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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
BERKELEY COUNTY COURT OF COMMON PLEAS
The Honorable Bentley D. Price, Circuit Court Judge

Appeal No.: 2022-000927

Shelby Trehus, ... Plaintiff,

v.

Santee Run Apartments, A South Carolina Corporation, and Shelly Jean Colley, ... Defendants,

and

Kayden M, a Minor, By His Guardian Ad Litem Shelby Trehus, ... Plaintiff,

v.

Santee Run Apartments, A South Carolina Corporation, and Shelly Jean Colley, ... Defendants,

Of Whom

Shelby Trehus and Kayden M., A Minor, By His Guardian Ad Litem Shelby Trehus, are the ..... Appellants,

and

Santee Run Apartments, a South Carolina Corporation, is the ..... Respondent.

AMENDED INITIAL BRIEF OF RESPONDENT SANTEE RUN APARTMENTS, A SOUTH CAROLINA CORPORATION

McANGUS GOUDELOCK & COURIE, LLC
Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com
Attorneys for Respondent Santee Run Apartments, a South Carolina Corporation

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STATEMENT OF THE CASE

Plaintiff Shelby Trehus ("Shelby") filed a Complaint in the Court of Common Pleas for Berkeley County on November 11, 2019, and then an Amended Complaint on December 6, 2019, against Defendant Santee Run Apartments, a South Carolina Corporation ("Santee Run"), and Shelby Jean Colley.[1] Shelby alleged that she began leasing an apartment with Santee Run on February 14, 2018, which she occupied with her minor son, Kayden, who was three years of age at the time of the May 29, 2019 incident that forms the basis for this lawsuit. (Amd. Compl. ¶¶ 7, 8).

Shelby alleged that, on May 29, 2019, she awoke to smoke that "was so intense that she could barely see from one side of the room she was in to the other side of the room," and that the smoke alarm in the apartment had not gone off, "which demonstrated that it was completely defective." (Amd. Compl. ¶ 10). She asserted that the nearest stairwell "was inaccessible for escape because of the flames and smoke from the fire." As a result, she ran to Kayden's bedroom where he "was sleeping, grabbed him, and went to the nearest window to try to escape the fire and smoke which surrounded and engulfed them." (Amd. Compl. ¶ 12). Shelby alleged she "dropped" Kayden M. from the second story window of the apartment to people who were standing below her window, and then jumped out of the window "to save her own life," breaking her ankle and foot in the process. (Amd. Compl. ¶¶ 13, 14, 15). She alleged she "was immediately taken to a hospital" where she was treated for her injuries. (Amd. Compl. ¶ 16).

Shelby alleged Santee Run was negligent in failing to install and/or timely replace the smoke detectors and/or fire extinguishers in her apartment, and that such negligence caused her

[1] This matter was assigned C/A No. 2019-CP-08-02808.

injuries. (Amd. Compl. ¶¶ 23, 24). She also alleged Santee Run was guilty of gross negligence, (Amd. Compl. ¶¶ 25-27), and that it had breached the lease agreement. (Amd. Compl. ¶¶ 28-30).

Santee Run timely answered the Complaint, denying the substantive allegations and raising multiple affirmative defenses including, among others, sole negligence of a third party, and intervening and superseding negligence of a third party.

On April 29, 2020, Shelby filed a Complaint on behalf of her minor son, Kayden,[2] alleging similar facts related to the fire and alleging he suffered emotional and psychological injuries from the fire and "[t]he effects of the traumatic experience of having to be saved from death caused by the apartment fire and having to be physically dropped by his mother from the second floor into the arms of someone on the ground below." (Kayden M. Compl. ¶¶ 10-20). Kayden's Complaint contained the same three causes of action—negligence, gross negligence, and breach of contract—as did his mother's Amended Complaint.

Again, Santee Run filed a timely Answer, denying the substantive allegations of Kayden's Complaint and raising affirmative defenses. Those included, among others, sole negligence of a third party, and intervening and superseding negligence of a third party.

The two matters were consolidated and set for jury trial. (Order to Consolidate, filed Dec. 16, 2021).[3] The trial took place over three days, on February 22, February 23 and February 25, 2022, with the Honorable Bentley Price presiding. After deliberating, the jury returned a Defense verdict in both cases. (Verdict Form).

[2] This matter was assigned C/A No. 2020-CP-08-00965.

[3] Shelby Jean Colley was dismissed from both actions on Directed Verdict, (Tr. p. 182, lines 12-19), and is not a party to this appeal.

On March 4, 2022, Plaintiffs filed a Motion for New Trial, arguing that: 1) the circuit court erred in failing to give the jury a charge for Gross Negligence; and that 2) the jury verdict was defective because: a) it did not render a verdict on Plaintiffs' Breach of Contract claim; b) it found the Plaintiffs were not contributorily negligent but nonetheless found they were not entitled to any damages; c) that the jury found that Defendant was negligent toward Shelby but not toward Kayden; and d) the jury failed to award Plaintiffs damages. (Plaintiffs' Motion for New Trial, filed March 4, 2022).

After Defendants filed a Memorandum in Opposition, (Defendant Santee Run Apartments' Memorandum in Opposition to Plaintiffs' Motion for a New Trial, filed March 15, 2022), Plaintiffs filed a more detailed Memorandum in Support of their Motion, raising the same arguments. (Plaintiffs' Memorandum in Support of Motion for New Trial, filed March 21, 2022). Defendant filed a Reply in Opposition to Plaintiffs' Memorandum in Support, (Defendant Santee Run Apartments' Reply in Opposition to Plaintiffs' Motion for a new Trial & Memorandum in Support, filed April 7, 2022), after which the parties were heard by Judge Price on April 18, 2022.

The circuit court issued a Form 4 Order on June 6, 2022 denying Plaintiffs' Motion and ruling that, "If the Court granted this motion, it would be prejudicial to the defense as all parties had an opportunity to review and object to the verdict form at trial. No objections were made to the verdict form at trial. Instead, Plaintiff's [sic] objections arose after an unfavorable outcome. The ends of justice would not be met by granting this motion. Therefore, Plaintiff's [sic] motion for a new trial is denied." (Form 4 Order, filed June 6, 2022).

Plaintiffs timely appealed to this Court.

