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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2021-000535
Case No. 2017-CP-26-6643

Logan Wood and Sarah Wood, ... Respondents,

v.

Horry County School District, ... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. The trial court erred in failing to correctly interpret and apply the Tort Claims Act definition of "occurrence" and in failing to reduce the verdict for the Respondent Logan Wood to $300,000 based on the monetary caps set forth in S.C. Code Ann. § 15-78-120(a).

The trial court determined that the jury found "two separate, independent occurrences of gross negligence which caused the brain injury of Logan Wood." (Order, p. 6). Based thereon, the trial court reduced the jury verdict for Logan to $600,000, which represents two "caps" of $300,000 each. Judgment was entered in that amount. (Order, pp. 6-7). The Appellant Horry County School District claims that the trial court committed legal error in that the jury's verdict did not support that judgment.

In their response brief, the Respondent Logan Wood attempts to justify the $600,000 judgment by arguing that the jury found two "occurrences" as that term is defined under the Tort Claims Act. *See*, S.C. Code Ann. § 15-78-30(g) ("the term "occurrence" means "an unfolding sequence of events which proximately flow from a single act of negligence"). However, the Respondent takes great liberties in his representation of what the jury "found." In reality, what the jury "found" is articulated in the special verdict form and nowhere else. The word "occurrence" does not appear on the special verdict form. The jury was not asked to determine the number of "occurrences." Likewise, the jury was not asked to determine

whether each act of gross negligence, as found by the jury, constituted a separate "occurrence." Indeed, the jury was not asked on that special verdict form whether the acts of gross negligence were "separate and distinct" or "separate and independent." The Respondent appears to concede that those are necessary findings to support an adjudication of multiple "occurrences" under the rationale of *Chastain v. AnMed Health Foundation,* 388 S.C. 170, 694 S.E.2d 541 (2010). However, the Respondent does not explain how the special verdict form conveys those findings.

To cover up or otherwise deflect from those deficiencies in the jury's actual findings, the Respondent attempts to shift the burden and blame to the School District. The Respondent argues that the trial court charged the jury on the Tort Claims Act definition of "occurrence" (Tr. 556), and that the School District did not object to the charge. That is true but immaterial. The Respondent further argues that the trial court charged the jury that "[t]he plaintiff has the burden of proving that each act of gross negligence was separate and independent in order for you to find that more than one occurrence has occurred" (Tr. 556), and that the School District did not object to the charge. That is also true but immaterial.

It is immaterial because the special verdict form never gave the jury the opportunity or mechanism to make those findings. Without question, the special verdict form shows that the jury was only asked to and did provide a factual finding as to the acts of gross negligence – nothing more and nothing less. The jury

ultimately was not asked to find the number of "occurrences." Likewise, despite what was stated in the charge, the jury was not asked to find that "each act of gross negligence was separate and independent." (Tr. 556). Those findings do not appear on the face of the special verdict form. (Verdict Form).

Recognizing these deficiencies, the Respondent blames the School District. The School District did not object to the charge, he asserts.[1] The School District did not object to the special verdict form, he insists. However, an improper shifting the burden of proof does not allow for an inadequate verdict form to support a $600,000 judgment.[2]

There is no denying that it is the Respondent's burden of proving each "occurrence" as pled, and an important part of that burden is to request a verdict form that provides the information needed to support a finding of multiple occurrences. In *Chastain v. AnMed Health Foundation*, 388 S.C. 170, 694 S.E.2d 541 (2010), the Supreme Court ruled that "[i]f [plaintiff] alleges multiple

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[1] The Respondent writes that "HCSD never objected to the jury determining the number of occurrences." *See*, Respondents' Brief, p. 9. In addition to that being untrue (see footnote 2, *supra*), the record reflects that the jury never did determine the number of occurrences. Therefore, there was no need for the School District to object to the charge.

