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Jan 17 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Hon. Alex Kinlaw, Jr., Circuit Court Judge

Case No. 2015-CP-10-02191
Appellate Case No. 2019-001403

Karrie Gurwood & Howard GurwoodAppellants

v.

GCA Services Group, Inc. & GCA Services Group of North Carolina, Inc. ... Respondents

RESPONDENTS' PETITION FOR REHEARING

s/Robert T. Lyles, Jr.

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January 17, 2023

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Appellants

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Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondents hereby file this Petition for Rehearing and respectfully request a rehearing of Unpublished Opinion 2022-UP-462 (filed December 21, 2022) and/or the issuance of a new opinion on the issues outlined herein.

Argument

I. The Court of Appeals Erred in Applying the Direct Verdict Standard in Its Review of the Trial Court’s Decision Not to Submit the Issue of Punitive Damages to the Jury Without Applying to the Clear and Convincing Standard.

In its decision to reverse the Trial Court’s decision not to submit the issue of punitive damages, the Court of Appeals erroneously applied a simple negligence standard of review and stopped its inquiry.

In its review, the Court of Appeals recognized that to recover an award of punitive damages, Karrie Gurwood and Howard Gurwood (the “Gurwoods”) were required to prove that GCA Services Group, Inc. & GCA Services Group of North Carolina, Inc. (“GCA”) was grossly negligent, by clear and convincing evidence. Which has been defined as:

[That]degree of proof which will produce in the [fact finder] a firm belief as to the allegations sought to be established. Such measure of proof is intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt; it does not mean clear and unequivocal.

Satcher v. Satcher, 351 S.C. 477, 483, 570 S.E.2d 535, 538 (Ct. App. 2002).

However, in doing its review, the Court of Appeals considered the evidence at trial but did not weigh that evidence by the higher standard. Instead, the Court of Appeals erroneously applied a simple negligence standard, which does not apply.

It must be recognized that the submission of punitive damages to a jury, by law, requires greater scrutiny than simple negligence. South Carolina has adopted a statutory

framework for punitive damages, §15-32-520, which calls for a higher burden of proof, clear and convincing evidence, in order to entitle a party to an award of punitive damages. S.C. Code Ann. § 15-32-520(D) (2011)). It also mandates a series of express factors a jury must consider when applying that burden of proof §15-32-520(E). Among others, those factors include:

- (3) the extent to which the plaintiff's own conduct contributed to the harm;*
- (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant;*
- (5) the existence of similar past conduct;*
- (6) the profitability of the conduct to the defendant;*
- (8) the likelihood the award will deter the defendant or others from like conduct;*

In addition, §15-32-520(F), gives the trial court a gate-keeping role to play with respect to the issue of punitive damages. That section provides:

If punitive damages are awarded, the trial court shall review the jury's decision, considering all relevant evidence, including the factors identified in subsection (E), to ensure that the award is not excessive or the result of passion or prejudice.

By only applying the standard of review applicable to a simple negligence claim to a decision not to submit the issue of punitive damages to the jury, the Court of Appeals treats the issue of punitive damages no differently than a simple negligence case.

When conducting the review of a case with a heightened burden of proof, a mere scintilla of evidence is not enough to withstand review. The Supreme Court has even stated “[I]n cases requiring a heightened burden of proof ... the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.” *Swiger v. Smith*, 426 S.C. 408, 415, 827 S.E.2d 200, 203 (2019) (citing *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330-31, 673 S.E.2d 801, 803 (2009)). In those types of cases, like the matter at hand, when making a review of the evidence, it is paramount

that the appellate court determine if a reasonable inference can be made that the burden of proof was met, here clear and convincing evidence of willful, wanton, or reckless conduct on the part of the respondent, not just that an inference can be made of some negligence. See, *Ralph v. McLaughlin*, 423 S.C. 640, 856 S.E.2d 154 (2021) (Holding that the evidence at trial did not support a finding of gross negligence by clear and convincing evidence.) It is clear from the case law that this Court must apply the clear and convincing standard of proof when considering the direct verdicts reasonable inference.

