

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Robin R. Stilwell, Judge

Case No. 2011-CP-23-02204
Appellate Case No. 2011-204086

Deena L. Bettencourt and Scott Bettencourt, ... Appellants,
v.
Mary R. Wald, ... Respondent.

BRIEF OF APPELLANT

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AUG 26 2013

SC COURT OF APPEALS

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TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	iii
Statement of the Case	1
Statement of the Facts	2

ARGUMENT

I. THE COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR ALL ATTORNEYS FEES AND EXPENSES PURSUANT TO RULE 37(c).	9
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

Black v. Roche Biomedical Laboratories, 315 S.C. 223, 433 S.E.2d 21 (Ct. App. 1991)	11
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Statutes and Rules

Rule 36, SCRCP	9
Rule 37, SCRCP	9, 12, 13
Rule 54, SCRCP	11, 12
Rule 68, SCRCP	12

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying the Plaintiff's request for attorney fees and expenses pursuant to Rule 36 and Rule 37?
2. Did the court err in finding attorney fees and costs patently unreasonable?
3. Should the decision of the lower court be modified or reversed to increase the award for attorney fees and expenses requested by Plaintiff pursuant to Rule 36 and Rule 37?

STATEMENT OF THE CASE

This matter came to court by way of summons and complaint filed by Plaintiff seeking damages as a result of an automobile accident occurring in Greenville County. The Defendant filed an Answer to the Plaintiff's Complaint and the matter was ultimately set for and tried by a jury September 12th through the 15th of 2011, the Honorable Robin Stilwell presiding. A jury returned a verdict for the Plaintiff.

Subsequent to the verdict the Plaintiff moved for attorney fees and costs pursuant to Rule 37(c). A written Motion and Memorandum with attachments was filed by the Plaintiff. A written Memorandum in Opposition was filed by the Defendant. The Court granted the Plaintiff's Motion and awarded an amount of fees and costs less than the total requested by the Plaintiff. The Plaintiff filed a post trial motion for the remainder of attorney fees and expenses. The Court denied further relief. The Plaintiff appealed from the Court's decision.

Plaintiff was represented below by Robert C. Childs, III and Robert C. Ray of Greenville. They are joined on appeal by J. Falkner Wilkes. Defendant was represented below by Marcus H. McGarr of Greenville, who continues on appeal on behalf of the Defendant.

STATEMENT OF FACTS

This case arises out of an automobile wreck and involves the adequacy of the award of attorney fees, costs and expenses pursuant to SCRCP Rule 37(c). In the present case the Plaintiff attempted to establish her injury and related medical expenses through the use of requests to admit as allowed by SCRCP Rule 36. Req Ad. The Defendant denied the Plaintiff's requests to admit, putting to the Plaintiff to the task of providing that, as a result of the wreck, she was injured and incurred certain medical expenses. The Plaintiff prevailed in obtaining a verdict of \$16,500, which was greater than the Defendant's Offer of Judgment. (R. pp. 26-27; 29-47). Plaintiff therefore sought fees, costs, and expenses relating to the Defendant's denials of the Plaintiff's Requests for Admission #1 through #7.

Pursuant to Rule 36, the Plaintiff requested the Defendant admit that the Plaintiff sustained a physical injury as a direct and proximate result of the collision of the party's vehicles; that the Plaintiff suffered pain and suffering as a result of the wreck; that she incurred medical expenses for treatment resulting from injuries incurred in the wreck; that she suffered a traumatic brain injury as a result of the wreck; that the Plaintiff incurred no less than \$13,000 dollars in medical expenses as a result of the wreck. (R. pp. 477-478). The Defendant denied all of the foregoing. (R. pp. 477-478; 48). The case went to trial and the jury awarded the

Plaintiff \$16,500 in actual damages. (R. pp. 13; 551). The verdict exceeded the Defendant's Offer of Judgment. (R. pp. 29, 48).

At the end of the trial the Plaintiff made a motion for attorney fees and costs pursuant to SCRCP Rule 37(c). (R. pp. 29-47; 552-553). As a result of the Defendant's failure to admit all of the forgoing, the Plaintiff was forced to incur \$146,546.21 in attorney fees and expenses necessary to establish the facts denied by the Defendant. Memo & Aff. The Court awarded only \$4190 in attorney fees and costs, plus \$2141 dollars in costs conceded by Defendant, and \$185 dollars for costs of filing and service. (R. pp. 1-2). The Plaintiff timely moved to have the court reconsider its award and award an additional \$128,725 dollars in costs which were "incurred in making that proof." See Rule 37(c), SCRCP, (R. pp. 52-55). The Court denied Plaintiff's post trial motions. (R. pp. 7; 52-55).