[2] In fact, the Court should discount the Respondent's entire preservation argument. He claims that the School District "never argued at trial that only the court may determine the number of occurrences." *See*, Respondents' Brief, p. 9. Yet, in the trial court's post-trial order, which incidentally was written by the Respondents' counsel, the trial court explained that "[d]uring argument on motions made during trial, the Defendant argued that the question regarding the number of occurrences should not go to the jury for determination." (Order, p. 5). That alone shows that this last ditch assertion of a preservation problem is absolutely meritless and intended to deflect from the legal errors committed in the court below.

occurrences, that is, that there was more than a single act of negligence from which proximately flowed an unfolding sequence of events, she bears the burden of proving each occurrence." 694 S.E.2d at 544. In the case at bar, however, the Respondent has not satisfied his burden of proof in demonstrating that there were multiple occurrences. As was the case in *Chastain*, the jury was not asked for the type of information that the trial court needed to apply the monetary caps for multiple occurrences. This does not make the verdict form inconsistent but rather inadequate. As in *Chastain*, the special verdict form in this case simply does not furnish the needed information.

As the Supreme Court made clear in *Chastain*, it is a plaintiff's responsibility to provide a verdict form bearing the information necessary to prove his case and support the judgment, if he seeks a judgment in excess of the $300,000 cap. The defendant has no responsibility to make sure the verdict form proves the plaintiff's case – that burden lies solely with the plaintiff. Thus, the Court must reject the Respondent's current attempts to shift the burden to the School District to make certain there is an adequate verdict form to prove entitlement to multiple occurrences and a judgment in excess of the $300,000 cap, just as a similar position taken by the plaintiff in *Chastain* to blame the defendant hospital for the inadequacy of the verdict form was correctly rejected by the trial judge and the Supreme Court.

Clearly, a trial judge may not speculate as to the jury's verdict, particularly on questions that jury was never asked to answer *and did not answer* on the special verdict form. *Chastain* makes that clear as well. However, that is precisely what the trial court did in this case. The trial judge erroneously speculated that "[i]n completing the verdict form, the jury found for the Plaintiff that the first and second independent occurrences were supported by the evidence." (Order, p. 5).[3] The trial judge proceeds to conclude that "the jury found that there were two separate and distinct occurrences of gross negligence which caused Logan Wood's brain injury." (Order, p. 6). That, however, is nothing but speculation. To reiterate, the special verdict form says nothing about "occurrences" and says nothing about acts of gross negligence being "separate and distinct" or "separate and independent." The jury did not make those findings.

That is not the School District's fault. It is the burden and responsibility of the plaintiff, here Logan Wood, to obtain a special verdict from the jury that satisfies the requirements of *Chastain* and provides the factual findings that the trial court needed to determine if there were multiple occurrences. Based on the absence of that needed information from the jury, the trial court erred in awarding more than one cap of $300,000, just as the trial court in *Chastain* had insufficient

[3] Notably, the special verdict form was given to the jury with no explanation of the special interrogatories asked or their legal significance. (Tr. 560-561).

information to award multiple caps and thus was compelled to reduce the verdict to one cap of $300,000.[4]

However, in an about face, the Respondent then argues that the "procedural errors," as he describes them, are "harmless" because the trial court conducted its "own analysis" and concluded there were two occurrences. The trial court did no such thing. Ignoring the context, the Respondent isolates one sentence of the post-trial order that states: "The evidence supported a finding that Logan Wood's injury resulted from the independent, gross negligence of different sets of employees; taking place on different dates; and taking place at different locations." (Order, p. 4). However, the prior sentence provides the needed context: "In the instant case, the Plaintiff presented expert testimony and concessions from the Defendant's employees at trial which created a factual issue regarding the number of occurrences." (Order, p. 4). The trial court was not engaged in its "own analysis" of the occurrence issue; the court was simply making the point that the evidence "created a factual issue regarding the number of occurrences." (Order, p. 4). The trial court did not engage in its "own analysis" or make its own findings

[4] The Respondent argues that *Parker v. Spartanburg Sanitary Sewer District*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005), "is irrelevant to this appeal." *See*, Respondents' Brief, p. 11. That is patently incorrect. In *Parker*, this Court, *using mandatory language no less*, states: "We conclude that the monetary statutory cap is self-executing and the court *is required to* apply the monetary statutory cap to any jury verdict exceeding $300,000." 607 S.E.2d at 716. (Emphasis added). Thus, *Parker* describes the trial court's *duty* in a Tort Claims Act case to apply the monetary caps where, as here, the jury's verdict exceeds $300,000.

independent of the jury. Instead, the trial court erroneously believed the jury made those findings, but they are not reflected on the special verdict form. That is indeed one of the critical errors that requires reversal.

