STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Case No. 2011-CP-22-545

Rickie Joe McKnight,

Respondent,

v.

Cinda Barnes McAlum,

Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On April 18, 2011, Appellant, Rickie Joe McKnight brought this action against alleging negligence against Appellant in an automobile accident which occurred on June 20, 2010, in Georgetown County, South Carolina. Respondent further alleged that, as a result of Appellant's negligence, he suffered personal injuries. Appellant answered Respondent's Complaint, asserting both a general denial and contributory/comparative negligence.

This action was tried before the Honorable W. Jeffrey Young and a jury in the Court of Common Pleas for Georgetown County on November 26-27, 2012. The trial resulted in a jury verdict in favor of Respondent in the amount of $175,000.00 total damages. The jury also found that the Respondent was 20% at fault, and the trial court reduced the damages to $140,000.00 accordingly.

Following the jury's verdict, on motion of counsel for Appellant, the trial judge granted Appellant's motion for ten days within which to file post-trial motions. On December 6, 2012, Appellant filed her motion for a new trial absolute, or in the alternative, a new trial *nisi remittitur*. By Order dated January 25, 2013, the trial judge

denied Appellant's motions. On February 13, 2013 Appellant served her Notice of Appeal on Respondent.

FACTS

This case involves an automobile accident in which Respondent's automobile collided with a vehicle being driven by the Appellant. Following the accident, the Respondent was taken to the Georgetown Hospital and was treated in the emergency room. (Trial Tr., p. 31) According to the Respondent, he was treated for his collarbone and his back was checked. He then went back to the hospital a couple of days after his initial visit because of some problems with his right ankle. He was not hospitalized on either occasion. (Trial Tr., p. 31)

The Respondent then was referred to an orthopedic surgeon, Dr. James Aymond, for treatment of his various injuries. According to the Respondent, Dr. Aymond on the initial visit checked his shoulder, collarbone, finger, feet, ankle, leg and back and prescribed a course of physical therapy of about 10 or 12 weeks. (Trial Tr., p. 32) Following the extremely truncated testimony by the Respondent concerning his accident injuries, his counsel questioned him about his current condition. (Trial Tr., p. 36) Respondent testified that he now has cramp like pain if he stays still and uncomfortable for too long; continues to be bothered by his "broke bone," collarbone and damaged shoulder. He further stated that he could not put a lot of pressure on his right leg "as of yet." (Trial Tr., p. 36)

At the conclusion of Respondent's testimony, as summarized above, Respondent's counsel asked that the court take judicial notice of his life expectancy of

23.1 years, which the court agreed to do. No explanation of the meaning of "life expectancy" was given to the jury at that juncture.

On cross-examination, defense counsel established that the last time the Respondent had seen his treating orthopedist, Dr. Aymond, was in November, 2010. (Trial Tr., p. 48). In response to a question about the final date on which he went to physical therapy, November 18, 2010, the Respondent stated that "I didn't have the money to pay for it, so once he told me it was enough, that was it." (Trial Tr., p. 48) Then, purporting to answer an innocuous follow-up question by defense counsel to the effect that "[o]nce Dr. Aymond told you that was enough, that was it..," the Respondent blurted out the following "response:"

> Once he told me I didn't need to go back anymore, that was it. But as far as I'm concerned, I was just getting started with the physical therapy and the people down there thought I should need more, so I don't---I think that the fact that I wasn't covered under my wife insurance, I thought I was and I know she feel bad too, I feel bad and I don't like people to make me feel bad because I don't have the insurance.

(Trial Tr., p. 49)

At that point, counsel for Appellant moved the court for a mistrial. The argument of Appellant's counsel was that the Respondent's testimony was not only not responsive to the question asked but was clearly intended to elicit the sympathy of the jury in improperly stating that he couldn't get more treatment because his wife's insurance didn't cover him and he had no insurance himself.

Respondent's counsel argued in opposition that the answer was responsive and that the Respondent was just explaining why he did not treat longer by stating that he would have gotten more treatment but did not have any health insurance to pay for it.

Ironically, Respondent's counsel had made a motion in limine at the outset of the trial to prohibit any mention by Appellant or her husband that they did not have the money to pay any jury verdict, because that would be prejudicial. (Trial Tr., pp. 15-16) Respondent's counsel had made a point of arguing that "I asked that the Defendant counsel not mention to----my poor client, they can't afford this verdict or things of that nature, Your Honor." (Trial Tr., pp. 15-16) Appellant's counsel readily agreed that he had no intention of offering such potentially prejudicial testimony from either of the defendants. However, in attempting to justify his client's wholly improper answer to the innocuous question of defense counsel as to the date of termination of his treatment, Respondent's counsel took a completely contrary position and argued that, while it was improper for the defendants to have pleaded inability to pay, it was entirely proper for his client to have pleaded to the jury his own inability to afford his medical treatment.

Importantly, in denying Appellant's motion for mistrial, the court stated as follows:

> I'm gonna deny the motion and if later on it comes back with—if the verdict, I think was swayed by that then I can certainly act as the thirteenth juror, but at this point in time, I am going to deny your motion.

(Trial Tr., p. 51)

The court went on to say that he would have granted a mistrial if the Respondent had talked about liability insurance rather than health insurance. (Trial Tr., p. 51) That in this instance is a distinction without a difference. The court's ruling implicitly recognized the prejudicial nature of the testimony at issue but predicated its decision on that "difference."

On cross-examination, Respondent acknowledged that he was in a fairly serious second accident approximately three months after he was last treated by Dr. Aymond for the June 20, 2010 accident. He suffered a severe injury to his right hand, which resulted in several surgeries and the loss of use of that hand. (Trial Tr., p. 52-53) He acknowledged at trial that the loss of use of his right hand was permanent. (Trial Tr., p. 53)

Respondent further acknowledged that at the time of the second accident, he was ". . . just getting over the first accident." (Trial Tr., p. 53). He further elaborated that his hand was ". . . smashed by the car and glass (in the second accident) so I lost the use of my right hand. It caused soreness from the first accident because I was just getting over that but that's about the extent of it." (Trial Tr., p. 53) Respondent also admitted that three days after the second accident he saw his treating physicians for low back pain and shoulder pain from the second accident. (Trial Tr., p. 54) Respondent acknowledged that he was sent for x-rays by his treating physicians following the second accident and that the x-rays showed some degenerative problems in his low back. (Trial Tr., p. 55) He further stated that he never saw any doctors after the second accident other than his primary care doctor for any neck, back, shoulder pain or anything like that. (Trial Tr., p. 55)

Importantly, the only other testimony concerning Respondent's physical problems other than his brief, skeletal testimony described above was offered by his wife, Clarice McKnight and his treating orthopedist, Dr. James Aymond, who testified by way of video tape deposition. Mrs. McKnight's testimony was extremely brief, consuming less than three full pages of the trial transcript. (Trial Tr., pp. 56-58) Mrs. McKnight's entire

testimony concerning her husband's injuries from both accidents and his current physical condition comprises 23 lines of the trial transcript. (Trial Tr., p. 58, line 16—p. 59, line 14) Mrs. McKnight admitted that the second accident was "devastating" with respect to the loss of use by her husband of his right hand but attributed the balance of his alleged continuing problems to the first accident. She summed it up by saying that "I've not seen him in a comfortable situation since the accident." (Trial Tr., p. 58)

