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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

Civil Action No. 2017-CP-42-03523
Appellate Case No.: 2023-001735

Shannon P. Green
and Darrell Russell — Petitioner-Respondent,

v.

Edward C. McGee
and David Hudgins — Respondent,
Respondent-Petitioner

RETURN TO PETITIONER-RESPONDENT SHANNON P. GREEN AND RESPONDENT-PETITIONER DAVID HUDGINS' PETITIONS FOR WRIT OF CERTIORARI

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2) DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO DECLINE TO APPLY THE SETOFF TO MR. RUSSELL?

3) DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DECISION TO DENY MR. HUDGINS' MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT?

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II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about November 19, 2015 in Spartanburg, South Carolina. Appellant, Shannon Green, was traveling on Simuel Road when Respondent, Edward McGee, collided with her vehicle. [R. pp. 0010-0012]. Just prior to the collision, Respondent-Appellant, David Hudgins, had been driving too fast for conditions behind Mr. McGee, which ultimately resulted in Mr. McGee and Ms. Green colliding. [R. p. 0329, Lines 20-25]. On September 27, 2017, Ms. Green, along with Darrell Russell, her husband, filed the subject lawsuit for alleged injuries sustained in the accident. [R. pp. 0010-0012].

Prior to the filing of the lawsuit, Ms. Green settled with Mr. McGee and his liability insurer, Nationwide Insurance Company ("Nationwide"), for $100,000.00 and executed a Covenant Not to Execute. [R. pp. 0460-0462]. Ms. Green's husband, Darrell Russell, also executed a separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars ($2,500.00). [R. pp. 0457-0459]. Importantly, this separate covenant with Mr. Russell was for "any and all claims, demands, damages, costs, or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above-referenced accident." Id. Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, and denied the allegations of negligence. [R. pp. 0013-0018]. In effort to pursue underinsured motorist benefits ("UIM") under her own insurance policy, Ms. Green served Progressive Direct Insurance Company ("Progressive"), who timely answered on May 30, 2018. [R. pp. 0019-0025].

This matter was tried before a jury in Spartanburg County on October 14-16, 2019, with the Honorable Grace Gilchrist Knie presiding. Following the conclusion of the testimony, argument, and charge, the jury found Mr. Hudgins and Mr. McGee were negligent, and the proximate cause of the injuries sustained by the Plaintiffs in the subject motor vehicle accident.

[R.pp. 0006-0009]. The jury found that Mr. McGee was sixty percent (60%) at fault and Mr. Hudgins was forty percent (40%) at fault. Id. The jury returned a verdict for Ms. Green in the amount of $88,546.78 in actual damages. The jury further awarded $35,000.00 in punitive damages against Mr. McGee and $35,000.00 in punitive damages against Mr. Hudgins. Id. The jury further found that Mr. Russell was not entitled to any damages for his loss of consortium claim. Id.

Ms. Green and Mr. Hudgins, through their respective counsel, timely filed post-trial motions. On October 25, 2019, Ms. Green filed a Motion for New Trial *Nisi Additur* or in the alternative, a Motion for a New Trial Absolute. [R. p. 0026]. That same day, Mr. Hudgins filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b), SCRCP, and sought to have the verdict against him set aside in its entirety and judgement entered in his favor, or to at least have the punitive damages award set aside. [R. pp. 0027-0038]. Additionally, Mr. Hudgins filed a Motion to Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the court apply and give Mr. Hudgins credit for the $100,000.00 paid on behalf of Mr. McGee prior to trial as part of the Covenant Not to Execute. [R. pp. 0039-0045].

All post-trial motions were heard before Judge Knie on December 20, 2019. On January 8, 2020, Judge Knie issued an Order and denied Ms. Green's Motion for New Trial *Nisi Additur* and Motion for New Trial Absolute. [R. pp. 0001-0005]. Judge Knie also denied Mr. Hudgins' Motion for JNOV, but granted his Motion for Setoff. Id. Counsel for Ms. Green filed her Notice of Appeal on February 5, 2020. On February 10, 2020, counsel for Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal. The parties submitted their briefs and oral argument was held on March 1, 2023.

