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Appeal

J. H. Tedards Jr.

APPEAL

I. FORMALITIES

A. *Exceptions and Brief*

In *Odom v. County of Florence*[1] the South Carolina Supreme Court took a drastic but necessary step to uphold the integrity of the Rules of the Supreme Court. Rule 4, section 6[2] states the requirements for the formal exceptions to be included in the transcript of record on appeal. Basically, the requirement is for a single, complete, brief assignment of error in each exception, with the object being 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."[3]

In a brief per curiam opinion in *Odom*, the court noted that none of appellant's exceptions contained any assignment of error whatever, being instead in the form of questions. Although the court does not say so, the seven "Exceptions" listed in the transcript of record are actually verbatim copies of the seven "Questions Involved" in appellant's brief. Since the statement of questions involved is also required by the rules,[4] a practice such as this would obviously deprive the court of information which the rules intended to make mandatory. Because nothing was properly before the court for review, the appeal was dismissed.

A similar situation and result occurred in *Lawson v. Arkwright Mills*.[5] Here the court disapproved not only of appellant's exceptions but also of his brief. Citing a lack of full compliance with rule 8, section 2[6] and total disregard of rule 8, section 3,[7] the

1. 258 S.C. 480, 189 S.E.2d 293 (1972).

2. S.C. SUP. CT. R. 4, § 6. In relevant part this rule reads as follows: "Each exception must contain a concise statement of one proposition of law or fact which this Court is asked to review. . . . Each exception must contain within itself a complete assignment of error . . . ."

3. Brady v. Brady, 222 S.C. 242, 245, 72 S.E.2d 193, 194 (1952).

4. S.C. SUP. CT. R. 8, § 2.

5. 259 S.C. 308, 191 S.E.2d 637 (1972).

6. S.C. SUP. CT. R. 8, § 2. In relevant part this rule reads as follows: "The statement of the questions involved must be set out in the briefest and most general terms. It should never exceed one page, unless the questions involved absolutely require it and must always be printed on the first page of the Brief, without any other matter appearing thereon."

7. S.C. SUP. CT. R. 8, § 3. This rule reads as follows:

The Brief of argument shall be divided into as many parts as there are questions to be argued; shall have at the head of each part in distinctive type, or in type

court dismissed the appeal. There was some attempt to soften the impact of this holding on the parties involved by a dictum that no prejudicial error was apparent from the record and briefs.

B. Motion for a New Trial

Bowers v. Watkins Carolina Express, Inc.,[8] dealt primarily with the propriety of statements made in closing argument to the jury by counsel for plaintiff, an interesting point discussed in the Survey of Practice and Procedure. Having decided that the argument was improper and that the handling thereof by the trial court was in error, the supreme court was faced with plaintiff-respondent's contention that relief should be denied because the impropriety was not made the ground of a motion for mistrial or for a new trial.

The supreme court rejected this contention, choosing to place primary emphasis on its common sense reason for doing so: "When the court, in effect, overruled defendant's objection to the argument, it would have been futile to move for a mistrial based upon the same objection."[9] A 1939 case, *Hubbard v. Rowe*,[10] was cited in support of this holding. There, in a more complete discussion, it is made clear that the only requirement is that the question must have been properly raised in the trial court and ruled upon there. While this may in some circumstances mean that a motion for new trial would be necessary, that is only one manifestation of the general rule.

C. Presentation of Issue in Lower Court

Although avoided by appellant in the *Bowers* case above, the most common pitfall on appeal remains the requirement noted from *Hubbard v. Rowe*[11] that the question presented on appeal must have been properly raised in the trial court. The principle must be deceptive in its simplicity, for the supreme court disposes of questions because of noncompliance with that rule with

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distinctively displayed, the particular point treated therein, followed by such discussion and citation of authorities as is deemed pertinent; and under each head shall refer to the specific exception alleged to raise the question being considered therein.

8. 259 S.C. 371, 192 S.E.2d 190 (1972).

9. *Id.* at 376, 192 S.E.2d at 192.

