IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Case No. 2014-CP-26-2463

Donna Jensen, ... Appellant,

v.

Matthew B. Wiseman and Peoples Underwriters, Inc., ... Respondents.

[INITIAL] REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUE IN REPLY BRIEF

1. **NEITHER THE TWO-ISSUE RULE NOR ERROR PRESERVATION PREVENTS THIS COURT FROM REDRESSING THE TRIAL COURT'S ERROR IN GRANTING SUMMARY JUDGMENT BECAUSE IT IS CLEAR FROM BOTH THE TRANSCRIPT OF THE PROCEEDINGS AND THE COURT'S WRITTEN ORDER THAT SUMMARY JUDGMENT WAS GRANTED BECAUSE THE TRIAL COURT WAS CONVINCED APPELLANT DID NOT HAVE AN INSURABLE INTEREST IN THE DAYCARE VANS AND THAT APPELLANT'S ARGUMENTS ARE PRESERVED**

ARGUMENT

I. Neither the two-issue rule nor error preservation bars Appellant's appeal in this case because it is clear from both the transcript of record and the written Order that summary judgment was granted for one reason and one reason only, i.e. because the trial judge believed Appellant did not have an insurable interest in the daycare vans and that Appellant's arguments are preserved.

Respondents claim that the two-issue rule precludes this Court from considering Appellant's appeal because, according to Respondents, "Jensen has failed in her initial brief to address each of the three grounds supporting summary judgment as set forth in the Circuit Court's order." (Respondent's Initial Brief, p. 6) To accept this argument would be to ignore the fact that the trial judge granted summary judgment solely because Appellant failed to produce evidence that the daycare vans were titled in her name and, thus, she had no insurable interest. This is crystal clear from the arguments during the motion hearing as well as the written order.

While Respondents complain in their brief that Appellant unnecessarily criticizes the trial judge for the manner in which this issue of insurable interest was injected into the case, a thorough examination of the procedural background was essential to convey to this Court the unfairness of the position in which Appellant's counsel was placed. The issue of insurable interest had never been raised by Respondents nor was it even mentioned in Respondents' motion for summary judgment. It was not brought up during the initial arguments on Respondents' motion for summary judgment before The Honorable Larry Hyman. The trial judge here raised this issue herself and even

acknowledged on the record that it was "a bit of a bombshell." (Transcript of Record of Summary Judgment Motion, p. 22, lines 21-23). She also noted that, but for this one issue -- an issue raised by her on the morning of the trial – the Appellant would have survived summary judgment. (Id., at p. 45, line 20; p. 46, line 4). Appellant has nothing but respect for the courts of this state, but it was critical to her argument that the manner in which this issue of insurable interest arose be thoroughly discussed.

It is also exceedingly clear from the written order that its holding was permeated by the issue of insurable interest. That issue and that issue alone drove the trial court's holding that Appellant could not prove the elements of her claim for negligence. Despite Respondents' effort to characterize the trial court's order as granting summary judgment on multiple grounds, it is readily apparent that the court granted relief to Respondents on one ground and one ground only, i.e., that Appellant had not shown she had an insurable interest in the subject matter of the insurance policy at issue.

While Respondents attempt to posit that the trial court granted summary judgment on more than one ground, this is simply not so. The perceived lack of an insurable interest by Appellant was the reason the court found Appellant could not prove the elements of negligence against Respondents. While that is absolutely clear from the colloquy between the court and the attorneys during the summary judgment hearing, it is also evident from the written order itself. In the Discussion section of her Order, the trial court stated in bold under Subsection A: "There is No Evidence to Support a Claim that Defendants Owed a Duty to Jensen individually." (Order Granting Summary Judgment, p. 4). On the following page, this statement is found: "The Court, in viewing the facts in

the light most favorable to the plaintiff, inquired at the June 23, 2015 hearing as to whether there was any evidence in the record that Jensen had an insurable interest." (Id., p. 5) As noted more fully in Appellant's Initial Brief, this question was, indeed, at the forefront of the trial court's mind and explains why she *sua sponte* raised this issue during the hearing on the motion for summary judgment. On page six of her Order, the trial court states: "The only evidence in the record is that Defendants were asked to place commercial policies for the daycare, not Jensen individually." (Id., at p. 6) Thus, because the Appellant failed to present evidence to support a claim that the Respondents owed her a duty, the trial court held that her claim failed "as a matter of law." (Id.)

This section of the trial court's order is followed by Subsection B, which holds that there was no evidence to support the claim that the Respondents breached a duty to Appellant individually. Subsection C of the trial court's Order declares that *Trotter v. State Farm Mutual Automobile Insurance Company*, 297 S.C. 465, 377 S.E.2d 343 (Ct. App. 1988) is the controlling law in this State rather than the case which Appellant contended was dispositive, *Riddle-Duckworth, Inc. v. Sullivan,* 253 S.C 411, 171 S.E.2d 486 (1169). The balance of the trial court's Order concerns whether there was any evidence, express or implied, that Respondents undertook to advise Jensen individually as to her insurance needs, discussing again the law as articulated in *Trotter*. Appellant argued against that proposition of law at the motion hearing and has continued to assert the applicability of *Riddle-Duckworth* on appeal.

Finally, in the Conclusion section of the Order, the trial court stated: "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's claims

against Defendants be dismissed as a matter of law because she has not satisfied the elements of her negligence claim." (Order Granting Summary Judgment, p. 13) The reason the trial court believed that Appellant could not survive summary judgment was because she lacked an insurable interest. That one notion—the brainchild of the trial court herself—infected every part of the trial court's decision. To suggest that the two-issue rule somehow bars this Court from hearing Appellant's appeal is disingenuous.

