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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.

APPELLANT'S FINAL BRIEF

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STATEMENT OF ISSUE ON APPEAL

I. Did the trial court err in denying Appellant's Motion for New Trial, *Nisi 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. 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.

On May 22, 2023, two (2) weeks before trial, and over six (6) years after the collision, Respondent identified two (2) expert witnesses who purportedly conducted an accident reconstruction and biomechanical investigation of the collision.

Appellant filed a motion to exclude these experts, and the trial court permitted Respondent to proffer their testimony at trial. After questioning, the trial court determined the experts were qualified and admitted their testimony.

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 during closing arguments.

On July 18, 2023, 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.

STANDARD OF REVIEW

"[T]he appellate court reviews a denial of a new trial motion for an abuse of discretion." *Kunst v. Loree*, 424 S.C. 24, 38, 817 S.E.2d 295, 302 (Ct. App. 2018) (quoting *Duncan v. Hampton Cnty. Sch. Dist. No. 2*, 335 S.C. 535, 547, 517 S.E.2d 449, 455 (Ct. App. 1999)). "The trial court's decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion." *State v. Makins*, 433 S.C. 494, 500, 860 S.E.2d 666, 670 (2021) (quoting *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006)).

"An abuse of discretion occurs when the trial court's order is controlled by an error of law or when there is no evidentiary support for the trial court's factual conclusions." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 536, 787 S.E.2d 485, 495 (2016). "In determining whether the [trial] court erred in denying a motion for a new trial, the appellate court must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Kunst*, 424 S.C. at 38, 817 S.E.2d at 302.

ARGUMENT

I. The trial court abused its discretion in finding Respondent's expert witnesses' testimony reliable.

"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. All expert testimony must meet the requirements of Rule 702, regardless of whether it is scientific, technical, or otherwise. *State v. White*, 382 S.C. 265, 270, 676 S.E.2d 684, 686 (2009).

In determining whether to admit expert testimony, the court must make three (3)

inquiries. First, the court must determine whether "the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury." *Watson v. Ford Motor Co.*, 389 S.C. 434, 446, 699 S.E.2d 169, 175 (2010). Second, the expert must have "acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter," although he "need not be a specialist in the particular branch of the field." *Id.* Finally, the substance of the testimony must be **reliable**. *Id.* (emphasis added). It is this final requirement of reliability which is the central feature of this appeal.

If the proffered testimony is scientific in nature, then the circuit court must determine its reliability per the factors set forth in *State v. Council*. *Id.* at 449-50, 699 S.E.2d at 177 (citing 335 S.C. 1, 515 S.E.2d 508 (1999)). Under *Council*, the court must consider the following:

(1) the publications and peer review of the technique;

(2) prior application 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.

335 S.C. at 19, 515 S.E.2d at 517. In this case, the Court abused its discretion in determining Respondent's experts were reliable under the *Council* factors.

Mr. Paradiso was asked to perform an accident reconstruction and form an opinion as to the severity of the collision in this case based on the change in velocity (delta-v) and the principal direction of force experienced by Ms. Vohringer's vehicle. Ultimately, Mr. Paradiso opined the delta-v of Appellant's vehicle was 12 miles per hour. The basic calculation for determining delta-v is change in velocity (from initial to end). (R. p. 170, ¶¶

10-13).[1] Mr. Paradiso testified that energy absorbed is a function of the "closing speed and the ration of the masses of the vehicles involved." (R. p. 169). Although delta-v is not necessarily an unreliable calculation for purposes of expert testimony, an expert's opinion regarding delta-v must be reliable. That is, according to Merriam-Webster dictionary, giving the same result on successive trials. Here, Mr. Paradiso's delta-v opinion was so subjective, relied on assumptions not in evidence, and failed to rely on sufficient evidence or facts. For these reasons, and the reasons herein, his opinion was unreliable and should not have been admitted.

In this case, Mr. Paradiso never identified any speed (or velocity) of Appellant's vehicle (or Respondent's). Instead, he determined the delta-v by looking at the energy absorbed by a different vehicle from a different collision and compared that to photos of Appellant's vehicle. (R. p. 112, ¶¶17-20) ("I was able to determine in that test how much energy was absorbed by that vehicle and compare it to the energy and the damage sustained on Appellant's vehicle in this case.").[2] Mr. Paradiso did not speak to any witness or even rely on the investigating officer's report, which estimated the speeds of the parties' vehicles. (R. p. 116).[3] He did not review any crash test data or information about the vehicle Respondent was driving in this collision. (R. p.243). Mr. Paradiso admitted that he did not even know the delta-v of the IIHS crash test he relied on. (R. p. 120, ¶25 – R. p.

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[1] "[I]f you're doing 60 miles an hour and you step on your brakes and come to a stop, that is a delta-v of 60 miles an hour." (R. p. 170, ¶¶19-21).

