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S.C. SUPREME COURT

THE 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. 2017-000963
Op. No. 2020-UP-014

Case No. 2012-CP-38-0845

Ralph C. Williams, Sr., and Linda Williams, ... Petitioners,

v.

Patricia A. Johnson, Josette Peppers
and UniHealth Post-Acute Care-Orangeburg, LLC..... Respondents.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUES FOR REVIEW

I. Did the Court of Appeals err in affirming the circuit court's decision to grant the Defendants a new trial under the Thirteenth Juror Doctrine because the circuit court's decision was controlled by an error of law?

II. Did the Court of Appeals err in refusing to address Petitioners' argument that the circuit court erred in overruling Plaintiff's objection to the verdict form and in denying Plaintiff's motions for directed verdict and for JNOV as to the issue of whether the individual defendant nurses were acting within the course and scope of their employment?

III. Did the Court of Appeals err in ruling that Petitioners' argument was not preserved regarding the circuit court permitting the Defendants to present an alleged joint defense when the employer Defendant sought to relieve its liability by deflecting fault upon its own employees, who were also Defendants, by arguing these employees were of acting outside the scope of their employment?

STATEMENT OF THE CASE

On June 21, 2012, Mr. Williams (Plaintiff) and his wife filed an action against Plaintiff's former employer, UniHealth Post-Acute Care-Orangeburg, LLC (UniHealth) and two of its nurses/employees, Patricia A. Johnson and Josette Peppers. Plaintiff asserted claims against the nurses for defamation and abuse of process, and against UniHealth under a theory of respondeat superior. Mrs. Williams asserted a claim for loss of consortium.

On August 2, 2012, the same law firm filed separate but nearly identical answers on behalf of each defendant. Each answer denied that the nurses were acting within the course and scope of their employment with UniHealth or that UniHealth had *respondeat superior* liability. (R.pp.14-43, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269; R.pp.44-73, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269; R.pp.74-103, ¶¶ 165, 166, 182, 183, 200, 201, 217, 218, 234, 235, 243, 244, 254, 255, 268, 269). UniHealth also separately alleged the nurses' actions were "not in furtherance of [UniHealth's] business." (R.p.42, ¶ 285). That defense, however, was not included in the answers filed on behalf of Nurse Johnson or Nurse Peppers.

On August 27, 2013, UniHealth moved for summary judgment. UniHealth argued in part that "employers are not liable for the intentional acts of their employees which fall outside the scope of employment." (R.pp. 104-105, 109-116). On January 6, 2014, the circuit court denied UniHealth's motion for summary judgment on the basis that triable issues of fact existed as to (1) whether the Plaintiffs had overcome the rebuttable presumption of good faith under the Omnibus Adult Protection Act and (2) whether the nurses acted outside the scope of their employment

with UniHealth. The court also entered a scheduling order. On January 13, 2014, Plaintiff filed an amended complaint.

The case was tried from September 4 through September 8, 2014. Each side moved for directed verdict at the close of all of the evidence. Plaintiff sought a directed verdict as to UniHealth's argument that the nurses acted outside the scope of their employment so as to relieve UniHealth of any liability. UniHealth moved for directed verdict as to all aspects of the case. The trial court denied both motions.

The jury returned verdicts finding the nurses did not act in good faith when they reported suspicions that Plaintiff had abused a patient. The jury also found both nurses acted outside the scope of their employment when they made the reports regarding Plaintiff. The jury awarded Plaintiff $102,500 actual damages and awarded Mrs. Williams $0 on her consortium claim.

The jury next found by clear and convincing evidence that each defendant, including UniHealth, engaged in willful, wanton or reckless conduct in harming Plaintiff. The jury then awarded punitive damages as follows: $200,000 against Nurse Johnson; $97,000 against Nurse Davis (Peppers); and $600,000 against UniHealth.

All defendants filed a joint motion for JNOV or, alternatively, for a new trial absolute. Defendants contended alternatively the trial court should grant a new trial under the "thirteenth juror" doctrine. Defendants also filed a joint motion to reduce the amount of the punitive damages award.

UniHealth filed a separate motion for JNOV or new trial "consistent with special interrogatory answers." UniHealth asserted that the jury specifically found that Nurse Johnson and Nurse Davis (formerly Peppers) did not act in good faith or in the course and scope of their

employment so that UniHealth should be exonerated as a matter of law. Again, the same law firm represented all defendants throughout the proceedings.

