THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2017-CP-26-02880

Appellate Case No. 2019-002082

John Byerly, individually, and as PR of the Estate of Susan B. Byerly, …….....Appellant,

v.

Thomas Wesley, ……Respondent.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE FACTS

In 2016, Appellants John Byerly and the late Susan Byerly were the tenants of one half of a Blynn Drive, Myrtle Beach, South Carolina duplex home, owned by Respondent Thomas Wesley. (R. p. 44, lines 4-5). In October of that year, Hurricane Mathew impacted the Myrtle Beach area and caused a large tree to fall on the roof of the rented home (R. p. 119, lines 21-25).

After the hurricane, property owner and landlord Thomas Wesley hired Brown Rooftops, LLC, who sub-contracted with Bay Service Contracting, LLC, to perform repairs to the property. (R. p. 118, line 22-p. 119, line 9). At some point during the repairs, railroad ties, which had bordered the front of the property were moved, so that equipment could reach the home. (R. p. 105, line 25-p. 106, line 6). Susan Byerly claims that she tripped over the railroad ties and that she was injured. (R. p. 17).

STANDARD OF REVIEW

In an action at law, on appeal of a case tried by a jury, an appellate court's jurisdiction extends only to correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). The trial judge has discretion concerning the admission of evidence and that ruling will not be disturbed on appeal absent an abuse of that discretion. Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994). The scope of cross-examination rests largely in the discretion of the trial court. Cornwell v. Plummer, 265 S.C. 587, 220 S.E.2d 879 (1975). "The admission or exclusion of evidence is a matter within the sound discretion of the trial court and absent clear abuse, will not be disturbed on appeal." Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 373, 474 S.E.2d 438, 441 (1996); see also Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 439 S.E.2d 838 (1994).

"To warrant reversal, a trial court's refusal to give a requested jury charge must be both erroneous and prejudicial […] failure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining issues." State v. Patterson, 367 S.C. 219, 232, 625 S.E.2d 239, 245 (Ct. App. 2006).

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Standard Fed. Sav. & Loan Assn. v. Mungo, 306 S.C. 22, 25, 410 S.E.2d 18, 20 (Ct.App.1991) (quoting Rule 61, SCRCP).

ARGUMENT

I. APPELLANT FAILED TO PRESERVE THE FIRST ISSUE ON APPEAL BECAUSE APPELLANT NEGLECTED TO MAKE ANY CONTEMPORANEOUS OBJECTION TO JOHN BYERLY'S CROSS-EXAMINATION ON THE BASIS ASSERTED; APPELLANT'S SOLE OBJECTION DURING JOHN BYERLY'S CROSS-EXAMINATION WAS NOT PROPER, NOR SUFFICIENT, AND THE TRIAL JUDGE WAS NOT AFFORDED THE OPPORTUNITY TO RULE UPON THE ISSUE.

"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 to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997). South Carolina law requires a contemporaneous objection when the evidence is actually offered into evidence at the trial to preserve the issue for review. White v. Wilbanks, 298 S.C. 225, 379 S.E.2d 298 (Ct. App.1989), rev'd on other grounds, 301 S.C. 560, 393 S.E.2d 182 (1990).

Further, an objection must be sufficiently specific so as to "inform the trial court of the point being urged by the objector and to show the opposite party the point of the objection, so that he may have an opportunity to obviate the error, if possible." Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct.App.1986) (citing 88 C.J.S. Trial § 124 at 248–

49 (1955). If an objection fails with regard to specificity, the trial judge committed no error in overruling the objection and in admitting the evidence. See Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 845 (1967).

During the entirety of Respondent counsel's cross-examination of John Byerly, counsel for Appellant made only one objection, which took place during the following exchange:

> BY MS. ANTHONY:
> Q Mr. Byerly, you testified that you drove Ms. Byerly straight to the hospital after her fall on October 13th in the morning around 6:00, 6:30 in the morning?
> A Yes, sir -- yes, ma'am. Sorry.
> Q […] And you drove directly to Grand Strand Regional Medical Center, the emergency room, correct?
> A Yes, ma'am.
> Q But isn't it true that you didn't check Ms. Byerly into the emergency room until 12:50 p.m.?
> A That is not true.
> Q You did not show up to the emergency room at --
> A I went there directly from the house at 6:30.
> Q Isn't it true that the medical bill that your attorney moved in and is asking the jury to have Tom pay reflects treatment which took place on October 13 between the hours of a 12:50 check-in time, and a 2:30 p.m. discharge time?
> A I can't explain the time. All I can tell you is I took her directly out there. I don't know if the time didn't start under after she was in the back room or whatever, but I took her out there directly after the accident.
> Q Right. 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.**
> **THE COURT: You put it into evidence, it's subject to cross-examination. I overrule your objection.**
> Q (MS. ANTHONY) I can't remember exactly where I was, but from your residence at the time, the Blynn Drive address, that is at 6211-A, Blynn Drive, correct?
> A Correct.
> Q And you took Ms. Byerly directly, you say, at 6:00, 6:30 to 809 82nd Parkway, which is the emergency room, right?
> A Right.
> Q And it is my understanding that is about 1.8 miles away from your house?
> A About that.
> Q And with traffic, maybe four or five minutes at the most?
> A Maybe, yes.

Q And those medical bills that you would 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?
A No, ma'am. But I can't explain why they had the 12:00 to 2:00, but I know when I took her out there. That is all I can say.
Q All right. And when Ms. Byerly fell and tripped over the railroad tie, if you took her directly to the emergency room and checked in at 12:50, it would have been light outside at the time of her trip and fall, correct?
A No, ma'am, it wouldn't be. The sun rose at 7:15, 7:20, and I was already on my way to the hospital by then. It was dark when she tripped.

(R. p. 75, line 17-p. 78, line 14)(*emphasis added*)

As an initial point, despite Appellant's assertion that John Byerly was being improperly cross-examined about his wife's medical records, the record reflects that Mr. Byerly was not being cross-examined about the substance of his wife's medical records, at all, but was instead being asked factual questions concerning the time the treatment was rendered, the treatment being that which was reflected by the charges in the ER bill, which Appellant had already put into evidence. Counsel was merely inquiring as to Plaintiff's personal knowledge as to what time the services, which were reflected in the bill that he, himself, put into evidence, were performed; a fact which Mr. Byerly was certainly competent to testify as to given his testimony that he was at the hospital during the duration of his wife's treatment, having driven her to the ER. John Byerly was not being cross examined about the substance of Susan Byerly's medical records or treatment; he was being cross examined about what time he arrived at the hospital with Susan Byerly, which was highly relevant due to the open and obvious nature of railroad ties during the daylight vs early-morning darkness to which John Byerly had testified. During direct, the medical bill from the ER at Grand Strand Regional Medical Center was introduced into evidence without objection. On

cross examination, Wesley's counsel inquired of John Byerly: "Isn't it true that the medical bill that your attorney moved in and is asking the jury to have Tom pay reflects treatment which took place on October 13 between the hours of a 12:50 check-in time, and a 2:30 p.m. discharge time?" (R. p. 76, lines 8-12). By this question, counsel was simply asking the witness if the treatment that was reflected by the charges on the bill happened at a later time than that time at which the witness previously claimed. At no point did counsel indicate that the bill itself reflected any specific times, but rather that the charges included on the bill were for treatment at an issue-relevant, factually-contradictory time.

Nonetheless, Appellant failed to preserve the first issue on appeal, as presented, because Appellant neglected to make any contemporaneous objection to John Byerly's cross-examination on the basis asserted. Because Appellant's sole objection during John Byerly's cross-examination was not proper, nor sufficient, and the trial judge was not afforded the opportunity to rule upon the issue. Cross-examination concerning the bill was quite clearly the subject of the judge's ruling, the evident basis for the ruling being that Appellant had already admitted the bill into evidence. No ruling was made on the subject or, much less, upon the basis, that Appellant now asserts: that Respondent should not have been allowed to cross-examine the witness about his deceased wife's medical records that were not admitted into evidence. (See Issues on Appeal, 1). Furthermore, the basis for the sole objection made at trial was that the witness "didn't author" the document, not that they were not admitted into evidence. (R. p. 76, line 21-23).

During the trial, Appellant did not ask for, nor receive, a ruling on the objection now-raised. And, though "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial" and are not an opportunity to raise new issues, they are necessary to "preserve those that have been raised to the trial court but not yet ruled upon by it." Hubbard v. Rowe, 192 S.C. 12, 5

S.E.2d 187 (1939). As such, had Appellant felt that his objection was misunderstood and, therefore, never ruled upon, it was incumbent upon him clarify and/or reassert his objection. If, post-trial, Appellant remained unsatisfied with the trial judge's understanding of his objection and there remained no ruling thereon, Appellant needed to file a post-trial motion, pursuant to Rule 59, SCRCP, in order to allow the trial judge an opportunity to rule. Appellant filed no Rule 59 motions and never afforded the trial judge an opportunity to obviate the error, if any, and thus failed to preserve the issue for appeal.

