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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM UNION COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-000572

Fast Formliners Company . . . . . Appellant / Respondent,

vs.

Construction Resource Group, Inc. . . . . Respondent / Appellant,

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INITIAL REPLY BRIEF OF RESPONDENT / APPELLANT IN FURTHERANCE OF THE CROSS-APPEAL

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ARGUMENT IN REPLY

Respondent / Appellant Construction Resource Group, Inc. ("**CRG**") is mindful that a reply brief should be limited in scope, and therefore, will address only salient aspects of the opening brief submitted by Fast Formliners Company ("**Formliners**").

I. THE AFFIDAVIT OF JIMMY BELUE IS A PART OF THE PERTINENT RECORD.

In Argument Section I of CRG's opening brief, CRG makes reference to the affidavit of an individual named Jimmy Belue. Mr. Belue "is a quality control manager with CRG," and "affirmed that, on August 25, 2022—which was barely one week after the conclusion of trial—Mr. Belue's wife had a conversation with a woman who is her 'best friend at work;'" this individual "reported that she was a juror in Formliners' trial against CRG, and that CRG lost." (CRG's Op. Br. at 6.)

However, on Page 5 of their brief, at Footnote 3, Formliners asserts that CRG has "falsely state[d] that Belue submitted an affidavit in support of CRG's new trial motion." Formliners is mistaken.

The docket from the underlying proceedings show: (1) that CRG filed its motion for a new trial on August 26, 2022; and (2) that, on August 29, 2022—a mere three days later—CRG supplemented its motion for a new trial with the affidavit of Mr. Belue. Accordingly, Mr. Belue's affidavit is a part of the pertinent record, and nothing about the inclusion of his affidavit has been misrepresented to this Court.

II. FORMLINERS MISAPPREHENDS THE ANALYSIS APPLICABLE TO JUROR CONCEALMENT.

On Page 5 of their brief, Formliners asserts that the "two-part test for when failure to disclose during *voir dire* would justify a new trial" is supplied by Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014); that: first, the trial

court must determine whether the concealment was intentional; and second, only if the concealment was intentional may the court then consider whether there was any prejudice. (Formliners' Op. Br. at 5-6.) Formliners is mistaken.

Lynch was decided in the early part of 2014, and was displaced later that same year by the Supreme Court's decision in State v. Coaxum, 410 S.C. 320, 764 S.E.2d 242 (2014). Coaxum appears to be the Supreme Court's effort to reconcile decades of precedent regarding juror concealment during voir dire into one, cohesive analytical framework.

In that connection, the Coaxum analysis draws a foundational distinction between juror concealment that is intentional, and concealment that is unintentional. Nowhere does Coaxum—or any other South Carolina appellate decision, for that matter—attempt to define "intentional concealment." Instead, Coaxum defines "unintentional concealment," which sheds light on what "intentional concealment" is, and what consequences may follow from it.

Concealment, of course, refers to the circumstance when a juror fails to respond, either truthfully or at all, to a specific interrogatory propounded by the trial court during voir dire. This is a critical aspect of trial, since it directly affects each party's right to an impartial jury, free from the persuasions of bias or prejudice. See id., 410 S.C. at 327, 764 S.E.2d 245. It also affects each party's right to exercise peremptory challenges, which itself is an essential mechanism toward achieving an impartial jury.

To be clear, a juror's response to the trial court's interrogatories is either truthful and candid, or it's not. There is no in-between. And, in the circumstance when a juror is less-than truthful or candid in response to the trial court's interrogatories, there is

concealment. At that point, the question becomes whether the concealment is intentional or unintentional.

The Supreme Court has specifically identified the types of juror responses (or lack of responses) that comprise "unintentional concealment." They are as follows:

1. When the question posed during voir dire is ambiguous;
2. When the question posed during voir dire is incomprehensible to the average juror; and/or,
3. When the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances.

Coaxum, 410 S.C. at 325, 764 S.E.2d at 244 n.4 (citing State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001)).

When a juror's failure to respond truthfully and candidly to a trial court's inquiry is characterized by the foregoing circumstances, then, according to the Supreme Court, a juror's concealment of information during voir dire is "unintentional." Therefore, consistent with this precedent, all other circumstances of nondisclosure would seem to constitute "intentional concealment."

Coaxum quite clearly explains what the consequences of intentional concealment are. The party seeking relief from a juror's intentional concealment "need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent." Coaxum, 410 S.C. at 328-29, 764 S.E.2d at 246 (citation omitted). If the intentional concealment is discovered before the jury has rendered its verdict, the trial judge may either replace the juror or grant a mistrial.

Presumably, then, if the intentional misconduct is discovered after verdict, the only recourse available is a new trial.

The consequences of unintentional concealment are not necessarily as severe. In those circumstances, "no inference of bias can be drawn. [Instead], the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias." Coaxum, 410 S.C. at 329, 764 S.E.2d at 246 (internal citation omitted). When unintentional—or innocent—concealment is established, "the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." Id., 410 S.C. at 328, 764 S.E.2d at 246 (citation omitted).

