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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

The Honorable Donald B. Hocker
The Honorable Maite D. Murphy

Case No. 2021-CP-30-000256

Appellate Case No. 2023-000053

Guadalupe J. Colorado and Sandra B. Colorado

Appellants,

vs.

Maurice Powers

Respondent.

REPLY BRIEF OF APPELLANTS

Sarah J.M. Cox (SC Bar No. 104316)
Annie Day Bame (SC Bar No. 104592)
BURNETTE SHUTT & McDANIEL, P.A.
Post Office Box 1929
Columbia, SC 29202
T: 803.904.7930
F: 803-904-7910
SCox@BurnetteShutt.law
Abame@Burnetteshutt.law

ATTORNEYS FOR APPELLANTS

September 25, 2023

Columbia, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTRODUCTION

Appellants submit this Reply Brief to concisely address the arguments made in Respondent's Initial Brief, but otherwise rely on the detailed arguments set forth in their Initial Brief.

ARGUMENT

I. Respondent's misunderstanding of the summary judgment standard does not undermine Appellants' presentation of evidence as to their claims at summary judgment.

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact*. Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 588, 635 S.E.2d 649, 649 (Ct. App. 2006). "The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case." *Id.* Once the moving party produces such evidence, the burden shifts to the nonmoving party to present evidence of a genuine issue. *Id.* at 589, 635 S.E.2d at 649. The nonmoving party cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* The nonmoving party must come forward with *specific facts* showing there is a genuine issue for trial. *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 214, 609 S.E.2d 565, 565 (Ct. App. 2005) (emphasis added).

Respondent argues that Appellants were not entitled to summary judgment because they did not produce new affidavits for their summary judgment motion, and they did not produce medical records to substantiate their damages. (Respondent's Brief, p. 13.) Respondent fails to cite any legal authority for this position. Appellants were not required to produce additional affidavits or medical records to meet their burden.

Appellants testified as to their damages via affidavit. (R.p.__; Aff. of Sandra Colorado, attached as Exhibit 1 to Mot. for Temp. Inj.; R.p.__; Aff. of Guadalupe Colorado, attached as Exhibit 2 to Mot. for Temp. Inj.) Such testimony is sufficient to shift the burden to Respondent to produce evidence to counter Appellants' testimony. *See* S.C. R. Civ. P. 56(e). Thus, Appellants presented sufficient evidence to show the absence of a disputed issue of material fact as to their claims for breach of restrictive covenants and injunction by producing other evidence sufficient to show a lack of genuine dispute of material fact as to their claims and called the court's attention to the absence of contradictory evidence. (*See* Appellants' Initial Brief, pp. 10–11.)

Once Appellants produced evidence showing there was no disputed issue of material fact as to their claims, the burden transferred to Respondent to present contradictory evidence. Respondent failed to do so. At summary judgment and now on appeal, Respondent neglected to point to any evidence illustrating a genuine issue of material fact. As such, Respondent failed to meet his burden at summary judgment and unsuccessfully defended this failure on appeal. Accordingly, this Court should find that the trial court erred in denying summary judgment to Appellants on their breach of restrictive covenants claim and their request for an injunction.

II. Review of the lower court's denial of summary judgment on Respondent's intentional infliction of emotional distress claim is proper.

Respondent contends that Appellants did not preserve the trial court's denial of summary judgment as to Respondent's intentional infliction of emotional distress claim for review on appeal. (Resp. Br. p. 16.) Respondent apparently contends that Appellants argue for the first time on appeal that they are entitled to summary judgment because Appellants submitted "other documentary evidence demonstrate that there is an absence

of genuine dispute of material fact…" and the Respondent did not. (*Id.*) This is the exact argument Appellants made in the lower court (R.p.__; Mot. for Summ. J., p. 5), and exceeds what was required of Appellants for a summary judgment motion on Respondent's counterclaim. *See Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (when the nonmoving party bears the burden of proof on an issue, "this initial responsibility may be discharged by showing -- that is, pointing out to the trial court -- that there is an absence of evidence to support the nonmoving party's case.") (quotations omitted). As such, this issue is appropriately preserved for appeal.