In order to establish her injury and related medical expenses the Plaintiff was required to present the testimony of numerous witnesses including the investigating officer, lay witnesses, and numerous medical experts. The facts show that the Defendant in this case negligently ran into the back of the Plaintiff's vehicle. (R. p. 106). The officer that investigated the wreck testified that the Defendant's vehicle had to be towed from the scene. (R. p. 108). The impact was of sufficient force to cause the Defendant's airbag to deploy. (R. p. 123). The

Defendant testified that she didn't think that she did anything wrong in the accident. (R. p. 125). The Defendant, despite having run into the back of the Plaintiff, claimed that she was paying attention. (R. p. 131).

At trial the Defendant admitted that she hurt her neck, arm and knees in the accident and had to go to the hospital as a result of her injuries. (R. p. 125). The Defendant also admitted that as a result of the wreck her own arm was swollen for three weeks. (R. p. 126). The Defendant testified that her car had to have the fender, bumper, radiator, and headlight replaced. (R. p. 126). The Defendant admitted that at the scene of the wreck the Plaintiff indicated that she had suffered an injury to her neck and head. (R. p. 126-127).

Kim McFall witnessed the wreck while standing near the intersection where the wreck occurred. (R. p. 138). McFall observed the Plaintiff stopped waiting to make a turn when the Defendant ran into the back of the Plaintiff's car. (R. p. 138). The impact of the wreck pushed the Plaintiff's car into the intersection and into a lane of oncoming traffic. (R. pp. 141-143). After helping the Defendant out of her car McFall attended to the Plaintiff. (R. p. 144). McFall testified that five minutes after the wreck the Plaintiff was "processing slowly." (R. p. 144). Plaintiff was alert but "in a delayed manner." (R. p. 145). McFall testified that at the time that she was hit, the Plaintiff was facing a green light waiting to make a left hand

turn. (R. p. 145).

Ashley Shramek testified that she knew the Plaintiff prior to the wreck. (R. pp. 160-161). Shramek testified that Weeks after the wreck Plaintiff was “sort of foggy, a little bit disoriented, uh, just a little bit sad” and “shocked a little”. (R. pp. 162-163). Sharmek testified that Plaintiff was not quite as sharp as she was prior to the accident. (R. p. 163).

Kathy Benson, Nurse Practitioner testified that she treated the Plaintiff for a concussion injury resulting from the wreck in 2008. (R. p. 561). Benson testified that the Plaintiff suffered from nausea, buzzing in her ears and difficulty in thinking clearly. (R. p. 562). She also reported decreased memory, distractibility, dizziness, headaches, and unusual sensations in her head. (R. p. 565). The Plaintiff's records further showed that she suffered from irritability, tearfulness, anxiety, and an inability to concentrate. (R. p. 565). Benson's assessment was that the Plaintiff had suffered a concussion with no loss of consciousness. (R. p. 565). Plaintiff's condition worsened to the point that she was unable to function in the afternoons. (R. p. 566). She continued to have headaches and tinnitus. (R. p. 567). Plaintiff also suffered from mononueritis resulting in pain that radiated down her neck and shoulder that caused difficulties in her everyday life. (R. p. 574).

Benson referred the Plaintiff to the neurologist Dr. Kent Kistler. Dr. Kistler

diagnosed the Plaintiff with post-concussive syndrome. (R. p. 606). In addition to the headaches and pain the Plaintiff continued to feel “slow” cognitively. Dr. Kistler referred Plaintiff to a psychologist, Dr. Randall Jones, for neuropsychological testing. (R. p. 609). Dr. Kistler identified the results of neuropsychological testing as being consistent with mild closed head injury, “indicated by a reduction sense of smell, problems repeating words, difficulty managing multi tasks, decreased emotional control, difficulty in maintaining cognitive focus and being attentive.” (R. p. 611). Kistler was aware that Dr. Jones had indicated that the Plaintiff had a twenty percent impairment rating. (R. p. 614). This was later confirmed by Dr. Brabham who conducted a second psychological opinion. (R. p. 614). Dr. Kistler indicated that the potential for the Plaintiff to recover her sense of smell was minimal. (R. p. 617).

Judith Waite, Plaintiff’s mother testified that as a result of the accident the Plaintiff has trouble with her thought process and multitasking. (R. p. 250). Waite testified that the Plaintiff experienced some difficulty in processing information, suffered from frustration, and had headaches as a result of the accident. (R. p. 251). Scott Bettencourt, Plaintiff’s husband, testified to the Plaintiff’s loss of concentration and pain she suffered as a result of the accident. (R. p. 272). Plaintiff’s husband also testified to the gradual recovery of the Plaintiff, and

resolution of the pain issue, but that she continued to have lingering difficulties in concentration, memory and focus. (R. pp. 272-275).