At any rate, the Respondent's subsequent analysis of the "occurrence" issue is flawed and at odds with the Supreme Court's decision in *Boiter v. South Carolina Department of Transportation*, 393 S.C. 123, 712 S.E.2d 401 (2011), in several respects.

First, the Respondent accuses the School District of using a "half-definition"; yet, that is precisely the analysis in which he then engages. "Occurrence" is defined by statute to mean "an unfolding sequence of events which proximately flow from a single act of negligence." S.C. Code Ann. § 15-78-30(g). The Respondent complains that the School District relies on the first-half of the definition – "an unfolding sequence of events" – and "discounts the entire second half of the definition." *See*, Respondents' Brief, p. 12. In fairness, from a grammatical standpoint, "an unfolding sequence of events" is the predicate clause that defines the term "occurrence." Nonetheless, the Respondent then relies on the back-half of the definition, i.e. a "half-definition," by focusing on "a single act of negligence." Yet, the Supreme Court in *Boiter* already rejected any notion that the number of "occurrences" is tied to the number of acts of negligence or gross

negligence. *Boiter*, 712 S.E.2d at 406 ("we do not adopt a bright-line test based on the existence of multiple acts of negligence").

Next, the Respondent argues that "occurrence is something that flows from 'a single act of negligence' and not something that flows from a combination of multiple acts of negligence." *See*, Respondent's Brief, p. 12. However, an "occurrence" is not "something" by definition; it is "an unfolding sequence of events," which the Respondent tries to write out of the definition. In addition, as *Boiter* teaches, multiple acts of negligence may give rise to a single occurrence. Indeed, the Supreme Court recognized that "[i]n many situations, negligent acts from more than one entity would still equal but one occurrence." *Boiter*, 712 S.E.2d at 407. This would likewise be true where there are multiple acts of gross negligence committed by the same entity.

Notably, the Respondent abandons his argument made in the trial court that the number of "occurrences" is based on the number of "proximate causes." (Tr. 416). Instead, the Respondent now points to evidence of "at least five concussions" and suggests in error that that shows "separate occurrences." *See*, Respondent's Brief, p. 13. However, that argument was also rejected in *Boiter*, where the Supreme Court reversed the trial court's analysis which "tied the number of occurrences to the number of injuries sustained by the [plaintiffs]." *Boiter*, 712 S.E.2d at 406.

Based on a proper analysis, the number of "occurrences" is not determined by the number of acts of negligence or gross negligence. *Boiter,* 712 S.E.2d at 406 Rather an "occurrence," by statutory definition, is an "unfolding sequence of events." Given the jury's verdict which found two acts of gross negligence, the Court must apply that definition of "occurrence," and analyze whether those acts of gross negligence gave rise to or proximately caused a different "unfolding sequence of events." If those acts of gross negligence each give rise to a new "sequence of events" so as not to be "unfolding" or "evolving" from past events, only then is there a new and separate "occurrence." In other words, if the same "unfolding sequence of events" proximately flows from the two acts of gross negligence by the same entity, there is but a single occurrence, as the Supreme Court in *Boiter* explains.

In this case, there was a single event which proximately flowed from the two acts of gross negligence committed by the same entity, that being the failure to remove Logan Wood from the middle school football game and have him assessed for a concussion. The acts of gross negligence, as found by the jury, flow into that singular event, i.e., they combined and concurred to proximately cause that single occurrence. One grossly negligent act was an error in planning (the staffing protocol of one trainer for both teams), and the other was an error in implementation (inattentiveness of the trainer). As stated, if the same "unfolding sequence of events" proximately flows from multiple acts of gross negligence by the same entity, there is

still but a single occurrence. That is the scenario the Respondent has presented in the case at bar. The evidence does not support a finding of new or different "unfolding sequences of events." Therefore, on that basis, the trial court should only have found a single occurrence and, accordingly, the verdict should have been reduced to a single statutory cap of $300,000 in accordance with the mandates of S.C. Code Ann. § 15-78-120(a).

