THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. D. Morgan, Jr., Circuit Court Judge

Case No. 2022-CP-23-04451
Appellate Case No. 2023-001129

Danny Rose, Respondent,

v.

Robert Rose, Gloria Rose-Ruch, Mary Margaret Doll Rose, and John Does 1-99, Defendants,

Of Whom Robert Rose, Gloria Rose-Ruch, and Mary Margaret Doll Rose are the Appellants.

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Was the circuit court correct in granting judgment on the pleadings for conversion and money had and received in favor of a plaintiff property owner, where the defendants admit in their answer to possessing and using the property against the owner's objections and refusing to return it to the owner?
2. Are sanctions warranted where, to avoid attachment of property, a party proposes to provide information concerning property but then fails to do so?

COUNTERSTATEMENT OF THE CASE

This appeal and the facts giving rise to the underlying claims center on Appellants saying one thing but doing another. In their brief, Appellants contend they are "willing to transfer all the accounts" to Respondent while simultaneously challenging the order commanding them to do so. There can be no confusion on this point: If Appellants truly wanted to return Respondent's money, they would have done so instead of pursuing this appeal.

This action was brought by Respondent Danny Rose ("Danny" or "Respondent") to recover $225,000.00 taken from him by his children, Robert Daniel Rose ("Robert") and Gloria Rose-Ruch ("Gloria"), with the help of Robert's ex-wife, Mary-Margaret Doll Rose ("Mary") (collectively, the "Appellants"). Danny asserted causes of action in negligence, breach of fiduciary duty, money had and received, conversion, fraud/constructive fraud, negligent misrepresentation, and civil conspiracy (Complaint, R.p.__). Robert, Gloria, and Mary filed a joint answer to the summons and complaint in which they admitted:

- Danny deposited the net proceeds of the sale of his home into a Bank of America checking account (Complaint, para. 3 R.p. __; Answer, para. 4, R.p.__).

- After the sale proceeds were deposited with Bank of America, Robert wired $175,000.00 from that account to Mary's bank account. Mary subsequently transferred the money to an account held by Robert (Complaint, para. 14, R.p. __; Answer, para. 15, R.p. __).
- The same day money was wired to Mary, $50,000 was wired to Gloria's bank account. (Complaint, para. 15, R.p. __; Answer, para. 15, R.p. __).

In addition to these admissions, Appellants also asserted Danny possessed "continued ownership interests to the assets acquired" (Answer, p. 6, R.p. __). Notably, Appellants did **not** assert any preference to the funds or a counterclaim alleging any portion of the money rightfully belonged to them. (Answer, R.p. __).

After multiple unsuccessful efforts to resolve the dispute, Respondent filed a motion for judgment on the pleadings pursuant to Rule 12(c), SCRCP, or alternatively, for summary judgment. (Motion, R.p. __). After a hearing, the Honorable G.D. Morgan, Jr., entered an order on May 26, 2023, granting judgment on the pleadings in favor of Respondent as to the claims for money had and received and conversion for $247,496.75. (Order, R.p. __) The same order sanctioned Appellants for their failure to provide an accounting of the funds, as the circuit court had previously directed. (Order, R.p. __). The circuit court also awarded Respondent his attorney's fees and expenses totaling $2,337.75. (Order, R.p. __). Appellants timely filed a motion to alter or amend pursuant to Rule 59, SCRCP, which the circuit court denied without a hearing on June 14, 2023. (Order, R.p. __). On July 13, 2023, Appellants submitted a timely notice of intent to appeal to this Court. (Notice of Intent to Appeal, R.p. __).

FACTS

On March 9, 2022, Respondent sold the house he owned for thirty years, depositing the

proceeds of the sale into an account with Bank of America. (Complaint, para 3; R.p. __). Within two weeks, the Appellants removed $225,000 of the sale proceeds from the Bank of America account. (Complaint, para 5; R.p. __). Most of the money ($175,000) was first funneled through Mary's bank account before being transferred into Robert's bank account. (Complaint, para 14; R.p. __). The remaining $50,000 was wired to Gloria. (Complaint, para 15; R.p. __). When Respondent asked Appellants to return the funds, they refused. (Complaint, para 19; R.p. __). Respondent thereafter commenced the within litigation by filing a summons and complaint in the Greenville County Court of Common Pleas.

