IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Opinion No.: 2016-UP-431 (S.C. Ct. App. filed October 19, 2016)

Benjamin K. Henderson, ... Petitioner,

-v-

Patricia Greer, ... Respondent

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for the Petitioner, Benjamin Henderson, certifies that the Petition for Rehearing was denied by the original panel of the Court of Appeals on January 20, 2017.

I. **DID THE COURT OF APPEALS ERR IN AFFIRMING THE LOWER COURT'S DENIAL OF HENDERSON'S MOTION FOR NEW TRIAL *NISI ADDITUR* OR, IN THE ALTERNATIVE, NEW TRIAL UNDER RULE 59, SCRCP, WHEN THE JURY AWARDED ONLY HENDERSON'S MEDICAL EXPENSES AND THE UNCONTRADICTED TESTIMONY WAS THAT HENDERSON EXPERIENCED PAIN AND SUFFERING?**

Pursuant to Rule 242, SCACR, Petitioner, Benjamin Henderson ("Henderson") requests the South Carolina Supreme Court grant a Writ of Certiorari to review and reverse the South Carolina Court of Appeals' unpublished opinion number 2016-UP-431 of October 19, 2016, which affirms the trial court's order denying Henderson's Motion for New Trial *Nisi Additur*, or in the Alternative, New Trial Pursuant to Rule 59, SCRCP. Henderson relies upon the Appendix filed contemporaneously with the Petition. This Petition should be granted as the case presents a novel question of law for which there is no directly applicable authority.

STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Appellant, Benjamin Henderson's ("Appellant", "Benjamin", or "Henderson"), Motion for New Trial *Nisi Additur*, or in the Alternative, New Trial Pursuant to Rule 59, SCRCP, following the conclusion of a two-day trial where the jury found Respondent, Patricia Greer ("Respondent" or "Greer"), liable for the exact amount of Mr. Henderson's incurred medical expenses. (App. pp. 3-6). The uncontroverted testimony in the case was that Mr. Henderson sustained pain and suffering, a recoverable damage under South Carolina law. The events giving rise to this action occurred on July 27, 2010, when Benjamin and his cousin, Bryant Henderson, were leaving Aiken and heading to Hampton when they came across a tree that had fallen across U.S. Highway 278 in Aiken County during a rainstorm. Benjamin and Bryant got out of the vehicle and attempted to remove the tree from the traveled portion of the roadway. Before they could do so, however, a vehicle, driven by Ms. Greer, traveling in the opposite direction struck the tree, driving it into Benjamin and causing personal injuries.

Appellant filed this negligence action in the Aiken County Court of Common Pleas on July 17, 2012. (App. pp. 14-16). The Complaint alleges that Ms. Greer was negligent in several particulars:

(a) In traveling too fast for the conditions existing at that time;

(b) In failing to keep a proper lookout;

(c) In failing to keep her vehicle under proper control;

(d) In failing to apply the brakes;

(e) In failing to exercise that degree of care and caution which a reasonable and prudent person would have exercised under the same or similar conditions; and

(f) In such other particulars as the evidence may establish.

(App. p. 15, ¶ 8). Greer denied the negligence allegations and asserted that Henderson was negligent. (App. p. 17, ¶¶ 3; 5). The case was tried in the Aiken County Court of Common Pleas before the Honorable R. Knox McMahon on October 13-14, 2014. Following Greer's presentation of evidence, the trial court granted Henderson's motion for directed verdict on the issue of comparative negligence. (App. pp. 144-145). The jury found that Greer's negligence proximately caused Henderson's damages and awarded $5,531.20 in damages. (App. p. 7). This was the exact amount of medical expenses incurred by Henderson and presented to the jury on his medical expense summary. (App. pp. 275-284).

Henderson moved for a new trial *nisi additur*, or, in the alternative, for a new trial pursuant to Rule 59, SCRCP. (App. pp. 10-12). The basis for the motion was that the jury's verdict only awarded Henderson his medical expenses and the uncontroverted testimony was that Henderson sustained either a fractured left wrist or a sprained wrist and endured pain and

suffering as a result. (App. pp. 10-12). In an Order signed February 5, 2015, the trial court denied Henderson's motion. (App. pp. 3-6). Henderson received a copy of the Order on February 9, 2015 and filed a Notice of Appeal on March 2, 2015. (App. pp. 285-295).

