IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2012-CP-02-1691
Appellate Case No.: 2015-000409

Benjamin K. Henderson, ... Appellant,

-v-

Patricia Greer, ... Respondent

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. **DID THE TRIAL COURT ERR IN DENYING HENDERSON'S MOTION FOR NEW TRIAL *NISI ADDITUR* OR, IN THE ALTERNATIVE, NEW TRIAL UNDER RULE 59, SCRCP, WHEN THE JURY AWARDED ONLY HENDERSON'S INCURRED MEDICAL EXPENSES AND THE UNCONTRADICTED TESTIMONY WAS THAT HENDERSON EXPERIENCED PAIN AND SUFFERING?**

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Appellant, Benjamin Henderson's ("Appellant", "Benjamin", or "Henderson"), Motion for New Trial *Nisi Additur*, or in the Alternative, New Trial Pursuant to Rule 59, SCRCP, following the conclusion of a two-day trial where the jury found Respondent, Patricia Greer ("Respondent" or "Greer"), liable for the exact amount of Mr. Henderson's incurred medical expenses. (Order Denying Mot. for New Trial). The uncontroverted testimony in the case was that Mr. Henderson sustained pain and suffering, a recoverable damage under South Carolina law. The events giving rise to this action occurred on July 27, 2010, when Benjamin and his cousin, Bryant Henderson, were leaving Aiken and heading to Hampton when they came across a tree that had fallen across U.S. Highway 278 in Aiken County. Benjamin and Bryant got out of the vehicle and attempted to remove the tree from the traveled portion of the roadway. Before they could do so, however, a vehicle, driven by Ms. Greer, traveling in the opposite direction struck the tree, driving it into Benjamin and causing personal injuries.

Appellant filed this negligence action in the Aiken County Court of Common Pleas on July 17, 2012. (Compl.). The Complaint alleges that Ms. Greer was negligent in several particulars:

(a) In traveling too fast for the conditions existing at that time;

(b) In failing to keep a proper lookout;

(c) In failing to keep her vehicle under proper control;

(d) In failing to apply the brakes;

(e) In failing to exercise that degree of care and caution which a reasonable and prudent person would have exercised under the same or similar conditions; and

(f) In such other particulars as the evidence may establish.

(Compl. ¶ 8). Greer denied the negligence allegations and asserted that Henderson was negligent. (Ans. ¶¶ 3; 5). The case was tried in the Aiken County Court of Common Pleas before the Honorable R. Knox McMahon on October 13-14, 2014. Following Greer's presentation of evidence, the trial court granted Henderson's motion for directed verdict on the issue of comparative negligence. (Tr. pp. 151-152). The jury found that Greer's negligence proximately caused Henderson's damages and awarded $5,531.20 in damages. (Verdict Form). This was the exact amount of medical expenses incurred by Henderson and presented to the jury on his medical expense summary. (Exhibit 12).

Henderson moved for a new trial *nisi additur*, or, in the alternative, for a new trial pursuant to Rule 59, SCRCP. (Mot. for New Trial). The basis for the motion was that the jury's verdict only awarded Henderson his medical expenses and the uncontroverted testimony was that Henderson sustained either a fractured left wrist or a sprained wrist and endured pain and suffering as a result. (Mot. for New Trial). In an Order signed February 5, 2015, the trial court denied Henderson's motion. (Order). Henderson received a copy of the Order on February 9, 2015 and filed this Appeal on March 2, 2015. (Not. of App.). For the reasons set forth below, the jury's verdict was inadequate and inconsistent in light of the uncontroverted testimony presented at trial.

FACTS

On July 27, 2010, Benjamin Henderson and his cousin, Bryant Henderson ("Bryant"), performed a remodeling job in Aiken to install a wood laminate floor for a family friend. (Tr. p. 55, ll. 6-22; p. 94, ll. 4-8). Bryant lives in Varnville, located in Hampton County (Tr. p. 54, ll. 5-6), while fifty-three year old, Benjamin lives in Islandton, which is in Colleton County between Walterboro and Hampton. (Tr. p. 92, ll. 14-17; 92, l. 18 – p. 93, l. 1). Benjamin and Bryant traveled back and forth to Aiken for approximately two weeks while installing the floor. (Tr. p. 55, l. 24 – p. 56, l. 2). On July 27, 2010, Benjamin and Bryant left Aiken and were traveling on U.S. Highway 278 between Barnwell and New Ellenton. (Tr. p. 56, ll. 9-13). They were traveling in Bryant's truck when it started raining and they both observed a tree fall into the roadway. (Tr. p. 56, ll. 12-13; p. 94, ll. 21-22).

