THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2010-CP-40-07858
Appellate Case Tracking No. 2015-000789

Betsy L. Spriggs, ... Respondent,

v.

James Walker, ... Appellant.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Did the trial court abuse its discretion in granting Respondent's motion for a new trial absolute based upon a finding that the jury considered matters outside of the evidence in reaching its verdict?

COUNTER-STATEMENT OF THE CASE

This case arose out of an automobile collision in Richland County. On November 8, 2010, Betsy L. Spriggs (Respondent) filed suit against James Walker (Appellant)[1] in Richland County, South Carolina, for injuries Respondent received when the car she was driving was rear-ended by a car Appellant was driving. (Complaint) Appellant answered, admitting the wreck occurred but denying Respondent was injured. Appellant raised several other affirmative defenses. (Answer)

Following discovery the matter was tried on September 9, 2013 through September 12, 2013. The jury returned a verdict for the defendant. (Verdict Form)

On September 19, 2013, Respondent filed a motion for a new trial absolute on the grounds that (1) the verdict was based upon improper matters outside the record, and (2) the verdict was contrary to the preponderance of the evidence.

On March 16, 2015, the circuit court entered an order granting Respondent's motion for a new trial absolute. On April 15, 2015, Appellant filed and served a notice of appeal from that order.

FACTS

It is undisputed that Appellant drove his car into the rear of the car being driven by Respondent. (See Complaint, ¶ 4 alleging rear-end collision; Answer, ¶ 4, admitting "a very minor collision" between the vehicles and that Appellant's "vehicle collided with the

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[1] On October 27, 2011, Mr. Walker died and on March 4, 2013, the circuit court entered an order appointing H. Wesley Kirkland as personal representative of Mr. Walker's estate. (Order of March 4, 2013). For convenience Respondent refers to both Mr. Kirkland and Mr. Walker as "Appellant."

rear of the Plaintiff's vehicle while Plaintiff's vehicle was stopped"). The issue at trial, then, involved only the amount of damage, if any, that Respondent suffered in the wreck.

In opening statements Appellant admitted "simple negligence." (Tr. p. 66, ll. 17-20). However, he "did not admit liability for the accident or that he caused [Respondent] to be injured the way she claims to be injured." (Tr. p. 66, ll. 20-22). At trial, Appellant agreed that comparative negligence was "out the window" and the case would go to the jury only on the issue of actual damages. (Tr. p. 212, ll. 1-8; p. 229, ll. 7-13).

The trial court charged the jury that it did not "have to worry about ... negligence, because the Defendant has admitted that he was at fault. He ran into the back of the Plaintiff." (Tr. p. 267, ll. 1-5; ll. 16-17; p. 319, ll. 6-13). The court added that the jury was concerned with two things: proximate cause and damages. (Tr. p. 267, ll. 11-12). In closing argument, Appellant's counsel told the jury Appellant admitted he "hit her in the rear." (Tr. p. 296, l. 23 - p. 297, l. 4).

Following closing arguments, the trial court instructed the jury that "a verdict in this case cannot be based upon sympathy, passion, prejudice, or emotion, or some other consideration not found in the evidence." (Tr. p. 331, ll. 13-16). The jury sent a note to the trial court with the following questions:

1. Where is the police report?
2. Have [Appellant's] insurance paid for any medical bills?
3. When did [Respondent] consult an attorney?
4. Did [Respondent] receive Worker's Comp?
5. Where is the Defendant's paperwork?

(Tr. p. 335, ll. 9-14). The trial court gave the jury the following response:

> First of all, I start off by telling you the last thing I said to y'all, members of the jury, that a - - I charge you that a verdict in this case cannot be based upon sympathy, passion, prejudice, or emotion; or some other consideration not found in the evidence. That's very important.
>
> Number one, the police report is not in evidence. The officer testified to what happened, what he saw, what he observed. You've got to go by his testimony and his testimony alone. Okay. Number two, lawyers in this state aren't even allowed to mention insurance. Okay. You can't consider that at all. If you go back in and even discuss or bring insurance up, you need to let me know, Madam Forelady, and I'll have to declare a mistrial. Number three, "When did Ms. Spriggs consult the lawyer?" That's not in evidence. It doesn't matter. Number four, "Did Ms. Spriggs receive Worker's Comp?" Once again, not in evidence. It doesn't matter. You can't consider it. Number five, "Where is the Defendant's paperwork?" That's the only question I have. I don't know what you mean by the Defendant's paperwork. You gotta help me out a little bit on that.
>
> But let me ... make it easier for everybody: You've got to base your decision, ladies and gentlemen, on the testimony that you've heard from the witnesses, the exhibits that have been introduced into evidence, and what I told you the law is that applies to this case. All these questions don't have anything to do with your ability to reach a fair and impartial verdict. Okay.
>
> You gotta base your decision on the testimony of the witnesses, the exhibits that have been introduced into evidence, and the charge I gave you; and considering the arguments of the lawyers to try to persuade you to agree with their version of the facts.
>
> The simple question you need to answer is this: Did Mr. Walker running into the back of [Ms.] Spriggs, was that the proximate cause of her damages? Okay? You gotta be convinced by the greater weight or preponderance of the evidence.
>
> Three things that the Plaintiff must prove: Negligence, that's conceded; two, proximate cause. They gotta prove that to you by the greater weight or preponderance of the evidence; and damages got to be proved by the greater weight or preponderance of the evidence.
>
> In short, you gotta make your decision based on what you've heard in this courtroom and no other consideration outside of the evidence. And

all these questions are, basically, outside of the evidence.