Plaintiff moved for JNOV as to the scope of employment questions. Plaintiff also raised the issue of the conflict of interest of the attorneys representing all defendants as a basis to preclude UniHealth from arguing the nurses acted outside the scope of their employment.

On January 14, 2016, the trial judge entered an order granting Defendants' motion for new trial under the Thirteenth Juror Doctrine. The trial judge gave as a reason that the facts did not justify the verdict in light of the "good faith" provisions under the South Carolina Omnibus Adult Protection Act. The judge ruled the remaining post-trial motions were dismissed as moot.

Plaintiff received written notice of the entry of the order on January 25, 2016. On February 2, 2016, Plaintiff filed a motion for reconsideration and to alter or amend the judgment pursuant to Rule 59, SCRCP, contending the order was controlled by an error of law such that the trial judge abused his discretion in granting the Defendants' motion. Plaintiff also requested a ruling on each of his post-trial motions.

On March 16, 2016, Defendants jointly filed a return to Plaintiff's motion. The return essentially mirrored the order the trial judge entered.

On April 14, 2016, Plaintiff filed a supplemental brief in support of his Rule 59 motion. On August 1, 2016, Defendants filed a response to the supplemental brief, requesting the judge strike the supplemental brief and arguing Plaintiff's contentions did not have merit. On August 11, 2016, Plaintiff filed a response to these assertions.

On March 10, 2017, the trial judge entered an order denying Plaintiff's Rule 59 motion. The judge stated he was "concerned that the jury improperly handled the issue of the Defendant

[nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." (R.p.13).

Plaintiff thereafter appealed. Following oral arguments the Court of Appeals affirmed. *Williams v. Johnson*, 2020-UP-014 (S.C. Ct. App. filed Jan. 15, 2020). The Court found the trial court's grant of a new trial was not "wholly unsupported by the evidence," and proceeded to review the evidence in a manner inconsistent with the jury's expressed verdict. The Court also rejected Plaintiffs' contention that the trial court misapplied the immunity provisions of the Omnibus Adult Protection Act, S.C. Code Ann. § 43-35-75(A) (Supp. 2019), instead finding the trial court "was restating, admittedly in a different and more specific way, its belief that the evidence did not justify the verdict – specifically that the evidence did not justify a finding that [the nurse employees]acted in bad faith, which would have prevented them from claiming immunity." Slip at 5. The Court agreed with Defendants that Plaintiffs' argument that the circuit court erroneously concluded the jury misapplied the law "misinterprets the circuit court's orders" and found "the circuit court's statements fell within its authority under the thirteenth juror doctrine." Slip at 5.

The Court declined to address Plaintiffs' argument regarding the denial of their motion for JNOV on the scope of employment issue. Slip at 6.

Finally, the Court held Plaintiffs' argument as to the conflict of interest that arose due to permitting the same lawyers to represent both the employer and employees, and then place all blame on the employees, was not preserved.

Plaintiffs now seek review from this Court.

ARGUMENTS

The trial court granted Defendants' motion for a new trial under the Thirteenth Juror Doctrine. The trial judge gave as the reason that the facts did not justify the verdict in light of the "good faith" provisions under the South Carolina Omnibus Adult Protection Act. In denying Plaintiff's motion for reconsideration the judge stated he was "concerned that the jury improperly handled the issue of the Defendant [nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." These statements demonstrate the judge's belief that "good faith" under the Act was not an issue for the jury because there was no evidence to overcome the permissive presumption under the Act. The record, however, contained evidence which permitted the jury to find a lack of good faith so as to overcome the presumption under the Act so that the nurses did not enjoy qualified immunity. A recitation of that evidence appears in Plaintiffs' Brief to the Court of Appeals. (See Brief of Appellant, pp. 6-25). Plaintiffs refer to the discussion pursuant to Rule 208(b)(6), SCACR.

JURY INSTRUCTIONS

The trial court gave the following instructions to the jury:

> You are to consider only the evidence before you. If there was any testimony ordered stricken from the record of this trial you are to disregard that testimony. You are to consider only the testimony which has been presented from this witness stand and any exhibits which have been made part of the record. It is my duty to charge you the law applicable to this case and it is your duty as jurors to accept and apply this law as I now state it to you. If you think you have any idea what the law is or what the law ought to be and it does not agree with what I tell [you] the law is you must forget that idea, because you are sworn to accept the law and apply the law exactly as I now state it to you.
>
> In every case tried before a jury the jury is the sole and exclusive judge of the facts.

