

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Honorable L. Casey Manning, Circuit Court Judge

Case No. 2016-002268

Bertha Rodriguez

Respondent

v.

Taliah Shabazz

Appellant

PETITION FOR REHEARING RESPONSE

Taliah Shabazz
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Pro Se Appellant

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SC Court of Appeals

STATEMENT OF THE CASE

On May 8, 2012, Plaintiff, Taliah Shabazz a 19 year old college student, was injured in an automobile accident and incurred permanent bodily impairment injuries as a result of this accident. Miss Shabazz had reportedly reached maximum medical improvement (MMI) by her physician. Dr. Ogburu assigned Miss Shabazz an impairment rating for soft tissue injury, shoulder contusion or crushed injury with minor soft tissue or skin injury. Class 1 grade B 2% UEI (upper- extremity) 1% whole body shoulder contusion category MMI measured 1%-3%. (American Guide to the Evaluation of Permanent Impairment, 6th Edition, published 2008, Chapter 3, Table 15-5 R.p.39) The Appellant, Taliah Shabazz, filed a lawsuit against Bertha Rodriguez, on February 17, 2015 for damages and injuries sustained.

This case is one of admitted liability. The case was initially brought before the Honorable Jocelyn Newman on June 13, 2016 but was declared a mistrial due to an undecided verdict on June 14, 2016. The case was tried again before the Honorable Casey Manning on August 29, 2016 and August 30, 2016; judgment was entered on August 31, 2016.

On August 29 and August 30, 2016, the case was tried by a jury which consequently awarded her \$12,500.00 in actual damages; said jury award was less than the medical expenses incurred as a result of the accident.

During the proceedings, the Respondent's attorney admitted liability for the accident, but disputed the Appellant's medical treatments and bills. In both trials, the defendant Ms. Rodriguez was not present during the proceedings. The Appellant provided the jury with medical records, bills and treatments for injuries sustained since the accident. On the last visit to her specialist for

pain management, the Appellant's neurologist gave her an impairment rating for all of her injuries sustained since the accident. The Respondent's attorney highlighted complaints of headaches that were noted on the Appellant's records during an extended time frame of her treatments. The Respondent argued the delay of the headaches and the Appellant's visit to her neurologist was not causally related to the accident, and therefore, should not be considered for compensation. After the Appellant's neurologist was rhetorically asked whether he believed it likely that a person suffering from migraine headaches as severe as the Appellant claimed would wait a year to seek treatment, the doctor replied it was unlikely, however, he went on to say that certain injuries such as Miss Shabazz had sustained can cause reflexive headaches. In closing remarks, the judge informed the jury that unlike the opening remarks the closing remarks must be true. The Respondent attorney took the initiative to explain Miss Shabazz's impairment rating to the jury and how Miss Shabazz's rating (IPR) was calculated. Arguing that Miss Shabazz injury was rated on a scale from 1% - 100% and 2%-100%, ignoring the AMA guide mentioned previously.

The defense claimed the impairment rating was not significant enough to reward Miss Shabazz for the entire cost of her medical bills. The headaches and neurologist visits should not be considered because the Appellant complained too late in her treatment. Therefore, the jury should disregard them. The Respondent then proceeded to remind the jury that their job was only to return Miss Shabazz to the state she was in prior to the accident, not to make her rich. Then the Respondent proceeded to demand that the jury cut Miss Shabazz's medical bills despite the fact the Respondent provided no evidence that Miss Shabazz's headaches were caused by anything prior to or after the May 8, 2012 accident. The Respondent speculated that the

headaches could be caused by stress and anxiety about school or allergies to pollen, despite Miss Shabazz having denied allergies to pollen and medical records saying no known allergies. The defense gave the jurors what she deemed was an “appropriate amount” of \$8,851.14 as adequate compensation and suggested anything more would be a punishment for the defense. The judge had already instructed the jury before trial that they were the sole finders of facts in this case and no one else would be permitted to weigh the evidence and to render a verdict based upon the evidence. The jury disregarded those instructions and considered the Respondent’s amount of \$8,851.14, and responded in deliberations by asking if the treatments before the neurology appointments were covered by Miss Rodriguez’s insurance. The judge reminded the jury again they were the finders of facts and could not consider anything outside the scope of evidence. The jury delivered their verdict within minutes after being sent back to deliberate. Miss Shabazz was awarded \$12,500.00 in damages without consideration for the total amount of previous expenses, in addition to pain and suffering or compensation for future treatments. After the trial, post-trial motions were filed by the Appellant’s attorney. The Appellant’s attorney filed a motion for a new trial *nisi additur*. The judge denied the motion in an order filed on October 16, 2016. On November 8, 2016 Miss Shabazz filed a notice of appeal *pro se*.

