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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2020-000638

Gerald Nelson, ... Petitioner,

vs.

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

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on November 17, 2023.

QUESTIONS PRESENTED

I. When a jury deliberating a civil case asks a direct question to the trial judge regarding insurance payments, must the trial judge specifically instruct the jury not to consider the existence of insurance in reaching their verdict?

II. Did the Court of Appeals err in affirming the trial court's general response to the jury's direct question regarding insurance payments?

III. Did the Court of Appeals erroneously ignore that the brief time after the trial court's response to the jury's question about insurance as well as the Defendants' own offer of judgment demonstrate that the jury was moved by improper considerations outside the evidence presented and disregarded the trial court's general instructions?

IV. Did the Court of Appeals inappropriately focus on the fact that Plaintiff's damages were disputed when that focus fails to cure or excuse the inherent prejudice to the Plaintiff when the jury raised direct questions during deliberations regarding insurance payments?

STATEMENT OF THE CASE

Plaintiff filed this matter on June 19, 2018. The Complaint alleged causes of action for negligence against Defendants Harris and K&B Towing related to a vehicle collision on January 28, 2016. Defendants filed a timely Answer on July 20, 2018. On January 4, 2019, Defendants filed an offer of judgment in the amount of $30,000.00. (R. 29; Order, April 1, 2020, R. 14).

This matter was tried before a jury from January 21, 2020 through January 24, 2020. (R. 51). Plaintiff testified that he incurred $8,008.58 in medical bills as well as $11,000 to $12,000 in lost wages. (R. 76-77, 171). Plaintiff, his mother, and his treating physician all testified regarding damages and Plaintiff's limitations as a result of the injuries he sustained in the

collision.

The trial court charged the jury and sent the jury to deliberate at approximately 12:37 p.m. (Tr. p. 295, ln 16-17; R. 140). During deliberations, the jurors sent a note to the trial court asking "what insurance has paid for/from both parties." (R. 140, 166). The jury sent this question to the trial court at approximately 1:30 p.m. (R. 140, 166). The trial court brought the lawyers back to discuss the jury's question. Plaintiff's counsel renewed the request on the record for the trial court to charge the jury not to consider the existence of insurance (Plaintiff previously requested the instruction after the Defendant mentioned insurance in his testimony). The trial court wrote on the jury's note and returned it to the bailiff who walked it back to the jury. For a second time the trial court declined Plaintiff's request to charge the jury that it was not to consider insurance of any kind when reaching its civil verdict. (R. 140-141, 165-166). Instead, the trial court sent a note back to the jury stating "you are to consider only the evidence presented during this trial. Judge." (R. 141, 166). While the transcript fails to state the specific time the trial court sent the note back to the jury, the jurors entered the courtroom with the verdict only a short while later at 2:03 p.m. (R. 142).

The jury returned a verdict for Plaintiff in the amount of $18,500 in actual damages. (R. 142, 17). Plaintiff requested and received ten days to file post-trial motions. The Defendants requested time to address their offer of judgment to Plaintiff. The trial court granted both requests. (R. 143-144).

Plaintiff filed a timely Motion for New Trial *Nisi Additur* or New Trial Absolute on January 27, 2020. (R. 146). The jury's verdict was entered on January 30, 2020. (R. 17). The trial court sent an email to the parties on March 12, 2020, indicating its intent to deny Plaintiff's

January 27, 2020 motions. However, no order was entered.

On April 1, 2020, the trial court entered an Order granting Defendants a reduction in the verdict based on the offer of judgment. (R. 14). Plaintiff filed and served his initial Notice of Appeal on April 13, 2020. On April 28, 2020 the trial court entered an order denying Plaintiff's Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute. (R. 9). On or about May 1, 2020, Plaintiff filed a copy of the Order with the Court of Appeals as a part of his Notice of Appeal. Plaintiff filed his final brief on December 20, 2020.

The Court of Appeals held oral argument in this matter on April 4, 2023, and affirmed the trial court's decision on September 6, 2023. *Nelson v. Harris*, 441 S.C. 379, 893 S.E.2d 592 (Ct. App. 2023). Plaintiff moved for reconsideration on September 21, 2023, which the Court of Appeals denied on November 17, 2023.

Plaintiff seeks a writ of certiorari to review that decision, as the decision is at odds with this Court's precedents regarding the inherent and presumed prejudice civil litigants face when the jury discusses insurance payments during deliberations, as well as the inadequate instruction the trial court gave in response to the jury's direct question about insurance payments.

ARGUMENT

I. The Court of Appeals should have reversed the trial court and held that when a jury deliberating a civil case asks a direct question regarding insurance payments during deliberations, the trial judge must specifically instruct the jury that consideration of insurance is expressly forbidden in reaching their verdict.

