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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Hon. Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2023-000718

DARLEEN RASH, Individually and as Personal Representative for the ESTATE OF BRONSON HARLEY RASH.....Appellant-Respondent,

v.

DOMINION ENERGY (formerly SOUTH CAROLINA ELECTRIC & GAS COMPANY); ANTHONY M. AKBAR; AND PAUL QUATTLEBAUM,.....Respondent-Appellants.

RESPONSE TO JOINT MOTION TO STRIKE RESPONDENT'S BRIEF

Darleen Rash, the Appellant/Respondent ("Appellant"), makes this Response to Cross-Appellants' motion to strike her brief. The remedy sought by Cross-Appellants in their joint motion is extraordinary—striking Appellant's brief in its entirety—and should be denied by this Court.

This cross-appeal is part of Appellant's appeal from a defense verdict in favor of Dominion Energy, Anthony M. Akbar, and Paul Quattlebaum arising from the motor vehicular death of Appellant's only child. On February 19, 2017, Bronson Rash was on his way to work at Charleston County EMS when his motorcycle was struck by a Toyota Tundra driven by Daniel McJunkin. Rash had the right-of-way but McJunkin's vision was obscured by utility poles and vegetation as

he made a left turn into Rash's lane of travel on Meeting Street Road. Rash ultimately died from his injuries and this lawsuit followed.

Cross-Appellants' appeal concerns their asserted entitlement to a directed verdict. In responding to their brief, Appellant endeavored to demonstrate that there was ample evidence to warrant sending this case to the jury, including evidence from her expert witness, Paul McCullough, which Appellant contends was wrongfully excluded by the trial judge.[1] Cross-Appellants complain that Appellant utilized McCullough's deposition testimony in support of her argument for admissibility of his testimony and seek the extraordinary remedy of striking her brief in its entirety.

I. The deposition testimony should not be stricken from Appellant's brief.

Cross-Appellants are correct that the trial judge excluded McCullough's testimony and that his deposition was not included in the Designation of Matter. Nevertheless, McCullough's full deposition transcript was filed as Exhibit 6 to Rash's filed memorandum in opposition to Dominion's motion for summary judgment. Rash's memorandum and the exhibits were filed before the trial court, and the same trial judge who considered the Dominion's motion and presided over the trial, Judge Jefferson, denied summary judgment a mere *five* days before trial. (3.15.23 Order denying Dominion's Motion for Summary Judgment). Further, once defense counsel sought to exclude McCullough as an expert based on McCullough's qualifications, both parties referenced portions of McCullough's deposition in their argument to the court. (Tr. T. p. 290, lines 10-15; p. 291, lines 13-14 "[Defense counsel stating] he said, and this is a quote from his deposition, 'I have the outputs, not the inputs.'"; p. 293, line 2-7). During voir dire of McCullough, which essentially also served as a proffer of his testimony, his deposition testimony also was referenced. Tr. T. p.

[1] This is one of numerous rulings by the trial judge which Appellant seeks to reverse on appeal.

311, lines 21-24, p. 344, line 6 – p. 347, line 21). Thus, Cross-Appellants are wrong that the deposition testimony was not before the trial court.

Cross-Appellants also object to Appellant's mention of McCullough's deposition testimony in her brief because the deposition purportedly cannot be considered in the Record on Appeal. However, as noted by Cross-Appellants in their Motion, Rule 210(c), SCAR, provides that the record on appeal "shall not [ ] include matter which was not presented to the lower court or tribunal." Although admittedly important, error preservation rules should not be used as a game of "gotcha" in the hopes of trapping an unwary attorney. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting) ("I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests."). Accordingly, Appellant requests that this Court permit an amended designation of matter to be filed that includes the memo in opposition to Dominion's summary judgment and the attached exhibits.[2]

Here, it was clear to all concerned, especially the trial judge, that Appellant wanted to introduce the expert testimony of Paul McCullough. This fact was made known prior to trial in that Mr. McCullough's deposition was attached to Appellant's Memorandum in Opposition to Summary Judgment, a motion which was denied by the trial judge. (3.15.23 Order denying Dominion's Motion for Summary Judgment)

[2] Alternatively, Appellant will file a motion to supplement the record to add these materials pursuant to Rule 212, SCACR.

