THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No: 2011-CP-26-1718
Appellate Case No.: 2014-001736

Bank of North Carolina, Successor in Interest to Beach First National Bank.....Respondent.

v.

Waterfall Investors 2, LLC and Raymond E. Cleary, III ..... Appellants,

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INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

In the Respondent's Brief, the Bank of North Carolina ("BNC") argues that (a) the Appellants did not property preserve two of its objections and reasons justifying its request for a new trial and (b) argues that contradictory evidence irrelevant to the elements of the causes of action should somehow be considered in the evaluation of unrefuted and uncontested testimony. As it relates to issue preservation, first, BNC argues that Appellants did not preserve its objection to BNC's use of highly prejudicial statements in closing arguments. Second, BNC argues that Appellants did not properly preserve its objection to the testimony of BNC's expert that was beyond the scope of his testimony as disclosed in discovery. As it relates to the existence of contradictory evidence, while it is true that contradictory evidence exists, there is no contradictory evidence on the negligence of BNC.

LEGAL ARGUMENT

I. The arguments made by Appellants are properly preserved for the Court of Appeals.

Respondent contends the Appellants arguments concerning the improper and prejudicial statements made in closing arguments and improper testimony by the expert witness are not preserved for this Court's review. Contrary to Respondent's position, South Carolina law provides that these arguments are properly preserved. The arguments made by Appellants were timely, properly asserted, and, though erroneously, ruled upon by the trial court all in accordance with South Carolina law. In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled upon by the trial court. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23–24, 602 S.E.2d 772, 779–780 (2004). Error preservation principles are intended to enable the

trial court to rule after it has considered all relevant facts, law, and arguments. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct.App.2004). The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. *Id.* Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide this Court a platform for meaningful appellate review. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372-73, 628 S.E.2d 902, 919 (Ct. App. 2006). The two arguments Respondent contends are not preserved were both timely raised and ruled upon by the Trail Court after having the ability to consider the relevant facts, law, and arguments. Thus, the Appellants have met all of the requirements so as to preserve the arguments made before this Court.

A. The Appellants objection to the use of the highly prejudicial statements made by Respondent and the request for new trial preserves the issue for this Court.

The Appellants properly preserved the issue of Respondent's improper conduct during closing arguments. Upon objection by the Appellants, the Trial Court ruled in Appellants favor that the objected to material was inadmissible and prejudicial. The Respondent's intentional and explicit mention of Dr. Cleary's purported annual income after the ruling so as to arouse prejudice in the jury was then argued as grounds for a new trial by the Appellants. The Trial Court ruled that the Respondent's actions were not grounds for new trial. As this issue was timely objected to, properly argued, and ruled upon by the Trial Court, the issue of whether the Respondent's improper conduct is grounds for a new trial is preserved.

South Carolina law runs contrary to the Respondent's assertions. The procedure to be followed when objection is taken to remarks of counsel is set forth in *Young v. Warr*, 252 S.C.

179, 165 S.E.2d 797 (1969):

> [T]he proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the court for a distinct ruling thereon.

252 S.C. at 200, 165 S.E.2d at 807. In this matter, the Respondent sought to admit specific misleading information regarding Dr. Cleary's wealth. Immediately upon the submission of such evidence, Appellant objected thereto. Trial Transcript p. 391. After hearing argument from both sides as to the admissibility of the evidence and in accordance with South Carolina law, the trial court explicitly held that "the figures themselves don't come in." Trial Transcript p. 401. Respondents' counsel, in order to clarify, asked

> Just to make sure [the Respondent's Counsel] compl[ies] with the Court's ruling, [Respondent's Counsel] can question [the witness] as to whether there was adequate liquidity and income and assets to make the loan, [they] just can't talk about ***the actual numbers***?

See Trial Transcript p. 402-403 (emphasis added). To which the trial Court responded in the affirmative. In direct contravention of the Court's ruling, the Respondent later stated to the jury that Dr. Cleary had an annual income "as high as $1 million." Not only were these statements factually incorrect, but legally improper. Further, if the clarification made by the Trial Court was not enough to make clear the ruling of the Court, the Respondent's review of the record prior to closing arguments with the sole purpose of reviewing this exchange should have reiterated the Trial Court's position of this being prejudicial and excluded. See Transcript of Hearing on Motion for New Trial or JNOV p. 24.

