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Apr 16 2026
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
The Honorable R. Lawton McIntosh

Case No. 2020-CP-04-00085
Appellate Case No. 2024-001911

Moats Construction, Inc. and Russell Moats,

Appellants,

v.

Anderson County, Rusty Burns, Matt Schell, and Holt Hopkins,

Respondents.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

Twelve jurors heard all the testimony, reviewed all the evidence, and unanimously determined that Moats Construction was damaged by Anderson County's breach of contract in the amount of $412,105. (R. p. 13 (Verdict Form)). The jury's verdict is entitled to substantial deference and should not be set aside absent compelling reasons, not merely because the court holds a different view of the amount of damages. *Jolly v. Fisher Controls Int'l, LLC* 443 S.C. 511, 905 S.E.2d 380 (2024).

The lower court disagreed with the jury's verdict based on the court's erroneous determination that damages were capped at $33,105.91 and could not include amounts for damages to goodwill and business reputation. (R. p. 8). The fact that the verdict is more than the lower court would have awarded does not make the jury's decision "so grossly excessive so as to shock the conscience of the court and clearly indicate[] that the figure reached was the result of caprice, passion, prejudice, partiality, or corruption, or other improper motives." *Rush v. Blanchard*, 310 S.C. 375, 380-81, 426 S.E.2d 802, 805 (1993).

The lower court also erroneously concluded that there was "no evidence" of business reputation or goodwill damages, which is directly contradicted by the record evidence and substantial testimony that Anderson County's breach of contract, coupled with misleading communications to Moats Construction's bonding company, directly impacted Moats's continuing ability to get bonded, secure new public contracts, and to continue as a going concern. Therefore, there was enough evidence in the record from which the jury could reach its verdict.

Anderson County unsurprisingly disagrees with Moats's position and with the jury's verdict, but its only argument is that the facts should have been interpreted in its favor—the same argument that it made to the jury and that the jury obviously rejected. The jury made

its own factual determinations and clearly did not buy Anderson County's version of the facts and instead awarded damages to Moats.

There is nothing new in Anderson County's argument, and because the lower court erred, the jury's verdict should be reinstated.

I. The Court Erred By Invading the Province of the Jury.

The trial court erred in invading the province of the jury, substituting its view of the evidence for theirs, and excluding an entire category of permissible damages. This was error.

> The judge cannot, under the guise of amending the verdict, invade the exclusive province of the jury or substitute his verdict for theirs. After the amendment the verdict must be not merely what the judge thinks it ought to have been, but what the jury intended it to be. Their actual intent, and not his notion of what they ought to have intended, is the thing to be expressed and worked out by the amendment.

Vinson v. Hartley, 324 S.C. 389, 407, 477 S.E.2d 715, 724 (Ct. App. 1996) (quoting *S.C. State Hwy. Dep't v. Miller,* 237 S.C. 386, 394-95, 117 S.E.2d 561, 565 (1960) (quotation marks omitted)).

Despite the South Carolina Supreme Court's prohibition on verdict substitution, this is exactly what the trial court did when it ruled that the maximum contractual damages available to Moats were $33,105.91:

> The Court finds the verdict is grossly excessive in that there is no evidence to support it and, therefore, the verdict was the result of passion, caprice, prejudice, partiality, corruption or other considerations not reflected by the evidence such as confusion and/or misunderstanding of the evidence. There is no trial evidence supporting any verdict over $33,105.91, which would have been the maximum contractual damages recoverable by the Plaintiffs based on the evidence presented because evidence of the Court's directed verdict of $50,000 on delay damages was not submitted to the jury. Therefore, at most, the contract damages under the Mediated Settlement Agreement were $33,105.91, which consisted of $27,555.91 in retainage on East West Park and $5,550.00, or the net amount of the Change Order.

(R. p. 8 (Order at 4 (emphasis added))).

When invading the jury's province and overturning the jury's verdict, the lower court was required to explain how this was "one of those rare cases in which 'compelling reasons' justify the conclusion the verdict" was excessive, despite the substantial deference given to the jury's constitutional role. *Jolly*, 443 S.C. at 524-25, 528, 905 S.E.2d at 387-88, 389. Here, the trial court failed to offer any compelling reasons for throwing out the jury's verdict. The trial court ignored Moats's evidence supporting goodwill and business reputation damages and instead, offered only a conclusory statement that the verdict "is not only unsupported by the evidence, but there is no evidence in the record upon which the jury could have relied to support the amount awarded." (R. p. 8 (Order at 4 (emphasis added))). The court cites the County's *argument* in support but offers no analysis of the actual *evidence* entered into the record.

