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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Court of Common Pleas
Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001302

The Callawassie Island Members Club, Inc., Respondents

v.

Arthur H. Applegate, Petitioner

REPLY

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Response to Respondent's Statement of the Case

In its Return the Respondent includes an explanation of the denial of its summary judgment motion that does not properly explain the record in the case and needs to be addressed because of the misleading impression it may give the Court. Specifically, the Respondent alleges at page 1 of its Return that it “sought dismissal of the action by motion for summary judgment” which, they claim was denied due “in part to its proximity in time to the scheduled trial.” This is a misleading characterization which attempts to distort the fact that the Respondent [Plaintiff] in fact made two summary judgment motions in the underlying case, both of which were denied. The first such motion was denied in June 2011 (App. p 11-12) and the second was denied on May 9, 2013. The May 9, 2013 denial was subsequently affirmed after Respondent’s reconsideration motion. In fact, as to the motion (and denial) mentioned by the Respondent in its Return, the Respondent made a motion to have that denial reconsidered based upon the fact that it had not a “full and fair opportunity to be heard on its motion for summary judgment.”. Because the case had by that time been removed from the jury roster by the trial judge (which is now appealed by the Petitioner), whatever time pressures existed for the May 9, 2013 Order were in fact removed and can not rightly be held to be a factor in the Court’s subsequent hearing of the Motion to Reconsider, where the Respondent cannot deny it was granted a full hearing (App 180-184) on its motion. The Court heard the full motion and denied (App. 9-10) that second summary judgment motion, not based upon its proximity in time to the then cancelled trial date, as set forth by the Respondent, but in fact because most of the grounds they were claiming (that there

existed no issue of material fact) (App. p. 73-84) had already been argued (App. p. 193) in the first summary judgment motion and the Court had already ruled upon those issues (App.11-12). This is mentioned because it is significant for the Court to understand that the record reflects that upon a full hearing for summary judgment, the Court has repeatedly denied summary judgment, stating that there are material issues of fact existing in the case. Those rulings run directly contrary to the ruling herein appealed, which was decided without a hearing, and without reference to any evidence upon which such ruling might be based.

A. Response to Arguments of the Respondent
(Court of Appeals Order reference to SCRCP 39(a)(2))

The Respondent contends that the Court of Appeals, by citing Rule 39(a)(2) SCRCP in its Order is evidencing agreement with the trial court's "legal" reasoning. (Return p. 3) In reality this citation by the Court of Appeals, which is sandwiched between two citations indicating that Court could not review the appeal because the issue was not preserved in an on the record motion, is merely referencing that the SC Rules give the trial court authority to make a finding that a right of trial by jury of some or all of those issues does not exist. (SCRCP 39(a)(2)). The Petitioner does not dispute that this authority exists just as SCRCP 39(b) authorizes the court to order that a trial by jury be conducted. However, in both such cases the trial court is not authorized to violate the constitutionally and legislatively recognized rights of a party to have a jury trial in an action at law. The Petitioner has indisputably raised numerous defenses, including

denying that a breach of contract has occurred, asserting that the contract does not allow the pursuit of the damages sought in this case, the construction and interpretation of the contract language is at issue, and other defenses as asserted repeatedly in case filings including in its Amended Answer (App. 35-48) and in the Appeal filed (App 436 – 452). The Court of Appeals has refused to examine the case and make a determination as to whether the action was in fact an action at law or review the trial Court’s ruling with regard to what factual issues are in dispute, despite the fact that the law clearly establishes that whether a party is entitled to a jury trial is a question of law and an Appellate court may decide questions of law with no particular deference to the trial court. In re Campbell, 379 S.C. 593, 599, 666 S.E.2d 908, 911 (2008). Instead of examining the question of law presented in the appeal, the Court of Appeals denied the appeal on procedural issues.

