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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, Appellants-Respondents,

v.

Mervin Lee Johnson, Respondent-Appellant.

RETURN TO PETITION FOR REHEARING

Appellant-Respondent (Green) submits this Return to Respondent-Appellant's (Johnson) Petition for Rehearing per request of this Court on or about February 6, 2024, for a return by February 16, 2024.

I. Appellant-Respondent Timely Submitted a Notice of Appeal, Giving this Court Jurisdiction

Johnson argues the Greens did not timely appeal after the final Rule 59(e) order in the underlying case, entered on or about March 8, 2021, and thus, this Court did not have jurisdiction to decide the matters before it on appeal. This argument was considered by this Court and decided on or about June 28, 2021, denying Johnson's Motion to Dismiss the Greens' Notice of Appeal. Johnson asserted the same arguments in his briefing and now raises timeliness again.

Johnson admits the Greens' initial Notice of Appeal was timely. On December 9, 2020, Johnson moved to hold the appeal "in abeyance…pending resolution of the unresolved Rule 59

motion." Ex. A (Johnson Motion, Dec. 9, 2020, at pg. 1). Indeed, there is nothing in this motion from Johnson asking to dismiss Greens' appeal. Id. In response, this Court agreed as evidenced in its orders on or about February 4, 2021, and March 4, 2021, ordering the appeal "in abeyance" during the pendency of the lower court's ruling on Greens' Rule 59(e) motion. See Ex. B (Order, Feb. 4, 2021, and Order, March 4, 2021). In fact, in reading the two orders, the second was entered by this Court to clarify that the appeal is only in abeyance, pending the 59(e) ruling. Id.

Johnson's rehearing petition suggests that Johnson asked this Court to dismiss the Greens' Initial Notice of Appeal and that this Court actually did that. However, the clear reading of Johnson's December 9 motion and the Court's subsequent orders on the matter, the appeal was only held in abeyance. This Court properly permitted Greens' Notice of Appeal to proceed in its June 28, 2021, order. Johnson has failed to present argument suggesting otherwise and thus, rehearing must be denied on this basis.

II. Respondent-Appellant's Evidence was Presented too Late for the Lower Court to Consider it on a Rule 59(e) Motion

Johnson seems to argue in his petition for a rehearing that even if the lower court should not have considered the new evidence Johnson presented at the 59(e) motion to reconsider, it doesn't matter because the lower court could have reversed his decision based off the evidence in the motion to set aside hearing. This argument is flawed.

In ultimately amending the award, the trial court explicitly states the decision is based upon "uncontested medical bills of $12,826.00; *and the additional evidence presented at the hearing*[.]" R. p. 30. There was no evidence of meritorious defense at the damages hearing nor in the motion to set aside default, only two affidavits from adjusters. These nearly identical affidavits provide no reliable insight into a meritorious defense. Both reference a video recording of the accident and recite that the video "seems to indicate that the February 28, 2018, MVA was relatively minor in

nature, in terms of impact speed." R. pp. 107-112. Both then offer the conclusory statement that "[f]ortunately for all involved, the property damage to Plaintiffs' vehicle was relatively minor." R. p. 108, paragraph 11 and R. p. 111, paragraph 10. These affidavits are inadmissible hearsay on both liability and damages.

In its November 4, 2019, Order the court had already concluded the affidavits submitted by the Defendant were insufficient to establish a meritorious defense. It is unsurprising, therefore, that the court only reconsidered its prior rulings based upon "the additional evidence presented at the [reconsideration] hearing." R. p. 30. A Rule 59(e) motion cannot be used as a vehicle to introduce new issues which a party belatedly realizes should have been previously submitted. *Poch*, 386 S.C. at 31, 686 S.E.2d at 699; *Gartside*, 383 S.C. at 43, 677 S.E.2d at 625; *Spreeuw*, 385 S.C. at 68–69, 682 S.E.2d at 855; *Jones*, 415 S.C. at 330 n.7, 781 S.E.2d at 742.

