STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	2015-CP-10-3550
	)	
Richard Ralph and Eugenia Ralph,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**ORDER DENYING PLAINTIFFS' MOTION FOR NEW TRIAL**
	)	
Paul Dennis McLaughlin and Susan Rode McLaughlin,	)	
	)	
Defendants.	)	

BACKGROUND

This trespass case came before this Court for a jury trial beginning January 23, 2017. The jury was charged and began deliberations on Thursday, January, 26, 2017. The jury deliberated over five hours and returned a verdict in the amount of one thousand dollars ($1,000.00) in favor of the plaintiffs. On February 3, 2017, the plaintiffs filed a motion for a new trial *nisi additur*, or in the alternative, a new trial as to damages only, or in the alternative, a new trial absolute. Defendants provided this Court with a Reply to plaintiffs' motion. After thorough consideration of the plaintiffs' arguments and the defendants' arguments, this Court does not find compelling reasons to invade the jury's province. Therefore, plaintiffs' Motion for a New Trial is denied.

STATEMENT OF FACTS

This trespass case involved a drainage easement and a no build area that extended across several lots located on Seabrook Island including lots twenty two through twenty six illustrated on the "E.M. Seabrook Jr." plats. (Pls.' Ex. 2 & 4). Plaintiffs are the owners of Lot 23. (Pls.' Ex. 1). Defendants are owners of Lot 22. (Pls.' Ex. 3). Defendants asserted that the drainage easement and the no build area had been abandoned as illustrated on the "Forsberg" plat. (Pls.' Ex. 5).

At trial the plaintiffs presented evidence, including the above referenced deeds and plats, indicating that plaintiffs had an ownership interest in the drainage easement and no build area ("easement"). Howard Yates, qualified as an expert in the law of real property, testified that he examined the chain of title on the subject properties and found that all deeds in the chain of title were subject to the easement. Mr. Yates testified that any abandonment of interest in the easement by the Seabrook Island Property Owners' Association (SIPOA) would not have extinguished the easement. Rather, abandonment of the easement would require at least the agreement of all the owners of any property that had an interest in the easement. Additionally, Mr. Yates testified that the recording of the Forsberg plat indicating the easement is "to be abandoned" does not result in the abandonment of the easement. (Pls.' Ex. 5). However, Mr. Yates also testified on cross examination that recorded plats become part of the deed to a property and that the Forsberg plat did become part of the defendants' deed. Mr. Yates also testified that the easement was originally in favor of SIPOA.

Testimony was received regarding alleged damage caused to plaintiffs' property by defendants' removal of a portion of the drainage pipe (part of the easement) that was located on defendants' property. Plaintiffs asserted that the drainage pipe removal increased the volume of surface water on plaintiffs' property after rainfall and increased length of time required for that surface water to dissipate. Mrs. Ralph testified that prior to the drainage pipe removal, the surface water after rain fall would take approximately one to one and one half days to dissipate, and subsequent to the drainage pipe removal, it takes several days for the surface water to dissipate. Mrs. Ralph also testified that although there was a surface water problem prior to removal of the drainage pipe, the removal of the drainage pipe exacerbated the surface water problem. Robert George was qualified as an expert in civil engineering, registered land surveying, and storm water drainage, and testified that the removal of the drainage pipe directly caused the poor drainage and flooding on the plaintiffs' property.

However, Mr. George also testified that he was not aware of the surface drains that the defendants had installed on their own property to alleviate problems that may have resulted from the removal of the drainage pipe. Additionally, the defendant, Mr. McLaughlin, testified that he visited his property at least three times prior to removal of the drainage pipe, and observed standing water on the plaintiffs' property after rain fall. Mr. McLaughlin also testified that the standing water was in an amount that it reached the steps of the plaintiffs' property.

Finally, this Court received testimony regarding the value of plaintiffs' property. Mrs. Ralph testified that the exacerbated surface water problem would have to be disclosed if the property were sold, and that it has decreased the value of the property. Mrs. Ralph testified that based on comparable homes in the neighborhood, she believed the value of her property to be seven hundred seventy five thousand dollars ($775,000.00) if the exacerbated surface water problem did not exist. Mr. Ralph testified that he believed the diminution of value to his home was approximately two hundred thousand dollars ($200,000.00). Testimony was also received from Nick Thompson regarding the value of the plaintiffs' property. Mr. Thompson was qualified as an expert in commercial and residential real property appraisal. Mr. Thompson testified that the plaintiffs' valuation of their property was likely accurate, and that plaintiffs' property could be depreciated by between forty and sixty percent (40-60%) based on the surface water problem.

At the close of plaintiffs' case-in-chief, the plaintiffs moved for a directed verdict on their cause of action for trespass and this Court denied that motion. Defendants also moved for a directed verdict on plaintiffs' cause of action for trespass, intentional infliction of emotional distress, and punitive damages. This Court denied defendants' motion for directed verdict on trespass, but granted a directed verdict on the intentional infliction of emotional distress and punitive damages. At the close of all the evidence, this Court ruled there was sufficient evidence for the jury to determine issues

of trespass and abandonment regarding the easement, and denied both parties' motions for directed verdict.

After closing arguments, the jury was charged on the law including the law of easements, trespass, and nominal and actual damages. Neither the plaintiffs, nor the defendants, objected to the charges given by this Court. During deliberation, the jury requested to rehear the testimony of Howard Yates. The jury deliberated over five hours before indicating that it was deadlocked. This Court gave the jury an Allen[1] charge, after which the jury continued deliberation for an additional hour before returning a verdict. Neither party objected to this Court giving the jury an Allen charge. The jury's verdict was in the amount of one thousand dollars ($1,000.00) in favor of the plaintiffs. The word "nominal" was hand written on the verdict form by the jury.

DISCUSSION

I. Nominal Damages

The jury was given the following instruction on nominal damages: "The plaintiff is entitled to at least nominal damages if you find the defendant committed trespass. Nominal damages may be a token sum such as one cent or one dollar."[2] The jury returned a verdict in the amount of $1,000.00 and wrote "nominal" on the verdict form. Plaintiff asserts that $1,000.00 is not a nominal award, but rather a substantial award, relying upon Hinson v. A.T. Sistare Const. Co., 236 S.C. 125; 113 S.E.2d 341 (1960) (overruled on other grounds by McCall v. Batson, 285 S.C. 243; 329 S.E.2d 741 (1985)). The facts in Hinson, however, are distinguishable from the case before this Court.

Hinson involved a condemnation action which was appealed resulting in the condemnee receiving an award of twenty three hundred fifty dollars ($2,350.00) as opposed to the condemnation

[1] Allen v. United States, 164 U.S. 492 (1896).
[2] See Snow v. City of Columbia, 305 S.C. 544, 553; 409 S.E.2d 797, 802 (Ct. App. 1991) ("mere entry entitles the party in possession at least to nominal damages.").

board's proposed tender of seven hundred dollars ($700.00). Id. at 130; 113 S.E.2d at 343. At the end of the trespass case,[3] the jury's verdict read "We find for the plaintiff the sum of nominal dollars actual damages and two thousand dollars punitive damages." Id. at 133; 113 S.E.2d at 345. The jury was instructed to put "some token amount or some trifling sum in lieu of the word 'nominal[,]'" and the jury returned a sum of two hundred dollars ($200). Id. at 134; 113 S.E.2d at 345. The Hinson court found that "$200 is a verdict for substantial, not nominal, damages[,]" and reversed the judgment "as to actual damages and affirmed as to punitive damages." Id. The Court further explained that "[w]here there has been a wilful (sic) invasion of a legal right but no substantial damage has been shown to have resulted therefrom, a verdict for punitive damages alone will stand, since it will be presumed that nominal damages, incapable of admeasurement, have been merged in the punitive damages." The Court's decision was based on the fact that the "verdict in the condemnation proceeding included just compensation for its loss [condemnee's shrubbery] as well as for all other loss sustained by him as the result of the taking. Id. at 133; 113 S.E.2d at 344.

In the case before this Court, at the close of the plaintiffs' case-in-chief, this Court directed a verdict in favor of the defendants against plaintiffs' assertion of punitive damages and therefore there was not the possibility of nominal damages being "merged into" punitive damages. Additionally, unlike the plaintiff in Hinson, plaintiffs had not received compensation in any manner prior to trial, a factor that influenced the Hinson Court's decision. Finally, the award of two hundred dollars in nominal damages in Hinson, represents approximately eight and one half percent (8.5%) of Hinson's actual damages represented by the award in the condemnation proceeding. Here, the award of one thousand dollars ($1,000.00) in nominal damages represents one half of one percent (0.5%) of the

[3] The plaintiff maintained a suit against the contractor who performed work on that part of the plaintiff's property which was condemned on the basis that such work began prior to tender of any money from the State and prior to a decision in plaintiff's appeal of the condemnation board's award.

lowest estimate of plaintiffs' alleged actual damages.[4] Therefore, this Court finds that it was the jury's intention to award nominal damages, not actual damages, by writing "nominal" on the verdict form, and based on the facts before this Court, the jury's award of one thousand dollars ($1,000.00) is nominal.

II. 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

[4] If this Court uses the estimate of 40%-60% of property value loss presented at trial, the $1,000.00 in nominal damages would represent a range between three thousandths of one percent (0.003%) and two thousandths of one percent (0.002%) of the alleged actual damages.

verdict on factual grounds . . . ." Vinson v. Hartley, 324 S.C. 389, 404; 477 S.E.2d 715, 723 (Ct. App. 1996).

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, although there was testimony that the surface water problem on the plaintiffs' property was exacerbated by the defendants' trespass, i.e., the removal of the drainage pipe, Mrs. Ralph also testified that her property always had some type of surface water problem. Defendants also testified that on various trips to their property, prior to the removal of the drainage pipe, they observed flooding of the plaintiffs' property after rain fall. Based on testimony from the plaintiffs, the alleged diminution in property value could have been in an amount of two hundred thousand dollars ($200,000.00). However, the plaintiffs also presented testimony of a forty to sixty percent decrease in the property value. Based on that percentage range and Mrs. Ralph's testimony on the estimated value of the property, the resulting loss in property value could have been in an amount between three hundred ten thousand dollars ($310,000.00) and four hundred sixty five thousand dollars ($465,000.00).

The jury's verdict in favor of the plaintiffs indicates that the jury found that the defendants committed trespass by removing the drainage pipe. The award of nominal damages in the amount of one thousand dollars ($1,000.00) indicates that the jury did not find that the defendants' trespass caused the damage alleged by the plaintiffs but understood that the law requires at least nominal damages to vindicate the plaintiffs' rights.

This Court finds there exists evidence to sustain the factual findings implicit in the jury's verdict. Additionally, the length of deliberation coupled with the request to rehear testimony indicates the jury's thoughtfulness and thoroughness in its deliberation and reaching its verdict. There is no indication to this Court that the jury was confused or that the verdict was unsupported by the evidence. Finally, this Court finds that the amount of the verdict is consistent with the instructions given to the

jury, and as such, does not shock the conscience of this Court. Plaintiffs' motion for a new trial absolute is denied.

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 trial judge granted a new trial *nisi additur* because the jury award failed to cover all the chiropractic bills and the chiropractic bills were "reasonable and necessary." Id. at 265. However, the Luchok court found the trial court's findings were not compelling reasons and therefore overruled the trial court. Id.

For the reasons stated in Part II. A., supra, this Court does not find any compelling reasons to invade the province of the jury. Therefore, plaintiffs' motion for a new trial *nisi additur* is denied.

C. New Trial as to Damages Only

"The law in South Carolina is clear that when a verdict in favor of a plaintiff is fully supported by the evidence on the issue of liability but the damages awarded are inadequate, a new trial *may* be ordered on the issue of damages alone. S.C.R.C.P. 59(a). (Emphasis added.) (sic)" Cartin v. Keller Bldg. Products of Charleston, 299 S.C. 152, 153; 382 S.E.2d 922, 923 (1989). However, "[a] new trial on damages alone is not warranted unless the evidence presented indicated that a directed verdict on the issue of liability would have been proper." Pelican Building Centers of Horry – Georgetown, Inc. v. Dutton, 311 S.C. 56, 61; 427 S.E.2d 673, 676 (1993).

This Court denied both plaintiffs' and defendants' motions for a directed verdict on the trespass cause of action which were made at the end of the plaintiffs' case-in-chief. Additionally, at

the close of all evidence, this Court ruled there was sufficient evidence for the jury to determine issues of trespass and abandonment regarding the easement, and denied both parties' motions for directed verdict. For these reasons and the reasons stated in Part II. A., supra, plaintiffs' motion for a new trial as to damages only is denied.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for a New Trial Absolute, New Trial *Nisi Additur*, and New Trial as to Damages Only is DENIED.

IT IS SO ORDERED!

February 28, 2017
Charleston, South Carolina

Roger M. Young Sr.
Presiding Judge