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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable William H. Seals, Jr.
Circuit Court Judge

Appellate Case Number 2023-001308

Jane E. Vohringer,..Appellant,

v.

Robert C. Watford, ...Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in denying Appellants' Motion for New Trial, Nis Additur, and New Trial Absolute?

STATEMENT OF THE CASE

This case involves a motor vehicle accident that occurred in Surfside Beach, South Carolina on March 30, 2019. At trial the Respondent did not dispute that he was responsible for the collision, and during trial, the trial court ultimately granted Appellant's motion for a directed verdict as to the issue of liability. At the conclusion of the trial, the jury returned a verdict for the Appellant in the amount of $30,000.00.

The Respondent hired two expert witnesses who conducted a thorough and detailed accident reconstruction and biomechanical investigation of the collision. The Appellant was able to depose both expert witnesses at length and had ample time to review their reports prior to this trial. Appellant filed a motion to exclude these experts, however, the trial court permitted Respondent to proffer their testimony at trial. After thorough questioning, the trial court determined that both of Respondent's experts were qualified and admitted their testimony. Although the Appellant objected to their qualification, he never objected to the reliability of the testimony of either expert. All exhibits pertaining to both of Respondents' experts were admitted without objection from Appellant's counsel.

On June 19, 2023, Appellant filed a Motion for New Trial, Nisi Additur, and New Trial Absolute, arguing she was entitled to a new trial because: (1) the trial court should not have admitted Respondent's expert witnesses' testimony; (2) the trial court failed to hold a punitive damages trial after bifurcation; and (3) improper statements allegedly made during closing arguments.

On July 18, 2023, after consideration of the arguments of counsel, the trial court denied Appellant's motion for a new trial. This appeal followed. On August 16, 2023, Appellant timely filed a Notice of Appeal.

ARGUMENTS

I. THE TRIAL COURT CORRECTLY HELD THAT RESPONDENTS' EXPERT WITNESSES'S TESTIMONY WAS RELIABLLE AND THE TRIAL COURT'S HOLDING WAS NOT AN ABUSE OF DISCRETION.

Rule 702 sets the standards for expert testimony in a trial. It states that ""If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702 SCRE. A review of the evidence in this case shows that the trial judge correctly found the testimony of Mr. Marc Paradiso (Respondent's accident reconstructionist) and Dr. Ian Campbell (Respondent's biomechanical expert) met all the requirements of the rule. The evaluation and ultimate qualification or disqualification of an expert is squarely within the discretion of the trial court. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 609 S.E.2d 506 (2005). For this Court to disturb the trial court's ruling the Appellant must show a clear abuse of discretion. *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176. It is respectfully submitted that the Appellant has failed to show any evidence indicating a clear abuse of discretion.

Our Courts have recognized that the trial court must make three determinations as to an expert's testimony prior to admitting it into evidence. First, the trial court must find that the subject matter is beyond the ordinary knowledge of a jury, then that the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter, and then that the substance of his testimony must be reliable. *Watson v. Ford Motor Co.*, 389 S.C., 389 S.C. 434, 699 S.E.2d 169 (2010). The subject matter related to both accident reconstruction and biomechanical analysis is clearly beyond the ordinary

knowledge of a jury. Further, both of Respondent's experts have acquired the requisite knowledge and skill to qualify as experts in their fields. Appellant's main focus is upon the reliability of the substance of both experts' testimony.

As set forth in Appellant's brief, the Court allowed a proffer of Mr. Paradiso's testimony. This proffer included a thorough and sifting cross-examination by Appellant's counsel. The testimony that was elicited established several items of note. One, Mr. Paradiso was qualified to render expert opinions (later bolstered by his testimony before the jury and documented by his CV (Defendant's Exhibit 1). The Court justifiably concluded that Mr. Paradiso was qualified to render his expert opinions in the area of accident reconstruction.

The Court went beyond the foregoing. After hearing the proffer, and allowing Appellant's counsel to cross examine Mr. Paradiso extensively, the Court concluded the opinions of Mr. Paradiso were reliable and helpful. (Tr. 102, ¶¶ 15-19). This ruling, given the magnitude of information in the trial record about both Respondent's experts, was not at abuse of discretion. Both were shown to be qualified as experts in their respective fields. Their CV's establish that both are peer reviewed and have published many papers related to their specialties. (Defendant's Exhibit #1 and Defendant's Exhibit # 12). In the present case nothing in the record shows that Respondent's experts were unqualified or otherwise worthy of exclusion. Therefore, after an extensive proffer of Marc Paradiso's proposed testimony, the court properly found that he was duly qualified to be an expert witness as to accident reconstruction. Similarly, Dr. Ian Campbell was also properly found to be qualified as an expert witness in the field of biomechanics.

