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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Case No. 2021-CP-22-00927

Steven Michael Okun, Personal Representative
of the Estate of Jane Luanne Okun……...…Respondent,

v.

Pobuckra Properties, LLC and Alliance
Commercial Property Management, Inc……..…Appellants.

INITIAL REPLY BRIEF OF APPELLANTS

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PREFATORY NOTE: THE RECORD SET STRAIGHT

The parties face markedly different hurdles to prevailing on appeal. To demonstrate reversible error, Pobuckra Properties, LLC ("Pobuckra") and Alliance Commercial Property Management, Inc. ("Alliance") need show only that *one* of the three grounds they advance warrants a finding that the trial court abused its discretion in imposing drastic sanctions. To defend the sanctions order, in contrast, Steven Michael Okun ("Okun") must show that *all* grounds are correct. Okun cannot do so, in light of the undisputed facts of record and governing law.

To distract from this reality, Okun's respondent brief is compendium of misstatements, flip-flops, and irrelevancies. A few illustrations warrant mention—and correction—upfront.

A critical error that pervades Okun's brief is the statement that the trial court determined that Pobuckra and Alliance acted in bad faith or with willful disobedience or gross indifference to Okun's rights. (Resp. Br. at 7) The assertion is patently false. The court did not make that finding because it could not make that finding. Okun neither presented evidence of bad faith, willful disobedience, or gross indifference, nor even argued that Pobuckra and Alliance had acted with a culpable state of mind.

In a belated attempt to shore up the erroneous sanctions order, Okun cites evidence that no party submitted to the trial court: the deposition of David Teems, Alliance's Regional Property Manager. (Resp. Br. at 3) The evidence is not properly before this Court and cannot be considered. SCACR 210(c) ("The Record shall not …

include matter which was not presented to the lower court or tribunal."). As such, Pobuckra and Alliance separately move to strike Teems' deposition from Okun's record designation.

Another critical error that pervades Okun's brief is his misrepresentation that Alliance was bound by the order requiring preservation of the righthand secondary handrail. (Resp. Br. at 1–2, 6–8, 16, 18–20) Below, however, Okun conceded the opposite: "So as to the argument about the management company [Alliance], I agree they didn't have—they weren't party to the order, so they shouldn't be bound by any order." (Jan. 6, 2023 Tr. at 8)

In sum, Okun's contortion of the facts, reversed positions, and reliance on evidence outside the record betray a willingness to adopt whatever position he deems expedient in the moment. In doing so, Okun imperils his credibility before this Court.

ARGUMENT

I. Reply to Okun's assertion that culpable intent, warranting drastic sanctions, is established by the mere loss of evidence. (Resp. Br. at 1, 6–8, 15–16, 18–19)

Okun's defense of the order striking Pobuckra's and Alliance's pleadings suffers from a fatal flaw. South Carolina law mandates that it is an abuse of discretion to impose drastic discovery sanctions, where the requesting party presents no evidence of bad faith, willful disobedience, or gross indifference to its rights. Orlando v. Boyd, 320 S.C. 509, 511–12, 466 S.E.2d 353, 355 (1996). And Okun presented no evidence

below that, in inadvertently losing the righthand secondary handrail, Pobuckra and Alliance acted with the requisite state of mind. (Pl. Mot. to Strike)

Confronted with this fact, Okun labors mightily to cure an incurable evidentiary void. For the first time on appeal, Okun simply recasts loss of the righthand secondary handrail as "willful," "deliberate," and "disobedient." (Resp. Br. at 8, 16, 18) Of course, Okun cites no supporting evidence because he never developed any or submitted it to the trial court.

Also for the first time on appeal, Okun endeavors to portray loss of the righthand secondary handrail as at least "grossly negligent." (Resp. Br. at 16, 19) The sole evidence Okun cites is the affidavit of David Teems, Alliance's Regional Property Manager. But Teems' affidavit shows just the opposite—that the loss was inadvertent:

> Unbeknownst to me, several months ago, a third-party landscaping service *inadvertently* discarded the already inspected and documented right side secondary handrail from the fenced area without my or the Defendants' permission, authority, knowledge, or assent.
>
> ****
>
> The removal of the previously inspected and documented right side secondary handrail from the fenced area was not requested by me or by the Defendants, was not conducted by me or at the behest of the Defendants and was done *unintentionally* by a third-party landscaping company.

