THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-38-02087

Kathy Beason,.....Respondent,

v.

Chatone Lowden,.....Appellant.

FINAL BRIEF OF APPELLANT

J. Austin Hood
CLAWSON & STAUBES, LLC
1612 Marion Street, Suite 200
Columbia, South Carolina 29201
(800) 774-8242
Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting Beason's motion for a new trial *nisi additur* in this automobile accident negligence case by not giving compelling and proper reasons for invading the province of the jury's determination of damages?

STATEMENT OF THE CASE

On December 29, 2009, the Respondent Kathy Beason (hereafter "Beason") brought this action alleging negligence against the Appellant Chatone Lowden (hereafter "Lowden") resulting in personal injuries and damages arising out of an automobile accident that occurred on December 13, 2008. Lowden's Answer raised a general denial to the allegations in the Complaint.

The jury trial in this action was held before the Honorable Edgar W. Dickson on March 2, 2011. Lowden admitted simple negligence and the case revolved around the question of the damages being asserted by Beason. Beason claimed $36,245.21 in medical bills at the trial of the case and $2,500.00 in lost wages at the trial of the case bringing her total claimed special damages at trial to $38,745.21, which she alleged were incurred as a result of injuries she suffered in the accident of December 13, 2008. The jury deliberated the case for approximately one hour and 45 minutes and returned a verdict in favor of the Plaintiff in the amount of $17,000.00.

On March 11, 2011, Beason made a Motion for New Trial and/or New Trial Nisi Additur. Lowden responded to the Motion on March 24, 2011. A hearing on Beason's motion was conducted on July 22, 2011 before the Honorable Edgar W. Dickson. On December 20, 2011, an order was filed wherein Judge Dickson granted Beason's Motion for New Trial Nisi Additur. The Order added $63,000.00 to the jury verdict bringing the total award to Beason to $80,000.00.

Lowden served the Notice of Appeal on all parties on January 3, 2012.

FACTS

This case concerns an automobile accident that occurred on December 13, 2008 on Broughton St. in Orangeburg, SC. At the time of the accident, Beason was operating a 2007 Ford Explorer and was traveling westbound on Broughton St., and at the same time Lowden was operating a 1989 Chevrolet S-10 pickup truck and was traveling behind Beason on Broughton Street. Just before the accident occurred, Beason was stopping for traffic in front of her that had stopped suddenly, and Lowden was unable to bring her vehicle to a stop before the front left hand side of her vehicle struck the left rear side of Beason's vehicle. (R. p. 42, lines 3 - 4). Lowden admitted she was responsible for causing the accident. (R. p. 37, line 22).

The sole issue for the jury to consider at trial was what damages, if any, did Beason suffer as a result of the accident on December 13, 2008. Beason admitted in her deposition that the damage to her car was to the left rear side and was in the form of damage to the rear bumper and tailgate (R. p. 68, line 10 - p. 70, line 4). Beason admitted that no part of her body hit the dashboard, drivers door or center console of her vehicle as a result of the accident. (R. p. 71, lines 2 - 12). Beason claims that she experienced pain in her left arm at the scene of the accident. (R. p. 72, lines 1 - 13). Beason admitted that her arm did not hit anything inside the vehicle as a result of the accident. (R. p. 71, lines 2 - 9). Beason went to the emergency room at The Regional Medical Center following the accident and complained of left arm pain from the middle upper part of her arm down to her left wrist. (R. p. 71, lines 19 – 23 and R. p. 54, lines 14 - 15).

The next physician Beason saw following the accident was Dr. Dale Padgett on January 23, 2009. (R. p. 73, lines 15 - 24). Beason was having pain in her left arm from her upper arm all the way down at that time. (R. p. 74, lines 20 – 23 and R. p. 56, lines 7 - 9). Beason subsequently had an MRI scan of her left shoulder and upper arm. (R. p. 56, lines 19 - 22). Beason subsequently was referred to Dr. Matthew Nelson at South Carolina Orthopedic Institute who recommended that she undergo surgery. (R. p. 56, lines 21 – 25 and R. p. 57, lines 1 - 7). The surgery was performed on Beason's left shoulder on March 5, 2009. (R. p. 80, lines 10 - 12). Following the surgery, Beason had 5 physical therapy visits between March 18, 2009 and April 3, 2009. (R. p. 80, lines 13 - 19). She also had a total of 3 postoperative follow up visits with Dr. Nelson and Dr. Marro of the South Carolina Orthopedic Institute. (R. p. 80, line 25 - p. 81, line 1).

Beason was employed at the time of the accident in question as a route driver for Atlas Food System and had worked for Atlas for 12 years. (R. p. 76, lines 6 - 11). As a route driver she testified she is responsible for driving a delivery truck and delivering snacks, drinks and food and stocking vending machines. (R. p. 76, lines 21 - 25). As part of her position Beason loads the snacks, drinks and food from her truck on a cart to and pushes the cart to the location of the vending machines. (R. p. 77, lines 1 – 14 and R. p. 78, lines 2 - 11). Beason admits that this is a physical job and she does not have an assistant that works with her on her route. (R. p. 78, lines 12 – 15 and R. p. 79, lines 15 -17). Beason admits that following the accident she was never on light duty at work and admits that she was back at work for a full day on December 15, 2008 which was the Monday following the accident and the next work day, following the accident. (R. p. 78, lines 18 – 22 and R. p. 79, lines 1 -

14). Beason further admits that she worked full time without missing a day of work up to the time of her surgery on March 5, 2009. (R. p. 79, lines 1 – 14).

