IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2023-001938

Gerald Nelson, …….. Petitioner,

v.

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

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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S.C. SUPREME COURT

Wesley B. Sawyer, Esq. (SC Bar #100229)
Rogers E. Harrell, Esq. (SC Bar #101532)
John M. Grantland, Esq. (SC Bar #64158)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Phone: (803) 782-4100
Email: wsawyer@murphygrantland.com
rharrell@murphygrantland.com
jgrantland@murphygrantland.com

Attorneys for Respondents

Other Counsel of Record:

John S. Nichols, Esquire
Bluestein Thompson Sullivan, LLC
1614 Taylor Street
Columbia, SC 29202
Email: john@bluesteinattorneys.com

Amanda N. Pittman, Esquire
McGowan, Hood, Felder & Phillips, LLC
1517 Hampton Street
Columbia, SC 29201
Email: apittman@mcgowanhood.com

H. Patterson McWhirter, Esquire
McWhirter, Bellinger & Associates, P.A.
1807 Hampton Street
Columbia, SC 29201
Email: pat@mcwhirterlaw.com

Melissa G. Mosler, Esquire
Joye Law Firm, LLP
1333 Main Street, Suite 260
Columbia, SC 29201
Email: mmosier@joylawfirm.com

Matthew B. Rosbrugh, Esquire
MBR Law, LLC
Post Office Box 292290
Columbia, SC 29229
Email: matt@mbrlawllc.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

CASES

STATUTES AND RULES

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether the unanimous decision of the Court of Appeals correctly found that the Circuit Court did not abuse its discretion by denying Petitioner's Motion for New Trial *Nisi Additur* or New Trial Absolute where the jury awarded Petitioner $18,500 in this soft-tissue injury case with evidence of only $8,000 in medical bills.

II. Whether the Court of Appeals correctly found that it was not erroneous and prejudicial for the Circuit Court to respond to a jury question regarding insurance payments by instructing the jury to consider only the evidence presented in the case where there was no evidence of insurance payments presented to the jury.

COUNTER-STATEMENT OF THE CASE

In his appeal, Petitioner challenged the Circuit Court's denial of his Motion for New Trial *Nisi Additur* or New Trial Absolute and the trial judge's response to a jury question. The Court of Appeals unanimously found that the verdict was well within the range of trial evidence and that Petitioner was not entitled to reversal on either ground.

This is a soft-tissue injury case with evidence of only $8,008.58 in medical bills and competing evidence on Petitioner's lost wages claim. After the January 28, 2016 automobile accident, Petitioner returned to work in early April 2016 and did not seek any additional treatment in the more than three-and-a-half years between then and trial. At trial, Respondents presented Petitioner's W-2s as evidence that Petitioner's lost wages were $3,389.00. The jury awarded Petitioner $18,500. Petitioner moved for a new trial *nisi additur* or new trial absolute arguing that this amount was inadequate. The trial judge denied Petitioner's Motion.

The Court of Appeals unanimously affirmed, finding that the Circuit Court did not abuse its discretion in denying Petitioner's Motion for a New Trial *Nisi Additur* or New Trial Absolute. As the Court of Appeals recognized, it is possible "to interpret the evidence in this case to find Nelson's economic damages totaled $11,397.58, including $8,008.58 in medical bills and $3,389.00 in lost wages as reflected by his 2015 and 2016 W-2s." (September 6, 2023 Court of

Appeals Order). The Court of Appeals further found that "the undisputed medical bills and disputed lost wages figure can be accounted for within the jury's $18,500 verdict and the trial evidence supports the jury's award." (*Id.*).

Petitioner also argued he was entitled to a new trial based on the Circuit Court's response to a jury question. During deliberations, the jury asked about insurance payments. The trial judge responded that the jury was to consider only the evidence presented during the trial. During the trial, there was no evidence presented concerning insurance payments. The Court of Appeals unanimously found that the Circuit Court did not abuse its discretion by giving this response. The Court of Appeals also held that Petitioner failed to show that he was prejudiced by such response.

