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SC Court of Appeals

.THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge
Case No. 2018-CP-26-01626

Appellate Case No. 2024-000070

Mark Conard and Intercoastal Endo., P.C., ... Respondents

vs.

Wade Nichols, Wade Nichols D.M.D. P.A. and Nichols Holdings, LLC ..... Appellants

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INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Mark Conard and Intercoastal Endo, P.C. brought this lawsuit against Wade Nichols, Wade Nichols D.M.D. P.A. and Nichols Holdings, LLC. Conard and Nichols are both endodontists. Nichols has been a practicing endodontist in the Myrtle Beach area for more than thirty-five years and desired to semi-retire so he recruited Conard to purchase his practice. Nichols and Conard signed an agreement wherein Nichols would sell the practice to Conard but continue to practice part time at his discretion. (R.). The parties also agreed Nichols would transfer his goodwill to Conard and the definition of goodwill was specifically defined in the goodwill agreement. (R.). When a disagreement arose, Conard brought this lawsuit for breach of contract asserting that Nichols had breached the goodwill provisions of the contract of sale. Nichols denied he breached the agreement and counterclaimed for breach of lease because Conard failed to make lease payments to Nichols for the Myrtle Beach and North Charleston offices. The case was tried June 1, 2021 through June 4, 2021. The jury returned a verdict on the breach of contract/goodwill claim in the sum of $409,000.00 for Conard and $48,000.00 for Nichols on his breach of lease counterclaim. The trial court took all post-trial motions under advisement but did not rule on them until over two and one-half years later. This appeal was timely filed after the trial judge denied Nichols' motions for JNOV, a new trial and a new trial remittitur pursuant to Rules of Civil Procedure 54, 59 and 60 on December 29, 2023.

STANDARD OF REVIEW

When reviewing the denial of a motion for a judgment notwithstanding the verdict or a new trial *nisi* remittitur, this court must employ the same standard as the trial court, by reviewing the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Welch v.*

Epstein, 342 S.C. 279, 299-300, 536 S.E.2d 408, 418-19 (Ct. App.2000) (an appellate court will reverse the trial court only when no evidence supports the ruling below).[1]

In *Hassell v. City of Columbia*, 430 S.C. 620, 626 (Ct. App. 2020), this Court stated as follows in regard to the standard of review:

> "When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice." *Elam v. S.C. Dept of Transp.*, 361 S.C. 9, 27, 602 S.E.2d 772, 781 (2004). "If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (quoting *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). "The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal." *Elam*, 361 S.C. at 27, 602 S.E.2d at 781.

Further, a trial court's order denying a new trial will not be upheld when the order is unsupported by the evidence or controlled by an error of law or if "no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). This rule applies to all motions for directed verdict, JNOV, new trial and involuntary nonsuit. *Sweatt v. Norman*, 283 S.C. 443, 322 S.E.2d 478 (Ct. App. 1984).

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[1] In this case, no evidence supports a breach of the goodwill provisions of the contract much less a verdict of $409,000.00 . The trial judge erred in not granting a directed verdict and a judgment notwithstanding the verdict or in the alternative a new trial remittitur.

ARGUMENT

I. NICHOLS FULLY COMPLIED WITH THE ASSIGNMENT OF PERSONAL GOODWILL AND RESTRICTIVE COVENANT AGREEMENT AND THE COURT ERRED IN NOT GRANTING NICHOLS' MOTION FOR DIRECTED VERDICT.

At the close of the evidence Nichols moved the court for an order granting a directed verdict because Nichols had complied with the Assignment of Personal Goodwill and Restrictive Covenants Agreement as written and agreed to by the parties. (R.). Only two provisions of the Assignment of Personal Goodwill are implicated in this case. They are as follows:

> 1. **Assignment of Goodwill.** In order to assure the Purchaser of the beneficial enjoyment of Nichols' personal goodwill value, Nichols does hereby sell, transfer and assign unto Purchaser all of Nichols' personal goodwill associated with the Practice, and in connection therewith:
>
> (a) Nichols agrees to cause the Corporation to prepare a mutually agreeable letter to all patients of the Practice for which treatment is scheduled or ongoing and all referring sources, announcing the transaction, and to recommend Purchaser to new and existing patients, referring doctors and staff. Such letter(s) and addressed envelopes will be delivered to Purchaser upon the execution of this Agreement and payment of the purchase price set forth in Section 3 below. Purchaser shall be required to add the necessary postage and mail the same; and
>
> (b) Purchaser shall be entitled to use Nichols' name on Practice signage, in Practice telephone listings, and in advertisements of the Practice, for a period of one (1) year following Nichols' last date of services in the Practice, subject to applicable laws, rules and regulation. Provided, any use of Nichols' name in advertisements must be pre-approved by Nichols, who agrees that any such approval shall not be unreasonably withheld or delayed. The Purchaser and Conard, jointly and severally, agree to indemnify, defend and hold harmless Nichols from and against any and all losses, costs, expenses, liabilities or damage, including counsel fees reasonably incurred in defending or resisting same, whether incurred directly or indirectly, resulting from the use of Nichols' name as described above. (R. _____).

These two provisions were the only provisions in the Contract for Assignment of Personal Goodwill at issue in this trial. The record is clear that a letter was prepared by Dr. Nichols and mailed by Dr. Conard's office, thus complying with Section 1(a) of the Assignment of Personal Goodwill. (Tr. pp. 131-132). Both Conard and Nichols agree this occurred. Conard testified Nichols signed the

letter and did what he was supposed to do. (Tr. p. 131, lines 4-25). Conard testified he used Nichols' name, signage and telephone listings thus satisfying Section 1(b) of the Assignment of Goodwill. (Tr. p. 132, lines 1-13). Conard testified Nichols fully complied with Section A & B of the goodwill provisions of the contract. (Tr. p. 132, lines 18-25). The record further has extensive evidence that the Practice signage, telephone listings and advertisements remained in place for a period of one year. (Tr. p. 132, lines 1-2). Thus, all of the evidence in the record shows only one conclusion -- Nichols fully complied with the Assignment of Personal Goodwill in all aspects.[2] In fact, Nichols' phone number is still used even to this day by Conard. In sum, based on the testimony, Nichols fully complied with the provisions of the Assignment of Personal Goodwill Agreement and thus no damage was caused to Conard. Accordingly, the trial court should have granted a directed verdict as to the goodwill provision of the contract since all the testimony was those provisions were complied with by Nichols.

A. Personal goodwill case law supports Appellants' argument.

The Supreme Court of South Carolina has laid down strict bright line rulings concerning the goodwill of a professional. It has done so because goodwill is of such a speculative nature and goodwill attaches solely to the person and does not possess value or constitute an asset separate and apart from the professional. In *Keane v. Low Country Pediatrics*, 372, S.C. 136, 641 S.E.2d 53 (Ct. App. 2007), Chief Judge Hearn, then of the South Carolina Court of Appeals, reversed an award to the Keanes concerning goodwill and valuation of the Low Country Pediatrics Group. Judge Hearn in her ruling cited *Donahue v. Donahue*, 295 S.C. 353, 384 S.E.2d 741 (1984) and *Weinberg v. Wallace*, 314 S.C. 183, 442 S.E. 2d 211 (Ct. App. 1994) which are family court cases but still applicable. In

[2] Further, a Consent Order filed February 14, 2017 found that Nichols had not violated the personal services agreement and was free to compete as of May 7, 2016. (R. ____)

both *Donahue* and *Weinberg*, South Carolina courts held that in valuing a professional association the goodwill of a professional attaches solely to the person or the professional man and does not possess value or constitute an asset separate and apart from the professional's person. Personal goodwill follows the owner. *Moore v. Moore*, 414 S.C. 490, 779 S.E.2d 533 (2015). *Dickert v. Dickert*, 387 S.C. 1, 691 S.E.2d 448 (2010) (goodwill extinguished in the event of a professional's death, retirement or disablement) ("intangible nature of goodwill asset ... results in speculative valuation."). See *Weinberg*, 314 S.C. at 187, 442 S.E. 2d 211 (Ct. App. 1994).

This case is strikingly similar to an unpublished opinion from the Hawaii Court of Appeals, *Timon v. Timon*, No. 30713, 2014 WL 100361 at 6 (Haw. Ct. Appl, March 13, 2014). The *Timon* case was cited by this Court in *Bostick v. Bostick*, 436 S.C. 434, 872 S.E.2d 859 (2022). In *Timon*, the husband sold his dental practice. The sales agreement attributed a portion of the sales price to personal goodwill. The Court concluded the sales agreement did not require the husband to remain active in the dental practice and thus no evidence supported a finding that a portion of the sales price constituted goodwill. This same set of facts exists here which shows the trial court erred in sending this matter to the jury.