Respondent filed a petition for a writ of attachment on November 9, 2022, seeking to attach Appellants' property valued at the full amount taken. (Petition; R.p. __). As stated in counsel's affidavit supporting the petition, Appellants had assigned, disposed of, or secreted approximately $150,000 of the $225,000 taken from Respondent. (Affidavit, R.p. __). Following a hearing on February 16, 2023, the circuit court issued an order addressing the petition and detailing events at the hearing:

> At the hearing on this matter, [Appellants[1]] informed the Court an estimated $182,000.00 of the funds at issue could be accounted for and were unencumbered, leaving approximately $43,000.00 unaccounted for, disposed of, or encumbered. [Respondent] expressed skepticism over [Appellants'] representation but expressed a willingness to reduce the attachment amount if [Appellants] could provide proof that $182,000.00 (approximately) was available.

(Order on Petition for Writ of Attachment; R.p. __)

Based on the Appellants' representations during the hearing, the circuit court ordered Appellants to "submit a joint statement establishing $182,000.00 is accounted for, available, and unencumbered" (Order on Petition for Writ of Attachment; R.p. __). Appellants failed to provide *any* statement, causing Respondent to file a motion for sanctions seeking to recover his

[1] For purposes of clarity, references to "Defendant" and "Plaintiff" contained in the circuit court's order were changed to reflect the position of each party in the within appeal.

attorney's fees and costs. (Motion for Sanctions, R.p. __). The circuit court determined sanctions were warranted and awarded Respondent $2,337.75 in attorney's fees and expenses. (Order, p. 4; R.p. __).

Respondent thereafter filed a motion for judgment on the pleadings or in the alternative, for summary judgment. (Motion, R.p. __). At the hearing, Respondent focused on the pleadings and concessions concerning the claims for money had and received and conversion, arguing the Appellants' answer entitled Respondent to judgment on those causes of action. (Hearing transcript; R.p. __). The circuit court agreed and entered judgment in favor of Respondent, along with prejudgment interest pursuant to S.C. Code §34-31-20. (Order; R.p. __) This appeal followed.

Wary of the possibility Appellants are attempting to draw Respondent into a factual dispute to bolster their appeal, Respondent nevertheless calls attention to "facts" asserted by Appellants that are not supported by the record or competent evidence:

a. Appellants invested Respondent's money (Appellants' Brief, p. 4);
b. Respondent gave Appellants permission to invest his money (Appellants' Brief, p. 4);
c. Respondent owed $16,000.00 to Robert (Appellants' Brief, p. 4);
d. All claimed funds, plus interest and accepting [sic] market losses, have been returned to Respondent (Appellants' Brief, p. 4);
e. Robert placed $170,096.56 into accounts with TD Ameritrade, Fifth Third Bank, and Founders Federal Credit Union, but did not withdraw any other funds belonging to Danny (Appellants' Brief, p. 11).

Because these facts are wholly unsupported by the record, the Court of Appeals should disregard these assertions. Rule 210(h), SCACR; *See State v. Mitchell*, 330 S.C. 189; 498 S.E.2d 642

(1998) (Refusing to consider the impact of an excluded written statement when written statement is not part of the record on appeal); *See also Goode v. St Stephens United Methodist*, 329 S.C. 433, 494 S.E.2d 827 (Ct. App. 1997) (Appellant has the burden of presenting appellate court with an adequate record).

ARGUMENTS

I. The Court of Appeals should affirm based upon the record presented.

Pursuant to Rule 220(c), SCACR, this Court should affirm the circuit court's judgment upon any ground(s) appearing in the record on appeal.

II. The Court of Appeals should affirm the circuit court's order granting judgment on the pleadings.

Standard of Review

An appellate court reviewing the granting of judgment on the pleadings applies the same standard implemented by the trial court. *See Williams v. Condon,* 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001). Rule 12(c), SCRCP, provides "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." A motion for judgment on the pleadings "should be granted when it appears the moving party would be entitled to judgment on the merits without regard to what the findings might be on the facts." *Lowery v. The Wade Hampton Co.*, 270 S.C. 194, 241 S.E.2d 556 (1978).

a. Appellants did not argue to the circuit court that it utilized an improper standard of review, the circuit court did not rule on that issue, and therefore it was not preserved for review.

Appellants contend the circuit court erred when it failed to treat the dispositive motion as one for summary judgment. However, this issue was not raised to or ruled upon by the circuit court and therefore not preserved for appellate review. It is axiomatic that an issue cannot be raised for the first time on appeal. *See I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526

S.E.2d 716 (2000). The hearing transcript confirms Appellants never argued the standard of review was at issue. Respondents' Rule 59(e) motion merely offers a conclusory statement regarding the proper standard of review, failing to cite any authority or otherwise explain how the circuit court's order, which only considers the pleadings, is inconsistent with controlling law. Accordingly, this issue has not been preserved for review. *See First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1993).

b. The Court applied the proper standard under Rule 12(c) because it based its decision solely on the pleadings and Appellants' admissions in their answer.

