THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Curtis Mills, Respondent,

v.

The South Carolina State Ports Authority, Appellant.

Appellate Case No. 2018-001158

Appeal from Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 5862
Heard February 2, 2021 – Filed September 15, 2021

AFFIRMED

Randell Croft Stoney, Jr., and John William Fletcher, of Barnwell Whaley Patterson & Helms, LLC, of Charleston; and Randolph Russell Lowell, of Willoughby & Hoefer, PA, of Charleston, all for Appellant.

Ladson Fishburne Howell, Jr., of Mount Pleasant, for Respondent.

LOCKEMY, C.J.: In this personal injury action, the South Carolina State Ports Authority (the Ports Authority) appeals the jury's verdict in favor of Curtis Mills (Mills), arguing the trial court erred by (1) refusing to charge comparative negligence and (2) denying its motion for a new trial absolute or, in the alternative, new trial nisi remittitur. We affirm.

FACTS

Mills brought this action against the Ports Authority alleging he was injured when its employee, a crane operator at the Wando Terminal port facility, negligently lifted a cargo container from his truck. Mills alleged the crane operator lifted the container while it was still connected to the chassis, which caused the back of the truck to lift along with the container. He claimed that rather than alerting him and safely lowering the container and truck, the crane operator kept them lifted about six to eight feet in the air and shook the container until it came free. Mills alleged this action caused the truck and chassis to fall violently to the ground, throwing him around the cab and injuring him. The Ports Authority alleged comparative negligence as an affirmative defense, arguing Mills was negligent for failing to completely disengage the locking mechanisms that secured the load to his chassis.

At trial, Mills testified he entered the port facility around 3:00 p.m. on October 4, 2012. He testified that prior to checking in at the gate, drivers usually got out and walked around their truck to inspect the chassis and "unlock the box." Mills explained there were four locking mechanisms or "pins" around the box; the front pins slide and the rear pins twist. He testified that when he arrived at the gate, he "walked around the whole truck" and disengaged all four locking pins. A worker at the gate then checked him in and instructed him to proceed to a crane row to offload his box. Mills drove to the designated row and waited for the crane operator. He testified the crane operator—Greg Spanbauer—"clamped down hard on the box" and when Spanbauer lifted it, the chassis and the truck came about four or six feet off the ground. Mills explained that when a crane operator lifts a box and notices the chassis start to come up, he is supposed to lower the box down, blow the horn, and allow the driver to get out and disengage the pins. Mills averred Spanbauer saw the chassis lift off the ground. He stated Spanbauer seemed to "shake the box off," the box separated, and the chassis and tires of the truck came back down "hard." Mills stated that after the box broke free, he drove his truck forward so the box did not fall back onto the truck. He then reported the incident to driver's assistance and the Ports Authority police.

Mills testified he felt pain in his neck and back and he went to the hospital after the accident. He explained the hospital referred him to Dr. Poletti for treatment and that he later treated with Dr. Zgleszewski.[1] Mills testified he incurred medical expenses of about $50,000. He stated Dr. Poletti discussed surgery with him and told him there was a "50/50 chance" that he "would walk out of surgery." Mills testified Dr. Zgleszewski administered spinal injections for pain. He stated the

[1] Although the record contains references to Dr. Poletti's trial testimony, this testimony does not appear in the record on appeal.

injections provided some relief but the pain would eventually return and was "still there." Mills testified he was "still in pain" at the time of the 2018 trial and although he took pain medication, "it[wa]s going to be a lifetime . . . pain."

Mills explained Dr. Zgleszewski released him for "light duty" work in February 2014, and although he had returned to work, he was not able to maintain a regular schedule because he had to stop frequently to stretch. Mills stated he could no longer engage in certain activities he participated in prior to the accident, such as playing basketball and running with his children. He recalled he missed about nine weeks of work and lost about $12,000 in income during that time.

Dr. Zgleszewski testified to a reasonable degree of medical certainty, Mills suffered a herniated disk and annular tear, which were most probably caused by the accident. He opined the treatment he and Dr. Poletti provided was reasonable and necessary. Dr. Zgleszewski stated he last treated Mills on February 24, 2014, and on that date he believed Mills could return to work and his pain was at a low level. He stated he then placed Mills on a medical management plan.

