

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-00462

ROBERT W. EDWARDS, JR., ...Appellant,

v.

LINDA N. JORDAN, ...Respondent.

**PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING *EN BANC***

Appellant, Robert W. Edwards, Jr., respectfully petitions the Court for rehearing and reconsideration of Opinion No. 2013-UP-449, filed December 11, 2013, pursuant to Rule 221(a), SCACR. Mr. Edwards petitions the Court for a rehearing on the grounds that the Court failed to fully consider Appellant's arguments concerning Ms. Jordan's abandonment of her affirmative defenses and the jury's failure to award Mr. Edwards any compensation for pain and suffering. Furthermore, because these issues represent questions of exceptional importance to the jury trial process, Mr. Edwards respectfully suggests that *en banc*

consideration is warranted pursuant to Rule 219(a), SCACR.

I. The Court of Appeals overlooked or misapprehended Mr. Edwards' arguments that Ms. Jordan failed to establish evidence of her affirmative defenses because she abandoned those defenses in open court during trial.

When reviewing a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict, this Court will reverse when there is no evidence to support the ruling or when the ruling is governed by an error of law. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010).

Comparative negligence and assumption of the risk are affirmative defenses. Youmans ex. Rel. Elmore v. S.C. Dep't of Transp., 380 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008). It is a "well-established rule that the party pleading an affirmative defense 'has the burden of proving it.'" Pike v. S.C. Dep't of Transp., 343 S.C. 224, 231, 540 S.E.2d 87, 91 (2000), quoting Hoffman v. Greenville County, 242 S.C. 34, 129 S.E.2d 757 (1963).

In Larchick v. Diocese of Great Falls-Billings, the Supreme Court of Montana upheld partial summary judgment in favor of the plaintiff on the defense of comparative negligence where the defendant school's principal testified that he did not blame the plaintiff student for his injuries. 208 P.3d 836, 850 - 51 (Mont. 2009). In Larchick, the plaintiff sued the defendant for personal injuries sustained during a lacrosse game. The defendant raised a comparative negligence, but the lower court granted the plaintiff summary judgment on the same. The Montana Supreme Court upheld the grant of partial summary judgment, noting that the defendant's arguments in support of a comparative negligence defense were "particularly unpersuasive given that [the] Principal [of the defendant school] stated that the school did not blame [the plaintiff]. Id.

In like manner, “No instructions should be given to a jury concerning an issue made by the pleadings that is abandoned in open court by the party pleading it.” Brown v. Howell, 284 S.C. 605, 609, 327 S.E.2d 659, 662 (Ct.App. 1985), citing Caines v. Marion Coca-Cola Bottling Co., 196 S.C. 502, 14 S.E.2d 10 (1941). An abandoned pleading becomes inapplicable to the proceedings. It is reversible error to charge the jury on a principle of law that is “inapplicable to the issues on trial.” Id. at 610, 327 S.E.2d at 662 (Ct.App. 1985) (internal citation omitted).

On August 15, 2008, Appellant Robert (Bobby) Edwards was performing lawn maintenance on Ms. Jordan’s property when he was struck and knocked unconscious by a defective two by six board in her deck, painfully injuring him (the “Incident”). (R. p. 93, line 13 - p. 94, line 6.) Ms. Jordan pleaded the affirmative defenses of comparative negligence and assumption of the risk¹ in her answer. However, in open court, she testified that she did not blame Mr. Edwards at all for the Incident. (R. p. 47, lines 3 - 12.) Ms. Jordan specifically answered counsel’s questions: “You’re not claiming Bobby Edwards did anything improper that day, are you?” with “No.” (R. p. 70, lines 4 - 18.) Likewise, Bobby Pearson, Ms. Jordan’s long-time, live-in boyfriend, testified that Mr. Edwards was not at fault in Incident. (R. p. 83, lines 4 - 21.)

Based on the complete lack of evidence pointing to any negligence on his part, Mr. Edwards timely moved for a directed verdict on the affirmative defenses of comparative negligence and assumption of the risk. The trial court denied this motion. Finally, in closing

¹ Mr. Edwards will refer to Ms. Jordan’s “open and obvious condition” defense as “assumption of the risk.”

arguments, Ms. Jordan's counsel reiterated Ms. Jordan's position: "What he did was and we're not blamin' him, there's no blame to go around but he stepped on the edge of the board and the board came up and hit him in the nose." (R. p. 132, lines 19 - 21.) Over the objection of Mr. Edwards, the trial court charged the jury on comparative negligence and assumption of the risk.