[2] "And using those comparisons and my engineering knowledge and reliable engineering ad physics equations, determine how much energy was absorbed, and based on that energy absorbed based on the conservation of momentum and the conservation of energy, determine what the change in velocity was for [Appellant's] vehicle." (R. p. 112, ¶¶20-25).

[3] Mr. Paradiso did not provide the jury – or counsel – with any calculations he conducted. (R. p,123, ¶¶ 8-13).

121, ¶1). Additionally, though, despite evidence of the parties' speeds being available to him, Mr. Paradiso did not even conduct any testing or experiments with that information. He only utilized the pictures of the vehicles. (R. p. 168). Finally, even though he stated he relied on the vehicles' closing speeds in his analysis, he went on to testify that he never calculated the velocities. (R. p. 123, ¶24 – R. p. 124, ¶14; R. p. 168, ¶¶3-6) ("I never calculated the velocities because there was not information for me to determine their specific speeds at impact.").[4] His statements alone should have established the unreliability of his opinions.

Because of his failure to rely on sufficient evidence or facts, Mr. Paradiso attempted to explain his delta-v number based on a different parameter – what structures were impacted in Appellant's vehicle versus those in the IIHS test. (R. p. 148, ¶¶16-21; R. p. 173, ¶11 - 174, ¶12). Essentially, Mr. Paradiso's opinion was: "So there was less impact or less overlap in the subject collision, and so less items were damaged during the subject crash than are damaged in the IIHS crash test." (R. p. 150, ¶¶20-22). However, he admitted that the entire calculation of delta-v for the IIHS test involved knowing *speed* because that vehicle **<u>was fitted with an accelerometer</u>**. (R. p. 156, ¶¶15-18) ("So using the accelerometer data we're able to determine how much force was acting on the vehicle throughout the crash[.]").

But, as to the quality controls, Mr. Paradiso's entire opinion rested on the difference between 6 inches – the number he picked for Appellant's vehicle damage – versus the 17 inches in the IIHS test data. That is because Mr. Paradiso admitted that he was unable

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[4] "Again, there was not physical evidence to allow me to, a reasonable degree of scientific certainty, determine what their exact speeds were at impact. And it was not necessary to do so to come to my opinions." (R. p. 168, ¶¶15-18).

to tell the jury, by either his own observations or any other data, including, but not limited to, publications or peer reviewed data, at what distance the structures in Appellant's vehicle would be damaged – except the 17 inches in the IIHS test data. (R. p. 174, ¶¶16-18) ("I cannot tell you as I sit here today at what engagement they start to be contacted, but they were not contacted in the subject incident and that is all that matters."). incredibly, he finally admitted that his number – the 6 inches – was an estimation. (R. p. 176, ¶¶13-14) ("That 6 inches is my estimation[.]"). He even admitted that he could not tell the jury at what level of "engagement" certain structures would be damaged, like the frame rail or the bumper. (R. p.177, ¶¶13-15).

As to the *Council* factors, first, Mr. Paradiso did not demonstrate how his methodology was generally accepted in the reconstruction industry other than by bare assertion and citation to articles and books discussing accident reconstruction and biomechanical data. In fact, he then changed his answer regarding methodology to claim that it was based on "engineering physics." (R, p. 115, ¶¶ 8-13).[5] More troubling, though, was Mr. Paradiso's admission that he was wholly unaware of any publication or peer reviewed study that involved a similar crash as the one in this case – involving a Peterbilt truck. (R. p. 122, ¶¶ 2-3).

Second, Mr. Paradiso provided no evidence that eyeballing photographs, without more, is an acceptable method for engineers to determine the energy absorbed by a vehicle in a collision, or, more importantly, its change in velocity. *See Reali v. Mazda Motor of Am., Inc.*, 106 F. Supp. 2d 75, 78 (D. Me. 2000) (finding an engineer's calculation of delta-v unreliable where the engineer eyeballed accident photographs).

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[5] "I am telling you that it's based on my degrees in mechanical engineering."

Third, it should go without saying that Mr. Paradiso's methodology did not employ quality control procedures to ensure reliability. In fact, his ultimate opinion – the delta-v calculation based on the difference between 6 inches and 17 inches - has an almost 65% percentage error (11 inches divided by 17 inches) and was plainly unreliable as it did not come close to meeting the standard for expert opinions – reasonable degree of certainty. Additionally, the crash test he utilized to determine the delta-v differed in several significant respects from the instant accident, including the parties' vehicles. Incredibly, Mr. Paradiso testified that delta-v is a component of vehicle weights and the coefficient of restitution. Remarkably, though, he failed to testify about the weight of Respondent's vehicle or the coefficient of restitution.

