

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, II, Circuit Court Judge

Appellate Case No. 2013-000514
Lower Court Case No. 2008-CP-42-3397

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MAR 20 2015

S.C. Supreme Court

Quentin S. Broom, Jr.,Petitioner,

v.

Ten State Street, LLP, Timothy D, Scranton,
Mark Broadwater, and H. Hugh Andrews Defendants,

Of Whom

H. Hugh Andrews, Individually
and on behalf of Tri-Star
Communications, Inc. is the, Respondent,

v.

Quentin S. Broom, Jr., Third-party Defendant.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and ruled upon by the court of appeals on February 19, 2015.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the court of appeals erred in remanding this case to the circuit court when the issue being remanded was unpreserved for appellate review.
- II. Whether the Supreme Court should grant a writ of certiorari because clarifying the application and scope of issue preservation is a question of significant importance to South Carolina courts and practitioners.

STATEMENT OF THE CASE

The writ of certiorari seeks a review of the court of appeals' decision to remand this matter. The court of appeals' decision allows the circuit court to address an unpreserved motion. (App. p. 1). By doing so, the court of appeals ignores this Court's firmly established rules of issue preservation and allows the circuit court to rule on an issue it previously heard, but did not rule on, prior to the notice of appeal being filed.

The procedural history of this case is lengthy and convoluted. For the purpose of this petition, H. Hugh Andrews was a named defendant in the underlying action brought by Petitioner. (App. p. 30). Andrews counterclaimed on behalf of himself and Tri-Star Communications, LLC, in which he was a member with Petitioner. (App. p. 76). Petitioner filed a motion to dismiss the counterclaims by Andrews and the purported third party claims by Tri-Star for failure to properly plead a derivative action. (App. p. 130, 133-155). The circuit court granted the motion to dismiss. (App. p. 4-5).

Following the circuit court's dismissal, Andrews, individually and on behalf of Tri-Star, filed two motions: (1) a motion for reconsideration and (2) a motion to amend Andrews' answer and counterclaims. (App. p. 164-192, App. p. 193-234). The circuit court heard arguments on both motions in the same hearing, with each motion being argued by separate trial counsel. (App. p. 236-299, App. p. 300-317). On February 1, 2013, the circuit court entered a written order denying only the motion to reconsider. (App. p. 38). The February 1, 2013 order did not address the November 14, 2011 motion to amend. (App. p. 38-39). Andrews' counsel timely filed a notice of appeal that was limited to the circuit court's order on the motion for reconsideration.

On appeal, Andrews argued the circuit court erred in failing to allow him to amend his pleadings. Specifically, Andrews explained:

On January 14, 2013, the circuit court issued a form order denying the motions to reconsider. [App. p. 36]. On February 1, 2013, the court issued a written order confirming this ruling. [App. p. 38]. Neither order expressly mentioned Andrews' motion to amend his answer, but the effect of the orders was to deny the motion.

(App. p. 323). In response, Petitioner argued the issue was unpreserved because the circuit court failed to make a ruling prior to Andrews' filing of the notice of appeal. (App. p. 374).

In his Reply Brief, Andrews states:

[Petitioner] is right about the court's order. It never mentions the motion to amend. See [App. p. 38]. But the obvious import of the order is to deny the motion. [Petitioner] had argued that the court could grant the amendment only if the court changed the order dismissing the case. The only rational view of the court's decision is that it agreed. In deciding not to alter the order that dismissed Andrews claims, the circuit court necessarily rejected Andrews request that he be allowed to amend his claims. Nothing else is possible.

There is no cogent justification for denying the motion to amend.

(App. p. 388).

After briefing and oral argument, the court of appeals entered an unpublished opinion on January 14, 2015, remanding the case to the circuit court for a ruling on the motion to amend. (App. p. 1). Petitioner filed a Petition for Rehearing, which was denied on February 19, 2015. (App. p. 4-12).

ARGUMENTS

I. THE COURT OF APPEALS ERRED IN REMANDING THIS CASE TO THE CIRCUIT COURT WHEN THE ISSUE BEING REMANDED WAS UNPRESERVED FOR APPELLATE REVIEW.

