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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Spartanburg County Court of Common Pleas

The Honorable Grace Knie, Circuit Court Judge

Case No. 2018-CP-42-00063
Appellate Case No. 2021-001304

Betty McDade as Guardian *Ad Litem* for Matthew McDade..Appellant,

v.

Roger Caldwell..Respondent.

INITIAL BRIEF OF APPELLANT

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March 7, 2022
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STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err by denying the Appellant's Motion for a Directed Verdict after the Respondent admitted that he was negligent?

II. Did the Trial Court err by denying the Appellant's Motion for Judgement Notwithstanding the Verdict based on finding no basis existed with regards to the Defendant's negligence?

III. Did the Trial Court err by denying the Appellant's Motion for a New Trial Absolute based on finding no basis existed with regards to causing confusion for the jury by allowing the Plaintiff to testify, improperly charging the jury with regards to the expert's testimony, the curative instructions, by refusing to permit Appellant's rebuttal witness to testifying or by allowing the Plaintiff's impeachment testimony to be a critical factor in jury deliberations?

STATEMENT OF THE CASE

On October 16, 2015, Matthew McDade was driving a motorcycle northbound on Boiling Springs Road in Spartanburg, South Carolina. At the same time, Respondent Roger Caldwell (hereinafter "Respondent") was driving southbound on Boiling Springs Road. Respondent turned his vehicle in front of Matthew McDade causing a collision leading to serious injuries and leaving Appellant permanently disfigured and damaged.

On January 8, 2018, Appellant brought negligence, gross negligence, and negligence *per se* claims against Respondent arising from injuries Appellant sustained as the result of the collision. Respondent asserted a general denial of all of Appellant's claims.

Trial on this matter began on Wednesday morning, July 21, 2021. On the morning of July 22, 2021, just before the trial was set to reconvene, the Court and counsel were made aware that a juror tested positive for COVID 19. After much deliberation and efforts by the entire court staff and administration, the Court and all counsel agreed to postpone and reconvene the trial on August 9, 2021. On August 9, 2021, the trial reconvened with the alternate in place of the previously ill juror. At the conclusion of the matter, a verdict was rendered for the Respondent on August 10, 2021.

On August 20, 2021, Appellant filed post-trial motions, which were the Plaintiff's Motion for Judgment Notwithstanding the Verdict, Plaintiff's Motion for a New Trial Absolute, and Plaintiff's Motion for a New Trial Pursuant to the Thirteenth Juror Doctrine. The Respondent replied by a responsive memorandum to all three of the Appellant's post-trial motions on August 30, 2021. On October 8, 2021, the Court entered an Order denying the Appellant's Motions stating that there was no basis for granting a new trial. The Appellant filed a Notice to Appeal on November 5, 2021, which is the subject of this appeal.

STANDARD OF REVIEW

A trial court's decision to grant or deny (a) a motion under Rule 50(b), a Motion for a New Trial pursuant to the Thirteenth Juror Doctrine, or (b) a Rule 59 motion, should be overturned on appeal when the trial court abuses its discretion. *See (respectively), Dunn v. Dunn,* 298 S.C. 499, 381 S.E.2d 734 (1989); *Downey v. Dixon,* 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987); *Davis v. Parkview Apts.,* 409 S.C. 266, 762 S.E.2d 535 (2014); *Weeks v. Drawdy (In re Estate of Weeks)*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion occurs when the judgement is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013).

When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in light most favorable to the nonmoving party. *Elam v. S.C. Dept. of Trans.,* 361 S.C. 9, 602 S.E.2d 772 (2004).

A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Howard v. Roberson,* 376 S.C. 143, 152, 654 S.E.2d 877, 882 (Ct. App. 2007). The appellate courts will reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law. *Steinke v. S.C. Dep't of Labor, Licensing and Regulation,* 336 S.C. 373, 520 S.E.2d 142 (1999).

ARGUMENT

This matter is before the Court because Appellant contends that the Trial Court abused its discretion in denying the Appellant's Motion for a Judgment Notwithstanding the Verdict, Motion for a New Trial Absolute, and/or Motion for a New Trial Pursuant to the Thirteenth Juror Doctrine.

The Trial Court denied the Appellant's post-trial motions contending that there was no basis existing in order to grant a new trial. The Appellant contends that the Trial Court erred in denying the Appellant's post-trial motions for the foregoing reasons.