BACKGROUND FACTS

Shelby testified at trial that she and Kayden had lived in the Santee Run apartment for approximately one year and three months at the time of the fire. (Tr. p. 40, lines 13-18). When asked whether anyone from Santee Run had inspected the smoke alarm in her apartment, Shelby could only answer, "Not to my knowledge." (Tr. p. 43, lines 3-8). Shelby testified that she had changed the batteries in the smoke alarm at least once. (Tr. p. 75, line 20 – p. 76, line 15).

Shelby testified that she woke up a little after 12:30 a.m. on the night of the fire and that the smoke in her hallway was "medium" thickness. She "opened up the front door not knowing what was happening, and a whole bunch of smoke barreled in." She shut the door and "went straight for my son," who was asleep in his bed. Without waking him up, Shelby opened the window in his bedroom, "lowered him as low as I could, and then I let go," into the arms of waiting neighbors. (Tr. p. 48, line 21 – p. 50, line 6; p. 80, line 17 – p. 81, line 15). Shelby agreed that she was not sure if Kayden was awake until he was outside of the apartment. (Tr. p. 72, lines 22-24).

Shelby acknowledged that, while she was walking around her apartment looking around, she was able to walk normally and did not have to crawl to stay below the smoke. (Tr. p. 66, lines 1-7). She testified that she did not use the stairwell because she of thick smoke. (Tr. p. 50, lines 15-25; p. 56, lines 19-24; p. 62, lines 15-25). However, she later admitted that the hallway is "open air" and that the concrete stairs are only about ten feet from her apartment door. (Tr. p. 70, line 1 – p. 71, line 10; p. 82, lines 13-17).

Shelby testified that, on the night of the fire, she did not hear any smoke alarm. (Tr. p. 43, lines 9-11). However, she later testified she did not hear any noises at all, not even the fire

engines as they came down the street beside her apartment. (Tr. p. 64, line 19 – p. 65, line 9). Although she initially testified that she did not see the firefighters until she "got out," after being presented with a portion of her prior disposition testimony, she revised her testimony to state that, when she opened her apartment door, Shelby could see the fire trucks that had already arrived on the scene. (Tr. p. 66, line 17 – p. 69, line 19).

Shelby was presented with a photograph, taken by an acquaintance after she and Kayden were on the ground, of the building in which her apartment was located. Plaintiff's counsel asked her to point out where her apartment was with respect to the "flaming building." Shelby testified her apartment was not even in the photograph but, "would be further down that way." (Tr. p. 47, line 5 – p. 48, line 17; p. 76, line 29 – p. 78 , line 1). In other words, the part of the building that was "engulfed in flames" was on the opposite end from Plaintiffs' apartment.

Shelby testified that she and Kayden stayed at Santee Run after the fire until around 5:30 a.m. (Tr. p.72, lines 6-13). She said she was "sitting in Joe's car for a good portion of the night." (Tr. p. 82, lines 20-21). The morning after the fire, she went to Roper Express Care where the x-ray of her foot was inconclusive. She went back to work after "[a] couple of days," and then a couple of weeks later had an MRI done of her foot that revealed a cuboid fracture. (Tr. p. 84, lines 5-16; Corey Dep. p. 9, line 19 – p. 10, line 3). Shelby wore a boot prescribed by her primary care doctor for two months. (Tr. p. 85, lines 2-6).

Shelby was asked about Kayden, both before and after the fire. She testified that, prior to the fire, "[h]e was a healthy little boy" with no "particular illnesses." Shelby acknowledged on cross-examination, however, that Kayden was receiving speech therapy prior to the fire. (Tr. p. 88, line 21 – p. 89, line 7). She also admitted she had smoked marijuana during her pregnancy,

that Kayden did not crawl on time, walk on time or start talking on time, and had other developmental issues prior to the apartment fire. (Tr. p. 91, line 9 – p. 92, line 13; p. 93, line 6 – p. 94, line 25). In addition, prior to the fire, Kayden was in a special education class, where an IEP (individualized education plan) was created for him with input from Shelby, that noted that he had difficulty "[c]ontrolling his anger and complaining to teacher direction without inappropriate behaviors." This IEP was dated May 16, 2019, ten days prior to the apartment fire. (Tr. p. 96, line 3 – p. 97, line 11). And, while prior to the fire, Kayden was in a special needs class all the time, at the time of the trial, he was only in special education 30 minutes a day and the rest of the time he was in regular classes. (Tr. p. 98, line 6 – p. 99, line 4). His 2020 IEP noted marked improvement. (Tr. p. 112, lines 1-15).

Shelby testified that, after the fire "and being dropped out of a window," Kayden no longer slept "like a normal little kid," that "he's very irritable because he doesn't sleep very well. He always wants to sleep with me. So that's about it." (Tr. p. 59, lines 5-22). However, Shelby later agreed that Kayden was "irritable" both before and after the fire. (Tr. p. 95, line 7 – p. 97, line 21). She also conceded that Kayden has a television in his room that he sometimes turns on during the night. (Tr. p. 113, line 20 – p. 114, line 12). She agreed that Kayden sleeps better when he does not have a television in his room. (Tr. p. 115, lines 23-25). She testified that Kayden sometimes has nightmares about a video game called "Granny" that his cousins play and he is worried "Granny" "is going to jump out and get him." (Tr. p. 114, line 13 – p. 225, line 3).

Shelby testified that, sometime after the apartment fire, Kayden's father died in a motorcycle accident. (Tr. p. 88, lines 5-15). Kayden began seeing therapists at the National Crime Victims Center a couple of weeks after his father's death, and a full eight months after the

apartment fire, after she had retained a lawyer and on her lawyer's recommendation. (Tr. p. 99, line 12 – p. 100, line 10).

Shelby admitted that the only proof she has to support her allegation that the fire alarm was malfunctioning was the partial photograph she said she took the day after the fire. She did not test the alarm to see if it was working; she just took a partial photograph. (Tr. p. 73, line 6 – p. 74, line 13).[4] Shelby could not say whether smoke or heat, or how much of either would have triggered the alarm. She had changed the batteries in the alarm at least one time, but without ever testing it. (Tr. p. 74, line 24 – p. 76, line 15). Shelby agreed that her lease provided that, if she ever had a maintenance request, she should submit it to the office, which she had done with respect to a clogged sink and an air conditioning problem, but never with respect to the smoke alarm. (Tr. p. 119, line 14 – p. 120, line 22).

