THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

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Jul 27 2020
SC Court of Appeals

Case No. 2018-CP-32-02102

Court of Appeals Case No. 2020-000638

Gerald Nelson, Appellant,

v.

Christopher S. Harris and Charles L. Baughman, Sr. d/b/a K&B Towing, LLC Respondents.

INITIAL BRIEF OF APPELLANT

Melissa G. Mosier, Esquire
Amanda N. Pittman, Esquire
MCWHIRTER, BELLINGER, & ASSOCIATES, P.A.
119 East Main Street
Lexington, South Carolina 29072
(803) 359-5523 Phone
(803) 359-1248 Fax
melissam@mcwhirterlaw.com
amanda@mcwhirterlaw.com
and
Matthew B. Rosbrugh
MBR Law, LLC
Post Office Box 292290
Columbia, South Carolina 29229
Telephone: 803-753-1432
Email: matt@mbrlawllc.com
Attorneys for Appellant

July 27, 2020

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II. **Whether The Circuit Court Committed Reversible Error In Failing To Grant Appellant's Motion For New Trial Absolute Or *Nisi Additur* Where The Verdict, Combined With The Jury's Question During Deliberations And Other Factors, Was Sufficiently Inadequate To Demonstrate The Jury's Improper Considerations**

STATEMENT OF THE CASE

This matter was originally filed by the Appellant in the Lexington County Court of Common Pleas on June 19, 2018. The Complaint alleged causes of action for negligence against Respondents Harris and K&B Towing related to a vehicle collision occurring on January 28, 2016. Defendants filed a timely Answer on July 20, 2018.

On January 4, 2019 Respondents filed an offer of judgment in the amount of $30,000.00. *See* Offer of Judgment dated January 4, 2019; Order, April 1, 2020

This matter was tried before a jury by the Honorable Donald B. Hocker beginning on January 21, 2020 and continuing until January 24, 2020. Transcript, p.1. Appellant testified that he incurred $8,008.58 in medical bills as well as eleven to twelve thousand dollars in lost wages. Tr. p.86, ln 2-18, p. 87, ln 10-12, Plaintiff's Ex. 9. During jury deliberations on January 24, 2020, the jurors sent a note to the Court asking "what insurance has paid for / from both parties." Transcript p.295, ln 18-25, Court's Ex. 7. The Court previously declined Appellant's request to charge the jury on insurance and denied Appellant's renewed request in light of the jury's question. Transcript p.295, ln 25, p.296, ln 1-10. Court's Ex. 6 & 7. After refusing Appellant's request, the Court sent a note back to the jury stating "you are to consider only the evidence presented during this trial. Judge." Transcript p.296, ln 7-10, Court's Ex. 7.

The jury subsequently returned a verdict for Appellant in the amount of $18,500 in actual damages. Transcript p.297, ln 17-20, Verdict Form. Appellant requested and received ten days to file post-trial motions which was granted by the Court. Concomitantly, the Respondent requested time to address their offer of judgment to Appellant. Both requests were granted by the Court. Transcript p.299, ln 23-25, p.300, ln 1-18.

Appellant filed a timely Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute on January 27, 2020. *See* Motion, January 27, 2020. The jury's verdict was entered on January 30, 2020. *See* Verdict. The Court sent an email to the parties on March 12, 2020 indicating its intent to deny Appellant's January 27, 2020 motion. However, no order was entered. On April 1, 2020 the Court entered an Order granting Respondent a reduction in the verdict based on an offer of judgment made by Respondent on January 4, 2019. *See* Order, April 01, 2020. Appellant filed his initial notice of appeal on April 13, 2020. *See* Notice of Appeal April 13, 2020. On April 28, 2020 the Court entered an order denying Appellant's Notice of Motion and Motion for New Trial *Nisi Additur* or New Trial Absolute.[1] *See* Order, April 28, 2020. On or about May 1, 2020, Appellant filed a copy of the Order as a part of his Notice of Appeal.

