STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS

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SC Court of Appeals

Appeal from Florence County
Court of Common Pleas
The Honorable H. Steven Deberry, IV, Circuit Court Judge for Common Pleas

Appellate Case No.: 2022-001006

Wendy Lynch, ...Respondent,

v.

Elizabeth Langley and Rebecca White Lynch,.....Defendants,
Of whom Elizabeth Langley is the Appellant and
Rebecca White is a Respondent.

APPELLANT'S FINAL REPLY TO RESPONDENT'S RETURN TO BRIEF OF APPELLANT

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V. The Trial Court erred in allowing the use of the word "kill" in reference to the allegedly defamatory statement by Appellant that Respondent "tried to send Daddy to Heaven early" when the word "kill" was both more prejudicial than probative and overstepped the Jury's Fact-Finding role of determining the meaning of the ambiguous statement to determine if it was or was not defamatory in nature.

I. The Trial Court erred in overruling Appellant's Motion for Directed Verdict and/or Motion of Judgment Notwithstanding the Verdict as to the Cause of Action of Civil Conspiracy.

Contrary to Respondent's claim, this issue was properly preserved for appellate review. Respondent's Brief, p. 20. At the close of Respondent's case, Appellant made a proper Motion for Direct Verdict and was prevented for making another Motion for Directed Verdict at the close of all evidence. (R. p. 869, line 16 to p. 878, line 19).

As stated by Respondent, "an objection to the sufficient of the evidence cannot be raised for the first time in a motion for a new trial, a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict." Peay v. Ross, 292 S.C. 535, 536, 357 S.E.2d 482, 483 (Ct. App. 1987). Appellant's objection to the sufficiency of evidence was first raised in their Motion for a Directed Verdict at the close of Respondent's Case. (R. p. 869, line 16 to p. 878, line 19).

Respondent raises the issue that Appellant did not renew their Motion for Direct Verdict at the close of all evidence. Respondent's Brief, p. 20. Appellant does not argue that it has clearly been stated in numerous opinions that the Motion for Directed Verdict must be renewed at the close of all evidence. *See* Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006); Freeman v. A. & M. Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987); State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006); State v. Rosemond, 348 S.C. 621, 560 S.E.2d 636 (Ct. App. 2002).

However, Courts have also recognized that when a party is not given the opportunity to make a motion by the court, the issue is still considered preserved for appellate review. At the close of all evidence upon Appellant's withdrawal of the request to have their last witness testify, which

concluded all evidence in the trial, the continued interruptions of this trial by Appellant's *pro se* co-Defendant continued to occur, resulting in a lengthy back and forth between co-Defendant, Respondent, and the Court. (R. p. 948, line 19 to p. 962, line 25). This was quickly followed by the Court concluding for that it was time to send the Jury to lunch. (R. p. 964, lines 21-25). At no time were Appellant or her co-Defendant given any opportunities to renew their Motions for Directed Verdict.

As to the issue of whether or not there was sufficient evidence to support the Jury's verdict that Appellant was guilty of civil conspiracy, Appellant refers to and relies on the arguments of their Brief. Appellant's Brief p. 10-13. However, Appellant reiterates that at no point can Respondent point to a single time that Appellant and co-Defendant acted in conjunction with each other with the intent to injure Respondent's reputation. Respondent largely argues that various conduct done by Appellant and co-Defendant independent of each other, but emphasizing the fact that they are "SISTERS", shows that they must have been done in conjunction with each other, thus rising to the level of Civil Conspiracy. Respondent's Brief p. 23-25. Respondent did not meet the burden of showing "a combination of two or more persons joining for the purpose of injuring and causing [omitted] damage to the [Respondent]." McMillian v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006) (word "special" omitted due to the recent ruling in Paradis v. Charleston Cnty. Sch. Dist., 443 S.C. 562, 861 S.E.2d 774 (2021)). Even taken in the light most favorable to the non-moving party, the elements of Civil Conspiracy were not met, and Appellants Motion for Directed Verdict and/or Motion for Judgment Notwithstanding the Verdict were denied in error by the Trial Court. Allegro, Inc. v. Scully, 418 S.C. 24, 32, 761 S.E.2d 140, 144 (2016).

