IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2023-000063

Steven Michael Okun, as Personal Representative of the Estate of Jane Luanne Okun ..... Respondent,

v.

Pobuckra Properties, LLC and Alliance Commercial Property Management, Inc. ..... Appellants.

APPELLANTS' PETITION FOR REHEARING AND SUPPORTING MEMORANDUM OF LAW

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INTRODUCTION

Appellants, Pobuckra Properties, LLC and Alliance Commercial Property Management, Inc., seek rehearing of this Court's April 2, 2025 unpublished per curiam decision, which affirmed an order striking Appellants' pleadings as a sanction for violating a consent order to preserve the handrail that allegedly caused Plaintiff's injuries. Rehearing is warranted for two reasons.

First, this Court misapprehended the conduct that was the foundation of the sanctions order. Appellants were sanctioned for loss of the handrail and ensuing violation of a consent order to preserve the evidence. Notably, neither the trial court nor this Court found such conduct to be intentional, in bad faith, or marked by gross indifference to Plaintiff's rights. Appellants were *not* sanctioned for, as this Court mistakenly found, failing to disclose to Plaintiff that the handrail had been lost. This misapprehension, in turn, led this Court to unfairly resolve the case on novel grounds.

Second, although this Court addressed Appellants' contention that the sanctions order was unsupported by evidence of bad faith, this Court overlooked Appellants' other challenges to the sanctions order—that loss of the handrail was not unduly prejudicial, considering there was other evidence of its condition, and case-dispositive sanctions were overly broad compared to the sanctioned conduct. These unresolved challenges to the sanctions order, either alone or together, constituted alternative grounds for finding reversible error.

For these reasons, as explained below, this Court should grant Appellants' petition for rehearing. Upon rehearing, this Court should vacate and reverse the order striking Appellants' pleadings and remand the case for additional proceedings.

REHEARING STANDARD

Rehearing should be granted, when the movant's arguments have been "overlooked or misapprehended." SCACR 221(a); see also Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001).

ARGUMENT

I. This Court misapprehended the sanctioned conduct, misapprehended that a single instance of objectionable conduct warrants drastic sanctions, and unfairly resolved the appeal on novel grounds.

In reviewing the case-dispositive sanctions order, this Court recognized the governing legal standard. Such drastic sanctions are reserved for cases involving bad faith, willful disobedience, or gross indifference to the opponent's rights. Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 394–95, 396 S.E.2d 369, 372 (1990); Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996).

Although this Court applied the correct legal standard, it incorrectly determined that the record contained evidence of bad faith conduct required to uphold the sanctions order. This Court found bad faith in Appellants' failure to notify Plaintiff that the right-hand secondary handrail had been lost until several months after the loss had occurred. (Op. at 1) This finding does not support affirmance of the extreme sanctions imposed.

Foremost, this Court misapprehended the conduct for which Appellants were sanctioned. Appellants were *not* sanctioned for failing to disclose the handrail's loss, but for the *loss itself* and ensuing violation of the consent order. (R. 5–8) The sanctioned conduct—spoliation of evidence—had already occurred, before there was any occasion to notify Plaintiff of that circumstance.

Even if this Court intended to affirm on a ground other than the one on which the trial court relied, this Court still erred. SCACR 220(c) ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723–24 (2000) (holding that an appellate court may not affirm on an alternative ground, when the court believes it would be unwise or unjust to do so, such as when respondent failed to present that ground to the lower court). Plaintiff did not contend below that Appellants should be sanctioned for failure to notify him *sooner* that the handrail had been lost, only that Appellants should be sanctioned for violating the consent order through loss of the handrail. (R. at 36–37) It follows that this Court should have declined to resolve the appeal on a novel basis—one that was never briefed or considered below. I'On, 338 S.C. at 421 ("In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal.").

