THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....Petitioner.

PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 242, SCACR, the Petitioner Eric Sanders respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' decision in this case.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming the trial judge's decision to grant a new trial *nisi additur*, where the Court of Appeals failed to follow controlling precedent and overlooked or failed to consider record evidence that supports the jury's original verdict, and where the Court of Appeals' opinion suggests an unwarranted change in South Carolina law?

STATEMENT OF THE CASE

This case arises from an automobile accident that occurred at the intersection of I-77 and Garners Ferry Road in Columbia, SC, on February 16, 2015. The Respondent Henry Pressley claims to have sustained physical injuries as a result of that accident, and he filed a Summons and Complaint in the Court of Common Pleas for Richland County on August 3, 2015. The Petitioner Eric Sanders filed and served a timely Answer on September 10, 2015.

After a full period of discovery and an unsuccessful mediation, the case was called to trial before the Honorable L. Casey Manning on October 11, 2016. At the opening of the trial, counsel for Sanders admitted fault for the accident, but denied that Pressley was entitled to all the damages he was claiming. During the course of the two-day trial, the jury heard testimony from both parties, as well as deposition testimony by a doctor who treated Pressley. Pressley presented medical and chiropractic bills totaling $9,658. He did not offer evidence of lost wages or any other special damages. Counsel for Sanders challenged at least half of the bills based on the overall evidence, including gaps in Pressley's course of treatment and the fact that his attorney referred him to the final caregiver. Counsel for Sanders argued that the treatments leading to roughly half of those bills were neither reasonable nor necessary under the circumstances.

On October 12, 2016, after deliberating for approximately an hour-and-a-half, the jury returned a verdict of $9,888.00. [R. pp. 169-170.] Although it had not been asked to do so, the jury broke down its verdict into two component parts: medical expenses of $4,888.00 and $5,000 for "pain and suffering." [R. pp. 169-170.] When the trial judge asked if the jury intended for both parts to combine for a total verdict of $9,888.00, the foreperson responded affirmatively. [R. pp. 169-170.]

After the trial judge effectively invited him to do so, Pressley filed a Motion for a New Trial Absolute or in the Alternative for a New Trial *Nisi Additur* on October 24, 2016. [R. pp. 7-11.] The trial judge granted that motion in an Order signed on January 10, 2017. [R. pp. 3-6.] Although the Order was styled an "Order Granting Plaintiff's Motion for a New Trial Absolute or in the Alternative for a New Trial *Nisi Additur*," the judge did not address or grant Pressley's request for a new trial absolute. [R. pp. 3-6.] The judge granted only a new trial *nisi additur*, adding $10,000 to the jury's original verdict. [R. p. 6.] Counsel for Sanders received a copy of the Order on January 11, 2017, and filed and served a timely Notice of Appeal on January 27, 2017.

After deciding not to conduct oral arguments, the Court of Appeals issued a published opinion affirming the trial judge's decision on March 24, 2021. Sanders filed and served a timely Petition for Rehearing, arguing in part that the Court of Appeals' decision conflicted with several previous decisions of that Court and, in effect, created new law. [Petition for Rehearing.] The Court of Appeals denied the Petition for Rehearing in an Order issued on May 5, 2021. However, on that same date, the Court of Appeals withdrew its previous opinion and refiled it as an unpublished opinion. [Unpublished Opinion No. 2021-UP-156.] Although the Court of Appeals changed the opinion's status to unpublished, the Court made no substantive changes to the actual text of the opinion.

STATEMENT OF THE FACTS

On the morning of February 16, 2015, sixty-nine-year-old Henry Pressley was stopped in his vehicle at a stop sign, waiting to merge onto Garners Ferry Road from the exit ramp of I-77. [R. pp. 24, 33.] Eric Sanders drove his vehicle down the same exit ramp and stopped just behind Pressley's truck. [R. p. 122.] Sanders looked to his left to check the flow of traffic on Garners Ferry Road and then turned his attention back to the vehicle in front of him. [R. p. 122.] He saw the brake lights in that vehicle go off and assumed the driver was proceeding onto Garners Ferry Road. [R. p. 122.] Sanders again looked to his left to check traffic and then took his foot off his brake, thinking the vehicle ahead of his had entered the roadway. [R. pp. 122-123.] Unfortunately, Pressley had not moved his vehicle, and a minor collision occurred. [R. p. 123.]

