

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge JUN 19 2013

RECEIVED

Case No. 2011-CP-07-00013

SC Court of Appeals

Maureen T. Coffey, Respondent,

v.

Community Services Associates, Inc. and
George F. Breed, Jr. Appellants.

RETURN TO RESPONDENT'S MOTION TO STRIKE PARTS OF APPELLANT
COMMUNITY SERVICES ASSOCIATES, INC.'S INITIAL BRIEF

INTRODUCTION

On April 18, 2013, Appellant Community Services Associates, Inc., ("CSA") filed and served its initial brief. On June 12, 2013, Respondent Coffey filed and served a motion to strike 28 pages of CSA's 53-page brief. Coffey thereby seeks to obliterate the heart of CSA's appeal, eliminating three of the four arguments presented therein. CSA strenuously opposes Coffey's attempt to eviscerate its appeal in this important case for the reasons addressed below.

ARGUMENT

The pertinent pages of the transcript of trial are 1710-1728. Copies of those pages are attached at Exhibit 1. Examination of these pages yields several points that should lead to a denial of Respondent's motion.

I. THE TRIAL COURT, KNOWING THAT THERE WAS TO BE A REBUTTAL WITNESS THEREAFTER, INSTRUCTED THE APPELLANTS TO RENEW THEIR MOTIONS FOR DIRECTED VERDICT.

On p. 1710 of the transcript, the Trial Court ascertained that the Respondent's counsel had one rebuttal witness whom he was going to present. Despite this known intention of Respondent's counsel, the Court then instructed the parties, "what we need to do is let's renew our motions." Tr. 1710, lines 16-17. After addressing scheduling, the Court reiterated that the motions for directed verdict be renewed then. She said, "I think you need to renew your motions at this point. And if you don't mind we can do [it] pretty summarily." Tr. 1711, lines 21-23 (emphasis added). At no point did Respondent's counsel or Appellants' counsel object to the Trial Court's outlined procedure. Inasmuch as trial courts are vested with authority to determine many things in the conduct of a trial (e.g., summary judgment, admissibility of evidence, whether a party needs a GAL) it was assumed by all parties that the Court here had authority to direct when the Defendants were to renew their motions. Respondent's motion cites no authority to the contrary.

Appellants, in fact, submitted a written motion for directed verdict, Tr. 1711, line 24-1712, line 6. That written motion in renewal of the prior motion should be considered as continuing until the end of trial. The colloquy between Appellants' counsel and the Court was as follows:

MS JOLLEY: Your honor, we filed a written motion for direct verdict. We're happy to, and we've argued previously, we're happy to rely; on that argument and submit motion.

THE COURT: Okay. As well.

MS JOLLEY: We'll re-submit it at this point.

THE COURT: Okay. That's fine, and I appreciate that.

Transcript, p. 1711, line 24 – 1712, line 5.

The trial court thereby clearly gave approval to that procedure to renew the motion for directed verdict.

II. THE TRIAL COURT ADJUDICATED THE MOTIONS FOR DIRECTED VERDICT BEFORE THE REBUTTAL WITNESS TESTIFIED.

Immediately after directing the defending parties to renew their motions for directed verdict, the Court, in fact, elicited argument on, and adjudicated, those motions. Tr. 1712, line 8 – 1722, line 12. She granted directed verdict on the civil conspiracy claim, Tr. 1714, lines 19-20, but denied it as to the slander claim against CSA, Tr. 1721 lines 1-3, while granting it as to Defendant/Appellant Breed. Id.

The fact that the Court adjudicated the motions with no objection from Respondent's counsel constitutes Coffey's waiver of any claim about the sequencing of the DV motions and the rebuttal witness.

III. THE RULE 50(b) STATEMENT TO THE EFFECT THAT MOTIONS FOR DIRECTED VERDICT MUST BE MADE "AT THE CLOSE OF ALL THE EVIDENCE" AS A PREREQUISITE TO A MOTION FOR JNOV IS SUBJECT TO EXCEPTIONS, WHICH ARE APPLICABLE HERE.

