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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer B. McCoy, Circuit Court Judge

Appellate Case No.: 2024-001254

Eric Bernard Bowman, Appellant,

v.

Wallace Blair Crosby Respondent,

AND

Samantha Albert Respondent.

v.

Eric Bernard Bowman Appellant.

APPELLANT'S INITIAL BRIEF

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II. STATEMENT OF THE CASE

This lawsuit arises out of an incident that occurred on October 5, 2018, outside of Dunleavy's Pub ("Dunleavy's) on Sullivan's Island. Appellant Eric Bowman ("Bowman") and his wife were attempting to leave Dunleavy's in their golf cart. Bowman had an outstanding bar tab at Dunleavy's, which he intended to pay at a later date. Bowman was unable to pay his bar tab on the date of the incident as Dunleavy's did not accept American Express credit cards. As Bowman and his wife were leaving, Respondent Wallace Crosby ("Crosby") stood in front of Bowman's golf cart, demanding that he pay his outstanding bar tab. Bowman struck Crosby with his golf cart, resulting in injuries to Crosby.

Bowman was charged with assault and battery in the third degree. Bowman pled guilty to assault and battery in the third degree on November 30, 2023.

Appellant filed his Summons and Complaint in the Charleston County Court of Common Pleas on July 21, 2020 against Crosby. [Complaint]. The Complaint alleged causes of action for false imprisonment, assault, battery, malicious destruction of property, intentional infliction of emotional distress, and slander. On September 18, 2020, Respondents filed their Answer, Counterclaim and Third-Party Complaint. [Answer]. Crosby and Respondent Samantha Albert ("Albert") alleged causes of action for negligence/negligence per se/gross negligence, assault, intentional infliction of emotional distress. Crosby alleged causes of action for battery, malicious prosecution, abuse of process, and defamation/defamation per se. Bowman filed his Answer to the Counterclaim and Third-Party Complaint on September 30, 2020. [Answer to Counterclaim and Third-Party Complaint].

This matter went to trial on June 10, 2024, before the Honorable Jennifer B. McCoy and concluded on June 13, 2024. The jury returned a verdict for Respondent Crosby, awarding him $1,865,483.20 in actual damages, and $2,798,224.80 in punitive damages. [Verdict Form].

On June 21, 2024, Appellant filed a Motion for Judgment Notwithstanding the Verdict, a New Trial Absolute and Motion for a New Trial *Nisi Remittitur*. [Motion for JNOV]. Appellant argued that the trial court erred by not allowing the issue of resisting unlawful arrest and the misdemeanor status of failure to pay a bar tab to go to the jury, by allowing statements regarding assets contained in an irrevocable trust, and that the verdict was not justified based on the evidence. [Motion for a New Trial]. On June 21, 2024, Appellant also filed a Motion for Post-Trial Review of Punitive Damages. [Motion for Post-Trial Review of Punitive Damages]. On July 1, 2024, the trial court found that the jury's award of punitive damages was proper. [Order on Post-Trial Review of Punitive Damages]. On July 18, 2024, the trial court denied Appellant's Motion for JNOV. [Order Denying JNOV].

On July 31, 2024, Appellant filed his Notice of Appeal.

III. STATEMENT OF THE FACTS

The record does not support the jury's award of actual and punitive damages, or the trial court's decisions. Crosby presented evidence that his actual damages totaled approximately $358,000.00. Testimony was presented that Crosby had pre-existing issues, going all the way back to 2008. [Transcript P. 328, lines 5-11]. Further, evidence was presented that Crosby had been in two motorcycle accidents prior to the incident. [Transcript P. 397, lines 14-17].

During trial, Respondents argued that collateral estoppel applied to bar Bowman from taking an "inconsistent position" in his civil proceeding than that of his guilty plea. [Transcript P. 22, lines 8-9]. However, Bowman was not taking an "inconsistent position." During the criminal proceeding, Bowman pled guilty to assault. Whether Bowman was unlawfully detained by Crosby, whether Crosby was the initial aggressor, or what actions Crosby undertook during the incident were not directly determined in the guilty plea.