The accident resulted in light damage to the front of Sanders' vehicle and the rear trailer hitch of Pressley's vehicle. [R. pp. 52, 123-124.] Pressley's airbag did not deploy. [R. p. 51.] Both men were able to drive their vehicles away after the investigating police officer released them from the scene. [R. pp. 35, 51-52.]

Pressley did not request an ambulance at the accident scene. [R. pp. 35, 52.] Later that day, he went on his own to a local emergency room to get checked out. [R. p. 70.] The emergency room staff took an x-ray of his back, which revealed no fracture or any other traumatic injury. [R. p. 71.] The emergency room doctor did not recommend any follow-up care or refer Pressley to any other medical provider. [R. p. 53.]

The next day, Pressley consulted with an attorney, who referred him to a chiropractor. [R. p. 53.] Pressley treated with that chiropractor for roughly three weeks. [R. pp. 38, 76.] During that course of treatment, Pressley underwent an MRI of his lumbar spine, which did not reveal any

traumatic injuries. [R. pp. 76-79.] On March 15, 2015, the chiropractor released Pressley, noting that he was able to return to normal activities of daily living. [R. p. 76.]

Pressley did not receive any further treatments until more than a month later, when he visited his family doctor complaining of neck pain that had developed "over the past five days." [R. p. 81, line 10.] The doctor prescribed a pain medication and a muscle relaxer and recommended stretching exercises. [R. p. 81.] The record contains no evidence that the doctor referred Pressley to any other provider.

Once again, almost another full month passed before Pressley sought any further treatment. [R. p. 82.] This time, Pressley's attorney referred him to Dr. Zgleszweski at Palmetto Spine and Sports Medicine. [R. p. 44.] Dr. Zgleszweski performed a "left sacroiliac joint injection" on May 21, 2106. [R. p. 87.] The injection was a diagnostic tool used to determine potential causes of Pressley's pain complaints. [R. pp. 86-87.] Dr. Zgleszweski described the injection as feeling like a "big bee sting." [R. p. 90, line 6.] As a result of that test, Dr. Zgleszweski recommended further procedures for Pressley's neck and back, but Pressley declined those treatments. [R. pp. 92-95.]

At his final visit with Dr. Zgleszweski, Pressley stated that he no longer had any pain in his neck or back. [R. p. 94.] Pressley further stated that he was "pretty much doing his activities of daily living without pain" and that "medication was no longer required." [R. p. 94, lines 13-16.] That visit occurred on June 9, 2015. [R. p. 94.] Pressley did not seek any other medical treatments after that date, other than to request medications from his family doctor. [R. pp. 46-47.]

ARGUMENT

I. The Court of Appeals erred in affirming the trial judge's decision because the jury was not required to accept Dr. Zgleszweski's opinions.

In affirming the trial judge's decision, the Court of Appeals relied primarily, and heavily, on the fact that Dr. Zgleszweski, whose treatments Sanders challenged, testified at trial via deposition. That reliance was misplaced, however, because it overlooked well-established case law holding that a jury does not have to credit the testimony of a witness, even if the testimony is not directly disputed by competing testimony.[1] The Court of Appeals neither acknowledged nor discussed any of that authority in its opinion.

As the Court of Appeals has previously held, "[e]ven 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." *Ross v. Paddy*, 340 S.C. 428, 434, 532 S.E.2d 612, 615 (Ct. App. 2000). Thus, "the testimony of witnesses, although uncontradicted, is not binding, and the jury has a right to examine the evidence in light of all the circumstances and to give it such weight as the jury may think it is entitled." *Id.* at 435, 532 S.E.2d at 615 (emphasis added).

As this Court has noted, this rule does not change simply because the witness in question has been qualified as an expert. *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.*

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[1] As discussed below, Sanders strongly denies that Pressley's claimed damages were "undisputed" at trial. There was evidence in the record that cast doubt on the reasonableness and necessity of the treatments provided by Dr. Zgleszweski, and, thus, on the bills those treatments generated.

Milian-Hernandez, 287 S.C. 185, 186, 336 S.E.2d 476, 478 (1985) ("A jury may properly disregard expert testimony."). This is true even if the opinion stated by the expert is not contradicted. *See, e.g., Terwilliger v. Marion*, 222 S.C. 185, 188, 72 S.E.2d 165, 166 (1952) (the fact that testimony is not directly contradicted does not make it undisputed because questions remain as to the believability of the testimony and the credibility of the witness);). *See also Small v. Pioneer Machinery, Inc.*, 329 S.C. 448, 466, 494 S.E.2d 835, 844 (Ct. App. 1997) ("In a law case tried before a jury, it is the jury that must decide what part of a witness's testimony it wants to believe and what part it wants to disbelieve.").

