STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2019-000998

Cecil Rowe,.....Appellant,

v.

Family Health Centers, Inc.,.....Respondent.

AND

Rebecca Rowe,.....Appellant,

v.

Family Health Centers, Inc.,.....Respondent.

FINAL BRIEF OF APPELLANTS

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December 20, 2019

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STATEMENT OF THE ISSUES ON APPEAL

Was it an abuse of discretion for the trial court to consolidate the cases of Cecil Rowe v. Family Health Centers, Inc. and Rebecca Rowe v. Family Health Centers, Inc. for trial?

Did the cases of Cecil Rowe v. Family Health Centers, Inc. and Rebecca Rowe v. Family Health Centers, Inc. involve common questions of law and fact?

STATEMENT OF THE CASE

On September 13, 2017 Cecil Rowe filed an action against Family Health Centers, Inc. seeking damages for personal injuries suffered from an August 1, 2016 fall at the Family Health Center in Neeses, South Carolina. (Hearing Transcript; R. p. 79, lines 7-10). This incident occurred when the chair in which Mr. Rowe was sitting broke, causing him to fall onto the floor. (Cecil Rowe Compl. ¶ 8; R. p. 18, ¶ 8).

Also on September 13, 2017, Rebecca Rowe filed a separate action against Family Health Centers, Inc. seeking damages for personal injuries suffered from an incident on March 31, 2016 at the same Family Health Center in Neeses, South Carolina. (Rebecca Rowe Compl. ¶ 6; R. p. 28, ¶ 6). This incident occurred when the chair in which Mrs. Rowe was sitting suddenly slipped out from behind her as she stood up, causing her to fall onto the floor. (*Id.* at 7; R. p. 28, ¶ 7). Mrs. Rowe's primary contention was that the chair, which had hard plastic feet, created a dangerous condition when utilized on the hard tile floor of the waiting room.

Carolina Kwik Dry, LLC was originally named in both cases but was dismissed with prejudice prior to the trial of both matters. On October 30, 2017 Defendant, Family Health Centers moved to consolidate these actions. That motion was later withdrawn without prejudice and the parties agreed to consolidation of discovery in these two matters to save expenses. (Emails; R. pp. 194-196). Defendant again raised its motion to consolidate the cases for trial during a status

conference, and a hearing was held on May 8, 2019. Following the hearing, both parties submitted summaries of their arguments via email. (Emails; R. pp. 197-199). The court issued a Form 4 Order consolidating the cases for trial on May 15, 2019. (Order; R. pp. 3-4). Trial of the consolidated cases began on May 20, 2019 and a verdict was reached on May 21, 2019. (Verdict Form; R. pp. 10-12).

STANDARD OF REVIEW

"When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Rule 42(a), SCRCP. "The moving party has the burden of persuading the court that consolidation is desirable." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (S.C.App. 1993). A trial court's rulings on consolidation are reviewed subject to the abuse of discretion standard. *Id.*

ARGUMENT

A. THE CASES BROUGHT BY CECIL AND REBECCA ROWE SHOULD NOT HAVE BEEN CONSOLIDATED BECAUSE THEY DID NOT INVOLVE COMMON QUESTIONS OF FACT.

"Consolidation under Rule 42(a), SCRCP, may be ordered whenever actions involving a common question of law or fact are pending before the court." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (S.C.App.,1993). The existence of common questions of law and fact is a prerequisite for any consolidation. *Magnavox Co. v. APF Elecs., Inc.*, 496 F. Supp. 29, 32 (N.D. Ill. 1980). "[I]n resorting to the use of Rule 42(a) the trial judge should be most cautious . . . to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case." *Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir.

1966). "Where prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error." *Id.*

In support of its motion to consolidate, Respondent identified several factual grounds as a basis for consolidation. However, none of these grounds were actually questions fact common to the cases of Rebecca and Cecil Rowe. At the hearing, Respondent stated "the basis of the motion is that both of the cases involve the Family Health Center location, which is located on Norrie Road in Neeses, South Carolina." (Transcript 5:7-10; R. p. 79, lines 7-10.) Respondent further summarized the grounds for consolidation in a follow-up email to the court, identifying the following:

> 1. Both cases involve the same defendant – The Family Health Center; 2. Both cases involve the same witnesses for the Defendant . . .; 3. Both cases involve the same type of chair and both falls took place in the exact same spot - in front of the receptionist's desk; 4. Plaintiffs are husband and wife living in the same address and each has knowledge of the other's injury claim.

