

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

**APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS**

**THE HONORABLE KRISTI LEA HARRINGTON,
CIRCUIT COURT JUDGE**

CIVIL ACTION NO. 2018-001158

RECEIVED
MAR 29 2019
SC Court of Appeals

Curtis Mills,

versus

South Carolina State Ports Authority,

RESPONDENT,

APPELLANTS.

INITIAL BRIEF OF RESPONDENT

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STATEMENTS OF ISSUES ON APPEAL

- I. Where Defendant produced zero evidence that Plaintiff breached any duty of care, did the trial court err in refusing to instruct the jury on the law of comparative negligence?

- II. Did the trial court err in denying Defendant's post trial motions based on excessive verdict where the uncontroverted evidence presented at trial proved Plaintiff would endure a lifetime of pain, and may need future surgeries?

STATEMENT OF THE CASE

This case arises out of an accident at the State Ports Authority that occurred on October 4, 2012, [R.p. Complaint page 2]. The case was called to trial on May 29, 2018 before the Honorable Kristi Harrington. Plaintiff alleged at trial that Defendant, by and through its crane operator, negligently hoisted his truck, while still attached to the chassis, and further failed to safely lower the container and chassis so that the pins which held the container in place could be safely removed. Defendant's own witness, also a crane operator, testified at trial that the proper maneuver is for the crane operator to lower the container and chassis back on the ground, flag the driver, and let him know to come out and either slide his front pins or twist the rear pins. [Tr. Transcr., 147: 2 - 25, & 148: 1 - 2]. Plaintiff presented evidence at trial as to the significant severity of his injuries. [Tr. Transcr 113- 118]

Prior to the commencement of jury deliberations, the trial Court ruled that Defendant was not entitled to a charge on the issue of comparative negligence. Defendant objected at trial to any charge on the issue of lost wages. [Tr. Transcr., at 434: 6-9]. The trial Court granted this request. [Tr. Transcr., at 436: 1-2]. However, the Court charged the jury on both the issue of lost wages, [Tr. Transcr., 483: 6 - 25], as well as reduced earning capacity for the future. [Tr. Transcr., 483: 1-15]

The jury returned a verdict for Plaintiff in the amount of \$616,710.07. [Form 4 verdict form]. A post trial hearing was held on June 8, 2018. Defendant's post trial motions for new trial, motion for JNOV, new trial *nisi remittitur*, thirteenth juror doctrine were each

denied by the trial Court. The parties agreed to a reduction of the verdict to \$300,000.00 under the SCTCA, S.C. Code Ann. § 15-78-120(a). This appeal followed.

STATEMENT OF FACTS

Plaintiff was a truck driver, and came to the Port in the afternoon after coming off of a long haul, [Tr. Transcr., at.104: 11-18]. Upon approaching the gate, stopped and got out of his truck. Plaintiff then proceeded to walk around the truck and removed all four locking pins [Tr. Transcr., at 105: 1-19]. This testimony was uncontroverted at the trial of this matter.

It is common for these pins to jostle back into place while the truck is driving back into the yard to get from gate to where the cranes are. Witness, Damion Solomon, also a truck driver testified that this happens all the time, and had indeed happened to him the week prior to trial. [Tr. Transcr., 173: 21-25, 174: 1 - 10].

Upon arriving at the cranes, the arm of the crane begins to remove the shipping container from the chassis of the truck. Witness Solomon testified at trial that no driver exits the truck once the truck arrives beside the crane. [Tr. Transcr., 187: 13-21].

Upon Plaintiff's arrival at the crane, Defendant's crane operator clamped down hard on the box and began to lift the box up. The box and the chassis, as well as Plaintiff's truck tires all came off of the ground. Rather than slowly lowering the box, and with it the truck itself safely to the ground, Defendant's crane operator continued upward and attempted to shake the box off of the chassis. Plaintiff's truck and chassis fell loose from the crane and the tires of Plaintiff's truck came down hard. [Tr. Transcr., 106: 5 - 21]. Witness Solomon,

who watched the accident happen, testified that the chassis was lifted high enough for him to walk under it. [Tr. Transcr., 169: 10 - 12].