In support of his client's case, Respondent's counsel then offered the video deposition of Dr. William Aymond, the treating orthopedist. (Trial Tr., pp. 67-70) Unfortunately the court reporter at the trial did not include Dr. Aymond's testimony in the trial transcript and, following a request by Appellant's counsel that the trial transcript be admitted to include that testimony, advised that she was not obligated to prepare or preserve that testimony as requested. Accordingly, counsel for the parties have agreed to utilize the deposition transcript of Dr. Aymond's testimony for the purposes of this appeal. (Record on Appeal, Deposition Tr. of Dr. James Aymond)

Dr. Aymond was offered as an expert in orthopedic surgery by counsel for Respondent (Aymond Tr., p. 5) Dr. Aymond first examined Respondent on July 9, 2011. He was found to have tenderness over his left collarbone; tenderness along his left hand; good range of motion in hips and knees; tenderness along his right ankle. (Aymond Tr., pp. 6-7)

Dr. Aymond also examined the x-rays brought by Respondent to the initial examination and concluded that the x-ray showed a left collarbone fracture, as well as a fracture of a finger on Respondent's left hand. Importantly, Dr. Aymond diagnosed

Respondent's alleged serious right extremity injury as an ankle sprain of the right ankle without any evidence of a fracture. (Aymond Tr., p. 7)

Dr. Aymond opined to a reasonable degree of medical certainty that the injuries described above were related to the June 20, 2010 motor vehicle accident. Respondent was given a sling for his left arm and shoulder for the broken collar bone, a removable ankle brace for the right ankle and some immobilization for his right hand. (Aymond Tr., p. 8) When the Respondent returned to see Dr. Aymond on August 2, 2010, for his second visit, he was complaining of "lower back pain and was wearing a strap around his waist." (Aymond Tr., p. 8) The Respondent claimed at that time that he had had this back pain since the date of the injury but, importantly, Dr. Aymond noted that the Respondent had not complained about back pain at the time of his initial visit. (Aymond Tr., p. 8)

Although the Respondent had listed back pain as a problem at the time of his initial visit of July 9, 2010, he did not discuss that problem with Dr. Aymond or verbally complain of it. When the Respondent complained of back pain on his August 2, 2010 visit, Dr. Aymond did a neurological examination which was normal but found mild tenderness in the lower back. (Aymond Tr., p. 10) His diagnosis was "lumbar pain or lower back pain status post-motor vehicular accident." (Aymond Tr., p. 10)

Importantly, when Respondent's counsel attempted to elicit an opinion from Dr. Aymond that the Respondent's back pain originated with the June 20, 2010 car accident, Dr. Aymond declined to connect the back problem to the 2010 accident, stating that he had no history prior to the accident in question or before Aymond's first evaluation of Respondent in July, 2010. Aymond stated that he did not know if the Respondent's back

pain was "brand new or preexisting or aggravated by this car wreck." (Aymond Tr., p. 10) Dr. Aymond declined to give an opinion as to whether the back problem was related to the motor vehicle accident in question. (Aymond Tr., p. 10)

Dr. Aymond prescribed physical therapy for the Respondent for his lower back and left shoulder and then examined him again on August 30, 2010. (Aymond Tr., p. 11) At that point, Dr. Aymond found that the Respondent was improving with respect to both the back pain and left shoulder. He found improved range of motion of Respondent's left shoulder and found that motor and sensation were normal in Respondent's left arm. He found that the Respondent's limping gait which was secondary to the ankle sprain, was also improving. (Aymond Tr., p. 11) He also found that x-rays of the collarbone and hand showed near complete healing of those fractures. (Aymond Tr., p. 11)

On November 22, 2010, Dr. Aymond saw the Respondent for the final time. At that time, Dr. Aymond stated that Respondent had completed all of his therapy and that Respondent ". . . said he had full mobility of his shoulder and very minor residual swelling of his right ankle.." and that Respondent's lower back examination revealed near full range of motion. The final x-rays of the collarbone showed full healing of that fracture. Respondent was released from Dr. Aymond's care on November 22, 2010, with instructions for Respondent to return to see him as needed. (Aymond Tr., p. 13) Respondent never contacted Dr. Aymond's office again. (Aymond Tr., pp. 13-14)

Following the testimony of Dr. Aymond, the Respondent rested his case. At the conclusion of the evidence in the Respondent's case, counsel for Appellant moved for a directed verdict on the issue of liability, which motion was denied. Appellant's counsel then moved the court to prohibit the Respondent from arguing to the jury, or the court

instructing the jury, about the mortality table on grounds that there was no evidence that supported any permanent injury or pain and suffering from those injuries continuing for the rest of the Respondent's life. (Trial Tr., p. 80)

Respondent's counsel argued that the testimony of the Respondent and his wife that the Respondent was continuing to have pain and problems with the areas that were injured in the accident was sufficient to allow the issue of permanent injury and future damages to be submitted to the court. Even the court observed, however, that "[t]he problem is that he's had a subsequent intervening cause of a bad accident. Even his doctor said he was fully recovered...," referring to Dr. Aymond. (Trial Tr., p. 81) The court then stated in denying the Appellant's motion that Respondent's counsel clearly was ". . . not gonna be able to argue the back because there's no medical—but as to the foot, I think there's enough that he gets to argue it." (Trial Tr., pp. 81-82)

Appellant's counsel then objected to the intention of Respondent's counsel, as evidenced by a chart displayed to Appellant's counsel and the court, to argue to the jury his personal opinions as to concrete figures to be awarded for pain and suffering, as well as for future damages computed by multiplying a specific annual figure times the Respondent's life expectancy. The argument of Appellant's counsel was that such an argument was an improper expression of the personal opinion of Respondent's, whether it was in the form of a chart displayed to the jury or merely argued by Respondent's counsel. Specifically, Respondent's counsel wanted to argue that the loss of enjoyment of life to the Respondent had a value of $100,000.00 and his permanent injury/pain and suffering was worth $116,000.00. (Trial Tr., p. 83)

The court denied Appellant's motion to prohibit Respondent's counsel from giving what, in effect, were his personal opinions and evaluations of the Respondent's entitlements as to two critical elements of general damages. Although the court prohibited Respondent's counsel from displaying his chart on damages to the jury, the court permitted Respondent's counsel to argue the same figures, which were solely his personal opinions. (Trial Tr., pp. 82-84)

In his final argument, with the court's permission, Respondent's counsel proceeded to give his personal opinions and evaluations of the amount of the award to which Respondent was entitled for loss of enjoyment of life. (Trial Tr., p. 95) Respondent's counsel characterized this as "pain and suffering." Respondent's counsel went on to say that if he were talking about contusions and muscle strains, he might ask for the amount of $10,000 for that. (Trial Tr., p. 95) Respondent's counsel then stated that if Respondent had had injuries severe enough to require several surgeries, Respondent's counsel would suggest that the award be $200,000-$300,00 or more depending on the amount of the surgeries and severity of the injury. (Trial Tr., p. 95) At that point, Appellant's counsel noted and reiterated his objection to this line of argument. Respondent's counsel then went on to say that "[t]he reason why I think that $100,000.00 for loss of enjoyment of life is proper hits somewhere between there." (Trial Tr., p. 95) Appellant's counsel once again objected.

