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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2019-000998

Cecil Rowe,……Petitioner,

v.

Family Health Centers, Inc.,…….Respondent.

AND

Rebecca Rowe,……Petitioner,

v.

Family Health Centers, Inc.,…….Respondent.

PETITION FOR A WRIT OF CERTIORARI

Joseph O. Thickens
SC Bar No.:101398
J. Eric Cavanaugh
S.C. Bar No. 100044
Cavanaugh & Thickens, LLC
1717 Marion Street (29201)
Post Office Box 2409
Columbia, SC 29202
Tel: (803) 888-2200
Attorney for Petitioners

May 2, 2022

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Pursuant to Rule 242 of the South Carolina Appellate Court Rules, Petitioners Cecil Rowe and Rebecca Rowe petition this Court to issue a writ of certiorari[1] to review the controlling issue in the decision of the Court of Appeals in the matter titled Cecil Rowe and Rebecca Rowe v. Family Health Centers, Inc., Op. No. 2022-UP-063 (S.C. Ct. App. Filed Feb. 9, 2022) ("the Opinion"). For the reasons set forth below, this Court should grant the Rowes' petition and reverse the Court of Appeals' erroneous opinion.

QUESTION PRESENTED FOR REVIEW

It is important for this Court to review the decision of the Court of Appeals in order to preserve the integrity of Rule 42(a), SCRCP by preventing the consolidation of cases that do not involve commons issues of law and fact. Further, it is essential that this Court intervene to preserve the Constitutional right of civil litigants to a fair and impartial jury trial. *See* U.S. Const. Art. III, Section 2. The question presented for this Court's review is:

> Did the Court of Appeals err in affirming the trial court's consolidation of cases against a defendant for trial where the initial pleadings contained similar allegations, but all material facts were denied via responsive pleading and the cases involved different events, claimants, damages, witnesses and substantive law?

STATEMENT OF THE CASE

On September 13, 2017 Cecil Rowe filed an action against Family Health Centers, Inc. seeking damages for personal injuries suffered from an August 1, 2016 fall at the Family Health Center in Neeses, South Carolina. (Hearing Transcript; R. p. 79, lines 7-10). This incident occurred when the chair in which Mr. Rowe was sitting broke, causing him to fall onto the floor. (Cecil Rowe Compl. ¶ 8; R. p. 18, ¶ 8).

[1] The undersigned certifies that a rehearing petition was made and ruled on by the Court of Appeals on March 31, 2022.

Also on September 13, 2017, Rebecca Rowe filed a separate action against Family Health Centers, Inc. seeking damages for personal injuries suffered from an incident on March 31, 2016 at the same Family Health Center in Neeses, South Carolina. (Rebecca Rowe Compl. ¶ 6; R. p. 28, ¶ 6). This incident occurred when the chair in which Mrs. Rowe was sitting suddenly slipped out from behind her as she stood up, causing her to fall onto the floor. (*Id.* at 7; R. p. 28, ¶ 7). Mrs. Rowe's primary contention was that the chair, which had hard plastic feet, created a dangerous condition when utilized on the hard tile floor of the waiting room.

Carolina Kwik Dry, LLC was originally named in both cases but was dismissed with prejudice prior to the trial of both matters. On October 30, 2017, Defendant, Family Health Centers moved to consolidate these actions. That motion was later withdrawn without prejudice and the parties agreed to consolidation of discovery in these two matters to save expenses. (Emails; R. pp. 194-196). Defendant again raised its motion to consolidate the cases for trial during a status conference, and a hearing was held on May 8, 2019. Following the hearing, both parties submitted summaries of their arguments via email. (Emails; R. pp. 197-199). The court issued a Form 4 Order consolidating the cases for trial on May 15, 2019. (Order; R. pp. 3-4). Trial of the consolidated cases began on May 20, 2019 and a verdict was reached on May 21, 2019. (Verdict Form; R. pp. 10-12).

The Rowes timely appealed and raised the issue of consolidation to the Court of Appeals, but the Court of Appeals affirmed the trial court and relied on the same misapplication of Rule 42, SCRCP. After the Court of Appeals denied rehearing, the Petitioners now seek a writ of certiorari from this Court.

ARGUMENT

The two cases underlying this matter should not have been consolidated because they did not involve common questions of fact and law. The Court of Appeals incorrectly applied precedent regarding the effect of allegations in pleadings which led the Court to uphold the improvident consolidation of these cases without analyzing the Rule 42(a), SCRCP factors. The Court of Appeals opinion creates confusion and opens the door to a new line of procedural precedent that dramatically changes how cases may be consolidated by trial courts under Rule 42(a), SCRCP. It is important for this Court to provide clarity for the bar on the scope of procedural rules permitting consolidation in order to protect the right of each individual to a fair and impartial trial.