(R. p. 619, l. 22 - p. 620, l. 11). The judge charged the jury on the burden of proof (R. p. 620, l. 23 - p. 621, l. 17), circumstantial and direct evidence (R. p. 621, l. 18 - p. 622, l. 17), and credibility (R. p. 622, l. 18 - p. 623, l. 9).

The circuit court then gave the jury case-specific instructions. This included instructions on defamation (R. p. 624, l. 8 - p. 626, l. 3), *respondeat superior* and the liability of a principal for the defamatory statements of an agent "acting within the scope of his employment" or "in the scope of his apparent authority" (R. p. 626, l. 4 - p. 627, l. 15), privileged communications (R. p. 627, l. 16 - p. 629, l. 2; p. 640, ll. 17-20), the Adult Protection Act (R. p. 629, l. 3 - p. 631, l. 5), truth as a defense. (R. p. 631, ll. 6-17) and Plaintiff's burden of proof as to actual and punitive damages. (R. p. 632, l. 9 - p. 636, l. 14). The court then stated:

> Now, I have declared the law to you through these instructions to help guide you to a just and lawful verdict. *Whether some of these instructions apply will depend on what you find to be the facts*. The fact that I have instructed you on various subjects in this case must not be taken as indicating an opinion of this court as to what you should find to be the facts or as to which party is entitled to your verdict. Your verdict must represent the considered judgment of each juror. In order to return a verdict it is necessary that each one of you agree. Your verdict must be unanimous. All 12 of you must agree on the verdict. *Your verdict cannot be based on sympathy, passion, prejudice, emotion or any other consideration not in evidence in this case*. Remember at all times you are not favoring one party over another. *You are the judges of the facts*. Your sole interest is to seek the truth from the evidence in this case ....

(R. p. 636, l. 15 - p. 637, l. 6) (emphasis added). Finally, the court went over the verdict form with the jury. (R. p. 637, l. 8 - p. 639, l. 8).

Plaintiffs renewed their objections they made prior to the charge. (R. p. 641, ll. 5-10).

The Verdict

The jury deliberated for nearly five hours and returned a verdict finding each nurse did not act in good faith in making the report. (R. p. 642, ll. 7-13; p. 3). The jury found, however, that each nurse acted outside the scope of her employment. (R. p. 642, ll. 14-24). The jury awarded actual damages of $102,500 to Plaintiff and punitive damages against each defendant as follows: (1) $200,000 against Defendant Johnson; (2) $97,500 against Defendant Davis (Peppers); and (3) $600,000 against UniHealth. (R. p. 643, ll. 1-19). Defendant requested the jury be polled and each adhered to the verdict. (R. p. 644, l. 3 - p. 647, l. 8).

Each party made post-verdict motions. The trial court granted the Defendants a new trial under the Thirteenth Juror doctrine and denied Plaintiffs' motions.

This review follows.

ARGUMENTS

The trial court granted the Defendants' motion for a new trial under the Thirteenth Juror Doctrine. The court gave reasons that demonstrate the order was controlled by an error of law. Furthermore, the court improperly permitted the Defendants to proceed with a joint defense although defendant UniHealth took positions during the trial that deflected its liability unto the individual defendants, nurses Patricia A. Johnson and Josette Peppers, despite assurances by UniHealth's counsel that it would not do so.

The Court of Appeals affirmed the new trial, declined to rule on other issues, and found Plaintiffs' arguments regarding the obvious conflict of interest were not preserved.

This Court should grant review and reverse the Court of Appeals' decision. If the Court does not reverse the trial court's grant of a new trial, the Court should do what the Court of Appeals refused to do, and instruct the circuit court to either require the defendants to truly present a unified front (without deflecting UniHealth's fault) or require each party to obtain new, separate counsel on remand.

SCOPE OF REVIEW

A trial judge's order granting or denying a new trial under the thirteenth juror doctrine will not be disturbed unless the judge's decision is wholly unsupported by the evidence, or the conclusion was controlled by an error of law. *Folkens v. Hunt*, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990); *Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002). The trial judge is not required to explain its rationale for granting a new trial under the thirteenth juror doctrine. *Folkens*, 300 S.C. at 254, 387 S.E.2d at 267. However, if the trial court chooses to do so, the appellate court will review the reasons the trial judge provided. *See*

Lane v. Gilbert Constr. Co., 383 S.C. 590, 597-600, 681 S.E.2d 879, 883-84 (2009) (reviewing the trial court's rationale for granting a new trial despite the fact the trial court granted the new trial under the thirteenth juror doctrine and was not required to provide any reasons for the outcome). *Cf. Youmans v. S.C. Dep't of Transp.*, 380 S.C. 263, 282, 287-88, 670 S.E.2d 1, 10, 13 (Ct. App.2008) (holding that despite the discretion given the trial court by the thirteenth juror doctrine, the trial court could not grant a new trial based on the brevity of the jury deliberations); *id.* at 282, 670 S.E.2d at 10 ("[G]ranting a new trial due to suspicions of deliberation quality is a flagrant deviation from premising a new trial upon the facts.").

