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S.C. SUPREME COURT

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,……..Appellant.

RESPONDENT'S RETURN TO APPELLANT'S PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

This case arises out of an automobile accident that occurred on February 16, 2016 on the exit ramp at the intersection of I-77 with Garners Ferry Road in Columbia, South Carolina. Appellant Eric Sanders ("Sanders") failed to stop his truck and rear-ended Respondent Henry Pressley's ("Pressley") truck. Pressley sought medical care for his personal injuries and he completed treatment when he could not tolerate needles, which were required for pain management. Pressley filed a Summons and Complaint in Richland County, South Carolina on August 3, 2015. Sanders filed and served his Answer on September 10, 2015. After discovery was conducted and a mediation failed, the case was tried before the Honorable Casey L. Manning between October 12-13, 2016. At trial, Sanders admitted liability, but denied that the damages were causally related to the accident.

Pressley testified about the injuries that he suffered as well as the limitations that resulted from the accident. Pressley testified that he suffered from back and neck pain that progressed to radiating pain and numbness in his lower extremities. His physical complaints were consistent from the time of the accident until he ceased treatment. One of Pressley's treating physicians, Timothy M. Zgleszweski, M.D., was qualified as an expert and he testified in the Plaintiff's case that Pressley's injuries were caused by the accident and that the costs associated with treatment were fair and reasonable. [R., pp. 066-067, 083, 096.] Medical bills of $9,658.00 were introduced into evidence without objection. Sanders did not cross examine Pressley or Dr. Zgleszweski about the whether the injury or treatment were related to the accident or whether the cost of treatment was fair and reasonable. Sanders asked Dr. Zgleszweski if Pressley's degenerative disease was possibly related to Pressley's career as a brick mason, but did not ask whether the accident caused the injury or pain Pressley suffered from following the accident. Sanders argued, without support, that Pressley's career path was the cause of the injuries. Sanders offered no evidence, witness or

expert to rebut Dr. Zgleszweski's testimony or the evidence presented. Sanders did not present any evidence of prior injuries that were similar to those suffered in the accident nor did he cross examine Pressley on that subject. The testimony and evidence were undisputed in that the defense did not offer any evidence or testimony to rebut Dr. Zgleszweski's testimony or the evidence presented.

On October 12, 2017, the jury returned a verdict for Pressley in the amount of $9,880.00, which was allocated as $4,888.00 for medical expenses and $5,000.00 for pain and suffering. [R., p. 169-170.] When the trial judge asked if there were any motions at the end of the trial, Pressley asked for additional time and was granted ten days to file any post-trial motions. [R., p. 170] The trial judge anticipated Pressley filing a motion based upon the jury's verdict not conforming to the evidence and stated that he would strongly consider such a motion. [Tr., p. 170] Pressley timely filed his Motion for a New Trial Absolute or the in the Alternative for a New Trial Nisi Additur. [Motion.] Sanders filed no memorandum in opposition to Pressley's Motion. The trial judge granted Pressley's motion and ordered additur of $10,000.00.

STATEMENT OF THE FACTS

On February 16, 2015, Sanders's pickup truck struck the trailer hitch on the rear of Pressley's truck. [R., pp. 024, 034.] Pressley was 69 years old at the time of the accident. [R., p. 024] Sanders could not recall if he was texting or talking on his cell phone at the time preceding the accident or at the time of the accident. [R., pp. 126-128.] Sanders was looking at traffic on Garner's Ferry Road instead of paying attention to what was in front of him. [R., 128.] Pressley never saw Sanders prior to the impact. [R., p. 034.]

Pressley testified that he had pain in his back and neck and that he went to the emergency room on the same day as the accident. [R., pp. 035, 036.] He had not previously suffered from any problems in his back or neck that required medical treatment. [R., p. 031.]

