

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Civil Action No.: 2013-CP-02-1337
Appellate Case No.: 2014-00250

Adele J. PopeAppellant,

v.

Estate of James Brown, Deceased; The James Brown 2000 Irrevocable Trust; Russell L. Bauknight, Individually, as former *Executor de son tort*, and in every current and former Fiduciary status claimed or held as to the Estate of James Brown and the James Brown 2000 Irrevocable TrustRespondents,

AND

Robert L. Buchanan, Jr. Interested Party.

INITIAL BRIEF ON BEHALF OF RESPONDENT RUSSELL L. BAUKNIGHT,
INDIVIDUALLY

Frederick A. Crawford, Esquire
Sheila M. Bias, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT RUSSELL L.
BAUKNIGHT, INDIVIDUALLY

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STATEMENT OF ISSUES

- I. Appellant has failed to preserve any issue related to the dismissal of the claims against Russell Bauknight, Individually.
- II. Assuming, *arguendo*, Appellant preserved issues related to Russell Bauknight, Individually, the trial judge did not err in granting Respondent's Motion to Dismiss.

STATEMENT OF THE CASE

The instant appeal is part of the extensive and tumultuous litigation related to The Estate of James Brown (“Estate”). The Summons and Complaint, spanning 63 pages and over two hundred separate paragraphs, was filed on June 10, 2013. [Summons & Complaint]. Lacking in definitiveness, the action seemed to derive from Russell L. Bauknight, in his fiduciary capacity, having disallowed a claim Appellant made to the Estate for over \$ 4 Million dollars for compensation for her previous services as a fiduciary to the Estate. [Id.].

On July 10, 2013, Russell L. Bauknight, in his individual capacity, filed a Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement. [Bauknight, Individually, Motion to Dismiss]. The same day, Russell L. Bauknight, in his fiduciary capacities as general personal representative and special administrator of the Estate and general trustee and special trustee of The James Brown 2000 Irrevocable Trust, filed a Motion to Dismiss or, in the alternative, for a More Definite Statement. [Bauknight, Fiduciary, Motion to Dismiss]. A hearing on the two motions was held on December 2, 2013. [Transcript of December 3, 2013 Motion to Dismiss Hearing].

Judge Early issued an Order, signed January 7, 2014, filed January 17, 2014, granting the Motion to Dismiss on behalf of Bauknight, in his fiduciary capacities, on all claims, except for Appellant’s request for payment of her claims in accordance with the Petition for Allowance of Claim. [Order of Dismissal, Fiduciary]. Appellant filed a Rule 59(e), SCRCF motion related to this Order which was denied on February 4, 2014. [Form 4, Fiduciary, Rule 59(e), SCRCF, Fiduciary order]. Appellant filed a Notice of Appeal related to these Orders on February 7, 2014.

Although the Notice of Appeal was from Judge Early's Order related to Bauknight in his Fiduciary capacity, Appellant informed this Court that counsel for Bauknight, Individually, should also be counsel of record for the appeal, and that the appeal involved decisions related to Bauknight in both his fiduciary and individual capacities. [Notice of Appeal]. Bauknight, Individually, filed a Motion to be Removed as a Party in this matter since the Motion to Dismiss filed on behalf of Bauknight, Individually, remained pending before Judge Early. [March 6, 2013 Letter and May 23, 2014 Letter/Motion submitted on behalf of Bauknight, Individually]. Appellant's replies contended Judge Early's January 17, 2014 Order related to Bauknight both in his individual and fiduciary capacities. [May 28, 2014 Return and Memorandum in Opposition, June 16, 2014 Supplemental Return to Letter/Motion].

Notwithstanding the above Motions, Judge Early issued an Order, dated March 4, 2014, filed March 10, 2014, granting the Motion to Dismiss filed on behalf of Bauknight, Individually. [Order of Dismissal, Individually]. Appellant filed a Rule 59(e), SCRCF, motion, with Bauknight, Individually, filing a response, and Appellant filing a Reply. [Rule 59, SCRCF Motion, Memorandum in Opposition, Reply to Opposition]. Judge Early denied the Motion for Reconsideration, via a Form 4 Order, on June 2, 2014. Thereafter, Appellant filed an Amended Notice of Appeal on June 26, 2014 seeking to add Judge Early's Order addressing Bauknight, Individually, to the above-captioned appeal. [Amended Notice of Appeal]. This Court denied the Motion to be Removed as a Party on June 30, 2014 and consolidated the Amended Notice Appeal with the instant appeal.