As previously mentioned, the Appellant has focused upon the reliability of the testimony of both experts. Initially, Appellant failed to object as to the reliability of the evidence supplied by

Respondent's experts. Appellant only objected to the expert's qualifications. Appellant's failure to object to the reliability of Mr. Paradiso's testimony constitutes a complete waiver. *See, Greer v. Greenville County*, 245 S.C. 442 (SC 1965) (Expert testimony, which is introduced without objection, should be considered, and can support a verdict). Appellant did object to Mr. Paradiso being qualified as an expert witness, but her counsel never made a contemporaneous objection to the reliability of his testimony. Appellant cannot now contest Mr. Paradiso's reliability as the time to do so has long passed.

Primarily the Appellant attacks the reliability of Mr. Paradiso's testimony. She then alleges that Dr. Campbell's testimony was not reliable because it was based upon Mr. Paradiso's testimony. The Appellant cites *State v. Council,* 515 S.E.2d 508, 335 S.C. 1 (S.C. 1999). In that case the Court sets forth four criteria for determining the reliability of expert testimony. Those four criteria are:

1. The publications and peer review of the technique.

2. Prior publication of the method to the type of evidence involved in the case.

3. The quality control procedures used to ensure reliability; and

4. The consistency of the method with recognized scientific laws and procedures.

Looking at the *Council* factors, the trial court properly found that the testimony of both men was reliable. Both experts are peer reviewed and the discussion below will show that their opinions and testimony were based upon scientific principles and established methodologies. Both Mr. Paradiso and Dr. Campbell have published numerous treatises and articles related to the techniques and methods particular to their respective fields. Further, their testimony showed that each expert

used accepted quality control procedures when doing their analysis. Both were extensively questioned by Appellant's counsel, and both clearly set forth their rationale for their opinions, as well as how they came to those opinions. Likewise, the extensive testimony given by both experts showed consistency with recognized laws and procedures.

Appellant has not shown anything which would warrant a determination that the testimony of Respondent's experts was not reliable in the eyes of the law or scientific opinion. The jury were the people who were to determine the weight to be placed upon these opinions. The full record from trial shows the litany of items relied on by Respondent's experts. Now, Appellant alleges that the trial Court got it wrong. The trial testimony further demonstrates the expert's reliability. Items in the record that were relied upon by Respondents' experts include the following:

Exhibit 2 (admitted without objection)- Photographs of Plaintiff's vehicle; (Tr. 115, ¶¶ 22-25).

Exhibit 3 (admitted without objection)- 2d Model of Plaintiff's vehicle; (Tr. 118, ¶¶ 16-20).

Exhibit 4 (admitted without objection)- Photographs of Defendant's truck; (Tr. 120, ¶¶ 3-8).

Exhibit 5 (admitted without objection)- Impact orientation of the vehicles; (Tr. 121, ¶¶ 19-23).

Exhibit 6 (admitted without objection)- IIHS test results as compared with Plaintiff's vehicle; (Tr. 123, ¶¶ 22-25 -124, ¶ 1).

Exhibit 7 (admitted without objection)- Overhead of IIHS test showing engagement of test vehicle; (Tr. 126, ¶¶ 12-17).

Exhibit Ex. 8 (admitted without objection)- Comparison of damage to subject vehicle vs. IIHS test vehicle; (Tr. 129, ¶¶ 3-9).

Exhibit Ex. 9 (admitted without objection)- Photographs of IIHS test; (Tr. 131, ¶¶ 5-11).

Exhibit 10 (admitted without objection)- Accelerometer Graph; (Tr. 132, ¶¶ 23-25 – 133, ¶¶ 1-3), and

Exhibit 11 (admitted without objection)- Overhead of Nissan Versa PDOF (principle direction of force). (Tr. 137, ¶¶ 2-7).

