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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Judge

Appellate Case No. 2023-000707

Deloris Campbell, ...Appellant,

v.

Cole B. Collins,...Respondent.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Where negligence was admitted and the Respondent acknowledged he was liable for some damages to the Appellant, did the trial court err in failing to grant Appellant's motion for a new trial following a defense verdict?

ARGUMENT IN REPLY

I. Collins admitted his negligence caused Campbell to sustain some damages.

The Respondent, Cole B. Collins ("Collins"), writes that he "admitted negligence and denied he was the proximate cause of Plaintiff [i.e., Appellant Deloris Campbell ("Campbell")]'s injuries." (Initial Brief of Respondent p. 1.) That is not entirely accurate. What would be more accurate would be for Collins to say that he admitted negligence, admitted his negligence was the cause of some of Campbell's damages, and denied his negligence was the cause of some other damages Campbell was claiming. (R. pp. ___; transcript p. 54 ln. 7-19, p. 190 ln. 4-5, p. 191 ln. 15-19, p. 193 ln. 8-9.) Defense counsel declared in Collins' opening statement that Campbell "recovered in two and a half months from her neck and back problems after this accident as documented in the medical records. And *Mr. Collins is prepared to pay for those two and a half months of treatment for temporary injuries*[,]" after which he contrasted those damages, for which he admitted liability, with the other damages Campbell claimed: "But he's not prepared to pay for that foot. He's not prepared to pay for her retirement and he's not prepared to pay for the hundreds of thousands of dollars that they're gonna ask you for at the end of this trial." (R. pp. ___; transcript p. 54 ln. 11-19) (emphasis added).

Collins asks this court now to ignore this because his lawyer said it, pointing out the rule that the arguments of a party's lawyer do not constitute evidence to support that party's position. (Initial Brief of Respondent pp. 12-13.) Collins' reliance on this rule is misplaced. There is a tremendous difference between a party trying to use *his own lawyer*'s statement as though it were evidence and a party pointing out concessions or admissions that *the opposing party* made through *the opposing party's lawyer*.

The rule of which Collins seeks to take advantage is the one that prevents a party from treating remarks made by that party's *own* counsel as evidence. An examination of cases applying this rule reveals that it has been applied where a party on appeal has tried to cite as factual support a statement that party's *own* lawyer made below. Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) (error, among other things, for family court to rule in favor of party based on that party's lawyer's statements and not on evidence); McManus v. Bank of Greenwood, 171 S.C. 84, 171 S.E. 473, 475 (1933) (refusing to affirm based on factual assertion stated by respondent's lawyer but not supported by any evidence in record); S.C. Dept. of Transp. v. Richardson, 335 S.C. 278, 283, 516 S.E.2d 3, 5-6 (Ct. App. 1999) (appellant's own counsel's remarks below were not evidence but would have been treated differently if they had been joined in or agreed to by opponent); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 599-600, 486 S.E.2d 269, 273 (Ct. App. 1997) (error to grant summary judgment on basis of movant's counsel's assertions of fact); Historic Charleston Foundation v. Krawcheck, 313 S.C. 500, 508 & n. 7, 443 S.E.2d 401, 406 & n. 7 (Ct. App. 1994) (appellants could not rely on a statement made below by their own attorney that building was vacant as evidentiary support for building actually being vacant). The rule rightly recognizes that a party cannot manufacture his own evidence just by getting his lawyer to say something.

This is very different from when *opposing* counsel makes a concession during the course of court proceedings. An opponent's concession voiced by his lawyer during trial is of course binding on that opponent, as "[a]cts by an attorney are binding on clients through principles of agency law." Collins v. Bisson Moving & Storage, Inc., 332 S.C. 290, 303, 504 S.E.2d 347 (Ct. App. 1998) (citing Clark v. Clark, 271 S.C. 21, 244 S.E.2d 743 (1978)).

The latter is what we have here – Collins is bound by the statement of *Collins'* counsel. (R. pp. ___; transcript p. 54 ln. 11-19.) This court has specifically recognized that a party's concession through counsel in opening statement – in that case, a concession generally to the effect that the defendant's negligence caused the plaintiff to sustain some damages – is binding against that party. Collins, 332 S.C. at 303. This court has recognized that such a concession – materially identical to the concession in the case at bar – forecloses the conceding party from taking the position on appeal that no evidence exists of proximately caused damages. Id.

Collins, through his counsel in opening statement, conceded liability for "two and a half months of treatment for temporary injuries." (R. pp. ___; transcript p. 54 ln. 14-15.) That concession dooms the defense verdict here and reveals that a new trial is required under South Carolina law.

II. Campbell's arguments are preserved for review.

Collins contends that Campbell's arguments on appeal are not preserved for review. Collins is wrong.

No magic words are required to be said in order that an issue be preserved for review. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation), *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012). Campbell's motion for a new trial argued that "the verdict is contrary to the greater weight of the evidence" and that "it is undisputed the

evidence clearly established that, 'but for' the motor vehicle collision, Plaintiff [Campbell] sustained some injuries." (R. pp. ___; motion for new trial pp. 1, 8.) What Campbell wrote in that motion was right, and it is consistent with what she is now saying to this court. (R. pp. ___; motion for new trial pp. 1, 8.) She has done at least the minimum so that her argument is preserved for review. Toole, 260 S.C. at 240; Russell, 345 S.C. at 128; Robert D., 340 S.C. at 12.

III. Collins cannot write away the conceded facts that mean this verdict cannot stand.

Collins spends most of his brief discussing what the record showed about Campbell's foot injury. This is a red herring. Whether Campbell's foot injury was proximately caused by Collins' negligence was obviously a matter of dispute. What Collins cannot escape is that his counsel conceded his negligence caused *some* injury to Campbell. (R. pp. ___; transcript p. 54 ln. 11-19).

"Not only does a trial judge have the discretion but also the duty to grant a new trial if the jury verdict is contrary to the fair preponderance of the evidence." Jessup v. Hansen, 289 S.C. 54, 56, 344 S.E.2d 618, 620 (Ct. App. 1986). "Where there is no evidence on which the jury could have based their finding of actual damages, it is error for the court to refuse a motion for a new trial." Sparrow v. Toyota of Florence, Inc., 302 S.C. 418, 422, 396 S.E.2d 645, 648 (Ct. App. 1990).

In light of Collins' concession of liability for some damages, it was the trial judge's "duty to grant a new trial," Jessup, 289 S.C. at 56, and it was "error for the court to refuse a motion for a new trial" under these circumstances. Sparrow, 302 S.C. at 422.

CONCLUSION

On this set of facts, with liability and the existence of proximately caused damages admitted, Campbell is entitled to a new trial. It was an abuse of discretion for the lower court to deny her new trial motion. This court should reverse the lower court and remand this case for a new trial.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing initial reply brief on the date given below by emailing it to opposing counsel at the addresses noted below.

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