Dr. Matthew Nelson's (hereafter "Nelson") deposition was presented at trial via videotape and that deposition was not transcribed into the official court record. Nelson testified that when Beason first presented to him she was complaining of left shoulder pain. (R. p. 94, lines 8 - 12). On his initial evaluation, he found that Beason had predominant pain in her left shoulder concentrated towards the anterior. (R. p. 94, lines 13 - 20). Nelson believed initially that Beason had a rotator cuff problem and reviewed an MRI scan of her left shoulder, which showed increased signal in the rotator cuff. (R. p. 95, lines 7 - 20). Nelson indicated that based on the fact Beason had failed two months of NSAID treatment he felt surgery would be the best treatment for Beason and he did perform arthroscopic surgery as a result of which he discovered Beason had a labral tear. (R. p. 96, lines 1 - 25). Nelson debrided the labral tear and did some shaving artound the tear and found it to be stable and he performed a subacromial decompression where he shaved underneath the bone to clear a space in the shoulder and he performed a distal clavicle excision wherein he shaved the distal end of the clavicle. (R. p. 97, lines 6 – 25 – p. 98, lines 1 - 13). Nelson subsequently testified that he believed that the injuries to Beason's shoulder were caused by the accident of December 13, 2008. (R. p. 100, lines 1 - 9).

On cross examination, Nelson admitted that two months had gone by between the time of the accident and the time Beason first presented to his office. (R. p. 104, lines 2 - 6). Nelson further admitted on cross examination that the MRI scan of Beason's left humerus showed osteoarthritis of the AC Joint and he further admitted that was a condition that would have developed over time and would not have developed in two months time and

would have been present before the accident. (R. p. 105, lines 7 – 25 – p. 106, lines 1 – 11). Nelson admitted that he was not surprised to see arthritis in the joint especially if Beason was someone who used her hands to work. (R. p. 107, lines 5 - 14). Nelson was of the belief when Beason presented to him that she had not only failed NSAID treatment but had also failed physical therapy treatment for her left arm and shoulder prior to presenting to his office for treatment which he testified would be standard treatment practice. (R. p. 107, lines 13 – 25 – p. 108, lines 1 - 14). Nelson noted that the MRI scan of Beason's left shoulder also showed mild supraspinatus tendinopathy which he claims usually shows up due to active inflammation which he admitted could be caused by arthritis, rubbing the joint. (R. p. 109, lines 17 – 25 – p. 110, lines 1 - 10). Nelson further admitted on cross examination that the subacromial decompression and distal clavicle resection procedures could be performed on someone who has never been involved in an accident and simply has developed a degenerative condition such as osteoarthritis. (R. p. 112, lines 6 - 22). Nelson also admitted on cross examination that the labrum in the shoulder does become more brittle as an individual ages such as Beason. (R. p. 115, lines 7 - 21). Nelson further admitted that he does not know anything about the severity of the accident between Beason and Lowden only that it was a rear end impact. (R. p. 117, lines 1 - 13). Additionally, Nelson admitted that he did not know what Beason did for a living at the time of the accident or the time she first saw him. (R. p. 117, lines 14 - 20). Nelson admitted that knowing a patient's occupation is often very important because it could be something that could have aggravated or lead to the injury being complained of by the patient. (R. p. 118, lines 1 - 19). Nelson further admitted on cross examination that the injury to Beason's shoulder that lead to the surgery he performed could have been caused by a variety of circumstances and admitted it could

have possibly been caused by a lifting injury at work although he claimed he would have expected to see complaints of pain in both shoulders instead of just one. (R. p. 119, lines 7 – 25 – p. 120, lines 1 -15). Nelson further admitted he did not know if Beason continued to work between the time of the accident and the time of her first visit at his office. (R. p. 121, lines 3 - 7). Finally, Nelson admitted that during his last visit with Beason he sent her back to work full duty without any limitations. (R. p. 124, lines 24 – 25 – p. 125, lines 1 - 3).

At the conclusion of the trial, the jury returned a verdict in favor of the Beason in the amount of $17,000.00. (R. p. 5). The jury was polled and the verdict was unanimous. Beason requested ten days to file post trial motions and on March 11, 2011, Beason made a Motion for New Trial and/or New Trial Nisi Additur. The hearing on the Motion was conducted on July 22, 2011 after which time Judge Dickson entered an Order Granting Beason's Motion for New Trial Nisi Additur. The Order added $63,000.00 to the jury verdict bringing the total award to Beason to $80,000.00. (R. pp. 2-4).

