THE STATE OF SOUTH CAROLINA
In The Court of Appeals

GREENVILLE COUNTY
APPEAL FROM THE COURT OF COMMON PLEAS
RICHLAND COUNTY

Appeal No. 2021-001461

Ironwork Productions, LLC., ... Appellants,

v.

Bobcat of Greenville, LLC and
Bobcat Company, Inc.,..... Respondents.

BOBCAT OF GREENVILLE, LLC'S
PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioner Bobcat of Greenville, LLC ("Bobcat of Greenville"), hereby petitions this Court to rehear Points One and Three of its Opinion in the above-captioned case, Opinion No. 2023-UP-246 (Ct. App. filed June 21, 2023).[1] Petitioners received this Court's Opinion No. 2023-UP-246 on June 21, 2023.

This Court overlooked and/or misconstrued the facts that: 1) Plaintiff's Motion to Alter or Amend, (R. pp. 165-171), was ineffective to stay the time to appeal due to Plaintiff's failure to timely provide Judge Miller a copy of the Motion as is required by Rule 59(g), SCRCP; 2) Plaintiff's argument that the Complaint should not be dismissed

[1] Petitioner Bobcat of Greenville does not take issue with Point Two of Opinion No. 2023-UP-246, other than that the outcome reached as to Bobcat Company Inc./Clark Equipment Company ("CEC") should apply equally to Bobcat of Greenville.

as to Bobcat of Greenville was waived and is unpreserved for appellate review; and 3) the Circuit Court properly dismissed the Complaint as to both Defendants.

I. This Court overlooked and/or misconstrued Defendants' argument that Plaintiff's failure to comply with Rule 59(g) rendered the October 25, 2019 Order final and not subject to further review.

It is undisputed that neither the Motion to Alter or Amend, (R. pp. 165-171), nor the Motion for Reconsideration, (R. pp. 172-178), was sent to Judge Miller within ten days of filing as is required by Rule 59(g), SCRCP.[2] It is also uncontested that the Motion for Reconsideration, filed on November 5, 2019, was untimely and, therefore, of no effect. This is because Rule 59(e) provides that "[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." Rule 59(e), SCRCP (emphasis added); *Van Ness v. Eckerd Corp.*, 350 S.C. 399, 402-403, 566 S.E.2d 193, 195 (Ct. App. 2002) (a trial court loses jurisdiction to alter or amend unless a Rule 50(e) motion is filed within ten days of a judgment); *Garrison v. Target Corp.*, 435 S.C. 566, 581-582, 869 S.E.2d 797, 806 (2022) (the use of the term "shall" indicates "that the action is mandatory"). Thus, the ten-day window in which to seek reconsideration under Rule 59(e) is mandatory and cannot be expanded by the trial court. *See, e.g., Overland, Inc. v. Nance*, 423 S.C. 253, 256, 815 S.E.2d 431, 433 (2018) ("the ten-day limit for serving a Rule 59(e) motion is an absolute deadline"), *citing Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000).

Rule 59(g) provides "[a] party filing a written motion under this rule *shall* provide a copy of the motion to the judge within ten (10) days after the filing of the motion."

[2] As this Court correctly pointed out, accepting Defendants' argument that Plaintiff's Motion to Alter or Amend was ineffective due to Plaintiff's failure to comply with Rule 59(g), SCRCP, is dispositive of this appeal.

Rule 59(g), SCRCP (emphasis added). Applying traditional rules of statutory interpretation, *Kosciusko v. Parham*, 428 S.C. 481, 496, 836 S.E.2d 362, 370 (Ct. App. 2019) ("[i]n interpreting the meaning of [procedural rules], the [c]ourt applies the same rules of construction used to interpret statutes"), the use of the mandatory shall in Rule 59(g), makes it mandatory. *Garrison*, 435 S.C. at 581-582, 869 S.E.2d at 806. Consequently, Plaintiff's failure to provide a copy of his Motion to Judge Miller within ten days of filing rendered the October 25, 2019 Order final and no longer subject to review. (*See* R. p. 651, line 22 – p. 652, line 8; p. 653, lines 3-9; Brief of Bobcat of Greenville pp. 19-20; Brief of CEC pp. 9-10).