10. 192 S.C. 12, 5 S.E.2d 187 (1939).

11. *Id.*

amazing regularity. Some of the factual situations in which it has arisen during the survey period are outlined here.

Hester v. Harleysville Mutual Insurance Co.[12] involved an action against an insurer to recover the amount of a default judgment against the insured. The defense of the defendant-insurer was that it received neither notice of the original suit nor the suit papers therein as required by the terms of its policy. The Spartanburg Civil Court agreed with plaintiff that the insurer waived its right to rely on these policy conditions, but the county court reversed because of a total absence of evidence to support this finding.

On appeal, the supreme court agreed with the county court that there was no evidence of waiver. It then faced plaintiff-appellant's contention that the verdict in her favor should be sustained because the insurer failed to show it had been prejudiced by the failure of the insured to forward suit papers. This assertion, if true, would undoubtedly have supported a verdict for plaintiff based on established South Carolina law.[13] But the court refused to consider it because "it was not presented nor considered by the trial court, nor [was] it raised by any exception on appeal to this Court."[14] Verdict for the insurer was affirmed.

Carolina Home Builders, Inc. v. Armstrong Furnace Co.[15] was an interesting tort case in which plaintiff initially recovered for damages to its apartment complex allegedly caused by heating and cooling equipment manufactured by defendant. Although reversing and remanding because of an improper instruction to the jury, the supreme court elected to treat all of defendant's questions in the course of its opinion.

One such question concerned another instruction to the jury that "an implied warranty arises if the manufacturer who sells the product knows 'the particular purpose for which the goods are required and that the buyer is relying on its skill or judgment to select or furnish suitable goods . . . .' "[16] Defendant-appellant considered that instruction to be improper because there was no evidence of the existence of such knowledge. But, since it had not taken advantage of its opportunity to object to the charge at

12. 259 S.C. 45, 190 S.E.2d 487 (1972). *See also* Survey of Insurance *infra.*

13. *See* Factory Mut. Liab. Ins. Co. of America v. Kennedy, 256 S.C. 376, 182 S.E.2d 727 (1971); Squires v. National Grange Mut. Ins. Co., 247 S.C. 58, 145 S.E.2d 673 (1965).

14. Hester v. Harleysville Mut. Ins. Co., 259 S.C. 45, 50, 190 S.E.2d 487, 489 (1972).

15. 259 S.C. 346, 191 S.E.2d 774 (1972).

16. *Id.* at 359, 191 S.E.2d at 779-80.

trial,[17] defendant was not allowed to raise the issue on appeal.

The primary issue on appeal in *Bledsoe v. Metts*[18] concerned the granting by the trial judge of defendant's motion to be relieved of a failure to plead within the time required by law. After deciding this question against plaintiff-appellant, the supreme court considered her contention that the trial court abused its discretion because the certificate of defendant's attorney did not comply with Circuit Court Rule 19.[19]

Here the court appeared to retreat from its usual position for no particular reason. After stating that the issue "is not properly before us for decision for the reason that the record does not disclose that it was made or decided in the court below,"[20] the court went on to decide the issue anyway by saying that the certificate did substantially comply with rule 19.

The careful language quoted above may indicate that the court believed the issue was actually raised in the trial court, with the record on appeal failing to indicate that fact. But whatever the reason, it does not seem to justify the weakening of the court's position. A better solution (and perhaps the one intended by the court) would have been to apply the customary principle absolutely, and then to indicate gratuitously that there was "probably" no merit to the claim anyway.[21] Any hint that the court may be willing to consider issues not raised in the trial court can only encourage attorneys to argue them on a theory of "what do I have to lose?". This will lead to more wasted time on the part of all concerned.

D. The Record

With the importance attached to the contents of the record on appeal, as shown by the *Bledsoe* case discussed above, it is inevitable that questions will occasionally arise on appeal con-

17. *See* S.C. CODE ANN. § 10-1210 (1962).

18. 258 S.C. 500, 189 S.E.2d 291 (1972).

