RECEIVED
Apr 23 2025
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.

PETITION FOR REHEARING

The Appellant, City of Rock Hill, petitions the South Carolina Court of Appeals for a rehearing of the Court's April 8, 2025 Order dismissing this appeal on the ground that the notice of appeal was untimely because the Rule 59, SCRCP motion filed in the lower court was inappropriately successive and procedurally improper.

The grounds for Appellant's petition for rehearing are addressed in detail in the supporting memorandum being filed herewith and incorporated herein.

This petition for rehearing is based upon the Court's April 8, 2025 Order dismissing this appeal, the supporting memorandum filed herewith, the motion to dismiss appeal briefs and exhibits, including the Rule 59 SCRCP motion filed in the lower court and challenged by Appellant, Rule 221(a), and Rule 221(c) SCACR and other rules of court.

GARFIELD SPREEUWERS LAW GROUP

By: *s/ David L. Morrison*

David L. Morrison (Bar #4101)
Post Office Box 119
Columbia, South Carolina 29202
Phone: (803) 830-5469
E-mail: david@gslawsc.com

Attorney for City of Rock Hill

Columbia, South Carolina

April 23, 2025

RECEIVED
Apr 23 2025
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.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Appellant, City of Rock Hill petitions the South Carolina Court of Appeals for a rehearing of the Court's April 8, 2025, Order dismissing this appeal on grounds that the Rule 59(e) motion filed in the lower court was inappropriately successive and procedurally improper, thereby rendering the subsequent notice of appeal untimely. The Appellant respectfully submits that the following points were overlooked or misapprehended by this Court.

No issue exists regarding the timeliness of the Notice of Appeal following the denial of the Rule 59(e) motion.[1] Instead, the only issue before the court in this motion to dismiss is whether the Rule 59(e) motion was proper so that it tolled the time to appeal.

[1] The JNOV motion, the Rule 59(e) motion and the court's ruling on the JNOV motion are in the record pending before the court and are not separately attached here. Each of those documents is attached to the Respondent's Motion to Dismiss the Appeal. Likewise, the Response to the Motion to Dismiss the Appeal is in the record. Appellant craves reference and incorporates that document here. Many of the issues are explained in more detail in that Response.

This Court held that motion for reconsideration was inappropriately successive and therefore procedurally improper. The court misconstrued the state of the law, the motion itself and the applicability of the narrowly created judicial exceptions to the rule that a timely filed motion tolls the time for appeal.

The South Carolina Supreme Court has recently clarified the law applying to this area in *Elam v. S.C. Dept of Transportation* , 361 S.C. 9, 602 S.E.2d 772,777 (2004) and more recently in *Swing v. Swing*, Op. No. 28266 (S.C.Ct filed March 12, 2025).

The normal rule is that a timely filed Rule 59(e), SCRCP motion tolls the time for the filing of an appeal. The exceptions to this rule apply to successive Rule 59(e) motions (*Coward Hund Const. Co. v. Ball Corp.*, 518 S.E.2d 56 (Ct.App. 1999) or to 59(e) motions that are virtually identical to post-trial motions. (See, *Elam*, supra, affirming (*Quality Trailer Products v. CSL Equipment Co., 562 S.E.2d 615 (Ct.App. 2002)* and *Collins Music v. IGT, , 579 S.E.2d 524 (Ct.App. 2002).*

Here, there was no successive motion. Only one motion to reconsider was filed. The judicially created exception to the rule created by *Coward Hund* has no application.

Likewise, there was no virtually identical motion as in *Quality Trailer* so that the narrowly created judicial exception in *Quality Trailer* has no application either. In analyzing the Rule 59(e) motion to reconsider in *Quality Trailer*, the court said:

> I Corp then filed a written motion pursuant to Rules 52, 59 and 60 SCRCP which was virtually identical to its written JNOV/new trial motion. The only changes I Corp made were to caption the Rule 59(e) motion differently and to change the relief sought in the Rule 59(e) motion's final paragraph to coincide with the Rule 59(e) motion's caption.
>
> *Elam*, 602 S.E.2d @ 776.