> Plaintiffs also asked the jury to make an award to Moats Construction related to its inability to obtain bid bonds because the County did not rescind its termination of the Toxaway Contract. The County argued at directed verdict, at the close of all evidence and again during post-trial motions that there was no evidence by which the jury could determine such damages and that such damages were speculative. Consequently, the remaining amount of $378,999.09 is not only unsupported by the evidence, but there is no evidence in the record upon which the jury could have relied to support the amount awarded.

(R. p. 8 (Order at 4 (emphasis added))). More is required to invade the jury's province.

The lower court's conclusion that the maximum amount of contractual damages was $33,106.91 ignored an entire category of damages to Moats Construction's business and goodwill, and it was legal error to exclude any recovery for this category of damages. *Foreign Academic & Cultural Exch. Servs. v. Tripon*, 394 S.C. 197, 205, 715 S.E.2d 331, 335 (2011) (recognizing damages to goodwill as an appropriate category of damages from breach of contract); *Petty v. Weyerhaeuser Co.*, 288 S.C. 349, 357, 342 S.E.2d 611, 616 (Ct. App. 1986) (recognizing damages to business goodwill and reputation); South Carolina Damages § II.5.A.5 (2017). These damages are recoverable even if not calculable with precision. Restatement 2d Contracts § 352, cmt. a.

("Damages need not be calculable with mathematical accuracy and are often at best approximate. This is especially true for items such as loss of good will as to which great precision cannot be expected.").

Anderson County does not dispute that this is a legally compensable category of damages, it simply makes factual arguments as to why the jury should not have found in Moats's favor and why the court's actions were justified. (County Br. at 10-11). But these are the exact same arguments that Anderson County made to the jury and which the jury clearly rejected when it awarded damages to Moats Construction. (R. pp. 931-37 (Anderson County Closing Argument)).

In the cases cited by the lower court and Respondent Anderson County finding excessiveness or inadequacy of verdict, there is more than simply a disagreement over how to interpret the facts. In *Dillon v. Frazer*, 383 S.C. 59, 678 S.E.2d 251 (2009), the South Carolina Supreme Court found the jury's verdict grossly inadequate and actuated by improper motivation where the jury's verdict was significantly lower than the unchallenged testimony on actual damages and the jury sent out three questions suggesting it was looking for legally impermissible ways to offset damages, such as considering insurance coverage. *Dillon*, 383 S.C. at 64-65, 678 S.E.2d at 253; *see also Sullivan v. Davis*, 317 S.C. 462, 466, 454 S.E.2d 907, 910 (Ct. App. 1995) (determining that jury question about insurance coverage combined with verdict less than actual damages indicated jury did not follow judge's instruction to disregard insurance). Similarly, in *Sanders v. Prince*, 304 S.C. 236, 403 S.E.2d 640 (1991), the South Carolina Supreme Court, in finding a jury's verdict excessive, was concerned with the "conduct of the jury" when it sent a question to the trial judge asking if it could force a public figure to resign from the school board as part of its verdict on defamation, and then awarded defamation damages in excess of $1 million to a plaintiff whose reputation, though impacted, did not prevent her reelection to the same public

body. *Sanders*, 304 S.C. 238-39, 678 S.E.2d at 642. In *Small v. Springs Industries, Inc.*, the South Carolina Supreme Court set aside the jury's verdict in an employment discharge dispute as excessive where the verdict would place the plaintiff in a position of receiving more damages than the income she would have received for the rest of her working life and would not require her to mitigate damages. *Small*, 292 S.C. 481, 486, 357 S.E.2d 452, 455 (1987).

Here, the only juror question to the court during trial concerned Moats's bonding capacity: "Has the UCC-1 been released or expired from Toxaway?". (R. p. 851, lines 15-18, 853, line 19-854, line 15, p. 1010 (Court's Ex. 5)). This suggests that the jury recognized the negative impact of Anderson County's actions on Moats's bonding capacity and this became part of their deliberations.