Barney Washington, a witness listed by Defendant, who himself is a crane operator, testified that in his 17 years working at the Port he has experience with containers being lifted while still attached to the chassis. Mr. Washington, Defendant's own witness, also testified as to the proper procedure to be used by crane operators when a chassis is lifted off the ground while still attached to the container. He testified the proper maneuver is for the crane operator to lower the container and chassis back on to the ground, flag the driver, and let him know to come out and either slide his front pins or twist the rear pins. This is the safe way to handle the situation such as the accident that caused Plaintiff's injuries, and this is the way Mr. Washington safely allows for the container and chassis to be disengaged. [Tr. Transcr., 147: 2 - 25, & 148: 1 - 2]. Mr. Washington also testified it is not unusual for pins to jostle back into place between the gate and his crane. [Tr. Transcr., 149: 7 - 12].

Timothy Zgleszewski, M.D., testified at trial as to the treatment and prognosis of Plaintiff. His treatment consisted primarily of his giving injections, with a 5 inch needle to both Plaintiff's right and left sacroiliac joints specifically L3-4, L4-5, and L5-S1. [Tr. Transcr., 203: 19 - 23 & 212: 14 - 16]. Plaintiff's EMG test was positive for acute or chronic pinched nerve. [Tr. Transcr., 213: 6 - 8].

Dr. Zgleszewski testified that Plaintiff's injuries, including herniation of disc and annular tear were within a reasonable degree of medical certainty most probably caused by Plaintiff's accident. Dr. Zgleszewski also testified that Plaintiff's pain is real and he will suffer from it for the remainder of his life. [Tr. Transcr., 230: 6 - 25]. Plaintiff testified that

his medical bills were \$50,228.92, and these bills were submitted into evidence for the jury's consideration without objection from Defendant. [Tr. Transcr., 114: 21 - 25 & 115: 1 - 22].

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST FOR A JURY CHARGE ON THE ISSUE IN THIS CASE WHERE DEFENDANT PRESENTED ZERO EVIDENCE OF NEGLIGENCE ON THE PART OF PLAINTIFF.

A. Appellant's Argument is an Attempt to use *Res Ipsa Loquitor* as a Shield

Plaintiff clearly testified at trial that upon approaching the gate, he stopped and got out of his truck. Plaintiff then testified that he proceeded to walk around the truck and removed all four locking pins [Tr. Transcr., at 105: 1-19]. **This testimony was uncontroverted at trial.** Defendant was unable to produce any evidence, in the form of testimony, video surveillance, or otherwise, that Plaintiff committed any act or omission that might be construed as negligence. The reason for Defendant's failure to do so is because no such evidence exists.

As the doctrine of *res ipsa loquitor*, or rather the absence thereof, applies to Plaintiffs in South Carolina, Where circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were

due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation. *Leek v. New South Express Lines*, 192 S.C. 527, 7 S.E.2d 459; *Barnwell v. Elliott*, 225 S.C. 62, 80 S.E.2d 748.

Because Defendant failed to produce even a scintilla of evidence of negligence on the part of Plaintiff, this Court should affirm the trial court's decision to refrain from charging the jury on the issue of comparative negligence.

B. Appellant Failed to Either Establish a Duty Owed by Respondent, or any Breach of Duty.

Jury instructions should be confined to the issues raised by the pleadings **and supported by the evidence**. [emphasis added]. *Mouzon v. Moore and Stewart, Inc.*, 282 S.C. 233, 317 S.E.2d 756 (S.C. App (1984), citing *Tucker v. Reynolds*, 268 S.C. 330, 233 S.E.2d 402 (1977); *Baker v. Weaver*, 279 S.C. 479, 309 S.E.2d 770 (S.C.App. 1983).

Where an issue is implicitly suggested by the pleadings and is **supported by the evidence**, the trial court is obligated to instruct the jury concerning it. [emphasis added]. *Mouzon, Id.*, citing *Carroll v. Smith-Henry, Inc.*, 313 S.E.2d 649 (S.C.App. 1984).

Appellant makes the argument that Plaintiff breached his duty to exit his truck after arriving at the crane to check for a second time whether the pins had jostled back into place. However, at trial, **Defendant offered zero evidence that any driver at the port has ever gotten out of the truck to check the pins a second time, either before or after this accident.** The reason no drivers get out of their truck upon arrival at the crane is because that would be dangerous.

Upon cross examination by Defendant, Barney Washington, a truck driver and eyewitness to the incident, testified as follows:

Q. Is there any reason you can't tell that [crane] operator, just hold on a minute and let me jump and make certain, I went over some bumps getting here, and I want to double check to make certain the pins are pulled?

