THE STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-23-04585
Appellate Case No. 2013-000666

James L. Dawkins and Delphine Dawkins ..... **Appellants,**

v.

Troy Lee Watts, Jr... ..... **Respondent.**

APPELLANTS' FINAL BRIEF

Donald R. Moorhead
Donald R. Moorhead, P.A.
880 S. Pleasantburg Drive, 3-A
Greenville, SC 29607
(864) 242-9999

Cynthia B. Patterson
P.O. Box 6786
Columbia, SC 29260
(803) 790-2688

Attorneys for Appellants

RECEIVED
JUN 23 2014
SC Court of Appeals

TABLE OF AUTHORITIES

Cases

TABLE OF CONTENTS

STATEMENT OF THE CASE

This is an admitted case of negligence. (R.7 & R.14 - Complaint & Answer; R.686) On September 24, 2008, Respondent Troy Lee Watts, Jr. (Watts) caused a motor vehicle collision between his vehicle and the vehicle owned and operated by James L. Dawkins (Dawkins) (R.7 & R.14 - Complaint & Answer).

Watts' primary carrier paid Dawkins $25,000 in exchange for a covenant not to execute - of which Dawkins received $10,000. (R.7 - Complaint; R.578-579 - Tr. 115-16) Thereafter, Dawkins sued Watts seeking underinsured benefits. (R.7 - Complaint) The attorney representing State Farm, the underinsured carrier, elected to defend the case in Watts' name. (R.14 - Answer)

Following the trial and after deliberating for forty minutes, the jury returned a verdict of zero dollars for Dawkins and found for Watts.[1] (R.741 - Tr.278)

Dawkins filed a Motion for New Trial Nisi Additur or in the Alternative Motion for New Trial as to Damages Only. (R.882 - Motion) The court denied the motion. (R.3 - Order at 1) This appeal followed.

STATEMENT OF FACTS

Immediately following the September 24, 2008 accident, an ambulance transported Dawkins to the Greer Memorial Emergency Room after his spine was immobilized by backboards and neck blocks. (R.554 -56 - Tr.91 - 93) He was treated and released. (R.556 - Tr.93) On September 27, 2008, Dawkins was again treated at St. Francis Women's Hospital Emergency Room. (R.556 - Tr.93) Later, he was treated by various providers

---

[1] The zero verdict on Delphine Dawkins' loss of consortium claim is not being appealed. References to Dawkins only refer to James Dawkins.

including North Hills Medical Clinic, by Dr. Stephen Geary at Steadman Hawkins Orthopaedic group, and Dr. Timothy McHenry for his neck and his back. (R.556-57 - Tr.93 - 94)

In that collision, and admitted by Respondent, Dawkins' vehicle sustained $3,893.49 damage, and Watts' vehicle was a total loss. (R.554 - Tr.91) Dawkins incurred medical bills of $21,680.61. (R.749 - Plaintiff's 2)

Dr. McHenry testified by video deposition that the injuries to Dawkins' cervical spine and low back problems were the direct and proximate result of the automobile collision of September 24, 2008. (R.374 - Depo.13) Dr. McHenry also testified that as a result of the automobile collision of September 24, 2008, Dawkins needed cervical and lumbar surgeries. (R.374 - Depo.13) He specified the type of surgery, the medications, the physical therapy visits, radiographic studies and other ancillary services which would be necessary for the surgeries. (R.374 -77 - Depo. 13-16)

Penny Cates, a certified life care and medical cost projection expert testified that the cervical surgery, including the ancillary services would cost $104,213.00 in present day dollars. (R.522 - Tr.59) Ms. Cates further testified that the lumbar surgery would amount to the sum of $119,203.00, including ancillary services, for a total of $223,416.00. (R.536-542 - Tr.73 - 79)

ISSUE ON APPEAL

A. Did the trial court err by refusing to grant a new trial where liability was admitted, yet the jury returned a verdict for zero damages?

i. Did the trial court err by allowing defense counsel in this UIM case to refer

to Watts as his client who deserves his one and only fair day in Court and by denying Dawkins the ability to correct this misrepresentation?

ii. Did the trial court err by allowing defense counsel to present evidence that Dawkins was on disability eleven years prior to the accident?

iii. Did the trial court erred by allowing evidence that in June 2009 Dawkins may have had health insurance?

