THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2018-001849
Civil Case No. 2016-CP-40-05857

Joshua Steven Stone, Respondent,

v.

George Hunter McMaster, Appellant.

INITIAL REPLY BRIEF OF APPELLANT

June 3, 2019

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STANDARD OF REVIEW

On appeal from a case tried before a jury in an action at law, the appellate court only has the authority to correct errors of law. *Townes Assocs., Ltd. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976). Thus, the jury's factual findings will not be disturbed "unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." *Id.; see, e.g. Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011); *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 629 S.E. 2d 653 (2006).

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN FAILING TO SPECIFY REASONS AND OR RATIONALE FOR DENIAL OF POST TRIAL MOTIONS, THUS DENYING EFFECTIVE APPELLATE REVIEW.

2. WHETHER THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE GUILTY PLEA IN THE CRIMINAL PROCEEDING, THUS NOT ONLY ALLOWING IMPERMISSIBLE HEARSAY, BUT ALSO TAINTING MCMASTER'S OPPORTUNITY FOR A FAIR CIVIL TRIAL.

3. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

4. WHETHER THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL ABSOLUTE.

5. WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL NISI REMITTITUR

STATEMENT OF THE CASE

This is an appeal from the circuit court jury trial verdict and the denial of post-trial motions in this case. This matter was commenced by the filing of a Summons and Complaint on September 29, 2016, alleging causes of action for sexual assault, sexual battery and intentional infliction of emotional distress, requesting actual and punitive damages by jury trial. Appellant hereinafter McMaster answered and *inter alia*, denied liability as alleged, and alleged no damages. The matter proceeded to and was tried before a jury on August 27-28, 2017, with the jury rendering a verdict in the amount of $50,000 actual damages and $50,000 punitive damages on August 28, 2017, and that verdict being filed on August 29, 2017. McMaster filed his Motion for JNOV, New Trial Absolute, and New Trial Nisi Remittitur on September 6, 2017, the same being denied by the trial

court on October 5, 2017. The Notice of Appeal was filed October 15, 2017 with the trial court and on October 16, 2017 with this Court.

STATEMENT OF FACTS

Respondent, Stone, brought this action alleging personal injuries arising out of an incident in Columbia, South Carolina on or about May 13, 2014 claiming by the pleadings that Appellant, McMaster, committed a sexual assault and battery on him and that those same acts constituted the intentional infliction of extreme emotional distress.

At trial, over McMaster's objection, the Stone was allowed to read the pleadings to the jury. McMaster also moved for the exclusion of McMaster's guilty plea to assault and battery third and any reference to the same in any testimony, based on *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E. 2d 224 (2008). The trial court overruled McMaster's objections. As part of Stone's case, the trial court also allowed the reading of McMaster's deposition into evidence, over McMaster's objections, but removed the transcript of that guilty plea from submission to the jury although the court allowed testimony from the deposition as to the plea and related criminal prosecution. The trial court also overruled McMaster's specific objections as to hearsay concerning the guilty plea, ruling that *Zurcher, supra*, did not apply. McMaster did not appear nor testify.

At trial Stone testified to the incident, his waiting about two (2) hours after the incident attempting to determine what had happened and smoking a cigarette, then his call to his mother, then his call to the police, and his reactions thereafter.

The incident in question took place in a room just off the dining room, not the bathroom as erroneously stated in Respondent's Statement of Facts (Respondent's Initial Brief, pg, 3, l. 19 and Tr. pp. 76, l. 6- pp. 77, l. 6). Stone's expert testified that Stone suffered from PTSD due to the incident and recommended treatment of once a week counseling for a six (6) month period. She also testified that some of his effects were permanent. The only other damages testimony was from Stone as to sleeplessness and anxiety, and from his mother as to his seeming to react differently in some situations. A defense witness, *inter alia*, countered the claims of a change in behavior.

The trial court originally intended to instruct the jury on sexual assault and sexual battery, however, after McMaster's objection to the same as not being causes of action under South Carolina law the trial court instructed on assault, battery and intentional infliction of emotional distress. After deliberation the jury sent a question to the court asking about Stone's attorney's fees and costs. The court instructed the jury that it could not answer the question. The jury returned a verdict for Stone in the amount of $50,000 actual damages and $50,000 punitive damages.

