

AD

THE STATE OF SOUTH CAROLINA

In the Court of Appeals
Appellate Case No: 2014-001799

RECEIVED

JUN 03 2015

APPEAL FROM RICHLAND COUNTY

Civil Action No. 2011-CP-40-4111

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

Coastal Pi, LLC d/b/a Primarily Pi and James Bigby..... Respondents,

vs.

Danville Business Advisors, LLC and Marion D. Tubeville..... Defendants,

Of Whom Marion D. Turbeville is..... Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. The two issue rule does not bar the Court's consideration of the issue of whether Appellant is individually liable for unfair trade practices under S.C. Code Ann. § 33-44-303(a).

The South Carolina Supreme Court has described the "two issue rule" in detail as follows:

"Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal." *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.E.2d 472, 473-74 (1985). The "two issue" rule may be applied by appellate courts in a few situations. In one situation, when a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of action. See *Sierra v. Skelton*, 307 S.C. 217, 414 S.E.2d 169 (Ct.App.1991) (trial court's decision affirmed where jury returned a general verdict, and appellant only raised abuse of process issue, but failed to raise defamation issue). Under a second application of the "two issue" rule, the appellate court will find it unnecessary to address all the grounds appealed where one requires affirmance. See *Smoak v. Liebherr-America, Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984) (where case was presented to jury on negligence and breach of warranty causes of action, appellate court need not address breach of warranty exceptions if it finds that verdict was supported by the evidence under the theory of negligence).

These two applications of the "two issue" rule are illustrated in the following example: A case is submitted to the jury on the issues of defamation and invasion of privacy. The jury returns a general verdict for the plaintiff. The defendant appeals, arguing that the trial court erred by failing to direct a verdict on the defamation issue. Under one application of the "two issue" rule, an appellate court would affirm because defendant has failed to appeal the invasion of privacy issue as well. Assuming, however, that the defendant has appealed both issues, the appellate court would affirm on the basis of a second application of the "two issue" rule, if either of the two issues supported affirmance.

Anderson v. S. Carolina Dep't of Highways & Pub. Transp., 322 S.C. 417, 419-20, 472 S.E.2d 253, 254-55 (1996). The Anderson opinion notes that the two issue rule is applicable in cases involving trial court orders where the trial court directs a verdict on multiple claims and the appellant fails to appeal the ruling on one or more claims. *Id.* at 420, 472 S.E.2d at 255, n. 1.

Appellant filed a timely notice of appeal asserting that the trial court erred by denying Appellant's Motion to Dismiss *all claims* asserted against him in his individual capacity. Appellant's initial brief frames the first issue as follows: "Did the trial court err in denying Appellant's Motion to Dismiss claims against him individually arising from actions taken by Appellant in furtherance of the business of an LLC in which he is a member?"

As an initial matter, Respondents' assertion that Appellant failed to raise the issue of whether "an individual can be held liable under the UTPA for unfair trade practices he personally commits, participates in, authorizes or directs" is inaccurate. (Brief of Respondent at p. 11). Appellant argues based on S.C. Code Ann. § 33-44-303(a) that *all claims* and *all grounds for liability* against him individually, including Respondents' claim for violation of the South Carolina Unfair Trade Practices Act ("UTPA"), should have been dismissed. Under the plain language of S.C. Code Ann. § 33-44-303(a), Appellant is insulated from individual liability for actions taken on behalf of the LLC, including, but not limited to, liability for unfair trade practices in which he participates. Appellant asserts that "the trial court should have relied upon the plain language of S.C. Code Ann. § 33-44-303(a) and dismissed the claims against Appellant in his individual

capacity.” (Brief of Appellant at p. 11). Appellant asserts that the Court “should reverse Judge Cooper’s Order holding that Appellant is personally responsible for torts or unfair trade practices committed within the course and scope of his authority and in furtherance of Danville’s business.” *Id.*

The two issue rule does not require Appellant to appeal the trial court’s interpretation of *BPS v. Worthy*, 362 S.C. 319, 608 S.E.2d 160 (Ct. App. 2005) as it relates to claims for unfair trade practice against corporate directors. The trial court’s Order denying Appellants’ Motion to Dismiss states: “The ruling of the Supreme Court in *Jade Street I* and the ruling of this Court regarding an LLC member’s liability for his own torts ‘also has long been the rule with respect to shareholders and officers of corporations, an organizational structure from which LLCs borrow heavily.’” (May 14, 2014 Order, R. p. 12) (quoting *16 Jade St., LLC v. R. Design Constr. Co., LLC*, 398 S.C. 338, 348, 728 S.E.2d 448, 453 (2012)). The trial court’s reference and citation to *Worthy* in one sentence of its five page Order denying Appellant’s motion to dismiss merely supports this quoted reasoning in *Jade Street I* and is not essential to the trial courts’ ruling. Further, the trial court’s citation to *Worthy* does not require affirmance in light of the issues raised by Appellant in this appeal.