(Teems Aff. at ¶¶ 13, 15; emphases supplied) That the loss was inadvertent is not mere "argument," as Okun claims, but undisputed fact. (Resp. Br. at 6)

To bolster his baseless assertions, Okun declares that the trial court found that loss of the righthand secondary handrail was "grossly negligent and willful." (Resp. Br. at 7) The court made no such finding, given the lack of supporting evidence. Okun unwittingly refutes his own assertion, by failing to cite a single record document that contains the supposed ruling. Okun's need to distort the record, combined with his violation of the procedural rules, is proof positive that his position is factually untenable. SCACR 208(b)(4) (stating that in the initial brief, citations should be to the page of the referenced material).

Taking a different tack, Okun altogether collapses the distinction between a negligent and willful loss of evidence. Okun insists that loss of the righthand secondary handrail is *itself* evidence of bad faith, willful disobedience, or gross indifference to his rights: "Appellants, in failing to comply with the court order, showed gross indifference to the Respondent's rights which justified the sanction …." (Resp. Br. at 8) Binding precedent is to the contrary, holding that a mere negligent loss of evidence does not warrant imposition of drastic sanctions. Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394–95, 396 S.E.2d 369, 372 (1990). To be sure, Okun does not cite a single South Carolina decision upholding drastic sanctions absent evidence of bad faith, willful disobedience, or gross indifference.

Undaunted, Okun invites this Court to adopt the trial court's rejection of binding precedent. Citing a federal case applying federal law, Okun professes that drastic sanctions may be imposed for a negligent loss of evidence. United Med.

Supply Co. v. United States, 77 Fed. Cl. 257, 268 (2007) ("an injured party need not demonstrate bad faith in order for the court to impose, under its inherent authority, spoliation sanctions"). Okun fails to acknowledge that the South Carolina Supreme Court imposes a more stringent standard, requiring proof of bad faith, willful disobedience, or gross indifference. E.g., Orlando, 320 S.C. at 511.

Okun's cited case underscores the point. QZO, Inc. v. Moyer, 358 S.C. 246, 257–58, 594 S.E.2d 541, 547–48 (Ct. App. 2004) (affirming order striking defendant's answer for intentional defiance of a temporary restraining order requiring defendant to produce his computer, reasoning that defendant had produced the computer late and willfully destroyed evidence by erasing the hard-drive). Here, unlike QZO, the record is devoid of evidence of bad faith, willful disobedience, or gross indifference.

Under these circumstances, Okun falls short in justifying the trial court's imposition of drastic sanctions for a mere negligent loss of evidence. For this reason alone, the order cannot stand.

II. Reply to Okun's assertion that courts "routinely" impose harsh sanctions for discovery violations. (Resp. Br. at 5–6, 8, 15)

The assertion is divorced from the totality of circumstances courts consider in tailoring an appropriate sanction. Okun myopically focuses on the end result, to the exclusion of the particular facts that have been found to warrant drastic sanctions. Okun strives to avoid such a comparison, due to the absence of any remotely analogous facts here.

Okun's cited cases, upholding drastic sanctions for discovery violations, all involved obstreperous litigants who had been forewarned of the impending consequences of their continued intentional misconduct. Barnette v. Adams Bros. Logging, 355 S.C. 588, 594–95, 586 S.E.2d 572, 576 (2003); McNair v. Fairfield Cnty., 379 S.C. 462, 464–67, 665 S.E.2d 830, 832–33 (Ct. App. 2008); Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 199–200, 511 S.E.2d 716, 719 (Ct. App. 1999); Halverson v. Yawn, 328 S.C. 618, 620, 493 S.E.2d 883, 884 (Ct. App. 1997). Here, in contrast, loss of the righthand secondary handrail was not preceded by other discovery violations or a warning that noncompliance with the preservation order would result in drastic sanctions. Thus, Okun's attempt to shoehorn the sanctions order into this line of cases is unpersuasive.

III. Reply to Okun's assertion that loss of the righthand secondary handrail is unduly prejudicial, in that alternative sources of proof are inadequate. (Resp. Br. at 1, 7–8, 16–18)

Okun does not contest the existence of other evidence through which he could establish the condition of the righthand secondary handrail: 1) photographs, which accurately depict the condition of the secondary handrails, anchor points, and footbridge; 2) multiple fact witnesses with knowledge of the righthand secondary handrail, including Okun himself; and 3) the lefthand secondary handrail, the condition of which is similar to that of the righthand secondary handrail. (Resp. Br. at 1; Teems Aff. ¶¶ 9–12, 17; Defs. Opp'n to Pl. Mot. to Strike, Ex. A)

In conclusory fashion, Okun rejoins merely that such evidence is inadequate. Okun contends that loss of the righthand secondary handrail prevented him from conducting testing and inspections and generating expert analyses. (Resp. Br. at 18) Okun misses the point. The righthand secondary handrail is *a* source of proof, not *the* source of proof. In other words, its loss does not foreclose Okun from establishing his claims, given the undisputed existence of alternative sources of proof.