A. THE CASES BROUGHT BY CECIL AND REBECCA ROWE SHOULD NOT HAVE BEEN CONSOLIDATED BECAUSE THEY DID NOT INVOLVE COMMON QUESTIONS OF FACT.

"Consolidation under Rule 42(a), SCRCP, may be ordered whenever actions involving a common question of law or fact are pending before the court." *Keels v. Pierce*, 315 S.C. 339, 342, 433 S.E.2d 902, 904 (S.C.App.,1993). The existence of common questions of law and fact is a prerequisite for any consolidation. *Magnavox Co. v. APF Elecs., Inc.*, 496 F. Supp. 29, 32 (N.D. Ill. 1980). "[I]n resorting to the use of Rule 42(a) the trial judge should be most cautious . . . to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case." *Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966). "Where prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error." *Id.*

In support of its motion to consolidate, Respondent identified several factual grounds as a basis for consolidation. However, none of these grounds were questions fact common to the cases of Rebecca and Cecil Rowe. At the hearing, Respondent stated "the basis of the motion is that both

of the cases involve the Family Health Center location, which is located on Norrie Road in Neeses, South Carolina." (Transcript 5:7-10; R. p. 79, lines 7-10.) Respondent further summarized the grounds for consolidation in a follow-up email to the court, identifying the following:

> 1. Both cases involve the same defendant – The Family Health Center; 2. Both cases involve the same witnesses for the Defendant . . .; 3. Both cases involve the same type of chair and both falls took place in the exact same spot - in front of the receptionist's desk; 4. Plaintiffs are husband and wife living in the same address and each has knowledge of the other's injury claim.

(Emails; R. p. 197).

None of the grounds identified by the Respondent were common *questions of fact* that allowed consolidation. First, the fact that these incidents happened at the same physical location does not itself create a common question of fact under Rule 42. If that logic held true, nearly every injury action currently pending at any particular supermarket, restaurant, or other physical location could be consolidated merely because the events happened at the same place. The location of the incidents underlying this appeal was not a Rule 42 common question of fact because it had no bearing on the circumstances of the separate accidents involving Mr. and Mrs. Rowe. To the contrary, the cases involved distinctly different facts: a chair placed on a tile floor which slid out from behind Mrs. Rowe, versus a chair that broke and caused Mr. Rowe to fall. (Transcript 9:18 – 10:6, 10:11 – 19; R. p. 83, line 18-p. 84, line 6, p. 84, lines 11-19).

Second, the commonality of witnesses is misleading in these cases since every witness was called to discuss two separate incidents and some witnesses had knowledge of only one of the matters. For instance, the Respondent primarily identified Mr. Elvin Cobbs as a common witness. (Transcript 6:2-3; R. p. 80, lines 2-3). Mr. Cobbs is indeed a witness in both cases, but not as to

common issues of fact. He investigated both incidents, which occurred approximately six months apart. Importantly, Mr. Cobbs performed a separate investigation and prepared separate incident reports after each case. As a result of consolidation, the Plaintiffs were required to have him sequentially but separately discuss both incidents on the stand because although the same witness was speaking, his testimony was about two different occurrences and investigations.

The incident reports prepared by Mr. Cobbs highlight the different factual scenarios presented in each of the cases. (Incident Reports; R. pp. 191-193). Further complicating matters, two different versions of an incident report were discovered in Cecil Rowe's case, one of which was altered after it was first prepared to attribute fault to Mr. Rowe. (Incident Reports; R. pp. 191-192. Transcript 12:11-20; R. p. 86, lines 11-20). In addition, there was confusion over whether the same chair was at issue in both cases because the chair that broke in Mr. Rowe's case was lost or destroyed by the Defendants after they were on notice of the claim. (Transcript 25:7 – 16; R. p. 99, lines 7-16. FHC 30(b)(6) Depo.; R. p. 189). Because the trial was consolidated, Appellant was forced to question Mr. Cobbs about his investigations of the two separate accidents, the altered report issue in Mr. Rowe's case, and the loss of the chair or chairs involved in both cases, all of which amounted to a confusing presentation to the jury of decidedly dissimilar issues of fact.

Another witness, Ms. Marsha Corbitt, was identified by Respondent as the receptionist who saw both plaintiffs before and after their accidents, though she did not see either accident happen. Like Elvin Cobbs, Ms. Corbitt was a witness in both cases but her knowledge of facts at issue did not overlap at all. While she was present on both dates, this witness observed two different factual scenarios and therefore could not provide a common answer or insight to any question of fact.