Respondent's counsel then returned to the issue of permanent damages. (Trial Tr., pp. 95-97) Basing his argument solely on the testimony of Respondent and his wife that Respondent was still having problems with his collarbone and foot, Respondent's counsel argued that the Respondent was entitled to $5,000 per year times his 23.1 years

of life expectancy. He stated that "we would ask for [that] amount for the continuation of problems he's having and he has today for those 23.1 years of about $5,000 per year." (Trial Tr., p. 96) Appellant's counsel once again objected to this improper argument, which was the reiteration of his prior objections at the close of the evidence.

Respondent's counsel then totaled up all of the amounts as to which he had expressed his personal opinion concerning Respondent's injuries and stated that ". . . it comes to approximately $240,000 which I think is a proper amount in this case. And so I'd ask you to return a verdict in favor of the Plaintiff for that amount." (Trial Tr., pp. 96-97)

At the conclusion of the charge by the court, Appellant's counsel once again objected to that section of the charge dealing with permanent injury and the life expectancy table, which Appellant's counsel had raised and argued at the conclusion of the evidence. The court noted the objection by Appellant's counsel.

The jury then retired and deliberated, returning a verdict of $175,000.00 total damages and finding that the Respondent was guilty of 20% comparative negligence. The court reduced the amount of the verdict accordingly to $140,000.00 and entered judgment in that amount. Counsel for Appellant moved the court for a new trial absolute or, in the alternative a new trial *nisi remittitur*. Those motions were denied, and this appeal ensued.

Arguments

I. BECAUSE THE COURT ALLOWED THE JURY TO CONSIDER PERMANENT INJURY, ACCOMPANIED BY THE MORTUARY TABLE, APPELLANT WAS SUBSTANTIALLY PREJUDICED AND IS ENTITLED TO A NEW TRIAL ABSOLUTE OR NEW TRIAL *NISI REMITTITUR*

There was no evidence in this case creating a reasonable inference on the part of a jury that the Respondent's injuries from the accident in question were permanent in nature. In fact, the only medical testimony produced by the Respondent at trial, that of Dr. James Aymond (Aymond Tr., pp. 1-14), clearly indicated that the Respondent's injuries had almost entirely healed and subsided by November 22, 2010, some four months after the accident, and that the Respondent had suffered no permanent injury of any kind. Additionally, Dr. Aymond refused to connect the alleged low back problems to the motor vehicle accident. (Aymond Tr., pp. 10-14) In fact, although Respondent's wife testified that he was not the same man as he had been before the accident of June 20, 2010 (Trial Tr., pp. 57-58), on the October 4, 2010 visit to Dr. Aymond, the Respondent complained that he was "feeling low endurance . . . as feeling washed out, having little energy and was concerned about that." (Aymond Tr., p. 12) He was referred to his primary physician regarding his low energy level, but there was no evidence that he ever saw a physician for that problem, which could certainly account for his "not being the same man he was before." None of that was ever related to the auto accident in question.

Additionally, Dr. Aymond saw the Respondent only five times. On direct examination by Respondent's counsel, Dr. Aymond testified that he was discharged to return to see Dr. Aymond as needed, but it is clear that the Respondent never again sought treatment from Dr. Aymond for any purpose (Aymond Tr., pp. 13-14)

The sum total of the Respondent's testimony about his current and future problems is set out in nine lines of testimony. (Trial Tr., p. 36) The Respondent testified as follows:

Q: Mr. McKnight, how are you feeling now?

A: Well, on the right side of my body is—if I stay very still and uncomfortable for too long, feel like a cramp coming up on me so I have to move before it grabs me into a pain. Right now, I really want to stand up, but like I say the other part of my body is constantly bothering me because it's a broke bone, collarbone and damaged shoulder. On the right side, you know, if I'm walking, I can't put a lot of pressure on my right leg not as of yet. So, I just move until I get in a comfortable position.

(Trial Tr., p. 36)

The above testimony is entirely insufficient to establish permanency or continuing future problems so as to permit that issue to have been submitted to the jury. This is especially true when coupled with the testimony of Dr. Aymond, which was to the effect that the Respondent had reached maximum recovery as of November 22, 2010 and was discharged to return as needed. While the Respondent's medical bills totaled approximately $26,000.00, it is uncontroverted that $11,000.00 of those bills were from the Georgetown Hospital, primarily for diagnostics, as acknowledged by Respondent on cross-examination. (Trial Tr., p. 48) Further, approximately $9,000.00 of the bills were for physical therapy, which had been prescribed by Dr. Aymond and which was apparently quite successful. (Trial Tr. P. 94) In fact, the only "treatment" which the Respondent received for his injuries, other than the sling for his broken collarbone, was the prescription for physical therapy, a full course of which he completed. There is no evidence that the Respondent ever asked Dr. Aymond for additional physical therapy either before or after his discharge.

Likewise, the skeletal, general testimony of Respondent's wife, Clarice McKnight, is insufficient to create a jury issue as to permanency or future treatment. Her testimony was to the effect that:

My husband is not the same. My husband is a very energetic man. He love to do things. He's no longer—our lives have changed. He's not strong, his endurance has changed. Walking is an issue. We just—we're just not the same, he's not the same, he's not the man that I've been married to before this accident.

Q: And he—it was brought up about the accident he was in some months after this first accident.

A: Uh-huh (affirmative response).

Q: Was that a bad accident as well?

A: Yes, that was a bad accident as well, but the difference was that was really—you know, he lost the use of his right hand so that was devastating, but the problem with the first accident was with the fracture to his collarbone and the ball of the shoulder bone being out and the foot, you know, with him not being able to put pressure his foot or be able to walk and now he walks pretty much with a limp. Those are things that are, you know, every day you use your foot. You can't put any pressure on your shoulder because it hurts all the time. He's pretty much—he's not in a very comfortable situation. I've not seen him in a comfortable situation since the accident.

