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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2018-CP-21--02958

Appellate Case No.: 2019-001370

Walt Parker, ...Appellant,

v.

John C. Curl, ...Respondent.

v.

Palmetto Floor Covering Installation, LLC,
and Florence Custom Countertops, Inc.,.....Third-Party Defendants.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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STATEMENT OF THE CASE

This action was commenced by a Summons and Complaint with an application for a temporary restraining order and a temporary injunction on November 8, 2018. The Temporary Restraining Order was granted on November 9, 2018, and the preliminary injunction was entered on November 19, 2018.

The issues were joined between Mr. Walter Parker ("Mr. Parker") and Mr. John C. Curl ("Mr. Curl") with an Answer and the Third-Party Summons filed December 13, 2018, and an Answer and Counterclaim from Mr. Parker on January 18, 2019. Mr. Curl filed a Motion for Summary Judgment on February 1, 2019, which was denied by Order of February 22, 2019.

On March 21-22, 2019, a trial was held before the Honorable Michael Nettles for the non-jury purposes created by the pleadings:

I. A declaratory judgment as to the rights of the parties arising under their contractual arrangements;

II. To determine and declare the ownership of Florence Carpet & Tile, Inc.; and

III. To determine whether the Defendant should be ordered to transfer shares of stock in Florence Carpet & Tile, Inc. to the Plaintiff Parker.

Following the court's oral rulings of March 22, 2019, it entered Findings of Facts and Conclusions of Law dated April 25, 2019, to which the Mr. Parker requested reconsideration. The reconsideration was substantially denied on August 6, 2019, and the court Amended its Findings and of Fact and Conclusions of Law. An appeal followed.

On July 20, 2022, the decision of the lower court was affirmed. Specifically, this Court concluded that Mr. Parker's arguments on appeal were abandoned and declined to address the merits of the issues presented. Mr. Parker now petitions this Court for rehearing and suggests

that the rehearing be held *en banc* pursuant to Rule 219, SCACR, since it involves a question(s) of exceptional importance to the parties and/or the public at large.

FACTS

On April 30, 2007, Mr. Curl and Mr. Parker purchased 100% of the outstanding stock in Florence Carpet & Tile, Inc. ("FCT") from Charles Carnell ("Carnell") for a purchase price of $1,080,000. (R. pp. 423–435). This purchase occurred four months into the Corporation's fiscal/tax reporting year (the calendar year 2007). At that time, Mr. Curl and Mr. Parker agreed that Mr. Curl owned 53% of FCT and Mr. Parker owned 47%. This ownership split was memorialized in the minutes of a shareholders meeting for FCT on April 30, 2007. (R. p. 436).

Based upon the financial strength of Mr. Curl, Mr. Carnell owner-financed $540,000 of the Purchase Price and Branch Bank and Trust ("BB&T) lent FCT the remaining $540,000. The purchase was bankrolled based upon the strength of Curl's financial statements and the new owners planned for Parker to run the Corporation's daily operations. Both Mr. Curl and Mr. Parker personally guaranteed the loans. (R. p. 204, lines 6-24).

To help incentivize Mr. Parker's management of the Corporation, Mr. Curl communicated with Mr. Porter Stewart, Esquire, before the closing with Carnell and requested that he prepare corporate minutes of the first meeting of the Shareholders of FCT which would contain an incentive proposal (the "Agreement"). In those minutes, Mr. Curl set forth a performance incentive proposal to transfer 3% of his shares to Parker if certain conditions were met:

> At this meeting, in consideration of their mutual promises and the sums of Five ($5.00) Dollars in hand paid as acknowledged, the shareholders agreed that John C. Curl as fifty three (53%) per cent shareholder and Walter A. Parker as forty seven (47%) per cent shareholder, would agree for a transfer of share ownership

> from Curl to Parker within the period of the first five years of one per cent of share ownership from Curl to Parker for each complete fiscal year of operation of said corporation at a profit as determined by the accountant for the corporation, up to a total of 3 percentage points, the effect of which would be to allow for an ownership of fifty (50%) per cent to Curl and fifty (50%) per cent to Parker if the corporation operated at such profit for a minimum of three of the first five years.
>
> (R. p. 436)

Because Mr. Curl unilaterally provided the Agreement terms to attorney Porter Stewart and because Stewart acted solely as a scrivener of the Minutes, Mr. Curl was the drafter of the Agreement. (Finding of Fact 8). (R. p. 27).