Plaintiffs' expert, Baumann, was the only witness who testified about the personal goodwill of Dr. Nichols during the trial. He testified Nichols transferred a good portion of the personal goodwill to Conard but ignored the written agreement on goodwill. (Tr. p. 319, lines 11-12); that he was getting less money than he expected from the personal goodwill (Tr. p. 321, line 18); that his "assumption" was that a third of the goodwill was not transferred[3] (Tr. p. 331, lines 1-2); that he could

[3] How he arrived at a one-third loss is baffling and never met the standard for expert witness testimony. Baumann's testimony did not meet the reasonable degree of certainty required for expert testimony. *Green v. Lilliewood*, 292 S.C. 186, 249 S.E.2d 910 (1978); *Payton v. Kearse*, 329 S.C. 51, 495 S.E.2d (1998) (the expert testimony standard is more than what is possible).

not offer any specific instance of Nichols trying to get Conard's referrals (Tr. p. 342, lines 3-6); that he couldn't say more money would have been made even if Nichols had stayed for a year (Tr. p. 343, line 14); that his testimony was based on what Conard told him (Tr. p. 343, lines 20-23); that if Conard's assumption was incorrect he couldn't connect any loss (Tr. p. 343, lines 1-5); that if no alleged actions by Nichols occurred he couldn't say the damages were attributable to Nichols (Tr. p. 345, lines 1-25); that since Conard paid a million dollars and only got $700,000.00 that his testimony was Conard didn't get $290,000.00 of the personal goodwill (Tr. p. 360, lines 15-16); that Nichols could quit work any day he chose (Tr. p. 363, line 21); that this was unusual in this type of contract (Tr. p. 364, line 4); that he was surprised Nichols could quit on short notice (Tr. p. 369, lines 3-4); that Nichols sent letters to other dentists consistent with the contract (Tr. p. 373, lines 12-13); and that Nichols complied with the contract for personal goodwill (Tr. p. 373, lines 18-19). In sum, Baumann's testimony was rank speculation and conjecture and did not comport with the requirements concerning a claim for goodwill laid down in *Keane v. Low County Pediatrics*, 372 S.C. 136, 641 S.E.2d 53 (Ct. App. 2007).

At the close of the testimony, Nichols moved for a directed verdict based on the fact that the personal goodwill testimony of Baumann was too speculative and that Plaintiffs' expert could not assess damages to a reasonable degree of certainty (Tr. p. 395, lines 4-20). The trial court, after hearing the motion, found the issue of personal goodwill was for the jury despite South Carolina appellate court decisions directly on point and the improper expert testimony offered by Conard. (Tr. p. 401, lines 1-5). See *Keane*, *Donahue*, *Weinberg* and *Bostick*, *supra*).[4]

[4] Goodwill in a professional practice consists largely of personal goodwill. *Wilson v. Wilson*, 227 W.Va. 57, 706 S.E.2d 354 (W.Va. 2010) cited in *Bostick v. Bostick, supra.*

The trial court erred in submitting the issue of goodwill to the jury. All the testimony showed Nichols fully complied with the Assignment of Personal Goodwill Agreement which only required Nichols to prepare a mutually agreeable letter to the patients of the practice (which he did) and to allow Conard to use Nichols' name on practice signage and in advertisements of the practice for a period of one year. (R. _____). (Which he did.) Further, Baumann's testimony was based on a false premise: the fact that he had been told by Conard that Nichols was taking his patients. In fact, Conard in his testimony indicated he could not assign any damage to Nichols and that his expert, Baumann, would testify as to the damage which occurred to Conard. (Tr. p.160, line 12; p. 161, lines 21-25). Thus, Conard's argument at trial was circular and highly speculative. Baumann said his testimony was based on Conard's statements to him. (Tr. p. 343, line 14). Conard said he could not provide any information about the damages – all of which shows the trial court should have granted Nichols' motion for a directed verdict on the goodwill claim. (Tr. p. 132, lines 18-25; p. 160, line 12; p. 161, lines 21-25).

