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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Patrick W. Carr, Special Referee

Circuit Court Case No. 2024-CP-07-00660
Appellate Case No. 2025-000927

JAYLEN AIKEN,……...…Respondent,

v.

RICHARD EMMONS,…….……Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENT

Respondent's efforts to parse a distinction between the facts of this case and those addressed by this Court in *Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987), serve to reinforce how factually analogous – and therefore controlling – that decision is here. Because Appellant's argument was raised to the Special Referee, it was implicitly ruled upon in the Special Referee's order denying Appellant's motion for relief from judgment under Rule 60(b)(1), SCRCP, and is therefore properly preserved for appellate review. Here, as in *Roberts*, because Appellant has no recourse against his employer, the failure to grant relief from the default judgment entered in Respondent's favor effectively makes Appellant personally liable for his employer's error. The rule established by this Court in *Roberts* is intended to prevent this inequitable result, and should be applied in this case to like effect.

I. This Court's Decision in *Roberts v. Peterson* is Not Limited to Cases Involving Sovereign Immunity.

Respondent argues that this Court's decision in *Roberts* is a narrow one, wherein the Court determined that a school official's "lack of knowledge of the legal effects of the abolition [of] sovereign immunity was excusable." (Initial Brief of Respondent, p. 11). The decision in *Roberts*, however, was not rooted in the existence *vel non* of sovereign immunity. To the contrary, the concept of sovereign immunity was relevant to this Court's decision in *Roberts* only inasmuch as it had bearing on the Court's primary concern—whether or not the affected employee had recourse against her employer for the employer's actions in connection with the default judgment. *See Roberts*, 292 S.C. at 151, 355 S.E.2d at 281. As this Court explained:

> We also conclude from the record that although the state maintained a personal injury liability policy to cover Peterson, there is no evidence of record that the state maintained an errors and omissions liability insurance policy covering the particular school employees who failed to hand the suit papers to the attorney. In all probability, were the appealed order affirmed and a large verdict rendered against Peterson, since this suit was instituted on January 16, 1985, **Peterson would**

> **have no recourse against the state** under *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

Id. (emphasis added).

Following this recognition of Peterson's lack of recourse against her employer, the Court referenced the longstanding rule in South Carolina that "that the negligence of an attorney or insurance company is imputable to a defaulting litigant." *Id.* As here, however, the operative negligence in *Roberts* was not that of an attorney or an insurance company, and the Court explained the significance of that distinction:

> Before us, however, is an employer, the school officials of Charleston County, whose business is education not litigation. **The duty to act timely in attending the pending litigation was, of course, existent. But the negligence in the failure to act was more excusable, we think, than the cases involving attorneys or insurance companies.**

Id. The *Roberts* court thus made no specific finding regarding the nature of the school officials' failure to act, save that it "was more excusable" than failures by attorneys or insurance companies solely because their "business is education not litigation." *Id.*

Here, as in *Roberts*, the business of Penske is "not litigation," and because of this its failure to "act timely in attending the pending litigation" is "more excusable" than an identical failure by an attorney or an insurer. Here, as in *Roberts*, Appellant gave the suit papers to his Penske manager, Mr. Wilson. (R. __ (Emmons Aff. ¶ 10)). Appellant asked Mr. Wilson if he should retain counsel, but Mr. Wilson assured him that "Penske's legal team" would handle the matter. (*Id.*). Mr. Chris Carney, an employee in Penske's Human Resources Department, also told Appellant that Penske's legal department was handling the lawsuit. (*Id.* at ¶ 15). Here, as in *Roberts*, there is no evidence in the record of any act or omission by an insurer or an attorney—Appellant's contacts were solely with non-attorney agents of his employer, Penske. As such, Appellant is faced with the same situation as the employee in *Roberts*, with a "verdict rendered against [Appellant]"

through the Special Referee's order, for which "[Appellant] would have no recourse against [Penske]" based on the nature of the employer-employee relationship. *See Roberts*, 292 S.C. at 151, 355 S.E.2d at 281.

It is this employer-employee relationship, within which no recourse lies against an insurer or an attorney, that this Court addressed in *Roberts*, and not the role of sovereign immunity. Were it otherwise, the Court would not have included in its analysis a recitation of "the general rule in this country that when an employee hands suit papers to his/her employer and the employer fails to properly answer the suit papers, the courts grant relief to the defaulting defendant in the interest of trying cases on their merits." *Id.* (citation omitted). This rule, which alone is a sufficient and independent ground for reversal of the Special Referee's order, has no relationship to the concept of sovereign immunity, but is instead grounded entirely in the employer-employee relationship, recognizing the employee's lack of recourse within that relationship.