Bryant stopped his truck, and both he and Benjamin got out to assess the situation. (Tr. p. 57, ll. 10-11). They wanted to get the tree out of the roadway, if possible. (Tr. p. 57, ll. 13-14; p. 96, ll. 8-10). Bryant left his headlights on and put his emergency flashers on before getting out the truck. (Tr. p. 57, ll. 16-20; p. 95, l. 23 – p. 96, l. 7). A big truck stopped behind Bryant's truck. (Tr. p. 95, ll. 6-7). After they got out of the truck, it started raining harder. (Tr. p. 56, ll. 21-22). Benjamin and Bryant were out of the truck about a minute when Benjamin heard Bryant yell run. (Tr. p. 95, ll. 14-15).

Patricia Greer lives in Aiken. (Tr. p. 120, ll. 8-14). On July 27, 2010, she went to Ridgeland for an interview with the Jasper County School District and traveled through Barnwell on US Highway 278 on her way back to Aiken. (Tr. p. 120, l. 5 – p. 121, l. 2).

Greer was headed to a water aerobics class at Gold's Gym that started at 6:00 p.m.[1] (Tr. p. 121, ll. 16-25). She was traveling at approximately fifty-five miles per hour when it started raining. (Tr. p. 123, ll. 9-10). Once it started raining, she took off the cruise control and was going between thirty-five and forty miles per hour and started looking for a location to pull off the roadway. (Tr. p. 123, ll. 11-15). Greer estimates she traveled for approximately thirty minutes looking for a place to pull off. (Tr. p. 126, ll. 6-8). Despite taking her time to get to Aiken in a safe manner, she plowed into the tree at approximately 5:55 p.m.[2] (Tr. p. 127, ll. 10-13; p. 125, ll. 22-24; p. 98, ll. 15-16). The collision with the tree caused her airbag to deploy and totaled her vehicle. (Tr. p. 124, ll. 11-14; Ex. 3). The damage to her vehicle was such that she had to be cut out with the jaws of life. (Tr. p. 142, ll. 16-20).

The impact drove the tree, that Greer described as being so big she could not put her arms around, into Bryant's truck. (Tr. p. 58, ll. 16-17; p. 97, ll. 23-25; p. 124, ll. 2-4). As Benjamin ran from Greer, the tree struck him in the back and knocked him into the ditch. (Tr. p. 95, ll. 15-17). After climbing out of the ditch, Benjamin looked at his wrist and noticed it was not turned the right way. (Tr. p. 96, l. 25 – p. 97, l. 2).

Benjamin was transported by Aiken County EMS to the Medical College of Georgia ("MCG") in Augusta. (Tr. p. 98, ll. 13-14). While being transported by EMS, Benjamin was put on a spinal board and given an IV. (Tr. p. 98, ll. 24-25). The MCG records noted swelling and deformity of the left wrist, small abrasion over left wrist, and

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[1] It's approximately 13.61 miles from the accident site to the Gold's Gym. (Tr. p. 127, ll. 8-13).

[2] Greer testified at trial that she had decided to forgo the 6:00 aerobics class, but at her deposition she did not testify she decided to forgo the class and only remembered the accident because she was on her way to the aerobics class. (Tr. p. 127, ll. 4-20).

abrasions on the low back. (Carter Depo. p. 18, ll. 18-25). As part of his treatment, Benjamin's clothes were cut off by hospital staff. (Tr. p. 99, ll. 18-24). The x-ray records noted a distal radius fracture and stated "reduction of distal fracture, anatomic alignment." (Carter Depo. p. 19, ll. 7-10; p. 21, ll. 7-9). A reduction is "putting the bones back in normal alignment. So taking a fracture that is maligned and putting it back into normal alignment." (Carter Depo. p. 22, ll. 23-25). Since MCG is a teaching hospital, both the resident and attending faculty member signed off on Benjamin's diagnosis as a left wrist fracture. (Carter Depo. p. 19, l. 21 – p. 20, l. 5). After being placed in a cast, Benjamin was discharged. (Tr. p. 99, ll. 4-13). Benjamin arrived home in Islandton around 4:00 a.m. (Tr. p. 99, ll. 14-15).

