

THE STATE OF SOUTH CAROLINA
In The Supreme Court
APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

RECEIVED
May 23 2024
S.C. SUPREME COURT

James B. Jackson, Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, Respondents,

v.

Mervin Lee Johnson, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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

STANDARD OF REVIEW

A court reviewing a case on a writ of certiorari must “confine its review to the correction of errors of law only and will not review the findings of fact of an inferior Court or body except when such findings are wholly unsupported by the evidence.” Pettiford v. South Carolina State Bd. of Educ., 218 S.C. 322, 62 S.E.2d 780 (1950); See also Berry v. Spigner, 226 S.C. 183, 84 S.E. 2d 381 (1954).

I. The Court of Appeals properly held the appeal in abeyance in lieu of dismissal

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 the Court of Appeals and decided on or about June 28, 2021, denying Johnson's Motion to Dismiss the Greens' Notice of Appeal. Johnson raised it on his petition for rehearing to the Court of Appeals, which was denied, and now raises it a third time on this writ.

Citing *Hudson v. Hudson* in his writ, Johnson argues, in short, that the Greens' initial notice of appeal should be dismissed because the Clerk of Court of Appeals did not dismiss their initial notice of appeal when Johnson told the court (in his Cross Notice of Appeal, filed in September/October of 2020) that the Greens filed a Rule 59(e) motion and simultaneously filed a Notice of Appeal. Johnson asserts *Hudson* puts the burden on the Clerk of the Court of Appeals to dismiss it and because it didn't, the Greens now must have their arguments completely disregarded by this court. Given all that has transpired in this case, this is not a reasonable outcome nor is it the intent of *Hudson*.

In fact, under *Hudson* the court specifically considered if a notice of appeal needed to be dismissed because the appellant had filed a Rule 59(e) motion. Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986). The court specifically denied the Respondent's motion to dismiss because the lower court retained jurisdiction to decide the Rule 59(e) motion and did in fact do so. Id. There was then no need for the appeal to be dismissed at that point. Yet Johnson is now requesting a dismissal of the Greens' appeal because *Hudson* says "the appeal shall be dismissed without prejudice" when timely 59(e) motions are presented "simultaneously with or subsequent to the Notice of Appeal." Id. at 216, 349 S.E.2d at 341-342. Reading *Hudson* closely, it does not call for such a drastic consequence. Because the lower court had the opportunity to consider the post-trial motions in full, the *Hudson* court allowed the appeal to continue and declined to dismiss it. In the

case at hand, the Court of Appeals effected the same outcome by granting Johnson's Motion to Hold the Appeal in Abeyance.

On December 9, 2020, Johnson moved to hold the appeal "in abeyance...pending resolution of the unresolved Rule 59 motion." See Ex. A (Johnson Motion, Dec. 9, 2020, at pg. 1). The very nature of this motion concedes the Greens' initial notice of appeal was valid and timely. Johnson doesn't even use the word dismissal much less ask the Court of Appeals to then kick the Greens' Notice of Appeal. In response, the Court of Appeals' order confirmed the validity of the Greens' Notice of Appeal by just holding it "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.

After the order of abeyance, the master denied the Greens' Rule 59(e) motion on March 8, 2021. At that point, the procedural postures of the appeals were exactly the same as when the Greens' initially appealed and Johnson Cross Appealed. Neither party was prejudiced by the abeyance nor did any inconsistencies result. To now dismiss the Greens' initial notice would punish the Greens for relying on a court order. It's also important to note that at the time Johnson finally moved to dismiss the Greens' initial appeal (May 7, 2021), a significant amount of briefing had been completed and the master's order under appeal affirmed. There would be no reason to restart an appeal at that point, retriggering briefing deadlines and essentially redoing what had already been done. Even if technically the Clerk of the Court of Appeals should have dismissed the Greens' initial notice of appeal back in October 2020, there is no consequence to that error. By going through the abeyance and getting the master's order finalized, the parties remained in essentially the same position they were in when the appeal first began in 2020.

II. The master improperly considered new evidence which affected his amended order

Johnson's writ rephrases his previous arguments regarding evidence considered at his 59(e) motion but argues his consistent proposition 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.

First, the evidence was new and thus not appropriate at Johnson's 59(e) motion. The Court of Appeal's order squarely answers this question by citing *Spreeuw v. Barker* and *Hickman v. Hickman*. Johnson has offered nothing to counter this precedent: "finding this court could not consider a document that was submitted to the family court 'only as an attachment to [the father's] Rule 59(e) motion'" *Spreeuw v. Barker*, 385 S.C. 45, 68-69, 682 S.E.2d 843, 855; and " 'A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not'" (*Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E. 2d 481, 482 (Ct. App. 1990). Johnson undeniably attached new evidence to his Rule 59(e) and, undeniably that evidence was available to him at his first motion in this case, his motion to set aside the default. The Court of Appeals was absolutely correct in finding that Johnson's evidence in his 59(e) motion was new and thus could not be considered by the master.

Johnson cannot deny his evidence was new but tries to diminish the evidence's effect on the master's decision to reduce the award. This argument ignores the plain language of the master's amended order: "Given Plaintiffs' uncontested medical bills of \$12,826.00; **and the additional evidence presented at the hearing**, IT IS SO ORDERED the Plaintiffs are awarded \$250,000..." (emphasis added). There is no other way to read this statement.

Furthermore, 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 master had already concluded the affidavits submitted by Johnson were insufficient to establish a meritorious defense. It is unsurprising, therefore, that the master only reconsidered its prior rulings based upon “the additional evidence presented at the [reconsideration] hearing.” R. p. 30. Throughout the motion to reconsider hearing Johnson’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 master’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 writ also again 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. The Greens 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. Johnson Untimely Asks this Court 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 rehearing for the first time in this appeal and now raises it again. It was not a question before the Court of Appeals, and thus, not considered nor ruled upon. Johnson’s request was untimely then, is untimely now, and thus, needs no determination from this Court.

V. The Court of Appeals Properly Applied *McClurg*

Johnson argues *McClurg* hinged on the insurer’s “reasonable expectation” of notification of a suit, but the Court of Appeals 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 the insurer. 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. Johnson has never presented an affidavit to any court explaining why he didn't answer but now asks this court to accept what hearsay testimony from two adjusters said as sufficient to excuse his default years after it was entered.

CONCLUSION

The Court of Appeals properly considered and ruled upon all matters before it in issuing its order on January 17, 2024. Johnson's petition for rehearing was denied. Johnson's petition for writ to this court must likewise be denied.

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