(Trial Tr., pp. 57-58)

The problem with Ms. McKnight's testimony, as well as that of Respondent, is that it is completely refuted by the testimony of the treating orthopedist, Dr. James Aymond, whose testimony was offered by the Respondent himself at trial. Dr. Aymond testified that the Respondent himself had stated himself that he was improving and had found that as of November 22, 2010, after a steady progression of improvement, the Respondent had virtually no residual problems as a result of the accident of January 20, 1010. (Aymond Tr., pp. 1-14)

Against this backdrop, the trial judge should not have permitted the jury to consider the issue of permanent injury, future damages or the mortuary table. The court

in its Order denying Appellant's motions for new trial and, in the alternative, motion for new trial *nisi remittitur,* relied on *Daniels v. Bernard*, 270 S.C. 51, 240 S.E. 2d 518 (S.C. 1978) in ruling that sufficient evidence existed for the issue of permanent and future damages to go to the jury. In *Daniels*, the trial judge ruled that the evidence was insufficient to support an inference by the jury of permanent injury. The Supreme Court reversed that decision. However, in *Daniels*, the treating physician testified that the plaintiff might need some treatment in the future. The plaintiff's chiropractor also testified that the plaintiff would need future chiropractor care. *Id.* at 56-57, 240 S.E. 2d at 520. On appeal, the Supreme Court reversed the trial judge and held that the chiropractor's testimony was competent evidence, despite the ruling of the trial judge otherwise, and that with the chiropractor's testimony and the plaintiff's own assessment of his continuing condition, a jury issue was created as to future damages. *Id.* at 57-58, 240 S.E. 2d at 520-21. Only in dicta, however, did the Supreme Court state that even without the testimony of the chiropractor a jury issue existed on the issue of future damages. *Id.* at 58, 240 S.E. 2d at 521.

Here, Dr. Aymond did not recommend any future treatment, and there is absolutely no evidence by the Respondent or his wife that he has needed or sought any future treatment for the injuries allegedly incurred in the June 20, 2010 accident. In fact, Dr. Aymond's testimony as recounted above was that the Respondent had completely healed from his injuries at the time he was discharged on November 22, 2010. (Aymond Tr., pp. 10-14)

Because there was no evidence from which a reasonable inference of permanent injury could have been drawn by the jury, the jury should not have been advised of the

mortuary table by the court in its charge. *Fishburne v. Short*, 268 S.C. 546, 550, 235 S.E.2d 118, 119-20 (1977). Where such evidence is lacking, it was error for plaintiff's counsel to argue the mortuary table to the jury or for the court to charge it.

Respondent's counsel has erroneously argued, and the court has equally erroneously noted (1/25/2013 Order, pp. 5-6) that defense counsel failed to object to the charge of the mortuary table (or, for that matter, to the charge on permanent injury), prior to the court's instructions. As noted above, however, at the conclusion of the evidence in the case, and immediately following motion of the Appellant for a directed verdict on the issue of liability, Appellant's counsel noted and argued his objection ". . . to the Plaintiff introducing or having Your Honor tell the jury about the mortality table and his life expectancy because there is no evidence that supports the argument that he wants to make." (Trial Tr., p. 80) In fact, the entire quote is as follows:

> Mr. Cole: The second motion Your Honor, and we can take this up now or later is that it has to do with this business of life expectancy and the mortality table. There isn't any testimony in this case that this man has suffered any permanent injury or that he is going to suffer pain and suffering from his injuries from this accident for the rest of his life. So, we would object to the plaintiff introducing or having Your Honor tell the jury about the mortality table and his life expectancy because there is no evidence that supports the argument that he wants to make.

(Trial Tr., p. 80)

In response, the court noted that "[t]he problem is that he's had a subsequent intervening cause of a bad accident. Even his doctor said he was fully recovered." (Trial Tr., p.81) In denying the motion of Appellant's counsel to exclude permanency and the mortuary table, the court then stated:

Q. I'm not talking about the back. I'm just—certainly he's not going to be able to argue the back because there's no medical—but as to the foot, I think there's enough that he gets to argue it. Of course, you're going to have ample opportunity to argue the opposite. So I'm going deny that motion.

(Trial Tr., pp. 81-82)

Clearly, the statement in the court's Order and the argument of Respondent's counsel, that defense counsel did not object to the issue of permanency and the use of the mortality table is erroneous. There is an substantial difference between the court taking judicial notice of the life expectancy of the Respondent during the trial and the court charging and explaining to the jury the South Carolina Mortuary Table as part of his charge, along with the connection to the issue of permanency. This was improper and prejudicial. Furthermore, the issue was properly raised and preserved by Appellant's counsel at trial. The exception to that charge was further noted at the conclusion of the court's charge to the jury by Appellant's counsel and preserved by the court. (Trial Tr., p. 123)

The trial judge committed clear error in denying Appellant's motion for a new trial absolute or, in the alternative, for a new trial *nisi remittitur*, on the issue of allowing the jury to consider permanency and in connection with permanent injury, the South Carolina Mortuary Table.

In considering a new trial absolute, the trial judge has the power to order a new trial whenever necessary to prevent injustice. James Flanagan, South Carolina Civil Procedure, p. 466 (2d ed.) The thirteenth juror doctrine is well established as the standard for granting a new trial absolute in South Carolina. *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 477, 567 S.E.2d 871, (2002). "South Carolina's thirteenth juror

doctrine is so named because it 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." *Id.* at 478, 567 S.E.2d at 854 (internal quotation marks omitted); *see also Folkens v. Hunt*, 300 S.C. 251, 387 S.C. 265 (1990). Several circumstances exist that justify a new trial, including judicial errors (principally in the admission of evidence or jury instructions), misconduct of counsel, a verdict against the weight of the evidence, and an excessive or inadequate verdict. FLANAGAN, *supra* p. 466.

In fact, the trial judge *must* grant a new trial absolute if the amount of the verdict is so excessive 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. The failure of the trial judge to grant a new trial absolute under such circumstances amounts to an abuse of discretion and, on appeal, will warrant reversal and the award a new trial to the appellant. *See Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007).

In contrast to the more stringent standard for granting a new trial absolute, "the trial court may grant a new trial *nisi additur* or *remittitur* when it finds the verdict is merely inadequate or excessive." *Howard v. Roberson*, 376 S.C. 143, 154, 654 S.E.2d 877, 883 (Ct. App. 2007). The consideration of a motion for a new trial *nisi* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 600, 493 S.E.2d 875, 883 (Ct. App. 1997). The trial court may reduce the amount of a verdict which in his judgment is excessive. When the verdict indicates the jury was unduly liberal in determining damages, the trial court should grant a new trial *nisi remittitur*. *See Becker v. Wal-Mart*

Stores, Inc., 339 S.C. 629, 529 S.E.2d 758 (Ct. App. 2000). Our appellate courts have recognized that any new figure ordered by the court is essentially a settlement figure set by the court. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). On appeal, a trial court's decision to deny a motion for a new trial *nisi remittitur* will be reversed if it amounts to an abuse of discretion. *See James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006).

Here, the decision to permit the Respondent to submit permanent damages, backed up by the Mortuary Table, was one of a series of three egregious errors committed by the trial court in this matter, any one of which should have entitled the Appellant to a new trial absolute or, at a minimum, to a new trial *nisi remitter.* As noted by the trial judge himself, "[e]ven his doctor said he was fully recovered," referring to the Dr. Aymond. (Trial Tr., p. 81) Even in the face of the treating physician's testimony that the Respondent had fully recovered from his injuries at the time he was discharged on November 22, 2010 (Trial Tr., pp. 10-14), the court nevertheless, and despite its own observation that the Respondent was "fully recovered" permitted the Respondent to submit the issue of permanency to the jury, based solely on the scant, skeletal testimony of the Respondent and his wife recounted above.