Furthermore, multiple calculations and analysis accompany these exhibits, including testimony that the comparison provided is a valid and recognized methodology in the field of accident reconstruction. Specifically, the trial testimony demonstrated that there was only six inches of intrusion into the Appellant's vehicle. Mr. Paradiso knew there was limited damage to Appellant's vehicle given that the windshield wiper reservoir was undamaged. He repeatedly stated this point during both his direct examination and his cross examination. For example, under questioning from Respondents' counsel on re-direct, Mr. Paradiso stated, "The hood was not damaged in this impact, so therefore that is one of our validating scenarios. The water bottle is also nominally located at that 6-inch mark, so the water, or sorry, so if the windshield washer reservoir wasn't damaged you couldn't have had more than 6 inches of engagement between the two vehicles. It's a plastic piece, it's a plastic container, it would have been ripped right off of the structure of the vehicle if it had been contacted." (Tr. 156, ¶¶ 14-22). (See also, Tr. 117, ¶¶4-9, and Tr. 153, ¶¶ 8-18). Respondents' experts provided the significance of this fact **many** times during cross-examination. Respondents' experts explained how the amount of deformation from this accident compared to a well-documented IIHS crash test. Respondents' experts explained how the relatively small amount of deformation, including the location of the deformation, related to the forces that a driver, such as Appellant, would be expected to experience during the incident. Dr. Campbell later used this information to testify that

the medical issues experienced by Appellant were not consistent with the forces she sustained in the accident. (Tr. 172, ¶¶ 1-25). Appellant did not call an expert witness to contest the testimony of Respondents' experts. Based on the work of Respondents' experts, it is patently clear their testimony was reliable and helpful. Indeed, the jury verdict speaks volumes on those issues

Appellant criticizes Mr. Paradiso because he did not speak to the witnesses. The Appellant extensively cross-examined Paradiso on this very issue. Mr. Paradiso clearly and competently explained that information from the witnesses was not necessary, given the work he performed and methodology he utilized. ((Tr. 145, ¶¶ 1-18). He stated numerous times during cross-examination by Appellant's counsel that his analysis did not require that he speak with Mr. Watford or the Appellant. Instead, he used crush from the subject vehicle and compared it to crush from a well-documented IIHS crash test to determine the delta-V for the subject vehicle. He further explained that this methodology is accepted, typical and often utilized in his field of expertise. Much was made at trial about Mr. Paradiso not running a crash test, but he competently explained that such tests are cost prohibitive to do in each and every case. (Tr. 158, ¶¶ 1-21).

Appellant's arguments regarding the delta-V associated with Appellant's vehicle are full of confusion on Appellant's part and do not track the evidence at trial. Appellant knows, or should know, that a 12 mph delta-V means that the Appellant's vehicle experienced a change in velocity of 12 mph as a result of the impact. A delta-V of 12 mph could be consistent with a vehicle traveling 42 mph and decreasing its speed to 30 mph as a result of the impact, or a vehicle traveling 20 mph and decreasing its speed to 8 mph after impact. Again, delta-V is the **change** in speed of a vehicle. And, it is the change in speed that matters when looking at the forces associated with the collision. Appellant's attempt to confuse the issue didn't work at trial with the jury and it shouldn't work now.

Appellant is critical of a lack of testimony regarding calculations, however, calculations were performed and discussed. It was abundantly clear from the trial exhibits identified above that calculations were conducted. Indeed, Mr. Paradiso discussed measurements, deformation/crush, comparisons to crash tests, how calculations and measurements led to his opinions, etc. but Appellant's counsel never asked him to show his calculations to the jury (despite the fact Appellant is aware of same). That said, Mr. Paradiso provided the jury with many exhibits showing his calculations and methodology. Appellant's brief fails to recognize these. Furthermore, Appellant's counsel failed to object at the time of the testimony – likely because he knows the calculations exist and couldn't later make this argument. At any rate, calculations were conducted to support the testimony and Appellant's counsel simply didn't ask about them. Nothing supports an exclusion of Mr. Paradiso's testimony. His exhibits showing his work were admitted without objection. Mr. Paradiso explained his methodology and calculations for hours. Contrary to Appellant's assertions, Mr. Paradiso didn't simply "eyeball" the evidence or otherwise fail to provide the Court and jury with the bases for his opinions.

Appellant cites *Reali v. Mazda*, 106 F. Supp.2d 75 (2000). *Reali*, however, is not controlling and does not warrant exclusion of Respondent's experts. In *Reali* the Court excluded the expert opinion because the party offering the expert "produced no testimony or record evidence suggesting that this is an acceptable way to determine delta V." Here, Mr. Paradiso testified numerous times that his methodology was accepted in his field and was an appropriate method for determining delta-V.

