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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Daniel Coble, Circuit Court Judge

Lower Court Case No. 2022-CP-40-05305

George Gallo, Appellant,

v.

Autumnwood Crossing LP and Intermark Management Corporation,
Respondents.

Appellate Case No. 2025-000757

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENTS IN REPLY 1

The circuit court erred in granting summary judgment because Mr. Gallo was entitled to an adverse inference instruction due to the Defendants' spoliation of evidence and the adverse inference created a genuine issue of material fact as to whether the Defendants had knowledge of the dangerous carpet ripple. 1

A. The arguments made on appeal by Mr. Gallo are the same as the arguments raised below and are therefore preserved for appellate review. 1

B. The entire circuit court record was "before" the court at the summary judgment stage, including the prior motions to compel with their corresponding exhibits and the prior circuit court order requiring the Defendants to disclose inspection reports. 3

C. The Defendants do not dispute that Mr. Gallo was entitled to an adverse inference instruction as a result of their failure to respond to discovery requests. 5

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Atl. Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 323, 730 S.E.2d 282 (2012) 2

Ben. Fin. I, Inc. v. Windham,
431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020) 3

Clea v. Odom,
394 S.C. 175, 714 S.E.2d 542 (2011) 1

Gilmore v. Ivey
290 S.C. 53, 348 S.E.2d 180 (Ct. App. 1986) 3, 4, 5

Higgins v. Med. Univ.,
326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) 3

Johnson v. Roberts,
422 S.C. 406, 812 S.E.2d 207 (Ct. App. 2018) 2

Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.,
302 S.C. 390, 396 S.E.2d 369 (1990) 5

S.C. DOT v. First Carolina Corp.,
372 S.C. 295, 641 S.E.2d 903 (2007) 2

State v. Russell,
345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) 3

Welsh v. Gibbons,
211 S.C. 516, 46 S.E.2d 147 (1948) 5

Rules

Rule 11, SCRCP 4

Rule 56, SCRCP.....3

Rule 59, SCRCP 2, 5

Other Authorities

Jean Hoefer Toal et al., *Appellate Practice in South Carolina* (3d ed. 2016).....2

ARGUMENTS IN REPLY

The circuit court erred in granting summary judgment because Mr. Gallo was entitled to an adverse inference instruction due to the Defendants' spoliation of evidence and the adverse inference created a genuine issue of material fact as to whether the Defendants had knowledge of the dangerous carpet ripple.

A. The arguments made on appeal by Mr. Gallo are the same as the arguments raised below and are therefore preserved for appellate review.

The Defendants maintain that "certain arguments" presented on appeal by Mr. Gallo are not preserved for appeal. (BOR p. 6). Mr. Gallo raised two primary arguments on appeal in his opening brief: (1) a tenant is not required to give written notice of a dangerous condition where there is evidence that could support a finding that the landlord had actual knowledge of the condition, and (2) the Defendants' refusal to disclose the written records of its inspections of the premises after being ordered to do so supported a spoliation instruction which in turn supported an inference that the Defendants had actual knowledge of the dangerous condition.

At the hearing on the motion for summary judgment, Counsel for Mr. Gallo pointed out at they had previously filed motions to compel and the circuit court signed a consent order which required the Defendants to turn over the records of their inspections of the premises. Counsel also pointed out that the Defendants failed to turn those records over. (R. P. 147, ll. 9 – 22). Counsel argued that this failure warranted a spoliation instruction which would support a finding that the Defendants had actual knowledge of the dangerous condition. Counsel cited to *Clea v. Odom*, 394 S.C. 175, 714 S.E.2d 542 (2011) to support his argument that actual knowledge of the dangerous condition is sufficient to impose liability on a landlord for injuries sustained as a result of that dangerous condition. (R. p. 148, l. 14 – p. 151, l. 25).

Rules regarding issue preservation are well established by our Supreme Court. As this Court is aware, "[i]n order to preserve an issue for appellate review, the issue must have been (1) raised to and ruled upon by the lower court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the lower court with sufficient specificity." Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 185 (3d ed. 2016). Former Chief Justice Toal has cautioned that "an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332, 730 S.E.2d 282, 287 (2012) (Toal, C.J., concurring in result and dissenting in part).

It is not the place of our appellate courts "to scour the records before [it] for the purpose of avoiding issues or, even worse, to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients." *Id*. This Court should keep in mind that "behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests." *Id*. "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. at 333, 730 S.E.2d at 287).

Here, the arguments made by Mr. Gallo on appeal are in essence the same arguments that were made at the summary judgment stage. Mr. Gallo did not raise any argument on appeal that was raised for the first time in this Rule 59(e) motion. Accordingly, his arguments are preserved for appellate review. *See S.C. DOT v. First Carolina Corp.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (finding argument preserved even though appellant did not phrase its objection to the lower court in the exact terms used on appeal because the argument was made with sufficient

specificity to the lower court); *see also State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding argument preserved even though appellant did not use exact name of legal doctrine below because it was clear from the record that appellant had made his motion on the same grounds presented on appeal).