(Emails; R. p. 197). None of these grounds are common *questions of fact* that support consolidation.

First, the fact that these incidents happened at the same physical location does not itself create a common question of fact under Rule 42. If that logic held true, nearly every injury action currently pending at any particular supermarket, restaurant, or other physical location could be consolidated merely because the events happened at the same place. The location of the incidents underlying this appeal was not a common question of fact because it had no bearing on the circumstances of the separate accidents involving Mr. and Mrs. Rowe. To the contrary, the cases actually involved distinct facts: a chair placed on a tile floor which slid out from behind Mrs.

Rowe, versus a chair that broke and caused Mr. Rowe to fall. (Transcript 9:18 – 10:6, 10:11 – 19; R. p. 83, line 18-p. 84, line 6, p. 84, lines 11-19).

Second, the commonality of many witnesses is misleading in these cases since the witnesses were called to discuss two separate incidents. For instance, the Respondent primarily identified Mr. Elvin Cobbs as one common witness. (Transcript 6:2-3; R. p. 80, lines 2-3). Mr. Cobbs is indeed a witness in both cases, but not as to common issues of fact. He investigated both incidents, which occurred approximately six months apart. Importantly, Mr. Cobbs performed a separate investigation and prepared separate incident reports after each case. The Plaintiffs were required to have him sequentially but separately discuss and explain each incident on the stand, because although the same witness was speaking, his testimony was about two different occurrences.

The accident reports prepared by Mr. Cobbs documented the different factual scenarios presented in each of the cases. (Incident Reports; R. pp. 191-193). Further complicating matters, two different versions of the accident report were discovered in Cecil Rowe's case, one of which was edited after it was first prepared to attribute fault to Mr. Rowe. (Incident Reports; R. pp. 191-192. Transcript 12:11-20; R. p. 86, lines 11-20). In addition, there was confusion over whether the same chair was at issue in both cases because the chair that broke in Mr. Rowe's case was lost or destroyed by the Defendants after they were on notice of the claim. (Transcript 25:7 – 16; R. p. 99, lines 7-16. FHC 30(b)(6) Depo.; R. p. 189). Because the trial was consolidated, Appellant was forced to question Mr. Cobbs about his investigations of the two separate accidents, the altered report issue in Mr. Rowe's case, and the chairs involved in both cases, all of which amounted to a confusing presentation to the jury of decidedly dissimilar issues of fact.

Another witness, Ms. Marsha Corbitt, was identified by Respondent as the receptionist at the time both incidents happened who saw both plaintiffs before and after their accidents. Like Elvin Cobbs, Ms. Corbitt was a witness to both incidents but her knowledge of facts at issue was inherently different with respect to the two separate accidents. She may have been present on both dates, but she observed two different factual scenarios and therefore could not provide a common answer or insight to any question of fact.

To highlight this point, it is worth noting that it would be impossible to question either Mr. Cobbs or Ms. Corbitt about their knowledge of the facts and circumstances at issue without asking about each incident separately because the cases are different occurrences. Consolidation may be appropriate where a witness is offered to establish facts about a single incident that affected multiple claimants, but not where the witness must be asked separate sets of questions to establish what happened during different incidents. Nothing Mr. Cobbs or Ms. Corbitt could say to establish the facts about what happened on March 31, 2016 when Ms. Rowe's chair slipped helps establish whether/why Mr. Rowe's chair broke on August 1, 2016, and vice versa.

Two other witnesses who testified at trial further emphasize the impropriety of consolidation in this matter. Mayor Sara Ann Johnson testified about facts relevant to Mrs. Rowe's case, including in particular the slick condition of the floor. (Plaintiff Rebecca Rowe's Supp. Ans. to Interrogatories; R. p. 51). By contrast, Mr. Edward Perry was an eyewitness to Mr. Rowe's fall. (Plaintiff Cecil Rowe's Supp. Ans. to Interrogatories; R. p. 62). Neither witness had any knowledge concerning the facts at issue in the case in which they were not named, but they nevertheless testified at the same trial. This was highly prejudicial to the Appellants, who were forced to provide testimony to the same jury about two different cases with two different types of factual scenarios to explain and prove. The danger of confusion from this format was heightened

by the presentation of witnesses who testified about their knowledge of both events with witnesses who provided information about only one of the occurrences.