Therefore, although a trial judge enjoys a broad level of discretion when ruling upon a motion for new trial on the facts, that decision is subject to review for abuse of that discretion. And where the trial judge gives reasons for granting the motion, the appellate court will review the reasons given. Where those reasons are controlled by an error of law, the appellate court should reverse the decision.

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF A NEW TRIAL UNDER THE THIRTEENTH JUROR DOCTRINE

The trial judge stated he granted the motion for new trial under the Thirteenth Juror doctrine because he was "concerned that the jury improperly handled the issue of the Defendant [nurses'] immunity under the South Carolina Omnibus Adult Protection Act. See S.C. Code Ann. §§ 43-35-25(A) & (G)." (R. p. 12). Thus, the trial judge believed these Code sections provided immunity from liability under the Act for a reporter as a matter of law and that the jury must have misunderstood this fact. This was an error of law. The Court of Appeals erred in re-characterizing the ruling in affirming the trial court's decision.

In 1993, the General Assembly enacted the Omnibus Adult Protection Act ("the Act") to protect vulnerable adults from abuse, neglect, and exploitation. S.C. Code Ann. §§ 43-35-5 to 43-35-595 (2015). The Act imposes a duty on certain individuals to report if they have "reason to believe that a vulnerable adult has been or is likely to be abused, neglected, or exploited..." S.C. Code Ann. § 43-35-25(A) (2015). The individual nurse defendants are among those Individuals designated as "mandated reporters" under the Act. *Id. Accord Doe v. South Carolina Department of Social Services*, 407 S.C. 623, 757 S.E.2d 712 (2014).

The report must be made to the agencies enumerated in Section 43-35-25(D). Subsection (G) adds that so long as a person meets the mandatory reporting requirements of the section, the person is not precluded from also "reporting directly to law enforcement, and in cases of an emergency, serious injury, or suspected sexual assault law enforcement must be contacted immediately."

Importantly, the Act provides qualified immunity:

> A person who, *acting in good faith*, reports pursuant to this chapter or who participates in an investigation or judicial proceeding resulting from a report is immune from civil and criminal liability which may otherwise result by reason of this action. In a civil or criminal *proceeding good faith is a rebuttable presumption.*

S.C. Code Ann. § 43-35-75(A) (2015) (emphasis added). Thus, a report under the Act is presumably made in "good faith," but that presumption is rebuttable. *Williams v. Watkins*, 379 S.C. 530, 665 S.E.2d 243 (Ct. App. 2008).

Regarding presumptions, the Rules of Evidence provide:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of the risk of non-*

persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 301, SCRE (emphasis added). *State Acc. Fund v. SC Second Inj. Fund*, 409 S.C. 240, 762 S.E.2d 19 (2014) (a presumption is a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts, and shifts burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption). A "rebuttable presumption" is defined as an "inference drawn from certain facts that establish a *prima facie* case, which may be overcome by the introduction of contrary evidence." *Jowers v. SC DHEC*, 423 S.C. 343, 359 n. 13, 815 S.E.2d 446, 454 n. 13 (2018). Thus, so long as there was contrary evidence which served to overcome the presumption of good faith, it was up to the fact finder to determine whether the nurses were entitled to immunity under Section 43-35-75(A).

In denying directed verdict, the court stated there was a question of fact "as to what" defendants Johnson and Peppers saw and whether they were acting in good faith. (R.p. 596, l.18 - p. 597, l.2). In granting the new trial, however, the court expressed a belief that the jury misapplied or "improperly handled" the Act's presumption of good faith. That reasoning flies in the face of the statute's express language that the presumption is rebuttable and the jury's finding of the existence of evidence that overcame that presumption. The court's grant of a new trial is controlled by an error of law and is the result of an abuse of discretion.

