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 BREED'S BRIEF

Appellant George F. Breed, Jr. ("Breed") advances five reasons why the motion to strike should be denied. None of the reasons advanced have merit. Each is addressed below *seriatim*.

1. The Motion to Strike Part of Brief Is a Proper Motion.

Breed first makes a procedural argument. He argues "first and foremost" that the Respondent must be confusing subject matter jurisdiction with preservation of error and that a motion to strike is "an improper vehicle" for presentation of Respondent's argument. Breed Return, p. 1. Breed then says if Respondent's motion to strike is granted, it "will mark the beginning of appeals being decided, in large part, through motions practice." *Id.* at p. 2. Breed posits that, "Our appellate rules do not authorize and have never contemplated such an approach to resolving appeals." *Id.* Lastly, Breed

says "If Respondent's motion is granted, Appellant Breed will move for rehearing of this issue," *id.* at p. 3, and that then a certiorari petition would follow, and other litigants in similar circumstances would act similarly.

Respectfully, these arguments by Breed should be rejected and Respondent's motion should be granted. Respondent is faced with having to respond to lengthy and complex legal arguments asserted by both Breed and Appellant Community Services Associates, Inc. ("CSA") if Respondent's motion is denied. CSA and Breed waived all of those arguments by failing to make a directed verdict motion at the close of all evidence. Respondent should not be forced to prepare what would likely be a total of 50 pages or more of briefing with respect to arguments clearly waived by Appellants. Moreover, this Court would be required to waste its judicial resources on the waived arguments.

Attached as Exhibit A hereto is an Order from the Supreme Court striking part of a brief in a prior action. This Order was entered adverse to the undersigned counsel in a different matter. However, it is illustrative of a motion to strike being both made and granted. Rule 240, SCACR, authorizes the motion here. Granting Respondent's well-founded motion in this case will not lead to appeals being mostly decided through motions practice, as Rule 269, SCACR precludes frivolous motions or motions filed for the purposes of delay. Thus, in an appropriate case, a motion to strike should certainly be both entertained and granted by an appellate court.

Lastly, Rule 240(i), SCACR prevents a petition for rehearing from an order granting Respondent's motion. An order granting Respondent's motion to strike parts of Breed's brief would not have "the effect of dismissing or finally deciding a party's

appeal." Rule 240(i). Hence, Breed's statements regarding his rights and intent with regarding to a petition for rehearing are without merit. For all of these reasons, Breed's first argument for why Respondent's motion should be denied should be rejected.

2. 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. Breed charges that "the presiding judge clearly instructed the parties" when to make their motion for directed verdict. Breed Return, at p. 8. 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 (which Breed admits "may have been a technical violation of Rule 50 in this case"[1]), 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."[2] 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

[1] Breed Return, at p. 6.
[2] *See* Transcript page 1728, attached as Exhibit B.

may not blame their failure to renew their Rule 50 motion after the testimony of witness Sherry Hamilton on the trial judge.

3. The Rebuttal Testimony Should Not be Weighed by This Court But Even if it is, it was Not Inconsequential.

Breed 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 must 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, Breed 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 C.

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.[3] She further testified that at such different location, the office was configured in a manner so that anyone had to walk past her and another clerk 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.[4] 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. Appellants did not "Substantially Comply" with the Rule Governing Directed Verdicts.

Next, Breed argues he did not need to renew his directed verdict motion after the testimony of Ms. Hamilton because he had already moved for directed verdict and the law does not require a motion to be made "repeatedly." Breed Return, at p. 11.

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

Breen misapprehends the problem with his failure to renew his motion. Unlike the cases Breed cites in support of his argument, Appellants here ***never*** requested that the trial court consider the ***totality*** of the evidence and make a ruling on a directed verdict motion after doing so. Hence, there is ***no ruling, at all,*** by the trial judge on a request for a directed verdict based on all of the evidence before the court. Hence, an appellate court cannot "reverse" the trial court on a ruling she was never asked to make and never made. The cases Breed cites involve situations where an objection has been made and where the courts state the same objection regarding the same issue need not be repeated for preservation of error purposes. Those cases are inapplicable for the reasons set forth above.

Breed also cites *State v. Bryant,* 316 S.C. 216, 447 S.E.2d 852 (1994) for the proposition that a renewal of the motion would be futile in light of commentary from the trial judge regarding submitting the case to the jury on defamation. This same argument, however, would mean that no Rule 50 motion at all is required under similar circumstances. *Bryant* does not stand for the proposition that Rule 50 motion requirements, which our courts have stated are "strict" requirements, can be disregarded based on trial court commentary during trial about submitting this or that claim to the jury. The requirements on filing directed verdict motions are well known, strict requirements which cannot be so lightly ignored as suggested by Appellants. Appellants' motion is defective and is not saved by the authorities cited.

5. A Grant of Respondent's Motion Does not Result in Manifest Injustice.

Breed avers that this case involves "fair criticism of a sitting judge" and characterizes his failure to renew his directed verdict motion at the close of all evidence

as a "mere technicality" in an effort to persuade this Court that a grant of the motion at bar would create a "manifest injustice." Breed Return, at p. 12. This argument should be rejected. It is simply Breed's view of what the case involves, with which Respondent (and the jury and trial court) disagreed.

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.

Breed's failure to move for a directed verdict, after all of the evidence, was not a "mere technicality." He should not be allowed to blame his failure on the trial judge or the jury. Instead, his failure to make the motion properly definitively precludes review of the arguments he 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