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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001183

Joe Clemons, ... Appellant,

v.

Peggy H. Pinnell Agency, Inc., Peggy H. Pinnell Insurance Agency Inc., State Farm Life Insurance Company, (jointly and severally liable), ... Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities iii

Counter-Statement of the Case 2

Counter-Statement of Facts 2

Standard of Review 4

Argument 5

I. Clemons Abandoned All Issues Raised on Appeal Because Clemons' Arguments are Conclusory Statements Made Without Supporting Authority 5

A. Clemons abandoned his issue on appeal that the trial court erred by granting Defendants' motion for directed verdict 5

B. Clemons abandoned his issue on appeal that the trial court erred by proceeding to trial without conducting a review of the audio recording of the January 11, 2021 hearing before Judge Roger Young 6

II. Clemons Abandoned All Issues Raised on Appeal Because His Initial Brief Fails to Identify with Particularity the Alleged Errors Committed by the Trial Court 7

III. Even if The Court Were to Find Clemons' Issues Are Preserved, Clemons Failed to Prepare an Adequate Record on Appeal and The Court May Decide the Case Without Reaching the Merits 8

A. Clemons failed to include Judge McCoy's ruling to grant the Defendants' motion for a directed verdict 9

B. Clemons failed to include Judge Price's ruling on Clemons' motion to obtain audio of the January 11, 2021 hear 9

IV. Clemons Cannot Use His Reply Brief to Raise Issues Not Argued in the Initial Brief or Supplement the Designation of Matter. 10

Conclusion 11

Table of Authorities

Cases

Bochette v. Bochette, 300 S.C. 109, 112, 38 S.E.2d 475, 477 (Ct. App. 1989)...........................10

Brown v. Theos, 338 S.C. 305, 309 n.2, 526 S.E.2d 232, 235 n.2 (Ct. App. 1999)...................5, 6

Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004)............................5

Estate of Car ex rel. Bolton v. Circle S. Enter., Inc., 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008)..4

Glasscock, Inc. v. U.S. Fidelity and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691-2 (Ct. App. 2001)..5

Hennes v. Shaw, 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012)..............................8, 9

Johnson v. South Carolina Dept. of Prob., Parole, and Pardon Ser., 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007). 8

Jones v. Lott, 379 S.C. 285, 288, 665 S.E.2d 642, 644 (Ct. App. 2008)...................................4, 9

Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997).. 10

Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011)...........5

Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 214, 723 S.E.2d 597,608 (Ct. App. 2012)..8

Spivey v. Carolina Crawler, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005)..............10

State v. Rowell, No.2018-000022 (S.C. Ct.App. March 2, 2022)...8

Rules

Rule 208(b)(1)(B), SCACR..8

Rule 208(b)(4), SCACR..7, 8

Rule 210(c), SCACR..8

Rule 210(h), SCACR. 8

Rule 211(b), SCACR. 10

211(b)(1),(2), SCACR..10

COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court correctly granted Defendants' motion for a directed verdict.
2. Whether the trial court correctly proceeded to trial without conducting a review of the audio recording of the January 11, 2021 hearing before Judge Roger Young.

COUNTER-STATEMENT OF THE CASE

Joe Clemons ("Clemons") filed this action on February 15, 2019, against his insurance company State Farm Life Insurance Company, along with Peggy H. Pinnell Agency, Inc., and Peggy H. Pinnell Insurance Agency, Inc.[1] (generally and collectively herein "Defendants") for Breach of Contract, Breach of Fiduciary Duty, Negligence, Negligent Misrepresentation, Fraud, Constructive Fraud, Civil Conspiracy, and violation of the UTPA. *See generally*, (Pl.'s Compl.[2]) Defendants timely filed an Answer on March 20, 2019. *See generally*, (Def.'s Ans. ¶ 1.[3])

