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

Case No. 2011-CP-07-00013

Maureen T. Coffey, ... Respondent,

v.

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

RETURN IN OPPOSITION TO RESPONDENT'S MOTION TO STRIKE PARTS OF APPELLANT GEORGE F. BREED, JR.'S INITIAL BRIEF AND REQUEST FOR STAY OF BRIEFING REQUIREMENTS ON RESPONDENT

Pursuant to Rule 240, SCACR, Appellant George F. Breed, Jr. submits this Return in Opposition to Respondent's Motion to Strike Parts of Appellant George F. Breed, Jr.'s Initial Brief and Request for Stay of Briefing Requirements on Respondent, dated June 11, 2013 ("Motion"). This Court should deny Respondent's Motion on the ground that, first and foremost, it is an improper vehicle by which to challenge whether the issues raised in Appellant Breed's Initial Brief are properly preserved. Instead, if Respondent believes the issues addressed in pages 12-26 and 30-35 of Appellant Breed's Initial Brief were not preserved for appeal, she should address this issue in her brief, not through a motion to strike.

Respondent's Motion attempts to strip this Court of authority to review a number of substantive issues raised on appeal. Granting Respondent's Motion essentially would deprive this Court of jurisdiction to review issues timely and properly raised on appeal. However, issue or error preservation does not equate to subject matter jurisdiction, as Respondent appears to suggest. *See, e.g.*, Dove v. Gold Kist, Inc., 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994) (holding "[s]ubject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong'"). Even if, solely for the sake of argument, Appellants failed to preserve the issues addressed in their directed verdict motion,[1] "[t]he failure to preserve an issue for appeal does not deprive an appellate court of jurisdiction to hear the appeal." Hill v. South Carolina Dept. of Health & Envtl. Control, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010). Heretofore, motions to strike portions of briefs filed with this Court have been granted only with respect to references to material that was not part of the record before the lower tribunal, *see* Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (1984), and have not been extended to addressing whether substantive arguments have been properly preserved.

If this Court grants Respondent's Motion, it will mark the beginning of appeals being decided, in large part, though motions practice. Any time a party alleges the other side failed to preserve an issue for appeal, the entire portion of the appeal related to that issue will be attacked via a motion to strike. Our appellate rules do not authorize and have never contemplated such an approach to resolving appeals. Such an approach deprives this Court of the benefit of full briefing and argument, as well as the opportunity to review the entire record. At the same time, such an approach will embroil the motions judge or judges in reviewing substantial portions of

[1] The motion for directed verdict was filed and argued below by counsel for both Mr. Breed and Community Services Association, jointly referred to herein as Appellants.

the record that necessarily will be included with the various motions pleadings as the parties present evidence of what was or was not preserved below.

Furthermore, if Respondent's Motion is granted, Appellant Breed will move for rehearing of this issue. If the motion for rehearing is denied, Appellant Breed will file a petition for certiorari review with the South Carolina Supreme Court. Future litigants placed in this position will do likewise. This approach to resolving appeals unnecessarily and improperly injects undue delay and complexity into the appellate process and should be rejected.

Alternatively, if this Court does not deny Respondent's Motion as an inappropriate attempt to preclude the Court from hearing the full appeal, it should deny the Motion on the basis that: 1) the trial court specifically instructed the parties when to raise their directed verdict motion; 2) the rebuttal testimony was extremely brief and inconsequential; 3) Appellants substantially complied with the rule governing directed verdicts; and 4) granting Respondent's Motion would result in a manifest injustice as the verdict is wholly without legal support.

BACKGROUND

Respondent Maureen T. Coffey, Municipal Judge for the Town of Hilton Head, South Carolina, filed this defamation action in Beaufort County Circuit Court, alleging, among other things, that Mr. Breed had defamed her in a June 6, 2008 letter he wrote to the South Carolina Commission on Judicial Conduct ("Commission") raising his concerns about Judge Coffey. (Ex. 1, Amended Complaint) (Ex. 2, June 6, 2008 letter). In the June 6 letter, Mr. Breed described several scenarios that he believed indicated Judge Coffey had "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts & criminal justice procedure." (Ex. 2). Two sentences in the 3-page, single spaced June 6 letter concerned Captain Toby McSwain of the Beaufort County Sherriff's Office ("BCSO"):

> Sometime after this arrest [of Respondent's brother Otis Coffey] Capt Toby McSwain-BCSO had a meeting with Judge M. Coffey and advised her that Otis was the prime suspect in a rash [of] burglaries occurring over the previous several months. Judge Coffey stated to Capt. McSwain that she was "going to get him out of town", or words to that effect.