II. The trial court erred in denying the Appellant's motion to pay the amount of the judgments into court pursuant to Rule 67, SCRCP.

The School District contends that the trial court erred in denying its motion to pay the amount of the judgments into court as permitted by the Supreme Court's longstanding precedent from such cases as *Manning v. Brandon Corporation*, 163 S.C. 178, 161 S.E. 405 (1931), and *Russo v. Sutton*, 317 S.C. 441, 454 S.E.2d 895 (1995), which the School District has referred to as the "*Manning/Russo* rule."[5]

[5] The Respondents are critical that the School District sought to deposit the "entire judgment" into the court including what they describe as the "uncontested $300,000 for Logan and $25,000 for Mrs. Wood." *See*, Respondents' Brief, p. 16. That is an unfair and improper characterization. At the time that the Rule 67 motion was filed and decided by the trial court, the School District had not even filed its opening initial brief setting forth the issues on appeal. Liability issues related to the full judgments awarded to both Respondents had been litigated in post-trial motions. The trial transcript was not even completed and available to appellate counsel to review until September 30, 2021. (Tr. 581). Therefore, the amounts now described as "uncontested" were not uncontested at the time the Rule 67 motion was filed or decided by the trial court. The transcript of the August 10, 2021 hearing on the Rule 67 motion does not reflect that the Respondents took the position that a portion of the $625,000 was "uncontested." On appeal, this Court must assess the posture of the case as it existed when the trial court made its ruling and not the posture as it exists while the case is on appeal.

As a critical threshold issue, the parties have a fundamental disagreement as to the applicable standard of review. The Respondents argue that an abuse of discretion standard applies, and the School District contends that a *de novo* standard applies because the application of the *Manning/Russo* rule is purely a question of law.

The Respondents rely on the Supreme Court's decision in *South Carolina Department of Transportation v. First Carolina Corp. of South Carolina*, 369 S.C. 150, 631 S.E.2d 533 (2006), where the Court wrote: "The granting of leave to deposit money with the court pursuant to Rule 67, SCRCP is a matter within the discretion of the trial court and will not be overturned absent an abuse of that discretion." 631 S.E.2d at 535. Notably, the Supreme Court did not cite to any prior South Carolina precedent such as *Manning* or *Russo* or the numerous other cases applying the *Manning/Russo* rule. Instead, the Supreme Court cited only to a federal decision from the Fifth Circuit Court of Appeals. Importantly, the federal courts' application of Rule 67 has always been diametrically different from existing South Carolina precedent.

Nonetheless, the School District submits that the standard of review as discussed in *First Carolina* should be treated as *dicta*.[6] That is because the issue

[6] *See, Drummond v. Beasley*, 331 S.C. 559, 503 S.E.2d 455 (1998) (characterizing as dicta certain language in a case concerning a subject not within the question before the court); *Hampton v. Richland County*, 296 S.C. 72, 370 S.E.2d 714, 714 (1988) (concluding discussion of a legal principle in an opinion was dicta where it was "clearly unnecessary to a resolution of the issue before the court"); *Dennis v. South Carolina National Bank*, 299 S.C. 34, 382 S.E.2d 237, 240 (Ct. App. 1988) (construing language in a case as dicta because it was "an expression or

actually before the Supreme Court in that case was not one of discretion but rather purely an issue of law to which a *de novo* standard of review applies. The Supreme Court found that Rule 67 conflicted with a provision of the Eminent Domain Procedure Act which required post-judgment interest to be added to any judgment that was not paid within a twenty-day period. The Supreme Court applied principles of law and concluded that "the Act prevails over the rules of civil procedure." 631 S.E.2d at 536. In short, that case presented a pure issue of law and not one to which an abuse of discretion standard would even be applicable.

Moreover, in *First Carolina*, the Supreme Court did not overrule the *Manning/Russo* rule. Instead, the Court cited to *Russo* and explained that "Rule 67, SCRCP, allows a judgment debtor to avoid further accrual of post-judgment interest pending the resolution of an appeal from the judgment by depositing the judgment with the court." 631 S.E.2d at 536. That is consistent with the position taken by the School District in the present case.