II. The Trial Court erred in overruling Appellant's Motion for Directed Verdict and/or Motion for Judgment Notwithstanding the Verdict as to the Cause of Action of Intentional Infliction of Emotional Distress.

Contrary to Respondent's claims, this issue was properly preserved for appellate review. Respondent's Brief, p. 25. As previously stated, at the close of Respondent's case, Appellant made a proper Motion for Direct Verdict. (R. p. 869, line 16 to p. 878, line 19).

As stated by Respondent on the same argument as to the Cause of Action of Civil Conspiracy, "an objection to the sufficient of the evidence cannot be raised for the first time in a motion for a new trial, a motion for a directed verdict is a prerequisite to a motion for a new trial on the ground that the evidence does not support the verdict." Peay, 292 S.C. at 536, 357 S.E.2d at 483 (Ct. App. 1987).

Respondent raises the issue that Appellant did not renew their Motion for Direct Verdict at the close of Appellant's case. Respondent's Brief, p. 25. While it has been stated in numerous opinions that the Motion for Directed Verdict must be renewed at the close of all evidence. *See* Wright v. Craft, 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006); Freeman v. A. & M. Home Sales, Inc., 293 S.C. 255, 359 S.E.2d 532 (Ct. App. 1987); State v. Bailey, 368 S.C. 39, 626 S.E.2d 898 (Ct. App. 2006); State v. Rosemond, 348 S.C. 621, 560 S.E.2d 636 (Ct. App. 2002).

As previously argued as to the Motion for Directed Verdict as to the Civil Conspiracy Cause of Action, Courts have also recognized that when a party is not given the opportunity to make a motion by the court, the issue is still considered preserved for appellate review. At the close of all evidence upon Appellant's withdrawal of the request to have their last witness testify, which concluded all evidence in the trial, the continued interruptions of this trial by Appellant's *pro se* co-Defendant continued to occur, resulting in a lengthy back and forth between co-Defendant,

Respondent, and the Court. (R. p. 948, line 19 to p. 962, line 25). This was quickly followed by the Court concluding that it was time to send the Jury to lunch. (R. p. 964, lines 21-25). At no time were Appellant or her co-Defendant given any opportunities to renew their Motions for Directed Verdict.

As to the issue of whether or not there was sufficient evidence to support the Jury's verdict that Appellant was guilty of Civil Conspiracy, Appellant relies heavily on their Brief. Appellant's Brief p. 14-17. However, Appellant reiterates that Respondent failed to meet the required element that "the [Appellant's] conduct was so extreme and outrageous that it exceeded all possible bounds of decently and must be regarded as atrocious and utterly intolerable to a civilized community;" and failed to meet the required element that "the emotion distress suffered by [Respondent] was so severe that no reasonable person could be expected to endure it." Fleming v. Rose, 350 S.C. 488, 537, 567 S.E.2d 857 (2002), citing Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776, 778 (1981).

While Respondent outlines a lengthy family dispute among Appellant, Respondent, and co-Defendant, nothing alleged to have been done by Appellant raises to the level of "atrocious and utterly intolerable to a civilized community" or "so severe that no reasonable person could be expect to endure it". Id. To state that lengthy family disputes, even such a lengthy and tangled one as is present in this instance, over the estate of a deceased family member rises to the level of Intentional Infliction of Emotional Distress would negate the lengthy legal history of cases law setting a significantly high burden to prove Intentional Infliction of Emotional Distress occurred. *See* Ford, 276 S.C. 157, 276 S.E.2d 778 (1891) (holding that only that most extreme and outrageous cases, actions that shock the conscience, rise to the level of Intentional Infliction of Emotional Distress); *see also* Wright v. Sparrow, 298 S.C. 469, 381 S.E.2d 503 (Ct. App. 1989)

(also holding that only that most extreme and outrageous cases, actions that shock the conscience, rise to the level of Intentional Infliction of Emotional Distress), McSwain v. Shei, 34 S.C. 25, 402 S.E.2d 890 (1991) (holding that forcing an employee to perform physical activities in from of co-workers for the sole purpose of highlighting the employee's incontinence issues for the purpose of humiliation and embarrassment rises to the level of Intentional Infliction of Emotion Distress), and Corder v. Champion Road Mach. Int'l Corp., 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984) (holding that a client entering a real estate agent's home without permission to threaten and berate them in front of guests rises to the level of Intentional Infliction of Emotional Distress).