(Ex. 2). Although Judge Coffey disputed that she met with Captain McSwain during this time period, she admitted at trial that she met with a BCSO detective, Brian Baird, who told her Otis was a suspect. She then spoke with her brother Otis, who told her he had not committed any crime. She testified, "I said, 'All right. Well, then, clear your name and take the lie detector test.' And he said 'Okay, I will.'" When it came time to take the lie detector test, Otis refused to take the test. Judge Coffey testified that she told her brother, "Well, listen, it doesn't look good if you're in my jurisdiction and you're a suspect in a crime. Go to work at the restaurant in Tybee [Georgia]." She testified that she called Detective Baird back and told him Otis didn't want to take the lie detector test. (Ex. 3, Tr. 1687, line 17 – 1698, line 20). She testified that she told Otis, "[y]ou need to clear your name. If you're not going to clear your name, then just go work at the restaurant – at the Tybee restaurant for awhile. And if they had any evidence, I would have assisted them, and they know that, in bringing him back." (Ex. 3, Tr. 1690, lines 2-8). She admitted that she told Otis to go to Georgia, "I told him that - well, I was trying to coerce him to take the lie detector test to clear his name. ... So I told him, 'If you don't want to take the test, then I really don't think it's a good idea if you stay in my jurisdiction; it doesn't look good.'" (Ex. 3, Tr. 1699, lines 2-11) (*see also* Ex. 3, Tr. 240, line 6 – 241, line 24).

The trial took six days during which a total of 21 witnesses testified and/or had deposition testimony read into the record. At the close of Respondent's case, the presiding judge heard extensive arguments on Appellants' motion for directed verdict, (Ex. 4, Tr. 1402-

1425),[2] at the conclusion of which she made it very clear that she believed there was sufficient evidence to go to the jury on the defamation claim. (Ex. 4, Tr. 1424, line 10 – 1425, line 1).

On the fifth day of the trial, at the close of Appellants' case, the presiding judge asked if Respondent had any rebuttal witnesses. Respondent's counsel indicated he wanted to recall one witness, Ms. Sherry Hamilton, who was Judge Coffey's court assistant. The presiding judge then stated:

> Okay. Okay. Well then, what we need to do is let's renew our motions. Let's do this somewhat quickly, again. And then we'll go ahead and bring the jury back to hear your rebuttal witness. Then, I don't see any way we can go over the charge, argue motions, you all argue, me charge, and get this to them by 5:30 in any way, shape, or form today. ... Again, it's problematic for me that, again, I have my son's graduation tomorrow. So by the time we argue and charge, my thought is, is that if we actually argued and charged tomorrow, that I would bring them in at 9:00.... Again, to get things done, we may want to go ahead and do that. Okay. Well, let's do this. I think you need to renew your motions at this point. And if you don't mind, we can do pretty summarily.

(Ex. A to Motion, Tr. 1710, line 16 – 1711, line 23). Appellants' counsel indicated that they would rely on their previously filed written motion for directed verdict, to which the presiding judge replied, "Okay. And that's fine, and I appreciate that." (Ex. A to Motion, Tr. 1711, line 24 – 1712, line 6). After the parties argued Appellants' renewed motion for directed verdict, the presiding judge ruled in Appellants' favor on Respondent's conspiracy claim, and then ruled, "[a]nd what we have left is the defamation cause of action, so. ... I think that's what you all have basically put out in front of this jury, quite frankly, so." (Ex. A to Motion, Tr. 1714, line 25 – 1715, line 2). The presiding judge then said:

> Okay. All right. Well, let's do this then. Let's bring the jury back in, and you can call your rebuttal witness. And then what I propose – what about you all

[2] Respondent is incorrect that the statement that Defendants below (Appellants here) "again moved for directed verdict at the close of their case," is inaccurate. (Motion p. 3 n.2). Defendants/Appellants moved for directed verdict at the close of Respondent's direct case, (Ex. 4, Tr. 1402-1425), and again at the close of Defendants'/Appellants' case. (Ex. A to Motion, Tr. 1710-1712; *see also* Ex. 5, Defendants' Motion for Directed Verdict, filed June 4, 2012).

> being able to argue today? I mean, I would love it if you could argue today, considering you both are going to argue for an hour. And I think that's a good use of our time. We come back at 9:00 a.m. in the morning. I'll charge them on the law. Because I'm going to tell you quite frankly, my charges, I'm going to have to go through it yet again. I just can't send it to them today. It's just too late. And I do have one juror that needs to leave by 5:45 today, anyway.

(Ex. A to Motion, Tr. 1722, lines 10-21).