On October 19, 2016, in a one-paragraph unpublished opinion pursuant to Rule 220(b), SCACR, the Court of Appeals affirmed the lower court. (App. pp. 359-360). On November 1, 2016, Henderson filed a Petition for Rehearing pursuant to Rule 221(a), SCACR, pointing out the arguments overlooked by the Court of Appeals in its unpublished opinion. (App. pp. 361-366). On January 20, 2017, the Court of Appeals denied Henderson's Petition for Rehearing. (App. p. 367).

ARGUMENT

By summarily deciding this appeal pursuant to Rule 220(b), SCACR, the Court of Appeals failed to address and rule upon the central issue posed by Henderson: whether the jury verdict in this case for the exact amount of medical expenses inadequately compensates Henderson when the uncontroverted testimony is he endured pain and suffering, a recoverable damage under South Carolina law. The jury found that Ms. Greer's negligence proximately caused Mr. Henderson's damages and awarded $5,531.20 in damages – the exact amount of medical expenses contained on the medical expense summary. (App. 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 at the Medical College of Georgia that Benjamin sustained a left wrist fracture, Dr. Carter testified he diagnosed it as a left wrist sprain. (App. 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. (App. p. 236, lines 16-19). Nine days after the accident, Dr.

Carter noted that Mr. Henderson was still experiencing pain. (App. p. 229, line 23 – p. 230, line 4). Dr. Vega treated Benjamin on October 4, 2010 for left wrist pain. (App. p. 202, lines 6-14). By June 29, 2011, nearly eleven months after Ms. Greer struck the tree, Benjamin's pain started to improve. (App. p. 95, lines 4-6). At trial, Benjamin testified he still experiences pain in his wrist from time to time. (App. p. 95, lines 7-13). It cannot be reasonably argued that Mr. Henderson did not endure pain and suffering as he sustained either a fractured wrist or sprained wrist.

By finding Ms. Greer liable, and awarding damages solely for his medical expenses, the jury failed to adequately compensate Mr. Henderson and failed to follow the trial court's charge. The trial court charged the jury "[y]ou 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 presented in this case."*** (App. p. 183, lines 2-7). In the order denying Mr. Henderson's motion for new trial or new trial *nisi additur* the trial court noted "the jury could have reasonably determined the Plaintiff suffered little or no damage as a result of pain and suffering." (App. pp. 3-6). This is inconsistent with the uncontroverted evidence presented at trial as the jury is not free to disregard the evidence of pain and suffering.

This Court addressed a zero verdict for conscious pain and suffering despite a liability finding in Carson v. CSX Transp. Inc., 400 S.C. 221, 734 S.E.2d 148 (2012). Carson involved a car-train collision in Denmark. Id. at 226, 734 S.E.2d at 151. The uncontroverted evidence presented at trial 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.

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, this 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 jury is not free to disregard the uncontroverted evidence presented at trial when it found that Greer was liable. This 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 was warranted.

The jury's verdict in this case was also the result of passion, caprice, prejudice, or some other influence outside the evidence. If the jury awarded $1,000,000.00 in this case, Ms. Greer would be moving for *remittitur* on the basis that the verdict was the result of passion, caprice, prejudice, or some other influence outside the evidence. *Remittitur* should be used to reduce a verdict that is excessive while *additur* should be used to increase an inadequate verdict. Both *additur* and *remittitur* should be viewed through the same standard. It should not be that

excessive verdicts are decreased while an inadequate verdict is merely the jury's verdict despite uncontroverted evidence to the contrary.

In addition to not addressing Henderson's arguments on Carson, the Court of Appeals also overlooks Henderson's arguments on the Court of Appeals' 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.

CONCLUSION

The Court of Appeals did not address Henderson's arguments from Carson or Waring in its one paragraph unpublished decision. The verdict in this case is grossly inadequate given the

uncontroverted and uncontested evidence regarding Henderson's pain and suffering. This Court should grant the Petition to address Henderson's arguments of an inadequate verdict that contravenes the evidence.

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February 20, 2017
Hampton, South Carolina

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CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant/Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within the ***Petition for Writ of Certiorari and Appendix*** to:

The Honorable Daniel E. Shearouse
South Carolina Supreme Court Clerk of Court
Post Office Box 11330
Columbia, SC 29211

A. Shane Massey, Esquire
Nance, McCants & Massey
Post Office Box 2881
Aiken, SC 29801

This is to certify further that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant/Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within the ***Petition for Writ of Certiorari*** to:

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
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Megan C. Davis

Megan C. Davis

February 20th, 2017
Hampton, South Carolina