STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	**C/A: 2016-CP-43-01289**
Gwendolyn Scott,	)	
	)	**ORDER DENYING DEFENDANT'S**
Plaintiff,	)	**MOTION FOR NEW TRIAL,**
	)	**NEW TRIAL NISI REMITTITUR, AND**
vs.	)	**JUDGMENT NOTWITHSTANDING THE**
	)	**VERDICT**
James Applewhite,	)	
	)	
Defendant.	)	

I. INTRODUCTION

The following matter comes before the Court on Defendant James Applewhite's Motion for New Trial, New Trial Nisi Remittitur and Judgment Notwithstanding the Verdict. Both parties filed briefs on this motion subsequent to a telephone conference on September 20, 2018. Applewhite's motion follows a jury trial held on May 29 and 30, 2018 that resulted in a verdict in favor of Plaintiff Gwendolyn Scott. Plaintiff initiated the negligence action against Defendant to recover for personal injuries sustained in a motor vehicle accident which occurred on November 1, 2013. Venue is proper in this Court because Defendant is a resident of Sumter County. S.C. Code Ann. § 15-7-30(C)(1) (2005).

On June 7, 2018, Defendant Applewhite filed a motion for a new trial on the grounds that the verdict amount is excessive and that certain testimony from Plaintiff Scott and her expert were improper. For the reasons set forth below, the Court denies Defendant Applewhite's motion.

II. FACTUAL BACKGROUND

On November 1, 2013, Plaintiff Gwendolyn Scott and Defendant James Applewhite were involved in a motor vehicle collision while both parties were travelling on Garner's Ferry Road in

Richland County, South Carolina. Defendant's vehicle struck the rear of Plaintiff's vehicle, resulting in personal and property damages to Plaintiff. After a jury trial in Sumter County, the jury returned a verdict in favor of Plaintiff and awarded her $70,000 in damages.

Plaintiff testified to her injuries and damages. She also offered expert testimony that her injuries from the collision resulted in permanent, lifelong impairment. Plaintiff's expert, Dr. Gerald Rudolph, D.C., assigned her a 25% impairment rating to the cervical spine and a 15% impairment rating to the whole body. Defendant did not offer any expert to rebut Plaintiff's expert. Plaintiff suggested to the jury that a fair verdict would be in the range of $150,000.00-$250,000.00. After a trial lasting almost two days, the jury awarded Plaintiff $70,000.00.

III. LEGAL STANDARD

The determination of whether to grant or deny new-trial motions rests within the discretion of the trial court, which may grant a new trial because *inter alia*, the verdict is contrary to the clear weight of the evidence, errors were committed at trial, or the ultimate damage award is excessive. *See* Rule 59, SCRCP. Generally, however, "[t]he [c]ourt must respect the verdict of the jury . . . and must not interfere or substitute its own judgment for that of the jurors." *Brabham v. S. Asphalt Haulers, Inc.,* 223 S.C. 421, 430, 76 S.E.2d 301, 306 (1953). Specifically, [t]he jury's determination of damages . . . is entitled to substantial deference." *Rush v. Blanchard*, 310 S.C. 375, 379, 426 S.E.2d 802, 805 (1993) (citing *Brabham,* 223 S.C. at 430, 76 S.E.2d at 306). "The trial court should grant a new trial based on the excessiveness of the verdict *only if* the amount is not merely different from that which he would have awarded, but is so grossly excessive so as to shock the conscience of the court and clearly indicates that the figure reached was the result of

caprice, passion, prejudice, partiality, corruption, or other improper motives." *Rush*, 310 S.C. at 380, 426 S.E.2d at 805.

Alternatively, a "motion for a new trial nisi remittitur asks the trial court to *reduce* the verdict because the verdict is merely excessive." *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006) (emphasis added). However, "compelling reasons must be given to justify invading the jury's providence by granting a new trial nisi remittitur." *Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (quoting *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 320, 628 S.E.2d 496, 518 (Ct. App. 2006)). "[T]he consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented." *Curtis,* 392 S.C. at 501, 709 S.E.2d at 82.

"When considering directed verdict and JNOV motions, the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the nonmoving party." *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999). Furthermore, the trial court must deny the motion "when the evidence yields more than one inference or its inference is in doubt." *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000). "Neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Welch,* 342 S.C. at 300, 536 S.E.2d at 419.

IV. DISCUSSION

A. Admission and Scope of Plaintiff's Expert's Testimony.

Defendant contends that the trial court erred in allowing Plaintiff's expert, Dr. Rudolph, to testify as to Plaintiff's permanent impairment because (1) Dr. Rudolph is not a medical doctor and

(2) he had no knowledge as to the Plaintiff's range of motion prior to the accident. The South Carolina Supreme Court has held that "a duly licensed chiropractor stands for all purposes in the position of a physician, to the extent that he limits his activities to the scope of his profession." *Daniels v. Bernard*, 270 S.C. 51, 57, 240 S.E.2d 518, 520 (1978) (citing *Williams v. Capital Life & Health Ins. Co.*, 209 S.C. 512, 41 S.E.2d 208 (1947)). The general rule is that:

> A chiropractor is competent to testify as an expert or medical witness concerning matters within the scope of the profession and practice of chiropractic. Where the proper foundation is laid and the matter is within the scope of the profession of practice of chiropractic, a chiropractor is competent to express his opinion as to the nature and extent of injuries to portions of the human body to which the chiropractic segment of medical science relates, as to the probable cause of an injury to, or the physical condition or death of, a person, and as to the probable effects and duration, *permanence*, future medical requirements, or the like, in connection with an injury to or the physical condition of an injured person.