In any event, Appellants' failure to disclose loss of the handrail sooner does not constitute bad faith warranting the most drastic sanctions. This is an isolated instance of objectionable conduct, a far cry from the type of conduct justifying imposition of drastic sanctions: a repeated pattern of discovery violations by obstreperous parties, who had been forewarned that drastic sanctions were possible. (Appellants' Final Br. at 15–18) This Court's cited authority confirms the point. (Op. at 1) E.g., Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co., 334 S.C. 193, 199–200, 511 S.E.2d 716, 719 (Ct. App. 1999) (affirming order striking answer, where defendant intentionally violated four discovery orders, prior sanction imposing attorneys' fees had not coerced compliance, and trial court had warned that continued defiance would result in drastic sanctions).

As for the conduct that *was* the subject of the sanctions order, it is undisputed that the record is bereft of evidence that Appellants spoliated evidence in bad faith. This is because Plaintiff did not even argue bad faith in the trial court, let alone present supporting evidence. (Appellants' Final Br. at 18–19) The trial court made no finding of bad faith in connection with loss of the handrail. (R. at 8) This Court likewise made no finding that Appellants acted in bad faith in *losing* the handrail. Instead, this Court found bad faith solely in Appellants' alleged failure to timely disclose the loss—which, as explained above, was not the sanctioned conduct.

In sum, this Court misapprehended the sanctioned conduct, misapprehended that it was fair to resolve the appeal on novel grounds, and misapprehended that an isolated instance of objectionable conduct justifies the imposition of case-dispositive sanctions. For these reasons, this Court should grant rehearing, vacate and reverse the sanctions order, and remand for further proceedings.

II. This Court overlooked Appellants' remaining arguments.

Appellants raised two additional arguments establishing that the trial court abused its discretion in imposing case-dispositive sanctions—one or both of which would have been grounds for finding reversible error. This Court, however, either partially or entirely overlooked these arguments.

Appellants argued that loss of the right-hand secondary handrail was not unduly prejudicial. Other sources of evidence—namely, the left-hand secondary handrail, multiple witness' testimony, and photographs—demonstrated the subject handrail's condition. (Appellants' Final Br. at 20–23) This Court partially addressed this argument, stating that the left-hand secondary handrail was an inadequate substitute. (Op. at 2) This Court did not, however, address whether and why witness testimony about and photographs of the right-hand secondary handrail's condition were likewise inadequate substitutes—particularly when combined with the existence and availability of the left-hand secondary handrail.

Appellants also argued that the sanctions order was overly broad, in that: (1) it included Alliance Commercial Property Management, Inc., who was not a party to the consent order; (2) Plaintiff conceded that the right-hand secondary handrail was relevant only to notice, such that striking the non-notice affirmative defenses was excessive; and (3) Plaintiff did not demonstrate that an adverse inference instruction would be inadequate to redress the loss. (Appellants' Final Br. at 23–27) This Court did not address these arguments at all.

Instead, this Court held that loss of the right-hand secondary handrail *alone* was sufficient to demonstrate that the sanctions order was narrowly tailored: "[B]ecause the handrail is gone and there is no opportunity for Okun to inspect or use the right-hand handrail in support of his causes of action … , we hold there is evidence to support the sanction was narrowly tailored." (Op. at 2) On the contrary, loss of evidence alone does not automatically warrant imposition of the most drastic sanctions available. Kershaw, 302 S.C. at 395 (affirming decision to give an adverse inference jury instruction, where plaintiff lost evidence that was subject to a preservation order, noting that "dismissal under Rule 37(b)(2)(C) is not mandatory").

In sum, Appellants' unaddressed arguments—either alone or together—would have been alternative grounds for vacating the sanctions order. For these additional reasons, this Court should grant rehearing, vacate and reverse the sanctions order, and remand for further proceedings.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court: (1) grant rehearing; (2) upon rehearing, withdraw its April 2, 2025 decision and reissue a new decision vacating and reversing the trial court's sanctions order; (3) remand for further proceedings; and (4) grant such further relief as this Court deems just.

Respectfully submitted,

/s/ *Agelo L. Reppas*

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PROOF OF SERVICE

I certify that I have served Appellants' Petition for Rehearing and Supporting Memorandum of Law on counsel for Respondent Steven Michael Okun, as Personal Representative of the Estate of Jane Luanne Okun, by e-mail in accordance with the South Carolina Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), on April 17, 2025.

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s/*Karen L. Jessee*
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