Lastly, Appellant references *Thorndike v. DaimlerChrysler*, 266 F. Supp. 2d 172 (2003) for the proposition that a party offering an expert has the burden of establishing the methodology utilized

is reliable. Here, again, Mr. Paradiso met this burden in his direct examination and extensive cross-examination. Indeed, the only evidence at trial regarding the methodology supported a finding that it was reliable, accepted in the field and appropriate. There was no error of law and there was ample evidence in the record to support the finding that Mr. Paradiso was giving reliable testimony. *See, Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ('An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.'). For the Court to allow this reliable expert testimony into the record was clearly not an abuse of discretion. It was the province of the jury to give this testimony and evidence the proper weight when exercising their duties as the ultimate finder of fact.

As discussed earlier herein, Appellant tries to argue that Dr. Campbell's testimony was essentially unreliable by extension. The foundation for this flawed argument is that Dr. Campbell based some of his analysis on material from Mr. Paradiso's work. Therefore, if Mr. Paradiso is not reliable then Dr. Campbell is not also. First, as discussed extensively herein, Mr. Paradiso most certainly provided reliable testimony on the reconstruction of this accident. Second, there is ample evidence in the trial record which shows that Dr. Campbell provided reliable testimony for the jury to consider. Third, any criticism or objection to Dr. Campbell's testimony has been waived. There was no contemporaneous objection when Respondent moved to qualify Dr. Campbell as an expert. Therefore, Appellant cannot complain now that the trial is over. In fact, there was no independent basis presented for the exclusion of any of Dr. Campbell's testimony. *Without* a contemporaneous objection at trial, this issue has been completely waived by the Appellant. Absent an objection at the time the witness is presented, any claims the Appellant had were waived. *United States v. Odom,* 736

F.2d 104 (4th Cir. 1984); *Patterson v. Reid*, 318 S.C. 183 (SC Ct. App 1995) ("A party cannot for the first time raise an issue by way of a motion which could have been raised at trial").

II. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY NOT HOLDING A PUNITIVE DAMAGES PHASE AFTER BIFURCATION, BECAUSE THE APPELLANT HAD ABANDONED THE PUNITVE CLAIMS.

Any claim for punitive damages was abandoned and/or waived by Appellant or her counsel. *See Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 734 S.E.2d 177 (2012) (recognizing a party's ability to abandon a claim); *Gravelle v. Roberts*, 2008 WL 9841726 (S.C. App. 2008) (Plaintiff abandoned several theories at trial); cf. 75 Am.Jur.2d Trial § 649 at 608 (1974) (a court is not warranted in submitting to a jury an issue raised by the pleadings but abandoned by the party pleading it). In this case:

-Appellant's counsel made no mention of a punitive damages claim in his opening statement; (Tr. 30-40).

-Appellant's counsel failed to elicit any evidence to support a punitive damages claim from any witness;

-Appellant's counsel did not reference a claim for punitive damages during his closing argument. (Tr. 353-391).

-Appellant's counsel failed to provide jury instructions on punitive damages; and

- Appellant's counsel failed to include any claim for punitive damages on the Verdict form.

The record is clear that the jury was never charged on punitive damages. Due to the actions of Appellant's counsel, the jury lacked a factual basis for an award of punitive damages, the applicable law to make a decision regarding a punitive damages claim, and a verdict form which would have allowed them to award same. It would have been error for the jury to have awarded punitive

damages; Appellant's failure to provide the jury with the relevant law relating to punitive damages precluded a punitive damages award. Lastly, Appellant's failure to request jury charges on the issue of punitive damages, and object to the charges actually given, results in a waiver of the issue.

As Appellant recognized in her brief requesting a new trial, and in her brief to this Court, without a request for bifurcation, it was incumbent for Appellant to pursue the issue in Appellant's case. As this Court is aware, the trial was not bifurcated and, as such, the jury was required to consider all claims, all law and all damages when rendering its decision. It is important to note that even if the matter had been bifurcated, the jury would have still been required to determine whether punitive damages were appropriate in the first phase. Appellant, however, did not provide any evidence, argument or law regarding that critical issue. Appellant cannot be heard to complain now. The time to complain was at the trial of this case while the jury was still empaneled. But, Appellant failed to do so. Instead, after the Court read the jury verdict, Appellant and her counsel simply got up and left the courtroom. Appellant's counsel apparently knew unequivocally at that point that there was nothing left for the jury to decide.

III. THE TRIAL COURT PROPERLY DENIED THE APPELLANT'S MOTION FOR A NEW TRIAL NISI

The Appellant argues that Respondent's counsel improperly directed the jury to award her $25,000. It is patently clear, as will be detailed below, that Appellant's counsel opened the door to Respondent's counsel discussing the value of the case. Appellant focuses wrongly on the emergency room bill.