Indeed, throughout the motion to reconsider hearing Defendant's counsel drew the court's attention to a variety of documents contained within "Exhibit A." *See, e.g.*, R. p. 63, lines 20-23; p. 71, lines 11-15; and p. 74, lines 20-24. These documents were submitted to the court as an exhibit to the memorandum of law submitted to the court on the morning of the hearing. R. pp. 121-122. The trial court's reliance on this exhibit can be seen from the numerous references to the documents throughout the Amended Order. *See, e.g.*, R. p. 21, paragraphs 5-6 (referencing correspondence and emails between Plaintiffs' counsel and Defendant's insurer as well as a copy of a check issued by Plaintiffs' insurer); R. p. 24, paragraph 14 ("Defendant's supplemental filing also included a photograph purporting to show the rear of Plaintiff's vehicle after the collision"); R. p. 27, paragraphs 10-11 (implicitly referencing the check copy as evidence of "previously settled property damages").

Johnson next argues the record does not conclusively establish that the evidence offered by Johnson at the motion to reconsider hearing was not previously brought to the Master's attention mainly because the motion to reconsider hearing was not recorded or transcribed. This argument is flawed too. If it had been presented at the motion to reconsider, then why wasn't it filed with the affidavits that were presented with the motion to reconsider. And, if it had been presented, why did Johnson present it again? Finally, the motion to reconsider was Johnson's motion. To be able to rely on the absence or presence of evidence at that motion, he should have taken steps to preserve the record at that point.

Johnson's petition also argues he could not offer the evidence prior to the default judgment because he was not represented at that time. But, there was nothing to prevent Johnson from presenting that evidence at the motion to set aside default hearing. If he had, we would likely not still be arguing these issues today. Hence, the judicial economy purpose of Rule 59(e) standard to only consider "newly discovered evidence." And the "judgment" that evidence should have been presented prior to, was the judgment to deny the set aside, which Johnson absolutely had a chance to present evidence and which he did – the two adjuster affidavits. "A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009), *aff'd as modified,* 405 S.C. 359, 747 S.E.2d 757 (2013); *see also Gartside v. Gartside*, 383 S.C. 35, 43, 677 S.E.2d 621, 625 (Ct. App. 2009); *Spreeuw v. Barker*, 385 S.C. 45, 68–69, 682 S.E.2d 843, 855 (Ct. App. 2009) (refusing to consider a form that "appears only as an attachment to his Rule 59(e) motion"); *Jones v. Builders Inv. Grp., LLC*, 415 S.C. 321, 330 n. 7, 781 S.E.2d 737, 742 (Ct. App. 2015) (noting attempt to introduce new evidence

at a 59(e) hearing was denied by the trial court with a subsequent attempt to supplement the record denied by the Court of Appeals).

III. Appellants-Respondents Preserved their Objections to the Admission of Evidence

Johnson admits the Greens raised their objections to the admission of new evidence at the motion to reconsider hearing. Johnson also admits the Greens raised their objections to the admission of new evidence with their proposed order denying Johnson's Rule 59(e) motion. Yet, Johnson argues this Court can't consider this as preservation of an issue because "[a] trial court is under no obligation to read, much less rule upon, a proposed order." Here, the lower court's amended order says it considered Plaintiffs' proposed order: "Plaintiffs requested leave of Court to brief the issue of the timeliness of Defendant's motion to Alter or Amend. Plaintiffs thereafter submitted a proposed order denying Defendant's motion to both liability and damages. Because the Court finds Plaintiffs' arguments on the timing of Defendant's motion unavailing, its rulings from the bench stand." R. p. 19. The lower court clearly considered the Greens' proposed order in coming to its conclusions in the amended damages order. Thus, Johnson's arguments are also flawed on this premise.

IV. This Court was not Asked to Decide if the Master Failed to Provide Factual Support for Punitive Damages

Johnson raises the issue of factual support for punitive damages in his petition for the first time in this appeal. It was not a question before this Court, and thus, not considered nor ruled upon by this court. Johnson's request now is untimely and thus, needs no determination from this Court.

