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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley Price, Circuit Court Judge

Case No. 2017-CP-10-5426
App. Case. No. 2020-001132

Family Services, Inc., as Conservator for Muriel W. Clarkin.................................Appellant,

v.

Bridget D. Inman, Muriel C Kennedy, and Patricia Clarkin Smith..................... Respondents,

And

Bruce A. Berlinsky, Intervenor.

FINAL REPLY BRIEF OF APPELLANT
TO BRIDGET D. INMAN'S RESPONSE

July 5, 2021

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INTRODUCTORY STATEMENT

In this Reply Brief, Appellant addresses and replies only to those allegations and issues raised directly in the substance of Bridget D. Iman's (hereinafter "Inman's") initial Brief. Appellants would assert that any issue or allegation raised in Appellants' Initial Brief and/or more fully detailed in Appellants' memorandum in opposition to the motion to strike (memo op strike), but not address by Respondent Inman in the body of her initial brief or addressed with only conclusory remarks is deemed conceded to and abandoned. *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) ("issues not argued in the brief are deemed abandoned); *R& G Construction, Inc. v. Lowcountry Regional Transportation Authority*, 343 S.C. 424, 437, 540 S.E.2d 113 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *Fields v. Fields*, 342 S.C. 182, 536 S.E.2d, 684 (Ct. App 2000) (fn. 8: "she fails to argue the issue in the body of the brief and it is therefore deemed abandoned."); *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003) (fn. 3: "Since the County failed to argue this issue in the body of its brief, the issue deemed abandoned."); *Muir v. CR Bard, Inc.*, 336, S.C. 266, 519 S.E.2d 583 (Ct. App.1999) (conclusory arguments are deemed abandoned); *Fields v. Melrose Limited Partnership*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (an issue is deemed abandoned on appeal and therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority).

In this case, in her in her response brief Inman did not address issue II or allegations raised by Appellant in its initial brief. Inman further did not address the elements a court must consider in determining whether to award sanctions.

ARGUMENT

I. THE COURT ERRED IN GRANTING BRIDET INMAN'S MOTION TO STRIKE ALLEGATIONS OF THE AMENDED COMPLAINT BASED ON RULE 408, SCRE.

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: . . . (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action. . . *S.C. Code Ann.* §14-3-330(2). "If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court could not say there was error of law in confining the evidence and charge to the pleadings. . . Under the reasoning of *Miles* and *Bowden*, an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14-3-330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial. Whether an order granting a Rule 12(f) motion to strike is appealable under section 14-3-330(2)(c) depends on the effect of the individual order under the facts and circumstances of the case." *Thorton v. SCE&G,* 391, S.C. 297, 705 S.E.2d 475 (Ct. App. 2011).

In this case Inman moved to strike the allegations of paragraph 90 and 91 of the Amended Complaint asserting they were evidence of settlement negotiations and therefore should be struck pursuant to Rule 408, SCRE. The Court granted the order and Appellant filed a motion to

reconsider, requesting that court amend its order with an order denying the motion or at a minimum issue an amended order stating that the ruling was not an evidentiary ruling. "An unappealed order become the law of the case and precludes further consideration of the issue on appeal. *In re Morrision*, 321 S.C. 370 n.2, 468 S.E.2d 651 n. 2 (1996). "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Judy v. Martin*, 381, S.C. 455, 458, 674 S.E.2d 151 (2009). Appellant asserts that the court abused its discretion in granting the motion to strike because the allegations were material to Appellant's causes of action against Inman and raised issues as to the credibility of Inman's asserted defense that the loan was a gift and are an admission against her interest. Appellant asserts the order affected a substantial right of Appellant by removing a material issue from the case thereby preventing the issue from being litigated on the merits.

Prior to the court ruling on Appellant's motion to reconsider the order striking the allegations, and prior to this appeal, Inman filed an amended answer to the Amended Complaint and admitted the allegations as true. (R.p. 285 ¶¶ 48, 49). "[F]acts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible. . . It is a general rule that a party is concluded by his own testimony which is favorable to the adverse party." *Elrod v. All,* 243 S.C. 425, 134 S.E.2d 410, 436 (1964). A party is judicially bound by admissions contained in pleadings. *See. Truesdale v. Jones*, 224 S.C. 237, 241, 78 S.E.2d 274 (1953). Now for the first time, in her response brief, Inman abandons the merits of her argument that the court did not abuse its discretion in striking the allegations of the complaint stating that the issue is moot because Inman admitted the allegations in her amended answer which was filed after the order striking the allegations from the

amended complaint. (Inman Brief p. 1). However, Inman still contends that allegations are inadmissible at trial under rule 408, SCRCP, but states "Whether they are admissible for any purpose is not before this Court, however. This Court should remand the issue to the Circuit Court with instructions that the admissibility of evidence of these allegations shall be decided by the trial judge." Inman Brief pg. 2) Appellant would assert that this court should find that the court abused its discretion in granting a motion to strike the allegations of the complaint based upon an evidentiary rule. Further this court should find that given Inman's abandonment of the issue and binding testimony in her pleadings and brief the Court should also rule that Inman is now judicially bound by her pleadings, absent leave of the court to amend, and evidence contradicting such pleadings is inadmissible.

