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

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

On December 29, 2009, the Respondent Kathy Beason (hereafter "Beason"), filed an action for damages resulting from an automobile accident against Appellant, Chatone Lowden (hereafter "Lowden"). The action alleged that on December 13, 2008, Lowden struck Beason in the rear of her vehicle, causing her to suffer personal injuries. Lowden raised a general denial.

The case was tried before the Honorable Edgar W. Dickson in the Orangeburg County Court of Common Pleas on March 2, 2011. At the trial, Beason presented evidence that she presented to the emergency room the same day of the accident. She also presented expert medical testimony that she suffered a labrum tear to her left shoulder that required surgery to repair. In all, she alleged medical bills of approximately $36,000, and had lost wages of approximately $2,500.00. At trial, Lowden admitted negligence, but denied the damages were causally related.

The jury received the case late in the afternoon, and deliberations lasted approximately one hour and forty-five minutes. Initially, the jury came out and said they had reached a verdict, but the jury foreman refused to take part in the verdict. Judge Dickson instructed them the verdict must be unanimous, and ordered them to continue deliberating. They returned in a matter of a few minutes with a verdict of $17,000.00. R. p. 5.

On March 11, 2011, Beason moved for a New Trial Absolute or, in the alternative, a new trial *nisi additur*. At a hearing on the matter on July 22, 2011, Judge Dickson granted the Motion

for *additur*, and reformed the verdict to $80,000, or roughly twice the special damages claimed. Lowden timely filed her appeal of that Order.

FACTS

On December 13, 2008, Lowden's Chevrolet S-10 pickup struck the back of Beason's 2007 Ford Explorer. The impact caused deformation of the left rear tailgate and bumper, and the jury was shown photographs of this damage. (R. p. 68, line 18-p. 70, line 3). Lowden admitted she was negligent in causing the wreck. (R. p. 37, lines 15-24). Accordingly, the only issue for the jury to decide was whether the wreck was the proximate cause of Beason's claimed damages.

Beason reported to the Regional Medical Center's (TRMC) Emergency Department approximately one-and-one half hours after the accident complaining of pain in her upper back, scapula area and elbow. She testified that she had pain in her left shoulder from the time of the wreck on. (R. p. 53, line 21 through p. 66, line 5). Beason explained she continued to work while continuing to seek medical treatment because she had to. (R. p. 57, lines 10-11). She stated that while her job consisted of loading and unloading boxes, most of the boxes were filled with lightweight items such as bags of chips and other snacks. (R. p. 50, line 18 through p. 51, line 4). She stated she modified her usual behavior at work to take fewer boxes at a time, and that while it took longer to finish her route, she was able to complete it. (R. p. 79, lines 6-11).

Ms. Beason followed up with her primary care physician within one month of the wreck, and he immediately ordered an MRI exam, and referred her to an orthopedist for a consult. (R. 56, lines 7-22). Her first appointment with Dr. Nelson, the orthopedist, was on February 11, 2009. (R. 103, lines 18-20). After Beason's initial visit, Dr. Nelson indicated surgery was needed to address her injury and scheduled her for surgery. (R. 96, lines 1-17). The surgery was conducted on March 5, 2009. Following surgery, she underwent a course of physical therapy

and was released on April 3, 2009. (R. 59, lines 12-23). She continued to follow up with South Carolina Orthopedic Institute until they released her on July 6, 2009. Dr. James Marro saw her on July 6, as Dr. Nelson had moved his practice to West Virginia. (R. 80, line 25). Dr. Marro gave her a 2% overall impairment rating to the left shoulder, based on her decreased range of motion in the shoulder.

After the jury received the case, deliberations began. Throughout much of the time the jury was deliberating, there were raised voices. As noted in the trial judge's order awarding the *additur*, the trial judge could hear two distinctly male voices, and he felt those voices had angry and aggressive tones. When the jury initially returned the verdict, the jury foreperson refused to sign it. Judge Dickson gave the jury an *Allen* charge, and they returned for more deliberation. There was a short period of very loud deliberation, and within minutes, the jury returned with a verdict which they affirmed was unanimous. That verdict was for $17,000. (R. 88, lines 11-13).

STANDARD OF REVIEW

The denial or granting of a motion for a new trial *nisi* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *Burke v. AnMed*, 393 S.C. 48, 710 S.E.2d 84 (2011); *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006); *See also*, *Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995) ("If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*."). The trial judge who heard the evidence, and, in this case the deliberations, possesses a better informed view of the damages than the Court of Appeals. Accordingly, great deference is given the trial judge. *Vinson v. Hartley*, 324 S.C. 389, 405-6, 477 S.E.2d 715, 723-4 (Ct. App. 1996).

ARGUMENT

DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR A NEW TRIAL, NISI ADDITUR, IN THE FACE OF A VERDICT THAT WAS NOT SUPPORTED BY THE EVIDENCE AND FOLLOWING A DELIBERATION PROCESS WHICH THE COURT FOUND TO BE TROUBLING.