What is more, the evidence that these sources of proof are adequate substitutes for the righthand secondary handrail stands unrebutted in the record. Okun points to no contrary evidence—for example, expert affidavits attesting that inspection and testing of the righthand secondary handrail alone would yield accurate information, and that the lefthand secondary handrail is unsuitable for this purpose. Okun was unable to develop such evidence, given that he has never requested an inspection of the lefthand secondary handrail.

It follows that Okun's objection to the adequacy of the alternative sources of proof is pure speculation. And speculation is not evidence, much less evidence sufficient to sustain imposition of the harshest sanction available.

Because Okun was not unduly prejudiced, his attempt to distinguish Kershaw on this basis fails. Kershaw, 302 S.C. 390. According to Okun, the Kershaw manufacturer's defense was not prejudiced by removal of asbestos-containing ceiling materials, as the same materials could be found in "many" other schools within the district. (Resp. Br. at 8) This fact does not appear in the Kershaw opinion, so Okun

asks this Court to take judicial notice that the Kershaw County School District has 19 schools, according to an unspecified website. (Resp. Br. at 8 n.3)

As an initial matter, Okun's request for judicial notice is improper. The number of schools within the Kershaw County School District *today* does not establish the number of schools within the Kershaw County School District *33 years ago*, when Kershaw was decided. Given that the latter fact is subject to reasonable dispute, it cannot be judicially noticed. SCRE 201(b) (stating that a judicially noticed fact is beyond reasonable dispute, in that it is generally known within the court's territorial jurisdiction or capable of accurate and ready determination from sources whose accuracy cannot reasonably be questioned).

In any event, Kershaw's finding that the manufacturer had not sustained undue prejudice was not grounded in the availability of asbestos-containing ceiling materials in other schools. For this reason, the case does not support Okun's perceived distinction between Kershaw's (nonprejudicial) partial loss of evidence and this case's (prejudicial) total loss of evidence. Like Kershaw, where there was a total loss of evidence as to the particular school at issue, there was likewise a total loss of the righthand secondary handrail. Yet this fact did not move Kershaw to impose drastic sanctions. As such, the same reasoning and result applies here.

Even if Kershaw had relied on the availability of asbestos-containing ceiling materials in other schools, that would simply reinforce the point. Just as Okun represents was true in Kershaw, Okun also has available other means of proving the

condition of the lost evidence. Because Kershaw is on all fours with the present case, the decision compels the conclusion that the trial court's imposition of drastic sanctions constitutes reversible error.

IV. Reply to Okun's assertion that the sanctions order was not excessive, despite extending to unrelated affirmative defenses. (Resp. Br. at 8, 16–20)

Okun claims that striking the pleadings was a measured response to violation of the preservation order, in that the lost evidence "go[es] directly" to comparative negligence and other affirmative defenses. (Resp. Br. at 8) Okun does not explain how the righthand secondary handrail tends to prove or disprove the affirmative defenses of comparative negligence and intervening or superseding causes. No such explanation exists. These defenses were based solely on decedent's *own* conduct (failure to use a medically required walker) and conditions (advanced age, preexisting medical conditions, and ill health). (Alliance Answer ¶¶ 16–17, 23–24; Defs. Opp'n to Pl. Mot. to Strike at 3) Consequently, striking the entirety of the pleadings went far beyond what was necessary to redress violation of the preservation order.

Okun downplays the severity of the sanction, noting that at least the trial court "did not issue an order of default." (Resp. Br. at 8) But there is no meaningful distinction between striking Pobuckra's and Alliance's pleadings and entering a default order. Either way, the end result is the same. Orlando, 320 S.C. at 511 (recognizing that a sanction can be tantamount to granting judgment by default or dismissal).

Okun professes concern that, absent imposition of the harshest sanction available for every loss of evidence, "litigants would routinely disregard the court's orders with impunity." (Resp. Br. at 8) The notion that nothing short of case-dispositive sanctions would have a deterrent effect is hyperbolic. Courts have discretion to craft a sanction that strikes the appropriate balance between curbing the offending conduct and facilitating discovery. Kershaw, 302 S.C. at 395. Even in the spoliation of evidence context, a lesser sanction—an adverse inference jury instruction—has been found sufficient to accomplish this dual goal. *Id.*

Finally, in tacit admission that the trial court went too far, Okun constructs and refutes imaginary arguments. Okun feigns indignation when he asserts that Pobuckra—the only party subject to the preservation order—wants a "free pass" and "no penalty" for losing the righthand secondary handrail. (Resp. Br. at 17) In doing so, Okun presents a false dichotomy: The only choices are the harshest sanction available or no sanction at all. Not so. There are a number of options in between, necessitating a remand for consideration of a more narrowly tailored sanction.