B. Response to Arguments of the Respondent
(Respondent’s arguments as to preservation – Case Law)

The Respondent cites Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129-130, 64 S.E.2d 253, 258 (1951), Duncan v. Hampton County Sch. Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) (cert. denied) and Wierszewski v. Tokarick, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct.App. 1992) for the proposition that the issues appealed by the Petitioner were not preserved. The reliance of the Respondent on this line of cases is misplaced. In the Mize case the defendant was the moving party and had **not raised the issue** of specific gross contributory negligence “by the answers, not

incorporated in the motion for directed verdict, and not specifically alluded to in the exceptions on appeal.” Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 129, 64 S.E.2d 253, 258 (1951). The Defendant in the Mize case was relying for its argument for preservation upon an issue on which the Judge made a remark “in passing” on the motion. Id at 130. The Court concluded that such a passing remark did not have the effect of “enlarging the grounds upon which said motion was made.” Id . The Court’s entire reason rests upon the statement that the trial court’s **remarks** enlarged the grounds of the motion. That case is quite different than the current case where the motion of the Respondent that was granted was directly made to the Court. The Court did not sua sponte raise the issues now appealed, they were alleged by the Respondent in its written motion, and opposed by the Petitioner in a written Memo in Opposition as well as in previous filings and memorandum in opposition to summary judgment (App. pp.154-179, 244-245, & 253-272)) and in its Amended Answer. (App. pp.35-48). In fact, the petitioner not only filed a Memo in Opposition to the subject Motion (App. pp. 58-60) he also filed a Motion to Reconsider the Order (App. pp. 61-66). I emphasize that unlike the cases cited by the Respondent, an important distinction in this case is that the motion in this case was made by the Respondent and, though opposed by the Petitioner, it was granted. The issues contested and raised on appeal in this case are found in the content of that motion, are seen in the Court’s Order and were not raised in dicta by the trial judge.

The Duncan v. Hampton County Sch. Dist. No. 2 case cited by the respondent contains even less relation to the current case as it simply indicates that the moving party must state its grounds for a directed verdict motion in order to preserve the issue for

appeal. 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) (cert. denied) Again, the issues on appeal were certainly raised by the Respondent in its motion. The Petitioner opposed and objected to the granting of the motion raising numerous arguments in opposition and stating “**the Plaintiff’s [respondent] motion must be denied.**” (App. 59). The Petitioner references in its Memo in Opposition that the argument made by the Respondent (that the contracts are not ambiguous) can not be supported and have twice been rejected by the Court in previous summary judgment motions (App. p 59). The Petitioner also filed a motion to reconsider the appealed Order. The record clearly reflects that the Petitioner has made a record of its objection to the Order in question.

Finally, in the Wierszewski v. Tokarick case the Court of Appeals noted that the trial court’s mere mention at the hearing that attorney’s fees might be authorized under a certain statute was not sufficient to preserve an issue where “it was **not raised in the petition or addressed in the order.**” (Emphasis added) 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct.App. 1992). The Wierszewski v. Tokarick case is quite the opposite of the current matter before the court in which the appealed issues were in fact raised in the petition and were in fact addressed in the Order currently appealed.

None of the cases cited and relied upon by the Respondent are appropriate to rely upon in this case for the contentions set forth by the Respondent. The cited cases involve statement made during trial by the judge, not reflected in the Order, not raised by the parties.

The Respondent cites York v. Conway Ford, Inc., 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) and State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct.App.

2005) for the propositions that the an off-the-record objection does not preserve an argument (Return p. 5) and that an objection and the grounds must be included in the record for appellate review. However, an examination of those cases can not support the argument for which they are put forth in this case by the Respondent. Specifically, in the State v. Carlson case the defendant sought to appeal a procedure used by the Court to review an out of court identification of the defendant. However, the defendant had consented (and had not objected) to the procedure used by the Court in that case. 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct.App. 2005). That is in sharp contrast to the current case in which the Petitioner opposed the written motion. It is simply implausible to suggest that the Petitioner has not opposed the Motion to have the case heard non-jury, upon which the appealed Order arises.

Likewise, the York v. Conway, case was based upon an appeal of an off-the-record motion for continuance. 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997). The current case does not involve off-the-record motions, and the Petitioner has made a filed and documented objection to the motion that was granted, including by filing a subsequent Motion to Alter or Amend. The cases cited by Respondent have in view situations of failing to raise and issue which are significantly different than the current case.

