South Carolina Law Review

Volume 20 | Issue 1 Article 4

1968

The Rule Against Generality, Vagueness, and Failure to Assign Error in Rule 4, Section 6 of the South Carolina Supreme Court Rules

J. S. White

NOTES

THE RULE AGAINST GENERALITY, VAGUENESS, AND FAILURE TO ASSIGN ERROR IN RULE 4, SECTION 6 OF THE SOUTH CAROLINA SUPREME COURT RULES

I. Introduction

An invidious quality of rules and regulations is that the simplest, clearest and most unambiguous of them can lay the most lethal trap for the unwary. The apparent ease with which such a rule can be followed and the simplicity of its requirements often not only leads to the most cursory reading of it and, consequently, nonrealization of hidden complexities, but may result in its being disregarded altogether. Such has been the unhappy case with South Carolina Supreme Court rule 4, section 6. The rule sets out for the appealing litigant those elements which must necessarily be contained in his exceptions to the proceedings below in order for the court to consider his case. It reads:

> Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review, and the same assignment of error should not be repeated. Each exception must contain within itself a complete assignment of error, and a mere reference therein to any other exception then or previously taken, or request to charge will not be considered. The exceptions should *not* be long or argumentative in form.[1]

Apparently plain on its face, devoid of technical terms, and unchanged for decades, it leaves one to wonder why anyone should fail to follow such a rule, particularly when one considers that failure to comply with it may result in the dismissal of an otherwise meritorious appeal.[2]

But if this paper were to be a simple admonishment to "follow the rule" it would certainly have no place in this publication. The reasons behind the frequent breach of the rule[3] must go deeper. It is the opinion of this writer that aside from simply disregarding the rule, which must account for many of the

1. S.C. Sup. Ct. R. 4 § 6.
2. *See e.g.*, State v. Carter, 241 S.C. 262, 127 S.E.2d 882 (1962).
3. See the many cases cited by the annotator in Volume 15 of the S.C. Code Ann. (1962) wherein the rule is set forth at page 146.

cases, a large number of appellants fail to understand precisely what the rule requires of them. The purpose of this paper is to muster the significant decisions pertaining to the rule and by presentation and analysis provide the practitioner with a handy reference to the law in this area. Emphasis will be placed on the later decisions.

II. PURPOSE OF THE RULE

Basic to the appreciation and understanding of any rule is a thorough knowledge of its function. Often the realization of the exact purpose behind a rule of this type will solve most of the problems of use and interpretation. In *Simpson v. Cox*[4] the court sought to explain at length the intent of the rule:

> It was intended to let the Court and opposing counsel see at a glance what points of law or fact the appellant desires the Court to review, and it is not fair, either to the Court or opposing counsel, to allow an appellant, by the generality of the language of his exceptions, to so mask the questions which he will ask the Court to review, that they can be ascertained only by the aid of his own explanation of the purpose concealed in the generality of his language, thereby, perhaps, also allowing them to serve as a cover for an afterthought.[5]

A more concise expression of this purpose was articulated by the court when it said that it would not "grope in the dark" to discover precisely on what the appellant was basing his appeal.[6] It becomes obvious that to comply with the rule the first thing that an appellant should do is to read his exception as if he were on the opposing side. If the exception, standing alone, conveys the precise proposition of law or fact upon which his issue is taken, he has at least met the functional requirement of the rule.

III. THE RULE AGAINST GENERALITY, VAGUENESS, AND INDEFINITENESS

The three shortcomings listed in the title to this section have long stood as the most objectionable characteristics of an improperly drawn exception. The reason is clear. As pointed out in the

4. 95 S.C. 382, 79 S.E. 102 (1913).

5. *Id.* at 385-86, 79 S.E. at 103.

6. *E.g.*, Solley v. Weaver, 247 S.C. 129, 146 S.E.2d 164 (1966); Fruehauf Trailer Co. v. McElmurray, 236 S.C. 141, 113 S.E.2d 756 (1960); Hewitt v. Reserve Life Ins. Co., 235 S.C. 201, 110 S.E.2d 852 (1959).

quote from *Simpson v. Cox*, *supra*, such an exception tends to leave both the court and opposing counsel guessing as to the precise proposition of law on which the appellant is depending. Formulation of a test for generality, however, is not so easy as might be supposed. Cases such as *Hewitt v. Reserve Life Insurance Company*,[7] *Elkins v. South Carolina & Georgia Railroad*,[8] and *Shell v. Brown*[9] present no problem.