III. Appellants were entitled to success on their breach of restrictive covenants claim and their request for injunction at summary judgment and at trial.

Matching his presentation at summary judgment and trial, Respondent fails to cite any evidence in his Initial Brief to contradict Appellants' evidence of his using his land for a nonresidential purpose. Appellant's Initial Brief cites specific evidence introduced at trial that Respondent admitted to spray painting cars on in property for family and friends in exchange for money (App. Br. p. 20 (citing R.p.__; Trial Tr. pp. 59, 60, 63, 64, 65, 67, 68, 73)), and that Respondent testified the reason he spray painted these cars was to improve his skills for the purpose of enhancing his business, the main part of which he operated elsewhere, *id.* (citing R.p.__; Trial Tr. pp. 68, 87, 88). Appellants further point to witness testimony and Respondent's tax return as evidence of his nonresidential use of the property. (*See* App. Br. p. 10 (citing R.p.__; Ex. E to Mem. In Supp. of Summ. J.); *id.* at p. 20 (citing R.p.__; Trial Tr. pp. 153, 154 and R.p.__; Trial Tr. pp. 70, 71).)

Appellants note that Respondent's Initial Brief cites evidence that was not on the record before the trial court and makes numerous arguments that are unsupported by citations to the record. Instead of citing evidence in the record to dispute Appellants'

showing related to the nonresidential use of his property, Respondent points to trial testimony regarding smells and testimony of witnesses who had no knowledge that Respondent used his property for a business purpose. (Resp. Br. p. 18.) Testimony as to witnesses' lack of knowledge is not sufficient to overcome Appellants' evidence that Respondent used his property to work on vehicles and received money for his work. Moreover, witness testimony on the existence of smells emanating from the property is a separate issue. Ultimately, Respondent fails to cite any evidence in the record to counter his own testimony that he painted vehicles in exchange for money or his tax returns showing income from this business. Therefore, Appellants were entitled to summary judgment and judgment notwithstanding the verdict on this issue.

IV. Respondent failed to submit evidence at summary judgment and at trial to support his intentional infliction of emotional distress claim.

Appellants were also entitled to Summary Judgment and Judgment Notwithstanding the Verdict on Respondent's intentional infliction of emotional distress claim. Respondent was required to produce evidence of *all four* elements in order to recover under the theory of intentional infliction of emotional distress, including: (1) The defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe so that no reasonable man could be expected to endure it. *Ford v. Huston*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981). There is a heightened burden of proof for the second and fourth elements of an intentional infliction

of emotional distress claim. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007) (citing *Ford*, 276 S.C. at 161, 276 S.E.2d at 778). Respondent failed to meet this heightened burden on either of these elements.

Respondent attempts to blame Appellants for his lack of evidence, stating that if Appellants had bothered to request the summary judgment transcript, they would see the discussion between trial counsel and Judge Hocker at the hearing. (Resp. Br. pp. 16–17.) Respondent confuses attorney argument with evidence. The South Carolina Rules of Civil Procedure require more. "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." S.C. R. Civ. P. 56(e). Conversations between attorneys about phone calls made by Appellants does not amount to proof that Respondent was severely injured by Appellants' conduct. Appellants presented evidence showing they were entitled to judgment as a matter of law. Respondent merely discussed claims without providing any documentary evidence to show that Appellants' phone calls to law enforcement constituted conduct so extreme and outrageous as to exceed all possible bounds of decency or that such conduct caused him severe distress. As such, the trial court erred in denying summary judgment to Appellants as a matter of law.

Respondent also asserts that, based on testimony presented at trial, Appellants' reports to legal authorities constituted extreme and outrageous conduct because the reports were unfounded. (Resp. Br. p. 23.) Specifically, Respondent states that Appellants "admitted they had no business calling these authorities." (*Id.*) However, Respondent

manipulates trial testimony in a futile attempt to justify a baseless argument. The transcript portion cited by Respondent is the trial testimony of Appellant Sandra Colorado on cross-examination related to emails from Mrs. Colorado to a building code manager asking him to make sure Respondent's property was up to code. (R.p.__; Trial Tr. pp. 203–04.) When asked what business of that was hers, Mrs. Colorado stated "[It's not, but when – it's not. Can I explain?" (R.p.__; Trial Tr. p. 204.) She went on to explain that she was worried about safety due to an unattended fire. (R.p.__; Trial Tr. pp. 204.) Respondent cites this brief exchange with a building code official as evidence that Appellants conceded all of their phone calls to government officials were unfounded. (*See* Resp. Br. p. 23 ("The appellants admitted they had no business calling these authorities.").) Respondent vastly overstates the implications of Mrs. Colorado's testimony, implying that Appellants have admitted that each call they made regarding Respondent's property was unfounded. Appellants have admitted no such thing and the testimony does not support this contention.

