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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Hon. George M. McFaddin, Jr.
Presiding Circuit Court Judge

Appellate No. 2023 – 001845
Civil Action No.: 2022 – CP – 25 – 00269

Daniel A. Speights . . . . . Appellant,

vs.

Chubb Limited d/b/a Chubb National Insurance Company, Auto-Owners Insurance Company, and Bankers Standard Insurance Company . . . . . Defendants,

Of Whom Auto-Owners Insurance Company is the . . . . . Respondent.

RESPONDENT AUTO-OWNERS INSURANCE COMPANY'S MOTION TO STRIKE MATTER AND EXCLUDE MATTER FROM RECORD ON APPEAL

Respondent Auto-Owners Insurance Company ("Auto-Owners") hereby moves this Honorable Court for an Order striking certain arguments presented in Appellant Daniel A. Speights's ("Speights") Initial Brief as well as excluding the Letter from Algernon Gibson Solomons, III to the Honorable George M. McFaddin, Jr.(the "Letter"), the Plaintiff's Motion to Reconsider ("Motion"), and the Affidavit of Daniel A. Speights (the "Affidavit") from the record on appeal.

Speights's arguments set forth in Sections 1 and 3 of his Initial Brief were not preserved for appeal as Speights failed to raise these arguments prior to or during the hearing on Auto-

Owners' motion for summary judgment hearing and presented them as new arguments in his motion to reconsider pursuant to Rule 59(e), S.C.R.C.P. Specifically, Speights makes three new arguments in his motion and includes them in his Initial Brief:

1.) Demonstrate a need for further discovery;

2.) The dictionary definition of voluntary parting; and

3.) Speights's standing to bring suit.

[R. __; *See generally* Speights Initial Brief.]. Speights alludes to a need for further discovery, particularly a deposition of Daniel A. Speights, but does not demonstrate how further discovery would make a difference. [R. __; Id. at 10, 12-13.]. Speights also offers the Affidavit in furtherance of this argument. [R. __; Id. at 10.]. Second, Speights presents the dictionary definition of 'voluntary' for the voluntary parting exclusion. [R. __; Id. at 6.]. Finally, Speights presents limited liability law as providing standing to sue. [R. __; Id. at 11.]. These arguments were not presented to the Circuit Court prior to its granting of summary judgment. [R. __; *See generally* Transcript of Hearing on Summary Judgment.]. Speights first raised these arguments in his Motion for Reconsideration. [R. __; *See generally* Speights Motion for Reconsideration.]. The Circuit Court properly identified these new arguments and denied Speights's motion for reconsideration because they were not raised prior to its ruling on summary judgement. [R. __; Order Denying Motion for Reconsideration, § I.].

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. South Carolina Dept. of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004). A party cannot use Rule 59(e), S.C.R.C.P, to present to the lower court an issue the party could have raised prior to judgment but did not. Gartside v. Gartside, 383 S.C. 35, 677 S.E.2d 621 (Ct. App. 2009). Rule 59(e) motions are not vehicles for bringing

new theories or arguments, nor can a party use a Rule 59(e) motion to present to the lower court an issue the party could have raised prior to the judgment but did not. See Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (citing Natural Resources Defense Council v. U.S. E.P.A., 705 F. Supp. 698, 701 (D.D.C. 1989)). "It is axiomatic that an issue cannot be raised for the first time on appeal but 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). Therefore, these issues were not preserved and are not properly before the Court for consideration.

Additionally, Speights includes in his Designation of Matter to be Included in the Record on Appeal the Letter, Affidavit, and Motion. All are not proper matters for inclusion in the record on appeal. The Letter was never offered nor introduced into any record, either as an exhibit or filed with the Circuit Court as Speights's formal opposition to Auto-Owners' Motion for Summary Judgment. [R. __; *See generally* Solomons Letter to Hon. McFaddin.]. The Letter was sent on September 26, 2023, after the September 25, 2023 hearing on summary judgment had concluded, where both parties had an opportunity to argue for or against summary judgment and during which the Circuit Court did not ask for any submissions. [R. __; *See generally* Transcript of Hearing.]. Speights did not make the Circuit Court aware that he would submit further arguments after the hearing. [R. __; Id.]. After receiving the Circuit Court's ruling but prior to a formal order being filed, Speights notified the Court and counsel for Auto-Owners that it had mailed the letter to the Circuit Court. [R. __; Email from Solomons to Hon. McFaddin.]. This Letter was not mentioned during the hearing, never filed with the Circuit Court, and otherwise never made a part of any record until Speights's Designation of Matter to be included in the Record, and therefore should be excluded from the record on appeal.

Speights also includes the Motion and Affidavit in his Designation of Matter to be Included in the Record on Appeal. As discussed above, the Motion raised new arguments that were not made prior to the Circuit Court's granting of summary judgment and thus were improperly argued in the Motion. Speights did not present these arguments during the hearing. [R. __; *See generally* Transcript of Hearing.]. Speights did not raise these arguments in the Letter he sent after the hearing, which should also be struck from the record on appeal as discussed above. [R. __; *See generally* Letter.]. To accompany his new argument that a deposition of Daniel A. Speights is necessary for further discovery, Speights included as an exhibit to the Motion the Affidavit. [R. __; *See generally* Affidavit of Daniel A. Speights.]. The Affidavit was not offered nor introduced into evidence prior to the Circuit Court's granting of summary judgment but was first presented as an exhibit to Speights's Motion for Reconsideration. [R. __; *See generally* Affidavit & R. __; Speights Motion, pg. 4.]. Thus, the Motion and Affidavit should be excluded from the record on appeal because Speights used the Motion and Affidavit to improperly raised new arguments for the first time on a motion to reconsider.

Based upon the foregoing, Respondent Auto-Owners Insurance Company respectfully requests that this Honorable Court issue an Order striking the new arguments included in Appellant Daniel A. Speights's Initial Brief and excluding the Letter, Motion, and Affidavit from the record on appeal.

[SIGNATURE INTENTIONALLY ON FOLLOWING PAGE]

Dated this 3rd day of April, 2024.

Respectfully submitted,

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