19. S.C. CIR. CT. R. 19. In relevant part this rule reads as follows:

> No order extending the time to answer or demur to a complaint shall be granted unless the party applying for such order shall present to the Judge to whom the application shall be made a certificate of the attorney or counsel retained to defend the action, that, from the statement made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint or to some part thereof.

20. Bledsoe v. Metts, 258 S.C. 500, 504, 189 S.E.2d 291, 293 (1972).

21. *See* Lawson v. Arkwright Mills, 259 S.C. 308, 191 S.E.2d 637 (1972), discussed earlier in this article.

cerning the contents of the record. Rule 4, section 7, of the Rules of the Supreme Court[22] is the controlling authority to be followed procedurally in such instances. It confers on the trial judge the authority to settle the record for appeal when the parties cannot agree. But any party aggrieved by the settlement order may appeal from it, inserting in an appendix to the settled case the matters necessary for a consideration of the appeal.

The case of *Seymour v. Seymour*[23] raised a threshold question concerning appeal from an order settling the record. Appellant noted exceptions[24] to the order settling the case in an appendix to the transcript of record; he also reserved a place for the transcript of the settlement hearing before the trial judge.[25] When appellant's counsel discovered that the hearing had not been recorded and transcribed, they commented thereon in their brief[26] but took no further steps to place before the supreme court a formal statement of their objections to the settlement order. The court had before it in the transcript of record the appellant's proposed case,[27] the respondent's proposed case,[28] and the statement as settled by the trial court.[29] Nonetheless, it held as follows: "The additional matters which appellant sought to have included in the record have not been printed and their nature is not disclosed. Appellant has therefore failed to carry the burden of showing error as alleged. These exceptions are overruled."[30] This ruling kept the supreme court out of the realm of speculation as to exactly what objections appellant had made at the settlement hearing. It offers no hint of leniency for parties who may wish to challenge an order of settlement.

In another case, *Lawyers Title Insurance Corp. v. Elmwood Properties*,[31] both parties appealed from the order of settlement. Although ostensibly reaching the merits on this appeal, the court's only comment was that it thought "the record as settled by the trial judge was adequate. . . ."[32] Again, little encouragement was offered to those who would question such an order.

22. S.C. SUP. CT. R. 4, § 7.
23. 259 S.C. 26, 190 S.E.2d 502 (1972).
24. Record at 55.
25. *Id.* at 54.
26. Brief for Appellant at 16-17.
27. Record at 49.
28. *Id.* at 52.
29. *Id.* at 1-2.
30. Seymour v. Seymour, 259 S.C. 26, 29, 190 S.E.2d 502, 503 (1972).
31. 258 S.C. 221, 187 S.E.2d 799 (1972).
32. *Id.* at 228, 187 S.E.2d at 802.

II. REVIEW

A. *Findings of Lower Court*

A seemingly well-settled area of the law in South Carolina involves the scope of review which the supreme court will exercise over findings of fact by the lower court. This scope varies of course with the nature of the action and with the history of the case before the trial judge and master. During the survey period the court had occasion to restate its position in three different situations, making them available for contrast here.

Hutchinson v. Metropolitan Life Insurance Co.[33] was an action at law, tried by consent of the parties before the presiding judge without a jury. Defendant challenged a finding by the trial court that plaintiff had returned to a condition of only partial disability between an earlier accident and the accident at issue in this case. Before answering the question, the supreme court stated its scope of review in such a case as follows:

> It is well settled that when, as here, an action at law is by agreement of the parties tried by the judge, without a jury, his findings of fact have the force and effect of a jury verdict upon the issues and are conclusive upon appeal unless unsupported by any competent evidence, or shown to have been influenced by an error of law.[34]

Lowndes Products, Inc. v. Brower[35] was a complex and difficult case in which plaintiff sought injunctive relief and damages for misappropriation of trade secrets and for a breach of duty of loyalty on the part of its employees. The circuit judge affirmed the master's recommendations that all issues be resolved against plaintiff. Before entering its lengthy discussion of the evidence and issues on plaintiff's appeal, the court reiterated the controlling principle for such a setting:

> It is appropriate to here restate this general proposition: Concurrent findings of fact by the master and trial judge will not be disturbed on appeal unless against the *clear* preponderance of the evidence or without evidentiary support.[36]

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33. 259 S.C. 219, 191 S.E.2d 157 (1972).
34. *Id.* at 222, 191 S.E.2d at 159.
35. 259 S.C. 322, 191 S.E.2d 761 (1972).
36. *Id.* at 328, 191 S.E.2d at 765 (emphasis added).