The Court of Appeals notified both parties that the Shabazz vs Rodriguez case would be submitted without oral arguments. The pro se appellant submitted a petition for rehearing of the Appellate court’s decision on December 31, 2019, affirming the trial court’s decision. The Court of Appeals has given the Appellant the opportunity to respond to the Respondent’s petition for a rehearing dated January 24, 2020. The Appellant humbly asks the Appellate panel to reconsider the facts.

PETITION FOR A REHEARING RESPONSE

In Pursuant to Rule 221, SCACR, The Appellant demonstrated in the appeal briefs how the jury verdict was inconsistent with their findings based on the insurance question that was asked and based on opposing counsel closing remarks that were prejudiced against Miss Shabazz. In addition to the preponderance of evidence that the Plaintiff, now Appellant presented at trial, the verdict did not match the evidence and justice has not been given for the Plaintiff and the injuries she sustained due to the May 8, 2012 accident. The Appellant acknowledges that our legal system allows juries wide leeway when making decisions and that judges and Appellate courts are not eager to overturn a jury's decision. However, in Miss Shabazz's case the jury was charged with the law but did not consider the facts. In the post trial motions, the judge was hesitant to overturn the jury's decision because they were the triers of fact, so the trial court only looked to see if there were laws made in error and did not consider errors in the facts or rather if the facts satisfy the legal ruling. The trial court applied the standard of abuse of discretion, rather than the standard for denovo review. This case is a negligence case and is a mixture of both law and fact. By using the abuse of discretion standard instead of the denovo standard has made it difficult for the Appellant to receive justice. The Respondent claims that the issues the Appellant argues in her briefs are not properly preserved for review. This is also another obstacle for the Appellant, but not hard to overcome. The Appellant is commencing her appeal pro se; this is not an argument saying that the rules do not apply to pro se, but in the Appellant's case, the Appellant did not want to jeopardize the appeal by misquoting laws or facts. The Appellant believed that by asking the Court of Appeals to set aside the jury verdict and look at the whole

record with a set of new eyes, the Court of Appeals would reverse the decision and that Miss Shabazz would finally receive justice. In the Appellant's haste to demonstrate to the Court of Appeals the inconsistency of the jury's verdict, and other issues mentioned previously above, the Appellant negated to make clear the remedy being sought from the Court of Appeals. This is not the Appellant raising issues for the first time on appeal. This is the Appellant making clear the remedy being sought. The Appellant would like to also inform the Court of Appeals that the issues on her appeal were ruled upon in the trial court during post trial motions, and contrary to what the Respondent said, are properly preserved for review. The Appellant would like to address this issue first then lead into the remedy being sought so as to show the direct correlation of the two issues.

The Respondent claims that the issues the Appellant argues on her briefs are not properly preserved for review. The Appellant disagrees, citing Rule 50 (e) SCACR on her brief. According to Rule 50(e) time for motions; Appeals; End of term on post trial motions; A jury verdict is final if no motion for a new trial or judgment notwithstanding the verdict is filed within 10 days thereafter. The Appellant's attorney submitted post trial motions within that specific time frame. (See Post-trial Motions R.pp. 1-9)

Rule 50(e) SCACR Time for Motion; Appeal; End of Term. The motion for judgment n.o.v. shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter. The time for appeal for all parties shall be stayed by a timely motion for judgment n.o.v. and shall run from the receipt of written notice of entry of the order granting or denying such motion. The time within which to make the motion shall not be affected by the ending of a term of court or departure of the judge from the circuit, and the trial judge shall retain jurisdiction of the action for the purpose of hearing and disposing of such motion if not heard and disposed during the term. Except by consent of the parties, argument on the motion shall be heard in the circuit

where the trial was held. The motion may in the discretion of the court be determined on briefs filed by the parties without oral argument.

