THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
The Honorable Grace Gilchrist Knie, Circuit Court Judge

Civil Action No. 2017-CP-42-03523
Appellate Case No.: 2020-000203

Shannon P. Green
and Darrell Russell

Appellant-Respondent,

v.

Edward C. McGee
and David Hudgins

Respondent,
Respondent-Appellant

FINAL BRIEF OF RESPONDENT PROGRESSIVE DIRECT INSURANCE COMPANY, AS UIM CARRIER

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II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about November 19, 2015 in Spartanburg, South Carolina. Appellant, Shannon Green, was traveling on Simuel Road when Respondent, Edward McGee, collided with her vehicle. [R. pp. 0010-0012]. Just prior to the collision, Respondent-Appellant, David Hudgins, had been driving too fast for conditions behind Mr. McGee, which ultimately resulted in Mr. McGee and Ms. Green colliding. [R. p. 0329, Lines 20-25]. On September 27, 2017, Ms. Green, along with Darrell Russell, her husband, filed the subject lawsuit for alleged injuries sustained in the accident. [R. pp. 0010-0012].

Prior to the filing of the lawsuit, Ms. Green settled with Mr. McGee and his liability insurer, Nationwide Insurance Company ("Nationwide"), for $100,000.00 and executed a Covenant Not to Execute. [R. pp. 0460-0462]. Ms. Green's husband, Darrell Russell, also executed a separate Covenant Not to Enforce Judgment against Mr. McGee for a settlement of two thousand five hundred dollars ($2,500.00). [R. pp. 0457-0459]. Importantly, this separate covenant with Mr. Russell was for "any and all claims, demands, damages, costs, or expenses, including, but not limited to, any medical or hospital expenses, loss of services, actions and cause of action, arising from any act, omission, or occurrence, resulting or to result from the above-referenced accident." Id. Mr. Hudgins filed his Answer to the Complaint on December 12, 2017, and denied the allegations of negligence. [R. pp. 0013-0018]. In effort to pursue underinsured motorist benefits ("UIM") under her own insurance policy, Ms. Green served Progressive Direct Insurance Company ("Progressive"), who timely answered on May 30, 2018. [R. pp. 0019-0025].

This matter was tried before a jury in Spartanburg County on October 14-16, 2019, with the Honorable Grace Gilchrist Knie presiding. Following the conclusion of the testimony, argument, and charge, the jury found Mr. Hudgins and Mr. McGee were negligent, and the proximate cause of the injuries sustained by the Plaintiffs in the subject motor vehicle accident.

[R.pp. 0006-0009]. The jury found that Mr. McGee was sixty percent (60%) at fault and Mr. Hudgins was forty percent (40%) at fault. Id. The jury returned a verdict for Ms. Green in the amount of $88,546.78 in actual damages. The jury further awarded $35,000.00 in punitive damages against Mr. McGee and $35,000.00 in punitive damages against Mr. Hudgins. Id. The jury further found that Mr. Russell was not entitled to any damages for his loss of consortium claim. Id.

Ms. Green and Mr. Hudgins, through their respective counsel, timely filed post-trial motions. On October 25, 2019, Ms. Green filed a Motion for New Trial *Nisi Additur* or in the alternative, a Motion for a New Trial Absolute. [R. p. 0026]. That same day, Mr. Hudgins filed a Motion for Judgment Notwithstanding the Verdict ("JNOV") pursuant to Rule 50(b), SCRCP, and sought to have the verdict against him set aside in its entirety and judgement entered in his favor, or to at least have the punitive damages award set aside. [R. pp. 0027-0038]. Additionally, Mr. Hudgins filed a Motion to Setoff, pursuant to S.C. Code Ann. § 15-38-50, seeking to have the court apply and give Mr. Hudgins credit for the $100,000.00 paid on behalf of Mr. McGee prior to trial as part of the Covenant Not to Execute. [R. pp. 0039-0045].

All post-trial motions were heard before Judge Knie on December 20, 2019. On January 8, 2020, Judge Knie issued an Order and denied Ms. Green's Motion for New Trial *Nisi Additur* and Motion for New Trial Absolute. [R. pp. 0001-0005]. Judge Knie also denied Mr. Hudgins' Motion for JNOV, but granted his Motion for Setoff. Id. Counsel for Ms. Green filed her Notice of Appeal on February 5, 2020. On February 10, 2020, counsel for Mr. Hudgins timely submitted a Notice of Appeal for a Cross Appeal.