The Respondent's arguments regarding the necessity to strike are misguided. The prejudicial statements were improper for two reasons. First, the information was presented to the

jury through counsel's arguments in direct contradiction of what the Trial Court deemed proper evidence. *See South Carolina Dept. of Transp. v. Thompson*, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct.App.2003)("Arguments made by counsel are not evidence."); *O'Leary–Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 352, 638 S.E.2d 96, 102 (Ct.App.2006)("Closing arguments must be confined to evidence in the record and reasonable inferences therefrom."). Second, informing the jury of a person's net income is improper, and the prejudicial effect of doing so is self-evident. See *Branham v. Ford Motor Co.*, 390 S.C. 203, 241, 701 S.E.2d 5, 25 (2010). The Trial Court's later striking the inflammatory comments would have little impact on the resulting prejudice to the Appellants. As a general rule, the appellate courts do not require "futile acts" to preserve an issue for appeal. See, *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1993). Were the Respondent's argument in accord with South Carolina law, counsel would be encouraged to make inflammatory and improper statements to the jury, knowing that the recourse of opposing counsel is limited to an instruction to strike. South Carolina law is contrary to this position. The Supreme Court has found that the use of inadmissible evidence in closing arguments, denies the party a fair trial, and must result in a new trial as a matter of law. *Id.*, 390 S.C. 203, 241, 701 S.E.2d 5, 25 (citing *Scoggins v. McClellion*, 321 S.C. 264, 269, 468 S.E.2d 12, 15 (Ct.App.1996); see also *Sulton v. HealthSouth Corp.*, 400 S.C. 412, 734 S.E.2d 641 (2012).

Similarly, South Carolina courts have long held that "even in the absence of a contemporaneous objection, a new trial motion should be granted in flagrant cases where a vicious inflammatory argument results in clear prejudice." *South Carolina State Highway Dept. v. Nasim*, 255 S.C. 406, 179 S.E.2d 211 (1971). The Respondent erroneously cites to *Dial v.*

Niggel Associates, Inc., 333 S.C. 253, 509 S.E.2d 269 (1998) for the premise that such an exception is not applicable here. The present facts, however, present an even more clear reason why such a strict requirement to contemporaneously object is not required under South Carolina law. The facts discussed in Dial and its progeny applied to cases where inflammatory statements were made in closing without contemporaneous objection. Unlike those cases, however, the statements complained of here had been previously objected to and ruled as inadmissible. Thus, the Respondent's argument fails and South Carolina law provides that the issue has been preserved.

B. The Record is sufficient to preserve the Appellants' argument as to the Trial Court's error in permitting the Expert witnesses testimony.

The assertion by Respondent that the Appellants arguments concerning the appropriate nature of the testimony admitted by the Trial Court is not preserved is, similarly, without merit. It is well settled that an objection ought to be so distinctly stated that "the Court may at once see the point which it is called upon to decide." *Solley v. Weaver*, 247 S.C. 129, 131, 146 S.E.2d 164, 165 (1966). The object of an exception is to present some distinct principle or question of law which the appellant claims to have been violated by the Court in the trial of the case from which the appeal is taken, and to present it in such form that it may be properly reviewed. *Hewitt v. Reserve Life Ins. Co.*, 235 S.C. 201, 110 S.E.2d 852 (1959); *Fruehauf Trailer Co. v. McElmurray*, 236 S.C. 141, 113 S.E.2d 756 (1960). The South Carolina rules of evidence, however, only requires specificity where the ground for objection is not apparent from the context of the discussion contained in the record. Rule 103(a)(1), SCRE. The objection made and overruled by the Trial Court was made, in context, with enough specificity so as to bring into

focus that the Appellants were arguing the testimony should be excluded for the aforementioned reasons. Thus, the objection and argument based upon the improper ruling are preserved.

At trial, Appellants moved to exclude the expert testimony of Mr. Watson in regards to any matters outside of the scope of the description provided in pre-trial discovery, such as the Banks negligence relating to the review and later reliance on the appraisals. See Trial Transcript p. 492-496. Appellants argued they were not informed he would be used as an expert at trial in regards to the negligence of the bank and, therefore, were not afforded the right to depose the witness regarding such testimony. See Trial Transcript p. 492-496. Respondents countered that because they had indicated he would be an expert witness, allowing him to testify as an expert would not be a surprise to Appellants. They then argued in the alternative that the questions would fall within the scope of the discovery response. Appellants withdrew their objection with the understanding that any future testimony outside of the scope of the discovery responses would be objected to on the same grounds. See Trial Transcript p. 496. Later, upon the Respondent's seeking to have the complained of evidence admitted, the Appellants objected, specifically stating "I have to renew my objection." See Trial Transcript p. 504. After a sidebar, the trial court ruled Mr. Watson could testify as an expert on the unrelated matters due to Respondent listing him as an expert witness. And again later testimony outside of the scope of the disclosures was admitted after Appellants renewing his objection. See Trial Transcript p. 505. The court's ruling was an error and should have later resulted in the Court ordering a new trial.

The Respondent's contention that in order to preserve an objection counsel must reassert the exact same argument to the Trial Court for the previously stated grounds is unsound. The term "renew" should seem clear to most members of the bar so as to add context as to what was

being objected to. Even if the Respondent remains confused, the only party that must understand the objection and grounds for the objection under South Carolina law is the Trial Judge. See *Solley*, 247 S.C. 129, 146 S.E.2d 164. The Trial Court's side bar and later immediate ruling after the "renewed" objections makes clear its understanding. Similarly, Respondent, ignoring the Trial Court's order denying a new trial (drafted by Respondent) that directly addressed the present argument made by Appellants, now wishes to characterize the present argument as somehow different than the one being made at trial and on motion for new trial. As is evidenced by the context of the record of the pertinent trial testimony, the Judge was fully aware of the grounds for Appellants' objection to the evidence proffered. Thus, the argument is properly preserved.