As will be seen in the following section of this brief concerning the improper arguments of counsel for Respondent permitted by the trial judge during the trial of this case, the interjection of the issue of permanent or future damages was the linchpin of the excessive verdict awarded by the jury in this case. At a minimum, as is stated above, the Appellant was entitled to a new trial *nisi remitter,* if not a new trial absolute,, based on the erroneous admission of the evidence complained of and, further, the use of the South

Carolina Mortuary Table validated by the court in its charge. (Trial Tr., pp. 117-18) The erroneous admission of the evidence of permanent damage and the Mortuary Table at the trial of this case was an abuse of discretion by the trial court, entitling the Appellant to a new trial, or in the alternative, or remand for a new trial *nisi remittitur*.

II. BECAUSE THE TRIAL COURT ERRED IN PERMITTING RESPONDENT'S COUNSEL IN HIS FINAL ARGUMENT TO IMPROPERLY ASSERT HIS PERSONAL OPINION AS TO THE VALUE OF ELEMENTS OF THE RESPONDENT'S CASE, APPELLANT WAS SUBSTANTIALLY PREJUDICED, REQUIRING THE COURT TO REMAND THIS CASE FOR A NEW TRIAL ABSOLUTE OR, IN THE ALTERNATIVE, A NEW TRIAL *NISI ADDITUR*.

The linchpin of Respondent's halfway to a substantial damage award in this case was the use of "permanent" damages, linked with the Mortuary Table, as a means of asking the jury to make a substantial award. This transparent tactic was entirely foreseeable and was addressed by motions made by Appellant's counsel at the conclusion of the evidence in this case. (Trial Tr., pp. 80-84) The initial, prejudicial error by the court was permitting the jury to consider permanent injuries and damage and, consequently, the Mortuary Table, in the face of skeletal testimony concerning continuing problems by the Respondent and his wife in the face of the testimony by the Respondent's treating physician, offered by the Respondent as part of his case in chief, that the Respondent had largely recovered from his injuries at the time of his discharge in November, 2010. As set out above, it is uncontroverted that the Respondent never sought any additional treatment of any kind or nature whatsoever for the injuries and damages allegedly incurred in the June 20, 2010 auto accident after his final visit to Dr. Aymond on November 22, 2010. (Aymond Tr., pp. 10-14)

At the close of the evidence in the case, after objection to the submission of permanent and future injuries and damages to the jury and the use of the Mortuary Table,

Appellant's counsel next objected to the issue of the intention of Respondent's counsel to state his personal opinion as to a concrete figure for pain and suffering and future damages to the jury. (Trial Tr., pp. 82-84) Initially at issue was a chart (not in evidence) which Respondent's counsel proposed to use in which he totaled up a number of figures, including Respondent's medical expenses, a $100,000 figure for pain and suffering to date and a figure of $116,000 for permanent and future damages. The court quickly ruled that Respondent's counsel could not use the pre-prepared chart in his final argument, but the balance of the court's ruling is confusing. (Trial Tr., pp. 82-84)

Respondent's counsel clearly indicated that he was going to tell the jury that in his opinion the value of Respondent's loss of enjoyment of life was $100,000. (Trial Tr., p. 83) He also clearly indicated that he was going to argue to the jury that in his opinion the Respondent's future or permanent damages were $116,000, utilizing the 23.1 years of life expectancy of the Respondent under the Mortuary Table, multiplied by $5,000 per year, yielding a total figure of $116,000 for this supposed element of damages. (Trial Tr., p. 83) At no time did he indicate, nor did he tell the jury, that his figures were mere suggestions and that the final decision as to any award of damages was solely it province.

The court stated as follows in response to the position of Respondent's counsel:

> THE COURT: No, sir. I'm not gonna let you put that figure there. What you---you can ask them for a figure but this needs to actually stop when you total these numbers up, the actual amount---.
>
> * * *
>
> THE COURT: I think you can argue that but you're not gonna put a number in front of them—I mean, you can say we want a million—2 million dollars and you can---.

MR. DRESCHER: My question is, can I argue the numbers that are on here without putting it up?

THE COURT: Yes. I believe you can argue that. I've seen attorneys do that and usually they have a board they'll put up there and they'll just suggest but as far as putting that to them, it's not possible.

At that point, Appellant's counsel continued his objection to this improper argument (Trial Tr., p. 82, 84) It was the position of Appellant's counsel that Respondent's counsel could not tell the jury what he wanted in terms of pain and suffering. The court concluded its consideration of this objection by stating as follows:

THE COURT: We'll leave it there, you can show what the actual medicals are and then you can argue but I'm not gonna let you put that number up there.

Plaintiff's counsel then proceeded to express his personal opinion of the value of Plaintiff's claims in his final argument. (Trial Tr., pp. 94-97) First, Plaintiff's counsel went through the details of Plaintiff's medical bills. As indicated above, the bulk of these bills were for the emergency room visits ($11,000) and the physical therapy treatment ($9,000). (Trial Tr., p. 94) Those bills were in evidence. Having properly expounded on the amount of the medical bills to the jury, however, Plaintiff's counsel then launched into the expression of his personal opinion of the value of the alleged "loss of life, loss of enjoyment of life" of the Plaintiff. (Trial Tr., p. 95) Plaintiff's counsel then argued on the issue of loss of enjoyment of life/pain and suffering as follows:

> This is about what Mr. McKnight went through, fractured collar bone, dislocated shoulder, fracture hand, he hurt his foot. And if we were talking about contusions, muscle strains, *I might ask you to consider an amount of $10,000 for that.* If we were talking about surgeries, and if Mr. McKnight had injuries that severe enough that he would have to have several surgeries---

MR. COLE: Your Honor, can I---I want to note my objection to this line of argument as I previously stated.

THE COURT: Yes.

* * *

MR. DRESCHER: *I might suggest that you come back with an award of $200,000, $300,00 or more depending upon the amount of surgeries and the severity of the injury. The reason why I think that $100,000 for loss of enjoyment of life is proper hits somewhere between there. Okay.*

MR. COLE: Same objection Your Honor.

THE COURT: Yes sir.

