

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2011-CP-26-08314

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FEB 02 2017

SC Court of Appeals

Chester S. Hejna and Mary Ann Henja, Individually and
Representing as a class, All Unit Owners of Magnolia
North Horizontal Regime as that class is defined below,

Respondents,

v.

Heritage Communities, Inc., Heritage Magnolia North, Inc.
and Buildstar Corporation,

Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. The trial court erred in finding the Appellants are estopped from relitigating whether its conduct was willful because that finding imposes a duty on the jury to award punitive damages in violation of the Due Process Clause of the United States and South Carolina constitutions.

Throughout their Brief, the Respondents assert the Appellants' due process claims are without merit because the trial judge's order does not preclude proof the Respondent Class was or was not entitled to punitive damages. (Respondents' Brief, p. 8) The Respondents' argument relies heavily on this Court's finding in the POA case. See Magnolia N. Prop. Owners' Ass'n, Inc. v. Heritage Cmty., Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012). The Respondents' reliance on Magnolia North is misplaced. The issue on appeal in Magnolia North was the constitutionality of the trial court's jury instruction on punitive damages.¹ Id. at 364, 725 S.E.2d at 120. In its ruling in Magnolia North, this Court did not overrule Broom v. Southeastern Highway Contracting Co., Inc.,² but instead clarified that a jury must first determine entitlement to punitive damages, and if entitlement is so determined, the duty to award punitive damages arises. Id. The issue presented in this case is distinguishable from the issue presented in Magnolia North in one fundamental respect: the trial judge's order precludes relitigation of willfulness *on the basis of offensive nonmutual collateral estoppel* in a subsequent case. The Respondents' Brief improperly conflates these issues as one and the same, and in light of the significant constitutional considerations at stake, the Appellants strongly urge this Court to carefully consider the application of offensive nonmutual collateral estoppel to preclude

¹ The jury instruction read: "If you should find that the plaintiff is entitled to recover punitive damages in addition to actual damages, it would be your duty to include such damages in your verdict and award such an amount as you may deem reasonable and proper in light of the facts and circumstances."

² 291 S.C. 93, 98, 352 S.E.2d 302, 305 (Ct. App. 1986) ("Upon a finding by the jury of willful, wanton, reckless, or malicious violation of the defendant's rights, it is not only the right, but the duty of the jury to award punitive damages.")

relitigation of willfulness in light of the “duty to award” language often charged to a jury in this State on the issue of punitive damages.

Precluding relitigation of willfulness in a subsequent case on the basis of the doctrine of collateral estoppel, coupled with the “duty to award” language set forth in Broom, all but guarantees the jury will award punitive damages to the Respondents in this case. At least the jury in Magnolia North, unlike any future jury in this case, sat through the entire trial and heard all of the evidence, before the issues of willfulness and punitive damages, among others, were submitted for its consideration. In the instant matter, the Respondents assert the court can just “instruct the jury that although it has been determined in a prior lawsuit that the Appellants’ conduct in the construction of the Magnolia North Condominiums was willful, wanton and grossly negligent, it remains up to them to determine whether, under all the circumstances, Respondent Class is entitled to an award of punitive damages.” (Respondents’ Brief, p. 8–9). Respectfully, it is nonsensical to believe a jury will exercise the kind of discretion contemplated in Pacific Mutual Life Insurance Co. v. Haslip³ after a judge instructs them that a prior jury already determined the Appellants’ conduct was willful, they are bound by that finding, and they have a duty to award damages if they deem the Respondents are entitled to them. By instructing the jury it is bound by that previous finding, directly followed by the “duty to award” language, leaves the jury with only one logical conclusion—that it *must* award punitive damages because the issue has already been determined in a previous case. Such instructions clearly prevent a jury from making an impartial evaluation of the degree of wrongfulness of the Appellants’ conduct, and for the reasons set forth in the Appellants’ initial brief, fail to meet minimum threshold requirements of constitutional due process.

³ 499 U.S. 1, 22–23, 111 S. Ct. 1032, 1045–46 (1991).

