

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2016CP0701475
Appellate Case No. 2017-001761

RECEIVED

May 20 2020

SC Court of Appeals

Shamsy Madani, Respondents,

v.

Rickey Phelps and Christy Phelps Appellants.

APPELLANTS' PETITION FOR REHEARING

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APPELLANTS HEREBY RESPECTFULLY MOVE PURSUANT TO RULE 221(a),
SCACR, for this Court to rehear points believed to have been overlooked or misapprehended
upon the following grounds:

1. RESPONDENT WAS NOT DENIED THE OPPORTUNITY TO TIMELY OBJECT TO THE IRRECONCILABILITY OF THE JURY'S VERDICTS WHEN SHE FAILED TO RAISE THE ISSUE ON NO LESS THAN THREE (3) OCCASIONS POST-TRIAL AND HAS NOT RAISED THIS ISSUE OF THE MAGISTRATE'S DENIAL OF HER OPPORTUNITY TO QUESTION THE JURY.

2. WHETHER A VERDICT ASSESSING LIABILITY AGAINST A DEFENDANT BUT AWARDING ZERO DAMAGES IS INCONSISTENT WHERE A STATUTORY CLAIM PROVIDES A MECHANISM FOR ASSESSING DAMAGES AND DOES NOT REQUIRE A FINDING OF NOMINAL DAMAGES AND/OR INVALIDATE(S) OTHER SEPARATE CLAIMS IF SO INCONSISTENT.

3. WHETHER RESPONDENT'S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION BEFORE THE CIRCUIT COURT AND, SUBSEQUENTLY, THIS COURT WAS DENIED.

FACTS

As provided in this Court's order issued April 15, 2020 affirming the lower court, the jury awarded Appellants the following on April 18, 2016: zero dollars for unlawful ouster or exclusion and \$950 for failure to return security deposit. Order at 2. Upon publishing the verdicts, the magistrate Judge Nancy Sadler ("Magistrate") excused the jury. Fin. Rec. at 38. Respondent made no objection to excusing the jury or to any issues concerning irreconcilability before the Jury was physically out of the presence of the Magistrate and/or the courthouse. *Id.* There appears no mention in the record that the jury's dismissal was instantaneous and Appellants attorney now asserts that the jury departed the courtroom in a manner such that any party could have easily objected to their dismissal in a timely fashion as provided by certification attached hereto as Exhibit A. Ex. A.

Following dismissal, Respondent appeared to make a motion notwithstanding the verdict pursuant to Rule 50, SCRCF for an insufficient defense verdict stating "there should be a judgment notwithstanding the verdict . . . to give three months rent," however, she does not request a new trial for inconsistent verdicts or any other issue to include denial of her opportunity to question the jury before their dismissal. Fin. Rec. at 40. The magistrate took the post-trial

motions into consideration and allowed the parties seven (7) days to submit their post-trial arguments in writing in full. Fin. Rec. at 48. In Respondent's memorandum submitted April 25, 2016, she argued for a new trial *nisi additur* for an insufficient defense verdict, however, failed to request a new trial for inconsistent or irreconcilable verdicts. Supp. Fin. Rec. at 38.

Respondent similarly failed to object to the magistrate's denial of an opportunity to question the jury with regard to any inconsistent verdicts in her first post-trial motion. *Id.* The Magistrate issued an order awarding Appellants three times the rent (\$950) under section 27-40-660 and three times the security deposit (\$950) under section 27-40-410 –totaling \$5,700. *See* Fin. Rec. at 1 (where magistrate stated “[t]he Motions apply to the Court's Order on Post-Trial Motions of the parties filed April 28, 2016 and the Court's Order on post-trial motions of the parties signed on May 12, 2016”). Respondent finally moved for reconsideration on May 20, 2016 arguing irreconcilability of verdicts and requesting a new trial as addressed now on appeal after two post-trial motions had been ruled upon by Magistrate; order filed April 28, 2016 and signed May 12, 2016. Supp. Fin. Rec. at 50. It further does not appear from the record that Respondent has ever asserted error for appellate review for Magistrate's denial of an opportunity to object to the verdicts issued at trial on April 16, 2016 but rather asserts it was not Respondent's obligation to object. *See* Resp. Final. Brief. at 7.