The trial judge's decision to grant Beason's motion was primarily based on two reasons based on the content of his Order. First, the trial judge found the manner of the jury deliberations troublesome. The trial judge found that two distinctly male voices could be heard throughout the courtroom during jury deliberations. The trial judge found in his order that the voices had angry and aggressive tones. The trial judge was also concerned because the jury foreperson initially indicated to the bailiff that although the jury had reached a verdict she took no part in the decision and did not want to sign the verdict form. The trial judge then issued an Allen charge and sent the jury back to deliberate after which time the trial judge believes it once again heard loud male voices emanating from the room and shortly thereafter a unanimous jury verdict for the Plaintiff

for $17,000.00 was rendered. Second, the trial judge also found that the verdict bore no logical relationship to the evidence submitted at trial and was insufficient and inadequate to compensate Beason for her injuries. The trial judge further indicated in the Order that if the jury found that Beason's medical costs and / or wage loss was not proximately caused by the Defendant's negligence then a verdict should have been entered for the Defendant. (R. pp. 2-4).

STANDARD OF REVIEW

The determination of damages by a jury is entitled to substantial deference. Stevens v. Allen, 336 S.C. 439, 446-47, 520 S.E.2d 625, 629 (Ct. App. 1999). A trial judge may grant a new trial *nisi additur* whenever he or she finds the amount of the verdict to be merely inadequate. Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 438 (Ct. App. 1995). 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. Ligon v. Norris, 371 S.C. 625, 635, 640 S.E.2d 467, 472 (Ct. App. 2006). The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court. Accordingly, great deference is given to the trial judge. Vinson v. Hartley, 324 S.C. 389, 405-06, 477 S.E.2d 715, 723-24 (Ct. App. 1996).

When considering a motion for a new trial based upon 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. Dept. of Transp., 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). The trial judge must grant a new trial absolute if the amount of the verdict is

grossly inadequate or excessive so as to shock to conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996).

While the granting of such a motion [for new trial *nisi additur*] rests within the sound discretion of the trial court, substantial deference must be afforded to the jury's determination of damages. Evans v. Taylor Made Sandwich Co., 337 S.C. 95, 100, 522 S.E.2d 350, 352 (Ct. App. 1999). To this end, a judge must offer compelling reasons for invading the jury's province by granting a motion for *additur*. Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995). We will only reverse if the trial judge abused his discretion in deciding a motion for new trial *nisi additur* to the extent that an error of law results. Patterson v. Reid, 318 S.C. at 185, 456 S.E.2d at 438. If inapplicable grounds are given for granting *additur*, the order fails by error of law. Bailey, 318 S.C. at 14-15, 455 S.E.2d at 692. The Court of Appeals has the duty to review the record and determine whether there has been an abuse of discretion amounting to an error of law. Vinson, 324 S.C. 389, 477 S.E.2d 715.

ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING BEASON'S MOTION FOR A NEW TRIAL *NISI ADDITUR* WITHOUT PROVIDING COMPELLING AND PROPER REASONS FOR USURPING THE JURY'S DECISION ON DAMAGES.

The sole issue on appeal in the instant case is whether the trial judge improperly granted Beason's motion for a new trial *nisi additur*. The trial judge is required to give substantial deference to the jury's determination of damages. Lowden contends that Judge Dickson committed a reversible error of law when he granted Beason's motion for

additur without articulating compelling and proper reasons for invading the province of the jury. Lowden argues that neither of the two basic reasons given in Judge Dickson's Order granting *additur* to Beason were sufficient to allow the trial judge to substitute his judgment on damages for that of the jury.

The instant case is factually and procedurally similar to the Court of Appeals decision in Green v. Fritz, 356 S.C. 566, 590 S.E2d 39 (2003). Mildred Green sued Jason Fritz to recover damages for bodily injuries suffered during an automobile accident. Green, 356 S.C. at 568, 590 S.E2d at 40. The jury returned a verdict for Green in the amount of $1,500 in actual damages and $500 in punitive damages. Id. Green moved for a new trial *nisi additur*. Id. The trial judge granted the motion, increasing the total award to $14,000. Id. Fritz appeal[ed], asserting, *inter alia*, the motion was improvidently granted because the trial judge failed to articulate compelling reasons to invade the province of the jury. Id. The Court of Appeals reverse[d] and reinstate[d] the jury verdict. Id.

Fritz turned left out of a gas station parking lot in front of Green, causing the vehicles to collide. Id. The EMS crew that responded to the accident took Green by ambulance to the Orangeburg Regional Medical Center. Id. Green, who had a history of high blood pressure and diabetes, was kept overnight for the purpose of monitoring her blood sugar and blood pressure. Id. During her stay at the hospital, Green did not complain of, and was not treated for, neck, back, or muscle pain. Id.

Green took two days off from work after the accident, though she testified that the pain in her neck and back persisted after that period. Id. Four weeks after the accident, Green sought treatment from Dr. Shay, a chiropractor. Id. Dr. Shay diagnosed Green

with cervical subluxation. Green, 356 S.C. at 568-69, 590 S.E2d at 40. Subluxation is a condition where vertebrae are out of alignment. Green, 356 S.C. at 569, 590 S.E2d at 40, fn. 1. The treatment lasted approximately four weeks and cost a total of $1,470. Green, 356 S.C. at 569, 590 S.E2d at 40.

