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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-00462

ROBERT W. EDWARDS, JR., ...Appellant,

v.

LINDA N. JORDAN, ...Respondent.

FINAL BRIEF OF APPELLANT

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2. THE TRIAL COURT ERRED IN DENYING MR. EDWARDS' ALTERNATIVE MOTIONS FOR NEW TRIAL NISI ADDITUR AND NEW TRIAL ABSOLUTE BECAUSE HE PRESENTED COMPELLING, UNCONTRADICTED EVIDENCE AT TRIAL OF HIS PAIN AND SUFFERING, AND THE AMOUNT OF THE VERDICT WAS AT LEAST INSUFFICIENT AND AT WORST GROSSLY INADEQUATE.

STATEMENT OF THE CASE

Appellant Robert (Bobby) Edwards filed this action against Respondent Linda N. Jordan on January 27, 2010, bringing claims for negligence and gross negligence arising from personal injuries he sustained on her property. (R. pp. 4 - 6.) Respondent answered on February 10, 2010, raising the defenses of contributory negligence and assumption of the risk. (R. pp. 7 - 9.)

The case was tried to a jury verdict on October 3 and 4, 2011. (R. pp. 14 - 166.) Mr. Edwards timely moved for a Judgment Notwithstanding the Verdict and a New Trial Nisi Additur and/or New Trial Absolute. (R. pp. 10 - 13.) Judge Derham Cole denied these motions by Order dated March 26, 2012. (R. pp. 1 - 2.) This appeal followed.

FACTS

On August 15, 2008, Appellant Robert (Bobby) Edwards was performing lawn maintenance on Respondent's property when he was struck and knocked unconscious by a defective two by six board in her deck, painfully injuring him and violently breaking his

nose. (R. p. 93, line 13 - p. 94, line 6.) When he came to, Mr. Edwards called someone to get his truck, and had his fiancee take him to the emergency room. The resulting injuries included a broken nose, a deviated septum, and significant bruising and swelling. Mr. Edwards also later endured a painful procedure to reset his nose, and still suffers congestion and snoring from his septum injury. (R. p. 95, line 15 - p. 97, line 20.)

Mr. Edwards' negligence case was tried to a jury. Although Respondent pleaded the defense of comparative negligence in her answer, she did not raise this defense during the trial. She did not offer any evidence of Mr. Edwards' alleged negligence. Her counsel never argued that Mr. Edwards was negligent or in any way contributed to his own injuries.

To the contrary, Respondent testified throughout the trial that Mr. Edwards was doing his job as he should, that she was pleased with his work, that she did not doubt his account of the injury, and that her deck was in good shape.

Mr. Edwards testified at trial that on August 15, 2008, he had no idea that the wood on the deck walkway where he stepped was rotted, or that screws or nails were missing or loose. (R. p. 102, lines 16 - 21.)

Respondent testified that she knew Mr. Edwards would step on the extensive deck and deck walkway area to maintain her yard, and that he had her permission whenever necessary to do the weekly lawn maintenance. The section of walkway was just a few inches off the ground, and there was shrubbery planted right beside the deck area where Mr. Edwards was injured that he was expected to maintain. (R. p. 48, lines 4 - 25; p. 51, lines 21 - 25.)

Respondent agreed that the board that struck Mr. Edwards in the face should have been secured with a deck screw, but she claimed she did not know that it had deteriorated.

(R. p. 49, lines 5 - 25.) She purchased the home in 1988, and had not done any work to the deck or otherwise inspected the deck, which was there when she purchased the property. She admitted that she did not know how long it had been there. She testified that she did not blame Mr. Edwards at all for the accident. (R. p. 47, lines 3 - 12.) Mr. Edwards had only been working on the property for approximately six months at the time of his accident. (R. p. 46, lines 16 - 18.) Respondent acknowledged that the plank and the screws or nails must have been in poor condition at the time of the accident. (R. p. 49, line 5 - p. 50, line 18.)

