

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APR 13 2017

S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2017-000485

Benjamin K. HendersonPetitioner,

vs.

Patricia GreerRespondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE COURT OF APPEALS ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF HENDERSON'S MOTION FOR A NEW TRIAL NISI ADDITUR?

STATEMENT OF THE CASE

On July 27, 2010, Benjamin Henderson ("Henderson") and his cousin, Bryant Henderson ("Bryant"), were traveling on U.S. 278 between Aiken and Barnwell during a heavy rain storm when they saw a large tree fall across the roadway in front of them. (App. 49, lines 9-13). After stopping, Henderson and Bryant exited the vehicle and walked up to the tree. (App. p. 49, line 14 – p. 57, line 12).

As Henderson and Bryant were traveling toward Barnwell, Patricia Greer ("Greer") was driving on U.S. 278 in the opposite direction, toward Aiken. (App. p. 113, line 24 – p. 114, line 2). Greer slowed as the rain became stronger. (App. p. 116, lines 11-15). The heavy rain restricted Greer's visibility, and she did not see the fallen tree in front of her. (App. p. 128, lines 5-8; p. 131, lines 20-23). Greer struck the tree, and the force of the impact pushed the tree into Henderson and Bryant, who were standing on the opposite side of the tree. (App. p. 49, line 14 – p. 50, line 9). The tree tripped Henderson and knocked him into a ditch. (App. p. 87, line 23 – p. 88, line 20).

Henderson testified that he sustained injuries to his left hand, left knee, and right shoulder. (App. p. 91, lines 9-12). He was transported via ambulance to the Medical College of Georgia, made one follow-up visit to the Medical College of Georgia, and had six visits to Palmetto Primary Care Physicians. He presented medical bills totaling \$5,531.20. (App. p. 275).

Henderson filed this action in the Aiken County Court of Common Pleas on June 12, 2012, alleging Greer was negligent in striking the tree and injuring him. The

Honorable R. Knox McMahon tried the case before a jury on October 14 and 15, 2014. At the trial of the case, the jury heard testimony from Henderson, Bryant, Greer, Dr. Luis Vega, Dr. Craig T. Carter, and Dr. Edward Warren. Following the trial, the jury found Greer was negligent and that her negligence proximately caused injuries to Henderson. The jury awarded Henderson \$5,531.20, the amount Henderson presented in medical bills. (App. p. 313).

In an order filed on February 5, 2015, Judge McMahon denied Henderson's motion for a new trial nisi additur. (App. pp. 316-317). Henderson served his Notice of Appeal to the South Carolina Court of Appeals on March 2, 2015. The Court of Appeals affirmed the trial court on October 19, 2016. (App. pp. 359-360). Henderson filed a Petition for Rehearing on November 1, 2016, and the Court of Appeals denied that Petition on January 20, 2017. (App. p. 367).

ARGUMENT

THE COURT OF APPEALS DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF HENDERSON'S MOTION FOR A NEW TRIAL NISI ADDITUR.

Henderson presents three primary arguments to support his contention that the Court of Appeals erred in affirming the trial court's denial of the motion for a new trial nisi additur: the jury failed to follow the trial court's instructions, the verdict was inadequate because the jury and courts below ignored uncontroverted evidence of pain and suffering, and the verdict was inconsistent in that the jury awarded Henderson's medical bills without a corresponding award for pain and suffering.

1. THE JURY FOLLOWED THE TRIAL COURT’S INSTRUCTIONS.

Henderson first argues the jury failed to follow the trial court’s instructions and, consequently, arrived at an inconsistent verdict in awarding Henderson’s medical bills but not awarding an amount for pain and suffering. However, the jury’s verdict was not at all inconsistent with the charge.

Throughout his charge, the trial judge repeatedly instructed the jury that the jury finds and determines the facts:

“I’m going to now instruct you or charge you on the law which you must apply to the facts of this case as you find the facts to be.” (App. p. 170, lines 18-20).

...

“In every case tried in this court before a jury, the jury becomes the sole and exclusive judges of the facts. The trial judge cannot comment on or make any statement about the facts in a case. You are the sole judges of the facts.” (App. p. 172, lines 1-5).

...

“Review the evidence and you determine what the facts are and the inferences to be drawn from the facts individually and as a jury. You then take those facts and those inferences, compare them to the law as I have told you the law is and you will reach a verdict as I said for either one or the other, the plaintiff or the defendant.” (App. p. 184, line 20 – p. 185, line 1).

Furthermore, the trial judge’s charge on pain and suffering was significant: “Pain and suffering compensates the plaintiff for physical discomfort and emotional response to the sensation of pain cause by the injury itself. There's no definite standard by which to compensate a plaintiff for pain and suffering. You 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 and the evidence presented in this case.” (App. p. 182, line 23 – p. 183, line 7) (emphasis added).

The trial judge did not instruct the jury that it was required to award an amount for pain and suffering. Instead, the judge told the jury to determine the facts and, based on those facts, to determine the amount, **if any**, to be awarded for pain and suffering. By awarding no damages for pain and suffering, the jury acted appropriately within the bounds of the instructions.

2. THERE IS EVIDENCE TO SUPPORT THE ADEQUACY OF THE VERDICT.

In his Petition, Henderson argues repeatedly that the jury, trial judge, and Court of Appeals ignored the “uncontroverted” evidence of pain and suffering. To support his position, Henderson cites Waring v. Johnson, 341 S.C. 248 (Ct.App. 2000). Like our case, Waring resulted from a motor vehicle collision. Similarly, as in our case, the jury in Waring awarded the plaintiff’s medical bills without a corresponding award for pain and suffering. Unlike our case, though, the trial court in Waring granted the plaintiff’s additur motion. The Court of Appeals affirmed the trial court because the trial court “articulated compelling reasons in his order justifying the grant of the nisi additur.” Id. at 261. Henderson argues, then, that an affirmed additur in Waring under similar facts compels overruling the denial of an additur motion here. But that argument misses the real point, and holding, of Waring.

“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.” Id. at 256. “The trial judge who heard the evidence and is more familiar with the

evidentiary atmosphere at trial possesses a better-informed view of the damages than this Court. Accordingly, great deference is given to the trial judge.” *Id* at 257. Thus, the holding in *Waring* is that a trial judge’s decision on a motion for a new trial *nisi*, whether that is a grant or denial of the motion, must be upheld if there is any evidence to support that decision.

In this case, although there is certainly evidence in the record to support an award for pain and suffering, the evidence is not as one-sided as Henderson suggests. Dr. Craig T. Carter, an orthopedic surgeon, testified that x-rays taken of Henderson’s wrist at the emergency room after the accident show “calcium deposit in the soft tissues of his wrist, which looks more like a chronic issue, and again no obvious bony injury that looks like an acute-type injury” (App. p. 219, line 24 – p. 220, line 2). Dr. Edward Warren, a radiologist, testified that a subsequent x-ray of Henderson’s wrist appeared to show “calcium pyrophosphate deposition disease, and that is a -- an arthritic kind of change with calcium pyrophosphate crystals in the joint fluid” that develops over a long period of time. (App. p. 245, lines 17-22). Therefore, the jury could have concluded that any pain and suffering Henderson endured resulted from a chronic, arthritic condition in his wrist rather than from injuries sustained in the accident with Greer.

In his Order denying Henderson’s motion for a new trial *nisi additur*, the trial judge noted that “[w]hether or not the Plaintiff suffered further actual damages due to pain and suffering caused by the Defendant’s negligence is a question of fact for the jury.” (App. p. 303, paragraph 3). In deciding that question of fact, the jury necessarily evaluates the credibility of each witness. In so doing, the jury could certainly have concluded that Henderson’s claims of pain and suffering were not credible in light of the

limited medical treatment, trial testimony that was inconsistent with deposition testimony and/or the doctors' testimony, and, perhaps, exaggerated testimony that Henderson continued to experience wrist pain even though he had received no medical treatment for more than three years prior to the trial. (See App. p. 111, line 15 – p. 112, line 5).

3. THE VERDICT WAS NOT INCONSISTENT.

Even if it were “uncontroverted” at trial that Henderson endured pain and suffering as a result of Greer’s negligence, this Court still should deny the Writ for Certiorari because Henderson did not present that legal argument to the trial court in a timely manner so as to preserve it for appellate review. At the conclusion of Henderson’s case, the trial judge asked the parties for proposed requests to charge. Henderson did not request the court to instruct the jury that an award of Henderson’s medical bills must be accompanied by an award of pain and suffering. (See App. p. 139, line 6 – p. 142, line 7).

At the conclusion of Greer’s case, the trial court entertained directed verdict motions. Henderson made three motions for a directed verdict; none of those motions sought a directed verdict on pain and suffering. (See App. p. 144, line 4 – p. 150, line 22).

After delivering his instructions to the jury but before the jury began its deliberations, the trial judge asked whether the parties had any exceptions to the charge. Henderson asserted no objections to the court’s instructions for the jury to “determine the amount, if any, to be allowed for pain and suffering” or any other part of the charge. (See App. p. 186, lines 2 – 22).

Furthermore, even if Henderson were correct that the jury’s verdict was inconsistent, a motion for a new trial nisi additur would not be the appropriate vehicle to

cure the purported error. “The proper and most consistent approach of treating [inconsistent] verdicts is to require, upon request, the trial court to resubmit the matter to the jury.” Stevens v. Allen, 342 S.C. 47, 53 (2000). After the jury returns a revised verdict, or if the jury cannot reach a consistent verdict, “it is within the province of the trial court to order a new trial nisi or a new trial absolute.” Id.

In Dykema v. Carolina Emergency Physicians, 348 S.C. 549 (2002), the jury apportioned 100% of actual damages against one defendant, Greenville Hospital System, and awarded punitive damages against another defendant, Companion Health Care. The trial court granted Companion’s motion for judgment notwithstanding the verdict because the jury’s failure to award actual damages against Companion precluded an award of punitive damages. This Court reversed the trial court, finding “Companion’s failure to object prior to discharge of the jury results in a waiver of the right to challenge the verdict.” Id. at 553. This Court cited a long history of precedent to support its holding that “a party may [not] allow the jury to be discharged in the face of an obviously defective verdict, which could easily be corrected upon resubmission to the jury,” and then seek to correct the error with a post-trial motion or appeal. Id. at 553-554.

In Bensch v. Davidson, 354 S.C. 173 (2003), the trial judge provided the jury with two verdict forms in a breach of contract action. One of the verdict forms applied solely to the defendants’ counterclaim and included instructions that if the jury found for the defendants on the counterclaim, the jury should “state the total amount of actual damage, *if any*, sustained by” the defendants. Id. at 179 (emphasis in original). The jury found for the defendants but awarded no damages. The trial court clarified the verdict with the jury, polled the jury at the defendants’ request, and dismissed the jury. Thereafter, the

defendants appealed, claiming the verdict of liability with no damages was inconsistent. This Court rejected the appeal, finding the defendants had “allowed the jury to be discharged before voicing their objection to the verdict.” *Id.* More specifically, “[t]he ‘if any’ language in the verdict form indicated the jury could find no damages even if they found for appellants on their counterclaim.” *Id.* at 179-180. By not objecting to that instruction, the defendants had waived their right to challenge a verdict of no damages.


Here, Henderson did not request a ruling or jury instruction that a verdict awarding Henderson’s medical bills must include an award of pain and suffering. Additionally, after the court announced the jury’s verdict, the trial judge asked the attorneys whether they required anything further of the jury. Both attorneys said they had no remaining issues for the jury. (See App. p. 190, lines 17 – 21). Therefore, even if Henderson were correct in his assertion that the jury’s verdict was inconsistent, Henderson waived any objection to that inconsistent verdict by not raising the issue prior to the jury being dismissed. Henderson cannot overcome that waiver by subsequently asserting a motion for new trial *nisi additur*.

CONCLUSION

Based on the preceding argument, this Court should deny Henderson’s Petition for a Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

April 11, 2017

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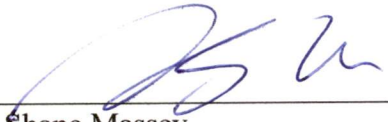
Patricia GreerRespondent.

CERTIFICATION OF SERVICE

I certify that I have served Respondent's Return to Petition for Writ of Certiorari on Petitioner by depositing a copy of the Return in the United States Mail, postage prepaid, on April 11, 2017, addressed to the attorney of record as follows:

William F. Barnes, III, Esquire
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April 11, 2017


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