STANDARD OF REVIEW

The trial court must grant a new trial if the amount of the verdict is so grossly inadequate or excessive so as to shock the conscience of the court and clearly indicates the figure was the result of passion, caprice, prejudice, partiality, corruption, or some other improper motive. Sullivan v. Davis, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1997); Dillon v. Frazer, 383 S.C. 9, 678 S.E.2d 251 (2009). Moreover, the trial court must ensure a plaintiff receives an award of damages where liability is admitted unless proof completely fails. Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990).

The admission of evidence is within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of that discretion. Hofer v. St. Clair, 298 S.C. 503, 381 S.E.2d 736 (1989). Evidence is relevant and admissible if it tends to establish or to make more or less probable some matter in issue. Id.; Associate Management, Inc. v. E.D. Sauls Const. Co., 279 S.C. 219, 305 S.E.2d 236 (1983). See also Washington v. Whitaker, 451 S.E.2d 894, 317 S.C. 108 (1994).

ARGUMENT

A. The trial court erred by refusing to grant a new trial where liability was admitted, yet the jury returned a verdict for zero damages.

In this case, liability was admitted. (R.14) The only evidence - the medical opinions

- indicate the injuries sustained were the result of the accident. (R.368, 382, 403, et seq.) Simply put, the proof does not completely fail. Accordingly, Dawkins is entitled to an award as a matter of law. The trial court erred by not granting the request for additur or new trial. "When liability is admitted . . . a [p]laintiff is entitled to an award unless proof completely fails." Page v. Crisp, 303 S.C. 117, 399 S.E.2d 161 (Ct. App. 1990).

Where liability was admitted and there were undisputed immediate damages to both Dawkins and his vehicle (R.748-754, 686), the jury's verdict of zero damages could only have been the result of passion or caprice. Further indicating the jury's refusal to obey the law as charged is that the verdict form found for Watts (R.6) - even though liability was admitted. (R.14) Under these circumstances, the trial court was obligated to grant a new trial. Watts was clearly responsible and admitted responsibility for the damages to Dawkins' vehicle, the ambulance ride, the initial emergency room visit, etc. The jury was obviously motivated by something other than the law as charged to them.

"Evidence is relevant and admissible if it tends to establish or to make more or less probable some matter in issue." Washington v. Whitaker, 451 S.E.2d 894, 317 S.C. 108 (1994). Dawkins submits the following three sources of this passion, caprice, prejudice, partiality, corruption, or some other improper motive. He further asserts the admission of this testimony did not make any issue more or less probably and served only to sway the jury. Accordingly, Dawkins is entitled to a new trial.

i. The trial court erred by allowing defense counsel in this UIM case to refer to Watts as his client who deserves his one and only fair day in Court and denying Dawkins the ability to correct this misrepresentation.

At the trial of the case, defense counsel repeatedly referred to Watts as his client who

deserved a fair day in court, which would be his only day in court. (R.511) Dawkins' counsel moved the court to be allowed to bring into evidence that such references were misrepresentations. Dawkins' counsel further requested that he be allowed to question Watts as to what, if anything, did he have at stake in the trial of the case. (R.582-83) Dawkins' counsel requested that the true nature of the released and the cause of action, including the fact that State Farm was the true defendant. (R.582) Dawkins' argument was that defense counsel opened the door, so to speak, when he argued that Watts was his client. (R.582) The court denied that Motion. (R.583)

Defense counsel's statement was a misrepresentation of the facts. Defense counsel does not nor has he ever represented Watts who is released from any liability on a Covenant Not To Execute in return for his liability insurance company (which is not State Farm) paying the policy limits of $25,000.00. (R.582-83) Defense counsel opened the door to having the true parties be disclosed to the jury when he attempted to curry favor for Watts in order to reduce the exposure of his client, State Farm. (R.582-83) The jury should have been able to hear that Watts was not the client of defense counsel and to hear that State Farm is the client of defense counsel.

