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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM YORK COUNTY

Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Civil Action No. 20-CP-46-01803

Appellate Case No. 2025-000032

Bobby Blakney ……..…….., Respondent,

v.

City of Rock Hill …….…..., Appellant.

RESPONSE TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellee moved to dismiss this appeal from the York County Court of Common Pleas upon the sole ground that the notice of appeal was not filed timely. Appellee misunderstands and misapplies both the Appellant's motion and law.

Relevant Factual background

Following a week-long trial, the jury returned a verdict on February 19, 2024. The verdict was tainted by several elementary and significant evidentiary errors by the trial judge. The gravamen of Appellee's claim was that the City was negligent in its actions to mark utility lines. However, it is not disputed that the City timely marked the utility lines using a method specifically

prescribed by state statute and that the Appellee failed to comply with state statute that required he request the City to mark the utilities again. South Carolina state statute requires an excavator to call for a re-mark if no marks are apparent and utilities are apparent at the site. In this instance, there were several different utilities in the exact area Appellee intended to excavate. Appellee dug with a mechanized jackhammer with a shovel attachment directly beside the visible electrical conduit connected to the visible electric the meter box that supplied electrical service to the home. (See photo on page 2 of the City of Rock Hill's original post-trial motions.) Predictably, he hit the electrical line and was shocked.

After the verdict, the court allowed the parties ten (10) days to file post-trial motions. The court entered judgment on March 6, 2024. The Appellant timely filed post-trial motions and set forth eight discrete issues in support thereof. These eight issues were not conclusory or boilerpate; rather, Appellant expounded on each in detail covering over 25 pages. Appellee does not contest timeliness of the post-trial motions. The Court entered its order denying post-trial motions on March 21, 2024. In this Order, the Court obliquely rejected Appellant's post-trial motions and provided no insight as to the Court's reasoning on any particular issue. The Court's order could be filed in any case at this same stage with little alteration.

Given the obvious evidentiary errors, the magnitude of the resulting verdict stemming from these errors and the trial court's seeming inattention, Appellant was concerned i) that these important issues be preserved for appeal and ii) that the trial judge, who is generally not prone to errors this rudimentary and material, had grossly misconstrued the issues and controlling law. Accordingly, on April 1, 2024, Appellant timely filed a Motion to Alter or Amend Order and/or Motion to Reconsider. Again, the timeliness is not contested. On December 4, 2024, the trial court issued an order denying the motion to reconsider. Appellant then timely filed this appeal.

The only issue before the Court on this motion to dismiss is whether the Motion to Alter or Amend Order and/or Motion to Reconsider stayed the time for the filing of the appeal.

Applicable Law

Rule 203(b)(1) of the South Carolina Appellate Court Rules provides that:

> **(b) Time for Service.**
>
> (1) *Appeals From the Court of Common Pleas.* A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.
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> SCACR 203.

The Supreme Court's opinion in *Elam v. South Carolina Department of Transportation*, 602 S.E.2d 772 (Ct.App. 2004) controls the disposition of the motion to dismiss. The *Elam* Court altered the framework previously adopted by this Court. The Supreme Court (i) clarified and limited *Coward Hund*, 518 S.E.2d 56 (Ct.App. 1999), *Quality Trailer,* 349 S.E.2d 615 (Ct.App. 2002) and *Collins Music,* 579 S.E.2d 524 (2002); (ii) overruled *Matthews v. Richland County School Dist. One,* 594 S.E.2d 2004; (iii) reversed the court of appeals in Elam and (iv) provided the framework and reasoning for this Court to deny the motion to dismiss.

In the motion to dismiss, Appellant relies upon three Court of Appeals cases that preceded *Elam*. However, pursuant to the Supreme Court's holdings and reasoning in Elam, none apply to this situation. The Elam decision altered and clarified procedure in South Carolina. The Supreme Court specifically held:

> We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely. In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court. Again, we caution a party who files post-trial motions to note carefully the exceptions to this general rule as expressed in *Coward Hund , Quality Trailer* and *Collins Music*.
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> *Elam 579 S.E.2d @* 778.

The Supreme Court further explained the holdings of *Coward Hund, Quality Trailer* and *Collins Music*:

> Accordingly, we reaffirm the rationale and principles expressed in *Coward Hund*, *Quality Trailer* and *Collins Music*. An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment. *Coward Hund.* An appeal may also be barred due to untimely service of the notice of appeal when a party - instead of serving a notice of appeal – *recaptions a written NNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59 (e) motion. Quality Trailer, Collins Music.*

Id.