III. STANDARD OF REVIEW

The granting of a motion for new trial *nisi additur* rests within the sound discretion of the trial court, but substantial deference must be afforded to the jury's determination of damages. Green v. Fritz, 356 S.C. 566, 570, 590 S.E.2d 39, 41 (Ct. App. 2003). Compelling reasons must be given to justify invading the jury's province in this manner. Chapman v. Upstate RV & Marine, 364 S.C. 82, 89, 610 S.E.2d 852, 856 (Ct. App. 2005)(citing Pelican Bldg. Ctrs. V. Dutton, 311 S.C. 56, 61, 427 S.E.2d 673, 676 (1993)). Howard v. Roberson, 376 S.C. 143, 154-55, 654 S.E.2d 877, 883 (Ct. App. 2007). The denial of a motion for new trial *nisi additur* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. O'Neal v. Bowles, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

When reviewing the trial judge's decision on directed verdict motions or judgment notwithstanding the verdict, an appellate court must apply the same standard as applies to the lower court by viewing the evidence and all inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435, S.E.2d 864 (1993); Welch v. Epstein, 342 S.C. 279, 299, 536 S.E.2d 408, 418 (Ct. App. 2000). The appellant court may only reverse the denial of a motion for directed verdict or JNOV if no evidence supports the trial court's ruling. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). When considering directed verdict and JNOV motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000); Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). A motion for JNOV may be granted only if no reasonable jury could have reached the challenged verdict. Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 415 S.E.2d 393 (1992). The

jury's verdict will not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Smalls v. South Carolina Dep't of Educ., 339 S.C. 208, 528 S.E.2d 682 (Ct. App. 2000); Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999).

A respondent may argue any additional reasons why an appellant court should affirm the appealed ruling, "regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000). A reviewing court may, in its discretion, review the additional reasons presented by the respondent and "if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." Id. at 420, 526 S.E.2d at 723. See also Rule 220(c) SCACR.

IV. ARGUMENT

A. The Trial Court Did Not Err In Denying Appellant's Motion for New Trial *Nisi Additur*, Because the Evidence and Testimony Presented at Trial Reasonably Supported the Jury's Determination.

"The consideration of a motion for a new trial *nisi additur* requires the court to consider the adequacy of the verdict in light of the evidence presented." Waring v. Johnson, 341 S.C. 248, 257, 533 S.E.2d 906, 911 (Ct. App. 2000). If an award is merely inadequate or unduly liberal, the trial judge alone has the discretion to grant a new trial *nisi additur*. Easler v. Hejaz Temple, 285 S.C. 348, 356, 329 S.E.2d 753, 758 (1985). Compelling reasons, however, must be given to justify invading the jury's province in this manner. Pelican Bldg. Centers v. Dutton, 311 S.C. 56, 427 S.E.2d 673, 676 (1993). The mere listing of the plaintiff's claimed damages compared to the jury verdict "does not constitute compelling reasons for invading the jury's province." Green, 356 S.C. at 570, 590 S.E.2d at 41. Furthermore, '[a] jury verdict should be upheld when it is possible to do

so and carry into effect the jury's clear intention. Johnson v. Parker, 279 S.C. 132, 135, 303 S.E.2d 95, 97 (1983).

A trial court does not abuse its discretion in denying a motion for a new trial *nisi additur* where evidence in the record supports the jury's verdict. See Steel v. Dillard, 327 S.C. 340, 345, 486 S.E.2d 278, 281 (Ct. App. 1997) (finding no abuse of discretion where the evidence in the record supports the amount of the jury award even though other evidence in the record indicated the jury could have awarded a larger verdict). Todd v. Joyner, 385 S.C. 509, 517-18, 685 S.E.2d 613, 618 (Ct. App. 2008), aff'd, 385 S.C. 421, 685 S.E.2d 595 (2009).

