

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2012-212109

Susan Anne Bell Lynch,

Appellant/Respondent

v.

Carolina Self Storage Centers, Inc.,

Respondent/Appellant.

REPLY BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE THE RESPONDENT'S DISCOVERY RESPONSES AS WELL AS EVIDENCE THAT THE RESPONDENT INTENTIONALLY PROVIDED EVASIVE AND INCOMPLETE INFORMATION REGARDING A CRITICAL WITNESS AND EVIDENCE, WHEN SAME WAS CLEARLY RELEVANT ON A NUMBER OF ISSUES INCLUDING PUNITIVE DAMAGES.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE THE DOCUMENTATION SURROUNDING RESPONDENT'S EVICTION OF APPELLANT FROM THE STORAGE UNIT CONTEMPORANEOUSLY WITH APPELLANT REQUESTING ACCESS TO THE FACILITY TO HAVE HER EXPERT WITNESS CONDUCT AN INVESTIGATION, WHEN SAME WAS CLEARLY RELEVANT TO THE ISSUE OF PUNITIVE DAMAGES.

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING PLAINTIFF'S POST-TRIAL MOTION FOR NEW TRIAL *NSI* *ADDITUR*, BECAUSE THE JURY'S VERDICT FAILED TO TAKE INTO ACCOUNT, AMONG OTHER THINGS, APPELLANT'S PAIN AND SUFFERING AND SCARRING.

IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO GRANT THE APPELLANT A NEW TRIAL ABSOLUTE BASED UPON THE MISCONDUCT OF MEMBERS OF THE JURY RENDERING SAME UNFAIR AND BIASED AGAINST APPELLANT, OR IN THE ALTERNATIVE, FAILING TO CONDUCT A HEARING TO INQUIRE INTO THE EXTENT OF PREJUDICE OF THE JURORS OR THE EFFECT OF THE JUROR'S COMMENTS ON THE REMAINING MEMBERS OF THE JURY.

V. EVEN IF NO ONE ERROR ALONE WARRANTS A NEW TRIAL, THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS DEPRIVED APPELLANT OF A FAIR TRIAL.

ARGUMENT

I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO ALLOW APPELLANT TO INTRODUCE INTO EVIDENCE RESPONDENT'S DISCOVERY RESPONSES, PORTIONS OF DAN COMFORT'S DEPOSITION, AND THE DOCUMENTATION SURROUNDING RESPONDENT'S EVICTION OF APPELLANT.

"Evidence is relevant and admissible if it tends to establish or make more or less probable some matter in issue." Johnson v. Horry Cnty. Solid Waste Auth., 389 S.C. 528, 534, 698 S.E.2d 835, 838 (Ct. App. 2010) (citing Rules 401 & 402, S.C.R.E.). Specifically at issue in this case were the credibility of Respondent's employees and punitive damages. Appellant attempted to admit several items of evidence that were relevant to both of these issues. Appellant sought to admit evidence, by way of Respondent's Answers to Interrogatories and portions of Mr. Dan Comfort's deposition testimony, which tended to show that Respondent hid the location and contact information of a key witness. Appellant additionally sought to admit documentation revealing that Respondent evicted Appellant from her rental unit within days of when her expert examined Respondent's premises in preparation for trial.

As to credibility, Appellant submits that there can be no evidence more relevant to a witness's credibility than evidence showing that that particular witness hid or concealed the location and contact information for another key witness. The "key witness" in this case whose location was concealed happened to be an employee of Respondent who had interactions with Appellant in the days following her accident and injury. In a trial where the credibility of both Appellant herself and the employees of Respondent was paramount to the outcome, the probative value of evidence showing that Respondent misled Appellant regarding the location and contact information of a key witness substantially outweighs any prejudice or jury confusion that it may have caused.