In this case, the City of Rock Hill did not file successive motions for reconsideration under Rule 59(e); therefore, *Coward Hund* is not applicable. Moreover, the City did not "recaption" a written JNOV/new trial motion…and resubmit[] it as a virtually identical, written Rule 59(e) motion" as expressly proscribed in *Elam* construing *Quality Trailer* and *Collins Music.* Rather,

Rock Hill filed the Motion to Alter or Amend the Order and/or Motion to Reconsider seeking to have the trial court consider and provide its legal reasoning for its ruling, for two reasons: to ensure the issues were preserved for appeal and to prod the trial court to examine the issues in greater detail so that the trial court could discern its manifest errors and correct them.

When a party believes that a court may have misapprehended the arguments or the law, they certainly have the opportunity in accordance with *Elam* to ask the court to reconsider – "even if it means re-hashing all or part of an argument previously presented." *Elam, 579 S.E.2d @* 779. That is the purpose of a motion to reconsider. The order is devoid of any reasoning supporting the ruling. The lack of any rationale does not negate the opportunity for a party to have the court reconsider the issue.

Here, the City contends that these issues have been misconstrued. For instance, allowing the plaintiff's expert witness to testify that the City deviated from the national standard of care, when he admitted on cross-examination that there is no national standard, is clear error. Contradicting this testimony, the witness admitted that each state's specific laws control and that South Carolina's statute requires the excavator to call for utilities to be re-marked if the prior markings are unclear. Yet, the trial court inexplicably allowed this "expert" provide his legal opinion as to this statute in contravention to the plain language of the statute. These evidentiary decisions manifest the normally able trial court either misunderstood or misconstrued basic evidentiary rules to the prejudice of Rock Hill. *Elam* plainly sets forth that a party has the right to file a motion to reconsider, even if that issue was previously presented to the court and ruled upon. Indeed, the overruling of *Matthews* squarely confirms that logic and procedure.

The only conclusion that could be drawn from the evidence was that the Appellee violated South Carolina statutory law because Appellee was the excavator, and the excavator was statutorily

required to call for a re-mark when there were utilities present and there were no visible marks remaining. By not doing so, he was guilty of negligence per se. However, the court inexplicably failed to recognize that the Underground Facility Damage Protection Act provided the appropriate statutory scheme defining the duties of the parties and therefore failed to charge the jury on the proper applicability of the Act. Consequently, the trial court failed to recognize that Appellee's failure to call for a re-mark of the line prior to excavation when utilities were obviously apparent, and no lines were marked violated his statutory duties under South Carolina law.

The court also allowed the jury to determine what the law was, which was clear error. He charged the statutes but also charged the jury that the act does not affect any civil remedies for personal injury. That led to confusion by allowing the parties to argue whether those statutes applied at all to this civil remedy. The parties were arguing what the law was with the court not providing any clear direction to the jury. The court's charge allowed argument as to whether those statutes even applied to this case and left that to the jury to determine. Again, that is a misunderstanding or misapprehension of the law that is appropriate for a motion to reconsider. That approach is sanctioned by the Court in *Elam*:

> There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity….
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> [T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed for the practice of freely allowing a motion for reconsideration.
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> *Elam,* 602 S.E.2d @ 779 (2004).

Appellee's approach regarding any re-argument in a motion to reconsider would render motions to reconsider meaningless, useless and improper. A motion to reconsider presumes that

the court has considered the matter and is being asked one last time to try to correct the alleged error. That has long been the approach in South Carolina. *See*, *Arnold v. State*, 420 S.E.2d 834 (1992) ("purpose of Rule 59(e), SCRCP to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits."). That approach is still appropriate today. The Elam court's conclusion applies equally to this case:

> While SCDOT in its written Rule 59(e) motion may have revisited some issues and arguments raised in its oral JNOV/new trial motions, we conclude the Rule 59(e) motion was proper for the reasons we explain today. This case is not factually similar to *Coward Hund* because it involves a first, written Rule 59(e) motion, not a second one. It is not factually similar to *Quality Trailer* or *Collins Music* because SCDOT did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a previous, written JNOV/new trial motion.
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> SCDOT timely served its notice of appeal within thirty days after receipt of written notice of entry of the order denying its Rule 59(e) motion. Consequently, we reverse the Court of Appeals' order dismissing SCDOT's appeal as untimely. We also overrule *Matthews,* 357 S.C. 594, 594 S.E.2d 177, because it is inconsistent with the view of post-trial motions we set forth today.
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> *Elam,* 602 S.E.2d @ 781 (2004).