Section I of this brief shows that the Trial Court erred when they denied the Appellant's motion for a directed verdict because the Respondent admitted through counsel and testimony that he acted negligently and offered no evidence to rebut this presumption. **Section II** of this brief shows the overwhelming amount of evidence that was presented during trial of the Respondent's negligence – including his own admission through counsel – and that no reasonable jury could have returned a verdict finding the Respondent not negligent. This section will also explain how the Respondent and his counsel admitted to the Respondent's fault throughout the trial, and therefore a reasonable jury could not infer that the Respondent was zero percent (0%) at fault. **Section III** shows that the Trial Court erred in allowing the Plaintiff to testify despite his incompetence and that the Court erred when not properly charging the jury with regards to the expert's testimony. This section will also show that the curative instructions regarding statements about the traffic ticket misled the jury and caused the jury to be prejudice against the Appellant due to treating the Appellant and his counsel unfairly.

I. The Trial Court erred in denying the Appellant's Motion for a Directed Verdict as to the Respondent's negligence because (a) Respondent admitted through counsel that he acted negligently, which admission is binding, and/or (b) there is no factual dispute that the Respondent turned left in front of oncoming traffic, which is presumptive negligence, and (c) there is no evidence offered by the Respondent to rebut that presumption

The Respondent's counsel had admitted that his client had some fault in both his opening and closing statements. When the jury found the Respondent to have zero percent (0%) negligence, it did not comport to the evidence. The Appellant's counsel then moved for a Directed Verdict as

to the Defendant's negligence, which was improperly denied. As outlined in the Appellant's post-trial motions and throughout this brief, the Respondent freely admitted on the stand that he was negligent in turning left, his counsel made statements during their opening and closing statements and admitted their client was negligent, and expert testimony throughout trial showed the Respondent's negligence.

The Trial Court should have granted the Appellant's motion for a Directed Verdict because when applying the standard of review most favorable to the nonmoving party, the Respondent should be bound to the statements he made throughout trial. The Respondent during his opening and closing statements stated that his client was at least five percent (5%) at fault. Therefore, Respondent's counsel must be bound by this statement, which said that his client was at some fault rather than no fault at all.

Respondent indicated that he just did not see Appellant, although he admitted to seeing other vehicles traveling in the same direction as Appellant. Of course, as our law states, and our jury instructions clearly read: a driver's duty is not merely one of looking but one of seeing. The judge found as a matter of law that the Respondent owed a duty to Appellant to obey the rules of the road. Respondent never called into question Appellant's damages or causation, and the jury did not reach those questions on the verdict form. Therefore, the sole issue before this Court as to the judgment is the Respondent's negligence or breach of the duties he owed to Appellant. The Court further charged negligence as a matter of law or negligence *per se* for violation of a statute. Therefore, since the Respondent and Appellant do not disagree that the Respondent was making a left turn into oncoming traffic, the Respondent must be bound by the statements he made concerning his fault when he made such turn.

Therefore, the Trial Court erred when it denied the Appellant's Motion for a Directed Verdict when the Respondent and his counsel admitted throughout the trial that the Respondent was in fact negligent. The Respondent should be bound to these statements showing that the Respondent admitted to being at fault and was therefore, not zero percent (0%) negligent.

II. The Trial Court erred in denying the Appellant's Motion for Judgment Notwithstanding the Verdict because the Defendant's negligence is overwhelming and, as described in Section I, Defendant admitted the same.

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). If the verdict is so grossly inadequate that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute. See *Cock–N–Bull Steak House, Inc. v. Generali Ins. Co*., 321 S.C. 1, 466 S.E.2d 727 (1996); *Waring v. Johnson*, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). In deciding whether to assess error to a court's denial of a motion for a new trial, we must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Umhoefer v. Bollinger,* 298 S.C. 221, 379 S.E.2d 296 (Ct. App. 1989).

The jury found that the Respondent was not negligent at all despite the overwhelming evidence to the contrary. Referring back to the Appellant's previously filed post-trial motions, the Appellant provided a great deal of evidence and proof that all of the elements of negligence were proven by the Appellant against the Respondent. The Respondent argued that the jury

reasonably found that the Respondent had zero percent (0%) fault and that they further argued this point prior to trial, which is incorrect. For the Respondent's counsel to infer that the jury was correct in finding the Respondent zero percent (0%) at fault despite the Respondent's testimony, statements of his counsel, and the officer's findings all supported that the Respondent was in fact negligent to some extent is false and contrary to the facts.