Pressley went to the emergency room after the accident where an x-ray of his back was performed. [R., p. 071.] There was no bone fracture in his back. [R., p. 071.] Pressley then followed with a conservative course of medical treatment that included chiropractic care, medicines from his primary care physician and ultimately pain management from Dr. Zgleszweski. [R., pp. 036-047.] Pressley underwent an MRI of his back which did not show any traumatic injury. [R., pp. 076-079.] Dr. Zgleszweski testified that there are multiple studies that you do not treat anybody based on the MRI. [R., p. 080.]

The pain got worse as it began to radiate down his arms and legs as the initial course of treatment did not resolve his pain. [R., p. 077.] Unfortunately, Pressley could not overcome his fear of needles, so he was unable to tolerate Dr. Zgleszweski's recommended course of treatment. [R., pp. 045-047, 060, 094-095.] Pressley underwent the initial diagnostic injections into his hip joints. [R., pp. 087-088.] This treatment required the use of needles and radio frequency to ablate the nerves in Pressley's hip joints. [R., p. 092-093.]

Pressley testified that his job required him to carry bricks and that the pain prevented him from being able to perform that duty. [R., pp. 026-027 ,047.] He also testified that he could not take advantage of activities that he liked to do outdoors such as fishing. [R., pp. 048.]

STANDARD OF REVIEW

The denial or granting of a motion for a new trial *nisi* is within the trial court's discretion and will not be reversed on appeal absent an abuse of discretion. *Burke v. AnMed*, 393 S.C. 48, 710 S.E.2d 84 (2011); *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 193, 638 S.E.2d 667, 670 (2006); *See also, Bailey v. Peacock*, 318 S.C. 13, 14, 455 S.E.2d 690, 691 (1995)("If an award is merely inadequate, the trial judge alone has the discretion to grant a new trial *nisi additur.*") The trial judge who heard the evidence possesses a better view of the damages than the Court of

Appeals. Accordingly, great deference is given the trial judge. *Vinson v. Hartley*, 324 S.C. 389, 405-6, 477 S.E.2d 715, 723-4 (Ct. App. 1996).

ARGUMENT

THE COURT OF APPEALS FOLLOWED CONTROLLING PRECEDENT AND PROPERLY AFFIRMED THE TRIAL JUDGE'S DECISION TO ORDER A NEW TRIAL, *NISI ADDITUR* SO APPELLANT'S PETITION SHOULD BE DENIED.

The Court of Appeals affirmed South Carolina law when it ruled that the trial court was within its authority to grant Pressley's motion for a new trial *nisi additur*. There was no abuse of discretion. Sanders now questions whether the trial judge has the inherent authority to ensure that justice is done and when a jury verdict does not comport with the evidence and testimony presented at trial and appears to want to strip any discretion that the trial judge maintains as the umpire of the trial. While a jury verdict is entitled to great deference, that deference is restrained by basic notions of justice. It is well settled that the trial judge has the power to grant a new trial *nisi additur* if he finds the amount of the verdict merely inadequate. Great deference is given to the trial judge because he listened to the testimony and reviewed the evidence as it was presented to the jury at trial and ruled that the verdict was inadequate. Sanders position would abandon longstanding principles where a trial judge has any power to ensure that justice is done at trial and to eliminate any compelling reasons.

Sanders leans on *Luchok v. Vena*, 391 S.C. 262, 705 S.E.2d 71 (Ct. App. 2010) and *Green v. Fritz*, 356 S.C. 566, 590 S.E.2d 39 (Ct. App. 2003), where the facts are dissimilar to this case presently before this Court. The trial judge's orders in those cases were deficient so they were overturned on appeal.

In *Green*, the trial judge gave no compelling reason to substantiate his ruling and did not base his ruling on the inadequacy of the jury's verdict. Sanders demands that this Court to plug in

the facts of this case into *Green* and to return the same outcome. However, there are important distinctions between *Green* and the present case that is before this Court. Whereas, the chiropractor's diagnosis was challenged in *Green*, none of the treating medical providers' diagnoses were challenged in the present case. Further, no alternate cause of injury was offered. It appears that the trial court relied upon passion, caprice or something not found in the record. *Green* at 569, 571 S.E.2d at 42. The trial court order was not capable of appellate review and the appropriate remedy would have been a new trial rather than *nisi additur*.

