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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas**

Walton J. McLeod, Circuit Judge

Appellate Case No. 2024-000253

Elisa Montgomery Edwards and Emily Cecile Edwards,...Respondents,

v.

David C. Bryan, III,.....Petitioner.

RETURN TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Was the question stated in the Petitioner's *Petition for Writ of Certiorari* presented to the trial court in the Petitioner's (defendant's) motion for a directed verdict?

COUNTERSTATEMENT OF THE CASE

This action went to trial on two causes of action: fraud and deceit, and negligent misrepresentation. At the conclusion of Respondents' case in chief, the Petitioner moved for a directed verdict upon the negligent misrepresentation cause only. Respondent's attorney asked whether the Petitioner would move for a directed verdict upon the fraud and deceit cause as well. Petitioner's attorney replied: "Actually, I'm not." [R. p. 176/11-13.] The Respondents thereupon elected to dismiss their claim for negligent misrepresentation and to proceed only on the fraud cause of action.

After lunch recess, however, the Petitioner's attorney reconsidered and moved for a directed verdict as to fraud on a single ground — that the evidence of fraud did not meet the standard of "clear and convincing".

MR. HEMLEPP: Your Honor, the defense would move for directed verdict on the cause of action for fraud in this case. There's been a failure of evidence by the plaintiff to put forth – for the jury to the standard of clear and convincing that a fraud occurred. It was denied by the defendant. I'd move for a directed verdict.

[R. pp. 220-21.] The motion was denied.

The evidence showed that the Petitioner lied to the Respondents for many years about what he had done with their inheritance from their grandfather. The Petitioner assured them that he was carefully managing their money in a brokerage

account, and that it would be there when they needed it. In fact, the evidence proved that there was no brokerage account and the Petitioner had apparently stolen the money from them or, if not, he gave no account of what had happened to it.

After judgment was entered upon the jury's verdict for actual damages of \$500,000.00 and punitive damages of \$100,000.00, the Petitioner moved for judgment notwithstanding the verdict on the following ground, among others:

The court should have granted the Defense motion for a directed verdict on the cause of action for fraud because the plaintiffs failed to show the alleged fraudulent act resulted in any proximate or consequential damages.

[R. p. 041.]

Addressing the motion for judgment notwithstanding the verdict, the court observed that this motion "is simply a renewal of a motion for directed verdict."

It follows that "[o]nly the grounds raised in the directed verdict motion may properly be reasserted" in a motion for judgment notwithstanding the verdict. *RFT Mgmt. Co.*, at 331, 732 S.E.2d at 170-71 (citing *In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)).

The court noted that a directed verdict motion

"must state the specific grounds relied upon therefor * * * ." Rule 50(a), SCRCP; *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012).

[Order, R. p. 001-002.]

In his motion for judgment notwithstanding the verdict, the Petitioner attempted to supply the specificity missing from his directed verdict motion. The Petitioner devised an elaborate theory that the Respondents “had a myriad of avenues they could have pursued against the defendant [Petitioner]” but an action for fraud and deceit was not one of them, and that the Respondents had suffered no damage from any fraud which the Petitioner may have committed.

The court denied the motion for judgment notwithstanding the verdict, and the Court of Appeals affirmed.

ARGUMENT

In his motion for a directed verdict, the Petitioner failed to challenge the sufficiency of the evidence of damage with respect to any of the nine elements of fraud and deceit. The Petitioner only challenged the *quality* of the evidence as insufficiently clear and convincing.

Once the sufficiency of the evidence has been determined by the trial judge, it is for the jury to decide whether fraud has been proved by evidence which is clear and convincing, under an appropriate charge. *Austin v. Independent Life and Accid. Ins. Co.*, 296 S.C. 156, 160-61, 370 S.E.2d 918, 920-21 (Ct. App. 1988).

Even if the Petitioner's motion were deemed sufficient to claim that no evidence supported any of the nine elements of fraud, the trial judge would have had no duty to sift through the evidence as to the each of the nine elements, one by one, with no help from the moving party. Hence the duty to state the grounds of the motion with specificity. Rule 50(a), SCRCP.

The *Austin* case is closely in point. The defendant failed to move for directed verdict on the ground that there was *no* evidence of damage, then attempted to raise such an issue on appeal for the first time. The court stated:

* * * [The defendant] asserts error by the trial court in denying its trial motions on the fraud claim because there was no evidence * * * of damage to [the plaintiff]. * * *

South Carolina Rule of Civil Procedure 50(a) requires a party to state the specific grounds for a directed verdict motion. The record does not indicate [the defendant] moved for directed verdict on the ground there was no evidence of damage to [the plaintiff]. Since the issue was not raised at the trial level, this court will not determine an issue presented for the first time on appeal.

In the case at bar, the Petitioner made a blanket objection to all nine elements of fraud, not for insufficiency as to any of the nine elements but for the allegedly unconvincing nature of any such evidence. The court in the *Austin* case found that such an objection failed to raise an issue as to *sufficiency* of the evidence as to any of the nine elements. The court also rejected the claim that the

evidence, if sufficient, was insufficiently “clear and convincing”.

[The defendant] * * * asserts [the plaintiff] failed to prove fraud by the standard of clear, cogent, and convincing evidence. * * * We assume the trial judge correctly instructed the jury about the burden of proof and the jury followed the court’s instructions. It is not the function of this court to weigh the evidence in a law case, but rather to determine if there is any evidence to support a jury verdict. * * *

In the case at bar, the motion for directed verdict raised no issue concerning the sufficiency of the evidence of any one of the nine elements of fraud. As to the *quality* of that evidence, it was the role of the jury, not the trial judge, to determine the convincing quality of any such evidence.

The issue presented in the certiorari petition is not properly before the Court. Even if it were, the evidence is that Petitioner averred that he had placed the Respondents’ inheritance in a brokerage account. For years thereafter, Petitioner told the Respondents that he was carefully managing their money. At some point he either stole the money or, if not, he gave no account of why he had lied about it for years.

Even if the new issue could be considered, the Petitioner does not identify the “myriad of avenues the plaintiffs [Respondents] could have pursued against the defendant [Petitioner].” An action for fraud and deceit most closely fits the tort.

CONCLUSION

The issue presented by the Petitioner certiorari petition was not made to the trial court in a timely fashion, and therefore cannot be considered.

The Respondents therefore ask the Court to deny the petition.

Respectfully submitted,
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