The appealed-from order relies **solely** upon the pleadings filed in this case and explains how they support the circuit court's decision to grant judgment on the pleadings, justifying its reliance upon Rule 12(c) in granting judgment to Respondent. Appellants contend the motion automatically converts into a summary judgment motion because matters outside the pleadings were argued at the hearing. "The written order is the trial judge's final order and as such constitutes the final judgment of the court." *Ford v. State Ethics Comm'n*, 344 S.C. 642, 545 S.E.2d 821 (2001). The written order clearly states its decision was based only on the allegations and admissions in the parties' pleadings:

> At the hearing on this matter, Plaintiff pointed to several admissions within Defendants' answer…[and] argued these admissions, taken together and in the context of the entirety of the complaint and Defendants' answer, established Plaintiff's right to obtain a judgment on the pleadings… . Defendants did not challenge Plaintiff's contentions and did not point to any allegations in the answer which would undermine Plaintiff's argument or which would entitled Defendants to remain in control and custody of Plaintiff's money and the assets derived therefrom.

(Order, p. 3, R.p. __)

Accordingly, the circuit court effectively excluded all materials outside the pleadings in deciding the motion for judgment on the pleadings.

As noted above, Appellants' answer admits the money was, is, and continues to be

Respondent's property which Appellants removed from his possession (Answer, R.p.__). These admitted facts must be taken as true. *Postal v. Mann*, 308 S.C. 385, 418 S.E.2d 322 (Ct. App. 1992). Appellants are bound by their pleadings and cannot subsequently take a position inconsistent with these admissions. *Id*. Further, to this day, Appellants have not sought to withdraw, alter, or strike these admissions. Consequently, their own concessions confirm Respondent's right to obtain judgment against Appellants on the claims of money had and received and conversion. Once Appellants admitted they possessed money belonging to Respondent, the court was obligated to grant a judgment on the pleadings because the pleadings revealed the merits of the case could only result in a judgment for Respondent.

The undercurrent of Appellants' position is an argument that courts cannot, or do not, compartmentalize the analysis of Respondent's motion. This argument is entirely without merit, as courts are commonly called upon to do just that. Further, Appellants' argument, if adopted, would grant a non-moving party significant control over movant's motion, a concept antithetical to the Rules and established law. For example, the "plaintiff chooses" rule stands for the proposition that someone injured by two or more joint tortfeasors has the option to sue each separately or to join them in a single action. *See Smith v. Tiffany*, 419 S.C. 548, 799 S.E.2d 479 (2017). Likewise, settling parties are generally the architects of their own settlements and a plaintiff is fully within his rights to apportion a settlement in the manner most advantageous to it, even to the detriment of a non-settling party. *See Riley v. Ford Motor Co.*, 414 S.C. 185, 777 S.E.2d 824 (2015).

The logic applied in *Tiffany* and *Riley* applies equally here. Appellants cannot have the unilateral authority to transform Respondent's 12(c) motion to one for summary judgment, particularly where Respondent offered summary judgment as an alternative to judgment on the

pleadings. Further, as discussed above, the order rejects the notion that matters outside of the pleadings were considered. Accordingly, Appellants' argument is defeated by the express language of the order.

Moreover, Appellants suggest the court is bound by rulings during the hearing[2]. This is not the law. Courts are not bound by any oral ruling and may issue a written order in conflict with an oral ruling. *First Union National Bank of S.C. v. Hitman, Inc.*, 308 S.C. 421, 418 S.E.2d 545 (1992).

Finally, Appellants' argument on appeal is premised upon the court using an improper standard to grant the motion. They do not argue the circuit court made any error in its actual analysis of the pleadings. Consequently, Appellants do not challenge the court's ruling in applying the standard imposed by Rule 12(c) was incorrect. This concession means if this court finds the circuit court applied the proper standard under Rule 12(c), the appealed-from Order must be affirmed.

c. Appellants did not challenge the award of prejudgment interest to the circuit court.

Appellants contend the circuit court improperly granted prejudgment interest. However, although Respondent specifically requested prejudgment interest at the hearing, Appellants did not challenge Respondent's right to recover. (Hearing transcript, pp. 22-24, R.p. __). Therefore, based upon the same authority cited in subsection II.a. hereinabove, this issue was not preserved for review. *See I'ON, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1993).

[2] Respondent does not concede any statements during the hearing constituted rulings, but to the extent the court's comments could be construed as such, the court's final rulings are reflected in the court's written order.

d. Because the amount in controversy was clearly ascertainable, the circuit court properly awarded prejudgment interest.