ARGUMENTS

Appellant would argue that from the moment the trial court allowed evidence of the criminal plea, the civil trial was tainted. Further, Appellant would argue that there was never any testimony of fear of bodily injury contemporaneous with the original incident, thus no assault, no testimony of any bodily injury at or near the time of the alleged battery, therefore no battery, and no testimony sufficient

to constitute the tort of intentional infliction of extreme emotional distress, such that, but for the allowing of the objected to reading of the pleadings, which included an impermissible reference to the guilty plea and criminal matter, the introduction over objection of certain portions of the deposition of Appellant, and the introduction over objection of the criminal prosecution, the evidence was insufficient to go to the jury or to support the verdict. Even if the evidence was sufficient to support a verdict, the damages awarded are not supported by the evidence, and a new trial should have been granted or at least a nisi remitter ordered as to the damages.

1. THE TRIAL COURT ERRED IN FAILING TO SPECIFY REASONS AND OR RATIONALE FOR DENIAL OF POST TRIAL MOTIONS, THUS DENYING EFFECTIVE APPELLATE REVIEW.

Respondent has argued in his Initial Brief that, contrary to Appellant's argument that the Court should reverse and remand the denial of Appellant's post-trial motions on the basis that the Order lacks specificity, that under Rule 52, SCRCP and *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014) that no such specificity is required. Appellant maintains that the analysis and application of Rule 52, SCRCP as contained within *Woodson*, *supra*, is inappropriate. In *Woodson*, *supra*, prospective buyers sued a seller and his agents after they believed they had a valid agreement to purchase real estate and the seller sold to another purchaser. The seller in that case filed for and was granted a motion for summary judgment as to the claims. The issue presented which is relevant to this matter concerned whether there was an error by the Court of Appeals in

affirming the Circuit Court on the basis that there was an insufficient record for review. In *Woodson, supra,* the Court specifically cited to Rule 52, SCRCP stating "However, Rule 52, SCRCP, provides that findings of fact and conclusions of law are unnecessary on decisions on motions under Rule 12 or 56..." thus such findings or conclusions are not required for Appellate review, and for this reason we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment. Nevertheless, here, the circuit court's reasoning is clear from the order, as is plainly referenced the evidence the circuit court considered in making its decision. *Woodson, supra*, 406 S.C. at 527, 753 S.E.2d at 433. *Woodson, supra*, does not support Respondent's analysis since *Woodson, supra*, makes it clear that there must be some reference in the order to the facts upon which the decision is based, and in that case, since it was a summary judgment order, and there was sufficient evidence before the court on that motion, that denial of review on that basis and the failure to provide a transcript was inappropriate. Appellant would argue that under Rule 52, SCRCP, as the motion was heard by the trial court, while specific findings of fact and conclusions of law may not be required, there must be some reference to the facts stated in the order upon which the order is based, and the Order denying post-trial motions filed October 5, 2018 contains no such reference.

Respondent next attempts to distinguish and differentiate *Sorin Equipment Co., Inc. v. The Firm, Inc.*, 323 S.C. 359, 474 S.E.2d 819 (Ct.App.1996) and *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25(Ct.App.2005) on Appellant's proposition

and argument that a trial court order must contain specific evidentiary and legal support.

Respondent misses the point of *Sorin, supra*, and *Howe, supra*, in that there must be some explanation of a trial court ruling in the order whether it be to grant or deny a motion in order for the same to be upheld. In *Sorin, supra*, the explanation was found in the erroneous ruling as to the measure of damages. *Sorin*, 323 S.C. at 364. In *Howe, supra*, Court stated, "...In contrast, we are unable to glean and "stated grounds" in this case from either the order denying reconsideration or the record on appeal as to why the trial judge rejected Doe's arguments concerning his breach of fiduciary duty claim. At this point, we can only speculate about the reason the trial judge determined Doe could not proceed on this claim. Despite a number of possible explanations as to why the trial judge held as he did, we are reluctant to pass judgment on his ruling based on mere conjecture as to how he reached his decision" *Howe, supra*, 367 S.C. at 448-449, 626 S.E.2d at 35. The Court then sent this matter back to the trial court for an order requiring the identification of facts and legal analysis on which the trial court relied.

