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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM COLLETON COUNTY
In the Court of Common Pleas

Brooks Goldsmith, Circuit Court Judge

Appellate Case No.: 2023-000132

Jill Maliszewski,

Appellant,

v.

Margaret Yeager, Respondent.

FINAL BRIEF OF APPELLANT

URICCHIO HOWE KRELL JACOBSON
TOPOREK & KEITH, P.A.

Jeff Buncher, Jr., Bar No.: 78890
jeff@uricchio.com
Post Office Box 399
Charleston, South Carolina 29402
(843) 723-7491
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 1

ARGUMENT 5

A JURY VERDICT OF $0.00 WHEN THE DEFENSE ADMITS THAT PLAINTIFF IS ENTITLED TO SOME COMPENSATION IS NOT A JUST VERDICT AND A NEW TRIAL MUST BE GRANTED 5

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990) ……..……..……..3-4

Graham v. Whitaker, 282 S.C. 393, 321 S.E.2d 40 (1984) ……7-8

Hall v. Benefit Ass'n of Ry. Employees, 164 S.C. 80, 161 S.E. 867 (1932)…….5

Haskins v. Fairfield Elec. Coop., 283 S.C. 229, 321 S.E.2d 185……....6

Krepps by Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996)…….8

McCourt by and Through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995)..4

O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993)…….6

Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990)……6

Pelican Bldg. Ctrs. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993)……4

S.C. Highway Dept. v. Townsend, 265 S.C. 253, 217 S.E. (2d) 778 (1975)……4

Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833 (1993)……..5

Smith v. Pearson, 210 S.C. 524, 43 S.E.2d 479 (1947)……...5

Stevens v. Allen, 336 S.C. 439, 520 S.E.2d 625 (Ct. App. 1999).……...6

Stevens v. Allen, 342 S.C. 47, 536 S.E.2d 663 (2000)…….……...6

Taylor v. Devore, 253 S.C. 393, 171 S.E.2d 158 (1969)……7

Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). 3-5

Watson v. Town of Pendleton, 294 S.C. 155, 363 S.E.2d 234 (Ct. App. 1987)……..…6

Worrell v. South Carolina Power Co., 186 S.C. 306, 195 S.E. 638 (1938). 3

STATEMENT OF THE ISSUES ON APPEAL

1. Whether a jury verdict of $0.00 is grossly inadequate and facially inconsistent where the juries only function is to fill in the amount of damages and defense counsel admits that Plaintiff is entitled to a verdict in some amount.

STATEMENT OF THE CASE

This case involves a motor vehicle collision when Defendant's vehicle struck the rear of the motor vehicle Plaintiff was a passenger in October, 2018. (R. pp. 57-58). Defendant admitted that the wreck was her fault. (R. p. 65, lines 9-11). Defendant's vehicle was totaled as a result of the wreck. (R. p. 66, lines 11-12; R. pp. 241-248). The vehicle Plaintiff was a passenger in also suffered appreciable damage. (R. pp. 75-76; R. pp. 235-240). As a result of the wreck, Plaintiff sustained back pain and treated with Injury Care Centers. (R. pp. 77-79; R. p. 249). She had an MRI. (R. p. 104). Plaintiff also missed work and lost wages during this time due to her treatment. (R. pp. 83-84).

Plaintiff's husband testified that Plaintiff sustained pain as a result of the wreck. (R. pp. 58-59, 61, 63). Plaintiff's chiropractor, Dr. Amy Bernstein, testified to a reasonable degree of chiropractic certainty that Plaintiff sustained back pain as a result of the wreck. (R. pp. 202, 207). Dr. Bernstein based this on the objective tests she performed on Plaintiff along with the underlying care performed by Injury Care Centers. (R. pp. 196-198). Even with a normal MRI, a person can still have pain. (R. p. 232). Plaintiff testified she sustained pain as a result of the wreck. (R. pp. 76-79). Plaintiff testified that she continues to have back pain. (R. pp. 85-86).

Defendant hired a radiologist to look at the two MRI scans conducted of Plaintiff's back after the wreck. (R. p. 103). The defendant's contention with their radiologist was that a subsequent MRI four years after the wreck showed a herniation, which was their contention of Plaintiff's ongoing pain, whereas there was no herniation on the MRI taken shortly after the wreck. (R. pp. 103-108). The defendant's radiologist testified one could have a clean MRI and have pain. (R. p. 112). Conversely, he testified that a person could have an MRI showing a lot of issues in one's back and not have pain. (R. p. 112). Moreover, he testified that the reason Plaintiff had MRIs conducted was because she was having pain. (R. p. 112). Most importantly, Defendant's radiologist could not testify to a reasonable degree of medical probability whether Plaintiff had pain as a result of the wreck by just looking at the imaging. (R. p. 114, lines 7-13). Thus, the only medical testimony and evidence in the record was that Plaintiff was injured and sustained pain as a result of the wreck.

