

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Thomas L. Hughston, Jr., Circuit Court Judge

RECEIVED
OCT 11 2016
SC Court of Appeals

Appellate Case No. 2016-000872

Aaliyah Smith	v.	Appellant
Scott Carr		Respondent

FINAL INITIAL BRIEF OF APPELLANT

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Dated: October 5, 2016
Spartanburg, South Carolina

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(B) STATEMENT OF ISSUES ON APPEAL

There are two issues on the appeal:

1. Whether the trial judge erred in failing to allow the use of pleadings in the trial.
2. Whether the trial judge erred in failing to allow evidence into the court that would show the Respondent's lack of truthfulness.

(C) STATEMENT OF THE CASE

This action was initially commenced on September 11, 2014. Appellant filed a complaint against Scott Carr following a motor vehicle accident that occurred on or about May 28, 2014. (R. p. 3-7). A jury was selected on March 21, 2016 and the case was tried on March 23, 2016 in the Court of Common Pleas in Spartanburg, South Carolina. In his Answer to the Complaint, Respondent denied liability and asserted defenses against Appellant including: comparative negligence, gross negligence, recklessness, and willful/wanton conduct as a complete bar to recovery; comparative negligence, gross negligence, recklessness, and willful/wanton conduct as a limitation on Appellant's recovery; and failure to mitigate damages. (R. p. 8-12). At trial, Respondent admitted liability. The pleadings were never withdrawn or amended, however. Throughout the trial, the lower court refused to permit Appellant to make reference to the Respondent's inconsistent pleadings.

Additionally, the lower court refused to permit Appellant to impeach the credibility of defendant based on prior inconsistent testimony even after Respondent's counsel attempted to boost Respondent's credibility in front of the jury.

These errors led to the jury reaching a verdict for Plaintiff of only \$799.25 despite the submission of special damages for Plaintiff of \$6,242.25. (R. p. 13) (TR., p. 74, lines 10-16). The notice of appeal was served on April 21, 2016. (R. p. 110).

(D) ARGUMENT

(D) I. Introduction

The lower court erred by its failure to allow evidence that would show Respondent's lack of truthfulness and by its failure to allow into evidence pleadings that would show inconsistencies on behalf of the Respondent.

(D) II. Facts

On or about May 28, 2014, Scott Carr was traveling west on E Main Street his vehicle struck Aaliyah Smith's stopped vehicle from the back causing a motor vehicle collision. (R. p. 118-119) (South Carolina Traffic Collision Report Form). Ms. Smith sought medical treatment following the wreck, which she attributed to the collision. She also missed several weeks of work due to the wreck. There was a dispute about the force of the impact between the two vehicles. Appellant testified that it was a hard impact that caused her injury. (R. p. 14-17) (TR., p. 70, lines 19-20; pp. 72-74). Respondent testified it was not a significant impact at all and if there had been another foot in front of his vehicle he would have been able to stop without any collision at all. (R. p. 18) (TR., p. 63, lines 16-24).

(D) III. Argument

a. The lower court erred in failing to permit Appellant to use the pleadings in the case.

During opening argument, Appellant's counsel was describing the history of the case and attempted to make reference to Respondent's denial of responsibility in his Answer, which had never been amended or withdrawn. Specifically, Appellant's counsel sought to make reference to the portion of the Answer in which Respondent alleged that Appellant was at fault for causing the wreck and was negligent, grossly negligent, reckless, willful and wanton in causing the wreck. (R. p. 19) (TR., p. 32). The lower court, without any objection from Respondent, *sua sponte* sent the jury out and stated that Appellant could not show what was said in the Answer. (R. p. 20) (TR., p. 33). Appellant's counsel responded that Appellant was entitled to present the pleadings and describe the history of the case and the reason the matter was before the jury. (R. p. 21) (TR., p. 35). The lower court stated: "That doesn't make any difference why we're here, the only thing is the dispute about how much damage she was caused." (R. p. 21) (TR., p. 35). The lower court went on to rule that Appellant could make no reference whatsoever about Respondent's allegations against Appellant in the opening statement. (R. p. 22) (TR., p. 38).

