

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

Appellate Case No.: 2015-000409

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SC Court of Appeals

Benjamin K. Henderson, Appellant,

-v-

Patricia Greer, Respondent

APPELLANT'S REPLY BRIEF

William F. Barnes, III
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Carson v. CSX Transp. Inc.,
400 S.C. 221, 734 S.E.2d 148 (2012)1

Dykema v. Carolina Emergency Physicians,
348 S.C. 549, 560 S.E.2d 894 (2002)1

The Appellant, Benjamin K. Henderson (“Henderson”), submits this Reply Brief in response to Respondent, Patricia Greer’s (“Greer”), Initial Brief. Henderson incorporates all arguments made in his Initial Brief and responds specifically to Respondent’s arguments that the verdict was inconsistent and there is evidence to support to the adequacy of the verdict. (Resp. Br. pp. 4-9).

Greer incorrectly argues that Henderson waived any right to contest the jury’s verdict by allowing the jury to be dismissed. (Resp. Br. p. 5). In the Initial Brief, Henderson relies on Carson v. CSX Transp. Inc., 400 S.C. 221, 734 S.E.2d 148 (2012) for granting a new trial when the jury awards zero damages. The Respondents in Carson, relying on Dykema v. Carolina Emergency Physicians, 348 S.C. 549, 560 S.E.2d 894 (2002), argued that any argument regarding an award of zero damages was waived by allowing jury to be dismissed. By granting a new trial on the survival action when the jury awarded zero damages despite uncontroverted evidence of pain and suffering, the Supreme Court implicitly rejected the argument put forth in this case by Greer. The uncontroverted evidence is that Henderson endured conscious pain and suffering, a cognizable damage under South Carolina that the jury failed to award an amount of damages.

Finally, Greer incorrectly argues there is evidence to support the adequacy of the verdict. In support of this position, Greer relies on the testimony of Dr. Carter and Dr. Warren about a calcium deposit on Henderson’s wrist. On August 5, 2010, Henderson saw Dr. 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 limitations on flexion and extension which was caused by pain. (Carter Depo. p. 24, ll. 17-25).

Dr. Carter testified that, despite the resident and attending faculty member's diagnosis in the emergency room, Benjamin did not have a 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).

Dr. Edward Warren is a radiologist at Hampton Regional Medical Center. (Warren Depo. pp. 4-5). Dr. Warren did not interpret x-rays of Benjamin's wrist until December 30, 2010, over five months after the events giving rise to this action. (Warren Depo. p. 6, ll. 11-18). Dr. Warren was specifically asked whether a fracture could heal in five months:

Q. Based on your 30 plus years of experience, if – if there had been a fracture in – in July, is that something that typically would still show up in December?

A. You know, I don't know that I'm really qualified to answer that question. It could be better answered by an orthopedist, *but fractures can completely heal in that amount of time.*

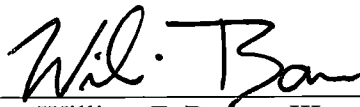
(Warren Depo. p. 8, l. 21 – p. 9, l. 3) (emphasis added). Dr. Warren did not testify that the pain Benjamin experienced would have been caused from the calcification on the wrist or any other aspect on causation – he merely opined he did not see a fracture over five months later. (Warren Depo.)

Obviously, if Benjamin sustained a sprain as Dr. Carter suggests there would be no indication of a fracture on the x-ray and would show only the bony structures, including a calcification. Importantly, though, without testimony that the pain was caused from the calcification, Greer merely muddies the water to suggest the calcification was the cause of Henderson's pain despite Dr. Carter's testimony that he sprained his wrist and sustained a "significant injury." The uncontroverted evidence is to the contrary and indicates that Benjamin endured pain and suffering for which the jury did not award an amount of damages.

Respectfully submitted,

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

November 30, 2015
Hampton, South Carolina

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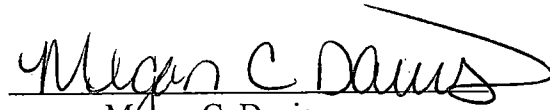
Patricia Greer, Respondent

PROOF OF SERVICE

This is to certify that I, Megan C. Davis, paralegal with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Counsel 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 *Appellant's Reply Brief* to:

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Megan C. Davis

November 30th, 2015
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Re: Benjamin Henderson v. Patricia Greer
Civil Action No.: 12-CP-02-1691
Appellate Case No.: 2015-000409

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Dear Ms. Kitchings:

Please find enclosed the original and two copies of *Appellant's Reply Brief* 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 Reply Brief is 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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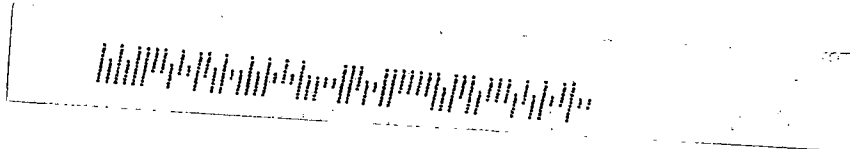


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