The jury's questions about insurance demonstrated that they intended to discount the Plaintiff's civil damages verdict by first determining how much money he already collected from any Defendant, and, second, how much Plaintiff's health insurance paid. Both considerations are improper, and specific guidance from the trial court became necessary at that time. This Court should grant this petition, reverse the courts below, and remand this matter for a new trial under proper jury instructions.

"[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.E.2d 444, 448-449 (Ct. App. 1997), *citing Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991).

The Court of Appeals' decision references only liability insurance but the jury's question in the midst of deliberations was aimed at discovering what Plaintiff owed after his health insurance paid for medical expenses and what money he had already received from liability insurance, if any. Plaintiff's proposed instruction comes from a charge book and would have specifically instructed the jury not to consider insurance of any kind. The proposed instruction is consistent with this Court's precedent.

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 topics that are off limits, yet the trial court gave no indication to the jury that its discussions concerning insurance payments must stop. Instead, the trial court told the jury to continue its deliberations considering only the evidence it heard, thereby affirming the jury's speculation. This instruction was confusing under the circumstances because while the jury heard mention of insurance, it heard no evidence regarding insurance payments received (in accordance with the collateral source rule), and it heard no evidence of the existence or payments from health or disability insurance. Instead, the jury was left to its own devices and speculation, and ultimately reduced the verdict to prevent a perceived windfall to the Plaintiff.

When the jury told the trial court it was discussing insurance it became the trial court's obligation 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 decisions by each court below also overlooked that in *Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995), where the jury asked in the midst of deliberations what Plaintiff owed on his medical expenses after insurance, the Court of Appeals "assume[d] the court correctly advised the jury it should not consider insurance in its deliberations." *Sullivan*, at 466, 454 S.E.2d at 910. *Sullivan* 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 the South

Carolina appellate courts have presumed the trial courts gave precise instruction to not consider insurance in deliberations, which is in direct contrast to the vague, general response provided in the instant case.

Additionally, at one time there was a complete bar on evidence of insurance. *Todd v. Joyner*, 385 S.C. 421, 685 S.E.2d 595 (2009). The adoption of Rule 411, SCRE, in 1995 altered this view. *Todd v. Joyner*, at 424, 685 S.E.2d at 596, citing *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*, 311 S.C. 43, 426 S.E.2d 756 (1993), 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 may be admissible. Rule 411, SCRE.

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." This comment raised in the minds of the jurors that the Defendants had to be insured. The jury thereafter sent the note telling the trial 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. *Cf. Sulton v. HealthSouth Corp.*, 400 S.C. 412, 418, 734 S.E.2d 641, 644 (2012) (reversing jury verdict and ordering a new trial where erroneous instruction "went to the heart of the case and was 'not cured by the fact that in other portions of the charge the law [was] correctly stated')

The Court of Appeals should have held that the trial court's general charge as well as the answer the trial court provided in response to the jury's question did not adequately address the substance of the Plaintiff's request that the trial court tell the jury, expressly, not to consider insurance "paid for/from both parties." The trial court instead 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 the insurance had paid something and that this consideration weighed on the jury.

Plaintiff requests that this Court grant this petition and issue a writ of certiorari to the Court of Appeals to review its opinion. Plaintiff further requests that the Court find the trial court's refusal to give the requested instruction was an abuse of discretion as being controlled by an error of law, for which the only remedy is a new trial.

II. This Court has previously held that a jury's consideration of insurance payments in a civil trial is "inherently prejudicial," therefore, the Court of Appeals erred in affirming the trial court's general response to the jury.

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, but *Dunn* instructs that it need not be – the Supreme Court adopted Acting Judge Littlejohn's dissent in the Court of Appeals' opinion in *Dunn*, which recognized that the inquiry into insurance was "inherently prejudicial." *Dunn*, 311 S.C. at 44, 426 S.E.2d at 757. The Court of Appeals overlooked a central holding in *Dunn*, which is that prejudice is presumed when insurance is raised, since "[r]ealistically no prejudice can be shown unless counsel is permitted to examine members of the

jury – which is forbidden." *Id.* at 46, 426 S.E.2d at 758.

Even the Defendants agreed that the mention of insurance is "purely prejudicial," yet the Court of Appeals' opinion is silent as to this point. (R. 60). Plaintiff faced the inherent prejudice that *Dunn* sought to prevent when the jury raised the issue of insurance payments and the trial court did nothing to stop the jury from considering the issue. The question by itself demonstrates that deliberations were focused on the inherently prejudicial matter of insurance.

Prejudice must realistically be presumed, *Dunn*, and the Court of Appeals erred when it affirmed the trial court's refusal to charge the jury that the law of this State forbids consideration or the discounting of a civil verdict based upon liability insurance payments and collateral sources. This Court should grant this Petition, issue a writ of certiorari, reverse the Court of Appeals' decision, and remand this matter for a new trial.