Although, the statement of court and counsel are not evidence, they are binding on the party he represents, and Defense counsel admitted that his client had some fault in both his opening and closing. As such, the jury's finding that there was no negligence on the part of the Respondent did not comport to the evidence. After all, if there had been NO evidence, then surely Defense counsel would not have admitted to the same. And surely, he would have moved for a directed verdict, which he never did. Moreover, a finding by the jury of no negligence at all, despite Respondent's counsel's own statements to the jury, evidence a verdict reached as a result of bias, passion, confusion or other improper purpose.

As outlined in the Appellant's previously filed JNOV, the Respondent also admitted to being at fault when he admitted during trial that he intentionally made a left turn across the double yellow lines in front of the Appellant and was cited with a ticket for failure to yield, which the Respondent paid and there was no ticket issued to Appellant. The Respondent freely admitted on the stand during trial that he received a ticket for failing to yield as a result of this collision. After the Respondent freely made this statement, his counsel did not make any contemporaneous objections or move for a Motion to Strike. A contemporaneous objection is required to preserve issues for appellate review. *Webb v. CSX Trans., Inc.,* 364 S.C. 639, 615 S.E.2d 440, 450 (2005). Ordinarily, if an appellant fails to object the first time a statement is made, he or she, waives the right to raise the issue on appeal. *McPeters v. Yeargin Constr. Co.,* 290 S.C. 327, 332, 350 S.E.2d

208, 211 (Ct. App. 1986). Since there were no objections or a Motion to Strike after this statement was made by the Respondent it is allowed into evidence and cannot be appealed. The Respondent's counsel are not permitted to object or bring this issue on appeal since their lack of objections and failure for a Motion to Strike constituted a waiver on appeal. To say that the verdict was correct and that the jury reasonably concluded that the Respondent was at zero percent (0%) fault for negligence, when the Respondent outwardly admitted that he was at fault, is completely improper because a reasonable jury would not have found the Defendant at zero percent (0%) negligent based on the outweighing evidence.

Gerry McDevitt, the expert at trial also testified that the Respondent was at fault for the collision. Mr. McDevitt testified that the Respondent failed to yield, the Plaintiff was not at fault, speed was not a factor in this collision, and there was no way Appellant's bike could have reached a speed of 70 mph. The Respondent's counsel presented absolutely no evidence to refute Mr. McDevitt's testimony. Despite having no factual or scientific basis for his claims, Respondent argued that the motorcycle was "like a bullet" and that the "only way [his] client's truck frame could be bent" would be a collision at 70 mph. Not only are these statements dubious, at best, they were unbacked by a single shred of evidence or testimony at trial.

The only evidence in favor of Respondent is testimony from Appellant at his deposition on November 7, 2018. At his deposition, he testified:

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18        Q.   How fast were you going before you
19   started locking the bike down?
20        A.   I think -- if I remember, like
21   70-something, but I wasn't speeding, speeding hard.
22   I mean -- but it happened, and I can't remember
23   every little detail about it.
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[Depo of Appellant, p. 34, l. 18-23]

This testimony should never have been allowed by the Trial Court due to the Appellant's incompetence, which will be discussed further in this brief. Absent this improper testimony there was no evidence that anyone, but Respondent was responsible for this collision. Moreover, this testimony would only establish comparative negligence on Appellant's part, not a lack of Respondent's negligence. There was simply no evidence presented to the jury that Respondent acted reasonably by turning left in front of oncoming traffic across double yellow lines. Considering all of the testimony and inferences made in light of the non-moving party, it can be concluded that the Trial Court erred when it denied the Appellant's Motion for Judgment Notwithstanding the Verdict because the verdict was unreasonable compared to the testimony and evidence at trial. It was unreasonable for the jury to find that the Respondent had a zero percent (0%) fault in this action, when even the Respondent agreed that he was at fault to some extent. Even if the jury thought the Appellant was at some fault, this would have only established comparative negligence and would not be a complete bar to the Respondent's negligence.

III. The Trial Court erred in denying the Appellant's Motion for a New Trial Absolute because the Court forced the Appellant to testify despite his incompetence, the Court failed to charge the jury regarding expert testimony, and the curative instructions misled the jury.

The Respondent's counsel in response to the Appellant's Motion for a New Trial Absolute argues that there was no evidence that the Appellant was incompetent prior to the commencement of jury trial. This is simply not true because there was amble evidence of the Appellant's mental condition throughout the discovery process. It is not the responsibility of the Appellant to ensure that the Respondent's counsel reviews discovery and acts with due diligence when preparing for trial. If the Respondent had carefully reviewed the discovery, they would have noticed the Appellant's treating physicians were listed as witnesses and they would have conducted a lot

more than just one deposition throughout discovery. It is not the Appellant's fault that the Respondent's counsel opted to not conduct discovery on a single one of the Appellant's witnesses.