Appellant properly raised to the trial court and in his initial brief the issue of whether he is individually liable under the UTPA. If the Court rules in Appellant’s favor, all grounds for liability against him will be extinguished; therefore, the two issue rule is inapplicable.

II. **Appellant properly preserved and raised the issues pertinent to this appeal in his initial brief.**

Rule 208(b)(1)(B) SCACR states:

Statement of Issues of Appeal. A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

Rule 208, SCACR requires Appellant to state the "issues presented for review." Appellant complied with the requirements of Rule 208, SCACR by raising in his initial brief the issue of whether he is immune from personal liability for torts and unfair trade practices under S.C. Code Ann. § 33-44-303(a).

Rule 208 SCACR does not require Appellant to appeal the decision of the trial court to deny his motion for directed verdict. Appellant's motion for directed verdict with respect to Appellant's individual liability under the UTPA was based on the same ground as his prior motion to dismiss: that Appellant is not personally liable under the language of S.C. Code Ann. § 33-44-303(a). In her oral ruling denying Appellant's directed verdict motion, Judge Lee merely adopted Judge Cooper's earlier findings and conclusions of law set forth in his Order denying Appellants Motion to Dismiss. Judge Lee ruled:

I did look at Judge Cooper's order in which he found basis to follow the rational[e] that was set forth by the Supreme Court in the 2012 Jade Street case, finding that it was not the legislative intent to exclude or shield an individual from personal liability for torts that were specifically committed even in light of the statutory framework. And so I'm leaving that as the law of the case and as it relates to his order in the motion to dismiss the claim. I'm not going to be inconsistent in going forward at this particular point.

(Trial Transcript at p. 318, Supp. R. at p. 4-5). Thus, the grounds for Judge Lee's ruling and her decision to submit the matter of Appellant's individual liability to the jury for its consideration were raised by Appellant in his initial brief.¹

Further, none of the cases cited by Respondents stand for the principle that a party must appeal the denial of a directed verdict motion based upon another judge's prior ruling on a motion to dismiss. See *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that an appeal was procedurally barred by the two issue rule where the appellant appealed the master's judgment on the respondents' negligent misrepresentation and breach of contract claims, but not the unjust enrichment claim); *State v. Dunbar*, 356 S.C. 138, 142-143, 587 S.E.2d 691, 693 (2003) (holding that the appellant failed to present the issue to the trial court for a ruling and therefore failed to preserve the issue); *State v. Prioleau*, 345 S.C. 404, 412, 548 S.E.2d 213, 216 (2001) (holding that the appellant failed to present the issue to the trial court and therefore failed to preserve the issue); *Wright v. Craft*, 372 S.C. 1, 21, 640 S.E.2d 486, 497 (Ct. App. 2006) (holding that the appellant failed to raise estoppel as an affirmative defense and failed to raise the defense to the trial court for a ruling such that the issue was not preserved for appellate review); *Barnes v. Cohen Dry Wall, Inc.*, 357 S.C. 280, 287, 592 S.E.2d 311, 314, n. 11 (refusing to consider an argument made at oral argument that was not raised in the initial brief).

¹ Appellant did not move for judgment notwithstanding the verdict as indicated by Respondents.

Appellant preserved the issue of his liability for all claims against him individually by raising the issue to the trial court and obtaining a ruling on it. See *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (holding that “issue preservation requires that an issue be raised to and ruled upon by the trial judge”). Appellant filed a timely notice of appeal asserting that the trial court erred in denying Appellant’s Motion to Dismiss him from this case prior to trial. Respondents’ argument that Appellant failed to comply with Rule 208, SCACR and that Appellant waived his right to be heard on the issue raised in his initial brief is unavailing.

III. Respondents will not be prejudiced by the Court’s consideration of the issues Respondents allege that Appellant failed to raise in his initial brief.

