THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Letitia Verdin, Circuit Court Judge

Case No. 2018-000897

Rosa S. St. Gelais, Appellant,

v.

Julius L. Leary, Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

WHETHER TESTIMONIAL EVIDENCE OF APPELLANT'S POSITIVE MARIJUANA TEST WAS PROPERLY ADMITTED AT TRIAL AS WHEN IT WAS ADMITTED FOR THE LIMITED PURPOSE OF PROVIDING AN ALTERNATIVE BASIS FOR APPELLANT'S SYMPTOMS AT THE SCENE OF THE MOTOR VEHICLE ACCIDENT.

STATEMENT OF FACTS

On August 19, 2013, Dr. Leary rear-ended appellant driving approximately two to three miles an hour. (R. p. 214, lines 22-23; p. 218, lines 7-9). Photographs of the vehicles did not show damage to either vehicle and Dr. Leary did not observe damage at the scene. (R. p. 216, lines 6 - 14, 23-25; p. 217, lines 1-5, 13 – 19; p. 219, line 7 – p. 220, line 9).

Appellant testified she felt dizzy and lightheaded immediately after the accident. (R. p. 99, lines 19-24; p. 122, lines 1-4). Appellant denied that she had consumed any intoxicating substances in both her interrogatories and on cross-examination, prompting the trial judge to allow impeachment evidence of the positive drug screen test. (R. p. 122, line 18-p. 124, line 25).

Following impeachment, the judge *sua sponte* gave the following limiting instruction:

> I just want to say that I allowed defense counsel to go into some records just now. Those records are not to be considered for any purpose other than them talking about the symptoms in this case or any symptoms that the Plaintiff alleges that she had. Fault is not an issue in this case, so that it shouldn't be considered by you as to fault in any – in any way. Defendant has admitted he was at fault in causing this accident. So, in other words, you can only use that testimony – whatever that you believe about that testimony you can only use it for that limited purpose – as related to an [sic] potential symptoms in this case.

(R. p. 125, lines 6-17).

On examination of Dr. Leary, he testified he is a surgeon and was on his way to the hospital to perform surgery when the subject accident occurred. (R. p. 214, lines 6-7, 22-23). He was

wearing his scrubs. (R. p. 214, lines 8-9; p. 222, lines 6-7). Dr. Leary exited his vehicle after impact and approached appellant's driver's side window to ensure she was unharmed and render aid, if necessary. (R. p. 215, lines 10-11; p. 222, lines 23-25; p. 223, lines 1-2). As he approached, he observed appellant talking to herself with the window up saying, "I've got a terrible headache." (R. p. 222, lines 10-12). Dr. Leary tapped on the window and appellant cracked her window open slightly. (R. p. 222, lines 12-14). Dr. Leary identified himself as "Dr. Leary", stated he had rear ended her vehicle but did not observe any damage. (R. p. 222, lines 14-16). Suddenly, appellant began screaming and holding the front of her head, yelling "I have a headache, I have a headache." (R. p. 222, lines 17-19). Appellant had no visible injuries or evidence of trauma. (R. p. 222, lines 22-24). Appellant refused Dr. Leary's aid, and rolled up her window. (R. p. 222, line 24-p. 223, line 4).

In his capacity as a doctor who has handled motor vehicle accident injuries and trauma before, Dr. Leary noted a frontal headache is not a common complaint after an automobile accident and found appellant's behavior "unusual". (R. p. 222, lines 13-14, 19-22; p. 223, lines 17-18). Dr. Leary felt that "something was not right" and described appellant as exhibiting an exaggerated response to a minor impact. (R. p. 223, lines 19-22). Dr. Leary later learned appellant's drug screen at the emergency room was positive for marijuana. He believed the mind-altering capabilities of marijuana caused a distorted perception of the accident, and therefore her response was exaggerated. (R. p. 224, lines 6-16). On cross-examination, Dr. Leary agreed the test result did not indicate the quantity of marijuana in appellant's system or the time it was ingested. (R. p. 225, line 18-p. 226, line 7).

ARGUMENT

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE EVIDENCE OF APPELLANT'S POSITIVE

MARIJUANA TEST WAS PROPERLY ADMITTED FOR THE LIMITED PURPOSE OF PROVIDING AN ALTERNATIVE BASIS FOR SYMPTOMS ALLEGED ON THE SCENE OF THE MOTOR VEHICLE ACCIDENT.