Plaintiff testified to a history of fully engaged work and tasking over the course of her twenty year marriage. (R. pp. 304-315). Plaintiff described the wreck and the resulting injury. (R. p. 318). She described the course of medical treatment and where it left her. (R. pp. 315-337). She continues to suffer from a loss of smell. (R. p. 341). Plaintiff suffers from an inability to regain her employment due to the losses incurred during the time immediately subsequent to the accident. (R. p. 345). Plaintiff also testified to the continuing difficulties she has suffered through to the date of trial. (R. pp. 345-370.)

Dr. Cecil Huey, professor emeritus of mechanical engineering Clemson estimated the acceleration of the Plaintiff's head during the wreck to be at a force of 16Gs, the equivalent of 130 pounds of force. (R. pp. 220-235).

Dr. Randel Jones, clinical psychologist, testified as to his neuropsychological assessment of the Plaintiff. (R. p. 171). Jones testified that the Plaintiff had a diminished sense of smell, was inattentive, difficulty focusing, retrieving words, and an increase in anxiety. (R. p. 187). Plaintiff had difficulties in managing multiple tasks at the same time and a dysregulation of emotion. (R. pp. 191-192). Dr. Jones was also of the opinion that the Plaintiff suffered a

permanent injury as a result of the wreck. (R. p. 196).

Dr. Robert Brabham testified as an expert in the diagnosis and treatment of traumatic brain injuries. (R. p. 485). Dr. Brabham testified that the Plaintiff suffered from some significant cognitive issues. (R. p. 498). Dr. Brabham's observations were consistent with those of the Roger C. Peace Center and Dr. Randall Jones. (R. p. 498). Dr. Brabham diagnosed Plaintiff with a mild traumatic brain injury. (R. pp. 499-500).

Dr. Jones testified to medical expenses incurred by the Plaintiff from him in the amount of \$2110. Kathy Benson, NP testified that the Plaintiff incurred medical expenses with her practice related to the accident. (R. pp. 579-580;768). Dr. Michael Shride testified to the Plaintiff's medical expenses related to the wreck in the amount of \$1,812. (R. p. 714). Dr. Kistler testified that the Plaintiff incurred \$656 dollars in medical expenses from his office related to the accident. (R. p. 622). Dr. Brabham testified that \$6,149 dollars was a reasonable amount of projected future medical expenses related to the Plaintiff's injuries. (R. p. 511-512).

ARGUMENT

I. THE COURT ERRED IN DENYING THE PLAINTIFF'S MOTION FOR ALL ATTORNEYS FEES AND EXPENSES PURSUANT TO RULE 37(c).

The Appellant in this case is entitled to the recovery attorney fees and expenses directly related to proving facts denied by the Defendant. In response to the Plaintiff's Requests pursuant to Rule 36, the Defendant denied that the Plaintiff sustained a physical injury as a result of the wreck; denied that the Plaintiff suffered pain and suffering as a result of the wreck; denied that the Plaintiff incurred various medical expenses for injuries as a result of the wreck; and denied that the Plaintiff suffered a traumatic brain injury as a result of the wreck. Def Res.

Rule 37(c) Expenses on Failure to Admit provides:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

The language of Rule 37 is mandatory. The Court *shall* make the order for

fees and expenses unless it finds one or more of the enumerated grounds. The Respondent has not argued below that the fees or expenses were unreasonable. Instead the Respondent argued below that he had reasonable grounds to believe that he might prevail on the matter pursuant to Rule 37(c)(3) and (4). This argument is simply unsupported by the facts of the case.

Here, the facts known early on in the case show the Defendant's denial of injury to be clearly unsupported. Kathy Benson, Nurse Practitioner, testified that in 2008 she treated the Plaintiff for a concussion injury resulting from the wreck in question. (R. p. 561). Dr. Randel Jones, clinical psychologist, testified that his neuropsychological assessment performed in February of 2009 indicated an injury as a result of the wreck. (R. pp. 171; 201). Dr. Robert Brabham, an expert in the diagnosis and treatment of traumatic brain injuries subsequently examined the Plaintiff and concurred that the Plaintiff suffered from a mild brain injury with significant cognitive issues. (R. p. 498). Neurologist Dr. Kevin Kistler also diagnosed the Plaintiff with postconcussive syndrome. (R. p. 606). There is overwhelming evidence of injury to the Plaintiff as a result of the wreck.

The impact of the wreck was sufficient to require the replacement of the Defendant's bumper, fender and radiator. The Defendant went to the hospital after the accident and admitted that she suffered injuries herself. Her own arm remained

swollen for three weeks after the wreck. It is difficult to see how the Respondent could deny that the Plaintiff was injured when she suffered injuries as well.