Benjamin made the 1 ½ to 2 hour drive to Augusta nine days later, on August 5, 2010, and saw Dr. Craig Carter, who was then working as a resident at the Hand and Upper Extremity Surgery Clinic at MCG. (Carter Depo. p. 16, l. 24 – p. 17, l. 9). Dr. Carter noted that Benjamin felt his wrist had made some improvement, although he was still in pain. (Carter Depo. p. 23, l. 23 – p. 24, l. 4). Dr. Carter removed the splint and noted that Benjamin had tenderness when pressed on the top portion of the wrist. (Carter Depo. p. 24, ll. 5-16). Benjamin also had limitation on flexion and extension which was caused by pain. (Carter Depo. p. 24, ll. 17-25).

At trial through video testimony, Dr. Carter opined that, despite the resident and attending faculty member's diagnosis in the emergency room, Benjamin did not have left wrist fracture but instead diagnosed a left wrist sprain. (Carter Depo. p. 19, l. 21 – p. 20, l. 5; p. 25, ll. 6-9; p. 25, ll. 15-18). Irrespective of whether it was a sprain or fracture, Dr.

Carter testified that Benjamin sustained a significant injury to his left hand. (Carter Depo. p. 30, ll. 16-19).

About two months after the accident, on October 4, 2010, Benjamin saw Dr. Luis Vega in Hampton because his wrist was still "hurting." (Tr. p. 100, ll. 12-17). Dr. Vega treated Benjamin on October 4, 2010, for pain at the left wrist, which was described as "dull and throbby (sic)." (Vega Depo. p. 11, ll. 6-14). Dr. Vega treated Benjamin until June 29, 2011. (Tr. p. 101, ll. 6-8). By June 29, 2011, nearly eleven months after Ms. Greer struck the tree, Benjamin's pain was starting to get better. (Tr. p. 102, ll. 4-6). At trial, Benjamin testified he still experiences pain in his left wrist from time to time. (Tr. p. 102, ll. 7-13). Benjamin incurred $5,531.20 in medical expenses as a result of Ms. Greer striking the tree. (Ex. 12).

Dr. Vega also testified at trial through video testimony. Dr. Vega graduated from Texas A&M, went to medical school at Boston University, did an internship at Brown for two years, and finished residency at the University of Florida – Shands Jacksonville. (Vega Depo. p. 5, ll. 10-21). He practices in Hampton and Walterboro with Palmetto Primary Care. (Vega Depo. p. 4, ll. 11-18). Dr. Vega testified that the medical treatment Benjamin received was a result of the July 27, 2010 events. (Vega Depo. p. 12, ll. 14-23).

STANDARD OF REVIEW

"It is within a trial judge's province to grant a new trial nisi if he finds the amount of the verdict to be merely inadequate or excessive." Carson v. CSX Transp., Inc., 400 S.C. 221, 241, 734 S.E.2d 148, 158-59 (2012) (citing Bailey v. Peacock, 318 S.C. 13, 14, 455, S.E.2d 690, 691 (1995)). "In reviewing the trial court's decision regarding a new trial nisi, '[t]his Court has the duty to review the record and determine whether there has

been an abuse of discretion amounting to an error of law.'" Id. at 241, 734 S.E.2d at 159 (quoting Bailey, 318 S.C. at 14, 455, S.E.2d at 691). "'If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.'" Id. (quoting O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). "The failure of the trial judge to grant a new trial absolute in this situation amounts to an abuse of discretion and on appeal this Court will grant a new trial absolute." O'Neal, 314 S.C. at 527, 431 S.E.2d at 556.