Daniels, 270 S.C. at 57-58, 240 S.E.2d at 520-21 (emphasis added).

Here, Dr. Rudolph testified extensively about his education, training and experience. Based on Dr. Rudolph's testimony regarding these issues, and with no objection from Defendant, Dr. Rudolph was qualified as an expert witness in the field of chiropractic medicine.

Further, Defendant's contention that the radiology report "had findings which were inconsistent with two other reports from diagnostic imaging taken shortly after this accident" is incorrect. Dr. Rudolph testified the radiology report he requested and relied on is used specifically to detect alteration of motion segment integrity – or in laymen's terms, ligament instability. He also testified that the type of radiology reports done in conjunction with the ER imaging would not have tested for or shown ligament motion and instability, and that in fact, the ER imaging and radiology reports were the type used to determine broken bones.

Dr. Rudolph explained in detail the difference between the views taken on the X-Rays he performed, and the radiology report he requested, and those taken on the X-Rays done at the ER

and the accompanying radiology report. Dr. Rudolph's testimony made it clear that the report he used was not in fact contradictory to the reports done based on the initial imaging; rather, the reports were based on completely different types of imaging techniques designed to detect different types of injury.

Defendant also argues that the radiology report Dr. Rudolph relied on was not conducted by any medical professionals who examined Plaintiff. However, the radiology reports Defendant references as having been done shortly after the collision were also not written by a medical professional who examined Plaintiff. Radiology reports are not typically conducted or written by a medical professional who examines the patient. The field of radiology is one in which the practitioners specialize in diagnosing and treating disease and injury by interpreting various medical imaging techniques. Ordinarily, the radiologist issues a report, and then a practitioner in the field of the injury or disease actually treats the patient. The evidence in this case indicates that Plaintiff's images and radiology reports were conducted following the typical protocol. Dr. Rudolph's testimony regarding Plaintiff's impairment was relevant and admissible, and therefore, proper.

B. Sufficiency of the Evidence to Support the Jury's Verdict.

Plaintiff contends that there is ample evidence to support the verdict of $70,000 in actual damages and that she met her burden of proof in showing that she was entitled to the jury's award. However, Defendant contends that the verdict was so excessive as to shock the conscience. Regarding actual, compensatory damages, "the goal is to restore the injured party, as nearly as possible through the payment of money, to the same position he or she was in before the wrongful injury occurred." *Harleysville Grp. Ins. v. Heritage Communities, Inc.,* 420 S.C. 321, 353, 803 S.E.2d 288, 306 (2017). Further, in South Carolina:

> [d]amages for pain and suffering are unliquidated and indeterminate in character and the assessment of unliquidated damages must rest in the sound discretion of the jury, controlled by the discretionary power of the trial judge. Pain and suffering have no market price. They are not capable of being exactly and accurately determined, and there is no fixed rule or standard whereby damages for them can be measured. Hence, the amount of damages to be awarded for pain and suffering must be left to the judgment of the jury, subject only to correction by the courts for abuse.

Harper v. Bolton, 239 S.C. 541, 548, 124 S.E.2d 54, 57 (1962) (internal quotation marks omitted).

Here, Plaintiff submitted evidence to establish the nature, character, and extent of her injuries which were substantiated by the treating doctor's testimony that those injuries were the natural and proximate consequence of Defendant's negligent acts. Additionally, Defendant had the opportunity to cross-examine Plaintiff's expert and critique his credentials and methods in front of the jury. The jury was then entitled to determine the appropriate weight and credibility to assign to his testimony.

Regarding liquidated damages, Plaintiff's medical bills total $9,425.32. Further, Plaintiff testified as to the many ways in which this collision has substantially changed her life. She testified to living with daily pain, having to give up her life-long hobby of dancing, gaining substantial weight because she can no longer exercise without pain, being depressed about her appearance as a result of weight gain, and a far less active social life. Plaintiff's expert testified that she will need chiropractic care for the rest of her life, that she will live with pain for the remainder of her life, and that based on American Medical Association ("AMA") guidelines, Plaintiff has an impairment rating of 25% to her cervical spine and a 15% whole person impairment rating.

Plaintiff's testimony, coupled with the expert testimony, provided ample proof that future damages are "reasonably certain to occur." The amount of an award for any such damages is a question for the jury to determine. Given the evidence in this case, including the many other ways in which this collision has already negatively impacted Plaintiff, and the likely future negative

effects, the verdict is not shocking to the conscious nor obviously motivated by caprice, bias or other improper motivations.