Appellant received a copy of the transcript of the trial on May 12, 2020. Appellant filed a motion to extend time to file his initial brief and designation of matter on June 8, 2020. This Court subsequently issued an Order on June 22, 2020 enlarging Appellant's time until July 13, 2020. The Court granted Appellant's second motion to enlarge on July 13, 2020 extending the deadline for Appellant's initial brief to July 28, 2020.

[1] No argument was heard by the Court on this motion. Instead it was decided based on the briefs submitted by the Appellant and Respondents.

FACTUAL BACKGROUND

This matter is a negligence case related to a motor vehicle collision occurring on January 28, 2016 in Lexington County, South Carolina. Tr. p.70, ln 6-9, p.71, ln 1-3. It is undisputed that Respondent Harris drove on Platt Springs Road while operating an 11,000 pound rollback tow truck owned by Respondent K&B Towing, LLC. Tr. p.133, ln 3-9. It is undisputed that Appellant was stopped in traffic on Platt Springs Road when Respondent failed to stop and ran into Appellant pushing his vehicle into the vehicle in front of him, causing that vehicle to collide with the vehicle in front of it. Tr. p.72-3, p.74, ln 6-22. Appellant was transported from the scene of the collision by ambulance. Tr. p.80, ln 3-15, p. 110, ln 18-23.

The day after the collision Appellant began treatment with his primary care physician, Dr. Cory Hunt. Tr. p.80, ln 16-25, p. 81, p.124, ln 19-20. Appellant treated with Hunt and engaged in physical therapy. Tr. p.82, ln 10-25, pp.83-85. Appellant testified that he incurred $8,008.58 in medical bills as well as eleven to twelve thousand dollars in lost wages. Tr. p.86, ln 2-18, p. 87, ln 10-12, Plaintiff's Ex. 9. Appellant further testified regarding the impact the collision had on his ability to work both prior to trial and into the future. Tr. p.87, ln 13-20. Appellant testified that he missed 51 to 52 workdays as a result of the collision. Tr. p.87, 7-9. Appellant further testified that when he returned to work, he was unable to be as productive as he was prior to the injury. Tr. p.87, ln 13-20. Appellant also provided testimony that he was unable to enjoy activities he enjoyed prior to collision due to pain and discomfort he now experiences. Tr. p.87, ln 21-25, pp.88-89. Appellant's mother also provided testimony regarding her observations of the collision's impact on Appellant, including seeing him in the hospital and having to assist him with household chores. Tr. p.114, ln 15-22. p.115, ln 8-25, p.116, pp.117-18.

Appellant's treating physician, Dr. Corey Hunt also testified in the case via video deposition. Tr. p.124, ln 11-20. Dr. Hunt's testimony elaborated on Appellant's complaints and his diagnosis and treatment. Dr. Hunt testified that he examined Appellant and ordered him out of work. Depo Tr. p.7, ln 19-25, p.8, p.9, ln 10-12. Dr. Hunt kept Appellant out of work due to his examination and diagnosis of Appellant. Depo Tr. p.10, ln 8-22. Dr. Hunt released Appellant to return to work at Appellant's request, but Appellant was unable to stay at work. Depo Tr. p.11, ln 1-12. p.12, ln 5-8. Dr. Hunt ordered an MRI for Appellant's continued back pain. Depo Tr. p.13, ln 20-23. Dr. Hunt then referred Appellant for physical therapy treatment. Depo Tr. p.14, ln 2-25. Dr. Hunt testified that the ten weeks Appellant was out of work was reasonable and necessary based on his diagnosis and treatment. Depo Tr. p.15. Dr. Hunt also attested that within a reasonable degree of medical certainty the "wreck was the triggering event for [Appellant's] back condition. Depo Tr. p.16, ln 11-16. Dr. Hunt also testified that "the wreck caused [Appellant] to become symptomatic, to start having pain in his back." Depo Tr. p.29, ln 5-10.

Appellant testified that he wanted to receive additional treatment from a neurologist but was unable to afford the required up-front payment to begin the treatment. Tr. p.89, ln 16-25, p.90, ln 8-10.

STANDARD OF REVIEW

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." *State v. Marin*, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (S.C. 2016), quoting *State v. Mattison*, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (S.C. 2010). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 197, 781 S.E.2d 534, 542 (S.C. 2015).

