

64855

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

RECEIVED
MAY 17 2012
SC Court of Appeals

Case No. 07-CP-40-8435
(S.C. Ct. App. Op. No. 2012-UP-270)

National Grange Mutual Insurance Company, Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood,
Ronald L. Clark, Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, Defendants,

of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark and
Susan F. Clark are Appellants.

PETITION FOR REHEARING
(With Suggestion for Rehearing En Banc)

Appellants Ronald and Susan Clark move, pursuant to Rule 221(a), SCACR, that the court rehear¹ the case, grant oral argument, vacate the unpublished, per curiam, memorandum opinion (No. 2012-UP-270, filed May 2, 2012), and issue a full opinion reversing the Circuit Court's order granting Plaintiffs-Respondents a new trial absolute. The Clarks respectfully suggest rehearing en banc, pursuant to Rule 219, SCACR.

¹"Rehearing" is a misnomer for reconsideration, as the appeal was not actually "heard," but rather, decided on the briefs.

The grounds for this motion, respectfully submitted, are that the Court overlooked substantially all of the nine issues in the appeal. Consequently, the Court also overlooked all the applicable principles of law. The form of the opinion does not comply with the South Carolina Appellate Court Rules. It is possible that this is the reason why the issues and law were overlooked. There was no oral argument on the appeal, and the opinion is not by an assigned judge and does not recite the facts of the case, nor the nine issues presented and actually argued in the briefs.

MEMORANDUM OF ARGUMENT FOR REHEARING, WITH
CITATION OF AUTHORITY

This appeal presents an instance in which the defendants' affirmative defense of bad faith to the approximately \$1,000,000 claim of a surety was tried to an attentive jury for three days.

The Plaintiff surety had repudiated the bond it had issued. The Plaintiff surety had made specious excuses for failing to honor the bond, made no payments or offers to pay which might have allowed the principal under the bond to stay in business, never consulted the defendants as they were being financially ruined by the surety's actions and inactions, litigated for years, spent alleged sums of money trying to deny the validity of the bond it issued, finally settled the litigation in secret, and then attempted to be indemnified by the defendants, while presenting inaccurate figures.

The jury was allowed to take notes, and did. There was a clean record. Most considerations were given to the Plaintiff-Respondent. No error was made in favor of the defendants. If any such errors could have been contended, zero were preserved. The Circuit Judge charged the jury on the defense of bad faith.

There was a clean record, no jury misconduct and a general form of verdict perfectly

consistent with the unopposed charge given to the jury. Yet, the Circuit Court granted the Plaintiff-Respondent a "do-over" -- a new trial absolute -- after the jury found substantial merit in the bad faith defense as it was charged to the jury and Plaintiff got an unfavorable result.

Completely illogically, the Circuit Court based its decision on "inadequate damages" being awarded in a contested liability case involving an affirmative defense charged to the jury by the Circuit Judge.

This error results in a complete disregard of the defendants' constitutional right to the jury trial. The jury trial guaranteed to the defendants by the State constitution was the one they endured for three days and thousands of dollars. They had a constitutional and common law right for that jury trial not to be summarily disregarded.

The only thing preventing the Circuit Court's grant of new trial from being a violation of the South Carolina Constitution's right to jury trial, would be compliance with rules of law pertaining to grant of new trial.

These rules have provided consistently for decade after decade that, although the trial court has wide discretion in granting new trial, the discretion is not unfettered, and that a grant of new trial will be reversed if there is an abuse of discretion. "Abuse of discretion" includes instances in which the trial judge was guided in his decision by an error of law.

Much of the problem with the Circuit Court's soi-disant "exercise of discretion" on this important decision, was its failure to supply its reasoning on the bad faith defense or identify the facts on which it relied, and its citation of a case not applicable to the facts or procedural posture of this case.

Like the motion which begat the order, the order thus starts with a premise which has zero basis in the record (that the jury did not find bad faith) and then asserts the jury was wrong about the damages.

In its motion for new trial, as if no three-day trial of an affirmative defense had even occurred, National Grange had stated that the jury “determined that the defendants were liable under the agreement.” (R. p. 539.) National Grange moved for new trial nisi additur. National Grange additionally moved for an increased money judgment under the 13th juror doctrine, which is not possible. Bailey v. Peacock, 318 S.C. 13, 455 S.E. 2d 690 (1995); Youmans v. S.C. Dept. of Transportation, 380 S.C. 263, 670 S.E. 2d 1 (Ct. App. 2008).

National Grange had not even mentioned once in its entire motion, “bad faith,” “evidence of bad faith,” or the believability of any evidence presented by the defendants. (R. pp. 538-539.)

The order later signed by the Circuit Judge granted a new trial absolute on the grounds that the defendants “did not offer any credible evidence as to any bad faith by National Grange.” (R. p.4.) The order then illogically transmuted this unsupported assertion into something completely different – an assumption, with no basis at all in the record, that the jury did not find bad faith on the part of the Plaintiff.