The parties agree that the sole issue on appeal is whether the trial court was within his authority to grant Beason's motion for a new trial *nisi additur*. It is without question that the trial judge has the inherent authority to ensure justice is done. When a jury verdict does not comport with the evidence presented, the trial judge has two remedies: a new trial absolute, or new trial *nisi*. While a jury verdict is entitled to great deference, that deference is restrained by basic notions of justice.

Lowden urges this Court to find that this case is so factually similar to *Green v. Fritz*, 356 S.C 566, 590 S.E.2d 39 (2003) that the same outcome is mandated. The cases, and the trial judge's order, are not similar, at all. *Green* does not at all stand for the proposition that the trial court was without the authority to grant a motion for a new trial *nisi additur*. Rather, the order itself was deficient. In *Green*, the court rested its decision on a finding that the jury must have been motivated by "passion, caprice or something not found in the record." *Id.* at 569, 571 S.E.2d at 42.The trial court then listed the medical bills as the basis for the *additur*. *Id.* at 569, 590 S.E.2d at 41. The reversible error was the failure of the order to be capable of appellate review. Additionally, if the jury verdict was due to passion or prejudice, as surmised, the appropriate remedy would have been a new trial.

In *Luchok v Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010), a trial judge's additur award was reversed for identical reasons. In Luchok, the plaintiff was the only witness as to the medical bills. *Id.* at 263, 571 S.E.2d at 72. The bills consisted of $9,100 in chiropractic treatment and $900 of other medical expenses. *Id.* There was no medical testimony as to the necessity of

the treatment or whether it was causally related to the accident. In the trial judge's order, there was again a mere recitation of the medical bills and a conclusory statement that the chiropractic bills were reasonable and necessary. *Id.,* at 264, 571 S.E.2d at 72. The Court of Appeals reversed on the grounds the order failed to list a compelling reason to invade the province of a jury. *Id.,* at 265, 571 S.E.2d at 73. They further found the trial court's determination that the chiropractic bills were reasonable and necessary when that issue was the disputed. *Id.*

In this case at bar, the trial judge's order specifically lays out the analysis undertaken to arrive at the conclusion that a new trial *nisi additur* was appropriate. (R. pp. 2-4). The court specifically referenced the fact that Beason's treating surgeon clearly opined the surgery was necessitated by the wreck. (R. p. 2) Further, the trial court pointed out there was no evidence contradicting this opinion. (R. pp. 2-4). As an additional ground for finding the verdict was merely inadequate, the trial noted the jury found the defendant was negligent, and that the plaintiff suffered injuries as a proximate result. *Id.* The actual verdict, however, was found to be "simply not reasonable in light of the evidence presented." (R. p. 3). If the finding that a verdict is unreasonable is not a compelling reason to grant a new trial nisi, then that relief is illusory for litigants.

Lowden asserts the trial court was "wildly speculating" as to the content of the deliberations. Appellants Final Brief, at p. 16. The judge made no attempt to interpret the content; his observation was as to tone. (R. p. 2). It is folly indeed to say a trial judge is not equipped to gauge the tone of voices coming from a jury room with such force and volume as to be audible throughout the courtroom and the judge's chambers. When Lowden, in her final brief, asks "[w]ho is the trial judge ..... 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." Appellants Final Brief, at p. 16. Lowden claims there is no way of knowing which side the voices were arguing for. *Id.* While this is true, it misses the point. The point is the deliberations, somehow, produced a verdict that made no sense in light of the evidenced presented. The nature of how the jury arrived at the verdict is merely context which tends to support the idea that the flawed process lead to a flawed result.

The size of the verdict must be examined in the context of the evidence presented and jury deliberations. The fact the trial court found the deliberation process to be "troubling" merely supports the ultimate finding that the verdict was not the result of a reasoned evaluation of the evidence presented. (R. p.p. 2-4). A trial judge must be permitted to correct unreasonable actions by a jury, whether they be too generous or not generous enough, if justice is to be preserved.

Lowden asserts the evidence was contested, despite the fact they offered no expert testimony, because Dr. Nelson's testimony on cross-examination called the validity of his opinions into doubt. Appellant's Final Brief, pp. 20-24. Lowden's examples of this are not a fair representation of the testimony of Dr. Nelson.

At the trial of the case, Dr. Nelson testified as follows:

> Q: [B]ased on what you found clinically, based on what you know on speaking with Ms. Beason, based on what you found surgically and your understanding of the mechanics of the accident, do you have an opinion to a reasonable degree of medical certainty that the injuries you treated Ms. Beason for were in fact caused by the motor vehicle accident?
>
> A: I do believe they were caused by the accident.

Q: Are there any other – to your knowledge--, is there anything else in the record that would indicate any other cause?

A: No.