The continued references to Watts as the true defendant led to the jury's sympathy for the young man. This is evidenced by the jury refusing to award even those damages for which Watts was admittedly responsible.

ii. The trial court erred by allowing defense counsel to present evidence that Dawkins was previously on disability.

Prior to trial, Dawkins' counsel made a motion in limine asking that defense counsel

not bring up the fact that Dawkins was on disability at the time of the accident, and/or that he would have been on Medicare or Medicaid at the time of the accident. (R.626) As it turns out, Dawkins was not on disability, Medicare, or Medicaid at the time of the accident. (R.626) As such, defense counsel agreed to that motion in limine. (R.627) Furthermore, defense counsel specifically asked the court to instruct all individuals who were going to testify to specifically not make any reference to automobile insurance, being paid or otherwise, in their responses to questions. (R.627) The Court agreed and instructed all parties to comply with its order. Nevertheless, testimony regarding his disability eleven years prior came into evidence. (R.628)

Such evidence was of great surprise to Dawkins who did not have the ability to adequately address to the jury evidence to contradict or clarify the evidence introduced by the defense counsel. Dawkins' counsel had made a Motion in Limine to prevent such evidence be introduced or any attempt to introduce such evidence be prohibited. (R.626) The Motion in Limine was granted, (R.626) but defense counsel cross-examined Dawkins on that very issue, (R.628) and the Court over-ruled Dawkins' counsel's objection. (R.630-32)

Such evidence was also highly prejudicial and irrelevant because Dawkins was not on disability at the time of the trial and, in fact, had not been on disability since 1997, some eleven years prior to this automobile collision. (R.664) As Dawkins' counsel argued to the court, the reference to disability and reference to evidence as to Dawkins being on disability at some point in time was irrelevant and highly prejudicial. (R.630) It raises the specter of entitlement to Medicare or Medicaid, which is also irrelevant and highly prejudicial.

Dawkins' counsel argued that there was no way he would overcome that prejudicial evidence with each of the twelve jurors. (R.630) The court over-ruled Dawkins' objection, and the evidence came in. (R.628-29)

Moreover, any probative value which such evidence may have had (and Dawkins does not admit that it had any) was outweighed by the highly prejudicial nature of that evidence. That opposing counsel contended the various and sundry ailments were preexisting and not as a result of the accident does not require proof of social security disability eleven years prior. The court erred by allowing this testimony into evidence as it prejudiced the jury as is indicated by their refusal to award admitted damages in this admitted liability case.

iii. The trial court erred by allowing evidence that in June 2009 Dawkins may have had health insurance.

Dawkins, at the time of trial, had no health insurance or any other source of payment for the surgeries that Dr. McHenry testified Dawkins needed as a direct and proximate result of the accident. (R.558) Nevertheless, the court allowed defense counsel to introduce evidence that Dawkins had health care insurance coverage three years and seven months prior to the trial of the case, i.e., June of 2009. (R.565)

First of all, such benefits are a collateral source and totally irrelevant to damages which should be considered by the jury. Dawkins was surprised and highly prejudiced by the introduction of such evidence. Moreover, Dawkins was denied an opportunity to rebut such evidence with a showing that any monies paid by Blue Cross Blue Shield for injuries sustained in the automobile collision would be recouped by Blue Cross Blue Shield.

Second, the question posed by Dawkins' counsel at the trial of the case was whether he has the ability (present tense) to pay for the surgeries which he requires. The evidence introduced by defense counsel pertained to coverage which may have been in effect in June of 2009, over three years and seven months from the date of the trial.

Moreover, any probative value which such evidence may have had (and Dawkins does not admit that it has any) was outweighed by the highly prejudicial nature of said evidence.