Spanbauer, whose deposition testimony was read into the record at trial, testified he lifted Mills's box and it came up about "two feet in the back." Spanbauer stated that during the lift, the back pins were unlocked but the front pins were engaged, which caused the container to rise off the chassis at an angle of about two feet. He explained that once he realized the front pins were engaged, Mills drove off, causing the truck to "bounce up and down." Spanbauer testified that the hydraulics of the crane would not allow a crane operator to "shake" a box. He noted drivers sometimes kept their pins engaged intentionally and would try to disengage them by sliding out during the lift instead. However, he stated it would be safe to lift a box off a chassis with the pins engaged if the driver told him ahead of time because he would be able to lift up the box and let them drive off.

Barney Washington, an equipment operator and employee of the Ports Authority, explained that when a crane operator lifts a container that is still attached to the chassis, the operator would notice this because the chassis or the wheels would rise up. He explained that if this occurred or if the crane operator saw the chassis twist during the lift, the operator is supposed to lower the box back to the ground and signal to the driver. Likewise, Jarod Brown, another employee of the Ports Authority, testified crane operators would know "pretty much immediately" if any resistance occurred during a lift and were "trained to stop and lower the container and have the driver check the equipment." Washington stated the crane operators did not "jiggle" containers and it would be dangerous to do so. Washington and

Brown both averred that for all four corners of a chassis to be lifted with a box, all four pins would have to be engaged. Washington testified the driver was responsible for ensuring the pins were disengaged and the box was safe to lift. He agreed that after a driver disengaged his pins at the gate, the pins would sometimes jostle back into place during the drive from the gate to the crane row. Brown stated some drivers left their front pins engaged for the lift intentionally because it allowed them to pick up another load after the lift without having to disengage the forward pins.

Damion Solomon, another truck driver, testified he witnessed Spanbauer lift the container from Mills's truck. He stated he saw the chassis, the box, and the back of truck lift up off the ground high enough for him to walk under it. He explained Spanbauer then twisted the boom, causing the box to come free and the chassis and everything else to fall back to the ground. Solomon explained that when drivers arrived at the terminal gate, they unlocked all four pins on their truck. He testified that in his experience, the pins frequently "jostle[d] back into place" when a driver traveled from the gate to the cranes. Solomon noted some drivers disengaged their pins at the gate and others waited until they arrived at the crane to do so. Although he agreed drivers could check the pins a second time upon arriving at the container handler, he stated that that no drivers actually did this.

The Ports Authority moved for a directed verdict, which the trial court denied. Mills objected to the Ports Authority's request to charge comparative negligence, arguing no standard required drivers to check the pins again immediately before the lift if the driver had already disengaged the pins at the terminal gate. The Ports Authority argued it was the driver's responsibility to make certain that the pins were disengaged, and Mills failed to do so. The trial court declined to charge comparative negligence.

The Ports Authority objected to Mills's request to charge lost wages, arguing such damages were speculative because Mills presented no tax returns or evidence of his salary, and the trial court agreed. However, the trial court inadvertently charged the jury that, in determining damages, it could consider "loss of time and income which resulted from the impairment of the ability to work and earn a livelihood" and could include in its estimate the "loss of the capacity for work." The trial court asked if the parties had any objections to the charges as read. The Ports Authority renewed its argument regarding comparative negligence but did not otherwise object. The jury returned a verdict for Mills and awarded him $616,710.07 in actual damages.

The Ports Authority filed several post-trial motions: it moved for a new trial based on the trial court's refusal to charge comparative negligence and requested a new trial under the thirteenth juror doctrine, a new trial absolute, and a new trial nisi remittitur. The Ports Authority also argued the South Carolina Tort Claims Act[2] limited Mills's recovery to $300,000, and Mills agreed. The trial court reduced the award to $300,000 but denied the Ports Authority's remaining motions. This appeal followed.

ISSUES ON APPEAL

1. Did the trial court err in refusing the Ports Authority's request to instruct the jury regarding comparative negligence?

2. Did the trial court err in denying the Ports Authority's motion for a new trial absolute or, in the alternative, a new trial nisi remittitur?

LAW AND ANALYSIS

I. Comparative Negligence Instruction

The Ports Authority argues the trial court erred by refusing to charge comparative negligence. The Ports Authority asserts the evidence showed drivers had a duty to disengage all four pins upon entering the gate and to ensure the pins did not thereafter reengage prior to the lift and substantial evidence showed Mills breached this duty. We disagree.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) (citation omitted).

"[T]he trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000). "Whe[n] a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." *Ross v. Paddy*, 340 S.C. 428, 437, 532 S.E.2d 612, 617 (Ct. App. 2000).