Lastly, Appellant filed a Motion in Limine to exclude all evidence regarding the assets contained in an irrevocable trust, as well as assets not in Bowman's name. Despite this, counsel for Respondents elicited testimony regarding Bowman's assets and made remarks during closing arguments about Bowman's wealth to inflame the jury's perspective of Bowman. The remarks significantly prejudiced Bowman, resulting in an unfair and grossly excessive verdict.

IV. STANDARD OF REVIEW

"In an appeal from the grant of a directed verdict, [the appellate court] must like the trial court . . ., view the evidence in a light most favorable to the non-movant." Miller v. Ferrell Gas, L.P., Inc., 392 S.C. 295, 297, 709 S.E.2d 616, 617 (2011) (citing J.T. Baggerly v. CSX Transp. Inc., 370 S.C. 362, 368, 635 S.E.2d 97, 100 (2006)). "When viewed in that light, if there is any evidence that may be reasonably construed as creating a question of fact, the motion must be denied and the matter submitted to the jury." Id. "If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." J.T. Baggerly, at 368, 635 S.E.2d at 100–01 (internal citation omitted). "When ruling on a motion for a directed verdict, the trial court is required to deny the motion if either the evidence yields more than one inference or its inference is in doubt." Jinks v. Richland Cnty., 355 S.C. 341, 585 S.E.2d 281, 283 (2003).

The appellate court may reverse the trial court's decision regarding jury instructions upon a showing of an abuse of discretion. Cole v. Raut, 378 S.C. 398, 663 S.E.2d 30 (2008); Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000); *see also* Keaton ex rel. Foster v. Greenville Hosp. Sys., 334 S.C. 488, 514S.E.2d 570 (1990) ("'In reviewing jury charges for error, [the appellate court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial.). The appellant bears the burden of demonstrating the trial court's jury instructions were erroneous and prejudicial. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80(2008); *see also* Pittman v. Stevens, 364 S.C. 337, 613 S.E.2d 378 (2005).

The appellate court may reverse when trial defects result in such error that is "material and prejudicial." Visual Graphics Leasing Corp. v. Lucia, 311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993); *see also* Wells v. Halyard, 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000); La Salle Bank Nat'l Ass'n v. Davidson, 386 S.C. 276, 688 S.E.2d 121 (2009). When the combination of such trial defects and errors are individually insignificant, the cumulative effect of each error may "prevent[]a party from receiving a fair trial." State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999); State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct. App. 1995). But see Lynch v. Carolina Self Storage Centers, Inc., 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014) (questioning whether cumulative error doctrine applies in civil cases).

V. ARGUMENT

A. The Circuit Court Erred in Denying Bowman's Motion For A New Trial Where Respondents' Closing Arguments Concerned Facts That Were Not In Evidence.

Closing arguments must be confined to evidence in the record and reasonable inferences therefrom. State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997). "In a closing argument to the jury, an attorney may not make such remarks which are unfairly calculated to arouse passion or prejudice." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 231, 317 S.E.2d 748, 755 (Ct.App.1984). Matters not admitted into evidence cannot be introduced by way of closing argument. State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981). Reference in closing arguments to matters not in evidence may be deemed reversible error. State v. Gaines, 271 S.C. 65, 244 S.E.2d 539 (1978).

South Carolina case law does not stand for the proposition that matters not in evidence may be introduced by way of closing arguments. *See* State v. Sinclair, 275 S.C. 608, 274 S.E.2d 411 (1981) (holding that closing arguments cannot be used as a vehicle to introduce new matters into

a trial which otherwise have not been properly admitted into evidence.) In Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973), the South Carolina Supreme Court found that counsel's argument to the jury that a verdict in plaintiff's favor would not cost the defendant one cent was, "beyond question a hint to the jury that the defendants had liability insurance." Id. at 235. In Orr, counsel's statement to constituted error. [1]

Here, during closing arguments, Respondents' counsel stated the following:

> "How do you punish a rich guy (inaudible)? You make every mistake (inaudible) huge household, sold Battery the Charleston (inaudible) for a pile of money, sold his company for a pile of money."