The Fourth Circuit, citing and quoting Moore's Federal Practice and cases from other circuits – Trujillo v. Goodman, 825 F.2d 1453 (10th Cir. 1987) and Ebker v. Tan Jay Int'l. Ltd., 739 F.2d 812 (2d Cir. 1984) – has made the point that there are two common exceptions to the general, strict rule. Singer v. Dungan, 45 F.3d 823, 829 (4th Cir. 1995). Specifically, Singer provides as follows:

Professor Moore notes that the courts have created various exceptions to Rule 50(b) analysis for purposes of reviewing the sufficiency of the evidence by holding that a party can still make a Rule 50(b) motion despite his failure to renew his Rule 50(a) motion at the close of all evidence if: "(1) the court indicated that renewal of the motion was unnecessary and/or; (2) the evidence following the party's unrenewed motion under Rule 50(a) was either nonexistent or was brief enough to be obviously inconsequential on the issue of the evidence's legal sufficiency."

Singer, 45 F.3d at 829 (citations omitted).

IV. TO STRIKE OVER HALF OF APPELLANT CSA'S BRIEF BASED ON THE SHORT, INCONSEQUENTIAL TESTIMONY OF ONE REBUTTAL WITNESS WOULD BE TO ELEVATE FORM OVER SUBSTANCE.

As this Court has held, “[w]e recognize that courts of this State have refused to elevate form over substance...” Pascal v. Price, 380 S.C. 419, 442, 670 S.E.2d 374, 387 (Ct. App. 2008) rev’d on other grounds, Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009). There are several features of this appeal that would cause the granting of Respondent’s motion to elevate form over substance; it would allow essentially a technicality¹ to virtually destroy CSA’s appeal. The substance of the situation that prevailed is as follows:

A. The Court Directed the Renewal of the Motions for Directed Verdict.

As addressed previously, it was the Court who told the defending parties when to renew their motions. She did so knowing that there was a rebuttal witness yet to be heard. CSA should not be severely punished for following the Court’s instructions regarding conduct of the trial.

B. Inasmuch as the rebuttal witness was a witness for the plaintiff to address the credibility of another witness, her testimony could not have affected – and did not affect – CSA’s motion for directed verdict.

The rebuttal witness, Sherry Hamilton, had testified previously in the trial. Her prior testimony is at pages 1042 – 1055 of the transcript; it is attached at Exhibit 2. She was brought back to challenge the credibility of Captain Toby McSwain of the Beaufort County Sheriff’s Office. He had previously testified that he had had a meeting with Judge Coffey at her office. This issue could not have had an effect on CSA’s motion for directed verdict inasmuch as issues of credibility are strictly for the trier of fact, the jury. State v. McKerley, 397 S.C. 461, 464, 725

¹ It would be a technicality because CSA submitted a written motion for directed verdict. It would, therefore, be present in court after the termination of the rebuttal witnesses.

S.E.2d 139, 141 (Ct. App. 2012) (“The assessment of witness credibility is within the exclusive province of the jury,” *citing State v. Wright*, 269 S.C. 414, 417, 237 S.E.2d 764, 766 (1977).

Hamilton’s rebuttal testimony, moreover, had no effect on the motion for directed verdict, as those motions had already been adjudicated, Tr. 1712-1722, before she testified, Tr. 1725, line 1 – 1728, line 20.

C. Hamilton’s testimony was short and completely inconsequential.

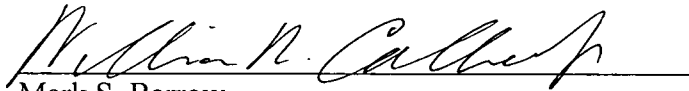
Perusal of Hamilton’s rebuttal testimony, Tr. 1725, line 1 – 1728, line 20, reveals that it offers nothing new or of consequence to the motion for directed verdict. She offers to provide speculation as to whether Captain McSwain visited Judge Coffey in 2004, but defendants successfully objected to that. Tr. 1725, lines 12-19. While she gives some description of Judge Coffey’s office, she offers no testimony whatsoever about Captain McSwain or his visiting the Judge, so the complete purpose of calling her was unfulfilled. Even if it had been fulfilled, however, it could have no conceivable effect on CSA’s motion for directed verdict.

