

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-00462

Robert W. Edwards, Jr., ... Appellant,

v.

Linda N. Jordan, ... Respondent.

BRIEF OF RESPONDENT

Raymond A. Tate, Jr.
Doyle, Tate & McDade, P.A.
Post Office Box 2125
Anderson, South Carolina 29622
(864) 224-7111
Attorney for Respondent

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STATEMENT OF ISSUE ON APPEAL

1. THE TRIAL COURT WAS CORRECT IN CHARGING COMPARATIVE NEGLIGENCE IN THE INSTANT CASE WHEN IT WAS WELL PLED AND THERE WAS EVIDENCE SUPPORTING THE CHARGE.
2. THE TRIAL COURT WAS CORRECT IN DENYING A NEW TRIAL NISI ADDITUR AND/OR NEW TRIAL ABSOLUTE BECAUSE IT WAS A VERDICT WELL WITHIN THE PROVINCE OF THE JURY.

STATEMENT OF THE CASE

This matter came to trial before the Honorable J. Derham Cole on October 3rd and 4th, 2011. It was filed on January 27, 2010, when the Appellant claiming negligence and gross negligence from personal injuries he sustained while working on the Respondent's property. Respondent answered on February 10, 2010, raising the defenses of general denial, comparative negligence, and assumption of the risk along with S.C.R.C.P. 12(b)6, the latter two later stricken by the court.

This case was tried to a jury verdict on October 4, 2011, with a verdict for the Appellant in the amount of \$1,919.19 which represented sixty-five percent of the total verdict of \$2,952.60. The Appellant asked for ten (10) days to make his written exceptions and/or objections to which the Respondent had no objection and thereafter the Appellant made a Motion for Judgement Notwithstanding the Verdict, A New Trial Nisi

Additur and/or New Trial Absolute. Judge Cole denied his motion by Order dated March 26, 2012. This appeal is now before this Honorable Court.

STATEMENT OF FACTS

This is a broken nose case. The Appellant did yard work for the Respondent and/or her live-in boyfriend at their residence on Woodburn Road in Spartanburg. On August 15, 2008 Appellant was performing home maintenance on Respondent's property when he was struck by a board after stepping on the end of the board and causing it to come up and hit him in the nose. He was carrying a 4 gallon tank on his back containing material to spray for vegetation (R. pp. 92-94). Appellant had done yard maintenance for 6 to 8 months and was very familiar with the yard and the decking that was situated in the yard to the extent that it was very weathered. The Appellant was later treated for his broken nose and deviated septum, but continued working at Mrs. Jordan's home for the next three (3) years at least. All of the facts and issues were before the jury, in fact, all of the facts and evidence came during the Appellant's case in chief either by direct examination or of course, cross examination by counsel for the Respondent. Counsel for the Appellant called all the witnesses and showed enlarged photographs of the deck, yard, and also read from a witness (Bobby Pearson) deposition or parts of his deposition including parts designated by counsel for the Respondent for trial. Having exhausted the witness list including the Respondent, the Respondent of course did not have any witnesses to call

any witnesses to call other than anyone who would be cumulative or repetitive and, therefore, did not have any witnesses. Counsel for Appellant called Nicha Jordan, the Respondent, first. In fact, the Respondent was the first person called as a witness by the Appellant.

Respondent testified that he had been working in the yard for approximately 6 months before this accident (R. p. 46, Lines 16-18) and that he came on a weekly basis and maintained the lawn and that he walked on the deck as well as she and her boyfriend did (R. p.48, Lines 19-22). She did not know how long the deck had been on the property because it was there when she had bought it (along with her deceased husband)(R. p. 51, Lines 4-8). Ms. Jordan also stated several times that she was unaware that Appellant would step on the end of a plank causing it to come up and hit him in the face as he did (R. pp. 49-52). Respondent also pointed out the abnormal stress that was put on the board by stepping on the end of it with a four (4) gallon tank on his back (R. p. 50, Lines 8-14). Ms. Jordan stated in general that she thought the deck was in good condition, but certainly weathered (R. p. 55, Lines 9-13). Respondent also identified several photographs that were enlarged that the Appellant presented including any that the plank was rotting and the nails were rusting (R. pp. 52-56). Ms. Jordan also stated that she certainly was not expecting him to step on the edge of the plank that was hanging on (R. p. 52, Lines 21-23). On cross-examination, the Respondent stated Appellant had never refused to walk

on any part of the deck because it was dangerous and also affirmed that the photographs looked just like the deck did on the day the Appellant was walking on it.