B. The entire circuit court record was "before" the court at the summary judgment stage, including the prior motions to compel with their corresponding exhibits and the prior circuit court order requiring the Defendants to disclose inspection reports.

The Defendants erroneously assert that "[t]he only facts before the circuit court [were] contained in the deposition excerpts and exhibits filed with [the Defendant's] Motion for Summary Judgment." (BOR p. 3). In reality, everything that had been filed with the circuit court prior to the hearing on the motion for summary judgment was properly "before" the court and proper to consider in evaluating whether a genuine issue of material fact existed.

Rule 56(c) of the South Carolina Rules of Civil Procedure specifically provides for the consideration, not just of affidavits or exhibits attached to the motion for summary judgment itself, but also the "pleadings, depositions, answers to interrogatories, and admissions on file." "When ruling on a motion for summary judgment, the trial judge must consider all of the documents and evidence *within the record*, including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits." *Higgins v. Med. Univ.*, 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997). "On a motion for summary judgment, the moving party carries the burden of proof even when the nonmoving party does not submit any evidence in opposition." *Ben. Fin. I, Inc. v. Windham*, 431 S.C. 256, 267, 847 S.E.2d 793, 799 (Ct. App. 2020).

In *Gilmore v. Ivey*, this Court considered an appeal where the circuit court granted summary judgment based only on the evidentiary support presented in support of the motion. 290 S.C. 53, 57, 348 S.E.2d 180, 183 (Ct. App. 1986). This Court noted that "[a] party who fails to show the

absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials." *Id*. at 58, 348 S.E.2d at 183 (internal quotations omitted). This Court further explained that in determining whether a genuine issue of material fact exists, the circuit court "must consider *everything* in the record—pleadings, depositions, interrogatories, admissions on file, affidavits, etc." *Id*.

Since the circuit court *must consider everything in the record*, it must consider the prior motions, exhibits, and orders that are on file with the court. In this case, "everything in the record" included two motions to compel filed by Mr. Gallo along with attached exhibits. The attached exhibits showed interrogatories, requests for production, the Defendants' inadequate and incomplete responses, two Rule 11 letters, and correspondence between counsel regarding a consent order. (R. pp. 30 – 58). Also included in the record below was a circuit court order finding that the Defendants "agree that Defendant Autumnwood testified in depositions as to the existence of the materials which have been sought by [Mr. Gallo]" and ordering the Defendants to disclose those materials. The order further finds that those materials include the inspection records of the premises for the previous five years. (R. pp. 16 – 19).

Accordingly, there was ample evidence before the circuit court showing that the Defendants had been ordered to disclose records and failed to do so. As Counsel for Mr. Gallo argued below, this failure supported a spoliation instruction which was sufficient to create a genuine issue of material fact as to whether the Defendants had actual knowledge of the dangerous condition.

C. The Defendants do not dispute that Mr. Gallo was entitled to an adverse inference instruction as a result of their failure to respond to discovery requests.

Tellingly, but perhaps unsurprisingly, the Defendants do not dispute the fact that they failed to comply with the circuit court's discovery order. Nor do the Defendants dispute that Mr. Gallo would be entitled to an adverse inference instruction based on their failure to produce documents they admitted to possessing. Instead, the Defendants focus their argument on issue preservation by maintaining that no evidence was before the circuit court to justify a spoliation instruction.

As indicated above, even if this Court were to agree with the Defendants that the exhibits attached to the Rule 59(e) motion cannot be considered on appeal, it is without question that the prior motions to compel and the prior circuit court orders can be. In fact, those prior motions and orders *must* be considered in evaluating whether a genuine issue of material fact exists. *See Gilmore*, 290 S.C. at 58, 348 S.E.2d at 183. This is especially true where Counsel for Mr. Gallo specifically referenced those motions and the prior order in arguing that a spoliation instruction was warranted and that the spoliation charge created an inference that the Defendants had actual knowledge of the dangerous condition. (R. p. 147, ll. 9 – 22).

As fully discussed in Mr. Gallo's opening brief, the Defendants repeated failure to disclose evidence which it admitted to possessing and which the circuit court ordered them to disclose warranted a spoliation instruction. *See Kershaw Cty. Bd. of Educ. v. United States Gypsum Co.*, 302 S.C. 390, 393, 396 S.E.2d 369, 372 (1990) (finding that a trial judge correctly instructed the jury that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party"); *see also Welsh v. Gibbons*, 211 S.C. 516, 523, 46 S.E.2d 147, 150 (1948) ("[T]he unexplained failure of a party to produce evidence. . . justifies an inference that such evidence, if presented, would be unfavorable to him"). Accordingly, the circuit court erred in granting summary judgment.

CONCLUSION

By reason of the arguments made in Mr. Gallo's opening brief, and this reply brief, this Court should reverse the circuit court's order granting summary judgment in favor of the Defendants and remand for a jury trial.

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