[Transcript P. 501, lines 24-25; P. 502, lines 1-3]. Bowman's counsel filed a Motion in Limine to exclude all evidence concerning assets that were not in Bowman's name, or that were held in any irrevocable trusts. [2] [Motion in Limine]. During trial, Respondents' counsel sought to elicit testimony regarding assets held in an irrevocable trust, such as the proceeds of the sale of the Charleston Battery and the sale of Bowman's business. There was no evidence admitted regarding the irrevocable trust and the assets held within it. It was completely inappropriate, and contrary to South Carolina case law, for Respondents' counsel to make remarks about the trust's assets during closing arguments when no such evidence had been introduced. Like in Orr, the statements unfairly aroused passion and prejudice with the jury, amount to an error. Therefore, the trial court erred in denying Bowman's Motion for a New Trial.

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[1] However, reversal was not required because the Court found that the $1,000 verdict was modest. Adams v. Orr, 260 S.C. 92, 194 S.E.2d 232 (1973).

[2] The trial court declined to rule on whether evidence regarding the Bowman's assets would be admissible until such a time arose. [Transcript P. 38, lines 8-14].

B. The Circuit Court Erred In Denying Bowman's Motion For A New Trial *Nisi Remittur* and New Trial Absolute Where The Jury Verdict Was Excessive and Unsupported By the Evidence.

"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., 602 S.E.2d 772, 778 (S.C. 2004). "A circuit court may grant a new trial absolute on the ground that the verdict is excessive or inadequate." Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 687 S.E.2d 54, 56 (Ct. App. 2009). "[W]hen the verdict indicates the jury was unduly liberal in determining damages, the trial court alone has the power to reduce the verdict by granting of a new trial nisi remitter." Allstate Ins. Co. v. Durham, 314 S.C. 529, 431 S.E.2d 557 (1993).

Here, Respondent Crosby introduced evidence of three surgeries and claimed medical costs totaling approximately $358,000 as a result of the accident. However, Crosby's treating physician, Dr. Richard Frisch testified that Crosby suffered from degenerative changes, which predated the accident. [Transcript P. 357, line 25; P. 358, lines 1-6]. Evidence was introduce suggesting that Crosby's alleged medical costs were not the result of the accident. Testimony was presented that Crosby had pre-existing issues, going all the way back to 2008. [Transcript P. 328, lines 5-11]. Further, evidence was presented that Crosby had been in two motorcycle accidents prior to the incident. [Transcript P. 397, lines 14-17]. Further, evidence was presented that Crosby was able to engage in activities after the incident that he claimed he was unable to. Yet, the jury still awarded Crosby $1,865,483.20 in actual damages. [Verdict Form]. This amount is almost six times the amount of damages claimed.

In addition, during deliberations, the jury submitted a note which read: "can we have the list of items that apply to actual damages?". [Transcript P. 529, lines 17-19]. The trial court declined the jury's request, and stated:

> THE COURT: That's the problem with throwing out these extra things and then they're confused as to why they don't have it all.

[Transcript P. 530, lines 10-12].

It is clear from the record that, not only was there a lack of evidence to support the jury's award, but also the jury was confused about actual damages. The jury's award was actuated by passion and prejudice based on counsel for Respondents remarks during closing arguments regarding Bowman's wealth and assets. These remarks were vicious, inflammatory remarks, which resulted in clear prejudice. Moreover, the jury's award of actual damages was the result of confusion. Therefore, the trial court erred in denying Bowman's Motion for a New Trial Absolute and New Trial *Nisi Remittitur*.

C. The Circuit Court Erred in Denying Bowman's Motion for JNOV Where the Jury Verdict For Punitive Damages Was Grossly Excessive.

In South Carolina, "in order to receive an award of punitive damages, the plaintiff has the burden of proving by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E.2d 449 (Ct. App. 1997). The Due Process Clause of the Fourteenth Amendment prohibits states from imposing grossly excessive punishments on tortfeasors. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

The South Carolina Supreme Court developed an eight factor post-verdict review which trial courts are required to conduct to determine if a punitive damages award comport with due

process. *See* Gamble v. Stevenson, 305 S.C. 104, 406 S.E.2d 350 (1991). The Gamble factors are: (1) the defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) other factors deemed appropriate. Id. at 354.

