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AUG 03 2015

SC Court of Appeals

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

PATRICIA B. CATHEY,

Plaintiff,

v.

ALMA PATTERSON CREIGHTON and
WILLIAM KINZLEY,

Defendants.

IN THE COURT OF COMMON PLEAS

IN THE FIFTH JUDICIAL CIRCUIT

Civil Action No. 2013-CP-40-724

ORDER GRANTING A NEW TRIAL

RICHLAND COUNTY
FILED
JUL - 6 PM 1:42
PATTERSON CREIGHTON
vs. CATHEY, G.S.

This matter came for trial on December 15, 2014. The jury returned a verdict in favor of Plaintiff Patricia B. Cathey in the amount of \$7,500.00 on December 16, 2014. Pursuant to Rule 59(a), of the South Carolina Rules of Civil Procedure, on December 23, 2014, Plaintiff filed her Motion for a new trial *nisi additur* or, in the alternative, for a new trial based on the Thirteenth Juror Doctrine, or alternatively, for *additur* of the jury's verdict. Upon consideration of the parties' filings, oral arguments, and a review of applicable law, this Court hereby **GRANTS** Plaintiff's Motion for a New Trial, as set forth in detail below.

This automobile accident occurred on December 8, 2010, at approximately 9:00 a.m. Plaintiff was operating her vehicle, a 2006 Saab, on Blossom Street in the City of Columbia. Defendant Alma Patterson Creighton was operating a 2004 Honda vehicle owned by Defendant William Kinzley. Plaintiff had the right-of-way at a traffic intersection on Blossom Street. Suddenly, without any warning, and without yielding the right-of-way to Plaintiff and in disregarding the red light traffic control device, Defendant Creighton, operating the 2004 Honda vehicle, collided into Plaintiff's vehicle, causing Plaintiff to suffer severe injuries and damages.

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CONCLUSIONS OF LAW

A new trial is required on the grounds that the jury's award was insufficient and contrary to the weight of the evidence.

I. NEW TRIAL BASED ON THE THIRTEENTH JUROR DOCTRINE STANDARD OF REVIEW

"South Carolina's thirteenth juror doctrine is well established as the standard for granting a new trial in state law actions." *Norton v. Norfolk S. Ry. Co.*, 350 S.C. 473, 477, 567 S.E.2d 851, 854 (2002) (citing *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct. App. 1996)). The thirteenth juror doctrine has also been termed granting a new trial upon the facts. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267 (citing *S.C. Highway Dept. v. Townsend*, 265 S.C. 253, 217 S.E.2d 778 (1975)). The effect of granting a new trial upon the facts is the same as if the jury failed to reach a verdict and a new trial is ordered. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267. The judge as the thirteenth juror "hangs" the jury. *Id.* Neither judge nor the jury is required to give reasons for this outcome. *Id.* "Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings." *Id.*

The question of whether to grant a new trial upon the facts is one addressed to the discretion of the trial judge. *McEntire v. Mooregard Exterminating Servs.*, 353 S.C. 629, 633, 578 S.E.2d 746, 748 (Ct. App. 2003) (citing *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976)). A party's evidence might make a case for the jury, but the evidence might be so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court may choose to set aside the verdict under the thirteenth juror doctrine. *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 334, 732 S.E.2d 166, 172

(2012) (internal citations omitted). Under the thirteenth juror doctrine, the trial judge weighs the evidence and need not view it in the light most favorable to the opposing party." *McEntire*, 353 S.C. at 633, 578 S.E.2d at 748 (internal citations omitted). Here, the Court uses its discretionary power to grant a new trial upon the facts.

II. A NEW TRIAL IS GRANTED ON THE GROUNDS THAT THE JURY'S AWARD WAS INSUFFICIENT AND CONTRARY TO THE WEIGHT OF THE EVIDENCE.

A. THE JURY'S AWARD WAS INSUFFICIENT BASED ON A CASE LAW REVIEW OF DAMAGES VERDICTS.

The Court has expansive authority to set aside a verdict as contrary to the weight of the evidence. *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320-322, 628 S.E.2d 496, 519 (Ct. App. 2006). "The law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability but the damages awarded are inadequate, a new trial may be ordered on the issue of damages alone." *Cartin v. Keller Bldg. Products*, 299 S.C. 152, 153, 382 S.E.2d 922, 923 (1989) (citing Rule 59(a), SCRPC). Several cases reflect that legal principle.