Even if this Court finds Appellants preserved the challenge to the award of prejudgment interest, the circuit court's order should be affirmed as properly based upon statute. The right to obtain prejudgment interest in this matter is premised upon S.C. Code §34-31-20(a), which states: "…[I]n all cases wherein any sum or sums of money shall be ascertained and, being due, shall draw interest according to law, the legal interest shall be at the rate of eight and three-fourths percent per annum." In this case, the amount at issue – $225,000 – was readily identifiable. Accordingly, the circuit court properly applied S.C. Code Ann. §34-31-20 in calculating prejudgment interest on the money Appellants took from Respondent.

e. Judicial estoppel does not apply.

In addition to missing the mark on their 12(c) standard argument, Appellants' contention that judicial estoppel applies is nonsensical and contrary to established authority.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). Judicial estoppel has been applied where a party in divorce proceedings denied having an ownership interest in a property but later contended he held an ownership interest by virtue of a resulting trust. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997) ("When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him"). The doctrine has also been applied where a party denied having the ability to bind a company he claimed was owned by his daughter, only to assert in a subsequent matter that he was the sole owner of the company. *Quinn v. Sharon Corp.* 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000). In addition, five elements are required to apply

judicial estoppel:

> 1) two inconsistent positions must be taken by the same party or parties in privity with one another;
> 2) the two inconsistent positions were both made pursuant to sworn statements;
> 3) the positions must be taken in the same or related proceedings involving the same parties in privity with one another;
> 4) the inconsistency must be part of an intentional effort to mislead the court; and
> 5) the two positions must be totally inconsistent—that is, the truth of one position must necessarily preclude the veracity of the other position.

Cothran, 357 S.C. 210, 592 S.E.2d 629.

Appellants make no effort to apply the elements of judicial estoppel: they fail to identify the alleged inconsistent positions Respondent has taken; they do not identify any sworn statements containing the inconsistent statements; they do not show any intent to mislead the court, and they do not show how any statements were totally inconsistent. The doctrine of judicial estoppel is not applicable in this appeal, but even if it could be, Appellants fall woefully short of establishing the doctrine should be imposed against Respondent.

III. The circuit court's award of sanctions should be affirmed because the court properly determined sanctions were warranted.

Standard of Review

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court." *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987). On review, an appellate court applying the abuse of discretion standard must determine whether the trial court's ruling is supported by any evidence. *State v. Wilson*, 545 S.E.2d 827 (2001). It does not re-evaluate the facts based upon its own view of the evidence. *Id.*

a. Appellants unnecessarily delayed the matter which justified sanctions.

Respondent's petition for writ of attachment was heard 99 days after the petition was filed, meaning Appellants had 99 days to prepare whatever was needed to substantiate their representation to the court that $182,000 was available and unencumbered. Instead, they arrived

with no documentation or proof of what they claimed and begged for more time. The circuit court graciously granted Appellants ten days to provide the information which they claimed to possess. Nevertheless, even after being afforded additional time, **Appellants ignored the very order they requested.**

A party may be sanctioned for filing a pleading, motion or other paper, or making an argument in bad faith (i.e., to cause unnecessary delay). *See Johnson v. Dailey*, 318 S.C. 318, 457 S.E.2d 613 (1995). *See also Rule 11, SCRCP*. The sanction may include an order to pay reasonable costs and attorney's fees incurred by the party opposing the bad-faith conduct. *See Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996).

Under the facts, the **only** conclusion to be drawn is Appellants never intended to provide proof $182,000.00 was unencumbered and available. Otherwise, they would have either a) had the information prepared in time for the hearing, or b) supplied it within the time required by the circuit court[3]. As a direct result of Appellants' delay tactics, Respondent was forced to incur additional attorneys' fees and costs in the form of filing an additional motion and appearing for a subsequent hearing. Accordingly, the circuit court properly found Appellants should be forced to compensate Respondent for the additional and unnecessary fees and costs he incurred.

Further, the penalty imposed by the circuit court was specifically tailored to the injury suffered by Respondent due to Appellants' failure to comply with the circuit court's order. The attorneys' fees awarded related to the work performed by Respondents' counsel, as reflected in supporting affidavits, and that work was performed at an hourly rate that is reasonable and customary. Accordingly, the trial court's order awarding attorneys' fees and costs to Respondent should be affirmed.

[3] Appellants have never provided this information, and as stated in the affidavit submitted with the petition for writ of attachment, evidence obtained indicates these representations are inaccurate. (Affidavit, R.p.__).

CONCLUSION

For the reasons detailed herein, as well as for any other contained in the record on appeal, Respondent respectfully requests this Court affirm the circuit court's order.

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June 1, 2024

Greenville, SC

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 1, 2024, he caused to be served the foregoing Respondent's Initial Brief upon all counsel of record, via electronic means, to counsel's email address on file with the South Carolina Attorney Information System.

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