The court correctly charged the jury:

> In this case there is a rebuttable presumption that Patricia Johnson and Josette Davis acted in good faith with their oral and written statements regarding the plaintiff. *A rebuttable presumption is a presumption made by the Court and the jury that a fact or issue is taken to be true unless someone comes forward to contest it and prove otherwise.* In this case the rebuttable presumption is that the defendants acted and reported in good faith when they made their oral and written statements and the jury must assume that to be true unless the plaintiffs prove otherwise. *The plaintiffs have the burden of proof and must establish by a*

> *preponderance of the evidence that the defendants did not act in good faith.* If you find that the defendants acted in good faith when they reported a suspected abuse, then they cannot be held liable and your verdict must be in favor of the defendants.

(R.p. 630, l.21 –p. 631, l.5). This was a correct charge on the Act's operation. Along with the remaining instructions there was nothing to indicate the jury "misapplied" any aspect of the Act.

The jury concluded from the testimony that Defendant Johnson, with the assistance of Defendant Peppers, acted recklessly in reporting that Plaintiff was attempting to have sex with the patient. Plaintiff and his wife testified about several incidents from which the jury could have concluded Plaintiff and Defendant Johnson, his supervisor, were not on good terms. The jury believed Plaintiff's version of events, including his testimony that the patient was soiled, that Plaintiff left the soiled brief on her when he was ordered out of the room, and by the time investigators arrived the soiled clothing was nowhere to be found (inferring that Johnson, Peppers or both of them removed the items to support their assertion that Plaintiff was acting improperly). There was abundant evidence to support the verdict in light of the instructions.

In reviewing the verdict form, the circuit court advised the jury to find whether each nurse acted in good faith when she reported her suspicions about Plaintiff. (R. p. 637, l. 17 - p. 638, l. 6). The jury specifically found each defendant did not act in good faith. There were no questions to the court, nor was there anything else to indicate the jury "misapplied" the law. And when Defendants requested the jury be polled, each reaffirmed his or her verdict.

Although the case law indicates the grant of a new trial under the Thirteenth Juror doctrine is nearly unreviewable, under the circumstances of this case where the trial judge gives a reason and that reason is flawed under the law, the decision should not stand. Defendants received a fair trial (in fact a trial under more favorable instructions than the law permitted) and

the jury sorted through the facts and correctly applied the law as instructed. The jury's verdict was not infected by improper motive, and was supported by the testimony and evidence. There is nothing to indicate the jury "misapplied" the Act.

The Court of Appeals should have reversed the trial judge's decision and remanded for entry of judgment in accordance with the jury's verdict. This Court should grant review of that decision, reverse the Court of Appeals and the circuit court, and remand for entry of judgment for Plaintiffs.

II. THE COURT OF APPEALS ERRED IN AVOIDING PLAINTIFFS' ARGUMENT THAT THE CIRCUIT COURT ERRED IN SUBMITTING THE ISSUE OF WHETHER THE INDIVIDUAL DEFENDANTS WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT TO THE JURY AND IN DENYING PLAINTIFF'S MOTION FOR JNOV

Plaintiff objected to the verdict form on the ground there was no issue "as to whether or not the nurses were outside the scope of their employment...." (R. p. 605, ll. 5-9). Plaintiff also moved for directed verdict "on the course and scope of the nurses' employment for UniHealth in making the reports at issue." (R. p. 605, l. 16 - p. 606, l. 7). Defendants' counsel contended whether his clients, the nurses, were acting within the course and scope of their employment with his other client, UniHealth, was an issue for the jury. (R. p. 606, ll. 9-18). Plaintiff responded that he was not contending they acted intentionally but that they were reckless. (R. p. 606, ll. 19-25). The trial court overruled the objection to the verdict form and denied Plaintiff's motion. (R. p. 607, ll. 2-10; p. 609, ll. 19-21).

Following the verdict Plaintiff moved for JNOV as to the issue of whether the nurses were acting within the course and scope of their employment. (R. pp. 178-187). After granting

the Defendants motion for new trial the trial court ruled this motion was moot. The Court of Appeals also avoided the issue. This Court should grant review and reverse those decisions.

Under *respondeat superior*, the master is liable for the wrongful acts of his servant while the servant acts within the scope of his employment. An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master's business. *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 276, 639 S.E.2d 50, 52–53 (2006); *Lazar v. Great Atlantic & Pacific Tea Company*, 197 S.C. 74, 14 S.E.2d 560 (1941); *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940); *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964). As this Court has instructed:

> The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefor. Under these circumstances the servant alone is liable for the injuries inflicted. If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time.

Armstrong, 371 S.C. at 276, 639 S.E.2d at 53. In defamation cases an employer is liable if the agent is acting within the scope of employment and in the actual performance of the corporation's duties touching the matter in question. *Johnson v. Life of Ga.*, 227 S.C. 351, 88 S.E.2d 260 (1955).