II. The Appellants agree that contradictory evidence was presented at trial, though the relevance of the contradictory evidence is disputed.

The Respondent goes to great length to argue that contradictory evidence is common place at a trial and that such evidence's credibility is to be determined by the Jury. The Respondent fails, however, to acknowledge that the contradictory evidence presented was irrelevant to the elements of the causes of action and matters for the Jury to determine. The Respondent fails in its brief, as it did at trial, to present evidence that contradicted the negligence, fraudulent statements, misrepresentations, and bad faith of the Bank. Thus, under South Carolina law the Judge was required to grant the Appellants judgment notwithstanding the verdict.

The Respondent wishes to stress that Dr. Cleary had been a member of the Board of the Bank, but wishes to ignore that he was hand-picked by the very person he trusted to help him in this investment. The Respondent wishes to stress that Dr. Cleary was a knowledgeable investor

by nature of his experience with the Bank, but wishes to disregard his experience with the Bank when considering whether he, too, like the Bank, would consider the Appraisals as a viable method of verifying the condition of the property. The Respondent wishes to stress the fact that the Appraisal was ordered by the Bank for its use in protecting itself from a bad investment, but wishes to ignore the fact that it utterly failed to review said appraisal under its own policies or federal guidelines. The Respondent wishes to stress the fact that federal guidelines prohibit the Bank from providing a written term in its contracts regarding a contingency for a certain result in the appraisal, but wishes to ignore the fact that, in practice and as sworn to by the Banks officers and expert, such a contingency is generally understood and relied upon by the Bank. The Respondent wishes to stress that Dr. Cleary helped propose the Bank's policies regarding appraisals, but wishes to ignore Dr. Cleary's reliance that the Bank would follow those policies. The Respondent wishes to stress that Dr. Cleary testified that he knew a delineation by the Army Corps. of Engineers would be needed for a final delineation, but wishes to ignore the fact that Dr. Cleary and the Bank's witness testified Dr. Cleary lacked an understanding of the impact and believed he had some ability to have the delineation later changed. The Bank wishes to stress that Dr. Cleary was involved in a similar development involving wetlands, but wishes to disregard the fact that said development was contemporaneous with the devolvement at issue in this matter and was being developed by the same developer.

When all the facts are viewed, especially in the light most favorable to the Bank, the record shows Dr. Cleary had no experience in investing in developments dealing with commercial property with such extensive wetlands prior to these loans. When Dr. Cleary discussed the investment with Ms. Huntley, her discussion regarding the need for an appraisal

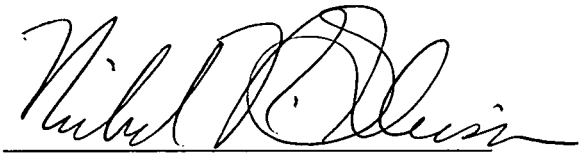
affirmed any experience he gained as a banking director and relying on verification by an appraisal company. Further, no evidence was presented that a reasonable person would not rely on such statements included in the appraisal. If anything, the Respondent presented copious evidence that all of the parties involved and the Bank's own expert would have done just as Dr. Cleary did. Further, the Respondent alluded to Dr. Cleary's ability to either get another appraisal or some other form of verification of the statements made by the Bank. Not only is such "evidence" not considered under an evaluation of due care, but the Banks own witnesses testified that they would not have independently verified the appraisal. *See Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005). Finally, Dr. Cleary's knowledge of the final delineation of the Property being done by the Army Corp of Engineers does not refute his testimony that he did not know how such a delineation occurred. Such a belief is reinforced by the fact that previous preliminary delineations had been performed and subsequent appraisers did not give credence to them or reference the necessity of a final delineation. Therefore, no material evidence was presented that Dr. Cleary did not act with due care.

Copious and unrefuted evidence was presented, however, that the Bank was negligent and acted in bad faith.

CONCLUSION

The trial court erred in not ordering a new trial or granting a judgment notwithstanding the verdict. The verdict of the jury was inadequate, inconsistent, reflected the jury's confusion, and was excessive. Similarly, the Jury's verdict was tainted by the use of excluded evidence in the Plaintiff's closing arguments and the Court's failure to exclude testimony by the Plaintiff's expert that was not disclosed prior to trial. Similarly, the action for comparative negligence was

improper. Not only was it legally incorrect and only served to confuse the jury, but the Respondent failed to produce any evidence of the Appellants own negligence. Thus, the trial judge's failure to grant a new trial based upon errors of law and conclusions of fact without evidentiary support is grounds for reversal. South Carolina law dictates that the Court erred in not using its discretion to grant a new trial and grant Appellants directed verdict. Finally, the Trial Court's granting of Plaintiff's motion for Attorney's Fees was also an abuse of discretion and should be reversed.

By: 

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