

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Appellate Case No.: 2017-000163

Henry Pressley,.....Respondent,

v.

Eric Sanders,.....Appellant.

**REPLY IN SUPPORT OF
PETITION FOR REHEARING**

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ARGUMENT

In his Return, Pressley continues to argue that the trial judge's decision was proper because it was based on medical testimony that was "undisputed" and not directly challenged with competing testimony. In limiting the response to that one argument, Pressley ignores the three primary assertions set forth in the rehearing petition. For that reason, the Return fails to present any reason for the Court to deny the rehearing petition.

First, Pressley does not even acknowledge, let alone address, the traditional rule in South Carolina that jurors are allowed to believe as much – or as little – of a witness' testimony as they see fit. *See Ross v. Paddy*, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000) ("Even where the evidence is uncontradicted, the jury may believe all, some, or none of the testimony, and where the credibility of the witness has been questioned, the matter is properly left to the jury to decide."). This rule applies regardless of whether or not the witness' testimony has been directly challenged. *Id.* It also applies to testimony by experts. *See, e.g., Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 563, 658 S.E.2d 80, 89-90 (2003) ("That a witness has been qualified as an expert does not mean that the witness's credibility and the accuracy of his conclusions are beyond reproach."); *State v. Milian-Hernandez*, 287 S.C. 185, 186, 336 S.E.2d 476, 478 (1985) ("A jury may properly disregard expert testimony."). Thus, it is no answer simply to assert, as Pressley does, that the trial judge's decision should stand because a medical doctor testified without direct contradiction. As discussed more fully in the rehearing petition, that is not the law of South Carolina.

Second, even if some "disputing" evidence is required to rebut an expert's testimony, such evidence exists in the record. Sanders' trial counsel based his arguments – and his defense of the case – on at least two pieces of evidence that came from Pressley's own testimony. Pressley admitted that he twice went nearly a full month without seeking medical treatments for his claimed

injuries, including the several weeks immediately prior to the start of the disputed treatments. [R. pp. 81-82.] Pressley further acknowledged that he had no previous relationship with Dr. Zgleszweski and that his attorney referred him to that doctor. [R. p. 44.] Those facts, coupled with the very minor nature of the collision involved in the wreck, were more than sufficient for a jury to conclude that Dr. Zgleszweski's treatments were not reasonable and necessary, regardless of what the doctor said. Pressley does not address this point at all in his Return.

Third, Pressley does not acknowledge or discuss Sanders' rehearing arguments based on concerns about the sea change in the law that the Court's current opinion will likely be cited to support. As it stands, the opinion seems to suggest that a trial judge is entitled to grant a new trial *nisi additur* any time a plaintiff's doctor testifies without direct contradiction by a witness for the defendant. From that assertion, which is not the law of South Carolina, it is not a far leap to the argument that a trial judge must grant additur in those types of scenarios. That latter position, if adopted, would radically change the manner in which smaller wreck cases are defended and tried. It would also intrude upon the role juries are intended to play in trials.

Pressley makes no effort to convince the Court that these concerns are unworthy of further arguments and review. Sanders respectfully asserts that this is because no such reasonable counter-arguments exist. The current opinion creates a very real risk that it will be misused by future plaintiffs in similar types of cases. Yet, Pressley completely ignores this point. In doing so, Pressley has failed to oppose Sanders' arguments on this issue.

As discussed in the rehearing petition, Sanders is not arguing that the Court has intentionally made this change in the law. Indeed, it seems doubtful that this was the Court's goal. The opinion does not cite or discuss any of the case law supporting the existing rule that a jury can choose to disregard testimony by a witness, even an expert, regardless of whether or not that

testimony is directly challenged or contradicted. If some change to that rule were intended, it is logical to assume that the existing rule would, at the very least, have been mentioned. Thus, the most reasonable assumption is that the apparent change to the traditional rule is an unintended consequence of the Court's decision. But it remains a consequence nonetheless – one that will hinder future parties' ability to defend against questionable injury claims. Even if the Court does not reverse its decision on the merits, which Sanders certainly asserts it should, the Court should still amend its opinion to state clearly that no change to existing law is intended or warranted.

CONCLUSION

For these reasons, the Court should grant the Petition for Rehearing and either issue a new opinion reversing the result in the trial court, or issue an amended, clarifying opinion as discussed above.

Respectfully submitted,

s/ R. Hawthorne Barrett

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