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.: 2020-000768

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

v.

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

REPLY TO RETURN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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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

I. APPELLANTS RAISED TIMELY: A) THE CONFLICT OF INTEREST THAT EXISTED WITH THE DEFENSE ATTORNEYS REPRESENTING BOTH THE CORPORATION UNIHEALTH, AND THE EMPLOYEE NURSES, WHO HAD OPPOSING LEGAL INTERESTS ON THE ISSUE OF THE NURSES SCOPE OF EMPLOYMENT; AND B) OBJECTIONS TO THE JURY CHARGE ON THE NURSES SCOPE OF EMPLOYMENT AS WELL AS THE SPECIAL VERDICT FORM QUESTIONS ON THEIR SCOPE OF EMPLOYMENT

At the summary judgment hearing before circuit Judge Goodstein, UniHealth took the position that the two nurses acted beyond the scope their reporting of the allegations and as such, the corporation should be dismissed. The Judge issued an Order January 6, 2014, and ruled that there were material issues of fact on the scope of employment for resolution by a jury, (R. p. 1, 2).

Appellants again raised the clear conflict of interest at the pretrial conference before the trial started, to which defense council stated to the court they would mount a unified defense for both nurse clients and the corporation, and would not be dividing that defense. (Pet. P. 19, R. p. 605, 607).

Again, after the Appellants were sandbagged at the jury charge conference, when Respondents asked the court to charge scope of employment of the nurses and asked for special jury verdict forms relating to scope of employment. Appellants objected, raising the conflict of interest. (Pet. p.19).

Again, the Appellants did timely raise objection to the charges on *respondeat superior* before the closing arguments. (R. p. 605, 607, Pet. p. 14).

Once again, before the verdict was read, Appellants renewed the objections to the charges and special verdict forms bases upon the conflict of interest. (R. p. 641). In their Return, Respondents claim "Appellants failed to raise any objections to these charges at trial and

therefore waived the opportunity to raise an objection for the first time on appeal." (Return p. 20).

How can the Respondents, presumably having read the Petition and prior briefs in this case, begin to make such a preposterous claim such under these facts? It seems clear to Appellants that Respondents, with repeated instances of untrue procedural complaints against the Appellants, seem to be focused on procedural, rather than the important substantive issues truly before the Court.

II. APPELLANTS CITED TO THE RECORD ON APPEAL SUFFICIENT FOR EFFECTIVE JUDICIAL REVIEW BY THIS COURT

Respondents argue that Appellants cite only four references to the Record on Appeal to support their arguments, and concludes that therefore, they should not be reviewed by the Court. (Return p. 10) On the contrary, Appellants cited to the Record on Appeal approximately 20 times. The winner in a legal case is not who had the most citations to the record, as in who has the most points in a basketball game. Appellants also incorporates by reference the factual trial evidence in detail under Rule 208(b)(6) (See Brief of Appellant, pp. 6-25), to give the Court as many facts as possible to support the case. Appellant's arguments are fully supported to the Record as appropriate, and should be reviewed.

III. THE COURT OF APPEALS ERRED IN SEIZING ON THE TRIAL JUDGE'S COMMENTS IN HIS ORDER GRANTING A NEW TRIAL, IN SUPPORT OF ITS OPINION, THAT WILLIAMS WAS SEEN ON THE RESIDENTS BED AS AGANST PROTOCOL, AND HAVING HIS PANT'S STRING TIES LOOSE AND PANTS SOMEWHAT DOWN, WHEN SUCH WAS EXPLAINED AND JUSTIFIED BY WILLIAMS, WHO COULD NOT CHANGE THE RESIDENT'S OTHERWISE

Respondent's Return points to the Court of Appeals opinion stating that Williams was on a female resident's bed contrary to the changing procedure at the facility. The reason is that

Williams was much smaller than the resident and had knee and back impairments which would not allow him to move the resident without using the bed as leverage to change the resident's brief. And this reason prevented him from following the proper protocol. Moreover, Williams's problems with nurse Johnson involved instances where he could not even get help from her in responding to residents' emergencies. And the jury believed his testimony that he had to modify to get his job done. (See R. p. 507, 542, 543, 544 547, 549).