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[2] *See* S.C. Code Ann. § 15-78-120(a) (limiting a plaintiff's recovery to $300,000).

"However, the trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved." *Clark*, 339 S.C. at 390, 529 S.E.2d at 539.

"[C]omparative negligence is an affirmative defense . . . ." *Ross*, 340 S.C. at 437, 532 S.E.2d at 617. The burden of proving an affirmative defense rests upon the party asserting it. *See id.* at 436-37, 532 S.E.2d at 616-17. "The determination of the respective degrees of negligence attributable to the plaintiff and the defendant is a question of fact for the jury, at least where conflicting inferences may arise." *Id.* at 433, 532 S.E.2d at 614-15. To establish negligence,

> [A] plaintiff must show the (1) defendant owe[d] a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. If there is no duty, then the defendant in a negligence action is entitled to a directed verdict.

Sabb v. S.C. State Univ., 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002) (citation omitted).

As an initial matter, as to the Ports Authority's contention Mills was negligent for driving his truck forward during the lift, we acknowledge the crane operator's testimony constituted some evidence that Mills was negligent. Spanbauer testified Mills realized the shipping container was still attached to the truck and tried to free the truck from the container by driving away. If it believed this testimony, the jury could have found Mills bore some of the fault for this incident by creating a tug-of-war between his eighteen-wheeler, the pins on a shipping container, and a heavy-duty crane. Based on these facts, a comparative negligence charge would have been appropriate. Critically, however, the Ports Authority's argument at the charge conference did not mention the conflicting testimony about what caused this incident or this evidence of Mills's potential fault. Instead, the Ports Authority only argued truck drivers are responsible for ensuring shipping containers remain unhooked after a truck leaves the terminal gate and travels to the point where containers are unloaded. Because the Ports Authority did not raise this argument to the trial court in support of its request for a comparative negligence charge, we cannot conclude the trial court erred by declining to charge comparative negligence on this basis. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate

review."); *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) ("A party may not argue one ground at trial and an alternate ground on appeal." (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003))).

We conclude the trial court did not err by refusing to charge comparative negligence because the Ports Authority failed to present evidence to support an inference Mills was negligent. In particular, no evidence showed he breached a duty of care to the Ports Authority. *See Sabb*, 350 S.C. at 416, 567 S.E.2d at 237 ("If there is no duty, then the defendant in a negligence action is entitled to a directed verdict."); *Clark*, 339 S.C. at 390, 529 S.E.2d at 539 ("[T]he trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.").

The Ports Authority contends that to accept Mills's version of events, the jury would have had to conclude that all four pins were engaged at the time of the lift and that Mills therefore never disengaged any of his pins. We find the record contains no evidence to support this theory. Although Washington and Brown averred it was unlikely the entire chassis could be lifted unless all four pins were engaged, Spanbauer—who actually performed the lift—testified that only the front two pins on Mills's truck were engaged at the time of the lift. Additionally, Mills testified he disengaged all four pins. Thus, the record does not support an inference that Mills failed to disengage any of the pins in the first place, nor does it support an inference that all four of the pins were engaged at the time of the lift.

The Ports Authority next contends that even if Mills disengaged the pins at the gate, he breached his duty by failing to ensure they were still disengaged at the time of the lift. The record contains no evidence showing a driver has a duty to recheck the pins prior to the lift to ensure they did not reengage. According to Solomon, no drivers did this. At most, the evidence showed only that a driver had a duty to disengage the locking pins on his truck either upon entering the gate at the port terminal or upon presenting his container to the crane operator for offloading—but not both. No evidence contradicted Mills's testimony that he disengaged all four pins when he entered the terminal gate. As we stated, Spanbauer testified only the front two pins were engaged when he performed the lift. Washington and Solomon testified locking pins sometimes jostled back into place during the drive from the gate to the crane operator, and Solomon stated this happened frequently. Spanbauer and Brown testified drivers sometimes intentionally left their front pins engaged and crane operators were familiar with this practice. Furthermore, Spanbauer stated this did not necessarily prevent him

from completing a lift safely. Washington and Brown both testified that when a crane operator initiates a lift, he could tell immediately if any pins were still engaged and was supposed to then lower the box back down and sound the horn to notify the driver that he needed to disengage the pins. Based on the foregoing, no evidence showed drivers were required to check their pins a second time prior to the lift. Therefore, the only reasonable inference to be drawn from the evidence was that Mills did not breach any duty owed to the Ports Authority.