III. Whether the Court of Appeals erred in failing to consider the scant timing after the court's response and the Defendants' offer of judgment as evidence that the jury was moved by considerations outside the evidence presented or disregarded the general instructions of the Court.

The trial 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 trial 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 trial court brought the lawyers back and the parties and the trial court discussed the question. The parties proceeded on the record and Plaintiff's counsel renewed the request for the trial court to charge the jury not to consider the issue of insurance during its deliberations. The trial court wrote on the jury's note and returned it to the

bailiff who walked it back to the jury.

While the transcript fails to state the specific time the trial court sent the note 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). In the roughly 33 minutes after the jury sent the note the trial court heard arguments from counsel on the record, sent the response back to the jury, and received the verdict.

The brief time from the return of the note to the jury's return with a verdict demonstrates that the jury failed to conduct any meaningful deliberative process following the trial court's ambiguous response to the jury's question. 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 payments "for/from both parties" and the trial 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 courts to consider in determining whether the jury's verdict should stand. The trial court and the Court of Appeals overlooked that the timing surrounding the jury's return of the verdict was evidence that little to no further untainted deliberations occurred following receipt of the trial court's response.

Additionally, an offer of judgment pursuant to Rule 68, SCRCP, represents the Defendants' good faith evaluation of the case prior to trial considering the admissible evidence. *Compare Marek v. Chesny*, 473 U.S. 1, 6-7 (1985) (Rule 68, Fed.R.C.P. offers of judgment encourage settlement, allows defendant to make lump-sum offer that would, if accepted, represent their total liability so that they are not reluctant to make settlement offers), *cited in Wells v. Vetech, LLC*, 437 S.C. 428, 879 S.E.2d 6 (Ct. App. 2022) (observing the plain language

and intent behind Rule 68 establishes the Rule exists to encourage settlement and reduce litigation).

In this case the Defendants' offer of judgment was $30,000.00, demonstrating Defendants' evaluation that this sum would represent their total liability. However, the jury's award was just $18,500.00. (R. 29). Plaintiff respectfully contends that the courts below overlooked or misapprehended the offer of judgment as an indication of the unfair prejudice Plaintiff suffered due to the jury's improper consideration of insurance payments during its deliberations. The only remedy for the improper result is a new trial.

This Court should grant this petition, issue a writ to review the Court of Appeals' decision, reverse and remand for a new trial.

IV. The Court of Appeals erred in refusing to grant a new trial because the fact that Plaintiff's damages were disputed fails to cure or excuse the inherent prejudice to the Plaintiff when the jury raised direct 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*, the Court of Appeals found the "jury failed to consider pain and suffering in reaching its verdict" and rejected the arguments advanced by the Defendants in this case at the Court of Appeals – that the "verdict intended to represent a portion of medical expenses, plus pain and suffering."

The Court of Appeals in *Waring* also rejected the argument advanced by the Defendants here, that the jury may have concluded while the medical expenses arose from the crash, Mr. Nelson's pain and suffering arose from a pre-existing condition – this view is directly at odds with the evidence at trial, including 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 trial court charged the jury that the Defendant takes the Plaintiff as he finds him, and in this case, like in *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 courts in the exercise of its power and duty to set aside a verdict and grant a new trial on the basis of excessiveness or, as 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 trial court's instructions. *Toole v. Toole*, 260 S.C. 235, 240, 195 S.E.2d 389, 391 (1973). Here, the jury's direct question regarding insurance payments, the scant timing between the jury's question and the verdict, the Defendants' own offer of judgment, 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 demonstrate that the jury speculated on whether Plaintiff received insurance payments and acted upon these improper considerations when reaching its verdict.

The Court of Appeals 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's specific questions and improper considerations about insurance. *Gastineau v. Murphy*, 323 S.C. 168, 473 S.E.2d 819 (Ct. App. 1996). In *Gastineau*, 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, this

Court reversed the Court of Appeals' decision in *Gastineau* on other grounds. *Gastineau v. Murphy*, 331 S.C. 565, 503 S.E.2d 712 (1998). Plaintiff 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 the existence of insurance during the trial.

This Court should grant this petition, issue a writ to review the Court of Appeals' decision, reverse and remand for a new trial.

CONCLUSION

The Bench and Bar need guidance on whether a general instruction to consider only evidence presented at trial addresses a jury's specific questions regarding payments from insurance sources, and whether under those circumstances, a verdict "within the range of the evidence" can stand. Plaintiff therefore requests that this Court to grant this petition for a writ of certiorari to the Court of Appeals to review its decision. Plaintiff further requests that the Court reverse the Court of Appeals, and remand this matter for a new trial under appropriate jury instructions.

Respectfully submitted,

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