Pursuant to this long-established rule, the jury in the present case was fully justified in rejecting some, or even all, of the opinions presented by Dr. Zgleszweski. This is true regardless of whether or not there was any competing medical evidence or even any direct challenges to Dr. Zgleszweski's opinions during the cross-examination by Sanders' trial counsel. Even if all the jury heard was Dr. Zgleszweski's testimony, the jury was under no obligation to accept it. The Court of Appeals' opinion suggests that the absence of competing medical evidence rendered Dr. Zgleszweski's testimony unassailable, but that is not the law of South Carolina.

Dr. Zgleszweski opined that his treatments of Pressley were reasonable and necessary under the circumstances. That is hardly a surprise. It is difficult to imagine a scenario in which a licensed medical professional would ever testify under oath that her treatments of a patient were not reasonable and necessary. Thus, the fact that the doctor gave that opinion was not dispositive on the issue of reasonableness and necessity of the challenged treatments. As the case law makes clear, it was the jury's job to weigh that opinion against the attendant circumstances of the accident and its aftermath and decide how much credence – if any – to give the opinion. The trial court and the Court of Appeals both erred in failing to let the jury perform that function.

The Court of Appeals further concluded that Dr. Zgleszweski's "undisputed" testimony served as a "compelling reason" for the trial judge to disturb the jury's verdict. Yet, in light of the rule discussed above, that cannot possibly be true. If a jury has the right to choose what parts of a witness's testimony to accept or reject, then a trial judge's mere disagreement with the jury's assessment of a witness – even an expert – should not be a proper basis for setting aside a verdict. In other words, such disagreement alone should never qualify as a "compelling reason" to grant a new trial *nisi*. It might be different if a jury were required to accept an expert's testimony, but that is not the law of South Carolina. The jury has the responsibility of evaluating a witness's testimony in light of all the evidence presented and determining whether or not to give that testimony any weight. Again, a trial judge should not be permitted to usurp that function simply because he or she disagrees with the jury's determination. Yet, that is exactly what happened in the present case. The trial judge decided to credit all of Dr. Zgleszweski's testimony even though the jury clearly did not. That was not a "compelling reason" to grant Pressley's motion. It was, instead, an improper invasion of the jury's role.

As it stands, the Court of Appeals' opinion could be read as justifying a decision to grant a new trial *nisi additur* any and every time a plaintiff presents medical testimony that is not directly challenged. Future plaintiffs could point to this decision as support for additur whenever a jury returns a verdict of less than the total medical bills, as long as a doctor testified that the treatments leading to those bills were necessary. Such an assertion would be a radical departure from the proposition that juries are allowed to accept or reject testimony as they see fit, regardless of whether it is directly contradicted.[2]

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[2] Sanders made this argument to the Court of Appeals in the Petition for Rehearing. Although the Court of Appeals did not expressly address the point in its subsequent Order, the Court appears to have tacitly acknowledged it by changing the opinion's status from published to unpublished.

The position taken by the Court of Appeals would also give plaintiffs a *de facto* safety net in trials, guaranteeing them a recovery at least equal to their medical bills. This, too, would be a sea change in South Carolina trial practice and would unfairly tip the scales towards plaintiffs at trial, particularly in minor impact wreck cases like the one at bar. Sanders respectfully submits that such a significant shift should not occur without even a discussion of the existing rule that juries can choose to reject testimony, even when it is not directly challenged. The Court of Appeals' opinion did not acknowledge that rule, let alone discuss it in any detail. The Court of Appeals failed to address that error on rehearing, and this Court should grant the current petition to examine and correct that error.

As stated above, the Court of Appeals did change the status of its opinion from published to unpublished. Admittedly, such a move might lessen the potential negative impact of the Court of Appeals' decision on future cases, but it does not eliminate that impact. Although unpublished appellate court decisions are not supposed to be cited as controlling authority, this Court is surely well aware that unpublished decisions are often cited in briefs and other submissions and arguments to the trial courts. As a result, the Court of Appeals' opinion in this case did not vanish simply because its status was changed to unpublished. The opinion remains intact, and it still goes directly against numerous previous cases stating that juries are not required to accept any kind of testimony just because it is not directly contradicted. If for no other reason than that, this Court should issue a writ of certiorari and review and reverse the Court of Appeals' decision.