In *Hewitt*, the plaintiff had brought an action on an insurance policy for payment of medical benefits, and defendant's motions for a directed verdict *non obstante veredicto* and, alternately, for a new trial had been denied. Defendants appealed on the following two exceptions:

> (1) That his honor Judge McGowen erred, it is respectfully submitted, in refusing the defendant's motion for a directed verdict *non obstante veredicto.*
> (2) That his honor Judge McGowen erred . . . in refusing the defendant's motion for a new trial.[10]

The error is patent. The legal grounds upon which the motion was based are left purely to conjecture.

Not as obvious but equally insufficient was the exception taken in *Shell v. Brown*: "His honor erred in failing to sustain the demurrer, the error being the complaint fails to state a cause of action as to the defendant."[11]

How does the complaint fail to do so? Has an indispensable element of the cause of action been omitted? Has the plaintiff charged the defendant with the breach of a duty when none existed? How can the opposing side know the nature of the challenge under these exceptions?

Brevity, of course, is no criterion on which to base the insufficiency of an exception. Consider the case of *Hall v. Senn*,[12] in which an action was brought to set aside a tax deed some eight years after the deed had changed hands. The special referee found for the validity of the deed and found further that in any event the plaintiffs were estopped by laches. On appeal the circuit court found the deed invalid but held that no pre-

7. 235 S.C. 201, 110 S.E.2d 852 (1952).
8. 59 S.C. 1, 37 S.E. 20 (1900).
9. 243 S.C. 380, 134 S.E.2d 214 (1963).
10. 235 S.C. 201, 202, 110 S.E.2d 852, 853 (1959).
11. 243 S.C. 380, 382, 134 S.E.2d 214, 215 (1963).
12. 242 S.C. 544, 131 S.E.2d 700 (1963).

judice had resulted from the referee's error since the court agreed that the plaintiffs were estopped by laches. Two exceptions were taken to this ruling:

> I. Exception is taken wherein the Court held that the sale was improper and disagreed with the Referee's conclusion, the specific error being that the Court did not consider this prejudicial to the plaintiffs.
>
> II. Exception is taken to the Court's opinion that the plaintiffs were guilty of laches and estoppel for not commencing their action against the defendants for the purpose of resolving the controversy for a period of eight years from the date of the deed from the Lexington County Forfeited Land Commission to Vergie Clark and her husband, Neal B. Clark.[13]

Well, what proposition of law or fact is relied upon? Was the error by the referee prejudicial as a matter of fact or law? The appellant has stated that the court did not think it was prejudicial, but merely to restate what the court has already said and preface the statement with the words "the specific error being" can hardly be said to meet the rule's requirement that "each exception must contain within itself a complete assignment of error" or the requirement that "each exception must contain a concise statement . . . of law or fact." As for the second exception, the appellants again failed to set out any legal or factual ground for their exception. One might just as well appeal on the ground that "the court was wrong."

These, and the many cases like them, are the easy ones. The line becomes more difficult to discern, however, when the rule is applied to the group of cases of which *Wren v. Kirkland Distributing Company*[14] is the most recent.

Wren was an action to recover $5,000 alleged to be due by reason of a breach of contract to purchase a quantity of millet seed. A counterclaim was entered for $3,000 alleged to be owed by reason of respondent's failure to ship the seed as contracted for. A verdict was directed against the buyer on the counterclaim and the buyer, having had his motion for a new trial denied, appealed from this decision complaining that the court had erred:

---

13. Hall v. Senn, 242 S.C. 544, 546, 131 S.E.2d 700, 701 (1963).
14. 156 S.E.2d 865 (S.C. 1967).

> in not ordering a new trial on the grounds that the trial Judge directed a verdict for the Respondent on Appellant's counterclaim, striking said counterclaim from consideration by the jury, when there was introduced sufficient unimpeached testimony to warrant consideration of the counterclaim to the jury.[15]

The court held that the exception would not be considered since it failed to meet the tests of the rule. But where does it fail? It contains a concise statement of law; that is, as a matter of law there was sufficient evidence to take the question to the jury. It is not long or argumentative in form. The exception referred to no other exception nor to any request to charge and, being the first exception in the record, it certainly was not a mere repetition of a previous exception. The answer has to lie in the only phrase of the rule left—"each exception must contain within itself a complete assignment of error."