For the same reasons as stated in *Sorin, supra*, and *Howe, supra*, Appellant maintains that the trial court denial of the post-trial motions should be reversed and remanded.

2. THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE THE GUILTY PLEA IN THE CRIMINAL PROCEEDING, THUS NOT ONLY ALLOWING IMPERMISSIBLE HEARSAY, BUT ALSO TAINTING MCMASTER'S OPPORTUNITY FOR A FAIR CIVIL TRIAL.

Appellant has argued that it was error to allow the reading of the pleadings

and allowing the publication of Appellant's deposition because the same contained and related directly to the guilty plea of assault and battery which constituted inadmissible hearsay under Rule 803(22), SCRE, and should have been excluded under *Zurcher v. Bilton*, 379, S.C. 132, 666, S.E.2d, 224 (2008).

While Respondent cites to rules and case law, state and federal, prior to *Zurcher, supra*, Respondent does not deal directly with nor cite any post *Zurcher* case nor rule contrary to *Zurcher's* admonition as to a misdemeanor plea as to being inadmissible hearsay. The reading of the pleadings in this action put before the jury claim of sexual assault and battery, such claims not being causes of action under South Carolina law, and having to be corrected by the trial court's instructions as to the correct causes of action. Thus, while Rule 43, SCRCP may allow such a reading, it should not have since those pleadings suggested causes of action that do not exist under S.C. law. As to the deposition being read, the same made reference to the criminal matter and outcome and was objected to timely. Respondent argues that under Rule 32(a)(2), SCRCP, such a reading to the jury was proper, but hearsay is allowable in deposition testimony, and objections to hearsay during the deposition are not necessary and are preserved under Rule 30(j)(2), SCRCP.

Appellant was clearly harmed by the admission of a criminal plea as argued in the Initial Brief and cannot imagine a more prejudicial situation in a civil trial than having a jury informed not only by the pleading containing the references to causes of action that do not exist, but also inadmissible hearsay material by way of deposition by the repeated references to a criminal proceeding to a jury, in a civil

case, subsequent to a guilty plea that is not admissible into evidence. For these reasons Appellant requests a reversal on the basis of the allowance into evidence of the guilty plea to the Magistrate Court offense by way of the reading of those pleadings and charges and the deposition testimony.

3. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

In response to Appellant's argument as to but for the pleadings alleging torts that do not exist and the guilty plea and the deposition testimony concerning the same, there would not have been evidence from which a reasonable juror could have determined there was an actionable tort, the Respondent contends differently.

Respondent also argues in their Initial Brief that the incident in question took place in a bathroom. (Respondent's Brief Page 14) This is clearly an inadvertent error on the part of Respondent in their brief as in the very next line, which is accurate, the Brief argues that the incident took place in a secluded hallway (Respondent's Brief, Page 14, Tr. pp. 76, l. 6- pp. 77, l. 6).

As argued in Appellant's Initial Brief, but for the reading of pleadings concerning causes of action that do not exist under S.C. law, and testimony concerning the guilty plea and documentation concerning the same all admitted over the objection of Appellant, Appellant argues that the coloring of the jury's impressions by these errors, in addition to the suggestions of improper influence, based upon no facts, all but guaranteed a jury verdict for Respondent.

Based upon the foregoing, Appellant requests that this Court reverse the denial of his motion not withstanding the verdict, set aside the verdict for

Respondent and grant judgment in favor of Appellant.

4. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL ABSOLUTE.

Appellant will not repeat the arguments made in his Initial Brief other than to point out that while Respondent argues that denial of a directed verdict does not necessarily mean that no relief is available under the thirteenth juror doctrine. *Folkens v. Hunt*, 300 S.C. 251, 254, 387, S.E.265, 267 (1990). Adding to that as argued in Appellant's Initial Brief that there was never any testimony as to any fear of bodily injury thus there could have been no assault. The Respondent himself admitted to the entire incident upon which his claims are based as being consistent with a person readjusting suspenders (Tr. pp. 92, l. 2 – 23), and nothing that would impose liability.