Furthermore, the evidence tending to show that Respondent concealed the location of a key witness and then evicted Appellant shortly after her expert examined Respondent's premises is both relevant and material to several factors for punitive damages, including Respondent's reprehensibility and culpability, the duration of Respondent's conduct, and Respondent's attempts at concealment. See Gamble v. Stevenson, 305 S.C. 104, 111-12, 406 S.E.2d 350, 354 (1991); see also BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99, 134 L. Ed. 2d 809, 826 (1996). Appellant contends that this evidence, that the trial court failed to admit, establishes that Respondent continued to hinder Appellant's pursuit of her claim after her injury and that Respondent's reprehensible conduct towards Appellant remained on-going almost until the start of trial.

Accordingly, the trial court erred and abused its discretion by excluding evidence relevant and material to both Respondent's credibility and the issue of punitive damages.

II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT CONCLUDED THAT THE JURY FOREPERSON'S AFFIDAVIT WAS NOT COMPETENT EVIDENCE.

Shortly after the jury rendered its verdict in this case, the foreperson of the jury, Mrs. Dale Cole, provided Appellant's trial attorney with an affidavit indicating her concerns over the comments that were made by various jurors during the jury's deliberations. The first comment that Mrs. Cole noted was that "[o]ne of the jurors stated she could not stand Kevin Barth (Appellant's trial attorney) and Ms. Sue Lynch was getting nothing." (R. p. 43). Mrs. Cole further noted that after she told this other juror she could not punish Appellant "for not like[ing] Mr. Barth," that other juror "said she did not care we would sit there until doomsday she wasn't going to get anything" (R.

p. 43). The second comment noted in Mrs. Cole's Affidavit was a comment from a juror and bank employee to the effect that Appellant did not need the money because she "had a large bank account." (R. p. 43).

Respondent contends in its Brief that the trial court properly concluded that the foreperson's Affidavit was not proper evidence. Specifically, Respondent argues that the statements contained in Mrs. Cole's Affidavit do not fit within the two (2) "recognized unusual circumstances . . . that would justify deeming Juror Cole's affidavit competent evidence." (Initial Respondent's Brief of Resp't 14). However, those two (2) unusual circumstances referenced by Respondent are exceptions to the rule regarding "internal jury misconduct." State v. Franklin, 341 S.C. 555, 560, 534 S.E.2d 716, 719 (Ct. App. 2000). Appellant contends that the comments set forth in Mrs. Cole's Affidavit are evidence of external juror misconduct, i.e., "allegation[s] of extraneous information or influence." Id. Rule 606(b) of the South Carolina Rules of Evidence specifically provides that "a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Moreover, Rule 606(b) then further contemplates that a juror's testimony on these matters can be received through an "affidavit." The South Carolina Supreme Court has recognized that "juror testimony can normally be used" when "extraneous influence is alleged," and that juror testimony regarding "internal misconduct" is even allowed "when necessary to ensure due process, i.e. fundamental fairness." State v. Hunter, 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). Mrs. Cole's Affidavit set forth two (2) separate statements that related to "extraneous prejudicial information" and "outside influences"—the precise topics for which Rule 606(b) was created. Specifically, Mrs. Cole's Affidavit states that one (1) juror

announced her intense dislike for Appellant's trial attorney and a second juror stated that Appellant did not need money because she had a large bank account. These statements, the large bank account statement in particular, related to information that was not in evidence. Because Mrs. Cole's Affidavit provided that "extraneous" information and influences were brought to the jury's attention, the trial court erred when it ruled that the Affidavit should not be considered under Rule 606(b).

III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT A NEW TRIAL ABSOLUTE BASED ON A JUROR'S INTENTIONAL CONCEALMENT OF MATERIAL INFORMATION DURING VOIR DIRE.

If a juror fails to disclose information requested during voir dire and "the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges," State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001), then "[t]he trial court must grant a motion for a new trial," State v. Miller, 398 S.C. 47, 50, 727 S.E.2d 32, 34 (Ct. App. 2012) (emphasis added).