"The trial court has sound discretion when addressing questions of excessiveness or inadequacy of verdicts, and its decision will not be disturbed absent an abuse of discretion." *Toole v. Toole,* 260 S.C. 235, 239, 195 S.E.2d 389, 390 (1973). In granting or denying motions for new trial absolute and new trial *nisi additur* the "exercise of such discretion, however, is not absolute and it is the duty of this Court in a proper case to review and determine whether there has been an abuse of discretion amounting to an error of law." *Sullivan v. Davis*, 317 S.C. 462, 467, 454 S.E.2d 907, 911 (Ct. App. 1994).

ARGUMENTS

I. **The Circuit Court Committed Reversible Error Where It Initially Failed To Specifically Charge The Jury Regarding Their Obligation To Disregard The Existence Of Liability Insurance And Again When The Court Refused To Specifically Charge The Jury Regarding Their Obligation To Disregard Insurance When The Question Was Raised During Deliberations.**

In this negligence action, the Court conducted a chambers charge conference prior to charging the jury. During that charging conference the parties submitted proposed requests to charge to the Court for consideration in supplementation of the Court's standard charges. One of the Appellant's requests to charge forbid discussion or deliberation concerning the existence of, or payments made by, any policies of insurance. *See* Court's Ex 6, Appellant's Request to Charge "Forbidding the consideration of insurance coverage (or Judge Anderson's 13-20)." The proposed charge guided the jury by forbidding consideration of health insurance, disability insurance, property damage insurance and liability insurance during jury deliberations. During the conference the Circuit Court refused to utilize the charge and noted this decision on the record when the parties returned to the courtroom. Tr. p.251, ln. 14-25, Court's Ex. 6. The Court again refused to specifically charge the jury that it was prohibited from considering insurance when asked during jury deliberations "what insurance has paid for / from both parties". Tr. p.295, ln 20-25, p.296, ln. 1-10, Court's Ex. 7. At that time, Appellant renewed his request that the Court specifically instruct the jury regarding the jury's duty to disregard insurance. *Id.* The Court again refused to make a specific charge to the jury on the impropriety of considering insurance in reaching a verdict. *Id.*

The Circuit Court committed reversible error when it refused to charge the jury on South Carolina law prohibiting consideration of liability or other insurance during its deliberations. The Circuit Court's refusal to charge the jury on its obligation to disregard insurance resulted in legal

prejudice to the Appellant and constitutes an abuse of discretion by the Court. The Circuit Court repeated this reversible error when it failed to provide the jury with specific instruction to disregard insurance after it became apparent that the jury was discussing insurance during deliberations.

A. Refusal to charge the jury on applicable law during initial instructions was error

South Carolina "courts have consistently held the existence and contents of a defendant's liability insurance policy may not be disclosed to the jury." *Landry v. Hilton Head Plant. Property Owners Ass'n, Inc.*, 317 S.C. 200, 206, 452 S.E.2d 619, 622 (Ct. App. 1994), citing *Dunn v. Charleston Coca-Cola Bottling Co.*, 426 S.E.2d 756 (1993), *Norris v. Ferre,* 432 S.E.2d 491 Ct.App. 1993). In *Landry* the Court held "the trial court did not err in excluding the liability insurance clause because, even if the clause was relevant to the question of duty, the prejudicial effect of its admission would have far outweighed any possible probative value that it might have had." *Landry*, at 206, 622.

"The trial judge is required to charge the current and correct law." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612 (Ct. App. 2000). "[A] trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." *Brown v. Smalls*, 325 S.C. 547, 554, 481 S.E.2d 444, 448 (Ct. App. 1997). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error. *Id.* "[W]hen general instructions to the jury are insufficient to enable the jury to understand fully the law of the case and issues involved, a refusal to give a requested charge is reversible error." *Id.* at 555, 448-49, citing *Jones v. Ridgely Communications, Inc.*, 304 S.C. 452, 405 S.E.2d 402 (1991); *Burns v. South Carolina Comm'n for the Blind*, 323 S.C. 77, 448 S.E.2d 589 (Ct. App.

