

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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**Jul 30 2021**

**S.C. SUPREME COURT**

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

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Appellate Case No. 2017-000163

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Henry Pressley,.....Respondent,

v.

Eric Sanders,.....Petitioner.

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**REPLY IN SUPPORT OF PETITION  
FOR WRIT OF CERTIORARI**

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Pursuant to Rule 242(g), SCACR, the Petitioner Eric Sanders respectfully submits this Reply in support of his Petition for Writ of Certiorari.

### ARGUMENT

In his Return to the Petition for Writ of Certiorari, Pressley continues to argue that the trial judge's decision was proper because it was based on medical testimony that was "undisputed" and not directly challenged with competing testimony. In limiting the response to that one argument, Pressley ignores several additional assertions that Sanders has in his petition. For that reason, the Return fails to present any reason for denial of the petition, which this Court should now grant.

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

Of course, the real issue is not that Pressley ignored this traditional and established rule, but that the Court of Appeals did. Like Pressley's Return, the Court of Appeals' opinion made no

mention of the rule and, by all appearances, simply disregarded it. That omission could have been an oversight, or it could have been a deliberate move away from that rule. Either way, however, it was reversible error. Pressley's Return offers no justification (or even an explanation) for that error. Consequently, this Court should grant the petition and review the Court of Appeals' decision.

Second, even if some "disputing" evidence is required to rebut an expert's testimony, such evidence plainly exists in the record. Sanders' trial counsel based his arguments – and his defense of the case – on at least two pieces of evidence that came from Pressley's own testimony. Pressley admitted that he twice went nearly a full month without seeking medical treatments for his claimed injuries, including the several weeks immediately prior to the start of the disputed treatments. [R. pp. 81-82.] Pressley further acknowledged that he had no previous relationship with Dr. Zgleszweski and that his attorney referred him to that doctor. [R. p. 44.] Those facts, coupled with the very minor nature of the collision involved in the wreck, were more than sufficient for a jury to conclude that Dr. Zgleszweski's treatments were not reasonable and necessary, regardless of what the doctor said. Pressley does not address this point at all in his Return.

Similarly, the Court of Appeals did not acknowledge the existence or significance of that disputing evidence in the record. The Court of Appeals discussed Dr. Zgleszweski's treatments and testimony in some length, but failed to examine what weight the jury could have given to the gaps in treatment and the attorney referral to Zgleszweski. It is unclear whether the Court of Appeals merely overlooked those pieces of evidence, or consciously determined that the evidence was of no importance. The reason that point is unclear is that the Court of Appeals did not address this issue at all. Instead, the Court of Appeals analyzed the case as if that evidence did not exist. That was a clear error in this setting, and this Court should grant the current petition to review and reverse the Court of Appeals' decision.

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

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

To be clear, Sanders is not arguing that the Court of Appeals intended to make such a sweeping change in the law. Indeed, it seems doubtful that this was the Court of Appeals' goal. The Court of Appeals' opinion did not cite or discuss any of the case law supporting the existing rule that a jury can choose to disregard testimony by a witness, even an expert, regardless of whether or not that testimony is directly challenged or contradicted. If some change to that rule had been intended, it is logical to assume the existing rule would, at the very least, have been mentioned. Thus, the most reasonable assumption is that the apparent change to the traditional rule was an unintended consequence of the Court of Appeals' decision. But it remains a consequence

nonetheless – one that will hinder future parties’ ability to defend against questionable injury claims.

Sanders raised all of these arguments and concerns to the Court of Appeals in his rehearing petition. The Court of Appeals obviously did not grant the petition, which means that Court never addressed the concerns. The Court of Appeals did withdraw its original opinion and substitute a “new” one, but the only difference between the two opinions was to change the status from published to unpublished. Presumably the Court of Appeals recognized the harmful potential of its opinion (as published) and changed the status in an attempt to mitigate that harm. But even if that is true, the fact remains that the erroneous opinion remains “on the books,” and litigants can still make reference to that decision, especially in the trial courts.

Rule 268(d)(2), SCACR, prohibits citations to unpublished decisions in most settings. In practice, however, litigants often treat this rule like many motorists treat posted speed limits – *i.e.* there is an assumption that violating the rule to some extent is excusable. Thus, attempting to minimize the opinion’s impact by marking it as unpublished (to the extent that was the Court of Appeals’ intention) does not solve the problem. The only way to do that is for this Court to grant the current petition and reverse the Court of Appeals’ opinion.

### **CONCLUSION**

For these reasons, this Court should grant the Petition for Writ of Certiorari and review and reverse the Court of Appeals’ erroneous decision that has the potential to alter and harm trial practice in vehicular accident cases in South Carolina.

(Signature on next page)

Respectfully submitted,

s/ R. Hawthorne Barrett

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