In The

Supreme Court of Virginia

RECORD NO. 141096

GLEN COSBY,

Appellant,

v.

SUSAN CLEM,

Appellee.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 1

NATURE OF THE CASE AND
MATERIAL PROCEEDINGS BELOW 1

STATEMENT OF FACTS 5

ARGUMENT 8

I. In Trial No. 1, the trial court erred in setting aside the verdict and granting *additur* 8

A. Standard of Review 8

B. There was credible evidence to support the jury's verdict 9

C. The trial court improperly relied upon the jury's question regarding insurance as a basis to set aside the verdict 13

II. In Trial No. 2, the trial court erred in setting aside the verdict and awarding *additur* 14

A. There was credible evidence to support the jury's verdict 14

B. The trial court improperly set aside the jury's verdict based on closing argument by Cosby's counsel 17

III. In Trial No. 2, the trial court erred in ordering a new trial when the defendant elected to accept *additur* under protest and appeal pursuant to Virginia Code section 8.01-383.1(B) 20

IV. In Trial No. 3, the trial court erred in granting partial summary judgment to Clem on her medical bills 22

V. The trial court erred in permitting Michael Decker, MD, a physical medicine and rehabilitation doctor, to testify regarding the technical and mechanical cause of the malfunction of the spinal cord stimulator 24

A. Standard of Review 24

B. Michael Decker, M.D. was not qualified to offer an opinion concerning the technical and mechanical aspects of the spinal cord stimulator 24

C. Dr. Decker's causation opinion was based on pure assumption and speculation and was there fore inadmissible..... 26

CONCLUSION 27

CERTIFICATE PURSUANT TO RULE 5:26(h) 29

TABLE OF AUTHORITIES

Page(s)

CASES

Allied Concrete Co. v. Lester,
285 Va. 295 (2013) 17

Artis v. Com.,
213 Va. 220 (1972) 17

Bloodworth v. Ellis,
221 Va. 18 (1980) 23

Bowers v. Sprouse,
254 Va. 428 (1997) 15

Brown v. Corbin,
244 Va. 528 (1992) 24

Brown v. Huddleston,
213 Va. 146 (1972) 12

Carson by Meredith v. LeBlanc,
245 Va. 135 (1993) 23

Cassady v. Martin,
220 Va. 1093 (1980) 26

CNH America LLC v. Smith,
281 Va. 60 (2011) 24

Combs v. Norfolk & W. Ry.,
256 Va. 490 (1998) 25

Conyers v. Martial Arts World of Richmond, Inc.,
273 Va. 96 (2007) 20

Doe v. West,
222 Va. 440 (1981) 12

Five Lakes, Inc. v. Randall, Inc.,
214 Va. 4 (1973) 23

Gilbert v. Summers,
240 Va. 155 (1990) 26

Graham v. Cook,
278 Va. 233 (Va. 2009) 17

Hoar v. Great E. Resort Mgmt., Inc.,
256 Va. 374 (1998) 8

Hundley v. Osborne,
256 Va. 173 (1998) 9

John Doe v. Brown,
203 Va. 508 (1962) 22

Keesee v. Donigan,
259 Va. 157 (2000) 24, 26

Kennemore v. Com.,
50 Va. App. 703 (2007) 13

King v. Sowers,
252 Va. 71 (1996) 24

May v. Leach,
257 Va. 61 (1979) 12

Meade v. Belcher,
212 Va. 796 (1972) 18

Nationwide Mut. Ins. Co. v. Hylton,
260 Va. 56 (2000) 22

Oberbroeckling v. Lyle,
234 Va. 373 (1987) 8

Richardson v. Braxton-Bailey,
257 Va. 61 (1999) 12

Rodgers v. Danko,
204 Va. 140 (1963) 22

Russo v. Com.,
207 Va. 251 (1966) 20

Rutherford v. Zearfoss,
221 Va. 685 (1980) 9

Shalimar Dev., Inc. v. Fed. Deposit Ins. Corp.,
257 Va. 565 (Va. 1999) 8, 9

Shifflett v. Com.,
212 Va. 741 (1972) 20

Slone v. GMC,
249 Va. 520 (1995) 22

St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.,
283 Va. 403 (2012) 22

State Farm Mut. Auto Ins. Co. v. Beng,
249 Va. 165 (1995) 21

State Farm Mut. Auto. Ins. Co. v. Cuffee,
248 Va. 11 (1994) 21

Supinger v. Stakes,
255 Va. 198 (1998) 9

Tarmac Mid–Atlantic, Inc. v. Smiley Block Co.,
250 Va. 161 (1995) 24

Tittsworth v. Robinson,
252 Va. 151 (1996) 26

Transportation Ins. Co. v. Womack,
284 Va. 563 (2012) 21

Virginia-Lincoln Furniture Corp. v. S. Factories & Stores Corp.,
162 Va. 767 (1934) 17, 18

Walker v. Mason,
257 Va. 65 (1999) 12, 15, 16

Weeks v. Com.,
55 Va. App. 157 (2009) 14

STATUTES

Va. Code § 8.01-383.1(B) ..... *passim*

Va. Code § 8.01-680 8

Va. Code § 38.2-2206(F) 21

Va. Code § 38.2-2206(L) 22

RULE

Va. Sup. Ct. R. 3:18 22

OTHER AUTHORITY

8 Wigmore, *Evidence* § 2348 (1961) 13

ASSIGNMENTS OF ERROR

I. In Trial No. 1, the trial court erred in setting aside the verdict and awarding *additur*. [8/20/12 Hearing Tr.; 9/17/12 Order; App. 237 - 239].