Mr. Paradiso used an assumed weight, no velocity data, and then used a delta-v (that he could not explain a formula for) to then use scientific literature to assume another factor that he said was a number used to calculate delta-v. His opinion was nothing more than a bunch of assumptions based on a delta-v number he wanted to get.

Recently, in *Blair v. Coney*, 340 So.3d 775, the Louisiana Supreme Court upheld the trial court's exclusion of an expert who calculated delta-v in the same manner as Mr. Paradiso. 340 So.3d 775, 785 (La. 2020) ("It is also significant that Dr. Bain did not inspect the vehicles involved in the collision and did not speak with the damage appraisers. Instead, he relied on two-dimensional photographs, estimates of the damage to the vehicles involved, and measurements of exemplar vehicles– i.e. vehicles of the same make and model as those involved in the collision – in lieu of actual measurements of damage to the vehicles, which exemplar measurements formed the basis of his delta-v calculation."). In another case from New York, the trial court excluded an expert who

reached a delta-v opinion based primarily on photographs. *Ruiz v. Losito*, 2023 NY Slip Op 31853(U), Index No. 158403/2019, MOTION SEQ. No. 003 (N.Y. Sup. Ct. Jun 01, 2023) ("Such study does not reach the conclusion that photogrammetry analysis, on its own, can accurately estimate the delta-v of the crash."); *see also Imran v. R. Barany Monuments, Inc.*, 167 A.D.3d 992, 90 N.Y.S.3d 304 (N.Y. App. Div. 2018) ("Among other things, McGowan failed to calculate the force exerted by all four vehicles, the crash test he utilized to determine the delta-v differed in several significant respects from the instant accident, and he reviewed simulations in which the weight of the dummies was not similar to that of the Appellant."). At trial, counsel requested Mr. Paradiso to show the jury ***any*** of his delta-v calculations and he told the jury that would involve hundreds of pages of calculations. The record, therefore, lacked any independent calculations.

Lastly, is incumbent on the ***proponent*** (Respondent in this case) to ensure that the record contains evidence explaining the methodology the expert employed to reach the challenged conclusion and why this methodology is a reasonably reliable one to employ. *Thorndike v. Daimlerchrysler Corp.*, 266 F. Supp. 2d 172 (D. Me. 2003) (citing *Reali*, 106 F. Supp. 2d at 79)). Here, Respondent cannot point the Court anywhere in the record where Mr. Paradiso's methodology was employed and why this was reasonably reliable considering the basic calculation of delta-v. The fact that Mr. Paradiso could not tell the jury the beginning and closing speed of the vehicles, as he testified was required, should have disqualified him as an expert witness.

Subsequently, Dr. Campbell's opinion is wholly dependent on the reliability of Mr. Paradiso's severity opinion, and, specifically, the change in velocity of Appellant's vehicle and the direction of force. (R. p. 230, ¶¶12-18). Because Mr. Paradiso's opinion is

unreliable, so is Dr. Campbell's, and it should likewise be excluded.

II. The trial court erred in failing to hold a punitive damages phase after bifurcation.

The decision to bifurcate is not discretionary, and instead is mandated by S.C. Code Ann. § 15-32-520(A), which states that "[a]ll actions tried before a jury involving punitive damages, if requested by any Respondent against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury." Here, Respondent never requested bifurcation. Despite Respondent's failure to request bifurcation, the jury returned a verdict for Appellant. However, the Court ended the trial and did not provide Appellant with the punitive phase of trial – effectively making the jury's decision regarding the same, which warranted a new trial. *See Sandel v. Cousins*, 266 S.C. 19, 221 S.E.2d 111 (1975) (citing *Jones v. Atlantic Coast Line R. Co.* 108 S.C. 217, 94 S.E. 490 (1917)).

III. The trial court erred in failing to order a new trial nisi based on opposing counsel's improper closing argument statements. The jury's award was inadequate based on the undisputed medical evidence.

In his closing argument, Respondent's counsel improperly directed the jury to award "$25,000.00," which he alluded was the cost of Appellant's emergency room bill, even though that was not evidence in the record. (R. p. 425, ¶¶15-17) ("I think $25,000.00. I think you pay her for the ER visit, and you pay her for the initial stuff, which certainly was involved."). Although the Court instructed the jury they should only consider the evidence in the record, the jury's question asking to see the emergency room bill indicates their verdict was directly influenced by this statement.

When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely

unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 431 S.E.2d 557 (1993). If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute. *See Cock-N-Bull Steak House, Inc. v. Generali Ins. Co.*, 321 S.C. 1, 466 S.E.2d 727 (1996). The test which guides this Court in the exercise of its power and duty ... is whether the verdict is so shockingly [inadequate] as to manifestly show that the jury was actuated by ***considerations not founded on the evidence and/or the instructions of the court.***" *Duffy v. Dixon Const. Co.*, 284 S.C. 603, 327 S.E.2d 382 (Ct. App. 1985) (citing *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389, 390-391 (1973); *Griffin v. Griffin*, 282 S.C. 288, 318 S.E.2d 24, 29-30 (Ct. App. 1984)).