In the matter at hand, the Court of Appeals failed to apply the clear and convincing standard at all. At no point did the Court of Appeals even mention the clear and convincing standard in their own analysis. The only time it is referenced during the analysis is in a saying that “it is for the jury to weigh the evidence and decide whether the Gurwoods met their burden of proof to present clear and convincing evidence of GCA’s recklessness.” (Unpublished Opinion 2022-UP-462 (filed December 21, 2022)). The Court of Appeals cited to *Ralph v. McLaughlin* as support for this type of analysis which is just incorrect. *Ralph* made it clear that the appellate court was to be the ones to take into consideration the clear and convincing standard. The *Ralph* case did exactly that and opined “The suggestion that removing the drainage pipe under these circumstances established clear and convincing evidence of Petitioners’ malicious intent to invade Respondents’ rights was not merely speculation, but absurd.” *Ralph v. McLaughlin*, 423 S.C. 640 (2021). Like the *Ralph* case, the idea that there was any conduct to show recklessness is absurd. The contention that there is clear and convincing evidence of recklessness is nonexistent. This Court erred by not applying the clear and convincing standard at all. This Court simply asked if a reasonable inference could be drawn from the fact presented and determined then it was an issue for a jury. What must be done is to ask whether there is a reasonable

inference, based on the facts of the case, that the clear and convincing burden was met by the Appellants, which it was not. A thorough analysis, using the factors from the statute S.C. Code Annotated §15-32-520(E), should have been conducted.

II. The Court of Appeals Erroneously Concluded That The Facts at Trial Supported a Finding of Gross Neglect on the Part of GCA.

In its opinion, the Court of Appeals cited to numerous facts from the trial but then erroneously concluded that those facts gave rise to an inference of gross neglect on the part of GCA. Much as it did in *Ralph*, the Court of Appeals misconstrued the facts.

In its opinion, this Court acknowledged that (1) Every put up wet wax signs and fold-out wet floor signs, (2) the wet wax signs were seen by Karrie Gurwood (“Mrs. Gurwood”) the Thursday before the incident, and (3) Mrs. Gurwood was verbally warned about the flooring being waxed the Friday before the incident by Every and Jamme’s announcement. Unfortunately, it then misconstrues the facts and the inferences to be drawn there from. First, citing to the fact that Mrs. Gurwood testified that she did not see the warning signs placed by Mrs. Every, or hear the announcements, made by Mrs. Jamme of the school, the Court of Appeals finds support for the imposition of punitive damages against the Defendant. Those facts do not support any inference at all with respect to the conduct of Defendants. Instead, those facts relate to whether or not Mrs. Gurwood was on notice or was herself negligent. Mrs. Gurwood’s lack of awareness does not constitute reckless conduct by GCA.

This Court goes on to cite the facts that Every, (1) admitted waxed floors were a safety hazard and (2) that signage was important, as more reason the trial judge should not have granted the directed verdict. However, Every testified that she placed those signs. Whether the signs were placed or not, Mrs. Every testified that she did place them, from

which no inference can be made that she willfully ignored the hazard associated with a wet floor. An inference of gross neglect from those facts simply cannot be made, much less to the required clear and convincing standard.

III. The Court of Appeals Applied the Incorrect Standard of Review of the Trial Court's Statutory Gate-Keeping Function.

In reversing the Trial Court, the Court of Appeals failed to recognize or properly review the Trial Court's statutory gate-keeping function relative to the issue of punitive damages, which should have been given deference and an abuse of discretion standard of review.

At issue in this matter was the Trial Court's gate-keeping function articulated in S.C. Code Annotated §15-32-520 (F), set-forth above. That gate-keeping function is not permissive, and instead mandates that a trial court "shall" review a jury's punitive damages award, to "ensure" it was not the result of "passion or prejudice." In doing so, the Trial Court is obligated to do the same rigorous analysis of the evidence relative to a punitive damages award that the appellate courts have done. It must consider the enhanced clear and convincing burden of proof that applies, and also consider the evidence relative to the (E) factors a jury is required to consider.

If a court exercises that function and rejects or reduces a punitive damages award, what standard of review applies? It cannot be a simple negligence standard. If that standard applied, then the trial court's gate-keeping function would be effectively eliminated from the statute.