V. This Court Properly Applied *McClurg*

Johnson argues *McClurg* hinged on the insurer's "reasonable expectation" of notification of a suit, but this Court only relied on the fact that the Greens' counsel never promised to send a copy of any pleading to Johnson's insurer. R-A Petition for Rehearing (Feb. 1, 2024, p. 13). *McClurg* went much deeper than that in evaluating the plaintiff attorney's conduct. In *McClurg*, the defendant's employer, New Prime, was not originally named a party to the action. *See McClurg*, 380 S.C. at 568, 671 S.E.2d at 90 ("[u]nbeknownst to Zurich and New Prime, counsel filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant"). The decision not to file suit against New Prime represented a marked departure from the plaintiff's prior contacts with New Prime and its insurer, Zurich. Counsel had previously sent Zurich a letter, "enclosing a copy of a complaint he prepared in the matter and indicating his intent to 'proceed to litigation' if the matter was not soon settled." *See id*. at 567, 671 S.E.2d at 90. The draft complaint "named only Ann McClurg as a plaintiff and New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton's actions and was also liable for its negligent hiring, retention, and training of Deaton." *Id*. This draft was consistent with a previous promise made to Zurich by counsel that "I will file suit and serve the [New Prime] and send you a courtesy copy of the pleadings." *Id.*

On appeal, the *McClurg* court highlighted a letter sent by plaintiff's counsel to Zurich "indicating an intention to file suit against both Deaton and New Prime . . . and stat[ing] counsel would file suit and serve the Defendant and send Zurich a courtesy copy of the pleadings." *Id.* at 572–73, 671 S.E.2d at 92. These representations were reinforced by the follow-up letter enclosing a draft complaint naming only New Prime as a defendant. *Id.* at 573, 671 S.E.2d at 92. Based upon this conduct, the court found it reasonable for Zurich and New Prime to believe that "any suit filed would include New Prime as a defendant or, at the very least, that counsel would

provide Zurich a copy of any pleadings in the matter when filed." *Id.* at 573, 671 S.E.2d at 92. Accordingly, "New Prime was taken by surprise when counsel filed the action solely against Deaton and failed to inform Zurich or New Prime of this action." *Id.* This failure to notify both the insured and insurer "[met] the surprise or excusable neglect requirement under Rule 60(b)(1)." *Id.*

This conclusion, the *McClurg* court explained, was consistent with prior case law holding that "a Rule 60(b) motion is properly made by an insurer under such circumstances." *Id.* at 573, 671 S.E.2d at 93 (referencing *Edwards v. Ferguson*, 254 S.C. 278, 175 S.E.2d 224 (1970)). In *Edwards*, the "circumstances" were equally egregious as those outlined in *McClurg*. The insured defendant, Ferguson, "never reported the accident to State Farm, and it was not until fourteen months after the wreck . . . that the company received a letter from plaintiff's attorney advising that plaintiff asserted a claim and asking that the company's representative make contact regarding a possible settlement." *Edwards*, 254 S.C. at 280, 175 S.E.2d at 225. Compounding matters, State Farm had trouble locating Ferguson as he "apparently stayed at the home of his parents most of the time; he was an alcoholic, and hard to catch." *Id.* at 280–81, 175 S.E.2d at 225.

Far from being caught completely unaware, as State Farm was in *Edwards*, Johnson's insurers were notified of the claim almost immediately. *See* R. p. 107, paragraph 5 ("In March 2018, I learned of the February 28, 2018 MVA and a potential claim involving the same"); R. p. 110, paragraph 5 (same). Unlike *McClurg*, neither affiant suggests that Plaintiffs' counsel promised (or even suggested) that a copy of any pleading would be forwarded to her. While the insurers in *McClurg* and *Edwards* were forced to hire private investigators and hunt down the individuals they represented, neither affiant suggests that Johnson made attempts to elude them or prevent contact. Most importantly, in *McClurg*, "New Prime was taken by surprise when counsel filed the action

solely against [a third party] and failed to inform Zurich or New Prime of this action." *McClurg*, 380 S.C. at 573, 671 S.E.2d at 92, while the present case was filed against Johnson alone and the "Defendant was properly served with the summons and complaint." R. p. 22, paragraph 8.

CONCLUSION

This Court properly considered and ruled upon all matters before it in issuing its order on January 17, 2024. Johnson's petition must therefore be denied.

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PROOF OF SERVICE

The undersigned hereby certifies that on the 16th day of February, 2024, she has served counsel for Respondent-Appellant with a copy of the RETURN TO PETITION FOR REHEARING together with all enclosures in this matter by electronically mailing copies of the same to the following address:

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