“When an issue is not specifically set out in the statements of issues, the appellate court may nevertheless consider the issue if it is *reasonably clear* from an appellant’s arguments.” *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. Further, the South Carolina Court of Appeals has recognized that a technical failure to comply with Rule 208, SCACR by failing to raise the issue of the trial court’s denial of a directed verdict motion in an initial brief is not fatal to an appeal. See *State v. Wakefield*, 323 S.C. 189, 473 S.E.2d 831 (Ct. App. 1986). In *Wakefield*, the appellant filed an initial brief raising the following issue: “The State failed to prove beyond a reasonable doubt that Wakefield committed the crime of distributing crack cocaine.” *Wakefield*, 323 S.C. at 190, 473 S.E.2d at 832. The appellant then filed a reply brief in which he raised the issue of whether the trial court properly denied his motion for directed verdict. *Id.* at 191, 473 S.E.2d at

832. This Court held that “[t]echnically, Wakefield’s Issue (1) in his reply brief should not be considered on appeal because all issues must be argued in initial briefs.” *Id.* at 191, 473 S.E.2d at 832 (citing Rule 207(b)(1)(B), the predecessor rule to current Rule 208(b)(1)(B)). “However, since the State addressed the denial of Wakefield’s motion for a directed verdict and was not prejudiced by the revision in the reply brief, the Court addresses the merits of this issue.” *Id.* at 191, 473 S.E.2d at 832.

Based on the holding of this Court in *Wakefield*, even if the Court finds that Appellant did not “technically” raise the issue of whether Judge Lee erred in denying the directed verdict motion or submitting the question of Appellant’s personal liability to the jury, the Court should not refrain from ruling on the issues Respondents contend in their initial brief that Appellants failed to raise. Respondents are not prejudiced by this Court’s consideration of these issues, which are: (1) whether an individual can be liable under the UTPA for unfair trade practices he personally commits, participates in, authorizes or directs; (2) whether the trial court erred in denying Appellant’s motion for directed verdict on the ground that Appellant is not personally liable for torts or unfair trade practices under S.C. Code Ann. § 33-44-303(a); (3) whether the trial court erred in charging the jury that Appellant may be deemed personally liable for torts or unfair trade practices; and (4) whether the trial court erred in relying upon Worthy in support of its ruling that S.C. Code Ann. § 33-44-303(a) does not insulate Appellant from personal liability for his torts and unauthorized trade practices. To the extent that the Court concludes these issues were not raised in Appellant’s

initial brief, the Court should consider them based on the holding in *Wakefield* because these issues were raised by Respondents in their brief and Respondents will not be prejudiced by the Court's consideration of them.

CONCLUSION

For the foregoing reasons, the Court should proceed to oral argument and should not affirm the decision of the trial court based upon Respondents arguments in their initial brief.

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June 3, 2015

Columbia, SC

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge
Alison Renee Lee, Circuit Court Judge

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APPELLATE CASE NO.: 2014-001799

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vs.

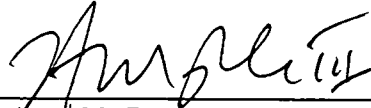
Danville Business Advisors, LLC and Marion D. Turbeville.....Defendants,

Of Whom Marion D. Turbeville is.....Appellant.

PROOF OF SERVICE

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that on the 3rd day of June 2015, I served the Appellant's **Reply Brief** upon counsel of record by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

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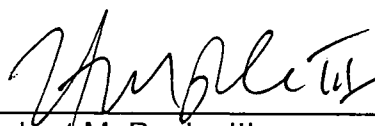
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Of Whom Marion D. Turbeville is.....Appellant.

PROOF OF SERVICE

I, Robert M. Peele, III, an attorney of Dougall & Collins, attorney for Appellant, Marion D. Turbeville do hereby certify that on the 3rd day of June 2015, I served the Appellant's **Reply Brief** upon counsel of record by depositing copy of the same in the U.S. Mail, postage prepaid, and addressed as follows:

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June 3, 2015

Columbia, South Carolina

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Of whom Marion D. Turbeville is Appellant.

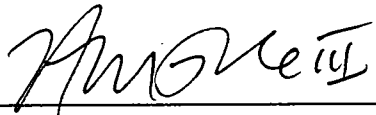
**APPELLANT'S DESIGNATION OF MATTER
TO BE INCLUDED IN THE SUPPLEMENTAL RECORD ON APPEAL**

Appellant propose the following to be included in the Record on Appeal

1. Trial Transcript pages 316-319

I certify that this designation contains no matter which is irrelevant to this appeal.

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