II. In Trial No. 2, the trial court erred in setting aside the verdict and awarding *additur*. [6/18/13 Hearing Tr.; 9/3/13 Orders; App. 387 - 391].

III. In Trial No. 2, the trial court erred in ordering a new trial when the defendant elected to accept *additur* under protest and appeal pursuant to Virginia Code section 8.01-383.1(B). [6/18/13 Hearing Tr.; 9/3/13 Orders; App. 387 - 391].

IV. In Trial No. 3, the trial court erred in granting partial summary judgment to Clem on her medical bills. [App. 487 - 501].

V. The trial court erred in permitting Michael Decker, MD, a physical medicine and rehabilitation doctor, to testify regarding the technical and mechanical cause of the malfunction of the spinal cord stimulator. [1/17/12 Hearing Tr. 55 - 56; 11/21/11 Order; App. 81 - 83, 382 - 383, 387 -389, 392 - 393, 197 - 201].

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This personal injury action was tried before a jury three times. On or about December 2, 2010, Plaintiff Susan Clem ("Clem") filed a lawsuit in the Circuit Court for Spotsylvania County against Defendant Glen Cosby ("Cosby"), alleging that she sustained injuries as a result of a motor vehicle accident that occurred on January 11, 2009. Cosby admitted liability, but he disputed that Clem's alleged injuries were caused by the accident.

Specifically, Cosby disputed Clem's claim that that her previously inserted spinal cord stimulator malfunctioned as a result of the accident.

Prior to the first trial ("Trial No. 1"), the parties took the *de bene esse* deposition of Clem's expert, Michael Decker, MD, a physical medicine and rehabilitation doctor. [App. 33 - 79]. Cosby filed a motion to exclude the testimony of Dr. Decker on the grounds that (1) he was not qualified to testify to the cause of the malfunction of Clem's spinal cord stimulator; and (2) his opinions were based on an inadequate foundation and therefore inadmissible. The trial court denied the motion and the parties proceeded to trial on June 5, 2012.

During deliberations in Trial No. 1, the jury submitted the following question to the trial court: "How much of these expenses were actually paid out of pocket by the plaintiff?" [App. 135]. Counsel deferred to the trial court as to how it ought to respond. [App. 220]. The trial court informed the jury that it could not answer the question and instructed the jury that its verdict must be based upon the evidence presented. [App. 220]. The jury continued deliberating and returned a verdict for Clem in the amount of $9,000.00 with no pre-judgment interest. [App. 222].

Clem moved to set aside the jury verdict and for *additur*. On September 17, 2012, the trial court granted Clem's motion and increased

the verdict in the amount of $188,513.08, for a total of $197,513.08, nearly 22 times the amount of the original verdict awarded by the jury. Cosby declined to accept the *additur* and, pursuant to Virginia Code section 8.01-383.1(B), the trial court ordered a new trial. [App. 237 - 239]

This matter was tried before a jury for the second time on February 19, 2013 ("Trial No. 2"). During closing, Cosby's counsel highlighted Clem's testimony that she turned down the stimulator at night because it would "shock" her. Clem's counsel objected, arguing that it was a mischaracterization of Clem's testimony. [App. 351 - 352]. The trial court did not rule on the objection, but stated, in the presence of the jury, that it was "a mischaracterization of the evidence" and it was "taken out of context." [App. 351 - 352].

Further in closing, Cosby's counsel discussed how Clem saw her primary care physician monthly for treatment. Referring to certain visits after the accident, Cosby's counsel stated, ". . . and if you recall, I was not allowed to ask questions about that." [App. 356]. Clem did not object to this comment. After the jury retired to deliberate, however, the trial court found Cosby's counsel in contempt for commenting on the trial court's ruling during closing argument. [App. 363 - 367]. The trial court also stated that Cosby's counsel mischaracterized Clem's testimony as to whether the

stimulator "shocked" her before this accident. [App. 365 - 366]. Clem did not move for a mistrial and the trial court did not order a mistrial *sua sponte*. Instead, the trial court stated, "Your mischaracterization, *had it continued*, could have resulted in another mistrial." [App. 366].

