

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

Appeal from Cherokee County  
Cherokee County Court of Common Pleas  
Hon. Judge R. Keith Kelly, Circuit Court Judge, Presiding

2017-CP-11-00330

**RECEIVED**  
FEB 24 2020  
SC Court of Appeals

Gladys B. Potter.....Respondent,

Versus

Donald Moody and Shayan Investments Gaffney, LLC, of whom Shayan Investments Gaffney, LLC is the.....Appellant.

**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT ERR IN AWARDING PUNITIVE DAMAGES AGAINST THE APPELLANT SHAYAN INVESTMENTS GAFFNEY, LLC?**
  
- II. DID THE TRIAL COURT ERR IN AWARDING ACTUAL DAMAGES AGAINST SHAYAN INVESTMENTS GAFFNEY, LLC?**
  
- I. DID THE TRIAL COURT ERR IN AWARDING DAMAGES IN FAVOR OF THE PLAINTIFF AGAINST SHAYAN INVESTMENTS GAFFNEY, LLC, DUE TO THE FACT THAT RECOVERY IS BARRED PURSUANT THE LAW OF LANDLORD AND/OR PROPERTY OWNER LIABILITY FOR ANIMALS?**

## STATEMENT OF THE CASE

This matter is an appeal of a judgment entered against the Appellant Shayan Investments Gaffney, LLC (“Shayan”). The Respondent, Gladys Potter, who was eighty-nine (89) years old at the time of trial, filed an action on or about April 20, 2017, alleging that she had been bitten by a dog owned by Donald Moody, a co-defendant and alleged tenant of Shayan. (Summons and Complaint) Shayan did not file an Answer, and an affidavit of default was filed against Shayan on June 7, 2017. (Affidavit of Default) The Plaintiff moved for a damages hearing, due to the fact that the damages in this case were unliquidated. A damages hearing was held on February 20, 2018, before Honorable R. Keith Kelley. The evidence presented at the damages hearing was the testimony of the son of the Plaintiff, and three (3) exhibits – a hospital bill, photographs of injuries, and tax records of Shayan Investments Gaffney, LLC. Judge Kelley took the matter under advisement, and filed his ruling on or about February 27, 2018 finding that Shayan and Moody, jointly and severally, were liable to the Plaintiff for \$181,000.00 in actual damages, and \$50,000.00 in punitive damages. (Judgment) This judgment was entered despite the fact that the Plaintiff produced evidence at trial of a medical bill in the total amount of nine-hundred-sixty-dollars-and-seventy-five-cents (\$960.75), from one visit to the hospital, and two (2) months of pain and suffering following the dog bite. (Tr. Trans. p. 11, lines 21-25; p. 17, lines 6-19.) Shayan received notice of the entry of the order or judgment in this case on July 22, 2019. Shayan filed a Notice of Appeal on August 21, 2019. (Notice of Appeal)

## ARGUMENT

### II. THE TRIAL COURT ERRED IN AWARDING PUNITIVE DAMAGES AGAINST SHAYAN INVESTMENTS GAFFNEY, LLC.

The trial court erred in awarding punitive damages against Shayan Investments Gaffney, LLC. An appellate court must review de novo a circuit court's post-trial "due process review" of a punitive damages award. *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 583, 686 S.E.2d 176, 183 (2009). As an initial matter, it appears to be an open question of South Carolina Law as to whether or not punitive damages are permitted pursuant to S.C. Code Ann. § 47-3-110(A), the "dog bite" statute, which reads as follows:

- (A) If a person is bitten or otherwise attacked by a dog while the person is in a public place or is lawfully in a private place, including the property of the dog owner or person having the dog in the person's care or keeping, the dog owner or person having the dog in the person's care or keeping is liable for the damages suffered by the person bitten or otherwise attacked.

The statute on its face does not designate whether punitive damages are recoverable by a Plaintiff - therefore, the court must make this determination. In the case of *Nesbitt v. Lewis*, 335 S.C. 441, 517 S.E. 2d 11 (Ct. App. 1999), the Court of Appeals held in a civil action by plaintiff to recover for injuries sustained by a dog bite in a residence owned by homeowner and her two children, that the court did not have to reach the issue of whether or not punitive damages were recoverable pursuant to S.C. Code Ann. § 47-3-110(A). The *Nesbitt* Court held that under the specific facts of the case, punitive damages would not otherwise be recoverable, and the court did not need to address the broader issue of whether punitive damages are ever recoverable under the statute. *Nesbitt*. And, in at least one South

Carolina Supreme Court case, the Court has held that punitive damages are not recoverable under a strict liability theory of recovery, similar to the dog bite statute. *Barnwell v. Barber-Colman Company*, 393 S.E.2d 162, 301 S.C. 534 (1989).