It is in this context that this Court's description of *Roberts* as "unique" must be understood. *Id.* at 152, 255 S.E.2d at 281. Plainly concerned that the decision might be read to support future relief in any of the numerous suits filed every year throughout the state involving state or local officials and employees, the Court explained by way of limitation that "State and County employees now have, or should have, detailed instructions and procedures to follow when served with suit papers; this was not the situation in the case before us which was instituted in early 1985." *Id.* As to private employers like Penske, however, no such caveat was made, and no such limitation should be read. Instead, the decisional reasoning applied in *Roberts* continues to apply to Penske employees like Mr. Wilson and Mr. Carney, who are not "State and County employees" with "detailed instructions and procedures to follow when served with suit papers." *Id.* Thus, to the extent the holding of *Roberts* is in any way limited by the final two paragraphs of that opinion,

such limitation applies only to the employees of state and local governments specifically addressed by the Court.

II. Appellant's Argument That He is Entitled to Relief From Judgment Under *Roberts v. Peterson* is Preserved For Review.

Perhaps recognizing the impossibility of substantively distinguishing the facts of *Roberts* from those of this case, Respondent argues that Appellant has waived his argument on appeal because he failed to request a ruling from the Special Referee on his entitlement to relief based on a "mistake of fact" instead of "excusable neglect." (Respondent's Initial Brief, pp. 12 – 14). The record demonstrates that this argument is without merit.

As an initial matter, Appellant made it clear to the Special Referee from the outset of the hearing below that Appellant's motion under Rule 60(b)(1), SCRCP, was based on both "mistake" and "excusable neglect." (R. __ (Transcript at 4:8 – 4:19)). Moreover, Appellant raised the exact same argument to the Special Referee that he raises on appeal, and that this Court addressed in *Roberts*, during that hearing:

> MR. ANDERSON: Mr. Carr, very briefly in response if I may I agree with Mr. Harvin, there's a lot of South Carolina law on the fact that look, neglect, negligence or incompetence that's attributable to an attorney or an insurance company is not grounds for relief under Rule 60.
>
> We agree on that. Neither one of those happened here. What we have here is a defendant who relies on his employer, not his attorney, not his insurance company, his employer whose vehicle he was driving at the time of the accident.
>
> He relies on his employer's reasonable assurances that this matter will be taken care of. That's a very different relationship than a defendant has with the defendant's attorney or the defendant's insurance company.

> Specifically against an attorney or as to an insurance company that defendant has recourse for the mistakes that those two parties may have made. The relationship between a defendant and his employer, that's entirely different.

(*Id.* at 12:25 – 13:21).

Whether Appellant's argument is denominated as Appellant's mistake of fact, or as excusable neglect by Penske, has no bearing on the substance of that argument or Appellant's demonstrated entitlement to relief under Rule 60(b)(1). The record reflects that, at the close of the hearing, the Special Referee asked both parties to submit proposed orders. (*Id.* at 19:10 – 20:12). The record also reflects that Appellant submitted a proposed order granting his motion for relief that discussed *Roberts v. Peterson*, along with a copy of that decision, on January 21, 2025. (R. __ (Email From Appellant's Counsel and Appellant's Proposed Order)). After considering both proposed orders, the materials submitted, and the arguments advanced at hearing for nearly three months, the Special Referee entered a ruling on Appellant's motion on April 14, 2025. (R. __ (Order)).

The proposed orders submitted by the parties constitute material submitted to and considered by the court below, and further evidence Appellant's preservation of this issue for appeal. *See, e.g.*, *Bowman v. Richland Mem'l Hosp.*, 335 S.C. 88, 92, 515 S.E.2d 259, 261 (Ct. App. 1999) ("In this case, both parties submitted proposed orders and they were unaware of which order the judge signed until after the order was filed with the clerk of court."). Because the Special Referee implicitly ruled on Appellant's argument addressed to the reasoning of *Roberts* by denying Appellant's motion for relief under Rule 60(b)(1), SCRCP, no further motion to the Special Referee was required to preserve that argument for appellate review. *See, e.g.*, *Bailey v. Segars*, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001) ("Post-trial motions are not necessary to preserve

issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not ruled upon.").

The Special Referee's failure to apply *Roberts* to the facts of this case was therefore legal error preserved for review by this Court, and as such an abuse of discretion that warrants relief. *See Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 916 (Ct. App. 2009) ("An abuse of discretion arises whether the judgment is controlled by an error of law or is based on factual conclusions that are without evidentiary support.").

CONCLUSION

For the reasons stated herein and in Appellant's Initial Brief, this Court should reverse the Special Referee's order denying Appellant's motion for relief from judgment, and remand this matter to the Beaufort County Court of Common Pleas.

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