Respondent testified that she tore out the walkway where Mr. Edwards was injured shortly after his accident. (R. p. 53, line 24 - p. 54, line 10.) Respondent acknowledged that there were still boards in other areas of the decking that were rotted, not secure, and in need of replacement. (R. p. 56, line 22 - p. 60, line 2.) She admitted that the board where Mr. Edwards was injured was in that kind of condition. (R. p. 64, lines 8 - 14.) Despite this admission, she insisted that the deck was in good condition at the time of the accident, and at the time of trial. (R. p. 54, line 11 - p. 64, line 14.) When questioned about photos of portions of the existing decking that appeared to be in the same condition as the decking that injured Mr. Edwards, she responded that these areas were not in "high traffic areas," so she was not concerned with them. (R. p. 62, lines 19 - 22.) She admitted, however, that she never told Mr. Edwards to avoid any area of the decking. (R. p. 67, lines 5 - 7.)

Further, she testified that the deck should have been constructed to endure stepping on the edge of the boards. She specifically answered counsel's questions: "You're not claiming Bobby Edwards did anything improper that day, are you?" with "No." (R. p. 70, lines 4 - 18.) Respondent testified that she walked on the center of the walkway instead

of stepping on the edge, but she acknowledged that deck should be constructed to tolerate that type of movement. (R. p. 70, lines 6 - 18.)

Bobby Pearson has lived with Respondent since 2000, and dealt directly with Mr. Edwards. (R. p. 76, lines 11 - 16; p. 82, lines 11 - 14.) Mr. Pearson testified that Mr. Edwards had full reign of the property, and that it did not surprise him that he was working in the area where he was injured because he had full permission to be there. (R. p. 82, line 16 - p. 83, line 2.) He testified that Mr. Edwards did good work, that he was a truthful person, and he did not doubt that the injury occurred just as Mr. Edwards described. Mr. Pearson testified in no uncertain terms that Mr. Edwards was not at fault in the accident. (R. p. 83, lines 4 - 21.)

Based on the complete lack of evidence pointing to any negligence on his part, Mr. Edwards timely moved for a directed verdict on the comparative negligence issue at the close of Respondent's case. The trial court denied this motion.

In closing arguments, Respondent's counsel told the jury: "What he did was and we're not blamin' him, there's no blame to go around but he stepped on the edge of the board and the board came up and hit him in the nose." (R. p. 132, lines 19 - 21.)

Respondent failed to adduce evidence to support her comparative negligence claim, she and Mr. Pearson repeatedly asserted that Mr. Edwards did nothing wrong, and her counsel assured the jury during his chance to argue Mr. Edwards' fault in closing that Mr. Edwards was not to blame. The trial court nonetheless charged the jury on comparative negligence, over the objection of Mr. Edwards.

The jury reached a verdict allocating 65% fault to Respondent, and 35% fault to Mr. Edwards. The jury awarded Mr. Edwards his medical bills, but made no award for pain and

suffering. Mr. Edwards timely moved for a judgment notwithstanding the verdict on the issue of comparative negligence, or in the alternative, an order granting a new trial nisi additur or a new trial absolute, all of which the trial court denied in error.

Specifically, the trial court gave the following charge: "In this case the defendant not only denies her own negligence but she goes further and alleges that the plaintiff himself was negligent and that the plaintiff's negligence was the cause of any injury claimed to have been sustained by the plaintiff as a result of the event in question." (R. p. 149, lines 2 - 6.) This is not true. Respondent testified that she did not believe Mr. Edwards was in any way at fault for the accident, and that he did nothing wrong. In so testifying, she abandoned this defense, and the trial court issued this charge in error. Because Respondent did not meet her burden of both production and persuasion on the issue of Mr. Edwards' alleged negligence, the trial court's ruling must be reversed.

ARGUMENT

I. The trial court erred in charging the jury on the issues of comparative negligence and open and obvious condition where Respondent abandoned them at trial by failing to present any evidence to support these issues and/or failing to argue the specifications of negligence made in her Answer; the trial court further erred in failing to grant Mr. Edwards' directed verdict motion and motion for judgment notwithstanding the verdict on these grounds.

A court is not warranted in submitting to a jury, by instructions, any issue raised by a pleading which is abandoned, and in support of which the party presents no evidence. Caines v. Coca Cola Bottling Co.,196 S.C. 502, 14 S.E.2d 10 (1941). Courts across jurisdictions recognize this burden. See, e.g., Wendt v. General Acc. Ins. Co., 895 S.W.2d 210 (1995)(holding that a comparative fault instruction is not warranted in every negligence suit; rather, the defendant bears the burden of producing evidence to support the

instruction); Rice v. Shuman, 519 A.2d 391, 395 (Pa. 1986)(holding that "[T]he defendant has the burden of establishing the contributory negligence of the plaintiff. Thus, it is incumbent upon the defendant to produce the evidence to persuade the jury on this issue."); Blake v. Haggard, 610 P.2d 1235, 1237 (Or. Ct. App. 1980) (holding that it is only proper to submit specifications of negligence to the jury on a comparative negligence defense that have actually been pleaded in the defendant's answer).