The Appellant's attorney filed a motion for judgment notwithstanding the verdict that was later denied. Therefore, the Appellant's arguments are preserved for review because they were ruled upon in the trial court, post-trial motions. During post-trial motions the Plaintiff's attorney argued that the jury verdict was inconsistent and arbitrary.^{1 2}

Another issue that was properly preserved for review and was ruled on during post trial proceedings was the fact that Miss Shabazz received a defense verdict contradictory to the evidence and inconsistent with the law applied to them. The Appellant also makes this point in her appellate brief. The Judge instructed the jurors that Miss Shabazz was entitled to loss of enjoyment of life and actual damages, including pain and suffering as well as loss of expenses because of the defense's negligence. (See Judges Instructions to the Jurors R.pp.69-73). The Appellant cited the case Boan vs Blackwell in the appellate briefs.

"An award for pain and suffering compensates the injured person for the physical discomfort and the emotional response to the sensation of pain caused by the injury itself. Separate damages are given by mental anguish where the evidence shows, for example, that the injured person suffered shock, fright, emotional upset and/or humiliation as the result of the defendants negligence. Boan V.S Blackwell 541S.E.2d 242 (2001).

The judge instructed the jury as to what Miss Shabazz was entitled to. Miss Shabazz submitted evidence that backed what the judge's instructions said about her being compensated for actual damages she sustained due to the defense's negligence. She submitted the evidence to

¹ "For the jury to award a defense verdict in a stipulated liability case with as much evidence of damages as was presented to this jury is contrary to reason and can only be explained by failure to understand the law as it was charged." (See Post-Trial Motions R.p3)

² "Verdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge should not be required to guess at what the jury sought to render." Daves v Cleary, 355 S.C. 216, 231, 584 S.E.2d 423, 430 (Ct. App. 2003)(quoting Prego v Hobart, 287.S.C.116,118,336 S.E.2d 725,726 (Ct.App.1985) Note: This is a Tort action. Respondent Laura E. Prego (a minor) and her father Respondent Joseph E. Prego, sued appellants Frederick James Hobart and FS Wholesale corporation seeking damages for injuries sustained when Hobart's automobile collided with the bicycle Laura was riding. The actions were consolidated for trial. The jury returned a verdict against Laura and her claim, and found for her father on his claim for her medical expenses. The trial court ordered new trials based on inconsistent verdicts. Hobert and FS appeal. The Court of Appeals affirmed in favor of Laura and her father.

the jury and in the record on appeal: This evidence showed that she was receiving treatments from all of her doctors for all of her primary injuries she complained about due to the May 8, 2012 accident, including treatments from her neurologist Dr. Ogburu. It also showed her visits to shoulder and knee specialist Dr. Nahagian. Yet the jury cut off Dr. Nahagian's medical bills dated May 6, 2013 (See Exhibit: 4 R.pp. 96-97) and the follow up appointment dated August 4, 2013 (See Exhibit 4 plan of care May 6, 2013) in addition to Dr. Ogburu's visits. What the jury chose to ignore would have answered the question as to whether Miss Shabazz's medical bills were related and the injuries she sustained were caused by the accident. Yet, Miss Shabazz received a defense verdict contradictory to the evidence and inconsistent with the law applied to them. Furthermore, the judge had already instructed the jurors that they were the sole finders of facts and no one else would be permitted to weigh the evidence and render a verdict. The Appellant's entire appeal addressed more than one instance of the jury verdict lacking impartiality in addition to the insurance question including the cutting of Miss Shabazz's medical bills following opposing counsel's demands to cut Miss Shabazz medical bills. In addition, deliberating on a verdict for less than 10 minutes after the judge instructed them to reconvene their deliberations shows that they did not have time to consider all of the evidence. This also constitutes bias and prejudice to the Plaintiff and stopped her from achieving a fair and impartial trial. The jury improperly considered factors other than Dr. Ogburu's testimony, other witness testimony, and evidence that was presented at trial. The Appellate cited in her briefs that the only remedy for a verdict infected by the improper considerations outside the scope of the evidence presented by the parties is a new trial. O'neal v Bowels, 314 S.C. 525, 431. Uncoincidentally the trial court ruled on the motions about the argument of the insurance question, without the considerations of

the circumstances surrounding the jury question, or the evidence of the jury's bias mentioned above. The post trial motion mentions that the jury had more than one instance of bias like the Appellate argues in her appeal. The appellate brief details what those instances are as mentioned above.^{3 4}

Another constitution of bias and prejudice towards the Plaintiff was opposing counsel's disparaging and damaging remarks about the Plaintiff. Remarks such as the jury's only job was to return Miss Shabazz to the state she was in prior to the accident, not to make her rich. The defense purposely provided false statements and misled the court on Miss Shabazz's impairment rating. This point covers the entire trial proceedings that Miss Shabazz was entitled to a fair and impartial trial.⁵ The defense asked the jurors to become personal partisans instead of impartial