Mrs. Colley, who owns Santee Run with her husband, (Tr. p. 215, line 8 – p. 216, line 9), testified that they tell their tenants "that they're responsible for keeping the batteries in the smoke alarms and letting us know if they have a problem with it." Mrs. Colley never received any notice from Shelby about the smoke alarm in her apartment before the fire. (Tr. p. 218, line 8 – p. 219, line 5). While other tenants had come to her about the smoke alarms in their apartments, asking for a replacement, Shelby never did. (Tr. p. 223, lines 1-7). Mrs. Colley also testified that they had had tenants who took down the smoke alarms and, "when we found out about that, we got onto them because we told them not to ever do that, but they do." (Tr. p. 220, line 23 – p. 221, line 7). Mrs. Colley testified that they inspected the smoke alarms from time to time but did not keep records of those inspections. (Tr. p. 225, lines 7-22; p. 227, lines 6-10).

[4] Shelby also testified that she took a photograph of the fire extinguisher that was in the apartment's kitchen, which was introduced into evidence. (Tr. p. 122, line 6 – p. 123, line 13).

Robert Gass, the Fire Chief for the town of Moncks Corner, (Tr. p. 148, line 19), testified that he arrived at the apartment building between 15-30 minutes after the fire started. (Tr. p. 149, lines 17-21). While he testified that having a functioning smoke detector in an apartment is "pretty important," he stated that "[t]hey're not required to be serviced or inspected." Instead, the fire department teaches "residents to test them regularly." (Tr. p. 149, line 25 – p. 150, line 18). Fire Chief Gass testified that the fire started in a different apartment as a "cooking fire, a pot left on the stove." (Tr. p. 155, lines 10-15). Fire Chief Gass was shown the photograph of the fire extinguisher in Shelby's apartment, and he confirmed that it had not been serviced since April of 2008. (Tr. p. 152, lines 3-23).

Corey Denny, a captain with the Moncks Corner Fire Department, was on the first fire engine to arrive on the scene the night of the apartment fire. (Tr. p. 159, line 24 – p. 160, line 10). Captain Denny testified that the purpose of a smoke detector is to warn "you that smoke is present," and that "[s]moke detectors are placed up high so when the smoke comes in, the smoke rises, it has a chance to alert you before the smoke gets down to the level where it would be breathed in by the person." (Tr. p. 163, lines 12-23). He did not go into Plaintiffs' apartment nor did he inspect their smoke detector, and had no information as to whether it was functioning. In fact, he agreed that it was possible that, although it was old, their smoke detector was functional. (Tr. p. 167, line 19 – p. 168, line 10). When Captain Denny spoke with Shelby after the fire, she did not mention any thing to him about her alarm not having gone off. (Tr. p. 169, lines 13-16). Captain Denny also confirmed that his engine's lights and sirens would have been on the entire time it traveled down Debbie Lane, which runs adjacent to Plaintiffs' apartment. (Tr. p. 166, line 11 – p. 167, line 8).

Dr. Wiita, Defendant's expert witness, testified that he conducted an in-person interview with Kayden and his mother on September 2, 2021 that lasted about two and a half hours. (Tr. p. 136, lines 9-12; p. 210, line 22 – p. 211, line 12). Dr. Wiita confirmed that Kayden met the diagnostic criteria for ADHD and had a language disorder, both of which he had prior to the fire. (Tr. p. 197, lines 7-25). Dr. Wiita concluded that Kayden did not have PTSD as a result of the apartment fire. (Tr. p. 200, lines 9-12). Dr. Wiita disagreed with Dr. Brewerton's diagnosis that Kayden had "partial PTSD in remission," explaining that that was not a DSM-5 diagnosis. (Tr. p. 198, lines 8-12). Although Dr. Wiita agreed that Kayden would probably remember the fire, (Tr. p. 213, line 13-16), he pointed out that his memory of the fire could be affected by the stories his mother told him about the fire. (Tr. p. 214, lines 18-20).

Following the close of evidence, the parties discussed the jury charges with the presiding judge. In objecting to a charge on punitive damages, Defense Counsel argued that "there's been no clear and convincing evidence of willful, malicious or reckless conduct," and "[t]here hasn't been a statutory violation." The Court agreed and declined to charge the jury on gross negligence. (Tr. p. 253, lines 4-22).

As part of the jury instructions on negligence, Judge Price walked through the verdict form, explaining to the jury how to move from question to question. There was no mention of the breach of contract cause of action in that explanation, nor was any objection raised by Plaintiffs' Counsel. (Tr. p. 296, line 8 – p. 297, line 22). After that explanation, Judge Price gave the jury charges with regard to Plaintiffs' breach of contract claim; however, no mention of the verdict form followed that charge. (Tr. p. 297, line 23 – p. 298, line 20). Just before sending the jury into

deliberations, Judge Price again referenced the verdict form, (Tr. p. 306, line 15 – p. 307, line 12), with no objection or request to review or revise it at any time from Plaintiffs' counsel.

When the jury returned with their verdict, Judge Price read the verdict, step by step, into the record, confirming with the Foreperson that the verdict as read was correct. Judge Price noted that the jury had found that any negligence on the part of Defendant, "was not the proximate cause of the injuries, and therefore, you wanted to award zero to both. But you did find that they were negligent, but just it wasn't the proximate cause of the injuries. Okay, I got it right. All right. And that he was not negligent, so that doesn't matter, correct?" to which the Foreperson responded, "[c]orrect." (Tr. p. 308, line 20 – p. 310, line 16). Again there was no objection or question from Plaintiffs' counsel.

After excusing the jury, Judge Price asked whether there was anything else from counsel. The only issue raised by Plaintiffs' Counsel was a request for "a few days to file post-trial motions," due to the "complicated nature of this whole thing." (Tr. p. 311, line 7 – p. 312, line 21).

STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." *Felder v. K-Mart Corp.*, 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989); *see also Youmans v S.C. DOT*, 380 S.C. 263, 271, 670 S.E.2d 1, 4 (Ct. App. 2008) ("a trial judge's order granting or denying a new trial will be upheld unless the order is 'wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law'"). A jury's determination of damages is entitled to 'substantial

deference.'" *Burke v. AnMed Health*, 393 S.C. 48, 56, 710 S.E.2d 84, 88 (Ct. App. 2011). Indeed, "a factual finding of the jury will not be disturbed unless a review of the record discloses no evidence which reasonably supports the jury's findings." *Haskins v. Fairfield Elec. Coop.*, 283 S.C. 229, 233-235, 321 S.E.2d 185, 188 (Ct. App. 1984), *overruled on other grounds by O'Neal v. Bowles*, 314 S.C. 525, 431 S.E.2d 555 (1993).