By remanding this case to the circuit court, the court of appeals ignored the general rules of issue preservation. Andrews took the position throughout his brief and oral argument that the issue of amending his pleadings was impliedly preserved. When the court of appeals determined

that the issue was never ruled upon, the general rules of issue preservation should have controlled. Those rules instruct the court of appeals to (1) rule on the remaining issues and (2) to find the issue on amending the pleadings unpreserved for review.

“It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court.” *Chastain v. Hiltabidle*, 381 S.C. 508, 514-15, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-511, 598 S.E.2d 712, 715 (2004)). This case does not qualify for any of the exceptions to issue preservation recognized by South Carolina appellate courts: (1) subject matter jurisdiction, (2) rights of minors, (3) additional sustaining grounds, (4) judicial economy, nor (5) waiver of counsel. See *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Ex parte Morris*, 367 S.C. 56, 624 S.E.2d 649 (2006); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000); *Jeter v. S.C. Dept. of Transp.*, 369 S.C. 433, 633 S.E.2d 143 (2006); *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993). As such, this issue could only have been preserved if Andrews had raised this unanswered issue in a separate 59(e) motion specific to the Rule 15 motion. See *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting that proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court); *Walsh v. Woods*, 371 S.C. 319, 325, 638 S.E.2d 85, 88 (Ct. App. 2006) (finding issue on appeal was not preserved because the trial court did not rule on the issue and it was not raised in a Rule 59(e) motion). Andrews' failure to obtain a ruling should control. *Power v. Allstate Ins. Co.*, 312 S.C. 381, 383, 440 S.E.2d 406, 407 (Ct. App. 1994) (holding an issue was not preserved because the trial court did not address it in its order and the party did not request the trial court to rule upon it in any motion).

Andrews' reliance on an implied preservation was misplaced. The motion required a ruling. No futility existed in seeking a ruling of the Rule 15 motion. A plain reading of the order demonstrates that the circuit court never attempted to encompass a decision of the Rule 15 motion in that order. (App. p. 38). Andrews should have made a 59(e) motion to obtain a ruling, but did not. Remanding this case for a ruling was an error. (App. p. 1).

II. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE CLARIFICATION AND APPLICATION OF ISSUE PRESERVATION IS A QUESTION OF SIGNIFICANT IMPORTANCE.

Pursuant to Rule 242, SCACR, this Court has the discretion to grant a writ of certiorari for "special and important reasons." In this case, a determination of the applicability and scope of issue preservation is of significant importance. This issue is imperative not only to Petitioner, but to all South Carolina courts and practitioners. Addressing this issue will add indispensable clarity to the preservation rules that define the scope of appellate practice in this state.

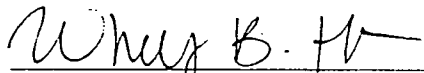
This Court went to great lengths in *I'On* to address both the procedural and practical implications of issue preservation. *I'On*, 338 S.C. 406, 526 S.E.2d 716. Since that time, *I'On* has frequently been cited for the general proposition that an issue raised but not ruled upon is unpreserved for appellate review. *Id.* The court of appeals' reasoning in this case signals a departure from the *I'On* rule, and therefore necessitates review by this Court. (App. p. 1). This case is representative of the ongoing misapplication of preservation rules by South Carolina courts. A certification here, grounded only in preservation, provides the opportunity for this Court to once again clarify preservation rules in South Carolina without being entangled with other issues.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this Court to grant this writ of certiorari and review the court of appeals' decision to remand this matter to the circuit court.

Respectfully submitted,

March 20, 2015


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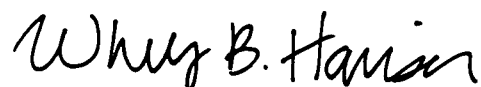
PROOF OF SERVICE

I, Whitney B. Harrison, an attorney with McGowan, Hood & Felder, LLC do hereby certify that on March 20, 2015, I served a copy of the Petition for a Writ of Certiorari and Appendix by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

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