700-033

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STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Bobby Lee Tucker, Sr., Plaintiff, vs. John Doe, individually, and d/b/a Doe Trucking Company, Defendants.	IN THE COURT OF COMMON PLEAS FOURTH JUDICIAL CIRCUIT CASE NO.: 2010-CP-16-0315 **ORDER GRANTING DEFENDANTS' MOTION FOR NEW TRIAL *NISI REMITTITUR* AS TO PUNITIVE DAMAGES AND DENYING REMAINING POST-TRIAL MOTIONS**

This matter is before the Court, pursuant to Rules 50 and 59, SCRCP, on Defendants John Doe and Doe Trucking Company's ("Defendants") motions for judgment notwithstanding the verdict (JNOV), new trial absolute, new trial based on the Thirteenth Juror doctrine, or, in the alternative, new trial *nisi remittitur*.

BACKGROUND

This lawsuit arises out of a single vehicle accident that occurred on April 30, 2010, when Plaintiff Bobby Lee Tucker, Sr. ("Plaintiff"), was driving a 2001 Freightliner tractor-trailer southbound on I-95. As Plaintiff approached Exit 153, he lost control of this tractor-trailer and struck several concrete abutments in the median, suffering grievous injuries. Plaintiff subsequently filed this John Doe action alleging that on April 30, 2010, at 12:30 AM, he was proceeding south on I-95 and that "at the same time and place the Defendant was transporting a piece of machinery and a part of machinery (a 700 pound bearing) fell from the Defendant's tractor-trailer." Plaintiff did not strike Defendants' vehicle, and no one saw an object fall from a vehicle. No one reported seeing an object in Plaintiff's lane. Plaintiff filed this uninsured motorist action pursuant to S.C. Code Ann. § 38-77-170.

FILED
2013 DEC 18 AM 9:41
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At trial, Plaintiff testified that as he traveled south on I-95, a vehicle ahead of him applied its brakes and darted swiftly to the left, exposing what appeared to be an object sitting in his lane. He was unable to avoid the object and struck it. As a result of the accident, Plaintiff incurred medical bills of $325,000.00. He was hospitalized and in physical therapy for several weeks, and suffered permanent injury.

This matter came before the Court for trial on April 15, 2013. At the conclusion of the trial, the jury returned a verdict for Plaintiff. It awarded him $2.5 million in actual damages and $2.5 million in punitive damages. Plaintiff made no post-trial motions. Defendants filed motions for JNOV, new trial absolute, new trial based on the thirteenth juror doctrine, or, in the alternative, new trial *nisi remittitur*.

For the reasons set forth below, the Court denies Defendants' Motion for JNOV, Motion for New Trial Absolute, Motion for New Trial under the Thirteenth Juror doctrine, and Motion for New Trial *Nisi Remittitur* as to actual damages. The Court grants Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages.

ANALYSIS

I. Motion for Judgment Notwithstanding the Verdict (JNOV)

Defendants assert they are entitled to a judgment notwithstanding the verdict for several reasons. They assert Plaintiff: (1) failed to satisfy the affidavit requirements of the uninsured motorist statute, S.C. Code Ann. § 38-77-170(2); (2) failed to meet his burden of proof to establish negligence on the unknown Defendant by a preponderance of the evidence; and (3) failed to meet his burden of proof to warrant an award of punitive damages. Defendants also contend the Court erred in allowing into evidence testimony of two witnesses (Mr. Harris and Mr. Vereen) over Defendants' objections.

"In ruling on motions for directed verdict and JNOV, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. South Carolina Dept. of Highways and Public Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994).

A. Compliance with Uninsured Motorist Statute

Defendants originally moved for summary judgment on the basis that Plaintiff failed to comply with the requirements of S.C. Code Ann. § 38-77-170(2). This Court heard those motions and denied them. Defendants filed a motion for reconsideration which the Court also denied. At trial, Defendants reasserted the arguments raised in their previous motions. For the purpose of this Order, those arguments and this Court's orders denying them are incorporated herein. The Court again denies Defendants' Motion for JNOV based on Plaintiff's alleged failure to comply with S.C. Code Ann. § 38-77-170(2).