However, that change does not completely resolve the problem, as the Court of Appeals still erroneously affirmed the trial judge's decision.

II. The Court of Appeals erred by overlooking or disregarding evidence that placed some of the claimed damages in dispute.

The Court of Appeals' opinion concluded that Pressley's claimed damages (i.e. medical bills and pain) were "undisputed" because Sanders did not present competing medical evidence, and his trial counsel did not directly argue with Dr. Zgleszweski about his opinions during cross-examination. But in reaching that conclusion, the Court of Appeals overlooked the record evidence on which Sanders' trial counsel relied in arguing that the jury should not include the bills for Dr. Zgleszweski's treatments in its verdict.

The key issue for the jury to decide at trial was whether Dr. Zgleszweski's treatments were reasonable and necessary. The Court of Appeals apparently believed that the jury was required to answer "yes" to that question because the doctor said they were, and no other doctor disagreed with him. As previously discussed, that conclusion overlooks the jury's ability to reject Dr. Zgleszweski's testimony even under those circumstances – if for no other reason than its self-serving nature. However, even if competing evidence were required, it existed in this trial. The Court of Appeals did not acknowledge or address that point.

The Court of Appeals failed to take into account at least two facts established by the evidence that called the need for Dr. Zgleszweski's treatments into question. First, the record demonstrates that Pressley twice went several weeks without seeking any medical treatments, including almost a full month before he first saw Dr. Zgleszweski. [R. pp. 81-82.] Second, Pressley admitted that the referral to Dr. Zgleszweski came not from another medical provider, but from Pressley's attorney. Based on the long gaps in treatment and the attorney referral, the jury easily could have concluded that Pressley went to Dr. Zgleszweski not because he truly still needed treatments, but rather because he was attempting to increase his claimed damages. The jury was

not required to reach that conclusion, of course, but neither was it required to ignore those facts and credit Dr. Zgleszweski's testimony. Weighing that competing evidence and reaching its own conclusion was the jury's function.

One problem with the Court of Appeals' decision is that takes a far too limited view of what constitutes "disputing evidence." The Court of Appeals at least implied that the only ways to "dispute" or "challenge" Dr. Zgleszweski's testimony were to present a competing medical opinion or to get some sort of concession from Dr. Zgleszweski on cross-examination. Certainly those are both possible methods of challenging testimony, but they are not the only ones. Just as Sanders did at trial, a party can use other evidence in the record as the basis for arguments against a witness's testimony. Thus, it is inaccurate to conclude, as the Court of Appeals seemingly did, that Sanders did not challenge or dispute Dr. Zgleszweski's testimony. Sanders did challenge and dispute that testimony; he just went about it in a different manner than the Court of Appeals contemplated in its opinion.

Similarly, the nature and extent of Pressley's pain were not "undisputed" in the sense suggested by the Court of Appeals' opinion. Granted, Pressley testified that he experienced pain for an extended period of time, but the jury was not obligated to believe him. Furthermore, there was evidence to support the jury's decision not to credit Pressley's testimony on that point. On multiple occasions, Pressley went roughly a full month without seeking any kind of medical care. Upon hearing that fact (which was, itself, undisputed), the jury could reasonably have concluded that Pressley must not have been hurting all that much if he went for such long of periods of time, on multiple occasions, without seeking any medical treatments. Of course, the jury was not obligated to reach that conclusion, but the evidence gave the jury more than a sufficient basis to do so. In short, that issue was disputed at trial, and it was the jury's job to resolve it.

Similarly, the jury also could have viewed Pressley's testimony skeptically based on the admitted attorney referral to Dr. Zgleszweski and the fact that Pressley reported having little or no pain, both to his chiropractor and to Dr. Zgleszweski. [R. pp. 44, 75-76, 92-94.] In addition, Pressley presented no evidence of lost wages and received a "zero" impairment rating from Dr. Zgleszweski, despite Pressley's testimony that he could no longer work after the accident. Taken as a whole, this evidence created a dispute as to whether, or at least to what extent, Pressley experienced pain after the accident, let alone "great" pain. Pressley's self-serving testimony on this point was not dispositive, as the Court of Appeals' opinion suggested. The jury was free to resolve that dispute as it saw fit, and the trial judge should not have substituted his opinion for the jury's. Accordingly, the Court of Appeals erred in affirming the trial court, and this Court should grant the current petition to review and reverse that decision.