At the risk of belaboring this point, Petitioner respectfully points out that from an evidentiary standpoint, it was impossible to question either Mr. Cobbs or Ms. Corbitt about their

knowledge of the facts at issue without asking about both incidents separately because the cases are completely different occurrences. The Petitioner concedes that consolidation may sometimes be appropriate where a witness is offered to establish common facts about a single incident that affected multiple claimants, but not where the witness must be asked separate sets of questions to establish what happened during different incidents on different occasions. Nothing Mr. Cobbs or Ms. Corbitt said to establish the facts about what happened on March 31, 2016 when Ms. Rowe's chair slipped helps establish whether or why Mr. Rowe's chair broke on August 1, 2016, and vice versa.

Two other witnesses who testified at trial further emphasize the impropriety of consolidation in this matter. Mayor Sara Ann Johnson testified about facts relevant to Mrs. Rowe's case, including in particular her knowledge of the slick condition of the waxed tile floor prior to Mrs. Rowe's fall. (Plaintiff Rebecca Rowe's Supp. Ans. to Interrogatories; R. p. 51). By contrast, Mr. Edward Perry was an eyewitness to Mr. Rowe's fall and the broken chair. (Plaintiff Cecil Rowe's Supp. Ans. to Interrogatories; R. p. 62). Neither witness had anything to do with the case in which they were not named, but they both had to be presented during the same trial. This was highly prejudicial to the Petitioners, who were forced to present witness testimony to the same jury about two different cases with two different types of factual scenarios to explain and prove.

Third, like the fact that the incidents occurred at the same location, Respondent's contention that the incidents involved the same type of chair ignored the factual differences in in each scenario. As alleged in the complaint and confirmed through deposition testimony, Respondent admitted at the hearing that Mrs. Rowe's case arose out of her chair slipping out from behind her as she stood up, whereas Mr. Rowe's chair broke. (Transcript 5:11-21; R. p. 79, lines 11-21). Thus, while identifying a superficial commonality between the cases, Respondent failed

to identify a common question of fact as required by Rule 42, SCRCP. There is simply no common question to be answered that explains how or why each event happened.

Finally, but not less importantly, Mr. and Mrs. Rowe, who should be each other's best damages witness, had to testify about their own case facts and damages and then pivot to testifying about their spouse's case and damages, all to the extreme detriment of their presentation to the jury. Critically, they did not witness each other's accidents. (Transcript 11:21 – 12:3; R. p. 85, line 21-p. 86, line 3). In addition, the Petitioners argued at the hearing that the consolidation of matters involving a husband and wife could lead to undue speculation of fabrication by a jury, and in turn infringes Petitioners' right to fair and impartial trial by a jury. U.S. Const. Art. III, Section 2.

For these reasons, the grounds for consolidation set forth by Defendant failed to meet the threshold requirement of common questions of fact set forth by Rule 42.

B. THE CASES BROUGHT BY CECIL AND REBECCA ROWE SHOULD NOT HAVE BEEN CONSOLIDATED BECAUSE THEY DID NOT INVOLVE COMMON QUESTIONS OF LAW.

Respondent's motion to consolidate should also have been denied because of the different questions of law in Mr. and Mrs. Rowe's cases. While both cases are premises liability claims, the different facts at issue in turn raise two different questions of law. The two primary theories of recovery in a premises liability action are as follows:

> To recover damages for injuries caused by a dangerous or defective condition on a storekeeper's premises, the plaintiff must show either (1) that the injury was caused by a specific act of the respondent which created the dangerous condition; or (2) that the respondent had actual or constructive knowledge of the dangerous condition and failed to remedy it.

Garvin v. Bi-Lo, Inc., 343 S.C. 625, 628, 541 S.E.2d 831, 832–33 (2001) (citing *Anderson v. Racetrac Petroleum Inc.*, 296 S.C. 204, 371 S.E.2d 530 (1988); *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969); *Hunter v. Dixie Home Stores*, 232 S.C. 139, 101 S.E.2d 262 (1957); *Cook v. Food Lion, Inc.*, 328 S.C. 324, 491 S.E.2d 690 (Ct.App.1998).

As explained above, Mrs. Rowe alleged that her March 31, 2016 accident happened because the Respondent placed a chair in its waiting room that had hard plastic feet which slid easily over the hard tile floor. (Transcript 9:18-25; R. p. 83, lines 18-25). She contended that this was a "created condition", which does not require proof of notice because the Respondent's specific act of placing the chair on the tile floor created the hazard that led to her accident. *Id.*

By contrast, Mr. Rowe alleged that his chair broke and he fell as a result of the failure of the chair. (Transcript 10:1-6; R. p. 84, lines 1-6). Thus, the law applicable to Mr. Rowe's case fell under the second category of premises liability case identified above; namely, that the condition of the chair involved a notice issue/latent condition that the Respondent had a duty to discover and warn its customers about. (Transcript 10:20-23; R. p. 84, lines 20-23).