On July 26, 2023, the Court of Appeals issued its Opinion. Thereafter, Mr. Hudgins filed a Petition for Rehearing, which was denied by the Court of Appeals on October 11, 2023. These Petitions followed.

III. ARGUMENT

A. The Court of Appeals Correctly Decided that the Trial Court Did Not Err In Denying Appellant's Motion for New Trial *Nisi Additur*, because the Evidence and Testimony Presented at Trial Reasonably Supported the Jury's Determination.

The granting of a motion for new trial *nisi additur* rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). The denial of a motion for new trial *nisi additur* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). "The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur.* Easler v. Hejaz Temple*,* 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985). Compelling reasons, however, must be given to justify invading the jury's province in this manner. Pelican Bldg. Centers v. Dutton*,* 311 S.C. 56, 427 S.E.2d 673, 676 (1993). The mere listing of the plaintiff's claimed damages compared to the jury verdict "does not constitute compelling reasons for invading the jury's province." Green, 356 S.C. at 570, 590 S.E.2d at 41. Furthermore, '[a] jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention. Johnson v. Parker*,* 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983).

A trial court does not abuse its discretion in denying a motion for a new trial *nisi additur* where evidence in the record supports the jury's verdict. See Steel v. Dillard, 327 S.C. 340, 345,

486 S.E.2d 278, 281 (Ct. App. 1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict). Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009).

Throughout the trial of this case, substantial evidence was presented that challenged Ms. Green's medical damages and supported the jury's verdict. Contrary to counsel for Ms. Green's contention that "pre-existing conditions are not an issue here," Ms. Green testified that she had pre-existing medical issues. The jury apparently found that some or all of her claimed damages were unrelated to the accident. Ms. Green testified that she has for years been a severe Type I diabetic and has had complications from her diabetes. [R. p. 0289, Line 24]. She admittedly has suffered from prior back pain and hip pain. [R. p. 0287, Lines 5-17]. Ms. Green further testified she also had pre-existing joint pain prior to the accident. [R. p. 0290, Line 10]. Ms. Green testified regarding her own medical history and the alleged injuries sustained in the accident. No doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most probably related to the accident. Therefore, it was reasonable for the jury to have found that Ms. Green's alleged injuries were unrelated to the accident and were instead caused by these other pre-existing conditions.

Additionally, Ms. Green's alleged pain and suffering was heavily contested throughout trial. Ms. Green, but no medical doctors or experts, provided testimony regarding the medical treatment and timeline of medical treatment she sought after the accident. Ms. Green testified she did not even have an x-ray of her shoulder performed at the hospital following the accident. She also testified it was not until three days after the accident that she sought any medical treatment at

all for her left shoulder. [R. p. 0273, Line 22 – p. 0274, Line 15]. The jury heard Ms. Green further testify that she stopped seeking any medical treatment for any back pain two months after the accident. [R. p. 0276, Lines 20-24]. Ms. Green testified that she was able to return to work full-time only eight days after the accident and was also able to return full-time to work two-weeks after her left shoulder surgery. [R. p. 0280, Line 3]. Finally, Ms. Green admitted before the jury that, despite alleged continued complaints of left shoulder pain, she has not presented for treatment with any physician for the past three years. [R. p. 0285, Lines 16-22]. The only conclusion that can be drawn from the jury's verdict is that the jury did not find the testimony offered by the plaintiff regarding her pain and suffering to be credible.

Ms. Green contends that her motion for a new trial *nisi additur* was incorrectly denied because the jury awarded the exact amount of plaintiff's medical bills. However, South Carolina courts have held that it is not improper or an abuse of discretion by the trial court to deny a plaintiff's motion for a new trial when the jury awards the exact amount of claimed medical bills and nothing further. *See* Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009); Nestler v. Fields, 426 S.C. 34, 824 S.E.2d 461 (Ct. App. 2019).

