

RECEIVED

May 18 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001183

Joe Clemons,..... Appellant,

v.

Peggy H. Pinnell Agency, Inc., Peggy H. Pinnell Insurance Agency Inc.,
State Farm Life Insurance Company, (jointly and severally liable),
..... Respondents.

**MOTION TO DISMISS
AND IN THE ALTERNATIVE
REQUEST FOR APPELLANT TO AMEND
THE RECORD ON APPEAL**

WHELAN MELLEN & NORRIS, LLC

By: s/Charles R. Norris
Charles R. Norris
SC Bar No. 004238
E-Mail: charles@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondents

Charleston, South Carolina

May 18, 2022

Respondents, Peggy H. Pinnell Insurance Agency Inc.¹ and State Farm Life Insurance Company, file this Motion to Dismiss, or in the alternative request the Appellate Court to require Appellant, Joe Clemons, to file an Amended Record on Appeal that complies with the Appellate Court Rules. Respondents further move to dismiss the appeal on the grounds that neither Appellant's Record on Appeal nor his Briefs set forth any error of law by the lower court.

Respectfully submitted,

WHELAN MELLEN & NORRIS, LLC

By: s/ Charles R. Norris

Charles R. Norris
S.C. Bar No. 004238
E-Mail: charles@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondents

Charleston, South Carolina

May 18, 2022

¹ There is only Peggy H. Pinnell Insurance Agency, Inc.

RECEIVED

May 18 2022

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001183

Joe Clemons,..... Appellant,

v.

Peggy H. Pinnell Agency, Inc., Peggy H. Pinnell Insurance Agency Inc.,
State Farm Life Insurance Company, (jointly and severally liable),
..... Respondents.

**MEMORANDUM IN SUPPORT OF RESPONDENTS’
MOTION TO DISMISS
AND IN THE ALTERNATIVE
REQUEST FOR APPELLANT TO AMEND
THE RECORD ON APPEAL**

WHELAN MELLEN & NORRIS, LLC

By: s/Charles R. Norris
Charles R. Norris
SC Bar No. 004238
E-Mail: charles@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondents

Charleston, South Carolina

May 18, 2022

FACTUAL BACKGROUND

Joe Clemons (“Clemons”) filed this action on February 15, 2019, against his insurance company State Farm Life Insurance Company, along with Peggy H. Pinnell Agency, Inc., and Peggy H. Pinnell Insurance Agency, Inc.² (generally and collectively herein “Defendants”) for Breach of Contract, Breach of Fiduciary Duty, Negligence, Negligent Misrepresentation, Fraud, Constructive Fraud, Civil Conspiracy, and violation of the UTPA. *See generally*, (Pl.’s Compl.) Defendants timely filed an Answer on March 20, 2019. *See generally*, (Def.’s Ans.)

On January 11, 2021, Judge Roger Young denied Clemons’ motion to amend the complaint. (Jan. 11, 2021 Trans. p. 11, line 1-15.) On April 16, 2021, Clemons filed a motion to obtain audio of the January 11, 2021 hearing with Judge Young, which was denied by Judge Bentley Price. (Pl.’s Mot. Obtain Audio of Jan. 11, 2021 Hearing.) A trial by jury was held on August 23 and 24, 2021. (Trial Trans. p. 1, line 12, p. 231, line 12.) After Clemons rested his case in chief, without testifying, Defendants moved for a directed verdict, which Judge Jennifer McCoy granted on all causes of action. (Trial Trans. p. 330, lines 20-3.) Clemons’ filed a notice of appeal on October 18, 2021.

² There is only Peggy H. Pinnell Insurance Agency, Inc.