In this case there was no evidence from which the jury could have concluded that Johnson and Peppers were acting for some independent purpose of their own completely separate from their duties in support of the business of their master, UniHealth. Not only were the nurses' reporting acts at issue "reasonably necessary to accomplish the purpose of their employment," the employer mandated those acts. They were clearly in furtherance of the master's business

relating to the care of the resident in Room 39-A. The nurses carried them out in reckless fashion and for that their employer is liable as a matter of law. The only evidence was that the statements Johnson and Pepper made were in the actual performance of UniHealth's duties and touched the matter in question (the subject matter the nurses were required to report as to whether Plaintiff was changing diapers per facility policy versus abusing a resident).

Our courts have held that even slight deviations from employment by an agent are within the scope of employment as a matter of law. As this Court instructed:

> The terms "course of employment" and "scope of authority," are not susceptible of accurate definition. What acts are within the scope of employment can be determined by no fixed rule. The authority from the master is generally to be gathered from all the surrounding and attendant circumstances. In cases where the deviation is slight and not unusual the Court may, and often will, as matter of law, determine that the servant was still executing his master's business.

Adams v. South Carolina Power Co., 200 S.C. 438, 21 S.E.2d 17, 18 (1942).

The district court in *Miller v. C.P. Chems*, 808 F. Supp. 1238 (DSC 1992) turned to the common law rules of agency and found instructive the following from the Restatement:

> (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.

Restatement (Second) of Agency § 228 (1958). The court added that the comments to section 229 state that acts incidental to authorized acts may be within the scope of the employment:

> *Acts incidental to authorized acts.* An act may be incidental to an authorized act, although considered separately it is an entirely different kind of an act. To be incidental, however, it must be one which is subordinate to or pertinent to an act which the servant is employed to perform. It must be within the ultimate objective of the principal and an act which it is not unlikely that such a servant might do. The fact that a particular employer has no reason to expect the particular servant to perform the act is not conclusive.

Restatement (Second) of Agency § 229 comment b (1958). *See also* Restatement (Second) of Agency § 235 (1958) ("An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which he is employed."); Restatement (Second) of Agency § 236 cmt. b (1958) ("The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment").

The evidence included UniHealth's policy that all of its employees were mandated to report possible abuse or neglect of a resident immediately. Both nurses testified they were aware of such policy and were carrying out the employer's policy directives at the time of the reporting events. They also testified as to the consequences of failing to report, including being fired. The nurses were both on duty at the employer's facility on the 11:00 p.m. to 7:00 a.m. shift, performing their jobs and were being paid for that work at the time of the relevant events. The only evidence was that they were furthering the interests of the master, UniHealth, in making these reports, and were attempting to follow the Act, but they just went about it in a reckless manner. *Compare J.E.B. v Danks*, 785 N.W.2d 741 (Minn. 2010) (under Minnesota's reporting statute filing a report that is knowingly or recklessly false will defeat a showing of good faith).

While Plaintiff did not agree that there was evidence of any personal motive by either nurse to intentionally injure Plaintiff, the Restatement standard cited above holds the conduct at issue inside the scope of employment as long as the conduct "is actuated, *at least in part*, by a purpose to serve the master." The conduct falls outside the scope of employment only if "done with no intention to serve the master." That standard was met in this case; there was, in fact, no evidence to the contrary. Both nurses were serving a business purpose of UniHealth at the time

of reporting and were acting within the scope of employment under the evidence. They reported recklessly and without regard for whether their snap judgments were reasonable or accurate.

There was also no evidence that either of the two nurses were somehow outside their employment when making these reports. There likewise was no argument or suggestion or request by the defense while in the presence of the jury that either nurse was not working for the facility nor acting outside the course and scope of their employment at the time the statements at issue were made; or that the jury should find the nurses acted outside the scope of their jobs. In the motion for directed verdict made both at the close of Plaintiff's case and the close of all the evidence, defense counsel argued "if you dismiss [because] the individuals are fulfilling their duties then likewise UniHealth has to be dismissed." (R.p. 595, ll. 9-10; p. 607, ll. 15-24).