Accordingly, the trial court erred as a matter of law in failing to hold that the issue of personal goodwill was speculative and unproven, especially in light of the testimony of Baumann and Conard and the clear precedent decided by this Court. See *Keane v. Low Country Pediatrics*, 372, S.C. 136, 641 S.E.2d 53 (Ct. App. 2007) in which this Court found that the trial court erred in including the value of the physician's individual professional goodwill in the calculation of the fair market value of the association. The expert's testimony in *Keane* was similar to Baumann's testimony which was mere conjecture. Here, Baumann relied on false assumptions from Conard when Conard testified he could not speak to the issue of his damages. (Tr. p. 160, line 12; p. 161, lines-21-25. As a result, the trial court should have granted Nichols' motion and the verdict which was based solely on a false pretense that the goodwill was not transferred. See *Weinberg v. Wallace*, 314 S.C. 183, 442 S.E. 2d

211 (Ct. App. 1994) where this Court affirmed summary judgment regarding conversion of goodwill in a family business.

Thus, the trial court should have granted a directed verdict since both the written purchase agreement on goodwill and South Carolina case law hold that goodwill attaches solely to the person and is not an asset separate and apart from a professional's persona. Further, the written agreement of the parties concerning goodwill does not require Nichols to take any action other than comply with Sections 1 and 2 of the Assignment of Personal Goodwill and Restrictive Covenants Agreement, which the parties agree Nichols did at the time of sale. (Tr. p. 131, lines 4-25; p. 132, lines 18-25). Finally, Conard conceded at trial Nichols could have left the practice at any time without penalty or consequence. (Tr. p. 149, lines 24-24; p. 150, lines 1-2).

Accordingly, the trial court erred as a matter of law in allowing testimony by Baumann as to the losses incurred by goodwill and Nichols' motion for directed verdict should have been granted as a matter of law.

II. THE VERDICT OF $409,000.00 IN FAVOR OF CONARD IS UNSUPPORTED BY THE EVIDENCE.

As an alternative argument if the Court finds the goodwill argument was properly sent to the jury, the only evidence in this case as to damages was presented by Plaintiffs' expert, Baumann. Conard and Nichols had signed a Purchase Asset Agreement and Assignment of Personal Goodwill Agreement which is at the heart of this lawsuit. (R.). Bauman, during his testimony, stated that Conard had suffered goodwill damages of between $254,000.00 and $329,000.00. ("The observed damages is anywhere between $254,000 at a low end, to a high of $329,000; that is basically what it shows us.") (Tr. p. 331, lines 19-22). The Plaintiff Conard testified that he could not calculate his damages and relied solely on Baumann's testimony. (Tr. p. 160). Conard offered no testimony about damages at trial. ('I'm leaving it up to my attorney." (Tr. p. 160, line 12). ("But you can't point to

one dollar – one dollar you lost as a result of the purchase of this successful 30-year dental practice?") (A. I think my expert can.") ((Tr. p. 161, lines 22-25). The only damage testimony offered by any witness was by Conard's expert, Baumann, who put $329,000.00 as the outer limit of Conard's damage claim. (Tr. p. 331, lines 19-22). The jury awarded $409,000.00 which has no basis from the evidence presented. (Tr. p. 331, lines 19-22). Nichols asserts that an improper jury argument about attorney's fees most likely resulted in a verdict of $409,000.00. An attorney's fee of 33-1/3% of $409,000.00 is $136,197.00. When one subtracts $136,197.00 from $409,000.00, the result is $272,803.00 – almost the middle of Plaintiffs' expert's range of damages offered at trial.

Nichols moved for a new trial/remittitur since the evidence at trial was $329,000.00 and thus the maximum amount of damages that a jury could legally award. (Tr. pp. 331, lines 19-22).

During the closing arguments, Conard's counsel argued attorney's fees as an element of damage. Nichols' counsel timely objected and the Court did not issue a curative charge. (Tr. p. 806, lines 18-24). In sum, the jury's verdict of $409,000.00 is patently erroneous since the only evidence of any damages was at most $329,000.00 per Baumann's testimony (Tr. p. 331, lines 19-22) (Jury Verdict Form (R. ___).

A. South Carolina case law supports Appellants' position.

Numerous South Carolina cases have discussed the legal theory behind a motion for new trial and/or new trial remittitur. In the seminal case of *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772, 781 (2004) the Supreme Court held "If the amount of the verdict is grossly inadequate or excessive, as a result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute." See also *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003).