The trial court's conclusion that there existed "no evidence" to support damages related to the negative impact on Moats's goodwill and business reputation from Anderson County's actions impacting Moats's bonding capacity is contrary to the record evidence and simply reflects what the court *thought* the verdict ought to have been. The lower court failed to acknowledge any of the evidence supporting these damages and failed to offer compelling reasons why this evidence did not support the jury's verdict. The evidence showed:

- Russell Moats built Moats Construction from the ground up, weathered the 2008 Great Recession, and in 2013 began focusing exclusively on public jobs, which require bonds throughout the entire job, from bidding, performance, and payment to subcontractors;[1]

- Moats's bonding capacity was well over $500,000 at the time of the Anderson County jobs;[2]

- Anderson County refused to rescind termination of the Toxaway Mill Project, as it agreed to do in the Mediated Settlement Agreement;[3]

[1] (R. p. 129, line 12-p. 130, line 7, p. 130, line 22-p. 131, line 8, p. 132, lines 7-25; p. 133, line 2-p. 134, line 1; p. 269, line 16-p. 270, line 3 (Russell Moats)).
[2] (R. p. 738, line 25-p. 740, line 5 (Russell Moats)).
[3] (R. p. 1144 (Mediated Settlement Agreement at 2); p. 231, lines (Russell Moats)).

- On July 20, 2018, Anderson County wrote a letter to Moats's bonding company placing full blame on Moats for incompletion of the East-West Project despite Anderson County's own breach of the Mediated Settlement Agreement, and placing Moats's bonding company on notice of a potential claim on the East-West Project;[4]

- On April 8, 2019, Anderson County responded to Moats's bonding company's request for an update on the Toxaway Mill Project and blamed the project's incompletion on Moats for supposedly having breached the Mediated Settlement Agreement, when in fact it was the County that breached the agreement by never restarting the Toxaway Mill Project;[5]

- On April 15, 2019, after Anderson County's communication to the bonding company, Moats's bonding company told Moats in response to its request for bonds that the "answer from the surety companies is: will consider once the UCC-1 is removed."[6]

- Russell Moats testified that this UCC issue with the bonding company was caused by Anderson County and "killed our bond." "We couldn't bond. We were un-bondable at that point."[7]

- Anderson County never provided an update to Moats's bonding company or backup for a potential claim on East-West Project and it took Moats two years to finally get its bonding company to release this bond after the County provided no backup information.[8]

- At least one bid bond application entered into evidence showed Moats planning to bid $490,000 on a job at Clemson University that ultimately was awarded to a different contractor for $596,219, and for which Moats had estimated a profit at $180,000.[9]

- The two Anderson County jobs totaled approximately $550,000 (East-West $324,761;[10] Toxaway Mill $223,000[11]), and the Toxaway Mill job was a thirty-day contract.[12]

[4] (R. p. 1106 (Pl. Ex. 42)).
[5] (R. p. 1108 (Pl. Ex. 43)).
[6] (R. p. 1085 (Pl. Ex. 12)).
[7] (R. p. 271, lines 10-13 (Russell Moats)).
[8] (R. p. 740, line 9-p. 741, line 10 (Russell Moats)).
[9] (R. p. 1087 (Pl. Ex. 14, compare 1 to 5)).
[10] (R. p. 1143 (Mediated Settlement Agreement at 1)).
[11] (R. p. 1110 (Toxaway Mill Contract)).
[12] *Id.*

All of these facts lend support to the jury's verdict and were ignored by the lower court. Simply because goodwill is difficult to measure does not mean that the jury's verdict was excessive.

The court committed legal error by excluding an entire category of damages for losses to business reputation and goodwill and failed to offer compelling reasons to overturn the jury's verdict in light of the evidence in the record supporting this element of damages. For these reasons, the Court should reinstate the jury's verdict.

II. The Lower's Court Grant of a New Trial Based on the Thirteenth Juror Doctrine Should Be Overturned.

When the lower court ruled that the maximum amount of contractual damages available to Moats was $33,105.91, (R. p. 8), it made a legal error in excluding damages to business reputation and goodwill. This error resulted in the lower court's decision to grant a new trial under the thirteenth juror doctrine. (R. p. 9). The court's additional conclusion that "no evidence" existed of goodwill damages is wholly unsupported by the record. As shown above, there is substantial evidence to support damages to goodwill and business reputation. For these reasons, court's ruling under the thirteenth juror doctrine should be overturned.

In granting a new trial based on the thirteenth juror doctrine, the court was required to determine that the facts supporting the jury's verdict were so outweighed by countervailing evidence that the jury's verdict could not stand:

> The granting of a new trial upon the facts is not the equivalent of granting a directed verdict. The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion. Stated another way, a party's evidence might make a case one for the jury, **but the evidence might be so outweighed by the countervailing evidence** that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine.

RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., 399 S.C. 322, 334, 732 S.E.2d 166, 172 (2012) (internal quotation marks and citations omitted) (emphasis added).