Throughout the trial of this case, substantial evidence was presented that challenged Ms. Green's medical damages and supported the jury's verdict. Contrary to counsel for Ms. Green's contention that "pre-existing conditions are not an issue here," Ms. Green testified that she had a superfluity of pre-existing medical issues upon which the jury could have found that some or all of her claimed damages were unrelated to the accident. [See App. Green's Initial Brief, p.9]. Ms. Green testified that she has for years been a severe Type I diabetic and has had complications from her diabetes. [R. p. 0289, Line 24]. She admittedly has suffered from prior back pain and hip pain. [R. p. 0287, Lines 5-17]. Ms. Green further testified she also had pre-existing joint pain prior to the accident. [R. p. 0290, Line 10]. Ms. Green testified herself regarding her own medical history and the alleged injuries sustained in the accident. No doctor or other qualified medical expert testified at trial regarding medical causation or attempted to rule out these other possible causes. There was no medical expert testimony opining to a reasonable degree of medical certainty that her injuries were most probably related to the accident. Therefore, it was reasonable for the jury to have found that Ms. Green's alleged injuries, were unrelated to the accident and were instead caused by these other pre-existing conditions.

Additionally, Ms. Green's alleged pain and suffering was heavily contested throughout trial. Ms. Green, but no medical doctors or experts, provided testimony regarding the medical treatment and timeline of medical treatment she sought after the accident. Ms. Green testified she did not even have an x-ray of her shoulder performed at the hospital following the accident, and she also testified it was not until three days after the accident that she sought any medical treatment at all for her left shoulder. [R. p. 0273, Line 22 – p. 0274, Line 15]. The jury heard Ms. Green further testify that she stopped seeking any medical treatment for any back pain two months after the accident. [R. p. 0276, Lines 20-24]. Ms. Green testified that she was able to return to work full-time only eight days after the accident, and was also able to return full-time to work two-weeks after her left shoulder surgery. [R. p. 0280, Line 3]. Finally, Ms. Green admitted before the jury that, despite alleged continued complaints of left shoulder pain, she has not presented for treatment with any physician for the past three years. [R. p. 0285, Lines 16-22].

After considering all the evidence at trial and listening to the Court's thorough instructions, the jury returned a verdict of $88,546.78 in actual damages for Ms. Green. [R. pp. 0006-0009]. Counsel for Ms. Green now asks this Court to invade the province of the jury based on the fact she is unsatisfied by the amount the jury awarded. In this trial, Ms. Green presented no testimony regarding her subjective pain levels and injuries besides that of her own and that of her husband. The only conclusion that can be drawn from the jury's verdict is that the jury did not find the testimony offered by the plaintiff regarding her pain and suffering to be credible.

As the case law cited above requires, Ms. Green fails to present and prove any errors of law and fails to put forth any evidence that the trial court abused its discretion when it properly denied Ms. Green's Motion for New Trial *Nisi Additur*. Therefore, this Court should affirm the January 8, 2020 Order, which denied Ms. Green's Motion for New Trial *Nisi Additur*.

B. The Trial Court Did Not Abuse Its Discretion When Applying the Offset to Ms. Green Only Because The Jury Awarded Mr. Russell Nothing In Actual Damages.

As a preliminary matter, counsel for Ms. Green incorrectly states in her initial brief that Mr. McGee's liability carrier, Nationwide, paid Ms. Green and her husband, Mr. Russell, $100,000.00 in "UIM benefits." [See App. Green's Initial Brief, p.14]. However, and instead, Mr. McGee's liability carrier paid $100,000.00 in liability limits, not UIM benefits. [R. pp. 0457-0462]. Counsel for Ms. Green argues that because both Mr. Russell and Ms. Green signed the Covenant Not to Execute in consideration of $100,000.00 for "UIM Benefits" that setoff would apply to both Ms. Green and her damages and Mr. Russell for his loss of consortium claim. [See App. Green's Initial Brief, p. 14]. However, the jury after hearing and seeing all the evidence presented at trial, deliberated, and chose not award any money to Mr. Russell for his loss of consortium claim. [R. pp. 0006-0009]. Mr. Russell has not appealed that judgment. [See App. Green's Initial Brief, p.14, footnote 2]. Counsel for Mr. Russell argues that the trial court was charged with determining the value of Mr. Russell's claim. Such a contention flies in the face of the twelve jurors who patiently sat through a three-day trial and determined that the value of Mr. Russell's claim amounted to zero dollars.

Counsel for Ms. Green has failed to show any error of law and has failed to put forth any evidence that the trial court abused its discretion when it did not award Mr. Russell money from the setoff. Therefore, the post-trial Order should be affirmed.

C. The Trial Court Did Not Err When It Denied Mr. Hudgins' Motion For a Judgment Notwithstanding The Verdict and Declined to Set Aside the Punitive Damages Award Against Mr. Hudgins Because There Was Evidence That A Reasonable Jury Could Find That Mr. Hudgins Willful Actions Contributed To The Accident.