Many South Carolina cases have addressed a new trial remittitur and/or new trial motion. Those include *Hutson v. Cummins Carolinas, Inc.*, 280 S.C. 552, 314 S.E.2d 19 (1984) in which the trial judge in a case involving a damaged truck reduced a verdict from $65,000.00 to $47,500.00. The Court held: "However, where as here, the damages are capable of being measured by fixed principles, it is error for the jury or judge to base damages on other standards. *Charles* [280 S.C. 560] *v. Texas Co., supra*; 22 Am.Jur.2d *Damages* Section 370 (1965)."

The *Hutson* Court further held "as to the trial judge's conclusion that the jury could have found from the evidence that the loss of use exceeded $30,000.00 and depreciation approached $31,000.00, these conclusions are against the overwhelming weight of the evidence, are not supported by any rational view of the evidence and bear no relationship to the character and extent of Hutson's damages. We therefore find the verdict to be so grossly excessive that it becomes the duty of this Court to set aside the verdict. *Young v. Warr*, 252 S.C. 179, 165 S.E.2d 797 (1969)."

Other cases of this Court and the Supreme Court have also discussed a motion for new trial/new trial remittitur. In *Blackwell v. Paccar, Inc.*, 302 S.C. 294, S.E.2d 736 (1990), the trial court granted a motion for new trial remittitur from $108,000.00 to $75,000.00, which was affirmed. See also *Roland v. Palmetto Hills*, 308 S.C. 283, 417 S.E.2d 626 (1992) (remittitur granted by trial court to the contract amount of $49,000.00 for the construction of a home from a verdict rendered by a jury of $52,500.00.) *See also Proctor v. Dept. of Health & Envtl. Control*, 368 S.C. 279, 320, 628 SE.2d 496, 518 (Ct. App. 2006) (stating "compelling reasons must be given to justify invading the jury's province by granting a new trail *nisi* remittitur" and noting "[t]he consideration for a motion for new trial *nisi* remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented."); *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (Review by an appellate court of the grant or denial of a new trial is "limited to consideration of

whether evidence exists to support the trial court's order.");[5] *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758 (2000) ($1.75 million dollar verdict reduced by remittitur of trial judge to $525,000.00, trial judge found the verdict returned by the jury was excessive); *Stevens v. Allen*, 336 S.C. 439, 520 S.E.2d 625 (1999) (a new trial is warranted if the verdict is inconsistent; and if the trial judge denies the motion for new trial in that context, it is an abuse of discretion and this court will grant a new trial absolute.); *Sea Island Food Group, LLC v. Yaschik Dev. Co., Inc.*, 433 S.C. 278, 857 S.E.2d 902 (2021) (the trial court cannot disturb the facts or findings of a jury unless a review of the record discloses no evidence which reasonably supports him); *Garrison v. Target Corp.* 435 S.C. 566, 869 S.E.2d 797 (2022) ($4.5 million punitive damage award remand because there was no evidence to support the ruling).

Here, Conard's expert speculated that the most damage that Conard could have suffered was $254,000.00 to $329,000.00. (Tr. p. 331, lines 19-22). This case involved an alleged breach of contract between the parties. In South Carolina, a breach of contract action includes only damages naturally flowing from the breach. See *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E. 2d 332 (2004). In *Layne v. Gateway Construction Co., Inc.*, Unpublished Opinion No. 2008-UP-304 filed June 11, 2008, this Court found that the damages awarded by a jury in a breach of contract action must be within the range of evidence presented at trial. In *Layne*, Gateway's president testified Gateway's damages totaled $108,380.00 including the contract balance of $50,711.00, $21,073.50 in other damages and $36,595.50 in interest. Gateway reduced the total by $9,000.00 in retainage fees. The jury returned a verdict in favor of Gateway in the amount of $99,380.00. The Laynes moved for a new trial nisi remittitur, arguing the jury awarded compound interest and the verdict included a

[5] In this case no evidence supports a verdict of $409,000.00 – neither the expert nor the Plaintiff can justify such an award.

double recovery of damages. The trial court granted the Laynes motion as to the issue of compound interest and reduced the damages to $92,933.99.

This case is similar to *Layne* in that the only testimony about damages was offered by Plaintiffs' expert witness based on a dubious legal theory about goodwill which Appellant asserts is contra to established South Carolina case law. Here, Plaintiffs' own expert witness candidly admitted at trial that the damages in the case for loss of personal goodwill based on Plaintiffs' testimony could be no more than $329,000.00. (Tr. p. 331, lines 19-22). This was the only testimony on damages offered to the jury for the breach of the contract of personal goodwill – no other testimony was offered. Conard himself testified he relied on his expert, thus the jury verdict over $329,000.00 is unsupported by any evidence and it was legal error not to grant the new trial motion. (Tr. p. 161).