On January 11, 2021, Judge Roger Young denied Clemons' motion to amend the complaint. (Jan. 11, 2021 Trans. p. 11, line 1-15, R.18.) On April 16, 2021, Clemons filed a motion to obtain audio of the January 11, 2021 hearing with Judge Young. (Pl.'s Mot. Obtain Audio of Jan. 11, 2021 Hearing, R.9-11.) A trial by jury was held on August 23 and 24, 2021. (Trial Trans. p. 1, line 12, R.20, p. 231, line 12, R.33.) After Clemons rested his case in chief, without testifying, Defendants moved for a directed verdict, which Judge McCoy granted on all remaining causes of action. (Trial Trans. p. 330, lines 20-3, R.45.) Clemons' filed a notice of appeal on October 18, 2021.

COUNTER-STATEMENT OF FACTS

In 2008, Clemons purchased a 20-year term life insurance policy of $250,000.00. (Pl.'s Compl. ¶ 8.) On May 21, 2010, Clemons applied to convert the term policy to a 15-year pay life policy with a waiver of premium based upon disability. (Pl.'s Compl. ¶ 9.) On June 7, 2010, State Farm Life Insurance Company notified the Pinnell Agency that the waiver of premium for

[1] There is only the Peggy H. Pinnell Insurance Agency, Inc. (Pl.'s Comp ¶ 2.)

[2] Appellant included Plaintiff's Complaint in his Designation of Matter but it is not included in the Supplemental Record on Appeal.

[3] Appellant included Defendant's Answer in his Designation of Matter but it is not included in the Supplemental Record on Appeal.

disability, which Clemons had applied for on May 21, 2010, was denied. (Pl.'s Compl. ¶ 11.) Accompanying this denial of the application to waive the premium upon proof of disability was an alternative to accept the policy without the waiver of premium. (Pl.'s Compl. ¶ 11.) Clemons further alleges that on July 6, 2010, the Pinnell Agency, without the Clemons' knowledge or consent, signed Clemons' signature to a new conversion application (Pl.'s Compl. ¶ 12.), and that it was not until March 2017 that Clemons first learned that a waiver of premium for disability was not included in his policy. (Pl.'s Compl. ¶ 14.) Clemons filed suit on February 15, 2019, for Breach of Contract, Breach of Fiduciary Duty, Negligence, Negligent Misrepresentation, Fraud, Constructive Fraud, Civil Conspiracy, and Violation of the UTPA. (Pl.'s Compl.)

During pre-trial motions, Clemons attempted to move the court to review audio recordings of a hearing that took place in front of Judge Roger Young on January 11, 2021. (Trial Trans. p. 89, line 23-5, R.21; p. 90 line 1-16, R.22.) Judge McCoy did not allow, nor did she rule on the motion, finding that the motion had been made and denied. (Trial Trans. p. 90, line 17-22, R.22.) Judge McCoy granted Defendants' motion for directed verdict as to all remaining causes of action. (Trial Trans. p. 330, line 18-20, R.45.) While it appears Clemons takes issue with the directed verdict granted, he has not appealed Judge McCoy's decision, and has failed to include any portion of it in the record.[4,5]

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[4] Clemons did not testify at trial and, therefore, the portions of his Statement of Facts referencing Clemons' setting forth his thoughts are improper. *See*, *e.g.*, (Pl.'s Initial Brief State. of Fact p. 4.) ("Appellant claims he had no information on the WPD matter, until on or about March 6, 2017 when he met with Respondent Agent to file a disability claim pursuant to his Social Security total disability determination. . . Appellant thought it strange that the 10-year lifetime $150,000 policy he bought in 2016 included the *waiver*, and the May 2010 did not, especially that when it was Respondent Agent who assured that the WPD was included in the 2016 policy.")

[5] Clemons, in his statement of the facts, states he received notice on June 7, 2010 from Defendants that Clemons was ineligible for the WPD he had applied for on May 21, 2010, with an alternative to accept it without the WPD clause. Later in his statement of facts Clemons then states Defendants gave him no notice of the denial of the WPD to his 2010 policy, nor offered him an alternative option until March 16, 2017. Again, there was no testimony at trial by Clemons to support these statements.

STANDARD OF REVIEW

It is unclear from Clemons' Initial Brief what the issue is on appeal. In Clemons' Statement of the Issue, Clemons argues, "[I]t was error for the court to deny him the right to have the jury evaluate the evidence presented and render a verdict." (Pl.'s Initial Brief State. of the Issues p. 2.) The totality of Clemons' argument is a mere citation to case law for reviewing a grant of a directed verdict. (Pl.'s Initial Brief Argument p. 5.) There is no argument about why it was error to grant Defendants' motion for directed verdict. Indeed, the one sentence argument is no argument at all.

When considering a motion for directed verdict, the trial court is required to view the evidence and the inferences that can reasonably be drawn therefrom in the light most favorable to the nonmoving party. *Jones v. Lott*, 379 S.C. 285, 288, 665 S.E.2d 642, 644 (Ct. App. 2008). The trial court is to deny the motion where either the evidence yields more than one inference, or its inference is in doubt. *Id.* "In essence, the court must determine whether the verdict for the opposing party would be reasonably possible under the facts as liberally construed in his or her favor." *Estate of Car ex rel. Bolton v. Circle S. Enter., Inc.*, 379 S.C. 31, 38, 664 S.E.2d 83, 86 (Ct. App. 2008). The Appellate Court will only reverse the trial court's ruling on a directed verdict motion when there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Jones*, 379 S.C. at 288-9, 665 S.E.2d at 644.

It is unclear from Clemons' Initial Brief what transcript and what order is being contested, or what part of the transcript is erroneous. In any event, it was in the judge's discretion whether to grant Clemons' motion to review transcripts for accuracy. Clemons must demonstrate

the judge committed an abuse of discretion in denying his motion. No argument is advanced in this issue.

Argument

I. Clemons Abandoned All Issues Raised on Appeal Because His Arguments are Conclusory Statements Made Without Supporting Authority.

South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and, therefore, are insufficient to preserve an argument for review. *Glasscock, Inc. v. U.S. Fidelity and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691-2 (Ct. App. 2001); *see also Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."). For example, in *Brown v. Theos*, this Court found the appellant's one sentence paragraph "that he had raised an action for 'intentionally negligent and malicious conduct'" was so conclusory that it may be deemed abandoned. 338 S.C. 305, 309 n.2, 526 S.E.2d 232, 235 n.2 (Ct. App. 1999). Additionally, this Court has held on numerous occasions that an issue is deemed abandoned on appeal when it is not argued within the body of the brief, but is only a short conclusory statement. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004).

A. Clemons abandoned his issue on appeal that the trial court erred by granting Defendants' motion for directed verdict.

Here, Clemons argues, "[I]t was error for the court to deny him the right to have the jury evaluate the evidence presented and render a verdict." (Pl.'s Initial Brief State. of Issues p. 2.) As in *Brown*, Clemons' argument for this issue is only supported by a one sentence conclusory statement. Clemons' entire argument consists of the following:

> Here, as in Drew, Appellant was denied the option of having the jury reach a verdict on evidence which could have been decided in his favor.

(Pl.'s Initial Brief Argument p. 5.)

Clemons' case did not reach the jury because of his failure to present adequate evidence at trial and Judge McCoy found a directed verdict was proper. Clemons' argument fails to demonstrate how the trial court erred in granting Defendants' motion for a directed verdict. Clemons' argument also fails to refer to any facts that would show the court's ruling was not supported by evidence or was controlled by an error of law. Clemons, further, fails to show how the purported case law he has cited demonstrates reversible error by the trial court.

Thus, to the extent Clemons even raises any issue on appeal, the issue is abandoned as it is only supported by a conclusory statement made without supporting authority.

B. Clemons abandoned his issue on appeal that the trial court erred by proceeding to trial without conducting a review of the audio recording of the January 11, 2021 hearing before Judge Roger Young.

Here, Clemons argues, "[I]t was error. . . to proceed to trial without conducting a thorough review of the transcript audio upon his request." (Pl.'s Initial Brief State. of Issues p. 2.) Again, as in *Brown*, Clemons' argument for this issue is only supported by a one sentence conclusory statement. Clemons' entire argument consists of the following:

> Appellant contends that had the court reviewed transcript audio recordings, the results would have been different.

(Pl.'s Initial Brief Argument p. 5.)

First, Clemons' argument fails to demonstrate with facts from the record how the results would have been different, or how it was an error for the court to proceed to trial without reviewing the audio recording. Further, the purported case law cited by Clemons pertains to whether it is proper for the court to grant the Defendants' motion for a directed verdict. (Pl.'s Initial Brief Argument p. 5.) Clemons does not cite to any case law that would support his argument that the court erred by proceeding without conducting a review of the audio recording from the January 11, 2021 hearing. There is simply no nexus between the granting of the Defendants' directed verdict and reviewing the transcript of the pre-trial hearing.

Thus, this issue is deemed abandoned as it is only supported by a conclusory statement made without supporting authority.

II. Clemons Abandoned All Issues Raised on Appeal Because His Initial Brief Fails to Identify with Particularity the Alleged Errors Committed by the Trial Court.

Under South Carolina Appellate Court Rules, "A brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged. Reference shall also be made to where relevant objections and rulings occurred in the transcript." Rule 208(b)(4), SCACR. For example, in *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, the appellant failed to identify any specific trial court rulings claimed to constitute error. 414 S.C. 33, 73, 777 S.E.2d 176, 197 (2015) (citing Rule 208(b)(4), SCACR.). As a result, the appellant's argument did not sufficiently identify with particularity the alleged error, and the Supreme Court found the appellant had abandoned its claim on appeal. *Id.*

Here, Clemons' Initial Brief never references or cites to any transcripts, pleadings, orders, exhibits, or other materials in either his Statement of the Case, Statement of the Facts, nor his

Argument. Therefore, Clemons' argument fails to identify with particularity any alleged issues on appeal as required by Rule 208(b)(4), SCACR. [6]

Thus, Clemons' issues on appeal should be deemed abandoned because he failed to specifically identify the alleged issues on appeal.

III. Even if The Court Were to Find Clemons' Issues Are Preserved, Clemons Failed to Prepare an Adequate Record on Appeal, and The Court May Decide the Case Without Reaching the Merits.

South Carolina Appellate Court Rules provide appellate review is limited to the Record on Appeal. Rule 210(h), SCACR. Rule 210(c) states, "The Record on Appeal shall include all matter designated to be included by any party…" Rule 210(c), SCACR. Further, the Appellate Court has found "[t]he appellant has the burden of proving an adequate record on appeal." *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 214, 723 S.E.2d 597,608 (Ct. App. 2012).

For example, in *Johnson v. South Carolina Department of Probation, Parole, and Pardon Services*, the appellant provided the full transcript of the hearing before the trial court in the record on appeal but failed to include the trial court's final order. 372 S.C. 279, 283, 641 S.E.2d 895, 897 (2007). The Appellate Court found that because of the appellant's failure to include the final order, it was not advised to the grounds upon which a motion on appeal was denied. *Id.* The Supreme Court affirmed finding, "Because the [appellant] failed to include the trial court's final order in the record on appeal, the court of appeals properly decided the case without reaching the merits." *Id.* 372 S.C. at 284, 641 S.E.2d at 897. In *Hennes v. Shaw*, the Appellate Court found the appellant had the burden of furnishing the court with a sufficient record on appeal, and without inclusion of

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[6] Further, Clemons does not set forth in his Statement of the Issues on Appeal that the trial court erred in granting Defendant's motion on appeal. Clemons merely refers to the standard for a directed verdict in purported case law in his Argument. The Court of Appeals has recently held, if a party fails to raise an issue in an appellate brief, the Court will decline to address the argument on the merits. *State v. Rowell*, No.2018-000022 (S.C. Ct.App. March 2, 2022); citing Rule 208(b)(1)(B), SCACR.

the circuit court's complete ruling on the issue or any testimonial evidence from trial to show appellee's conduct was actionable, the Appellate Court affirmed the circuit court's decision to grant a directed verdict. 397 S.C. 391, 402, 725 S.E.2d 501, 507 (Ct. App. 2012).

A. Clemons failed to include Judge McCoy's ruling to grant the Defendants' motion for a directed verdict.

For Clemons to prove Judge McCoy erred by granting Defendants' motion for a directed verdict, Clemons would have to prove Judge McCoy's ruling was not supported by evidence, or the ruling was controlled by an error of law. *Jones v. Lott*, 379 S.C. 285, 288-9, 665 S.E.2d 642, 644 (2008). To consider this issue the Appellate Court would have to refer to Judge McCoy's reasoning in her decision. Like in *Johnson*, because Clemons failed to include Judge McCoy's order, the Appellate Court cannot be advised of the grounds upon which Judge McCoy granted Defendants' directed verdict. Therefore, the Appellate Court may properly dismiss the appeal without reaching the merits.

B. Clemons failed to include Judge Price's ruling on Clemons' motion to obtain audio of the January 11, 2021 hear.

Clemons argues the trial court erred by not conducting a review of the transcript audio upon his request. Judge McCoy did not allow or rule on the motion, finding the motion had been made and denied by Judge Bentley Price. (Trial Trans. p. 90, line 18-22, R.22.) For the Appellate Court to determine if the denial of access to audio recording of January 11, 2021 hearings was improper, the Appellate Court must review Judge Price's ruling of June 4, 2021. Clemons has failed to provide in his designation of the record the transcript from the hearing on June 4, 2021 before Judge Price or the order issued by Judge Price. Therefore, the Appellate Court may properly dismiss the appeal without reaching the merits.

Accordingly, for the reason set forth, Clemons has failed to submit an adequate record on appeal to allow the Appellate Court to determine the issues on appeal, and the Appellate Court should dismiss the appeal without reaching the merits, to the extent there are any merits.

IV. **Clemons Cannot Use His Reply Brief to Raise Issues Not Argued in the Initial Brief or Supplement the Designation of Matter.**

Under the South Carolina Appellate Court Rules, "The final brief(s) shall be identical to the brief(s) previously served." Rule 211(b), SCACR. Parties are only allowed to revise references to the record to indicate where the material appears in the Record on Appeal and correct any obvious typographical errors and misspellings that are contained in the initial brief. Rule 211(b)(1),(2), SCACR. Therefore, "[a]n appellant may not use the reply brief to argue issues not argued in the appellant's initial brief." *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 153, 494 S.E.2d 449, 460 (Ct. App. 1997); *See also Spivey v. Carolina Crawler*, 367 S.C. 154, 161, 624 S.E.2d 435, 438 (Ct. App. 2005) (If an issue is not raised in Appellant's or Appellee's initial brief it will not be considered by the Appellate Court.); *Bochette v. Bochette*, 300 S.C. 109, 112, 38 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use either oral argument or the reply brief as a vehicle to argue issues not argued in the appellant's brief.").

Clemons cannot use his reply brief to argue abandoned issues he failed to raise in his initial brief or assert any additional issues. Further, Clemons has not provided a sufficient Record on Appeal for the Court to determine the issues presented, and pursuant to Rule 211(b), SCACR, Clemons cannot supplement the record to cure the deficiencies.

Accordingly, Clemons cannot use his reply brief to raise issues abandoned or not argued in the initial brief or supplement his designation of the record.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court affirm the directed verdict in Defendants' favor and affirm the trial court's decision to deny Clemons' motion to obtain audio of the January 11, 2021 hearing.

Respectfully submitted,

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CERTIFICATE OF COUNSEL REGARDING RESPONDENT'S FINAL BRIEF

I, the undersigned, certify that Respondent's Final Brief comply with Rule 211(b), SCACR.

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