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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2019-000502
Civil Action No. 2018-CP-43-00138

Jamaine Holman, Victoria Lewis, Melanie Baker,
Christopher Shipman, Robert Weaver, Vonetta Wilson,
Francesca Worley, Brittany Johnson, Shirley Pearson, Robert
Weaver, Gostonia Pearson, Rodney Leachman, Cassandra
Pugh, and Krystal Bostinto, on behalf of themselves and all
others similarly situated Appellants,

v.

South Carolina Education Lottery Commission d/b/a South
Carolina Education Lottery, and Intralot, Inc. Respondents.

**RETURN TO APPELLANTS' PETITION FOR REHEARING BY RESPONDENT SOUTH
CAROLINA EDUCATION LOTTERY COMMISSION**

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Respondent South Carolina Education Lottery Commission (the “Commission”), pursuant to Rule 221(a), SCACR, submits this Return to Appellants’ Petition for Rehearing. On August 9, 2023, this Court affirmed the decision of circuit court concluding that Appellants failed to exhaust administrative remedies prior to filing their putative class action suit. Appellants filed a petition for rehearing on August 24, 2023 regarding certain arguments which this Court found were not preserved for appellate review. This Court’s Opinion is correct, including the finding that Appellants failed to preserve the arguments, and rehearing should be denied.

STANDARD OF REVIEW

A petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). To prevail on a petition for rehearing, the petitioner must demonstrate the Court overlooked or misapprehended their argument. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). The purpose of a petition for rehearing “is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Herron* at 466, 719 S.E.2d at 643 (quoting *Kennedy v. S.C. Ret. Sys.*, 349 S.C. at 532, 564 S.E.2d at 322). Thus, our appellate courts will deny a petition for rehearing whenever “the points set forth in the petition have all been considered and expressly decided against the respondent by this Court in the opinion filed.” *Clemmons v. Nicholson*, 188 S.C. 124, 198 S.E. 180, 183 (1938).

ARGUMENT

Appellants' Petition for Rehearing purports to address two arguments or groups of arguments that this Court found were not preserved for appellate review: (1) a procedural argument regarding the submission of materials outside of the pleadings *Holman v. South Carolina Education Lottery Commission*, Op. No. 6013, at 7-8 (S.C. Ct. App. Filed August 9, 2023) and (2) a group of arguments presented by Appellants on why certain claims should not be subject to the requirement of exhaustion of administrative remedies *Id.* at 8.

I. Rehearing Should Be Denied Regarding The Procedural Argument

A. Preservation Requirements Would be Thwarted by Rehearing

The purpose of the “preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” *I’On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E. 2d 716, 724 (2000), citing *Roche v. South Carolina Alcoholic Beverage Control Comm’n*, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant’s contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). “The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must ***both*** present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.” *I’On*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added).

B. Appellants Did Not Object to Materials or Information at the Trial Court

For an issue to be considered on appeal, it “must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Additionally, when the appellant presented any objection to raise the issue, it “must be sufficiently specific to inform the trial court of the point being urged by the objector.” *Id.*

Nothing in the Appellants’ Petition for Rehearing demonstrates, or even asserts, that Appellants made any objection related to the trial court’s review of information beyond the pleadings, much less an objection that meets the specificity requirements of the law. Appellants do not present any record citation because the record contains no place at which the Appellants objected or argued to the trial court that it should not consider the information or materials regarding the Gaming Laboratories International report and the letters between the ticket holders and the Commission seeking and declining payment of the tickets. In fact, these documents and information were first argued by Appellants in their filings as a basis to support their assertion that the administrative process would be futile and discussed at the hearing without objection. *See* Plaintiff’s Memorandum in Opp p. 5-6 (R. 102-103); Hearing Tr. at 5:6–15, 7:21–24, 11:17–22, 13:19 to 14:1, 19:12–20 (R. p. 194, lines 6–15, R. p. 196, lines 21–24, R. p. 200, lines 17–22, R. p. 202, line 19–p. 203, line 1, and R. p. 208, lines 12–20). Appellants now improperly want to claim prejudicial error from the trial court’s possible consideration of information that they first presented to the trial court. A party cannot complain of a claimed error which his or her own conduct had induced. *Cox v. Cox*, 290 S.C. 245, 248, 349 S.E.2d 92, 93 (Ct. App. 1986).

Because the arguments and facts in the Commission’s Motion to Reconsider had previously been raised to the trial court without objection and had been acknowledged and

discussed by Plaintiff's counsel at that hearing and in briefing, there was no procedural impropriety to the Commission reiterating them, along with demonstrative support, in the Motion to Reconsider to show the status of the administrative review. After the Commission's Rule 59 motion was filed, Appellants could have objected in either a memorandum in opposition or their own Rule 59 motion. They made no such objection.

C. The Trial Court Never Ruled on Submission of Information Outside of the Pleadings

Appellants also fail to point to any ruling by the trial court regarding the information or materials outside of the pleadings. Appellants note that the trial court mentioned that both parties "make reference to matters outside of the pleadings . . ." in Footnote 1 of the January 4, 2019 Order (R. p.17). Nevertheless, the trial court does not rule whether it is considering any such referenced matters in either the January 4, 2019 Order (R. 15-21) or the February 25, 2019 Order (R. 1-7). So, even if an objection to the consideration of matters outside the pleadings had been made (which it was not), no ruling on the issue was obtained.