This Court issued its order affirming the lower court's reversal for irreconcilability of the verdicts on April 15, 2020 stating, “[t]he magistrate court excused the jury before either party had an opportunity to question the jury's intentions in rendering its verdict. Upon being given the opportunity by the court Respondent raised her concerns regarding the verdict . . . [and] . . . verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law.” Order at 2-3.

1. RESPONDENT WAS NOT DENIED THE OPPORTUNITY TO TIMELY OBJECT TO THE IRRECONCILABILITY OF THE JURY'S VERDICTS WHEN SHE FAILED TO RAISE THE ISSUE ON NO LESS THAN THREE (3) OCCASIONS POST-TRIAL AND HAS NOT RAISED THIS ISSUE OF THE MAGISTRATE'S DENIAL OF HER OPPORTUNITY TO QUESTION THE JURY.

As provided above, Appellant's counsel has certified that there were no exigent circumstances surrounding the departure of the jury upon their dismissal by Magistrate such that

Respondent was denied an opportunity to question their verdicts after publication. In fact, the excusal of a jury under any normal circumstance in the absence of an objection to the verdict would look exactly like the transcript provided in the record; dismissal of the jury and defendant's silence. Respondent first did not raise an objection during dismissal of the jury. Similarly, the record does not indicate any warning from Magistrate that objections should not have been made or would not be heard. Second, after the jury departed and Respondent waived her first opportunity to raise the issue of irreconcilable verdicts, Respondent addressed the Magistrate, through counsel, and asked for a judgment notwithstanding the verdict for an insufficient defense verdict; not for a denial of an opportunity to question the jury or irreconcilability of the verdicts. Upon the Magistrate holding post-trial motions in abeyance for seven (7) days and allowing the parties to submit arguments in writing in full, Respondent for a third time failed to preserve the issue of irreconcilability of the verdicts in her memorandum on April 25, 2020 and only requested the Magistrate rule on her motion for new trial *nisi additur* for an insufficient defense verdict. Also, Respondent similarly, for a third time, failed to object to the denial of an opportunity to question the jury as to the irreconcilable verdicts. It was not until Respondent's fourth opportunity did she raise the issue of irreconcilable verdicts in her motion for reconsideration filed on May 20, 2020 which was ultimately denied by Magistrate upon finding that S.C. Code § 2-40-660 provided for a statutory award in lieu of actual damages.

Summarily, this Court should rehear the issue of whether Respondent was denied the opportunity to question the jury as to the irreconcilability of the verdicts by Magistrate's dismissal, whether Respondent timely raised the issue of irreconcilability and/or denial of opportunity to object on the record immediately following the dismissal, or whether Respondent timely raised the issue of irreconcilability and/or denial of opportunity to object in her motion filed April 25, 2016 resulting in preservation of the issue currently affirming the reversal and order of new trial below. In the event this Court declines to rehear the matters above-requested, Appellants request the Court clarify Magistrate's abuse of discretion in dismissal of the jury to avoid further complications.

2. WHETHER A VERDICT ASSESSING LIABILITY AGAINST A DEFENDANT BUT AWARDING ZERO DAMAGES IS INCONSISTENT WHERE A STATUTORY CLAIM PROVIDES A MECHANISM FOR ASSESSING DAMAGES AND DOES

**NOT REQUIRE A FINDING OF NOMINAL DAMAGES AND/OR INVALIDATE(S)
OTHER SEPARATE CLAIMS IF SO INCONSISTENT.**

As provided in this Court's order issued April 15, 2020 affirming the lower court, the jury awarded Appellants the following on April 18, 2016: zero dollars for unlawful ouster or exclusion and \$950 for failure to return security deposit. Order at 2. This Court affirmed reversal of all awards rendered below and remanded the matter for full retrial stating, "[v]erdicts which are irreconcilably inconsistent should not stand, and a new trial should be granted, because the parties and the judge 'should not be required to guess as to what a jury sought to render[;] *Stevens v. Allen*[;] . . . [a] verdict assessing liability against the defendant but awarding the plaintiff zero damages is inconsistent and contrary to South Carolina law." Order at 2-3.