A. No driver do that

[Tr.Transcr., at 187: 13-18]

Appellant's argument that Plaintiff breached a duty rests on the absurd notion that Plaintiff should have exited his truck while next to the crane, an action that no driver, before or since, performs at Defendant's port. Four of Defendant's employees testified at trial, two of which are crane operators. Not one witness testified at trial that a truck driver has a duty to check the pins a second time while at the crane. Accordingly, this Court should affirm the trial court's refusal to charge comparative negligence at the trial of this matter.

II.

THE TRIAL COURT PROPERLY DENIED DEFENDANT'S POST TRIAL MOTIONS BECAUSE THE VERDICT WAS NEITHER EXCESSIVE NOR UNSUPPORTED BY EVIDENCE.

A. Appellant Failed to Preseve the Issue of Lost Wages or Future Lost Income for Appeal.

Defendant objected at trial to any charge on the issue of lost wages. [Tr.Transcr., at 434: 6-9]. The trial Court granted this request. [Tr.Transcr., at 436: 1-2]. However, the

Court charged the jury on both the issue of lost wages, [Tr. Transcr., 483: 6 - 25] as well as reduced earning capacity for the future. [Tr. Transcr., 483: 1-15].¹ After the jury was charged, and prior to the case going to the jury the Court asked counsel for the parties whether there were any objections to the charges as given. Both parties responded that there were no objections. [Tr. Transcr., 490: 6-22]. However, Defendant failed to take exception to any charges related to past and future lost wages.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]. Issues not raised and ruled upon in the trial court will not be considered on appeal."

State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003).

"A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground."

Id. at 142, 587 S.E.2d at 694.

Accordingly, because the issue of lost wages was not preserved for appeal, this Court may not properly consider any arguments related to past and future lost wages.

B. The Verdict Was Not Excessive and was Supported by the Evidence

Dr. Zgleszewski testified that Plaintiff's injuries, including herniation of disc and annular tear were within a reasonable degree of medical certainty most probably caused by

¹

Appellant's contention that counsel for Plaintiff was under the impression that lost wages was not charged [Brief of Appellant, p. 12, footnote 5] is simply untrue. It was discussed in chambers, and it is the specific reason the undersigned obtained an expedited transcript of the charges and made same available to the trial Court at the post-trial motion hearing. [Post Tr. Transcr 14: 10-25; 15: 1-25; 16:1-25]

Plaintiff's accident. Dr. Zgleszewski also testified that Plaintiff's pain is real and he will suffer from it for the remainder of his life. [Tr. Transcr., 230: 6 - 25]. The trial Court charged the jury that Plaintiff had a life expectancy of 32.78 years, and that the jury was entitled to consider the effect of the injuries on Plaintiff's future occupation. [Tr. Transcr., at 485: 18-25; 486: 1]. Mr. Solomon and Plaintiff have identical occupations. Defendant entered Mr. Solomon's pay stub into evidence, and Defendant questioned Plaintiff about the pay stub. [Post Tr. Transcr 10: 11-21]

Appellant relies in part on the Court of Appeals case of *McAlhanev v. McElveen*, 413 S.C. 299, 775 S.E.2d 411 (Ct. App 2015) in support of its argument that the trial Court abused its discretion in denying Appellant's motions for new trial absolute and new trial *nisi remittitur*. The Court in *McAlhanev*, finding no abuse of discretion by the trial Court, noted that there is a distinction between an appellate Court's review of actual damages as opposed to punitive damages, which is reviewed *de novo* on appeal. Punitive damages are not at issue in this case.

The jury's determination of damages, however, is entitled to substantial deference. *See, e.g., Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953). 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. *Id.* The decision to grant a new trial is left to the sound discretion of the trial court

and ordinarily will not be disturbed on appeal. *Vernon v. Atlantic Coast Line R. Co.*, 221 S.C. 376, 70 S.E.2d 862 (1952).

Plaintiff testified that he lost wages in the amount of about \$12,000.00 over the course of approximately 9 weeks. [Tr. Transcr., 116: 6-15]. This equates to approximately \$1,333.33 per week. Considering Plaintiff's life expectancy of 32.78 years, with an average of 52.1 weeks per year, and assuming Plaintiff's earnings never increase, this equates to approximately 1,707 weeks, for a total future lost earning capacity of \$2,275,994.3.