III. THE TYPE OF JUROR CONCEALMENT AT ISSUE IN THIS CASE IS INTENTIONAL, WHICH REQUIRES A NEW TRIAL.

Formliners contends that CRG has not identified which of the voir dire questions is at issue. CRG would direct the Court's attention to the following excerpt from the underlying trial court proceedings:

> The Court: This is a breach of contract case involving work at Construction Resource Group's business located on Brown Creek Road. We did have one individual earlier who indicated he had worked for Construction Resource Group. Is there any member of the jury panel have [sic] any connection with anybody or the site, the location of Construction Resource Group at Brown Creek Road here in Union? If so, please stand.
>
> (No response given.)

The Court: Thank you. No one stands.

(Trial Tr. at 7:4-13.)

The trial court's interrogatory was not "incomprehensible," and certainly not to a reasonable juror of ordinary intellect. Quite clearly, the trial court asked if "any member of the jury panel" has "any connection with anybody" at Construction Resource Group. It is hard to fathom how this question could reasonably have been misunderstood, particularly by a juror whose "best friend" is the spouse of the quality control manager for CRG.

The trial court's interrogatory was not insignificant, either. It is a standard interrogatory that each and every judge in this State propounds in voir dire, at the outset of each and every jury trial that is conducted in this State. The question is important, and the responses thereto are critical; after all, it is specifically intended to ferret out any information that would suggest pre-existing preferences or prejudices that may cloud the impartiality of the ultimate panel.

Nor is the information that the juror should have disclosed temporally remote. The juror in question is the "best friend" of the spouse of Mr. Belue, who is the quality control manager for CRG. This is not the sort of information that, due to the passage of time, just happened to slip the juror's mind.

Nor is the trial court's interrogatory ambiguous. By definition, "ambiguity" requires a condition where the language utilized is susceptible to more than one reasonable interpretation. There is nothing ambiguous about the interrogatory in question. The trial court asked each juror to disclose if "any member" has "any connection with anybody" at CRG. The question is, by design, framed broadly. Here, the connection that the juror failed to disclose is the fact that her best friend is married to a member of CRG's

management team. It is bewildering how a reasonable person could fail to perceive that her close association with a member of CRG's management would not be within the ambit of the information sought by this question.

This is particularly true given the additional context of what happened during voir dire. The juror-in-question had literally just sat through a colloquy involving another juror, whose own connection with CRG resulted in his dismissal for cause:

> The Court: Is there any member of the jury panel who is close friends or have a business or personal relationship with any of these attorneys or for the individual representing the plaintiff in this case? In other words—yes, sir, if you'd stand. Your number?
>
> The Juror: 148 (indiscernible) if I understand Resource Group?
>
> The Court: That—and I'm going to get to that in just a moment. Yes. The defendant in the case is Construction Resource Group.
>
> The Juror: Okay. My thing is, I'm a former employee from there.
>
> The Court: All right. Tell me your number again.
>
> The Juror: 148.
>
> The Court: Mr. Johnson?
>
> The Juror: Yes, sir.
>
> The Court: Would that fact affect your ability to be fair and impartial to both the plaintiff and the defendant in this case?
>
> The Juror: Yes, sir.
>
> The Court: When did—did you retire from there?
>
> The Juror: No.
>
> The Court: But would it affect your ability?
>
> The Juror: Yes, Your Honor.

The Court: All right. Then—

The Juror: (Indiscernible)

The Court: All right, Mr. Johnson, No. 148, will be excused from this particular case.

(Trial Tr. 4:15-5:17.)

As illustrated by this exchange, a juror who had been dismissed for cause raised his connection to CRG before the trial court had even asked specifically about any prospective juror's connection to CRG. The juror-in-question in this appeal sat through that discussion. She doubtless heard Juror No. 148 explain that he was a former employee of CRG, and that this relationship was sufficient to result in his removal from the panel. This alone should have caused a reasonable juror of ordinary intellect to at least have had a question about whether her own connection to CRG merited disqualification. And that is especially true, given the breadth of trial court's interrogatory of just a few moments later, asking if any juror had "any connection to anybody" at CRG.

This leads back to the Coaxum analysis. Under Coaxum, it is beyond dispute that the juror-in-question failed to disclose a material relationship with a party during voir dire, despite being asked a direct question that should have resulted in the disclosure of that relationship. The inquiry now becomes whether the juror's failure to disclose was intentional or unintentional. The trial court's question was not ambiguous; nor was it incomprehensible. The information sought was not insignificant; nor was the relationship that the juror failed to disclose so far removed in time that juror's nondisclosure is reasonable. In short, under Coaxum, the juror's nondisclosure was not unintentional. It was intentional.

Formliners may contend that, even if the juror's nondisclosure was intentional, there has still been no demonstration of bias or prejudice. But that argument would be unavailing. Coaxum plainly states that, in the circumstance of intentional juror concealment, bias and prejudice are presumed.