Green brought this negligence action against Fritz seeking to recover damages sustained in the accident. Id. During opening remarks at trial, Fritz's attorney admitted fault. Id. Green's chiropractor testified about the extent of Green's back injuries. Id. On cross-examination, defense counsel challenged the causal link between the accident and Green's subluxation diagnosis. Green, 356 S.C. at 569, 590 S.E2d at 40-41. Specifically, Dr. Shay was asked whether Green's back injury could have been caused by something other than the car accident, and Dr. Shay admitted it was possible. Green, 356 S.C. at 569, 590 S.E2d at 41. Green did not claim to experience any accident-related problems subsequent to her treatment with Dr. Shay. Id. She also did not claim to have sustained any permanent injuries as a result of the accident. Id.

Following the jury's verdict, Green moved for a new trial *nisi additur* arguing that the verdict was grossly inadequate and that "it had to be compassion, prejudice, or something of that nature, some other outside influence." Id. The trial court granted Green's motion for a new trial *nisi additur*, increasing the jury's total award from $2,000 to $14,000. Id. The order, in its entirety, reads as follows:

> The plaintiff's motion for a new trial *nisi additur* or in the alternative for a new trial *nisi* absolute is hereby granted.
>
> The jury returned a verdict in the amount of $1,500 actual damages and $500 punitive damages. The evidence revealed that the plaintiff's actual damages were:
>
> 1. Loss [sic] wages $118.88

2. Hospital Bill $1,132.55
3. Dr. Shea [sic] $1,470
4. Medical Records $21.47
5. Ambulance Bill $186.35

Total Special Damages = $2,929.25

> It is well settled that a trial judge may add to or subtract the jury's award if it appears to be the result of passion, caprice, or something not found in the record. If [sic] find and conclude that the verdict in this case is grossly inadequate.
>
> It is therefore ordered, adjudged and decreed that the sum of $12,000 be added to the jury's award of $2,000 for a total award of $14,000.

Green, 356 S.C. at 569-70, 590 S.E2d at 41.

The sole issue on appeal was whether the trial court improperly granted Green's motion for a new trial *nisi additur*. Green, 356 S.C. at 570, 590 S.E2d at 41. Fritz argue[d] that the trial judge erred when he granted the motion without articulating compelling reasons. Id. The Court of Appeals agreed, finding that the trial court provided no compelling reasons for invading the province of the jury in granting *additur*. Green, 356 S.C. at 571, 590 S.E2d at 41.

Where the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province. Id. The order offers no reasons upon which we can review the appropriateness of usurping the jury's decision on damages. Id.

In support of the grant of a new trial *nisi additur* and his conclusory statement that the verdict was grossly inadequate, Green agrue[d] that the jury ignored evidence of bills and "undisputed pain and suffering," thereby demonstrating "passion, caprice, prejudice particularly, corruption, or some other improper motive." Green, 356 S.C. at 571, 590 S.E2d at 42. If indeed the jury's verdict was motivated by caprice, passion, or prejudice,

the appropriate remedy would be for a new trial absolute. Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000) ("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."). Green's only post-trial motion was for a new trial *nisi additur*. Id.

The Court of Appeals found that the trial judge abused his discretion in granting a new trial *nisi additur* without stating compelling reasons. Id. The trial judge's order was therefore reversed and the jury verdict was reinstated. Id.

The instant case is also similar to the Court of Appeals recent decision in Luchok v. Vena, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010). In this automobile accident case, the jury returned a verdict in an amount significantly below the damages claimed by [the] Plaintiff. Luchok, 391 S.C. at 263, 705 S.E.2d at 72. The trial judge granted Plaintiff's motion for a new trial *nisi additur*, but failed to state compelling reasons for doing so. Id. The Court of Appeals addressed this specific situation on indistinguishable facts in Green v. Fritz, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003). Luchok, 391 S.C. at 263, 705 S.E.2d at 72. As the Court of Appeals did in Green, they reverse[d] and reinstate[d] the jury verdict. Id.

Kathryn Luchok sued Rebecca Vena for damages resulting from a rear-end collision. Id. Vena admitted that her negligence caused the accident but disputed whether all of the alleged damages were recoverable. Id. Luchok claimed over $10,000 in medical bills, of which $9,100 were bills from a chiropractor. Id. In addition to the chiropractic bills, the record contained evidence of $1,512.78 in other damages. Luchok,

391 S.C. at 263, 705 S.E.2d at 72, fn. 2. Luchok testified to $87.80 for a rental car bill, $20 for prescriptions, $176 for a cervical collar and doctor's visit with her regular physician, $413.98 of lost wages, $775 for physical therapy to which she was referred by her physician, and $40 for a high-back work chair. Id. The jury returned a verdict for Luchok in the amount of $3,023.90. Luchok, 391 S.C. at 263, 705 S.E.2d at 72. The order granting the motion [for new trial *nisi additur*] state[d]:

> During trial, Plaintiff presented evidence that her medical bills alone totaled $10,071, consisting almost entirely of chiropractic treatment. Plaintiff testified at trial that the treatment for her injuries was reasonable and necessary and that she ceased to treat once she felt that she no longer required chiropractic treatment.
>
> Based on the findings of fact as set forth above, the Court concludes and orders:
>
> The charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary. Despite the Defendant's admittance of liability and medical bills of $10,071, the jury limited the Plaintiff's award to $3,023.90. This award represents a grossly inadequate judgment rendered by the jury as liability was uncontested and the amount awarded does not approach the amount of medical costs reasonably and necessarily incurred by the Plaintiff.

Luchok, 391 S.C. at 263-64, 705 S.E.2d at 72.

In Green, the Court of Appeals repeated the long-standing requirement that "a judge must offer compelling reasons for invading the jury's province by granting a motion for *additur*." Green, 356 S.C. at 570, 590 S.E.2d at 41 (*citing* Bailey v. Peacock, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995)). The requirement is imposed to balance the wide discretion given to a trial judge in ruling on a new trial motion with the substantial deference courts must give to a jury's determination of damages. Todd v. Joyner, 385 S.C. 509, 517, 685 S.E.2d 613, 618 (Ct. App. 2008); Green, 356 S.C. at 570, 590 S.E.2d at 41. The Court of Appeals found that the judge's order did not comply with that requirement. Luchok, 391 S.C. at 264, 705 S.E.2d at 72.

The amount of recoverable damages was hotly contested. Luchok, 391 S.C. at 264, 705 S.E.2d at 72. The only two points made by defense counsel in her opening statement were to argue that Plaintiff did not prove causation as to the chiropractic treatments and to focus the jury on the question of whether those treatments were reasonable and necessary. Id. Plaintiff was the only witness in her case in chief. Id. She testified she did not need an ambulance, she did not go to the emergency room, and she drove herself home after the accident. Id. She waited until the next day to go to her family doctor. Id. The first time Plaintiff went to the chiropractor was more than three weeks after the accident and she continued going to the chiropractor for seventeen months. Luchok, 391 S.C. at 264-65, 705 S.E.2d at 72. On cross-examination, Plaintiff conceded that the chiropractor's bills during those seventeen months included charges for massages she received from a massage therapist who worked for the chiropractor. Luchok, 391 S.C. at 265, 705 S.E.2d at 72.

The Court of Appeals interpreted the judge's order to set forth two reasons for invading the jury's province. Luchok, 391 S.C. at 265, 705 S.E.2d at 73. First, the verdict did not cover all the chiropractic bills. Id. In the face of sharply conflicting evidence, this is not a compelling reason to grant the motion. Id. *See* Green, 356 S.C. at 571, 590 S.E.2d at 41 ("Where, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province."). The second compelling reason was that the "charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary." Luchok, 391 S.C. at 265, 705 S.E.2d at 73. The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Id. Therefore,

there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion. Id.

In many respects, the appeal in Luchok presented an even more compelling case for reversal than Green. Luchok, 391 S.C. at 265, 705 S.E.2d at 73, fn. 4. In Green, the plaintiff actually went to the emergency room in an ambulance and spent the night in the hospital. Id.; Green, 356 S.C. at 568, 590 S.E.2d at 40. The chiropractor testified at trial to a specific diagnosis of the plaintiff's injuries, and to the causal connection between the accident and the chiropractic treatment. Id.; Green, 356 S.C. at 568-69, 590 S.E.2d at 40-41. The chiropractic treatment in Green lasted only four weeks, and cost only $1,470. Id.; Green, 356 S.C. at 569, 590 S.E.2d at 40. The $1,500 verdict in Green exceeded the combined ambulance and hospital bills of $1,318.90. Id.; Green, 356 S.C. at 569, 590 S.E.2d at 41. *See also* Pelican Building Centers of Horry-Georgetown, Inc. v. Dutton v. Rothwell, 311 S.C. 56, 427 S.E.2d 673 (1993) (trial court committed an error of law in granting Rothwell's motion for new trial *nisi additur*).

Based upon the content of the Order, it would appear the trial judge's initial reason for granting Beason's Motion for New Trial Nisi Additur was due to purported issues with the jury deliberations. Specifically, the trial judge made reference in his order to the fact that "two distinctly male voices were heard throughout the Courtroom" and "[t]he voices had distinctly angry and aggressive tones." (R. pp. 2-4). The trial judge has also based its finding on the fact that the jury foreperson initially indicated to the bailiff that the jury had reached a verdict but she "took no part in the decision" and did not want to sign the verdict form. As is noted in the Order, after the trial judge was informed of the jury forperson's reaction, the trial judge issued an Allen charge to the jury regarding

unanimity in their verdict and the jury was sent back to deliberate. Once again, the trial judge indicates in its Order that loud male voices were heard in the jury room after the jury was sent back to deliberate following the Allen Charge and shortly thereafter the verdict for $17,000.00 was handed down. (R. pp. 2-4).