Respondent stated that she walked down the middle and on both sides where it was weathered and nothing was hidden (R. pp. 68-70). Respondent also stated that no one had ever been hit by a board in the mouth, nose or anything like that before the Appellant was hit (R. p. 69, Line 22-24). The Appellant was asked if he was wearing anything at the time of the accident (protective gear) besides sun glasses and he replied, "No" (R. p. 110, Lines 18-25). Respondent also acknowledge one more time that that was not the path she would have taken to get on the deck by stepping on side of the board (R. p.70, Lines 9-13). The Appellant testified that he had been working there six (6) to eight (8) months every week weather permitting (R. pp. 91-92). He told the jury that he was in no way disabled and went to work everyday twelve (12) to fourteen (14) hours a day, six(6) or seven (7) days a week. (R. pp. 97-98). The Appellant told his attorney that he did not walk on parts of the deck anymore apparently because it was too dangerous (R. p. 104, Lines 4-8). He acknowledged that he told counsel for Respondent that he still walked on it on March 15th during his deposition and he still walked on it but, stated at trial that after March 15th he did not walk on that deck anymore (R. pp. 106-107, Line 25, Lines 1-8). Appellant acknowledged that he had walked on the deck for three (3) years after the accident and never had an accident (R. p. 107, Lines 22-24). He walked on it "a thousand

times”, but never had an accident except for August 15, 2008 and there was no reason for Mrs. Jordan to know any more about the condition of the deck than he knew (R. p. 108, Lines 17-24). Finally, the Appellant was asked if there was any particular reason why the Respondent, Nicha Jordan, would know why the board was not secured and he said, “No.....” (R. p. 50, Lines 7-14) .

The Appellant puts a lot of weight on that fact that when asked if the Respondent blamed the Appellant, she replied “No” and uses that response to negate the defense of comparative negligence. While of course the jury can believe all or part of any witnesses’ testimony, it is also true that the words should be taken in context. Counsel for the Appellant never asked her if the comparative negligence allegations she had in her Complaint should have been stricken or removed or should not have been pled, but it was apparently taken in a way that the counsel was asking in a punitive manner was Appellant at fault. As stated above Respondent did not say she would have taken that route and also stated that he stepped on the end of the plank (R. p. 50, Lines 7-14). The Respondent stated in an answer to a question, “ *Just to clarify that though because we are talking about a board that is probably five (5) feet across and they would be nailed in the end. We would walk down the center of the walkway where as my understanding is that Bobby stepped on the very edge and with his weight in carrying equipment that would be kind of abnormal stress on any kind of board or plank if you are just stepping on the end of it*

like that” (R. p. 50, Lines 8-14). Again, while the Respondent does not obviously have any sense of betrayal or disloyalties since she is not seeking any monetary award or placing any “fault” or “blame” on the Appellant, it was obviously not meant in any legal context but simply good manners and was not blaming him for his negligence or carelessness and no way to negate comparative negligence.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN CHARGING COMPARATIVE NEGLIGENCE IN THE INSTANT CASE WHEN IT WAS WELL PLEAD AND THERE WAS EVIDENCE SUPPORTING THE CHARGE.

Comparative negligence is the law in South Carolina. Nelson vs. Concrete Supply Company, 303 S.C. 243, 399 S.E. 2nd 783 (1991). *“The jury must apportion fault between the Appellant in a negligence action. The Appellant may recover damages when his/her negligence is not greater than that of the Respondent. The Appellant’s damages, however, are reduced in proportion to the amount of his/her negligence.”* *Id.* Also, the trial court can only be reversed by the Appellate Court when there is no evidence to support the ruling below. Brown vs. Stewart, 348 S.C. 33, 557 S.E. 2nd 676 (S.C. App, 2001). The Appellant in his case in chief spent most of the time showing Respondent photographs and a video of her deck that she testified was in the same condition as when the photographs and video of her deck was shown in the photographs

and video as when the Appellant stepped on the end of the board and the board hit him in the nose. Respondent testified that the deck looked weathered, but she thought it was in good condition and, after having worked approximately six (6) to eight (8) months, the Appellant testified that he was familiar with the deck. Respondent testified that there was nothing hidden in the photographs or otherwise and everything was open and obvious.