III. The Court of Appeals erred in failing to conclude that the trial judge's decision was an abuse of discretion amounting to an error of law.

In its opinion, the Court of Appeals cited evidence that it believed supported the trial judge's conclusion that "compelling reasons" existed to justify the granting of a new trial *nisi additur*. Even under the lenient abuse of discretion standard of review, however, an appellate court should still reverse a trial judge's decision when it is controlled by an error of law. *See Waring v. Johnson*, 341 S.C. 248, 256-57, 533 S.E.2d 906, 910-11 (Ct. App. 2000). That is the situation in the present case.

As discussed above, the trial judge and the Court of Appeals both concluded that the jury was required to accept the testimony of Dr. Zgleszweski. That is contrary to the law of South Carolina. *See Ross v. Paddy, supra*. Even if the trial judge never stated his conclusion that bluntly, the fact remains that his decision credited all of Dr. Zgleszweski's testimony, despite the jury

clearly exercising its right to reject it. In doing so, the trial judge ignored the applicable law and substituted his opinion for that of the jury. That was an abuse of discretion amounting to an error of law.

Significantly, the trial judge was aware of the established law; he simply failed to follow it during the post-trial motion stage. The judge's charge to the jury explicitly acknowledged the extent of the jury's discretion in deciding what testimony to accept or reject. *See* R. p. 161, lines 22-23 ("[Y]ou can believe as much or as little of the witnesses' testimony as you deem proper."); p. 167, lines 3-4 ("[Y]ou do not have to accept the expert's opinion even though it comes from an expert."). Yet, after properly recognizing the jury's authority to accept or reject witnesses' testimony in that charge, the trial judge stripped the jury of that authority by granting the motion for a new trial *nisi additur*. Again, that constituted reversible error, even under an abuse of discretion standard.

The trial judge substituted his opinion of the case's value for that of the jury, even though evidence existed to support the verdict. In doing so, the trial judge clearly erred. *See State v. Miller*, 287 S.C. 280, 283, 337 S.E.2d 883, 885 (1985) ("Where there is competent evidence to sustain a jury's verdict, a trial judge may not substitute his judgment for that of the jury and overturn the verdict."). Thus, the proper question for the Court of Appeals to consider was not only whether there was evidence to support the trial judge's decision, but also whether there was evidence to support the jury's original verdict. As discussed above, such evidence existed in this case.[3]

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[3] The bills from Dr. Zgleszweski accounted for roughly half of the total medical expenses presented at trial ($9,658). If Dr. Zgleszweski's bills are subtracted from the total, the remaining bills are less than $5,000. The original verdict gave Pressley $4,888 for his medical bills and $5,000 for pain and suffering, for a total of $9,888. Based on that analysis, it is clear that the jury concluded the treatments with Dr. Zgleszweski were not reasonable or necessary. The jury further determined that Pressley experienced some pain and suffering, but that $5,000 was fair

Although the trial judge obviously disagreed with the jury's conclusion, that did not give him the right to disregard certain evidence and replace the jury's verdict with his own opinion of the case's value. The Court of Appeals erred by overlooking this vital point in reaching its decision.

IV. The Court of Appeals erred by misapprehending controlling precedent.

The Court of Appeals found that the cases relied upon by Sanders on appeal were distinguishable. Sanders respectfully submits that the Court of Appeals erred in reaching that conclusion. The cases cited by Sanders are on-point, and they warrant reversal of the trial judge's decision. The Court of Appeals should have followed those cases, and this Court should grant the current petition to reverse that error.

In *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003), the plaintiff alleged she sustained injuries as a result of a minor automobile accident. The defendant admitted fault for the accident at trial, but disputed the amounts and extent of some of the medical treatments. *Id.* at 569, 590 S.E.2d at 40-41. Specifically, the defendant challenged the reasonableness and necessity of chiropractic bills ($1,470.00) that constituted roughly half of the plaintiff's total claimed specials ($2,929.25). *Id.* When the jury ultimately awarded a total verdict of $2,000, the trial court granted the plaintiff's motion for additur. *Id.* at 569-70, 590 S.E.2d at 41.