> So once again, you gotta base your decision on what you've heard from the witness stand, the exhibits, the arguments of the lawyers, and the charge I gave to you.
>
> Anything else - - for you to go back to that jury room now and start talking about the police report or Worker's Comp or insurance or when did Ms. Spriggs get a lawyer, any of these questions, it would be unfair to either side for you to do so.
>
> Now, with that instruction - - and I want y'all to relax. It's not easy to be a juror. But you gotta go back in and make up your mind on the evidence that you've heard and the law that I gave you to guide you by in making a decision.

(Tr. p. 336, l. 25 - p. 339, l. 11). The trial court then asked the jury to retire and recommence deliberations. After the jury left the courtroom the court indicated to counsel that the questions from the jury "bother me so much." (Tr. p. 340, ll. 21-22).

The jury returned almost immediately with a defense verdict. (Tr. p. 340, l. 15 - p. 341, l. 20). The trial court gave Respondent's counsel 10 days to file post-verdict motions, adding the motion "obviously ... should be along the lines that, gee whiz, they had to consider something they shouldn't have." (Tr. p. 343, l. 24 - p. 344, l. 2).

Respondent thereafter moved for a new trial absolute on the grounds that (1) the jury's verdict was perverse as evidenced by the questions the jury sent to the court; and (2) the verdict was contrary to the preponderance of the evidence. (Plaintiff's Motion for New Trial Absolute). On March 16, 2015, the trial court entered an order granting Respondent's motion for new trial absolute on the ground that the jury considered matters outside the record in reaching its verdict.

This appeal follows.

ARGUMENT

When an order granting a new trial is before the appellate court, the appellate court's review is limited to the consideration of whether evidence exists to support the trial court's order. *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990); *S.C. Dep't of Highways & Pub. Transp. v. Mooneyham*, 275 S.C. 205, 269 S.E.2d 329 (1980). The grant or denial of a new trial motion rests within the discretion of the trial judge and will not be disturbed on appeal unless the trial judge's findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. *South Carolina State Highway Dept. v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976); *Creighton v. Coligny Plaza Ltd. Partnership*, 334 S.C. 96, 512 S.E.2d 510 (Ct. App. 1998).[2]

The trial court possesses the discretion to order a new trial absolute, and the trial court exercised its discretion in doing so in this case. The court perceived that the jury based its verdict on matters outside the record. Settled law permitted the trial court to do precisely what it did here, and the record supports the trial court's decision. This Court should affirm.

A. The Trial Court's Grant of a New Trial Absolute Was Not "Based on Mere Suspicions of Juror Misconduct"

Appellant contends the trial court's grant of a new trial is based upon "mere suspicions of juror misconduct" because Respondent presented no evidence that the jury

[2] Although the trial court did not say it was granting a new trial "on the facts," that is necessarily what the court did. After seeing the trial of this case and the questions the jury posed, the trial court exercised its discretion as a thirteenth juror to grant a new trial absolute. *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389 (1973) (noting failure to use "magic words" in new trial motion did not preclude supreme court from reviewing substance of new trial motion).

"actually considered the matters contained in the five questions presented in their note" or "to create a strong conviction of injustice." (App. Br. pp. 3-4). Appellant first asserts the trial court supported its finding of misconduct on two things: (A) the five questions regarding matters not in evidence, and (B) the brevity of returning a verdict. (App. Br. p. 4). Appellant then contends that the decision was based upon the brevity of deliberations alone. (App. Br. p. 4). This Court should not be persuaded to reverse.

If the amount of the jury's 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. *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006); *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (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 the appellate court will grant a new trial absolute. *O'Neal.*

In this case, the jury expressly told the trial court that it was considering matters outside the record, including whether Respondent had received payment from the liability insurance carrier, whether Respondent had received workers' compensation benefits, and the contents of the police officer's report. The nature of those matters were highly inappropriate, and despite being told *not* to consider them, the trial court felt the jury disobeyed those instructions. The jury was concerned that Respondent had already been compensated in this case involving admitted negligence and despite being told not to consider those matters, the jury returned with a defense verdict in five (5) minutes. As discussed below, although the length of deliberations *alone* is insufficient to question the jury's decision, when combined with the obvious consideration of improper factors such

as collateral sources of recovery and how quickly Respondent obtained a lawyer, the brevity of deliberation may be considered when deciding whether to set a verdict aside.