Third, like the fact that the incidents occurred at the same location, Respondent's contention that the incidents involved the same type of chair fails to account for the factual differences in in each scenario. As alleged in the complaint and confirmed through deposition testimony, Respondent admitted at the hearing that Mrs. Rowe's case arose out of her chair slipping out from behind her as she stood up, whereas Mr. Rowe's chair broke. (Transcript 5:11-21; R. p. 79, lines 11-21). Thus, while perhaps identifying a superficial commonality between the cases, Respondent failed to identify a common question of fact as required by Rule 42, SCRCP. There is simply no common question to be answered that explains how or why each event happened.

Finally, but not less importantly, Mr. and Mrs. Rowe were put in the difficult situation of being the primary witness with respect to their own cases but also testifying as a damages witness with respect to each other. Critically, they did not witness each other's accidents. (Transcript 11:21 – 12:3; R. p. 85, line 21-p. 86, line 3). This alone is prejudicial enough to require reversal, as it violates the common question of fact requirement while tending to confuse the jury. In addition, Appellants argued at the hearing that the consolidation of matters involving a husband and wife could lead to undue speculation of fabrication by a jury, and in turn infringes Appellants' constitutional right to fair and impartial trial by a jury. U.S. Const. Art. III, Section 2.

For these reasons, the grounds for consolidation set forth by Defendant fail to meet the threshold requirement of common questions of fact set forth by Rule 42.

B. THE CASES BROUGHT BY CECIL AND REBECCA ROWE SHOULD NOT HAVE BEEN CONSOLIDATED BECAUSE THEY DID NOT INVOLVE COMMON QUESTIONS OF LAW.

Respondent's motion to consolidate should also have been denied because of the different questions of law applicable to Mr. and Mrs. Rowe's cases. While both cases are premises liability claims, the different facts at issue raise two different questions of law. The two primary theories of recovery in a premises liability action are as follows:

> To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.

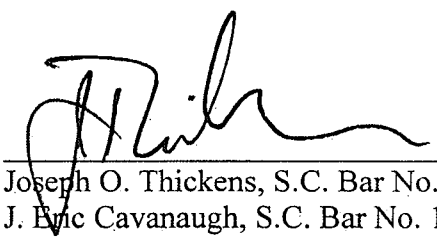
Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832–33 (2001) (citing *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1998).

As explained above, Mrs. Rowe alleged that her March 31, 2016 accident happened because the Respondent placed a chair in its waiting room that had hard plastic feet which slid easily over the hard tile floor. (Transcript 9:18-25; R. p. 83, lines 18-25). Appellant contended that this was a "created condition", which does not require proof of notice because the Respondent's specific act of placing the chair on the tile floor created the hazard that led to Plaintiff's accident. *Id.* By contrast, Mr. Rowe alleged that his chair broke and he fell as a result of the failure of the chair. (Transcript 10:1-6; R. p. 84, lines 1-6). Appellant contended that the law applicable to Mr. Rowe's case fell under the second prong identified above; namely, that the condition of the chair involved a notice issue/latent condition that the Respondent had a duty to discover and warn its customers about. (Transcript 10:20-23; R. p. 84, lines 20-23).

Notably, the court specifically inquired whether Mr. Rowe's chair slipped, and the uncontested evidence at the hearing was that the failure of Mr. Rowe's chair caused his fall. (Transcript 10:11-15; R. p. 84, lines 11-15). It was further acknowledged by the court that the Appellants' theories of liability differed in that one case was a created condition whereas the other was a notice case. (Transcript 16:3-7; R. p. 90, lines 3-7). Thus, the applicable law was completely different and had a high likelihood of confusing the single jury that was charged with evaluating the two cases under the separate standards. (Transcript 11:1-7; R. p. 85, lines 1-7). Tellingly, despite the different facts and law in question, the jury made the exact same allocation of fault in both cases. (Verdict Form; R. pp. 11-12).

CONCLUSION

Based on the foregoing, Appellants respectfully submit that this Court should reverse the circuit court's grant of Respondent's Motion to Consolidate because the cases did not involve common questions of law and fact as required by Rule 42(a), SCRCP.



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CERTIFICATION OF COUNSEL

I certify that the Appellant's Final Brief complies with Rule 211(b).

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