The lower court made the same erroneous ruling during the cross examination of Respondent. At that time, Appellant sought to examine Respondent about the portion of the Answer in which Respondent's stated he was "not liable to plaintiff in any sum whatsoever." (R. p. 23) (TR., p. 45). Appellant argued even assuming Respondent admitted fault for the wreck, this still was relevant to the issue of damages and credibility and Respondent's prior statement that he was not liable for any damages. (R. p. 24) (TR., p. 46). The lower court again erroneously precluded this inquiry.

Under South Carolina law, prior pleadings in an action may be received in evidence against the pleader and it is error for a trial judge to prohibit cross examination on the pleadings.¹ This is because “it is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.”²

The lower court undoubtedly committed error in precluding Appellant from cross examining Respondent regarding prior inconsistent pleadings. This error was also prejudicial to Appellant because Respondent was a witness to the accident and impeachment would have been of value to the Appellant’s position. Respondent alleged as his principle defense that the force of impact in the vehicle collision wasn’t enough to cause injury to Appellant. This specifically created a credibility issue regarding the force of the impact. (R. p. 25-27) (TR., p. 160, line 25 to p. 161, line 6; p. 162, lines 16-25). Credibility was further an issue based on Appellant’s testimony that there was greater damage to the Respondent’s vehicle than what Respondent testified to. (See, R. p. 28-30) (TR., p. 53, lines 3-22; p. 70, line 19 to p. 71, line 6).

For years Respondent blamed this wreck on Appellant and filed written pleadings to that effect. This inconsistency was important for credibility purposes. Pleadings are admissible so that the jury can have the full picture of the parties’ positions. Appellant even specifically provided the Lucht and Postal cases to the lower court but the lower

¹ Lucht v. Youngblood, 221 S.E.2d 854, 858 (S.C. 1976) (holding it was error for the trial judge to prohibit a party from cross examining another party in respect to a prior inconsistent pleading).

² Postal v. Mann, 418 S.E.2d 322, 323 (S.C. App. 1992).

court persisted in its refusal to allow reference to the pleadings. (R. p. 145-148) (TR., p. 145, line 1 to p. 148, line 18). The failure to allow the use of these pleadings is prejudicial error and for this reason alone, Appellant is entitled to a new trial.

b. The lower court erred in barring cross examination on the Respondent's inconsistent testimony on his felony criminal history

Respondent was asked during his deposition about any past felony convictions. His response was that he had none. (R. p. 111-112) (Deposition of Scott Carr, p. 7, lines 12-24). This was not true as Mr. Carr had a felony dui in Virginia that was uncovered by research done by the Appellant. (R. p. 113-117) (Official Criminal Record of Scott N. Carr). Appellant sought to cross examine Mr. Carr based on his lack of truthfulness and counsel for Respondent objected. The lower court took testimony outside the presence of the jury on this issue. During this questioning Respondent again lied about his past felony criminal history until he was confronted with the official criminal record from Virginia. (R. p. 68-70) (TR., p. 47, line 18 to p. 49, line 24). Appellant argued to the lower court that these lies were admissible to impeach Respondent's lack of truthfulness under Rule 608(b). Specifically, Appellant argued that credibility was an issue based on Respondent's allegations that the impact was not sufficient to cause Appellant any injury. (R. p. 71) (TR., p. 51, lines 3-8). As noted, there was also the issue of Appellant's testimony that there was greater damage to the Respondent's vehicle than what Respondent alleged. (See, R. p. 28-30) (See, TR., p. 53, lines 3-22; p. 70, line 19 to p. 71, line 6). Yet, the lower court refused to allow any cross examination as to Respondent's prior inconsistent statements. (R. p. 73-75) (TR., p. 9-11). This error was compounded when the lower court again refused to permit cross examination even after Respondent attempted to boost Respondent's credibility by telling the jury about his past

military service and “honorable discharge.” (R. p. 76-77) (TR., p. 61, line 21 to p. 62, line 9). Respondent went on to allege that Appellant told him at the scene she was not injured. (R. p. 78) (TR, p. 64, lines 13-19). Appellant argued that even presuming the felony convictions were not admissible initially that Respondent’s insertion of these credibility issues into the case more than justified the Appellant’s ability to cross examine on these matters. (R. p. 79) (TR., p. 67, lines 6-21). Again, the lower court denied Appellant the opportunity to fully and properly cross examine Respondent. (R. p. 80) (TR., p. 67, lines 22-23).