The order signed by the Circuit Judge further stated that the verdict of only \$10,000 in the case was irreconcilably inconsistent with “the evidence [of damages] presented at trial.” The order thus viewed the verdict as a rejection of the bad faith defense, but a refusal to award full damages. (“The verdict goes beyond a merely conservative award and suggests the jurors were motivated by improper considerations.” (R. p. 3.)) The order was based on the assertion that the verdict of only \$10,000 suggested “that the jurors were motivated by improper considerations,” and that “the jury failed to follow the Court’s instructions in returning their verdict.” (8-17-09 Order, R. pp. 4-5.) The order signed by the Circuit Judge accordingly cited an opinion pertaining to new trial in cases in which no defense is raised, liability is admitted, and the jury fails to return enough damages. (R. p. 5.) The order signed by the Circuit Judge was thus controlled by an erroneous assertion of jury impropriety and failure to follow the law as charged. The order was

not based solely on a different view of the facts by the Circuit Judge. The Circuit Judge's order was not based on the Thirteenth Juror doctrine. It was an incongruent jumble controlled by error of law and lack of any support whatsoever in the record.

The Clarks' appellate briefs to this Court presented the background and procedural facts, and thirty-three cases and two treatises of relevant law, and discussed at length, in the form of eight issues presented on appeal, what an abuse of discretion is, and the multiple, independent instances in which the grant of new trial was an abuse of discretion. These issues, plus a ninth one concerning the constitutional implications of a wide-open ability to order new trial, were as follows:

1. Was it an abuse of discretion to grant National Grange a new trial based upon the jury only awarding National Grange a partial recovery, when the Circuit Judge intended for the jury to be able to only award a partial recovery, when the Circuit Judge charged the defense of bad faith, when the Circuit Judge intended for the jury not to perceive bad faith as necessarily a total bar to recovery, and the Circuit Judge specifically denied requests to charge which would have presented bad faith as a total bar?

2. Where the jury was specifically instructed that it could find bad faith to be a defense to the claims of National Grange, was it error to conclude that the jury's decision not to award a 100% recovery to National Grange was "a failure to follow the Court's instructions in returning their verdict"?

3. Was it error, and therefore an abuse of discretion, to grant National Grange a new trial based on law applicable to inadequate verdicts in cases in which liability is uncontested, when the instant case was one of contested liability and the jury was charged on the defense of bad faith?

4. Was it error for the Circuit Judge to state, in granting National Grange a new trial, that the evidence of National Grange's bad faith was not "credible" when the basis of National Grange's motion for new trial was not credibility, but, rather, that there was no dispute as to liability or damages?

5. Was it a failure to exercise discretion, and therefore an abuse of discretion, for the Circuit Judge to state that the evidence of National Grange's bad faith was not "credible" without identifying what was meant by bad faith, without identifying the evidence referred to, without stating what about it was believed to be not credible, and without discussing it in any way?

6. To the extent the trial Judge granted National Grange a new trial based on insufficiency of evidence rather than upon the reasons stated, was it error to do so when insufficiency of evidence of bad faith was not raised by National Grange as a ground for directed verdict or JNOV, and was it further error not to measure the sufficiency of the evidence against the law charged to the jury rather than as against some other unidentified standard or perception of the law?

7. Was it error, when considering and granting new trial, for the trial judge not to consider the greater weight of the evidence while viewing the evidence and the inferences to be drawn from it in the light most favorable to the nonmoving party, the defendants?

8. Was it error, when considering and granting new trial, for the trial judge to actually not consider or mention any evidence at all in favor of the nonmoving party, the defendants, including dishonest positions taken by National Grange in denying the validity of the bond?

9. Was granting new trial under the circumstances, a violation of due process under the State and federal constitutions, and a violation of the right to trial by jury under the State constitution?

(Appellant's Brief, "Statement of Issues on Appeal," at 1-2.)

"In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Rule 220 (b), SCACR.²

The Clarks' thirty-three page Appellant's Brief and Reply Brief are respectfully incorporated herein, without re-briefing, as an argument on the nine points distinctly stated in the case and asked to be decided now on rehearing.

This court's one-paragraph, unpublished, per curiam³, memorandum decision correctly cites Dillon v. Frazer, 383 S.C. 59, 63, 678 S.E.2d 251, 253 (2009) as a case standing for the proposition that the grant of new trial "will not be reversed absent an abuse of discretion," and

²Rules 220 (b)(1) and 220 (b)(2) provide exceptions to this requirement that the appellate court address each of the issues presented on appeal, rather than file a summary opinion. Rule 220 (b)(1) provides four exceptions, which are for use of the Supreme Court, rather than for the intermediate Court of Appeals and none of the four exceptions would apply in this case even if available to the Court of Appeals. Rule 220 (b)(2) provides an exception for "a point which is manifestly without merit." Rule 220 (b) (2), SCACR. None of the nine distinct points presented are manifestly without merit – they all present instances of clear and pertinent error by the Circuit Court. This Court's opinion did not skip one point, but nine.

³"Per curiam" means "by the court", i.e., by the court as a whole rather than under claim of authorship by a single justice and usually without extended discussion.