Ms. Hamilton previously had testified as to the proximity of her office to Judge Coffey's office and as to whether she recalled whether Captain McSwain had been to Judge Coffey's court. (Ex. 6, Tr. 1042, line 21 – 1045, line 3) (Ex. 6, Tr. 1050, line 9 – 1051, line 9). Her rebuttal testimony by and large repeated this direct testimony regarding the location of Judge Coffey's office and whether Ms. Hamilton recalled any time that Captain McSwain came to the courthouse to meet with Judge Coffey. (Ex. A to Motion, Tr. 1725, line 1 – 1728, line 5).

After the jury rendered its verdict, the presiding judge advised, "I'm going to go ahead and give you all ten days for post-trial motions." (Ex. 7, Tr. 1923, lines 9-10).

ARGUMENT

Respondent's Motion is little more than an attempt to avoid having major substantive issues on appeal reviewed by this Court. While both South Carolina and federal courts have discussed strict adherence to the rule that a party must move for directed verdict at the close of all of the evidence, both also recognize that rules of civil procedure are to be liberally construed in the interest of justice. *See* Rule 1, SCRCP; Rule 1 FRCP. Although there may have been a technical failure of Rule 50 in this case, it should be excused based on the clear intention and understanding of the parties and the court, as well as the fact that the rebuttal witness's testimony was extremely brief and entirely inconsequential.

Under Rule 50(b), SCRCP, "[a] party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in

accordance with his motion for a directed verdict." The notes to Rule 50 state that it "conforms to the Federal Rule," with four exceptions that are not relevant here. Rule 50, SCRCP. South Carolina courts routinely look to federal court interpretation of the rules of civil procedures. *See, e.g.*, Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004) (looking to "the prevailing view among federal courts" regarding post-trial motions). Furthermore, like federal courts, our courts apply the rules of civil procedure in a manner that promotes the interests of justice and a search for the truth. "[C]ivil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party ..." Elam, 361 S.C. at 25, 602 S.E.2d at 780; *see also* James v. South Carolina Dept. of Transp., 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (same). Instead, procedural rules should be liberally construed in order to "do substantial justice." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

Federal courts recognize limited exceptions to the strict rule that a party must move for directed verdict at the close of all of the evidence. These exceptions are "necessary to serve the interests of justice and to ensure that all circumstances are fairly considered at the post-trial stage." Cretella v. Kuzminski, 640 F. Supp. 2d 741, 755 (E.D. Va. 2009); *see also* Bayamon Thom McAn, Inc. v. Miranda, 409 F.2d 968, 972 (1st Cir. 1969) (noting that, in a proper case, the strict requirements under Rule 50(b) should be relaxed in the interest of justice). In Singer v. Dungan, 45 F.3d 823 (4th Cir. 1995), the defendants made a Rule 50(a) motion at the close of the plaintiff's case but did not renew it at the close of all of the evidence. The Fourth Circuit instructed that the issues raised in a prior Rule 50(a) motion may be preserved for appeal where, "(1) the court indicated that the 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." 45 F.3d at 829. South Carolina courts have acknowledged that these exceptions may be warranted in some cases. In Henderson v. St. Francis Cmty. Hosp., 295 S.C. 441, 447, 369 S.E.2d 652, 656 (Ct. App. 1988), *rev'd on other grounds*, 303 S.C. 177, 399 S.E.2d 767 (1990), the plaintiff moved for directed verdict after the close of evidence by two of three defendants, but failed to move again after the third defendant, Snoddy & McCulloch, presented its evidence. In denying the plaintiff's appeal of the court's denial of her JNOV motion, this Court found significant the facts that the trial court "never suggested to Henderson that the renewal of the motion would not be necessary to preserve her rights, and the evidence offered by Snoddy & McCulloch following Henderson's unrenewed motion for directed verdict was neither brief nor inconsequential." 295 S.C. at 447, 369 S.E.2d at 656. Federal courts also recognize exceptions, "where there has been substantial compliance with the rule," and/or "where manifest injustice will otherwise occur [where] the verdict is wholly without legal support." Smith v. University of N.C. at Chapel Hill, 632 F.2d 316, 339 (4th Cir. 1980).

All of the exceptions recognized in federal and South Carolina courts apply in this case. First, in the section of the transcript attached to the Motion, the presiding judge clearly instructed the parties that they would renew their motions, then hear the rebuttal witness and then proceed directly to the jury charges and closing arguments. The presiding judge expressed several times her personal time constraints in concluding the trial. (Ex. A to Motion, Tr. 1710-1711). After the jury returned its verdict, the presiding judge clearly believed Appellants' directed verdict motion was preserved because she instructed them that she would entertain post-trial motions filed within ten days. (Ex. 7, Tr. 1923, lines 9-10). Thus, the presiding judge

instructed the parties when to file their motions for directed verdict and clearly signaled her belief that those issues were preserved for post-trial motions.