FACTUAL AND PROCEDURAL BACKGROUND

I. Statement of the Facts

A. Petitioner's Medical Treatment Claim

Petitioner alleged that he suffered a back injury in the January 2016 auto accident. Petitioner's treating physician testified that he had previously treated the Petitioner for back issues in 2013, several years before the accident at issue. (R. p. 43, lines 12–20).[1] A March 2016 MRI revealed Petitioner had disc bulges and herniations. However, according to Dr. Hunt – Petitioner's own treating physician – the odds were "[n]o greater than 50 percent" that the wreck aggravated Petitioner's existing back condition and caused the disc herniation to become symptomatic. (R. p. 45, lines 9–17). Dr. Hunt testified that the sort of disc bulges and herniations revealed in the MRI are commonly caused by degenerative spine disease and occur in many people that have not been involved in a car accident. (R. p. 46, lines 9–17). Dr. Hunt admitted

[1] Dr. Hunt testified at trial via deposition.

that he had "no idea whether any of the conditions reflected in the MRI were caused by this wreck." (R. p. 46, lines 18–21). Dr. Hunt also testified that Petitioner's subjective complaints were not consistent with the MRI results. (R. p. 46, line 25–p. 47, line 16).

Petitioner testified that on February 19, 2016 – about 20 days after the accident – he told his doctor that he felt able to return to work. (R. p. 89, lines 1–9). Appellant also testified that on April 7, 2016 he told his physical therapist that, "I'm doing great, man, nothing to complain about." (R. p. 89, line 15–p. 90, line 15).

Despite this testimony, Petitioner claimed ongoing injuries and sought medical losses "going into the future." (R. p. 124, lines 16–17). However, he failed to present evidence at trial that future treatment was necessary or reasonable. On April 8, 2016, Dr. Hunt cleared Petitioner to return to work. (R. p. 90, lines 1-6). Dr. Hunt testified that at that time Petitioner was doing well with no complaints. (R. p. 48, lines 7-11). Dr. Hunt testified that there would be no need for further treatment with an orthopedist or neurologist if Petitioner had no symptoms. (R. p. 48, lines 12–16). Petitioner has not treated for back pain since April 8, 2016 and did not provide evidence that he requires future treatment. (R. p.44, lines 8–10; p. 90, lines 1-15). Petitioner testified that his medical bills totaled $8,008.58. (R. p. 76, lines 16-20).

B. Petitioner's Lost Wages Claim

Petitioner testified that he had lost wages of "$11, $11.5, $12,000, $11, in that area." (R. p. 77, lines 10-12). He testified that he missed 51–52 days of work and was paid approximately $26–27 per hour and worked about 42 hours per week. (R. p. 77, lines 3–12). Petitioner did not provide any documentation corroborating his lost wages testimony or provide witness testimony from his employer regarding the calculation of his wages. (R. p. 81, line 25-p.82, line 2). In closing argument, Petitioner's counsel alleged lost wages in excess even of the range to which

Petitioner testified. (R. p. 122, lines 8-25 (arguing he was entitled to over $13,000 in lost wages)).

Petitioner's W-2s did not corroborate his lost wages claim. Respondents solicited Petitioner's testimony regarding his W-2s from 2015 to 2018, which were entered into the record by the parties' stipulation. Petitioner's W-2s showed lost wages of $3,389.00 in 2016, with his wages rising in the years following the 2016 accident. (R. p. 82, lines 10-p.87, line 15). Thus, the jury heard competing evidence on Petitioner's lost wage claim.

II. Procedural History

Petitioner filed this lawsuit on June 19, 2018. The jury heard the case on January 23–24, 2020. Respondents moved *in limine* for an order prohibiting the use of the word "insurance" at trial. (R. p. 100, lines 7-21). Petitioner argued in favor of being able to inform the jury that the Respondent company had a liability insurer. (R. p. 53, line 5-p. 56, line 17). The Court granted the Respondents' Motion. (R. p. 100, lines 7-21). Nonetheless, during the trial Petitioner's counsel solicited the following testimony from Charles Baughman regarding the training of his tow truck drivers:

> Q: Do you know if just anyone off the street can operate a tow truck that is as large as yours without any special training?
>
> A: Not without training. There's not an insurance corporation no where that would touch them. You cannot insure them.

(R. p. 108, lines 19–24). This passing reference was the only time in the two-day trial that the word insurance was uttered. Petitioner did not object to this testimony, move to strike it, or otherwise request a curative instruction from the Circuit Court.