ARGUMENT

The jury's verdict in this case inadequately compensates Mr. Henderson for his recoverable damages under South Carolina law. The jury found that Ms. Greer's negligence proximately caused Mr. Henderson's damages and awarded $5,531.20 in damages – the exact amount of medical expenses contained on the medical expense summary. (Verdict Form; Ex. 12). The uncontroverted evidence in this case is that Mr. Henderson experienced pain and suffering. Despite the attending faculty member and resident's diagnosis in the emergency room that Benjamin sustained a left wrist fracture, Dr. Carter testified he diagnosed it as a left wrist sprain. (Carter Depo. p. 19, l. 21 – p. 20, l. 5; p. 25, ll. 6-9; p. 25, ll. 15-18). Regardless of whether it was a sprain or fracture, Benjamin sustained a significant painful injury to his left hand. (Carter Depo. p. 30, ll. 16-19). Nine days after the accident, Dr. Carter noted that Mr. Henderson was still experiencing pain. (Carter Depo. p. 23, l. 23 – p. 24, l. 4). Dr. Vega treated Benjamin on October 4, 2010 for left wrist pain. (Vega Depo. p. 11, ll. 6-14). By June 29, 2011, nearly eleven months after Ms. Greer struck the tree, Benjamin's pain was starting to get

better. (Tr. p. 102, ll. 4-6). At trial, Benjamin testified he still experiences pain in his wrist from time to time. (Tr. p. 102, ll. 7-13). It cannot be reasonably argued that Mr. Henderson did not endure pain and suffering as he sustained either a fractured wrist or sprained wrist.

By finding Ms. Greer liable, and awarding damages solely for his medical expenses, the jury failed to adequately compensate Mr. Henderson and failed to follow the trial court's charge. The trial court charged the jury "[y]ou have the authority to determine the amount, if any, to be allowed for pain and suffering using calm and reasonable judgment to insure the damages are just and reasonable ***in light of the testimony presented in this case."*** (Tr. p. 190, ll. 2-7). In the order denying Mr. Henderson's motion for new trial or new trial *nisi additur* the trial court noted "the jury could have reasonably determined the Plaintiff suffered little or no damage as a result of pain and suffering." (Order Denying Mot. for New Trial). This is inconsistent with the uncontroverted evidence presented at trial as the jury is not free to disregard the evidence of pain and suffering.

The Supreme Court addressed a zero verdict for conscious pain and suffering despite a liability finding in Carson v. CSX Transp. Inc., 400 S.C. 221, 734 S.E.2d 148 (2012). Carson involved a car-train collision in Denmark. Id. at 226, 734 S.E.2d at 151. The uncontroverted evidence presented at trial established that Beryl Harvey endured conscious pain and suffering prior to his death. Id. at 241. 734 S.E.2d at 159. An eyewitness to the accident testified that Beryl "looked like he was in a knot," and that "[h]e was hollering Mama." Id. Another witness testified she could hear Beryl moaning, groaning, and experiencing pain. Id. at 241-42, 734 S.E.2d at 159. A volunteer fireman

who responded testified that he could hear Beryl moaning and then Beryl started gurgling. Id. at 242, 734 S.E.2d at 159. The fireman could tell Beryl was in a lot of pain. Id.

The jury found CSX forty (40%) percent liable and Beryl's mother, the sole wrongful death beneficiary, sixty (60%) liable. Id. at 228, 734 S.E.2d at 152. Despite the testimony on conscious pain and suffering, the jury awarded zero in damages on the survival action. Id. The trial court denied Carson's motion for new trial or, in the alternative, new trial *nisi additur*. Id. In reversing and awarding a new trial, the Supreme Court noted:

> Although the jury found CSX forty percent negligent in causing the accident, the jury found the damages for conscious pain and suffering and funeral expenses amount to zero dollars. It is evident to us that the jury was confused in rendering its damages award. Aside from Appellant's clear showing at trial that Decedent experienced conscious pain and suffering before his death, Appellant presented funeral and burial receipts representing expenses in excess of $7,000.00. Therefore, the award of zero dollars in damages was not "merely inadequate," but was legally incorrect.

Id. at 242, 734 S.E.2d 159. Here, as in Carson, the jury is not free to disregard the uncontroverted evidence presented at trial when it found that Greer was liable. The Supreme Court did not hold that the jury awarded zero damages because the jury must have found that Beryl Harvey did not endure conscious pain and suffering. The testimony in Carson, as in this case, was to the contrary and as a result a new trial was warranted.