There are two main problems with the trial judge's rationale on this issue and its use of this reasoning to back up the award of an additur in this case. First, the trial judge is wildly speculating as to the content of the conversations that lead to the loud voices being heard from the jury room. The trial judge, much like the parties, has no independent knowledge as to why loud voices were heard emanating from the jury room. The trial judge claims the tones of voices heard were angry and aggressive. However, no words could be discerned. Who is the trial judge, or the parties or their attorneys for that matter, to say the tones were actually angry and aggressive and how does the trial judge know what was actually said between the jurors that lead to the loud voices that could be heard emanating from the Courtroom. Additionally, the trial judge and parties do not know who the loud jurors were or which party they were favoring. The individuals using the loud voices could have been in favor of Beason and not Lowden. There simply is no way to know. That of course is the point of the private deliberations by the jury. No party can know what was discussed in the jury room while the deliberations are ongoing. No affidavits or other evidence was submitted by either party to support the claim that the tones heard from the jury room were angry or aggressive. No affidavits or other evidence were submitted indicating that the words being spoken at that time were angry and aggressive in their nature or that the individuals using the loud voices were favoring one party over another or that the words spoken by the individuals using the loud voices had

anything to do with the verdict rendered by the jury or even were inappropriate or improper.

Second, as noted above, the trial judge also references the statement made by the jury foreperson to the Bailiff following the initial deliberations by the jury in his Order. Once again, the parties do not know the basis for the comment. The parties do not know why the foreperson made the comment. The parties do not know which party, if any, the foreperson may have been favoring in the deliberations. Perhaps she wanted to render a smaller award, perhaps a larger award. Once again, as is clear from the content of this brief, any conclusion the trial judge drew from the comment made by the jury foreperson is wild speculation on the part of the trial judge and the part of the parties. Following the publication of the verdict, the trial judge properly polled the jury and all jurors agreed that the verdict was their verdict and was still their verdict without hesitation. The verdict was unanimous. The trial judge's assertion in its Order that the jury may have acted improperly during deliberations or that the manner of the deliberations was inappropriate on these grounds is unsubstantiated. It is wild speculation by the trial judge. No evidence to support this assertion was presented at the hearing on the Plaintiff's Motion for a New Trial Absolute, or in the alternative, a New Trial Nisi Additur. Certainly, the trial judge's speculation that the manner of the jury deliberations was in some way inappropriate is not a compelling reason to justify the trial judge invading the province of the jury and granting Beason a $63,000.00 additur on top of the $17,000.00 verdict rendered by the jury.

It should also be noted that if the trial judge in fact believed that that there was some improper conduct by the jury or if the jury was motivated by some sort of improper

rationale, a new trial absolute should have been granted. The trial judge must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock to conscience of the court and clearly indicates the figure reached was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motives. *See* Cock-N-Bull Steak House, Inc. v. Generali Ins. Co., 321 S.C. 1, 466 S.E.2d 727 (1996) and Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). Thus, the trial judge should not have based his decision to grant Beason's Motion for a New Trial Nisi Additur in any way on improper conduct by the jury or on any belief that any members of the jury had an improper motive in granting the award for the Plaintiff. Thus, as what would appear to be one of two primary reason for the grant of the additur, the judge's Order contains references to potential improper jury deliberations, motivation or conduct by the jury. Such grounds are improper when granting an additur to a party. Thus, the trial judge's Order is deficient and does not offer compelling and proper reasons to grant Beason an additur on $63,000.00 to bring the total verdict in this case to $80,000.00 and the Respondent would request that the jury verdict of $17,000.00 be reinstated.

As noted above, based upon the content of the trial judge's Order, the second reason for granting Beason's Motion was that the verdict bore no logical relationship to the evidence submitted at trial and was insufficient and inadequate to compensate Beason for her injuries. The trial judge further indicated in the Order that if the jury found that Beason's medical costs and /or wage loss was not proximately caused by the Defendant's negligence then a verdict should have been entered for the Defendant. (R. pp. 2-4).

In support of this position the trial judge notes that Beason presented medical expenses of $38,245.21 including surgery to her shoulder, that she claimed were causally related to the wreck and that Beason's surgeon testified by video that the wreck was more likely than not the cause of her injuries, and that her treatment was medically necessary and appropriate for her injuries. The trial judge also noted in support of its position that Lowden did not present any medical testimony to contradict Beason's surgeon and simply argued that Beason's job with Atlas Foods was the cause of her injuries. The trial judge's Order states that the jury found completely for the Plaintiff but awarded an amount that simply was not supported by the evidence. (R. pp. 2-4). Based on these limited findings the trial judge found a reasonable verdict to be $80,000.00. This amount happens to be the exact same amount requested by Beason's counsel in the hearing on Beason's Motion for New Trial or New Trial Nisi Additur. (R. p. 22, line 4). However, no basis for the amount of the additur is provided in the Order issued by the trial judge; just a simple finding that the trial judge believed this to be a reasonable verdict. (R. pp. 2-4).