The actions by Appellant that respondent alleged to have risen to the level of Intentional Infliction of Emotional Distress were shown through testimony at trial to not have actually been actions taken by Appellant herself. Respondent's Brief, p. 27. Most notably, the allegations of false reports to Department of Social Services, false complaints to doctors and nurses at various hospitals caring for their father, sabotaging Respondent's judgeship by speaking with Senator Johnson, and false reports to the South Carolina Nursing Board to sabotage Respondent's nursing license were shown to not have come from either Appellant or her co-Defendant through the testimony provided under oath at trial by Appellant. Id.; (R. p. 346, line 18 to p. 347 line 7; R. p. 348, line 9 to p. 349, line 5; R. p. 351, lines 9-20; R. p. 366, lines 3-7; R. p. 371, lines 2-18).

Additionally, through Respondent's own testimony and the closing arguments of Respondent's attorney, though not considered evidence but are certainly an emphasis of Respondent's testimony, it was shown that at no point over the decade of alleged Intentional Infliction of Emotional Distress that "no reasonable person could be expected to endure" did

Respondent require a doctor's appointment or psychiatric appointment to deal with the "unbearable" stress and trauma alleged to have been caused by Appellant's actions. Fleming, 350 S.C. at 537 (2002), citing Ford, 276 S.E.2d at 778 (1981); (R. p. 1044, lines 19-24; Respondent's Brief p. 27).

Even taken in the light most favorable to the non-moving party, the elements of Civil Conspiracy were not met, and Appellants Motion for Directed Verdict and/or Motion for Judgment Notwithstanding the Verdict were denied in error by the Trial Court. Allegro, Inc. v. Scully, 418 S.C. 24, 32, 761 S.E.2d 140, 144 (2016).

III. The Trial Court erred in allowing the Verdict Form to be sent to the Jury without separating Actual and Punitive Damages for each separate Cause of Action, in so that the Damages awarded for each individual Cause of Action could not be distinguished from the other Causes of Action.

Respondent's argument regarding proper preservation for appeal regarding the Verdict Forms sent to the Jury is a moot point. Respondent's Brief, p. 28-29. Should the Court find that the Trial Court erred in the previous two issues on appeal, the Court must find that the Verdict Forms were improper as a matter of law. Should the Causes of Action for Civil Conspiracy and/or Intentional Infliction of Emotional Distress be remanded for a new trial, the Actual and Punitive Damages as to each individual Cause of Action cannot be separated using the Verdict Forms submitted to the Jury in this case. Therefore, the Court must find that the Verdict Forms were an error by the Trial Court and remand the entire case, including the causes of actions not appealed, back to the Trial Court for a new trial.

IV. The Trial Court erred in allowing the voicemail message left for Respondent by Attorney Eric Poston (A.K.A. Ducati James) be admitted into evidence, when the voicemail message was both hearsay and more prejudicial than probative.

Respondent argues that the voicemail message left by Eric Poston was not hearsay on the grounds of the legal requirement that clients are bound by the statements made by their attorneys. Respondent's Brief p. 31-32; Arnold v. Yarborough, 281 S.C. 570, 572, 316 S.E.2d 416, 417 (Ct. App. 1984). While Appellant certainly does not argue with the clearly established law regarding client adoption of statements made by their attorneys, Appellant does argue that Eric Poston was not Appellant's attorney and therefore cannot be required to adopt his statements. (R. p. 287, lines 16-18; R. p. 713, lines 14-18).

Per the transcript testimony previously cited in Appellant's Brief, Eric Poston was not representing Appellant at the time that the voicemail message was left on Respondent's phone. (R. p. 287, lines 16-18). He had been fired, her legal file collected from his office, and a new attorney hired. Id.