Additionally, Sanders argues that *Luchok* is dispositive of this case. In *Luchok*, the plaintiff was the sole witness as to the medical bills. There was no medical testimony in *Luchok* as to whether the treatment was reasonable and necessary or whether it was causally related to the plaintiff's accident. The trial judge determined from the medical bills alone that the chiropractic treatment was reasonable and necessary, which was an error. The Court of Appeals reversed the trial court on the grounds that the trial judge invaded the province of the jury without listing a compelling reason for taking that action.

In the present case, the following are the trial judge's compelling reasons:

1. There was no contrary testimony or evidence to dispute that the medical treatment and bills resulted from the car collision at issue in this trial. Plaintiff submitted undisputed, uncontroverted evidence of loss in the amount of his total medical bills that were $9,658.00.

2. The testifying treating physician, Timothy M. Zgleszweski, M.D., was qualified as an expert and gave an undisputed opinion that the injuries, pain, and subsequent treatment were related to the collision. The treating physician also testified that the treatment was reasonable and necessary as were the bills incurred for treatment. There was no testimony or evidence to rebut the treating physician's testimony or opinions.

3. There was no evidence or testimony that Plaintiff ever suffered from injuries to his neck or back prior to the collision.

4. [Pressley] suffered great pain as a result of the accident.

[R., pp. 003-006.] In this case, the trial judge's order is specific in explaining why a new trial *nisi additur* was appropriate. The trial court explained that the sole testifying medical expert, Timothy M. Zgleszweski, M.D., gave an undisputed opinion that the injuries, pain, and subsequent treatment were related to the collision. The treating physician also testified that the treatment was reasonable and necessary as were the bills incurred for treatment. These opinions were stated to a reasonable degree of medical certainty. In addition, Pressley testified about his pain, having to go to doctor's appointments, and the limitations on his life.

There was no testimony or evidence presented by Sanders to rebut the treating physician's testimony or opinions. Sanders had the opportunity in the context of discovery to have an independent medical evaluation or to hire an expert witness to contradict Dr. Zgleszweski's testimony. On cross-examination, Dr. Zgleszweski conceded that it was "possible" that degenerative disease could have been caused by working as a brick mason for forty years. [R., p. 116]. But, Dr. Zgleszweski was not asked whether this was the source of pain or injury from the accident. Further and in spite of requesting medical records for a period time preceding the incident, Sanders never presented any testimony or evidence that Pressley's symptoms preceded the accident. The trial court found that the verdict was "inadequate in light of the evidence and testimony present at trial." [R., pp. 003-006.]. This was a compelling reason to grant Pressley's post trial motion.

Sanders did not dispute this testimony via cross examination or by presenting adverse witnesses or evidence. Rather, his trial strategy was to downplay the severity of the impact, to improperly blame Plainitff's choice of occupation, and to attempt to illustrate the gaps in treatment. Sanders asserts that the evidence and testimony were contested. However, Sanders presented no evidence or testimony to counter Plaintiff's case in chief.

The trial court ruled in its order that "it is abundantly clear that the verdict in this case was inadequate, in light of the evidence and testimony presented at trial, and granting *nisi additur* is appropriate." Dr. Zgleszweski did not admit that it was probable or back down from his opinion that the accident was the cause of the injury and subsequent pain. Sanders argues that the evidence and testimony was contested, even though he offered no expert testimony, because cross-examination yielded a possible alternative reason for Pressley's pain. However, there is no testimony or medical evidence to back up the theory that the degenerative disc disease caused the pain. In this case, Dr. Zgleszweski testified that the bills and treatment were fair and reasonable, and that the treatment was related to the accident. Sanders did not challenge the veracity of his opinions or his credibility in cross-examination. Further, Sanders never challenged Dr. Zgleszweski's opinion on the causal link between the accident and the injury or pain.

