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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2019-001290

Debbie Bannister, individually and as Personal Representative of
the Estate of Hazel L. Clerk,.....Respondents

vs.

Mary Sims Touchton; Faith, Hope and Charity Retirement, LLC; and
The Resting Place, LLC,.....Appellants

APPELLANTS' FINAL BRIEF

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September 9, 2020

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT TO THE TWO APPELLANT LLC'S BECAUSE THEY WERE INCORPORATED AFTER THE ALLEGED TORTS.
- II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL NOTWITHSTANDING THE VERDICT BECAUSE THE APPELLANT LLC'S WERE NOT INCORPORATED AT THE TIME OF THE ALLEGED TORTS.
- III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT PROVIDING A VERDICT FORM THAT ALLOWED THE JURY TO CONSIDER EACH INDIVIDUAL APPELLANT'S ACTIONS OR RESPONSIBILITY AS TO THE ALLEGED NEGLIGENT ACTS

STATEMENT OF THE CASE

In March, 2017, Debbie Bannister, individually and as personal representative of the estate of her mother, Hazel L. Clark ("Mrs. Clark" or "deceased"), filed a suit against Mary Sims Touchton, Faith, Hope and Charity Retirement, LLC, and The Resting Place, LLC for the wrongful death of Mrs. Clark on September 7, 2015 under S.C. Code Ann. §15-51-20 (R. p. 21) and a survival action under S.C. Code Ann. §62-3-203 (R. p. 9). The suit alleged the two LLC's are community residential care facilities as defined by the Department of Health and Environmental Control (DHEC) Regulation 61-84. Mary Sims Touchton ("Mrs. Touchton") was alleged to be the owner and operator of the LLC's and responsible for their actions.

The two suits charged negligence, gross negligence, and negligence *per se* in the death of Mrs. Clark and prayed for damages and punitive damages for the treatment of the deceased from July 10th to August 27th 2015, the period Mrs. Clark was a resident at the facility.

The Appellants denied the allegations of the complaints. (R. p. 18 (Survival Action) and R. p. 30 (Wrongful Death Action)). As to the allegations of negligence and gross negligence, as

additional defenses the Appellants pled waiver, comparative negligence, and any damages were caused by additional intervening causes.

The two suits were consolidated for trial.

A jury trial was held on April 8, 2019 through April 11, 2019 before the Honorable R. Lawton McIntosh in Anderson County. Preliminary to the trial the court heard motions from both parties as to evidentiary matters. After the court ruled on those matters the case was tried.

During the presentation of the Respondent's case it was discovered that the two Defendant LLC's, Faith, Hope and Charity, LLC and The Resting Place, LLC, were not in existence at the time Mrs. Clark was alive and a resident of the community residential care facilities.

At the close of the Respondent's case, the Appellants moved for a directed verdict on numerous grounds which were denied. One of the Appellate LLC's grounds for a directed verdict was that the two LLC's were not in existence at the relevant times. The Respondent also moved for directed verdict which was also denied.

The Appellants proceeded to present its case.

At the close of the Appellants' case, the LLC's renewed their motions for a directed verdict on the grounds they were not in existence at the relevant times, which was denied. The Respondent also moved for a directed verdict which the court also denied. (R. p. 150).

A charge conference was held and the Appellants requested that the verdict form require verdicts against each Appellant individually, which was denied by the court.

The jury found the Appellants jointly liable for negligence and awarded the Respondent \$134,866.55 actual damages against all Appellants on the survival action and \$100,000 actual damages on the wrongful death action against all Appellants. The jury awarded punitive

damages of \$100,000 on the survival action and \$200,000 on the wrongful death action against all Appellants. (R. p. 166).

Both parties timely filed post-trial motions. (R. p. 33). The Respondent filed for *nisi additur* but withdrew the motion.

Appellants filed motions for judgment notwithstanding the verdict, new trial remittitur and dismissal of the two LLC's from the verdict. The trial court denied the motions by Form 4 Order filed June 14, 2019 with a written order to follow. The trial court filed its final order denying the Appellants' motions on July 9, 2019.

The Appellants filed Notice of Appeal which was marked "received" by the Court of Appeals on August 2, 2019.

STATEMENT OF THE FACTS

Mrs. Touchton is a high school graduate who became an ordained minister in Florida in 1981. She moved from Florida to Anderson, South Carolina that year and formed a church, The Full Gospel Lighthouse Outreach (R. p. 106-107). To help support the church Mrs. Touchton established a residential care facility in 1984 named Faith, Hope and Charity. By 1988 she and her husband had three residential care facilities. The last two she and her husband established were named The Resting Place and The Resting Place, II.

