THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2018-CP-32-02102

Court of Appeals Case No. 2020-000638

Gerald Nelson, Appellant,

vs.

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

PETITION FOR REHEARING

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Pursuant to Rules 221 and 240, SCACR, Gerald Nelson (the Petitioner) petitions the Court for rehearing regarding *Nelson v. Harris*, Op. No. 6025 (S.C. Ct. App. filed Sept. 6, 2023) (Howard Adv. Sh. No. 35 at 62). The Petitioner respectfully urges that the Court has overlooked or misapprehended the following points:

I. The jury told the Court that a deciding factor in reaching its monetary verdict in a civil case could not be reached until it was told "what insurance has paid for/ from both parties." The Court's general response to the jury's very specific questions failed to instruct the jury that the topics of health insurance coverage and liability insurance payments are unequivocally forbidden when reaching a verdict in a civil case.

The jury's questions about insurance should have signaled to the Court that the jury did not understand that insurance was an improper consideration during deliberations and that specific guidance from the Court became necessary. "[W]hen general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Fairchild v. SC Dept. of Transp.*¸398 S.C. 90, 104. 727 S.E.2d 407, 414 (2012); *Brown v. Smalls*¸325 S.C. 547, 555, 481 S.C. 444, 448-449 (Ct. App. 1997), citing *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

The Court's decision references only liability insurance but the question the jury presented in the midst of deliberations was aimed at discovering what the Plaintiff owed after health insurance paid and what money he had already received from liability insurance, if any. The Petitioner's proposed instruction, while lengthy as the Court points out, comes from a charge book, and would have instructed the jury not to consider insurance of any kind.

A jury asking what insurance has paid is seeking to reduce the Plaintiff's verdict by considering liability insurance and collateral sources. In this case, the trial court was presented with an opportunity to help the jury understand that its questions concerned off limits topics, yet the trial court gave no indication to the jury that its discussions concerning insurance payments must stop, and instead told the jury to continue its deliberations considering the evidence it heard. This instruction was confusing because while the jury heard a mention of insurance, it heard no evidence regarding insurance payments received in accordance with the collateral source rule, and heard no evidence of health or disability insurance, either. Instead, the jury was left to its own devices and reduced the verdict to prevent a perceived windfall to the Plaintiff.

Petitioner urges that when the jury told the Court it was discussing insurance it became the obligation of the Court to steer the jury clearly away from such further discussions to prevent an unjust result. *Burns v. South Carolina Comm'n for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994) ("If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial."). The Court's decision also overlooks that in *Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995), the jury asked in the midst of deliberations what Plaintiff owed on his medical expenses after insurance, this Court "assume[d] the court correctly advised the jury it should not consider insurance in its deliberations." *Sullivan*, at 466, 910. *Sullivan* also cited to *Norris v. Ferre*, 315 S.C. 179, 182 432 S.E.2d 491, 493 (Ct. App. 1993), cert. denied, (Mar. 4, 1994), for the proposition that "the Supreme Court has been meticulous in keeping the issue of insurance coverage away from the jury." In the past this Court has presumed precise instruction to not consider insurance in deliberations in direct contrast to the vague response provided in the instant case.

The adoption of Rule 411, SCRE, in 1995 changed this view. *Yoho v. Thompson*, 345 S.C. 361, 365, 548 S.E.2d 584, 585 (2001) (noting that the adoption of Rule 411, SCRE, modified the rule expressed in *Dunn v. Coca-Cola*, by providing that the admissibility of evidence of insurance depends upon the purpose for which such evidence is introduced). Thus, when offered for a purpose other than to establish a person acted negligently or otherwise wrongfully, evidence of insurance maybe admissible. *Id.* Here, in response to whether "anyone off the street can operate a tow truck without training," the defendant gratuitously testified "there's not an insurance company [anywhere] that would touch them. You cannot insure them." The jury sent a note telling the court that it "needed to know what insurance has paid for/from *both* parties." (emphasis added). Under these circumstances a more specific jury instruction was required, not to establish liability for negligence or other wrongful conduct, but to ensure that the jury did not do what it did here – reduce the verdict on speculation that the plaintiff would otherwise recover a windfall.

The Court overlooked or misapprehended that the court's general charge as well as the answer the court provided in response to the jury's question did not adequately address the substance of the Plaintiff's request that the court tell the jury, expressly, not to consider insurance "paid for/from both parties." The Court focused on the lack of any reference to an insurance payment, but that view ignores the very question the jury asked, demonstrating its belief that there *was* insurance and that it had paid something.

The Court should grant this petition, reconsider its decision, and issue a new opinion finding the trial court's refusal to give the requested instruction was an abuse of discretion as being controlled by an error of law.

II. The jury's consideration of insurance is inherently prejudicial, and the jury told us they needed to know what insurance paid "for/from both parties" to reach their verdict.

In *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993) the defense opposed voir dire asking the jurors if they believe that they should limit money damages to reduce insurance rates. No specific objection to the inquiry was spelled out and *Dunn* tells us it need not be – the Supreme Court adopted Acting Judge Littlejohn's dissent in this Court, which recognized that the inquiry into insurance was "inherently prejudicial." *Dunn,* 311 S.C. at 44. Petitioner respectfully urges that the Court misapprehends or has overlooked a central holding in *Dunn,* which is that prejudice is presumed when insurance is raised, since "no prejudice can be shown unless counsel is permitted to examine members of the jury – which is forbidden." *Id.* at 46.