The specific facts of *Nesbitt* are analogous to the facts at bar, wherein the Plaintiff sued the homeowner as well as her son, who resided at the residence, and her daughter who merely owned a partial interest in the house that she received at her father's death. The Court of Appeals found that there was no liability for the daughter who merely had an interest in the residence, because there was no evidence that she was the one who exercised control over the premises, nor did she receive enjoyment therefrom, nor did she have the dog in her "care or keeping." As will be discussed in Argument III, there is no evidence in the record, nor the bare allegations of the complaint in the case at bar that the Appellant had the dogs in his "care or keeping," which is a crucial consideration for liability.

Not only are punitive damages not clearly available to the Plaintiff in this case pursuant to S.C. Code Ann. § 47-3-110(A), there is no analysis by the trial court in the final judgment applying the factors from the seminal cases of *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589 (1996), and *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), to justify the arbitrary award of \$50,000 awarded in punitive damages in this case. In *Gamble*, the S.C. Supreme Court held that a trial judge shall review the constitutionality of a punitive damages award (pursuant to *Gore*) by determining whether the award was reasonable under the following guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual and potential harm suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties

authorized or imposed in comparable cases. Subsequently, there are eight additional considerations that trial courts should apply in conducting a post-judgment due process review of any punitive damages award. These considerations are: (1) the defendant's degree of culpability; (2) the duration of the conduct; (3) the defendant's awareness or concealment; (4) the existence of similar past conduct; (5) the likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably-related to the harm likely to result from such conduct; (7) the defendant's ability to pay; and (8) any other factors deemed appropriate. *Gamble*, 305 S.C. at 111-12, 406 S.E.2d at 354. The only justification for the award of punitive damages by the trial court in this case was the amount of property owned by Shayan that was listed on the tax records of Cherokee County. There were no other considerations by the trial court as required by *Gore* and *Gamble*, that addressed the actions of the Appellant which would justify the award of punitive damages. Further, the award of punitive damages was arbitrary in this case, and not based on any rationale other than the amount of property owned by the Appellant. The trial court erred in awarding punitive damages against the Appellant, and the judgment should be reversed by this Honorable Court, with prejudice.

### **III. THE TRIAL COURT ERRED IN AWARDING ACTUAL DAMAGES AGAINST SHAYAN INVESTMENTS GAFFNEY, LLC.**

In the case at bar, the trial court erred in awarding actual damages against Shayan Investments Gaffney, LLC. There is absolutely no justification in the record of this case for the trial court's award of \$181,000 in actual damages against the Appellant. The award of actual damages remains within the discretion of the trial court. See *Gamble*; *Fennell v. Littlejohn*, 240 S.C. 189, 125 S.E.2d

408 (1962); *Miller v. City of West Columbia*, 471 S.E.2d 683, 322 S.C. 224 (S.C. 1996). Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of the appellate court to set aside the award. *Id.* Moreover, when considering whether or not the verdict is excessive, if there is substantial evidence to sustain the verdict, it will not be disturbed. (emphasis added) The appellate court will intervene only where the verdict is so grossly excessive and the amount awarded is so shockingly disproportionate to the injuries to indicate that it was the result of caprice, passion, prejudice, or other considerations not found on the evidence. *Easler v. Hejaz Temple A.A.O.N.M.S. of Greenville*, 285 S.C. 348, 329 S.E.2d 753 (1985); *Brabham v. Southern Asphalt Haulers, Inc.*, 223 S.C. 421, 76 S.E.2d 301 (1953).

In this case, the damages award is so grossly excessive and shockingly disproportionate to the injuries to indicate that it was the result of other considerations not found on the evidence. The facts of the *Nesbitt* case, cited in Argument I, *supra*, is instructive and illustrative of how excessive the actual damages award was in this case. In *Nesbitt*, a minor child went to the hospital and underwent surgery to address her injuries caused by a dog bite. Her injuries required a three-day stay in the hospital and resulted in \$6,850 in medical bills. Her injuries also required washing and re-dressing the wounds three times a day for several months. The injuries emotionally disturbed the child to the point that her mother had to sleep in the room with her for some three to four months with the light on all night. Her injuries caused permanent scars. The child testified that she could no longer engage in volleyball, soccer, baseball or basketball as she formerly did prior to the dog bite incident. The jury granted to her Father (individually and as her guardian) reimbursement of her medical bills of \$6,850, as well as granting to the child \$15,000 in actual damages and \$25,000 in punitive damages – however the punitive damages were reversed. The injuries in *Nesbitt* were significantly more extensive and costly than in the case at bar, and the