The jury reached a verdict allocating 65% fault to Ms. Jordan and 35% fault to Mr. Edwards. Mr. Edwards timely moved for a judgment notwithstanding the verdict on the issues of comparative negligence, or in the alternative, an order granting a new trial *nisi additur* or a new trial absolute, all of which the trial court denied in error. Mr. Edwards timely appealed the trial court's denial of his motion for a directed verdict as well as his post-trial motions.

In its December 11, 2013 Order, this Court held that there was evidence in the record to support the trial court's exercise of discretion in charging the jury on the affirmative defenses of comparative negligence and assumption of the risk. This Court also held that Ms. Jordan presented sufficient evidence of comparative negligence to support denial of Mr. Edwards' motions for a directed verdict and judgment notwithstanding the verdict.

Mr. Edwards respectfully asserts that this Court misconstrued the impetus of his argument in reaching these holdings. This is not simply a case where Mr. Edwards claims that Ms. Jordan failed to present sufficient evidence of comparative negligence and assumption of the risk. Mr. Edwards argues that instead of meeting her burden of establishing these affirmative defenses, Ms. Jordan abandoned them in open court. Just like the school principal in Larchick, Ms. Jordan, her boyfriend, and her counsel emphasized to

the jury that they did not blame Mr. Edwards for his injuries. As held in Brown v. Howell, abandoned pleadings become inapplicable. Ms. Jordan previously-asserted affirmative defenses that implicated Mr. Edwards thus became inapplicable and should not have been charged. However, instead of holding Ms. Jordan to her trial theory of not blaming Mr. Edwards, the trial court did just the opposite, charging the jury on legal theories in which Ms. Jordan did blame Mr. Edwards.

The import of Ms. Jordan's trial strategy and the trial court's approval of the same is not lost on Mr. Edwards' counsel. If allowed to stand, this case will stand for the proposition that civil defendants can speak out of both sides of their mouths in exchange for a unilateral benefit. The jury will reward the defendant with good will for abstaining from blaming the plaintiff for his or her injuries. At the same time, the defendant—at no loss of rapport with the jury—will be allowed to have the trial court be the “bad guy” when it instructs the jury on the principle of comparative negligence. If this trial strategy is approved by this Court, civil defendants and their counsel no doubt will clamor to trial to take advantage of this “win-win” trial strategy.

The running theme of Ms. Jordan's testimony and her counsel's argument was that she was not blaming Mr. Edwards for the accident or his injuries. By developing this theme in open court, she abandoned her affirmative defenses which blamed Mr. Edwards. The trial court therefore erred in denying Mr. Edwards' directed verdict motion, in charging the jury on comparative negligence and assumption of the risk, and in denying Mr. Edwards judgment notwithstanding the verdict.

II. The Court of Appeals overlooked or misapprehended Mr. Edwards' arguments that he was entitled to a new trial *nisi additur* or, alternatively, a new trial because the jury failed to award Mr. Edwards damages for pain and suffering despite being presented uncontested evidence of Mr. Edwards' pain and suffering.

The denial of a new trial motion will be overturned on appeal if the trial court's findings are unsupported by the evidence or the conclusions reached are controlled by an error of law. Proctor v. Dep't of Health and Environmental Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006).

The trial court may grant a new trial *nisi additur*, one form of a new trial, when it finds that a jury verdict merely is inadequate. Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000). In Waring, the plaintiff was injured in an auto accident. The jury awarded the plaintiff the exact amount of her medical bills but made no award for pain and suffering. Id. at 252 - 55, 533 S.E.2d at 908 - 10.

The trial court granted a new trial *nisi additur*, increasing the plaintiff's award by \$40,000 to account for the pain and suffering that the plaintiff testified she had suffered. Id. at 256, 533 S.E.2d at 910. On appeal, this Court found that the "jury's award of exactly the amount of [the plaintiff]'s medical expenses, to the penny," was an attempt to compensate the plaintiff for her medical expenses. Id. at 260, 533 S.E.2d at 912. This Court noted that, based upon review of the record, the plaintiff also presented factual and medical testimony regarding her pain and suffering for which she was "entitled to an award of pain and suffering." Id. This Court upheld the trial court's award of a new trial *nisi additur* in the amount of \$40,000, holding that based upon the record, "[t]he jury failed to consider [the plaintiff's] pain and suffering in reaching its verdict." Id. at 260 - 61, 533 S.E.2d at 912 - 13.

