IN THE

SUPREME COURT OF APPEALS OF VIRGINIA

AT RICHMOND

RECORD No. 1807

S. M. BASS,
Plaintiff-in-Error,

v.

SAMUEL PETERSON,
Defendant-in-Error.

REPLY BRIEF FOR PLAINTIFF-IN-ERROR

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To the Honorable the Chief Justice and the Justices of the Supreme Court of Appeals of Virginia:

THE JURY ARE NOT, AS A MATTER OF LAW, REQUIRED TO BELIEVE A WITNESS' TESTIMONY AS TO THE EXTENT OF INJURIES IN AN AUTOMOBILE CASE

The above statement is taken verbatim from 10 *Bashfield,* Cyclopedia of Automobile Law, page 141, section 6552, and is particularly pertinent to the case at bar, where it will be remembered that upon conflicting evidence as to liability and injuries, the jury brought in a verdict for $450.00 in favor of the plaintiff, which the Court set aside and entered judgment in the sum of $2,693.50.

The plaintiff attempted to prove injuries far greater than the $450.00 allowed by the jury. He complained of dizziness, lameness and an inability to work down to the time of the trial, some seven months after the accident. His doctors, Dr. Meredith and Dr. Coleman, testified that he still had *subjective* symptoms, but they did not testify as to any *objective* symptoms.

The testimony of Dr. Richardson and Dr. Decker indicated that he had been entirely cured when he left the hospital, nine days after the accident. In fact, Dr. Decker stated emphatically that the plaintiff was *not* suffering from dizziness (R. 63). This, in conjunction with his demeanor upon the stand and his disregard of Dr. Meredith's advice to stay out of the sun and see a doctor, amply warranted the jury in believing that he was ma-

lingering and was attempting to make the defendant pay for a winter's sojourn in Florida.

A case directly in point is *Carr* v. *Florian,* 29 Pac. (2d) 728 (Arizona—1934). Here the plaintiff incurred medical and hospital expenses amounting to $900.00, as a result of an accident, and the jury brought in a verdict for $1,500.00, leaving him $600.00 to compensate for pain, suffering and loss of earning ability. In holding that the jury were warranted in disregarding the testimony of the plaintiff and his doctors as to the extent of his injuries, the Court said:

> "We have thus in favor of plaintiff's theory of the case his own testimony as to his subjective symptoms, and the testimony of two physicians, based on their observation of him during a treatment of nine weeks, which would have sustained a judgment that he was seriously and permanently injured. We have, on the other hand, the testimony of his conduct immediately after the accident, and that of another physician as to his objective condition as shown by X-rays, which we cannot say would not justify a reasonable man in believing that the actual injuries suffered by plaintiff were negligible, and that plaintiff's physicians were mistaken in both their diagnosis and prognosis of the case, and as to the proper treatment to be given thereto."

* * *

"There is no evidence which would justify us in concluding that the jury was actuated by passion, prejudice, or a misconception of the law applicable to the damages to be awarded in cases of this nature, unless we assume that no reasonable man could conclude from the evidence that plaintiff had failed to sustain the burden imposed upon him of proving that his injuries resulting from the accident were of a serious and permanent character. As we have said, we would not be justified on the record in so holding."

THE TRIAL COURT ERRED IN ENTERING JUDGMENT FOR A GREATER AMOUNT THAN THE JURY ALLOWED

There is no question but in a proper case, a Trial Court can enter up judgment for a different amount than the jury's verdict. The cases of *Apperson-Lee Motor Company* v. *Ring,* 150 Va. 283, and *Kemp* v. *Miller,* 166 Va. 661, cited by the plaintiff, involve liquidated damages, which is not true in the case at bar, which was for unliquidated damages. In those cases, there was no dispute as to whether the actual damages were sustained. In the case at bar, it was a jury question whether, in fact, the plaintiff was injured as greatly as he claimed.

The Court arbitrarily held that the plaintiff was entitled to certain items of damages claimed by him. In *Rawle* v. *McIlhenny,* 163 Va. 735, cited and discussed in our petition for writ of error, this Court held that upon conflicting evidence, a jury's verdict should not be disturbed, unless it was due to the "misconduct of the jury" or "its misconception of the merits of the case," and in that event only should a new trial be granted, and not as in the case at bar, by arbitrarily entering judgment for a much greater amount.

CONCLUSION

For these additional reasons, it is earnestly submitted that the judgment of the Trial Court be reversed.

Respectfully submitted,

S. M. BASS,

By SINNOTT AND MAY,
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Counsel.