The burden of proof in this case, as in all civil cases where liability is not in dispute, was not on Lowden but was Beason's burden. However, as noted above, Lowden's counsel did more than just argue that Beason's job at Atlas Food was the cause of Beason's injuries. Lowden's counsel went so far as to question whether or not the accident in question could have even caused such an injury and whether or not Nelson had sufficient grounds to link the injury and ultimate surgery to the accident. The question in this case was the proximate cause of the injuries just as it was in the cases of

Green v. Fritz, 356 S.C. 566, 590 S.E2d 39 (2003) and Luchok v. Vena, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010).

Nelson's testimony on cross-examination certainly called into question whether or not Beason's injuries were actually caused by this accident. On cross examination, Nelson admitted that two months had gone by between the time of the accident and the time Beason first presented to his office. (R. p. 104, lines 2 - 6). Nelson further admitted on cross examination that the MRI scan of Beason's left humerus showed osteoarthritis of the AC Joint and he further admitted that was a condition that would have developed over time and would not have developed in two months time and would have been present before the accident. (R. p. 105, lines 7 – 25 – p. 106, lines 1 – 11). Nelson admitted that he was not surprised to see arthritis in the joint especially if Beason was someone who used her hands to work. (R. p. 107, lines 5 - 14). Nelson was of the belief when Beason presented to him that she had not only failed NSAID treatment but had also failed physical therapy treatment for her left arm and shoulder prior to presenting to his office for treatment which he testified would be standard treatment practice. (R. p. 107, lines 13 – 25 – p. 108, lines 1 - 14). Although it is clear from the facts such treatment did not take place. Nelson noted that the MRI scan of Beason's left shoulder also showed mild supraspinatus tendinopathy which he claims usually shows up due to active inflammation which he admitted could be caused by arthritis, rubbing the joint. (R. p. 109, lines 17 – 25 – p. 110, lines 1 - 10). Nelson also admitted on cross examination that he does not know anything about the severity of the accident between Beason and Lowden only that it was a rear end impact. (R. p. 117, lines 1 - 13). Additionally, Nelson admitted that he did not know what Beason did for a living at the time of the accident or the time she first saw him. (R. p. 117, lines 14 - 20). Nelson admitted

that knowing a patient's occupation is often very important because it could be something that could have aggravated or lead to the injury being complained of at the time of presentation. (R. p. 118, lines 1 - 19). Nelson further admitted on cross examination that the injury to Beason's shoulder that lead to the surgery he performed could have been caused by a variety of circumstances and admitted it could have possibly been caused by a lifting injury at work although he claimed he would have expected to see complaints of pain in both shoulders instead of just one. (R. p. 119, lines 7 – 25 – p. 120, lines 1 -15). Nelson further admitted he did not know if Beason continued to work between the time of the accident and the time of her first visit at his office. (R. p. 121, lines 3 - 7).

Through cross-examination, Lowden was able to demonstrate to the jury that Beason clearly had pre-existing arthritic conditions in her shoulder that were present well before the accident. Lowden was further able to show that 2 months expired between the time of the accident and the time Beason saw Nelson and that during that time Beason did not receive physical therapy as Nelson believed and that Beason worked full time at what was described by Beason as a physical job that required the use of her arms and shoulders without missing a single day of work prior to undergoing surgery on March 5, 2009, almost 3 months after the accident in question occurred. (R. p. 127, lines 19 – 22; p. 129, lines 1 – 10; p. 166, lines 3 – 25 – p. 167, lines 1 – 8). Additionally, Lowden was able to demonstrate to the jury that Nelson knew nothing about how the accident occurred, knew nothing about the severity of the impact, knew nothing about the position of Beason's body inside her vehicle at the time of the impact, and knew nothing about the forces applied to Beason's body and specifically her left shoulder as a result of the impact. Beason demonstrated to the jury that while it was true Nelson had performed the surgery and testified that it was his opinion the injury was

caused by the accident, there were serious problems with the foundation of the opinion. Lowden demonstrated to the jury that Nelson never even bothered to consider the nature of the accident in developing his opinion and never even bothered to ask what Beason did for a living at the time the accident occurred despite his admission that such knowledge could be important. Through this cross examination, the jury was alerted to the fact that Nelson failed to consider any other cause in developing his opinion and only focused on a single cause not even asking the basic questions to determine if another cause was even possible. Additionally, he was not provided any additional information until the time of the deposition at which time he admitted that the injury to Beason's shoulder that lead to the surgery he performed could have been caused by a variety of circumstances and admitted it could have possibly been caused by a lifting injury at work although he testified he would have expected to see complaints of pain in both shoulders instead of just one. (R. p. 119, lines 7 – 25 – p. 120, lines 1 -15). Lowden was able to demonstrate to the jury that Nelson's opinion regarding causation, which the trial judge relied upon in issuing its Order, did not take into consideration all relevant factors, such as employment and the facts of the accident and was not based on information Nelson admitted could be important in determining the causation of an injury. Additionally, much like in the case of Green v. Fritz, Lowden provided the jury, through cross-examination, with another possible cause of the injury, a cause Nelson admits could have some validity despite his primary opinion regarding causation.