In 1995 Mrs. Touchton's husband died (R. p. 119) and she closed The Resting Place II. The two remaining residential care facilities are physically located in two buildings which are contiguous to each other. The area of the two facilities is fenced in. Both buildings consist of five bedrooms, three baths, a dining room, and kitchen. Most bedrooms contain two beds and a closet. Some have side tables by the bed. All residents are women.

Community residential care facilities are licensed by DHEC. Mrs. Touchton took and passed a training course in 1988 and has renewed her license each year thereafter (R. p. 109).

DHEC licenses several different levels of care for residents. Community residential care facilities provide the lowest level of care and were described by Mrs. Touchton as one step above a boarding house. The residents of a DHEC licensed community residential care facility are provided room, board, meals, laundry, transportation to doctors, and shopping trips (R. p. 110). Meals are approved by DHEC. The medication of residents is controlled by the staff and records are kept and inspected regularly by DHEC. Each staff member receives training in administering the correct medication (R. p. 117) and keeping the correct records.

Community residential care facilities that are ten or less residents are required to have one staff member on duty from 8:00 p.m. until 8:00 a.m. and two staff members during the day. More than ten residents require more than one staff member at night.

The next level of care above a community residential care facility is the assisted living facility, which requires a nurse on duty. The next level above an assisted living facility in terms of care is a nursing home, and finally, acute care (R. p. 110).

Mrs. Touchton charged roughly a little over \$1,200 per resident per month (R. p. 122). Generally this amount is the resident's social security payment. If the resident is on Medicaid the State will supplement the social security (R. p. 124) but generally the resident pays in the neighborhood of \$1,200 to \$1,300 for their keep. It is fair to say Mrs. Touchton's facilities were for the less economically advantaged.

As part of her outreach ministry for her church, Mrs. Touchton would hire as staff persons who had problems in the past with drugs, alcohol and the law (R. 128-129). She believed in giving these women a second chance as part of her ministry (R. p. 90).

In July, 2015, Mrs. Touchton received a call from a local hospital to come look at Mrs. Clark as an appropriate candidate for her facility (R. p. 120-121). The local hospital often called Mrs. Touchton for possible placement for residents who no longer needed hospital care.

At that time, Mrs. Clark was seventy-eight years old and widowed. She weighed 250 pounds and had COPD along with early signs of dementia (R. p. 66). She was in rehabilitation and was about to be released. Her family felt she needed more care because of her condition and because she lived alone. Mrs. Clark was on a great deal of medication to include hydrocodone six times per day if necessary (R. p. 134).

Ms. Touchton advised Mrs. Clark's daughter, Plaintiff Debbie Bannister, of the requirement for residing in her facilities and Mrs. Clark was brought to Faith, Hope and Charity on July 10, 2015 by Debbie Bannister. Mrs. Clark was without a walker when she arrived at the facility and fell the first day that she was a resident (R. p. 126). Mrs. Touchton furnished Mrs. Clark a walker and put a big sign at the foot of her bed which read, "Don't forget your walker. Please Mrs. Clark, don't forget your walker." (R. p. 126-127). Mrs. Clark suffered a contusion to her head from the first fall.

Debbie Bannister took Mrs. Clark out of the facility on August 21, 2015 for a shopping trip and Mrs. Clark fell while with her daughter (R. p. 74). Mrs. Clark was taken to the emergency room of the local hospital and then returned to the Faith, Hope and Charity facility.

On the morning of August 27, 2015, Catherine Bellotti was the caregiver on duty at the Faith Hope and Charity facility. She testified one of the residents advised her that Mrs. Clark had fallen. Mrs. Bellotti found Mrs. Clark on the floor and helped put her on her bed and called 911. She denied physically abusing Mrs. Clark. She did, however, acknowledge she used vulgar language or profanity in front of Mrs. Clark (R. p. 86). Once Mrs. Touchton was advised of the

verbal abuse Mrs. Bellotti was never allowed to work again at the facility. In a word, she was fired.

An EMS employee, David Pody, came to the facility as a result of the 911 call from Mrs. Bellotti. He found Mrs. Clark on the bed. He further testified he asked Mrs. Clark what happened and she replied that she slid down, fell over and bumped her head (R. p. 84).