Even so, though Appellant's sole objection was overruled, Respondent's counsel nevertheless chose to forgo the question and moved on with cross-examination, thereby abandoning the question to which Appellant's counsel objected altogether. In essence, despite the ruling, Appellant got that for which he was asking – that counsel not ask the objected-to question. No further objection was made during the course of John Byerly's cross-examination. Yet, now, despite the voluntary abandonment of the objected-to question, Appellant is aiming the use this singular objection to raise new issues, which were not preserved by way of any contemporaneous objection, the merits of which the trial judge was not given the opportunity to rule upon.

II. THE TRIAL COURT PROPERLY DECLINED TO SUBMIT APPELLANT'S REQUEST TO CHARGE TO THE JURY.

Appellant argues that the trial court erred in denying to charge the following:

> South Carolina Courts have found that a landlord who undertakes repair of his property by use of a contractor has a non-delegable duty to see that the repair is done properly and remains vicariously liable for **injuries caused by improper repairs.** Gary v. Askew, 417 S.C. 232, 789 S.E.2d 94 (Ct. App. 2016); Simmons v. Tuomey Reg'L Med. Ctr. (Simmons 2), 341 S.C. 32, 42, 533 S.E.2d 312, 317 (2000). (*emphasis added*).
>
> A person may delegate a *duty* to an independent contractor, but if the independent contractor breached that duty by acting negligently or improperly, the delegating person remains *liable* for that breach. It actually is the liability, not the duty, that

is not delegable. The party which owes the non-delegable duty is vicariously liable for the negligent acts of the independent contractor. Id. (Emphasis in original).

(R. p. 26; see also Final Brief of Appellant, pp. 10-11)

A. Appellant's requested jury charge was not factually relevant to, nor supported by, the issues and evidence presented at trial and the instructions given by the trial court afforded the jury the proper test for determining the issues.

"The law to be charged must be determined from the evidence presented at trial." State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006). Jury instructions should be confined to the issues made by the pleadings and supported by the evidence. Baker v. Weaver, 279 S.C. 479, 309 S.E.2d 770, 771 (Ct. App. 1983). A requested charge must be applicable to the case and not otherwise covered by the charge. Burns v. S.C. Comm'n for Blind, 323 S.C. 77, 80, 448 S.E.2d 589, 591 (Ct. App. 1994). "[F]ailure to give requested jury instructions is not prejudicial error where the instructions given afford the proper test for determining issues." Id.

Here, the requested charge, as proposed, was not factually relevant to the underlying case and was not supported by the evidence presented at trial. As the trial judge pointed out, "[Defense counsel's position is that the landlord is] not responsible […] because it is an obvious condition. [The case] has nothing to do with the work. It has to do with what the premises looked like." (R. p. 133, lines 23-p. 134, line 1). And, though Appellant counsel pointed out that the caselaw, from which the proposed charge was pulled, does address the landlord's nondelegable duty to "maintain the leased property in a reasonably safe condition" (R. p. 134, lines 6-7), this is *not* the portion of the case that Appellant requested be charged. Instead, the selected caselaw and proposed jury charge concerned "improper repairs" and injury resulting from the same, a matter that was not at issue and was not supported by the evidence presented at trial. Though Appellant now argues that the jury should have been instructed on "a landlord's nondelegable liability for the dangerous condition of the property when repairs are being made" (Final Brief of Appellant, p. 9), this

language was not included in Appellant's Request to Charge and is not able to be raised for the first time on for appeal. The portion that was selected, proposed, and ruled upon, was entirely irrelevant to the facts and, thus, properly excluded from the court's charge.

Too, the landlord's duties and all pertinent issues were already adequately covered by the court's charge. Contrary to the argument presented in Appellant's initial brief, the jury *was* directly asked to determine if Respondent, pursuant to his duties as landlord, was negligent. The jury instruction, as given, in no way insinuated that he was somehow immune from, or able to delegate, liability; in fact, this was the threshold issue for the jury. The jury was charged with the law on negligence and the duties owed by a landlord to a tenant (R. p. 142, line 20-p. 148, line 18). The verdict form directly stated, "Do you find that the defendant [Thomas Wesley] was negligent?" (R. p. 1).