Notably, the court specifically inquired whether Mr. Rowe's chair slipped, and the uncontested response at the hearing was that the failure of Mr. Rowe's chair caused his fall. (Transcript 10:11-15; R. p. 84, lines 11-15). It was even acknowledged by the court that the Appellants' theories of liability differed in that one case was a created condition whereas the other was a notice case. (Transcript 16:3-7; R. p. 90, lines 3-7). Thus, the applicable law was completely different and had a high likelihood of confusing the single jury that was charged with evaluating the two cases under the separate standards. (Transcript 11:1-7; R. p. 85, lines 1-7). The jury was tasked with evaluating and applying different law to these cases along with keeping straight which witnesses testified regarding which case, and what facts applied in each instance. Significantly,

despite the different facts and law in question, the jury made the exact same allocation of fault in both cases. (Verdict Form; R. pp. 11-12).

C. THE COURT OF APPEALS MISAPPLIED THE LAW REGARDING THE EFFECT OF STATEMENTS IN PLEADINGS.

The Court of Appeals seemingly based part of its decision on the similarity of the premises liability complaints filed by Mr. Rowe and Mrs. Rowe. Respondents asserted that the Rowes were bound by allegations in their complaints which Respondents argued gave rise to common issues of law or fact regardless of the actual case facts. The Court of Appeals relied on *Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) and its progeny, which hold that a party is conclusively bound by the allegations in its pleadings. However, the Court of Appeals ignored the important caveat that "[a]llegations in a [c]omplaint denied in [an] answer are evidence of nothing." *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 71, 832 S.E.2d 760, 765 (Ct. App. 2019) (citing *Griffin v. Van Norman*, 302 S.C. 520, 522, 397 S.E.2d 378, 379 (Ct. App. 1990)).

Just as in *Curry*, each of the paragraphs relied upon by Respondent in support of consolidation in this case were denied in its Answers, which were never amended. (Answers of Family Health Centers to Complaints of Cecil and Rebecca Rowe, R. pp. 33-43). In fact, the Respondent only admitted jurisdictional and venue allegations in both cases; every other allegation including each paragraph of the Complaint cited by the Respondent in support of consolidation was denied. Because the allegations relied on by this Court were contested, they are by definition under the applicable precedent "evidence of nothing" because they were all denied by Respondent. *Curry*, 428 S.C. at 71-72, 832 S.E.2d 760, 765–66. As a result of the denials, and through over a year of litigation and discovery, it became clear that the cases presented quite different factual scenarios which were both covered within the general allegations of the complaints and specifically alleged as different factual circumstances. (R. pp. 13-32)

Most of the similarities pointed out by the Respondent about the pleadings are contained within the causes of action pled by both Appellants. When pleading negligence/gross negligence, etc., there is of course a well-defined body of caselaw through which a premises owner may be held liable for damages, and thus the elements of negligence are similar across many different cases despite the different factual scenarios which may be pled and developed through discovery in each one. Pleading in the alternative is also permitted. *See* Rule 8(e)(2), SCRCP.

If the Court of Appeals decision stands, there is nothing to stop the consolidation of nearly every motor vehicle accident or premises liability case brough in this state because most of the pleadings are for all intents and purposes identical. Extrapolating the facts of the Rowes' cases, two car wrecks that occurred six months apart, involved different witnesses, one of which concerned a slick road where the other involved a mechanical failure, but which happened to involve a husband and wife who were both rear-ended on the same road, could be consolidated. Similarly, slip and fall cases might as well all be consolidated based on the store at which the incident occurred without regard for the nuances that make each case unique. Besides infringing the rights of claimants to be heard on the merits of their own case, this policy invites countless motions to consolidate by entities that defend multiple lawsuits.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court grant their petition for a writ of certiorari because their cases did not involve common questions of law and fact as required by Rule 42(a), SCRCP and it is important for this Court to provide guidance on consolidation for the reasons set forth herein.

Joseph O. Thickens, S.C. Bar No. 101398
J. Eric Cavanaugh, S.C. Bar No. 100044
Cavanaugh & Thickens, LLC
1717 Marion Street (29201)
Post Office Box 2409
Columbia, SC 29202
Tel: (803) 888-2200
Fax: (803) 888-2219

AND

Clyde C. Dean, Jr., S.C. Bar No. 1606
The Dean Law Firm, LLC
146 Centre St.
Orangeburg, SC 29115
Attorneys for Petitioner

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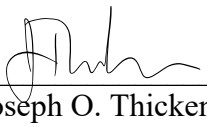
CERTIFICATION OF COUNSEL

I certify that a petition for rehearing or reinstatement was made and finally ruled on by the Court of Appeals.



Joseph O. Thickens, S.C. Bar No. 101398