Second, the rebuttal testimony presented by Respondent was both brief and inconsequential. In Bayamon Thom McAn, the court excused a failure to renew a motion for directed verdict at the close of all the evidence where the additional evidence consisted of "two pages of transcript and involving no more than a few minutes ..." 409 F.2d at 972. The court held that there was "no possibility that any of this [testimony] could have changed the court's mind in ruling on a repeated motion." Id.; *see also* Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (where the defendant failed to resubmit its motion for directed verdict at the end of all of the testimony, and where the additional testimony was "brief and largely cumulative," finding "no logical purpose would be served by holding that the district court was precluded from entertaining TRW's motion for a judgment n.o.v."). In Beaumont v. Morgan, 427 F.2d 667 (1st Cir. 1970), defendants were excused from resubmitting their motions for a directed verdict at the close of all the evidence where the additional testimony consisted of brief testimony by three witnesses that was relevant to one defendant but which, "bore only tangentially on the liability of the remaining defendants." 427 F.2d at 670. Here, Ms. Hamilton's rebuttal testimony was slightly over three pages long (in a trial transcript running in excess of 1,900 pages), and only covered the location of Judge Coffey's office, whether it had a window, and whether she recalled Captain McSwain visiting Judge Coffey in her office. (Ex. A to Motion, Tr. 1725, line 3 – 1728, line 5). None of these facts are relevant to whether Mr. Breed's June 6 letter was defamatory. It is entirely irrelevant whether Judge Coffey made the statement about moving her brother "out of town" to Captain McSwain or to Detective Baird. In fact, the statements Judge Coffey admitted she made to Detective Baird are far more problematic

(*i.e.*, that she was going to have her brother Otis move out of state and that she was attempting to coerce him into taking a lie detector test) than any statement ascribed to Captain McSwain in Mr. Breed's letter. Thus, Ms. Hamilton's rebuttal testimony was not only extremely brief but entirely inconsequential to the defamation claim and could not possibly have affected the presiding judge's ruling on the directed verdict motion.

Another reason Ms. Hamilton's rebuttal testimony was inconsequential is because she was brought back to the stand specifically to attack the credibility of Captain McSwain's testimony that he had met with Judge Coffey in late 2004 or early 2005. (Ex. 8, Tr. 1611-1617 (cross-examination of Captain McSwain by Respondent's counsel regarding location of Judge Coffey's office and whether it had windows, as well as the location of Ms. Hamilton's desk)) (Ex. A to Motion, Tr. 1725-1727 (rebuttal testimony regarding the location of Judge Coffey's office and whether it had a window, as well as its proximity to Ms. Hamilton's desk)). Patently, when ruling on a motion for directed verdict, the court is not to judge the credibility of the witnesses but is concerned only with "the existence of non-existence of evidence ..." State v. Rosemond, 348 S.C. 621, 627, 560 S.E.2df 636, 639 (Ct. App. 2002); *see also* Garrett v. Locke, 309 S.C. 94, 99, 419 S.E.2d 842, 845 (Ct. App. 1992) (in considering a motion for directed verdict, a trial court has "no authority to decide credibility issues nor [does] it have authority to resolve conflicts in the testimony and evidence"). Thus, Ms. Hamilton's rebuttal testimony could not have had any influence on the presiding judge's ruling on Appellants' directed verdict motion.

Third, Appellants substantially complied with the rule by renewing their directed verdict motion when requested to do so by the court at the close of their case. At the time the presiding judge heard the renewed motion for directed verdict, she was aware that Respondent was

planning to recall a rebuttal witness. (Ex. A to Motion, Tr. 1710). Furthermore, the presiding judge made it clear throughout the trial that she believed the defamation claim was going to go to the jury. (Ex. A to Motion, Tr. 1714-1715) (Ex. 4, Tr. 1424-1425 (ruling "[a]s far as the defamation claim is concerned, I'm going to let it go to a jury"). Therefore, "it was not incumbent upon defense counsel to harass the judge by parading the issue before him again ..." Dunn v. Charleston Coca-Cola Bottling Co., 311 S.C. 43, 46, 426 S.E.2d 756, 758 (1993); *see also* Bennett v. State, 383 S.C. 303, 308, 680 S.E.2d 273, 275 (2009) (where an objection has already been raised and ruled on by the court, there is no need for defense counsel to repeatedly object to similar testimony); State v. Bryant, 316 S.C. 216, 220, 447 S.E.2d 852, 854-55 (1994) (holding that, once defense counsel objected, "it would have been futile to move to strike testimony which the trial court had already ruled was proper"). In State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011), the Court held that defense counsel's motion to exclude hearsay evidence at trial was preserved for appellate review because it substantially complied with procedural requirements, even though counsel did not make a contemporaneous objection. In this case, Appellants' motion for directed verdict likewise substantially complied with procedural requirements and is preserved for review.