The trial court's decision to grant a new trial absolute does not lack support in the record. This Court should affirm.

i. Juror misconduct was not "inferred from the duration of a jury's deliberation" alone

Appellant contends the jury's deliberation of about five (5) minutes after being told not to consider matters contained in their questions "does not itself indicate that the jury considered any matters included in the note" asking the questions. (App. Br. p. 5).

It is true that "brevity of the jury deliberations *alone* does not suffice as a reason to set aside the verdict." *Curtis v. Blake*, 392 S.C. 494, 504-505, 709 S.E.2d 79, 84 (Ct. App. 2011). *See also Youmans ex rel. Elmore v. S.C. Dept. of Transp.*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008) (noting the trial court should not base a decision on a thirteenth juror new trial motion on the brevity of jury deliberations). However, the brevity of the jury's deliberation in this case is telling when taken against the backdrop of the jury's written note (*i.e.*, when the brevity of deliberations is not viewed alone).

Furthermore, while the trial court noted in its order that "[t]he jury announced that it reached a verdict for the Defense only five (5) minutes later," (Order, p. 1), the trial court also specifically found and concluded that "the jury did, in fact, improperly consider matters outside the record in reaching its verdict" based on "all facts and circumstances...." (Order, p. 2). The court did not decide this matter on the brevity of deliberations "alone." Suggesting otherwise requires a selective reading of the record.

Trial judges enjoy broad discretion in assessing whether juror conduct warrants a new trial absolute. *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998). This trial court found that the jury necessarily permitted improper matters outside the record to drive its verdict and (in the trial court's judgment) a new trial was required.

Appellant has not demonstrated an abuse of discretion. This Court should affirm.

ii. The trial court properly considered the jury's note in finding the jury considered matters outside the record

The trial court properly considered the jury's note in granting Respondent's a new trial. This Court should affirm.

Appellant contends that, under *State v. Zeigler*, this Court should reverse the trial court's discretionary grant of a new trial. 364 S.C. 94, 610 S.E.2d 859 (Ct. App. 2005). *Zeigler*, however, does not mandate reversal.

In *Zeigler*, the trial court *denied* a motion for new trial after the jury sent a note asking whether they could hear from the defendants under oath in a criminal case. This Court affirmed, holding the trial court did not abuse its discretion, particularly where the trial court denied the motion after giving a curative instruction to the jury. Here, however, the trial court, in its discretion, *granted* a new trial after finding the jury failed to follow the court's instructions not to consider matters outside the record. Appellant is asking this Court to use a case in which the Court affirmed one trial court's exercise of *its* discretion in order to *reverse* another trial court's exercise of the same discretion. Discretion implies that different results are permissible. The Court should not be persuaded by Appellant's argument but should affirm and remand the matter for a new trial absolute.

B. Settled Case Law Supports the Trial Court's Decision

The trial court in this case was deeply concerned about the nature of the questions the jury posed to the court. The court attempted to cure the jury's consideration of inappropriate matters but found the jury failed to follow the court's instructions. The trial court's grant of a new trial under these circumstances is in line with settled precedent.

When the jury renders a verdict in disregard of the instructions given by the trial court, it is error for the court, on motion, not to grant a new trial. *Southeastern Mobile Homes, Inc. v. Walicki*, 282 S.C. 298, 317 S.E.2d 773 (Ct. App. 1984), *citing Thompson v. Lee*, 19 S.C. 489 (1883). Thus, a trial judge has the authority to grant a new trial when he or she finds the verdict to be contrary to the evidence. *Watford v. South Carolina State Highway Dept.*, 269 S.C. 130, 236 S.E.2d 558 (1977). *See also Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995) (trial judge erred in granting a new trial nisi additur instead of a new trial absolute where it was apparent from the verdict the jury did not follow the judge's instructions to disregard the existence of insurance).

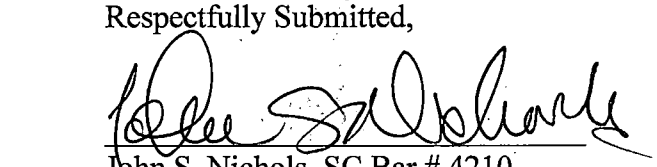
In this case the trial court concluded that the jury permitted improper considerations to drive its verdict. Pursuant to *Walicki* and *Thompson*, it would have been error for the trial court *not* to grant a new trial once the court concluded the jury disregarded the court's instructions to consider only those matters introduced into evidence.

The Court should affirm the trial court's discretion in granting Respondent a new trial.

CONCLUSION

For the reasons stated this Court should affirm the trial court's order granting Respondent a new trial absolute.

Respectfully Submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellant with a copy of the *Initial Brief of Respondent* and *Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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