In reversing the trial court's decision, the Court of Appeals focused on the absence of any "compelling reasons" for granting additur. The trial court's only stated reason for granting the motion was that the verdict was less than the plaintiff's claimed specials, which the court then listed. *Id.* at 569-70, 590 S.E.2d at 41. This fact alone, however, was not a compelling reason for disturbing the jury's verdict. As the Court of Appeals explained:

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compensation for it. As discussed above, there was competent evidence to support both of those decisions.

> Where, as here, the evidence of damages is disputed, the mere listing of [the plaintiff's] claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province. The order offers no reasons upon which we can review the appropriateness of usurping the jury's decision on damages.

Id. at 571, 590 S.E.2d at 41. Thus, the decision to grant additur was an abuse of discretion, and the Court of Appeals reversed and reinstated the original verdict. *Id.* at 571, 590 S.E.2d at 42.

The facts in the present case are practically identical to those in *Green*. In both cases, the defendants admitted fault for the accidents, but disputed some of the treatments claimed as damages. In both cases, the plaintiff presented testimony by one of the medical treatment providers, which the defendants challenged through cross-examination. In both cases, the jury accepted the defendants' arguments and awarded the plaintiffs less than the total amount of their claimed specials. And in both cases, that fact alone served as the real basis for the decision to grant additur. Therefore, this Court's reasoning in *Green* applies with equal force here.

The Court of Appeals concluded that *Green* was distinguishable because the trial judge in that case only listed the claimed specials in the order granting a new trial and did not provide any "compelling reason" for his decision. Yet, as discussed above, the underlying facts in the two cases are remarkable similar, and nothing in the *Green* opinion suggests that the outcome would have been different if the trial judge had worded his order differently. Furthermore, regardless of the language the trial judge used in the present case, it is clear his real reason for granting the motion was the fact that the jury awarded an amount less than the total of all claimed medical bills. Thus, the supposed distinguishing factor between *Green* and the present case is a distinction without any true difference.

However, even if *Green* were distinguishable, *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2015), is not.[4] *Luchok* was also an admitted fault case arising from a minor vehicular accident. The plaintiff claimed medical bills of $10,071, of which $9,100 came from chiropractic treatments. *Id.* at 263, 705 S.E.2d at 72. The defendant contested the chiropractic treatments as being unnecessary and unreasonable, given the three-week delay between the accident and the first chiropractor visit and the unusual length of that course of treatment. *Id.* at 264, 705 S.E.2d at 72. The jury returned a verdict of $3,023.90. *Id.* at 263, 705 S.E.2d at 72. The plaintiff moved for a new trial *nisi additur*, which the trial judge granted.[5]

The defendant appealed, and the Court of Appeals reversed the trial judge. After noting the close similarities between the case before it and *Green*, the Court of Appeals explained the deficiencies of the trial judge's order as follows:

> We interpret the judge's order to set forth two reasons for invading the jury's province. First, the verdict did not cover all the chiropractic bills. In the face of the sharply conflicting evidence, this is not a compelling reason to grant the motion. *See Green*, 356 S.C. at 571, 590 S.E.2d at 41 ("Where, as here, the evidence of damages is disputed, the mere listing of Green's claimed damages by the trial judge in his order does not constitute compelling reasons for invading the jury's province.") ... Second, the "charges for chiropractic treatment of Plaintiff's injuries were reasonable and necessary." The judge is not entitled to make that determination as a matter of law when the evidence is conflicting. Therefore, there is no compelling reason and the trial judge's improper invasion of the province of the jury amounts to an abuse of discretion.

391 S.C. at 265, 705 S.E.2d at 73 (footnote omitted). Based on that abuse of discretion, the Court of Appeals reversed the order and reinstated the original verdict. *Id.*

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[4] The Court of Appeals called the facts in *Luchok* "indistinguishable" from those in *Green*. 391 S.C. at 263, 705 S.E.2d at 72.

[5] Although it is not stated in this Court of Appeals' opinion, the Record on Appeal in *Luchok* reveals that the trial judge granted an additur amount of $12,500.

If the word "chiropractic" is replaced with "Dr. Zgleszweski," the passage quoted above could just as easily describe the situation in the present case. As in *Luchok*, the trial judge relied on the fact that the verdict did not cover all the medical bills, as well as on a personal, subjective belief that the challenged treatments were reasonable and necessary. *Luchok* establishes that those purported bases are not compelling reasons to justify disturbing a verdict.