Further, Respondent was not asking for a delegation of his duty (or liability). The jury was not asked to decide upon or apportion fault to any third-party. The trial judge directly instructed the jury as to the Respondent's duty pursuant to his role as owner and landlord of the property; Respondent did not deny that he had any such duty or argue that the duty was no longer his by virtue of delegation to a third-party. Nor did Respondent argue that he would not be liable to Appellant, should the jury determine that he breached such duty. The jury was asked to make a factual determination as to whether Respondent was, based upon his admitted duty, negligent. Though a jury charge concerning a landlord's non-delegable duty (or liability) may have been appropriate had the jury been asked to also make a determination as to the liability of a third-party contractor, which then may have been imputed, vicariously, upon the landlord, Appellant voluntarily dismissed all other defendants and, therefore, the jury was left to decide only upon the

negligence, or lack thereof, of Respondent. The jury was afforded the proper test for determining the issues and, based upon the evidence presented, any further jury instruction was not warranted.

Appellant also raises various arguments and cites other bits of caselaw concerning issues that were not raised at trial and are not before the court on appeal, including "an exception to the open and obvious danger rule" (Final Brief of Appellant, p. 9). No such jury charge was proposed by Appellant at the trial of this matter and this newly-raised caselaw and its applicability cannot now be addressed on appeal.

B. Vicarious liability arising from respondent's nondelegable duty, as outlined in Appellant's request to charge, could not be charged without an initial jury determination as to the contractor's underlying liability.

Notwithstanding the factually irrelevancy of the proposed charge, by the time the case reached the jury, there existed no contractor-party to whom the jury could have been asked to assign liability, for which Thomas Wesley could have *then* been vicariously liable. There *must* have been an initial determination that the contractor was in fact negligent, before Respondent could *then* have been deemed to be vicariously liable; Appellant reached a settlement with Brown Rooftops, LLC before trial and dismissed it from the case. Appellant then voluntarily dismissed the remaining contractor-party, Bay Service Contracting, LLC, before the start of the trial. Having done so, Appellant was left with no contractor for whom the landlord-Respondent could be vicariously liable. The Verdict Form did not include any special interrogatory or other means by which the jury may have been asked to determine whether any non-party-contractor was negligent.

C. Vicarious liability arising from respondent's nondelegable duty establishes an independent cause of action for breach of the duty under the Residential Landlord Tenant Act, which was not plead in Appellant's Complaint or Amended Complaint.

"The RLTA [South Carolina Residential Landlord Tenant Act] creates a ***new cause of action*** not found at common law." Pryor v. Northwest Apartments, Ltd., 321 S.C. 524, 469 S.E.2d

630 (Ct.App.1996). (*emphasis added*). The RLTA creates a right in tort for breach of a duty owed by the landlord to the tenant. Watson v. Sellers, 299 S.C. 426, 385 S.E.2d 369 (Ct.App.1989). The Act imposes specified duties upon a landlord, and it is established through the RLTA that "a landlord owes his tenants a non-delegable duty not to create unsafe conditions on premises and is thus vicariously liable for torts of his independent contractor." Durkin v. Hansen, 313 S.C. 343, 348, 437 S.E.2d 550, 553 (Ct.App.1993).

Rule 8 of the South Carolina Rules of Civil Procedure requires "[a] pleading which sets forth a cause of action […] to contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled. Though the Rule requires pleading of the facts, rather than a "statement of the claim", the "Rule does not allow 'jumbling' of two or more causes of action in one count." (SCRCP, Rule 8, Notes).

Here, notwithstanding the aforementioned inapplicability of the requested jury charge at issue, Appellant failed to assert any cause of action for breach of duty under the RTLA, from which the independent cause of action is derived. Appellant's initial complaint, filed by Susan Byerly, asserted only a negligence claim; the amended complaint only adding John Byerly and his claim for loss of consortium. (R. pp. 3-8; R. pp. 14-20) and, as such, Appellant was not entitled to any jury charge related to an independent cause of action for breach of duty under the RTLA, which was not before the jury, having not been plead.

CONCLUSION

Based upon the foregoing, Respondent moves the Court dismiss this appeal and the judgment of the trial court be affirmed.

Respectfully submitted,

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s/ Stephanie P. Anthony

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CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

I hereby certify that Respondent's Final Brief complies with Rule 211(b), SCACR.

s/ Stephanie P. Anthony

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