THE STATE OF SOUTH CAROLINA
In the 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.

PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, the Appellant Eric Sanders respectfully petitions this Court for a rehearing in this matter.

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 Appellant 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 the Sanders challenged at least half of the bills based on the overall evidence, including gaps in Pressley's course of treatment and his attorney referring him to the final caregiver. Counsel for Sanders argued that the treatments leading to at least some of those bills were not reasonable and 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, this Court issued an opinion affirming the trial judge's decision on March 24, 2021.

STATEMENT OF THE FACTS

On the morning of February 16, 2015, the sixty-nine-year-old 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.] 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 preparing to proceed 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 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.

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 jury was not required to accept Dr. Zgleszweski's opinions.

In affirming the trial judge's decision, the Court relied primarily, and heavily, on the fact 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 did not acknowledge or discuss any of that authority in its opinion.

As this Court has 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,

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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.

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).

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. 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 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's opinion suggests that the absence of competing medical evidence rendered Dr. Zgleszweski's testimony unassailable, but that is not the law of South Carolina.

The Court further concludes 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, that 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 credence or 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 province.

As it stands, the Court's 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 cite 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 a rule 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.

It would also give plaintiffs a *de facto* safety net at trial, guaranteeing them a recovery at least equal to their medical bills. This, too, would be a sea change in South Carolina practice and would unfairly tip the scales towards plaintiffs at trial, particularly in minor impact wreck cases like the one at bar. Pressley respectfully submits that such a significant change in the law 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's opinion does not acknowledge that rule, let alone discuss it or the current decision's impact on it. Therefore, the Court should grant the rehearing petition to consider this important issue.

It may be that the Court does not intend to make the sudden change in the law discussed in the preceding paragraphs. Even if that was not the Court's intention, however, it is almost certainly the way in which future plaintiffs will attempt to characterize the opinion. Future plaintiffs will cite the decision as support for the proposition that the total amount of medical bills is the established floor for any verdict amount in cases where the doctors testify without competing medical evidence. As previously discussed, that proposition, if accepted, will radically alter trials in South Carolina by eliminating a degree of risk for plaintiffs and placing that risk entirely on defendants in these types of cases. Therefore, if that kind of transformation was not the Court's intention, the Court should at the very least issue an amended opinion that limits its decision to the current facts and clarifies that the opinion should not be cited for the proposition that plaintiffs have a minimum guaranteed recovery amount simply because their doctors testified at trial without any direct contradiction.

II. The Court overlooked evidence that disputed some of the claimed damages.

The Court's opinion appears to conclude 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 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. This Court seemingly concludes 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. However, if competing evidence were required, it was present in this trial.

The Court's conclusion fails 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 approximately a month without seeking any medical treatments, including almost the 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.

The issue with the Court's decision is that takes a far too limited view of what constitutes "disputing evidence." The Court at least implies 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 does, 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 contemplates in its opinion.

Similarly, the nature and extent of Pressley's pain was not "undisputed" in the sense suggested by the Court's 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 a jury's decision not to credit Pressley's testimony. On multiple occasions, Pressley went roughly a full month without seeking any kind of medical care. Upon hearing that, a jury could reasonably conclude that he must not have been hurting all that much if he had those kinds of gaps in his treatments. A jury could also view 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 and 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's opinion suggests. 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 should grant this petition and reconsider its conclusions.

III. The trial judge's decision was an abuse of discretion amounting to an error of law.

In its opinion, the Court cites evidence that it believes supports 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 this Court, 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 overlooked it during the post-trial motion stage. The judge's charge 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 question for this Court to consider was not just 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.[2] 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. This Court overlooked this vital point in reaching its decision, and the rehearing petition should be granted.

IV. The Court misapprehended controlling precedent.

In reaching its decision, the Court found that the cases relied upon by Sanders were distinguishable. Sanders respectfully submits that the Court erred in reaching that conclusion. The cases cited by Sanders are on-point and warrant reversal of the trial judge's decision.

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, this Court 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,

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[2] 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. The jury clearly concluded that the treatment with Dr. Zgleszweski was not reasonable and necessary. The jury further determined that Pressley experienced some pain and suffering, but that $5,000 was fair compensation for it. As discussed above, there was competent evidence to support both of those decisions.

590 S.E.2d at 41. This fact alone, however, was not a compelling reason for disturbing the jury's verdict. As the Court explained:

> 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 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 concludes that *Green* is 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.

However, even if *Green* were distinguishable, *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2015), is not.[3] *Luchok* was also an admitted fault case arising from a minor accident.

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

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 the 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.[4]

The defendant appealed, and this Court reversed the trial judge. After noting the close similarities between the case before it and *Green*, the Court 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 reversed the order and reinstated the original verdict. *Id.*

If the word "chiropractic" is replaced with "Dr. Zgleszweski," the passage quoted above could just as easily describe the present case. As in *Luchok*, the trial judge relied on the fact that the verdict did not cover all the medical bills and on a personal, subjective belief that the challenged

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

treatments were reasonable and necessary. *Luchok* establishes that those purported bases are not compelling reasons to justify disturbing a verdict.

This Court asserts that *Luchok* is 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 gives 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 does 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 also finds that *Luchok* is distinguishable because the trial judge in that case expressly found 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 that opinion did not necessarily 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 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 discusses *Green* and *Luchok*, it does 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 this Court affirmed. As the Court 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 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.

This Court 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*. This Court 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, the Supreme 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.[5] 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 the Supreme 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's opinion discusses *Green* and *Luchok*, but not the other cases that Sanders relies upon. The Court's opinion also fails to discuss the preference expressed in all of those cases for leaving verdicts undisturbed in cases where a defendant challenges some or all of the plaintiff's claimed damages. Sanders disputed the treatments and bills from Dr. Zgleszweski in the present case. 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

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

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. These cases cited by Sanders demonstrate that the trial judge abused his discretion in failing to honor the jury's role. Therefore, Sanders respectfully asserts that this Court erred in affirming the trial judge's decision, and the rehearing petition should be granted.

V. The absence of evidence of prior neck or back pain has no legal significance.

Even if Pressley had no neck or back pain prior to the subject accident, 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, such 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. Thus, to the extent the absence of evidence of previous neck or back pain factored into this Court's decision, the rehearing petition should be granted.

CONCLUSION

As it stands, the Court's decision constitutes a dramatic departure from previous law. The Court's opinion implies – 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's current opinion will be cited by future plaintiffs as support for a significant shift in the law.

Moreover, in reaching its decision, the Court has overlooked both applicable law and record evidence that supports the jury's verdict. For the reasons set forth above, therefore, the Court should grant the Petition for Rehearing and either conduct further arguments or issue an amended opinion that reverses the trial judge's decision.

Respectfully submitted,

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April 7, 2021

THE STATE OF SOUTH CAROLINA
In the 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.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant Eric Sanders, certifies that I have this **7th day of April, 2021**, served copies of the **Petition for Rehearing** 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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April 7, 2021