1994) ("If the requested charge states a sound principle of law that is applicable to the case, and not otherwise covered by the charge, refusal to charge it is error and requires a new trial.").

Jury charges are necessary to guide the jury during their deliberations in regard to the state of the law in South Carolina. Tr. p.280, ln 22-25, p.281, ln 1-4. *Pantovich v. State*, 427 S.C. 555, 832 S.E.2d 596 (2019) ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); S.C. Const. art. V, § 21; *Stephens v. CSX Transp., Inc.*, *supra*.

In the instant case, Appellant made a timely request to charge the jury forbidding consideration of the issue of insurance coverage during jury deliberations. Tr. p.251, ln 13-25; Court's Ex. 6. Despite this request the trial court refused to instruct the jury on Appellant's proposed request to charge regarding insurance. The record further demonstrates that Appellant's request to charge was timely made to the trial judge during the charging conference. The Court even made the request an exhibit to the record. *See* Court's Ex. 6. The Circuit Court's general instructions of law failed to cure or in any way redress the jury's improper consideration of insurance during its deliberations.

In conclusion, the Circuit Court committed reversible error by failing to specifically charge the jury regarding their obligation to ignore insurance during their deliberations. The Court's refusal to charge the jury regarding the applicable law was an abuse of discretion and substantially prejudiced Appellant requiring remand of this case for retrial.

B. After receiving the Jury's question regarding the amounts paid by insurance, the Circuit Court erred again when it failed to unequivocally prohibit the jury from discussing or considering the existence of insurance during deliberations

During deliberations the jury sent a note to the Court asking "what insurance has paid for /

from both parties." Tr. p. 295, ln 18-25, p. 296, ln1-10, Court's Ex. 7. Instead of providing a specific instruction to guide the jurors on the law of South Carolina as it relates to the issue of insurance in this negligence action, the Court committed reversible error by providing an unclear, generic written response to the question for the jurors to "consider only the evidence presented during this trial." Tr. p. 296, ln 6-10, Court's Ex. 7. The Court's response failed in any way to remedy the jury's improper consideration of insurance in reaching its verdict and failed to provide guidance to the jury's specific question. As such, the Court abused its discretion and must be reversed.

Sullivan v. Davis, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995), is highly instructive in regard to how a trial court should respond to a question from the jury regarding insurance. The *Sullivan* jury inquired about "what medical expenses incurred by Mr. Sullivan that have not been paid and which are not covered under existing insurance." *Id.*, at 466, 910. The Court of Appeals noted that the record failed to set forth the specific response but that they "assume[d] the court correctly advised the jury it should not consider insurance in its deliberations." *Sullivan,* at 466, 910. *Sullivan* also cited to *Norris v. Ferre*, 432 S.E.2d 491, 493 (Ct. App. 1993), cert. denied, (Mar. 4, 1994), for the proposition that "the Supreme Court has been meticulous in keeping the issue of insurance coverage away from the jury." The Court of Appeals presumed precise instruction to not consider insurance in deliberations is in direct contrast to the vague response provided in the case at bar.

"Great care should be exercised in the 'delicate, difficult and important matter' of instructing the jury to disregard incompetent evidence. The jury should be specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations. A mere

general remark excluding the evidence does not cure the error." *State v. White*, 371 S.C. 439, 639 S.E.2d 160, 163 (Ct. App. 2006), quoting *State v. Smith*, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (S.C. 1986).

The transcript in this matter demonstrates that the parties and the Court recognized the hazards implicit in the issue of liability insurance and South Carolina's long-standing prohibition on testimony or evidence regarding the introduction of insurance except in very limited circumstances. Tr. p.48-53, p.54, ln 1-15. In fact, Respondents strenuously argued against the introduction of evidence regarding the purported background investigation of Respondent Harris prior to his hiring by Respondent K&B. Tr. p.49, ln 18-25, p.50-51.[2] The Circuit Court refused to allow any testimony regarding the word insurance regarding Respondent K&B's driver screening due to the potential prejudice to the Respondent. Tr. p.127, ln 18-24, p.200, ln 5-13.