In the present case the Court of Appeals claimed that that *Luchok* was distinguishable because Dr. Zgleszweski testified the challenged medical expenses were reasonable and necessary, whereas the plaintiff in *Luchok* did not present any such opinion from her chiropractor. Although it is true the chiropractor did not testify in *Luchok*, that fact does not have the significance that the Court of Appeals apparently gave it. Even if the chiropractor had testified, the jury in the *Luchok* trial would not have been obligated to accept that testimony. *Luchok* does not stand for the proposition that additur is not warranted only if the challenged care provider did not testify. It stands for the proposition that a trial judge's disagreement with a jury over whether or not to credit certain disputed expenses does not constitute a "compelling reason" to disturb the jury's verdict. That is why *Luchok* is controlling in the present case.

The Court of Appeals also claimed that *Luchok* was distinguishable because the trial judge in that case found on his own that the challenged chiropractic bills were reasonable and necessary, whereas the judge in the present case cited Dr. Zgleszweski's testimony for that conclusion. As previously discussed, however, the fact that Dr. Zgleszweski stated the opinion did not automatically make it true. Based on the gap in treatment and the attorney referral (if nothing else), the jury was well within its rights to reject Dr. Zgleszweski's self-serving conclusion and determine that his treatments were, in fact, not reasonable and necessary. Thus, this difference between *Luchok* and the present case has no legal significance. In both cases, there was a

reasonable and competent basis for the jury's decision, and in both cases the trial judge erred by disturbing the verdict to reflect his own opinion of the case's value.

Although the Court of Appeals discussed *Green* and *Luchok*, it did not acknowledge or address Sanders' reliance on other similar precedent. Like the present case, *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997), arose from a rear-end accident. The plaintiff claimed roughly $8,000 in specials at trial, and the defendant challenged the necessity of some of the treatments that led to those amounts. After the jury awarded only $6,662.88, the plaintiff filed a motion for a new trial *nisi additur*. The trial court denied the motion, and the Court of Appeals affirmed. As the Court of Appeals noted, the defendant had disputed the claimed damages at trial, and it was well within the jury's discretion to award only a portion of those damages. *Id.* at 343-44, 486 S.E.2d at 280. Indeed, the Court of Appeals went so far as to say that even if the claimed damages had been undisputed, the jury still could have rejected some (or all) of them based on its evaluation of the plaintiff's credibility. *Id.* Therefore, the trial court had properly allowed the verdict to stand.

The Court of Appeals also reached a similar result in *Boozer v. Boozer*, 300 S.C. 282, 387 S.E.2d 674 (Ct. App. 1988). In that case, the plaintiff claimed he was injured while riding as a passenger in his wife's vehicle. At trial, the plaintiff alleged the accident caused an injury to his mouth that required $2,000 in dental treatments. The jury awarded only $748.39, and the plaintiff requested a new trial *nisi additur*. The Court of Appeals affirmed the trial court's denial of that motion because it concluded the evidence regarding causation of the condition was in dispute. Consequently, the jury was not obligated to award the plaintiff the entire amount of the claimed dental bills, and no additur was warranted.

In still another case, this Court affirmed the denial of an additur motion when the discrepancy between the claimed specials and the verdict was much higher than in the cases previously discussed. *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993). There, the defendant physician admitted he negligently damaged one of the plaintiff's nerves during surgery, thus requiring a second procedure. But the defendant disputed the plaintiff's claimed specials, which totaled $43,832.46.[6] Specifically, the defendant argued the severed nerve did not cause most of the plaintiff's lingering injuries. The jury returned a verdict of only $12,500, which both the trial court and this Court allowed to stand. The jury was free to decide the issue of what caused the plaintiff's damages (*i.e.*, the injury that required the first surgery, or the severed nerve during that surgery), and there was evidence to support the jury's decision either way. Thus, the Court held the trial court had properly refrained from disturbing the verdict.

All of these authorities share one crucial element with the present case. In each of them, the defendant challenged the amount of specials claimed by the plaintiff. The tactics and rationales for those challenges varied from case to case, but all of the defendants called at least some of the plaintiffs' alleged damages into question at trial. This fact is significant because it provided justification for the decisions reached by the respective juries. Once the defendants contested the issue of damages, the juries were free to reject the claimed damages (or any portions of them) and compute awards based on their own views of the evidence. As these authorities demonstrate, this is a process the courts should strive to protect.