Appellant was no longer bound by the statements made by Eric Poston as there existed no attorney-client relationship at the time the voicemail message was left. Therefore, the voicemail message statements do not fall within the non-hearsay rule of admission of a party-opponent. Rule 801(D), SCRE. Eric Poston's claims in the voicemail message that he still represented Appellant are not relevant, given the facts testified to under oath by Appellant that he was not her attorney at the time. (Respondent's Brief p. 32; R. p. 287, lines 16-18).

Respondent also argues that admission of the voicemail message was not more prejudicial than probative. Respondent Brief, p. 33. Citing State v. Key, Respondent argues that Appellant does not meet standard of showing that the error was not harmless because it "could not

reasonably have affected the result of the trial." 337 S.C. 598, 661 S.E.2d 112 (Ct. App. 2008); Respondent's Brief p. 33. To find that a voicemail left by an Attorney, one purporting to be the Attorney of the Appellant, left for the opposing party in a civil suit as wholly unprofessional and outrageous as the voicemail message played for this Jury could not have affected the result of the trial, thus making admission of this voicemail message a harmless error by the Trial Court, would be to disregard all common sense.

V. The Trial Court erred in allowing the use of the word "kill" in reference to the allegedly defamatory statement by Appellant that Respondent "tried to send Daddy to Heaven early," when the word "kill" was both more prejudicial than probative and overstepped the Jury's Fact-Finding role of determining the meaning of the ambiguous statement to determine if it was or was not defamatory in nature.

Respondent argues that this issue was not preserved for appellate review. Respondent's Brief p. 34. Citing Respondent's own Brief, Appellant objected during Motions *in Limine* that only the actual words used in the allegedly defamatory statement of Appellant, that Respondent "tried to send Daddy to Heaven early," should be used during the court of the Trial. Respondent's Brief, p. 34. Having objected to the use of any terms other than the actual defamatory statement alleged to have been said by Appellant adequately preserves the issue for appellate review.

Respondent further argues that the use of the word "kill" was not more prejudicial than probative. Respondent's Brief, p. 35-36. As previously argued in Appellant's Brief, to state that the Jury hearing the word "kill" used over and over throughout the trial in reference to the alleged defamatory statement had no effect on the Jury's fact-finding responsibility would, once

again, ask the Court to disregard all common sense to determine this to be a harmless error by the Trial Court. Appellant's Brief, p. 23.

Conclusion

Respondent's main argument regarding the issues on appeal are that the issues were not properly preserved for appellate review. However, as to the issue of the Motion for Directed Verdict for the Cause of Action of Civil Conspiracy, the issue of the Motion for Directed Verdict for the Cause of Action of Intentional Infliction of Emotional Distress, and the issue of the use of the word "kill" in reference to the alleged defamatory statement of Appellant, Appellant has shown that all issues were properly objected to and properly preserved for appeal at trial.

As to Respondent's argument that the issue of the error in the Verdict Forms not being properly preserved for appeal, that argument in a moot point, since, as a matter of law, the Court must find an error in the Verdict Forms by the Trial Court should the Court find for the Appellant as to the issues of the Appellant's Motions for Directed Verdict and/or Motions for Judgment Notwithstanding the Verdict as to the Causes of Action of Civil Conspiracy and Intentional Infliction of Emotional Distress.

Respondent's argument that the admission of the voicemail message left for Respondent by Attorney Eric Poston was non-hearsay under the admission of an opposing-party exception fails on its face by the fact that Poston was not Appellant's attorney at the time that the voicemail message was left for Respondent. Rule 801(D), SCRE.

Finally, as to Respondent's arguments that the admission of the voicemail message left by Attorney Eric Poston and use of the word "kill" in reference to the allegedly defamatory

statement by Appellant were not more prejudicial than probative and were harmless error, Respondent's argument requires the Court to abandon all common sense in what would affect the outcome of a Jury Trial.

Respectfully submitted,

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May 31, 2023
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RULE 211 CERTIFICATION

The undersigned hereby acknowledges that the Final Reply Brief of the Appellant complies with Rule 211 SCACR in that it only contains the material from the Appellants Initial Reply Brief with the corrections and citations from the Record on Appeal.

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RULE 267 CERTIFICATION

The undersigned hereby acknowledges that the Final Reply Brief of the Appellant complies with Rule 267 SCACR.

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