To determine the standard of review that applies, one must see what review applies to similar gate-keeping functions exercised by the trial courts. A similar gate-keeping function is required when a court considers the admissibility of expert testimony under Rule 403, *SCRE*. The gate-keeping function has been recognized in numerous cases discussing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* and *State v. Council*. (See

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993); *See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999)). In those cases, when reviewing the trial court's admission or exclusion of expert testimony, the appellate courts have adopted a deferential standard for an abuse of discretion. *See, State v. Phillips*, 430 S.C. 319, 334, 844 S.E.2d 651, 658 (2020) (“[w]e have repeatedly discussed the trial court's "gatekeeping" role regarding the admission of expert testimony...”); and *State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) (“[w]e review a trial court's decision to admit or exclude evidence under a deferential standard for an abuse of discretion.”) It is clear that appellate courts are aware that when a gatekeeping function is in play, deference must be given. The review should be for the abuse of discretion, not simply a minor degree of difference in opinion.

In the event a review of that discretion is required, appellate courts are to undertake that review *de novo* while not completely ignoring the position taken by the trial court, but rather looking at the entirety of the facts. The Supreme Court even mentioned they understand that review of a gate-keeping function may appear as “second-guessing” the trial court, but they are actually conducting the analysis for the first time. (*See State v. Phillips*, 430 S.C. 319, 341, 844 S.E.2d 651, 662 (2020)).

Another area where a trial court is given a gate-keeping function involves the assessment of prospective jurors. In reviewing those decisions, appellate courts apply an abuse of discretion standard and will not reverse a trial court unless it is found to be wholly unsupported by the evidence. (*See State v. Council*, 335 S.C. 1, 515 S.E.2d 508 (1999) (citing *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992)).

The gate-keeping function of the trial court set forth in §15-32-520(F) must also be reviewed under an abuse of discretion standard. To hold otherwise, is to ignore the statutory language.

Turning to the facts of this case, the Trial Judge, in his role as gatekeeper, elected not to submit the issue of punitive damages to this jury in this matter. In doing so, he considered the heightened burden of proof and the evidence from four full days of trial and concluded that the evidence submitted would not legally support any award of punitive damages. With respect to the issue of GCA's willful, wanton and reckless conduct, there simply was none, and certainly none that would satisfy the "clear and convincing" burden of proof.

In reviewing the Trial Court's ruling on punitive damages on an abuse of discretion standard, the Court of Appeals was also required to consider the (E) factors. The Trial Judge was aware that there was *no evidence* put forth in support of any of the (E) factors in the trial of this case, except factor "3", Mrs. Gurwood's own culpability for the injury, which the jury determined was 50% the fault of Mrs. Gurwood, herself.

If an award for punitives had been issued, part of the Trial Court's gate-keeping function would also have been to consider the reprehensibility of GCA's conduct with regard to that award, just as appellate courts have in a number of South Carolina decisions. (See *James v. Horace Mann Ins. Co.*, 371 S.C. 187, 638 S.E.2d 667 (2006); *Atkinson v. Orkin Exterminating Co.*, 361 S.C. 156, 604 S.E.2d 385 (2004); *Frazier v. Badger*, 361 S.C. 94, 603 S.E.2d 587 (2004); *Hollis v. Stonington Dev., LLC* 394 S.C. 383, 714 S.E.2d 904 (Ct. App. 2011); *Hale v. Finn*, 388 S.C. 79, 694 S.E.2d 51 (Ct. App. 2010); *O'Shields v. Columbia Auto., LLC*, 435 S.C. 319, 867 S.E.2d 446 (Ct. App. 2021)). Again, there was no evidence of reprehensible conduct by GCA or Mrs. Every, which the Trial Court knew,

having watched all of the witnesses and seen all of the evidence. In the absence of that, any award of punitive damages would have been reversed.

The fact that the Trial Court exercised its gate-keeping function before submitting the issue to the jury, rather than after, is immaterial. If anything, it should be commended for shortening the trial and not confusing the jury with the law of a heightened burden of proof, the statutory factors and other aspects of a punitive damages issue that he knew was not supportable.

By failing to consider the Trial Court's statutory gate-keeping role, and then applying an abuse of discretion standard, the Court of Appeals has made the issue of punitive damages no different than simple negligence and has removed the gate-keeping role of the Trial Court from §15-32-520(F).

IV. The Jury's Verdict Does Not Support An Award of Punitive Damages.

The Court of Appeals has ordered a new trial on all issues, even those which have not been disturbed on appeal. This jury found GCA and Mrs. Gurwood herself equally at fault for her injuries. The same jury emphatically limited Mrs. Gurwood's damages to her past medical bills, explicitly rejecting her claim for future medicals (rejecting her claim of having CRPS), and even rejecting her claims for pain and suffering. That verdict explicitly recognized, as did the Trial Judge, that this was a simple negligence case, in which Mrs. Gurwood failed to prove the majority of her claims. It is judicially inconceivable that a jury with those findings would find GCA grossly negligent and then award Mrs. Gurwood punitive damages.