The level of care owed to a person on landowner's property is dependent upon the class of the person present. Larimore vs. Carolina Power and Light, 340 S.C. 438, 531 S.E. 2nd 535 (S.C. App, 2000). The degree of care owed with regard to an open and obvious nature is commensurate with the circumstances involved, including the possessor's prior knowledge of the defects as a capacity of the invitee. Given his familiarity with the deck and the yard, his testimony commensurate with that and there is no reason to believe that comparative negligence should not have been charged as reflected so well by the jury's deliberation and verdict.

Arguments made by counsel are not evidence. South Carolina Department of Transportation vs. Thompson, 357 S.C 101, 590 S.E. 2nd 511 (S.C. App. 2003) While Appellant makes a reference to Respondent's counsel stating something during his closing obviously is well settled, and is not evidence and the jury cannot consider it as such. However, the Appellant's counsel also stated several times that it was "an accident about to happen" (R. p. 124, Lines 15-16). "Yesterday I said this day was an accident about to happen, still an accident about to happen....."(R. p. 124, Lines 15-16). If it was an accident waiting to happen, the Appellant was or should have been well aware of it as he

stated that he walked on it “a thousand times” and there was no reason for the Respondent to know anymore about it than he did. He was negligent in walking on the deck, certainly by stepping on the end of a plank. Of course, he stepped on the end of a board which was certainly not the proper way and rather careless to stand or approach a weathered deck that is “an accident about to happen” as per the photographs and/or video that the Appellant showed. While obviously the argument was not evidence, the Appellant cited the undersigned’s words and simply obvious that if it was an accident about to happen, the Appellant would know that either walking on the deck and certainly stepping on the end of a plank.

The determination of respective degrees of negligence attributable to the Appellant and Respondent presents a question of fact for the jury, at least with conflicting inferences which may be drawn Berberich vs. Jack, 392 S.C. 278, 709 S.E. 2nd 607 (2011). Berberich is only to say that the court adopted a modified version of comparative negligence known as the “less than or equal to” approach, by which the Appellant in the negligence action could recover damages in his/her negligence is 50% or as, stated another way, if the Appellant’s negligence does not exceed 50%. Singleton vs. Sherer, 377 SC SE 185, 205, 659 S.E. 2nd 196, 206 (Ct. App. 2008). “The determination of respective degrees of negligence attributable to the Appellant and the Respondent presents a question of fact for the jury, at least when conflicting inferences may be

drawn.” Hurd vs. Williamsburg County, 363 S. C. 421, 429-611 S.E. 2nd 488, 492 (2005). As

it has been said many times before, when there is any testimony to go to jury on issue involved or where more than one inference can be drawn from testimony, case must be submitted to jury even if witnesses for one party contradict each other or a witness has a conflicting statement. Collum vs. Southern Ry. Company, 189, S. C. 336, 1 S.E. 2nd 234 S.C. (1939).

“Now you as finders of the fact and you as judges of credibility of each witness are permitted to believe as much or as little of what a witness is testified to as you deem it appropriate and therefore you may believe everything that a witness testified to, may choose to believe none of it. You may believe one portion of a witness’ testimony and object some other portion of that same witnesses testimony. You may believe one witness as opposed to several or several as opposed to one or whatever your good judgment and common sense tells you is the most credible and believable testimony is the testimony you should accept and you should reject any testimony or other evidence you find not to be credible or believable” (R. p. 140-141).

In this case, the Appellant appears to seem to think the evidence of comparative negligence was rendered null because it was not submitted on direct by counsel for the Respondent. That evidence was already in and before the jury. The evidence about the weathered deck, photographs, video, the fact that the Appellant had walked on the

deck and yard for six (6) to eight (8) months weekly, there was no reason why the Respondent would know more about it than he did, the fact that he stepped on the end of the

board wearing merely sunglasses for protection. To call the client who has been the only witness ,probably called by the Respondent, again to reiterate what he just said, would have been cumulative at best and in this particular trial setting. The evidence was already in and before the jury. There was direct evidence, circumstantial evidence, demonstrative evidence provided by the Appellant direct evidence, of course through testimony and by direct and cross examination and to lengthen the trial simply to single out the issue of comparative negligence would only serve to contradict the general denial. *"Part of the function of presenting evidence at trial is to educate the finder of fact as to the surrounding circumstances and rise to the narrow issues raised. Sloan vs. Greenville County, 356 S.C. 531, 590 S.E. 2nd 338 (S.C. App 2003).* As said above, the jury or finder of fact had already heard the evidence and to rehear it would simply be redundant or cumulative at best, perhaps confusing. So it was when it went to the jury properly and after two and a half hours of deliberation, the verdict reflected such.