Talbot v. James[37] was another complex equitable action, this one brought by stockholders against a corporate director-officer for an accounting. The master in equity recommended judgment for plaintiffs (actually for the corporation) in the amount of $25,025.31, but the circuit judge reversed the master's findings and ordered judgment for defendants. On appeal the supreme court stated its role as follows:

> This being an equity case and the Master and the Circuit Judge having disagreed and made contrary findings on the material issues in the case, this Court has jurisdiction to consider the evidence and make findings in accordance with our view of the preponderance or greater weight of the evidence.[38]

Although very similar to the test applied in *Lowndes Products*, this test is slightly different. If the master and circuit judge have agreed on findings, the supreme court will upset them only if against the *clear* preponderance of the evidence. But if the master and circuit judge have disagreed, the supreme court may determine the facts in accordance with its own view of the preponderance of the evidence, free from any type of presumption. This distinction was probably determinative in *Talbot*, where three members of the court reversed the circuit court and agreed with the master's findings while two dissenting justices agreed with the circuit judge's findings. Because the issue was close enough to cause a 3-2 split, it seems unlikely that the court would have disturbed the decision of the circuit judge had the test required the findings to be against the *clear* preponderance of the evidence.

B. Amount of Recovery

Another familiar comment on the scope of review was restated in the case of *Smoak v. Seaboard Coast Line Railroad Co.*[39]: "This Court will reverse the refusal of a motion for a new trial on the contention that a verdict is excessive only when the verdict is so grossly excessive as to shock the conscience of the Court."[40] While the test has been variously stated as whether the verdict shocked the conscience of the court,[41] whether the trial

37. 259 S.C. 73, 190 S.E.2d 759 (1972).
38. *Id.* at 77-78, 190 S.E.2d at 761.
39. 193 S.E.2d 594 (S.C. 1972). *See also* Survey of Damages *infra.*
40. 193 S.E.2d at 597.
41. Norton v. Ewaskio, 241 S.C. 557, 565, 129 S.E.2d 517, 521 (1963).

judge abused his discretion,[42] and whether the verdict was wholly unsupported by the evidence,[43] the test is a familiar one in South Carolina law.

This case presented an added dimension to the test, however. The supreme court in effect took judicial notice of inflation and the rising cost of living, implying that the amounts of verdicts have necessarily increased just as the wages of carpenters and the cost of a can of beans.[44] Because of this, the court emphasized that a comparison with past verdicts for similar injuries may be informative but cannot be controlling.

After setting this background, the court referred to a verdict[45] in 1955 awarding $50,000 actual damages and $15,000 punitive damages for the wrongful death of a twelve year old boy. In *Smoak* the decedent was an employed eighteen year old boy contributing to the support of his mother and father; the damages for wrongful death were $75,000 actual and $25,000 punitive. Considering this implied comparison and the recognized change in the value of money, the court decided that the award in *Smoak* could not be deemed unreasonable.

The explicit recognition of inflation was not at all unique,[46] but such language in the past has accompanied an apparent feeling by the court that the verdict approached the allowable limits.[47] Taking this together with the full and fairly lengthy discussion of the amount of the verdict in *Smoak*, one might be tempted to infer that a verdict significantly larger than the one rendered would have been labeled excessive in the factual situation of this case.