³ The jury improperly considered insurance in their deliberations. Additionally and importantly, it is clear, based on the short amount of time before the foreperson sent out the note. That insurance and other matters outside the scope of the evidence were discussed at the commencement of or at least very early in the first, brief deliberation. The jury then, for the second time, disregarded the court's instruction, returning a verdict in less than (10) minutes following being instructed to re-commence deliberations. (Post-Trial Motions R.pp.4-5)

⁴ In spite of the Court's original and subsequent instructions, it is indisputable that the jury improperly considered factors other than the testimony and evidence that was presented in the trial and they did so twice. The only remedy for a verdict infected by improper considerations outside the scope of the evidence presented by the parties is a new trial. *O'neal v Bowels*, 314 S.C. 525, 431 (Post-Trial Motions R.pp.4-5)

⁵ Impartial Tribunal. Just as in criminal and quasi-criminal cases,⁷⁶² an impartial decision maker is an essential right in civil proceedings as well.⁷⁶³ "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."⁷⁶⁴ Thus, a showing of bias or of strong implications of bias was deemed made where a state optometry board, made up of only private practitioners, was proceeding against other licensed optometrists for unprofessional conduct because they were employed by corporations. Since success in the board's effort would redound to the personal benefit of private practitioners, the Court thought the interest of the board members to be sufficient to disqualify them.⁷⁶⁵ (Fourteenth Amendment procedural due process).

jurors infringing on Miss Shabazz's 14 amendment due process rights. The Civil Due Process, Criminal Due Process, Yale Law and Policy Review describes an impartial juror as:

"A neutral decision - maker, required by due process principles, is not simply a person without financial interest in the case, but more broadly a person who is not affiliated with, or biased in favor of or against, one side or the other. A decision - maker cannot act as both a party and a neutral, because those two roles are fundamentally incompatible." (procedural due process) [Civil Due Process/ Criminal Due Process]

Although the attorney is not directly under oath, they still have to follow the rules and the principles of professionalism and should never seek to mislead an opposing party, the judge or jury by a false statement of facts of law, which is why the Appellant cited the Attorney Oath Mandate Rule 402 (k) SCACR in her appellate briefs. The Respondent backtracks on their reply brief by acknowledging the Appellant's impairment rating falls from 1% to 13%, stating the impairment rating chart in its entirety provides ratings from 0% through 100%. However, there is no mention of 1% to 13 % mentioned anywhere in defense counsel closing remarks.(Page 6 Respondent's Reply brief).

"Dr Ogburu, the plaintiff's neurologist gave her a one percent impairment rating for her entire body. One percent on a scale of one to 100. For her upper extremity, he gave her an impairment rating of two percent, two percent on a scale of one to 100." [Opposing Counsel Closing Arguments, R.pp.65-66]

The Respondent then goes on to state: *The Respondents attorney never suggested or even implied that the impairment ratings were anything other than what the doctor said; she merely argued that those ratings were not sufficiently serious to warrant a significant damage in awards.*(Page 6 Respondent's Reply brief). The Appellant would like to point out that the Respondent's attorney did not bring any physician of her own to constitute that claim as to whether Miss Shabazz's injuries were not sufficiently serious to warrant a significant damage in awards. Therein lies the problem with the Respondent's entire brief. Its lack of evidence to support the claims that Miss

Shabazz's injuries are not related to the accident makes the Appellant's previous point that the jury improperly considered factors other than Dr. Ogburu's testimony, other witness testimony, and evidence that was presented at trial. The Respondent is relying on the fact that there was no objection at trial. By stating there was no objection does not give the Respondent a pass to knowingly provide false information to mislead a jury or to provide false statements on an appeal. The Respondent also argues that this argument is being raised on appeal for the first time.⁶

Nevertheless, Miss Shabazz was entitled to a fair and impartial trial and the opposing counsel's inflammatory remarks and demands affected the substantial rights of the Plaintiff Miss Shabazz. Affecting a party's substantial rights should be grounds for reversal of the trial court's decision to not grant Miss Shabazz a new trial.