As mentioned in the Appellant's previously filed JNOV and Motion for a New Trial Absolute, Appellant moved pre-trial for an order precluding Appellant from testifying in the case. Appellant's motion was based upon Appellant's medical status, consultation with his caregivers and family, and Appellant's counsel's own interactions with Appellant. Appellant fully briefed the issue for the Court. [Court's Exhibit 7]. The Court denied Appellant's motion without a full hearing on the matter. The Court indicated that without a letter from a doctor on the matter, she was not willing to grant the motion. During the break of the trial, Appellant obtained a letter from Dr. Craig Williams, M.D., Appellant's psychiatrist. Upon reconvening the trial, Appellant renewed the motion to exclude the testimony of Appellant at trial and presented the previously requested letter. Dr. Craig Williams' letter was also made a Court's Exhibit. [Court's Exhibit 7]. Dr. Williams was also under a subpoena to be present when trial reconvened if the Court wished to examine him regarding Respondent's competency. [Id.]. The Court declined and again denied Appellant's motion.

As also stated in the Appellant's previously filed JNOV and Motion for New Trial Absolute, there is no duty to disclose a rebuttal witness. By the Appellant's competency coming into question, it could be inferred that the Appellant's counsel would call a rebuttal witness to testify to the Appellant's competency since that was at direct issue. Therefore, the Trial Court erred when it refused to allow Dr. Williams to testify as to the Appellant's mental condition, which was put in direct question. *McGaha v. Mosley,* 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984).

The Trial Court also erred in allowing the Appellant's improper impeachment testimony with reference to speed. The improper statement by the Appellant was a critical factor to the jury deliberations when the jury asked if they could review the Appellant's full deposition testimony, which they were not permitted to do. If the jury was able to read the full deposition testimony, they would have been able to read and see where the Appellant said numerous times that he did not remember the exact speed he was traveling and was told to guess (as testified to by Betty McDade), along with all of the other incorrect statements made by Appellant regarding employment, age, residence, and etc.

Betty McDade was called as a rebuttal witness for the testimony elicited from Appellant by defense counsel. Betty McDade was not able to testify because of Defense counsel's numerous improper objections.

"A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal." SCRE 611(d).

Defense counsel called Appellant in order to show the jury his deposition testimony where he said he may have been going seventy miles per hour but wasn't speeding. The speed limit on Boiling Springs Road at the location of the collision was forty miles per hour. [Testimony of Franks and McDevitt].

Appellant's intention in recalling Betty McDade was to highlight the inconsistencies from Appellant's deposition testimony that Respondent did not elicit in his examination of Appellant. Appellant's counsel did not explore these inconsistencies on cross examination of Appellant, as

counsel continues to maintain he is absolutely not competent to testify. There was no need for cross-examination of a witness whose presence on the stand was improper to begin with.

Betty McDade was present in the room during Appellant's deposition. She experienced the tone, tenor, and body language of the participants. She testified in her direct examination in Appellant case-in-chief that Appellant was told to "just guess" how fast he was going. [Testimony of Betty McDade]. She also witnessed how he answered most questions with "I don't know" and "I don't remember." The purpose of her testimony was to aid the jury in understanding the condition of her son, for whom she is a Guardian and caretaker.

However, the Court limited her testimony without explanation, even when guidance on the same was sought out. The Court instructed Appellant to only address those issues raised in Respondent's examination of Appellant yet prohibited Appellant from introducing testimony that went to the very heart of the issue – whether the previous testimony was wholly unreliable.

The Trial Court erred when it failed to offer a curative instruction regarding the expert's testimony. During the Respondent's counsel's closing argument, they stated that the Appellant's expert testified that the Respondent was not reckless, willful, or wanton in his actions. This statement is not true, the Appellant's expert only said that the Respondent was not reckless, which was based off of the expert's criminal law experience and was not at issue. This statement was allowed, without a curative instruction or escorting the jury out of the room, which is a clear and direct violation of the rules despite Appellant's objections. In contrast, when the Appellant received an objection, during his closing statement for something that was completely proper and not a misrepresentation of evidence, the jury was escorted out of the room for over thirty minutes. The jury was tainted when the Court handled issues in this way because it seemed as though the Appellant's counsel was trying to mislead the jury and cause issues for the Court when that is not

true. Instead, the Court treated Appellant unfairly and violated his fundamental right to a fair jury trial.