The jury returned a verdict in favor of Clem in the amount of $1,766.25 with no prejudgment interest. [App. 367 - 368]. Clem again moved to set aside the jury verdict. [App. 369 - 380]. On September 3, 2014, the trial court granted Clem's motion and again increased the verdict in the amount of $188,513.08. [App. 387 - 391]. Pursuant to Virginia Code section 8.01-383.1(B), Cosby elected to accept *additur* under protest, but Progressive Gulf Insurance Company, one of the two underinsured motor carriers, elected for a new trial. The trial court ordered a new trial. [App. 390 - 391].

On March 25, 2014, this matter was tried before a jury for the third time ("Trial No. 3"). After the close of the evidence, Clem made a Motion for a Directed Verdict[1] as to her medical bills, which she asserted were uncontroverted. [App. 487 - 492]. Over Cosby's objection, the trial court granted the motion and ordered that Clem was entitled to recover $176,814.98 in medical bills. [App. 499 - 501]. The trial court instructed the

[1] Counsel later verbally amended the motion to clarify that it was a Motion for Partial Summary Judgment.

jury to determine the amount of non-monetary damages to which Clem was entitled. After deliberation, the jury awarded Clem $6,000.00 for non-monetary damages with no interest. [App. 502].

Cosby moved to set aside the verdict. [App. 504 - 505]. The trial court denied the motion and by Final Order dated April 17, 2014, entered the judgment for Clem in the amount of $182,814.98. [App. 507 - 510].

Cosby timely filed his Notice of Appeal on May 16, 2014. [App. 511 - 512].

STATEMENT OF FACTS

There is no dispute that Clem had a long prior history of back pain. In 1999, many years before the subject accident, Clem broke her back during a work-related incident, requiring multiple surgeries. [App. 144, 164, 279, 292, 417]. In 2003, she had a spinal cord stimulator inserted into her back to manage her pain. [App. 147, 149, 154, 293, 417 - 418]. A spinal cord stimulator is a device inserted in the spinal canal that uses electrical stimuli to interfere with pain impulses sent to the brain. [App. 46].

Clem has been disabled and unable to work since the 1999 injury. [App. 103]. Even with the stimulator, Clem continued to have back pain over the years, reporting at times that the pain was “unbearable” or “excruciating.” [App. 108 - 109, 321 - 322, 451 - 452, 456]. She

complained to her doctors that the stimulator did not work as well as she hoped. [App. 158, 166 - 167, 183 - 184, 295 - 296]. Clem was involved in a motorcycle crash in 2006 and she fell down a flight of stairs in 2008, although she denied sustaining any back injuries from those incidents. [App. 184 - 187, 324, 328, 415, 419 - 420]. Clem sought treatment monthly from Dr. Alex Rizk, her primary care doctor, to check her stimulator and manage the medication prescribed for her chronic back pain. [App. 186, 294]. Prior to the subject accident, Clem was "in pain most of the time," but she could function through it. [App. 150 - 151].

On January 11, 2009, Cosby's vehicle rear-ended the vehicle in which Clem was a front seat passenger. The parties disputed the force of the impact and the extent of the property damage from the accident. Cosby testified that the impact was minimal, like getting bumped in a parking lot. [App. 204, 210, 348; 474]. Cosby also argued that the photographs taken after the accident showed little visible property damage. [App. 206 - 207, 288, 348 - 349, 475 - 476]; [Trial I Defendant's Exhibit Nos. 1, 2A and 2B; Trial II Defendant's Exhibit Nos. 1 and 2; Trial III Defendant's Exhibit No. 1].

Clem alleged that her spinal cord stimulator stopped working immediately after the accident.[2] [App. 171, 188, 282 - 283, 298 - 299]. Three months later, Clem was referred to Michael Decker, M.D., a physical rehabilitation and pain management doctor. Dr. Decker testified by deposition that he was unable to make the stimulator work and recommended Clem undergo surgery to have the device replaced. [Decker Dep. Tr. 17 - 18]. The bulk of Clem's medical bills, totaling $188,513.08,[3] were related to the replacement of the spinal cord stimulator. [App. 177, 315 - 316, 440 - 445].

Dr. Decker opined that the subject accident caused the stimulator to malfunction, but he could not say "what was broken or what didn't work." [App. 69 - 70]. Dr. Decker conceded that he had no idea of Clem's usage of the spinal cord stimulator prior to the accident, but agreed that the usage can impact how long battery life lasts. [App. 74]. He further admitted that he did not know how much battery power Clem's unit had when he treated her after the accident. [App. 74]. He testified that the accident caused a

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[2] In Trial No. 2, Cosby read portions of Clem's discovery deposition into evidence. In her deposition, Clem testified that she did not know her spinal stimulator was broken until the day *after* the accident. [Trial Tr. II 153]. In Trial No. 3, Mr. Clem testified that his wife noticed the stimulator was not working the following day. [App. 410].