(Trial Tr., p. 95)

Plaintiff's counsel contrasted his client's case with other kinds of cases in which there were lesser injuries and cases in which there were more severe injuries. He suggested concrete figures for each level and type of case. He suggested $10,000 for a soft tissue case. (Trial Tr., p. 95) He then suggested that $200,000-$300,000 would be sufficient for a case involving surgeries, depending upon the number of surgeries and the severity of the injury." (Trial Tr., p. 95)

Then, in telling the jury that this case fell in the middle ground those types of cases, Respondent's counsel told the jury that in his personal opinion ". . . I think that $100,000 for loss of enjoyment of life is proper . . . ." (Trial Tr., p.95)

As set out below, this kind of argument is frowned upon by our courts. It does not comport with the usual and acceptable "suggestion" of different ways in which a jury might want to consider awarding damages for pain and suffering and future/permanent injuries, which is the "per diem " argument. Customarily, Plaintiff's counsel argues that a jury might want to consider $5.00 a day or $10.00 a day or some figure per year but

tells the jury that it is solely within its province to determine an amount it believes is proper by whatever means the jury deems proper, if the jury wishes to award such damages at all. Here, Plaintiff's counsel not only improperly stated his personal opinion that $100,000 was the amount that the jury ought to award but contrasted this case with other kinds of cases and amounts that he would ask the jury for in those cases. This was entirely improper, as it improperly interjected matters totally outside the record, as well as wholly irrelevant matters, for the jury's consideration. (Trial Tr., p. 95) This is precisely the scenario which Appellant's counsel tried to prevent in his objections made at the close of the evidence in the case. (Trial Tr., pp. 82-84) Once again, however, the trial court rejected the objections of Appellant's counsel and permitted this improper, prejudicial argument to proceed.

Unfortunately, the impermissible, improper, prejudicial arguments of Plaintiff's counsel continued with his plea to the jury for permanent damages utilizing the Mortuary Table. (Trial Tr., pp. 94-97) First, Plaintiff's counsel improperly speculated to the jury that the doctors who treated the Plaintiff for his second accident, if they had been brought to trial, ". . . would have said, look, we treated for the exact same areas of the body but they didn't because in the second accident, it was his hand. There was no treatment at the hospital after the second accident for his shoulder, his collarbone or his foot." (Trial Tr., p. 96) There was absolutely no testimony in the trial about what treatment the Plaintiff received at the hospital for his second accident. There was testimony, however, including from the Plaintiff himself, that the second accident was "devastating" and caused him to lose the use of his right hand permanently." (Trial Tr., p.58) Further, the

Plaintiff himself testified that he had problems with his back and neck after the second accident but sought no treatment for it. (Trial Tr., p. 54-55)

Plaintiff's counsel then asked the jury for future damages for Respondent's allegedly permanent injuries. Plaintiff's counsel stated that ". . . we would ask for an amount for the continuation of problems he's having and has today for those 23.1 years of about $5,000 per year." (Trial Tr., p. 96) There was simply no basis in the record for this argument and surely no basis at all for Respondent's counsel being permitted by the court to express his personal opinion about the amount of these damages. Appellant's counsel noted his objection to that "improper argument." (Trial Tr., p. 96)

Plaintiff's counsel then went on to total up the amounts of the medicals, the $100,00 for loss of enjoyment of life/pain and suffering and the $116,000 for supposed permanent problems and stated that ". . . it comes to approximately $240,000 which I think is a proper amount in this case. And so I'd ask you to return a verdict in favor of the Plaintiff for that amount." (Trial Tr., pp. 96-97) This was in the face of the court's admonition that ". . . this needs to actually stop when you total these numbers up, the actual amount---." (Trial Tr., p. 83) Quite frankly, there was very little difference in the prejudice that would have been created by the court allowing the Plaintiff to use his written chart, which had precisely the same numbers on it, compared to letting the Plaintiff verbally argue the same thing. Both were equally improper and extremely prejudicial to the Appellant. Plaintiff's counsel quite clearly expressed his personal opinion as to the value of these elements of Plaintiff's damages and then, completely impermissibly, told the jury the total amount of damages the Plaintiff wanted as a verdict, adding up the very figures the court had told him he could not, in fact, total up. As with

the previous element of damages as to which he gave his personal opinion, Respondent's counsel once again failed to even attempt to mitigate his improper argument but telling the jury the final decision was theirs alone.

Our court over the course of time, has approved, *under appropriate circumstances,* the use and final argument of a so-called per diem formula for the award of pain and suffering and other similar damages. The argument in this case as to both pain and suffering and permanency runs completely afoul of the procedure approved by our courts. Of course, as is set out above, Plaintiff's counsel should never had been permitted to argue "permanent" damages in the first place or to utilize the Mortuary Table in connection with those damages.

In *Harper v. Bolton*, 239 S.C. 541, 124 S.E.2d 124 (1962) our Supreme Court held that counsel's use of a mathematical formula to establish a per diem or other fixed basis for pain and suffering was improper. The rationale of the *Harper* court was that pain and suffering cannot be cleanly or precisely calculated, and that an attorney could not provide a dollar value to the jury, because doing so would be "speculation of counsel unsupported by evidence, amounting to his giving testimony in his summation argument." That is precisely what happened in this case, of course.

Two years later, however, the South Carolina Supreme Court ruled that it was acceptable for an attorney to use, *for illustrative purposes*, a per diem formula for assessment of such damages, where it was made clear that the amount to be awarded was left to the judgment of the jury. *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d (1964). In *Edwards*, however, the court held that not only was there "ample testimony of pain and suffering," but that counsel *carefully refrained from giving his opinion as to the per diem*

value thereof, being careful to point out that only the jury could place a monetary value thereon. Under these specific circumstances, the court in *Lawton* held that the use of the per diem formula *for illustrative* purposes was not error. Of course, the Plaintiff's counsel here never told the jury that only it could place a monetary value on Plaintiff's claims, instead substituting his speculative, improper personal opinion for the jury's prerogative.

In the case of *Howle v. PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157 (Ct. App. 1986), the trial court allowed the plaintiff's counsel to use a blackboard to illustrate the plaintiff's damages. Counsel included in his presentation a per diem calculation for pain and suffering, with a total of all figures coming to $195,767. The verdict was $200,000. Defendant argued that the actual verdict was so close to that suggested by Plaintiff's counsel, that counsel's opinion was improperly substituted for that of the jury and that the argument was, therefore, improper and prejudicial.

The court upheld the *Howle* verdict. The reason was that, as in *Lawton,* plaintiff's counsel in *Howle* had repeatedly told the jury that he could not suggest a figure for pain and suffering and stressed that any amount awarded for pain and suffering was for the jury alone to determine. That is in direct and stark contrast to the argument of Plaintiff's counsel in this case. Nowhere in the argument of Plaintiff's counsel (Trial Tr., pp. 95-97) does he even *suggest* to the jury, much less *stress* to the jury that an award for pain and suffering and future damages was totally within their province alone. In fact, Plaintiff's counsel stated with regard to his demand for $100,000 for loss of enjoyment of life that ". . . I think. . . " that figure ". . . is proper hits somewhere between there. . . . " With respect to the future/permanent damages, Plaintiff's counsel stated ". . . we would ask for an

amount for the continuation of the problems he's having and has today for those 23.1 years of about $5,000 per year." (Trial Tr., p. 96) Finally, gilding the lily even further, Plaintiff's counsel summed up his argument as follows:

> MR. DRESCHER: Thank you. And when you come up with that figure and you come up with a loss of enjoyment of life and the medical expenses, *it comes to approximately $240,000 which I think is a proper amount in this case. And so I'd ask you to return a verdict in favor of the Plaintiff for that amount.*

(Trial Tr., pp. 96-97) emphasis added.