In this case, Appellant contends that at least one (1) juror intentionally concealed her prior involvement with Appellant's trial attorney's law firm and that concealment prejudiced Appellant. In the Affidavit of the foreperson of the jury, Mrs. Dale Cole stated the following:

I did not know we had such bias jurors until we went into deliberating. . . . One of the jurors stated she could not stand Kevin Barth and Ms. Sue Lynch was getting nothing. I told her she could not punish her for not like[]ing Mr. Barth. She said she did not care we would sit there until doomsday she wasn't going to get anything

(R. p. 43). Mrs. Cole provided her Affidavit to Appellant's trial counsel soon after the jury rendered its verdict. Upon learning of that juror's comments regarding Appellant's trial counsel, Nicholas Lewis, one (1) of Appellant's trial counsel's law partners, checked our law firm's records and discovered, upon information and belief, that this juror referenced in the affidavit was the adverse party in a domestic litigation in which the undersigned's firm represented her husband at the time. (R. p. 44). Appellant then filed a post-trial Motion for New Trial based in part on this juror's misconduct and intentional concealment. The trial court erred when it denied Appellant's Motion.

As discussed above, Appellant contends that Mrs. Dale Cole's Affidavit was proper evidence that should have been considered by the trial court. However, regardless of whether the court was to consider Mrs. Cole's Affidavit, Appellant contends that the one (1) particular juror intentionally concealed her previous relationship with Appellant's trial attorney's law firm and this concealment prejudiced Appellant. Respondent spends a significant portion of its Brief arguing that there is no way of knowing whether the juror referenced in Mrs. Cole's Affidavit and the juror referenced in Mr. Lewis's Affidavit are the same person, that there is no way of knowing what gave rise to the juror's bias referenced in Mrs. Cole's Affidavit, and that Mr. Lewis's affidavit did not provide any details regarding the domestic litigation in which both the one (1) juror and Appellant's trial attorney's law firm were involved. However, this is not the proper focus of an intentional concealment determination. The only questions to be answered by the court are whether the juror "intentionally concealed" the information requested during voir dire and whether "the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges." Woods, 345 S.C. at 587, 550 S.E.2d at 284. Based on a review of only Mr. Lewis's

Affidavit¹ and the transcript of the voir dire proceedings, both of these determinations are answered in the affirmative. Mrs. Cole's Affidavit, if considered, would serve only to buttress the fact that this juror held bias against Appellant's trial attorney, which ultimately surfaced during deliberations, and that she intentionally concealed that information during voir dire.

"Intentional concealment occurs when the question[s] presented to the jury . . . [were] reasonably comprehensible to the average juror and the subject of the inquiry [was] of such significance that the juror's failure to respond [was] unreasonable." *Id.* at 587, 550 S.E.2d at 284. Here, the trial court first asked, "Is there any member of the jury panel related by blood, connected by marriage or have a close personal or social relationship with any of the attorneys involved in this case[?]," (R. p. 51), and then asked, "Does any member of the jury panel have any type of business relationship . . . with the law firms of Ballenger, Barth & Hoefer, Baker, Revenel & Bender, or Ellis Lawhorne & Sims?," (R. p. 53). The purpose of these questions was to identify any potential jurors who may have been biased for or against any of the law firms involved in this case. This Court just recently recognized the concept that the "mere existence" of a relationship between a potential juror and a law firm involved in a case is "significant." *Miller*, 398 S.C. at 52, 727 S.E.2d at 35. Furthermore, Appellant contends that these two (2) questions and the substance of the inquiries were "reasonably comprehensible" to the average juror. As a matter of fact, after each of the questions, at least one (1) other member of the jury pool stood and responded. The first, Mr. Timothy Thompson, stated that "Mr. Barth was [his] divorce attorney," (R. p. 51), and the second potential juror, Mr. Jerry Burns, indicated

¹ In its Initial Respondent's Brief, Respondent concedes that "Nicholas Lewis' affidavit was competent evidence." (Initial Respondent's Brief of Resp't 14 n.8). Mr. Lewis's Affidavit states that, upon information and belief, Juror Carter "was the adverse party in domestic litigation in which [Appellant's trial attorney's] firm represented her husband." (R. p. 44).