Assuming that the appellant's exception was not sufficiently complete, the question becomes what else should it have contained? The court answered this question when it expressed its agreement with counsel that the exception was "too general, vague, and indefinite to be considered by this Court, because the exception contains no issue of fact upon which the counterclaim should have been submitted to the jury."[16] In other words, the appellant should have spelled out specifically which issues of fact presented in the transcript with regard to the counterclaim were in sufficient doubt that the jury was needed to find the truth. In support of this statement the court cited the decision in *Solley v. Weaver*.[17]

Solley had presented the same question. In an action for personal injuries arising out of an automobile accident, the trial judge had directed a nonsuit against the plaintiffs on the grounds that there was no proof of negligence. Only one exception was taken, to wit: "The Court erred in granting Defendant's Motion for a nonsuit because there was more than one reasonable inference properly deducible from the testimony of negligence on the part of the Defendant."[18]

---

15. *Id.* at 866.
16. *Id.*
17. 247 S.C. 129, 146 S.E.2d 164 (1966).
18. Solley v. Weaver, 247 S.C. 129, 131, 146 S.E.2d 164, 165 (1966).

This exception, too, was found to be too general, vague, and indefinite. The explanation of the court was as follows:

> We have held in many cases that every ground of appeal ought to be so distinctly stated that the Court may at once see the point which it is called upon to decide without having to "grope in the dark" to ascertain the precise point at issue. 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; *Fruehauf Trailer Co. v. McElmurray*, 236 S.C. 141, 113 S.E. 2d 756.
>
> It has been held that an exception requiring a review of all the evidence is too general to be considered. *Marshall v. Creel*, 44 S.C. 484, 22 S.E. 597; *Weatherly v. Covington*, 51 S.C. 55, 28 S.E. 1; *Elkins v. South Carolina & G.R.R. Co.*, 59 S.C. 1, 37 S.E. 20. In the *Elkins case*, this Court said: "***a good test whether an exception is too general is to inquire whether it is so framed as to involve the necessity of retrying the whole case just as it was presented to the circuit judge. Subjecting this case to that test, it is very manifest that the exception here is entirely too general."
>
> In the case of *FCX Co-op Service, Incorporated v. Bryant*, 242 S.C. 511, 131 S.E.2d 702, Justice Brailsford, speaking for this Court said:
>
> "Exceptions I, XXI, and XXII all charge error in directing a verdict for plaintiff; exception I, upon the ground that more than one issue could be drawn from the testimony; exception XXI, because the credibility of the testimony was for the jury alone; and exception XXII, because the evidence would support a verdict in favor of defendant on his counterclaim. None of these exceptions points out any issue of fact which appellant claims should have been submitted to the jury. They leave the court to search the entire record and are too general to be considered."[19]

It should be clear from the foregoing that the general exception "that there was sufficient evidence to go to the jury" and

19. *Id.* at 131-32, 146 S.E.2d at 165.

the various forms thereof will never be satisfactory. An appellant must at least set out *which* issues of fact he claims to have sufficiently proved. The justification for this position, as the court said in the quote above, is that it is a waste of the court's time if it must review the entire record. Functionally, then, we can see that the emphasis in this class of cases is on protection of the court rather than on protection of the parties litigant.

If we accept the idea that the reason for the rule's insistence on completeness is principally to protect the court and, secondarily, opposing counsel from generalities which take too much time or may be impossible to clear up, then its application in *Winter v. United States Fidelity & Guaranty Company*[20] is a little hard to accept. In that case the plaintiff, a receiver in bankruptcy, alleged that the parties in receivership had been put there due to a civil conspiracy between the defendants. The defendant had moved that the complaint be made more definite and certain in some particulars. The motion was refused by the trial court. The defendant felt that the trial judge had improperly refused to uphold that part of his motion which asked that the plaintiffs be required to state dates, times, places, and parties with regard to the alleged instances of conspiracy. The exception read: "That His Honor erred in refusing to grant Paragraph 6 of Appellant, Southern Equipment Sales Company's Motion to Make More Definite and Certain, the error being that the Appellant was entitled to the information requested therein."[21]

The court held this to be too vague, general, and indefinite to be considered. The court's explanation consisted simply of the general language employed in the first quoted paragraph from *Solley v. Weaver*, *supra* page 64 and is unsatisfactory. The court does not have to "grope in the dark" as they assert. The appellant clearly says that as a matter of law he was entitled to have the requested information. The only explanation must lie in the fact that he neglected to set out what information and to what it referred. By merely referring to "Paragraph 6" of the motion he violated the sanction against incompleteness explicit in rule 4, section 6.

