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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

Case No. 2018-CP-32-02102
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.

REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENTS

Petitioner Gerald Nelson files the following brief Reply to the Return filed by Respondents Christopher S. Harris and Charles L. Baughman, Sr. d/b/a K&B Towing, LLC. Petitioners reiterate that the circuit court committed an error of law in refusing to specifically charge the jury that it should not consider the issue of insurance in its deliberations. The Court of Appeals erred in affirming the verdict. This Court should grant review, reverse the Court of Appeals, and remand this matter for a new trial.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS FROM THIS COURT REGARDING THE JUROR'S CONSIDERATION OF INSURANCE PAYMENTS

The Court of Appeals' decision conflicts with prior decisions of the Supreme Court of South Carolina. Those decisions hold that a jury's consideration of insurance is inherently prejudicial.

Respondents do not dispute that the jury in this matter deliberated about insurance payments when attempting to reach their verdict, even though the matter of insurance *payments* was outside the record. There can be no dispute that the issues of whether and how much insurance paid to the Petitioner, if anything, is an improper topic of jury deliberations in a civil case.

A civil litigant is provided one jury verdict of monetary damages for the harms inflicted upon him, and he is entitled to a fair process in reaching the result – a result that is the fair appraisal by the jury of the evidence properly before it. Therefore, the matter before this Court is not that of a disappointed civil Plaintiff, but whether the trial court improperly refused Petitioner's specific charge in response to the jury's specific question about insurance payments.

This Court has held that "when 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.C. 444, 448-449 (Ct. App. 1997), *citing Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991). The general instruction in this case was not sufficient to address the jury's deliberation regarding insurance payments.

Noticeably absent from Respondents' brief is any recognition of this Court's holding in *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993). In *Dunn*, this Court held that the inquiry into insurance was "inherently prejudicial." *Dunn*, 311 S.C. at 44. At trial, the respondents agreed that the mere mention of insurance is "purely prejudicial" yet the Court of Appeals' opinion is silent as to this point - as is the Respondents' (Return. R. 60). Instead Respondents claim that Petitioner "speculates" that the jury continued its deliberations regarding insurance – but this Court's holding in *Dunn* presumes unfair prejudice in the verdict in light of the fact that counsel is not permitted to examine members of the jury regarding their deliberations. *Dunn, id.* at 46, 426 S.E.2d at 758 ("Realistically no prejudice can be shown unless counsel is permitted to examine members of the jury-which is forbidden.").

Particularly in light of the fact that this Court has recognized the matter of insurance as inherently prejudicial, a specific instruction to the jury to steer away from the topic of insurance was required, and in prior decisions, the Court has presumed such a charge was given to the jury. *Sullivan v. Davis*, 317 S.C. 462, 466, 454 S.E.2d 907, 910 (Ct. App. 1995). Therefore, the Court of Appeals erred in failing to grant a new trial and remand this matter to the trial court

because a new trial is the only way to cure a verdict that is the result of "some other influence outside the evidence." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004).

Respondents' focus on the amount of the verdict in what Respondents repeatedly refer to as a "soft tissue case" attempts to diminish the importance of the stakes: A fair civil jury trial. Here, the verdict is the product of deliberations which centered on the amount of insurance payments, a topic which this Court has found inherently prejudicial.

As the Court has stated repeatedly, "it is incumbent upon the court of appeals to apply this Court's precedent. *See* S.C. Const. art. V, § 9 ('The decisions of the Supreme Court shall bind the Court of Appeals as precedents.')." *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016). Under those precedents the only proper remedy is a new trial.

II. THE COURT OF APPEALS DECISION CONFLICTS WITH DECISIONS FROM THIS COURT REGARDING THE JUROR'S CONSIDERATION OF PAYMENTS FROM A COLLATERAL SOURCE

The Court of Appeals' decision is also in conflict with prior decisions of the Supreme Court which recognize that payments by health insurers are collateral sources, which are not to be considered by the jury.

The jury's questions about insurance demonstrated that they intended to discount the Plaintiff's civil damages verdict by first determining how much of his medical expenses were paid by health insurance – an improper consideration that the Court of Appeals nor the Return address in any way. Respondents cite *Gastineau v. Murphy* in support of its cause, however no party in *Gastineau* requested a charge on insurance as Petitioner requested here. *Gastineau v.*

Murphy, 323 S.C. 168, 183, 323 S.E.2d 819, 828 (Ct. App. 1996), *rev'd on other grounds*, 331 S.C. 565, 503 S.E.2d 712 (1998). Moreover, in the Court of Appeals' decision to uphold Gastineau's verdict, it held that "where the amount of the verdict falls within the range of damages testified to, the verdict cannot be disturbed on the ground of excessiveness." *Id., citing Buzhardt v. Cromer*, 272 S.C. 159, 163, 249 S.E.2d 898, 900 (1978) (emphasis added).

Gastineau is inapposite here. The harm is not simply the amount of the verdict, but the process by which the jury reached it. Had the trial court charged the jury that the jury was prohibited from considering any type of insurance payment in reaching its verdict as the Petitioner requested, this matter would not be before the Court today.

Where a requested charge states a sound principle of law not otherwise covered in the court's charge, a refusal to charge is error and requires a new trial. *Burns v. South Carolina Comm'n for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App. 1994). Petitioner urges that his requested insurance charge (which came from a charge book) should have been given to the jury to provide the jury with guidance on its deliberations and assurance to the Petitioner that he received a fair verdict based on the evidence at trial.

Petitioner requests that this Court grant this petition and issue a new opinion finding 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.

III. THE ISSUE IS THE JURY'S IMPROPER CONSIDERATION AND SPECULATION ABOUT INSURANCE PAYMENTS DURING ITS DELIBERATION

Respondent Charles L. Baughman's mention of his liability insurer and liability insurance in trial is part of the trial record. While neither party moved to strike or request further

instruction from the Court when Respondents' witness mentioned insurance, that remark was before the jury. Petitioner and perhaps Respondents as well did not wish to call further attention to what Respondents agree was a "passing comment" about insurance.

Contrary to Respondent's contention, Petitioner is not complaining here about the passing reference to insurance, but instead about the jury's direct inquiry into insurance payments during deliberations and the trial court's refusal to instruct them not to consider insurance. (Resp. Ret. at p. 9). All parties agree that the topic of insurance *payments* was never brought before the jury, but this was in fact what the jury told the Court it needed to know before it could conclude its deliberations. Petitioner did not waive his argument that insurance payments were not a proper the subject of the jury's deliberations and that his proposed charge would have cured his concerns about the jury improperly considering insurance.

Here, Petitioner does not reference the Respondents' own offer of judgment as a matter admissible at trial, but instead as the Respondents' good faith evaluation of the case prior to trial considering the admissible evidence. This is in response to the contention that the verdict was "within the range of the evidence." Here, the Defendants' offer of judgment was $30,000.00, yet the jury's award was just $18,500.00. (R. 29) Petitioner respectfully urges that this reviewing Court may consider the offer of judgment as evidence of the unfair prejudice suffered by the Plaintiff due to the improper consideration of insurance payments during the jury's deliberations. The only adequate remedy is a new trial.

CONCLUSION

For the reasons stated, this Court should grant the petition for a writ of certiorari, review the Court of Appeals' decision, reverse, and remand for a new trial.

Respectfully submitted,

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