However, during the trial, Respondent Baughman made specific mention of insurance in his testimony when he was being examined regarding special training. Respondent Baughman's answer was not specifically responsive to the question posed. Appellant's counsel asked Respondent Baughman:

> Q. Do you know if just anyone off the street can operate a tow truck that is as large as yours without any special training?
>
> A. Not without training. There's not an insurance corporation no where that would touch them. You cannot insure them.

[2] Respondent's counsel called evidence of insurance "purely prejudicial". Tr. p.50, ln 24-25.

Transcript, p.168, ln 19-24.

No mention of this testimony was noted by the parties or the Court. However, it is now apparent, particularly in light of the jury's question during deliberations, that this impermissible testimony resulted in prejudice to the Appellant as a result of the Court's refusal to issue a specific instruction to the jury. The jury asked a specific question about what insurance had paid for or to the parties. Tr. p.295, ln 18-25, Court's Ex. 7. Rather than provide a specific response to the jury's specific question, the Court provided an ambiguous and generic instruction to only consider the evidence in the case. Court's Ex. 7. Such a generic answer to a very specific question failed to provide the jury with the necessary guidance on the law in South Carolina and resulted in the jury considering and relying on impermissible grounds. This failure by the Circuit Court amounted to an abuse of discretion that prejudiced Appellant thereby requiring the case be remanded for retrial.

The Circuit Court's Order denying Appellant's motion for new trial and motion for *nisi additur* is also in error as it states as a basis for its ruling that "the jury never received evidence of liability insurance during trial, and when the jury presented this Court with a question regarding liability insurance, this Court correctly instructed the jury to only consider the evidence presented during trial." *See* Order, April 28, 2020, p.4. And as further set forth below, the Court's Order focuses on liability insurance, and omits the very real possibility that the jury considered payments by health, disability, and/or property damage insurance– all of which were addressed in Appellant's proposed jury charge.

The failure to specifically charge the jury on its obligation to disregard the issue of insurance was an abuse of discretion by the trial court and resulted in prejudice to the Appellant as evidenced both by the question asked during deliberations as well as the inadequacy of the verdict in light of

the evidence presented during trial.

II. **The Circuit Court Committed Reversible Error By Failing To Grant Appellant's Motion For New Trial Absolute Or *Nisi Additur* Where The Verdict, Combined With Its Question During Deliberations And Other Factors, Was Sufficiently Inadequate To Demonstrate The Jury's Improper Considerations.**

The Court's Order entered April 28, 2020 denying Appellant's Motion for New Trial should be reversed in light of the abuse of discretion and the substantial prejudice to Appellant.

"[A] verdict may properly be said to be capricious if it is against the overwhelming weight of the evidence." *Toole v. Toole*, 260 S.C. 235, 195 S.E.2d 389, 391 (S.C. 1973), quoting *Watson v. Paschall*, 100 S.C. 281, 84 S.E. 531, 532 (S.C. 1915) and citing *Nelson v. Charleston & W.C.R. Co.*, 231 S.C. 351, 98 S.E.2d 798 (S.C. 1957). The *Toole* court further noted that "a verdict is capricious when it is without any rational basis in the evidence and / or the instructions of the court." *Id.* "[T]he phrase 'passion and prejudice' does not necessarily imply bad faith, wrongful purpose or moral delinquency." *Nelson v. Charleston & W.C.R. Co.*, 231 S.C. 351, 362, 98 S.E.2d 798 (S.C. 1957), quoting *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 P. 513 Ca.Sup.Ct. 1911).

The Court's April 28, 2020 Order erroneously states that "[t]he jury *never received evidence of liability insurance during trial,* and when the jury presented this Court with a question regarding liability insurance, this Court correctly instructed the jury to only consider the evidence presented during trial." (emphasis added) It must also be pointed out that the Court's Order only addresses liability insurance, and omits that the jury could have been considering health insurance, disability insurance or any other types of insurance when consider the amount to award in its verdict. As discussed in detail herein, the Court's vague response to the jury who came to the Court for

guidance on a specific issue critical to the question of damages constituted reversible error on the part of the Circuit Court.