only that “[his] wife had a lawsuit against” one of Mr. Barth’s law partners “years ago,” (R. p. 53). After hearing each of their respective responses, the trial court recognized the significance of these prior relationships, as the court set aside both potential jurors for purposes of this case without regard to whether the potential jurors were previously represented by Appellant’s trial attorney or aligned against Appellant’s trial attorney’s law firm. All the while, the juror in question sat in the courtroom, heard these same questions asked, witnessed these two (2) other individuals stand and announce that they had prior dealings with either Mr. Barth or his law firm, watched the trial court remove each of them from the jury pool, and then she chose to remain silent knowing good-and-well that she previously had been on the opposite side of a lawsuit from Mr. Barth’s law firm. While the juror in question may have decided that these questions did not apply to her, as Respondent argues, the fact remains that these questions were “reasonably comprehensible” and, in fact, were reasonably comprehended by two (2) other members of this same jury pool.

Once the court determines that a juror did intentionally conceal information requested during voir dire, the only remaining determination is whether “the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party’s peremptory challenges.” Woods, 345 S.C. at 587, 550 S.E.2d at 284. Here, the concealed information would have supported a challenge for cause and, if not struck for cause, certainly would have been a material factor in Appellant’s trial attorney’s use of peremptory challenges. As acrimonious as domestic litigation tends to be, knowing that a potential juror was a party on the opposite side of a domestic case would certainly be material to one’s use of peremptory challenges. As a matter of fact, the trial court in this case recognized the significance and materiality of

these types of relationships, again without regard to which side of the prior litigation the potential juror had been aligned. The trial court removed from the jury pool each of the jurors who answered honestly the voir dire questions regarding previous relationships with the law firms involved in this case. Most notably, the trial court struck potential juror Thompson even after Appellant's trial attorney indicated to the court that he had not represented Mr. Thompson in years, ruling specifically: "I'm not going to let him serve. . . . I mean that puts [Mr. Thompson] in a bad situation . . . if he were to get put on the jury. He may or may not have been happy with you [Mr. Barth]." (R. p. 52). Presumably, if the juror in question also had honestly answered the voir dire questions, she additionally would have been "set aside" by the court or struck for cause. If not, then the information of her prior relationship with the undersigned's law firm certainly would have been a material factor when using Appellant's peremptory strikes.

IV. THE TRIAL COURT ERRED BY FAILING TO CONDUCT A POST-TRIAL EVIDENTIARY HEARING TO QUESTION THE JURORS REGARDING BOTH INTENTIONAL CONCEALMENT AND THE EXTENT OF JUROR MISCONDUCT DURING DELIBERATIONS.

Respondent argues in its Brief that the trial court properly denied Appellant's request to conduct a post-trial evidentiary hearing as to juror misconduct during deliberations. However, Appellant sought an evidentiary hearing not only for the purpose of determining the extent of any juror misconduct during the jury's deliberations, but also to determine whether the particular juror discussed in the section above intentionally concealed during voir dire her prior relationship with Appellant's trial attorney's law firm and her bias stemming therefrom. As the Supreme Court of South Carolina has stated, "whether a juror's failure to respond is intentional is a fact intensive determination." Woods, 345 S.C. at 588, 550 S.E.2d at 284. "Ordinarily, the juror's testimony is part of

the basis of that determination.” Miller, 398 S.C. at 54, 727 S.E.2d at 36. This Court, in State v. Miller, recognized that “Woods support[ed] a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available.” Id. In this case, the information regarding the particular juror’s intentional concealment was discovered by Appellant’s trial attorney and presented by motion to the trial court less than one (1) week after the conclusion of the trial. Appellant contends that, at that time, the juror’s testimony was still “reasonably available,” as the trial had just recently ended and the trial court easily could have located and required the one (1) juror to testify at a post-trial hearing. The trial court could have then made its determination of intentional concealment based on all of the evidence, including the juror’s stated reasons for not responding during voir dire. Appellant contends that the trial court abused its discretion by failing to conduct such a post-trial evidentiary hearing.