[3] In Trial No. 3, Clem's claimed medical bills were reduced to $176,814.98. [Trial Tr. III 148].

broken wire or a wire to become loose, because he admitted did not see any broken or loose wires either on the x-ray or after he surgically removed the device. [App. 70 - 71]. Dr. Decker did not have the device tested to determine the cause of the malfunction; instead he threw away the stimulator after the surgery. [App. 72].

ARGUMENT

I. In Trial No. 1, the trial court erred in setting aside the verdict and granting *additur*

A. Standard of Review

Pursuant to Virginia Code section 8.01-680, the trial court may set aside a verdict only if it is "plainly wrong or without evidence to support it." In reviewing the trial court's decision to set aside the verdict, this Court will reinstate the verdict if there is *any* credible evidence to support it. *Hoar v. Great E. Resort Mgmt., Inc*., 256 Va. 374, 378 (1998); *Oberbroeckling v. Lyle*, 234 Va. 373, 378 (1987).

The Court must give the prevailing party the benefit of all substantial conflicts in the evidence and all reasonable inferences that may be drawn from the evidence. *Shalimar Dev., Inc. v. Fed. Deposit Ins. Corp.*, 257 Va. 565, 570 (Va. 1999). Thus, if the evidence is conflicting on a material point, if reasonable persons may draw different conclusions from the evidence, or if a conclusion is dependent on the weight the fact finder gives to the

testimony, a judge is not permitted to substitute his or her conclusion for that of the jury merely because he or she would have reached a different result. *Id.* at 570.

Likewise, this Court has stated that to award *additur*, the jury verdict must be inadequate as a matter of law. *Supinger v. Stakes*, 255 Va. 198, 203 (1998). Such a conclusion must stem from the trial court's finding that passion, corruption, or prejudice influenced the jury, or it based its decision on a misconception or misunderstanding of the facts or the law. *Id.* (quoting *Rutherford v. Zearfoss*, 221 Va. 685, 689 (1980)).

B. There was credible evidence to support the jury's verdict

The trial court set aside the verdict and awarded *additur*, finding that Clem's medical bills were uncontroverted. However, damages can be controverted despite the defense putting on no conflicting direct evidence. The test is whether "reasonably fairminded [persons] may differ." *Hundley v. Osborne*, 256 Va. 173, 178 (1998). In *Hundley*, the plaintiff's doctors offered the only testimony on the issue of future medical expenses. Still, this Court declared the evidence controverted because the jury could have reasonably concluded the plaintiff would incur fewer future damages than claimed. *Id.*

Similarly, in this matter, although Cosby offered no direct evidence that the accident did not damage the spinal cord stimulator, there was sufficient evidence for the jury to disregard the testimony of Clem and her witnesses concerning the proximate cause of the stimulator malfunction. First, the jury may have been persuaded by the evidence that this was a minor impact accident with little visible property damage.

Second, Clem and her husband testified concerning Clem's long history of back pain, which continued even after the stimulator was installed. For years, Clem complained about back pain, which was "unbearable" or "excruciating" at times. She saw her primary care doctor monthly to check the stimulator and manage the medication for her chronic pain. She also admitted that she complained to her doctors that the stimulator was not working as well as she hoped. Furthermore, she was in another automobile accident in the fall of 2006 and fell down the stairs in 2008. The jury could reasonable conclude that Clem's chronic back pain over the years was evidence that the stimulator was not functioning properly even before this accident.

Finally, the jury also had good reason to disregard Dr. Decker's opinion that the accident caused the spinal cord stimulator to malfunction. Dr. Decker testified that he did not examine any records from before the

accident about Clem's lower back. Nor did he speak with any doctors about the status of the stimulator before the accident. He relied solely on Clem's statements and failed to even review the ER records from the accident. He was not aware of Clem's motorcycle accident or her fall down the stairs prior to the subject accident. He admitted that he did not see any broken or loose wires either on the x-ray or after he surgically removed the device. Dr. Decker never tested the stimulator to determine the cause of the malfunction. Furthermore, Dr. Decker did not know how much battery power the device had when he first examined Clem. He agreed that "anything can happen" when the battery is dying. [App. 74 - 75].

Based on this cross-examination, the jury's rejection of his opinion was grounded in reason. From Dr. Decker's testimony, the jury could have reasonably believed that a dying battery was the cause of the malfunction. Reasonable people could certainly differ in accepting Dr. Decker's opinion, and therefore the evidence was not "uncontroverted."

During argument on Clem's post-trial motion, the trial court suggested there must be "some mathematical relationship" between the verdict and the evidence. [8/20/2012 Hearing Tr. 14 - 15, 27]. As this Court has held, however, "[t]he quality of the evidence is dispositive, not a comparison between the amount of the verdict and the special damages claimed."