As a result, Plaintiff's failure to provide a copy of its Motion to Alter or Amend to Judge Miller within ten days provides an additional substantial reason to uphold the Circuit Court's denial of those Motions. *See Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017) (providing that failure to provide a Rule 59 motion to the presiding judge can serve as the sole basis for denial of the motion); *see also* Rule 220(c), SCACR (an "appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal").

This Court cites *Gallagher v. Evert*, 353 S.C. 59, 63, 577 S.E.2d 217, 219 (Ct. App. 2002) for the proposition that, because the Circuit Court heard arguments to alter or amend despite Plaintiff's failure to comply with Rule 59(g), its arguments were preserved and the time for appeal did not start to run until the order on rehearing was filed. However, as explained above, Rule 59(g) uses the same mandatory "shall" as does Rule 59(e), which "means that the action is mandatory." *Garrison*, 435 S.C. at 581-582, 869 S.E.2d at 806; *see also Kosciusko*, 428 S.C. at 496, 836 S.E.2d at 370. Our courts

consistently and unequivocally have held that the 10-day deadline under Rule 59(e) is absolute and cannot be expanded. *Overland*, 423 S.C. at 256, 815 S.E.2d at 433. The basis for this bright-line rule is that, while trial courts have limited authority under Rule 6(b), SCRCP, to extend deadlines, Rule 6(b) specifically provides that "[t]he time for taking any action under rules 50(b), 52(b), 59, and 60(b) may not be extended except to the extent and under the conditions stated in them." Like Rule 59(e), Rule 59(g) "does not have any 'conditions stated' which would allow such an extension." By ruling that the trial court can "excuse" the failure of a party to provide the judge with a copy of its Rule 59(e) within ten days of filing by simply hearing the motion, essentially allows the judge discretion to grant an extension of time—despite the fact that Rule 6(b) specifically prohibits such an extension.

This Court should grant rehearing and rule that Plaintiff's failure to provide Judge Miller with a copy of its Motion to Alter or Amend within ten days of filing rendered the October 25, 2019 Order final and no longer subject to review.

II. This Court overlooked and/or misconstrued the fact that Plaintiff's argument that the dismissal should not apply to Bobcat of Greenville was waived, is unpreserved and should not be considered by this Court.

Even if this Court were to address the substance of this appeal, Plaintiff's argument that the dismissal should apply only to CEC, and not to Bobcat of Greenville, is unpreserved for appellate review. Plaintiff's argument on this point is unpreserved in two respects: 1) Plaintiff failed to object to the breadth of the October 1, 2019 Order or to Bobcat of Greenville's request to join in CEC's motion to dismiss, and 2) the first time Plaintiff raised this argument was on reconsideration.

A. Plaintiff failed to make timely objections.

Plaintiff had at least two clear opportunities to object to the Complaint being dismissed as to both Defendants, but either failed or strategically decided not to do so. First, Plaintiff's counsel was provided with a copy of the proposed October 1, 2019 Order before it was submitted to Judge Miller. Plaintiff's counsel did not object to any of the wording, including the fact that the entire "Complaint in this lawsuit shall be dismissed" if Plaintiff failed to meet the deadline set therein. Instead, Plaintiff's counsel stated that the proposed Order was "fine" with him. (R. p. 663). Indeed, in its October 25, 2019 Order Dismissing Plaintiff's Complaint with Prejudice, the Circuit Court noted that Plaintiff's counsel had "consented to the language of the [October 1] Order before it was filed." (October 25, 2019 Order, R. pp. 4-6).

The Circuit Court's October 1, 2019 Order stated broadly and definitely that if Plaintiff did not "provide full and complete responses to all outstanding requests … with[in] ten (10) days of receipt of" the Order, "Plaintiff's Complaint in this lawsuit *shall* be dismissed." (R. pp. 1-3) (emphasis added). The October 1, 2019 Order did not say the Complaint *might* be dismissed, nor did it say the Complaint would be dismissed *only as to CEC*. Instead, the October 1, 2019 Order stated clearly and unequivocally that if Plaintiff failed to comply with the discovery order, his Complaint would be dismissed, period.