C. Response to Arguments of the Respondent
(Respondent's arguments as to preservation –Exceeding the Scope of the Motion)

The Respondent contends that the issue of whether the trial court's order denying the Motion to Alter or Amend exceeded the scope of the motion was not preserved (Return p. 5-6). The Respondent makes the statement that the "Petitioner made no objection to the materials relied upon by the trial court prior to the appeal." (Return p. 6) However, one of the legal defects in the appealed Order is that it does not make the required factual findings and in fact nowhere does it state what materials were relied upon or even reviewed.

Interestingly, the Respondent agrees that a "Rule 59 Motion would have been pointless." And would have likely forfeited the right to appeal (Return pp. 6 & 7) because the order denying the motion to Alter or Amend did not alter the order it merely set forth the court's reasoning. Reasoning which we contend is both legally and factually defective and erroneous on its face. The Court need only apply the law to this case to determine that the granting of the Plaintiff's motion was in error.

The record clearly reflects that the Petitioner opposed the Motion to have the matter heard non-jury. Although the Form Order (App. pp. 3-4) granting the motion is believed to be a clear error of law, the Petitioner filed a Motion seeking to have the matter reconsidered and the motion denied or in the alternative for the Court to put forth its reasoning so that an appeal could be had. The Petitioner could do no more than what it did in this case. Upon receiving the Court's reasoning in the Order of June 17, 2013 (App. pp. 5-6) whereby it affirmed its order granting the motion, which the record clearly

shows the Petitioner had opposed, the Petitioner did not need to file another Motion to Reconsider the Court's reasoning. Upon seeing that the Court had decided the issue, not based upon the state constitution, state law and cases cited by the Petitioner, but instead by adopting wholesale the Respondent's arguments that unspecified "documents at issue" are "unambiguous" the positions of the parties had been established and review by the appellate court was appropriate.

D. Response to Arguments of the Respondent
(Respondent's arguments as to no record existing)

The Respondent also contends that the fact that there is no record to support, or justify, the order being appealed somehow prevents the current appeal. The Respondent cites Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673 (1993); In re Timmerman, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct.App. 19978) for the proposition that "where a party receives an order **granting certain relief** not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), to alter or amend the judgment in order to preserve the issue for appeal" (Emphasis added). However, in this case the **relief granted** was the granting of the Respondent's Motion to have the case heard non-jury, the denial of the Petitioner's right to a jury trial. There can be no doubt this relief was both contemplated and presented in the motion, and opposed by the Petitioner in a written and filed Memo in Opposition to said Motion, in the demand for a jury trial, and in the Motion to Reconsider. The Court did not parse out separate items of relief that are being appealed

instead the appeal is upon the very granting of the motion. The Petitioner need not file another motion to reconsider this reasoning, as was previously admitted by the Respondent, to do so (Return p. 6) “would have been pointless”.

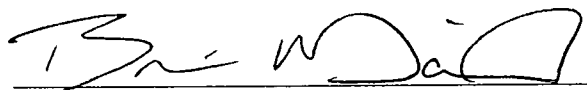
CONCLUSION

The Court of Appeals ruling that the Petitioner failed to preserve the issues appealed and/or failed to present a sufficient record for appellate review is erroneous. The harm to the Petitioner in this matter is substantial and involves the fundamental and constitutionally recognized right to a jury trial. The decision of the Court of Appeals conflicts with prior decisions and is not supported by the record in the case.

For the foregoing reasons, Arthur Applegate respectfully requests that this Court GRANT his petition for writ of certiorari.

Respectfully Submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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The Callawassie Island
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Petitioner.

PROOF OF SERVICE

REPLY

I certify that I have served the Petitioner's Reply upon the Respondent, The Callawassie Island Members Club, Inc. by depositing a copy of the document in the United States Mail; postage prepaid, on July 27, 2015, addressed to its attorneys of record, Stacey S. Collins, Esq, Ehrick K. Haight, Jr., Esquire, Minor, Haight & Arundell, P.C., P.O. Drawer 6067, Hilton Head Island, SC 29938; and to: Howell, Gibson & Hughes, P.A., Stephen P. Hughes, Esq., J Andrew Yoho, Esq., P. O. Drawer 40, Beaufort, SC 29901-0040.

I further affirm that on this same date, the original and six copies of the Reply along with Proof of Service were deposited in the United State mail, addressed to the Supreme Court of South Carolina.

A handwritten signature in black ink, appearing to read "Brian McDaniel", written over a horizontal line.

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