Moreover, Cross-Appellants themselves attached a portion of McCullough's deposition to their memorandum filed during the trial – when McCullough was called as a witness – challenging his qualification as an expert witness. His deposition and its contents were mentioned numerous times by counsel as they argued to the trial judge over the admissibility of McCullough's expert testimony and the trial judge already had it before her as part of the trial record at that time. Therefore, there can be no prejudice to Cross-Appellants from Appellant's argument in her brief concerning this issue.

II. The Court should not strike Appellant's argument on the trial court's decision to exclude expert testimony from Paul McCullough.

Cross-Appellants also object to Appellant including in her brief materials which they assert are already included in her appellant's brief in the main appeal. Again, there can be no prejudice to Cross-Appellants because the main appeal and their cross-appeal are inextricably linked and Appellant's brief in the main appeal is already before this Court. *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize -- or at least they should recognize -- an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter.").

Further, Cross-Appellants complain of a purported error that they themselves make in their initial briefing. Indeed, in Cross-Appellant's brief to Appellant's appeal, they state under "Issue F" as "For the Reasons Set Forth in DESC's Brief as Appellant, the Court Should Affirm Because — Notwithstanding Plaintiff's Arguments on Appeal—DESC Was Entitled to a Directed Verdict as to Liability." Dominion Initial Brief at 36. They then attempt to incorporate by reference their argument in the cross-appeal brief into the brief in Appellant's appeal. Cross-Appellants should not be heard to complain about conduct which mirrors their own. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 603 n.13, 799 S.E.2d 912, 917 (2017) (ostensibly acknowledging where a party benefits

from an act, they cannot later complain of the same and noting "[a]s the old saying goes, what's good for the goose is good for the gander").

III. Cross-Appellants' remedy is drastic and unwarranted.

Finally, the remedy sought by Cross-Appellants here—the striking of Appellant's entire brief—is drastic. The fact that Cross-Appellants cite absolutely no authority for this extraordinary remedy should be sufficient to deny this motion. While this Court may ultimately decide that this issue is not preserved for appeal, it is premature to strike Appellant's brief at this juncture. Appellant submits that the Motion to Strike should be denied. In the alternative, Appellant should be permitted to file a new brief without the objectionable material.

Respectfully submitted,

/s/ Roy T. Willey, IV
Roy T. Willey, IV
S.C. Bar No.: 101010
roy@akimlawfirm.com
Poulin | Willey | Anastopoulo, LLC
32 Ann Street
Charleston, SC 29403
T: (803) 222-2222
F: (843) 494-5536
ATTORNEY FOR THE APPELLANT/RESPONDENT

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PROOF OF SERVIVE OF RESPONSE TO JOINT MOTION TO STRIKE RESPONDENT'S BRIEF

Pursuant to Rule 262(c), SCACR, I certify that I have served Appellant-Respondent's Response to Joint Motion to Strike Respondent's Brief on Respondents by Electronic Mail on May 31, 2024 addressed to the Respondents' attorneys of record: M. Dawes Cooke, Jr. of Barnwell Whaley Patterson & Helms at P.O. Drawer H., Charleston, SC 29402, David Spence Cox of Barnwell Whaley Patterson & Helms at 211 King St. Suite 300, Charleston, SC 29401, Chelsea A. Glover of Johnson, Toal & Battiste, P.A. at 130 Centre St., Orangeburg, SC 29115, George Craig Johnson and IS Leevy Johnson of Johnson, Toal & Battiste, P.A. at P.O. Box 1431, Columbia, SC 29202, Ian S. Ford, Hunter H. James, and Ainsley Fisher Tillman of Ford Wallace Thomson, LLC at 715 King St., Charleston, SC 29403.

Respectfully submitted,

s/ Roy T. Willey, IV
Roy T. Willey, IV
S.C. Bar No.: 101010
roy@akimlawfirm.com
Poulin | Willey | Anastopoulo, LLC
32 Ann Street
Charleston, SC 29403
T: (803) 222-2222
F: (843) 494-5536
ATTORNEY FOR APPELLANT/RESPONDENT

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