IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hooker, Circuit Court Judge

Case No. 2018-CP-32-02102

RECEIVED
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SC Court of Appeals

Gerald Nelson, ... Appellant,

v.

Christopher S. Harris and Charles L. Baughman, Sr.,
d/b/a K&B Towing, LLC, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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II. Whether the Circuit Court correctly responded to a jury question regarding insurance by instructing the jury to consider only the evidence presented in the case and where there was no evidence of insurance presented to the jury.

STATEMENT OF THE CASE

Appellant challenges a jury verdict of $18,500 for his claims arising out of a January 28, 2016 automobile accident admittedly caused by Respondent Harris. (Tr. 297:17–20). The jury issued this verdict after hearing testimony from Appellant, his mother, and his treating physician Dr. Corey Hunt. Through cross examination, Respondent showed that, although Appellant was injured in the late January 2016 accident, he returned to work in early April 2016, he regularly helped his elderly mother with physical tasks around her home, and he had not sought any additional treatment in the more than three-and-a-half years between April 2016 and the January 2020 trial. (Tr. 92:5–6; 112:10–12, 119:20–23) (Hunt Depo. Tr. 21:8–10). In other words, Appellant's injuries were minor, and he made a full recovery.

I. Statement of Facts

A. Appellant's Injuries

Appellant claimed injuries after a rear-end collision involving Respondent. Appellant allegedly suffered a back injury in the car accident. The jury heard evidence regarding Appellant's underlying and pre-existing back condition, for which he sought treatment in 2013. (Hunt Depo Tr. 17:12–20).[1] Then, Appellant treated with Dr. Hunt after the January 2016 accident.

[1] Dr. Hunt testified at trial via deposition.

An MRI taken in March 2016 revealed disc bulges and herniations. However, Dr. Hunt—Appellant's own treating physician and not a defense-retained expert—testified the odds were "[n]o greater than 50 percent" that the wreck aggravated Appellant's back condition and caused the disc herniation to become symptomatic. (Hunter Dep. Tr. 25:9–17). Dr. Hunt went on to explain that the sort of disc bulges and herniations revealed in the MRI are commonly caused by degenerative spine disease and occur in many people that have not been involved in a car accident. (Hunt Depo. Tr. 26:9–17). Finally, Dr. Hunt conceded that he had "no idea whether any of the conditions reflected in the MRI were caused by this wreck." (Hunt Depo. Tr. 26:18–21). Moreover, Dr. Hunt testified that Appellant's subjective complaints were actually inconsistent with the MRI results. (Hunt Depo. Tr. 26:25–27:16).

Appellant's own subjective observations also revealed that he made a speedy recovery. On February 19, 2016—approximately 20 days after the accident—he reported he felt like he was able to return to work. (Tr. 111:1–9). Appellant reluctantly admitted that he "probably did" tell his physical therapist on April 7, 2016 that, "I'm doing great, man, nothing to complain about." (Tr. 111:15–112:15).

Despite Dr. Hunt's testimony as to the questionable causal connection between the accident and Appellant's complaints, Appellant sought recovery for his medical bills. Moreover, despite telling medical professionals he felt ready to return to work as early as February 19, 2016 and that he felt "great, man, nothing to complain about" by April 7, 2016, Appellant also claimed ongoing injuries and sought medical losses "going into the future." (Tr. 263:16–17).

Despite seeking future medical expenses, Appellant failed to provide evidence that future treatment was necessary or reasonable. Dr. Hunt testified that there would be no need of further treatment with an orthopedist or neurologist if Appellant had no symptoms. (Hunt Depo. Tr.

28:12–16). On April 8, 2016, Dr. Hunt cleared Appellant to return to work. (Tr. 112:1–6). Appellant has not treated for back pain since April 8, 2016 and did not provide evidence that he requires future treatment. (Tr. 112:10–12) (Hunt Depo. Tr. 21:8–10).

In sum, as to Appellant's back pain, the jury heard that (1) his injuries could not be attributed to the wreck to any reasonable degree of medical certainty, (2) he did not need future treatment if he was symptom free, (3) he informed his physical therapist that he did not have any back pain on April 7, 2016, (4) his back pain diminished over time, and (5) he had not treated for back pain since April 8, 2016. (Hunt Depo. Tr. 21:8–10, 26:18–21, 27:11–16, 28:12–16) (Tr. 111:15–16, 24–25; 112:1–6, 10–12; 262:1–3).

B. Appellant's Lost Wages

Appellant also claimed over $10,000.00 in lost wages because he missed 10 weeks of work after the accident. (Tr. 262:17). Appellant testified that he missed 51–52 days of work and was paid approximately $26–27 per hour and worked about 42 hours a week. (Tr. 87:3–9; 12). Appellant did not provide any documentation corroborating his lost wages testimony or provide witnesses from his employer regarding the calculation of his wages. (Tr. 92:25–93:2).

However, Appellant's W-2s told a very different story. Rather than requiring the jury to do the math—or speculate as to Appellant's lost wages—Respondents solicited Appellant's testimony regarding his W-2s from 2015 to 2018, which were entered into the record by the parties' stipulation. The jury heard and saw this evidence, revealing that after Appellant suffered $3,389.00 of lost wages in 2016, his wages *rose* in the years following the 2016 accident. (Tr. 93:10–14; 96:8–14; 97:18–23; 103:5–12).