As noted *ante* at I (B), when asked about **training** for operating a tow truck of the size involved in the collision, Respondent Baughman discussed the insurability of a driver who lacked training. (emphasis added). This was not responsive to the question asked by Appellant's counsel. When the jury subsequently asked a specific question during their deliberations regarding insurance payments, the Court committed reversible error by not providing a **specific** curative instruction. The Court compounded the error when it denied Appellant's post-trial motion for a new trial *Nisi Additur* or new trial absolute.

"When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, prejudice, **or some other improper motive.**" (emphasis added) *Dillon v. Frazier*, 383 S.C. 59, 678 S.E.2d 251, 253 (2009), citing *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). A failure to consider pain and suffering in reaching a verdict can sustain a motion for new trial *nisi additur*. *Waring v. Johnson*, 533 S.E.2d 906, 341 S.C. 248 (Ct. App. 2000).

In *Dillon, supra*, the Supreme Court was faced with similar facts as the case at bar. The case involved a vehicular collision negligence claim with testimony regarding medical bills, lost wages, future earnings, and physical therapy. During the jury's deliberations, they asked the trial court "... (2) whether Dillon received any compensation while he was not working during the ten weeks after the accident; and (3) whether medical bills for the accident were paid for, and if so, by whom." *Dillon*, at 253. "The trial judge responded that those matters 'are not for your concern.'"

Id. However, the *Dillon* trial court granted the *additur* to the plaintiff's verdict increasing the award three and one half times from six thousand dollars to twenty-one thousand dollars.

In the appeal, the Supreme Court analyzed the matter by considering the questions asked during trial by the jury regarding whether Dillon received any compensation from any other sources with the award. The trial court responded that those matters were not for the jury's consideration. The Supreme Court found that "the jury's verdict demonstrates that the jury failed to follow the court's instruction." While the *Dillon* jury verdict was one-fifth of the undisputed damages, the Supreme Court found that even with the *additur,* the trial court's failure to grant a new trial absolute was an abuse of discretion. The *Dillon* Court reversed the trial court's denial of the plaintiff's motion for new trial absolute and remanded for a damages trial only.

The *Dillon* opinion also discussed *Sullivan v. Davis*, 317 S.C. 462, 454 S.E.2d 907 (Ct. App. 1995). In *Sullivan*, the Court was faced with a vehicular negligence case for a direct action by a passenger and his wife in a loss of consortium claim. During the course of deliberations, the jury asked for "information pertaining to what medical expenses incurred by Mr. Sullivan that have not been paid and which are not covered under existing insurance." *Sullivan*, at 466. The opinion notes that the specific response by the trial court is not contained within the record but the Court of Appeals presumed its response was to advise the jury "it should not consider insurance in its deliberations." *Id.* at 466, 910. The Court of Appeals' assumed instruction is far more instructive than the response actually provided to the jury by the Circuit Court in the case at bar.

Despite this presumed direct instruction, the jury returned a verdict of twenty-thousand dollars on the direct negligence action, which was equal to Medicare's allowed charges. The trial court granted the plaintiff's request for an *additur* and more than doubled the direct negligence

award to $44,022.38.[3] Even with the *additur* by the trial court, the *Sullivan* Court found the trial court committed reversible error by failing to grant a new trial absolute because the amount of the verdict indicated, as in *Kalchthaler v. Workman*, 450 S.E.2d 621 (Ct. App. 1994), that the jury's verdict indicated "passion, caprice, prejudice, or some other influence outside the evidence" as motive for its verdict.

Waring v. Johnson, 341 S.C. 248, 533 S.E.2d 906 (Ct. App. 2000), is also instructive in this case. In *Waring,* the Court rejected the defendant's argument that the trial court erred in granting *additur* upon the plaintiff's motion. The trial court's order stated that while the verdict was

> not so grossly inadequate so as to shock the conscience of the Court nor to indicate that the jury was motivated by passion, caprice or prejudice. Rather the verdict is merely inadequate because it fails to compensate [Waring] for all of her damages. Since the verdict was for the exact amount of the medical bills it is clear that the jury believed the medical treatment to be reasonable and necessary. The jury failed to make any award for other damages such as pain and suffering.