V. Okun's procedural objections are meritless.

A. Reply to Okun's assertion that an abuse of discretion must be shown by "clear and convincing evidence." (Resp. Br. at 5)

Hoping to dodge review on the merits of the sanctions order, Okun asserts that Pobuckra and Alliance must show an abuse of discretion by clear and convincing evidence—a more onerous burden than that to which Okun's negligence claims are

subject. Okun is wrong, in that he conflates the standard of review with the standard of proof. Tellingly, Okun cites no authority for his novel proposition.

B. Reply to Okun's assertion that Pobuckra and Alliance waived their challenges to the interlocutory sanctions order, by not moving to alter or amend a nonexistent final judgment. (Resp. Br. at 1–4, 7–15)

1. All arguments were preserved for review.

Okun's waiver claim rests on the faulty assumption that the trial court did not resolve Pobuckra and Alliance's arguments against imposing drastic sanctions. In fact, the record demonstrates that the court considered and rejected all opposition arguments—the very same arguments Pobuckra and Alliance press on appeal.

In evaluating preservation of error, a court may consider the entire record. Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). An error is preserved for review, where the trial court expressly adopts the respondent's argument or its order implicitly rejects the appellant's argument. Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009); Church v. McGee, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011). Any doubt should be resolved in favor of preservation. Johnson v. Roberts, 422 S.C. 406, 411–12, 812 S.E.2d 207, 210 (Ct. App. 2018), aff'd, 427 S.C. 258, 830 S.E.2d 910 (2019); see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (observing that preservation is "not a 'gotcha' game").

Here, the trial court rejected every argument Pobuckra and Alliance mounted in opposition to Okun's motion for sanctions. Those arguments included: 1) Pobuckra

and Alliance had not acted in bad faith, intentionally, or with gross indifference to Okun's rights, a prerequisite to imposing drastic sanctions; 2) Okun was not unduly prejudiced, as there was other evidence of the righthand secondary handrail; and 3) drastic sanctions were excessive. (Defs. Opp'n to Pl. Mot. to Strike at 3, 5–10; Jan. 6, 2023 Tr. at 3, 5–10) In entering a form order granting Okun's motion for sanctions, the court necessarily rejected every one of these contentions. (Form 4 Order)

Additional support for this conclusion is found in the court's contemporaneous email, explaining the reasons for its ruling. (Jan. 6, 2023 E-Mail) In the email, the court expressly rejected the arguments that Okun was not unduly prejudiced and that drastic sanctions were excessive. (Jan. 6, 2023 E-Mail) Although the court did not expressly reject the argument that bad faith, intentional misconduct, or gross indifference is a prerequisite to drastic sanctions, that is the import of the ruling. Viewing violation of the preservation order as dispositive, the court implicitly dispensed with the requirement of bad faith, intentional misconduct, or gross indifference. (Jan. 6, 2023 E-Mail)

In light of the form order and the court's email explaining its reasoning, nothing more is required to facilitate review. Clark v. S.C. Dep't of Pub. Safety, 353 S.C. 291, 311–12, 578 S.E.2d 16, 26 (Ct. App. 2002) (holding that an order denying post-trial motions was sufficient, as the trial court's reasoning could be discerned from the record, noting that "there is no blanket requirement that the trial court set forth a separate explanation on all of its rulings"), aff'd, 362 S.C. 377, 608 S.E.2d 573 (2005).

On appeal, Pobuckra and Alliance's arguments are all an iteration of one of the three points urged below. Okun protests that Pobuckra and Alliance do not articulate their arguments in precisely the same manner. (Resp. Br. at 10–12) The assertion is of no moment, amounting to the benign accusation that Pobuckra and Alliance's appeal brief is more fully developed than their trial brief. Not surprisingly, the same is true of Okun. It is rich indeed for Okun to complain about preservation of error, after he filed a two-page motion for sanctions that was bereft of supporting legal authority or evidence. (Pl. Mot. to Strike)

For these reasons, all issues have been preserved for review—particularly where Okun himself *agrees* that the trial court resolved every one of Pobuckra and Alliance's arguments. (Resp. Br. at 6–7, 19) It follows that there was no need for a motion to alter or amend the sanctions order. Okun's cited case makes the point. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (holding that a motion to alter or amend the judgment is not necessary to preserve issues on which the trial court ruled).