---

20. 240 S.C. 561, 126 S.E.2d 724 (1962).

21. Record at 20, Winter v. United States Fidelity & Guar. Co., 240 S.C. 561, 126 S.E.2d 724 (1962).

An elementary knowledge of South Carolina appellate procedure should make apparent the absurdity of this result. Rule 1 of the South Carolina Supreme Court requires that a certified transcript of the record below shall be filed with the Clerk of the Supreme Court within twenty days after the record is agreed upon by the parties. Rule 4, section 1 requires that any pleadings upon which grounds of appeal are based and the exceptions to the judgment below be included in this transcript. The exceptions do not have to appear elsewhere.

In this case the exceptions were set out nowhere except in the Transcript of Record, and *in that same Transcript* was reprinted the "Paragraph 6" to which the exception referred[22] — as it *had* to be under court rules. Since counsel for respondents did not argue the point in their briefs[23] it must be assumed that the court studied the exception and found it wanting on their own motion. Though it is true that the strict letter of the rule was not complied with, it also is true that no possible prejudice could have accrued either to the court or opposing counsel since any doubts or questions about the exception could have been dispelled by simply turning to another page of the document already in hand.

Two warnings to the draftsman are apparent from this case. First, the failure of opposing counsel to attack the exception is not conclusive that it will be considered. Second, the fact that the infraction of the rule could not have resulted in any of the evils which the rule is designed to prevent may be immaterial to the court's decision to dismiss that ground of appeal.

Obviously, it is not possible to draw up definite rules or a set of criteria whereby counsel can absolutely assure themselves that the exceptions they have drafted will meet the test against generality and vagueness implied in rule 4, section 6. But the preceeding cases and comments should amply indicate that the emphasis is on *completeness.* A doubt whether to include or exclude certain details in an exception should be resolved in favor of inclusion. This last recommendation is made in full recognition of the last sentence of the rule which forbids lengthy and argumentative exceptions. Research has revealed no case wherein an appeal was dismissed simply because an exception was too

22. *Id.* at 65.

23. Brief for Respondents, Winter v. United States Fidelity & Guar. Co., 240 S.C. 561, 126 S.E.2d 724 (1962).

long. All indications are that so long as only one proposition of law or fact is presented in the exception, length alone will not render it objectionable.

IV. Each Exception Must Assign Error

The office of an exception is to assign error to the lower court. Failing this, there is, of course, no need for an appeal, the inference being that there was an error-free adjudication of the parties' rights below. As basic as this seems it must be mentioned in light of the cases below. The reasons for failure to comply with this requirement seem to be that the draftsman, first, becomes so interested in setting out the law that he neglects to show in what way the principle was violated and, second, he attempts to argue the point rather than simply stating the principle and the fact that it was breached. Two examples sufficiently illustrate the point.

Brownie Knitting Mills, Incorporated v. Picow[24] was an action on a New York judgment to which defendants asserted various defenses and two counterclaims. Both counterclaims were struck as being collateral attacks. Appeal was taken from this ruling on the following exceptions:

> 1. Defendants' second Counterclaim does not constitute a collateral attack upon the Plaintiff's judgment, but rather, is a direct attack upon Plaintiff's New York judgment on the grounds that it lacked jurisdiction and was procured through fraud.
>
> 2. Defendants' second Counterclaim did not exist at the time of the New York action and could not have been asserted in the New York action because the damages alleged under the Second Counterclaim only arose when Plaintiff committed the overt act of entering its spurious New York judgment.[25]

Several other exceptions were listed but the above are sufficient for our purposes. The two reproduced here certainly seem to be complete enough—except for one thing. In the language of the court: "Examination of the exceptions reveals that none imputes error to the lower Court but rather the exceptions are

24. 244 S.C. 422, 137 S.E.2d 450 (1964).