Sanders improperly relies upon *Steele v. Dillard*, 327 S.C. 340, 486 S.E.2d 278 (Ct. App. 1997). In *Steele*, there was an issue as to contributory negligence as to liability. Defendant conceded liability in the present case. In *Steele*, the defendant presented evidence of past injuries that were similar to those claimed in his case. Finally, the issue in Steele was the denial of a Motion for a New Trial, Nisi Additur, which was upheld on the same standard, abuse of discretion, as is applicable in the present case. In *Steele*, the Court of Appeal summarized as follows:

> In sum, the record provides adequate support for the jury's award because it could have found (1) Steele negligent and then offset his damages by some percentage; (2) Steele free of negligence but disagreed with his evidence as to his damages; or (3) Steele negligent and disagreed with his evidence as to his damages.

Steele, at 344. Unlike *Steele,* there was no dispute of liability, issues of prior accidents causing personal injury, or contradictory evidence or testimony presented in this trial.

In *O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993), there was an issue whether the Plaintiff's damages arose out of the initial car wreck or the subsequent malpractice of the treating

physician. There was competing testimony from experts as to the cause and extent of impairment as well as evidence of pre-existing medical issues. Sanders did not present any evidence of a pre-existing condition or obtain testimony that contradicted the cause or extent of injury. Sanders only got Dr. Zgleszweski to say that it was possible that Pressley's career as a brick mason caused degenerative disc disease. However, Dr. Zgleszweski never testified that it was possible that the injury or pain was caused by degenerative disc disease. To the contrary, he testified that the cause of the injury and pain arose out of the lumbosacral sprain/strain. [R., p. 097]. There was no evidence or testimony that Pressley's career or any pre-existing condition caused injury or pain.

Pressley testified why he did not seek further treatment from Dr. Zgleszweski. [R., pp. 045-047]. He did not seek further treatment because he did not want any more needles in his back or neck. He did not like the needles because of the pain they caused and his fear. [R., p. 046]. This was the reason treatment was stopped, despite the continuing pain.

Sanders argues that the verdict of $9,888.30, where $5,000.00 was allocated to pain and suffering could be a finding that that the jury discounted Dr. Zgleszweski's treatment. However, the numbers do not add up to the damages presented and the verdict did not comport with the evidence or testimony that was presented at trial. For example, there was no allocation for loss of enjoyment of life or alteration of lifestyle. There was no allocation for impairment or hindrance of undertaking daily activities. The trial judge stated his compelling reasons in his Order, so it should be upheld.

Finally, the trial judge ordered an alternative to the new trial *nisi additur*. He gave Sanders the choice to have a new trial if he believes the *additur* is not proper or too generous. *See Graham v. Whitaker*, 282 S.C. 393, 402 321 S.E.2d 40, 45 (1984) ("In actuality, the import of a new trial *nisi additur* or *nisi remittitur* is a suggestion on the part of the judge of a settlement figure. If the

party ruled against agrees to the suggested amount he may not complain. The prevailing party having asked for the relief must likewise be content with the determination.") The trial judge is permitted to examine the size of the verdict in the context of the evidence presented and to correct verdicts that either too generous or not generous enough if justice is to be preserved.

CONCLUSION

The Court of Appeals properly upheld the trial court's *nisi additur* order because the trial judge did not abuse his discretion and he provided compelling reasons in his Order to substantiate his ruling after hearing all the testimony and reviewing the evidence presented at trial. The testimony and evidence supported the trial judge's ruling. Rather than overturn precedent, which would mean that no compelling reasons exist to allow a trial judge to apply his inherent authority, this Court should deny Appellant's Petition for Certiorari.

Respectfully,

s/ Page M. Kalish
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