The City of Rock Hill asked the court to reconsider certain rulings. Certainly, it is understandable that while reading a twenty-six-page post-trial motion for JNOV, new trial and other relief, that a reader might get lost in the woods with all the factual testimony and evidence laid out. In the City's motion to reconsider, Rock Hill attempted to point out the legal issues that Rock Hill believed the court had mis-apprehended in succinct form along with requesting that the court provide its reasoning its ruling in a five-page motion. The goal was to prod the court into delving deeper into the legal issues which Rock Hill believed were erroneously applied. When there has been an apparent misapprehension, a request for the court's rationale in reconsideration is appropriate and sensible. The request for the court's rationale further illustrates that the City

believed the court has misconstrued the arguments as illustrated above. The City did not re-file the prior 26-page motion verbatim.

In *Elam*, the Supreme Court identified five important factors in considering this issue. First, the court determined that a Rule 59 (e) motion is properly considered a motion to reconsider, which includes the re-hashing of all or part of arguments previously considered. That applies here.

Second, the court emphasized the importance of issue preservation. The Appellant clearly demonstrated concern with issue preservation because it requested the trial judge to provide his rationale for his ruling. That would also provide an appropriate basis to determine whether the trial court had mis-apprehended the motion, the facts or the law. While there is no case law that would require a trial judge to provide a written explanation, there is case law set forth in the motion to reconsider that certainly encourages a trial judge to do so. Given that case law, the Appellant had a good faith belief that the judge should be asked to provide that given what we believed was the misapprehension of the motion, the facts or the law. Requesting the learned trial judge to do so would make it more likely that any mistake or misapprehension would be corrected at the trial court level, potentially without the necessity of an appeal.

Third, *Elam* outlined the two basic situations in which a party should consider filing a Rule 59(e) motion. As applicable here, the court said that party may wish to file such a motion when she believes the court has misunderstood and the party wishes for the court to reconsider. *Elam, 579 S.E.2d @* 780. That is exactly what happened here.

Fourth, South Carolina appellate courts require issue preservation and do not recognize the "plain error rule" recognized in other courts. Those "mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e)

motion without concern a later appeal will be deemed untimely. *Elam, 579 S.E.2d* @ 781. Here, the Rule59(e) motion demonstrates the Appellants concern with issue preservation. The very nature of the issues presented led the Appellant to believe that the court had misapprehended the facts and/or the law. However, without any explanation, the City certainly could not demonstrate that. Requesting that the court provide its rationale served several purposes. First, any misapprehension could be readily identified in that rationale. Second, the issue of whether the Appellant should have given the court the opportunity to correct any error would properly preserved for appeal. Also, if the trial court would give its reasoning, it would be more likely that any error would be corrected prior to any appeal.

Fifth, Elam held that the civil procedure and appellate rules "should not be written or interpreted to create a trap for the unwary lawyer or party." *Elam* @ 781. When a party believes the court has misunderstood or misapprehended the issue, they may file a motion to reconsider. *Elam, 579 S.E.2d* @ 780.

But, in filing a Rule 59(e) motion, a party "may unwittingly forfeit the right to appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling. Elam. *579 S.E.2d* @ 780. The court held: "We strive to avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place." *Elam, 579 S.E.2d* @ 780-781. By footnote, the court noted that the SCDOT believed that a Rule 59(e) motion was necessary and appropriate. The City of Rock Hill likewise believed the motion was necessary and appropriate. Rock Hill certainly believed that the court had misapprehended the matter but had no way to demonstrate that without the court's reasoning. We requested that the court re-consider certain matters and provide its

reasoning. That was no attempt to delay the appeal. Under those circumstances, the rules should not be "interpreted to cause a trap for the unwary lawyer or party." Elam, *579 S.E.2d* @ 780.

Elam is controlling. That analysis requires this court to find that the single Rule 59(e) motion, which did not consist of a verbatim repeat of the original post-trial motions with a new caption, to be appropriate and proper. Therefore, that motion stayed the time for the filing of the appeal.

Because the motion was proper, and the appeal was timely filed. Appellee's motion to dismiss should be denied.

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