25. Record at 15, Brownie Knitting Mills Inc. v. Picow, 244 S.C. 422, 137 S.E.2d 450 (1964).

mere statements of fact or propositions of law which in some instances were not passed upon by the lower Court."[26]

In *Gulledge v. Young*[27] there were three personal injury actions arising out of an automobile-truck collision in Georgia. A motion for a change of venue was granted and plaintiffs appealed on the following exception:

> That his Honor . . . erred in granting the motion of the defendants for a change of venue from Darlington County to Anderson County.
>
> SPECIFICATIONS OF ERROR
>
> 1. That from the affidavits submitted by the defendants in support of their said motion . . . there are only two persons . . . who may be called to testify on behalf of the dedendants, at the trial of this action, who reside in the State of South Carolina. Both of these persons are employees, servants, and agents of the defendants . . . .
>
> 2. That all of the affidavits submitted by the plaintiff in opposition to the defendants' said motion for a change of venue, were of 21 persons who reside in the State of South Carolina, whose affidavits state that they reside considerably closer to the Court House at Darlington, S.C., than to the Court House at Anderson, S.C. . . .[28]

The court, besides finding the exception to be vague and indefinite, characterized it this way:

> The first of these [specifications] summarizes and minimizes the showing made by the defendants in support of the motion. The second numbered paragraph merely summarizes the showing made in opposition to the defendants' motion in the light most favorable to the plaintiffs . . . . Nowhere therein is a complete assignment of error set forth.[29]

In other words, instead of endeavoring to set out properly errors made by the lower court, appellants had merely given a short summary of their argument. There being no assignment of error, there was nothing for the court to decide. It should be

---

26. Brownie Knitting Mills Inc. v. Picow, 244 S.C. 422, 424, 137 S.E.2d 450, 451 (1964).
27. 245 S.C. 88, 138 S.E.2d 833 (1964).
28. Records at 83-84, Gulledge v. Young, 245 S.C. 88, 138 S.E.2d 833 (1964).
29. Gulledge v. Young, 245 S.C. 88, 90, 138 S.E.2d 833, 834 (1964).

noted that in this last example the mere fact that the word "error" was used in various places in the exception was insufficient to meet the requirements of the rule.

V. Application of the Rule

It would be misleading to leave an impression that every breach of the requirements of rule 4, section 6 results in the dismissal of an exception. In many cases the court has seen fit to waive a technical fault and then to proceed to rule on the questions raised. A study of these cases reveals, however, that despite technical failure, a reading of the materials available to both sides made it clear that a meritorious assignment of error was made.

The court itself has made definite statements concerning this liberal approach in cases like *Brady v. Brady*:[30]

> "If such an examination of an exception as may be necessary to disclose that it is framed in violation of the rule also discloses that it clearly embraces a meritorious assignment of prejudicial error, the court will ordinarily waive the breach of the rule and consider the exception."[31]

The policy is a bit overstated here. The sole exception in that appeal was, "That his Honor, the trial judge, erred in sustaining the oral demurrer to the complaint upon the ground that the complaint did not state a cause of action, the error being that the complaint does state a cause of action."

The court cannot be serious when they say that merely reading this exception is sufficient to reveal a meritorious assignment of error. (Compare the case of *Shell v. Brown*, *supra*.) The point is made, in any event, that if the judgment below was a result of prejudicial error which the appellant had attempted to set out, the court would consider it.

Other cases demonstrate that the court is particularly liberal when the appellant is a condemned man[32] or is a fiduciary representing the interests of several persons.[33]

Despite the foregoing, it should be kept in mind that the court has always made it clear that such exceptions to the enforcement

30. 222 S.C. 242, 72 S.E.2d 193 (1953).

31. *Id.* at 246, 72 S.E.2d at 195, *quoting from* Jackson v. Carter, 128 S.C. 79, 86-87, 121 S.E. 559, 562 (1924).

32. *See, e.g.*, State v. Griggs, 184 S.C. 304, 192 S.E. 360 (1937).

33. *See, e.g.*, Wallace v. Timmons, 232 S.C. 311, 101 S.E.2d 844 (1958).

of the rule are a matter of grace. Further, it must be remembered that the primary function of the rule is to insure that both litigants and the court are under no illusions as to the issues raised by the appeal. An exception which seeks to assign error in general without giving fair warning of its grounds even when read in conjunction with the remainder of the transcript will doubtless be dismissed regardless of errors committed below which could be gleaned from the record.

J. SPRATT WHITE