With respect to the emergency room bill, there was never any mention of this during trial. The Respondent and the Appellant did not put into evidence of the cost of any emergency room services. Instead, Appellant's counsel broadly opened the door to discussions regarding the value

of the case during his opening statement and closing argument. The law in this State is clear that otherwise inadmissible evidence may be properly admitted when opposing counsel opens the door to that evidence. *State v. Page*, 378 S.C. 476, 663 S.E.2d 357 (Ct. App. 2008). Further, the admission of evidence is fully within the Court's discretion. *Fowler v. Nationwide Mut. Fire Ins. Co.*, 410 S.C. 403, 764 S.E.2d 249 (SC App. 2014). Appellant made a strategic decision and it backfired. In his opening Appellant's counsel suggested that the Jury "So what is your role again? Your role is simply to decide what her damages are. With that role in mind, I want you to keep a few questions in mind this week, the next few days as we go through this case. These questions are for Mr. Simmons who represents Mr. Watford and his business. I want you to try and remember to ask Mr. Simmons or have him answer what does he think Jane's damages are." (Tr. 35, ¶¶ 16-22). Then, during his closing arguments the Appellant's counsel restated the suggestion that the jury ask Respondents' counsel about the value of the case, "He may have an idea of it. But I asked him, I put him on notice on Monday, tell us what you think it is, tell this jury what you think those damages are." (Tr. 356, ¶¶ 10-12). Respondents' counsel, due to these statements by Appellant's counsel, merely suggested a number that seemed "reasonable," given that the facts of the case show a minor motor vehicle accident accompanied by an Appellant who had significant pre-existing injuries. During deliberations the jury asked for the amount of the emergency room bill. Had Respondents' counsel, as Appellant suggests, told the jury the amount of the ER bill there would have been no need for this request. This is a red herring on the part of the Appellant and most certainly does not warrant a new trial.

Appellant's request for additur or new trial based on the amount of damages awarded is disingenuous and improper. The accident was a minor motor vehicle accident with minor damage to

Appellant's vehicle. Appellant, it should be noted, failed to disclose all of her pre-existing conditions. Further, her expert testified to a litany of pre-existing conditions, several in the same areas she claimed were injured in the subject accident. Appellant's pre-existing conditions included (but are not limited to):

Idiopathic osteoarthritis (Tr. 323, ¶ 8).

Osteoarthritis of knee (Tr. 398, ¶¶ 16-17).

Derangement of medial meniscus (Tr. 324, ¶¶ 12-13).

Shoulder joint pain (Tr. 325, ¶¶ 16-25) (Tr. 326, ¶¶ 1-5)

Pain in elbow (Tr. 324, ¶¶18-23)

Hip pain (Tr. 324, ¶¶ 21-25)

Displacement of lumbar intervertebral disc without myelopathy (Tr. 325, ¶¶ 1-15)

Degeneration of intervertebral disc (Tr. 325, ¶¶ 1-15).

Bursitis of shoulder (Tr. 325, ¶¶ 16-21).

Migraines (Tr. 278, ¶¶ 23-25 - 279 ¶¶ 1-25).

Moreover, expert testimony was provided by Respondents that NONE of Plaintiff's alleged injuries were consistent with the subject accident. A PhD biomechanical engineer provided this testimony, with no objections from the Plaintiff. (Tr. 200, ¶¶ 1-25). It was Appellant's own expert who testified that many of her cognitive issues could be related to medication she was taking. (Tr. 65, ¶¶ 20-22). The evidence abundantly supports the jury's award. As the ultimate finder of fact, the jury weighed all of the evidence in the record, to include Appellant's medical experts and Respondents' experts. The mere fact that they reached a conclusion contrary to what the Appellant wanted is not a valid reason to overturn their decision.

Indeed, the Court itself recognized the potential for this result and encouraged the parties to discuss resolution. Instead of having a discussion, Plaintiff chose to roll the dice. The Plaintiff will have to accept and live with this gamble on her part. Nothing in the trial record shows that the jury acted in an arbitrary and capricious manner, or that the trial court abused its discretion. The trial record is replete with evidence that supports this jury's decision. The jury showed no malice and appropriately weighed the evidence before them in the jury room. The Appellant is inappropriately asking this Court to invade the province of the jury and substitute its opinion for that of the jury.

CONCLUSION

For the reasons stated, this Court should Affirm the judgment of the Circuit Court in all particulars.

Respectfully submitted,

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