Lane v. Gilbert Constr. Co., 383 S.C. 590, 597-98, 681 S.E.2d 879, 883 (2009) as a case standing for the proposition that the grant of new trial “will be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.” This was a given, and not an issue on appeal. ⁴

It is respectfully submitted that this Court somehow overlooked the fact that much of the appeal was identification of the multiple ways in which the Circuit Court’s decision was an abuse of discretion, including being controlled by error of law. This Court overlooked all of the law regarding what an abuse of discretion is, and all of the facts and arguments establishing that an abuse of discretion occurred.

This Court observes that its review is limited to “whether evidence exists to support the trial court’s order.” However, this is a standard without a standard and applies on in “Thirteenth Juror” cases where no other basis is given. In the instant case, the “evidence” has to be evidence that prevents the decision from being an abuse of discretion. This Court’s opinion does not discuss or identify any such evidence. The opinion does not discuss evidence or anything else in the context of any of the instances of abuse of discretion argued by the Clarks.

In essence, in this case presenting a profound issue concerning the defendants’ constitutional right to jury trial, the unpublished summary opinion issued on appeal does not discuss or decide the issues presented on appeal, skips straight to the result, does not reveal on the face of the decision, the issues which were presented to the Court, and leaves the basis of the opinion to conjecture.

⁴However, other aspects of Lane, and cases cited therein, e.g., Norton v. Norfolk Southern Railway Co., 350 S.C. 473, 567 S.E. 2d 851 (2002), do not apply. These cases deal with the trial judge’s exercise of “The Thirteenth Juror Doctrine, “ which is supposed to be limited to instances in which the trial judge finds “the evidence does not justify the verdict” and grants a new trial solely “upon the facts.” Norton, 567 S.E. 2d at 854.

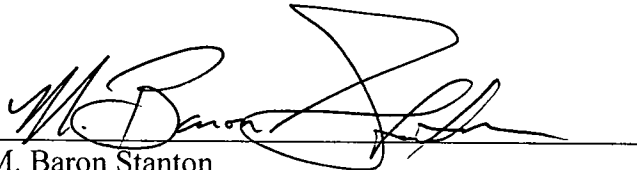
The Clarks also respectfully submit that further shielding such an opinion from examination by designating it unpublished and “without precedential effect” perpetuates the likelihood of similar mistakes, and should not be allowed to lessen the prospects of further judicial review.⁵ Such a procedure would allow likely or clearly erroneous appellate opinions to be obscured by lack of detail of what happened in the underlying trial and lack of detail of the issues that were actually presented on appeal, and yet prevent required reliance on these opinions in other cases, and thus avoid further public criticism, analysis and review. In the instant case, the summary form of the opinion and the designation of the opinion as “unpublished” would tend to prevent public criticism, analysis and review of what would be a profoundly low limit on the disregard for jury verdict in South Carolina.

Because the Court’s decision does not identify, rule upon, or discuss any of the nine (9) issues presented on appeal by the appellants, no further analysis of those issues or the Court’s opinion is possible here, and as stated above, the Clarks incorporate herein by reference, all of their thirty-three page Appellant’s Brief and their Reply Brief.

⁵This is reminiscent of the problems with and exceptions to the “mootness” doctrine, in which appellate courts are concerned with matters “capable of repetition, yet evading review.” Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911).

Accordingly, the Clarks, request that the appeal be reheard and that the Circuit Court's order denying the defendants the results of their jury trial be reversed.

Respectfully submitted,



M. Baron Stanton
STANTON LAW OFFICES, P.A.
1728 Main Street
P. O. Box 245
Columbia, SC 29202
803-929-1484

ATTORNEY FOR APPELLANTS
RONALD AND SUSAN CLARK

Date: 5-17-12

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
MAY 17 2012
SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 07-CP-40-8435
(S.C. Ct. App. Op. No. 2012-UP-270)

National Grange Mutual Insurance Company, Respondent,

v.

Phoenix Contract Glass, LLC, C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark,
Susan F. Clark, Henry H. Graham, III, and Renee L. Graham, Defendants,

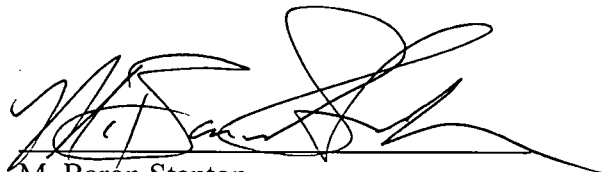
of whom C. Brent Chitwood, Linda N. Chitwood, Ronald L. Clark,
Susan F. Clark are Appellants.

CERTIFICATE OF SERVICE

I, M. Baron Stanton, do hereby certify that I have, on 5-17, 2012, served the
foregoing Petition for Rehearing with Suggestion for Rehearing En Banc upon Respondent or
attorney(s) for the Respondent by causing a copy thereof to be mailed with proper postage to the
address(es) indicated below:

Francis M. Mack, Esquire
Emily R. Gifford, Esquire and
Mason A. Summers, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street (29201)
P. O. Drawer 7788 (29202)
Columbia, SC

Mr. C. Brent Chitwood
Mrs. Linda N. Chitwood
131 Casco Bay Road
Irmo, SC 29063


M. Baron Stanton

Date: 5-17-12