ARGUMENT

I. **Clemons' Appeal Should be Dismissed Because Clemons Failed to Set Forth Any Error of Law by the Lower Court in His Briefs.**

The Court of Appeal has found, “(1) an appellant may not use the reply brief to argue issues not argued in his brief in chief; and (2) an issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.” *Fields v. Melrose Ltd.*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 n.3 (Ct. App. 1993). An appellate brief must set forth an issue and then discuss it with citations to authority or the issue is not preserved for appeal. *Parker v. Shecut*, 340 S.C. 460, 483, 531 S.E.2d 546, 558 (Ct. App. 2000); *see also Shapemasters Golf Course v. Shapemaster, Inc.*, 360 S.C. 473, 480, 602 S.E.2d 83, 87 n.4 (Ct. App. 2004) (When a party fails to provide arguments or supporting authority for his assertion, the party is deemed to have abandoned the issue).

It is unclear from Clemons' Initial Brief what errors of law were committed by the trial court. Both issues Clemons raised in his initial brief are only supported by a one sentence conclusory statement. Clemons has failed to demonstrate how “it was error for the court to deny him the right to have the jury evaluate the evidence presented and render a verdict,” or how “it was error... to proceed to trial without conducting a thorough review of the transcript audio upon his request.” Clemons' initial brief and his reply brief cite no law that would demonstrate the trial court made an error of law, nor does Clemons provide any evidence that would demonstrate an error of law. Thus, Clemons' issues should be deemed abandoned on appeal and not present for review.

Accordingly, Clemons' Appeal should be dismissed because he has failed to set forth any error of law by the lower court.

II. Clemons' Appeal Should be Dismissed Because the Record on Appeal Does Not Set Forth Sufficient Facts for The Appellate Court to Determine if an Error was Committed by the Trial Court.

The appellant has the burden of providing the Appellate Court with a sufficient record upon which the Court can make its decision. *Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983). The Appellate Court is confined to the appellate record in reviewing a judgment for error. *Cartee v. Lesley*, 286 S.C. 249, 255, 333 S.E.2d 341, 345 (Ct. App. 1985); *see also* Rule 210(h) (“[T]he appellate court will not consider any facts which does not appear in the Record on Appeal.”). The appellant must include all that is necessary to enable the Appellant Court to decide whether the ruling complained of was erroneous. *Smith v. South Carolina Dept. of Soc. Serv.*, 284 S.C. 469, 471, 327 S.E.2d 348, 349 (1985).

The court must not “[g]rope in the dark[] in order to identify errors which in actuality may not exist. Such a predicament has often been deplored by our State’s highest court and used by the tribunal as a basis for the dismissal of the appeal.” *Id*; *see also Hamilton v. Greyhound Lines East*, 281 S.C. 442, 444, 316 S.E.2d 368, 369 (1984) (Appellant failed to present a sufficient record for the court to make an intelligent review. There was simply nothing before the court for the court to conclude the trial court should be reversed and the appeal was dismissed).

Without a transcript of the trial, an appellant is unable to carry his burden of establishing on appeal any claim the lower court’s findings were erroneous. *Cox v. Frierson*, 311 S.C. 528, 529, 429 S.E.2d 866, 867 n.1 (Ct. App. 1993). In *Pawley’s Island Civic Association v. Johnson*, the issue on appeal involved a motion for directed verdict and the court found it was not improper to include all of the trial testimony. 292 S.C. 208, 210, 355 S.E.2d 541, 542 (Ct. App. 1986). The appellant cannot claim error in the ruling for a directed verdict motion where no such motion is in

the Record on Appeal. *Williams v. Moore*, 400 S.C. 90, 105, 733 S.E.2d 224, 231-32 (Ct. App. 2012).

Moreover, where a record only contains a form order by the circuit court and does not state the reason the court granted the motion and the record does not contain the proceedings in the circuit court, the court must assume the regularity of the proceeding below and the correctness of the ruling appealed from. *Vespazianni v. McAlister*, 307 S.C. 411, 412-13, 415 S.E.2d 427, 428 (Ct. App. 1992).