The trial judge's decision to admit evidence of appellant's positive marijuana test obtained at the emergency room following the motor vehicle accident was proper impeachment evidence, particularly in light of testimony that appellant exhibited exaggerated behavior and unusual symptoms following the minor impact. Evidence that appellant had marijuana in her system at the time of the accident was relevant to provide an alternative basis for her uncharacteristic symptoms where respondent's case entirely hinged on whether appellant's alleged injuries were causally related to the minor accident. Furthermore, the evidence was not overly prejudicial to appellant in light of the trial judge's thorough, and uncontested, limiting instructions to the jury.

I. Standard of Review

South Carolina's thirteenth juror doctrine entitles the trial judge to sit, in essence, as the thirteenth juror when he finds "the evidence does not justify the verdict," and then to grant a new trial based solely "upon the facts." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990) (citing *S.C. State Highway Dep't v. Townsend,* 265 S.C. 253, 217 S.E.2d 778 (1975)). On review by the appellate court, a trial judge's order granting or denying a new trial will be upheld unless the order is "wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Folkens*, 300 S.C. at 254-55, 387 S.E.2d at 267. This Court's "review is limited to consideration of whether evidence exists to support the trial court's order." *Folkens*, 300 S.C. at 255, 387 S.E.2d at 267.

The admission of evidence is within the trial court's discretion. *Watson v. Chapman*, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App. 2000). The court's ruling to admit or exclude evidence will only be reversed if it constitutes an abuse of discretion amounting to an error of law.

R & G ConsR., Inc. v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000).

II. The Positive Marijuana Test was Admissible

a. The evidence was relevant and probative

All that is required to render evidence admissible is that "the facts shown legally tend to establish, or to make more or less probable, some matter in issue, and to bear directly or indirectly thereon. Relevancy of evidence means the logical relation between the proposed evidence and a fact to be established." *Levy v. Outdoor Resorts of S.C.*, 304 S.C. 427, 431, 405 S.E.2d 387, 390 (1991) (quoting *Winburn v. Minnesota Mut. Life Ins. Co.*, 261 S.C. 568, 574, 201 S.E.2d 372, 374-75 (1973)); *see also* Rules 401, 402, SCRE.

After the minor accident, appellant complained of dizziness, lightheadedness, a frontal headache, and was exhibiting generally exaggerated behavior. Marijuana is universally known to cause the symptoms and behaviors identified by Dr. Leary. Therefore, the fact claimant testified positive for marijuana would certainly be relevant to show these symptoms and behaviors were not causally related to the accident.

Specifically, appellant complained of dizziness and lightheadedness on the scene. (R. p. 69, ll. 19 – 24; p. 92, ll. 1 – 4). When Dr. Leary approached her vehicle and asked if she was alright, appellant testified she exclaimed, "No. I'm not." (R. p. 69, ll. 13 – 16). Dr. Leary testified appellant began screaming about a frontal headache within thirty seconds of the motor vehicle accident – an accident that caused little to no damage and that occurred when Dr. Leary rear ended appellant traveling approximately two to three miles per hour. (R. p. 218, lines 7-9; p. 222, line 2-p. 223, line 5). However, appellant testified in her deposition and at trial that she did not hit her head and the records indicated no findings of a head injury. Dr. Leary explained that based on his

experience as a long-time physician, complaints of a frontal headache immediately after an accident are abnormal. *Id.* He further explained that he found her behavior to be "unusual" and that she was exhibiting an "exaggerated response" that was "not a normal response" for this type of accident. (R. p. 222, lines 10-14; p. 223, lines 17-22). This behavior was observed despite the fact that appellant had no visible injuries, no head injury, and no documented reason to be experiencing such symptoms.

Appellant argues the test results are not relevant and lack probative value because they were not reliable. To the contrary, the medical record from which this testimony was elicited indicated that the test had been "[v]erified by repeat analysis." To the extent appellant continues to argue the lack of reliability based on chain of custody grounds, it has been held that tests performed in medical facilities and relied upon by medical professionals, and documented in routinely kept medical records, are admissible without establishing chain of custody and are admissible as business records. *See Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002). In *Ex parte DHEC*, the Court's holding focused on the presumed trustworthiness of medical records and the fact that such tests are performed in a neutral setting for purposes of diagnosis and treatment. *Id.* 350 at 250, 565 at 297. Therefore, the drug test in this case cannot be deemed irrelevant or nonprobative on grounds of reliability, because the law recognizes the reliability of the medical records and appellant's drug test.