Most importantly, "[r]eference to [the defendant's] assets … ha[s] little to do with the actual harm sustained by the [plaintiff]. The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." Branham v. Ford Motor Co., 390 S.C. 203, 701 S.E.2d 5, 25 (2010) (quoting State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003)). "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Campbell, 123 S.Ct. at 1516.

As stated, Respondents' counsel made remarks regarding Bowman's assets in front of the jury. [Transcript P. 501, lines 24-25; P. 502, lines1-3]. Bowman testified that he would never intentionally "dine and dash", nor would he ever run out on a bar tab. [Transcript P. 123, lines 2-7]. Further, Bowman testified that Crosby was the initial aggressor and started punching the golf cart, jumping on top of it. [Transcript P. 124, lines 10-15]. Bowman also testified that he was attempting to go around Crosby, who then took a swing at Bowman's golf cart. [Transcript P. 124, lines 17-19]. Crosby himself testified that he stepped in front of Bowman's golf cart on his own accord. [Transcript P. 238, lines 19-21]. Moreover, witness testimony that suggested that Crosby was not confrontational, was the testimony of friends of the Respondents. [Transcript P. 259, lines 12-14]. Therefore, there was not a plethora of evidence suggesting that Bowman's conduct was

willful, wanton or reckless. In fact, evidence was presented that Crosby's conduct was reckless and wanton. Any evidence suggesting that Bowman acted recklessly came from friends of Respondents.

The evidence presented does not support a jury award of $2,798,224.80 in punitive damages, which is almost double the amount of actual damages awarded. As the trial court's order on post-trial review of punitive damages indicates, Bowman may have been the party that bore the greatest degree of culpability, he was not the only party culpable. [Order on Post-Trial Review of Punitive Damages]. As such, the jury's award of punitive damages stemmed from Respondents' mention of Bowman's wealth and assets. Respondents' mention of the inadmissible evidence denied Bowman a fair trial, manipulating the jury to assume that Bowman could pay a multimillion-dollar verdict. Therefore, the trial court erred in denying Bowman's Motion for JNOV as the jury's award of punitive damages was grossly excessive and unsupported by the evidence.

D. The Circuit Court Erred In Granting Respondents' Motion For Directed Verdict on Assault and Battery.

"An 'assault' is an attempt or offer, with force or violence, to inflict bodily harm on another or engage in some offensive conduct." Mellen v. Lane, 377 S.C. 261, 659 S.E.2d 236, 244 (Ct. App. 2008). "An assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 230, 317 S.E.2d 748, 754–755 (Ct.App.1984). The elements of assault are: (1) conduct of the defendant which places the plaintiff, (2) in reasonable fear of bodily harm." Herring v. Lawrence Warehouse Co., 222 S.C. 226, 241, 72 S.E.2d 453, 458 (1952).

"A battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of its degree; it is unnecessary that the contact be by a blow, as an forcible contact is sufficient." Gathers, 282 S.C. at 230. "There is a well[-]recognized distinction between criminal assault and a civil action for an assault and battery." Herring, 222 S.C. at 241.

For collateral estoppel to apply, it must be shown that the issue was: "(1) actually litigated in the prior action; (2) directly determined in the prior action; (3) necessary to support the prior judgment." "A party asserting the defense of collateral estoppel has the burden of proving all of the elements, including whether the issue was actually litigated." Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767, 770 (Ct. App. 2001). The party asserting collateral estoppel "must show that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment." Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct.App.1984).

Here, during trial, Respondents' counsel moved for a directed verdict on all of Bowman's claims. The trial court granted Respondents' directed verdict with respect to their claims for assault and battery based on collateral estoppel. [Transcript P. 408, lines 6-8]. The statement of facts read into the record during Bowman's guilty plea did not concern or address the actions of Mr. Crosby, or any defenses of Bowman. [Guilty Plea Transcript].