The post-trial motion filed by the Appellant was twenty-six pages and covered numerous grounds. The motion to reconsider at issue here was five pages. Three of the five pages had nothing to do with the original grounds asserted in the post-trial motions and instead were concerned with the apparent lack of understanding of the believed clarity of the issues presented and the preservation of those issues for appeal. However, trial counsel certainly has no room to argue to the trial judge that he did not understand the issues presented when the grounds for denial of the motion are not presented. Given the believed clarity of the issues presented, the Appellant sought better understanding of the reasons for the blanket denial so that the Appellant could properly ensure preservation. Further, Appellant could not contend why or how the court misconstrued the law when the reasons for the summary denial of the JNOV motion were unknown. For those reasons, the motion sought clarification.

In Elam, the Supreme Court said that a written JNOV motion followed by an initial Rule 59(e) motion is a part of a party's single bite at the apple in presenting his case to the trial court. Specifically, the court said:

> 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*.
>
> *Elam 579 S.E.2d @ 778.*

Here, the Appellant did not re-submit a virtually identical Rule 59 motion. Instead, it *appeared* that the court had misconstrued the law. 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. He testified that the standard in the industry is different than what the South Carolina statutes said. These evidentiary decisions manifest the normally able trial court either misunderstood or misconstrued basic evidentiary rules to the prejudice of Appellant.

Further, this same expert was allowed to testify that the Appellant was not an "excavator who had specific duties under the law despite the South Carolina Statute defining an "excavator" as the person digging. The excavator has a specific duty to call for a re-mark if utilities are present and no marks on the ground are apparent. The expert witness explained to the jury that South Carolina law did not mean what it said and that the standard in the industry is that only the employer is an "excavator" so that the Respondent had no such duty. Despite objections, this testimony was allowed as expert opinion on the standard in the industry despite much of his testimony being in contravention of applicable South Carolina statutory law.

The court also refused to instruct the jury that the statutory law of South Carolina applied to the facts of this case. Instead, he allowed the parties to argue whether the law applied in closing. He did so by charging the jury that the statutory scheme did not affect any *civil* remedies. The parties were allowed to argue whether the law applied. The jury was left to speculate as to what law applied and to decide that for themselves without appropriate guidance from the court.

The Appellant believes that is a misapprehension of the law. That misapprehension is appropriate for a motion to reconsider. The motion to reconsider requested that the trial judge

provide his reasoning so whether a misapprehension existed could be determined and argued. The Appellant contends that such a misapprehension is appropriate for a motion to reconsider.

The *Elam* Court sanctioned that approach.

> 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….
>
> [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.

Elam, 602 S.E.2d @ 779 (2004).

Additionally, prodding the court to examine the issues in greater detail so that it could discern the manifest errors and correct them is certainly appropriate for a motion to reconsider. Preserving the issues is also appropriate for a motion to reconsider.

By its very nature, a Rule 59(e) motion asks a court to reconsider certain rulings. Whether the judge is *required* to provide his thought process is not the issue. Whether a party is entitled to request that he do so under the circumstances presented here is the issue. The Appellant did not re-file its twenty-six-page motion. The majority of the motion to reconsider did not address the issues asserted in the JNOV.

The Court's order dismissing the appeal misunderstood the nature of the motion to reconsider and the issues presented. While a Rule 59(e) motion by its nature will always ask a court to re-hash some issues presented, such a motion has only been found to be improperly successive when it is virtually identical to the post-trial motion under the *Quality Towing* standard. Again, unlike the Appellant's motion, the motion in issue in Quality Towing was a cut and paste from the JNOV motion other than the caption and the relief requested. An attempt to ask the court

to prod deeper into the legal issues which the Appellant believes were erroneously applied is a part and parcel of a party's single bite at the apple.

The Order dismissing the appeal misconstrued nature of the Rule 59(e) motion. It is not virtually identical to the JNOV motion. A misunderstanding or misapprehension of the law is appropriate for a motion to reconsider. The *Elam* court sanctioned the type of motion filed here:

> 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….
>
> [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.
>
> *Elam,* 602 S.E.2d @ 779 (2004).

Elam recognizes that a Rule 59(e) motion may revisit issues and arguments previously made. The Court's order of dismissal does not recognize that. While issues are re-visited, it is not a virtually identical motion as the one in *Quality Trailer*. The motion itself reflects that as the majority of the motion is devoted to issues not raised in the JNOV motion that relate to the trial court's order and apparent errors. A goal of prodding the court into a deeper dive into the legal issues present is laudable and worthwhile. That should be encouraged, not discouraged.