In addition, under the framework asserted by the Respondents, the application of the doctrine of collateral estoppel in this action undermines its very purpose—judicial economy. From a policy standpoint, the application of this doctrine protects individuals from vexatious litigation and promotes the efficient use of judicial resources. Under the trial judge’s order, the Appellants are precluded from “relitigating whether [its] conduct constituted . . . willful, wanton or grossly negligent conduct,” but “not preclude[d from] the requirement of proof . . . that the plaintiff is entitled or not entitled to punitive damages.” (Order dated Mar. 16, 2016) Based on this finding, the Respondents assert the “Appellants and the Class will have a full opportunity to litigate punitive damages.” (Respondents’ Brief, p. 8) Litigating punitive damages necessarily involves the Respondents presenting virtually the same evidence they would on the negligence issue, and the Appellants putting forth the same evidence in defense of punitive damages, resulting in little, if any, savings of trial time. As such, in addition to the significant constitutional concerns,⁴ the Respondents’ assertion undermines the very purpose of the doctrine they so vigorously defend.

Accordingly, the Appellants respectfully request this Court reverse the trial court’s order granting the Respondents’ motion for summary judgment on the basis of the collateral estoppel doctrine because application of the doctrine, coupled with South Carolina’s concept of a duty to award punitive damages, fails to meet minimum threshold requirements of constitutional due process.

⁴ In its initial brief, the Appellants argued permitting successive recoveries for the same alleged wrong(s) is a violation of due process. The Respondents did not directly address this argument in their initial brief, but instead made a blanket statement that “[a]ny claims of due process violations are without merit and should be dismissed.” (Respondent’s Brief, pp. 10) The Appellants reiterate a jury is simply inept to assess the economic impact of a second punitive damages award and to permit double recovery for the same alleged wrong(s) violates that sense of fundamental fairness which lies at the heart of constitutional due process.

II. The trial court erred in finding the Appellants are collaterally estopped from relitigating the issue of negligence because genuine issues of material fact exist as to whether the Appellants' conduct proximately caused loss of use damages.

a. The trial court erred in finding the Appellants are estopped from relitigating negligence because Respondents failed to establish essential elements of the collateral estoppel doctrine.

The Respondents next argue the trial court's order was proper because it permits the Appellants to litigate the issues of proximate cause and damages. The Respondents miss the point. The trial court erred in finding the Appellants are estopped from relitigating negligence because *the specific acts of negligence that allegedly caused the loss of use damages* were not "actually litigated" and "directly determined" in the POA case.

There is simply no way to definitively know that a general verdict satisfies the criteria required to invoke the collateral estoppel doctrine. See, e.g., Bd. of Cnty. Sup'rs v. Scottish & York Ins., 763 F.2d 176, 179 (4th Cir. 1985) ("We cannot distill special findings from a general verdict and to do so would intrude on the independent role of a jury as much as would a court's unilateral amendment of its verdict."); S.E.L. Maduro (Florida), Inc. v. M/V Antonio de Gastaneta, 833 F.2d 1477, 1483 (11th Cir. 1987) ("[i]f the jury could have premised its verdict on one or more of several issues, then collateral estoppel does not act as a bar to future litigation of the issues"); Case Prestressing Corp. v. Chicago College of Osteopathic Medicine, 118 Ill. App. 3d 782, 785-86, 455 N.E.2d 811 (1983) ("where, as here, issues of both liability and damages are sent to the jury and the jury simply returns a general verdict [against the plaintiff], estoppel will not be applied since it is not certain whether the jury found against [the] plaintiff on liability or on damages or on both"); Chew v. Gates, 27 F.3d 1432, 1438 (9th Cir. 1994) ("we can only speculate as to which injury or injuries underlay the verdict, and speculation will not support the

application of collateral estoppel”), cert. denied, 513 U.S. 1148, 115 S. Ct. 1097, 130 L.Ed.2d 1065 (1995).

The loss of use claim is a personal claim of the individual owners of the condominiums seeking damages for the loss of use of their property. The defects case was a construction defects action brought by the POA for repair damages to the common elements of the condominiums. In the defects case, the jury simply checked “yes” next to a question inquiring whether “the [Appellants] were negligent in the construction of the Magnolia North Condominiums.” Based on this marking alone, it is entirely unclear which acts of the Appellants the jurors determined were negligent. In order for a jury to properly determine whether there has been a recoverable loss of use, the Respondents must first establish *the specific acts of negligence that proximately caused the loss of use damages*. This necessarily involves evidence as to the scope of repair, the costs associated with such repair, specific use or loss thereof of each homeowner, the knowledge of each homeowner when they purchased their units, proximate cause, and any mitigating factors.