The trial court was required to grant the Defendants a new trial or in the alternative, a new trial nisi remittitur. A verdict of $409,000.00 against the Defendants is erroneous as a matter of law since no evidence supports the verdict. The reason of course is that in a breach of contract action in South Carolina, the measure of damages is the loss actually suffered as a result of the breach and nothing else. See *Collins Holding Corp. v. Landrum*, 360 S.C. 346, 350, 601 S.E. 2d 332 (2004).

III. CONARD'S OUNSEL IMPROPERLY ARGUED ATTORNEY FEES DURING HER CLOSING.

Further, coupled with Conard's counsel's improper closing argument that attorney's fees should be considered by the jury clearly demonstrates it was an error of law for the trial court to deny Nichols' new trial motion. Conard's counsel during closing argument said:

> Additionally, I'm going to tell you something else in the contract. Loser pays. So I want to make sure that you know as a jury that under this contract --
>
> MR. CONNELL: Objection Your Honor. Objection.
>
> THE COURT: Yes, Sir.

MR. CONNELL: Objection.

(Trial Tr. p. 806, lines 18-24.)

The Court thereafter made no effort to correct this improper argument to the jury and the jury was left with the impression they could consider legal fees in their deliberations.

IV. CONARD'S COUNSEL VIOLATED THE RULES OF PROFESSIONAL CIVILITY.

During the trial, Plaintiffs' counsel accused Defendants' expert of "false testimony" and Defendants' counsel of being complicit. (Tr. p. 586, lines 1-25; p. 587, lines 1-3). This claim was outrageous and defamatory and has no place in a trial. The allegation was improper argument and cross-examination without sound basis in the facts or evidence presented at the trial. In *Toyota of Florence, Inc. v. Lynch*, 314 S.C. 257, 442 S.E.2d 611 (1994) the Supreme Court held that the use of improper or abusive language is highly prejudicial and raises the prejudices of the jurors. See also *Major v. Alverson*, 183 S.C. 123, 190 S.E.2d 449 (1937).

The *Toyota* rule was designed to protect witnesses, litigants and lawyers from "vicious inflammatory" arguments. Its principal purpose is to ensure a fair trial by discouraging attorneys from making outrageous and highly prejudicial arguments. In *South Carolina Highway Dept. v. Nasim*, 255 S.C. 406, 79 S.E.2d 211 (1971), a jury verdict was reversed because a witness was called a "great highway robber" and the witness was "trying to steal my client's property.") In *Major, supra* the Court stated calling the opposing party a "bare-faced liar" amounted to "an abuse of the witness." Probably the most famous case in South Carolina legal history on this point, *Edwards v. Union Buffalo Mills Co.*, 162 S.C. 17, 159 S.E. 818 (1931), involved counsel referring to the opposing party's expert in argument as follows:

> I am casting no reflections on the doctors, but I think it was one distinguished Chief Justice who said that there are two classes of liars. One, he said is the plain liars, and the other is the experts. Don't take that literally; I don't mean

> that, but I do mean that when you have money you can line up doctors on one side and doctors on the other, as many as you want to, and they will try to out-swear each other.

162 S.C. at 26, 159 S.E. 821. In reversing the *Edwards* case, the Court stated simply "witnesses are entitled to the protection of the Court."

In this case, Defendants' witness, Collier, and defense counsel were entitled to protection of the trial court. Plaintiffs' counsel insinuated during cross-examination that Collier was testifying falsely. Plaintiffs' counsel then said Collier was presenting false testimony and accused the Defendants' lawyer of being complicit, a crime in South Carolina. (Tr. p. 585, lines 1-25; p. 586, lines 1-9). This was an unwarranted, attack which was highly prejudicial to the Defendants as a matter of law. Thus, because witnesses are entitled to protection of the court from an uncalled for accusation during a trial, the trial court erred as a matter of law in failing to issue a limiting instruction or grant a new trial. As an example of Plaintiffs' counsel's conduct during the trial see the following section of the transcript:

> THE COURT: You put yourself in a very precarious position when you question witnesses about conversations. Are they to believe the witness? Believe you? So the witness is testifying, and you are not.
>
> MS. HANNA: I agree, Your Honor. And here is my problem: Ms. Collier is testifying to information that is absolutely false, and Mr. Connell knows that.
>
> MR. CONNELL: Is what now?
>
> MS. HANNA: False.
>
> THE WITNESS: I do not.
>
> THE COURT: Ma'am, be quiet. It is between the lawyers and the Court.
>
> MR. CONNELL: Your Honor, the same opinions have been offered as of June 19 that there is no damage; that is the same opinions.