STATEMENT OF THE FACTS

This action was commenced following the South Carolina Supreme Court's affirmance of the removal of Appellant, Adele J. Pope, and Interested Party, Robert L. Buchanan, Jr., as Personal Representatives of The Estate of James Brown and Trustees of The James Brown 2000 Irrevocable Trust in Wilson v. Davis, 403 S.C. 411, 743 S.E.2d 746 (2013).¹ Wilson also voided Russell L. Bauknight's appointment as Special Administrator of Brown's Estate and Special Trustee of the 2000 Irrevocable Trust; but, remanded to the trial court for a determination as to whether Bauknight should be appointed to fill a Fiduciary capacity.

Following the Wilson decision, Russell L. Bauknight was again appointed to the fiduciary positions of Personal Representative of the Estate and Trustee of the 2000 Irrevocable Trust ("Trust"). Appellant filed a petition with the Estate seeking fees for her service to the Estate in her previous fiduciary capacity. As the fiduciary of the Estate and the Trust, Bauknight issued a Notice of Disallowance for Appellant's claim. Rather than follow the proper procedures for appealing the Notice of Disallowance, Appellant filed a Summons and Complaint seeking to void Bauknight's appointment as personal representative and trustee, void the settlement agreement between her former co-fiduciary, Interested Person Robert Buchanan, and the Estate and Trust; and void the

¹ Specifically, the Court stated:

We are aware that Appellants have sought \$5 million in fees for their services as fiduciaries for a relatively short interval of time. In addition, Appellants sought and obtained permission from the circuit court to sell iconic assets from Brown's estate in order to raise funds, and a large portion of the amount raised went first to pay Appellants' own attorneys' fees. . . . These actions and the extreme discord between the parties convince us that Appellants' continued service as fiduciaries is not in the best interests of the estate.

Wilson, at 449, 743 S.E.2d at 766-67. The Wilson opinion also contains a recitation of the procedural history of the litigation attendant to the administration of James Brown's estate.

Notice of Disallowance she received from the Estate and Trust with regard to her petition for fees. [Summons and Complaint]. Appellant also asked that Bauknight be removed from his Fiduciary capacity, that an accounting be ordered, and that she be awarded attorney's fees and costs. [Id.] Importantly, the 63-page, 289-paragraph Complaint only directed two paragraphs toward Bauknight, Individually. Specifically, although the claims related to Bauknight's actions, in his fiduciary capacity, Appellant requested Bauknight, Individually, pay the costs of this action rather than be paid from the Estate. [Summons and Complaint, ¶ 289].

Russell Bauknight, Individually, and in his fiduciary capacities, filed Motions to Dismiss the Summons and Complaint. [Motions to Dismiss, Fiduciary and Individually]. Judge Early, by Order dated January 7, 2014, granted the Motion to Dismiss on behalf of Bauknight, as a fiduciary, finding (1) a portion of Appellant's Complaint was moot; (2) Appellant's argument regarding the probate court's appointment of Mr. Bauknight was not a decision over which the circuit court had appellate review; (3) that Appellant had no standing to void the settlement between Mr. Buchanan and the estate; and (4) Appellant had no standing to seek Mr. Bauknight's removal, to request an accounting, or to request that a special administrator and trustee be appointed. [Order on Dismissal, Bauknight Fiduciary]. Appellant filed a Motion for Reconsideration, which was denied by Order of Judge Early dated February 4, 2014. [Rule 59(e), SCRCF, Motion for Reconsideration, Order denying Motion for Reconsideration].

Judge Early granted the Motion to Dismiss on behalf of Bauknight, Individually on March 4, 2014. (Order on Dismissal, Bauknight, Individually). Judge Early found the only allegations against Bauknight, Individually, dealt with Appellant's desire for

Bauknight to pay his and Appellant's attorneys' fees, incurred in the defense of this action, from his personal assets and not from the assets of the Estate or Trust. [Id.]. Judge Early further found that the Complaint failed to meet the minimum pleading requirements of the South Carolina Rules of Civil Procedure. Specifically, the Complaint ran afoul of Rule 8, SCRPC, and,

did not sufficiently plead any single cause of action against Defendant Bauknight, in his individual capacity, but rather relates to, references, and cites actions taken by Defendant Bauknight as a Fiduciary of the Estate and the Trust. As a result, dismissal is proper under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure for failure to state facts sufficient to constitute a claim against Defendant Bauknight, in his individual capacity.

[Id.] (emphasis added). Appellant filed a Rule 59(e), SCRPC, motion which was denied by Order dated June 2, 2014. [Rule 59(e), SCRPC, Bauknight, Individually]. The instant appeal follows.