Appellant did not call a representative from his job to testify *how* his wages are calculated or how his absence from work after the accident resulted in lost wages. Nevertheless, Appellant's

counsel argued that Appellant ultimately lost $1,333.71 a week, for 10 weeks, totaling $13,337.10 in claimed lost wages. (Tr. 260:5, 15, 13, 23). This argument in closing was not evidence. Appellant did not provide corroborating evidence for this assertion or his testimony that his wages are calculated by the routes he makes. The jury did not hear testimony or see evidence regarding how routes are requested, selected, or assigned, if routes are determined based on the length of an employee's tenure with the company, or the value of the routes that were available during his absence from work. Appellant's lost wage claim relied on unsubstantiated assumptions, which were contradicted by the documentary evidence that his annual earnings suffered a small decrease in 2016 and then increased in the years following the accident.

II. Procedural History

Appellant filed this lawsuit on June 19, 2018. The parties selected a jury on January 21, 2020, and the jury heard the case on January 23–24, 2020. Respondent moved *in limine* for an order prohibiting the use of the word "insurance" at trial, and the Court granted that motion. (Tr. 126:21–21). Nonetheless, during the trial Appellant solicited the following testimony from Respondent Charles Baughman regarding the training[2] of his tow truck drivers:

> Q: Do you know if just anyone off the street can operate a tow truck that is as large as yours without any special training?
>
> A: Not without training. There's not an insurance corporation no where that would touch them. You cannot insure them.

(Tr. 168:19–24). This passing reference to insurance generally was the only time in the two-day trial that the word insurance was uttered. Appellant did not move to strike this testimony from

[2] Appellant pled a claim for negligent retention and supervision claim. However, Appellant abandoned that claim, along with his claim for punitive damages, at the close of evidence in the case. (Tr. 241:2–4; 250:8–10). The Circuit Judge granted Respondents' motion for directed verdict on Appellant's claim for "negligent entrustment, hiring, supervision and all those that go along with it." (Tr. 248:23–249:1).

Baughman. Likewise, the Appellant did not request a curative instruction from the Circuit Judge regarding Baughman's reference to insurance corporations.[3]

On January 24, 2020, the Circuit Judge held an informal, *in camera* charge conference off the record. (Tr. 251:16–18). At that time, Appellant requested several charges, which the court decided not to charge, one of which involved insurance. (Tr. 251:18–20). The court marked Appellant's requested jury charges as an exhibit for the record. (Tr. Ex. 6). Although Appellant requested an insurance charge, Appellant never referenced Baughman's comment about the insurability of untrained drivers as a reason for the Circuit Judge to give an insurance charge to the jury.

After the parties made their closing arguments, the court provided a copy of the jury charges to the parties to confirm the charges conformed to its decision outlined in the previous charging conference.[4] (Tr. 279:9–11). The parties agreed that the charge conformed to the court's previous decision and did not make any new objections regarding the charge. (Tr. 279:12–19). Again, Appellant did not request an insurance charge based on Baughman's testimony. Furthermore, the court advised the parties that they would have one last opportunity, after the jury charge was given, to "protect yourself on the record," if anything came to mind during the jury charge. (Tr. 279:20–25).

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[3] In fact, Appellant argued against the Motion *in Limine*, and argued in favor of allowing testimony regarding the insurance company's role in approving listed drivers. (Tr. 37:16–39:12).

[4] The substance of the charging conference was not put into the record by the trial court or the parties, beyond the marking of Appellant's requested jury charges—which the court declined to give—as exhibits to the record.

The court then charged the jury. On the general consideration of evidence, the Circuit Judge charged the jury that it was to consider only the evidence before it. (Tr. 280:13–15). Specifically, the Circuit Judge charged:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from this witness stand, and any exhibits which have been made a part of the record in this case and any stipulations of counsel.

(Tr. 280:14–21). Additionally, the Circuit Judge gave the standard, lengthy charge on the consideration and calculation of damages. (Tr. 287:10–292:23). Finally, the Circuit Judge charged the jury not to render a verdict based on sympathy, prejudice, passion, emotion, or anything else not in the record. (Tr. 293:11–13).

After the Circuit Judge charged the jury, he excused them and asked counsel for both parties if they had "any additional charges or exceptions, objections to the charge." (Tr. 295:5–6). Appellant did not request additional charges or make an objection to the given charge. (Tr. 295:7).

During deliberations, the jury sent a note to the Court asking "what insurance has paid for/from both parties." (Tr. 295:18–25). At this time, Appellant renewed its request that the Circuit Judge give his proposed insurance charge to the jury. (Tr. 296:4–5). Appellant did not argue to the Court that he believed the passing reference to insurance in the testimony he solicited from Baughman was evidence of insurance or that it related to the jury's question.

The Circuit Judge declined to give the requested charge and instead responded to the jury's question by reminding the jury to "consider only the evidence presented during the trial." (Tr. 296:7–10). No party introduced evidence regarding insurance, and no witness referenced any payments made by an insurance companies. In other words, in response to a jury question of "what insurance has paid for/from both parties"—a question for information that was not in evidence—

the Circuit Judge instructed the jury to limit its consideration to "only the evidence presented during trial", which did not include insurance.

The jury continued deliberations and ultimately awarded Appellant $18,500. On January 27, 2020, Appellant filed a Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute. In the Motion, Appellant argued in general terms that the jury improperly considered insurance in its deliberations, resulting in the lower verdict than Appellant believed the evidence merited. However, as with the charging conference and after the jury question, Appellant never contended that the passing reference to insurance in Baughman's testimony influenced the jury's deliberations.

The Court denied Appellant's motion, concluding that the evidence supported the jury's verdict. This appeal followed.