Further, Ms. Green relies heavily on Waring v. Johnson in support of her argument that the jury's award of the exact amount of medical bills translates to a granting of a new trial *nisi additur*. However, as the Court of Appeals stated in its Opinion:

> "As we see it, the key to Waring is that this court was reviewing a grant of additur rather than the denial of it. The standard of review is weighted in favor of affirming the trial court's decision; no doubt because that court possesses a superior sense of the case having presided over the trial. Just as the standard of review led this court to affirm in Waring, so too it leads us to affirm here."

[Court of Appeals Opinion No. 6001] (citation omitted).

As the case law cited above clearly provides, Ms. Green fails to present and prove any errors of law and fails to put forth any evidence that the Court of Appeals erred in affirming the trial court's decision to deny Ms. Green's Motion for New Trial *Nisi Additur*. Therefore, this Court should affirm the January 8, 2020 Order, which denied Ms. Green's Motion for New Trial *Nisi Additur*.

B. The Court of Appeals and Trial Court Correctly Decided To Apply the Offset to Ms. Green Only Because The Jury Awarded Mr. Russell Nothing In Actual Damages.

Counsel for Ms. Green argues that the $100,000.00 paid by Mr. McGee's liability insurance carrier, Nationwide, involved more than one claim – Ms. Green's personal injuries and her husband's loss of consortium claim. Therefore, Ms. Green argues that the trial court should have applied some of the $100,000.00 Nationwide payment to Mr. Russell's loss of consortium claim. However, counsel for Ms. Green have failed to show any error of law and have failed to put forth any evidence that the trial court abused its discretion or that the Court of Appeals erred in affirming the trial court's decision.

After being presented with the parties' evidence and arguments, the jury was given detailed instructions, including an instruction for a loss of consortium claim. The jury deliberated and unanimously returned a defense verdict with regard to Mr. Russell's loss of consortium claim. As the Court of Appeals stated in its Opinion:

> "We were not able to locate a case authorizing a judge, sitting after the verdict, to allocate settlement funds to a claim after the jury determines the claim has no value."

[Court of Appeals Opinion No. 6001]

As such, the trial court properly considered all relevant circumstances surrounding the settlement and did not abuse its discretion in declining to allocate the $100,000.00 to Mr. Russell, after the jury had rejected the claim.

C. The Trial Court Did Not Err When It Denied Mr. Hudgins' Motion For a Judgment Notwithstanding The Verdict and Declined to Set Aside the Punitive Damages Award Against Mr. Hudgins because There Was Evidence That A Reasonable Jury Could Find That Mr. Hudgins Willful Actions Contributed To The Accident.

When ruling on a Motion for JNOV, a trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. Pye v. Estate of Fox. 369 S.C. 555, 56 3,633 S.E.2d 505, 509 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a JNOV motion should be denied. Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). On JNOV motions, the trial court does not have "the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Thomas v. Dootson, 377 S.C. 293, 297, 659 S.E.2d 253, 255 (Ct. App. 2008) ("[I]t is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve."). When considering a Motion for JNOV, a trial judge is concerned with the existence of evidence and not its weight. State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct. App. 1996). Therefore, a jury's verdict should not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Id.

This case involves several parties, two plaintiffs and two defendants. Throughout trial, the jury had the opportunity to hear from each party as to what they believed happened to cause the subject accident. There is a factual dispute amongst Mr. McGee and Mr. Hudgins regarding the nature of their actions leading up to the accident. However, substantial evidence was presented such that a reasonable jury could find Mr. Hudgins contributed to the accident. There was also substantial evidence that Mr. Hudgins' actions were reckless, willful, and wanton.