The failure to raise the issue through specific objection and the failure of the court to make a ruling on the issue requires the finding that it is not preserved for appellate review. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

D. The Materials Were Submitted to Describe the Status of the Late Filed Administrative Review Not to Establish a Disputed Fact

As Respondent South Carolina Education Lottery Commission stated in its briefing (Final Brief of Respondent South Carolina Education Lottery Commission at p. 26), the trial court's ruling dismissing the suit did not depend on or adopt the supposedly "new" evidence and arguments. The Order Granting the Motions references only GLI's report in the "Factual and Procedural Background" to note *the Commission's* reason for its decision not to pay the tickets.

See Order at 2 (R. p. 2). The trial court did not accept the truth of GLI’s conclusion nor make any finding that the tickets were issued or printed in error. At most, the trial court noted that the *Commission* had made such a determination, *see* Order at 2, 4 (R. p. 2, 4), but the trial court did not make such a finding itself, nor was its ruling based on that fact. Rather, the ruling rested on (i) the trial court’s conclusion that a ticket holder seeking payment of his ticket must exhaust his administrative remedies (including an appeal to the ALC) before seeking judicial relief, *see* Order at 2-3 (R. p. 2-3) (ii) that Appellants had not alleged they had exhausted administrative remedies, *see* Order at 2 (R. p. 2), and (iii) the conclusion that their failure was not excused, *see* Order at 3-6 (R. p. 3-6). The justification the Commission gives for denying payment of a ticket (and the question of whether that justification was a good one) has no effect on whether exhaustion is required. The trial court’s ruling rested on the exhaustion requirement, not the claimed “new” evidence.

II. Rehearing Should Be Denied Regarding the Other Identified Exhaustion Issues

A. Appellants Presented No Argument on These Issues

Nowhere in the Petition for Rehearing do the Appellants make any argument that would demonstrate the basis of the petition on these issues. A petition for rehearing must “state with particularity the points supposed to have been overlooked or misapprehended by the court.” *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (quoting Rule 221(a), SCACR). Therefore, the petition on these issues should be denied.

B. Appellants Failed to Show that Arguments Regarding Applicability of Exhaustion Requirement Related to Third Parties Was Preserved

Appellants argued in their brief that certain claims against Respondent Intralot were not subject to administrative review because they involved the actions of a third party instead of the governmental entity. Appellants’ Brief p. 6-7. This argument does not apply to Respondent,

South Carolina Education Lottery Commission, which is undisputedly a governmental entity created by the South Carolina Legislature. *See* S.C. Code Ann. §§ 59-150-10 to 410.

Even if the issue or argument could apply to Respondent South Carolina Education Lottery Commission, there is no citation to any place in the record in which this issue was raised prior to the appeal brief and no citation to suggest that the trial court ruled on the issue in its Orders on the Rule 59 motions. For an issue to be considered on appeal, it “must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellants have failed to demonstrate that this issue was preserved.

C. Argument Regarding Need for a Board Decision Was Not Preserved

Appellants also argued in their brief that there must be a “Board” decision before any administrative review is required. Appellants’ Brief p. 7. There is no citation to any place in the record in which this issue was raised prior to the appeal brief. In fact, neither Appellants’ memorandum to the trial court nor arguments at the hearing raise the issue of the need for a “Board”¹ decision, and the trial court orders do not rule upon this issue. For an issue to be considered on appeal, it “must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Appellants have failed to demonstrate that this issue was preserved.

Additionally, the argument that a Board decision is required before any administrative review is required is wrong. The Lottery Act authorizes the South Carolina Education Lottery Commission to promulgate regulations and establish policies and procedures to regulate and administer game play, including ticket sales and deciding whether to pay a ticket. *See* S.C. Code

¹ The Board is defined as the “Board of Commissioners of the South Carolina Lottery Commission.” S.C. Code Ann. § 59-150-20(2).

Ann. §§ 59-150-60, -90(A), -230(A)(3), and -240(C). Pursuant to this statutory authority, the Board created a multistep administrative review process for any person (including the ticket holders who are the appellants in this case) aggrieved by any action or decision of the Commission relating to the administration or operation of lottery games. The first step in this process is for the complainant to file a formal written complaint with the Commission's Executive Director. *See* S.C. Code of Regulations § 44-70; SCEL Complaint Procedure ¶ A.² If the complainant is dissatisfied with the Executive Director's final, written decision, he or she must seek a hearing before the Commission's Board. *See* S.C. Code of Regulations § 44-70(F); SCEL Complaint Procedure ¶¶ L–M. If the complainant finds the Commission's final, written decision unpalatable, his or her appeal must be taken to the ALC. *See* S.C. Code Ann. § 59-150-300(A). Only *after* the ALC rules may the matter be taken to the Circuit Court. *Id.* § 59-150-300(D). The statutory and authorized regulatory procedures do not support Appellants' argument.

CONCLUSION

For the foregoing reasons, Respondent South Carolina Education Lottery Commission respectfully requests this Court deny the Petition for Rehearing.

SIGNATURE ON FOLLOWING PAGE

² Available at <http://www.sceducationlottery.com/images/pdf/ComplaintProcedures.pdf>.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP do hereby certify that I have served all counsel in this action with a copy of the pleading(s) specified below to the following email addresses:

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September 15, 2023

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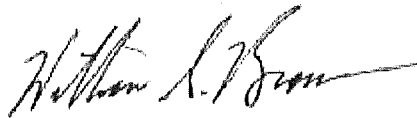
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Re: Jamaine Holman v. SCEL
Appellate Case No. 2019-000502

Dear Chief Deputy Clerk:

I represent the South Carolina Education Lottery in the above referenced matter. I am filing herewith the Return to Appellants' Petition for Rehearing.

Very truly yours,



William S. Brown

WSB:cb
Enclosure
cc: Mario A. Pacella, Esq.
Miles E. Coleman, Esq.
Joseph C. Hopkins, Esq.