THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 12-CP-02-1691
Appellate Case No. 2015-000409

Benjamin K. Henderson.....Appellant,

vs.

Patricia Greer .....Respondent.

INITIAL BRIEF OF RESPONDENT

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ISSUE ON APPEAL

DID THE TRIAL COURT ERR BY DENYING HENDERSON'S MOTION FOR A NEW TRIAL NISI ADDITUR?

STATEMENT OF THE CASE

On July 27, 2010, Patricia Greer ("Greer") was driving on U.S. 278 from Barnwell to Aiken when a large tree fell across the road during a heavy rain storm. Benjamin Henderson ("Henderson") and his cousin, Bryant Henderson ("Bryant"), were traveling in the opposite direction on U.S. 278 when they saw the tree fall. Henderson and Bryant exited their vehicle and were standing near the tree when Greer approached from the opposite side. Greer did not see the tree and struck it, knocking the tree into Henderson.

Henderson filed this action in the Aiken County Court of Common Pleas on June 12, 2012, alleging Greer was negligent in striking the tree and injuring him. The Honorable R. Knox McMahon tried the case before a jury on October 14, 2014. At the conclusion of the trial, the jury awarded Henderson $5,531.20, the amount Henderson claimed in medical bills.

In an order filed on February 5, 2015, Judge McMahon denied Henderson's motion for a new trial nisi additur. Henderson served his Notice of Appeal to the South Carolina Court of Appeals on March 2, 2015.

FACTS

Henderson and Bryant are cousins. Henderson lives in Colleton County, and Bryant lives in Hampton County. Transcript, p. 54, lines 5-8; p. 92, lines 18-19. In July 2010, Henderson and Bryant were working on a job to install laminate flooring in a house in Aiken. Transcript, p. 55, line 3 – p. 56, line 2. As they were driving home on July 27,

2010, Henderson and Bryant were traveling on U.S. 278 between Aiken and Barnwell when they saw a large tree fall across the roadway in front of them. Transcript, p. 56, lines 9-13. After stopping, Henderson and Bryant exited the vehicle and walked up to the tree. Transcript, p. 56, line 14 – p. 57, line 12.

As Henderson and Bryant were driving home, Greer was returning to Aiken from a job interview in Jasper County. Transcript, p. 120, line 24 – p. 121, line 2. It began to rain heavily, and Greer slowed to 35-40 mph. Transcript, p. 123, lines 11-15. The heavy rain restricted Greer's visibility, and she did not see the fallen tree in front of her. Transcript, p. 135, lines 5-8; p. 138, lines 20-23. Greer struck the tree, and the force of the impact pushed the tree into Henderson and Bryant, who were standing on the opposite side of the tree. Transcript, p. 56, line 14 – p. 57, line 9. The tree tripped Henderson and knocked him into a ditch. Transcript, p. 94, line 23 – p. 95, line 20.

Henderson testified that he sustained injuries to his left hand, left knee, and right shoulder. Transcript, p. 98, lines 9-12. He was transported via ambulance to the Medical College of Georgia, made one follow-up visit to the Medical College of Georgia, and had six visits to Palmetto Primary Care Physicians. He presented medical bills totaling $5,531.20. Plaintiff's Exhibit 12.

At the trial of the case, the jury heard testimony from Henderson, Bryant, Greer, Dr. Luis Vega, Dr. Craig T. Carter, and Dr. Edward Warren. Following the trial, the jury found Greer was negligent and that her negligence proximately caused injuries to Henderson. The jury awarded Henderson $5,531.20, the amount Henderson presented in medical bills. Jury Verdict Form.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING HENDERSON'S MOTION FOR A NEW TRIAL NISI ADDITUR.

Henderson presents three primary arguments to support his contention that the trial judge erred in denying his motion for a new trial nisi additur: the jury failed to follow the trial court's instructions, the verdict was inconsistent in that the jury awarded Henderson's medical bills without a corresponding award for pain and suffering, and the verdict was inadequate because the jury did not award an amount for pain and suffering.

1. THE JURY FOLLOWED THE TRIAL COURT'S INSTRUCTIONS.

Henderson first argues the jury failed to follow the trial court's instructions and, consequently, arrived at an inconsistent verdict in awarding Henderson's medical bills but not awarding an amount for pain and suffering. However, the jury's verdict was not at all inconsistent with the charge.

Throughout his charge, the trial judge repeatedly instructed the jury that the jury finds and determines the facts:

> "I'm going to now instruct you or charge you on the law which you must apply to the facts of this case as you find the facts to be." Transcript p. 177, lines 18-20.
>
> . . .
>
> "In every case tried in this court before a jury, the jury becomes the sole and exclusive judges of the facts. The trial judge cannot comment on or make any statement about the facts in a case. You are the sole judges of the facts." Transcript p. 179, lines 1-5.
>
> . . .