Plaintiff's counsel argued to the jury that the nurses were indeed doing their jobs at the time the statements were made, and that the employer would thus be liable for those acts. Plaintiffs argued reckless indifference by the nurse Defendants, not intentional conduct outside the scope of employment. (R. p. 606, ll. 19-25). For purposes of *respondeat superior*, whether an employee was acting in the course of his employment is usually a question for the jury. *Adams v. S.C. Power Co.*, 200 S.C. at 441, 21 S.E.2d at 18-19. However, where the evidence yields but one conclusion, and there is no evidence to the contrary so as to place the inferences from that evidence in doubt, the issue should be decided by the court as a matter of law. *Cf. Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 629 S.E.2d 653 (2006) (directed verdict motion should be denied where evidence yields more than one inference or inferences are in doubt).

Neither the evidence nor the reasonable inferences that flowed therefrom were in doubt in this case. Both individual defendants were acting in the course of their employment, and there was no evidence they exclusively were serving a personal motive apart from their employment.

The trial court should have directed a verdict for Plaintiff on this issue, and should never have allowed the jury to make an express finding on the verdict form. The Court of Appeals should have reversed the trial court's denial of Plaintiff's directed verdict and JNOV motions on scope of employment, as well as the trial court's decision to submit this issue to the jury on the verdict form. This Court should review that decision. Even if the Court affirms the grant of the Thirteenth Juror ruling (and it should not), then the Court should instruct the trial court not to charge this issue absent evidence to support the Defendant UniHealth's contention that it is not liable because its nurses were serving their own agenda unrelated to their employment.

III. THE COURT OF APPEALS ERRED IN HOLDING PLAINTIFF FAILED TO PRESERVE THE ISSUE REGARDING PERMITTING THE DEFENDANTS TO PRESENT AN ALLEGED JOINT DEFENSE

Plaintiffs contended the trial court erred in allowing an alleged "joint defense" in this case because UniHealth asked that the jury determine whether the Defendant nurses acted outside the scope of their employment. This point raised an unwaivable conflict of interest. The Court of appeals found the issue was not preserved for appeal. That finding is in error because Plaintiffs raised the issue early at the Summary Judgment hearing, and again at the pre-trial conference with the court. The defense attorneys told the court that they would advance a unified defense for both the company and the nurses, and would not present evidence or argue scope of employment (R. 268, 269); but they sandbagged the Plaintiffs by requesting both jury instructions and special verdict form questions on scope of employment. (R. p. 605, 606). This Court should grant review, reverse the Court of Appeals, and address this serious issue.

The Rules of Professional Conduct provide:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; *and*

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.7, RPC, Rule 407, SCACR (emphasis added).

When an attorney has a conflict of interest, a court has the power to remove the attorney from the action. *See State v. Wilson*, 387 S.C. 597, 599, 693 S.E.2d 923, 924 (2010) (the circuit court removed an assistant solicitor due to a conflict of interest; Supreme Court found the order was not immediately appealable); *State v. Justus*, 392 S.C. 416, 419-20, 709 S.E.2d 668, 670 (2011) (affirming the circuit court's removal of defense counsel due to a conflict of interest).

In an attempt to avoid the obvious concurrent and intractable conflict of interest prohibited by Rule 1.7, RPC, UniHealth did not offer evidence on the scope of employment issue or argue the issue to the jury. In fact, UniHealth's counsel moved to prevent Plaintiffs from

arguing "the facility has taken the position that these two nurses acted intentionally and had a desire to do something harmful to Ralph Williams." (R. p. 267, ll. 10-13). Defense counsel stated, "we do not want it stated that the facility has taken the position that the ladies - acted intentionally. That is not our position." (R. p. 267, ll. 20-24). The trial court remarked "if they were acting intentionally then the health care facility would not be liable," (R. p. 268, ll. 1-2) to which Defendants' counsel responded, "it would not be, but we're not going to be arguing that in this case, Your Honor." (R. p. 268, ll. 3-4). When Plaintiffs' counsel sought to verify that Defendants would not later "do an about-face" and ask the Court "for a charge on intentional conduct that relieves UniHealth," Defendants' counsel replied "we're not going to be, you know, dividing the defense in that sense." (R. p. 268, l. 21 - p. 269, l. 8).

Despite these assurances, and despite the lack of any evidence or argument on the point, Defendants' counsel requested a jury instruction and two special verdict questions (#3 and #4) on scope of employment, over Plaintiffs' objections. (R. pp. 605, l. 3 - p. 606, l. 18). The trial court ruled "the way the case has been tried there is inherently an issue about whether or not they were acting inside or outside their employment, and that's a question of fact, I think, for the jury to determine." (R. p. 607, ll. 2-3). Of course, it was a jury question *only because* UniHealth made it one, pointing its finger at the nurses in an attempt to absolve itself.