On appeal of an order denying a motion for a new trial, an appellate court sits "neither to determine whether we agree with the verdict nor to decide whether we agree with the trial judge's decision nor to disturb it. As described above, we employ a highly deferential standard of review when considering the trial judge's ruling on each of the grounds." *Burke*, 393 S.C. at, 57, 710 S.E.2d at 89; *see also Steinke v. S.C. Dep't of Labor, Licensing, & Reg.*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999) (an appellate court "will not disturb a trial court's decision granting or denying a new trial unless that decision is wholly unsupported by the evidence or the court's conclusions of law have been controlled by an error of law"). In conducting its review, an appellate court "must consider the testimony and reasonable inferences to be drawn therefrom in the light most favorable to the nonmoving party." *Brinkley v. S.C. Dep't of Corr.*, 386 S.C. 182, 185-186, 687 S.E.2d 54, 56 (Ct. App. 2009). In other words, the standard of review on appeal "dictates that [the reviewing court] must only look to see if there is evidence in the record to support the circuit court's decision [to grant or deny a new trial] and, only in the complete absence of such evidence, is it within our province to find the circuit court abused its discretion." *Id.*, 386 S.C. at 188, 687 S.E.2d at 58.

With respect to whether the circuit court properly declined to give a jury charge on gross negligence, "[a]n appellate court will not reverse the trial court's decision regarding jury

instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). Finally, this Court can affirm for any reason that appears in the record. *Burke*, 393 S.C. at 54 n.2, 710 S.E.2d at 87 n.2.

ARGUMENT

I. The circuit court properly refused to instruct the jury on punitive damages and/or gross negligence.

A "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*, 339 S.C. at 390, 529 S.E.2d at 539. Concomitantly, a "trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved." *Id.* Here, because there was no evidence of gross negligence on the part of Defendant, as a matter of law, the circuit court correctly declined to instruct the jury on gross negligence.

"Gross negligence is the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Bass v. S.C. Dep't of Soc. Servs.*, 414 S.C. 558, 571, 780 S.E.2d 252, 258-259 (2015). "It is the failure to exercise even the slightest care." *Clyburn v. Sumter County Sch. Dist. #17*, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994). Here, Plaintiffs fail to articulate coherently, let alone demonstrate, that the evidence presented to the jury supported a jury charge on gross negligence. Instead, after explaining that they timely "took exception" to the Court's refusal to charge gross negligence, Plaintiffs simply engage in a discussion of punitive damages and their purpose in civil litigation.

The cases on which Plaintiffs rely do not support their argument that the circuit court erred in declining to instruct the jury on gross negligence. None of the cases advanced by Plaintiffs discusses jury charges or the circumstances under which they must be given or are

properly refused. Furthermore, "[p]unitive damages can only be awarded where the plaintiff proves by clear and convincing evidence that defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." *Austin v. Specialty Transp. Servs.*, 358 S.C. 298, 313, 594 S.E.2d 867, 875 (Ct. App. 2004). Here, there is no such evidence, let alone clear and convincing evidence.

And, while the "*causative violation* of a statute constitutes negligence per se and is evidence of recklessness and willfulness, requiring the submission of the issue of punitive damages to the jury," *Austin*, 358 S.C. at 314-313, 594 S.E.2d at 875 (emphasis added), here, Plaintiffs failed to produce evidence that Santee Run violated any statute and/or that if it did, which is denied, that that violation caused any of their injuries. For example, in *Bell v. Atlantic Coast Line R.R. Co.*, 202 S.C. 160, 24 S.E.2d 177 (1943), the Supreme Court overturned a jury award of punitive damages on the very same basis that the circuit court here declined to give a jury instruction on gross negligence, *i.e.*, "there is no testimony, in our opinion, which indicates any approach to gross negligence by the defendant, or which supports the allegations of the complaint pertaining thereto." 202 S.C. at 171, 24 S.E.2d at 182. Here, Plaintiffs cannot point to any evidence of willfulness, wantonness or recklessness, or willfulness. Nor can they point to any statute or regulation that Defendant violated which, in turn, caused their alleged injuries. (*See* Tr. p. 149, line 25 – p. 150, line 18 (Fire Chief Gass testifying that, although smoke detectors are "pretty important," there is no requirement that they "be serviced or inspected").

Plaintiffs cite *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952) for the proposition that the issue of whether Santee Run was guilty of gross negligence had to be submitted to the jury. While "[g]ross negligence ordinarily is a mixed question of law and fact,"

where, as is the case here, "the evidence supports but one reasonable inference, the question becomes a matter of law for the court." *Clyburn*, 317 S.C. at 53, 451 S.E.2d at 887-888; *Bass*, 414 S.C. at 571, 780 S.E.2d at 259. In other words, where "the only reasonable inference that can be drawn" from the evidence shows that the defendant "at the very least[] exercised 'slight care,'" the court can and should find as a matter of law that defendant is not guilty of gross negligence. *Clyburn*, 317 S.C. at 54, 451 S.E.2d at 888. Here, there is evidence that Defendant exercised at least "slight care," which supports the circuit court's ruling. (Tr. p. 218, line 8 – p. 219, line 5 (Mrs. Colley testifying they tell their tenants "that they're responsible for keeping the batteries in the smoke alarms and letting us know if they have a problem with it"); p. 225, lines 7-22; p. 227, lines 6-10 (Mrs. Colley testifying that they inspected the smoke alarms from time to time but did not keep records of those inspections)).

Finally, even if it was error for the circuit court to refuse to instruct the jury on gross negligence, which is denied, "[i]n order to warrant reversal for refusal of the trial judge to give requested jury instructions, refusal must have been both erroneous *and prejudicial*." *Ellison v. Parts Distrib., Inc.*, 302 S.C. 299, 301, 395 S.E.2d 740, 741 (Ct. App. 1990) (emphasis added). Any error to give a requested jury instruction "is subject to harmless error analysis." *State v. Lee-Grigg*, 374 S.C. 388, 411, 649 S.E.2d 41, 53 (Ct. App. 2007). Here, although the jury found Santee Run was negligent in some respect toward Shelby, it did not award her any damages. This is because the jury found that any negligence by Santee Run toward Shelby did not proximately cause her injuries. (Verdict Form). As a result, the jury could not have awarded her punitive damages. *See, e.g.*, *McGee v. Bruce Hosp. Sys.*, 344 S.C. 466, 470, 545 S.E.2d 286, 288 (2001) ("[t]he rule in South Carolina is that there must be an award of actual or nominal damages for a

verdict of punitive damages to be supported"). Thus, at best, any error in failing to charge the jury on gross negligence was harmless and does not support, let alone require, a reversal. "[W]hatever doesn't make any difference, doesn't matter." *Crenshaw v. Erskine College*, 432 S.C. 1, 40 n.17, 850 S.E.2d 1, 21 n.17 (2020).