The Respondent's counsel argued that the Appellant never argued or objected to the failure of the curative instruction during the trial, which is not true. Appellant's counsel objected immediately after the Respondent's counsel said such statement and a bench conference was conducted. Although, the jury was present they could not hear the bench conference and the Court did not give a curative instruction to such statement, which gave further prejudice to the Appellant's counsel. The jury was escorted out of the room every time the Respondent's counsel objected to a statement and was given multiple curative instructions. However, when Appellant objected the jury remained present and the jury was not given a curative instruction. The Respondent's counsel was incorrect in arguing that the Appellant's counsel never objected to such statement during trial.

Objections not raised in the trial court cannot be relied on in the appellate court. *Wilson v. Clary,* 212 S.C. 250, 47 S.E.2d 618 (1948). Since the Appellant's counsel objected the moment the Respondent's counsel made such statement on record in the trial court, it will be allowed to be relied and reviewed upon by the appellate court. In addition to objecting to such statement that was made, the Appellant's counsel explained further what the expert had meant by such statement in closing arguments. During the trial's closing arguments on August 10, 2021, counsel for Appellant explained:

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11        With respect to the punitive damages, our expert
12     said that there was no evidence that Mr. Caldwell
13     acted recklessly.  I agree with that, he's my expert.
14     I don't disagree and I didn't offer that in closing.
15     Willful, you'll hear the charge.  The charge is
16     reckless, willful or wanton.  Willful.  Because the
17     act was intentional.  And it's about the act, the
18     conduct itself.  The actual act of that was taken,
19     okay.  It's not about some criminal standard or
20     anything like that.  It's a middle standard, clear
21     and convincing evidence of a willful act.  That led
22     to the harm, okay.  And lack of remorsefulness you'll
23     hear is one thing to consider.
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(Closing Arguments by Roy T. Willey, 86: 11-23).

Appellant's counsel, Mr. Willey explained after such statement and objection was made to the expert's testimony that the expert used his term of "reckless" as it relates to his experience in criminal law, which is not what was at issue in our trial. Therefore, the Appellants did in fact make an objection to the statement made by the Respondent and after such statement was made, Appellant's counsel further explained the reasoning behind the statement. The Trial Court erred when it did not give a curative instruction after this objection and further caused prejudice against the Appellant when it failed to treat objections by the Appellant the same as the objections raised by the Respondent.

The Court's multiple curative instructions regarding the presence or absence of the ticket greatly prejudiced the Appellant because it confused the jury and made them think that the Appellant's counsel was intentionally trying to mislead them. The jury was led to believe, or rather told by the Court, that the Appellant was acting improperly, when in fact the law supported the Appellant's position over the Respondents. Moreover, the continued use of the curative instruction, including during charging, further alienated the jury and unfairly prejudiced the Appellant.

As outlined in the Appellant's Motion for JNOV and Motion for New Trial Absolute,

during Respondent's testimony he admitted that he received a ticket for failure to yield. Respondent also paid that ticket, but the Court barred that evidence pre-trial as admission by a party opponent. During the testimony of the investigating officer, Appellant's counsel asked if the officer had issued the Appellant any tickets. Before the officer could answer, a loud, speaking, and inappropriate objection was made on the basis that the testimony was barred by a pre-suit motion in limine, which was solely based upon S.C. Code Ann. § 56-5-6160. That section only bars the conviction, not the issuance or lack of issuance of any tickets. The jury was sent out when the objection was made, and despite multiple requests neither the Court nor Defense counsel could state a legal basis for the objection or the sustaining thereof. When the jury returned, they were given a curative instruction, and were given another curative instruction during the charge on the law at the close of the case that they could not consider any issuance of tickets, including what Respondent had already testified to. The same was given with no basis in the law provided, and therefore is reversible error. The Respondent's counsel argued that the curative instructions were necessary due to the Appellant's counsel's actions, however, the Respondent's counsel failed to acknowledge their actions of their loud speaking and inappropriate objections throughout the trial after the Court asked both parties to only object non-verbally. The actions of the Respondent's counsel during the trial caused a bias against the Appellant's counsel, which also led to the confusion and prejudice of the jury.