The instant case closely parallels Waring. Mr. Edwards testified that as a result of the Incident, he suffered a broken nose, a deviated septum, and significant bruising and swelling. Mr. Edwards testified that the pain he suffered was similar to what one would feel after being hit with a baseball bat. He also testified that he later endured a painful procedure to reset his nose, and still suffers congestion and snoring from his septum injury. (R. p. 95, line 15 - p. 97, line 20.) Courtney Joanne Pavlovich, Mr. Edwards' girlfriend and a physical therapist, testified that Mr. Edwards was in a lot of pain and endured swelling and bruising following the Incident. (R. p. 113, lines 13 - 20, p. 114, lines 9 - 11.) Ms. Jordan testified that she did not dispute the pain and suffering that Mr. Edwards claimed to have endured following the Incident. (R. p. 66, lines 15 - 20.)

Finally, Mr. Edwards presented testimony from his ear, nose, and throat doctor, Christopher D. Rucker, M.D. (R. pp. 186 - 200.) Dr. Rucker testified that to a reasonable degree of medical certainty, Mr. Edwards suffered his nasal fracture and deviated septum as a result of getting hit in the face by a board. (R. p. 198, lines 16 - 22.) Dr. Rucker also described the manner in which he repaired Mr. Edwards nose fractures, including the necessity of applying downward, manual pressure to the outside of the nose while applying upward, manual force using a lever inside the nose. (R. p. 196, lines 11 - 23). Finally, Dr. Rucker testified that Mr. Edwards' complaints of chronic nasal congestion were consistent with the deviated septum that he suffered as a result of the Incident. (R. p. 198, lines 2 - 4.)

Like in Waring, Mr. Edwards submitted factual and medical evidence concerning the injuries, pain, and suffering that he endured as a result of the Incident. Also like Waring, the jury in this case found Ms. Jordan negligent and awarded Mr. Edwards damages in the exact

amount of his medical bills. (R. p. 163, lines 2 - 13; p. 235.) This case therefore warrants the same inference as that made in Waring: despite finding Ms. Jordan negligent for Mr. Edwards' injuries and despite the evidence of Mr. Edwards' pain and suffering caused by those injuries, the jury failed to consider an award for his pain and suffering. This case also warrants the same conclusion as that upheld by this Court in Waring: the jury's verdict in this matter was at least insufficient, and Mr. Edwards is entitled to compensation for his pain and suffering by way of a new trial *nisi additur*.

In the alternative, Mr. Edwards is entitled to a new trial absolute. The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate so as to shock the conscience of the court and clearly indicates that the figure reached was a result of passion, prejudice, caprice, corruption, partiality, or some other improper motive. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). As stated above, the denial of a new trial motion will be overturned on appeal if the trial court's findings are unsupported by the evidence or the conclusions reached are controlled by an error of law. Proctor, 368 S.C. at 279, 628 S.E.2d at 496. "In deciding whether to assess error to a court's denial of 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." Vinson, 324 S.C. at 405, 477 S.E.2d at 723.

In this matter, the jury's failure to award any damages for Mr. Edwards' pain and suffering is so inadequate as require a new trial absolute. Mr. Edwards presented evidence demonstrating that he suffered an exquisitely painful injury. Ms. Jordan did not present any evidence to the contrary and even acknowledged Mr. Edwards' pain and suffering. Based

upon the evidence presented, the jury found Ms. Jordan negligent and compensated Mr. Edwards in the amount of medical bills but failed to compensate him for his pain and suffering. The verdict demonstrates that in considering compensation for pain and suffering, the jury was motivated by some type of improper motive, warranting a new trial absolute.

Finally, the trial court, sitting as the thirteenth juror, should have granted a new trial as to liability and damages because the jury's failure to award damages for pain and suffering was contrary to the weight of the evidence. Howard v. Roberson, 376 S.C. 143, 153, 654 S.E.2d 877, 882 (Ct.App. 2007) (internal citation omitted). Likewise, the trial court, sitting as the thirteenth juror, should have granted a new trial as to damages because the jury's verdict was inconsistent and reflects the jury's confusion. Id.