STANDARD OF REVIEW

“Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court.” Flateau v. Harrelson, 355 S.C. 197, 201, 584 S.E.2d 413, 416 (Ct. App. 2003). “In deciding a motion to dismiss pursuant to 12(b)(6), SCRPC, the trial court should consider only the allegations set forth on the face of plaintiff's complaint.” Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). “A 12(b)(6) motion should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.” Id. (citing Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)); Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999). The question is whether, in the light most favorable to the plaintiff, and with every doubt

resolved in her behalf, the complaint states a valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). “A trial judge in a civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court.” Flateau at 201, 584 S.E.2d at 415.

Thus, in deciding whether the trial court properly granted the motion to dismiss, “this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief.” Id. “The trial court’s grant of a motion to dismiss will be sustained if the facts alleged in the Complaint do not support relief under any theory of law.” Id.

ARGUMENT

I. Appellant has failed to preserve any issue related to the dismissal of the claims against Russell Bauknight, Individually.

Similar to the Complaint in this action, Appellant has failed to state any claims or preserve any issues related to Bauknight, in his individual capacity. Accordingly, this Court must affirm the trial court’s dismissal.

a. Appellant has abandoned this issue.

Appellant has abandoned any issue related to the Motion to Dismiss on behalf of Bauknight, Individually, because she has failed to present any argument to this Court related to Judge Early’s dismissal of Bauknight, Individually.² A review of the Amended

² This Court should reject any argument by Appellant that her Initial Brief only addressed issues related to the dismissal of the claim against Bauknight in his fiduciary capacity because her Notice of Appeal only addressed Judge Early’s Order related to Bauknight in his fiduciary capacity. Appellant has consistently maintained through filings with this Court and with Judge Early, that Judge Early’s January 7, 2014, Order related to Bauknight, Individually and in his fiduciary capacity. Accordingly, Appellant’s Initial Brief should have conformed to her beliefs and addressed claims related to Bauknight, Individually.

Initial Brief of Appellant demonstrates Appellant has failed to assign any error related to Judge Early's dismissal of the claims against Bauknight, Individually—which is fatal to her appeal. Nienow v. Nienow, 268 S.C. 161, 232 S.E.2d 504 (1977) (failure to argue an issue in brief is deemed abandonment of the issue); Barr v. Barr, 287 S.C. 13, 335 S.E.2d 481 (Ct. App. 1985) (“A provision of an order neither excepted to nor raised in the brief is not properly before the court on appeal.”); Bankers Trust of S. Carolina v. S. Carolina Nat. Bank of Charleston, 284 S.C. 238, 245, 325 S.E.2d 81, 85 (Ct. App. 1985); (“Its brief, however, contains no reference to or argument of the exceptions and they are therefore deemed abandoned.”); Bentrim v. Bentrim, 282 S.C. 333, 318 S.E.2d 131 (Ct. App. 1984) (the failure to raise an issue in an exception constitutes waiver).

Additionally, Appellant's failure to raise this issue means that the dismissal of Bauknight, Individually, is the law of the case. See Transp. Ins. Co. & Flagstar Corp. v. S. Carolina Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (“An unappealed ruling is the law of the case and requires affirmance.”); Bell v. Bennet, 307 S.C. 286, 294-95, 414 S.E.2d 786, 791 (Ct. App. 1992) (holding issues not raised in the appellate brief are deemed abandoned and prior rulings on those issues constitute the law of the case).

b. Appellant has failed to preserve this issue.

Even if the Amended Initial Brief could somehow be construed as presenting argument related to the dismissal of the claims against Bauknight, Individually, Appellant has not preserved this issue. First, if there exists any argument in the brief related to Bauknight, Individually, it is wholly conclusory, not supported by any authority and, is therefore, not preserved. See Holly Woods Ass'n of Residence Owners v. Hiller, 392

S.C.172, 190, 708 S.E.2d 787, 797 (Ct. App. 2011) (“An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.”); First Sav. Bank v. McLean, 314 S.C. 361, 363, 44 S.E.2d 513, 514 (1994) (finding appellant abandoned issue when he failed to provide argument or supporting authority); Shealy v. Doe, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) (declining to address an issue on appeal when appellant failed to cite any supporting authority and made conclusory arguments).

Additionally, Appellant first attempted to state facts or raise claims against Bauknight, Individually, not in the Complaint, but in the Rule 59(e), SCRPC, motion filed after Judge Early dismissed the claims against Bauknight, Individually. A party may not raise an issue for the first time via Rule 59(e), SCRPC, motion. See Brailsford v. Brailsford, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (“Generally, a party cannot use a motion to alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.”) (internal quotations omitted); Mailsorce, L.L.C. v. M.A. Bailey & Assoc. Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) (“A party cannot raise an issue for the first time in a Rule 59(e), SCRPC motion which could have been raised at trial.”); Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (recognizing that a party cannot for the first time raise an issue by way of a Rule 59(e), SCRPC motion). Appellant’s attempt to raise the issue through her Rule 59(e), SCRPC, motion was improper and insufficient to cure her pleading deficiencies.