Therefore, consistent with the Coaxum analysis, the juror-in-question's failure to respond truthfully and candidly to the trial court's voir dire interrogatories cannot be deemed unintentional, or innocent. Moreover, consistent with Coaxum, in the post-trial environment, there is no opportunity for the trial court to mitigate a juror's intentional concealment, as would be available through excusing the juror and seating an alternate. The only recourse available now to protect the integrity of each party's right to an impartial jury is to grant a new trial. It was an abuse of discretion for the trial court to neglect to do so, and that decision should be corrected through these appellate proceedings.

IV. CONTRARY TO FORMLINERS' ARGUMENT REGARDING THE INADMISSIBILITY OF UNLAWFULLY OBTAINED VIDEO RECORDINGS, IN SOUTH CAROLINA, STATUTES MEAN WHAT THEY SAY.

"[T]here is no canon against using common sense in construing laws as saying what they obviously mean." Roschen v. Ward, 279 U.S. 337, 339 (1929) (Holmes, J.). "When, as here, the words of [a] statute are plain and reflect legislative intent unambiguously," it is incumbent on the Court to "enforce them according to their terms." Murphy v. Collins, 424 S.C. 627, 638, 819 S.E.2d 160, 166 (Ct. App. 2018) (citation omitted).

South Carolina Code § 17-30-65(A) provides as follows:

> Whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the State, or a

> political subdivision thereof, if the disclosure of that information would be in violation of this chapter. . . .

Formliners contends that the act of its representative wandering around CRG's production facility, recording its operations and any voices heard in connection therewith on his phone, does not constitute an "interception" within the meaning of the statutory section cited above, and that is indefensible. South Carolina Code § 17-30-15(3) establishes the definition of "intercept," which "means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." Quite clearly, then, the act of Formliners' representative in recording audio and visual perceptions on his phone—to include the oral communications of CRG's employees at CRG's production facility—would constitute an "interception."

Formliners further contends that, even if an interception did occur, it was with authorization, making the interception lawful under South Carolina Code § 17-30-30(B). But Formliners' argument does not withstand scrutiny. This statutory section makes the interception of communications lawful if "the person [recording] is a party to the communication or one of the parties to the communication has given prior consent to the interception." S.C. Code § 17-30-30(B). However, Formliners' representative testified to wandering around CRG's production facility for a few hours recording everything he saw and heard. (Trial Tr. 125:4-127:1.) He never testified that he was a party to any communications that he recorded.

Nor was there any evidence or testimony that Formliners' representative ever had permission to record communications on CRG's premises. The testimony was that CRG authorized Formliners to take pictures, (Trial Tr. 126:17-127:1), but there appears to never have been any discussion about video recording—much less audio recording. In fact,

CRG's representative testified to not even knowing that the recordings existed until long after they had been taken. (Trial Tr. 310:2-311:12.) And, it is undisputed that signs were posted around CRG's premises that strictly and expressly prohibited "audio or image recording." (See CRG's Mot. in Limine, Exhibits.) In short, there is no evidence anywhere that Formliners was authorized to record audio or video on CRG's premises.

Instead, it appears to be Formliners' argument that its representative was recording in an open and obvious fashion, and that therefore, CRG's consent should be deemed to have been implied. Which is nonsense. One of the privileges of property ownership is the right to dictate the terms on which invitees may enter upon your premises. In this case, CRG had made it plain and known that invitees were prohibited from engaging in audio/video recording while on its property. There is no evidence that this limitation was ever relaxed for the benefit of Formliners' representative by any of CRG's personnel. And there is no basis in law for an invitee to enhance his rights upon another's premises through the invitee's own unilateral conduct. It is the property owner—not the invitee—who gets to decide the rules applicable to the premises.

Accordingly, when Formliners' representative was recording audio and visual perceptions on CRG's premises, it was doing so without authorization—regardless of whose communications he was capturing.

And that leads directly the problem of statutory application that faces Formliners in this appeal. The statute plainly states that, "[w]henever any wire, oral, or electronic communication has been intercepted" unlawfully, "no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial." S.C. Code § 17-30-65(A) (emphasis added). It is CRG's position that the

Legislature's use of the phrase "no part" means exactly what it says: no part. Audio recordings that are made unlawfully are, to borrow a term from the criminal context, fruit of the poisonous tree; they are inadmissible. And when audio recordings are made contemporaneously with video recordings, unlawfully, such that the video recording is a part of the audio recording, it is likewise subject to mandatory exclusion. No part of the audio recording, no part of its contents, and no evidence derived therefrom may be admitted into evidence. The plain, unambiguous language of South Carolina Code § 17-30-65(A) requires nothing less. Accordingly, it was error for the trial court to admit even the video portion of Formliners' recordings which were obtained unlawfully, and that error compels a new trial.

CONCLUDING STATEMENT

Consistent with the foregoing discussion, and for any other reason that may appear in the record presented, CRG respectfully requests a decision from this Court which reverses the trial court's failure to grant CRG a new trial or an appropriate modification of the verdict, remands the case for further proceedings, and provides for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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