In addition, Appellant also contends that Mrs. Cole’s Affidavit provides evidence of “external” or “extraneous information” being considered during the jury’s deliberations. Mrs. Cole’s Affidavit indicates that a bank employee juror announced during deliberations that Appellant did not need money because she had a “large bank account.” (R. p. 43). While that juror ultimately said that Appellant was not a customer of her bank, that information as to Appellant’s bank account had already been announced during the jury’s deliberations. There was no evidence in the record regarding Appellant’s bank account and, to date, Appellant remains unsure as to where the juror obtained that information. At a minimum, Appellant contends that the trial court erred by not conducting a post-trial evidentiary hearing to determine the scope and prejudicial effect of this external jury misconduct. While Appellant recognizes that a trial court should delve into jury deliberations in only limited circumstances, Appellant contends that

the evidence presented here falls into the exception carved out of the rule for external jury misconduct. See United States v. Lawson, 677 F.3d 629 (4th Cir. 2012) (district court held post-trial evidentiary hearing where juror testified regarding his use of Wikipedia definitions during deliberations); State v. Elgin, 398 S.C. 39, 46, 726 S.E.2d 231, 235 (Ct. App. 2012) (noting that trial judge denied motion for new trial after “separately interview(ing) th[e] juror under oath” regarding her conversations with her mother during deliberations); State v. Bantan, 387 S.C. 412, 423, 692 S.E.2d 201, 207 (Ct. App. 2010) (affirming trial court’s denial of motion for mistrial and noting that “the trial court in this case interviewed the jurors and was satisfied each one could reach a fair and impartial verdict”). Thus, the trial court also erred by not conducting a post-trial evidentiary hearing to determine the extent and scope of this jury misconduct.

V. THE CUMULATIVE EFFECT OF THE MULTIPLE ERRORS IN THE TRIAL OF THIS MATTER DEPRIVED APPELLANT OF A FAIR TRIAL.

The “cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial” State v. Johnson, 334 S.C. 78, 92, 512 S.E.2d 795, 803 (1999) (citing Tennant v. Marion Health Care Found., 194 W. Va. 97, 459 S.E.2d 374 (1995)). While Respondent notes in its Brief that this doctrine typically applies in criminal matters, Respondent does not appear to dispute that it can be considered in this civil action. Respondent simply goes on to argue that “[t]here are no errors in this record that prejudiced [Appellant].” (Initial Respondent’s Brief of Resp’t 23).

To the contrary, Appellant contends that her trial was flawed from its start. The errors began during voir dire and did not conclude until the trial court erred by denying her post trial motions. As thoroughly discussed in this Reply brief and Appellant’s Initial Brief, the errors in Appellant’s trial included the exclusion of relevant evidence relating

to witness credibility and punitive damages, the intentional concealment of material information of at least one (1) juror during voir dire, external evidence being presented to the jury during deliberations, the trial court's refusal to conduct any type of post-trial hearing, and then the trial court's ultimate denial of Appellant's post-trial motions. Appellant contends that these errors cumulatively stripped her of the right to a fair trial and an impartial jury, and further warrant the award of a new trial absolute.

CONCLUSION

Based on the foregoing, Appellant respectfully submits that this Court should reverse the Trial Court's denial of Appellant's Motions and remand this matter to the Trial Court for the issuance of a New Trial Nisi Additur, or in the alternative remand the matter to the Trial Court for a new trial absolute.



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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant/Respondent, Final Respondent's Brief of Appellant/Respondent, and Reply Brief of Appellant/Respondent comply with Rule 211(b), SCACR.



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CERTIFICATE OF MAILING

I, the undersigned, of the law offices of Ballenger, Barth, Hoefer & Lewis, do hereby certify that I have served all counsel in this action with a copy of the foregoing pleading by causing a copy of the same to be mailed by United States mail, postage prepaid, to the following address(es):

PLEADING:

Final Brief of Appellant/Respondent
Final Respondent's Brief of Appellant/Respondent
Reply Brief of Appellant/Respondent

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Sworn to and subscribed before me
this 12th day of June, 2013

Ashley Coleman

Notary in and for South Carolina

My Commission Expires: 06/04/2022

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