The two-issue rule is a procedural tool which is sparingly used by appellate courts in resolving cases. The most familiar application of the rule is when the jury returns a general verdict involving two or more issues that its verdict is supported as to at least one issue; in that event, the rule is applied to uphold the verdict on appeal. *Gasque v. Heublein*, 281 S.C. 278, 281, 315 S.E.2d 556, 558 (Ct. App. 1984); *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 287 S.C. 190, 193, 336 S.C.2d 472, 473-474 (1985); *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900 (2010). This situation is not applicable here, where the case was ended at the summary judgment stage. However, under a second application of the two-issue rule, an appellate court will find it unnecessary to address all the grounds appealed where one ground requires affirmance. *Smoak v. Liebherr-Amer., Inc.*, 281 S.C. 420, 315 S.E.2d 116 (1984).

These two applications of the rule are the only ones sanctioned by the appellate courts in this state. See *Anderson v. South Carolina Dept. of Highways and Public Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996) (rejecting an "unusual application" of the two-issue rule as "undesirable.") *Graves v. Horry-Georgetown Technical College*, 391 S.C. 1, 8, 704 S.E.2d 350, ___ (Ct. App. 2010) (refusing to accept

the contention that affirmation was required under the two-issue rule because the plaintiff failed to appeal an ancillary issue which was a basis for the directed verdict where it was clear the trial court based its ruling upon procedure rather than evaluating the sufficiency of the evidence.)

It is inescapable from an examination of the record of the summary motion hearing and the written order that the *sole* reason the trial court granted summary judgment to Respondents was her belief that Appellant had no insurable interest in the daycare vans. This was erroneous because since the issue of insurable interest had never been raised by Respondents, Appellant did not realize it was something she had to prove. When Appellant's counsel sought to be permitted to introduce evidence on this issue, he was thwarted at every turn by the trial court. Applying the two-issue rule here to preclude this Court's consideration of the issues raised by Appellant would produce an unfair and undesirable result similar to that mentioned by the Supreme Court in *Anderson*. Moreover, just as this Court noted in *Graves*, the two-issue rule should not apply where it is clear from "the arguments presented, the lengthy discussion [of the pivotal issue], and the trial court's explanations, . . . [that] the trial court based its ruling upon procedure and did not evaluate the sufficiency of the evidence." *Graves*, 391 S.C. at 9.

In addition to erroneously asserting that the two-issue rule bars Appellant's first argument, Respondents also argue that the second issue which Appellant raises on appeal—that the trial court erred in granting summary judgment to Respondents because more than a scintilla of evidence exists that Wiseman was negligent in failing to ascertain

that at least one of the vehicles in question was, in fact, titled in Appellant's name—was not raised to the trial court and is, therefore, unpreserved on appeal. This is incorrect as the written order clearly shows this issue was before the trial court.

In Subsection C of the trial court's Order, the court pronounced: "*Trotter v. State Farm Mutual Automobile Insurance Company* . . . is the controlling law in this case." (Order Granting Summary Judgment, p. 8) A footnote at the end of the sentence clearly states that Appellant contended that *Riddle-Duckworth* should control. This is exactly the same argument that Appellant raises in its second argument in its brief, so Appellant is somewhat mystified that Respondents even make this preservation argument.

Issue preservation is a fundamental concept of appellate practice. Rules of preservation go hand-in-hand with the principle that the purpose of an appeal is to determine whether the trial judge erred, and when an appellant's contentions are not presented to the trial judge, such contentions will not be considered on appeal. See Jean Hoefer Toal, Amelia Waring Walker & Margaret E. Baker, Appellant Practice in South Carolina, p. 183-184 (3d Ed. 2016). Error preservation "prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and via a reversal, give him another opportunity to prove his case. (Id.)

Appellant submits that no one who reads the transcript showing how this issue of insurable interest was injected into the case and the ensuing efforts by Appellant's counsel in attempting to adduce proof of the state of the title so as to survive summary judgment could ever think that Appellant's counsel was attempting to hold an ace card up

his sleeve. Indeed, counsel was surprised when insurable interest suddenly became a pivotal issue in the case and merely wanted to be able to introduce evidence to show that his client did, indeed, have an insurable interest. Instead of permitting him to do so, the trial court compounded her error by reversing the burden of proof and denying counsel's every attempt to prove this heretofore uncontested fact. To apply error preservation here would not only be wrong, because the trial court order clearly shows this issue was before the trial court, it would actually turn the purpose of error preservation on its head.

CONCLUSION

For the reasons stated in her Initial Brief and herein, Appellant requests this Court to reverse the granting of summary judgment and remand the case for a trial on the merits.

Respectfully submitted,

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Dated: August 26, 2016

IN THE STATE OF SOUTH CAROLINA
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Diane Schafer Goodstein, Circuit Court Judge

Case No. 2014-CP-26-2463
Appellate Case No. 2015-002095

Donna Jensen .....Appellant,

v.

Matthew B. Wiseman and Peoples Underwriters, Inc. .....Respondents.

PROOF OF SERVICE

I, Allison Lazar, do hereby certify that I am an employee of THE BRITTAIN LAW FIRM, P.A., attorneys for the Appellant Donna Jensen in the above-entitled action, and that I have this 26th day of August 2016, caused to be served upon the following parties the **[Initial] Reply Brief of Appellant** by depositing a copy of same in the United States Mail, with sufficient first class postage affixed thereto, addressed as follows:

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SWORN AND SUBSCRIBED before me
this 26th day of August, 2016.

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August 26, 2016

Via FedEx
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Appellate Case No. 2015-002095

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I would appreciate your returning a clocked-in copy of the Reply Brief and Proof of Service to our office in the enclosed envelope.

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