Pody observed that Mrs. Clark had defecated on herself and that the aid (Mrs. Bellotti) started yelling at Mrs. Clark for that (R. p. 85).

Mrs. Clark was taken to the hospital where it was revealed she had numerous injuries from which she never recovered. There was testimony from medical experts that Mrs. Clark's injuries suggested abuse. She died on September 7, 2015.

Mrs. Touchton as the promotor incorporated the two facilities into limited liability companies on July 1, 2016.

Pleadings were filed on March 5, 2017 which contained the two identical allegations pertinent to this appeal.

Paragraph 2

At the time of the incidents giving rise to the Plaintiff's Complaint, Mrs. Clark was a resident at the Community Residential Care Facility known as "Faith, Hope & Charity Retirement" which is located at 101 Coe Street in Anderson, the County of Anderson, State of South Carolina

Paragraph 4

Upon information and belief, the Defendant, Faith, Hope & Charity Retirement, LLC, and the Resting Plaintiff, LLC, (collectively "Facility") are corporations organized and existing under the laws of the State of South Carolina, doing business in the County of Anderson and operating as a community residential care facility.

The Appellant's admitted both allegations.

At trial, Mrs. Touchton was examined by Respondent's counsel as to the incorporation of the two LLC's which came after Mrs. Clark's death (R. p. 99).

At the close of the Plaintiff's case Appellants moved for a directed verdict (R. p. 148-150).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO GRANT A DIRECTED VERDICT TO THE TWO APPELLANT LLC'S BECAUSE THEY WERE INCORPORATED AFTER THE ALLEGED TORTS.

At the close of the Respondent's case the trial court had testimony and evidence that Mrs. Clark resided in the residential care facility of Mrs. Touchton from July 10, 2015 until August 27, 2015. Mrs. Clark died on September 7, 2015.

As promotor, Mrs. Touchton incorporated the Appellant LLC's on July 1, 2016 which was ten months after Mrs. Clerk was removed from Mrs. Touchton's facility.

In Hanson v. Fields Co., LLC, 409 S.C. 541, 763 S.E.2d 31 (2014), the South Carolina Supreme Court firmly held that an LLC cannot be held liable for torts that its promotor committed before it came into existence. The trial court erred in failing to grant the two LLC's motion for a directed verdict.

Because the case went to the jury with all Appellants as joint tortfeasors, the only appropriate remedy is to grant a new trial to Mrs. Touchton. It would be pure speculation to say the jury found only Mrs. Touchton liable instead of one or both LLC's or either one of them.

II. THE TRIAL COURT ERRED IN FAILING TO GRANT A NEW TRIAL NOTWITHSTANDING THE VERDICT BECAUSE THE APPELLANT LLC'S WERE NOT INCORPORATED AT THE TIME OF THE ALLEGED TORTS.

In its post-trial motion to dismiss the two LLC's and grant Mrs. Touchton a new trial, the Appellants again raised the issue of the non-existence of the two LLC's at the time the

Respondent's cause of action arose. In its written Order denying the Appellants' motion the trial court stated in footnote 2 the following:

Plaintiff pled that, "at the time of the incidents giving rise to the Plaintiff's Complaint," Faith, Hope and Charity Retirement, LLC and The Resting Place, LLC (collectively referred to as "Facility") were the entities to which Ms. Clark was admitted and lived until her hospitalization. These allegations were admitted by the Defendants.

This statement is factually incorrect. Neither complaint alleged Mrs. Clark was a resident of an LLC at the time giving rise to the causes of action.

The trial court went on to conclude there was no prejudice to the two Appellant LLC's in allowing the judgment to stand against them. One can only reach this conclusion by failing to recognize a limited liability company as a separate legal entity. Such a finding ignores S.C. Code §33-44-101, et. seq., which establishes LLC's are separate legal entities. The trial court's conclusion is an error of law.

In its Order of July 9, 2019, the trial court also concluded that the Appellant LLC's were successor entities of Mrs. Touchton's DBA and therefore liable for her obligations. This finding is an extreme extension of present jurisprudence and ignores the ruling in Hanson, id.

Heretofore, the doctrine of successor liability was to prevent the transfer of assets from one corporation to another to avoid creditors. The test for successor liability was set out in Brown v. American Ry. Exp. Co., 128 S.C. 428, 123 S.E. 9 (1924).