Fourth, a manifest injustice would result if this Court grants Respondent's Motion in this case. Even where a party fails to move for a directed verdict at the close of all the evidence, courts "are not powerless to grant relief. Where a jury's verdict is wholly without legal support, we will order a new trial in order to prevent a manifest injustice." Sojak v. Hudson Waterways Corp., 590 F.2d 53, 54-55 (2nd Cir. 1978); *see also* Singer, 45 F.3d at 828 (recognizing "the precept that, even in the wake of a complete failure to move for judgment as a matter of law, if plain error would result, appellate review is permissible"). Here, there was a total failure to

meet Respondent's burden of proof on a number of issues, including constitutional actual malice and issues of privilege. To preclude review of a multi-million dollar verdict in a vitally important case involving fair criticism of a sitting judge, based on a mere technicality, would be the definition of manifest injustice.

The exceptions discussed above make sense and should be applied in this case. In Singer, the Fourth Circuit explained that a motion under Rule 50(b) may be granted "despite the movant's failure to renew a previous motion under *Rule 50(a)* at the close of all of the evidence, where the purposes of *Rule 50* have been met in that both the adverse party and the court are aware that the movant continues to believe that the evidence presented does not present an issue for the jury." 45 F.3d at 829. In Boynton, the Sixth Circuit admonished that, "[w]hile 'it is certainly the better and safer practice to renew the motion for directed verdict at the close of all of the evidence,' the application of Rule 50(b) in any case 'should be examined in the light of the accomplishment of its particular purpose as well as in the general context of securing a fair trial for all concerned in the quest for truth.'" 858 F.2d at 1185. The purpose of the requirement that a motion for directed verdict be made at the close of all of the evidence is to alert "the opposing party to the alleged insufficiency of the evidence at a point in the trial where that party may still cure the defect by presenting further evidence. Failure to renew an earlier motion for a directed verdict may lull the opposing party into believing that the moving party has abandoned any challenge to the sufficiency of the evidence once all of the evidence had been presented." Farley Transp. Co., Inc., v. Santa Fe Trail Transp. Co., 786 F.2d 1342, 1346 (9th Cir. 1985) (finding motion for directed verdict filed ***only*** after the close of the plaintiff's case insufficient to preserve issues for appeal). No such concerns arise in this case; neither Respondent nor the court was under any illusion that Appellants had abandoned their challenge to the sufficiency of

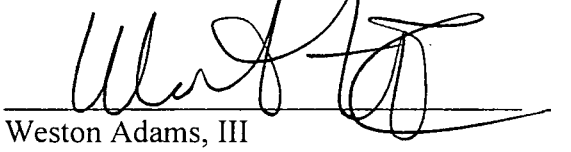
the evidence on the defamation claim. Instead, both Respondent and the court were aware that Appellants continued to believe the evidence was insufficient to present a jury issue.

CONCLUSION

For the reasons stated herein, this Court should deny Respondent's Motion to Strike and should order her to file her Initial Brief in a timely fashion.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE LLC



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June 20, 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

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 Appellant George F. Breed, Jr.'s **Return in Opposition to Respondent's Motion to Strike Parts of Appellant George F. Breed, Jr.'s Initial Brief and Request for Stay of Briefing Requirements on Respondent** on Maureen T. Coffey, by depositing a copy of it in the United States Mail, postage prepaid, on the 20th day of June, 2013, addressed to her attorney and other counsel of record, as follows:

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June 20, 2013

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
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RE: Maureen T. Coffey v. Community Services Associates, Inc. and George F. Breed, Jr.
Case No.: 2011-CP-07-00013
Our File No.: 20587.12019
Appeal Tracking No.: 2012-213252

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant George F. Breed, Jr.'s Return in Opposition to Respondent's Motion to Strike Parts of Appellant George F. Breed, Jr.'s Initial Brief and Request for Stay of Briefing Requirements on Respondent, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return the clocked-in copies via our courier.

If you have any questions, please do not hesitate to contact me.

Yours truly,

Weston Adams, III

Enclosures
WAIII/rsr

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