The trial court was given two opportunities to prevent this improper, prejudicial expression by Plaintiff's counsel of his personal opinion to the jury. First, defense counsel objected at the close of the evidence to this line of argument as improper. (Trial Tr., pp. 82-84) Next, during the Plaintiff's final argument, defense counsel objected three times to this line of argument, which objections the court simply noted. (Trial Tr., pp. 95-97) This was no mere suggestion of a per diem method of calculating pain and suffering, nor was the argument coupled with the statement to the jury that it was their prerogative alone to determine the method of calculating the damages sought, if any, and the amount there. Rather, Plaintiff's counsel expressed his specific, personal opinion of the value of these two elements of the Plaintiff's case. It should also be reiterated here that Plaintiff's counsel improperly interjected a comparison of the Plaintiff's case with other kinds of cases in which plaintiffs might have suffered only soft tissue injuries or more severe injuries, requiring surgery. (Trial Tr., p. 95) This was wholly speculative, outside the record and should never have been argued by Plaintiff's counsel, much less permitted by the trial court. All of this was to the substantial prejudice of the Defendant in this matter.

Appellant will not reiterate here the standards of review for the granting of a new trial absolute or, in the alternative, new trial *nisi additur*, which are set out in detail in the preceding argument in this Brief. Suffice it to say that the argument of Plaintiff's counsel alone is grounds for reversal and the award to Appellant of a new trial absolute or, in the alternative, for a new trial on the issue of damages. The trial court abused its discretion not once but twice in permitting this improper line of argument by Plaintiff's counsel to the great and irreparable prejudice of Appellant.

III. BECAUSE THE COURT PERMITTED PLAINTIFF'S PREJUDICIAL TESTIMONY CONCERNING HIS LACK OF ABILITY TO PAY FOR FURTHER MEDICAL TREATMENT DUE TO LACK OF INSURANCE, APPELLANT WAS SUBSTANTIALLY PREJUDICED, ENTITLING APPELLANT TO A NEW TRIAL ABSOLUTE, OR, IN THE ALTERNATIVE, A NEW TRIAL *NISI ADDITUR*

Set out above is a description of the rather brief, skeletal testimony of the Plaintiff concerning his injuries and the effect of those injuries. As the testimony of Plaintiff's Dr. James Aymond (Aymond Tr., pp. 1-14) establishes, the Plaintiff only saw Dr. Aymond five times. He was discharged on November 22, 2010, having completed his course of physical therapy on November 18, 2010. On the August 30, 2010 visit to Dr. Aymond, Dr. Aymond noted that ". . . the patient states that the physical therapy, he had been involved in the therapy and was improving with respect to his lower back pain as well as his left shoulder." (Aymond Tr., p. 11) It should be noted once again here, of course, that Dr. Aymond refused to connect the Plaintiff's low back pain with this accident. (Aymond Tr., p. 10) In any event, even the August 30, 2010 visit indicated that the Plaintiff had ". . . improved range of motion of his left shoulder and motor and sensation was normal in his upper extremity." (Aymond Tr., p. 11) On that visit, it was noted that

there was ". . . near complete healing of both fractures of his collarbone as well as his left hand." (Aymond Tr., p. 11)

On the October 4, 2010 visit, Aymond noted that the Plaintiff had ". . . good range of motion of the shoulder, his ankle had minimal swelling and no, no tenderness to his exam." (Aymond Tr., p. 12) The Plaintiff's main complaint on that visit was "feeling low endurance as well as feeling washed out, having little energy and was concerned about that." (Aymond Tr., p. 12) Aymond recommended that the Plaintiff ". . . see his primary physician or primary care physician regarding his low energy that he was having at that visit with me." (Aymond Tr., p. 12)

Significantly, the last time the Plaintiff saw Dr. Aymond on November 22, 2010, Dr. Aymond noted that the Plaintiff had ". . . completed all his therapy, *said he had full mobility of his shoulder,* he had very little residual swelling of his left—of his right ankle, and his lower back examination revealed near full range of motion. (Aymond Tr., p. 13) The collarbone fracture had completely healed. (Aymond Tr., p. 13) As is noted above, the Plaintiff was released from treatment on that particular day with instructions for the Plaintiff to re-contact Dr. Aymond as needed. (Aymond Tr., p. 13) All of this was elicited on direct examination by Plaintiff's counsel at Dr. Aymond's deposition, which was offered in full at the trial of this case. Furthermore, both Dr. Aymond and the Plaintiff acknowledge that the Plaintiff never saw Dr. Aymond after the November 22, 2010, visit, nor is there any evidence that the Plaintiff ever contacted Dr. Aymond or anyone else about any alleged continuing problems after the date of his last visit. Respondent never mentioned to Aymond that he needed or wanted further physical therapy.

All of the above is by way of background, underscoring and emphasizing the prejudicial effect of the Plaintiff's obviously rehearsed, non-responsive answers to routine questions posed by defense counsel at the trial. (Trial Tr., pp. 48-49) First, the Plaintiff acknowledged that the bulk of the bills he received from Georgetown Hospital were for diagnostic radiographic studies and not for treatment (Trial Tr., p. 48) He then acknowledged that the last time he saw Dr. Aymond was in November, 2010. (Trial Tr., p. 48) He further acknowledged that the last time he went to physical therapy was November 18, 2010, four days before he last saw Dr. Aymond. (Trial Tr., p. 48)

It was in response to the question about physical therapy that Mr. McKnight began to intentionally offer his rehearsed, prejudicial testimony. Insinuating that he needed more therapy, despite Dr. Aymond's very clear notes on his recovery and his failure to ask for same, the Plaintiff first stated that he would have gotten more therapy but ". . . I didn't have the money to pay for it, so once he told me it was enough, that was it." (Trial Tr., p. 48)

The following colloquy then took place:

> Q. Once Dr. Aymond told you that was enough, that was it?
>
> A. Once he told me I didn't need to go back anymore that was it. But as far as I'm concerned, I was just getting started with the physical therapy and the people down there thought I should need more, so I don't—*I think the fact that I wasn't covered under my wife insurance, I thought I was and I know she feel bad, too, I feel bad and I don't like people to make me feel bad because I don't have the insurance.*

(Trial Tr., p. 49) (emphasis added)

The Plaintiff's testimony was delivered with contrived sobbing and the dabbing of his eyes with a handkerchief. That was not the first time the Plaintiff had exhibited

supposed emotion while testifying about his alleged injuries and problems. Following this bit of unresponsive and extremely prejudicial testimony, Appellant's counsel moved the court for a mistrial. (Trial Tr., pp. 49-51) It was, and is, the contention of Appellant's counsel that the answer given by the Plaintiff was intended to improperly elicit the sympathy of the jury; referred impermissibly and prejudicially to the Plaintiff's alleged lack of health insurance to cover his medical costs; and was delivered with great emotion, tears and sobbing. (Trial Tr., pp. 49-51)