Finally, if the Supreme Court had truly intended for an abuse of discretion standard to apply to the granting of leave to deposit money with the court pursuant to Rule 67, the Court would have published the factors for courts to consider in exercising that discretion. Certainly, Rule 67, as promulgated by the Supreme Court,

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statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof").

includes no factors to be considered. Likewise, at no time has any South Carolina appellate court ever laid out any factors to be weighed and considered by a trial judge in deciding whether to allow a judgment debtor to deposit the judgment with the court under Rule 67. If Rule 67 truly presents a matter of discretion, the *Manning/Russo* rule would need to be overruled and the Supreme Court would need to elucidate the factors to be weighed, which would need to be accomplished by an amendment to Rule 67.

In effect, if this issue had truly been intended by the Supreme Court to be an issue for the exercise of discretion, due process dictates that there must be uniform factors for judges to apply. The issue cannot be left to the whim of the judges to decide what factors are relevant and should be applied. Those factors will undoubtedly differ from judge to judge. The lack of judicially recognized and uniform factors to be considered only results in a strong likelihood of inconsistent application and likely equal protection infringement where similarly situated judgment debtors are treated differently. There are no safeguards in place to prevent unequal or selective application. In short, given the absence of published or judicially recognized uniform factors, that supports the School District's position that the application of Rule 67 actually presents an issue of law and not a matter for judicial discretion, as the Respondents urge and the trial court erroneously concluded.

To reiterate, in *Duval v. Heritage Life Ins. Co.*, 339 S.C. 616, 529 S.E.2d 566 (Ct. App. 2000), this Court described the rule from *Russo* as being "unmistakably clear." 529 S.E.2d at 569. This Court specifically stated that "[t]he court of appeals is bound by the decisions of the supreme court. Where the law is unmistakably clear, this court has no authority to change it." *Id*. The same is true in the present case. The *Manning/Russo* rule is "unmistakably clear," and absent being overruled by the Supreme Court, it should be applied as the law of this state. The trial court thus erred in denying the School District's motion to deposit funds with the court under Rule 67.[7]

[7] In their response brief, the Respondents cite to and rely on this Court's recent decision in *Davis v. Agape Nursing Rehabilitation Center, Inc.*, Op. No. 2022-UP-094 (S.C. Ct. App. filed March 9, 2022). That decision is unpublished and therefore should not be treated as precedent. *See*, Rule 268(d)(2), SCACR ("[m]emorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved"). Moreover, this Court in *Davis* did not apply the *Manning/Russo* rule. This Court also applied an abuse of discretion standard which was in error for the reasons discussed above. This Court also relied heavily on case law interpreting the federal version of Rule 67, which has always been construed and applied differently than the state Rule 67. Further, that reliance on federal case law was misplaced. In *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 404 S.E.2d 200 (1991), the Supreme Court states: "Since our Rules of Procedure are based on the Federal Rules, *where there is no South Carolina law*, we look to the construction placed on the Federal Rules of Civil Procedure." 404 S.E.2d at 201. (Emphasis added). Thus, reliance on the federal jurisprudence is misplaced where there already is South Carolina precedent on the issue, and certainly the federal jurisprudence should not be used to effectively overrule (or at least disregard) that existing South Carolina precedent.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Horry County School District respectfully renews its request that the Court reverse the post-trial order of Circuit Court Judge William H. Seals, Jr. in part and order that the judgment in favor of Logan Wood be reduced to $300,000. In addition, the Court is requested to reverse the Order denying the School District's Motion to Deposit Funds and provide instructions on remand to the effect that the School District is not required to pay post-judgment interest on the judgments that remain after remand.

Respectfully submitted,

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APPEAL FROM HORRY COUNTY
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2021-000535
Case No. 2017-CP-26-6643

Logan Wood and Sarah Wood, ... Respondents,

v.

Horry County School District, ... Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only at the below email addresses this the 21st day of April 2022, as follows:

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April 21, 2022

Via Email Only
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RE: Logan Wood and Sarah Wood v. Horry County School District
Appellate Case Number: 2021-000535
Civil Action Number: 2017-CP-26-6643
Claim Number: B4173
Our File Number: 104.20465

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise. Thank you for your assistance.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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