South Carolina Rule of Evidence 608(b) states that “specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, may ... if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” Under this rule, Appellant should have been permitted to show that Respondent had not been truthful previously when asked questions under oath. This inquiry was relevant not only to Respondent’s character for truthfulness, but also because of Respondent’s testimony that contradicted the testimony of Appellant regarding the nature of the impact and whether there was greater damage to Respondent’s vehicle than what Respondent testified to. The admissibility of this testimony was even further substantiated by Respondent’s unsolicited insertion of his military record and purported honorable discharge into the record. These credibility issues are critical components of any trial. The lower court’s jury charge specifically emphasized credibility by directing the jury to

determine the facts it would be necessary for the jurors to “determine the credibility or believability of the witnesses who have testified.” (R. p. 81) (TR., p. 165, lines 21-24). The instruction went on to say that the jury must “decide do I believe what that person tells me, how much trust, how much faith do I put in what that person tells me.” (R. p. 82) (TR., p. 166, lines 15-17). Finally, the lower court instructed the jury to consider the manner or appearance of the witness who testified, was her or she straightforward or hesitant in answering, was the testimony of a witness consistent or inconsistent, how did the witness come to know the facts that he or she testified to or what was his or her ability to know these facts . . . was the testimony of a witness strengthened or weakened by other testimony or evidence presented.” (R. p. 83) (TR., p. 167, lines 1-11). These instructions emphasized credibility just after the lower court refused to permit Appellant to properly show the jury the Respondent’s lack of credibility through various inconsistencies. Even worse, the lower court permitted Respondent to boost his own credibility through references to his military past without permitting Appellant to show Respondent’s lack of truthfulness under oath. This fundamental unfairness was an abuse of discretion and for that reason Appellant is entitled to a new trial.

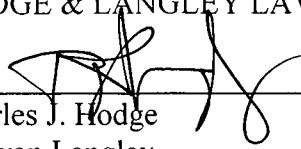
(E). CONCLUSION

The lower court erred by precluding Appellant from presenting to the jury the various inconsistencies in Respondent’s testimony and pleadings. These errors were compounded by Respondent’s self-promotion in front of the jury and even further by the lower court’s emphasis on credibility in the jury charge. Appellant was prejudiced by this because credibility was a central issue in the trial on significant issues such as whether the impact of the vehicles was hard enough to cause injury and whether the

Respondent was truthful about the actual damage to the Respondent's vehicle. Based on the foregoing, Appellant respectfully requests that this Court grant Appellant a new trial.

Respectfully Submitted by:

HODGE & LANGLEY LAW FIRM



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Dated: 10/5, 2016

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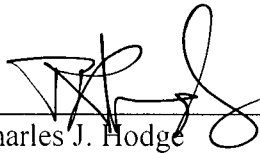
Appellant.

CERTIFICATE OF COMPLIANCE

Appellant hereby certifies that the Final Initial Brief fully complies with Rule 211(b) SCACR. The brief is identical to the Appellant's Initial Brief except for (1) addition of references to the Record on Appeal; and (2) the correction of obvious typographical errors and/or misspellings.

Respectfully Submitted by:

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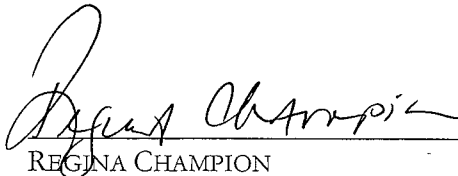
Respondent.

CERTIFICATE OF SERVICE

The undersigned employee of Hodge & Langley Law Firm P.C. certifies that she has, on the date below, served the FINAL INITIAL BRIEF OF APPELLANT AND THE FINAL REPLY BRIEF OF APPELLANT upon the below person(s) via first class mail.

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REGINA CHAMPION

October 6, 2016