In closing, defense counsel did not dispute the economic damages from Injury Care Centers that totaled $11,056.16 and said Plaintiff should be compensated for those. (R. pp. 171-172). Despite evidence and testimony that Plaintiff had sustained an injury as a result of the wreck and photographs of the vehicles showing appreciable property damage, the jury returned a verdict for Plaintiff in the sum of $0. (R. pp. 5, 186). Plaintiff filed a post-trial motion within ten (10) days of the jury verdict. (R. pp. 6-12). Said motion was denied by the trial court on January 4, 2023. (R. pp. 1-4). Plaintiff then filed her appeal on January 27, 2023.

STANDARD OF REVIEW

1. New Trial Absolute / Thirteenth Juror

The grant or denial of new trial motions rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *Vinson v. Hartley,* 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996).

> A trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate. The jury's determination of damages, however, is entitled to substantial deference. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so 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 in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute.

Vinson, 324 S.C. at 404-05, 477 S.E.2d at 723 (citations omitted).

The seminal case stating the "thirteenth juror" doctrine is *Worrell v. South Carolina Power Co.*, 186 S.C. 306, 195 S.E. 638 (1938). *Worrell* states:

> Nor does it follow that because under the law the trial Judge is compelled to submit the issues to the jury, he cannot grant a new trial absolute. As has often been said, the trial Judge is the thirteenth juror, possessing the veto power to the nth degree, and, it must be presumed, recognizes and appreciates his responsibility, and exercises the discretion vested in him with fairness and impartiality.

Worrell, 186 S.C. at 313-14, 195 S.E. at 641.

A review of the "thirteenth juror" doctrine was undertaken by the appellate entity in *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990):

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E. (2d) 778 (1975). The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.
>
> 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. *South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E. (2d) 696 (1976).

Folkens, 300 S.C. at 254-55, 387 S.E.2d at 267.

2. New Trial *Nisi*

The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. *McCourt by and Through McCourt v. Abernathy,* 318 S.C. 301, 457 S.E.2d 603 (1995). Compelling reasons, however, must be given to justify invading the jury's province in this manner. *Pelican Bldg. Ctrs. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993).

> While the trial judge may not impose his will on a party by substituting his judgment for that of the jury, he may give the party an option in the way of *additur* or *remittitur,* or, in the alternative, a new trial. The consideration of a motion for a new trial *nisi additur* requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. The trial judge who heard the evidence and is more familiar with the evidentiary

> atmosphere at trial possesses a better-informed view of the damages than this Court. Accordingly, great deference is given to the trial judge.
>
> The denial of a motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion. This Court has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law.

Vinson, 324 S.C. at 405-06, 477 S.E.2d at 723-24.

ARGUMENT

A JURY VERDICT OF $0.00 WHEN THE DEFENSE ADMITS THAT PLAINTIFF IS ENTITLED TO SOME COMPENSATION IS NOT A JUST VERDICT AND A NEW TRIAL MUST BE GRANTED.

It is a long-standing rule that a client is bound by the actions of his attorney. *See Shelton v. Bressant*, 312 S.C. 183, 184, 439 S.E.2d 833, 834 (1993) ("Acts of an attorney are directly attributable to and binding upon a client."); *Smith v. Pearson*, 210 S.C. 524, 530, 43 S.E.2d 479, 481 (1947) (finding appellants bound by statement made by counsel at the outset of hearing). "The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial." *Hall v. Benefit Ass'n of Ry. Employees*, 164 S.C. 80, 83, 161 S.E. 867, 868 (1932).

In this case, the issue for the jury was not whether the plaintiff was injured, it was the extent of Plaintiff's injury which is confirmed by defense counsel's arguments to the jury. (R. p. 53, lines 13-15). In opening, defense counsel conceded that Plaintiff was indeed hurt as a result of the wreck. (R. pp. 50-52). Further, in closing, defense counsel again argued to the jury that Plaintiff was entitled to a verdict as "we all agree she got

hurt." (R. p. 171, lines 4-5). Defense counsel went on to argue to the jury that the medical treatment Plaintiff underwent at Injury Care Center and the MRI in the amount of roughly $11,000 was a fair amount to compensate Plaintiff. (R. pp. 171-172). Despite defense counsel's arguments and admissions to the jury, the jury returned a verdict of $0.00 actual damages which is grossly inadequate and facially inconsistent with the evidence presented at trial and the concessions of defense counsel to the jury.