When reviewing a trial court's grant or denial of a motion for directed verdict or judgment notwithstanding the verdict, the court will reverse when there is no evidence to support the ruling or when the ruling is governed by an error of law. Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010); Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (Ct. App. 2003).

Comparative negligence is an affirmative defense. Respondent bore the burden at trial of proving that defense. Youmans ex. Rel. Elmore v. S.C. Dep't Of Transp., 280 S.C. 263, 281-82, 670 S.E.2d 1, 10 (Ct. App. 2008). Specifically, Respondent pleaded comparative negligence in the following particulars against Mr. Edwards:

- In failing to be aware of any dangers impending or otherwise;
- In failing to act as a reasonable and prudent person would under the same or similar circumstances;
- In failing to abide by the common and statutory laws of the State of South Carolina.

(R. p. 8.)

A determination of the degrees of negligence attributable to a plaintiff and a defendant is generally a question of fact for the jury to decide. However, in a comparative negligence case, the trial court should grant a motion for directed verdict if the sole

reasonable inference from the evidence is that the non-moving party's negligence exceeded 50%. The burden is on the defendant alleging comparative negligence to offer evidence to support an inference of negligence on the part of the plaintiff. Fairchild v. South Carolina Dep't of Transp., 385 S.C. 344, 683 S.E.2d 818 (Ct. App. 2009).

The South Carolina Supreme Court has clearly established its position on the standard of proof a party must meet at trial when relying upon an affirmative defense. In Pike v. South Carolina Department of Transportation, 343 S.C. 224, 540 S.E.2d 87 (2000), the court held a defendant could not avail itself of an affirmative defense, but effectively relieve itself of the burden of proving that defense. The court held that this "flies in the face of the well-established rule that the party pleading an affirmative defense 'has the burden of proving it.'" Id. at 231, 540 S.E.2d at 91; quoting Hoffman v. Greenville County, 242 S.C. 34, 129 S.E.2d 757 (1963). The court emphasized that "'the party who has the burden of pleading a fact will have the burdens of producing evidence **and** of persuading the jury of its existence.'" Id.; quoting McCormick on Evidence § 337 (5th ed. 1999)(emphasis added by Supreme Court).

Respondent has in this case attempted to do exactly what the Supreme Court condemned. Respondent repeatedly emphasized - during testimony and through her counsel during closing arguments - that Mr. Edwards was not at fault for his injuries. She offered no testimony or evidence, as was her burden, that Mr. Edwards did anything to contribute to his injuries, that he should have taken better care to observe his surroundings, or that he ignored any condition that he should have recognized. She presented no evidence on any particular of negligence alleged in her Answer.

Mr. Edwards properly moved for a directed verdict on the issue of comparative

negligence at the close of Respondent's case because she presented no evidence that could reasonably support a finding that Mr. Edwards was negligent and/or because Respondent waived or withdrew this defense. The running theme of Respondent's testimony and counsel's argument was that she was not blaming Mr. Edwards for the accident or his injuries. See, e.g., Larchick v. Diocese of Great Falls-Billings, 208 P.3d 836 (Mont. S. Ct. 2009) (upholding the district court's grant of summary judgment to the plaintiff student on the issue of the defendant school's affirmative defense of comparative negligence where defendant's principal stated in his deposition that he "did not blame" the plaintiff for plaintiff's injuries). Mr. Edwards properly renewed his motion for a directed verdict on the issue of comparative negligence after closing arguments on the grounds that no evidence was presented upon which a jury could find Mr. Edwards negligent. The trial court charged the jury on comparative negligence over Mr. Edwards' objection.

A trial judge has a duty to charge only the law applicable to the issues and the evidence presented. Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App. 1997). Respondent abandoned the comparative negligence defense raised in her answer because she did not carry her burden of presenting evidence at trial and arguing that evidence to the jury in order to prove the defense. Respondent presented no evidence supporting a jury charge on comparative negligence or open and obvious condition. Respondent, in fact, insisted that the deck was in good condition.