The terms of the Agreement were found ambiguous in two respects: whether the financial results for FCT for the partial fiscal year 2007 are to be included in the incentive formula and whether Parker was entitled to receive a one percent interest ownership transfer from Mr. Curl for each single profitable year regardless of the total number of profitable years or was the transfer of shares by Mr. Curl contingent on a minimum total of three years profitability for FCT. (Finding of Fact 10). (R. pp. 27-28). The FCT tax returns and Profit/Loss Statements show an operational profit for the years 2007, 2010, and 2011. (R. pp. 406-422).

Both Mr. Parker and Mr. Curl were directors of FCT; both Mr. Parker and Mr. Curl were officers of FCT; Mr. Parker served as President while Mr. Curl served as Secretary. As the daily operations manager, Mr. Parker oversaw the finances of FCT and directed the preparation of the Company's tax returns. Mr. Parker and Mr. Curl each signed FCT's tax returns for those years when they were prepared by FCT's accountant. FCT's 2016 and following tax returns have not yet been prepared. In May of 2015, Mr. Curl informed Mr. Parker and his attorney that no additional shares were owed to Mr. Parker, alleging FCT was not profitable during the first five years of operation. (Finding of Fact 15). (R. p. 28).

In September 2011, Mr. Parker caused two companies to be created: Florence Custom Countertops, Inc. and Floor Covering Specialties, Inc. (the "Granite Business" and the "Installation Business", respectively). Although Mr. Curl was not ready for FCT to get into the granite countertop business, Mr. Parker thought it was important *to FCT* that it not be subject to competitive pressures from a current employee who announced his plans to leave the company to start his own granite works, that it was a meaningful way to offer incentives for another valuable employee to maintain her affiliation with FCT, and to respond to market demand. The result of those considerations *for the benefit of FCT* was that Mr. Parker assisted in the creation of the Granite Business:

> One of the drawing cards for Florence Carpet and Tile is … from a service standpoint we can provide just about any service from a -- remodel type situation. So, if somebody wants a kitchen floor, they don't just come to us for that and then have to go to somebody else and get a countertop and then go to somebody else to get something else. You know, they can go to one place … has a good reputation in the community, they can go there and feel confident that they can just deal with one person. And so it often happens that somebody comes in looking for just a countertop, then we wind doing a backsplash or they'll say … I want to put carpet in the bedroom so go ahead and measure for that or any number of things. So it is kind of a snowballing thing that takes place. … And so this was a manner that was definitely going to improve quality of what we were doing at Florence Carpet and Tile and it was going to improve profitability. So we always hoped that the countertop business would be of some benefit, but that was not the overall driving force. My commitment has and – initially was and has been and still is to – loyalty is with Florence Carpet and Tile.
>
> (R. p. 174, line 7-p. 175, line 18).

The short-lived Installation Business came about because of business that FCT had been turning away – installation work.

> … (I)f you don't purchase the materials at Florence Carpet and Tile, we won't install it for you because you get into liability issues. You get into all kind of potential problems. If there is a problem, whose fault is it, is it the material or is

> it the installation. And so for anybody to have work done at Florence Carpet and Tile, they have to purchase the material there. And so, there was a lot of that was taking place. And so, there was an opportunity to – that I saw … There was a lot of request to install materials that we did not sell or to do work that we did not do. …we formed an installation company and then I would take on work that Florence Carpet and Tile would typically not engage in. …we figured out how to do that work and there was a demand for that work Florence Carpet and Tile took over that work. So, Palmetto Floor Covering quit doing that kind of work and Florence Carpet and Tile started doing that kind of work. …It was not competing with nor undermining the business. As a matter of fact, it was one of the things that I think that help keep us where we are today… .
>
> (R. p. 176, line 3-p. 178, line 17).

FCT received the profits resulting from the Granite Business and the Installation Business. (R. p. 230, line 5-p. 236, line 7; p. 275, line 23-p. 276, line 24; p. 279, lines 2-24).

The defense offered by Mr. Curl neither disputed nor offered any evidence contradicting the expressed motivations of Parker or the testimony of Mr. Barker and Mr. Parker that all the Granite Business and Installation Business profits went to Florence Carpet & Tile, Inc. The only evidentiary mention of either business came in an off-hand, non-responsive answer to cross-examination when Mr. Curl stated: "Those business were a huge concern of mine that they were conflict of interest being operated out of Florence Carpet and Tile and not to the benefit of Florence Carpet and Tile." (R. p. 323, lines 11-14). In spite of the undisputed testimony that the sub-tenant businesses were created to be a benefit to FCT and operated so that their profits went to FCT, the court below found that their existence and operation must have been a breach of Mr. Parker's fiduciary duty. (R. p. 19).

