

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Aug 17 2020

S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Unpublished Opinion No. 2020-UP-108 (S.C. Ct. App. Filed Apr. 15, 2020)

Rickey Phelps and Christy Phelps Petitioners,

v.

Shamsy Madani, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of appeals on July 17, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Respondent timely preserved the issue of “irreconcilable verdict” for appellate review in first raising the issue in her motion for reconsideration of post-trial motions?
2. Did the Court of Appeals err in affirming the circuit court’s novel reversal of judgment(s) where the jury returned a verdict of zero actual damages for Respondent’s violation of S.C. Code § 27-40-660 of the Residential Landlord Tenant Act which provides for a statutory award equal to three month’s rent or twice the actual damages; whichever is greater.

STATEMENT OF THE CASE

On November 30, 2015 Rickey Phelps and Christy Phelps (“Petitioners”) brought this action alleging violation of S.C. Code § 27-40-660 (“Unlawful Ouster”) as against Shamsy Madani (“Respondent”), their landlord, for unlawful ouster of Appellants from their residential property and further alleging violation of S.C. Code § 27-4-410 (“Security Deposit”) for

Respondent's failure to return Appellants' security deposit as properly and timely requested. Respondent counterclaimed for common law breach of contract for lost rent and damages. On April 18, 2016 the jury returned verdicts in favor of Petitioners on both statutory claims, however, found zero actual damages as to the claim of unlawful ouster. App. 71-72. The jury returned a verdict in favor of Respondent for \$1,351.85 for loss rent and damages. App. 73-74. Upon publishing the verdicts, the magistrate Judge Nancy Sadler ("Magistrate"), excused the jury. App. 38, lines 1-24. Respondent made no objection to excusing the jury or to any issues concerning irreconcilability before the jury was physically out of the presence of Magistrate and/or the courthouse. *Id.* There appears no mention in the record that the jury's dismissal was improper or that Respondent was, otherwise, deprived of an opportunity to object to their dismissal for irreconcilable verdict(s).

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" in favor of Respondent however, she does not request a new trial for inconsistent plaintiff verdicts or any other issue to include denial of her opportunity to question the jury before their dismissal. App. 40. 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. App. 26. Accordingly, 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 plaintiffs' verdicts. App. 104. Respondent similarly failed to object to Magistrate's denial of an opportunity to question the jury with regard to any inconsistent verdicts in her first post-trial motion. *Id.* 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. App. 75. (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. App. 118. 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 question the jury as to the verdicts issued at trial on April 16, 2016 but rather asserts it was not Respondent's obligation to object. App. 201.

The Court of Appeals 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." App. 209-10. The Court of Appeals further provided, a "verdict assessing liability against the defendant but awarding plaintiff zero damages is inconsistent and contrary to South Carolina law." *Id.*

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT RESPONDENT FAILED TO PRESERVE THE ISSUE OF "IRRECONCILABLE VERDICT" FOR APPELLATE REVIEW.

As provided above, Appellant's counsel has previously 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. App. 220. 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 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 plaintiffs' verdicts. Upon 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 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 verbal/written argument 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, Respondent waived and/or failed to preserve the issue of plaintiffs' irreconcilable verdicts 1) before the jury, 2) upon the jury's dismissal and before the court on post-trial motion, 3) and in her post-trial motion filed on April 25, 2020. Additionally, Respondent has never raised or preserved the issue of whether Magistrate improperly dismissed the jury resulting in the Respondent's denial of the opportunity to so move for a new trial for irreconcilable verdict(s). For these reasons, Petitioner seeks a writ of certiorari to review the Court of Appeals decision finding Respondent timely raised the above-stated issue.

2. THE COURT OF APPEALS SHOULD HAVE REVERSED THE CIRCUIT COURT'S FINDING OF IRRECONCILABLE VERDICTS WHERE THE MAGISTRATE'S DECISION RELIED ON A CONSISTENT READING OF S.C. CODE § 27-40-660'S STATUTORY AWARD OF THREE MONTHS RENT WHICH IS GREATER THAN TWICE THE ACTUAL DAMAGES OF ZERO AS RETURNED BY THE JURY.

As provided in The Court of Appeals' 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. App. 208-09. The Court of Appeals 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.'" App. 210.

However, Magistrate was able to surpass guesswork in determining what the jury sought to render as controlled by S.C. Code § 27-40-660 in writing:

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.

App. 76. 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 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 having been stipulated 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. To find otherwise would result in the addition of a new element into S.C. Code 27-40-660 requiring a showing of nominal damages preceding statutory award which is clearly not provided by the legislature and contrary to its apparent language.

Further, The Court of Appeals as to 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. App. 49-52. Whether Respondent wrongfully prevented Appellants from entering their home is a wholly separate issue from whether Respondent wrongfully withheld Appellants security deposit.

Summarily, Magistrate was able to reconcile the verdicts as clearly provided in S.C. Code § 27-40-660 and a “jury's verdict should be upheld when possible to do so and to carry into effect what was clearly [the] jury's intentions.” *Hadfield v. Gilchrist*, 343 S.C. 88, 94, 538 S.E.2d 268, 283-84 (Ct. App. 2000). To find otherwise would create a nominal damages requirement in legislatively created causes of actions. Alternatively, the Court of Appeals should

not have affirmed the reversal of all verdicts and Petitioner seeks a writ of certiorari to review tis decision.

CONCLUSION

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

August 17, 2020

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PROOF OF SERVICE

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 August 17, 2020 at dtoney@mullenwylie.com.

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