V. Judicial Economy.

Judicial Economy is the idea of efficient management of litigation to streamline the process, and ensure that justice is done swiftly and fairly. This principle is one that is not

only important but necessary in order for our court systems in the state of South Carolina, and across the country, to function efficiently. Without the courts keeping one eye on justice and the other on judicial economy, litigation would string on forever with duplicative claims arising as stalling tactics and frivolous suits. Judicial economy is also paramount for the appellate courts to keep in mind when determining the fate of an appeal and its possible remand to be retried.

Courts may address an issue for the sake of judicial economy and to prevent further litigation between the parties. (*See Bruning v. SCDHEC*, 418 S.C. 537, 795 S.E.2d 290 (Ct. App 2016)). If at all possible, appellate courts should strive to reduce the number of cases required to be retried in their entirety to alleviate the backlog of matters in our trial courts.

In this matter, the Court of Appeals has remanded the case for retrial on the grounds that the directed verdict motion on punitive damages should not have been granted. Above we have made arguments, with ample support, as to why that motion was correctly granted by the Trial Court. Beyond those arguments, common sense shows that there is no reason this matter needs to be retried. It would take up vital resources of the judicial system on a case that was very clearly decided by the jury. When this matter went to the jury originally, they found that the Mrs. Gurwood was just as culpable as GCA. There is no way that jury, or any other jury, is going to find that punitive damages are appropriate in this matter. When awarding damages, the original jury only awarded Mrs. Gurwood's prior medical cost, and even reduced that verdict by the Mrs. Gurwood's own fault of 50%. This case was tried in Charleston County which is considered to be a moderate county where juries routinely award two to three times medicals. That just was not the case here. The jury was clear and adamant that Mrs. Gurwood was very much at fault in this incident and made clear by their verdict that she was not entitled to much in damages.

Remanding this matter for a new trial will only result in a similar outcome at a large expense to the judiciary and the parties. Not just a financial expense that goes along with a trial but one of clogging the roster with another trial of an already resolved matter while so many sit waiting for their day in court.

In addition, §15-32-520 of the S.C. Code states, “All actions tried before a jury involving punitive damages, if requested by any defendant against whom punitive damages are sought, must be conducted in a bifurcated manner before the same jury.” S.C. Code Ann. §15-32-520(A) (2011). This section requires the issue of punitive damages be separated from that of culpability. Even if GCA conceded, which they do not, that the Court of Appeals is correct that the Trial Court erred, it would not have made a difference in what was decided regarding culpability. The culpability and fault allocation would have taken place prior to punitive damages instructions ever being given. Requiring there to be an entirely new trial because of the punitive damages issue makes no sense based on the way the statute has the procedures set up. When you couple S.C. Code Annotated §15-32-520(A) with Section (F), giving power to the trial court to assess any punitive award given by a jury, there is clearly not reversible error even if the Trial Court should have denied the motion for a directed verdict on the punitive damages. The Court of Appeals should reverse their prior holding to remand.

CONCLUSION

For the foregoing reasons, GCA respectfully requests that the Court of Appeals reverse their holding in Unpublished Opinion 2022-UP-462 and hold that the Trial Court’s grant of a directed verdict was not in error and affirm the Trial Court’s decision.

s/Robert T. Lyles, Jr.

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Karrie Gurwood & Howard GurwoodAppellants

v.

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PROOF OF SERVICE

I certify that I have served a copy of Respondents' Petition for Rehearing on the Appellants by electronic mail and U.S. Mail to the following addresses:

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January 17, 2023

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Re: *Karrie Gurwood and Howard Gurwood vs. GCA Services Group, Inc., et al.*
Appellate Case No.: 2019-001403

Dear Ms. Allen:

Enclosed please find the original and six (6) copies each of Respondents' Petition for Rehearing and Proof of Service regarding the above-referenced matter, along with this firm's check in the amount of \$50.00 to cover the required filing fee.

With kindest regards, I am

Very truly yours,

LYLES & ASSOCIATES, LLC



Robert T. Lyles, Jr.

RTL/cw

Enclosures

cc: Karrie Gurwood
Howard Gurwood