STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Appellate Case No.: 2019-000998

Cecil Rowe,..Appellant,

v.

Family Health Centers, Inc.,..Respondent.

AND

Rebecca Rowe,..Appellant,

v.

Family Health Centers, Inc.,..Respondent.

PETITION FOR REHEARING

Pursuant to 221(a) and 240 of the South Carolina Appellate Court Rules, Appellants Cecil Rowe and Rebecca Rowe request rehearing of the Court's opinion issued February 9, 2022, affirming the trial court's rulings in favor of Family Health Centers, Inc. Appellants further request rehearing *en banc* pursuant to Rule 219(b) of the South Carolina Appellate Court Rules[1].

[1] Consideration by the full court is necessary to maintain uniformity of decisions and because the case involves questions of exceptional importance in that the Rowes were unable to effectively present their different cases at trial, thereby prejudicing their right to a fair and impartial trial by jury.

The Court's ruling disregarded recent precedent by relying on allegations in the Complaint that were denied by Defendant and contested throughout litigation. The Court also failed to protect the Rowe's Constitutional right to a fair jury trial by upholding the trial of two dissimilar cases during the same proceeding – one involving a slipping chair, and one involving a broken chair – thereby opening the door to a litany of consolidation requests by parties in many types of cases who wish to confuse juries by finding one common issue to tie together dissimilar cases.

ARGUMENT

A. The Court overlooked or misapprehended the law on what types of issues may be consolidated by trial courts.

Courts interpreting Rule 42(a) have urged caution in the imposition of consolidation to avoid prejudice to the parties. *See Dupont v. S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966). Even if there was *an* issue in this case that was similar enough to permit consolidation, the balancing of fairness to Mr. and Mrs. Rowe's right to present their cases should have immediately resulted in the denial of the Respondent's motion for consolidation. While the Court seems to have focused on the common issue of whether the Respondent's slippery floor was a dangerous condition, what is lost in the fixation on finding one commonality to support consolidation is the sheer impossibility of trying the rest of the unique issues to one jury and expecting them to be able to remember which witnesses and which issues pertain to each case. For instance:

1. A chair placed on a tile floor slid out from behind Mrs. Rowe; a chair 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).

2. The Defendants destroyed or disposed of the chair that broke and injured Mr. Rowe, but used an exemplar chair at trial that was similar to the one that slid out from under Mrs. Rowe. This exemplar chair was unbroken and not one of the actual chairs involved in either case.
3. Family Health Center employee Mr. Elvin Cobbs separately investigated both cases after each fall six months apart; however, Plaintiffs were forced to question him about both cases back-to-back on the stand with little way to separate the narratives other than a pivot in the middle of his testimony from one case to the other. The record shows that there was little if any common issue for him to discuss; he was just a witness in both cases.
4. Mr. Cobbs and other Family Health Center employees prepared different accident reports in both cases. The accident report in Mr. Rowe's case was subsequently altered and two versions of the report were produced with conflicting statements, whereas the accident report from Mrs. Rowe's case was uniform.
5. The cases involved different witnesses: Sara Ann Johnson testified about facts relevant to Mrs. Rowe's case, including in particular the slick condition of the floor, whereas Edward Perry testified about the broken chair in Mr. Rowe's case. Neither witness had anything to do with the other case, but both had to be presented during the same trial.
6. Mr. and Mrs. Rowe, who should be each others' best damages witnesses, 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.
7. Finally, different substantive law applies in each case – Mrs. Rowe's case involved pure constructive notice whereas Mr. Rowe's case was an actual notice/latent defect case. Thus, 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.

Appellant respectfully requests and urges this Court to consider the detrimental impact on trial presentation and logistics imposed by attempting to try these two very different cases together based the factual commonality of a slipping chair, particularly where the chair physically broke and slipped in one case whereas it just slipped on the floor in the other. Mr. and Mrs. Rowe deserve separate trials on the merits of their different cases, not half of a jury's attention. They have a Constitutional right to a fair and impartial trial, and unfortunately there was no way to afford that right amidst the confusion imposed by the improvident joinder of these two very different cases. *See* U.S. Const. Art. III, Section 2.