Mr. Hudgins admitted that he had pled guilty to driving too fast for conditions. [R. p. 0329, Lines 20-25]. An officer who had arrived at the scene testified that Mr. McGee reported he had been chased by Mr. Hudgins. [R. p. 0080, Lines 12-13]. Mr. McGee was unwavering in his testimony that he was fearful of Mr. Hudgins because Mr. Hudgins had tried "wreck" him on the interstate. [R. p. 0149, Lines 10-12]. He further testified that he wanted to get away from Mr. Hudgins, but Mr. Hudgins continued to follow him. [R. p. 0103, Lines 8-13]. Further, during the 9-1-1 call Mr. Hudgins made, he stated that he did not know where he was when he witnessed the collision, but yet claimed that he was driving that particular route on purpose. Further, Mr. Hudgins can be heard on the 9-1-1 call driving past Mr. McGee and telling Mr. McGee that he had the police coming for him. As the Court of Appeals noted, "[i]t was reasonable for the jury to find Hudgins chased or followed McGee, which made McGee distracted and nervous, and therefore made Hudgins a proximate cause of the collision." [Court of Appeals Opinion No. 6001].

As set forth in the case law above, the trial court does not have "the authority to decide credibility issues or to resolve conflicts in the testimony or evidence" in ruling on a JNOV motion. The record reflects that there was evidence that created factual disputes regarding liability, which were for the jury to resolve. All inferences are to be drawn in support of the jury's determination. Therefore, the Order denying Mr. Hudgins' JNOV Motion should be affirmed, and the Court of Appeals decision was not in error.

D. Mr. Hudgins Is Not Exempt From Paying His Allocation of the Judgement Rendered by the Jury Because He Is an Additional Tortfeasor, and Such Exemption would be in Violation of the Collateral Source Rule, S.C. Code 15-38-15(A), and Basic UIM Principles in South Carolina Law.

Mr. Hudgins' argues that he and his liability carrier are *solely* entitled to claim a setoff for the $100,000.00 previously paid by Mr. McGee's liability insurer.[1] As such, Mr. Hudgins contends that Progressive, as UIM carrier, is not entitled to claim a setoff. According to Mr. Hudgins, Progressive owes the remainder of the judgement, and Mr. Hudgins and his liability carrier are relieved from paying anything to Ms. Green, the injured party. As a basis for this argument, Mr. Hudgins argues that under the plain, unambiguous language of S.C. Code Ann. § 15-38-50 (the "Act"), Mr. Hudgins is the only "other tortfeasor", who is allowed to benefit from the set-off. However, S.C. Code Ann. § 15-38-50 states:

> When a release or covenant not to sue or not enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or same wrongful death:
>
> (1) **it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide**, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater; and
>
> (2) it discharges the tortfeasor to whom it is given from all liability for contribution to any other tortfeasor.

(emphasis added). Mr. Hudgins' contention flies in the face of the jury verdict finding Mr. Hudgins 40% liable for Ms. Green's damages and contravenes the UIM statute and established law interpreting the same.

[1] The $100,000.00 bodily injury limits were paid by Mr. McGee's liability carrier. The property damage liability limits remains unpaid. Arguably, pursuant to Geico v. Poole, Progressive would be entitled to any additional setoff from the unpaid property damage liability limits.

"The Uniform Contribution Among Tortfeasors Act (the Act) "represents the Legislature's determination of the proper balance between preventing double-recovery and South Carolina's 'strong public policy favoring the settlement of disputes.'" Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, 435 S.C. 109, 866 S.E.2d 542, 555 (2021). "The Act governs the setoff of prior settlements paid by those liable in tort, not those liable in contract. However, nothing in the Act prohibits the application of common law setoff to a claim founded in contract." Id. at 556.

The Court of Appeals rejected Mr. Hudgins' argument, and noted that this Court set forth the "equitable principles" of setoff. [Court of Appeals Opinion No. 6001]. The Court of Appeals also noted that, in Riley v. Ford Motor Co., 414 S.C. 185, 777 S.E.2d 824 (2015), this Court stated that setoffs "should be exercised so as to do justice between parties." Id. The Court of Appeals correctly held that "neither justice nor equity" support giving Hudgins the benefit of the settlement paid on behalf of Mr. McGee. As the Court of Appeals stated, "[a]fter all, precedent explains that when a liability insurance carrier provides funds for a settlement, the funds are provided to benefit its insured." Id.