On January 24, 2020, the Circuit Judge held an informal, *in camera* charge conference off the record. (R. p. 120, lines 16–18). There were several charges Petitioner requested, which the court decided not to charge, including one involving insurance. (R. p. 120, lines 18–20). The

court marked Petitioner's requested jury charges as an exhibit for the record. (R. p. 165). Although Petitioner requested an insurance charge, Petitioner never referenced Baughman's comment about the insurability of untrained drivers as a reason for the Circuit Judge to give an insurance charge to the jury.

After the parties made their closing arguments, the court provided a copy of the jury charges to the parties to confirm that the charges conformed to its prior decisions. (R. p. 130, lines 9–11). The parties agreed that the charges conformed to the court's previous decisions and did not make any new objections regarding the charges. (R. p. 130, lines 12–19). Again, Petitioner did not request an insurance charge based on Baughman's testimony. The court advised the parties that they would have one last opportunity, after the jury charge was given, to "protect yourself on the record," if anything came to mind during the jury charge. (R. p. 130, lines 20–25).

The court then charged the jury. On the general consideration of evidence, the Circuit Court charged the jury that it was to consider only the evidence before it. (R. p. 131, lines 13–15). Specifically, the charge stated:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from this witness stand, and any exhibits which have been made a part of the record in this case and any stipulations of counsel.

(R. p. 131, lines 14–21). The Circuit Court also gave the standard, lengthy charge on the consideration and calculation of damages. (R. p. 133, line 10–p. 138, line 23). Finally, the Circuit Judge charged the jury not to render a verdict based on sympathy, prejudice, passion, emotion, or anything else not in the record. (R. p. 139, lines 11–13).

After the Circuit Judge charged the jury, he excused them and asked counsel for both parties if they had "any additional charges or exceptions, objections to the charge." (R. p. 140,

lines 5–6). Petitioner did not request additional charges or make an objection to the given charge. (R. p. 140, line 7).

During deliberations, the jury sent a note to the Court asking "what insurance has paid for/from both parties." (R. p. 140, lines 18–25). At that time, Petitioner's counsel renewed his request that the Circuit Judge give his proposed insurance charge to the jury. (R. p. 141, lines 4–5). Petitioner's counsel did not argue that Baughman's passing reference to insurance was the basis for his request or that it caused the jury's question.

The Circuit Judge declined to give the requested charge and instead responded to the jury's question by reiterating to the jury to "consider only the evidence presented during the trial." (R. p. 141, lines 7–10). During the trial, no party introduced evidence of insurance, and no witness referenced any payments made by any insurance companies. In other words, in response to a jury question of "what insurance has paid for/from both parties" – a question for information that was not in the evidence – the Circuit Judge instructed the jury to limit its consideration to "only the evidence presented during trial", which did not include insurance.

The jury continued deliberations and ultimately awarded Petitioner $18,500. (R. p. 17). On January 27, 2020, Petitioner filed a Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute. In the Motion, Petitioner never contended that the passing reference to insurance in Baughman's testimony influenced the jury's deliberations. (R. pp. 146-49). The Circuit Court denied Appellant's Motion, concluding that the evidence supported the jury's verdict. (R. pp. 9-13). The Court of Appeals unanimously affirmed the Circuit Court's denial of the Motion and found that the Circuit Court's response to the jury question was appropriate.

STANDARD OF REVIEW

The Court "will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power." *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (citation omitted); *South Carolina Dep't of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020). Pursuant to Rule 242 of the South Carolina Appellate Court Rules, reasons for granting certiorari include "novel questions of law," "[w]here there is a dissent in the decision of the Court of Appeals," "where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court," where substantial constitutional issues are directly involved, or where federal questions are included. Rule 242(b), SCACR. None of these situations applies here. The standards at issue are well established, the Court of Appeals decision was unanimous, and the Court of Appeals faithfully applied prior decisions of this Court. Likewise, this case does not involve any substantial constitutional issues or federal questions.

ARGUMENT

I. Petitioner's Petition for Writ of Certiorari fails to set forth any "special reasons" justifying the Court's review in this case.

The unanimous decision of the Court of Appeals does not merit review because it is in full accord with the rulings of this Court and does not involve a novel question of law. Under the standards set forth by this Court, neither the denial of Petitioner's Motion for New Trial *Nisi Additur* nor the Circuit Judge's response to the jury question merits this Court's review.