The jury's verdict in this case was also the result of passion, caprice, prejudice, or some other influence outside the evidence. If the jury awarded $1,000,000.00 in this case, Ms. Greer would be moving for *remittitur* on the basis that the verdict was the result

of passion, caprice, prejudice, or some other influence outside the evidence. *Remittitur* should be used to reduce a verdict that is excessive while *additur* should be used to increase an inadequate verdict. Both *additur* and *remittitur* should be viewed through the same standard, not different ones. It should not be that excessive verdicts are decreased while an inadequate verdict is merely the jury's verdict despite uncontroverted evidence to the contrary. The Court of Appeals, in Waring v. Johnson, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000), noted this distinction: "[t]he granting of new trials upon the ground of inadequacy of damages occurs less frequently than the granting of new trials upon the ground of excessive damages, probably because detection of inadequacy of damages is not as easy as is detection of excessiveness." Regardless of whether it is excessiveness or inadequacy, the jury's verdict should be evaluated in light of the evidence.

Waring involved a two-car collision that occurred when Lea Waring's vehicle was struck from behind on US Highway 17 in Beaufort County. Id. at 251, 533 S.E.2d at 908. Ms. Waring had surgery for a herniated disc after the accident. Id. at 253, 533 S.E.2d at 909. At trial, the jury awarded $23,237.28, the exact amount of the medical bills. Id. at 255, 533 S.E.2d at 910. Waring moved for a new trial *nisi additur*, which the trial court granted, adding $40,000.00, on the basis that "[t]he jury failed to make any award for other damages such as pain and suffering." Id. On appeal, Johnson argued that the jury's verdict "may have been intended to represent a portion of Waring's medical expenses, plus pain and suffering. . . ." Id. at 260, 533 S.E.2d at 912. The Court of Appeals found Johnson's argument "patently untenable" as "[t]he jury's award of exactly the amount of Waring's medical expenses, to the penny, is an attempt to reimburse her

for those very expenses." Id.[3] The court, in affirming the trial court's *additur*, noted the trial judge "articulated compelling reasons in his order justifying the grant of the *nisi additur*." Id. at 261, 533 S.E.2d at 913. If the verdict for the exact amount of the medical bills was a compelling reason justifying *additur* in Waring, the same holding should apply here where the jury's verdict failed to award an amount for pain and suffering.[4]

CONCLUSION

The jury's verdict in this case fails to adequately compensate Mr. Henderson in light of the testimony offered at trial. The verdict is not only inadequate but also inconsistent with the trial court's charge, which the jury is not free to disregard. The testimony established that Mr. Henderson sustained either a left wrist fracture or left wrist sprain. He experienced pain throughout his treatment with Dr. Vega, which the jury found was caused by Ms. Greer's negligence. The failure of the trial court to grant Mr. Henderson's *additur* motion constitutes an abuse of discretion which should be reversed. A new trial is warranted.

[SIGNATURE PAGE TO FOLLOW]

[3] The Court of Appeals also rejected Johnson's argument that Waring's pain and suffering arose solely from her pre-existing condition. Id.

[4] The Court of Appeals recently held the trial court offered compelling reasons justifying *additur* in Beason v. Lowden, Op. No. 2015-UP-131(S.C. Ct. App. filed March 11, 2015), when the jury's $17,000.00 verdict failed to adequately compensate Beason for her medical expenses, lost wages, and pain and suffering.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK, P.A.

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CERTIFICATE OF SERVICE

This is to certify that I, **Megan C. Davis**, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorney for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to:

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Case No. 2012-CP-02-1691
Appellate Case No.: 2015-000409

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September 22nd, 2015
Hampton, South Carolina

IN THE STATE OF SOUTH CAROLINA
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-v-

Patricia Greer, ... Respondent

PROOF OF SERVICE

This is to certify that I, William F. Barnes, III, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorney for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **INITIAL BRIEF OF APPELLANT and DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to:

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September 22, 2015

The Honorable Jenny Abbott Kitchings
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Re: ***Benjamin Henderson v. Patricia Greer***
Civil Action No.: 12-CP-02-1691
Appellate Case No.: 2015-000409

Dear Ms. Kitchings:

Please find enclosed the original and two copies of ***Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal,*** and ***Certificates of Service*** in the above referenced matter. Please file the originals and return clocked-in copies of each in the envelope provided.

By copy of this letter, Appellant's Initial Brief and Designation of Matter are being served on all counsel of record.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: A. Shane Massey, Esquire

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