B. Plaintiff's Burden of Proof to Establish Negligence & Punitive Damages

Defendants contend they are entitled to JNOV because Plaintiff failed to prove by a preponderance of the evidence that Defendants were negligent. They contend Plaintiff: (1) failed to call any witness – including the affiant, Anthony Bernardo – to testify that any object was in Plaintiff's lane of travel; and (2) failed to call any witness – including the affiant, Anthony Bernardo – to testify that the presence of the object caused or contributed to Plaintiff's loss of control of his tractor-trailer.

At trial, Plaintiff presented the testimony of Donald Wilson ("Mr. Wilson") by deposition. Mr. Wilson testified that at approximately 10:30 P.M. on April 29, 2010, he saw a tractor-trailer turn onto the entrance ramp of southbound I-95 at its intersection with Highway

52. This is the same ramp Plaintiff used to access southbound I-95 approximately 1.5 hours later. He testified that strapped to the back of the flatbed was an object that "looked just like" the object Plaintiff claims he later struck. R. Dean Harris, M.E., P.E. ("Mr. Harris"), testified, over Defendants' objection, that based on his analysis the object was not properly strapped down and, again over Defendants' objection, that the damage to one of Plaintiff's front tires was "consistent with" striking some object. Albert Vereen ("Mr. Vereen") testified he came to the accident scene the morning after the accident to begin the lengthy process of removing Plaintiff's truck and trailer from the concrete abutments which were in the grassy median on the left side of southbound I-95. He testified he found the object on the right shoulder of southbound I-95. Over Defendants' objection, he testified that he believed Plaintiff struck the object and gave his reasons therefor. Charlie Hayes ("Mr. Hayes") testified he found the object on the right shoulder of southbound I-95 the morning after the accident as well.

None of the witnesses called by Plaintiff saw the object in the southbound lanes of I-95 or near the area where Plaintiff lost control of his vehicle. Mr. Vereen and Mr. Hayes are the only witnesses who saw the object on I-95. When they saw it, the object was on the right side of the road and several hundred feet south of the point where Plaintiff lost control of his vehicle. Plaintiff's expert, Mr. Harris, testified that if Plaintiff hit the heavy object, the impact would move the object only tens of feet.

Defendants further contend Plaintiff failed to prove by clear and convincing evidence that Defendants' conduct was reckless, willful and wanton. They contend that if Plaintiff has proven violation of a statute which requires loads to be properly secured, then that is all Plaintiff has proved. Defendants concede that violation of a statute is negligence *per se* and may be considered as evidence of recklessness. *Wise v. Broadway*, 315 S.C. 273, 276, 433 S.E.2d 857,

859 (1993) (citing *Daniels v. Bernard*, 270 S.C. 51, 240 S.E.2d 518 (1978)). However, they contend that, standing alone, it is not clear and convincing proof of recklessness, willfulness and wantonness.

Plaintiff concedes he has no direct evidence to corroborate his claim that the object was in his lane, that he struck the object causing him to lose control of his vehicle and propel the object south on I-95. However, Plaintiff contends the circumstantial evidence is sufficient to satisfy his burden of proof. This Court agrees with Plaintiff and, therefore, denies Defendants' Motion for JNOV on this basis.

The jury was made up of diverse personalities with various backgrounds, educational levels, and life experiences. This Court is of the opinion that it should not substitute its judgment for that of the jury. Based on the evidence presented to the jury, the Court finds that the verdict on liability and actual damages is supported by the evidence. The Court will not invade the province of the jury on these issues. The Court also believes Plaintiff satisfied his burden of proof on punitive damages. Therefore, the Court denies Defendants' Motion for JNOV on the bases that Plaintiff failed to satisfy his burden of proof as to negligence and recklessness.