The first question before the Court concerns denial of a motion for new trial *nisi additur* based on a jury award that Petitioner considers inadequate. This issue is not a novel question of law. This Court previously stated: "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." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993). Thus, the Court has addressed this issue

and set forth a discretionary standard of review. Furthermore, the "jury's determination of damages is entitled to substantial deference." *Welch v. Epstein*, 342 S.C. 279, 303, 536 S.E.2d 408, 420 (Ct. App. 2000) (*citing O'Neal*). A new trial is only required "[i]f the amount of the verdict is *grossly* inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." *Id.* (emphasis in original). "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). The jury's providence is not to be invaded without compelling reasons to justify such an invasion. *Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993).

In this soft-tissue injury case with evidence of only $8,008.58 in medical bills, Petitioner has not and cannot show that the Lexington County jury's award of $18,500 was "*grossly* inadequate" or that the Circuit Court abused its discretion in refusing to award an additur. At trial, Petitioner's W-2s were entered into evidence and showed lost wages of only $3,389.00. If the Lexington County jury accepted this evidence as the amount of Petitioner's lost wages claim, then its $18,500 award included Petitioner's medical bills, lost wages, and additional amounts for pain and suffering. Thus, under the Court's deferential standard, Petitioner cannot show that the $18,500 award is "*grossly* inadequate…so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence." *See O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556.[2] "In

[2] Petitioner also improperly argues that the amount of an offer of judgment under Rule 68, SCRCP is evidence of the inadequacy of the verdict. This argument violates the express language of Rule 68: "If the offer of judgment is not accepted . . . evidence thereof is not admissible except in a proceeding after trial to fix costs, interests, attorney's fees, and other recoverable monies."

considering a motion for new trial *nisi*, the trial court must evaluate the adequacy of the verdict in light of the evidence presented." *Welch*, 342 S.C. at 303, 563 S.E.2d at 420 (citation omitted). The jury's verdict here was well within the range supported by the evidence, and the Court of Appeals correctly refused to interfere with the jury's determination or the Circuit Judge's discretion on appeal.

Petitioner's other issues before the Court concern a circuit court's response to a jury question. In reviewing jury charges for error, the Court is to consider "the court's jury charge as a whole in light of the evidence and issues presented at trial." *Keaton ex rel. Foster v. Greenville Hosp. Sys.*, 334 S.C. 488, 497, 514 S.E.2d 570, 575 (1999) (citation omitted). *See also State v. Perry*, 440 S.C. 396, 404, 892 S.E.2d 273, 277 (2023). "To warrant reversal, the refusal to give a requested jury charge must be both erroneous and prejudicial." *Fairchild v. South Carolina Dep't of Transp.*, 398 S.C. 90, 104, 727 S.E.2d 407, 414 (2012).

"An appellate court will only reverse a trial court's decision regarding a jury charge if there is an abuse of discretion." *State v. Cottrell*, 421 S.C. 622, 643, 809 S.E.2d 423, 435 (2017) (citation omitted). "It is not error to refuse a request to charge when the substance of the request is included in the general instructions." *Brown v. Stewart*, 348 S.C. 33, 53, 557 S.E.2d 676, 686 (Ct. App. 2001); *Varnadore v. Nationwide Mut. Ins. Co.*, 289 S.C. 155, 160, 345 S.E.2d 711, 714-15 (1986) (affirming trial court's refusal to charge jury on a correct statement of law where the "request was included in the trial judge's instruction"). Here, the jury did not hear any evidence as to insurance payments. Thus, the Circuit Court's charge that the jury could only consider the evidence presented adequately charged the issue.

Prior to jury deliberations, the Circuit Court charged the jury not to render a verdict based on sympathy, prejudice, passion, emotion, or anything else not in the record. (R. p. 139, lines 11–

13). The Circuit Court charged the jury: "You are to consider only the evidence before you." (R. p. 139, lines 14-21). The Circuit Court also charged the jury on the consideration and calculation of damages. (R. p. 133, line10-p.138, line 23).

There was no evidence of insurance coverage or insurance payments in the record. When the jury later asked about insurance on their own, the Circuit Court again instructed them to consider only the evidence presented during the trial. (R. p. 141, lines 7–10). This response does not create a novel question of law. This is a routine response circuit courts give to jury questions when juries ask for information that is not within the record. The charge falls well within the Circuit Court's discretion, and it accurately charged the law to the jury. The Circuit Court charged the jury that it was limited to the evidence presented. That evidence did not include insurance payments.