CONCLUSION

Respondent’s Motion to Strike 28 pages of CSA’s 53-page brief should be denied. The Trial Court directed CSA to renew its motion for directed verdict at a specific time before the rebuttal witness testified. Those DV motions were adjudicated before the rebuttal witness, Sherry Hamilton, testified. Her testimony, moreover, was completely insubstantial on any issue of significance to any motion for directed verdict. Even if she had presented evidence to challenge the testimony of a captain from the Beaufort County Sheriff’s Office, it would have had no effect on the trial court’s consideration of the directed verdict motions. Form, i.e., the sequencing of submitting renewals of directed verdict motions, should not be allowed to triumph over substance, as outlined above.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

A handwritten signature in cursive script, appearing to read "William R. Calhoun, Jr.", is written over a horizontal line.

Mark S. Barrow
William R. Calhoun, Jr.
Sweeny, Wingate, & Barrow, P.A.
Post Office Box 12129
Columbia SC 29211
(803) 256-2233

**ATTORNEYS FOR PETITIONER
COMMUNITY SERVICES ASSOCIATES,
INC.**

Columbia, South Carolina

June 19, 2013

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

The Honorable Carmen T. Mullen, Circuit Court Judge

RECEIVED
JUN 19 2013

SC Court of Appeals

Case No. 2011-CP-07-00013

Maureen T. Coffey, Respondent,

v.

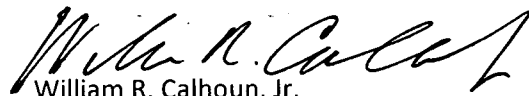
Community Services Associates, Inc. and

George F. Breed, Jr. Appellants.

PROOF OF SERVICE

I certify that I have served the Return of Community Services Associates, Inc. to the Motion of Respondent to Strike Parts of Appellants' Brief by depositing a copy of it in the United States Mail, postage prepaid, on June, 19 2013, addressed to her attorney of record, C. Mitchell Brown; Nelson Mullins Riley & Scarborough, LLP; 1320 Main Street, 17th Floor; Columbia, S. C. 29201 and on counsel for George F. Breed, Jr., Weston Adams, III, by similar mailing on the same date, at McAngus Goudelock & Courie, LLC ; Post Office Box 12519; Columbia, S.C. 29211-2519.

June 19, 2013



William R. Calhoun, Jr.
Sweeny Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, S.C. 29211
(803) 256-2233



SWEENY WINGATE & BARROW P.A.

June 19, 2013

Reply to: Main Office

Mark S. Barrow
(803) 256-2233 x 105
msb@swblaw.com

HAND-DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RECEIVED
JUN 19 2013

SC Court of Appeals


RE: Maureen T. Coffey v. Community Services Associates, Inc., George F. Breed, Jr.
Civil Action No.: 2011-CP-07-00013
SC Court of Appeals Tracking No.: 2012-213252
Our File: 4513-8299

Dear Kitchings:

Enclosed for filing are the original and seven (7) copies of Appellant Community Services Associates, Inc.'s Return to Coffey's Motion to Strike portions of this Appellant's brief. Enclosed also are two copies of a Proof of Service for this pleading. Please return with the courier who delivers these documents at least one stamped copy of each. Thank you very much. Should you have any questions or comments, please do not hesitate to contact me.

Yours truly,

SWEENY, WINGATE & BARROW, P.A.


for Mark S. Barrow

MSB/naa

Enclosures

cc: C. Mitchell Brown, Esquire, w/enclosures
Weston Adams III, Esquire,, w/enclosures