As evidence that he suffered emotional distress that was so severe no reasonable person should have to endure it, Respondent lamely points to his own testimony and that of his girlfriend that he suffered erectile dysfunction and had trouble sleeping. (Resp. Br. pp. 21–22.) Notably, Respondent did not seek treatment for the erectile dysfunction until the month before trial. However, vague assertions of stress and anxiety, even coupled with testimony about Respondent's erectile dysfunction simply do not rise to the level of legally actionable severe and extreme emotional distress. *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011). Respondent attempts to distinguish the present facts from those presented in Appellants' case law, opining that he presented

more severe injuries than those presented in the relevant cases. (Resp. Br. p. 22.) Importantly, even if Respondent had alleged slightly more severe injuries than those in the relevant case law, he did not present sufficient evidence to rise to the level of legally actionable severe and extreme emotional distress.

Appellants were entitled to favorable rulings on their Motion for Summary Judgment and their Motion for Judgment Notwithstanding the Verdict as to Respondent's intentional infliction of emotion distress claim. Summary judgment in Appellants' favor was appropriate based on the complete lack of evidence to support two of the elements. *See, e.g.*, *Hansson*, 374 S.C. at 358, 276 S.E.2d at 71 (that a genuine "the court must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim"). At the summary judgment phase, Respondent failed to produce evidence of each element of his claim for intentional infliction of emotional distress sufficient to show a disputed issue of material fact. At trial, Respondent again neglected to present evidence that Appellants' conduct was unreasonable or abusive or that his upset was other than transient or trivial. *See Rhodes v. Security Finance Corp.*, 268 S.C. 300, 302, 233 S.E.2d 105, 106 (1977). As such, the lower court's order denying summary judgment to Appellants and denying judgment notwithstanding the verdict were both improper.

V. Appellants' challenges to Respondent's improper jury arguments are appropriately considered on appeal and entitle Appellants to a new trial.

Respondent also opines that the improper jury arguments involving statute of limitations, discussion of evidence not in the record, and acts not attributable to Appellants were not raised at the lower court. (Resp. Br. pp. 25, 26, 27.) Not so. Appellants presented these issues to the trial court in their Motion for a New Trial Absolute. (R.p.__; Mot. filed

November 23, 2022.) The improper arguments made during Respondent's closing argument present cumulative errors that interfered with Appellants' right to a fair trial.

To defend his improper presentation of calls outside of the statute of limitations to the jury, Respondent claims that Appellants also presented evidence outside of the statute of limitations during the trial. (Resp. Br. p. 25.) However, Respondent fails to provide a single citation to the record, nor does he bother to cite any law setting forth the relevant statute of limitations. Further, even if Appellants did present evidence outside the relevant period, Respondent does not have carte blanche to present any evidence he wishes. Significantly, Appellants' discussion of past acts to establish that Respondent was currently breaching restrictive covenants is not comparable to asking for specific damages based on panic attacks and sleepless nights that allegedly occurred beyond the statute of limitations. Finally, as Respondent states in his Initial Brief, he did not object to Appellants' evidence. (Resp. Br. p. 25.) Respondent asserts that the parties agreed to not make objections to statute of limitations issues, but "[u]nfortunately counsel did not put this agreement on the record." (Resp. Br. p. 25.) Because this argument was not on the record before the trial court, Respondent cannot raise it on appeal.