Richardson v. Braxton-Bailey, 257 Va. 61 (1999) (citing *Doe v. West*, 222 Va. 440, 446 (1981). Thus, a jury is permitted to conclude that not all of the damages claimed by the plaintiff were incurred as a result of the accident. *Id.* at 64 (1999); *May v. Leach*, 257 Va. 61, 260 S.E.2d 456 (1979) (upholding an award of thirty cents greater than proven specials because the jury could believe that not all of the specials resulted from the accident); *Brown v. Huddleston*, 213 Va. 146, 191 S.E.2d 234 (1972) (affirming trial court's refusal to set aside verdict of less than specials because the jury was "justified in believing that only a portion of the special damages was reasonably related to the accident").

"While one may speculate as to the components of the damage amount awarded on this conflicting evidence, such speculation is not sufficient to warrant the conclusion, as a matter of law, that the jury did not consider all the elements of damage in reaching the amount of its verdict." *Walker v. Mason*, 257 Va. 65, 71 (1999).

Credible evidence exists to support the jury's verdict and it was reasonable for the jury to conclude that Clem failed to prove by the preponderance of the evidence that this accident broke the stimulator. If the jury was not persuaded that the stimulator malfunction was caused by the accident, the only related medical bills were for Clem's transportation to

the ER and her ER visit, which were only a few thousand dollars. [8/20/2012 Hearing Tr. 15]. Thus, the verdict was not based upon an unreasonable interpretation of the evidence and, therefore, it was error to set it aside.

C. The trial court improperly relied upon the jury's question regarding insurance as a basis to set aside the verdict

The trial court set aside the first verdict, stating that the low verdict, coupled with the insurance question, suggested that the jury must not have understood the instructions. However, the trial court did not identify what instructions, if any, would have confused the jury. Moreover, none of the instructions offered by Clem were rejected, and there were no substantive instructions given to the jury over Clem's objection.

Deliberations of jurors "during retirement, their expressions, arguments, motives, and beliefs, represent that state of mind must precede every legal act and is in itself no jural consequence." *Kennemore v. Com*., 50 Va. App. 703, 709 (Va. Ct. App. 2007) (citing 8 Wigmore, *Evidence* § 2348, at 680 (1961). It is impossible to know whether a question represents the jury's views or whether the question posed to the court during deliberations "suggest[s] little as the tentative views of a single juror." *Id*. In fact, the "unanimity of a verdict rarely, if ever, be undermined by speculative comments or questions from the jury prior to the verdict."

Weeks v. Com., 55 Va. App. 157, 162 (Va. Ct. App. 2009). Furthermore, juries speak only through their unanimous verdict, which must be taken "as the sole embodiment of the jury's act."

II. In Trial No. 2, the trial court erred in setting aside the verdict and awarding *additur*

A. There was credible evidence to support the jury's verdict

Cosby incorporates his arguments from Section I above, which apply to Trial No. 2, as the testimony and other evidence presented at the second trial were similar to the first. Additional testimony from Clem in the second trial gave the jury further reason to question whether the stimulator malfunctioned as a result of the accident. For example, Clem testified that the spinal cord stimulator always worked prior to the accident. [App. 294]. However, she also testified that it was not working as well as she hoped and it failed to resolve all her problems. [App. 295 - 296]. On cross-examination, she testified about the nature of her pain before the accident, including her frustration with the sometimes unbearable pain, admitting that the stimulator never completely took away her pain. [App. 294, 323].

The jury in the second trial also had further reason to question Clem's credibility. Clem claimed to have told the hospital on the day of the accident that her spinal cord stimulator was not working. [App. 299]. However, Cosby's counsel read portions of Clem's discovery deposition

into evidence that contradicted this testimony. In her deposition, Clem testified that she did not know her spinal stimulator was broken until the day *after* the accident. [Trial Tr. II 153].

Moreover, in the second trial, Cosby testified that Clem said she was okay after the accident. [App. 349]. Notably, Clem's counsel did not cross-examine Cosby. Clem's inconsistent testimony and her admission to Cosby at the accident scene provide additional bases for the jury to conclude that her claimed damages relating to the stimulator were unrelated to the accident.

The fact that the jury awarded the exact amount of the ER bill is of no import. In *Walker v. Mason*, 257 Va. 65, 67 - 69 (1999), the plaintiff moved to have the jury's verdict set aside as inadequate as a matter of law, because the jury award the plaintiff the exact emergency bill. *Id.* at 68. This Court ruled that when an award "deviates from the amount of all the special damages, *even if the amount of the verdict corresponds to an identifiable portion of the special damages*" such award does not invoke the rule espoused in *Bowers*. *Id.* (emphasis added) (*citing Bowers v. Sprouse*, 254 Va. 428 (Va. 1997)).