Clemons failed to meet his burden of providing the Appellate Court with a sufficient Record on Appeal upon which the Court may make its decision. Clemons failed to include all that is necessary to enable the Appellate Court to decide whether the ruling he complains of were erroneous. The only matters properly included in the Record on Appeal are the Complaint, the Answer, Clemons' April 16, 2021 Motion to obtain audio of the July 11, 2021 hearing, and Clemons' February 16, 2021 Motion for Relief from Judgment. Therefore, there is simply nothing before the Court to conclude the trial court committed an error of law.

As stated above the Court has found it proper to include the entire trial transcript when appealing a motion for a directed verdict. Clemons failed to include any portions of the transcript from the trial. Without the trial transcripts the Appellate Court is unable to determine if the lower court's grant of the Defendants' directed verdict motion was proper. Clemons has attempted to include in the Record on Appeal Judge McCoy's Form Order Granting the Defendants' Motion for a Directed Verdict. However, as argued below, Clemons did not include this order in his Designation of Matter. Even if Clemons would have included Judge McCoy's order in his designation of matter to be included in the Record on Appeal, the Form order does not specify Judge McCoy's reasoning for granting the Defendants Motion for a Directed Verdict and,

therefore, the trial transcript would be necessary to determine if Judge McCoy committed any errors in granting the Defendants' directed verdict.

Clemons also attempt to include Judge Price's orders denying Clemons' request to review the audio recording of the January 11, 2021 hearing with Judge Young. However, Clemons again did not include this order in his Designation of Matter. Even if he did, Judge Price's orders too are form orders which do not detail his reasoning for the denial. Without the transcripts from the June 14, 2021 hearing, the Appellate Court is unable to determine if Judge Price erred in denying Clemons' motion to review the audio recording.

Accordingly, Clemons' appeal should be dismissed because the Record on Appeal does not set forth sufficient facts for the Appellate Court to determine if an error was committed by the trial court.

III. Clemons' Appeal Should be Dismissed for His Failure to Comply with the South Carolina Appellate Court Rules.

Rule 260, SCACR states, "Whenever it appears an appellant or a petitioner has failed to comply with the requirements of these rules, the clerk *shall* issue an order of dismissal. . ." (emphasis added). The Appellate Court rules are not mere technicalities but provide the parties and the Court with an orderly mechanism through which to guide appeals in this State. *Henning v. Kaye*, 307 S.C. 436, 437-38, 415 S.E.2d 794, 794 (1992). The Supreme Court has found it would be completely justified to dismiss an appeal based on numerous violations of the rules. *Id.* The Respondents request the Appellate Court dismiss Clemons' appeal for the violations described below.

A. Violations of the Appellate Court Rules within Clemons' Initial Brief

i. Failure to include a Standard of Review in violation of Rule 208(b)(1)(D), SCACR.

Pursuant to SCACR 208(b)(1)(D), the appellant must provide a Standard of Review section which cites to relevant case law establishing the standard. Clemons' initial brief does not provide a Standard of Review section for any of the issues he attempts to raise on appeal.

ii. Failure to distinctively identify the issues to be addressed and discuss the issues he is attempting to raise in violation of Rule 208(b)(1)(E), SCACR.

An appellant's brief is required to be divided into as many parts as there are issues and each part shall be set forth in a distinctive type. Rule 208(b)(1)(E), SCACR. Further, the appellant is required to provide discussion of the issues with citations of authority. *Id.*

Clemons failed to divide his argument section into parts for each issue and set forth each part in distinctive type. Clemons also failed to provided discussion of the cited authority and its applicability to the facts of this case. In fact, Clemons does not reference any facts of the case in his argument section.

iii. Failure to reference to the Record on Appeal in the Statement of the Facts in violation of Rule 208(b)(1)(E), SCACR.

A party may include a separate statement of facts with reference to the record on appeal. Rule 208(b)(1)(E), SCACR. Clemons chose to prepare a separate statement of facts section in his initial brief and failed to cite to the any documents of record from the lower court. Moreover, the only documents included properly in the Record on Appeal are the Complaint, the Answer, Clemons' April 16, 2021 Motion to obtain audio of the July 11, 2021 hearing, and Clemons' February 16, 2021 Motion for Relief from Judgment which will not support the facts asserted by Clemons in his statement of the facts section of his briefs.