Waring, at 255-56

In making this finding, the *Waring* trial court nearly tripled the jury's verdict from $23,237.28 to $63,237.28. *Id.*

The Court of Appeals opinion found "the trial court did not err in granting a new trial *nisi additur*. The jury failed to consider Waring's pain and suffering in reaching its verdict." *Waring*, at 260. The Court of Appeals further rejected the defendant's argument the "verdict may have been intended to represent a portion of Waring's medical expenses, plus pain and suffering," *Id.*

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[3] This was "the amount of Medicare's allowed charges." *Sullivan,* at 466, 910.

The Court also rejected defendant's argument that the jury may have concluded the pain and suffering arose from a pre-existing condition finding instead that "[e]ven if the greatest portion of Waring's pain was caused by her pre-existing conditions, resulting in pain where there previously had been none." *Id.*, citing *Raino v. Goodyear Tire & Rubber Co.*, 309 S.C. 255, 259, 422 S.E.2d 98, 100 (1992) ("The defendant takes the plaintiff as he is found and the plaintiff is entitled to recover damages resulting from the aggravation of a pre-existing condition.").

In the case at bar, the trial court likewise abused its discretion in denying both the Appellant's motion for new trial absolute and motion for *nisi additur*. The evidence in the case demonstrated the Appellant experienced a substantial injury and incurred damages in the form of medical bills, lost wages, diminution of his quality of life, as well as pain and suffering. Appellant's uncontested evidence at trial also demonstrated medical bills and lost wages in excess of the jury's verdict. The jury's question regarding insurance was a clear indication they impermissibly considered insurance as a factor in awarding damages to the Appellant. The award, while close to arriving at Appellant's incurred medical expenses and lost wages, flatly failed to address Appellant's evidence of pain and suffering, future impairment, and diminution of his quality of life. Similar to a case where the trial court granted a *nisi additur* to approximate the damages, Appellant in this case is entitled to a new trial absolute based on the improper consideration of insurance by the jury.

Another indication of the inadequacy of the jury's award is found in the Respondents' offer of judgment. Respondents filed an offer of judgment with the Court on January 4, 2019. *See* Respondent's Motion for Costs and Reduction of Jury Verdict Persuant(sic) to Offer of Judgement(sic) Rule: S.C. Code Ann. §15-35-400(B) and Rule 68, *SCRCP* filed January 30, 2020.

In that offer of judgment, Respondents offered Appellant thirty thousand dollars ($30,000.00) to resolve the case. *Id.* The trial court went on to reduce Appellant's award by two thousand six hundred forty-four dollars and nine cents ($2,644.09) using the figure offered by Respondents. *See* Order entered April 01, 2020. The significant difference between the jury's award and Respondents' own offer of judgment further demonstrates the jury's verdict was inadequate and that the jury improperly considered insurance in its deliberations.

Evidence of the jury's impermissible consideration of insurance is also found in the timing of the deliberations. The jury was charged with the law by the Court and sent to deliberate at approximately 12:37 p.m. Tr. p.295, ln 16-17. The jury sent the question regarding insurance to the Court at approximately 1:30 p.m. Tr. p. 295, ln 18-21, Court's Ex. 7. While the transcript fails to state the specific time the note was sent back to the jury, the jurors entered the courtroom with the verdict at 2:03 p.m. Tr. p. 297, ln 1-2. The scant amount of time from the return of the note to the jury's return with a verdict is additional evidence that the jury failed to conduct any deliberative process following the Court's ambiguous response. The jury failed to understand that it was not to consider insurance in its deliberations, thereby prejudicing the Appellant.

It is also important to note that in each of the cases cited herein, the respective juries asked the trial court a similar question about insurance during deliberations. Despite the trial court's *additur* in those cases, the appellate courts found that, even with the *additur* and a specific response to the jury not to consider insurance, the appellants were entitled to new trials. In this matter, the Circuit Court failed to grant an Appellant's motion for *additur* and refused to increase the verdict in any amount. The trial court's refusal to consider the insurance question as evidence the jury made its award on matters outside of the record, or that should have been outside the record,

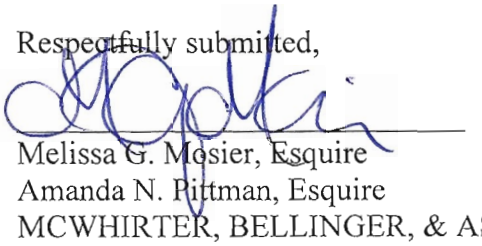
demonstrates an abuse of discretion warranting remand for a new trial absolute.