As a result, this Court should affirm the circuit court's denial of Plaintiffs' request for a jury charge on gross negligence.

II. Plaintiffs' argument regarding the jury's failure to reach a verdict on the breach of contract claim is unpreserved for appellate review and lacks merit.

Plaintiffs argue that the jury erred by failing to return a verdict on their breach of contract cause of action. While the circuit court instructed the jury on a breach of contract claim, that cause of action was not reflected on the verdict form provided to the jurors. Plaintiffs complain that "the Court did not provide Counsel an opportunity to review the verdict form at the conclusion of trial," and that "[t]he Court's failure to allow for the deliberation of and verdict for [the breach of contract] cause of action on the jury form was a violation of South Carolina law …" (App. Br. pp. 1, 6, 9, 10). However, even assuming solely for the sake of argument that the circuit court did not offer Plaintiffs' counsel an opportunity to review the jury form prior to its submission to the jury, which is denied, there is no indication that Plaintiffs' counsel ever *asked* to see the verdict form at any point before it was provided to the jury.

It is the parties' obligation to review and ensure the verdict form conforms to the allegations raised and evidence presented, in order to preserve any objection to the verdict form. "South Carolina jurisprudence indicates that a moving party must raise the objectionable issue at the appropriate time during trial; thus, unobjected to trial error cannot be advanced as grounds for a new trial." *Winters v. Fiddie*, 394 S.C. 629, 639, 716 S.E.2d 316, 321-322 (Ct. App. 2011).

In other words, "[a] contemporary objection is typically required to preserve" an issue. *Burke*, 393 S.C. at 54, 710 S.E.2d at 87. Specifically, the failure to object to a verdict form prior to its submission to the jury means any such objection is not preserved for later consideration. *Gause v. Smithers*, 403 S.C. 140, 151, 742 S.E.2d 644, 650 (2013) (rejecting challenge to erroneous verdict form that was first raised after the verdict was read), *citing Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995) (by failing to object to the verdict form "at the first opportunity" and waiting until after the verdict had been reached, the plaintiffs' challenge to the verdict form was unpreserved); *see also Munn v. Asseff*, 226 S.C. 54, 58, 83 S.E.2d 642, 644 (1954) (an objection to a jury charge or a verdict form cannot be raised for the first time "by a motion for a new trial" because "[o]rderly procedure requires that objections be timely made"); *Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 270, 332 S.E.2d 781, 786-787 (Ct. App. 1985) ("When the jury rendered its verdict, [Appellant] voiced no objection concerning the wording of the verdict. If [Appellant] considered the verdict confusing it should have complained about the form of the verdict at the time it was rendered).

After closing arguments, the court provided the jury with instructions concerning Plaintiffs' negligence claims. As part of this discussion, the Court went over the verdict form with the jury in detail, explaining the steps the jury needed to take to evaluate the negligence claims for both Shelby and Kayden. (Tr. p. 296, line 8 – p. 297, line 22). The court then proceeded to give instructions on Plaintiffs' Breach of Contract claim, with no mention of how that claim was treated on the verdict form. There was no question, comment or objection from Plaintiffs' counsel regarding this omission, and no request to see the verdict form.

Before sending the jury back to deliberate, the court instructed, "And the last thing that I charge you to do is you have to sign and fill out the verdict form, all right. I explained it in the charge how you go one to two, two to three, three to four, and so on and so forth. So if you'll just take a look at the verdict form, there are two. Obviously, there are two Plaintiffs in this case, and so you will decide as to Shelby Trehus and as to Kayden, all right. And both of them are on here." (Tr. p. 306, lines 15-23). Again, there was no question, comment or objection from Plaintiffs' counsel and no request to see the verdict form.

When the jury completed their deliberations and returned to the courtroom, the court indicated that, "we have overly complicated this verdict form, because we realized we should have put if you find that the person is not negligent, we should have put another line that says just stop here, but we didn't." (Tr. p. 309, lines 5-9). The court then read through the verdict form in its entirety to ensure it reflected the jury's determination, which the foreperson confirmed. (Tr. p. 309, line 12 – p. 310, line 16). There was no mention of the breach of contract claim. And, again, there was no question, comment or objection from Plaintiffs' counsel. The only request made by Plaintiffs' counsel at the end of the hearing was to ask for a few days to file post-trial motions. (Tr. p. 312, lines 2-4).

Here, Plaintiffs' failure to object to a verdict form prior to its submission to the jury means all the objections they raise on appeal are unpreserved for appellate review. *Gause v*, 403 S.C. at 151, 742 S.E.2d at 650; *Johnson*, 317 S.C. at 421, 453 S.E.2d at 912 (by failing to object to the verdict form "at the first opportunity" and waiting until after the verdict had been reached, the plaintiffs' challenge to the verdict form was unpreserved); *Munn*, 226 S.C. at 58, 83 S.E.2d at 644 (an objection to a jury charge or a verdict form cannot be raised for the first time "by a

motion for a new trial" because "[o]rderly procedure requires that objections be timely made"). Plaintiffs' counsel simply failed to make any objection to the verdict form before it was sent to the jury. In fact, there is no evidence that Plaintiffs' counsel *asked* to see the verdict form before it was given to the jury. Having failed to protect their rights below, Plaintiffs cannot expect either the circuit court or this Court to do what they themselves should have done, *i.e.*, ask for and carefully review the verdict form before it was submitted to the jury. Compounding their error, Plaintiffs' counsel failed to make any objection as the verdict was read back to and discussed with the jury foreperson. Given Plaintiffs' counsel's failure to ask to see the verdict form prior to jury deliberations and his failure to object when the verdict was read in open court, Plaintiffs are precluded from raising this issue on appeal. *Vacation Time*, 286 S.C. at 270, 332 S.E.2d at 786-787 ("When the jury rendered its verdict, [Appellant] voiced no objection concerning the wording of the verdict. If [Appellant] considered the verdict confusing it should have complained about the form of the verdict at the time it was rendered").