II. Motion for New Trial Based on Thirteenth Juror Doctrine

Defendants move for a new trial based on the "thirteenth juror" doctrine. They contend that the verdict is contrary to the preponderance of the evidence. Defendants also argue that the punitive damages award was not established by clear and convincing evidence. For the reasons stated above, this motion is denied.

III. Motion for New Trial Absolute Pursuant to Rule 59, SCRCP

Defendants move, pursuant to Rule 59, SCRCP, for a new trial absolute on the basis that Plaintiff failed to meet his burden of proof to establish negligence by a preponderance of the

evidence. Defendants also argue that Plaintiff failed to establish punitive damages by clear and convincing evidence. For the reasons stated above, this motion is denied.

Defendants further move for a new trial absolute on the basis that the Court erred in allowing Mr. Harris to offer expert testimony. Over Defendants' objection, Mr. Harris testified that the damage to Plaintiff's vehicle was "consistent with" striking the object. The basis for Defendants' objection was that Plaintiff did not identify Mr. Harris as an expert witness who would offer such testimony. Defendants contend Mr. Harris should have been allowed to provide testimony on the issues for which he was identified, but not allowed to offer expert opinion testimony on the other issues. During oral argument they directed the Court to *Jumper v. Hawkins*, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001) and *Bensch v. Davidson*, 354 S.C. 173, 580 S.E.2d 128 (2003). Defendants contend they were prejudiced because this testimony was critical and they did not have an opportunity to retain an expert to respond to it. They also contend the Court erred in allowing Mr. Vereen to offer opinion testimony that he believed Plaintiff struck the object. The basis for this objection was that Mr. Vereen was a fact witness only. Plaintiff did not identify him as an expert witness nor did Plaintiff qualify him as an expert witness. At trial, the Court found that this testimony fit the parameters of Rule of Evidence 701, and admitted it into evidence. Defendants' Motion for New Trial Absolute on these bases is denied.

IV. Motion for New Trial *Nisi Remittitur* as to Actual Damages and Punitive Damages

Defendants move for a new trial *nisi remittitur* as to actual and punitive damages. They assert the jury's award was excessive. "A motion for new trial *nisi remittitur* asks the trial court, in its discretion, to reduce the verdict because it is 'merely excessive,' although not motivated by

considerations such as passion, caprice, or prejudice." *Clark v. South Carolina Dept. of Public Safety*, 353 S.C. 291, 309, 578 S.E.2d 16, 25 (Ct. App. 2002).

A. Actual Damages

In this case, Plaintiff presented evidence in the form of expert opinion testimony by two doctors and his own testimony that, as a result of the accident, he sustained serious and life-threatening injuries, endured substantial and continuing pain, ongoing loss of enjoyment of life, permanent impairment, and disfigurement. Plaintiff further presented evidence of medical bills of approximately $325,000.00 for treatment of his injuries. Based on the evidence presented to the jury, the Court finds the verdict on actual damages to be wholly supported by the evidence. Accordingly, Defendants' Motion for New Trial *Nisi Remittitur* as to actual damages is denied.

B. Punitive Damages

In addressing Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages, this Court must conduct a post-judgment review of the punitive damages award. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006). In reviewing an award of punitive damages, this Court must look to the following factors, identified by the Supreme Court in *Mitchell v. Fortis Ins. Co.*: (i) the degree of reprehensibility of the defendant's actions; (ii) the ratio of the potential damages suffered by the plaintiff and the amount of the punitive damage award; and (iii) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in similar cases. 385 S.C. 570, 587-89, 686 S.E.2d 176, 185-86 (2009).

i. Reprehensibility

Reprehensibility is "perhaps the most important indicium of the reasonableness of a punitive damages award." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 565 (1996). In

evaluating reprehensibility, this Court is required to consider whether: "(i) the harm caused was physical as opposed to economic; (ii) the tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, rather than mere accident." *Mitchell*, 385 S.C. at 587, 686 S.E.2d at 185 (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003)).