Respondent's counsel also argued that the instruction given regarding mentioning the traffic ticket was proper and that Appellant's counsel failed to comply with such instruction. However, Appellant did not fail to comply with this instruction when the Respondent volunteered this statement freely. After the Respondent volunteered such statement, his counsel did not object or move for a Motion to Strike during trial. When Defendant has no objection to the admission

of certain evidence, it "amount[s] to a waiver of any issue [he] had with the [evidence]." *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App.2007). A party's "express waiver of objection to the admission of" evidence is "tantamount to a withdrawal of [that party's] previous motion to suppress." *State v. Dicapua*, 373 S.C. 452, 455, 646 S.E.2d 150, 152 (Ct.App.2007), aff'd, 383 S.C. 394, 680 S.E.2d 292 (2009). Since Respondent waived any previous objection, he had raised the issue of the ticket as evidence. The testimony of Respondent became evidence in the case once he freely made such admissions as to receiving a ticket. However, at the conclusion of the trial, Appellant's counsel was instructed by the Court not to talk about Respondent's testimony that he received a ticket. Further, the Court issued multiple curative instructions throughout the trial regarding the ticket and how the jury was not to consider the same in their deliberations. The jury was also instructed not to examine any of the testimony from the Appellant regarding the lack of issuance of a ticket. This was improper and tainted the Appellant's case. Further, it prejudiced the Appellant's right to a fair trial as the Court essentially gave an unfair advantage to Respondent by actively prohibiting the discussion of lawfully entered evidence during closing arguments. Therefore, such instructions made by the Trial Court was an error especially once the statement became part of evidence because the Respondent volunteered such statement.

The statements and questions regarding the Respondent's ticket were admissible by law in order to use as evidence to impeach the credibility of the witness. S.C. Code Ann. § 56-5-6160 states "No evidence of conviction of any person of any violation of the [Uniform Act Regulating Traffic on Highways] is admissible in any court in any civil action." However, this provision does not bar the use of such evidence to impeach the credibility of a witness, whether or not such witness is a party to the action. 31 S.C. Jur. Automobiles and Other Motor Vehicles § 233. This

statute, which has remained unchanged since its enactment in 1949, clearly and unequivocally does not contemplate the absence of a ticket. “The cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute.” *In re Manigo*, 398 S.C. 149, 157, 728 S.E.2d 32, 35–36 (2012). Absence of a ticket is admissible evidence. If it was not, our legislature would have contemplated the same in this statute. The simple addition of “or lack thereof” after “conviction” in § 56-5-6160 would indeed preclude evidence of absence of a ticket. However, it does not, and reading the plain language of the statute, that was not the legislature’s intent. As such, absence of a ticket is admissible evidence and therefore should have been allowed.

Assuming *in arguendo* that Appellant’s position on statutory interpretation is not correct, it is without question that the door was opened as to the issue of traffic tickets issued at the collision by the Respondent’s own admission while testifying on the stand. A litigant cannot complain of prejudice by reason of an issue he has placed before the court. *State v. Brown,* 344 S.C. 70, 543 S.E.2d 552 (2001). A party will be unsuccessful in opposing the admission of evidence if that party was the one who opened the door. *State v. Robinson,* 305 S.C. 469, 409 S.E.2d 404 (1991). The Court erred in not allowing this evidence in and in the handling of the curative instruction since the Respondent was the one who opened the door to such an admission in the first place. The Respondent’s admission should have been allowed and the Trial Court erred when they deemed it inadmissible because the Respondent put his credibility and issue before the Court when he took the stand and opened the door to such admissions.

CONCLUSION

Wherefore, based on the aforementioned the Trial Court's decision should be reversed because: (1) the Trial Court erred in denying the Appellant's JNOV because the verdict of no negligence as to the Respondent is contrary to the evidence presented against the Respondent; (2) the Trial Court erred in denying the Appellant's Motion for a New Trial Absolute the Court forced the Appellant to testify despite his incompetence, the Court failed to charge the jury regarding expert testimony, and the curative instructions misled the jury. Therefore, the Respondent respectfully requests that this Court reverse the Trial Court's ruling.

Respectfully submitted,

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March 7, 2022
Conway, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Case No.: 2018-CP-42-00063

Appellate Case No. 2021-001304

Betty McDade as Guardian *Ad Litem* for Matthew McDade — Appellant,

v.

Roger Caldwell — Respondent.

PROOF OF SERVICE

I certify that the Appellant's Initial Brief to be Included in the Record on Appeal was served on Respondent by Electronic Mail and U.S. Mail on March 7, 2022, addressed to Respondent's attorney of record, Michael T. Coulter, P.O. Box 6728, Greenville, South Carolina, 29606.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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March 7, 2022