When ruling on a Motion for JNOV, a trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing

the motions. Pye v. Estate of Fox. 369 S.C. 555, 56 3,633 S.E.2d 505, 509 (2006). If the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created and a JNOV motion should be denied. Parrish v. Allison, 376 S.C. 308, 319, 656 S.E.2d 382, 388 (Ct. App. 2007). On JNOV motions, the trial court does not have "the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." Thomas v. Dootson, 377 S.C. 293, 297, 659 S.E.2d 253, 255 (Ct. App. 2008) ("[I]t is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve."). When considering a Motion for JNOV, a trial judge is concerned with the existence of evidence and not its weight. State v. Wakefield, 323 S.C. 189, 197, 473 S.E.2d 831, 835 (Ct. App. 1996). Therefore, a jury's verdict should not be overturned if any evidence exists that sustains the factual findings implicit in its decision. Id.

This case involves several parties, two plaintiffs and two defendants. Throughout trial, the jury had the opportunity to hear from each party as to what they believed happened to cause the subject accident. There is a factual dispute amongst Mr. McGee and Mr. Hudgins regarding the nature of their actions leading up to the accident. However, substantial evidence was presented such that a reasonable jury could find Mr. Hudgins contributed to the accident. There was also substantial evidence that Mr. Hudgins actions were reckless, willful, and wanton. Mr. Hudgins admitted that he had pled guilty to driving too fast for conditions. [R. p. 0329, Lines 20-25]. An officer who had arrived at the scene testified that Mr. McGee reported he had been chased by Mr. Hudgins. [R. p. 0080, Lines 12-13]. Mr. McGee was unwavering in his testimony that he was fearful of Mr. Hudgins because Mr. Hudgins had tried "wreck" him on the interstate. [R. p. 0149, Lines 10-12]. He further testified that he wanted to get away from Mr. Hudgins, but Mr. Hudgins continued to follow him. [R. p. 0103, Lines 8-13]. In attempt to limit his own potential liability,

Mr. Hudgins had a different "story" regarding the accident and he had the opportunity to present his "story" to the jury. Counsel for Mr. Hudgins contends that Mr. Hudgins' "story" was so persuasive that the trial court erred when denying his JNOV Motion. However, as the case law cited above firmly requires, in ruling on a JNOV motion, the trial court does not have "the authority to decide credibility issues or to resolve conflicts in the testimony or evidence." It is clear that there was more than enough evidence that existed to create factual disputes regarding liability amongst the parties, which was an issue for the jury to resolve. As the law cited above provides, the standard is that all inferences are to be drawn in support of the jury's determination. Therefore, the Order denying Mr. Hudgins' JNOV Motion should be affirmed.

D. Mr. Hudgins Is Not Exempt From Paying His Allocation of the Judgement Rendered by the Jury Because He Is an Additional Tortfeasor and Such Exemption would be in Violation of the Collateral Source Rule, S.C. Code 15-38-15(A), and Basic UIM Principles in South Carolina Law

Mr. Hudgins' argues that he and his liability carrier are *solely* entitled to claim a setoff for the $100,000.00 previously paid by Mr. McGee's liability insurer.[1] As such, Mr. Hudgins contends that Progressive, as UIM carrier, is not entitled to the setoff. According to Mr. Hudgins, Progressive owes the remainder of the judgement, and Mr. Hudgins, who is a tortfeasor, is relieved from paying anything to Ms. Green, the injured party. This contention flies in the face of the jury verdict finding Mr. Hudgins 40% liable for Ms. Green's damages and contravenes the UIM statute and established law interpreting the same. Further, claiming that a plaintiff's UIM carrier, and not the tortfeasor, must pay a judgment against said tortfeasor violates the collateral source rule.

[1] $100,000.00 is the bodily injury liability limits. The property damage liability limits remains unpaid. Arguably, pursuant to Geico v. Poole, Progressive would be entitled to any additional setoff from the unpaid property damage liability limits.

The statutory purpose of underinsured motorist coverage is "to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist...." S.C. Code §38–77–160. "The very definition of UIM insurance mandates set-off." Broom v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995). It is axiomatic in South Carolina, that a UIM carrier is entitled to a setoff of the liability limits of the at-fault motorists. This Court, in Cobb v. Benjamin held, "a UIM carrier is entitled to a credit for any amount of liability insurance coverage not exhausted in a settlement with its insured." Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997). Therefore, Progressive is entitled to a setoff of the liability limits of the at-fault motorists in this case prior to providing UIM benefits.