Mr. Hudgins relies heavily on the argument that the Court of Appeals failed to give controlling weight to the General Assembly, and the language of the Act. Mr. Hudgins further argues that the statutory language of the Act leaves no room for interpretation and quotes Ellis v. Oliver, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999), stating that the Act "grants the court no discretion in determining the equities involved in applying a set-off." [Hudgins Petition for Writ of Certiorari P. 9] However, the passage in Ellis cited by Mr. Hudgins merely means that the when a defendant's right to a setoff arises by operation of law, the court does not have any discretion in whether to apply it; not in determining how it is applied. South Carolina courts have determined

how a setoff is applied. *See* Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC, 435 S.C. 109, 866 S.E.2d 542 (2021).

Moreover, the statutory purpose of underinsured motorist coverage is "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist...." S.C. Code §38–77–160. "The very definition of UIM insurance mandates set-off." Broom v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). It is axiomatic in South Carolina, that a UIM carrier is entitled to a setoff of the liability limits of the at-fault motorists. In Cobb v. Benjamin, this Court held, "a UIM carrier is entitled to a credit for any amount of liability insurance coverage not exhausted in a settlement with its insured." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). Therefore, Progressive is entitled to a setoff of the liability limits of the at-fault motorists in this case.

Mr. McGee's liability insurer tendered its full $100,000.00 of bodily injury limits prior to suit being filed. [R. pp. 0460-0462]. However, Mr. Hudgins' carrier has not made any payment on behalf of Mr. Hudgins. Once the suit was filed, Ms. Green pursued UIM benefits with her insurer, Progressive.

At the conclusion of the trial, the jury awarded $88,546.78 in actual damages to Ms. Green and $35,000.00 in punitive damages against each defendant. [R. pp. 0006-0009]. The total of all damages awarded is $158,546.71. The jury found that Mr. McGee was sixty percent at fault for the accident, and therefore, his allocation of the actual damages award is $53,128.07. Mr. McGee's allocation of the actual damages plus the $35,000.00 in punitive damages totals $88,128.07. As previously stated, Mr. McGee's liability carrier, Nationwide, tendered its $100,000.00 liability limit prior to the lawsuit. As such, Mr. McGee has fully paid, and actually has overpaid, his portion of the final judgement the jury rendered at trial.

The jury found that Mr. Hudgins, as an additional tortfeasor, was forty percent at fault for Ms. Green's actual damages. Forty percent of $88,546.78 (actual damages award) is approximately $35,418.71. That amount in plus the punitive damages awarded against Mr. Hudgins, totals $70,418.71. It is important to note for this Court that Mr. Hudgins has $1,000,000.00 in liability coverage. Neither Mr. Hudgins nor his liability carrier has paid anything towards the judgement. As the Court of Appeals in its Opinion pointed out, "the result Hudgins seeks to achieve is so far from the equitable purpose of setoff – he seeks to pay nothing even though the verdict plainly exceeds his co-defendant's coverage – that his interpretation is an interpretation we cannot follow." [Court of Appeals Opinion]

Additionally, S.C. Code §15-38-15(A) is applicable in the present case as it involves two tortfeasors, one of which was found to be less than fifty percent at fault by the jury. Section §15-38-15(A) of the South Carolina Code states that a "defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact." Therefore, Mr. Hudgins, as the 40% at-fault tortfeasor, is liable for his portion of the damages. He is not entitled to escape this liability simply because a joint tortfeasor, Mr. McGee has paid his share.[2]

IV. CONCLUSION

The Court of Appeals did not err in determining that the trial court did not abuse its discretion when denying Ms. Green's Motion for a New Trial *Nisi Additur*. The Court of Appeals correctly determined that the trial court did not abuse its discretion when denying Mr. Hudgins' JNOV motion. The Court of Appeals also correctly determined that the trial court correctly applied

[2] To the extent Mr. McGee has overpaid for his share of the liability, Mr. Hudgins may benefit from the overpayment.

the offset amount against Ms. Green's award only. Finally, the Court of Appeals correctly applied the setoff and determined that Mr. Hudgins, as an additional tortfeasor, is not relieved from paying is allocation of the judgement.

Respectfully Submitted by:

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