Where the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province. Green v. Fritz, 356 S.C. at 571, 590 S.E2d at 41. As in Green, the order issued by the trial judge in the case sub judice offers no reasons upon

which this Court can review the appropriateness of usurping the jury's decision on damages. Essentially the trial judge in the case sub judice listed the amount of the medical bills and advised that Nelson related the injuries and the medical treatment to the accident. The trial judge offered that Lowden did not present any medical testimony to contradict the medical testimony as a reason for the additur even though the burden of proof did not rest with Lowden but with Beason. (R. pp. 2-4). This was stated in the Order despite the testimony referenced above that was elicited during cross-examination of both Nelson and Beason regarding causation and the nature of the injury. The trial judge indicated in his Order that if the jury did not believe the medical cost or wage loss was caused by the accident the verdict should have been for the Defendant. (R. pp. 2-4). However, as pointed out by the undersigned during the hearing on Beason's Motion for New Trial or New Trial Nisi Additur, Beason received "about $2,000.00 in pre-surgical treatment. The jury could have considered some pain and suffering for that time perhaps, and essentially came up with what I count to be somewhere between eight and nine times for that verdict to come up with seventeen thousand dollars." (R. p. 27, lines 13 - 17). A straight verdict for the Defendant is therefore not required as there was pre-surgical treatment that would provide a foundation for some sort of dollar verdict in favor of the Plaintiff by the jury. As noted by the undersigned in the hearing on Beason's Motion for New Trial or New Trial Nisi Additur, the jury may simply have not believed that the surgery was necessitated by the accident but found that the pre-surgical treatment was necessary and thus awarded the verdict to Beason of $17,000.00. (R. p. 27, lines 21 – 25 – p. 28, lines 1 - 5).

Thus, Lowden would submit to this Court that the trial judge has failed to state any compelling and proper reasons for ordering an additur of $63,000.00 in favor of Beason. Evidence and testimony was presented at trial that would justify the verdict handed down by the jury and would certainly call into question the testimony provided by Nelson upon which the trial judge appeared to base its decision, at least in part, regarding the award of the additur.

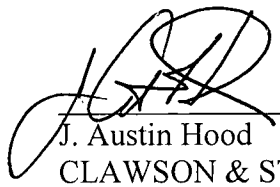
CONCLUSION

In granting Beason's motion for a new trial *nisi additur*, the trial court has committed a reversible error of law. First, the trial judge has listed what he believes to have been improper conduct by the jury and potentially the jury foreperson as a guiding reason for granting Beason's motion. As is clear, such reasoning cannot be the foundation for granting a motion for new trial nisi additur. Second, the trial judge found that Lowden essentially presented no evidence or testimony to contradict the evidence presented by Beason that her injuries and ultimate surgery were the result of the accident between Beason and Lowden of December 13, 2008. Additionally, the trial judge found that the jury's verdict must have either been for the Defendant or essentially for the Plaintiff in an amount equal to or greater than Beason's medical costs and lost wages. He provided no rationale or compelling reasons for such a finding. In fact, as noted above, there was most certainly evidence and testimony provided at trial to the jury that could give the jury sufficient reason to question whether or not Beason's shoulder surgery was in fact necessitated by the accident of December 13, 2008 and to award the verdict that was handed down by on March 2, 2011.

Since the trial judge committed a reversible error of law in granting Beason's motion for a new trial *nisi additur*, the Respondent would respectfully request that the Court reverse the Order granting *additur* and reinstate the jury's verdict of $17,000.00 actual damages for Beason.

Respectfully submitted,

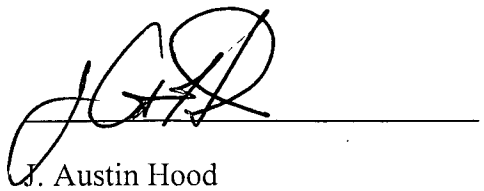
November 15, 2013



J. Austin Hood
CLAWSON & STAUBES, LLC
1612 Marion Street, Suite 200
Columbia, South Carolina 29201
(800) 774-8242
Attorneys for Appellant

CERTIFICATE OF COUNSEL

The Final Brief of the Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules.



J. Austin Hood
Clawson and Staubes, LLC
1612 Marion Street, Suite 200
Columbia, South Carolina 29201
(800) 774-8242
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-38-2087

Kathy Beason,.....Respondent,

v.

Chatone Lowden,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Respondent Beason by depositing a copy of it in the United States Mail, postage prepaid, on November 15, 2013, addressed to her attorneys of record, Daniel W. Luginbill, P.O. Box 1150, Bamberg, SC 29003 and Clyde C. Dean, Jr., P.O. Box 1405, Orangeburg, SC 29116.

November 15, 2013

J. Austin Hood
CLAWSON & STAUBES, LLC
1612 Marion Street
Columbia, South Carolina 29201
(800)774-8242
Attorney for Appellant