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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Appellate Case No.: 2016-002525

Anthony Wise, ... Appellant,

v.

Kenneth E. Leap, Newberry Hospital, LLC d/b/a Newberry County Memorial Hospital, and West Fraser, Inc., Defendants,

Of Whom, West Fraser, Inc. is ..... Respondent.

PETITION FOR REHEARING

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ATTORNEYS FOR APPELLANT

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant Anthony Wise moves the Court for Rehearing and/or to Alter its Unpublished Opinion number 2024-UP-216, filed on June 20, 2024, which was withdrawn, substituted, and refiled on July 17, 2024, and affirms the Circuit Court's grant of summary judgment to Respondent, West Fraser, Inc.

After the Court's June 20, 2024 Unpublished Opinion was filed, Wise petitioned the Court for rehearing on the basis that it wholly overlooked and did not address Wise's argument that a statement made by West Fraser's safety director, Keith Nelson, to Wise's coworker, George Wilson, could reasonable be construed as defamatory by way of innuendo and implication. The refiled Opinion addresses this argument as follows:

> After a scrupulous review of the record, we find this argument is not preserved for our review. Wise never raised an innuendo argument to the circuit court-he did not file any written arguments opposing summary judgment, nor did he make a defamation by innuendo argument at the summary judgment hearing before the circuit court.

Wise v. Leap, Op. No. 2024-UP-216 (S.C. Ct. App. refiled July 17, 2024). In short, the revised Opinion does not reach the merits of Wise's argument because it finds that the issue is unpreserved.

Appellate courts are to be "mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner as if this is some sort of game of 'gotcha' elevating form over substance to trap trial lawyers so as to prevent the appeal of a legitimate issue." *State v. Morales*, 439 S.C. 600, 609, 889 S.E.2d 551, 556 (2023) (citing *State v. Jones*, 435 S.C. 138, 145, 866 S.E.2d 558, 561

(2021)). "One primary purpose of our issue preservation rules is to 'give the trial court a fair opportunity to rule.'" *Id.* (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)). Additionally, issue preservation rules serve the purpose of ensuring that "both parties are aware of the nature of the [issue] such that they may present their best arguments addressing *that* [issue]." *Id.* So long as a party raises an issue with sufficient specificity to permit the opposing party and the trial court to meaningfully address that issue prior to ruling, the issue is preserved. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007).

At the hearing on West Fraser's Motion for Summary Judgment, the first argument that counsel for Wise advanced was that the statement made by Nelson to Wilson, that Wise had an "infection", could be defamatory by way of inference or innuendo:

> You know, I sat here listening to this, we obviously have different viewpoints of this case. Her thinking and the Defendant West Fraser's thinking, well, you got to have a witness to say that so and so told me. But you don't have to have that. All you have to do is have an inference that that is what they said.

(R. p. 132, lines 5-11). Counsel for West Fraser had just argued that Nelson only told Wilson that Wise had an "infection". (R. p. 126, line 17-p. 127, line 12). While the specific word "innuendo" was not used in Wise's argument at the hearing, it is sufficiently clear that Wise was arguing that one could reasonably infer from Nelson and Wilson's testimony that when Nelson told Wilson that Wise had an "infection" that he was inferring that Wise had a sexually transmitted infection. *See State v.*

Dunbar, 356 S.C. 138, 192, 587 S.E.2d 691, 694 (2003) ("A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground.").

West Fraser responded to this argument at the hearing, arguing that there was no evidence that a reasonable person could have inferred from Nelson's statement that he was accusing Wise of having a sexually transmitted infection. (R. p. 148, lines 11-14). The Circuit Court extensively addressed the argument and counterargument, stating in its Order that "Nelson's statement cannot be construed as defamatory by innuendo" and that his statement was true based on its literal meaning and that "there is no evidence to establish the statements reasonably would be construed as defamatory." (R. pp. 13-16). Therefore, the two overriding policy considerations behind issue preservation have been satisfied, as both West Fraser and the Circuit Court had sufficient notice of the innuendo argument that they were able to present counterarguments and rule on it on West Fraser's Motion for Summary Judgment. The issue was raised by Wise again on his Motion for Reconsideration. (R. pp. 111-14). Therefore, a meaningful opportunity for appellate review has been presented to the Court on this issue.

Denying Wise's previous Petition for Rehearing on the basis that he did not sufficiently raise the issue at the Motion for Summary Judgment hearing is in error because it places form over substance. It does not serve either of the purposes of the issue preservation rules because the Circuit Court had a "fair opportunity to rule" on the innuendo argument, and West Fraser had the opportunity to present its

counterargument, thus ensuring "meaningful appellate review." *Morales*, 439 S.C. at 609, 889 S.E.2d at 556. For the foregoing reasons, the Appellant requests that the Court rehear and alter its refiled Unpublished Opinion and reverse the Circuit Court's Order granting summary judgment to Respondent. Appellant incorporates all further arguments made in its previous Petition for Rehearing as to why the Court's Unpublished Opinion is in error.

Respectfully submitted,

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July 23, 2024
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PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing **Appellant's Petition for Rehearing** has been served upon the following counsel of record by emailing a copy of the same this 23rd day of July 2024.

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July 23, 2024
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