**II. THE TRIAL COURT WAS CORRECT IN DENYING A
NEW TRIAL NISI ADDITUR AND/OR NEW TRIAL
ABSOLUTE BECAUSE IT WAS A VERDICT WELL
WITHIN THE PROVINCE OF THE JURY.**

When a party moves for a new trial based on a challenge and the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards are actuated by passion, caprice or prejudice. *Waring vs. Johnson*, 341 S.C. 248, 533 S. E. 2nd 906 (S.C. App 2000). In the instant case, the jury was out for some two and a half hours very obvious that they thoroughly deliberated and the verdict was not the result of any passion, caprice or prejudice. Apparently, the verdict that was less than the Appellant wanted. Also, when the jury's verdict is inadequate or excessive the trial judge has the discretionary power to grant a New Trial Nisi, but compelling reasons must be given to testify evading the jury's province in this matter. Obviously, the trial court did not think that there was compelling reasons to invade the jury's province and did not do so. As noted in the outset, it is a broken nose case. Also, noted was that he had not missed any work and had continued to work six (6) or seven (7) days a week, twelve (12) to fourteen (14) hours a day. While that is very interesting and a positive manner and also the fact that he was certainly not rendered disabled at any time because of this broken nose. As stated above, the trial court did not see any compelling reasons to grant a *Nisi Additur* and also refused to order a judgment Notwithstanding the Verdict certainly at least in part because a *Motion for Summary Judgment Notwithstanding the Verdict (JNOV)* may be granted only if no reasonable jury could have reached the challenged verdict. *Brown vs. Stewart*, 348 S. C. 33, 557 S.E. 2nd 676 (S.C. App, 2001). Respondent would simply assert again that the jury deliberated for a

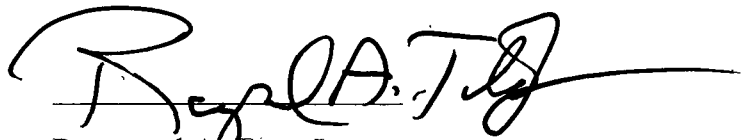
fairly long time in reaching this verdict. Certainly, the verdict did not result out of any passion, caprice, or prejudice and the jury reflected Spartanburg County very well in reaching this verdict.

CONCLUSION

In conclusion, the judge was correct in giving the issue of comparative negligence to the jury as there was more than ample evidence to substantiate that as was present in the direct, circumstantial and demonstrative evidence that was before them. Also, while the Appellant may think that verdict was low there is no evidence including the verdict that would in any way indicate that it was reached out of passion, caprice, or prejudice and certainly reached on the facts and evidence of the instant case. The jury obviously considered all the evidence before them in reaching this verdict with the detail verdict and the amount of time it took for them to reach it.

Respectfully submitted,

December 4, 2012

A handwritten signature in black ink, appearing to read "Ray A. Tate, Jr.", with a long horizontal flourish extending to the right.

Raymond A. Tate, Jr.
Doyle Tate & McDade, P.A.
Post Office Box 2125
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(864) 224-7111
Attorney for Respondent

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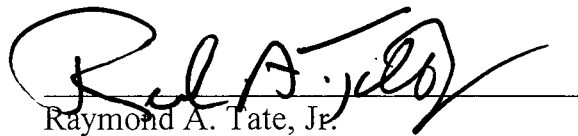
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b),
S.C.A.CR.

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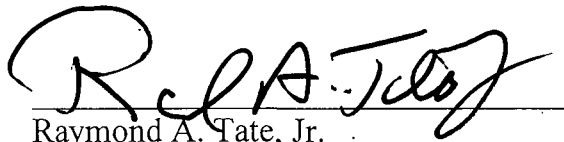
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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant on Robert W. Edwards, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on December 4, 2012, addressed to his attorney of record, William B. Darwin, Post Office Box 1897, Spartanburg, South Carolina 29304.

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