THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

R. MARKLEY DENNIS, JR., CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-002082

JOHN BYERLY, individually, and as Personal representative of the ESTATE OF SUSAN B. BYLERLY, ……Appellant,

v.

THOMAS WESLEY, ……Respondent.

REPLY BRIEF OF APPELLANT

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I. APPELLANT'S OBJECTION REGARDING IMPROPER CROSS-EXAMINATION ABOUT MEDICAL RECORDS WAS SUFFICIENT, SPECIFIC AND AFFORDED THE TRIAL JUDGE THE OPPORTUNITY RULE UPON IT.

First, Wesley attempts to argue that the cross-examination of Byerly about the times of his wife's medical treatment was not "about the substance of his wife's medical records." (Wesley Brief, p. 3). A mere cursory review of the record reveals otherwise. It is undisputed the Grand Strand Regional Medical Center ("GSRMC") Emergency Room bill for Susan Byerly was introduced into evidence, without objection. (Pl's. Ex. 2.) The GSRMC bill makes no reference whatsoever to any times of treatment, arrival or discharge. The medical records, however, contained references to such times. It is undisputed Susan Byerly's medical records were neither offered nor introduced into evidence. During cross-examination, Wesley's counsel did not refer to Ms. Byerly's GSRMC bill but rather her medical records.

> Q. But what I'm representing to you is that the medical records that you are asking for that treatment to be paid for by Tom --
>
> Mr. Hopkins: Your Honor, I need to object. I don't believe she can impeach him on a document he didn't author.

(Tr. 144-45).

Thus, it is clear the objection is about the medical records to which counsel has specifically referred, and not any medical bill. The Court then makes a completely erroneous and incorrect statement upon which it presumably bases its ruling.

> THE COURT: You put it into evidence, it's subject to cross-examination. I overrule your objection.

(Tr. 145.).

This statement, and the corresponding ruling, are indisputably in error. Byerly did

not introduce any medical records into evidence.

Realizing this position is completely indefensible, Wesley now tries to say "I wasn't asking about the records, I was asking about the bill". (Wesley Brief, p. 4). The problem with this argument, however, is the transcript itself. Wesley's counsel states she is representing what the "medical records" state, not any bill.

With the trial court now having condoned and approved such improper cross-examination about a document not in evidence, and which the witness did not author, Wesley's counsel took the ruling and ran with it. Contrary to the argument presented in Wesley's brief that his counsel "abandon[ed] the question" and "moved on with cross-examination", the transcript again tells a much different story.

> Q. And those medical bills that you like Tom to pay, that reflects treatment at a different time when you say you were there, do you dispute anything else in those medical records or in the bill you are submitting to the jury?
>
> A. Please repeat that.
>
> Q. Sure. The medical bill that you have submitted to the jury, and that you are here on behalf of your wife and asking Tom to pay, it reflects treatment during a different time than when you say you were there, are you disputing anything else in that medical record or that medical bill?

(Tr. 146).

Wesley's argument that the objection was about the "bill" which he had introduced into evidence is belied by the transcript, which clearly reveals the question that elicited the objection was only about the medical records. The question to which an objection was presented was only about the medical records, and the word "bill" was not included in the question. This argument is therefore specious at best and has no factual support in the record.

Byerly does not dispute the proposition of law stated by Wesley: an objection must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731, 734 (1997). The record makes clear this is exactly what Byerly did, objected to an improper question specifically addressed to medical records, which were neither in evidence nor authored by him, and was ruled upon by the trial judge, who erroneously stated that they were in evidence.[1] The medical records and the medical bill entered into evidence are not interchangeable. The objection was sufficient, was specific and the trial judge was afforded ample opportunity to rule upon it, which he did, albeit with an incorrect observation and in error.

II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S REQUEST TO CHARGE.

A. Byerly's requested charge was in accord with the facts and evidence presented at trial, and the trial court's ruling, like Wesley's argument, is largely one of semantics.

Byerly's requested charge accurately stated the law of South Carolina that when a landlord undertakes repairs to the rental property, and hires a contractor to perform the repairs, he or she remains "vicariously liable for the negligent acts of the independent contractor." (Court's Ex. 1). The requested charge also quotes the language directly from the case law cited therein which states that the landlord remains vicariously liable "for injuries caused by improper repairs." (Court's Ex. 1). The Court stated, and Wesley adopts the argument, that it wasn't the actual "repair" that caused the injury, but the unsafe condition of the premises during repairs. (Tr. pp. 206-07; Wesley Brief, pp, 7-8).

1 Furthermore, even if Wesley's counsel did not repeatedly and specifically identify or refer to the medical records, rather than medical bill, the reference would be obvious since the GSRMC bill introduced into evidence clearly does not contain or refer to any times.

As Wesley concedes, the cases cited by Byerly in the requested charge also refer to the landlord's duty to maintain the premises in a safe condition during repairs, and the Court easily could have revised or edited the requested charge if it believed it was inaccurate or inapplicable.[2]

Frankly, however, the argument is really distinction without a difference. Wesley testified the railroad crossties were moved by the contractors to be able to bring in equipment necessary to remove the pine tree from the roof. While moving the railroad crossties may or may not have been a distinct "repair", Wesley admitted that moving them was a crucial and necessary part of the repair process.