Mr. Parker alleges that Curl Properties, LLC was controlled and managed by Mr. Curl. As FCT's Landlord, it has failed and refused to keep the roof in decent repair, breaching his fiduciary duty to Mr. Parker. Mr. Curl has alleged that Mr. Parker mismanaged FCT, breaching

his fiduciary duty to Mr. Curl. These disputes were not to be resolved at the non-jury trial. (SR. pp. 682-688; R. p. 138).

ARGUMENT

Pursuant to Rule 221(a), SCACR, Mr. Parker respectfully petitions this Court for rehearing based on errors of law contained within its Opinion filed July 20, 2022. In particular, this Court incorrectly decided that Mr. Parker's arguments were abandoned on appeal, including his contentions that the circuit court erred by (1) considering the defense of unclean hands when it was not raised by Mr. Curl and (2) finding his post-contractual activity divested him of his entitlement to additional shares in Florence Carpet & Tile, Inc.

Notably, this Court incorrectly held that Mr. Parker made only short, conclusory statements in his appellate brief and failed to city any relevant legal authority in support of his contentions. In reliance thereon, this Court also erroneously declined to address the merits of the issues presented. For these reasons, Mr. Parker's petition for rehearing should be granted.

Admittedly, "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority." Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008). Short, conclusory statements made without supporting authority are also deemed abandoned on appeal. Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). When a party provides no legal authority regarding a particular argument, the argument is further abandoned and this Court will also not address the merits of the issue. State v. Lindsey, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011). Accordingly, it necessarily follows that those issues properly supported by legal

authority and/or sufficient legal argument are preserved on appeal and not abandoned.

Here, Mr. Parker's final brief undeniably was nearly ten (10) full pages in length and included citations to at least five (5) cases in support of his legal arguments. For example, in his final brief, Mr. Parker cited Crowder v. Crowder, 246 S.C. 299, 143 S.E. (2d) 580 (1965) Ecclesiastes Prod. Ministries v. Outparcel Assoc., LLC, 374, S.C. 483, 499-500, 649 S.E.2d 494, 502 (Ct. App. 2007), Koester v. Citizens' Pub. Co., 154 S.C. 54, 151 S.E. 452 (1930), Myrtle Beach Lumber Co., Inc. v. Willoughby, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981), and Townes Assocs., Ltd. v. Greenville, 266 S.C. 81, 86, 221 S.E. 2d 773, 775 (1976) in support of his arguments. Similarly, Mr. Parker's final brief was neither short and/or conclusory. As such, any conclusion by this Court that Mr. Parker's final brief contained only short conclusory statements and/or was without supporting authority was erroneous. Mr. Parker's arguments on appeal were also never abandoned. To the contrary, Mr. Parker preserved the issues presented on appeal by timely and properly briefing his arguments, with sufficient legal authority. *See eg.*, Rule 211 C.C.A.C.R. Similarly, while Mr. Parker's final brief does recite both the evidence and testimony presented at trial, such items were necessary and vital to present the issues presented on appeal, especially since the underlying legal action was tried by the lower court without a jury. Again, Mr. Parker did not abandon any issue on appeal. Therefore, the instant petition for rehearing should be granted.

CONCLUSION

For the reasons stated, this Court should grant Mr. Parker's request for rehearing and it is suggested that the rehearing should be held *en banc*. Alternatively, Mr. Parker requests that the Court review the argument and evidence presented and decide the issues presented in his favor.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc on the *Respondent,* through his attorney of record, Jeffrey L. Payne, by depositing a copy of same in the United States Mail, postage prepaid, to Post Office Box 5478, Florence, South Carolina, 29502 on July 29, 2022.
.

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July 29, 2022

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Re: Walt Parker v. John C. Curl
Appellate Case No: 2019-001370
Our File No.: 16453.17229

Dear Ms. Kitchings:

Pursuant to Mr. Williams's instructions, enclosed please find a copy of the Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc and Proof of Service which was emailed and mailed today in the above referenced matter. Also enclosed is a check in the amount of $50.00 for the filing fee, made payable to the Court of Appeals.

Please contact Mr. Williams with any questions or concerns.

With kind regards,

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Enclosures
cc: Jeffrey L. Payne, Esquire