The Court in *Walker* concluded that even though the defendant did not call an opposing expert, Walker's injuries were still controverted. *Id.* at

69. Accordingly, the Court could not rule that the verdict was based on an unreasonable interpretation of the evidence or failure to follow the law; thus, it reversed the lower court's decision setting aside the jury's verdict. *Id.*

Next the Court examined another appeal where the trial court set aside a jury's verdict as inadequate, because the jury awarded the plaintiff their claimed loss wages and nothing more. *Id.* at 69-70. Again, the Court believed there were multiple interpretations of the evidence regarding the seriousness of the injuries and claimed damages. *Id.* at 70. The defendant testified that the impact was a minor bump, where the plaintiff described it as a hard impact. *Id.* Also, plaintiff's doctor testified there were no objective symptoms. *Id.* Accordingly, the Court held the jury could have believed that this was a minor accident and the plaintiff was not injured to the extent she claimed. *Id.* at 70-71. The Court stated, while "one may speculate as to the components of the damage amount award" based on this evidence, "such speculation is not sufficient to warrant the conclusion, as a matter of law, that the jury did not consider all the elements of damages. . ." and to rule such is error. *Id.* at 71.

Likewise, in this matter, the verdict must be reinstated because there was credible evidence to support it.

B. The trial court improperly set aside the jury's verdict based on closing argument by Cosby's counsel

The trial court set aside the verdict in the second trial on the grounds that the relatively low award was influenced by defense counsel's "mischaracterization" of evidence and her reference during closing to a ruling made by the trial court. [6/18/2013 Hearing Tr. 44 - 48]. Notably, the trial court noted that the comments were inadvertent and not made in bad faith. [6/18/2013 Hearing Tr. 44 - 48].

It is well established that counsel has "every right to argue and comment on the testimony, the inferences and conclusions to be drawn therefrom and any discrepancy therein." *Artis v. Com.*, 213 Va. 220, 227 (Va. 1972). Furthermore, the purpose of closing "is to draw the jury's attention to the body of evidence that has been admitted into the record and to argue reasonable inferences that may be drawn from that evidence." *Graham v. Cook*, 278 Va. 233, 250 (Va. 2009).

Not every improper comment by counsel in closing is grounds for setting aside a jury's verdict. *Virginia-Lincoln Furniture Corp. v. S. Factories & Stores Corp.*, 162 Va. 767 (1934); *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (2013) (plaintiff's counsel wept during opening and closing, telling the jury that the defendant killed the plaintiff's wife, and invoked God and religion). As this Court noted, the comment must inherently prejudice

the opposing party. *Id.* at 781. There are several factors to consider, including the relevance and content of the improper reference, whether the reference was deliberate or inadvertent, and the probable effect of the reference. *Id.* The combination of these factors is critical to a court's determination, because not every irrelevant statement or question will result in prejudice to the opposing party. *Id.*; *Meade v. Belcher*, 212 Va. 796, 799 (1972) (to justify setting aside a jury's verdict, the improper remark must be likely to inflame the passion or instill prejudice in the minds of the jury).

During closing argument in the instant matter, Cosby's counsel argued that Clem experienced problems with her stimulator before this accident, relying in part on Clem's testimony that the stimulator would "shock" her at night. Specifically, Clem testified, "Well, we got up that morning to go to church, and like I do every morning, as I go to bed at night, I put the machine down because, as I lay down, it shocks me a little more than normal. As I get up in the morning, I turn it up to where it's functionable, and then we went off to head to church in the car." [App. 168]. During closing, counsel stated: "the night before the accident, once she went to bed, she turned down the spinal cord stimulator because it would

shock her. And she was shocked by the spinal cord stimulator at night so she turned - -". [App. 351].

Although the trial court disagreed with counsel regarding what Clem meant by "shock," counsel did not mischaracterize Clem's statement. It was a fair recitation of the testimony, and counsel was free to draw the jury's attention to said evidence and argue reasonable inferences that were to be drawn from such statements. There is no reason to believe that counsel's recitation of Clem's testimony resulted in any prejudice, particularly in light of the trial court's strong admonition of counsel in the presence of jury. [App. 351 - 352].

The trial court also took issue with the following comment made by Cosby's counsel in closing: ". . . and if you recall, I was not allowed to ask questions about that." [App. 356]. Again, there is no evidence that this statement, which the trial court acknowledged was inadvertent, was inherently prejudicial. Clem did not object to the statement. Before the jury returned with its verdict, the trial court did not believe the statement warranted a mistrial. [App. 366].

Assuming counsel's allusion to the trial court's ruling was improper, Clem did not object to the comment and, therefore, she waived the right to rely on the comment as the basis for setting aside the verdict. [App. 356].

Shifflett v. Com., 212 Va. 741 (1972) ("Counsel cannot remain silent and wait until after the jury has returned its verdict to make objection.") (*citing Russo v. Com.*, 207 Va. 251, 148 S.E.2d 820 (1966)). Thus, it was not proper for the trial court to set aside the jury's verdict based on counsel's closing argument.

III. In Trial No. 2, the trial court erred in ordering a new trial when the defendant elected to accept *additur* under protest and appeal pursuant to Virginia Code section 8.01-383.1(B)

An issue of statutory interpretation is a pure question of law which this Court reviews *de novo*. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007).