The trial court's decision to overturn the verdict based on the thirteenth juror doctrine was error because there was no such countervailing evidence here. In fact, Anderson County did not introduce *any* evidence that contradicted Moats's evidence that the inability to secure bonds to bid on new public work caused it to go out of business. Moats presented evidence that Anderson County's actions in breaching the Mediated Settlement Agreement damaged its ability to get bonding and continue as a going concern, which negatively impacted its business reputation and goodwill.

During the post-trial hearing, the trial court suggested that if the verdict were in its power to determine, it would not have granted Moats any of the $33,000 in damages for retainage and additional work. (R. p. 993, line 24-p. 994, line 1 ("Court: In my case, then I'm - - in my judgment remittor [sic] would be down to $50,000, that I grant verdict for.")).

Additionally, the court's comment about its experience and comparison to other jury verdicts in Anderson County shows that its decision was not based on the evidence but rather its *view* of the evidence, i.e., that the jury's verdict was simply too high for Anderson County:

> THE COURT: **You don't see them over here like that very often, but that makes it even more so to me the fact that it was passion, prejudice, or reason not supported by anything in the record**. You know, to me in this case, I can just do a thirteenth juror. I don't have to tell y'all why.

(R. p. 995, line 24-p. 996, line 4). The fact that it was unusual for a jury to hold a public body accountable for its actions has nothing to do with the evidence presented in court and is not an appropriate legal basis to throw out the jury's verdict and grant a new trial.

This Court has previously overturned a lower court's decision to grant a new trial based on the thirteenth juror doctrine where it was not supported by the evidence, *Youmans v. S.C. DOT*, 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008), and it should to the same here.

III. The Court Erred in Not Allowing Plaintiff to Amend Its Complaint to Conform to the Evidence.

Motions under Rule 15(b), SCRCP, "to conform to proof should be liberally allowed when no prejudice to the opposing party will result therefrom." *Soil & Material Eng'rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779 (Ct. App. 1987). "The focal inquiry in allowing amendment of pleadings is whether doing so will prejudice the opposing party." *Pool v. Pool*, 329 S.C. 324, 328, 494 S.E.2d 820, 822 (1998).

The record is devoid of any showing of prejudice to Anderson County or a showing that Anderson County would have presented any other evidence during trial to refute these allegations because it was already attempting to refute the two communications to the bonding company, (R. pp. 1106-08 (Pl. Exs. 42, 43)), and their negative impact on Moats. It is too late for Anderson County to now contend that it would have been prejudiced by the amendment when it made no such showing during trial.

Accordingly, there was sufficient evidence to support sending the claim for defamation against Anderson County to the jury and the court abused its discretion in denying this motion.

IV. The Court Erred in Directing a Verdict on Defamation Against Rusty Burns.

a. Appellant Timely Filed an Appeal

As an initial matter, the appeal of the court's directed verdict is timely. There is no requirement that Moats perfect an appeal in the middle of trial. Appellant timely filed its Notice of Appeal after the final order was entered resolving all claims in this action.

Rule 203(b)(1), SCACR, requires a notice of appeal to "be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." The rule further provides that the time for appeal shall be stayed upon timely motion to alter or amend judgment under Rule 59, SCRCP, until the entry of the order granting or denying such motion. Rule 203(b)(1), SCACR. The Rule also provides that a form or other short order or judgment that indicates that a more full and complete order or judgment is to follow does not require an appeal until entry of the more complete order or judgment. Rule 203(b)(1), SCACR.

The right of appeal arises from, and is controlled by, statutory law. *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by section 14-3-330 of the South Carolina Code. *Id*. at 196, 607 S.E.2d at 708.

The general rule is that intermediate judgments are interlocutory. South Carolina Code Section 14-3-330(1) provides for any intermediate judgment, order, or decree to be appealed after the final judgment is entered. In certain circumstances, an intermediate judgment can be appealed before the entire case is resolved. "Any judgment or decree, leaving some further act to be done by the court before the rights of the parties are determined, is interlocutory; but if it so completely fixes the rights of the parties that the court has nothing further to do in the action, then it is final." *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 573, 698 S.E.2d 856, 859 (S.C. App. 2010) (quoting *Adickes v. Allison & Bratton*, 21 S.C. 245, 259 (1884)).

The process of directing entry of judgment on fewer that all claims under Rule 54(b) is referred to as certification. *Id.* at 575, 698 S.E.2d at 860. Absent a certification under Rule 54(b), any order in an action with multiple claims, even if it appears to adjudicate a separable portion of the controversy, is interlocutory. *Id*. at 577, 698 S.E.2d at 861. Rule 54(b), SCRCP provides that:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment*. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

This Court has held that "Rule 54(b) does not require certification, but if the court chooses to certify a judgment, it must do so in a definite and unmistakable manner." *Ashenfelder*, 389 S.C. at 576 (citing *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 466, 570 S.E.2d 197, 200 (Ct. App. 2002)). Accordingly, Rule 54(b) requires an express determination that there was no reason for delay in entering the judgment on the previously adjudicated claims. *Id.* at 576, 698 S.E.2d at 861.