Inman also asserts for the first time an alternative sustaining ground for finding the court did not abuse its discretion in granting the motion to strike. Inman asserts that Appellant grossly violated Rule 8(a), SCRCP, by pleading 132 paragraphs in the Amended Complaint. The assertion of this alternative sustaining ground goes far beyond the limitations of Order striking just the two short sentences found in Paragraphs 90 and 91 of the Amended Complaint which state: "90. Defendant offered to provide Plaintiff the Proceeds of the Sale of the Subject Property, but did not do so. 91. Defendant testified in her deposition that she offered Plaintiff the entire proceeds of sale of the Subject Property stating: "I did make attempts to give that lump sum to them to show my appreciation for the gift." (R.p. 308)" "In our State, the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action. . ." *Moore v. City of Columbia*, 284 S.C. 278, 283, 326 S.E.2d 157 (Ct. App. 1985). In this case these allegations support necessary elements of various asserted causes including that Inman knew Appellant claimed Inman was obligated to repay Clarkin and further that Inman retained the funds. Further

Inman has asserted a defense that no obligation of repayment existed because Clarkin gifted the purchase money funds to her. These statements contradict that assertion and are statements against Inman's interest. The assertion that Appellant violated the requirements of Rule 8, SCRCP, by its pleadings in paragraphs 90 and 91 of the amended complaint is without merit.

For the forgoing reasons it was an abuse of discretion for the Court to grant Inman's Motion to Strike.

II APPELLANT DID NOT WAIVE ITS RIGHT SEEK SANCTIONS FROM INMAN AND THE COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR SANCTIONS.

Inman asserts that Appellant's counsel waived Appellant's its right to seek sanctions from Inman during the November 13, 2019, hearing on Appellant's Motion for Sanctions, before Judge McCoy which is false. Further Inman asserts that Judge McCoy made finds of facts and rulings of law as to the right of Appellant to receive sanctions from Inman, which is also false (R.pp. 325-353). Appellant moved to continue the motion for sanctions on November 13, 2019, because Berlinsky no longer represented Inman and was not present at the hearing. Judge McCoy granted the continuance. (R.pp. 352). Thereafter the Motion for Sanctions was heard by Judge Price on June 24, 2020 and reconvened on June 30, 2020.

Waiver is legal doctrine, which requires voluntary and intentional relinquishment or abandonment of a known right. Waiver requires an unequivocal intent to relinquish a known right. *Strickland v. Strickland,* 375 S.C. 76, 83-86 650 S.E.2d 465 (2007). Appellant's counsel did not unequivocally evidence intent to waive the right of Appellant to seek sanctions at the November 13, 2019 hearing. Appellant noted to the Court at that hearing that the rules provide the court the discretion to sanction a party and/or her attorney. (R.p. 337). Thereafter, the motion was continued without the court making a final determination on the merits of the motion.

Inman also asserts that she was not for responsible for the discovery problems created by Berlinsky, was not aware of them and therefore should not be sanctioned. (Iman Brief pg. 18) On June 24, 2020, before the court on the Motion Sanctions Appellant stated: "I would just first note the general rule of our jurisdiction that the neglect of an attorney is attributable to a client; that is *Graham v. Town of Loris*, 272 S.C. 442. I would also note that a party has a duty to monitor the progress of his case. And lack of familiarity of legal proceedings is unacceptable and the Court will not hold a laymen to any lesser standard than is applied to an attorney. That is *Goodson v. American Bankers*. (R.p. 379). Inman's deposition transcript and her brief make clear that Appellant made sure Inman had uncontested personal knowledge On April 8, 2019, that Inman at that time had stilled failed to comply with the order compelling discovery filed in June of 2018. (Inman Brief pg. 7; R.p. 307). Appellant filed the Motion for Sanctions on April 15, 2019. Thereafter Inman did not monitor her case, as she is required to do, and willfully failed to ensure that the June 2018 Compel Order was complied with. Inman did not take any affirmative actions to comply with the June 2018 Compel order until November of 2019, seven months after her deposition. The actions complained of in the Motion for Sanctions are attributable to Inman.

For the forgoing reasons it was an abuse of discretion for the Court to deny Appellant's Motion for Sanctions.

CONCLUSION

Based upon the foregoing arguments, the arguments contained in Appellant's Initial Brief and the lack of arguments set forth in Inman's initial response brief, Appellant would respectfully assert that this Court should undertake appellate review of the order granting Iman's Motion to Strike and denying Appellant's Motion for Sanctions and find that the court abused its discretion in regard to both orders.

RESPECTUFLLY SUBMITTED,

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