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

Benjamin K. Henderson, ... Appellant,

-v-

Patricia Greer, ... Respondent

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant, Benjamin K. Henderson ("Henderson") moves the Court for Rehearing and/or to Alter its Unpublished Opinion number 2016-UP-431 of October 19, 2016, which affirms the trial court's order denying Appellant's motion for a new trial *nisi*. Henderson also petitions and suggests the desirability of rehearing by the Court *en banc* because this case involves questions of exceptional importance as it relates to whether a jury can freely disregard uncontroverted evidence.

In this case, the jury found that Ms. Greer's negligence proximately caused Henderson's damages and awarded the exact amount of medical expenses contained on the medical expense summary. (R. p. 7; pp. 275-284). 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. (R. p. 225, line 21 – p. 226, line 5; p. 231, lines 6-9; p. 231, lines 15-18). Regardless of whether it was a sprain or fracture, Benjamin sustained a significant painful injury to his left hand. (R. p. 236, lines 16-19). Nine days after the accident, Dr. Carter noted that Mr. Henderson was still experiencing pain. (R. p. 229, line 23 – p. 230, line 4). Dr. Vega treated Benjamin on October 4, 2010, for left wrist pain. (R. p. 202, lines 6-14). By June 29, 2011, nearly eleven months after Ms. Greer struck the tree, Benjamin's pain was starting to get better. (R. p. 95, lines 4-6). At trial, Benjamin testified he still experiences pain in his wrist from time to time. (R. p. 95, lines 7-13). Based on the uncontroverted evidence in the Record, the jury cannot disregard that Henderson endured pain and suffering as he sustained either a fractured wrist or sprained wrist.

In stating that the jury is free to disregard uncontroverted evidence, the Court overlooks Henderson's central argument from Carson v. CSX Transp., Inc., 400 S.C. 221, 734 S.E.2d 148 (2012).[1] The uncontroverted evidence in Carson 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.

[1] The Court also relies on O'Neal v. Bowles, 314 S.C. 525, 431 S.E.2d 555 (1993), to affirm the jury's disregard of uncontroverted evidence. Here, unlike O'Neal, the verdict was for the exact amount of Henderson's medical expenses and the uncontroverted evidence was that Henderson endured pain and suffering for which the jury did not award an amount. Carson is directly applicable as it holds that the verdict is legally incorrect when the jury disregards uncontroverted evidence.

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 Court fails to address Henderson's argument from Carson that the jury cannot freely disregard uncontroverted evidence. The jury's verdict in this case was not only merely inadequate – which warrants a new trial *nisi* – but also legally incorrect. 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 is warranted. The Court should address Henderson's arguments from Carson and grant his Petition for Hearing.

In addition to not addressing Henderson's arguments on Carson, the Court also overlooks Henderson's arguments on this Court's opinion in Waring v. Johnson, 341 S.C. 248, 258, 533 S.E.2d 906, 911 (Ct. App. 2000), where the jury – as it did here – awarded the exact amount of Waring's medical expenses. 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. Then, the Court 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. 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 this Court held a verdict for the exact amount of the medical bills was a compelling reason justifying *additur* in Waring, then the same holding should apply here where the jury's verdict failed to award an amount for pain and suffering.

Henderson also incorporates all arguments made in his brief regarding the legally incorrect verdict being the result of passion, caprice, or prejudice in order to preserve it for Supreme Court review pursuant to Rule 242(d)(2), SCACR.

CONCLUSION

The Court overlooks the central arguments put forward by Henderson in affirming the trial court's denial of his motion for new trial *nisi*. A jury cannot freely disregard uncontroverted evidence. As a result, Henderson's Petition for Rehearing should be granted, and the trial court's decision should be reversed.

[SIGNATURE PAGE TO FOLLOW]

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November 1, 2016
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CERTIFICATE 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 Petition for Rehearing*** to:

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Aiken, SC 29801

Attorney for Respondent, Patricia Greer

Megan C. Davis

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November 1st, 2016
Hampton, South Carolina

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November 1, 2016

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 seven (7) copies of Appellant's Petition for Rehearing and Suggestion for Rehearing EN BANC and Certificate of Service in the above referenced matter. Please file the original and return a clocked copy of same in the self-addressed stamped envelope provided. Also enclosed is our firm's check in the amount of $25.00 for the filing fee.

By copy of this letter, Appellant's Petition for Rehearing 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