In the absence of statute, in order to render a purchasing company liable for the debts of the selling corporation, it must appear: a) that there was an agreement to assume such debts; b) the circumstances surrounding the transaction must warrant a finding that there was a consolidation of the two corporations; c) that the purchasing corporation was a mere continuation of the selling corporation; or d) that the transfer was pretensive of the transaction fraudulent in fact. (p. 429)

The trial court found that three of the four situations existed here. It conceded the Appellant LLC's did not agree to assume the debts of Mrs. Touchton.

As to the consolidation or merger, the trial court ignores one main purpose of forming a limited liability company. Under §33-44-303(a), a member or manager is not liable for the torts of the limited liability company. From the incorporation of the Appellant LLC's, July 1, 2016, the law of LLC's would apply to Mrs. Touchton. Under the trial court's decision any sole proprietorship forming a limited liability company would still have any assets of the limited liability company exposed to creditors on the theory they were merged.

Such a holding would negate one purpose of forming a limited liability company, and that is protection of the members of the limited liability company from liability for acts of the limited liability company. Of course, members of a limited liability company can be held individually liable for tortuous acts. See Plantation A.D. v. Gerald Builders, 386 S.C. 198, 687 S.E.2d 714 (Ct. App. 2009).

It is an error of law to hold that a promotor that forms a limited liability company makes the limited liability company liable for the promotor's torts as a merged or consolidated entity.

As a third reason for letting the judgment against the Appellant LLC's stand, the trial court found the Appellant LLC's were a mere continuation of its predecessor. The trial court cited Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc., Op. No. 2016-UP-168, 2016 WL 1359188 (S.C. Ct. App. filed April 6, 2016). This case was reversed by Nationwide Mut. Ins. Co. v. Eagle Window & Door, Inc., 424 S.C. 256, 818 S.E.2d 447 (2018). The Supreme Court held the lower court erred by incorrectly applying the test for successor liability.

Applying the successor liability test in product liability cases involving the purchase of assets by one corporation of another corporation to the facts before the court in this case is in

effect to adopt a “continuation of enterprise” which was rejected in Simmons v. Mark Lift Industries, Inc., 366 S.C. 308, 622 S.E. 2d 213 (2005).

Finally, the trial court concluded the forming of the Appellant LLC’s was fraudulent or intended to wrongfully defeat creditor claims. The only item transferred to the Appellant LLC’s was the DHEC license to operate a residential care facility (R. p. 101-102). There is no testimony of the value of these licenses because they have no value. The two licenses are more akin to the non-transferable granting of a privilege similar to a driver’s license.

A new trial is the only way to cure the errors that occurred.

III. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT PROVIDING A VERDICT FORM THAT ALLOWED THE JURY TO CONSIDER EACH INDIVIDUAL APPELLANT’S ACTIONS OR RESPONSIBILITY AS TO THE ALLEGED NEGLIGENT ACTS.

At the close of the trial the Appellants requested that the trial court send separate verdict forms as to each separate defendant on each separate cause of action (R. p. 162-163). The trial court refused. The practical result of that refusal is that each defendant was deprived its separate right to argue it was not negligent. The two LLC’s could not argue they could not be negligent because they were not in existence.

It is basic law that each individual defendant has a right to say the other defendant may be liable but I am not. In essence, the trial court made a factual finding that the three named defendants were all one and the same.

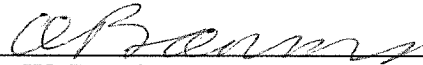
Rule 49, SCRCF, gives the court the discretion as to the form of the verdict. Rule 42(a) footnote states the parties are not merged in consolidated cases. In effect, the trial court merged the parties and this deprived each of the right to be considered separately. While not on point, Sarvghal v. Sitton Buick Co., Inc., 312 S.C. 429, 440 S.E.2d 894 (Ct. App. 1994) illustrates the error.

CONCLUSION

Because the trial court erred in not directing a verdict as to the Appellant LLC's and sending the case to the jury as joint tortfeasors it would be rank speculation to say the jury only found Appellant Touchton liable. The proper solution is to reverse the verdict against all Appellants and send the matter back for a new trial.

Respectfully submitted,

BANNISTER, WYATT & STALVEY, LLC



O. W. Bannister
Attorney for Appellants

CERTIFICATE OF COUNSEL

The undersigned certifies that this Initial Brief complies with Rule 208, *SCACR* and, further, complies with Supreme Court Order dated August 13, 2007, regarding personal identifiers and sensitive information as well as Supreme Court Order dated March 20, 2020, regarding the operation of appellate courts during the Coronavirus emergency.

BANNISTER, WYATT & STALVEY, LLC



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