Because Dr. Leary's defense focused on showing the symptoms and alleged injuries were not related to the subject accident, the positive marijuana test was not only relevant to the central issue in the case, but extremely probative.

b. The probative value was not substantially outweighed by the prejudicial effect

Relevant evidence may not be admissible "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Rule 403, SCRE. The trial court has "particularly wide discretion in ruling on 403 objections." *Busillo v. City of North Charleston*, 404 S.C. 604, 610, 745 S.E.2d 142, 146 (Ct. App. 2013). Appellant argues the evidence was substantially more prejudicial than probative because it "portrayed [appellant] as a drug user" and had the effect of allowing the jury to "base its decision on passion against drug use".

i. Issue Preservation

As an initial matter, appellant's arguments are not properly preserved for appeal. To preserve issues at trial for appellate review, the issues must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity. *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007). "As a general rule, the objection in the trial court must have been made by the party who urges the error in the appellate court." 4 C.J.S. *Appeal & Error* § 219 (1993); *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007). "Ordinarily, a general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for appellate review." 4 C.J.S. *Appeal & Error* § 215 (1993); *see State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998).

Appellant discussed her objections three times during trial, but at no point argued the evidence was more prejudicial than probative. During Motions in Limine, appellant argued the results of the test were unreliable and had no probative value. (R. p. 34, line 22-p. 35, line 11). The second objection, which occurred as the evidence was being presented to the jury as impeachment evidence, was not placed on the record. (R. p. 123, lines 12-18). The appellant's objection was last addressed at the close of her case-in-chief, at which time appellant argued it was

improper character evidence and speculative in nature. (R. p. 203, lines 10-18). Furthermore, appellant failed to object when the positive drug test was discussed during Dr. Leary's direct examination. (R. p. 224, lines 4-16). Because appellant never made a Rule 403 objection during the trial, this appeal should be disposed of on grounds of issue preservation. *See First Carolina, supra.*

ii. Limiting Instruction

Assuming arguendo this evidence could have prejudiced appellant, such danger was negated by the judge's thorough limiting instruction. "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Rule 105, SCRE; *see Brown v. Orndorff*, 309 S.C. 320, 422 S.E.2d 151 (Ct. App. 1992) (holding in an automobile accident case, the trial court's decision to admit evidence of a party's driving record for the limited purpose of evaluating future work opportunities was proper when the jury was instructed not to consider it on any issue pertaining to liability). "Juries are presumed and bound to follow the instructions of the trial judge." *Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 426 n.3, 537 S.E.2d 279, 284 n.3 (2000). South Carolina's rule on limited admissibility mirrors that of the federal rule. S*ee State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973) (analyzing instruction based on federal rule); Rule 105, FRCP. Under the FRCP, courts have noted "there is a strong presumption that proper limiting instructions will reduce the possibility of prejudice to an acceptable level." *United States v. Kilcullen*, 546 F.2d 435, 447 (1st Cir. 1976).

In this case, the judge immediately instructed the jury to limit the drug evidence only as it related to "potential symptoms", without request from appellant. Specifically, the judge stated the evidence could not be considered "for any purpose" other than the symptoms appellant allegedly

suffered as a result of the subject accident. The instruction further reminded the jury that fault was not an issue in this case and the drug evidence could not be considered in the context of negligence. Therefore, the prejudicial effect of the evidence, if any, was alleviated by the limiting instruction such that it did not "substantially outweigh" its probative value in suggesting appellant's unusual symptoms were a result of something other than the accident. Because jurors are presumed to follow a judge's limiting instruction, her argument regarding prejudice is without merit. *See Buff, supra.*

Further, appellant neither submitted to the trial judge language to be used in the limiting instruction, nor challenged the adequacy of the instruction either at trial or on appeal. In fact, the judge specifically offered to "give another limiting instruction of some kind" when counsel for appellant noted his objection to the evidence on the record later in trial. (R. p. 203, line 10-p. 204, line 5). Appellant did not accept or otherwise comment on the judge's offer.