IV. A. THE COURT OF APPEALS ERRED IN RULING THAT APPELLANTS' ARGUMENT WAS NOT PRESERVED REGARDING THE CIRCUIT COURT PERMITTING THE RESPONDENTS TO PRESENT AN ALLEGED JOINT DEFENSE WHEN THE EMPLOYER RESPONDENT SOUGHT TO RELIEVE ITS LIABILITY BY DEFLECTING FAULT UPON ITS OWN EMPLOYEES, WHO WERE ALSO RESPONDENTS, BY ARGUING THESE EMPLOYEES WERE OF ACTING OUTSIDE THE SCOPE OF THEIR EMPLOYMENT

B. THE COURT OF APPEALS ERRED IN REFUSING TO ADDRESS APPELLANTS' ARGUMENT THAT THE CIRCUIT COURT ERRED IN OVERRULING APPELLANTS' OBJECTION TO THE VERDICT FORM AND IN DENYING APPELLANTS' MOTIONS FOR DIRECTED VERDICT AND JNOV AS TO THE ISSUE OF WHETHER THE INDIVIDUAL RESPONDENT NURSES WERE ACTING WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT

The Respondents' attorneys continue to contend, to this day still, that their nurse clients were acting outside of their employment. One could say they are at least consistent in throwing their nurse clients under the bus.

The only evidence at trial on the issue was put forth by Appellants. The factual evidence presented at trial included Defendant/Employer 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 from their jobs with UniHealth. 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 of June 21, 2010. The only evidence was that they were furthering the interests of the master, UniHealth in making these reports, and were attempting to follow the Omnibus reporting law of South Carolina, 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). In Miller v. C.P. Chems, 808 F. Supp. 1238 (DSC 1992), the district court turned to the common law rules of agency and found instructive the Restatement (Second) of Agency, which provides:

(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. The Restatement (Second) of Agency § 228 (1958).

While Appellants did not agree that there was evidence of any personal motive by either nurse to intentionally injure Appellants, 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." And, the conduct falls outside the scope of employment only if "done with no intention to serve the master." That standard is met in the instant case and, in fact, there was 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 any reasonable view of the evidence. Unfortunately, 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 attorneys during any portion of the trial 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 they should find the nurses acted outside the scope of their jobs. And, in the motion for directed verdict made at the close of Appellant's case, 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). Defendants renewed this motion at the close of all the evidence. (R. p. 607, ll. 15-24).

Appellant's counsel maintained in arguments 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).

The facts of the case on the issue of scope of employment, as admitted into evidence, should be controlling the decision. The Respondents admitted no evidence of scope of employment. Appellants showed clearly by the facts that the nurses were doing their jobs. Under any reasonable view of the factual evidence presented, the nurses reporting was "...actuated, at least in part, by a purpose to serve the master." Restatement (Second) of Agency Sec. 228 (1958).

The Respondents seize on adjectives used in Appellant's closing argument in a backdoor attempt to make out their case against their own client nurses, and, after having told the Court they would not turn against them. They were using them as pawns to save the corporation.

Even though Respondents admitted no evidence on the issue, they take a "partial" quote from our brief, "The only evidence was that they were furthering the interests of the master, UniHealth in making these reports, and were attempting to follow the Omnibus reporting law of South Carolina, **but they just went about it in a reckless manner**", but omitted the last part of the quote (bold) to claim: "Gotcha," to falsely claim that Appellants were now admitting the issue was lost because of any lack of evidentiary support, which is far from the truth, as set forth in Appellants evidence on the issue..

The trial court should have directed a verdict on the issue, and never allowed the jury to make an express finding on the verdict form.

And, the Court of Appeals should have and held as a matter of law that the nurses were in the course and scope of their employment when making their reports.

CONCLUSION

For the reasons stated the Court should grant review of the Court of Appeals opinion. The court should hold that Appellants preserved the issues on appeal, timely objected to the conflict of interest, the objections to the jury charge on scope of employment and special verdict form questions. 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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