Appellant and Magistrate have both been able to surpass guesswork in determining what the jury sought to render as guided by S.C. Code § 27-40-660.

Defendant [] argues that a new trial must be granted because the jury's verdict of zero dollars is irreconcilable as a matter of law. . . . At the conclusion of the trial the jury returned a verdict for each Plaintiff for unlawful ouster but awarded \$0 (Zero dollars) in damages. . . . Had there been not statutory right to changes in the verdict, the Defendant would have 'netted' Four hundred one dollars and 74/100 (\$401.75) [H]owever, . . . if a landlord unlawfully removes or excludes the tenant from the premises, the tenant may . . . recover an amount equal to three months' periodic rent or twice the actual damages sustained by him, whichever is greater In this case, the damages awarded by the jury were zero and the Plaintiffs requested that the alternative treble rent award be made. There is no requirement that actual damages exist under the statute and the jury's award is therefore not irreconcilable.

Fin. Rec. at 1. Appellants agree that Magistrate's determination that there is "no requirement that actual damages exist under the statute and the jury's award is . . . not irreconcilable."

In determining the meaning of a statute, the terms used therein must be taken in their ordinary and popular meaning, nothing to the contrary appearing. *Citizens for Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992). If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. *Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971). The Court in *Stevens v. Allen* so vacated a jury verdict upon award of zero damages in a comparative negligence common law cause of action and not a

statutory claim with prescribed damages upon verdict of liability. *Stevens v. Allen*, 342 S.C. 47, 53, 536 S.E.2d 663, 666 (2000) (the jury, using special verdict forms, returned a verdict finding Stevens and Allen each 50% negligent, but awarded the Stevens "zero damages" in both the survival and wrongful death actions). The Supreme Court of South Carolina and the "Court of Appeals have routinely held that to state a cause of action for negligence the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage proximately caused by the breach. *Stevens v. Allen*, 536 S.E.2d 663, 342 S.C. 47, 51 (S.C. 2000) (citing *Kleckley v. Northwestern Nat. Cas. Co.*, 338 S.C. 131, 526 S.E.2d 218 (2000); *Tanner v. Florence County Treasurer*, 336 S.C. 552, 521 S.E.2d 153). However, this action on appeal addresses a statutory remedy providing the "the tenant may . . . recover an amount equal to three months' periodic rent or twice the actual damages sustained by him, whichever is greater" S.C. Code § 27-40-660.

At trial below, the jury found Respondent had violated S.C. Code § 27-40-660 but did not find evidence of actual damages and, the amount of rent haven been stipulated to by the parties, there was no other appropriate remedy then for Magistrate to award the greater of two times zero damages or three time the rent as clearly provided by S.C. Code § 27-40-660. S.C. Code § 27-40-660. If this Court maintains that a zero damages plaintiff's verdict effects an irreconcilability for S.C. Code § 27-40-660, it will be inserting a new element into S.C. Code 27-40-660 requiring a showing of nominal damages which is clearly not provided by the legislature and contrary to its apparent language.

Should this Court maintain that the jury's verdict issued for Respondent's violation of S.C. Code § 27-40-660 is irreconcilable because they failed to award actual damages, Appellant respectfully submits the zero award for unlawful ouster should have no effect on the jury's award for failure to return Appellants security deposit pursuant to S.C. Code § 27-40-410. [I]t is the duty of the court to sustain verdicts when a logical reason for reconciling them can be found. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 530, 155 S.E.2d 308, 310 (1967). By comparison, "[i]t is well settled in South Carolina that claims for personal injuries and for loss of consortium are separate and distinct." *Graham v. Whitaker*, 282 S.C. 393, 397, 321 S.E.2d 40, 43 (1984). "Thus, a judgment for the defendant in one action does not automatically bar recovery in