Virginia Code section 8.01-383.1(B) (the "*additur* statute") provides that if the trial court finds as a matter of law that the damages awarded by the jury are inadequate, it may award a new trial or require the defendant to pay an amount higher than the verdict. The statute further states "if either the plaintiff or the *defendant* declines to accept such additional award, the trial court shall award a new trial. If *additur* pursuant to the subsection is accepted by either party under protest, it may be reviewed on appeal." (emphasis added).

After the jury in the second trial awarded Clem only $1,766.25 with no prejudgment interest, Clem moved to set aside the verdict. The trial court

granted the motion and awarded *additur*. Pursuant to Section 8.01-383.1(B), Cosby elected to accept *additur* under protest, but Progressive Gulf Insurance Company, one of the two underinsured motor carriers, elected for a new trial. Contrary to the *additur* statute, the trial court ordered a new trial over Cosby's objection.

This Court has held that while the uninsured motorist carrier's right to defend is not tied to the actions of the defendant, "each is entitled to control his or its own action *but not the actions of the other*." *State Farm Mut. Auto. Ins. Co. v. Cuffee*, 248 Va. 11, 14 (1994) (emphasis added); *see also State Farm Mut. Auto Ins. Co. v. Beng*, 249 Va. 165, 168 (1995); *Transportation Ins. Co. v. Womack*, 284 Va. 563 (2012). By ordering a new trial, however, the trial court allowed the uninsured motorist carrier to control the actions of Cosby.

In a matter of first impression, this appeal presents the question of whether an UIM carrier has the right to trump the defendant's election of remedies as set forth by the *additur* statute. It does not. The unambiguous language of the *additur* statute vests the decision solely with the plaintiff or the defendant. Although Virginia Code section 38.2-2206(F) permits an uninsured motorist carrier to file pleadings and take other action allowable by law, the uninsured motorist carrier is not a defendant in the action.

Nationwide Mut. Ins. Co. v. Hylton, 260 Va. 56, 61 (2000); *Rodgers v. Danko*, 204 Va. 140, 143 (1963); *John Doe v. Brown*, 203 Va. 508, 515 (1962).

To permit a uninsured motorist carrier to deny the defendant from exercising his statutory right to accept *additur* under protest and appeal is particularly problematic in cases where, as here, the uninsured motorist carrier has not waived subrogation against the defendant and the responsibility for defense costs has not been shifted to the insurer pursuant to Virginia Code section 38.2-2206(L). In contrast, allowing Cosby to elect the post-trial remedy after the trial court awarded *additur* would not interfere with Progressive's right to present its defenses. Progressive would have been entitled to participate fully in any appeal. Accordingly, the trial court erred by ordering a new trial over Cosby's objection.

IV. In Trial No. 3, the trial court erred in granting partial summary judgment to Clem on her medical bills

On appeal, the grant of a motion for summary judgment is reviewed de novo. *St. Joe Co. v. Norfolk Redevelopment & Hous. Auth.*, 283 Va. 403, 407, 722 S.E.2d 622, 625 (2012).

The decision to grant a motion for summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute. Sup. Ct. of Va. Rule 3:18; *Slone v. GMC*, 249 Va. 520 (1995);

Carson by Meredith v. LeBlanc, 245 Va. 135 (1993). In considering a motion for summary judgment, the Court must adopt those inferences from the facts that are most favorable to the nonmoving party. *Bloodworth v. Ellis*, 221 Va. 18, 23, 267 S.E.2d 96, 99 (1980). When there is conflicting evidence as to a material fact, it is for the jury, not the trial court, to resolve the conflict. *Five Lakes, Inc. v. Randall, Inc*., 214 Va. 4, 196 S.E.2d 906 (1973).

For the reasons set forth in the above Sections, the trial court erred in granting partial summary judgment to Clem. In addition to the conflicting testimony and issues of credibility discussed *supra*, in Trial No. 3, Clem was impeached with her deposition testimony where she testified that she only went to the hospital as a "precaution" because of her history of back problems. [App. 457 - 458]. Because there were material facts in dispute and, adopting all inferences from the facts most favorable to Cosby, a reasonable jury could conclude that any damages related to Clem's spinal stimulator malfunction were unrelated to the accident. Therefore, it was improper for the trial court to grant partial summary judgment to Clem.

V. The trial court erred in permitting Michael Decker, MD, a physical medicine and rehabilitation doctor, to testify regarding the technical and mechanical cause of the malfunction of the spinal cord stimulator.

A. Standard of Review

On appeal, this Court applies an abuse of discretion standard in reviewing the trial court's rulings concerning the admissibility of expert testimony. *Tarmac Mid–Atlantic, Inc. v. Smiley Block Co*., 250 Va. 161, 166 (1995) (quoting *Brown v. Corbin*, 244 Va. 528, 531 (1992)); *Keesee v. Donigan*, 259 Va. 157, 161 (2000).