The Defendants remarked that the mention of insurance is "purely prejudicial." R. 60. Here, the jury raised the issue of insurance to the Court saying that it needed to know about insurance payments in order to reach a verdict. The question by itself demonstrates that deliberations were focused in on the inherently prejudicial matter of insurance, therefore the prejudice is presumed and the Court erred when it failed to charge the jury that the law of this State forbids the discounting of a civil verdict based upon liability insurance payments and collateral sources.

III. The scant time between the jury's question and the verdict signals that the court's general instruction failed to provide guidance to the jury, warranting a new trial.

The court charged the jury with the law and sent the jury to deliberate at approximately 12:37 p.m. Tr. p.295, ln 16-17 (R. 140). The jury sent the question regarding insurance payments to the Court at approximately 1:30 p.m. Tr. p. 295, ln 18-21 (R. 140), Court's Ex. 7 (R. 166). After

that time, the lawyers were brought back to Court, the question was discussed, the parties got on the record and counsel renewed her request for the Court to charge the jury, and the trial court wrote on the note and returned it to the bailiff who walked it back to the jury. While the transcript fails to state the specific time the note was sent back to the jury, the jurors entered the courtroom with the verdict at 2:03 p.m. Tr. p. 297, ln 1-2 (R. 142). The scant amount of time from the return of the note to the jury's return with a verdict demonstrates that the jury failed to conduct any deliberative process following the Court's ambiguous response. While it is true that "brevity of the jury deliberations alone does not suffice as a reason to set aside the verdict and remand for a new trial," *Curtis v. Blake*, 392 S.C. 494, 505, 709 S.E.2d 79, 84 (Ct. App. 2011), where the brevity follows a direct question from the jury regarding the payment of any source of insurance "for/from both parties" and the court refuses to give a specific charge not to speculate on whether there have been any insurance payments, brevity must be a factor for the court to consider in determining whether the jury's verdict should stand.

The Court has overlooked the timing surrounding the jury's return of the verdict form, as evidence that little to no further deliberations occurred following receipt of the court's response.

IV. The Court has overlooked or misapprehended the importance of the Defendants' own offer of judgment as evidence that the verdict manifestly shows that the jury was moved by considerations outside the evidence presented or the instructions of the Court.

An offer of judgment represents the Defendants' good faith evaluation of the case prior to trial considering the admissible evidence. Here, the Defendants' offer of judgment was $30,000.00, yet the jury's award was just $18,500.00. R. 29 Petitioner respectfully urges that the Court has overlooked or misapprehended the offer of judgment as evidence of the unfair prejudice

suffered by the Plaintiff due to the improper considerations deliberated by the jury, and the only remedy is a new trial.

V. **That the Plaintiff's damages were disputed fails to cure or excuse the inherent prejudice to the Plaintiff when the jury raised questions regarding insurance payments during deliberations**.

In *Waring v. Johnson,* 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), the jury's verdict was for the exact amount of medical bills. In *Waring,* this Court found "jury failed to consider pain and suffering in reaching its verdict" rejected the arguments advanced here – that the "verdict intended to represent a portion of medical expenses, plus pain and suffering." This Court also rejected another argument advanced by the Respondents here, that the jury may have concluded while the medical expenses arose from the crash, Mr. Nelson's pain and suffering arose from pre-existing condition – this view is at odds with the sworn testimony from Mr. Nelson's long-time family doctor, who stood by this opinion that the collision necessitated Mr. Nelson's back treatment. The jury was charged that the Defendant takes the plaintiff as he finds him, and in this case, like *Waring*, the Plaintiff presented evidence of a serious crash caused by a tow truck, medical bills, lost wages, diminution of his quality of life, and pain and suffering. The defense put up no case.

The test which guides the Court in the exercise of its power and duty to set aside a verdict and grant a new trial on the basis of excessiveness or here, inadequacy, is whether the verdict is so shocking so as to manifestly show the jury was actuated by considerations not founded on the evidence and/or the instructions of the Court. *Toole v. Toole,* 260 S.C. 235, 240, 195 S.E.2de 389, 391 (1973). Here, against the backdrop of the jury's question regarding insurance, the Defendants' own offer of judgment, the scant timing between the question and the verdict, and

the lack of value placed on the Plaintiff's intangible losses in the face of medical evidence from his doctor and a charge on preexisting condition all show that the jury acted upon improper considerations when reaching its verdict.

The Court also declared that the verdict was "well within the range of the trial evidence" in affirming the trial judge's refusal to give a more specific jury charge. Respectfully, only one case in South Carolina stands for the proposition that the appellate court will affirm a verdict within the range of the evidence in the face of a jury question about insurance. *Gastineau v. Murphy*, 323 S.C. 168, 473 S.E.2d 819 (Ct. App. 1996). In *Gastineau*, however, unlike this case "there was no mention of liability insurance during the trial and the jurors inquired about it on their own." *Id.*, at 183, 473 S.E.2d at 828. Importantly, the Supreme Court reversed this Court's decision in *Gastineau* on other grounds. *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). Petitioner could locate no other "range of the evidence" case in which a jury made a specific inquiry about health or liability insurance following a witness's mention of insurance during the trial.

For these reasons, the Petitioner respectfully requests that the Court grant its petition for rehearing.

Respectfully submitted,

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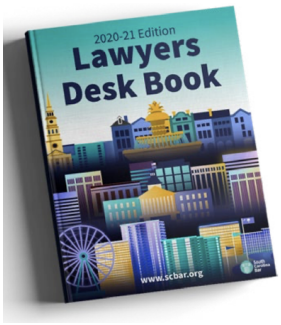

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing on Respondents, Christopher S. Harris and Charles L. Baughman,Sr., d/b/a K&B Towing, LLC by electronic mail on September 21, 2023, addressed to Respondents' attorneys of record:

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