the other action.” *Daves v. Cleary*, 584 S.E.2d 423, 355 S.C. 216 (S.C. App. 2003) (citing *Priester v. Southern Ry. Co.*, 151 S.C. 433, 149 S.E. 226 (1929); *Ryder v. Jefferson Hotel Co.*, 121 S.C. 72, 113 S.E. 474 (1922); *see also Burroughs v. Worsham*, 352 S.C. 382, 403, 574 S.E.2d 215, 225 (Ct.App.2002) (claims for personal injury and loss of consortium are separate and distinct, not derivative of each other, and each litigant is entitled to a verdict based on the law and the evidence). In this matter, the jury returned a verdict in favor of Appellant for Respondent’s violation of S.C. Code § 27-40-410 and further identified that the amount wrongfully withheld was \$950.00. Supp. Fin. Rec. at 2. Whether Respondent wrongfully prevented Appellants from entering their home is a wholly separate issue from whether Respondent wrongfully withheld Appellants security deposit.

Summarily, this Court should rehear the issue of whether S.C. Code § 27-40-660 requires a finding of nominal damages preceding a statutory award and whether any irreconcilable verdict issued for a violation of S.C. Code § 27-40-660 for unlawful ouster precludes a verdict issued for a violation of S.C. Code § 27-40-410 for failure to return a security deposit.

3. WHETHER RESPONDENT’S APPEAL FOR LACK OF SUBJECT MATTER JURISDICTION BEFORE THE CIRCUIT COURT AND, SUBSEQUENTLY, THIS COURT WAS DENIED.

Finally, Respondent first appealed from the magistrate court on June 30 ,2016 alleging, in addition to irreconcilability of the verdicts, lack of subject matter jurisdiction of the magistrate court to hear the matter as cross-appealed from now. The court below failed to rule on this issue and generally reversed for irreconcilability of the verdicts and remanded. This Court has provided in footnote 1:

“Respondent argues that the magistrate court lacked subject matter jurisdiction to hear the matter. We disagree. See S.C. Code Ann. § 27-40-130(a) (“The circuit courts and magistrate courts of this State shall exercise concurrent jurisdiction over any landlord with respect to any conduct in this State governed by [the RLTA] or with respect to any claim arising from a transaction subject to [the RLTA].”

In anticipation of Respondent’s forthcoming request for costs and for the purpose of better advising the South Carolina Bar as to this critical decision, Appellants respectfully request that this Court rehear and or amend its order to reflect the denial of Respondent’s cross-appeal for

lack of subject matter jurisdiction, explicitly.

THEREFORE, having fully set forth in this petition for rehearing Appellants particularized points they believe were overlooked or misapprehended by the Court, Appellants pray that this Court rehear these matters and:

1. Affirm the award of the magistrate court upon failure of Respondent to timely preserve the issue of irreconcilable verdicts and/or denial of her opportunity to question the jury with regard to the irreconcilable verdicts;
2. Affirm the award of the magistrate court for Respondent's violation of S.C. Code § 27-40-660 where there exist no requirement of nominal damages preceding a plaintiff's verdict;
3. Affirm the award of the magistrate court for Respondent's violation of S.C. Code § 27-40-410 where there exist no irreconcilability either with the verdict issued for violation S.C. Code § 27-40-410 or as between the two verdicts issued in favor of the Appellant..

May 20, 2020

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EXHIBIT A

STATE OF SOUTH CAROLINA

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AFFIDAVIT IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

In lieu of an affidavit, I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt:

1. I represented Rickey Phelps and Christy Phelps at all times in the civil action upon review including at trial on April 18, 2016.
2. I was in the courtroom at the publishing of the verdicts and dismissal of the jury.
3. Judge Nancy Sadler ("Judge Sadler"), the presiding magistrate, dismissed the jury after publishing the verdicts, however, did not create any urgency of departure such that a request by either party to question the jury as to the verdicts could not have been reasonably raised.
4. The jury departed the courtroom in typical fashion and without undue haste.
5. Judge Sadler similarly did not make an indication that any request or objection would not be considered should it be raised.

(Signature page to follow)



Chris S. Truluck
Attorney for Appellants

May 20, 2020

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SC Court of Appeals

The undersigned attorney hereby certifies that a true copy of the Appellants' Petition for Rehearing in the above-referenced case has been served upon Andrew J. Toney, Counsel of Record, by delivering same this date to him by Electronic Mail on May 20, 2020 at dtoney@mullenwylie.com.

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May 20, 2020