In *Taylor v. Devore*, an action for damages for both personal injury and property, arising out of an automobile collision, the verdict of the jury was for the plaintiff for actual damages in the amount of \$1,500. *Taylor v. Devore*, 253 S.C. 393, 171 S.E.2d 158 (1969). The plaintiff moved for a new trial on the ground that such verdict was inadequate. *Id.* The trial judge reviewed the evidence as to damages and concluded: "[i]n view of the extent of the damages to person and property proven by the greater weight of the evidence, I am of the opinion that the verdict is inadequate." *Id.* The trial judge issued an order granting the plaintiff's motion for a new trial. *Id.*

Cartin v. Keller Bldg. Products is an example of an opinion in which the trial court determined that the jury disregarded its instructions on damages and granted the accident victim's request for a new trial. *Cartin v. Keller Bldg. Products*, 299 S.C. 152, 382 S.E.2d 922 (1989). In *Cartin*, the accident victim filed an action alleging that his fall was proximately caused by loose carpet sold by the seller and negligently installed by the seller's employee. *Id.* After the trial court denied the jury's request for written definitions of agent and independent contractor, the jury rendered a verdict in the accident victim's favor. *Id.* However, the jury only awarded the accident victim one dollar in actual damages. *Id.* In response, the accident victim requested a new trial on the issue of damages and the seller requested a new trial absolute. *Id.*

A more recent review of a jury's determination on damages is found in *Dillon v. Frazer*, where the passenger sued the driver seeking damages for injuries suffered in a traffic accident. *Dillon v. Frazer*, 383 S.C. 59, 678 S.E.2d 251 (2009). A jury returned a verdict of \$6,000 for the passenger. *Id.*, 383 S.C. at 63, 678 S.E.2d at 252. The trial court then granted the passenger's motion for *additur* and increased the damages by \$15,000, but refused to grant a new trial absolute on damages and denied all other motions. *Id.* As in the case at hand, liability was not at issue, and the trial proceeded as to damages only. *Id.* The passenger argued that the trial court erred by not granting a new trial absolute as to damages. *Id.* The appellate court agreed. *Id.* The passenger presented evidence of over \$500,000 in damages as a result of the accident. *Id.*, 383 S.C. at 64, 678 S.E.2d at 253. While the driver contested portions of the claim, unchallenged testimony established \$30,026 in undisputed damages. *Id.* The appellate court found that the jury verdict of \$6,000 was irreconcilably inconsistent with the unchallenged evidence presented at trial. *Id.*

Here, as in *Taylor*, *Cartin*, and *Dillon*, a new trial is proper.

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B. THE JURY AWARD WAS WELL BELOW DAMAGES PROVEN BY PLAINTIFF.

Plaintiff moved for a new trial based on the grounds that the jury's verdict grossly undervalued the Plaintiff's damages, did not fully consider her uncontroverted witness testimony, did not consider the length of time Plaintiff suffered due to multiple treatments for her injury, and did not consider the future impact the injury will have on Plaintiff's remaining life span. During every trial, the court's goal should be to ensure that no party is unfairly prejudiced by an inaccurate damage award. *Sanders v. Green*, 208 F. Supp. 873, 1962 U.S. Dist. LEXIS 3644 (D.S.C. 1962). Courts seek to ensure that verdicts accurately and justly reflect the evidence presented to the jury, and do not result in a miscarriage of justice by awarding an insufficient amount to a party who has suffered greatly. *Id.* The evidence presented at trial yields only one conclusion, Plaintiff suffered months of pain and her injuries caused the disruption of her daily life and activities.

An award in the amount of \$7,500 is well below damages proven by Plaintiff. To support her request for damages, Plaintiff submitted evidence that was uncontroverted by three witnesses. Derek Anderson, an unbiased eye witness to the accident, testified by deposition that Plaintiff's injuries required her to be taken to the hospital by ambulance. Two other witnesses, Plaintiff's daughter and friend, testified that Plaintiff lost a great deal of physical enjoyment in her daily activities and was unable to continue her normal activities due to her severe neck pain. Moreover, Plaintiff's daughter testified that Plaintiff had multiple treatments, doctors' appointments, and therapy sessions. The evidence presented at trial overwhelmingly indicated that Plaintiff's medical treatments occurred and were needed as a result of the accident.

Furthermore, the jury failed to consider Plaintiff's pain and suffering in reaching its verdict. Plaintiff suffered substantial physical pain and mental distress as a result of the vehicular

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accident. Plaintiff described the pain as akin to a knife stabbing her neck on a daily basis; being so unbearable that Plaintiff can no longer fully turn her neck without pain; and debilitating to the point where Plaintiff can no longer participate in her life activities such as bike riding and knitting.