In the response to Plaintiff's motion for JNOV, purportedly filed on behalf of all the Defendants, UniHealth argued that the evidence showed the nurses were furthering their own agenda, they acted intentionally and outside the scope of their employment, they made "deliberate" false statements and "destroy[ed]" evidence, and are at best on their own in the fault found by the jury. (R. pp. 210-211). This argument was seriously detrimental to these nurses (and will be on retrial), yet the same counsel purports to represent their interests while

trying to exonerate their employer by placing all blame on those employees. Such is offensive not only to the spirit of Rule 1.7 but to the letter of the Rule as well. Had Defendants stuck to their word and faced the jury in a united front, such a concurrent conflict would not have arisen or would have, at best, been waivable.

The trial court should not have permitted the Defendants to whipsaw the Plaintiff in this manner. The jury heard the evidence, heard the arguments, and rendered its verdict, even in the face of UniHealth's attempt to deflect undetached blame onto its own employees. The Defendants then asked the trial court to use their change of position to undercut that verdict. What's rewarded will be repeated. The Court should hold the Defendants to their word, and prevent their lawyers from eviscerating the rules regarding concurrent conflicts of interest.

The Restatement provides guidance on the issue. Section 121 of the Restatement of the Law Governing Lawyers states:

> Unless all affected clients and other necessary persons consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if the representation would involve a conflict of interest. *A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.*

Restatement (Third) of the Law Governing Lawyers § 121 (2000) (emphasis added). The next section adds:

> (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 121 if each affected client or former client gives informed consent to the lawyer's representation. Informed consent requires that the client or former client have reasonably adequate information about the material risks of such representation to that client or former client.
>
> (2) Notwithstanding the informed consent of each affected client or former client, a lawyer may not represent a client if:

(a) the representation is prohibited by law;

(b) one client will assert a claim against the other in the same litigation; or

(c) in the circumstances, it is not reasonably likely that the lawyer will be able to provide adequate representation to one or more of the clients.

Restatement (Third) of the Law Governing Lawyers § 122 (2000).

Next, Section 128 provides:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer in civil litigation may not:

(1) represent two or more clients in a matter if there is a substantial risk that the lawyer's representation of one client would be materially and adversely affected by the lawyer's duties to another client in the matter; or

(2) represent one client to assert or defend a claim against or brought by another client currently represented by the lawyer, even if the matters are not related.

Restatement (Third) of the Law Governing Lawyers § 128 (2000).

Lastly, Section 131 states:

Unless all affected clients consent to the representation under the limitations and conditions provided in § 122, a lawyer may not represent both an organization and a director, officer, employee, shareholder, owner, partner, member, or other individual or organization associated with the organization if there is a substantial risk that the lawyer's representation of either would be materially and adversely affected by the lawyer's duties to the other.

Restatement (Third) of the Law Governing Lawyers § 131 (2000).

These provisions demonstrate that under the circumstances of this case counsel should not have been permitted to proceed as counsel for all defendants. UniHealth asserted a defense that was detrimental to the interests of its employees: It sought a determination that the Defendant nurses were acting outside the course and scope of their employment. That

determination served no purpose other than to relieve UniHealth of any liability while leaving the individual defendants exposed to full liability for the judgment. Through its counsel, UniHealth was able to deflect any respondeat superior liability and place all liability on its employees. If this is not a nonwaivable conflict of interest, then such does not exist in the law.

This issue informs Plaintiffs' Issue II, above. If the Defendants were truly putting forth a unified front in defense of this case, then there was no basis for submitting to the jury the question of whether the individual nurses were acting outside the scope of their employment. Counsel repeatedly reassured the trial court that there would be no "divided defense," but the denial of Plaintiffs' motions for directed verdict and JNOV, and the submission of the questions regarding this issue on the verdict form, belied those assurances.

Accordingly, although this Court should grant review and reverse the trial court's decision on the Thirteenth Juror Issue. If the Court affirms, then the Court should advise the trial court to either refuse to submit this issue to the jury on retrial or require all defendants to obtain separate, and new, counsel.

CONCLUSION

For the reasons stated the Court should grant review of the Court of Appeals opinion. The Court should reverse the trial court's order and remand for entry of judgment in accordance with the jury's verdict. Alternatively, should the Court affirm the trial court's order then the Court should instruct that the trial court must police the so-called joint defense to preclude UniHealth from attempting to relieve its own liability at the hands of its employees, or require each party to obtain new and separate counsel.

Respectfully Submitted,

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