Respondent also improperly presented the unsubstantiated and legally questionable claim that Respondent's damages for intentional infliction of emotional distress should include $24,000 for a rental property he sold, despite the lack of any evidence or prior notice of this claim. Contrary to Respondent's assertion, Respondent's trial testimony that he *owned* rental properties is not equivalent to evidence that Appellants' conduct directly caused Respondent to sell one of his rental properties or that the selling of a rental property relates to a claim of intentional infliction of emotional

distress. Later in his Brief, even Respondent appears to concede that there was no testimony on this issue. (Resp. Br. p. 27.)

Finally, Respondent misconstrues Appellants' argument regarding the impropriety of discussing acts not attributable to Appellants. Respondent contends counsel was responding to a statement made by Appellants' counsel that the Appellants' son pointed a gun and Respondent pointed a gun. (Resp. Br. p. 26.) The improper nature of Respondent's statement stems from the fact that the argument incorrectly attributed the act of calling law enforcement about the gun to Appellants, despite evidence to the contrary. Respondent's basis for damages relied heavily on Appellants' calls to state entities, and in this instance, the evidence clearly showed that Appellants did not make the call to law enforcement. (R.p.__; Trial Tr. p. 78 (Respondent's testimony that it was "the sister and the sister's husband" who called the police).) As such, this statement was improper and prejudicial to Appellants.

Each of these improper jury arguments clearly impacted the jury's findings and prevented Appellants from receiving a fair trial. Even Respondent understands that the jury reached its verdict based on Appellants' behavior, (Resp. Br. p. 27 ("[the verdict] was reached because the jury found the Appellants[‘] behavior to be that appalling.")), including the behavior Respondent's counsel improperly presented in his closing argument. Accordingly, the cumulative effect of these errors prejudiced Appellants to the extent that they were denied a fair trial and a new trial is warranted. *See Wall v. Keels*, 331 S.C. 310, 501 S.E.2d 754 (S.C. App. 1998) (granting a new trial is particularly appropriate in cases of cumulative errors).

VI. The record does not support Respondent's argument regarding Appellants' entitlement to a new trial under the Thirteenth Juror Doctrine.

Respondent attempts to distinguish the facts of the instant case from Appellants' case law by vaguely citing to "five additional witnesses and seven exhibits to support his claims." (Resp. Br. p. 28.) However, Respondent does not provide citations to the record or explain which claims he is referring to and how such evidence supports his claims for damages. "[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and no preserved for [the Court's] review." Based on these deficiencies, this argument should be deemed abandoned. *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003). Accordingly, Respondent's argument on this issue should be ignored.

CONCLUSION

For the reasons set forth above and in Appellants' Initial Brief, Appellants respectfully request that this Court reverse the circuit court's orders, grant summary judgment for Appellants on all claims refute Appellants' claims. Should this Court decline to order summary judgment for Appellants, Appellants respectfully request that this Court grant Appellants' motions for directed verdict, judgment notwithstanding the jury verdict, and in the alternative, grant Appellants' motion for a new trial *nisi* remittitur.

[*signature page follows*]

Respectfully submitted,

s/Annie Day Bame

Sarah J.M. Cox (SC Bar No. 104316)
Annie Day Bame (SC Bar No. 104592)
BURNETTE SHUTT & McDANIEL, P.A.
Post Office Box 1929
Columbia, SC 29202
T: 803.850-0912
F: 803-904-7910
SCox@BurnetteShutt.law
Abame@BurnetteShutt.law

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PROOF OF SERVICE

I certify that the **REPLY BRIEF OF APPELLANTS** was served on the following counsel of record for Respondent on September 25, 2023, via electronic mail under Paragraph (d)(1) of Order re: Methods of Electronic Filing and serve under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

Christopher L. Jones (SC Bar No. 78892)
Email: chris@chrisljoneslaw.com

s/Annie Day Bame
Annie Day Bame (SC Bar No. 104592)
Counsel for Appellants

Amy L. Abercrombie

From: Amy L. Abercrombie
Sent: Monday, September 25, 2023 3:26 PM
To: chris@chrisljoneslaw.com
Cc: Annie Bame
Subject: Colorado v. Powers
Attachments: 2023-09-25 Reply Brief of Appellant.pdf

Dear Counsel:

I have attached the Reply Brief of Appellants which is being filed with the SC Court of Appeals today.

Kind regards,
Amy