Which leads into the Appellants point of seeking a remedy from the Court of Appeals. The verdict that was given was arbitrary and capricious and was based on passion and prejudice and something not found in the evidence. The Respondent did not present any evidence that all of Miss Shabazz's injuries were caused by something else unrelated to the May 8, 2012 accident. The abuse of discretion standard instead of the denovo standard has made it difficult for the Appellant to overcome and receive justice.⁷ ⁸The Appellant would like to ask the Court of

⁶ It should be noted that the supreme court has recognized a very few limited circumstances in which it will review issues raised for the first time on appeal. Cf. Toyota of Florence, Inc. v. Lynch, 314 S.C 257, 442 S.E.2d 611 (1994) (challenge to abhorrent and outrageous arguments raised for the first time on appeal. Holding the vicious and inflammatory use of racial prejudice in counsel's closing arguments resulted in clear prejudice such that the appellant was entitled to a new trial.)

⁷ De novo standard of review mixed questions of law and fact arises when historical facts are established , the rule of law is undisputed, and the issue is whether the facts satisfy the legal rule.

⁸ Upon hearing the appeal the appellate court shall give judgement according to the justice of the case, without regards to technical errors and defects which do not affect the merits. In giving judgement the court may affirm or reverse the judgement of the court below, in whole or in part, as to any or all parties and errors for errors of law or fact.S.C. Code Ann§18-70-170.

Appeals to do what the trial court was hesitant to do. Set aside the jury's verdict and give justice according to the case. The trial court only looked to see if there were laws made in error and did not consider errors in the facts or rather if the facts satisfy the legal ruling in the case.

The Appellant has proven that the trial court's findings were wholly unsupported by the evidence, and the conclusions reached were controlled by error of law. The Respondent even contended in their reply brief “ *Undoubtedly there were some things about this trial that another attorney (or even another judge, for that matter) might have handled in a different way.* (Reply Brief page 11). This makes the Appellant point about her case.

Conclusion

Contrary to the Respondent's belief that Miss Shabazz was adequately compensated, the Respondent failed to acknowledge that prior to Miss Shabazz's accident, she was a healthy 19 year old female with no prior illnesses or cervical spasms, sprains or strains in the neck, shoulder, back, or head. Miss Shabazz's neurologist Dr. Ogburu diagnosed her with having musculoskeletal- type headache proximate to cervical spasms, neck pain and strain. Musculoskeletal- type headache is a reflexive headache stemmed from Miss Shabazz's injuries. This is why Dr. Ogburu gave her an impairment rating for her entire body and not one for headaches. The permanent disability rating she received can only be given once in a person's lifetime. Miss Shabazz and her mother have been paying out of pocket for Miss Shabazz's treatments since her May 8, 2012 accident. Miss Rodriguez paid nothing. Miss Shabazz, along with her mother's financial assistance, has been having to go to work and go to school, and pay for her own treatments. Fast forward seven years later she is still footing the bill for an accident she did not cause. Miss Shabazz still goes to the chiropractor, the acupuncturist, and doctors still

seeking treatment to relieve her pain. There is no such thing as being adequately compensated, especially when Miss Shabazz's medical bills have been cut, she is receiving no money for future treatments, and she is paying all of her medical expenses out of pocket. This is not the Appellant airing out grievances but addressing the consequences of a jury who did not take time to read and consider the facts. Once again the Appellant respectfully asks the Court of Appeals to set aside the trial court's decision, reverse and remand the Appellant's case, and modify the jury verdict to cover past, present, and future expenses. The Appellants sole purpose of this appeal was to establish weight with justice and not fall short in the balance of pursuing said justice.

March 9, 2020

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Taliah K. Shabazz', written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Casey L. Manning, Circuit Court Judge

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Appellate Case No. 2016-002268

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Taliah K. Shabazz

Appellant,

v.

Bertha Rodriguez,

Respondant

PROOF OF SERVICE

I certify that I have served the petition for a rehearing response, to Ms. Rodriguez's attorney of record, Allyce Bailey, Post Office Box 1473, Columbia South Carolina 29202, by depositing said materials in the United States Mail, postage prepaid, on March 9, 2020.

March 9, 2020

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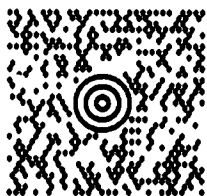
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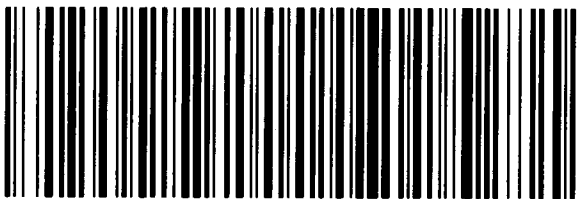
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