Second, when CEC filed its Notice of Plaintiff's Noncompliance with the Court's 10/1/19 Order and Request for Dismissal, (R. pp. 661-662), Counsel for Bobcat of Greenville responded by emailing other counsel of record and Judge Miller, stating that Bobcat of Greenville "joins in the request of defendant Clark Equipment Company Inc. to

dismiss the complaint." (R. p. 659). Critically, again, Plaintiff did not object or oppose in any way Bobcat of Greenville's request to join the motion to dismiss the complaint. And, while this Court criticized the timing and the alleged "informality" of Bobcat of Greenville's request to the Circuit Court to join the motion to dismiss—discussed below—there was no timely objection by Plaintiff to Bobcat of Greenville's joining the request for dismissal, or response of any kind from Plaintiff.

Accordingly, Plaintiff waived review of this issue by failing to make any timely objection, despite having had at least two opportunities in which to do so. *See*, *e.g.*, *Sea Cove Dev., LLC v. Harbourside Cmty. Bank*, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010) (noting both that "a contemporaneous objection is required to preserve an issue for appellate review," and an issue cannot be "raised for the first time in a motion for reconsideration"); *State v. King*, 334 S.C. 504, 510, 514 S.E.2d 578, 581 (1999) (an objection "must be timely made, which usually requires it be made at the earliest possible opportunity" or else it is waived).

While the result reached in this case could be seen as harsh under different facts, here, Plaintiff had a clear opportunity to object to the breadth of the proposed sanctions Order. It also had an opportunity to object to Bobcat of Greenville joining the motion to dismiss. However, Plaintiff failed to raise any objection, whether due to inadvertence or for strategic reasons. This Court should grant rehearing and hold that Plaintiff waived any argument it might have had that the Complaint should not have been dismissed as against Bobcat of Greenville.

B. Plaintiff failed to object to the dismissal as to Bobcat of Greenville until arguing its Motion to Alter or Amend.

The only Motion to Alter or Amend that was timely filed did not raise any argument that the Complaint should not be dismissed as to Bobcat of Greenville. Instead, that Motion only set forth reasons for Plaintiff's failure to respond to discovery and asking for leniency. (R. pp. 166-171). And, while Plaintiff's current counsel did argue that the Complaint should not be dismissed as to Bobcat of Greenville at the November 17, 2021 hearing on the Motion to Alter or Amend, conducted nearly two years after the motion was filed, (R. p. 649), that still does not cure the fact that this argument was made for the first time on reconsideration. Plainly, an issue cannot be raised for the first time in a motion for reconsideration. *Johnson v. Sonoco Prods. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009); *see also Kiawah Prop. Owners Group v. PSC*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (issue first raised in motion for reconsideration is not preserved for appellate review).

This Court should grant rehearing and hold that any argument that Plaintiff's arguments regarding the Complaint being dismissed against Bobcat of Greenville are waived and/or unpreserved for this Court's review.

III. This Court overlooked and/or misconstrued that the Circuit Court properly dismissed Plaintiff's Complaint as against all parties.

The Circuit Court properly dismissed Plaintiff's Complaint as to Bobcat of Greenville as well as to CEC. Arguments to the contrary fail for a number of reasons. As noted above, Plaintiff's appeal is untimely due to its failure to comply with Rule 59(g). In addition, this issue was waived and is not preserved for appellate review because Plaintiff failed to make any timely objections and did not raise it until rehearing. *See*, *e.g.*, *Sea Cove*, 387 S.C. at 108 n.5, 691 S.E.2d at 165 n.5 (noting both that "a contemporaneous objection is required to preserve an issue for appellate review," and an issue cannot be

"raised for the first time in a motion for reconsideration"); *King*, 334 S.C. at 510, 514 S.E.2d at 581 (an objection "must be timely made, which usually requires it be made at the earliest possible opportunity" or else it is waived); *Johnson*, 381 S.C. at 177, 672 S.E.2d at 570 (an issue cannot be raised for the first time in a motion for reconsideration); *Kiawah Prop. Owners*, 359 S.C. at 113, 597 S.E.2d at 149 (issue first raised in motion for reconsideration is not preserved for appellate review).