The verdict finding Respondent 35% at fault was not supported by any reasonable interpretation of the evidence as presented by Respondent. Mr. Edwards was entitled to both a directed verdict and a judgment notwithstanding the verdict.

II. The trial court erred in denying Mr. Edwards' alternative motions for new trial nisi additur and new trial absolute because he presented compelling, uncontradicted evidence at trial of his pain and suffering, and the amount of the verdict was at least insufficient and at worst grossly inadequate.

The denial of a new trial motion will be overturned on appeal if the trial court's findings are unsupported by the evidence or the conclusions reached are controlled by an error of law. Proctor v. Dep't of Health and Environmental Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006). The trial court has the discretion to grant a new trial nisi when the jury's verdict is inadequate or excessive. A new trial nisi additur may be ordered by the court when the verdict is merely insufficient based on the evidence. Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000).

In Waring, the plaintiff was injured in an auto accident. The defendant claimed at trial that some of her symptoms were the result of a pre-existing condition. The jury awarded the plaintiff the exact amount of her medical bills, around $20,000, but made no award for pain and suffering. The court granted a new trial nisi additur, increasing the plaintiff's award by $40,000 to account for the pain and suffering that the plaintiff testified she had suffered. This award was affirmed on appeal.

Mr. Edwards is entitled to a new trial nisi additur based on the evidence he presented at trial. The jury awarded Mr. Edwards only the amount of his medical bills. Mr. Edwards, however, presented compelling, unrefuted evidence at trial concerning his pain and suffering. Further, Respondent acknowledged that Mr. Edwards' injury was painful. The jury's failure to award any damages for Mr. Edwards' pain and suffering, after finding Respondent responsible, was clearly insufficient. Mr. Edwards therefore submits that the trial court committed reversible error in failing to order a new trial nisi additur to account for

the plain, undisputed evidence presented at trial. (R. pp. 14 - 166.)

In the alternative, Mr. Edwards was entitled to a new trial absolute. The trial court must grant a new trial absolute if the amount of the verdict is grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates that the figure reached was a result of passion, prejudice, caprice, corruption, partiality, or some other improper motive. Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). The jury's failure to award any damages for Mr. Edwards' pain and suffering is so inadequate as to meet this burden. The evidence presented by Mr. Edwards demonstrated that he suffered an exquisitely painful injury. A damages award representing only his medical bills—rendered despite the plain evidence of pain and suffering and Respondent's open acknowledgment of that pain and suffering—warrants a new trial absolute.

Finally, the trial court, sitting as the thirteenth juror, should have granted a new trial as to liability and damages because the verdict regarding comparative negligence and damages for pain and suffering was contrary to the weight of the evidence. See, e.g., South Carolina State Hwy. Dep't v. Townsend, 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975) ("There can be no doubt that a trial judge has the discretionary power to grant a new trial absolute or Nisi in a law case upon his disapproval of the verdict on factual grounds, and in this role he has been recognized and designated as the thirteenth juror.").

CONCLUSION

Allowing this verdict to stand would set the dangerous precedent envisioned by the Supreme Court when it warned that a party raising a defense must meet both the burden of production and the burden of persuasion. Respondent was effectively allowed to plead

a defense, offer no proof of that defense, actually disclaim the negligence of the party she accused of being negligent, then submit that defense to the jury anyway and hope for a positive result. Bobby Edwards respectfully submits that the trial court erred in refusing to grant his motion for directed verdict, in submitting a charge on comparative negligence to the jury, in submitting a charge on open and obvious condition to the jury, and in refusing to grant his motion for judgment notwithstanding the verdict. In the alternative, the trial court's failure to order a new trial nisi additur or new trial absolute constitutes reversible error.

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December 14, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served Appellant's Final Brief, including its Certificate of Counsel, on the following parties by depositing a copy of it in the United States Mail, postage prepaid, on December 19, 2012, addressed to the attorneys of record listed below:

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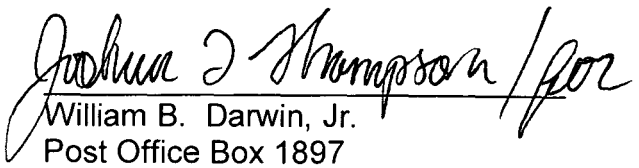

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