The record in this matter demonstrates the Circuit Court abused its discretion in failing to grant Appellant's motions for new trial absolute and for *nisi additur*. Therefore, the Circuit Court should be reversed and the Appellant is entitled to a new trial absolute on the issue of damages.

CONCLUSION

The record in this matter demonstrates Appellant is entitled to a new trial absolute based upon the trial court's abuse of discretion in not specifically charging the jury on insurance at the initial charging stage or in response to the specific insurance question and where the evidence demonstrates the jury's verdict failed to address the other elements of damages including pain and suffering.

Respectfully submitted,



Melissa G. Mosier, Esquire
Amanda N. Pittman, Esquire
MCWHIRTER, BELLINGER, & ASSOCIATES, P.A.
119 East Main Street
Lexington, South Carolina 29072
(803) 359-5523 Phone
(803) 359-1248 Fax
melissam@mcwhirterlaw.com
amanda@mcwhirterlaw.com

and

Matthew B. Rosbrugh
MBR Law, LLC
Post Office Box 292290
Columbia, South Carolina 29229
Telephone: 803-753-1432
Email: matt@mbrlawllc.com

July 27, 2020

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Jul 27 2020
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Donald B. Hocker, Circuit Court Judge

Case No. 2018-CP-32-02102

Gerald Nelson, Appellant,

v.

Christopher S. Harris and Charles L. Baughman, Sr. d/b/a K&B Towing, LLC, Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Appellant's Designation of Matter to be Included in the Record on Appeal on Respondents, Christopher S. Harris and Charles L. Baughman,Sr., d/b/a K&B Towing, LLC by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2020 addressed to Respondents' attorneys of record:

John M. Grantland, Rogers E. Harrell, III, Wesley B. Sawyer and Sarah Caiello
MURPHY AND GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260

Melissa G. Mosier, Esquire
Amanda N. Pittman, Esquire
MCWHIRTER BELLINGER & ASSOCIATES PA
119 East Main Street
Lexington, South Carolina 29072
(803) 359-5523 Phone (803) 359-1248 Fax
Melissam@mcwhirterlaw.com
Amanda@mcwhirterlaw.com
Attorneys for Appellant

LAW OFFICES
MCWHIRTER, BELLINGER & ASSOCIATES, P.A.
119 EAST MAIN STREET,
LEXINGTON, SOUTH CAROLINA 29072
(803) 359-5523
FAX (803) 359-1248
mail@mcwhirterlaw.com

H. PATTERSON McWHIRTER
THOMAS P. BELLINGER
GARLAND P. McWHIRTER
STACEY TARTE MEYER
MELISSA G. MOSIER
JOSEPH R. DASTA
L. LISA McPHERSON
ELIZABETH McMAHON PENTZ

RICHARD W. SIMMONS, II
JOHN P. MEADORS
AMANDA N. PITTMAN
CHRISTOPHER M. CUNNINGHAM
MADELYN E. DUKES
EMMA B. TAYLOR
ANGELA J. JOHNSON

July 27, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Gerald Nelson v. Christopher S. Harris and Charles L. Baughman, Sr., d/b/a K&B Towing, LLC
Appellate Case No: 2020-000638

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Initial Brief, Designation of Matter and Proof of Service. Please return a clocked copy to my office via email to my paralegal, jo.boyd@mcwhirterlaw.com .

Sincerely,

Melissa G. Mosier

Melissa G. Mosier

MGM/jsb
cc: Rogers E. Harrell, III, Esq.
Sarah Caiello, Esq.
Wesley Sawyer, Esq.
Post Office Box 6648
Columbia, South Carolina 29260
Attorneys for Respondents