Defense counsel discussed the fact that Dawkins had been cleared for surgery but refused to go through with the same. He explained that he could not have surgery because he did not have the funds to pay for the same. According to the defense, Dawkins clearly had BC/BS at the time of the accident and at the time that the surgery was scheduled. Such was not the case and there is no evidence to support this. They continue, Dawkins also had $10K available to him to apply to any deductibles.

Opposing counsel maintains Dawkins understated the length, degree, and nature of his preexisting conditions while overstating the same regarding his post-accident problems. Coupled with the alleged availability of insurance and the $10K, opposing counsel suggests Dawkins was less than truthful about having the surgery had funds been available. The defense concludes: "All of these statements were incorrect and severely hurt their credibility, as well as the credibility of the case." The fact remains, however, this was an admitted liability case with undisputed damages directly linked to and incurred the day of the accident. The only evidence in the record is that Dawkins needs surgery to his neck as that it getting worse and may become permanent. The only evidence in the record is that Dawkins may

need another surgery to his back, but that is a pain issue.

Because of the evidentiary errors made in this case, their cumulative effect, and the irrelevant and highly prejudicial nature of said evidence, it is clear that the verdict of the jury was based upon passion, caprice, prejudice or some other improper motive. It is clear that the irrelevant and highly prejudicial evidence regarding disability and Blue Cross Blue Shield coverage at the very remote point in time, and the misrepresentation of defense counsel that Watts was his client, resulted in the grossly inadequate verdict of the jury.

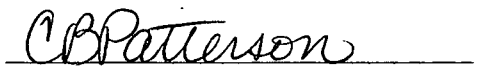
CONCLUSION

All of the medical evidence clearly established that Dawkins injured not only his neck, back, but also his left shoulder in the collision which occurred in this accident. There is no evidence to refute that - medical or otherwise. It was admitted by Dawkins that he had previous low back problems and had surgery for that, but in the twenty-five years since he had reached maximum medical healing with regard to that injury, he had neither seen an orthopaedic surgeon nor required surgery, until this motor vehicle collision. Uncontradicted testimony of the treating orthopaedic surgeon was that Dawkins needed an additional low back surgery as a direct and proximate result of the motor vehicle collision.

Further, there was no evidence of previous injuries or maladies to Dawkins' cervical spine. All of the medical evidence establishes that in this automobile collision Dawkins injured his spine and that he needs surgery as a result thereof. This evidence is uncontradicted. The cost of the cervical spinal surgery alone and ancillary services as established by the testimony of Penny Cates, certified life care planner and medical cost projector is $104,213. (R.744-48) In addition to the cost of the surgery there are significant general damages in the form of pain and suffering and mental anguish which undoubtedly are associated with surgery and recovery time. Moreover, there are the general damages which Dawkins has suffered in the four and a half years since this accident.

Under these circumstances, Dawkins respectfully requests this Court order a new trial.

Respectfully submitted,



Donald R. Moorhead
Donald R. Moorhead, P.A.
880 S. Pleasantburg Drive, 3-A
Greenville, SC 29607
(864) 242-9999

Cynthia B. Patterson
P.O. Box 6786
Columbia, SC 29260
(803) 790-2688

Attorneys for Appellants

June 23, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
In the Court of Common Pleas

D. Garrison Hill, Circuit Court Judge
Robert E. Hood, Circuit Court Judge

Case No. 2011-CP-23-04585
Appellate Case No. 2013-000666

James L. Dawkins and Delphine Dawkins ..... **Appellants,**

v.

Troy Lee Watts, Jr... ..... **Respondent.**

PROOF OF SERVICE

I certify that a copy of Appellants' Final Reply Brief was served on opposing counsel by depositing it in the United States Postal Service, first class, address to Respondent's counsel of record: Marcus K. McGarr, PA, 108 Whitsett St., Greenville, SC 29601.

June 23, 2014

CB Patterson

Cynthia B. Patterson
PO Box 6786
Columbia, SC 29260
(803) 790-2688

Attorney for Appellants