In this matter, the jury heard uncontested evidence from fact witnesses and a treating medical doctor which established Mr. Edwards' pain and suffering. The jury found Ms. Jordan negligent and awarded Mr. Edwards damages for his medical bills. Yet, the jury failed to award damages for pain and suffering. Whether this failure was due to improper motive or simple confusion, the jury's failure to award compensation for pain and suffering is not supported by the evidence. The trial court should have recognized the jury's error and exercised its authority as the thirteenth juror to award a new trial as to damages.

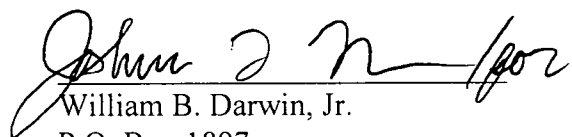
Mr. Edwards respectfully submits that the jury, the trial court, and this Court overlooked or misapprehended the uncontradicted evidence supporting an award of compensation for pain and suffering. At best, the jury's verdict was insufficient, justifying a new trial *nisi additur*. At worst, the jury's verdict awarding damages for medical bills but not pain and suffering reflects the jury's improper motive or confusion, justifying a new trial.

Conclusion

Ms. Jordan abandoned her affirmative defenses of comparative negligence and assumption of the risk. Still, the trial court charged the jury on these affirmative defenses. Ms. Jordan also failed to challenge Mr. Edwards' factual and medical evidence establishing his pain and suffering. The jury failed to award Mr. Edwards damages for pain and suffering despite any evidence supporting this portion of its verdict.

Mr. Edwards respectfully submits that this Court overlooked or misapprehended the evidence in the record when it upheld the trial court's errors in refusing to grant his motion for directed verdict, in giving charges on comparative negligence and assumption of the risk, and in refusing to grant his motion for judgment notwithstanding the verdict. Mr. Edwards also respectfully submits that this Court overlooked or misapprehended the evidence presented in this matter when it upheld the trial court's error in failing to order a new trial *nisi additur* or new trial absolute. For the reasons set forth above, Mr. Edwards is entitled to *en banc* reconsideration of this Court's December 11, 2013 Opinion.

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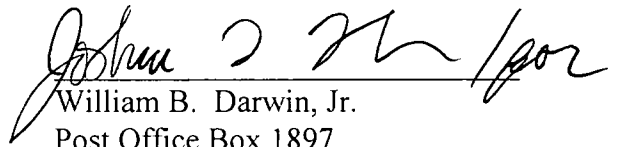
PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing and Suggestion for Rehearing *En Banc* on the following party by depositing a copy of it in the United States Mail, postage prepaid, on December 27, 2013, addressed to the attorneys of record listed below:

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Doyle, Tate, McDade, P.A.
P.O. Box 2125
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Attorney for Respondent

[Signature block on next page.]

HOLCOMBE BOMAR, P.A.

A handwritten signature in cursive script, appearing to read "William B. Darwin, Jr.", written over a horizontal line.

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December 27, 2013

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of the S.C. Court of Appeals
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SC Court of Appeals

RE: Robert W. Edwards, Jr. v. Linda N. Jordan
Case No. 2010-CP-42-00462
Appellant Case No. 2012-211394
Our File No. 10978

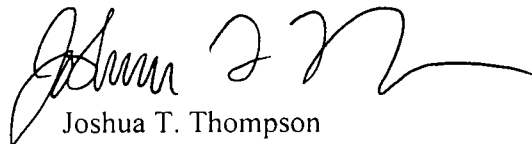
Dear Ms. Kitchings:

Enclosed please find for filing an original and seven copies of Appellant Robert W. Edwards, Jr.'s Petition for Rehearing and Suggestion for Rehearing En Banc as well as Proof of Service of the same. I also am enclosing our firm's check in the amount of \$25.00 representing the applicable filing fee for the Petition. Please return a filed copy of the Petition and Proof of Service to me via our courier.

Thank you in advance for your cooperation, and please do not hesitate to contact with me any questions.

By copy of this letter via U.S. Mail, I am serving Ms. Jordan's counsel with copies of the enclosed filings.

Sincerely,



Joshua T. Thompson

Enclosures

cc: James Victor McDade, Esq. (w/ enclosures)
William B. Darwin, Jr., Esq. (w/o enclosures) (via email only)