Additionally, as pointed out by Appellant's counsel in his argument for a mistrial, Plaintiff's counsel, as part of his motion *in limine,* had asked the court to admonish defense counsel ". . . not mention to----my poor client, they can't afford this verdict or things of that nature, Your Honor." (Trial Tr., pp. 15-16) Apparently, Plaintiff's counsel believed that it was acceptable for the Defendants to be prevented from stating that they could not afford to pay a jury verdict, while it was perfectly permissible for the Plaintiff to tell the jury that he could not pay for the medical treatment, because he did not have health insurance. As stated by the Plaintiff's counsel in arguing against Defendant's motion for a mistrial, "[w]e are not talking about liability insurance, we are talking about health insurance and he was answering why he didn't treat anymore because he couldn't afford it." (Trial Tr., p. 50) Both in its ruling at trial (Trial Tr., p. 51) and in its post-trial Order (1/25/13 Order, pp. 3-4), the trial court attributed its ruling to the fact that the Plaintiff was referring to health insurance instead of liability insurance. It was obviously all right with the trial court for the Plaintiff to give this unresponsive, prejudicial testimony, as the court stated in its post-trial Order:

> It would have been unjust and unfair to allow defense counsel to ask questions as to why Plaintiff did not go back

to the doctor even though he continued to have complaints of pain, and not allow Plaintiff to explain why.

(1/25/13 Order, p. 3)

It is clear from the short line of questions leading up to the unresponsive, prejudicial testimony given by the Plaintiff that defense counsel was simply attempting to establish the last date of treatment by the Plaintiff. In fact, the court implicitly recognized the potential prejudice in the Plaintiff's unelicited testimony by stating as follows in ruling on the Defendant's mistrial motion:

THE COURT: All right. At this point in time I understand you need the motion to protect the record. I'm gonna deny the motion and if later on it comes back with—if the verdict, I think was swayed by that then I can certainly act as the thirteenth juror, but at this point in time I am going to deny your motion.

(Trial Tr., p. 51)

The court then went on to tell Plaintiff's counsel the following:

THE COURT: And admonish him—when he gets back on the stand, he needs to say nothing more about insurance and he –had he said anything about their insurance, I would have granted a mistrial but he was simply talking that he didn't have the health insurance so he didn't bring in the liability insurance.

(Trial Tr., p. 51)

The court's ruling ignores several salient and important facts. The first of these is that the testimony offered by the Plaintiff was as irrelevant as it was prejudicial. Relevant evidence is defined as "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, S.C.R.E. Whether Respondent could afford future medical care, or whether he had health insurance, was not

relevant to the case. Importantly, Respondent's counsel acknowledged that the Respondent was not seeking future medical expenses as a component of damages in asking the jury only for (1) the amount of medical bills the Respondent had already incurred; (2) future pain and suffering; and (3) permanent damages. (Trial Tr., pp. 94-97) Additionally, there was absolutely no evidence adduced at trial by the Plaintiff concerning the necessity for future or further medical treatment, much less the projected amount of such treatment. One need only look at the testimony of Plaintiff's Dr. James Aymond, which has been discussed in detail above. (Aymond Tr., pp. 1-14) There was a complete lack of foundation for the answer of the Plaintiff to the simple questions of defense counsel designed to elicit the last dates on which the Plaintiff had been treated.

Furthermore, even if the court had found that Respondent's testimony was relevant, its probative value was substantially outweighed by the risk of unfair prejudice to the Defendant. *See* Rule 403, S.C.R.E. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. *See, e.g., State v. Sweat*, 362 S.C. 117, 606 S.E. 2d 508 (Ct. App. 2004). Prejudice is determined by looking at the record as a whole. *See State v. Stokes*, 381 S.C. 390, 673 S.E. 2d 434 (2009). In *State v. Sweat,*398 S.C. 197, 202-03, 727 S.E.2d 751, 754 (Ct. App. 2012), the court engaged in a discussion of this issue in some detail.

> Rule 403 provides that, although relevant, evidence may be excluded if its probative value is substantially outweighed by the danged of unfair prejudice." "Probative" means "[t]ending to prove or disprove." Black's Law Dictionary 1323 (9th ed. 2009) Probative value is the measure of the importance of that tendency to the outcome of the case. It is the weight that a piece of evidence will carry in helping the trier of fact decide the issues.... "When [balancing the danger of unfair prejudice] against the probative value, the determination must be based on the entire record and will

turn on the facts of each case." (citing *State v. Gillian,* 373S.C. 601,609, 646 S.E.2d 872, 876 (2007)

Here, rather than engaging in any meaningful balancing test, weighing the relevance versus the risk of unfair prejudice of the Plaintiff's improper testimony, the court simply conflates the issue of whether the Plaintiff testified about health insurance and his lack of ability to pay for future medical treatment with the fact that the Plaintiff was not referring to the Defendant's liability insurance coverage. (1/25/13 Order, pp. 3-4) Although telling Plaintiff's counsel to "admonish" his client about his outburst, (Trial Tr. p. 51), the court did not tell the jury to disregard the statement about lack of health insurance.

To add insult to injury, Plaintiff's counsel had made a point before trial of seeking assurance that the Defendants would not make any plea that they could not afford to pay any jury verdict. Yet, both Plaintiff's counsel and the trial court obviously believed it was perfectly acceptable for the Plaintiff, on the other side of the coin, to plead his own inability to pay his medical bills because he did not have health insurance. Of course, the court recognized the possible prejudice of the testimony in ruling on Defendant's motion by saying that he might revisit his ruling if he believed the jury was "swayed by" the Plaintiff's prejudicial testimony.

While the court did not have the benefit of Dr. Aymond's testimony in ruling on the defense motion for a mistrial resulting from the Plaintiff's improper, prejudicial testimony, it certainly had that testimony at hand when issuing its pretrial Order (1/25/13 Order). At that point, the court well knew that Dr. Aymond had prescribed no further treatment for the Plaintiff following his November 22, 2010 visit and had, in fact, chronicled the Plaintiff's recovery, including the Plaintiff's own statements about the

improvement in his shoulder and other parts of his body and should have exercised his prerogative as the "thirteenth juror" exactly as promised in denying Defendant's mistrial motion during the trial. (Trial Tr., p. 51) The trial court's failure to do so is an abuse of discretion and entitles the Appellant to the relief sought of a new trial or, in the alternative, a new trial *nisi remittitur*.

The decision to grant or deny a mistrial is within the trial court's discretion and is not to be overturned absent abuse of that discretion. *Creighton v. Coligny Plaza Ltd.*, 334 S.C. 96, 118, 512 S.E.2d 510, 521 (ct. App. 1998). To warrant reversal on appeal, the Appellant must show, as is demonstrated here, both error and prejudice. The trial judge should have granted Defendant's motion for a mistrial, since the "incident was so grievous and prejudicial the prejudicial effect could be removed no other way. *State v. Beckham,* 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999).

CONCLUSION

For the reasons stated, the Court should reverse the judgment of the circuit court.

Respectfully submitted,

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