While the Respondent in its argument below relied on the lack of findings in the Plaintiff's MRIs as the basis for her denials, expert testimony showed that the injuries of which the Plaintiff complained would not necessarily appear in an MRI. Likewise, there is no evidence that any of the Plaintiff's conditions or symptoms existed prior to the wreck. Most importantly, while the Respondent attempts to create a basis for the denials, it is important to note that the Respondent did not present any evidence that the defense obtained or relied on the opinion of an expert witness in the denial of the Plaintiff's requests to admit. The defense offered no expert testimony of its own that would contradict the overwhelming evidence that the Plaintiff was in fact injured in the wreck. As a result, the Defendant had no reasonable ground to believe that he might prevail on the matter.

The Appellant is entitled to recover the expenses incurred in the proof of injury and other facts alleged in the Plaintiff's Requests to Admit 1 through 7. The Respondent argued below that the majority of costs relating to the proof of injury were not recoverable under Rule 54(d), SCRCP. Rule 54(d) provides that any costs taxed on behalf of the prevailing party "shall be included in the judgment or decree." Respondent cited Black v. Roche Biomedical Laboratories, 315 S.C. 223,

433 S.E.2d 21(Ct. App. 1991) for her claim that the majority of costs incurred by the Appellant in proving the denied facts should be disallowed. The Respondent's argument misconstrues the basis for the Plaintiff's motion for costs. While the Appellant was entitled to certain costs under Rule 54, the Plaintiff's Motion specifically sought costs pursuant to Rule 37(c) SCRCP based on the Defendant's denial of the Plaintiff's requests to admit. SCRCP Rule 54 and Black are therefore inapplicable.

To the extent that Respondent admitted that certain limited costs are recoverable under Rule 54, such a recovery does not bar the Appellant's right to recover additional expenses and costs under Rule 37(c). It is important to note that Black addressed the issue of costs only under Rule 68. In the present case, unlike in Black, the verdict awarded exceeded the Defendant's Offer of Judgement. As conceded by the Defendant, Rule 68 and 54 support an award of certain costs as allowed under Black. To the extent that Black limits the type of costs recoverable under Rule 68 and Rule 54, such limitation does not apply where relief is requested pursuant to Rule 37(c), which allows the recovery of *expenses* incurred in making that proof which was denied by the other party.

In the present case the Defendant denied numerous requests to admit, including that the Plaintiff sustained a physical injury in the accident and that the

Plaintiff incurred medical expenses for the treatment of injuries sustained as a result of the wreck. Aff. The Plaintiff was therefore required to prove the allegations denied by the Defendant. As a result of having to prove essential facts denied by the Defendant, the Plaintiff incurred substantial expenses which included deposition costs and fees relating to expert witnesses, without whom the Plaintiff could not have established an injury. In addition to the costs and fees relating to the expert witnesses, the Plaintiff incurred additional costs and expenses, totaling \$15,893.87, all of which were directly related to proof of injury or other facts denied by the Defendant in her responses to the Plaintiff's Requests for Admissions. Aff. Ray & Childs. To the extent that they were necessary to proving denied requests, these costs are recoverable in their entirety under Rule 37(c) SCRCF.

Additionally, Rule 37(c) provides that a party is also allowed to recover reasonable attorney fees in relation to proving facts denied but later proven at trial. Here the record shows that the jury returned a verdict for the Plaintiff. While the Respondent argued in the court below that the amount of the verdict should somehow limit the Appellant's award under Rule 37, such an argument is unsupported by the language of Rule 37(c).

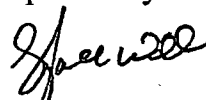
Prior to trial the Appellant sought to establish a number of facts through

requests to admit pursuant to Rule 36. The Respondent denied the Plaintiff's requests 1 through 7. The Plaintiff was then forced to establish facts denied by the Defendant. This required proof of injury and medical expenses as a result of the wreck. Although the cost of proving such facts were admittedly high, they were unavoidable due to the Defendant's denial of facts essential to the Plaintiff's case. Facts without which, the Plaintiff could not have obtained a verdict. As indicated by the affidavits of counsel, the attorney fees requested were directly related to the proof of facts denied in the Defendant's Response to Plaintiff's Request for Admissions under Rule 36.

CONCLUSION

Based on the foregoing, the decision of the lower court should be reversed and/or modified and the Plaintiff awarded expenses and fees as requested.

Respectfully submitted,



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July 6, 2013.

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CERTIFICATE

I certify that the Brief of Appellant is in compliance with Rule 211(b).



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

Robin R. Stilwell, Judge

Case No. 2011-CP-23-2204
Appellate Case No. 2011-204086

Deena L. Bettencourt and Scott Bettencourt, ...Appellants,
v.
Mary Wald, ...Respondent.

CERTIFICATE OF SERVICE

I certify that on the 23rd day of August, 2013, I served a copy of the Final Brief of Appellant, Reply of Appellant, and the Supplemental Record on Appeal on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below.

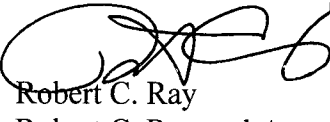
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