Because Appellant failed to raise the issue of the dismissal of the claims against Bauknight, Individually, in her Initial Brief, the dismissal is the law of the case and

requires affirmance. See Transp. Ins., 431, 699 S.E.2d at 691. Regardless, this issue is not preserved for this Court's review.

II. Assuming *arguendo*, Appellant preserved issues related to Russell Bauknight, Individually, the trial judge did not err in granting Respondent's Motion to Dismiss.

Judge Early properly granted the Motion to Dismiss filed on behalf of Bauknight, Individually. The Complaint in this matter does not meet the pleading requirements of Rule 8, SCRPC. Specifically, there was not a short and plain statement of facts showing that Appellant was entitled to relief from Bauknight, Individually.

As Judge Early found, the 63-page Complaint references Bauknight, Individually in only two places. See Summons and Complaint, ¶ 289 (“Russell, Individually, should pay all costs of the Notice, his Individual Defense of this case and the Estate's defense . . .”); Prayer ¶ 6 (“Directing Russell, Individually, to pay all costs and attorneys' fees of this action, with the Estate/2000 Trust to pay no portion of Russell's fees and costs . . .”). The remainder of the Complaint addresses actions taken by Bauknight in his fiduciary capacity in relation to his duties as personal representative and trustee. Even if the pleadings were “liberally construed to do substantial justice to all parties,” Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000), the two references in the Complaint to Bauknight, Individually, are not facts sufficient to constitute a claim against Bauknight in his individual capacity. “It is elementary that the principal purpose of pleadings is to inform the pleader's adversary of legal and factual positions which he will be required to meet on trial.” Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573-74, 743 S.E.2d 778, 785 (2013) (citing S.C. Nat'l Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)); see also Langston v.

Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975) (“The purpose of pleadings is to place the adversary on notice as to what the issues are.”). Here, Appellant has presented no legal or factual position related to Bauknight, Individually, nor do the pleadings provide Bauknight, Individually, with notice of the issues or claims Appellant brought against him.

Consequently, Appellant failed to state facts sufficient to sustain a claim against Bauknight, Individually, and dismissal under Rule 12(b)(6), SCRPC, was proper. See Flateau at 201, 584 S.E.2d at 415.

CONCLUSION

Based on the foregoing, this Court should affirm the trial judge’s grant of the Motion to Dismiss on behalf of Bauknight, Individually.

Respectfully submitted,



Frederick A. Crawford, Esquire
Sheila M. Bias, Esquire
Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, South Carolina 29202

ATTORNEYS FOR RESPONDENT RUSSELL L.
BAUKNIGHT, INDIVIDUALLY

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Russell L. Bauknight, individually as former executor de son tort and in every current
a former fiduciary status claimed or held as the Estate of James Brown
2000 irrevocable trust.....Respondents.


And Robert L. Buchanan, Jr., interested party

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A.,
attorneys for Respondent Russell L. Bauknight, individually, do hereby certify that I
have this date served the foregoing Initial Brief on behalf of Respondent Russell L.
Bauknight, individually by personally depositing a copy of the same in a United States
Postal Service mailbox, postage prepaid, addressed to the following:

Adele J. Pope
1228 Walnut Street
Newberry, South Carolina 29108

William Newsome, Esquire
J. David Black, Esquire
Nexsen Pruet
1230 Main Street, Suite 700
Post Office Box 2426
Columbia, South Carolina 29202-2426


Daisy F. Bonds

Dated: July 29, 2014

July 29, 2014

Columbia
Direct Dial (803) 576-3718
sbias@richardsonplowden.com

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: **Adele J. Pope v. Russell L. Bauknight, Individually, et. al.**
Appellate Case No.: 2014-00250
Our File No.: 101-2606

Dear Ms. Kitchings:

As counsel for the Respondent Russell L. Bauknight, Individually, I have enclosed for filing an original Initial Respondent's Brief as well as a Designation of Matter to be Included in the Record on Appeal in the above referenced matter, along with our original Certificates of Service for each. I have also enclosed two additional copies of our Initial Respondent's Brief and of our Designation of Matter and would request that these be file stamped and returned to our courier.

We are this day serving a copy of our Respondent's Initial Brief and Designation of Matter on Appellant and all counsel of record.

Thank you for your assistance in this matter.

Sincerely,



Sheila M. Bias
SC Bar # 100005

SMB/dfb

cc: Adele J. Pope, Esquire
William G. Newsome, III, Esquire
Frederick A. Crawford, Esq.

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