Additionally, South Carolina's appellate courts have previously held that this charge in response to a jury question about insurance is appropriate. In *Gastineau v. Murphy*, there was no evidence of liability insurance during the trial, but the jurors inquired about it during deliberations. 323 S.C. 168, 183, 473 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998). In response, the trial judge instructed the jurors "to base their decision only upon the evidence presented at trial." *Id.* Like here, the Court of Appeals in *Gastineau* concluded that "the court properly instructed the jury to consider only the evidence presented and handled the questions in an appropriate manner." *Id.*

To require reversal here based on the Circuit Court's response is to ignore the fact that the evidence presented at trial included no evidence of insurance payments. Petitioner speculates that the jury disregarded the Circuit Court's instruction, but there is no indication the jury did so. The charge to consider only the evidence presented necessarily precluded jury consideration of

insurance payments, and the verdict is consistent with a jury that faithfully followed that charge. Petitioner's speculation that the jury ignored this instruction does not merit this Court's review.

II. Petitioner has waived any argument that a trial comment – to which Petitioner made no objection and on which Petitioner based no post-trial motion – required a different jury instruction.

Petitioner argues on appeal that he was entitled to a jury instruction about insurance because a "comment" made during the trial "raised in the minds of the jurors that the Defendants had to be insured." (Pet. for Writ of Cert., p. 6). However, Petitioner never made this argument to the Circuit Court – not during the charge conference, after the charge, or in post-trial motions. Instead, Petitioner first asserted that the passing reference to insurance justified the requested charge after filing his Notice of Appeal in this case. The argument is not preserved for appeal.

By way of background, Petitioner's desire to inject insurance into the case was apparent from an early point, and defense counsel moved *in limine* to keep insurance out of the case. The Circuit Court heard lengthy arguments on the issue and rightfully granted that Motion *in Limine*. (R. pp. 52-62, 100-127). Petitioner has not appealed that decision.[3] Despite the ruling *in limine*, the "comment" at issue is testimony Petitioner's counsel solicited from Charles Baughn about the training of his tow truck drivers:

> Q: Do you know if just anyone off the street can operate a tow truck that is as large as yours without any special training?
>
> A: Not without training. There's not an insurance corporation no where that would touch them. You cannot insure them.

(R. p. 108, lines 19–24). This passing, general reference to insurance was the only mention of insurance in the entire two-day trial. Petitioner did not object to the response, move to strike, or take any other action.

[3] Ironically, Petitioner sought to inject insurance into the case, solicited testimony that referenced insurance, and now claims that a passing reference to insurance creates reversible error.

Regardless of Petitioner's counsel's reasons for not objecting, "[o]ne may not take his chance of a favorable verdict and, after an unfavorable one, raise an objection that should have been made before the verdict was rendered." *State v. Mayfield*, 235 S.C. 11, 23–24, 109 S.E.2d 716, 724 (1959). Furthermore, neither the transcript nor Petitioner's post-trial Motion contains any mention of Baughman's passing comment as a ground for the requested relief. *See* (R. pp. 146-49). Therefore, this argument is not preserved for appeal. *See Padgett v. Mercado*, 341 S.C. 229, 233, 533 S.E.2d 339, 341 (Ct. App. 2000) (holding issue was not preserved for appellate review because it was not raised in post-trial motion); *Dial v. Niggel Assocs., Inc.*, 333 S.C. 253, 257, 509 S.E.2d 269, 271 (1998) (holding issue not preserved for appellate review where argument not raised in post-trial motion).

CONCLUSION

As shown above, Petitioner fails to set forth any "special reasons" justifying the Court's review in this case. Neither the denial of Petitioner's Motion for New Trial *Nisi Additur* nor the Circuit Judge's response to the jury question merits this Court's review. These issues are subject to discretionary standards of review and do not involve novel questions of law. Moreover, the jury's $18,500 verdict was well within the range of the trial evidence, preventing Petitioner from demonstrating the prejudicial error required for a new trial. Therefore, Respondents respectfully request that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/Wesley B. Sawyer
Wesley B. Sawyer, Esquire (S.C. Bar No. 100229)
Rogers E. Harrell, Esq. (SC Bar #101532)
John M. Grantland, Esq. (SC Bar #64158)

Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Email: wsawyer@murphygrantland.com
rharrell@murphygrantland.com
jgrantland@murphygrantland.com

Attorney for Respondents

Columbia, South Carolina
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