In any event, even if this issue was preserved for appellate review, which it is not, it lacks merit. The lease contains the terms of the agreement between Shelby and Defendant, and provides, among other things, that maintenance requests must be "submitted to the office." While the Lease also provides that Defendant will "exterminate and do an inspection on the last Tuesday of every month starting at 9:00 a.m." and that "[i]f your apartment is not cleaned, you will be evicted," (Lease), there is no evidence that this was not performed. Shelby could only testify that she was unaware of any inspections of the smoke alarm, (Tr. p. 43, lines 3-8), but the lease does not specify inspection of the smoke alarm, just the apartment. Pursuant to the plain language of the lease, those inspections were for cleanliness. As there was no evidence presented

to the jury concerning any potential breach of any term in the lease, Plaintiff's Breach of Contract claim lacks any merit whatsoever.

As a result, this Court should affirm the circuit court's denial of Plaintiffs' motion for a new trial on their breach of contract claim.

III. The jury's finding that Defendant was negligent as to Shelby Trehus but awarding her no damages is supported by the evidence and must be upheld.

"A jury's determination of damages is entitled to 'substantial deference.'" *Burke*, 393 S.C. at 56, 710 S.E.2d at 88. Here, although the jury found that Santee Run was negligent in some respect as to Shelby, they also found that "Defendant's negligence was [not] the proximate cause of Shelby Trehus' injuries." (Verdict Form). This finding is not inconsistent with the jury also finding that Shelby was not contributorily negligent. The jury simply found that Santee Run's negligence did not proximately cause Shelby's injuries, even though she was not contributorily negligent.

"In a negligence action, the plaintiff must prove proximate cause," because "[n]egligence is not actionable unless it is a proximate cause of the injury." *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E. 2d 715, 720-721 (Ct. App. 1996) (internal citations omitted). "Proof of proximate cause requires proof of both causation in fact and legal cause." *Mellen v. Lane*, 377 S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008). "Ordinarily, the question of proximate cause is one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence." *Vinson*, 324 S.C. at 402, 477 S.E. 2d at 721; *see also Mellen*, 377 S.C. at 279, 659 S.E.2d at 245-246. Patently, "where the cause of the plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable," there can be no recovery.

Messier v. Adicks, 251 S.C. 268, 271, 161 S.E.2d 845, 846 (1968). Here, the cause of the fire in the apartment building was a cooking fire that started in an apartment on the opposite end of the apartment building from Plaintiffs' apartment. (Tr. p. 155, lines 10-15). It is entirely plausible and reasonable that the jury determined the cooking fire, not any alleged negligence on the part of Defendant, was the cause of Shelby's injuries.

Although the jury found Santee Run was negligent toward Shelby in some manner, the verdict form did not indicate how or in what way the jury found Defendant negligent. It is possible that the jury found that Defendant was negligent in not servicing the fire extinguisher since 2008, which was a topic Plaintiffs' counsel emphasized at trial. (Tr. p. 152, lines 3-23). However, there is no connection whatsoever between the fire extinguisher and Plaintiffs' injuries, as it was established at trial that no fire entered their apartment and, moreover, no indication Shelby ever attempted to use the extinguisher the night of the fire. (*See* Tr. p. 48, lines 9-15; p. 71, lines 5-7; p. 78, line 15 – p. 79 line 7).

Or, the jury could have found that the Defendant was negligent in not replacing the smoke alarm. However, even if that were the case, there is absolutely no evidence that the smoke alarm was defective and did not function and/or that it would not have gone off once the concentration of smoke in the apartment reached the threshold required to set it off. As Captain Corey Denny with the Moncks Corner Fire Department, (Tr. p. 149, line 10 – p. 160, line 10), testified, although it is recommended—not required—that smoke alarms be replaced, it is quite possible that the alarm in Shelby's apartment, though old, was still functional. (Tr. p. 167, line 21 – p. 168, line 15; *see also* p. 150, lines 11-18 and p. 157, line 24 – p. 158, line 14 (Monks Corner Fire Chief Robert Gass testifying that smoke alarms are not required to be inspected and that the

Fire Department teaches "residents to test them regularly")). Captain Denny also testified that when he spoke to Shelby after the fire was under control, she did not mention that her smoke alarm had not gone off. (Tr. p. 169, lines 13-16). Shelby admitted that, after the fire, she did not test the smoke detector to see if it was functional but, instead, only took a partial photograph. (Tr. p. 73, line 6 – p. 74, line 13).

In addition, Captain Denny testified that "[s]moke alarms are placed up high so when the smoke comes in, the smoke rises, it has a chance to alert you before the smoke gets down to the level where it would be breathed in by the person." (Tr. p. 163, lines 20-23). Shelby testified that at no point did she have to drop to her hands and knees and crawl because of the smoke in her apartment but, instead, was fully erect and walking around. (Tr. p. 66, lines 1-7). Thus, the jury could have drawn a reasonable inference that the smoke alarm, even though old and at least arguably uninspected, was functional but had not yet gone off because not enough smoke had accumulated to trigger it, such that any injuries suffered by Shelby when she jumped out of the bedroom window were not proximately caused by Defendant's negligence.

Plaintiffs suggest, incorrectly, that Defendant argued below that they had no duty to "provide a safe place to live." (App. Br. p. 13). Defendant readily acknowledged the applicability of the Residential Landlord Tenant Act ("RLTA"), while also noting that, as this Court correctly observed, under the common law a landlord had no "duty to maintain leased premises in a safe condition." *Robinson v. Code*, 384 S.C. 582, 586, 682 S.E.2d 495, 496 (Ct. App. 2009). As is discussed below and in *Robinson*, the RLTA supplanted the common law with regard to leased residential premises. "Statutes which are in derogation of the common law must be strictly

construed." *E.g.*, *Odom v. Town of McBee Election Comm'n*, 427 S.C. 305, 308, 831 S.E.2d 429, 430 (2019).

