THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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.

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

Appellant Community Services Associates, Inc. ("CSA") four reasons why the motion to strike should be denied. None of the reasons advanced have merit. Each is addressed below *seriatim*.

1. **The Trial Court Did Not Instruct CSA and Breed When to Make Their Directed Verdict Motion.**

Breed and CSA jointly made their directed verdict motion. *See* Breed Return to Motion to Strike, at p. 2, footnote 1. CSA argues the trial court "instructed" the Appellants regarding when to renew their directed verdict motions. A fair reading of the trial transcript does not reflect that the trial judge "instructed" such. While the trial court may have suggested that directed verdicts be made at a particular point, she did not order or instruct that to be done, and no one made any objection to her suggestion.

However, and most importantly, even assuming *arguendo* that the trial court "instructed" the Appellants to make their directed verdict motions before the rebuttal witness testified, she certainly ***did not*** preclude the Appellants from renewing their motions for directed verdict after the rebuttal witness testimony concluded. Instead, after the trial judge made the point of asking Respondent's counsel "at this time, do you rest?," to which Respondent's counsel replied "I do, your honor."[1] Appellants' trial counsel then said nothing and made no effort to renew anything. The trial judge said nothing at all about renewal of the directed verdict motion at that point in the proceedings. Put simply, the Appellants may not blame their failure to renew their Rule 50 motion after the testimony of witness Sherry Hamilton on the trial judge.

2. The Fact that the Trial Court Ruled on the Motions for Directed Verdict Before the Rebuttal Witness is of No Consequence.

CSA next points to the fact that the Trial Court ruled on its directed verdict motion, after which the rebuttal witness testified, and that Respondent's trial counsel failed to object to this, thus creating a "waiver of any claim about sequencing of the DV motions and the rebuttal witnesses." CSA Return, at p. 3. This argument is meritless. The Respondent is not contesting the directed verdict ruling made adverse to her on appeal. CSA, however, failed to make a renewed directed verdict motion at the close of all the evidence, which is fatal to their arguments and precludes those covered by the motion to strike from being raised on appeal. Again, the Trial Court absolutely did nothing to preclude the Appellants from renewing their directed verdict motions at the close of evidence. They may not blame their failure to so move on the Trial Court, and certainly not on the Respondent.

[1] *See* Transcript page 1728, attached as Exhibit A.

Were CSA correct on this point, then in any case where a directed verdict motion was made and ruled on, and where subsequent evidence came in and there was no renewed motion, then the renewed motion requirement would be excused. This is not the law, clearly.

3. The Rebuttal Testimony Should Not be Weighed by This Court But Even if it is, it was Not Inconsequential and there is no Elevation of Form Over Substance.

CSA desires that this Court follow a rule that a Rule 50 "close of all evidence" motion requirement may be disregarded if evidence comes in after the motion that is "brief" or "inconsequential," as adopted by the Fourth Circuit in *Singer v. Dungan*, 45 F.3d 823 (4th Cir. 1995). Respondent submits the *Singer* analysis is flawed and should not be followed for several reasons.

First, just because evidence is "brief" says nothing about its probative power. To determine, therefore, whether certain testimony was "brief" versus "lengthy" is simply illogical and should not be adopted as a test of any sort by any court.

Second, the *Singer* rule was expressly connected to the existence of the "plain error" doctrine which exists in federal court, but not in South Carolina state courts. *See Singer*, 45 F.3d at 847. Application of the *Singer* rule here would require the appellate court in the ***first instance*** to consider evidence under a Rule 50 standard at the close of the evidence. The trial court was never asked to, and did not, consider the Sherry Hamilton testimony in the context of a Rule 50 motion. Appellants nevertheless want this Court to do that, and then go further and reverse the trial court regarding a ruling she never made. Hence, the rule should have no application here.