B. Michael Decker, M.D. was not qualified to offer an opinion concerning the technical and mechanical aspects of the spinal cord stimulator

Under Virginia law, an expert's qualifications must correlate to the opinions for which the expert is being offered. *King v. Sowers*, 252 Va. 71 (1996). More importantly, this Court has repeatedly held that the fact that a person is a qualified expert in one field does not make him an expert in another field, even if they are closely related. *See CNH America LLC v. Smith*, 281 Va. 60 (2011).

In this case, the trial court improperly ruled that Michael Decker, M.D., an expert in the field of physical medicine and rehabilitation, could also testify as an expert concerning the mechanical and technical functions of Clem's spinal cord stimulator. [1/17/2012 Hearing Tr. 55 - 56]. This was

reversible error as Clem failed to show, as this Court requires, that "the proffered expert witness [Dr. Decker] ha[d] sufficient knowledge, skill, or experience to render him competent to testify as an expert on the subject matter of the inquiry." *Combs v. Norfolk & W. Ry.*, 256 Va. 490, 496 (1998).

The fundamental issue in this matter is whether the technical malfunction of Clem's spinal cord stimulator, resulting in the subsequent need for its replacement, was caused by the subject accident. While Dr. Decker's knowledge and experience in the *medical* aspects of the use and implantation of spinal cord stimulators is arguably "closely related" to the stimulator's mechanical and technical issues, that does not make him qualified to testify as an expert on those issues.

Dr. Decker admitted that the cause of the malfunction is not a *medical* issue or injury, but an issue involving damage to the "mechanical, electrical device." Dr. Decker is not an engineer, and by his own admission, he has *no knowledge* of the electronic devices that are installed in a spinal cord stimulator, including the wiring mechanisms, which he believes malfunctioned in this case as a result of the accident. Therefore, not only did he have insufficient "knowledge, skill, or experience to render him competent to testify as an expert on the subject matter of the inquiry," but he had no knowledge whatsoever of the exact "subject matter" he alleges

caused the malfunction: the electrical intricacies of the spinal cord stimulator and the wiring. Dr. Decker is a medical doctor and his testimony should have been limited to his knowledge in that field.

C. Dr. Decker's causation opinion was based on pure assumption and speculation and was there fore inadmissible

Expert testimony is inadmissible if it is speculative or founded on assumptions that have no basis in fact. *Tittsworth v. Robinson*, 252 Va. 151, 154 (1996); *Keesee v. Donigan*, 259 Va. 157, 524 S.E.2d 645 (2000); *Gilbert v. Summers*, 240 Va. 155, 159 - 60 (1990); *Cassady v. Martin*, 220 Va. 1093, 1100 (1980).

Even if the trial court determined that Dr. Decker was qualified to give the opinion that the malfunction of Clem's spinal cord stimulator was caused by the accident, that opinion was still inadmissible as a matter of law because it is based on pure assumptions. From the outset, Dr. Decker does not deny that in making his determination that the spinal cord stimulator malfunctioned as a result of the accident, he "solely relied" on Clem's account that the spinal cord stimulator worked before the accident and then stopped working after the accident. Dr. Decker did not review Clem's medical records prior to the accident; he did not review Clem's medical records from after the accident; and he did not speak with any of

her other physicians regarding the status of the spinal cord stimulator before the accident. Without considering any of this pertinent information, it is impossible for Dr. Decker to have opined with reasonable certainty, based entirely on Clem's account *three months after the accident*, that the spinal cord stimulator was not working as a result of the accident.

Dr. Decker had no other factual basis for his opinion that the malfunction was due to a broken wire. He did not test the wires to determine if his assumption was correct. He even admitted that he did not see any broken or loose wires on the x-ray or during his surgical removal of the unit. Dr. Decker admitted that the battery could have been low which interfered with the device's functioning. Without knowing Clem's usage of the stimulator prior to the accident, Dr. Decker cannot say whether the malfunction was due to a low battery or the accident. His opinions were speculative and permitting Dr. Decker to testify constitutes reversible error.

CONCLUSION

For all the reasons stated herein, Appellant Glen Cosby, by counsel, respectfully requests this Court reverse the judgment below and reinstate the first jury verdict in the amount of $9,000.00. In the alternative, this Court should reinstate the second jury verdict in the amount of $1,766.25. Should this Court find that these verdicts cannot be reinstated, Cosby

requests that the judgment be reversed and the case be remanded for a new trial.

Respectfully Submitted,

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CERTIFICATE PURSUANT TO RULE 5:26(h)

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On January 12, 2015, fifteen copies of this Brief of Appellant and ten copies of the Joint Appendix with, ten copies on CDs, were hand-filed with the Clerk of this Court. Three copies of the Brief and one copy of the Joint Appendix, with one copy on CD, was served, via U.S. Mail, postage prepaid, upon counsel for the Appellee.

Danielle D. Giroux, Esq.