In *Ashenfelder*, the plaintiff brough an action against the defendants asserting multiple claims and at trial, a directed verdict was granted on some of the plaintiff's claims and a mistrial was later granted as to the other claims. *Id.* at 570, 698 S.E.2d at 857. The plaintiff appealed the granting of the directed verdict on some of his causes of action prior to the declaration of a mistrial. *Id*. Since no judgment was entered for the directed verdict and no written or form order was entered that memorialized the directed verdicts, this Court found that the directed verdict was subject to revision pursuant to Rule 54(b). *Id*. at 577, 698 S.E.2d at 861. As such, this Court dismissed the appeal as premature. *Id.* at 570, 698 S.E.2d at 857.

Here, all orders in this matter were interlocutory until the final judgment was entered on October 14, 2024, resolving all causes of action in the lawsuit. Similar to *Ashenfelder*, the trial court did not enter an order granting a directed verdict on Appellant's defamation cause of action;

the court's ruling was only noted on the record in the trial transcript. Absent certification or some other "definite and unmistakable indication," the grant of the directed verdict on Appellant's defamation cause of action was interlocutory and under S.C. Code Ann. § 14-3-330(1) Appellant was permitted to wait and appeal the directed verdict until the court entered a final order adjudicating all claims. Therefore, as in *Ashenfelder*, an appeal of the directed verdict on Appellant's defamation cause of action would have been premature before the entry of the final order.

b. The Defamation Claim Against Rusty Burns Should Have Gone to the Jury

As to Moats's defamation claim against Rusty Burns, the issue is not what Defendant Burns or his attorney think about the allegations ("pure nonsense," Burns Br. at 4), but whether the evidence, when viewed in a light most favorable to Moats, the non-moving party, has any tendency to prove Moats's allegations. If there is *any* such evidence, the directed verdict motion must be refused. *Milhouse v. Food Lion, Inc.*, 289 S.C. 203, 345 S.E.2d 739 (S.C. Ct. App. 1986).

Here, a jury could have viewed Rusty Burns's statements to the media as defamatory, especially when the parties were in a legal dispute where just weeks later Anderson County accepted responsibility for certain delays and agreed to pay Moats delay damages. (R. p. 1143 (Mediated Settlement Agreement)). The jury also could have found actual malice or intent to harm from the evidence.

Actual malice means the defendant "published the statement with knowledge it was false or with reckless disregard of whether it was false or not." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 467, 629 S.E.2d 653, 665 (2006). Intent to harm does not require a showing of malicious intent, *Eldeco, Inc. v. Charleston County School District*, 372 S.C. 470, 481, n.5, 42 S.E.2d 726, 732 n.5 (2007), but publication with an improper purpose. Burns made the alleged

defamatory public statements knowing that Anderson County was about to mediate the project dispute with Moats, and ultimately Anderson County agreed to pay delay damages. (R. p. 704, line 20-p. 705, line 14, p. 712, line 24-p. 714, line 14, p. 791, line 5-p. 792, line 21). The jury could have viewed Burns's statements as made with reckless disregard for their truth or intended to interfere and gain an advantage in the ongoing dispute with Moats.

Viewing the evidence in a light most favorable to Moats, as a court is required to do, a jury could have found Burn's comments defamatory. For this reason, the court erred in granting a directed verdict on this claim.

CONCLUSION

The court erred in invading the province of the jury, setting aside the jury's verdict, and ruling that the jury's verdict was excessive and based on passion, caprice, or prejudice, or confusion or misunderstanding of the evidence. The court did not offer compelling reasons to ignore the substantial evidence in the record of damages to Moats's goodwill and business reputation. The court's ruling was driven by a misunderstanding of consequential damages and its failure to recognize that Moats could be awarded damages for lost goodwill and lost bonding capacity, which ultimately drove the company out of business. Anderson County makes the same factual arguments in its brief supporting the lower court's erroneous rulings that it made to the jury during trial, which the jury rejected. There is no support for throwing out the jury's verdict and forcing Appellant to retry the entire case.

Accordingly, the jury's verdict should be reinstated.

Respectfully submitted,

s/ David L. Paavola

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April 16, 2026