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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Master-in-Equity

Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2022-000708

Oak Forest Homeowners
Association, Inc.,

Appellant,

v.

Paul M. Dennison, Mortgage
Electronic Registration Systems,
Inc., solely as nominee for Branch
Banking and Trust Company, LLC
and South Carolina State Housing
Finance and Development
Authority, Defendants,

Of Whom Paul M. Dennison is the

Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

1. THE ARGUMENTS PRESENTED IN APPELLANT'S INITIAL BRIEF WERE PRESERVED FOR REVIEW AND ARE PROPERLY BEFORE THIS COURT.

It is an axiomatic rule of law that issues may not be raised for the first time on appeal. Talley v. S.C. Higher Educ. Tuition Grants Comm., 289 S.C. 483, 487, 347 S.E.2d 99, 101 (1986) (citing American Hardware Supply Co., Inc. v. Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983)). At a very minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). This Court has held that where “a trial court makes a general ruling on an issue, but does not address the specific argument raised by a party, that party must make a Rule 59(e) motion asking the trial court to rule on the issue in order to preserve it for appeal.” Cowburn v. Leventis, 366 S.C. 20, 41, 619 S.E.2d 437, 449 (Ct. App. 2005). Further, in Cullen v. McNeal, this Court ruled that where the circuit court did not rule on the argument raised, and no Rule 59(e), SCRPC, motion was filed, the arguments were not preserved for appellate review. 390 S.C. 473, 490, 702 S.E.2d 378, 390 (Ct. App. 2010).

Any arguments raised in Appellant's Rule 59(e) Motion that were not raised to and ruled upon by the trial court, due to its untimely nature, were abandoned on appeal. The arguments raised in Appellant's Initial Brief were raised to and ruled upon by the lower court, and in fact, came directly from the Master's Order. As such, those issues raised by Appellant in its brief are properly before this Court, and Respondent's argument fails.

2. THIS COURT SHOULD NOT BAR THIS ACTION UNDER RES JUDICATA AS THERE ARE SEVERAL RECOGNIZED EXCEPTIONS TO THE APPLICATION OF THIS DOCTRINE, TWO OF WHICH APPLY TO THE CASE AT HAND, ALLOWING APPELLANT TO PURSUE THIS ACTION

For res judicata to operate as a bar to Appellant's suit, the following elements must be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the

issue in the former suit. Riedman Corp v. Greenville Steel Structures, Inc., 308 S.C. 469, 419 S.E.2d 217 (1992). However, our courts have found that the doctrine of *res judicata* is not an “ironclad” bar to a later lawsuit. Garris v. Governing Bd. of the South Carolina Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998); *see also Carrigg v. Cannon*, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001) The primary purpose of the doctrine is to “bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly.” Id. (citing 50 C.J.S. Judgments §§ 697, 702 (1997)). “The doctrine [of *res judicata*] flows from the principle that public interest requires an end to litigation and no one should be sued twice for the same cause of action.” Duckett v. Goforth, 374 S.C. 446, 464, 649 S.E.2d 72, 81 (Ct. App. 2007) (citation omitted).

South Carolina courts have adopted the Restatement (Second) of Judgements as its general issue and claim preclusion rules. S.C. Prop. & Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991); *see also Judy v. Judy*, 393 S.C. 160, 712 S.E.2d 408 (2011) (applying Restatement (Second) of Judgments Section 26 to determine if *res judicata* precluded a later action). “Significantly, the Restatement (Second) of Judgments has recognized exceptions to the application of this doctrine.” Judy, 393 S.C. 168, 712 S.E.2d at 412; *see Restatement (Second) of Judgments* § 26 (1982 & Supp. 2011). Judy further emphasizes that Section 26 “presents a set of exceptional cases in which, after judgment that would otherwise extinguish the claim under the rules of merger or bar..., the plaintiff is nevertheless free to maintain a second action on the same claim or part of it.” Id. (citation omitted).

(1) When any of the following circumstances exist, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
... (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages

incurred to the date of suit, and chooses the latter course; or (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

Restatement (Second) of Judgments § 26(1)(e)–(f).

While Appellant can find no case law immediately on point with the case at hand, Appellant would argue that the principles of res judicata have no place in the instant action under subsection (e). In cases involving a continuing or recurrent wrong, a plaintiff should be allowed to sue from time to time for the damages incurred to the date of the suit. Since 2014, Respondent has consistently failed to pay the Association dues. These dues have continued to accrue and will continue to accrue for the foreseeable future. All while the Respondent continues to reap the benefit of the Association and other members' paying their assessments—the roads throughout the Association are maintained by Appellant; Appellant pays for power to the street lights (including the one directly outside of Respondent's property); and so forth. The burden falls on every other homeowner within the Association to pay their assessments to allow for this upkeep, providing a benefit to Respondent, yet Respondent is the only non-paying homeowner.

In the alternative, Appellant argues that the exception outlined in subsection (f)—that the preclusion is overcome for an extraordinary reason—would apply. Here, if res judicata bars the instant action and/or any further action against Respondent regarding his non-payment of the Association's dues and assessments, this sets the standard that Respondent cannot be foreclosed upon, and is "above the law," so to speak, as it pertains to the Oak Forest Homeowners Association, even though the Master was incorrect in its ruling that the subject property was not part of the Association.¹ This would set a dangerous precedent and allow Appellant to seek no redress against

¹ Appellant's Br. 5–9.

Respondent for his continued wrongdoing.

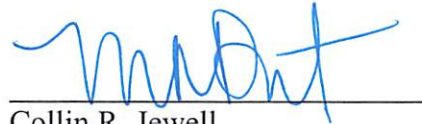
Allowing Respondent to continue his trend of nonpayment of Association dues is inequitable to all other members of the community who pay their assessments and dues as mandated by the governing documents, and abide by same. As it would be unjust to allow Respondent to evade the “laws” (of the Association) and leave Appellant no remedy, Appellant requests this Court find its arguments are not barred by res judicata and that the trial judge committed reversible error.

CONCLUSION

Appellant’s arguments were properly preserved for review by this Court, and the instant case falls within an exception to the principles of res judicata. As such, this Court should reverse the Master’s ruling and find that Respondent’s property is part of the Association, and thus, subject to its governing documents.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certify that this Final Reply Brief complies with Rule 211(b), SCACR.



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