

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 Gary Nestler and Julie Nestler,)
)
 Plaintiffs,)
)
 v.)
)
 Joseph E. Fields,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS
 2015-CP-10-00330

RECEIVED
 JUL 25 2016
 SC Court of Appeals

**ORDER DENYING PLAINTIFFS'
 MOTION FOR NEW TRIAL, AND
 GRANTING DEFENDANT'S MOTION
 FOR COSTS**

BACKGROUND

A jury trial was held in the above captioned case beginning on April 25, 2016. Plaintiffs Gary Nestler and Julie Nestler¹ were present and represented by attorney Daniel Slotchiver. The underinsured motorist carrier, QBE North America, retained attorney Paul Trainor to assume the defense of the defendant Joseph E. Fields. The issues of duty and breach were admitted by the defendant, and therefore the only issues before the jury were causation and damages. On April 26, 2016, the jury returned a verdict in favor of the plaintiff in the amount of seven thousand, one hundred seventeen dollars and fifty cents. (\$7,117.50) in actual damages and zero dollars (\$0.00) in punitive damages. This Court granted the parties ten (10) days to file post-trial motions.

On May 6, 2016, Plaintiff filed a Motion for New Trial Absolute. That same day, Defendant filed a Motion for Costs Pursuant to Offer of Judgment.

STATEMENT OF FACTS

This action arises from a motor vehicle accident which took place on March 8, 2014 occurring on Highway 17 North in Mount Pleasant, South Carolina. Plaintiff Gary Nestler was driving a 2012 Ford Explorer that was stopped in traffic on highway 17 North when the defendant,

¹ Plaintiffs' complaint contains a claim for loss of consortium by Mrs. Nestler, however, that claim was not asserted at trial. Unless otherwise noted, plaintiff as used throughout will refer to Mr. Nestler.

Joseph Fields, driving a 1988 Nissan pick-up truck, rear-ended the plaintiff's vehicle. Plaintiff was transported by EMS to East Cooper Medical Center shortly following the accident.

Plaintiff's case-in-chief presented testimony from Joseph Fields (defendant), Julie Nestler (plaintiff's wife), Robert Schoderbek, M.D., and the plaintiff himself. The examination of the defendant was of short duration and involved the defendant admitting to liability. Mrs. Nestler's examination involved testimony regarding the effect of her husband's injuries on his participation in the family lifestyle, specifically his inability to participate in physical activities with the family that he had participated in prior to the accident.

Dr. Schoderbek was qualified as an expert in orthopedic medicine and testified regarding his treatment of Mr. Nestler which included referrals to other facilities for treatment. Dr. Schoderbek testified that Mr. Nestler's injuries were caused by the accident and that Mr. Nestler's treatment was a reasonable course of treatment. Dr. Schoderbek's final assessment of Mr. Nestler included an impairment rating of thirty two percent (32%) for the entire person. (Pl. Trial Ex. 2). On cross examination, Dr. Schoderbek indicated that his initial assessment of Mr. Nestler, sixteen months prior to the final assessment, included an impairment rating of only eight percent (8%) whole body impairment. Additionally, Dr. Schoderbek testified that he had discussed with Mr. Nestler the possibility of performing EMG tests and injections, along with a recommendation to see a neurologist, all of which were declined by Mr. Nestler. Testimony was also elicited that Dr. Schoderbek had recommended physical therapy two to three times per week for four weeks, and Mr. Nestler had only completed five appointments. Finally, evidence was presented that while Mr. Nestler had begun physical therapy at another facility, he was discharged for failure to return.

The plaintiff, Mr. Nestler, the final witness for the plaintiff's case-in-chief, testified to his background, lifestyle, facts regarding the date of the incident, and his injuries. Photographs of the



damage to Mr. Nestler's vehicle were admitted into evidence. (Pl. Trial Ex. 4). Mr. Nestler testified that his injuries prevented him from participating in physical activities that had been a part of his lifestyle prior to the accident including physical activities with his family, household chores, recreational athletic activities with friends, and activities performed as a volunteer fireman. Mr. Nestler testified that he stopped physical therapy because it was not helping to improve his physical condition. Additionally, Mr. Nestler testified that his refusal of EMG tests, injections, and a consult with a neurologist was because those recommendations would not cure his injuries. On cross examination, Mr. Nestler testified that he had not made a claim for injuries, prior to or subsequent to his claim in the instant case, which is consistent with his answers to interrogatories. (Def. Trial Ex. 2). However, defense counsel introduced into evidence a 2003 complaint in which Mr. Nestler, as the plaintiff, was involved in a rear-end accident and claimed permanent injury to his neck and back. (Def. Trial Ex. 3).

