

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED

Gordon G. Cooper, Master

MAY 11 2017

SC Court of Appeals

Case No. 2016-CP-42-3107

Brandon Hendrickson.....Appellant,

v.

Dennis Wheeler.....Respondent.

INITIAL BRIEF OF APPELLANT

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S.C. Code Ann. § 15-33-135 (Supp. 2003).

STATEMENT OF ISSUES ON APPEAL

- I. DID THE MASTER ERR BY ADMITTEDLY AWARDING ONLY ECONOMIC DAMAGES IN THE EXACT AMOUNT OF APPELLANT’S MEDICAL EXPENSES AND LOST WAGES WHILE NOT AWARDING NONECONOMIC DAMAGES?

- II. DID THE MASTER ERR BY NOT CONSIDERING AND NOT AWARDING PUNITIVE DAMAGES?

STATEMENT OF THE CASE

On February 18, 2016, Respondent pled guilty to “failure to yield right-of-way on left turn.” (R. p. 4).

On August 22, 2016, Appellant filed the lawsuit in the Spartanburg County Court of Common Pleas. (R. pp. 17-19). On September 23, 2016, Respondent was served. (R. p. 48).

By November 1, 2016, Respondent did not file and serve an Answer, so Appellant filed an Affidavit of Default along with an Affidavit of Nonmilitary Service. (R. pp. 49-51). On November 2, 2016, Spartanburg County Clerk of Court entered Default. (R. p. 52). On November 9, 2016, Appellant filed a motion for Default Judgment. (R. p. 53).

On November 21, 2016, the Honorable Mark Hayes, II, executed and filed an Order of Default Judgment with Reference to a Master for a damages hearing. (R. pp. 54-56). Appellant coordinated for a date for the damages hearing. On December 16, 2016, Respondent served a Motion to Set Aside Default. (R. pp. 57-61).

On January 5, 2017, Appellant served Notice of the Damages Hearing to the same address Respondent provided to law enforcement at the time of the accident. (R. pp. 62-64).

After the damages hearing was set for January 30, 2017, the parties agreed to have the Motion to Set Aside Default heard before and on the same day as the Damages Hearing.

On January 30, 2017, Respondent served a Memorandum in Support of Defendant’s Motion to Set Aside Default. (R. pp. 25-30). In response, Appellant served a Return and Memo in Opposition to Defendant’s Motion to Set Aside Default. (R. pp. 31-65).

On January 30, 2017, Respondent’s Motion to Set Aside Default was heard and the

damages hearing was held. Judge Cooper denied Respondent's Motion to Set Aside Default¹ and proceeded with the damages hearing. (R. pp. 2-6). At the conclusion of the damages hearing, Judge Cooper took the matter under advisement.

On February 7, 2017, Judge Cooper executed an order regarding the damages hearing. (R. pp. 7-11). In that order, Judge Cooper ordered Respondent to pay some of Appellant's economic damages without any noneconomic damages or punitive damages.

On February 16, 2017, Appellant filed Post-Trial Motions to obtain an order that awarded all economic damages,² noneconomic damages and punitive damages. (R. pp. 66-68). On March 7, 2017, Respondent served his Reply to Plaintiff's Post Trial Motions. (R. pp. 69-71). On the same day, a hearing was held regarding Appellant's post-trial motions. Following arguments, Judge Cooper issued instructions to Appellant's attorney to draft an order adding \$318.00 to Appellant's medical bills but still denying an award for noneconomic and punitive damages. Several days later, Appellant submitted a proposed order to Judge Cooper. However, that order was not filed until May 4, 2017. (R. p. 12-16).

On March 6, 2017, Appellant filed and served a Notice of Appeal.

FACTS

During the hearing on January 30, 2017, Appellant submitted documented evidence that Respondent pled guilty to "Failure to Yield Right-of-Way on Left Turn." (R. p. 41).

In addition, Appellant submitted evidence of noneconomic damages. The relevant

¹ On February 1, 2017, Judge Cooper executed an order denying Respondent's Motion to Set Aside Default. (R. pp. 2-6).

² Appellant's noneconomic damages award did not include a \$318.00 medical bill that was presented at trial.

testimony on direct was as follows:

1. Appellant was in shock, razzed up and anxious at the scene. (R. p. 83).
2. Appellant sought medical treatment the same day for pain in his lower back, middle back, pretty much his whole back, his hips and numbness in hands. (R. p. 83).
3. Appellant further described his symptoms as numbness in hands, inability to turn his neck, tightness in his neck and tightness in his hips. (R. p. 84).
4. Appellant was prescribed a muscle relaxer and pain patches. (R. p. 84).
5. Appellant went to Dr. Acramone for follow up after he completed taking the prescriptions and when his pain got worse. (R. p. 85). Appellant's back was uncomfortable for the whole two weeks, numbness in his hands got worse and he could not sleep. (R. p. 86).
6. Appellant's pain level went from 7-8 out of 10 down to 1-2 out of 10 after completion of his treatment with Dr. Arcamone. (R. p. 86).
7. Appellant experienced back spasms during his recovery. (R. p. 86).
8. Appellant's neck and back still hurt for several months after conclusion of his treatment (R. p. 87) and still occasional hurt when the weather changed. (R. p. 87).
9. Aside from economic and punitive damages, Appellant asked for an award of noneconomic damages which included pain, suffering, shock and anxiety. (R. p. 88).

The relevant testimony during cross examination was as follows:

1. Respondent brought out that Appellant had decreased pain while in the emergency room, (R. p. 20), but this decrease in pain was due to the administration of pain medications in the emergency room. (R. pp. 27-29).
2. Respondent brought out that Appellant went to Dr. Arcamone shortly after

Appellant's medications ran out. (R. p. 94).

3. Respondent brought out that Appellant did not have any pre-existing conditions. (R. p. 96).

On redirect, Appellant testified that while a nurse failed to note neck pain and failed to note back pain, (R. p. 96), the doctor, under physical exam, noted Appellant experienced point tenderness in the lumbar spine with spasm. (R. p. 101).

Upon closing, Appellant argued for noneconomic damages due to (1) shock, (2) anxiety, (2) documented pain in emergency room and during treatment by Dr. Arcamone in the form pain scales, (3) pain and suffering, (4) disruption of life, (5) and ongoing pain in his neck and middle back. (R. p. 102). Appellant pointed out that he experienced spasms in his lower back, a clinical objective sign of injury. (R. p. 86).

Appellant also argued, pursuant to current case law that, given Respondent's guilty plea, the evidence was clear and convincing that Respondent violated a statute. Therefore, Appellant is entitled to some measure of punitive damages. (R. p. 102).

At the hearing on Appellant's post trial motions, Appellant argued that he had presented a preponderance of evidence of noneconomic damages while referencing previous testimony during direct and cross-examination. (R. pp. 111-113). Appellant further argued an exact award of the medical bills ignores the evidence presented on the issue of noneconomic damages. (R. p. 111).

Appellant further argued for punitive damages. Appellant acknowledged that appellate cases have held that a default without more does not lay a foundation for clear and convincing evidence regarding a violation of a statute. Appellant pointed out that, unlike

those said cases, Respondent admitted to a statutory violation and that admission provides a foundation for clear and convincing evidence of a violation of a statute warranting consideration and actual award of punitive damages. (R. p. 114).

ARGUMENTS

I. BECAUSE THERE WAS MORE THAN A PREPONDERANCE OF EVIDENCE OF NONECONOMIC DAMAGES AND THE MASTER ADMITTEDLY AWARDED ONLY ECONOMIC DAMAGES IN THE EXACT AMOUNT OF APPELLANT'S MEDICAL EXPENSES AND LOST WAGES, THE MASTER ERRED BY NOT AWARDING ANY NONECONOMIC DAMAGES.

A. LAW:

The purpose of actual damages is to compensate a party for injuries suffered or losses sustained. The goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he was in before the wrongful injury occurred. Barnwell v. Barber-Colman Co., 301 S.C. 534, 537, 393 S.E.2d 162, 163 (1989).

Noneconomic damages, e.g., pain and suffering, are recognized by the Courts of this State as a very material element of damages on which a recovery may be bottomed. Harper v. Bolton, 239 S.C. 541, 547, 124 S.E.2d 54, 57 (1962).

“When testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture. . . .” Armstrong v. Weiland, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976).

In a default action, the defaulting party has admitted to the truth of plaintiff's allegations in the complaint which settles the issue of liability. Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978). Further, a plaintiff must prove the amount of damages by a preponderance of the evidence. Id. at 240, 246 S.E.2d at 881. Thus, the damages

hearing is held solely to determine what damages should be awarded. Ammons v. Hood, 288 S.C. 278, 282, 341 S.E.2d 816, 818 (Ct.App.1986).

When liability is admitted, a plaintiff is entitled to an award unless proof completely fails. See Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct.App.1990).

When considering a motion for new trial nisi additur, the trial court is required to consider the adequacy of the verdict in light of the evidence presented. Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct.App.2000). Further, the evidence in the trial record must support the trial court's denial of a motion for new trial nisi. See e.g., Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct.App.2007).

The 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*. See Krepps by Krepps v. Ausen, 324 S.C. 597, 479 S.E.2d 290 (Ct.App.1996) (my emphasis).

A trial judge's exercise of discretion is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion. See Graham v. Whitaker, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984).

B. DISCUSSION:

In this case, the Master's decision not to award noneconomic damages was wholly unsupported by the evidence and/or was controlled by an error of law.

1. Evidence in the Record:

Appellant clearly testified to shock, anxiety, pain, suffering and other noneconomic damages at the scene of the accident, at the emergency room, during the days following the

emergency room visit and during treatment with Dr. Arcamone. (R. pp. 83-88). Therefore, there was not a complete failure of proof of noneconomic damages. See Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct.App.1990).

In Wilder v. Blue Ribbon Taxicab Corp., the Court affirmed the trial court's denial of relief from default and affirmed the master's³ award of economic and noneconomic damages. 396 S.C. 139, 719 S.E.2d 703 (Ct.App.2011). The evidence of noneconomic damages presented in Wilder was very similar to the noneconomic damages presented by the Appellant, but the result was different.

In this case, Appellant presented a preponderance of evidence of noneconomic damages when testifying to (1) a lot of pain due to the accident, numbness, like a rush to the head, (2) kind of dizziness and throbbing pain to the lower back, (3) prescription and taking of pain medications and (4) completion of follow-up therapy. (R. pp. 83-88).

When considering whether some other proximate factor contributed to Appellant's noneconomic damages, there was no evidence Appellant suffered from a pre-existing condition. See Steele v. Dillard, 327 S.C. 340, 486 S.E.2d 278 (Ct.App.1997). Actually, Appellant testified he did not suffer from a pre-existing condition. (R. p. 96).

Further, Appellant was not at fault because Respondent defaulted thereby establishing liability, and Respondent already pled guilty. Howard.

In the end, when the Master ruled that he awarded the exact medical bills and exact lost wages, all speculation about what could have been entered into evidence to offset the economic award was eliminated. This ruling created a void in the judgment wherein the

³ The same Master in this case.

damage award was conclusively only economic damages and without an award of noneconomic damages despite the preponderance of evidence of shock, anxiety, pain and suffering. Harper.

As a consequence, Appellant was not made whole or put him in a position as if the accident never happened. Barnwell. This result begs the question whether someone, like Appellant, can present a preponderance of evidence of pain and suffering following the accident, medical records documented pain complaints, prescriptions for pain medication and a regimen of treatment for several months and still be judicially declared “not in pain from the accident.”

2. Abuse of Discretion:

The Master abused his discretion when he foreclosed all reasons to offset the economic damages, awarded the exact amount of economic damages and then ignored the preponderance of evidence regarding noneconomic damages.

In the Master’s trial order and post-trial motions, he clearly awarded a judgment for economic damages that included all of Appellant’s medical bills and all of Appellant’s lost wages. (R. p. 10). The Master left no argument that the exact award of medical bills and lost wages may have been reduced for some other reason and then might include some measure of noneconomic damages.⁴ The Master simply ignored the evidence at the trial and recited in his orders and erred by not restoring, as much as possible, Appellant to the same position he was in before the wrongful conduct occurred. Barnwell.

⁴ Respondent elicited testimony and argued that Appellant’s medical records showed he may have been injured while exercising and that his medical bills were caused by something other than the accident. That argument was eviscerated when the Master awarded the exact amount of the medical bills and lost wages.

The Master's exercise of discretion is not absolute and this Court, under the facts of this case, should find an abuse of discretion. Graham. The Master abused that discretion by failing to recognize the uncontroverted, preponderance of evidence of noneconomic damages and give no value for the very reason Appellant sought medical treatment in the first place.

II. BECAUSE THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE RESPONDENT VIOLATED A STATUTE PURSUANT TO HIS GUILTY PLEA, THE MASTER ERRED BY NOT CONSIDERING AND BY NOT AWARDING SOME AMOUNT OF PUNITIVE DAMAGES.

A. LAW:

In a default action, a defaulting party has admitted the truth of plaintiff's allegations in the complaint which establishes those facts related to the issue of liability, including allegations of recklessness. See Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct.App.2012) (allegations of negligence and gross negligence deemed admitted by default and supporting award of punitive damages); Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) (default establishes liability).

Also, a plaintiff may meet the clear and convincing burden of proof⁵ by presenting evidence that a defendant displayed a reckless disregard for plaintiff's rights. Taylor v. Medenica, 324 S.C. 200, 479 S.E.2d 35 (1996); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct.App.2004).

It is the present consciousness of wrongdoing that justifies the assessment of punitive damages. Cody v. Bank of Am., N.A., 395 S.C. 611, 720 S.E.2d 473 (Ct.App.2011).

Punitive damages are awarded when, under proper allegations, a plaintiff proves a reckless violation of his rights. Thereafter, it is not only the right but the duty of the jury to

⁵ S.C. Code Ann. § 15-33-135 (Supp. 2003).

award punitive damages. Sample v. Gulf Ref. Co., 183 S.C. 399, 410, 191 S.E. 209, 214 (1937); Magnolia North Property Owner's Association, Inc., v. Heritage Communities, Inc., 397 S.C. 348, 715 S.E.2d 112 (Ct.App.2012), cert. denied September 30, 2015.

Punitive damages are not only awarded as punishment and deterrence, but also for the vindication of a private right. Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000).

B. DISCUSSION:

1. Consideration of Punitive Damages.

By the terms of the Master's trial order and post-trial motion order, the Master did not consider punitive damages and did not explain why he did not award punitive damages. (R. p. 10). Not only did Appellant have Respondent's admitted recklessness by way of the admitted allegations in his complaint, Appellant also presented evidence in support of that recklessness by way of Respondent's guilty plea. See Speizman Knitting Machines Corp. v. Fretwell, 264 S.C. 168, 213 S.E.2d 586 (1975) (a court acts correctly when it charges the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues).

In Payne v. Bouharoun, the defendant was in default. The trial judge, sitting without a jury, was presented with evidence of recklessness by the defendant but did not address or consider the plaintiff's request for punitive damages. 292 S.C. 390, 356 S.E.2d 438 (Ct.App.1987). The Court remanded the case for a hearing on punitive damages.

In this case, the Master did not consider Appellant's request for punitive damages and provided an explanation for his decision when he should have done so. Instead, the Master simply stated the Appellant did not present clear and convincing evidence entitling him to

punitive damages. (R. p. 10). However, when there is admitted recklessness and admitted violation of a statute, the court is required to consider punitive damages. Sample; Magnolia.

Further, Appellant was entitled to an explanation for the denial of a punitive damages award. See e.g., Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236 (Ct.App.2008) reh'g denied April 18, 2008. The Mellen case is illustrative. In Mellen, the Master opined in his order why he decided not to award punitive damages and, based on his explanation, the Court affirmed the denial of a punitive damage award. Id. at ____, 659 S.E.2d at 252. In this case, the Master did not discuss his reasoning for not awarding punitive damages nor explain why punitive damages were not appropriate. The Master erred by failing to do so.

2. Award of Punitive Damages.

In order for there to be justification for an award of punitive damages, a plaintiff must prove, by clear and convincing evidence, that a defendant was reckless. Taylor. In this case, Appellant pled that Respondent was reckless in the complaint. As a result of the default, the allegations in Appellant's complaint are deemed admitted.

It goes without saying that this admission to reckless conduct according to the language of Appellant's complaint constitutes clear and convincing evidence of the same. (R. p. 18). The combination of admitted proof of reckless behavior and admitted proof of conscious wrongdoing would place a duty upon the Master to award some measure of punitive damages.

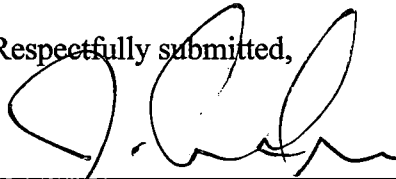
In Magnolia, the Court noted the well settled rule that when a plaintiff proves a defendant is reckless, a jury or factfinder has the duty to award punitive damages. Magnolia, 397 S.C. at 365, 715 S.E.2d at 121. According to the foregoing, Appellant proved by clear

and convincing evidence that Respondent was reckless by virtue of the admitted allegation of recklessness. To hold otherwise would run afoul of precedent and eviscerate Appellant's complaint of Respondent's reckless behavior. Therefore, the Master erred by not awarding some amount of punitive damages to vindicate Appellant's private rights.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Court and remand this case for a determination of noneconomic and punitive damages.

Respectfully submitted,



May 9, 2017

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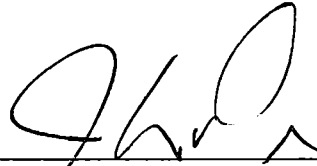
Dennis Wheeler.....Respondent.

CERTIFICATE OF MAILING

I certify that I have served the Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal as well as a copy of the proposed Record on Appeal on Jeanmarie Tankersley, Esq., by depositing a copy of the same in the United State Mail, postage prepaid, on May 8, 2017, addressed to the attorney of record at the address indicated below:

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May 9, 2017

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SC Court of Appeals

RE: Brandon Hendrickson, Appellant, v. Terri Wheeler, Respondent,
Case No. 2017-CP-42-3107.

Dear Ms. Kitchings:

Enclosed for filing are the following:


- (1) Initial Brief of Appellant.
- (2) Designation of Matter to be Included in the Record on Appeal.
- (3) Certificate of Mailing.

Sincerely,

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