Even though this Court addressed the substance of this issue, which it should not have done, it lacks merit. "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Davis v. Parkview Apts.*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014), *citing Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). Indeed, "the most severe in the spectrum of sanctions provided by statue or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Downey*, 294 S.C. at 45, 362 S.E.2d at 318. Indeed, the Circuit Court noted its judicial frustration with Plaintiff's Counsel's actions during discovery. (R. p. 649, lines 6-7).

Here, Plaintiff failed to meet its burden "to demonstrate the trial court abused its discretion." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542, 489 S.E.2d 679, 681 (Ct. App. 1997). As set out above, there is reasonable factual support to uphold the dismissal as to Bobcat of Greenville. Plaintiff's counsel was provided a copy of the proposed October 1, 2019 Order, to which he not only failed to object, but which he wholeheartedly endorsed, saying it was "fine" by him. When Bobcat of Greenville stated that it was joining in CEC's motion to dismiss, Plaintiff failed to make any timely

objection. The first time any objection was raised regarding the breadth of the October 1, 2019 Order or to Bobcat of Greenville joining the motion to dismiss was on rehearing, rendering that argument waived and unpreserved for this Court's review.

Here, Bobcat of Greenville specifically and unambiguously joined in CEC's "request … to dismiss the complaint." (R. p. 659). Although Plaintiff stated in a footnote in its November 5 Motion for Reconsideration that its Complaint should not have been dismissed as to Bobcat of Greenville, (R. p. 173 n.2), that Motion was untimely. While Plaintiff's counsel raised the same argument at the November 17, 2021 hearing, over two years after the Complaint was dismissed, that belated argument is both waived and unpreserved. While this Court dismissed the fact that Bobcat of Greenville properly joined in the motion to dismiss, describing it as belated and informal, and without explanation, there is no rule or requirement that a party explain its reasons for joining a motion to dismiss. Nor is there a timeframe in which a party must join a motion to dismiss. Ironically, this Court takes issue with the timing of Bobcat of Greenville's joining the motion to dismiss but gives Plaintiff a complete pass on the mandatory requirement to provide the presiding judge with a copy of its Rule 59(e) motion. The procedural rules of this Court should apply evenly between plaintiffs and defendants, and not in favor of one over the other.

This Court should grant rehearing and affirm the dismissal of Plaintiff's Complaint as to both Respondents.

CONCLUSION

For the reasons stated herein, Petitioner Bobcat of Greenville respectfully requests that this Court grant its Petition and rehear that portion of the Opinion No. 2023-UP-246 that reverses the Circuit Court's dismissal of the Complaint as to Bobcat of Greenville.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE

June 30, 2023

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
The Honorable Edward W. Miller, Circuit Court Judge

Appeal No. 2021-001461

Ironwork Productions, LLC, ...Appellant,

v.

Bobcat of Greenville, LLC, and
Bobcat Company, Inc.,.....Respondents.

PROOF OF SERVICE

I certify that on the 30th day of June 2023, I served **Bobcat of Greenville, LLC's Petition for Rehearing** on Ironwork Productions, LLC and on other counsel of record by emailing a copy of it to counsel as follows:

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Jun 30 2023
SC Court of Appeals

June 30, 2023

Via S.C. Courts E-Filing & U.S. Mail
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Ironwork Productions, LLC v. Bobcat of Greenville, LLC and Bobcat Company, Inc
Civil Action No.: 2021-001461 (Greenville)
Date of Incident: November 30, 2017
Carrier Claim No.: FEV1148
MGC File No.: 20527.18479
Appeal No.: 2021-001461

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter, please find Bobcat of Greenville, LLC's Petition for Rehearing, and Proof of Service of same. We will send our firm's check in the amount of $50 for filing the Petition via U.S. Mail with a copy of this letter.

Please do not hesitate to contact me if the Court requires additional copies and/or if you have any questions.

Very truly yours,

Helen F. Hiser

Enclosures

cc: Adam C. Bach, Esq. (via email only)
Jay T. Thompson, Esq. (via email only)bcc: