IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

RECEIVED
MAR 3 1 2014
SC Court of Appeals

Trial Case Number 2011CP2301149

Appellate Case No. 2013-000416

Patricia C. McLean, as Personal Representative of the Estate of William Eugene Connor, ... Respondent,

v.

Branch Banking and Trust Company and Aurelia Connor, ... Defendants,

of whom Aurelia Connor is the Appellant.

FINAL AMENDED BRIEF OF APPELLANT

Robert L. Waldrep, Jr. (S.C. Bar #5773)
Robert L. Waldrep, Jr., P.A.
116 West Whitner Street
Anderson, South Carolina 29624
(864)224-6341
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DENYING THE MOTION OF THE APPELLANT TO ALTER OR AMEND THE VERDICT OF DAMAGES OF $21,700.00 AGAINST APPELLANT IN FAVOR OF RESPONDENT BEFORE AND AFTER TRIAL WHEN THE RESPONDENT HAD EXECUTED A FULL RELEASE AND SETTLEMENT OF CLAIMS AGAINST A PREVIOUSLY DISMISSED CO-DEFENDANT FOR $7,500.00?

STATEMENT OF THE CASE

The Respondent, Patricia McLean, as personal representative of the estate of her father, W. E. Connor, brought an action against the Appellant, Aurelia Connor and Branch Banking and Trust Company (hereinafter referred to as BB&T) dated October 19, 2009, in the Court of Common Pleas in Greenville County, South Carolina under case number 2009-CP-23-8876.

The Respondent presented a First Cause of Action solely against the Defendant BB&T for breach of contract by the bank for violating the terms of a contract of safety deposit boxes leased by William Connor before his death October 20, 2006, for allowing the Appellant access to the deposit boxes (R. pp. 15-16). The Respondent presented a Second Cause of Action against the Defendant BB&T based upon the alleged negligence and gross negligence of the bank in allowing access to the safe deposit boxes to the Appellant and allowing the removal of personal property of William Connor (R. p. 16). The Respondent presented a Third Cause of Action against the Appellant alleging she removed and converted specific identifiable funds

and personal property of W.E. Connor and failed in an obligation to deliver such property to the Respondent (R. p. 17).

Appellant admitted only that she searched the two deposit boxes with the permission of Defendant BB&T employees and took into her possession a gold Parker High School class ring (R. pp. 38, lines 24-25; 38, lines 1-6).

The Respondent's Complaint prayed for judgment against both BB&T and Appellant for actual and punitive damages based upon the contractual and tortious conduct of BB&T and the Appellant (R. p. 5).

The parties dismissed the action pursuant to Rule 40(J) by Order dated September 9, 2010 (R. pp. 1-2) , and restored said action by Consent Order dated February 15, 2011, under case number 2011-CP-23-1149 (R. pp. 3-4).

On December 2, 2011, BB&T settled all claims against it with the Respondent and entered into a Consent Order of Dismissal of BB&T which was filed on December 29, 2011 (R. pp. 5-7). The Respondent executed a general release with Defendant BB&T in which Respondent accepted $7,500.00 in exchange for all claims against BB&T arising from the facts alleged by Plaintiff in this action (Release, pp. 1-3). The terms of settlement and dismissal were not made available to the Appellant at that time.

The trial then proceeded February 27, 2012, solely against the Appellant and a verdict was rendered against Appellant for $21,700.00 actual damages (R. p. 12). The Appellant made a timely motion to the trial judge, the Honorable Edward Miller before verdict and after verdict to amend the judgment against the Appellant to reflect

a credit for the settlement against the $21,700.00 verdict granted by the jury in favor of the Respondent (R. pp. 21-22).

The trial judge denied the Motion to Amend the Verdict as shown by his Order dated July 12, 2012. The Order denying Appellant's motion recites in its second paragraph that, "the Respondent's Complaint and Amended Complaint in this action set forth only one Cause of Action against the Appellant: conversion." (R. pp. 8-10).

The terms of settlement and dismissal were never made available to the Appellant until the Appellant filed a Notice of Motions and Motion for Reconsideration and Motion to Produce on July 27, 2012 (R. pp. 23-24). It was only after the filing of said motion that Appellant received a copy of the Release and learned a payment was made to the Respondent in the amount of $7,500.00 by the Defendant BB&T (R. pp. 25-28). Appellant's Motion for Reconsideration was denied (R. p. 11).

An examination of the record of this case shows that no Amended Complaint was ever filed by the Respondent and in fact the Respondent entered into a confidential agreement with Defendant BB&T to accept $7,500.00 for a general release. As a result of the Appellant's Motion for Discovery, the Respondent produced the release dated December 2, 2011, reflecting a payment of $7,500.00. This release was provided to Appellant Connor after the trial of this case after a Motion to Produce was made by the Appellant Connor.

The Respondent's Complaint against Defendant BB&T and Appellant reflected a single allegation of damages against both BB&T and Appellant which

arose from the tortious conduct of both BB&T and Appellant as indicated by the Respondent's pleadings and prayer for judgment. There was no Amended Complaint which differentiated or distinguished damages between Defendant BB&T and Appellant. Acts of negligence on the part of the Defendant BB&T and the Appellant as alleged combined in a single quest for a single jury verdict. The Appellant's Motion to Amend the Verdict was denied at trial after the verdict and Appellant's Motion for Reconsideration of the Motion was denied by Order the trial judge on July 3, 2012.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT TO ALTER OR AMEND THE VERDICT OF DAMAGES OF $21,700.00 AGAINST APPELLANT IN FAVOR OF RESPONDENT BEFORE AND AFTER TRIAL WHEN THE RESPONDENT HAD EXECUTED A FULL RELEASE AND SETTLEMENT OF CLAIMS AGAINST A PREVIOUSLY DISMISSED CO-DEFENDANT FOR $7,500.00.

It appears from the record that the funds allegedly located in the safety deposit boxes were in an unknown amount and that the funds arose principally from the results of a fraudulent scheme which was perpetrated by W.E. Connor which converted $100,000.00 from the late Benjamin Furman Watkins. Testimony of the Respondent explains her knowledge of the contents of the safe deposit boxes of W.E. Connor (R. pp. 44, lines 12-25; 45, lines 1-14). Basically, the Respondent is admitting that she had no real knowledge of the amount any funds in the deposit boxes which she would have a right to possess. The Respondent claims damages in a

sum to be determined against both BB&T and Appellant. Damages were not allocated between these co-Defendants and the record indicates no effort by Respondent was made to distinguish the damage claims between BB&T and the Appellant.

The Appellant Connor was entitled to an alteration or amendment of the $21,700.00 verdict against the Appellant after evidence of a general release and settlement for $7,500.00 was paid to the Respondent by the Defendant BB&T. The Respondent filed a single Complaint against the Defendant BB&T and Appellant on October 19, 2009, which sets forth three causes of action against the Defendant BB&T and Appellant as follows: First Cause of Action solely against Defendant BB&T for breach of contract, Second Cause of Action solely against Defendant BB&T for negligence and gross negligence, and a Third Cause of Action solely against the Appellant for conversion.

The Complaint of the Respondent alleges that the acts of the Defendant BB&T allowed access to two safety deposit boxes to Appellant which enabled Appellant to remove and convert personal property and belongings of the Estate of W.E. Connor. As this action progressed, Defendant BB&T settled all claims against it as a Co-Defendant prior to the trial of this case for $7,500.00.

The trial judge's denial of the Appellant's motion to alter or amend is erroneous.

S.C. Code §15-38-50 (1976) establishes the effect of release, covenant not to sue, or not to enforce judgment by providing:

"When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1) it does not discharge any of the other tortfeasors from liability or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or covenant, or in the amount of the consideration paid for it, whichever is greater; and

2) it discharges the tortfeasor to whom it is given from all liability for contributions to any other tort feasor."

The language of S.C. Code §15-38-50 applies to the facts of this case although the order denying Appellant's motion opines that the collateral source rule precludes the reduction of the verdict amount because of compensation from a source wholly independent from the wrongdoer.

The Complaint against the Defendant BB&T and the Appellant alleges a course of action by the bank breaching a contract and negligently allowing access to the deposit boxes the Appellant is then charged with an act of conversion. In this case, the first act of BB&T Company was inextricably connected to the Appellant's ability to allegedly take property from the boxes. The collateral source rule is explicit in requiring that the compensation (in this case settlement funds) is derived from a wholly independent source according to the pleadings the actions of the bank and the actions of Appellant combined to create a single damage to the Respondent.

The Respondent appears to argue that the S.C. Code §15-38-50 would not apply if the Respondent has proceeded against two or more defendants on different theories. The Appellant asserts that the focus of S.C. Code §15-38-50 is on the relationship existing between tort feasors rather than the manner in which the tort feasors have been held liable to an injured claimant. In *Puller vs. Puller*, 380 Pa. 219,

110 A.2d 175 (Pa. 1955), the Supreme Court of Pennsylvania observed that, "...contribution is not a recovery for the tort but the enforcement of an equitable duty to share liability for the wrong done." Thus a tort feasor's right to receive contribution from a joint tort feasor derives not from his liability to the claimant, but rather from the equitable principle that once the joint liability of several tort feasors has been determined, it would be unfair to impose the financial burden of plaintiff's loss on one tort feasor to the exclusion of the other. It matters not on which theory a tort feasor has been held responsible for the tort committed against the plaintiff. So long as the party seeking contributions has paid in excess of his or her share of liability, it would be inequitable under the act to deny that party's right to contribution from a second tort feasor who also contributed to the plaintiff's injury id. at 238, 513 at 407.

Most recently in the case of *Sandra C. Smith vs. Tracy E. Widner,* et. al., 724 S.E.2d 188 (S.C. App. 2012), the Respondent Smith filed complaint against several defendants for civil conspiracy, conversion, slander, and fraud and made a separate claim against the Defendant, Citistreet, for civil conspiracy, conversion, slander, and negligence. At the beginning of trial, the Respondent Smith settled with Citistreet for $35,410.38. At the conclusion of trial, the jury found in favor of Smith for the same amount, $35,410.38. Widener and Currie made a motion that the damages be setoff by the amount of settlement between Citistreet and Smith. The trial court denied the motion for setoff. The S. C. Court of Appeals cited S.C. Code §15-38-50(1) (2005) and *Hawkins vs. Pathology Associates of Greenville, P.A.*, 330 SC 92, 113, 498 S.E.2d 395, 407 (Ct.App. 1998) holding that, "A settlement by a joint tortfeasor

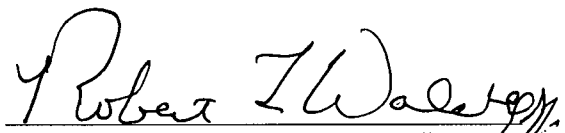
'reduces the claim against the others to the extent of any amount stipulated by the release or the covenant.' S.C. Code Ann. §15-38-50(1)(2005). Therefore, before entering judgment on a jury verdict, the court must reduce the amount of the verdict to account for any funds previously paid by a settling defendant, so long as the settlement funds were paid to compensate the same plaintiff on a claim for the same injury. *Hawkins*, 330 S.C. 113, 498 SE2d at 406-407. When the settlement is for the same injury, the nonsettling defendant's right to a setoff arises by operation of law. *Ellis vs. Oliver,* 335 S.C. 106 112, 515 S.E.2d 268, 271-72 (Ct.App. 1999). Under this circumstance, [s]ection 15-38-50 grants the court no discretion... in applying a set-off." 335 S.C. at 113, 515 S.E. 2d at 272; see also *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 210, 662 S.E.2d 444, 451 (Ct.App. 2008)."

The Appellant contends that the $7,500.00 settlement payment is a sum paid by the Defendant BB&T Company to be credited against any sum (in this case $21,700.00) which the Plaintiff may be entitled to by verdict. The fact that different theories were used by Respondent in her pleadings is not of consequence. The pleadings and the record show a single damage to the Respondent: that personal property was removed or allowed to be removed.

CONCLUSION

The Appellant contends that the criterion for setoff has been established and confirmed by the $7,500.00 settlement paid to Respondent for the same damages caused by the Appellant and BB&T Company and therefore by operation of law under §15-38-50(1) and applicable case law as cited the setoff of $7,500.00 paid by the Co-Defendant BB&T should be applied to the $21,700.00 verdict.

Respectfully submitted,



Robert L. Waldrep, Jr. (SC Bar #5773)
Robert L. Waldrep, Jr., P.A.
116 West Whitner Street
Anderson, South Carolina 29624
(864) 224-6341 Telephone
(864) 226-1852 Facsimile

Attorney for Appellant

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Trial Case Number 2011CP2301149

Appellate Case No. 2013-000416

Patricia C. McLean, as Personal Representative of the Estate of William Eugene Connor, ... Respondent,

v.

Branch Banking and Trust Company and Aurelia Connor, ... Defendants,

of whom Aurelia Connor is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Amended Brief of Appellant complies with Rule 211(b), SCACR.

March 27, 2014

Robert L. Waldrep, Jr. (S.C. Bar #5773)
Robert L. Waldrep, Jr., P.A.
116 West Whitner Street
Anderson, South Carolina 29624
(864)224-6341
Attorney for Appellant

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge
Trial Case Number 2011CP2301149

Appellate Case No. 2013-000416

Patricia C. McLean, as Personal Representative of the Estate of William Eugene Connor, — Respondent,

v.

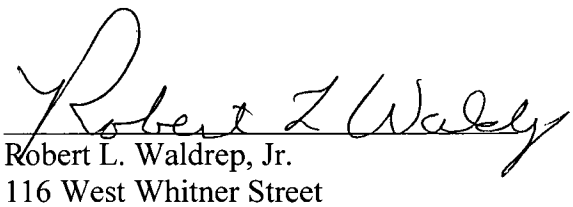
Branch Banking and Trust Company and Aurelia Connor, — Defendants,

of whom Aurelia Connor is the Appellant.

PROOF OF SERVICE

I certify that I have served the FINAL AMENDED BRIEF OF APPELLANT, RECORD ON APPEAL, AND CERTIFICATE OF COUNSEL on Patricia C. McLean, as Personal Representative of the Estate of William Eugene Connor, by depositing a copy of it in the United States Mail, postage prepaid, on March 27, 2014, addressed to Respondent's attorney of record, Clayton L. Jennings, Esquire, 1151 East Washington Street, Greenville, South Carolina 29601.

March 27, 2014.



Robert L. Waldrep, Jr.
116 West Whitner Street
Anderson, South Carolina 29624
(864) 224-6341 Telephone
(864) 226-1852 Facsimile
Attorney for Appellant