After the motion to dismiss and the response were filed, the Supreme Court again addressed this issue. The Court's order dismissing this appeal failed to appropriately apply the ruling in that most recent case. In *Swing v. Swing, supra*, the Supreme Court noted that our courts have struggled with the issue of preventing litigants from improperly filing successive and procedurally improper motions to delay the deadline for appeal, but also with the issue of protecting lawyers who "conscientiously attempt to comply with the preservation requirement that certain issues must be brought to the trial court's attention before an appeal." Swinton Op. No. 28266 (S.C.Sup.Ct filed

March 12, 2025) @ p. 14. The court noted that the issue in these cases is not whether a Rule 59(e) motion somehow runs afoul of a rule of procedure. The court flatly stated that it is not the correct view. Instead, the correct view is under Rule 203(b)(1). That Rule provides in plain language that a "timely" motion stays the time for appeal for all parties. There is no dispute that the Rule 59(e) motion here was timely filed. The court noted that there are two judicially created limited exceptions to this rule. One of those – successive Rule 59(e) motions does not apply here because there were no successive Rule 59(e) motions filed by Appellant. The Court's order of dismissal inappropriately relied upon the remaining narrow judicially created exception – that the Rule 59(e) motion was virtually identical to the JNOV motion. In *Coward Hund*, the Rule 59(e) motion found to be virtually identical was a paste and cut motion. The only changes were to the caption and the relief requested. That is not the case here.

The Court's order dismissing the appeal misconstrued the motion at issue here. There was no cut and paste. However, in a motion to *reconsider,* some repetition is appropriate and expected. The fact that the Appellant strongly believes in the validity of nearly all grounds set out in the JNOV motion and did not wish to waive any, does not render a motion to reconsider improper. Indeed, the majority of the motion was prodding the court to consider the issues deeper and provide the grounds for its reasoning so that any misunderstandings could be dealt with at the trial court level if those grounds were apparent.

The Court's order dismissing the appeal also failed to consider Elam's five factors to consider in addressing this issue. Those issues are developed and set out in the Appellant's Response to the Motion to Dismiss. The Appellant craves reference and incorporates those issues here along with the entirety of the ten-page Response to the Motion to Dismiss. However, Appellant briefly points out those five factors here.

First, the Supreme Court noted that a Rule 59(e) motion is properly considered a motion to reconsider, which includes the re-hashing of all or part of the arguments previously considered.

Second, the Court emphasized the issue preservation. Certainly, issue preservation was a concern expressed in the Rule 59(e) motion that was not addressed in the JNOV motion. While there is no law that would require the trial judge to provide a written explanation, there is law set forth in the motion Rule 59(e) motion that would encourage him to do so. It is certainly appropriate for a party to make that request.

Third, the *Elam* Court addressed two situations in which a party should consider filing a Rule 59(e) motion. One such situation was when a party believed the court had misunderstood and wished for the court to reconsider.

Fourth, the mandatory preservation requirements make it doubly important for litigants generally to be freely allowed to file a first, written Rule 59(e) motion without concern that a later appeal will be deemed untimely.

And fifth, the Elam Court held that the civil procedure rules "should not be written or interpreted to create a trap for the unwary lawyer or party." When a party believes the court has misunderstood, they may file a motion to reconsider.

Each of these five elements apply here. The Court's order of dismissal failed to consider these elements and failed to recognize that there was no virtually identical motion along with the other grounds stated here. For the reasons stated herein and in explained in more detail in the original Response to the Motion to Dismiss, this Court should grant this Petition for Rehearing, find the appeal timely and deny the Motion to Dismiss the Appeal.

(Signature to follow on page 9)

GARFIELD SPREEUWERS LAW GROUP

By: *s/ David L. Morrison*
David L. Morrison (Bar #4101)
Post Office Box 119
Columbia, South Carolina 29202
Phone: (803) 830-5469
E-mail: david@gslawsc.com

Attorney for City of Rock Hill

Columbia, South Carolina

April 23, 2025