C. *Motion Not Passed Upon by Lower Court*

Pamplico Bank and Trust Co. v. Prosser[48] came to the su-

42. Neese v. Toms, 196 S.C. 67, 77-78, 12 S.E.2d 859, 864 (1941).

43. South Carolina Pub. Serv. Authority v. Spearwant Liquidating Co., 196 S.E. 481, 484-85, 13 S.E.2d 605, 606 (1941).

44. "Money represents buying power. A verdict which was excessive when a carpenter earned forty cents an hour, might not be excessive today, when a carpenter earns three or four dollars an hour. A verdict given when beans were seventeen cents a can, would not represent the same consideration as when beans are thirty-seven cents a can." 193 S.E.2d at 597.

45. Mock v. Atlantic Coast Line R.R., 227 S.C. 245, 87 S.E.2d 830 (1955).

46. *See, e.g.*, Cabler v. L.V. Hart, Inc., 251 S.C. 576, 581, 164 S.E.2d 574, 577 (1968).

47. "While the amount of the judgment is large and has given some concern . . . ." Cabler v. L.V. Hart, Inc., 251 S.C. 576, 580, 164 S.E.2d 574, 576 (1968).

48. 193 S.E.2d 539 (S.C. 1972).

preme court on appeal from an order granting summary judgment to plaintiff in an action for indebtedness due on a promissory note. The lower court had granted the summary judgment based on the second of two grounds set forth in the motion, involving a question of election of remedies. This holding was reversed by the supreme court for reasons not of interest here.

The court then noted that both parties on appeal had argued at length the other ground in the original motion for summary judgment: that the matters set forth in the answer did not constitute a defense to the complaint. Without any reference to rule 4 (sections 7 and 8) of the Rules of the Supreme Court[49] or to any other explanation, the court in its discretion refrained from any discussion of the questions involved therein since the lower court had not passed upon them. It did, however, "call attention" to a lengthy quotation setting forth and emphasizing the heavy burdens that must be borne by one seeking summary judgment. While of no value as precedent, this admonition undoubtedly served to convey a message to the parties involved in further proceedings in this particular case.

D. Discretion of Lower Court

Defendant-appellant's counsel in the automobile collision case of *Able v. Young*[50] sought to circumvent an order by the trial judge granting plaintiff a new trial based on his consideration of the evidence. The supreme court restated the settled rule in South Carolina that such an order is completely within the discretion of the trial judge and is not appealable, not even to determine whether there was an abuse of discretion. In an attempt to subvert the rule, appellant argued that it should not apply when it appears from the face of the order that the order was based on an incomplete summary of the testimony and on irrelevant facts. Although admitting that part of the order was ineptly drawn, the court rejected the argument that this should render it appealable.

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49. S.C. SUP. CT. R. 4, § 7, reads in relevant part: "When the appellant shall serve a proposed case . . . , the respondent shall, within ten days thereafter, serve upon appellant any proposed amendment thereto, including any additional grounds upon which this Court will be asked to sustain the rulings or judgment below; and on failure to do so, he shall be deemed to have agreed to the proposed case."

S.C. SUP. CT. R. 4, § 8, reads: "While respondent may be restricted in argument to such additional sustaining grounds as noticed by him, this Court reserves the right to sustain any ruling, order or judgment upon any grounds appearing in the record."

50. 259 S.C. 362, 191 S.E.2d 781 (1972).

In *Bledsoe v. Metts*[51] the plaintiff-appellant challenged an order by the trial judge allowing defendant to file his answer after the 20-day period required by section 10-641 of the Code[52] had expired. The supreme court stated that such a motion is addressed to the sound discretion of the trial court. In view of the liberal construction which such motions should receive in furtherance of justice,[53] appellant failed to show any abuse of discretion that would justify disturbing the order on appeal.

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51. 258 S.C. 500, 189 S.E.2d 291 (1972).

52. S.C. CODE ANN. § 10-641 (1962) reads: "The only pleading on the part of the defendant is either a demurrer or an answer. It must be served within twenty days after the service of the copy of the complaint."

53. *See* McGhee v. One Chevrolet Sedan, 235 S.C. 37, 109 S.E.2d 713 (1959).