> "Review the evidence and you determine what the facts are and the inferences to be drawn from the facts individually and as a jury. You then take those facts and those inferences, compare them to the law as I have told you the law is and you will reach a verdict as I said for either one or the other, the plaintiff or the defendant." Transcript p. 191, line 20 – p. 192, line 1.

Furthermore, the trial judge's charge on pain and suffering was significant: "Pain and suffering compensates the plaintiff for physical discomfort and emotional response to the sensation of pain cause by the injury itself. There's no definite standard by which to compensate a plaintiff for pain and suffering. You 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 and the evidence presented in this case." Transcript p. 189, line 23 – p. 190, line 7 (emphasis added).

The trial judge did not instruct the jury that awarding Henderson's medical bills requires an award of some amount for pain and suffering. Instead, the judge told the jury to determine the facts and, based on those facts, to determine the amount, **if any**, to be awarded for pain and suffering. By awarding no damages for pain and suffering, the jury acted appropriately within the bounds of the instructions.

2. THE VERDICT WAS NOT INCONSISTENT.

Henderson's second argument is that South Carolina law requires – or, more accurately, should require – an award of pain and suffering if the jury finds that Greer's negligence proximately caused Henderson to incur medical expenses. However, Henderson did not present that legal argument to the trial court in a timely manner so as to preserve it for this Court's review. At the conclusion of Henderson's case, the court asked the parties for proposed requests to charge. Henderson did not request the court to

instruct the jury that an award of Henderson's medical bills must be accompanied by an award of pain and suffering. See Transcript p. 146, line 6 – p. 149, line 7.

At the conclusion of Greer's case, the trial court entertained directed verdict motions. Henderson made three motions for a directed verdict; none of those motions sought a directed verdict on pain and suffering. See Transcript p. 151, line 4 – p. 157, line 22.

After delivering his instructions to the jury but before the jury began its deliberations, the trial judge asked whether the parties had any exceptions to the charge. Henderson asserted no objections to the court's instructions for the jury to "determine the amount, if any, to be allowed for pain and suffering" or any other part of the charge. See Transcript p. 193, lines 2 – 22.

Furthermore, even if Henderson were correct that the jury's verdict was inconsistent, a motion for a new trial nisi additur would not be the appropriate vehicle to cure the purported error. "The proper and most consistent approach of treating [inconsistent] verdicts is to require, upon request, the trial court to resubmit the matter to the jury." Stevens v. Allen, 342 S.C. 47, 53 (2000). After the jury returns a revised verdict, or if the jury cannot reach a consistent verdict, "it is within the province of the trial court to order a new trial nisi or a new trial absolute." Id.

In Dykema v. Carolina Emergency Physicians, 348 S.C. 549 (2002), the jury apportioned 100% of actual damages against one defendant, Greenville Hospital System, and awarded punitive damages against another defendant, Companion Health Care. The trial court granted Companion's motion for judgment notwithstanding the verdict because the jury's failure to award actual damages against Companion precluded an award of

punitive damages. The Supreme Court reversed the trial court, finding "Companion's failure to object prior to discharge of the jury results in a waiver of the right to challenge the verdict." Id. at 553. The Supreme Court cited a long history of precedent to support its holding that "a party may [not] allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury," and then seek to correct the error with a post-trial motion or appeal. Id. at 553-554.

In Bensch v. Davidson, 354 S.C. 173 (2003), the trial judge provided the jury with two verdict forms in a breach of contract action. One of the verdict forms applied solely to the defendants' counterclaim and included instructions that if the jury found for the defendants on the counterclaim, the jury should "state the total amount of actual damage, *if any*, sustained by" the defendants. Id. at 179 (emphasis in original). The jury found for the defendants but awarded no damages. The trial court clarified the verdict with the jury, polled the jury at the defendants' request, and dismissed the jury. Thereafter, the defendants appealed, claiming the verdict of liability with no damages was inconsistent. The Supreme Court rejected the appeal, finding the defendants had "allowed the jury to be discharged before voicing their objection to the verdict." Id. More specifically, "[t]he 'if any' language in the verdict form indicated the jury could find no damages even if they found for appellants on their counterclaim." Id. at 179-180. By not objecting to that instruction, the defendants had waived their right to challenge a verdict of no damages.

Here, Henderson did not request a ruling or jury instruction that a verdict awarding Henderson's medical bills must include an award of pain and suffering. Additionally, after the court announced the jury's verdict, the trial judge asked the attorneys whether they required anything further of the jury. Both attorneys said they had

no remaining issues for the jury. See Transcript p. 197, lines 17 – 21. Therefore, even if Henderson were correct in his assertion that the jury's verdict was inconsistent, Henderson waived any objection to that inconsistent verdict by not raising the issue prior to the jury being dismissed. Henderson cannot overcome that waiver by subsequently asserting a motion for new trial nisi additur.