Finally, the excessiveness of the verdict itself makes clear Appellant's entitlement to relief under the thirteenth juror doctrine after the erroneous allowance of the reading of the pleadings and the deposition testimony.

Respondent testified that after the incident in question, he completed his education, continued advancing in his career, had only 4 counseling sessions at the behest of his attorney, then decided to stop, maintained an active social life, and ultimately moved to Tennessee (Tr. pp. 86, l. 3 -87, l. 15). Respondent testified to counseling where he admitted to traumatic events prior to the incident in question, (Tr. pp. 90-l. 2- pg. 91, l. 7). He even admitted to thinking about just how much money this incident would be worth him down the road (Tr. pg. 91, l. 8-11). Respondent argues inaccurately that his expert testified to "...Stone's symptoms of

PTSD and anxiety would continue indefinitely" (Respondent's Initial Brief p. 23, l. 21-22) her actual testimony was that it may have an influence, and it can affect a person. (Tr. pp. 102, l. 13- 103, l. 2). When asked about how several prior traumatic events in Respondent's life and if she could differentiate the origin of her diagnosis as between prior events and the incident in question, she was unable to do so since Stone never returned (Tr. 105, l. 16- 107, l. 17). In short, the jury was presented with the bare bones of a damages claim, with Respondent's immediate thoughts of financial recovery, and insufficient evidence to enable to jury to determine a damage amount with reasonable certainty without prejudice. For these reasons and in the interest of justice, Appellant requests the Court utilize the thirteenth juror doctrine to order a new trial absolute.

5. THE TRIAL COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL NISI REMITTITUR.

Under the law as presented in Appellant's Initial Brief, Appellant would submit that in the face of the prior cited direct financial damages of at best $3600, the Respondent's failure to take any action to ameliorate the damages, if any, and the inadequacy of the evidence presented to support the verdict presented, Appellant would submit as argued in his Initial Brief and in the above section, that the analysis of *Becker v. Wal-Mart Stores, Inc.*, 339 S.C. 629, 529 S.E.2d 758(Ct.App.2000) mandates that Appellant is entitled to this Court's correction of the error of the trial court in denying a reduction in the verdict amount based on the low direct dollar damages and the intangible nature of the damages claimed, and to

grant a new trial nisi remittitur on the grounds set forth in the Initial Brief.

CONCLUSION

For the reasons set forth herein and based on the applicable principles of law, McMaster respectfully requests the court grant its Motion for Judgment Not Withstanding the Verdict, set aside the jury verdict, and render judgment for McMaster. In the alternative, Stone requests that his Motion for New Trial Absolute based on the Thirteenth Juror Doctrine or for New Trial Nisi Remittitur be granted for the compelling reasons shown herein and within and subsequent memorandum appropriately submitted to the Court prior to or at the hearing set in this matter.

RESPECTFULLY SUBMITTED,

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June 3, 2019

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Clifton B. Newman, Circuit Court Judge

Appellate Case No. 2018-001849
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Joshua Steven Stone, Respondent,

v.

George Hunter McMaster, Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing **Initial Reply Brief of Appellant** by depositing a copy of the same on June 3, 2019 in the United States mail, postage prepaid, addressed as follows:

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June 3, 2019

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals of South Carolina
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Columbia, South Carolina 29201

RE: Joshua Stone v. George McMaster
Case No.: 2016-CP-40-05857
Appellate Case No.: 2018-001849

Dear Ms. Kitchings,

Enclosed herewith for filing in the above-referenced case are an original and two (2) copies of the **Initial Reply Brief of Appellant** and **Designation of Matter to Be Included in Record on Appeal,** along with proofs of service of the same. I have also included additional copies of each and ask that they be stamped as filed and returned.

Please file these documents and return the file-stamped copies to my office's courier.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Brian Dumas

BD/tlr

Enclosures

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