Here, the degree of reprehensibility is minimal. Because this case involves an unknown driver, the Court must base its determination of reprehensibility on inferences from the evidence admitted at trial. To that end, the Court is able to conclude that: an unknown driver failed to appropriately secure this 700 pound bearing; did not notice the bearing had fallen from the tractor-trailer; and failed to respond or otherwise warn the appropriate authorities of this danger. While this conduct certainly qualifies as reckless, it is not intentional. Therefore, based on these inferences, as well as consideration of the elements mentioned directly above, the Court finds that the first factor – reprehensibility – weighs in favor of the Defendants and a reduction of the punitive damages award.

ii. Ratio – Disparity Between the Actual or Potential Harm Suffered by Plaintiff and Amount of Punitive Damages Award

The United States Supreme Court has avoided identifying a bright line, or constitutional limit, "on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *Mitchell*, 385 S.C. at 588, 686 S.E.2d at 185. However, the Supreme Court has noted that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* With regard to this second factor,

the Court must consider: "the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant's ability to pay." *Id.*

In the present case the ratio between actual damages suffered by the Plaintiff and the punitive damages is 1:1, based on the jury award of $2.5 million dollars in actual damages and $2.5 million dollars in punitive damages. Moreover, the effectiveness of the punitive damages award as both a punishment and deterrent is minimal given that the identity of the tortfeasor is unknown. *See Clark v. Cantrell*, 339 S.C. 369, 378-79, 529 S.E.2d 528, 533 (2000) ("[t]he purposes of punitive damages are to punish the wrongdoer and deter the wrongdoer and others from engaging in similar reckless, willful, wanton, or malicious conduct in the future."). Consequently, this second factor weighs in favor of the Defendants and a reduction in the punitive damages award.

iii. Comparative Penalty Awards

The Court finds that this third and final factor also weighs in favor of the Defendants. In their supplemental memorandum, the Defendants point the Court's attention to a line of South Carolina cases that establish a pattern in which punitive damages awards have been less than accompanying actual damages awards, and in many cases, substantially less. Two of these cases involve phantom drivers whose conduct was more egregious than the present case at Bar. See *Beldon v. Doe*, 2004 WL 5392306 and *Manigault v. Doe*, 2005 WL 5791474. Thus, in light of prevailing law in this jurisdiction, and given the facts and circumstances of this case, the Court finds the punitive damages awarded by the jury to be excessive, but not motivated by improper considerations. Consequently, the Court finds it appropriate to reduce the amount of punitive damages awarded by the jury in this case, and grants Defendants' Motion for New Trial *Nisi*

Remittitur as to punitive damages to the extent that the amount awarded in punitive damages shall be reduced from $2.5 million to $500,000. Plaintiff shall have thirty (30) days from the date of service of this Order upon him to accept the reduction or file a motion for a new trial. In the event a new trial is requested, such trial shall be on the issue of both actual and punitive damages, as required by S. C. Code Ann. 15-33-125 (1988), and the Clerk shall return this case to the jury trial roster. In the event the *nisi remittitur* is accepted, upon written notice by Plaintiff to the Clerk, the Clerk is directed to reduce the verdict enrolled in this case to the total sum of $3,000,000, and this case shall be considered fully concluded at the trial level at that time.

CONCLUSION

For the foregoing reasons, it is ORDERED that Defendants' Motion for New Trial *Nisi Remittitur* as to punitive damages is GRANTED. Defendants' Motion for New Trial *Nisi Remittitur* as to actual damages, and all other post-trial motions, are DENIED.

IT IS SO ORDERED.

December 16, 2013
Darlington, South Carolina

J. Michael Baxley, Presiding Judge
Fourth Judicial Circuit

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2013 DEC 18 AM 8:41
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