The Court of Appeals' opinion discussed *Green* and *Luchok*, but not the other cases that Sanders relies upon in this appeal. The opinion also failed to discuss the preference expressed in all of those cases for leaving verdicts undisturbed in cases where a defendant challenges some or

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[6] The plaintiff also claimed a 10% impairment of his leg.

all of the plaintiff's claimed damages. Sanders disputed the treatments and bills from Dr. Zgleszweski in the present case; the record makes that very clear. Although Sanders did not present any competing medical testimony, he was not required to do so. He could – and did – rely on the long gaps in treatment and the attorney referral, as well as statements in the records of Pressley's previous care providers, to call into question the reasonableness and necessity of the challenged treatments. At that point, the issue became one for the jury, which properly served its function in resolving the dispute. The cases cited by Sanders in the Court of Appeals demonstrate that the trial judge abused his discretion in failing to honor the jury's role. Therefore, the Court of Appeals erred in affirming the trial judge's decision, and this Court should grant the current petition.

V. The Court of Appeals erroneously placed significance on the absence of evidence of prior neck or back pain for Pressley.

In reaching its decision, the Court of Appeals also appeared to rely on evidence that Pressley had not experienced any significant neck or back pain prior to this accident. Even if that is true, that fact would not automatically make Dr. Zgleszweski's challenged treatments reasonable and necessary. After seeking initial treatments for pain following the accident, Pressley experienced two lengthy gaps in treatment and then went to see Dr. Zgleszweski only after getting a referral from his attorney. Given those facts, there was a competent basis for the jury to conclude – as it obviously did – that the wreck caused Pressley some neck and back pain, but that the pain had resolved before he went to see Dr. Zgleszweski, at least to the point that the additional treatments were not reasonable or necessary. Pressley and Dr. Zgleszweski said otherwise, but the jury obviously did not believe them. That was the jury's right.

Thus, it is of no consequence that Pressley denied having previous neck or back pain. Even assuming that his testimony on that point was true, it has no bearing on the challenged damages.

There was still a sufficient basis for the jury to reject Dr. Zgleszweski's opinion and to decline to include his bills in the verdict. To the extent the absence of evidence of previous neck or back pain factored into the Court of Appeals' decision, it constituted reversible error, and this Court should issue a writ of certiorari to review that decision.

CONCLUSION

As it stands, the Court of Appeals' decision constitutes a dramatic departure from previous law. This is true regardless of whether the opinion is listed as published or unpublished. The Court of Appeals' opinion suggests – intentionally or not – that plaintiffs are entitled to recover all of their medical bills if a doctor testifies in support of them and the defendant does not offer competing medical testimony. South Carolina law has never required defendants to present medical testimony in support of their challenges to certain claimed damages. Nor has our law ever hamstrung juries in this manner. To the contrary, it has long been common for defendants to challenge the reasonableness and necessity of some claimed damages through arguments based on things such as the minor nature of the collision, gaps in treatment and attorney referrals to the challenged care provider. If left in place, the Court of Appeals' current opinion will be relied upon by future plaintiffs as support for a significant shift in the law. Again, this is true regardless of the opinion's status as published or unpublished.

Moreover, in reaching its decision, the Court of Appeals overlooked both applicable, controlling precedent and record evidence that supports the jury's verdict. For the reasons set forth above, therefore, this Court should grant the current petition, issue a writ of certiorari, and reverse the Court of Appeals' decision.

(Signature on next page)

Respectfully submitted,

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June 2, 2021

RULE 242(d)(1), CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for the Petitioner certifies that a time Petition for Rehearing was made in the Court of Appeals and was denied by the Court of Appeals in an Order issued on May 5, 2021.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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,.....Petitioner.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Petitioner Eric Sanders, certifies that I have this **2nd day of June, 2021**, served copies of the **Petition for Writ of Certiorari** upon counsel for the Respondent by email to the following addresses: pmk@pmklawllc.com, hab@palmettolawcenter.com, and also causing them to be deposited in the United States mail with sufficient postage attached, addressed to: Page Kalish, 141 Pelham Dr., Ste. F, 202, Columbia, SC 29209; Hammond Beale, 791 Greenlawn Dr., Ste. 2, Columbia, SC 29209.

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