While the trial court may not impose its will on a party by substituting its judgment for that of the jury, the court may give the party an option in the way of additur or, in the alternative, a new trial. *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). 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. *Krepps by Krepps v. Ausen*, 324 S.C. 597, 479 S.E.2d 290 (Ct. App. 1996). A new trial nisi additur may be ordered when the verdict is merely insufficient based on the evidence. *Pelican Bldg. Ctrs. Of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993).

In the instant case, the jury failed to consider Appellant's economic and noneconomic injuries in reaching its verdict. Appellant visited numerous doctors for years after the accident, seeking relief from varying degrees of pain and discomfort. She

underwent surgery for a condition which medical professionals testified was caused by the wreck, and it was undisputed that she suffered a traumatic brain injury as a result of the wreck.

In *Patterson v. Reid*, the Court of Appeals affirmed the trial court's grant of a new trial nisi additur. 318 S.C. 183, 184-85, 456 S.E.2d 436, 437-38 (Ct. App. 1995). There, the evidence consisted of conflicting medical evidence, and the aggravation of a pre-existing condition was at issue. *Id.* at 186, 456 S.E.2d at 438. However, the Appellant's treating physician testified the Appellant's condition was "most probably [the result of] her accident." Id. (alteration in original). The Appellant incurred medical expenses of $6, 339.40 and, according to the Appellant's and the physician's testimony, she experienced an increase in permanent pain. Id. The jury awarded the Appellant actual damages of $500.54. *Id.* at 184, 456 S.E.2d at 437. The trial court granted a new trial nisi additur and awarded damages of $7, 639.40. *Id.* The Court of Appeals affirmed the trial court's decision, finding ample evidence supported the finding of an insufficient verdict, and "[t]herefore, the grant of nisi additur was not an abuse of discretion." *See id.* at 187, 456 S.E.2d at 438.

Here, the record contains **undisputed opinions** that Appellant's injuries, pain, and treatment were related to the collision. Dr. Marshall White opined to a reasonable degree of medical certainty that it was more likely than not the automobile accident caused a traumatic brain injury that would require treatment for life. Additionally, he opined – undisputed – that Appellant's headaches were exacerbated by the wreck. Respondent did not dispute Dr. White's testimony concerning causation or necessity of treatment through cross-examination, nor did he present any adverse witnesses or evidence to

contradict such testimony. Rather, he simply argued to the jury that the treatment was not medically necessary and emphasized no physician had referred Appellant to Dr. White. Thus, Dr. White's testimony regarding the cause and extent of Appellant's traumatic brain injury, headaches, treatment, and pain was undisputed. *See Waring v. Johnson*, 533 S.E.2d 906, 910, 341 S.C. 248, 256 (Ct. App. 2000) (stating the trial court has discretion in ruling upon a motion for a new trial nisi and its "decision will not be disturbed on appeal unless [its] findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law").

Further, no evidence was offered to dispute that the medical treatment and bills resulted from the collision that Appellant and her expert witnesses testified about. Again, Respondent did not question Dr. White as to the necessity of any future treatment, and he did not question Lindsay Moore or Tricia Yount regarding any past medical expenses or lost income. The only injury Respondent questioned was Appellant's leg injuries. He did not challenge Appellant's brain injury, or her shoulder surgeries. Thus, Respondent presented no evidence to dispute Appellant's witnesses' testimony that the medical treatment and bills resulted from the collision.

Moreover, the record shows there was no evidence that Appellant suffered a brain injury prior to the collision. Although Respondent attempted to cross-examine Appellant about the same, he **never** questioned Dr. White about the same, nor did he question Lindsay Moore about how that would have factored into her future medical treatment calculation for Appellant. Likewise, although Respondent questioned Appellant about one (1) prior bodily injury – to her knee – he never asked Appellant's witnesses about the same and their effect on Appellant's future treatment. In essence, as stated above,

although Dr. Campbell admitted that he was unqualified to render an opinion about whether the collision caused any injuries to Appellant, and even admitted that she did suffer injuries in the collision, the purpose of Respondent's expert witnesses' testimony was to try and provide medical causation testimony for the jury.

Based on the foregoing, the jury's verdict was inadequate in light of the evidence presented at trial and was clearly influenced by opposing counsel's improper reference to evidence not in the record. Therefore, Appellant is entitled to a new trial nisi additur.

CONCLUSION

For the reasons stated, this Court should reverse the July 18, 2023 decision of the Court of Common Pleas, and remand this matter back to the Court of Common Pleas for an opinion consistent with these arguments.

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