Third, the language the *Singer* Court quotes from *Moore's Federal Practice* no longer appears in the current version of *Moore's*. This is because FRCP Rule 50 was amended in 2006 and no longer requires a motion for directed verdict to be renewed "at the close of all evidence." The amendment to the rule was in response to federal courts, like *Singer*, contriving exceptions to the requirement. *See generally Moore's Federal Practice: Civil* § 50.40. Rule 50 of the South Carolina Rules of Civil Procedure has not been so amended, and our courts have not expressly adopted any exceptions to the requirement that a directed verdict motion be made at the close of all the evidence.

Fourth, the *Singer* analysis of determining whether evidence is "inconsequential" conflicts with the historic role that our appellate courts have stated they play in a directed verdict context. The following was stated by this Court regarding that role in *Laney v. Bi-Lo, Inc.*, 309 S.C. 37, 419 S.E.2d 809 (1992):

> Since this is a law case, we must view the evidence and all its reasonable inferences in the light most favorable to Mrs. Laney, the party who resisted the motion for directed verdict, and most strongly against Bi-Lo, the party making the motion. Because we are not a jury, ***we do not weigh the evidence and we do not decide matters of credibility.*** We also eliminate from our consideration all evidence contrary to or in conflict with the evidence favorable to Mrs. Laney and give to her the benefit of every favorable inference that the facts reasonably suggest.

309 S.C. at 38, 419 S.E.2d at 810 (emphasis added). Here, contrary to the above stated rule from the *Laney* Court, CSA desires that this Court weigh the evidence and determine that certain evidence is "inconsequential," as compared with other evidence.

This Court has stated that it does not play that role. Hence, this Court should not follow *Singer* or the federal cases like *Singer*.

Fifth, the federal courts are split on whether Rule 50 should be strictly applied and the liberal exceptions rules followed by some federal courts have been expressly considered and rejected by some state appellate courts. *See, e.g., GMC v. Seay*, 879 A.2d 1049 (Md. Ct. App. 2005) (discussing split among the federal courts on the issue and declining to adopt any liberal exception to the requirement that a directed verdict motion be made at the close of all evidence, including after rebuttal testimony). In *Coker v. Amoco Oil Co.*, 709 F.2d 1433 (11th Cir. 1983) (superseded by statute on other grounds), Amoco moved for a directed verdict at the conclusion of the plaintiff's case but did not renew the motion at the conclusion of its own case. On appeal, Amoco argued that although it had not presented its motion at the close of all the evidence, it should not be prevented from arguing for j.n.o.v. because it had presented only a single witness, whose testimony comprised only nine pages of transcript. The court refused to overlook the failure, stating that Rule 50(b) "clearly requires a movant to file a directed verdict motion at the end of all the evidence in order to challenge the sufficiency of the evidence on appeal." 709 F.2d at 1438. The court also explained that "[t]he length of a movant's evidentiary presentation or demonstration, after the fact, that compliance would probably have been futile does not satisfy the rule's requirement." *Id.*

Assuming *arguendo* that a *Singer* test is followed, the testimony of Sherry Hamilton was of important consequence and thus Appellants' argument should be rejected in any event. Part of the support for the Appellants' defenses and the defamatory charges regarding Respondent was the testimony of Captain Toby McSwain.

McSwain testified that Respondent met him in her office and sought to influence an investigation of her adopted brother. *See* Transcript p. 1579-80, attached as Exhibit B. This claim by McSwain was alleged foundational support for the Breed written defamation of the Respondent. McSwain further testified that this meeting was in late 2004. *Id.* at 1578, 1613. Further, McSwain described the Respondent's office in appearance in which the meeting supposedly occurred. *Id.* at 1611-14. Conversely, the Respondent denied ever having a meeting with Captain McSwain, period. *Id.* at 239. Sherry Hamilton testified that Respondent's office was actually in a different location in late 2004 and early 2005 than her current office. *Id.* at 1726-27.[2] She further testified that at such different location, the office was configured in a manner so that anyone had to walk past her to get to the Respondent's office. *Id.* at 1726-27. Lastly, she testified she never saw Captain McSwain ever come to that office. *Id.* at 1727.