If Appellant had been concerned of the prejudicial effect cited in her appellate brief, she was in a position at trial to request a more detailed instruction. Furthermore, appellant failed to object to the judge's jury charges and nor did she seek a charge instructing the jury that it must not be motivated by passion or prejudice. *See City of Columbia v. Wilson*, 324 S.C. 459, 464, 478 S.E.2d 88, 90 (Ct. App. 1996) (holding a party's failure to object to a jury charge waived any right to later complain of error). Failure to request such a charge or instruction and failure to dispute the effectiveness of the charge or limiting instruction in her motion to the court should preclude appellant from blindly assuming the jurors were prejudiced. *See Buff v. S.C. Dep't of Transp.*, 342 S.C. 416, 426 n.3, 537 S.E.2d 279, 284 n.3 (2000) ("Juries are presumed and bound to follow the instructions of the trial judge.").

The trial judge, therefore, did not abuse her discretion in admitting the impeachment

evidence with a limiting instruction.

iii. Kennedy inapplicable

Appellant cites *Kennedy v. Griffin*, 358 S.C. 122, 595 S.E.2d 248 (Ct. App. 2004), to support her argument that the drug evidence was wrongly admitted on grounds of prejudicial effect. The Court of Appeals held in *Kennedy* that a positive marijuana test was inadmissible under Rule 403, SCRE, because 1) the results were not sufficiently quantifiable so as to show whether the marijuana was of such a level as to impair Kennedy's judgment, and 2) because there was no circumstantial evidence to support an inference that Kennedy was impaired. For these reasons, this Court found the evidence was more prejudicial than probative because there was "no correlation between the marijuana and the accident." *Kennedy*, 358 at 128, 595 at 251.

Had the subject case not been an admitted liability case, and had the evidence been admitted for purposes of proving appellant was driving impaired, the *Kennedy* case would arguably be on point. However, the only issues for the jury to determine in the subject case were causation of injuries and damages. The evidence of a positive marijuana test in this case was presented as impeachment evidence to be used not only as evidence of credibility, but also to present the jury with an alternative explanation for the exaggerated behavior and symptoms that were inconsistent with a minor accident without a head injury.

Unlike *Kennedy*, a limiting instruction was immediately given to the jury that specified the precise way in which they could apply this evidence. Although the evidence in *Kennedy* was used to prove impaired driving to establish liability for comparative fault purposes, the evidence in the subject case was used for very narrow, but extremely probative purposes: to impeach credibility and to show that the symptoms complained of, and for which appellant sought damages, may not have been causally related to the subject accident. The evidence admitted in this case was

presented in a much narrower context than in *Kennedy*, and therefore, had no prejudicial effect.

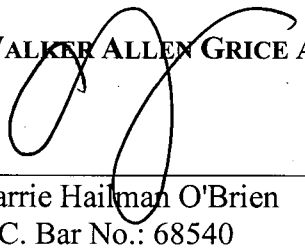
The *Kennedy* case is further distinguished because the drug test evidence was not presented in the subject case for purposes of linking the positive drug test to the accident. The *Kennedy* court called for a subset of evidence to promote a finding that the driver was, in fact, impaired. This requirement is irrelevant in the subject case, because a finding of impaired driving was not the purpose of the submitted evidence. Even if this Court were to require a showing of correlating factors, the circumstances surrounding appellant's behavior after the accident are, themselves, circumstantial evidence of marijuana usage. Not only were the results verified by a repeat test, but appellant displayed exaggerated responses, unusual behavior, and immediately complained of head pain inconsistent with a person who admitted she did not hit her head.

Respondent concedes the test did not measure the quantity of marijuana or how recently appellant had been exposed. In *Kennedy*, these factors were required to prove impaired judgment of a driver. Because the evidence in the subject case was not presented to prove appellant was driving impaired, the quantity and timing of ingestion are irrelevant. Furthermore, the trial judge allowed appellant ample opportunity to thoroughly cross-examine Dr. Leary on these points and argue them fully in closing argument. Appellant explored these points, further lessening any alleged prejudice.

CONCLUSION

For the foregoing reasons, respondent respectfully submits evidence exists to support the trial court's order denying appellant's Motion for New Trial and requests the Court affirm the judgment of the trial court.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

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