In this case, Mr. McGee's liability insurer, tendered its full $100,000.00 of liability coverage limits prior to the suit being filed. [R. pp. 0460-0462]. However, Mr. Hudgins' carrier has not made any payment on behalf of Mr. Hudgins. Once the suit was filed, Ms. Green pursued UIM benefits with her insurer, Progressive.

At the conclusion of the trial, the jury awarded $88,546.78 in actual damages to Ms. Green, as well as $35,000.00 in punitive damages against each defendant. [R. pp. 0006-0009]. The total of all damages awarded is $158,546.71. The jury found that Mr. McGee was sixty percent at fault for the accident, and therefore, his allocation of the actual damages award is $53,128.07. Mr. McGee's allocation of the actual damages plus the $35,000.00 in punitive damages totals $88,128.07. As previously stated, Mr. McGee's liability carrier, Nationwide, tendered its $100,000.00 liability limit prior to the lawsuit. As such, Mr. McGee has fully paid, and actually has overpaid, his portion of the final judgement the jury rendered at trial.

The jury found that Mr. Hudgins, as an additional tortfeasor, was forty percent at fault for Ms. Green's actual damages. Forty percent of $88,546.78 (actual damages award) is approximately

$35,418.71. That amount in plus the punitive damages awarded against Mr. Hudgins, totals approximately $70,418.71. It is important to note for this Court that Mr. Hudgins has $1,000,000.00 in liability coverage. Neither Mr. Hudgins nor his liability carrier has paid anything towards the judgement. Mr. Hudgins appears to argue that the $100,000.00 setoff should be applied only to his share of the liability (though the funds were paid by Mr. McGee's liability carrier on behalf of Mr. McGee) and not to the total damages of $158,546.71 awarded to Ms. Green by the jury. He then argues that Progressive, as UIM carrier, must pay the balance of the judgment awarded by the jury to Ms. Green. Howevér, pursuant to the basic principles of UIM coverage in South Carolina, Mr. Hudgins and his liability carrier are responsible for the remaining sums owed towards judgement, not Progressive.

"South Carolina has long followed the collateral source rule that compensation received by an injured party from a source *wholly independent of the wrongdoer* should not be deducted from the amount of the damages owed by the wrongdoer to the injured party." Rattenni v. Grainger, 298 S.C. 276, 277 379 S.E.2d 890 (1989)(emphasis added). This rule has been liberally applied in South Carolina to preclude the reduction of damages. Citizens & S. Nat'l Bank v. Gregory, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995). "The only requirement for qualification as a collateral source is that the source be wholly independent of the wrong doer" Id. The collateral source rule acts to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds received is "an insurance company, an employer, a family member, or other source." Johnston v. Aiken Auto Parts, 311 S.C. 285,287, 428 S.E.2d 737, 738 (Ct. App. 1993); *see* Dixon, 320 S.C. at 181, 463 S.E.2d at 640. "It is the tortfeasor's responsibility to compensate

the injured party for all the harm that he causes, not the net loss the injured party receives." Dixon, 320 S.C. at 182, 463 S.E.2d at 640. Therefore, requiring Progressive as UIM carrier for Ms. Green to pay for Mr. Hudgins' liability violates the collateral source rule and allows Mr. Hudgins to escape his responsibility for the injury the jury has determined that he caused to Ms. Green.

Additionally, S.C. Code §15-38-15(A) is applicable in the present case as it involves two tortfeasors, one of which was found to be less than fifty percent at fault by the jury. Section §15-38-15(A) of the South Carolina Code states that a "defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact." Therefore, Mr. Hudgins, as the 40% at-fault tortfeasor, is liable for his portion of the damages. He is not entitled to escape this liability simply because a joint tortfeasor, Mr. McGee has paid his share.[2]

V. CONCLUSION

The trial court did not abuse its discretion when denying Ms. Green's Motion for a New Trial *Nisi Additur*. The trial court did not abuse its discretion when denying Mr. Hudgins' JNOV motion. The trial court also correctly applied the offset amount against Ms. Green's award only. Finally, Mr. Hudgins, as an additional tortfeasor, is not relieved from paying is allocation of the judgement.

[signature on following page]

[2] To the extent Mr. McGee has overpaid for his share of the liability, Mr. Hudgins may benefit from the overpayment.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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