For the foregoing reasons, we find the Ports Authority failed to show Mills had a duty to keep the pins disengaged or to recheck them when he arrived at the crane operator. Therefore, the trial court did not err by refusing to charge comparative negligence.[3]

II. New Trial Motions

The Ports Authority argues the trial court erred in refusing to grant a new trial absolute or a new trial nisi remittitur because the jury's verdict was excessive and not supported by the evidence. We disagree.

"When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Nestler v. Fields*, 426 S.C. 34, 40, 824 S.E.2d 461, 464 (Ct. App. 2019).

"A new trial absolute should be granted only if the verdict is so grossly excessive that it shocks the conscience of the court and clearly indicates the amount of the verdict was the result of caprice, passion, prejudice, partiality, corruption, or other improper motive." *Knoke v. S.C. Dep't of Parks, Recreation & Tourism*, 324 S.C. 136, 141, 478 S.E.2d 256, 258 (1996). In such a case, "it becomes the duty of the trial judge and this [c]ourt to set aside the verdict absolutely." *Allstate Ins. Co. v. Durham*, 314 S.C. 529, 531, 431 S.E.2d 557, 558 (1993).

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[3] As the Ports Authority acknowledges, although the trial court used the words "last clear chance" when considering the parties' arguments, the court promptly clarified the doctrine did not apply and did not consider it in reaching its conclusion. Thus, any argument the trial court applied the last clear chance doctrine in refusing to charge comparative negligence is without merit.

"If the trial court determines that the verdict is 'merely excessive,' the court has the power to reduce the verdict by granting a new trial nisi remittitur." *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011). The trial court must provide "compelling reasons" to warrant invading the jury's province by granting a new trial nisi. *See Curtis v. Blake*, 392 S.C. 494, 501, 709 S.E.2d 79, 82 (Ct. App. 2011) (finding the appellant's arguments did not constitute compelling reasons to justify the grant of a new trial nisi remittitur). "Motions for a new trial on the ground of either excessiveness or inadequacy are addressed to the sound discretion of the trial judge." *Riley v. Ford Motor Co.*, 414 S.C. 185, 192, 777 S.E.2d 824, 828 (2015) (quoting *Graham v. Whitaker*, 282 S.C. 393, 401, 321 S.E.2d 40, 45 (1984)). The trial court's "decision will not be disturbed on appeal unless its findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law." *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009).

When considering the trial court's ruling on motions for a new trial or new trial nisi remittitur, this court "employ[s] a highly deferential standard of review." *Burke*, 393 S.C. at 57, 710 S.E.2d at 89; *see also Rush v. Blanchard*, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993) (acknowledging the trial court "who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt" and therefore this court gives "great deference" to the trial court, "especially in the area of intangible elements of damages"). Likewise, "[t]he jury's determination of damages is entitled to substantial deference." *Knoke*, 324 S.C. at 141, 478 S.E.2d at 258. "A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive." *Kunst v. Loree*, 424 S.C. 24, 46-47, 817 S.E.2d 295, 306 (Ct. App. 2018) (quoting *Young v. Warr*, 252 S.C. 179, 187, 165 S.E.2d 797, 801 (1969)).

The Ports Authority contends a jury note revealed the jury's calculations in reaching its verdict and showed the jury improperly considered future lost wages. The Ports Authority argued the amount of the verdict was speculative because Mills provided no evidence of lost wages. However, the record contains no reference to the note until the post-trial hearing. During the post-trial hearing, the trial court explained that after the jury's verdict was announced and the proceedings concluded, the bailiff handed the trial court a note, stating the jury foreperson gave the note to the bailiff to give to the court. The trial court stated she entered the note as a court's exhibit "out of an abundance of caution" but did not discuss the note with any of the jurors. This note bears the handwritten words,

"Juror 354" at the top, but it contains no other reference to particular jurors or the jury as a whole. The figure $398,665 was written on the note next to the words "lost wages till ret." The note contained several additional numbers and the words "salary," "out of work," "cleared to work," and "bills." In ruling upon the new trial motions, the trial court concluded "there [wa]s no way" it or the parties could understand "with absolute certainty" what the figures on the note meant, where they came from, or how they were utilized.