B. The Court has overlooked or misapprehended the law regarding statements in pleadings.

The general rule that a party is conclusively bound by the allegations in its pleadings comes with a significant caveat which was recently reinforced by this Court but overlooked or misapprehended in its February 9 Order: "Allegations 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)).

All of the paragraphs relied upon by Respondent in support of consolidation in this case were denied in Respondents' Answers. (Answers of Family Health Centers to Complaints of Cecil and Rebecca Rowe, R. pp. 33-43). 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 ,it became clear that the cases presented quite different factual scenarios which were both covered within the general allegations of the complaint.

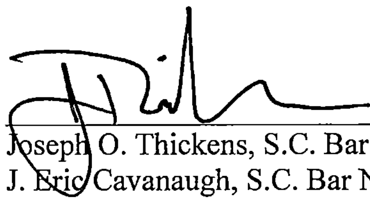
If the argument of the Respondent is accepted, there is nothing to stop the consolidation of nearly every motor vehicle accident or premises liability case brough in this state because most of the pleadings are for all intents and purposes identical. Under the logic urged by Respondents, two car wreck cases 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 concern a husband and wife who were both rear-ended on the same road, could be consolidated. Similarly, slip and fall cases might as well 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 Defendants who defend multiple lawsuits.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court grant rehearing and reverse the trial court. Appellants further request that the Court consider this petition *en banc* because consideration by the full court is necessary to secure or maintain uniformity in its decisions and the proceeding involves a question of exceptional importance.

SIGNATURE PAGE FOLLOWS

Respectfully Submitted,



Joseph O. Thickens, S.C. Bar No. 101398
J. Eric Cavanaugh, S.C. Bar No. 100044
Cavanaugh & Thickens, LLC
1324 Gadsden 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 Appellant

Columbia, South Carolina

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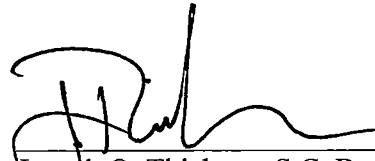
PROOF OF SERVICE

I certify that I have caused the service of Appellant's Petition for Rehearing on Respondent via electronic mail and by U.S. Mail on February 24, 2022 to the attorneys of record at the following addresses:

John M. Grantland
Phillip Florence
Murphy & Grantland, P.A.
Post Office Box 6648
Columbia, SC 29260
Attorneys for Respondent

SIGNATURE PAGE FOLLOWS



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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 Appellant

Columbia, South Carolina
February 24, 2022

Cavanaugh&Thickens
ATTORNEYS AT LAW

J. ERIC CAVANAUGH
JOSEPH O. THICKENS
ROBERT L. BROWN
PATRICK D. HICKMAN
STEPHEN F. KRZYSTON
NICHOLAS J. SKORZEWSKI
WILLIAM H. YARBOROUGH, JR.

February 24, 2022

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VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings
Clerk of Court
1220 Senate Street
Columbia, SC 29201

RE: **Appellate Case No.: 2019-000998**

Cecil Rowe vs. Family Health Centers, Inc. and Carolina Kwik Dry, LLC
Civil Action No.: 2017-CP-38-01232
Our File: 1724

Rebecca Rowe vs. Family Health Centers, Inc. and Carolina Kwik Dry, LLC
Civil Action No.: 2017-CP-38-01233
Our File: 1725

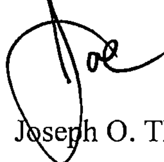
Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of a *Petition for Rehearing and Suggestion for Rehearing En Banc* in the above-referenced matter. We would appreciate it if you would file the original and return a copy to us by our office's courier.

By copy to this letter, counsel for Respondent is also hereby served with a copy of these documents.

Yours truly,

CAVANAUGH & THICKENS, LLC



Joseph O. Thickens

JOT/
cc: John M. Grantland and Phillip Florence (via Email and U.S. Mail)
Clyde C. Dean, Jr. (via Email only)