2. The trial court's email explanation is proper evidence of issue preservation.

Okun objects that the trial court's email explanation of its ruling must be ignored, as it is not embodied within the form order. The assertion elevates form over substance. Whether the reasoning appears in the order or some other document, it is part of the record that this Court may consider. SCACR 210(c) (stating that the record includes orders, decrees, decisions, and "other materials or documents"). The

assertion is also self-defeating, considering that Okun includes the email in his record designation, affirmatively relies on the email to defend the sanctions order, and did not move to strike the email from the record.

Okun's cited cases do not advance his position. Long v. McMillan, 226 S.C. 598, 611, 86 S.E.2d 477, 483 (1955) (holding that the trial court's off-the-record oral directive was not an order); State v. Highsmith, 105 S.C. 505, 505, 90 S.E. 154, 155 (1916) (holding that the trial court's off-the-record interpretation of its order was not controlling as to the order's meaning); State v. Fletcher, 363 S.C. 221, 258, 609 S.E.2d 572, 591 (Ct. App. 2005) (holding that a party's off-the-record objection does not preserve the issue for review), rev'd, 379 S.C. 17, 664 S.E.2d 480 (2008); Andrews v. Dorchester Cnty. Sch. Dist. No. 2, 292 S.C. 392, 394–95, 356 S.E.2d 439, 441 (Ct. App. 1987) (holding that a letter from an attorney representing the county board of education was not an "order" of that body).

These cases do not stand for the proposition that issue preservation excludes consideration of an email explaining the trial court's ruling. Long, Highsmith, Fletcher, and Andrews hold merely that a trial court's off-the-record statements, and a party's on- or off-the-record statements, do not have the force of law. That principle is inapt here, where the email—akin to a transcript of proceedings—represents the trial court's on-the-record statements supplementing its on-the-record order.

Grasping at straws, Okun detours into the absurd with the suggestion that the email reflects the rogue musings of Judge Seals' law clerk. Observing that the email

was "purportedly" sent on Judge Seals' behalf, and was not "written by the Judge himself," Okun tries to cast doubt on the email's authenticity by obliquely disparaging Judge Seals' law clerk. (Resp. Br. at 13–14) But Okun cites no evidence that the email was sent without Judge Seals' authority or misrepresented his words. Conjecture and innuendo are no substitute for evidence.

3. SCRCP 59(e) does not apply to an interlocutory order, such as the sanctions order.

In addition to the fact that a motion to alter or amend the sanctions order was not a prerequisite to preservation of error for appeal, Pobuckra and Alliance had no ability to seek such relief under SCRCP 59(e). The sanctions order is interlocutory in nature, whereas SCRCP 59(e) applies exclusively to a final judgment. SCRCP 59(e) ("A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."); SCRCP 54(a) (defining a "judgment" as "any decree or order which dismisses the action as to any party or finally determines the rights of any party").

Okun cites no authority extending SCRCP 59(e) to an interlocutory order. Just the opposite. Every case on which Okun relies involved application of SCRCP 59(e) to a final judgment. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004); Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003); Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 522 S.E.2d 144 (1999); Wilder, 330 S.C. 71; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992); Noisette v. Ismail, 304 S.C. 56, 403

S.E.2d 122 (1991); Siau v. Kassel, 369 S.C. 631, 632 S.E.2d 888 (Ct. App. 2006), overruled by Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (2009).

Nor does Okun cite any authority that an SCRCP 59(e) motion tolls the time to appeal an interlocutory order. The procedural rules contain tolling provisions, but only for certain motions directed against a final judgment. SCRCP 59(f) ("The time for appeal for all parties shall be stayed by a timely motion under this Rule …."); SCACR 203(b)(1) ("When a timely … [SCRCP 59(e)] motion to alter or amend the judgment … has been made, the time for appeal for all parties shall be stayed ….").

Succinctly put, Okun's procedural objections miss the mark. Insistence that Pobuckra and Alliance should have sought relief that was neither required nor permissible, a fruitless endeavor, is yet another illustration of Okun's elevation of form over substance. There is but one conclusion: The sanctions order must fall.

CONCLUSION

For the foregoing reasons, Pobuckra and Alliance respectfully request that this Court grant the relief requested in their opening brief.

Respectfully submitted,

s/ *Agelo L. Reppas*

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PROOF OF SERVICE

I certify that I have served Appellants' Initial Reply Brief on Respondent Steven Michael Okun, as Personal Representative of the Estate of Jane Luanne Okun, by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2023, addressed to Respondent's counsel of record, Gene M. Connell, Jr., Esq., P.O. Drawer 14547, Surfside Beach, SC 29587-4547.

BARNWELL WHALEY PATTERSON & HELMS, LLC

s/ *Janet Segell*
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