Based on Mr. Nestler's testimony, his answers to interrogatories, and the previously filed claim, the defense's request for a jury instruction on adverse inference was granted. (Ct. Trial Ex. 3). The jury was also instructed on its authority to award damages for personal injuries, pain and suffering, loss of enjoyment of life, prospective damages, future damages, and punitive damages, along with an instruction on plaintiff's duty to mitigate damages. (Ct. Trial Ex. 3). During deliberation, the jury requested a copy of plaintiff's medical bills which were not admitted into evidence during trial, and not provided to the jury during deliberation. (Ct. Trial Ex. 1). The jury made a second inquiry requesting the amount of plaintiff's medical bills which was provided to the jury in the amount of \$7,117.50. (Ct. Trial Ex. 2).

DISCUSSION

I. New Trial

Rule 59 of the South Carolina Rules of Civil Procedure authorizes the granting of a new trial “on all or part of the issues [] in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State;” Rule 59, SCRCP. “The grant or denial of new trial motions 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.” Howard v. Roberson, 376 S.C. 143, 149; 654 S.E.2d 877, 880 (Ct. App. 2007) (quoting Chapman v. Upstate RV & Marine, 364 S.C. 82, 88–89; 610 S.E.2d 852, 856 (Ct. App.2005)).

“When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice or prejudice.” Waring v. Johnson, 341 S.C. 248, 257; 533 S.E.2d 906, 911 (Ct. App. 2000). In the case of the former, the trial judge may order a new trial *nisi additur* or new trial *nisi remittitur*; in the case of the later, “the trial judge is required to grant a new trial absolute.” Id. “In ruling on a new trial motion, a trial judge has the discretionary power to grant a new trial absolute or *nisi* in a law case upon his disapproval of the verdict on factual grounds” Vinson v. Hartley, 324 S.C. 389, 404; 477 S.E.2d 715, 723 (Ct. App. 1996).

Rule 61 of the South Carolina Rules of Civil Procedure provides that:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every

stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, SCRCP. South Carolina's Supreme Court has explained that "[t]he admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion." Conner v. City of Forest Acres, 363 S.C. 460, 467; 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id.

Our appellate courts have held that in reviewing a jury's verdict "the jury does not have to believe uncontradicted testimony" because "[t]he fact that testimony is not contradicted directly does not render it undisputed." Vinson, 324 S.C. at 409-410. It remains in the jury's province to determine "the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation." Id. at 410. Furthermore, "[i]f there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm." Id. (quoting Hobgood v. Pennington, 300 S.C. 309, 313; 387 S.E.2d 690, 692 (Ct. App. 1989)).

A. New Trial Absolute

Under the thirteenth juror doctrine, the fact that "the trial judge is compelled to submit the issues to the jury" does not prevent the trial judge from granting a new trial absolute. Howard v. Roberson, 376 S.C. 143, 152; 654 S.E.2d 877, 881 (Ct. App. 2007). The South Carolina Supreme Court has explained the thirteenth juror doctrine as

a vehicle by which the trial court may grant a new trial absolute when [it] finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict.

The judge as the thirteenth juror “hangs” the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. 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.

Folkens v. Hunt, 300 S.C. 251, 254; 387 S.E.2d 265, 267 (1990) (internal citations omitted).

Several reasons have been held to provide a basis for a trial judge granting a new trial absolute including: “that justice has not prevailed,” “the verdict is inconsistent and reflects the jury’s confusion,” or “[the] verdict is unsupported by evidence.” Vinson, 324 S.C. at 404. (internal citations omitted). Additionally, “[a] trial court may grant a new trial absolute on the ground that the verdict is excessive or inadequate[.]” however, “[t]he jury’s determination of damages . . . is entitled to substantial deference.” Id. “If the amount of the verdict is so grossly inadequate or excessive that it shocks the conscience of the court and clearly indicates the amount was the result of passion, caprice, prejudice, partiality, corruption or some other improper motives, the trial judge is required to grant a new trial absolute.” Waring v. Johnson, 341 S.C. 248, 257; 533 S.E.2d 906, 911 (Ct. App. 2000).