Plaintiff testified that his medical bills were \$50,228.92, and these bills were submitted into evidence for the jury's consideration without objection from Defendant. [Tr. Transcr., 114: 21 - 25 & 115: 1 - 22]. Dr. Zgleszewski testified that Plaintiff's injuries, including herniation of disc and annular tear were within a reasonable degree of medical certainty most probably caused by Plaintiff's accident. Dr. Zgleszewski also testified that Plaintiff's pain is real and he will suffer from it for the remainder of his life. [Tr. Transcr., 230: 6 - 25]. He is a candidate for surgery, but cannot undergo the procedure because there is a fifty percent chance it would prove fatal; he is in pain every day; and he can no longer enjoy the physical activities he once enjoyed. [Tr. Transcr 113- 118]

The decision of the trial judge on matters related to a verdict should not be disturbed unless it clearly appears that the exercise of discretion was controlled by a manifest error of law. 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 an appellate Court. *Daniel v. Sharpe Const. Co.*, 270 S.C. 687, 244 S.E.2d 312 (1978).

The jury's verdict in no way shocks the conscious, was not excessive, was supported by the evidence, and the trial Court's rulings should be affirmed.

1. The Note Handed to the Trial Court Has No Dispositive Weight.

Appellant puts virtually all its eggs in the basket that is the note handed to the trial judge. However, for the following reasons, the note cannot be used as a basis to calculate the reasoning of the jury:

- a) All 12 jurors had notepads [Tr. Transcr 86: 2-7]
- b) Almost all jurors made use of their notepads [Post Tr. Transcr 16: 17-25]
- c) None of the many other pages of notes taken by jurors are part of the record in this case
- d) No juror was polled or otherwise divulged the reasoning that took place in the deliberation room
- e) As noted by the trial Court: "So I want to be clear. There was no discussion with any juror in any way concerning what was on that paper or what those numbers mean." [Post Tr. Transcr 17: 15-17]

The judge correctly informed the jury that notes are exactly that. One juror's notes are no more correct or accurate than another juror's notes. [Tr. Transcr 86: 8-15] Accordingly, Appellant's extrapolations and calculations based upon a single sheet of paper, are woefully misplaced, inaccurate, and cannot be relied upon.

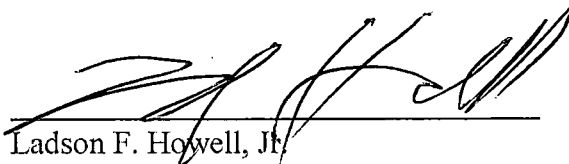
The trial judge has wide discretionary power to reduce the amount of a verdict which in his opinion is excessive, and his judgment, in the exercise of that power, will rarely be disturbed. *Johnson v. Life Insurance Company of Georgia*, 227 S.C. 351, 88 S.E.2d 260, 270, 55 A.L.R.2d 813 (1955).

The trial Court in this case properly recognized the unreliability of the single sheet of paper, gave the jury's decision the proper respect and sanctity it deserved, and correctly denied Appellant's post trial motions.

CONCLUSION

For the reasons set forth herein, this Court should preserve the sanctity of the jurors province, and affirm the trial Court's rulings below.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ladson F. Howell, Jr.", is written over a horizontal line.

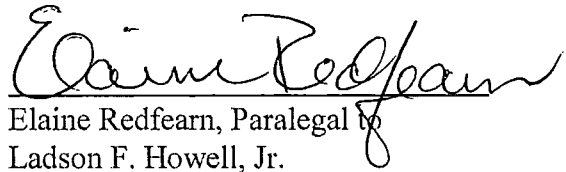
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ATTORNEY FOR RESPONDENT

March 25, 2019

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Howell Law Group, LLC, attorneys for Respondent, Curtis Mills, do hereby certify that I have served the foregoing Initial Brief of Respondent, dated March 25, 2019, by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:


Elaine Redfearn, Paralegal to
Ladson F. Howell, Jr.

Dated: March 25, 2019

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March 25, 2019

VIA U.S. MAIL

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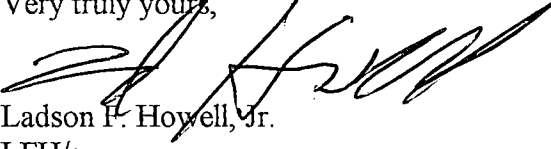
SC Court of Appeals

**RE: Curtis Mills vs. SC State Port Authority
Case No.: 2018-001158**

Dear Ms. Kitchings:

Please find enclosed Respondent's Initial Brief and Designation of Matter to be Included in the Record of Appeal for filing in this matter. By copy of this letter to all counsel of record, I am providing them a copy as well. Thank you for your assistance in this matter. With kind regards, I am,

Very truly yours,


Ladson F. Howell, Jr.
LFH/ser

cc: Randell C. Stoney, Jr., Esq.
Randolph R. Lowell, Esq.

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