(R. p. 100, lines 2-13). Appellant has stated in her brief that a reasonable jury could have concluded that Ms. Beason's shoulder pain and need for surgery was actually related to her pre-existing arthritis. Appellant's Final Brief, pp. 21-24. However, Dr. Nelson specifically addressed this possibility in response to cross-examination.

Q: Would you be surprised in a 54-year-old female to see arthritis developing in her shoulder?

A: No. Again, I would see arthritis - - normally, I would see arthritis in seven out of ten people in the AC joint; especially if you're a worker, someone who used your hands at work. However, maybe only one in ten would be symptomatic. But none would be symptomatic unless they were presenting with that chief complaint. Ms. Beason had physical therapy, she tried NSAIDS, and then came to my office.

(R. p. 107, lines 5-14). Respondent also mischaracterizes Dr. Nelson's testimony regarding the need for the subacromial decompression. *Id.* While inquiring on cross-examination as to whether this procedure could have been necessitated by the pre-existing arthritis, Dr. Nelson clarified as follows:

Q: By shaving that bone, is that where the - - because arthritis is essentially a development of extra bone in the area; is that correct?

A: Not necessarily. Sometimes you have not developed extra bone, you just have pain in that joint.

Q: Okay.

A: So the chromium (sic) - - the subacromial decompression is not - - is not an arthritis treatment because that's just - - you're planting (sic) the bone, you're really taking out inflamed tissue in the middle of that space.

(R. p. 111, lines 12-24).

Lowden asserts in her brief that she was able to show on cross examination that Ms. Beason had a pre-existing arthritic condition in her shoulder. Appellants Final Brief, pp. 21-24. However, Dr. Nelson clearly testified that, while Beason may have had some pre-existing arthritis in her shoulder, and that most people do, it was only the trauma that caused it to become symptomatic.

Q: If there is a gross osteoarthritis on the bone – arthritis on the bone, that's something –its not something caused by the accident – I believe we've established that earlier?

A: Well, no. I would say that you can have osteoarthritis in the joint that's asymptomatic. When you do have an injury, you can flare that up. So when I look into her – when I look into her AC joint, the AC joint was dropped down, so that joint was unstable. So you can get that picture from dormant arthritis with a superimposed injury.

(R. p. 111, lines 12-24). He further clarified on cross-examination that the labrum tear he observed and repaired during surgery was not caused by repetitive trauma, but rather by the wreck itself. (R. p. 114, line 16- p. 115, line 21).

Lowden claims that there were "serious problems" with Dr. Nelson's testimony because there was a two month period of time between the wreck and his first seeing her, and because he

thought she had done therapy before coming to see him, when in fact, she had not. Appellant's Final Brief, pp. 21-24. On redirect, Dr. Nelson clearly stated the physical therapy would not have helped her based on what he saw inter-operatively. (R. p. 122, lines 6-19). He also stated that the nature of her work, after it was described to him in the deposition on cross-examination, did not in any way change his opinion that the wreck was the cause of the injuries he treated her for. (R. p. 123, lines 9-15).

Lowden also argues the verdict of $17,000 could be a finding that the emergency room treatment of approximately $2,000 was related to the wreck, but that the surgery was not. Appellant's Final Brief, pp. 22-24. This would indicate the jury found that one day of pain and suffering was worth $15,000. A ratio greater than seven to one for medical bills to damages awarded would itself most likely be considered improper by Lowden if applied to the full special damages submitted in this case. It is certainly a ratio that would be well above the norm for cases of this type in this, and the vast majority of other venues. This inability to rationally explain a verdict of $17,000 is part and parcel to the trial judge's conclusion, based on the evidence, that the verdict was unreasonably low. The trial judge stated his compelling reasons in the order granting the motion to additur, and for that reason, the order should be upheld. (R. pp. 2-4).

It is also important to note that Lowden does not have to accept the verdict. The nature of a new trial *nisi additur* is that it gives the Defendant a choice. If Lowden believes the trial court's *additur* is unwarranted or overly-generous, she may afford herself of the option for a new trial. "In actuality, the import of a new trial *nisi additur* or *nisi remittitur* is a suggestion on the part of the judge of a settlement figure. If the party ruled against agrees to the suggested amount

he may not complain. The prevailing party having asked for the relief must likewise be content with the determination." *Graham v. Whitaker*, 282 S.C. 393, 402, 321 S.E.2d 40, 45 (1984).

CONCLUSION

The trial judge in the above case, after hearing all the testimony, after observing the nature of the jury deliberations, determined that under the totality of the circumstances, the verdict of $17,000 was inadequate. He exercised his inherent authority to insure that justice is done to the litigants who appear before him, and additured the verdict to $80,000. In his written order, he set forth compelling reasons for his decision. Accordingly, this court should afford the trial court great deference, and affirm his well-reasoned order.

Respectfully Submitted,

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PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief by depositing a copy of it in the United States Mail, postage prepaid, on this date, to J. Austin Hood, 1612 Marion Street, Suite 200, Columbia, SC 29201.

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CERTIFICATE OF COUNSEL

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

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