THE COURT: Ms. Hanna now accused you of unethical conduct by claiming that you are procuring false testimony, personal and all the like, so you may know it –

MS. HANNA: I'm not putting it on Mr. Connel;

(Tr. p. 585, lines 5-25)

I'm putting it on this witness.

THE COURT: You said she's giving false testimony, that Mr. Connell knows is false.

MS. HANNA: Well, I would agree with that. Mr. Connell knows that he has not had any problem getting documents out of my office or from Dr. Conard. So she's implying to this jury she's repeatedly stated she's had difficulty getting those documents, and it is not true.

THE COURT: She hasn't said that. That is what you continually say.

MS. HANNA: She has repeatedly stated --

THE COURT: She said she requested it and hasn't received it. You translated it to she's blaming you for it, and she's never indicated that. She said she made the request and she expected to receive it. You interjected that, Well, am I supposed to produce it? Why didn't you ask me? Why -- you know, all of that.

MS. HANNA: She's implying, Your Honor, that we are hiding something; that is exactly her goal in what she's doing. She's implying –

THE COURT: She indicated that she did not receive requested information, and she requested to interview Dr. Conard, and it wasn't done. So I'm not sure what more you could get out of that, other than

(Tr. p. 586, lines 1-25)

you're contending she's giving an incomplete opinion, and that is about the best you can do with that.

(Tr. p. 587, lines 1-2)

V. REPEATED IMPROPER COMMENTARY BY CONARD'S COUNSEL WHILE QUESTIONING WITNESSES WAS PREJUDICIAL AND MANDATES A NEW TRIAL

On numerous occasions during the trial, Defendants' counsel objected to Plaintiffs' counsel's improper commentary while questioning a witness, and the judge repeatedly sustained the objections. (Tr. p. 593, lines 11-14; p. 596, line 20; p. 610, line 3; p. 646, line 2; p. 651, lines 5-8). Courts in the United States have long recognized that counsel's opinions or personal beliefs have no place in a civil trial. In *United States v. Young*, 470 U.S. 1 (1985), the Supreme Court of the United States held the trial court by "not dealing promptly with counsel's remarks ... and informing offending counsel that his expression of personal beliefs and opinions would not be tolerated by the court" was an error of law. (See also S.C. Professional Responsibility Rule 3.4(e): A lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue....). Nichols asserts this conduct mandates a new trial since it confused the jury and was clearly inappropriate based on their questions to the Court. (Tr. p. 586, lines 1-25; p. 587, lines 1-2).

VI. THE TRIAL COURT ERRED IN HOW THE POLLING PROCEDURE WAS CONDUCTED.

At the conclusion of the trial, Nichols' counsel requested the jury be polled. During polling, each juror was asked, "Is this your verdict, and is it still your verdict?" One juror, Lanae Porter, expressed doubt when she stood up and said "Do I have to answer that? (Tr. p. 837, line 10). The court directed the juror to answer "yes" or "no" and thus put undue pressure on the juror. (Tr. p. 837, lines 11-15). Defendants assert this undue pressure by the court was prejudicial to Nichols. In *State v. Wright*, 439 S.C. 101, 886 S.E.2d 206 (2023), the Supreme Court addressed the issue of polling and affirmed the South Carolina Court of Appeals which concluded in its opinion:

> Individual polling means each juror must be separately asked to confirm, verbally on the record, that the verdict announced is still his or her verdict.

> We believe this person-by-person inquiry best advances the prime reason for individual polling "to dispel any doubt a party may entertain as to the propriety of a jury verdict as rendered."

State v. Linder, 276 S.C. 304, 278 S.E.2d 335, 339 (1981).

A corollary to that principal is that when a juror expresses doubt when asked "is this your verdict" the court must return the jury to the jury room and then discuss with the lawyers an additional charge. This trial court did not follow that procedure but instead put undue pressure on the juror to say yes or no when she expressed doubt.