South Carolina’s Supreme Court has found a jury verdict in the amount of \$6,000.00 “irreconcilably inconsistent with the unchallenged evidence presented at trial [.]” that included medical bills and lost wages totaling “\$30,026 in undisputed damages.” Dillon v. Frazer, 383 S.C. 59, 64; 678 S.E.2d 251, 253 (2009). The Court found such an award “grossly inadequate” demonstrating “that the verdict was actuated by improper motivation.” Id. at 65. In reaching this decision, the Court found the jury’s questions during deliberation (including whether any insurance had paid the plaintiff’s medical bills and whether the plaintiff had been paid while he was not working), and the trial court’s instructions that “those matters ‘are not for your concern[.]’” in light of the verdict indicate that “that the jury failed to follow the court’s instruction.” Id. at 64.

In contrast, the Vinson court affirmed the trial court's denial of plaintiff's "motions for reformation of the verdict, new trial *nisi additur*, and new trial absolute." Vinson, 324 S.C. at 412. The court found that based on the plaintiff's testimony, the jury could have found that the injuries were not a result of the accident. Id. Additionally, the plaintiff's "credibility may have been seriously weakened by his first claiming lost wages, then withdrawing that claim when confronted with deposition testimony which indicated he had no lost wages and was not making such a claim." Id. Finally, the court found that "certain inconsistencies came out during Dr. Carlson's [the plaintiff's doctor] testimony which may have brought his credibility into question." Id. Based on a review of the trial court's record, the appellate court determined that "the trial court's ruling is not 'wholly unsupported by the evidence' nor is it 'controlled by an error of law[,]'" concluding "the trial judge did not abuse his discretion" Id.

In the case before this Court, the jury granted an award of damages in the exact amount of the plaintiff's medical bills, \$7,117.50. Additionally, only two (2) questions were received from the jury during deliberations, both of which were inquiries into the amount of the plaintiff's medical bills. Neither of the questions addressed whether or not plaintiff's medical bills had been paid. As such, this Court finds that the jury was not "actuated by improper motivation," nor confused about its duties. Additionally, evidence was elicited on cross examination from both Dr. Schoderbek and Mr. Nestler which may have cast doubt on the credibility of their testimony and the extent of the plaintiff's injuries. As such, this Court finds that evidence did exist that could sustain factual findings implicit in the jury's verdict. Therefore, this Court finds the jury's verdict was not unsupported by evidence, and plaintiff's motion for a new trial absolute is denied.

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B. New Trial Nisi Additur

“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.” Waring v. Johnson, 341 S.C. 248, 256; 533 S.E.2d 906, 910 (Ct. App. 2000). “The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented.” Id. at 257. “A new trial *nisi additur* may be ordered when the verdict is merely insufficient based on the evidence.” Id. However, a trial judge is required to “offer compelling reasons for invading the jury's province by granting a motion for *additur*.” Luchok v. Vena, 391 S.C. 262, 264; 705 S.E.2d 71, 72 (Ct. App. 2010) (quoting Green v. Fritz, 356 S.C. 566, 570; 590 S.E.2d 39, 41 (Ct. App. 2003) (noting that the trial judge’s “mere listing of [plaintiff’s] claimed damages . . . in [its] order does not constitute compelling reasons for invading the jury's province. Green, 356 S.C. at 570)).

The Waring court affirmed the trial court’s granting of a new trial *nisi additur*, finding the trial court “articulated compelling reasons in [its] order justifying the grant of the *nisi additur*.” Waring, 341 S.C. at 261. The jury in Waring returned a verdict in “the exact amount of Waring’s medical bills.” Id. at 255. The trial court reasoned the jury had failed to consider pain and suffering based on the facts that Waring had received years of medical treatment, “underwent surgery for a condition which numerous doctors testified was aggravated by the wreck[,] . . . took advantage of every recommendation of her physicians[,] . . . will most likely suffer pain for the remainder of her life[, and] . . . [is] unable to continue her previous active lifestyle.” Id. at 260.

In contrast, the Luchok court found that the trial court improperly granted a new trial *nisi additur* because it failed to provide compelling reasons for invading the jury’s province. Luchok,



391 S.C. at 265. During trial Ms. Luchok was the only witness to testify in her case in chief. Id. at 264. Ms. Luchok's testimony indicated that she did not require an ambulance or seek immediate treatment, but rather "drove herself home after the accident." Id. While she went to her family doctor the next day, she did not begin chiropractic treatment until "more than three weeks after the accident[.]" and that treatment included "massages she received from a massage therapist who worked for the chiropractor." Id. The Luchok court found that the trial judge granted a new trial *nisi additur* because the jury award failed to cover all the chiropractic bills and that the chiropractic bills were "reasonable and necessary," which the Luchok court found were not compelling reasons and therefore overruled the trial court. Id. at 265.

