules 401 and 402, SCRE. The Court must first address this question 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 the amount of Appellant's damages. Appellant 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.** This evidence fails to satisfy the definition of “relevant evidence” and is therefore wholly inadmissible. 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 this Court.

Assuming, *in arguendo*, there were any relevance to this evidence rendering it admissible under Rule 402, then a Rule 403 analysis would be proper. This 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 causally related to, representative of, or useful in making a determination of Plaintiff's non-economic damages.

As briefed extensively by the Appellant, 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.)

As noted during oral arguments, 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.

However, the trial judge made 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."*) R. 169.

In applying the "abuse of discretion" standard¹, it is clear that this evidence was only "dragged in by the heels for the sake of its prejudicial effect." Respondent's only motivation in introducing these figures is 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

¹ As noted by both the Appellant 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 -330; § 14-8-20; 1'On v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000).

itemized list to the jurors; (3) the evidence did not describe, state the nature of, scope or duration of any of Appellant'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 Appellant's non-economic damages.

The Appellate Court held that there was "no reason [the jury] should be kept ignorant of the cost of [Appellant's] medical treatment" ... and that "part of the advocate's art is persuading jurors how such evidence should be interpreted." However, Appellant respectfully contends that 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 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 unring.

For the reasons herein stated, it is the position of the Appellant that the trial court abused their discretion and failed in their duty as gatekeeper. As this issue appears to be overlooked or apprehended by the Appellate Court's Opinion, Appellant respectfully requests this Court to GRANT the petition for rehearing.

II. Appellant's motion for new trial should have been granted as the jury's award was inconsistent with claims presented, reflected the jurors' confusion, and is in compatible with South Carolina law.

The Court's Opinion misapprehends or overlooks the issue of whether a 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); Johnson v. Hoechst Celanese Corp., 317 S.C. 415, 453 S.E.2d 908 (Ct. App. 1995).

In the case at bar, the jury's verdict warranted granting of Appellant'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 Appellant. 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 Appellant. Credibility concerns of the Appellant aside, an award which was clearly inconsistent with the claims presented at trial, or which reflected the jurors' confusion over their understanding of the claims warrants a new trial.

Secondly, the Court's Opinion misapprehends or overlooks the issue of whether a new trial ought to have been awarded based on the juror's failure to award any damages, however nominal, for pain and suffering. 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 trial court ought to have exercised his authority to grant a new trial.

CONCLUSION

For all of the foregoing reasons stated herein, and in consideration of the logical and legal support thereof, this Court should GRANT the Appellant's petition for rehearing.

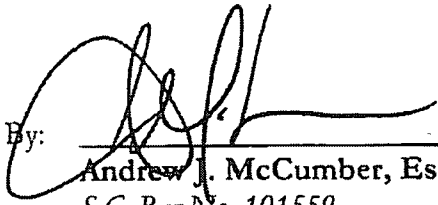
SUGGESTION FOR REHEARING *EN BANC*

Although the Courts generally do not favor rehearing a matter *en banc*, Appellant respectfully submits that consideration by the full court is necessary to secure or maintain uniformity of its decisions given the conflicting rulings between this Opinion and other controlling precedent of the State, and that this proceeding involves a question of exceptional importance in that it contains a novel issue of evidentiary law which is being litigated throughout the State at the trial court level; and, that the decision of this Court fundamentally impacts a Plaintiff's right to remain master of their Complaint.

Respectfully submitted this 14th day of February, 2019.

(signature contained on the following page)

By: _____



Andrew J. McCumber, Esq.

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COUNSEL FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

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SC Court of Appeals

Gary Nestler & Julie Nestler *Appellants,*

v.

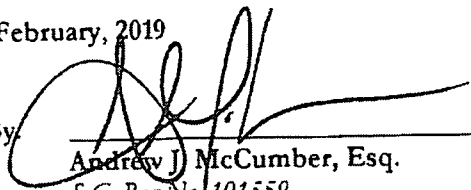
Joseph E. Fields *Respondent*

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this **Petition for Rehearing** is being submitted in conformance with the requirements of Rule 211(b), SCACR.

Respectfully submitted this 14th day of February, 2019

By


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No. 2016-001541

RECEIVED
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Gary Nestler & Julie Nestler *Appellants,*

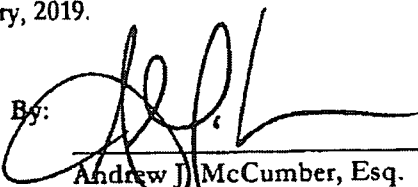
v.

Joseph E. Fields *Respondent*

CERTIFICATE OF SERVICE

I certify that I have served the Appellants' Petition for Rehearing on the Respondent, Joseph E Fields by mailing a copy of same on February 14, 2019 to their attorney of record, at their office address as follows: Hall Booth Smith, P.C., 40 Calhoun Street, Suite 550, Charleston, South Carolina 29401.

Respectfully submitted this 14th day of February, 2019.

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COUNSEL FOR THE APPELLANT

The South Carolina Court of Appeals

Gary Nestler and Julie Nestler, Appellants,

v.

Joseph E. Fields, Respondent.

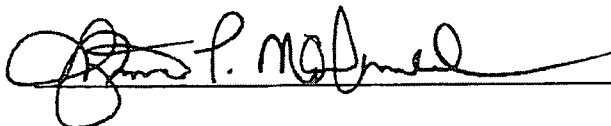
Appellate Case No. 2016-001541

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Andrew Joseph McCumber, Esquire

Paul Barry Trainor, Esquire

Alan Ross Belcher, Jr., Esquire

FILED

March 29, 2019