During the trial, Respondents' counsel argued that Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008), estopped Bowman from charging the jury with assault and battery. However, the facts of Zurcher are distinguishable from the case at bar. In Zurcher, the Court held that "so long as a defendant has entered a guilty plea freely and voluntarily, an admission of guilt fully and fairly litigates the matter in the same manner as a contested trial in which a defendant is adjudicated guilty. Id. at 136. Interestingly, the court noted that only guilty pleas punishable by death or

imprisonment in excess of one year were admissible under the hearsay exception found in Rule 803(2). Id. at 138 n.3. The court stated that "[t]herefore it appears that Zurcher's guilty plea to simple assault and battery, a misdemeanor carrying a $500 fine or 30 days imprisonment … was inadmissible hearsay evidence in the first instance." Id. However, the court ultimately held that Zurcher was estopped from denying liability for the assault in the subsequent civil action. Id. at 137.

Here, Bowman was not denying whether he was liable for assault and battery against Crosby, like in Zurcher. During cross-examination, Bowman testified that he sustained injuries during the altercation. When asked why Bowman did not present this during his guilty plea, Bowman responded as follows:

Q: Why didn't you – you tell Judge McCoy all this when you were pleading guilty?

A: I didn't have a chance to testify or do anything. It was not relevant at that time.

[Transcript P. 148, lines 17-20].

In addition, Bowman was claiming that Crosby *also* committed an assault and battery against Bowman. As the case law above notes, there is a distinction between civil causes of action for assault and battery, and criminal charges of assault and battery. Furthermore, counsel for Bowman objected to his guilty plea being read into evidence, as it was inadmissible hearsay, as was noted by Zurcher. [Transcript P. 175, lines 4-7]. It was an error for the trial court to find that collateral estoppel applied.

Notwithstanding the collateral estoppel issue, Bowman presented evidence that Crosby placed Bowman in reasonable fear of bodily harm, and that Crosby struck Bowman's golf cart. A motion for directed verdict must be denied when either the evidence yields more than one inference

or its inference is in doubt. Turner v. Med. Univ. of S.C., 430 S.C. 569, 582, 846 S.E.2d 1, 7 (Ct. App. 2020). Here, the evidence presented at trial created more than one inference concerning whether Bowman was liable for assault and battery. Therefore, the trial court erred in granting Respondents' Motion for a Directed Verdict.

E. The Circuit Court Erred in Denying Bowman's Request For A Jury Charge of Resisting Unlawful Arrest and Misdemeanor Status Of Failure To Pay A Bar Tab.

During trial, counsel for Appellant requested that the jury be charged with citizen's arrest, and on the right to resist unlawful arrest, which Appellant argued was relevant to the issue of actual and punitive damages. However, the trial court declined to charge the jury with resisting unlawful arrest and citizen's arrest.

"A trial court must charge the current and correct law." Welch v. Epstein, 342 S.C. 279, 311, 536 S.E.2d 408, 425 (2000) (citing McCourt by and through McCourt v. Abernathy, 318 S.C. 301, 457 S.E.2d 603 (1995)). When a party is prejudiced by the refusal to submit a charge to the jury, the refusal will be considered erroneous. *See* Daves v. Cleary, 355 S.C. 216, 224, 584 S.E.2d 423, 427 (Ct.App.2003).

Here, evidence was introduced by Sgt. Erickson that failure to pay a bar tab was a misdemeanor offense. [Transcript P. 313, lines 10-15]. By not instructing the jury on unlawful arrest and the misdemeanor status of failure to pay a bar tab, Bowman was prejudiced, as he was portrayed as the instigator of events and a criminal. This prejudicial portrayal of Bowman left the jury with a negatively influenced perception of Bowman. Therefore, the trial court erred in failing to charge the jury with resisting unlawful arrest and the misdemeanor status of failure to pay a bar tab.

VI. CONCLUSION

The trial court erred in denying the Bowman's Motion for Judgment Notwithstanding the Verdict, a New Trial Absolute and Motion for New Trial *Nisi Remittitur* and improperly found that the jury's verdict was reasonable based on the evidence presented. Therefore, Respondents respectfully request that the trial court's February 29, 2024 Order denying the Motion for a New Trial be reversed and that the jury's verdict be reversed, or at least reduced.

Respectfully Submitted by:

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