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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

Jamaine Holmes, 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.

APPELLANTS' PETITION FOR REHEARING

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ARGUMENT

I. APPELLANTS ARGUMENT WAS PRESERVED.

In its Order, the Court determined Appellants' arguments were unpreserved, specifically, regarding: (1) Appellants' argument that the trial court's improperly considered of facts not contained in the pleadings, *Holman v. Berry*, Op. No. 6013, at 8 (S.C. Ct. App. filed August 9, 2023) ("Appellants never raised this argument to the circuit court in a response to Respondents' motions to reconsider, alter, or amend and they failed to file a Rule 59(e) motion in response to the circuit court's orders granting Respondents' motions[.]"); and (2) Appellants' exhaustion arguments; (*Id.*) ("We find these exhaustion arguments are not preserved for appellate review.").

In doing so, the Court largely relied on South Carolina's precedent surrounding Rule 59(e), SCRCP. See *id.* However, as the Court overlooked, or misunderstood, the Supreme Court has identified two (2) situations where a party should "consider" pursuing a Rule 59(e) motion: (1) party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it; and (2) a party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004).

Additionally, "[a] party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not." *Anderson Memorial Hospital, Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399, 400 (Ct. App. 1994) (citing *C.A.H. v. L.H.*, 315 S.C. 389, 434 S.E.2d 268 (1993)). Moreover, a party cannot use Rule 59(e) to present

new evidence to the trial court. See *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008) (holding issue is not preserved for appeal where it was never presented to the trial court prior to the filing of the motion to alter or amend); *Eaddy v. Oliver*, 345 S.C. 39, 44, 545 S.E.2d 830, 833 (Ct. App. 2001) (a party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial).

On reconsideration, the trial court effectively converted Respondents' Rule 12(b)(6) motions into motions for summary judgment by reviewing matters outside of the pleadings – specifically, (1) a report and findings prepared by a forensic consulting firm (which the trial court improperly accepted as fact); and (2) the offer of Respondents to Appellants and other winning lottery ticket purchasers. A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRPC. In considering a 12(b)(6) motion, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. However, on a 12(b)(6) motion, if matters outside the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRPC, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. See Rule 12(b), SCRPC; *Brazell v. Windsor*, 682 S.E.2d 824, 384 S.C. 512 (2009).

Although the Court determined Appellants' argument regarding evidence presented to the trial court, in violation of Rule 12(b)(6)'s standard, was unpreserved, the trial court *did*, in fact, address that issue – in its Order Denying Respondents' Motions to Dismiss. (See R. p. 17, fn. 1) (“While this motion is couched as a 12(b)(6) motion to dismiss, both the [Appellants] and [Respondents] in their respective memoranda make

reference to matters outside of the pleadings on this issue. [Respondents] refer[] repeatedly to the SCEL website and [Appellants] to a New York Times article that quotes SCEL's press release."). Thus, while the trial court may not have directly addressed this issue in its orders dismissing Appellants' case, the trial court's order, in essence, considered this issue and determined dismissal was appropriate. For that reason, this argument was preserved, and because the trial court improperly considered this new evidence in its order granting Respondents' Rule 59(e) motions, this Court has overlooked or misapprehended Appellants' argument, and rehearing is warranted.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the Court rehear and reconsider its August 9, 2023 Opinion dismissing the appeal for failing to preserve their argument, to consider the merits of the appeal, including the briefs and oral argument, and rule accordingly.

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