STANDARD OF REVIEW

This Court reviews the Circuit Judge's denial of Appellant's Motion for New Trial *Nisi Additur* for abuse of discretion. *Todd v. Joyner*, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008), *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009) (citing *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). However, the Court gives significant deference to the jury's determination of damages. *Green v. Fritz*, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003); *see also Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000). When evaluating a motion for new trial absolute, "[t]he jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Wright v. Craft*, 372 S.C. 1, 36, 640 S.E.2d 486, 505 (Ct. App. 2006).

A Circuit Judge's refusal to give requested instruction is reversible only if the denial is "both erroneous and prejudicial." *Ballou v. Sigma Nu Gen. Fraternity*, 291 S.C. 140, 155, 352

S.E.2d 488, 498 (Ct. App. 1986) (citing *Merritt v. Grant*, 285 S.C. 150, 328 S.E.2d 346 (Ct.App.1985), cert. denied, 286 S.C. 125, 333 S.E.2d 569 (1985)). Additionally, jury instructions which are substantially correct and cover the law do not require reversal. *Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Communities, Inc.*, 397 S.C. 348, 363, 725 S.E.2d 112, 120 (Ct. App. 2012) (citing *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497–98, 514 S.E.2d 570, 575 (1999)).

SUMMARY OF THE ARGUMENT

The jury's verdict is amply supported by the evidence. The jury heard that Appellant suffered back pain after a rear-end accident, but that Appellant also had prior complaints of back pain three years before the accident. Appellant's own treating physician testified that the likelihood of the accident having caused Appellant's pain was, at most, 50/50, and that he could not testify that Appellant's disc herniations were caused by the accident. The jury also heard that Appellant felt ready to return to work approximately 20 days after the accident, and he reported that he was doing "great" with "nothing to complain about" slightly over two months after the accident. Moreover, from April 8, 2016 to the time of trial in January 2020, Appellant never sought any additional treatment. Simply put, there was ample evidence to support the jury's verdict, and Appellant cannot show that the jury reached its verdict through improper means.

The Court properly exercised its discretion by instructing the jury fully regarding the matters they could and could not consider. Specifically, the Court instructed the jury regarding the Appellant's claimed damages: medical bills, lost wages, future impairment, pain and suffering, and diminished quality of life. The Court also instructed the jury that it could not render a verdict based on sympathy, prejudice, passion, emotion. Most importantly, the Court instructed the jury that its consideration must be limited to the evidence in the record. The Court did not instruct the

jury on insurance matters because the case did not involve insurance matters. Insurance was not part of the evidence in the record. Thus, the Court's charge limiting the jury's consideration to the evidence encompassed the substance of Appellant's requested insurance charge. Because the Court fully instructed the jury on the law applicable to the case and the case did not involve insurance issues, the Court did not err in declining to give Appellant's requested instruction on insurance.

ARGUMENT

I. The Circuit Court properly denied Appellant's Motions for New Trial *Nisi Additur* and New Trial Absolute because the Jury's verdict of $18,500 in a case involving $8,000 in medical bills with equivocal testimony from Appellant's treating physician is amply supported by the evidence.

While the decision whether to grant a new trial *nisi additur* is within the discretion of the Circuit Judge, significant deference must be given to the jury's determination of damages. *Green*, 356 S.C. at 570, 590 S.E.2d at 41; *see also Welch*, 342 S.C. at 303, 536 S.E.2d at 420 ("[T]he jury's determination of damages is entitled to substantial deference. The Circuit Judge's decision [on a motion for new trial based on the alleged insufficiency of a jury's verdict] will not be disturbed on appeal unless it clearly appears the exercise of discretion was controlled by a manifest error of law.") (citations omitted). A Circuit Judge must offer compelling reasons for granting the motion. *Id.* The denial of a motion for a new trial *nisi additur* is within the Circuit Judge's discretion and will not be reversed on appeal absent an abuse of discretion. *Todd*, 385 S.C. at 517, 685 S.E.2d at 618 (citing *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556).

On the other hand, the standard for a new trial absolute is much higher. "A new trial absolute should be granted only if the verdict is so grossly excessive [or deficient] that it shocks the conscience of the court and clearly indicates the amount of the verdict was the 'result of caprice, passion, prejudice, partiality, corruption, or other improper motives." *Wright*, 372 S.C. at 36, 640 S.E.2d at 505 (citation omitted). "To warrant a new trial, the verdict must be so grossly excessive

[or inadequate] as to clearly indicate the influence of an improper motive on the jury." *Id.* (citation omitted). Moreover, "[w]hen a verdict falls within the range of the evidence, the courts will not disturb it on the ground of excessiveness" or inadequacy. *Id.* As with *nisi additur*, the decision of whether to grant a new trial absolute is "left to the sound discretion of the trial court and ordinarily will not be disturbed on appeal." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (citation omitted).

In this case, the Circuit Judge exercised his discretion and found that the jury's verdict was consistent with the evidence. Noting that "[p]roximate cause and the believability and credibility of witness[es] were questions of fact for the jury to decide," (Order p. 2), the Circuit Judge found the jury's verdict was not inadequate or insufficient. Because the verdict was supported by the evidence, the Circuit Judge acted within his broad discretion.

A. The evidence presented at trial supports the jury's $18,500.00 award to Appellant.

The jury awarded Appellant more than what some juries would have awarded him given the testimony in this case. New trial *nisi additur* is a tool to be used cautiously. It supplants a Court's evaluation of the evidence for the jury's determination. Therefore, "[c]ompelling reasons must be given to justify invading the jury's province in this manner." *Howard v. Roberson*, 376 S.C. 143, 155, 654 S.E.2d 877, 883 (Ct. App. 2007) (citing *Chapman v. Upstate RV & Marine*, 364 S.C. 82, 89, 610 S.E.2d 852, 857 (Ct. App. 2005)). Here, the jury considered the evidence, followed the Court's exhaustive charge, and awarded Appellant a verdict that was supported by the evidence.

Appellant's argument as to the perceived inadequacy of the verdict appears to assume that the jury was required to accept every word of Appellant's testimony as true. That is not the role of a jury. The jury's role was to weigh the evidence and each witnesses' credibility. *See Small v.*

Pioneer Machinery, Inc., 329 S.C. 448, 465, 494 S.E.2d 835, 843–44 (Ct. App. 1997) ("[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve.... [I]t is not the function of this Court to weigh the evidence and determine the credibility of the witnesses."). That is what the jury did. The jury considered Appellant's testimony that he continued to experience pain years after the accident and weighed that testimony against: (1) Appellant's admissions to his medical providers in 2016 that he was "great" and had "no complaints;" (2) Appellant's testimony that he did not seek any medical treatment from April 8, 2016 to the date of the January 2020 trial; (3) Appellant's treating physician's admission that he could not relate Appellant's disc bulge to the accident; and (4) Appellant's treating physician's testimony that it was no greater than a 50% chance that Appellant's back pain was caused by the accident. Finally, the jury weighed Appellant's testimony that he lost $13,000 in wages with the objective evidence presented in his W-2s showing no such loss.

Based on this evidence, a reasonable jury could determine that Appellant's damages—accounting for $8,008.58 and a disputed amount of lost wages—plus any pain and suffering during Appellant's quick recovery totaled $18,500. There is nothing about an $18,500 verdict under the facts presented in this case that is at all surprising. A jury could have easily awarded less. To the extent Appellant testified that his pain continued or that it prohibited him from certain activities, the jury was free to accept that testimony as credible or to find that it was not credible in light of the conflicting evidence. This is the foundational role of a jury.

In *O'Neal v. Bowles*, the jury heard from two experts who each attributed the plaintiff's permanent impairment to a different cause. *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556. The

Supreme Court affirmed the denial of the plaintiff's motion for new trial *nisi additur* because the jury could have attributed the permanent impairment to arthritis, rather than the defendant surgeon's improper severing of a nerve. *Id.* at 527, 431 S.E.2d at 557. In this case, Appellant did not submit any evidence to the jury regarding permanent impairment or that future treatment would be reasonable and necessary under the circumstances. It is possible the jury simply did not believe Appellant's uncorroborated testimony that he continued to suffer back pain and would need future treatment. This is especially true where the jury heard that Appellant had not treated for any back pain—or mentioned it to his primary care physician—in the three and a half years from his discharge from post-accident care until the trial, and he reported at his last visit in April 2016 that he was "great" with "no complaints." The jury determines credibility of witnesses, and a new trial is not appropriate where the jury's determinations are supported by the evidence in the record. *See Vinson v. Hartley*, 324 S.C. 389, 411, 477 S.E.2d 715, 727 (Ct. App. 1996) ("Simplistically put, credibility of witnesses was for the jury to determine."); *RRR, Inc. v. Toggas*, 378 S.C. 174, 182, 662 S.E.2d 438, 442 (Ct. App. 2008) (stating the denial of new trial motions will not be disturbed on appeal unless the circuit court's findings are "wholly unsupported" by the evidence).

Appellant also appears to contend that the jury awarded only medical bills and lost wages, with no consideration of pain and suffering or other related damages. As set forth above, there is no basis for that conclusion. The award of $18,500 is not a mathematical sum of the amount of medical bills and lost wages that Appellant sought at trial. As discussed above, Appellant's medical bills are undisputed and total $8,008.58. (Tr. 64:1–7; 266:2–7). Moreover, the parties dispute the amount of Appellant's lost wages: Appellant variously claimed amounts ranging from $10,000 to $13,000 and his W-2s revealed a loss of only $3,389.00. (Tr. 87:12; 101:10–12; 262:12–18). Accordingly, the verdict is more accurately described as sufficient to cover the

undisputed medical bills of $8,008.58, the corroborated lost wages of $3,389.00, and $7,102.42 additional damages. Thus, the number reflects a determination from the jury after weighing all the evidence.

However, even if the number were a mathematical sum of these two elements of damages—which it is not—a new trial *nisi additur* would still be improper. A Court is not required to grant a new trial *nisi additur* where the jury verdict does not appear to account for pain and suffering, future impairment, or diminished quality of life when the verdict is supported by the evidence and a jury charge adequately instructs the jury on the damages sought by the plaintiff. *See Todd*, 385 S.C. at 518, 685 S.E.2d at 618 (holding that Circuit Court did not abuse its discretion denying a motion for a new trial *nisi additur* where a jury's award of the plaintiff's exact medical costs was supported by the evidence where the jury charge "included a full explanation of actual damages....pain and suffering, loss of enjoyment of life, as well as mental anguish..."). In this case, the Circuit Judge provided a full jury instruction on (1) actual damages, (2) pain and suffering, (3) loss of enjoyment of life, (4) mental suffering, and (5) prospective damages, among other issues. (Tr. 287:13–292:13). Furthermore, the jury heard Dr. Hunt's testimony that the likelihood of the accident causing Appellant's disc becoming symptomatic was "no greater than 50 percent." (Hunt Depo Tr. 25:9–17). Thus, the evidence presented at trial supports the jury's award of $18,500.00 to Appellant.

The Court acted well within its discretion by denying the Motion for a New Trial *Nisi Additur* or New Trial Absolute and giving deference to the decision of the jury that observed the witnesses and weighed the evidence.[5] This Court should affirm.

[5] The Order characterized the jury's insurance question as one regarding the existence of "liability insurance." Appellant argues this is further evidence of error in the court's ruling. (App. Br. p. 12). Regardless of Order's characterization of the jury's question as one "regarding liability insurance,"

B. The Circuit Court properly denied Appellant's Motion for New Trial Absolute because there was evidence in the record to support the jury's verdict.

If a Circuit Judge acts within his or her discretion by denying a motion for new trial *nisi additur*, it is typically a foregone conclusion that the Circuit Judge acted within his discretion in denying a motion for new trial absolute. When evaluating a motion for new trial absolute, "[t]he jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision." *Wright*, 372 S.C. at 36, 640 S.E.2d at 505 (citation omitted).

Appellant bases this appeal upon Respondent Baughman's passing remark regarding the insurability of an untrained tow truck driver. According to Appellant's arguments, the jury improperly rendered a favorable verdict—sufficient to compensate him for his medical bills and claimed, yet uncorroborated, lost wages—based on an improper consideration of the existence of insurance coverage. However, the jury's verdict is supported by the evidence in this case, and there is no evidence the jury improperly relied upon evidence of insurance.

Specifically, Appellant relies upon the South Carolina Supreme Court's decision in *Dillon v. Frazer*, 383 S.C. 59, 678 S.E.2d 251 (2009). (App. Br. 14–15). The *Dillon* jury awarded the plaintiff $6,000 despite $30,000 of undisputed damages, including some medical bills and lost wages, in an admitted liability case where the plaintiff claimed over $500,000 in damages. *Id.* at 63, 678 S.E.2d at 252. The Circuit Judge granted the plaintiff's motion for *additur* and increased

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the Court's response to the jury's question at trial was broad enough to encompass any type of insurance by reminding the jury to consider only the evidence presented at trial. ("You are to consider only the evidence presented during this trial. Judge.") (Tr. 296:7–9). Therefore, even if the trial court did not consider other forms of insurance in its consideration of the jury's question at trial, its response sufficiently reminded the jury that it is to consider on the evidence presented. No party introduced evidence of any form of insurance at the trial. Thus, the Circuit Judge's response to the question sufficiently informed the jury not to consider any form of insurance in its deliberations. Accordingly, there was no prejudice to Appellant.

the award to $21,000 but denied the plaintiff's motion for new trial absolute on damages. *Id.* The South Carolina Supreme Court held that the $6,000 jury verdict "in the face of over $30,000 in undisputed damages is grossly inadequate and demonstrates the verdict was actuated by improper motivation" and remanded the case for a new trial absolute on damages. *Id.* at 65, 678 S.E.2d at 253. Specifically, the Supreme Court considered the "grossly inadequate" verdict in light of the jury's question regarding the payment of plaintiff's medical bills by any party.

In *Vinson v. Hartley*, this Court also considered the Circuit Court's denial of a Motion for New Trial *Nisi Additur* or New Trial Absolute. 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). That case involved a car accident when Hartley made a U-turn and rear-ended Vinson, who did not complain of injuries at the scene. *Id.* at 396–97, 477 S.E.2d at 719. Vinson suffered aches and pains the following day, and two of his teeth chipped a week after the accident. *Id.* Ultimately, Vinson claimed medical bills resulting from the accident for his subsequent physical therapy and dental work, including installation of a partial denture, tooth extractions, and a root canal. *Id.* At trial, Hartley admitted liability but contested causation and damages. *Id.* at 399, 477 S.E.2d at 720. The jury issued a verdict in favor of Hartley, and the Circuit Court denied Vinson's motion for new trial *nisi additur*. *Id.*

This Court affirmed the Circuit Court's denial of the motion for new trial. Specifically, this Court noted that the jury could have determined that Vinson was not a credible witness. *Id.* at 411, 477 S.E.2d at 727. Vinson claimed his denture break resulted from the accident, but also acknowledged that something else could have caused the fracture. The dentist testified that a denture break can occur in many ways, but it is unlikely that it would break in two and the person would be unaware of the break, as Vinson claimed. *Id.* Ultimately, this Court recognized that "credibility of witnesses was for the jury to determine." *Id.*

In this case, Respondents do not contest Appellant's medical bills. (Tr. 64:1–7; 266:2–7). Accordingly, there is $8,008.58 of uncontested damages. The $18,500 jury verdict is more than two times the undisputed damages in this case, unlike the "grossly inadequate" award in *Dillon*. *Dillon*, 383 S.C. at 65, 678 S.E.2d at 253. Even considering the jury's question regarding insurance in this case, the verdict does not rise to the level of "grossly inadequate" under *Dillon* where it completely accounts for the undisputed damages.

Instead, the result is more akin to the result in *Vinson*. Like *Vinson*, this case came down to an issue of credibility. Appellant challenges the jury's award of $18,500 to him because he claimed more than that in damages. However, like the dentist in *Vinson*, Dr. Hunt testified that the odds were "[n]o greater than 50 percent" that the wreck caused the Appellant's spinal disc issues to become symptomatic. (Hunt Depo. Tr. 25:12–17). Dr. Hunt went on to concede that he had "no idea whether any of the conditions reflected on the MRI were caused by this wreck" and that Appellant's subjective complaints were actually inconsistent with the MRI findings. (Hunt Depo Tr. 26:9–27:16). Similarly, though Appellant claimed $10,000 in lost wages, the jury saw his W-2s that revealed only $3,389 in lost wages. (Tr. 93:10–14; 96:8–14). Ultimately, the jury's verdict should be understood as a credibility determination regarding the testimony and evidence offered by Appellant.

Likewise, Appellant presented no evidence regarding future impairment, and his claims of ongoing pain and suffering were contradicted by the fact that he had returned to work, he had not received any additional treatment since April 8, 2016, and he reported to doctors in April 2016 that he was "great" and that he had "nothing to complain about." Like the jury in *Vinson*, the jury here could have found Appellant's testimony as to ongoing pain and higher lost wages was simply not credible.

Because the undisputed medical bills and corroborated lost wages may be accounted for within the $18,500 jury verdict and the evidence presented at trial supports the jury award, the Circuit Judge did not err in denying Appellant's Motion for New Trial *Nisi Additur* or New Trial Absolute. *See Steele v. Dillard*, 327 S.C. 340, 345–46, 486 S.E.2d 278, 281 (Ct. App. 1997) (holding that although the jury could have awarded a larger verdict, the jury verdict was not grossly inadequate where there is evidence in the record that supports the awarded amount, "irrespective of the manner in which it may have calculated its award"). Because the trial court's denial of Appellant's post-trial motion "is not 'wholly unsupported by the evidence' [or] controlled by an error of law," this Court should affirm. *Vinson*, at 412, 477 S.E.2d at 727.

II. The Circuit Court did not commit prejudicial error by denying Appellant's request to give the proposed instruction regarding insurance.

The jury charge in this case adequately covered the law by charging the jury "to consider only the evidence before" them. (Tr. 280:14–15). The Court specifically charged the jury that it could "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." (Tr. 280:18–21). The Court also warned the jury that its "verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case." (Tr. 293:11–13). Accordingly, the Court repeatedly instructed the jury to limit its deliberations to the evidence presented in the case.[6]

[6] The evidence in this case did not include insurance—a point acknowledged by Appellant in his post-trial motion. Post-trial, Appellant argued that the jury considered insurance matters in "utter disregard" of the Circuit Judge's instruction to consider only the evidence presented in the case. (Motion for New Trial *Nisi Additur* or New Trial Absolute, pp. 3–4). Nevertheless, he argues for the first time on appeal that insurance *was* presented in this case, through a passing, generalized remark about insurance companies.

In reviewing a jury charge, the Court considers the given charge as a whole in light of the evidence and issues presented at trial. *Bragg v. Hi-Ranger, Inc.*, 319 S.C. 531, 547, 462 S.E.2d 321, 330 (Ct. App. 1995) (concluding that Court properly charged the jury regarding the presented products liability theories and defenses and did not commit reversible error by declining to use the language of plaintiff's requested charges on these matters). Jury instructions which are substantially correct and cover the law do not require reversal. *Magnolia N. Prop. Owners' Ass'n, Inc.*, 397 S.C. at 363, 725 S.E.2d at 120 (citing *Keaton ex rel. Foster*, 334 S.C. at 497–98, 514 S.E.2d at 575). A Circuit Judge's refusal to give requested instruction is reversible only if the denial is "both erroneous and prejudicial." *Ballou*, 291 S.C. at 155, 352 S.E.2d at 498 (citing *Merritt*, 285 S.C. 150, 328 S.E.2d 346, *cert. denied*, 286 S.C. 125, 333 S.E.2d 569 (1985)); *see also* 66 *Corpus Juris Secondum*, New Trial § 75 ("Refusal to give a particular requested instruction is not ground for a new trial where...the subject matter thereof was substantially and sufficiently covered by other instructions or the general charge...."). Appellant's requested insurance charge was substantially and sufficiently covered by charging the jury to limit its consideration to the evidence presented, which did not include insurance. Thus, the Circuit Judge's refusal to give the requested charge in this case was neither erroneous nor prejudicial.

A. The Circuit Court acted within its discretion by declining to use Appellant's proposed jury charge regarding insurance.

In this case, the court repeatedly instructed the jury to limit its consideration to the evidence before it. Neither party presented evidence regarding insurance that required the Circuit Judge to give the requested insurance charge to the jury. Appellant argues—for the first time on appeal[7]—

[7] Appellant did not provide a reason for the requested insurance charge on the record at trial. Additionally, Appellant's post-trial motion did not argue the Circuit Judge improperly denied his request to charge, let alone argue the given charge was insufficient. Rather, Appellant argued that the jury considered insurance matters and issued "a verdict in utter disregard of the instructions given by the trial court." (Motion for New Trial *Nisi Additur* or New Trial Absolute, p. 4).

that Baughman's passing remark about the insurability of an untrained tow truck operator sufficiently raised the insurance issue and required a jury charge. (App. Br. pp. 11–12). The parties agree that no one mentioned Baughman's remark during the trial. (App. Br. p. 12). Moreover, this testimony was elicited by Appellant, and Appellant did not ask for any curative instruction or object to the testimony during trial. Thus, in a two-day trial, one witness made a passing remark about insurance matters generally—not medical insurance—and no party presented evidence regarding the existence of insurance (of any kind) for this accident specifically.

Nevertheless, Appellant argues it is "now apparent, particularly in light of the jury's question during deliberations, that this impermissible testimony—[that Appellant elicited]—resulted in prejudice to the Appellant." (App. Br. p. 12). There is no evidence that Baughman's passing reference to insurance for an untrained driver led to the jury's verdict to Appellant's detriment. Appellant bases this appeal on a speculation that a single mention of insurance companies, generally, prejudiced the jury into awarding Appellant a damages award that covered only his medical bills and claimed lost wages. This speculation is unreasonable, as the Circuit Court recognized in its order denying Appellant's Motion for a New Trial *Nisi Additur* or New Trial Absolute. (Order, pp. 3–4) (noting "it is impossible to speculate as to how a jury arrives at its verdict, and [Baughman's reference to insurance] is not a basis to grant a new trial."). More importantly, the substance of Appellant's requested insurance charge was encompassed in the Court's general charge limiting the jury to consideration of the evidence.

"It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001). In reviewing the charge for error, the Court construes the charge as a whole in light of the evidence and issues presented at trial. *Id.* Neither Appellant nor Respondents presented any

evidence regarding insurance in the trial of this case. Accordingly, an insurance charge was unnecessary. *See id.* (affirming trial court's refusal to give requested charges that were unnecessary based on the evidence presented at trial). To the extent Appellant's requested charge informs the jury not to consider insurance matters in its deliberations, the Circuit Judge's charge sufficiently instructed the jury on the matters it could consider in its deliberations:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from this witness stand, and any exhibits which have been made a part of the record in this case and any stipulations of counsel.

(Tr. 280:14–21). Appellant conceded this point in his post-trial motion by arguing that the jury's consideration of insurance matters was a consideration of "factors *outside of the evidence presented*" in "utter disregard" of the charge that it should consider only the evidence presented during the trial. (Motion for New Trial Absolute or *Nisi Additur*, pp. 3–4) (emphasis added).

Nevertheless, as to the propriety of the given charge, the Circuit Judge instructed the jury to "consider only the evidence before you." The jury asked "what insurance has paid for/from both parties." (Tr. 295:18–25). It is undisputed that no witness testified to any amount that had been paid by any insurance company. That information was not in the evidence, and Appellant does not argue otherwise. In response to that question, the Circuit Judge instructed the jury to limit its consideration to the testimony before it – which did not include insurance payments. Thus, the charge instructed the jury to do exactly what it was supposed to do.

The trial court is not required to enumerate each subject matter that the parties did not address during presentation of evidence so that the jury is aware that it should not consider those topics. Accordingly, the specific requested instruction that the jury should not consider insurance matters is unnecessary where insurance was not presented to the jury for consideration. *See Keaton ex rel. Foster*, 334 S.C. at 496, 514 S.E.2d at 574 (concluding that the trial court must instruct the

jury on the substance of the law but is not required to use particular verbiage) (quoting *State v. Smith*, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994)).

Moreover, that the Court limited the use of the word "insurance" does not justify the use of the requested jury instruction, despite Appellant's argument to the contrary. Certainly, Appellant correctly stated that Respondents argued "against the introduction of evidence regarding the purported background investigation" of Harris before K&B Towing hired him. (App. Br. p. 11). The policy of preventing mention of insurance matters in cases like this is to protect the *defense*:

> Historically, South Carolina restricted the admission into evidence of defendants' insurance against potential liability in an action for damages before a jury. The reasoning behind this rule was to avoid prejudice in the verdict, which might result from the jury's knowledge that insurance, and not the defendant, would be responsible for paying any resulting award of damages.

Todd, 385 S.C. at 514, 685 S.E.2d at 616, *aff'd*, 385 S.C. 421, 685 S.E.2d 595 (2009) (citing *Dunn v. Charleston Coca–Cola Bottling Co.*, 311 S.C. 43, 45, 426 S.E.2d 756, 757–58 (1993)). The concern is that a jury would award a larger verdict to the plaintiff when it knows the defendant is insured than when the defendant would be personally responsible for the verdict.

Respondents naturally argued that the word "insurance" should not be used "*regarding the purported background investigation*" of Harris prior to his employment with K&B Towing. (App. Br. 11) (emphasis added). Testimony regarding the insurance company's involvement would have revealed the existence of insurance for this accident. Appellant argued for allowing reference to insurance. Then, Appellant elicited Baughman's reference to insurance, to which Respondent did not object because it was a general, passing comment regarding the insurability of untrained drivers.

The Circuit Judge acted within its discretion by providing the standard jury charge to the jury, instructing the jury to limit its consideration to the evidence presented at trial. The jury did

not receive any evidence of insurance payments. Thus, this instruction from the Circuit Judge in response to the question of "what has insurance paid" adequately stated the substance of the law and gave the jury its marching order: do not consider insurance payments. The trial court did not err in refusing to give Appellant's unnecessary insurance charge.

B. Appellant was not prejudiced by the Circuit Court declining to give the proposed insurance charge.

Appellant cannot show prejudice resulting from the Court declining to give the proposed insurance charge—either initially or in response to the jury's question regarding insurance coverage. "To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial." *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012). Although a trial court ordinarily has a duty to give a requested instruction that correctly states the law, "jury instructions should be confined to the issues made by the pleadings and supported by the evidence." *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 350–51, 683 S.E.2d 818, 821–22 (Ct. App. 2009), *aff'd* by 398 S.C. 90, 727 S.E.2d 407 (2012).