B. Violations of the Appellate Court Rules within Clemons' Record on Appeal

i. Failure to include Defendants' designations and part of his designation in violation of Rule 210(c), SCACR.

SCACR 209 establishes requirements for the designation of matter to be included in the record on appeal. Parties shall set forth in their designation matters with specificity and may include parts of the transcript, pleadings, orders, exhibits, or other materials which they propose to include in the record on appeal. *Id.* "The Record on Appeal shall include all matter designated to be included by any party." Rule 210(c), SCACR. A party must certify the Record on Appeal contains all materials proposed to be included by any of the parties and not any other material. Rule 210(g), SCACR.

Here, the Record on Appeal submitted by Clemons does not include any matters included in Defendants' Designation of Matter or multiple items listed in his Designation of Matter. In fact, the only things from Clemons' Designation included in the Record on Appeal are the Complaint, the Answer, Clemons' April 16, 2021 Motion to obtain audio of the July 11, 2021 hearing, and Clemons' February 16, 2021 Motion for Relief from Judgment. Clemons does mention Defendants' Exhibits 3, 4, 5, and 6 in his Designation of Matter, however, he fails to do so with specificity. It is unclear which of Defendants' Exhibits from which phase of the proceedings Clemons is attempting to include in the Record on Appeal. There are approximately thirty-five documents included in the Record on Appeal not included in either parties' designation. Without the documents identified in the parties designations included in the Record on Appeal, the Respondents cannot include citations to the Record on Appeal for documents they have used to support their argument in their final brief.

ii. Including matter that were not presented to the lower court in violation of Rule 210(c), SCACR.

Pursuant to SCACR 210(c), “The Record shall not [] include matter which was not presented to the lower court.”

The following documents within the Record on Appeal were not presented to the lower court:

- 1) Testimony from Joe Clemons’ deposition, Peggy Pinnell’s deposition, and Shelia Clemons’ deposition;
- 2) Part (D) – Term Conversion Form;
- 3) What appears to be communications between Clemons and a court reporter;
- 4) A letter to the Court of Appeals from Clemons;
- 5) A Revised Life Insurance Illustration;
- 6) A State Farm Life Insurance Company Amendment of Application form;
- 7) A single page from a document opposing Defendants’ Motion for Summary Judgment; and
- 8) A letter to Peggy H. Pinnell from attorney Stefanie L. Huffer of Cobb, Dill, & Hammett, LLC;

iii. Failure to properly identify testimony included in the Record on Appeal in violation of Rule 210(c), SCACR.

Pursuant to Rule 210(c), “Where witness testimony is included in the Record on Appeal, the first page of each witness’s direct, cross, redirect and recross examination must show the name of the witness, the phase of examination and the name of the counsel conducting the examination.”

SCACR.

The testimony included in the Record on Appeal does not include the first page of each witness’s direct, cross, redirect and recross examination and does not state the phase of examination and the name of the counsel conducting the examination. Based off the dates on the

transcripts included by Clemons, Respondents can determine the testimony transcripts included in the Record on Appeal are from depositions. The deposition testimony from Clemons also two dates of testimony which are not identified in the Record pursuant the Appellate Court Rules. Further, as stated above, these transcripts were not presented to the trial court.

iv. Including material in the Record of Appeal that is not relevant to the appeal in violation of Rule 209(b), SCACR.

The Appellate Court Rules state, “A party shall not include any matter in his designation which is not relevant to the appeal.” Rule 209(b), SCACR.

