THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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SC Court of Appeals

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2017-000884

Deutsche Bank National Trust Company, as Trustee on Behalf of the Certificateholders of Morgan Stanley ABS Capital I Inc. Trust 2004-NC8 for Mortgage Pass Through Certificates, Series 2004-NC8,.....Respondent,

v.

James T. Burr a/k/a James Burr and Grand Strand Water & Sewer Authority, Defendants,

Of Whom James T. Burr a/k/a James Burr is.....Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. **Did the lower court err in granting summary judgment and disregarding Rule 43(l), SCRCP, where a motion seeking summary judgment had previously been denied and there had been no material change to the factual record before the court?**

II. **Did the lower court err in granting summary judgment where there was a genuine issue of material fact about whether the Respondent undertook and then breached an obligation to enter into a new contract to replace the one subject of the Respondent's case?**

ARGUMENT

In its effort to convince the court to affirm, the Respondent's brief stretches too far. The Respondent's brief misapprehends the record and ignores aspects of this case.

I. Appellant never "conceded" the lack of a genuine issue of material fact.

At several points in its brief, the Respondent contends that Appellant's counsel admitted that there was no genuine issue of material fact in this case. No such concession was ever made. The Respondent is trying to take a different statement by Appellant's counsel – that the discovery responses produced did not contain additional information beyond what was in the Appellant's affidavit – and turn it into something it was not. The colloquy between Appellant's counsel and the court about this shows that the "concession" the Respondent would have this court perceive is not one that was made by Appellant's counsel. (R. pp. ___; transcript p. 10 ln. 3 through p. 13 ln. 8.) Appellant's counsel agreed that the discovery responses to not contain new factual material relevant to the summary judgment motion (R. pp. ___; transcript p. 10 ln. 2-12). Appellant's counsel then noted that "there was a meeting of the minds and an agreement" to refinance that created a novation, "but that was not carried out by the plaintiff in this case or their servicer to allow for him to get to the point at which those documents could be signed[,]" (R. pp. ___; transcript p. 10 ln. 25 through p. 11 ln. 5), and Appellant's counsel then continued to argue that the Appellant's affidavit tends to show that there was a novation, an agreement to replace the mortgage loan with a new one, and that the Respondent failed to perform under it, thus showing that there is at least a scintilla of evidence that precluded a proper grant of summary judgment.

Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-3 (2009).

II. The two-issue rule does not bar Appellant from success on appeal.

"Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." Wofford v. City of Spartanburg, 415 S.C. 152, 157, 781 S.E.2d 146, 149 (Ct. App. 2015) (quoting Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). The Respondent argues that the two-issue rule bars Appellant's appeal as to his claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"), saying that Appellant did not challenge the lower court's ruling that Appellant "failed to produce evidence on the Unfair Trade Practice claim." (Initial Brief of Respondent p. 15.) The Respondent misses the point of Appellant's main argument in this appeal. As shown by the Appellant's affidavit, the parties had agreed on all material terms of an agreement to refinance the subject loan, given that it had progressed to the stage at which it was about to be closed, and the Appellant performed all of his obligations under the agreement to refinance until the Respondent insisted on performing unlawfully by refusing to have the refinance closed by an attorney, in violation of the public policy of this state as noted in State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), and its progeny. (R. pp. ___; amended answer and counterclaim; affidavit of Burr.) An action for violation of the UTPA lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the party asserting the claim. See, e.g.,

Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). The refusal to lawfully perform the agreement and have it closed in compliance with the law *is* the violation of the UTPA, and the Appellant has appealed the ruling that said that did not occur.

The Respondent makes a similar argument about the accounting claim. In actions involving long and complicated accounts, an accounting may be warranted. See Rogers v. Salisbury Brick Corp., 299 S.C. 141, 382 S.E.2d (1989). The refusal to take the necessary steps to implement the refinance agreement complicated this long account. Appellant appeals the ruling that such refusal did not occur.

III. Appellant's Rule 43(l) argument is preserved.

The Respondent argues that Appellant did not preserve his argument about Rule 43(l), SCRCP, for appeal. That is not correct.

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delecti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530 S.E.2d 137 (Ct. App. 2000), *overruled on other grounds by* State v. Liverman, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). And, indeed, the Respondent does not contend that Appellant's counsel did not note this argument to the lower court at the motion hearing – since he plainly did, in language the Respondent quotes in its brief. The Respondent, rather,

argues that by stating that "we're ready today to argue the law concerning whether there is an issue of material fact on those remaining counterclaims" the Appellant has somehow given up or undone his argument about Rule 43(l). (R. pp. ___; transcript p. 17 ln. 20-22.) By noting to the court that he was ready to argue about the merits of the factual record, Appellant was not conceding away the Rule 43(l) argument he had just made. The Respondent cites no authority in support of such a proposition. Indeed, there is none. Appellant's counsel simply did something lawyers routinely do: he made alternative arguments. Cf. Burnsed v. Greene, 291 S.C. 59, 351 S.E.2d 910 (Ct. App. 1986) (party is entitled to raise alternative claims); Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (Ct. App. 1986) (same).

Appellant's Rule 43(l) argument, raised at the motion hearing and in his motion to reconsider, is preserved for review. (R. pp. ___; motion to reconsider p. 4-5; transcript p. 16 ln. 12 through p. 17 ln. 2.)

IV. It is the Respondent that argues an absurd reading of Rule 43(l).

The Respondent argues that since the *same* judge heard and denied a summary judgment motion on a factual record that had not undergone any material change, Rule 43(l) does not apply, so the lower court could issue two different rulings on what was the same motion. The straitened reading of this rule proposed by the Respondent contravenes settled principles of statutory construction.

Court rules are construed like statutes. See Beach Co. v. Twillman, Ltd., 351 S.C. 56, 61, 566 S.E.2d 863 (Ct. App. 2002). Even "regardless of how plain the ordinary meaning of the words in a statute, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended

by the General Assembly. If possible, the Court will construe a statute so as to escape the absurdity and carry the intention into effect. In so doing, the Court should not concentrate on isolated phrases within the statute, but rather, read the statute as a whole and in a manner consonant and in harmony with its purpose." Duke Energy Corp. v. S.C. Dept. of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (internal citations omitted).

The unduly restrictive reading of Rule 43(l) urged by the Respondent would lead to an absurd result. Under the Respondent's interpretation, a party could make the identical motions on the same set of facts over and over and over, losing until he ultimately wins, as long as those motions are ruled upon by the same judge. That is a waste of the judiciary's time and only undercuts the public interest in a decision's finality.

Further, it is also inconsistent with what our state's case law on this rule has said to be the purpose of Rule 43(l). Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67, 70 (2008). "The rule requires a different 'set of facts'" for a court to hear a summary judgment motion where a motion seeking the same summary judgment has been previously denied. Id. And *that* is what was not before the lower court in this case.

CONCLUSION

The lower court erred in granting the summary judgment sought by the Respondent. The Appellant is entitled to reversal and remand.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the foregoing initial reply brief of appellant by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

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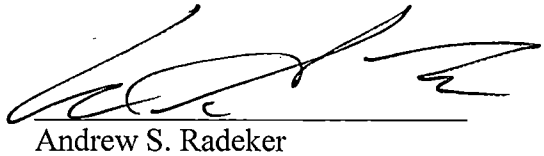
November 6, 2017



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