Plaintiff also described the pain as ongoing due to the accident. At trial, Plaintiff presented evidence that she suffered pain for a significant length of time while receiving multiple treatments for her injury that exceeded several months and was to continue.

Plaintiff further testified that she has been forced to substantially limit her activities as a result of the accident. The significance of the *Waring v. Johnson*, 341 S.C. 248, 260, 533 S.E.2d 906, 912 (Ct. App. 2000) to the present case is that it is an example of a trial judge deciding that in addition to the pain the plaintiff had and would continue to suffer, the judge found it important that the plaintiff found herself unable to continue her previous active lifestyle. Similarly, in the case at hand, Plaintiff testified that her injuries prevented her from participating in her previous active lifestyle in which she bicycled long distances on a regular basis.

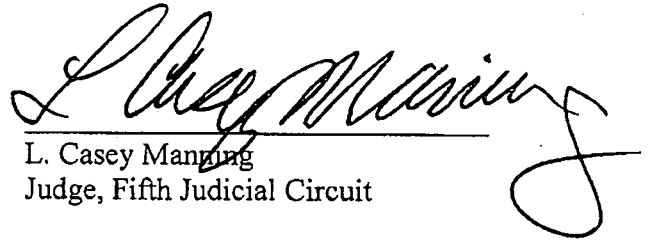
The jury verdict returned in this case is contrary to the preponderance of the evidence and is not supported by the factual testimony of the parties at trial. Plaintiff provided uncontroverted witness testimony as to the extent and value of her damages, and that testimony was not properly considered by the jury. No witness directly contradicted Plaintiff's testimony. Nevertheless, the jury returned a verdict for damages substantially below any reasonable amount of compensation. Furthermore, Derek Anderson's testimony, as an eyewitness to the accident, was uncontradicted at trial. Mr. Anderson testified to the severity of the impact and his immediate concerns for Plaintiff's life. Mr. Anderson's credibility was uncontroverted. Mr. Anderson is a disinterested witness with no personal stake in the result of the litigation.

Based on the testimony presented at trial, it is clear that the jury's verdict was grossly inadequate and contrary to the fair preponderance of the evidence. The verdict indicates the jury failed to properly consider and follow the instructions of the court in its deliberations. Accordingly, the exercise of judicial discretion and the awarding of a new trial is appropriate. Furthermore, the disparity between the jury award and the uncontroverted damages go beyond a merely conservative award and suggest that the jurors were motivated by improper considerations.

CONCLUSION

For the reasons set forth herein, Plaintiff's Motion for New Trial is hereby **GRANTED**, and it is hereby **ORDERED** that a new trial will be scheduled concerning the underlying matter.

AND IT IS SO ORDERED.


L. Casey Manning
Judge, Fifth Judicial Circuit

ENTERED this 2 day of July, 2015.
Columbia, South Carolina

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

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JUDGE IT IN A CIVIL CASE

CASE NUMBER: 2013CP4007214

Patricia B Cathey

AUG 03 2015 Alma Patterson Creighton

PLAINTIFF(S)

SC Court of Appeals

William Kinzley

DEFENDANT(S)

Submitted by: _____

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 6 July 2015 to attorneys of record or to parties (when appearing pro se) as follows:

J. Lewis Cromer

David A. Fedor

Jonathan Gamble Roquemore

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

Turner | Padget

Joshua D. Shaw

REPLY TO:

JShaw@TurnerPadget.com
Direct dial: 803-227-4310
Direct Fax: 803-400-1554

August 3, 2015

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VIA HAND DELIVERY

Attn: Elizabeth Carter
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: Patricia B. Cathey v. Alma Patterson Creighton and William Kinzley
Case No. 2013-CP-40-7214
Our File No. 1464.7321

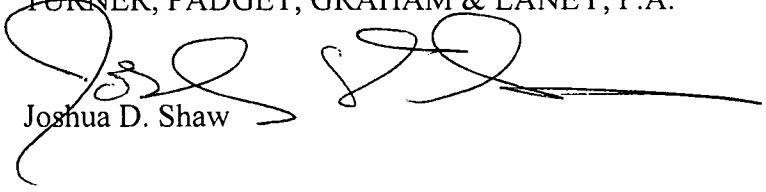
Dear Ms. Carter:

Enclosed please find the Order referenced in our Notice of Appeal in the above-referenced matter. I apologize for omitting it in the original submission. If you have any further questions or concerns, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.


Joshua D. Shaw

JDS/kcc
Enclosure