*Nesbitt* Plaintiff was merely awarded close to double the costs of her medical bills in actual damages (which would have included pain and suffering). In contrast, in the case at bar, the Plaintiff was awarded a sum over 188 times the amount of her medical bills. The testimony in this case by the son of the Plaintiff established that the Plaintiff was bitten on the right side of her leg, and her left cheek of her buttocks. (Tr. Trans. p. 8, lines 6-9.) The son testified that he was able to assist his Mother into the home after the incident, and she was scared to death. (Tr. Trans. p. 9, lines 19-21.) The son testified that his Mother didn't go to the hospital until the day after the dog bite, and only incurred a bill of \$960.75. (Tr. Trans. p. 11, lines 6-15.) She received some follow-up care from her physician, however she was no longer under the care of a physician at the time of trial. (Tr. Trans. p. 13, lines 14-25; p. 14, lines 1-8.) The son testified that for a period of two months after the incident, his Mother didn't go out of the house, had difficulty sitting and standing up, had pain and was uncomfortable. (Tr. Trans. p. 15, lines 15-24.) However, at the time of trial his mother was going out into the yard by herself. (Tr. Trans. p. 16, lines 17-20.) Based on this record, without the victim herself testifying to the court regarding the impact of the incident, and the limited amount of pain and suffering as compared to that of the *Nesbitt* Plaintiff, it is clear that the trial court abused its discretion and erred as a matter of law in awarding the actual damages in this case. Therefore, the judgment of Hon. Judge R. Keith Kelley should be reversed, with prejudice.

**IV. THE TRIAL COURT ERRED IN AWARDING DAMAGES IN FAVOR OF THE PLAINTIFF AGAINST SHAYAN INVESTMENTS GAFFNEY, LLC, DUE TO THE FACT THAT RECOVERY IS BARRED PURSUANT THE LAW OF LANDLORD AND/OR PROPERTY OWNER LIABILITY FOR ANIMALS.**

The Plaintiff is not entitled to a judgment against the Appellant in this case, because the Plaintiff's theory of liability is insufficient under prevailing South Carolina Law regarding animals kept by third parties on the owner's property: the Plaintiff's theory of recovery against Shayan is based solely on the fact that Donald Moody was keeping his dogs on property owned by Shayan. The case of *Bruce v. Durney*, 341 S.C. 563, 534 S.E.2d 720 (2000), is instructive. In *Bruce*, a civil action to recover damages due to a dog bite, Motsinger, a property owner who was similarly situated as Shayan, was granted summary judgment against the claims of the plaintiff alleging that Motsinger had liability to the Plaintiff for a dog bite that occurred on property that he owned, by dogs kept by the Durneys. Of course, the facts of this case are even more attenuated from *Bruce*, as the dog bite in this case happened on the property of the Plaintiff, and not on the residence of Donald Moody. An issue in *Bruce* was whether a formal landlord/tenant relationship had been established between Motsinger and his daughter and son-in-law who lived on the property. Assuming that there was at least an oral tenancy at will established and/or even if Motsinger was not considered to have a landlord/tenant relationship with his daughter and son-in-law, the S.C. Court of Appeals found that he was not liable as a matter of law based on his status as a private landowner because he was not the dog's owner or caregiver. The court cited S.C. Code Ann. § 47-3-110(A), which places liability for a dog bite on the owner of the dog, or the person having the dog in his care or keeping. The court in *Bruce* cites *Nesbitt* for the proposition that there was no liability for the Defendant situated as Shayan because the owner did not reside at the property, or have the dogs in his care or keeping. The Court in *Nesbitt* cites jurisprudence from other states regarding this issue. Other states have construed similar statutes and reached the same result. See *Boylan v. Everett*, 172 Mass. 453, 52 N.E. 541 (1899) (The mere fact that a dog is kept by its owner on another's premises, with the premises owner's knowledge, acquiescence, or permission, does

not of itself make the premises owner the dog's keeper.); *Goennenwein by Goennenwein v. Rasof*, 296 Ill.App.3d 650, 231 Ill.Dec. 24, 695 N.E.2d 541 (1998) (Property owner who exercised no degree of care, custody, or control over her son's dog, who bit owner's minor guest while on owner's premises, was not dog's "owner" within meaning of Animal Control Act.); John P. Ludington, Annotation, *Who "Harbors" or "Keeps" Dog Under Animal Liability Statute*, 64 A.L.R.4th 963 (1988) (Keeping has a proprietary aspect. Reference is sometimes made to the keeper's "dominion" over the dog. Keeping is often defined in terms of the three C's—that is, that keeping is exercising some measure of care, custody, or control over the dog.).