In the case of *Stevens v. Allen*, 336 S.C. 439, 449 (Ct. App. 1999), *aff'd*, 342 S.C. 47 (2000), the Court held that "Once a plaintiff proves damages proximately caused by the defendant, the verdict of zero damages is inconsistent or incomplete as a matter of law." The Court further held that "A verdict of 'no damages' or 'zero dollars' after a finding of liability against the defendant is grossly inadequate and facially inconsistent." *Stevens v. Allen*, 336 S.C. 439, 452 (Ct. App. 1999).[1]

The only issue in the present matter for the jury to determine was the amount of Plaintiff's damages as the verdict form had just one thing for the jury to do: write in the amount of damages, either actual or nominal. This is because defense counsel conceded Plaintiff was injured to some extent as a result of Defendant's negligence as noted in the trial transcript. However, the jury filled in the damages line with $0.00. (R. p. 5). Thus,

[1] In several other cases, the Court of Appeals has held such verdicts inadequate. *See Watson v. Town of Pendleton*, 294 S.C. 155, 363 S.E.2d 234 (Ct. App. 1987) (pointing out 3 ways trial court may cure verdict of zero damages); *Page v. Crisp*, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990) (holding that where liability is admitted, plaintiff is entitled to award of damages unless proof completely fails); *Haskins v. Fairfield Elec. Coop.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984) (trial court abused discretion in refusing to award wife new trial on damages on grounds of inadequacy where jury found for plaintiff but awarded no damages), overruled in part on other grounds, *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

the jury's verdict was inconsistent as a matter of law, grossly inadequate and facially inconsistent. As a result, the trial court should have issued a new trial absolute or new trial *nisi* and erred in not doing so.

In *Taylor v. Devore*, 253 S.C. 393, 171 S.E.2d 158 (1969), an action commenced for both personal injury and property damages arising out of a motor vehicle wreck. The jury returned a verdict in the amount of $1,500.00 for the Plaintiff, which was subsequently appealed as the Plaintiff moved for a new trial on the grounds that the rendered verdict was inadequate. *Taylor v. Devore*, 253 S.C. 393, 395, 171 S.E.2d 158, 159 (1969). The court in *Taylor* granted the Plaintiff's motion as the sitting trial judge concluded, "In view of the extent of the damages to person and property proven by the greater weight of the evidence, I am of the opinion that the verdict is inadequate." *Id*. Thereafter, the grant of a new trial was appealed. The *Taylor* court denied the appeal, founded on the well settled principle that, "…in this state that the trial judge has the authority and responsibility to grant a new trial when, in his judgment, the verdict of the jury is contrary to the fair preponderance of the evidence and that an order granting a new trial on such ground is not appealable." *Taylor v. Devore*, 253 S.C. 393, 395, 171 S.E.2d 158, 159 (1969) (citations omitted).

In *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984), the Defendant appealed a trial court order which granted a new trial *nisi* on damages unless the appellant agreed to an *additur* of $67,500 in actual damages. The order followed the returned jury verdict for $10,000 actual damages and $10,000 punitive damages. *Graham v. Whitaker*, 282 S.C. 393, 396, 321 S.E.2d 40, 42 (1984). On appeal, the court in

Graham affirmed the trial judge's order; finding the order was well-reasoned as stated by the trial court: "The court said it cannot be seriously argued that plaintiff herein was adequately compensated or even nearly so, for the injuries she sustained." *Id*. 282 S.C. at 402, 321 S.E.2d at 45.

In *Krepps by Krepps v. Ausen*, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996), the Plaintiff, Patsy C. Krepps as Guardian *ad Litem* for Shohn E. Krepps, brought two separate causes of action; the one under appeal concerning an action to recover damages for personal injuries arising out of an automobile wreck in which the jury returned a verdict in the amount of zero dollars. Plaintiff appealed the trial court's denial of the motion for a new trial absolute, and ultimately, the court in *Krepps* reversed and remanded the denial, and noted, "The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." *Krepps by Krepps v. Ausen*, 324 S.C. 597, 607, 479 S.E.2d 290, 295 (Ct. App. 1996) (citations omitted).

Justice did not prevail in this case. Based upon the evidence presented at the trial of this matter by way of witnesses and exhibits, the verdict in this case, $0, was inconsistent as a matter of law, grossly inadequate and facially inconsistent and Plaintiff is entitled to a new trial.

CONCLUSION

For all the foregoing reasons, the trial judge abused his discretion and committed an error of law by failing to grant a new trial absolute or new trial *nisi* as the case law is

clear that the jury's verdict of $0.00 where damages are admitted is inconsistent as a matter of law, grossly inadequate and facially inconsistent and Plaintiff is entitled to a new trial. Thus, Plaintiff asks that the trial court order be reversed and remanded for a new trial.

Respectfully submitted,

s/ Jeff Buncher, Jr.
Jeff Buncher, Jr., Bar No. 78890
17 ½ Broad Street
Post Office Box 399
Charleston, SC 29402
Phone: (843) 723-7491
Fax: (843) 577-4179
jeff@uricchio.com
Attorney for Appellant

November 15, 2023
Charleston, South Carolina

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

URICCHIO HOWE KRELL JACOBSON
TOPOREK & KEITH, P.A.

s/ Jeff Buncher, Jr.
Jeff Buncher, Jr., Bar No. 78890
17 ½ Broad Street
Post Office Box 399
Charleston, SC 29402
Phone: (843) 723-7491
Fax: (843) 577-4179
jeff@uricchio.com
Attorney for Appellant

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