S.C. Code Ann. § 5-25-1330 requires the owner of rental dwellings to supply and install smoke detectors. The owner is further directed to "provide the tenant at the time the tenant takes possession of the dwelling written or verbal instructions, or both, for testing the detectors and replacing batteries in battery-powered detectors." S.C. Code Ann. § 5-25-1330(a). Defendant did this. (Tr. p. 218, line 8 – p. 219, line 5). In addition, the tenant is statutorily required to "notify the owner in writing of any deficiencies in the performance of the smoke detectors," S.C. Code Ann. § 5-25-1330(b), which Shelby admittedly never did in this case. (Tr. p. 120, lines 2-16; p. 218, lines 19-22; p. 222, line 25 – p. 223, line 7). Finally, even if, solely for the sake of argument, Defendant had somehow violated the provisions of Section 5-25-1330, which is specifically denied, the "[f]ailure to comply with the provisions of this article does not create a cause of action for a per se statutory violation for liability, or for negligence-based liability, for death, injury, or damages." S.C. Code Ann. § 5-25-1380; *see also Robinson*, 384 S.C. at 586-587, 682 S.E.2d at 497. As this Court noted in *Robinson*, the RLTA "does not specifically state landlords must provide smoke detectors in their rental properties," and even if there was a defect with Shelby's smoke detectors, that same Act "requires written notice to the landlord specifying the acts and omissions constituting the breach and failure of the landlord to make the necessary repairs after notice." 384 S.C. at 588, 682 S.E.2d at 497-498. Here, as is explained above, Shelby never notified Defendant, either verbally or in writing, of any issue with regard to her smoke detector, although she had notified them of other issues with her apartment, which were promptly addressed.

Plaintiffs also suggest, without pointing to a specific code, that the Santee Run did not "compl[y] with applicable building codes." (App. Br. p. 13). Having failed to identify any building or other applicable code that Defendant allegedly violated, Plaintiffs cannot do so in their Reply Brief. *Simmons v. SC Strong*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief); *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E2d 449 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief"). In fact, Plaintiffs assert in their Brief that Defendant "voluntarily installed … smoke detectors …" (App. Br. 13). Logically, an act that is compelled by statute or code cannot be deemed "voluntary."

Plaintiffs also suggest that Defendant volunteered to inspect or maintain the smoke detectors and fire extinguishers in their apartment. The evidence, however, shows that, although Mrs. Colley testified that Defendant inspected the smoke alarms by taking the batteries out, (Tr. p. 225, lines 7-20; p. 226, line 22 – p. 227, line 10), she also told tenants "that they're responsible for keeping the batteries in the smoke alarms and letting us know if they have a problem with it." Defendant never received any notice from Shelby, either verbal or written, that there was a problem with her smoke alarm. (Tr. p. 218, lines 8-22). Moreover, Shelby testified that she changed the batteries in the smoke alarm at least once. (Tr. p. 75, line 20 – p. 76, line 15). Finally, although Plaintiff asserts Defendant voluntarily undertook a duty to inspect the fire alarm in her apartment, there is no evidence that they did not do so, (Tr. p. 225, lines 7-20; p. 226, line 22 – p. 227, line 10), or that the fire alarm did not function and/or would not have gone off once the smoke reached a level that would trigger it. (Tr. p. 167, line 19 – p. 168, line 10

(Captain Denny testifying that the smoke detector, although old, still could have been functional)).

Thus, Plaintiffs' entire argument is based on an assertion that Defendant had "voluntarily undertaken [a] duty to maintain smoke detectors," (App. Br. p. 14), which is, at best, subject to conflicting evidence. (Tr. p. 75, line 20 – p. 76, line 15 (Shelby testifying that she changed the batteries in the smoke detector at least once); p. 218, lines 8-12 (Defendant never received any notice—either written or verbal—from Shelby about the smoke alarm in her apartment before the fire). In addition, Shelby's version of events changed, from alleging the smoke was so thick she could not see the fire engines when she opened the apartment door, (Tr. p. 50, line 17 – p. 51, line 2), to conceding that she could, in fact see them, (Tr. p. 65, lines 7-9; p. 66, line 14 – p. 69, line 22), indicating the smoke was not so thick as to prevent Plaintiffs' exit via the stairs. Thus, even though there is testimony that the smoke detector had not gone off yet, there is no evidence that it would not have gone off if the smoke had become sufficiently dense to trigger it. (Tr. p. 66, lines 1-7 (Shelby testifying she was able to walk normally and did not have to crawl to stay below the smoke in the apartment)).

In the end, even if Defendant undertook a duty to inspect the smoke detectors, Plaintiffs failed to establish that the smoke detector was not working on the night of May 29, 2019. (Tr. p. 73, line 6 – p. 74, line 13 (Shelby testifying she did not test the smoke alarm after the fire but only took a photograph); p. 167, line 19 – p. 168, line 10 (Captain Denny testifying that it was possible the smoke detector in Plaintiffs' apartment was functional).

The jury also found that Shelby was not contributorily negligent. It is entirely possible for the jury to have determined that, upon opening the door of her apartment and seeing the fire

trucks below, Shelby made the choice to leave the apartment via a bedroom window rather than by the stairway. The jury could have determined that that decision, as a concerned mother, to jump out of her son's bedroom window, while not negligent (but also not caused by any negligence on the part of Defendant), was the cause of her injuries. Apodictically, South Carolina does not recognize the doctrine of *res ipsa loquitur*. *E.g.*, *Watson v. Ford Motor Co.*, 389 S.C. 434, 453, 699 S.E.2d 169, 179 (2010). The fact that an injury has occurred does not automatically mean one party or the other has to be found to have negligently caused the injury, which appears to be the case here. Instead, the cause of the fire—which the jury most likely found was the cause of any of Plaintiffs' alleged injuries—was established to have been a "cooking fire, a pot left on the stove." (Tr. p. 155, lines 10-15).

Finally, Plaintiffs advance the specious argument that, because the jury found Defendant was negligent as to Shelby, that that finding somehow inevitably "established that the Appellant was injured by her [sic] negligence." (App. Br. p. 15). While it is true that, in order "[t]o prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages," *Babb v. Lee County Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013), there is nothing inconsistent with a jury finding a defendant was negligent in some respect but that that negligence was not the proximate cause of the plaintiff's injuries. *See Vinson*, 324 S.C. at 400, 477 S.E. 2d at 720-721 ("In a negligence action, the plaintiff must prove proximate cause," because "[n]egligence is not actionable unless it is a proximate cause of the injury").

Moreover, *Pope v. Heritage Cmtys., Inc.*, 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), on which Plaintiffs rely, is inapposite and does not stand for the proposition for which Plaintiffs advance it. There, in a construction defect case, defense counsel "conceded construction defects"

and stated to the jury that "[W]e ask you [the jury] to render a true verdict in this case, which would be the cost of repairs that we submit to you through our expert … the true cost of the repairs in this case, which will be around 2.3, 2.391 million dollars." 395 S.C. at 415, 717 S.E.2d at 771. Based on this concession and the circuit court's directed verdict finding the defendants negligent, the judge properly instructed the jury that it must award damages, "to the extent these damages been proven." *Id.* Thus, in stark contrast to the instant case, there the defendants conceded both breach and proximate cause, leaving only the amount of damages for the jury to determine.