> Q. Is it your understanding that's the crossties necessarily had to be moved to get the Bay Services' vehicle or backhoe onto the property?
>
> A. Correct. And any other property or vehicles that needed to get in there, that was the best angle. The other side had tenants in it still, so we tried to leave them alone.

(Tr. 189).

Thus, to argue that moving the crossties from their normal resting place to directly beside the Byerly vehicle wasn't an actual "repair", and therefore the charge was not applicable, is wordsmithing at its best. Moving the crossties was a part of the repair process, in fact it was the "first order of business." (Tr. 189-90). To try and separate the movement of the crossties from the "repairs" being made by the contractors is splicing reality. They are one and the same. Wesley didn't move the crossties, the contractors he hired to perform the "repairs" moved them. Without the repairs there would be no crosstie movement. The movement of the crossties cannot be separated from the repair process,

[2] A copy of all case law was provided to the Court with the requested charge.

and cannot be isolated or viewed in a vacuum, outside of the context of the entire repair project. The movement of the crossties was an integral part of the repair work performed by the contactors and to argue Byerly wasn't insured by a "repair" is much too narrow an interpretation of the facts and testimony.

B. An initial "determination" of the contractor's liability was not necessary for the Court to charge the jury the correct and applicable statement of the law.

Without citing any authority whatsoever, Wesley argues, seemingly, that without a co-defendant contractor on the jury form the Byerly's requested charge could not be charged. Moreover, Wesley argues that without a contractor to whom the jury could assign liability, Wesley could not be vicariously liable. This argument misstates the doctrine of vicarious liability. The same argument was made in the case of *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 773 S.E.2d 144 (2015). In this nursing home case, the defendant argued it could not be held variously liable to plaintiffs until a finding of negligence on the part of its subsidiary had been made. In reversing the trial court's order granting summary judgment in favor of the defendant, the South Carolina Supreme Court noted that the trial court's order "conflates the theories of direct liability and vicarious liability." 412 S.C. at 540. As the Court noted, vicarious liability is actually a form of direct liability grounded upon "independent, yet interconnected, duties owed to" the plaintiffs. As in *Morrow*, Wesley's liability is not dependent upon the contractor's liability.

C. Wesley raises for the first time on appeal that the South Carolina Residential Landlord Tenant Act is the exclusive vehicle by which the Byerlys can seek damages resulting from unsafe conditions created during repairs of their rental property.

Wesley claims the non-delegable duties owed by him, as a landlord, to the Byerlys, as tenants, to keep the premises in a safe condition while repairs are being made on the rental property, arise from the South Carolina Residential Landlord Tenant Act, S.C. Code Ann. § 27-40-10, *et seq.*, ("SCRLTA") and seems to argue the Byerlys have no claim since they did not plead relief under this statute. Wesley also cites South Carolina Rule of Civil Procedure 8 in seemingly arguing the Byerly pleading is deficient. This is the absolute first time Wesley has ever made such a claim or presented such a defense. No such issues were ever the subject of any motions presented by Wesley or even raised in his responsive pleading. It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge. *Creech v. South Carolina Wildlife and Marine Resources Dep't.*, 328 S.C. 24, 491 S.E.2d 571 (1997). Without an order or ruling indicating the trial court ever considered, much less ruled upon, this issue, it should be disregarded by the Court.

Even assuming such an argument was made or presented to the trial court, which is denied, just because the SCRTLA sets out certain duties landlords owe tenants in South Carolina, it is neither the exclusive source of such duties nor the exclusive vehicle by which tenants such as the Byerlys can seek relief for breach of such duties. These duties can also arise from rental agreements or common law, and in many such cases allowing recovery no claim under the SCRLTA was even asserted. *See*, *Durkin v. Hansen*, 313 S.C. 343, 437 S.E.2d 343 (Ct.App. 1993) (duties arising from rental agreement, in addition to SCRLTA); *Conner v. Farmers and Merchants Bank*, 243 S.C. 132, 132 S.E.2d 385 (1963); *Simmons v. Tuomey Reg'l. Med. Ctr.* (*Simmons* 2), 341 S.C. 32, 533 S.E.2d 312 (2000); *Gary v. Askew*, 417 S.C. 232, 789 S.E.2d 94 (Ct.App. 2016).

CONCLUSION

Based upon the foregoing, Appellant John Byerly respectfully requests the trial court allowing Wesley to cross-examine Appellant regarding medical records which he did not author and which were not in evidence, and denying his request to charge, be reversed, and the case remanded for a new trial. Additionally, Appellant would ask that the judgment be reversed for any other reason appearing in the record of the case.

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PROOF OF SERVICE

I, William E. Hopkins, Jr., Esquire, do hereby certify that on April 20, 2020, I served a copy of the **Reply Brief of Appellant** upon counsel for Respondent via email and US Mail, postage prepaid, to the following address:

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