3. THERE IS EVIDENCE TO SUPPORT THE ADEQUACY OF THE VERDICT.

Assuming a motion for new trial nisi additur is the appropriate vehicle for relief, Henderson argues the trial judge ignored the "uncontroverted evidence presented at trial" in denying that motion. Henderson's Initial Brief, p. 9. To support his position, Henderson cites Waring v. Johnson, 341 S.C. 248 (Ct.App. 2000). Like our case, Waring resulted from a motor vehicle collision. Similarly, as in our case, the jury in Waring awarded the plaintiff's medical bills without a corresponding award for pain and suffering. Unlike our case, though, the trial court in Waring granted the plaintiff's additur motion. The Court of Appeals affirmed the trial court because the trial court "articulated compelling reasons in his order justifying the grant of the nisi additur." Id. at 261. Henderson argues, then, that an affirmed additur in Waring under similar facts compels overruling the denial of an additur motion here. But that argument misses the real point, and holding, of Waring.

"The grant or denial of a motion for a new trial nisi rests within the discretion of the trial judge and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." Id. at 256. "The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this

Court. Accordingly, great deference is given to the trial judge." Id at 257. Thus, the holding in Waring is that a trial judge's decision on a motion for a new trial nisi, whether that is a grant or denial of the motion, must be upheld if there is any evidence to support that decision.

In this case, although there is certainly evidence in the record to support an award for pain and suffering, the evidence is not as one-sided as Henderson suggests. Dr. Craig T. Carter, an orthopedic surgeon, testified that x-rays taken of Henderson's wrist at the emergency room after the accident show "calcium deposit in the soft tissues of his wrist, which looks more like a chronic issue, and again no obvious bony injury that looks like an acute-type injury . . . ." Deposition of Dr. Craig T. Carter, page 13, line 24 – page 14, line 2. Dr. Edward Warren, a radiologist, testified that a subsequent x-ray of Henderson's wrist appeared to show "calcium pyrophosphate deposition disease, and that is a -- an arthritic kind of change with calcium pyrophosphate crystals in the joint fluid" that develops over a long period of time. Deposition of Dr. Edward Warren, page 9, lines 17-22. Therefore, the jury could have concluded that any pain and suffering Henderson endured resulted from a chronic, arthritic condition in his wrist rather than from injuries sustained in the accident with Greer.

In his Order denying Henderson's motion for a new trial nisi additur, the trial judge noted that "[w]hether or not the Plaintiff suffered further actual damages due to pain and suffering caused by the Defendant's negligence is a question of fact for the jury." Order, page 1, paragraph 3. In deciding that question of fact, the jury necessarily evaluates the credibility of each witness. In so doing, the jury could certainly have concluded that Henderson's claims of pain and suffering were not credible in light of the

limited medical treatment, trial testimony that was inconsistent with deposition testimony and/or the doctors' testimony, and, perhaps, exaggerated testimony that Henderson continued to experience wrist pain even though he had received no medical treatment for more than three years prior to the trial. See Transcript, p. 118, line 15 – p. 119, line 5.

Finally, this Court must recognize that a verdict requires the unanimous agreement of all twelve jurors. Each juror thinks differently, analyzes information differently, and likely focuses on different portions of testimony as the most significant. To arrive at a unanimous verdict, jurors will most certainly have to compromise certain positions, including individual assessments of what an award should be. This Court, then, should give a significant amount of deference to the judge and jury that tried the case and allow for the necessary compromises that must occur to reach a unanimous verdict.

CONCLUSION

Based on the preceding argument, this court should affirm the trial court's denial of Henderson's motion for new trial nisi additur.

Respectfully submitted,

November 20, 2015

By: _____

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Benjamin K. Henderson.....Appellant,

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CERTIFICATION OF SERVICE

I certify that I have served Respondent's Initial Brief and Respondent's Designation of Matter to be Included in the Record on Appeal on Appellant by depositing copies of those documents in the United States Mail, postage prepaid, on November 20, 2015, addressed to the attorney of record as follows:

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November 20, 2015

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November 19, 2015

The Honorable Jenny Abbott Kitchings
Clerk of the Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: *Benjamin Henderson v. Patricia Greer*
Appellate Case No.: 2015-000409

Dear Ms. Kitchings:

Enclosed are the original and one copy of Respondent's Initial Brief, the original and one copy of Respondent's Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above-referenced case. Please file the originals and return clocked-in copies of the brief and designation to me in the enclosed envelope.

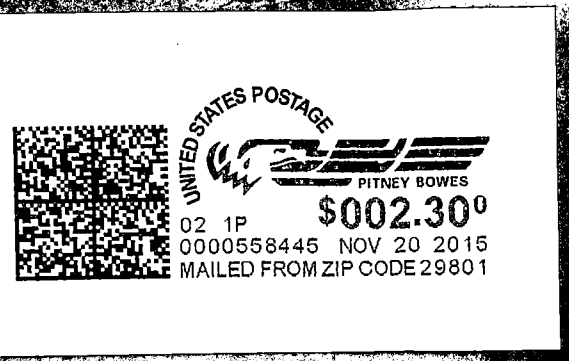
By copy of this letter, I am serving copies of each document on the other attorney of record.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A. Shane Massey

cc: William F. Barnes, III, Esquire



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