The Appeals Court of Massachusetts discussed a very similar situation in *Brown v. Bolduc*, 29 Mass.App.Ct. 909, 556 N.E.2d 1051 (1990). The property owners were sued after their daughter's dog bit a party invitee. The property owners allowed their daughter to live rent free on the property. They knew the daughter kept the dog, and on a few occasions, provided it water while they were caring for their horses kept at the same property. The court examined a similar statute to the South Carolina statute which placed liability on the "owner or keeper," and concluded the parents were not liable under the statute because they were not the "owners or keepers" of the dog.

In *Smith v. Isaacs*, No. Civ.A. 97C09028, 1999 WL 1240833 (Del.Super. Sept.21, 1999), the owner of the property allowed the dog and its owner to reside at her home. The property owner did not take care of the dog; however, she allowed the dog to sleep in the enclosed porch of her home. The court was asked to determine if the property owner was a "custodian" or "owner" of the dog for purposes of liability. The court concluded the property owner was not in sufficient control of the animal to consider her a "custodian."

In the *Bruce* case, Motsinger allowed the dog to be kept on property on which he did not live – facts that are distinguishable from the case at bar as there is nothing in the record to establish that Shayan permitted the dogs to be kept on the property. The *Bruce* court held that to this extent he did exercise some measure of control, but this is not sufficient to call him the dog's "keeper." Motsinger visited the property, but there is no evidence he provided any care or support for the dog. Custody was maintained by the Durneys, care was provided by the Durneys, and the Durneys were in almost complete control over the animal. The Durneys were the obvious owners and keepers of the animal. Motsinger could not be held liable as the property owner under S.C.Code Ann. § 47-3-110.

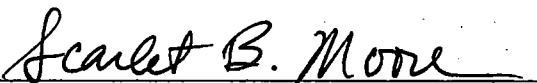
A similar result was held *Clea v. Odom*, 394 S.C. 175, 714 S.E.2d 542 (2011), wherein the South Carolina Supreme Court held that “The Legislature's use of the phrase ‘care or keeping’ clearly requires that the ‘other person’ (besides the dog’s rightful owner) act in a manner which manifests an acceptance of responsibility for the care or keeping of the dog.” *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 364, 673 S.E.2d 423, 427 (2009). “To this degree, the Legislature retained the common law principle of duty in determining the liability of the ‘other person.’ ” *Id.* The presence or absence of a duty determines liability in situations that involve a statutory claim against a person having the dog in his care or keeping. *Id.* at 365, 673 S.E.2d at 427.

Because the Plaintiff in this case is proceeding under a theory of strict liability based on the status of Appellant as a property owner, with absolutely no other facts to support the conclusion that the Appellant “cared for or kept” the dogs at issue, the trial court erred by entering judgment against the Appellant, and the judgment should be reversed, with prejudice.

## CONCLUSION

The Appellant Shayan Investments Gaffney, LLC respectfully prays that this Honorable Appellate Court will reverse the Order of the Trial Court, Honorable R. Keith Kelley, presiding, awarding actual and punitive damages against the Appellant, and for any and all relief that the Court deems necessary and appropriate.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that on this date, February 24, 2020, I served a copy of the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and Certificate of Service on the counsel of record by mailing to them to their addresses by depositing it in the U.S. Mail, in envelopes with sufficient postage affixed.

Respectfully Submitted,

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**RE: Gladys B. Potter, Respondent versus Donald Moody and Shayan Investments Gaffney, LLC, of whom Shayan Investments Gaffney, LLC is the Appellant  
2017-CP-11-00330**

Dear Madam Clerk,

Enclosed please find the Appellant's Initial Brief, Designation of Matter to be Included in the Record on Appeal, and a Certificate of Service. If the Court has any questions regarding the enclosed, please do not hesitate to contact my office. With kind regards, I remain

Very Truly Yours,



Scarlet B. Moore, Esq.  
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Cc: William G. Rhoden, Esq.



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