Moreover, the jury heard testimony regarding the accident's effect on Appellant's life. Specifically, Appellant testified he had incurred medical bills of $8,008.58 and lost wages of approximately $10,000.00. The jury could weigh this testimony against Appellants inconsistent prior statement, his medical history, Dr. Hunt's testimony, and Appellant's W-2s from 2015 to 2018, which revealed a $3,389.00 decrease in his wages in 2016. Furthermore, the jury could evaluate Appellant's subjective complaints of continued pain—and an occasional inability to enjoy swimming with his daughter due to back pain—in light of the testimony that he had not treated with any physician since April 2016. Altogether, the record does not show that the jury was influenced by any improper considerations, and Appellant has failed to show any prejudice. A jury evaluated all the evidence before it and rendered a verdict of $18,500—a verdict sufficient to cover

Appellant's undisputed medical bills more than twice. Therefore, the Circuit Court should be affirmed.

C. Appellant failed to preserve his jury charge objections for appellate review.

Appellant failed to object to the trial court's jury charge—and never cited Baughman's reference to insurance companies as grounds for any objection or requested charge. This failure to raise these arguments before the Circuit Judge waives appellate review of these issues. *Vaughn v. City of Anderson*, 300 S.C. 55, 60, 386 S.E.2d 297, 300 (Ct. App. 1989) ("Failure to object to the charge at trial waives any alleged error in the charge."); *see also Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54–55 (Ct. App. 2006). Appellant cannot raise an issue for the first time on appeal—the issue must have been raised to and ruled upon by the Circuit Judge to be preserved for appellate review. *Id.* at 212, 634 S.E.2d at 54. This Court cannot evaluate whether the circuit court committed error without a ruling from the Circuit Judge. *Id.* at 212, 634 S.E.2d 54–55. ("Therefore, when an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review.").

In *Doe*, this Court declined to address a wife's argument that the family court erred in identifying and valuing the marital property in her divorce proceedings. *Id.* at 212, 634 S.E2.d 54. Because the wife made no arguments regarding the valuation of the marital property to the family court and failed to address the issue in her Rule 59(e) motion, this Court found the issue to be waived. Like the wife in *Doe*, Appellant raised Baughman's testimony as support for the insufficiency of the jury charge and the necessity of his insurance charge for the first time on appeal—his post-trial motion was premised on the jury's inadequate verdict as a general matter. Despite multiple opportunities, Appellant failed to raise Baughman's testimony before the Circuit Judge.

Appellant failed to object to Baughman's testimony at trial. Additionally, Appellant failed to object to the Circuit Judge's jury charges in light of Baughman's testimony at the charging conference. (Tr. 251:16–252:17). Prior to instructing the jury, the Court asked the parties to confirm the charges. Once again, Appellant failed to object to the Circuit Judge's charge in light of Baughman's testimony. (Tr. 279: 3–25). The Court again indicated the parties would have "one last opportunity concerning the charge" to preserve any objections after he instructed the jury. (Tr. 279:20–25). Still, Appellant failed to object to the given charge after the Circuit Judge instructed the jury. (Tr. 295:5–9). Even after the jury sent its question to the Court regarding insurance payments in the case, Appellant failed to reference Baughman's testimony as a basis for an objection to the given charge. Appellant merely renewed its request for the Court to give his proposed insurance charge in addition to the Court's charge. (Tr. 295:22–296:11).

Post-trial, Appellant also failed to address Baughman's testimony. Indeed, Appellant's arguments in support of his Motion for New Trial *Nisi Additur* or New Trial Absolute are premised on the jury's "utter disregard" of the *given* instruction, rather than an objection to the given charge. (Motion for New Trial *Nisi Additur* or New Trial Absolute, pp. 3–4) (arguing that "[d]espite the Court's instructions....the jury considered factors outside of the evidence presented"). Notably absent from Appellant's post-trial motion are arguments—and support for arguments—regarding (1) the insufficiency of the given jury charge, and (2) Baughman's passing reference to insurance companies as a basis for an insurance charge that the Circuit Judge improperly declined to give.

Appellant's appeal is based on Baughman's passing remark about insurance companies in general. However, Appellant failed to raise Baughman's testimony before the Circuit Judge. The Circuit Judge had no opportunity to rule on the testimony. Without a ruling from the Circuit Judge, this Court cannot review the testimony issue for error. *See Doe*, 370 S.C. at 212, 634 S.E.2d 51,

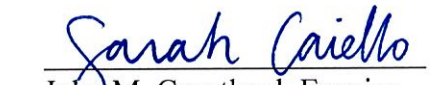
54. Accordingly, Appellant's failure to object to the charge and Baughman's testimony at trial and in his post-trial motion waives appellate review of this issue. *Vaughn*, 300 S.C. at 60, 386 S.E.2d at, 300.

CONCLUSION

For the above-stated reasons, the Circuit Court properly denied Appellant's Motion for New Trial *Nisi Additur* or New Trial Absolute. The Circuit Court also properly declined to give Appellant's requested, and unnecessary, insurance charge. The record reveals ample support for the jury's award of $18,500.00 to Appellant in light of approximately $8,000 in undisputed medical bills compared to equivocal testimony regarding the cause of Appellant's injuries. Even if Appellant had not waived review of Baughman's testimony, the evidence amply supports the jury's verdict. Therefore, Respondents respectfully request that this Court affirm the Circuit Court's denial of Appellant's Motion and the jury's verdict.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hooker, Circuit Court Judge

Case No. 2018-CP-32-02102

Gerald Nelson, ... Appellant,

v.

Christopher S. Harris and Charles L. Baughman, Sr.,
d/b/a K&B Towing, LLC, ... Respondents.

CERTIFICATE

I, Sarah E. Caiello, Esquire, attorney for Respondent, certify that the Respondent's Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents on Gerald Nelson by depositing a copy of it in the United States Mail, postage prepaid, on September 28, 2020, addressed to his attorney of record:

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