> JUROR: I guess so. (Tr. p. 837, line 14).
>
> COURT: You must answer yes or no. (Tr. p. 837, lines 15-17).

The correct polling procedure would have been to return the juror to the jury room for further deliberation and not pressure the juror. In sum, the individual juror polling procedure and the question answered is the only chance for the parties and the trial court to ensure the sanctity and unanimity of the verdict. Once juror Porter expressed concern, the court should not have pressed her for an answer but returned her to the jury room for additional deliberation. This procedural error, of course, requires a new trial.

VII. THE TRIAL COURT ERRED IN FAILING TO GRANT NICHOLS A DIRECTED VERDICT ON HIS BREACH OF LEASE CLAIM.

At the close of the Plaintiffs' case, Nichols moved for a directed verdict on his counterclaim in regard to the leases he had with Conard for the North Charleston and Myrtle Beach office locations. "We move for directed verdict based on the fact it is uncontroverted on our cause of action for breach of lease." (Tr. p. 701, lines 12-24). The Court denied the directed verdict and held that the matter was for a jury. Nichols asserts that there was only one reasonable inference from the evidence and as a result a directed verdict should have been granted. See *Creighton v. Coligny Plaza Ltd. Partnership*, 344 S.C. 96, 512 S.E.2d 510 (S.C. App. 1998).

The only evidence presented here was that the parties had entered into written leases which was part of the Agreement for Purchase and Sale of Assets of Professional Practice and those leases provided for payment by Conard on a monthly basis for both the Myrtle Beach and North Charleston locations. (R.). The evidence in trial was uncontroverted that the rent owed on the North Charleston lease was $10,422.00 (Tr. p. 654, line 22); and that the rent owed on the Myrtle Beach lease was $60,690.00 (Tr. p. 654, line 25). Neither Conard nor his expert disputed this fact and the jury awarded $48,000.00 on the breach of lease, a verdict which is unsupported by the evidence presented at trial. (Tr. p. 654, lines 22-25).

The only evidence of breach of lease by Conard was presented by Nichols who indicated that Conard did not comply with the lease. (Tr. p. 654, lines 15-25 (not paid the entire 5 years rent)). Significantly, Conard admitted at the trial that he didn't pay the leases and owed $60,000.00. (Tr. p. 144, lines 6-7). Also, Nichols offered a North Charleston realtor, Millard Smith, who testified that there was nothing wrong with the North Charleston location, that it was rentable and usable This evidence was uncontested by the Plaintiffs at trial and in fact Conard conceded this fact. (Tr. pp. 412-437).

Smith testified that there were minor problems at the North Charleston office location and did not result in the property being unable to be sold. (Tr. p. 424, lines 10-13). Smith's testimony was that the fire department only wanted to make sure all the exit lights are working and make sure there are fire extinguishers. He also said Conard must be involved since he leased the office. (Tr. pp. 424-425). Conard (nor any other witness) offered no contra testimony on these points.

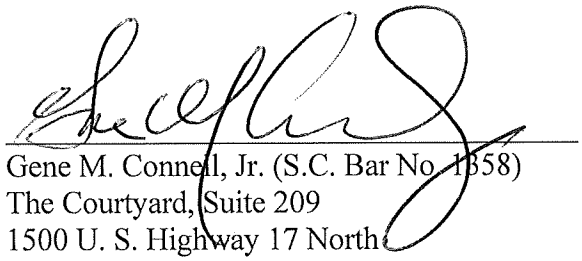
CONCLUSION

The trial court erred in sending the issue of personal goodwill to the jury based on the speculative testimony of Baumann and should have granted the directed verdict motion made by

Nichols. Further, the error is compounded since the jury award was $409,000.00 – an amount far above what Baumann testified to at trial and having no basis in the evidence. The trial court further compounded these errors by allowing Conard's counsel to make continuous unsolicited commentary during the trial and an improper closing argument which confused the jury. Finally, the trial court erred in failing to grant a directed verdict on Nichols' breach of lease counterclaim.

For these reasons and other exceptions presented in this brief, the Court should reverse the denial of Nichols' motion for JNOV, new trial and new trial remittitur. In the alternative, if that argument fails, the Court should reverse the award of $409,000.00 as it is not supported by any evidence presented at trial. Finally, the court should return Nichols' counterclaim to the trial court and order a new trial on damages only on that cause of action.

KELAHER, CONNELL & CONNOR, P.C.



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