Although it found Defendant had been negligent in some respect, the jury properly found that Defendant did not proximately cause Shelby's injuries, even though she was not contributorily negligent. Consequently, this Court should affirm the jury verdict and the circuit court's denial of Plaintiff's motion for a new trial.

IV. Any inconsistency between the jury verdict as to Shelby Trehus and Kayden M. is, at best, harmless error and not grounds for reversal.

Plaintiffs' argument that they are entitled to a new trial because the jury verdict is inconsistent in that it found Defendant was negligent as to Shelby but not as to Kayden fails as well. Regardless of whether Defendant was negligent toward Kayden, the jury clearly found there was no harm suffered by Kayden as a result of his mother dropping him out of the window into the arms of neighbors below, which is supported by a preponderance of the evidence. Judge Price even commented that "we have overly complicated this verdict form, because we realized we should have put if you find that the person is not negligent, we should have put another line that says just stop here, but we didn't." (Tr. p. 309, lines 5-9). Because the verdict form required the jury to still assess damages, even though they did not find Defendant negligent as to Kayden,

it is clear they found he did not suffer any damages because they awarded him $0, (Tr. p. 309, line 12 – p. 310, line 16), which is amply supported by the evidence.

For example, Shelby testified that, prior to the fire, Kayden was in a special education class full time. (Tr. p. 95, lines 7-19). Kayden's difficulty controlling his anger was noted prior to the fire. (Tr. p. 97, lines 4-21). Now, although Kayden still is in special education classes, he is mainstreamed for most of the day. (Tr. p. 98, line 6 – p. 99, line 4). Furthermore, his IEP from before the fire indicated that his "behavior impedes the student's learning and learning of others," but after the fire, that box was checked, "no." (Tr. p. 111, line 2 – p. 112, line 5).

Defense counsel elicited testimony from Shelby that she only took Kayden to the National Crime Victims Center on the advice of her counsel and that that occurred only a few weeks after Kayden's father was unexpectedly and tragically killed in a motorcycle accident. (Tr. p. 99, line 5 – p. 100, line 5). In addition, Shelby was put in touch with Dr. Brewerton, her expert, again on advice of counsel. She and Kayden met with Dr. Brewerton for a little over two and a half hours of substantive time via a cell phone zoom call so that he could evaluate Kayden for PTSD. (Tr. p. 103, line 3 – p. 104, line 16; p. 107, lines 19-21).

As to Kayden's alleged sleep disturbance, Shelby acknowledged that he has a television in his bedroom and access to Netflix. (Tr. p. 113, line 21 – p. 114, line 12). She also agreed that Kayden sleeps better when he does not have a television in his room. (Tr. p. 115, lines 23-25). He also is exposed to a video game called "Granny" via his cousins, which causes him to have difficulty sleeping because he fears "Granny" is going to jump out and get him. (Tr. p. 114, line 13 – p. 115, line 3).

Dr. Wiita, Defendant's expert witness, conducted an in-person interview with Kayden and his mother on September 2, 2021 that lasted about two and a half hours. (Tr. p. 136, lines 9-12; p. 210, line 22 – p. 211, line 12). Dr. Wiita confirmed that Kayden met the diagnostic criteria for ADHD, and had a language disorder, both of which he had prior to the fire. (Tr. p. 197, lines 7-25). Dr. Wiita concluded that Kayden did not have PTSD as a result of the apartment fire. (Tr. p. 200, lines 9-12). Dr. Wiita disagreed with Dr. Brewerton's diagnosis that Kayden had "partial PTSD in remission," explaining that that was not a DSM-5 diagnosis. (Tr. p. 198, lines 8-12). Although Dr. Wiita noted that Kayden would probably remember the fire, (Tr. p. 213, line 13-16), he also agreed that his memory of the fire could be affected by the stories his mother told him about the fire. (Tr. p. 214, lines 18-20).

The jury found that Shelby failed to prove proximate cause and, accordingly, that she was not entitled to any monetary damages despite finding Defendant was negligent as to her. In other words, the jury rendered a defense verdict with respect to Shelby's negligence claim. Because Kayden's damages are even more attenuated to the alleged (but unproven) lack of a functioning smoke alarm than are Shelby's, as he was asleep when she lifted him out of his bed and Shelby was not sure whether or not he was awake until he was already outside of the apartment, (Tr. p. 65, lines 24-25; p. 71, lines 20-24), the only logical or reasonable conclusion that could be reached is that, even if the jury found Defendant negligent as to Kayden, he would not be entitled to any damages for the same reasons Shelby is not entitled to damages—*i.e.*, Plaintiffs' failed to prove any of their injuries were proximately caused by any negligence on the part of Defendant. *Vinson*, 324 S.C. at 400, 477 S.E. 2d at 720-721.

Although the verdict *might* have been problematic if the jury had awarded damages to Shelby and not to Kayden, *see Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 529, 155 S.E.2d 308, 309 (1967) (finding an impermissibly inconsistent verdict where "either both plaintiffs should have won or both plaintiffs should have lost"), here, there was a defense verdict as to *both* Plaintiffs. As a result, the verdict is not impermissibly inconsistent. *Vinson*, 324 S.C. at 409, 477 S.E. 2d at 725 (verdict not inconsistent where the jury found for the defendant and awarded "no damages" to plaintiff). In the end, even if the jury verdict could be fairly construed as inconsistent, which Defendant denies, it is at best a harmless error, as it is not impermissibly inconsistent since the jury rendered a defense verdict as to both Plaintiffs. *Crenshaw*, 432 S.C. at 40 n.17, 850 S.E.2d at 21 n.17 ("whatever doesn't make any difference, doesn't matter").

As a result, this Court should affirm the jury verdict and the circuit court's denial of Plaintiff's motion for a new trial.

CONCLUSION

For the reasons stated herein, this Court should affirm both the jury verdict, which is legally sufficient and supported by the evidence, and the circuit court's denial of Plaintiffs' motion for a new trial, and dismiss this appeal with prejudice.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

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s/Helen F. Hiser

Helen F. Hiser
S.C. Bar No.: 76124
735 Johnnie Dodds Blvd., Suite 200 (29464)
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
helen.hiser@mgclaw.com

Attorneys for Respondent Santee Run Apartments, a South Carolina Corporation