In the case before this Court, evidence was received from the plaintiff including the testimony of the plaintiff's wife, treating physician, and the plaintiff himself. The evidence addressed the causal connection of the accident to the plaintiff's injuries, his pain and suffering, his loss of enjoyment of life, and the likelihood that his injuries will not improve. However, evidence was also elicited which may have impeached the plaintiff's credibility regarding the extent of his injuries and the reasonableness of his discontinuation of treatment. Additionally, the credibility of Dr. Schoderbek may have been impeached based on the two assessments of impairment which differed greatly. The court's duty is not to weigh the evidence or the credibility of witnesses, but rather to determine whether the verdict is insufficient based on the evidence. This Court finds that compelling reasons do not exist for invading the province of the jury, and therefore plaintiff's motion for a new trial *nisi additur* is denied.

II. Costs Pursuant to Offer of Judgment

On November 16, 2016, attorney Paul Trainor, on behalf of the underinsured motorist carrier, QBE North America ("QBE"), filed an offer of judgment ("Offer") with the Clerk of Courts.

The Offer was in the amount of forty thousand dollars (\$40,000) subject to offset of the full liability policy limits of twenty five thousand dollars (\$25,000) provided under defendant Joseph Fields' GEICO policy. As such, the Offer presented a net amount of fifteen thousand dollars (\$15,000) of potential underinsured motorist coverage under QBE's UIM. Plaintiff did not accept the Offer.

South Carolina Rules of Civil Procedure provide an exception of costs being awarded to the prevailing party where a statute or rule provides an express provision to the contrary, such as the statute and rule explained below. Rule 54, SCRPC. Subsection (e) of Rule 54 enumerates the taxable costs including among others: fees of the clerk, fees incurred in service of process, witness fees, and fees for the exemplification and copies of papers. Rule 54(e), SCRPC.

Pursuant to Rule 68, SCRPC, and S.C. Code Ann. § 15-35-400, "[i]f the offer of judgment is not accepted within twenty days after notification, or prior to or on the tenth day before the actual trial date, whichever date occurs first, the offer shall be considered rejected" Rule 68, SCRPC. If the offer is not accepted "and the offeror obtains a verdict . . . at least as favorable as the rejected offer, the offeror shall recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until the entry of the judgment[,]" and "(3) if the offeror is a defendant, reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer to the entry of the judgment." Rule 68, SCRPC.

In this case, plaintiffs failed to accept the Offer within the time prescribed by the Rule. The jury awarded a verdict in the amount of \$7,117.50 on April 26, 2016 that is less than half the Offer. Attorney Paul Trainor, on behalf of the defense, submitted a Motion for Costs Pursuant to Offer of Judgment. The affidavit of costs indicates the total administrative and court costs in the amount of \$1,313.11. Affidavit of Attorney Paul Trainor For Costs Pursuant to QBE North America's Offer of Judgment at ¶7, 1-2 Nestler v. Fields (2015-CP-10-00330). Pursuant to Rule 54(e), this Court



finds the costs listed in paragraph 7(c)-(j) are not taxable. This Court finds the costs listed in ¶7(a), (b), (k), and (l) are taxable. However, ¶7(k)'s Motion to Enforce Offer of Judgment has not been filed and as such is not a cost yet incurred. Therefore, this Court awards costs payable by the plaintiff to the defendant in the amount of \$364.68.

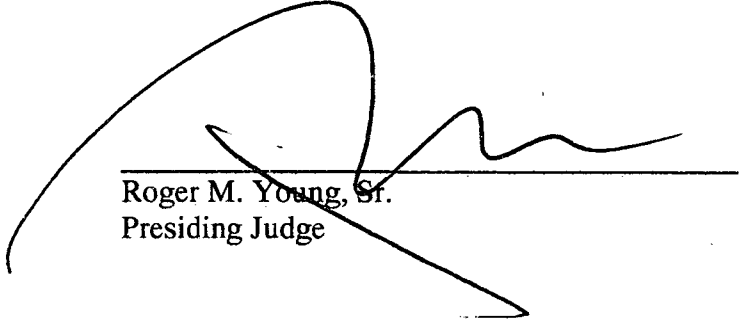
CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for a New Trial Absolute and *Nisi Additur* is DENIED; and it is further

ORDERED that Defendant's Motion for Costs is GRANTED in the amount of \$364.68.

IT IS SO ORDERED!

July 7, 2016
Charleston, South Carolina



Roger M. Young, Sr.
Presiding Judge