As stated, Captain McSwain was a key witness in the trial.[3] His credibility and the evidence concerning his actions and testimony were important to both sides. Needless to say, Respondent's credibility and testimony were also key. Ms. Hamilton's testimony (both her original testimony and her rebuttal testimony) related to and was probative with respect to both key witnesses' credibility and to evidence submitted by both sides as to the respective claims and defenses in the case.

4. CSA is Incorrect in its View that Since the Rebuttal Witness Addressed the Credibility of Another Witness, Her Testimony Could Not Have Affected CSA's Motion for Directed Verdict.

CSA argues that since Sherry Hamilton's testimony related to the credibility of another witness, it "could not have had an effect on CSA's motion for a directed

[2] Captain McSwain's description of Respondent's office was of her current office. *Id.* 1612-13.
[3] Captain McSwain has, since the trial, been hired to replace George Breed.

verdict...." CSA Return at p. 4. This argument should be rejected. When credibility of a witness is put into question, this can have an impact on a directed verdict motion. *See State v. Strickland*, 389 S.C. 210, 215-16, 697 S.E.2d 681, 684 (Ct. App. 2010) (credibility determinations go to the weight of the evidence and affect motions for directed verdict); *State v. Pitts*, 256 S.C. 420, 427, 182 S.E.2d 738, 742 (1971)(same). The procedural requirements are that a defendant who has moved for directed verdict at the close of plaintiff's case, must nonetheless move again at the close of ***all*** evidence, including his own introduced evidence, for directed verdict. The key issue is whether CSA made a directed verdict motion at the close of all the evidence. CSA did not do this. The Court should not engage in trying to categorize the Sherry Hamilton evidence or assess it somehow to create an exception to this requirement. Any such exception would be a slippery slope, and would lead to a swallowing of the rule.

Defamation of a sitting judge is no less defamation. One of the defamation counts in this matter involved a statement that Ms. Coffey was having an affair. Ms. Coffey's position as a judge does not somehow mitigate this defamatory statement. The other defamatory statement regarded Ms. Coffey's alleged abuse of her position as a judge. Respondent submits that such defamation is especially wrongful conduct. It not only defames the plaintiff, but also threatens to undermine the judicial system generally. One can imagine the severe problems the judiciary would face were widespread defamation permitted of judges.

CSA's failure to move for a directed verdict, after all of the evidence, was not a "technicality," as it states in its Return at footnote 1, page 4. CSA should not be allowed to blame its failure to so move on the trial judge or the Respondent. Instead,

CSA's failure to make the motion properly definitively precludes review of the arguments it makes on appeal which are the subject of the motion to strike, for the reasons set forth herein.

CONCLUSION

This Court should not be made to expend its resources on numerous and complex arguments which have been clearly waived by Appellants. Respondent should not be put to the expense of preparing briefing on those several waived arguments. The motion to strike should be granted. In the event the motion is not granted, it should be denied without prejudice so that Respondent may make these same arguments in her appeal briefs.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
SC Bar No. 012872
E-Mail: mitch.brown@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Robert V. Mathison, Jr.
Mathison & Mathison
Post Office Box 5271
Hilton Head Island, SC 29938
(843) 785-6503

Attorneys for Respondent Maureen Coffey

Columbia, South Carolina

7/10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Reply to Return to the Motion to Strike Parts of Appellant Community Services Associates, Inc.'s Initial Brief

Counsel Served:

Mark S. Barrow, Esquire
William R. Calhoun, Jr., Esquire
Sweeny Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

Weston Adams III Esquire
Helen F. Hiser, Esquire
M. McMullen Taylor, Esquire
McAngus Goudelock & Courie LLC.
P.O. Box 12519
Columbia, SC 29211-2519

Lisa P. Whitehurst
Administrative Assistant

July 10, 2013