The trial court did not err in declining to give the jury note dispositive weight in deciding the new trial motions. *See Burke*, 393 S.C. at 57, 710 S.E.2d at 89 (stating this court "employ[s] a highly deferential standard of review when considering the trial [court]'s ruling[s]" on motions for a new trial); *see also Knoke*, 324 S.C. at 141, 478 S.E.2d at 258 ("The jury's determination of damages is entitled to substantial deference."). The verdict form itself stated only that the jury found for Mills and awarded him $616,710.07 in damages; it did not include a specific calculation. Even if we were to accept the note as competent evidence to suggest the jury considered lost wages in reaching its verdict, the trial court instructed the jury that it could consider lost wages in calculating damages.[4] In addition, the trial court instructed the jury that a plaintiff was never entitled to speculative damages and that actual damages "need not be proven to a mathematical certainty" but "the evidence must allow [the jury] to determine what amount of damages is fair, just, and reasonable." Mills presented evidence from which the jury could have determined his approximate pay within a reasonable degree of certainty. *See Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981) ("[Although] neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required."). Specifically, he

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[4] Although the trial court inadvertently charged the jury on lost wages, the Ports Authority failed to object to the charge as read, and it has not raised this as an issue on appeal. Therefore, any argument that the trial court erred in charging the jury on lost wages is not before this court. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Ordinarily, no point will be considered on appeal which is not set forth in the statement of the issues on appeal." (quoting Rule 208(b)(1)(B), SCACR)); *see also Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 199, 232 S.E.2d 728, 730 (1977) ("[I]f there is any error in the court's charge, it should be called to the attention of the judge at the conclusion of the charge . . . . A party who fails to call the attention of the court to the objection at that time cannot later complain.").

testified without objection that he lost about $12,000 during the nine weeks he was out of work. Thus, we find the note did not indicate the jury's verdict was the result of improper motive, and the trial court did not err by declining to give it dispositive weight.

Next, the trial court did not err in refusing to grant a new trial absolute or new trial nisi remittitur. *See Rush*, 310 S.C. at 381, 426 S.E.2d at 806 (acknowledging the trial court "who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than this [c]ourt" and therefore this court gives "great deference" to the trial court, "especially in the area of intangible elements of damages"). The trial court articulated the correct law in ruling upon the new trial motions. The trial court denied the motions based on the testimony as a whole and found the jury's verdict did not shock the conscience and was based upon testimony presented at trial. At trial, Mills testified his truck was lifted four to six feet off the ground and that when the box disengaged, the chassis and the tires of his truck came down hard. According to Mills, he sought medical attention immediately after the accident and was out of work for about nine weeks, resulting in a loss of about $12,000 in earnings. Dr. Zgleszewski testified Mills suffered a herniated disk and an annular tear as the result of the accident. Mills presented evidence he incurred medical costs of $50,000. He explained the spinal injections provided only temporary relief, he was still in pain at the time of trial, he continued to take pain medication, he would have "lifetime" pain, and he could no longer play basketball or run with his children like he used to. Mills stated that although he was employed as a truck driver again, he was not able to maintain a regular schedule because he had to make frequent stops to take breaks and stretch. From this testimony, the jury could have reasonably concluded that (1) Mills suffered a severe injury to his back, (2) the injury caused chronic pain from which Mills continued to suffer, (3) Mills would likely need additional medical treatment for the injury in the future, and (4) his inability to maintain a regular schedule due to his ongoing pain reduced his earning capacity. Even though he did not submit documentation of his income, the jury was free to accept or reject his testimony about his earnings and draw other reasonable inferences from that testimony, including his approximate annual pay.

We cannot conclude the award was "so shockingly disproportionate to the injuries as to indicate that the jury was moved or actuated by passion, caprice, prejudice, or other considerations not found in the evidence." *See Durham*, 314 S.C. at 531, 431 S.E.2d at 558. Thus, the trial court did not abuse its discretion in denying the Ports Authority's motion for a new trial absolute.

Further, a rational view of the evidence supports the jury's award and the verdict is not out of proportion to the character and extent of the injury. *See Kunst*, 424 S.C. at 46-47, 817 S.E.2d at 306 ("A verdict which may be supported by any rational view of the evidence and bears a reasonable relationship to the character and extent of the injury and damage sustained, is not excessive." (quoting *Young*, 252 S.C. at 187, 165 S.E.2d at 801)). Thus, we conclude the trial court did not abuse its discretion in denying the Ports Authority's motion for a new trial nisi remittitur.

CONCLUSION

For the foregoing reasons, the trial court's rulings denying the Port's Authority's request to charge comparative negligence and its motions for a new trial absolute and new trial nisi remittitur are

AFFIRMED.

HUFF and HEWITT, JJ., concur.