Even if Clemons would have properly included in his designation the documents included in the Record on Appeal, the following matters are not relevant to the appeal:

- 1) March 10, 2020 Motion to Compel Discovery;
- 2) June 2, 2020 Amended Scheduling Order;
- 3) June 26, 2020 Form Order denying Defendants’ Motion to Determine Sufficiency of Plaintiff’s Responses to Defendants’ Request for Admissions;
- 4) July 23, 2020 Order to be Relieved as Counsel;
- 5) December 1, 2020 and January 29, 2021 Orders denying Plaintiff’s request to appoint counsel;
- 6) August 19, 2021 Defendants’ Omnibus Motion in Limine;
- 7) August 21, 2021 Plaintiff Response to Defendants’ Omnibus Motion in Limine;
- 8) August 10, 2021 Defendants’ Motion for Bifurcation; as well as
- 9) All documents listed above that were not presented to the trial court.

Accordingly, because of Clemons’ failure the abide by the Appellate Court Rules, Clemons’ appeal should be dismissed pursuant to Rule 260, SCACR.

IV. In the Event Clemons' Appeal is Not Dismissed, Clemons Should be Required to File an Amended Record on Appeal That Complies with the Appellate Court Rules.

For the reasons stated above, Clemons' Record on Appeal and his initial brief are fundamentally defective, and Defendants cannot properly prepare a final brief without corrections to the Record on Appeal. Clemons did file a motion with the Court requesting to amend the Record on Appeal on May 13, 2022. With the motion Clemons filed an Amended Record on Appeal adding and removing multiple irrelevant documents, adding his April 16, 2021 Motion to obtain audio of the July 11, 2021 hearing, adding his February 16, 2021 Motion for Relief from Judgment, and adding page numbers. The deficiencies described within this memorandum remain uncured.

Therefore, if the Court is not inclined to dismiss the appeal, Defendants ask the Court to require Clemons to file an Amended Record on Appeal compliant with the Appellate Court Rules.

CONCLUSION

For the foregoing reasons, Respondents respectfully requests this Court dismiss Clemons' Appeal, or in the alternative order Clemons to file an amended Record on Appeal that complies with the Appellate Court Rules.

Respectfully submitted,

WHELAN MELLEN & NORRIS, LLC

By: s/ Charles R. Norris

Charles R. Norris

S.C. Bar No. 004238

E-Mail: charles@whelanmellen.com

Post Office Box 939

Charleston, SC 29402

(843) 998-7099

Attorneys for Respondents

Charleston, South Carolina
May 18, 2022

RECEIVED
May 18 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2021-001183

Joe Clemons,..... Appellant,

v.

Peggy H. Pinnell Agency, Inc., Peggy H. Pinnell Insurance Agency Inc.,
State Farm Life Insurance Company, (jointly and severally liable),
..... Respondents.

PROOF OF SERVICE

I certify that I have served the **MOTION TO DISMISS AND IN THE ALTERNATIVE REQUEST FOR APPELLANT TO AMEND THE RECORD ON APPEAL** on Appellant by electronic service on May 18, 2022, as reflected on email attached hereto and as referenced below:

Joe Clemons, Pro Se
clemonswelding1@gmail.com

WHELAN MELLEN & NORRIS, LLC

By: s/Charles R. Norris
Charles R. Norris
SC Bar No. 004238
E-Mail: charles@whelanmellen.com
Post Office Box 939
Charleston, SC 29402
(843) 998-7099

Attorneys for Respondents

Charleston, South Carolina

May 18, 2022

Traci Corallo

From: Traci Corallo
Sent: Wednesday, May 18, 2022 10:11 AM
To: clemonswelding1@gmail.com
Cc: Charles Norris; Kori A. McGraw
Subject: Clemons v. Peggy H. Pinnell Agency, Inc., et al. - Appellate Case No. 2021-001183
Attachments: Clemons - Motion to Dismiss Appeal.pdf

Attached please find the following document for service upon you:

- Motion to Dismiss and in the Alternative Request for Appellant to Amend the Record on Appeal

Thank you.



Traci Corallo

Administrative Assistant | **WHELAN MELLEN & NORRIS, LLC**

(561) 351-0967 | whelanmellen.com