C. *Plaintiff's Rebuttal Testimony*

Finally, Defendant argues that the Court improperly allowed Plaintiff to testify during rebuttal as to new information that furthered her case-in-chief and was concealed during written discovery and depositions. Plaintiff testified during her deposition that she had been in a previous collision and that she thought she had treatment at a chiropractic clinic for the injuries she suffered in that collision. At trial, Plaintiff clarified the name of the facility where she received that treatment. The fact that she received previous treatment, however, was provided during discovery.

During her deposition testimony, Plaintiff testified that she believed she had been treated at Fields Chiropractic following the previous collision. During the same deposition, Plaintiff specifically stated, "It's been so long I can't remember." At trial, Plaintiff testified that Fields Chiropractic and the facility where she ultimately remembered being treated, Progressive Physical Therapy, were located on the same road within a very short distance of each other and that she simply had not remembered. The Court finds that Plaintiff's counsel completed the discovery in good faith based on what Plaintiff recalled at that time, and that there was no nefarious intent in the conduct of Plaintiff or her counsel.

Defendant also raises the issue of Plaintiff's prior treatment. During cross-examination of Dr. Rudolph, Defendant's counsel asked Dr. Rudolph if Plaintiff told him that she was in a collision five years earlier and that she had been treated by a chiropractor for back pain. Dr. Rudolph replied that Plaintiff had not told him this information. Throughout Dr. Rudolph's cross-examination, counsel repeatedly questioned him about whether he knew anything about Plaintiff's pre-collision condition and mobility. Then near the end of Dr. Rudolph's testimony, counsel again

asked Dr. Rudolph to confirm that he was not aware of the collision five years prior or Plaintiff treating previously with a chiropractor.

Plaintiff argues that this testimony left the impression that Plaintiff had a pre-existing back injury for which she treated with a chiropractor and intentionally concealed that information from Dr. Rudolph. Defendant argues that Plaintiff had an opportunity to address this issue on direct and redirect and failed to do so. Defendant's argument totally ignores the fact that these issues did not arise until Defendant raised Plaintiff's prior injury and treatment with his line of questioning to Dr. Rudolph. Further, although Dr. Rudolph was not called during Defendant's case-in-chief, the testimony was elicited during cross-examination of Dr. Rudolph, and his cross-examination was conducted in defense of the case. Plaintiff contends there was no need to address Plaintiff's treatment for injuries she sustained in the earlier collision prior to Defendant raising the inference that Plaintiff had intentionally concealed previous treatment to her back with a chiropractor.

Defendant's position fails to acknowledge that the very matters of Plaintiff's rebuttal were raised, not by Plaintiff, but by Defendant's counsel during his cross-examination of Dr. Rudolph. Moreover, Plaintiff's rebuttal testimony was not used to establish any of the elements or facts to prove Plaintiff's prima facie case. Rather, the testimony was in defense of Defendant's implication that Plaintiff had concealed a prior injury from her treating doctor. Once Defendant opened the door to the issue, Plaintiff was entitled to refute the inference that she concealed a previous back injury and treatment. *See* Rule 611(d), SCRE.

There is no evidence that Plaintiff's rebuttal testimony alone was dispositive of the jury's decision. Further, Defendant's suggestion that this information might have led to additional discovery is doubtful. Plaintiff's contends that to her knowledge, Defendant did not seek records from the clinic Plaintiff named during discovery. Defendant did not present any argument to the

contrary. Nevertheless, if Defendant deemed the issue as essential to his case and highly prejudicial as he now claims, there were other remedies available to him which he failed to raise or request. Defendant had the right to request a continuance of the trial to enable him an opportunity to obtain the records and give the Court an opportunity to rule on the issue. Defendant failed to make this request and or motion at the time of trial.

V. CONCLUSION

The evidence in this case supports both the conclusion that Plaintiff suffered a serious, permanent injury and the jury's award of damages. The jury had a duty to render a verdict encompassing all of Plaintiff's damages, past and prospective, which arose and will arise from Defendant's tortious conduct. This includes future pain and suffering and the reasonable value of medical services to the extent that these injuries are reasonably certain to result in the future. After hearing from both sides, the jury determined $70,000.00 to be an appropriate award of damages.

Based on the evidence presented at trial, this Court does not find the jury's award to be so grossly excessive so as to shock the conscience. Moreover, Defendant has not pointed to nor does the Court find any evidence to suggest that the jury was motivated by caprice, passion, prejudice, partiality, corruption, or other improper motives. Defendant does not present any argument that could carry the weighty burden necessary for a new trial. Further, Defendant's motion does not include any plausible basis for this Court to grant a judgment in Defendant's favor notwithstanding the verdict. Granting Defendant's motion would require this Court to invade the province of the jury without a valid reason, and the Court declines to do so.

For all of the foregoing reasons, Defendant's Motion for New Trial, New Trial Nisi Remittitur and Judgment Notwithstanding the Verdict are **DENIED**.

AND IT IS SO ORDERED.

George M. McFaddin, Jr.
Circuit Court Judge

_____ _____, 2018
Sumter, South Carolina

Sumter Common Pleas

Case Caption: Gwendolyn Scott VS James Applewhite

Case Number: 2016CP4301289

Type: Order/Other

So Ordered

S/George M. McFaddin, Jr., #2759