There was no basis for the trial judge to find the above-mentioned issues, namely the specific acts of negligent that proximately caused the loss of use damages, were “actually litigated” and “directly determined” in the POA case because these issues were not, in fact, the same issues in both cases. In order for a jury verdict to operate on the basis of offensive nonmutual collateral estoppel, there must have been a finding of a specific and controlling fact in the former case and it must conclusively appear that the issue of fact was necessarily determined by the jury rendering the verdict. If there is any uncertainty because more than one distinct issue of fact was presented, courts must yield its application of the doctrine because such application could result in a miscarriage of justice. Here, it is entirely unclear which acts of negligence are

attributed to the Appellants. Accordingly, for the reasons set forth above, the trial court erred by precluding relitigation of negligence but permitting proof of proximate cause and damages because the Respondents failed to establish essential elements of the collateral estoppel doctrine.

b. The trial court erred in finding the Appellants are estopped from relitigating negligence because proximate cause and damages are necessary elements to the negligence cause of action.

Respondents' Brief contends the trial court's order was proper because "there can be negligence without proximate cause" and "[a]ppellants will be free at trial to litigate whether their negligence in the construction of the Magnolia North Condominium caused any loss-of-use damages." (Respondent's Brief pp. 11–12) Again, without any indication as to which specific acts of negligence are attributed to the Appellants, it is impossible to litigate whether the Appellants "negligence . . . caused any loss of use damages."

Undoubtedly, there can be negligent acts without proximate cause and damages—i.e., a plaintiff could prove a defendant engaged in negligent conduct but fail to prove such conduct proximately caused any damages. Contrary to the Respondents' assertion, the Appellants are not contesting the validity of such a basic concept of tort law. The fundamental problem in the instant case is the trial court's order precludes the Appellants from relitigating "negligence," but permits "proof of proximate cause for actual damages" when the general verdict in the POA case provides absolutely no guidance as to the specific acts of negligence attributed to the Appellants. Presumably, the jurors concluded the Appellants committed some act of negligence that proximately caused damages to the common elements of the condominiums, thus entitling the POA to damages. The Appellants cannot reasonably defend against the negligence cause of action in this case when it is entirely unclear the precise basis of the jury's verdict. To allow the Respondents to bootstrap a loss of use claim on a separate finding of negligence is simply

contrary to the law. Accordingly, for the reasons set forth above, the trial court erred in granting summary judgment in favor of the Respondents on the basis of collateral estoppel because proximate cause and damages are necessary elements to the negligence cause of action.

CONCLUSION

The grant of summary judgment in favor of the Respondent on the basis of collateral estoppel was in error, and for the reasons set forth above, the Appellants respectfully request this Court reverse the trial court's erroneous order.

Respectfully Submitted,

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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

Appeal from Horry County
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R. Lawton McIntosh, Circuit Court Judge

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Representing as a class, All Unit Owners of Magnolia
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I, Marry S. Willis, of Young Clement Rivers, LLP, counsel for the Appellants above named, do hereby certify that I have served the **Initial Reply Brief of Appellants** on the above-named Respondents by depositing a copy of the same in the United States Mail, postage prepaid, on February 1, 2017, addressed as follows to all counsel of record:

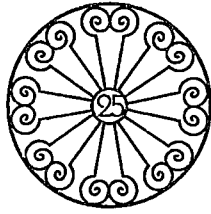
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SC Court of Appeals

Jenny Abbott Kitchings, Clerk of Court
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Re: Chester S. Hejna and Mary Ann Henja, Individually and Representing as a Class,
All Unit Owners of Magnolia North Horizontal Regime as That Class is Defined
Below, v. Heritage Communities, Inc., Heritage Magnolia North, Inc. and
Buildstar Corporation
Case No.: 2011-CP-26-8314
Claim No.: H0465752001
YCR File: 1952-20061504

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find the original and one copy of the Initial Reply Brief of Appellants along with the original and one copy of the Proof of Service regarding the same. As no new material has been designated, a supplemental Designation of Matter has not been prepared.

Kindly file the originals and return one court-stamped copy to me using the pre-stamped envelope provided. With best wishes and kindest regards, I am

Sincerely,

YOUNG CLEMENT RIVERS, LLP

Mary S. Willis
Associate

MSW/amj
Enclosures

cc: Philip C. Thompson, Esquire, Thompson & Henry, P.A.
John P. Henry, Esquire, Thompson & Henry, PA

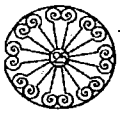
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