THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Jun 22 2020
S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alex Kinlaw, Jr., Circuit Court Judge

Common Pleas Case No. 2018-CP-23-00513

(Court of Appeals No. 2019-002040 – Ordered Dismissed on March 19, 2020)

Supreme Court Appellate Case No. 2020-000829

DAVID ROSEN,

Petitioner,

v.

JOSEPHINE MIDDLETON,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Howard W. Anderson III
SC Bar No. 100329
LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
howard@hwalawfirm.com
864-643-5790 (p)
Lead Counsel for Respondent

Kimberly Thomason
SC Bar No. 79179
Devon Puriefoy
S.C. Bar No. 102097
TRULUCK THOMASON, LLC
3 Boyce Ave.
Greenville, SC 29601
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Comes now Respondent and would respectfully reply to the Petition for Writ of Certiorari as follows.

COUNTER QUESTION PRESENTED

1. Where Petitioner has not even asked this Court to review the Court of Appeals' dismissal of the appeal for lack of subject-matter jurisdiction, can and/or should this Court second-guess the trial court's factfinding and discretion in setting aside a judgment under Rule 60, SCRCP?

COUNTERSTATEMENT OF THE CASE[1]

Appellant David Rosen filed a notice of appeal from the Court of Common Pleas, in a civil action he filed against Respondent Josephine Middleton. [App. 7.]. The order under appeal is "the Order of the Honorable Alex Kinlaw, dated December 4, 2019." [App. 7]. In that order, Judge Kinlaw granted Respondent Josephine Middleton's motion for relief under Rule 60, SCRCP, [App. 9-13], from a previous grant of summary judgment that had been entered without her participation or by any counsel for her, [App. 4-6].

On March 19, 2020, before Petitioner's Opening Brief was due, the Court of

[1] Because the Court of Appeals dismissed the appeal before merits briefing, no Record on Appeal was filed. In the Court of Appeals, Ms. Middleton objected under Rule 240(c)(3), SCACR, to Petitioner's attempts to make factual assertions in his opposition for which Petitioner had not supported with relevant documents. References to "App." are to the paginated appendix that Ms. Middleton included with her motion to dismiss in the Court of Appeals.

Appeals, by unpublished order, granted Ms. Middleton's motion to dismiss the appeal for lack of jurisdiction because "the underlying order granting relief under Rule 60(b), SCRCP, is not immediately appealable pursuant to section 14-3-330 of the South Carolina Code (2017)." *Rosen v. Middleton*, No. 2019-002040 (Ct. App. Order of March 19, 2020) (citations omitted). Because Petitioner never filed his Opening Brief in the Court of Appeals, the merits of the trial court's order was not designated as a Question Presented. Petitioner's short Petition for Rehearing in the Court of Appeals did not explicitly specify a Question Presented but did ask the Court of Appeals to reach the merits of the appeal.

The Court of Appeals denied rehearing by unpublished order. The instant Petition for Writ of Certiorari timely followed.

ARGUMENT

"A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR. This Court should deny this Petition because no such reasons exist here. Even if the Court were inclined to want to resolve the Question Presented, the Question Presented is not properly before the Court, making this case an unsound vehicle. Finally, this Court would ultimately sustain the trial court's judgment if it ever

reached the merits.

I. None of the Factors Identified in Rule 242(b), SCACR, Are Present.

"In 1979, the General Assembly created the South Carolina Court of Appeals for the purpose of reducing South Carolina's appellate backlog. The Court of Appeals reviews criminal as well as civil appeals and this Court reviews its decisions by writ of certiorari only where special reasons justify the exercise of that power." *In re* Exhaustion of State Remedies in Criminal & Postconviction Relief Cases, 321 S.C. 563, 564 (1990). In promulgating Rule 242(b), SCACR, this Court itemized examples that may justify certiorari. Petitioner does not cite, much less establish, any of those itemized reasons.[2]

II. Petitioner's Question Presented Is Not Properly Before the Court.

Although the Court of Appeals dismissed the appeal for lack of jurisdiction—thus never reaching the merits—the Question Presented here goes only to merits. The un-appealed jurisdictional ruling is the law of the appeal and not subject to review now. *See Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161 (1970) (holding

[2] In a passing footnote, Petitioner suggests that the Court of Appeals somehow deprived him of his federal constitutional rights. [Pet. At 6]. That claim was not developed in the Court of Appeals. Even if it had been, Petitioner has offered no cogent argument for it here, making the claim waived. *Cf.* R. 242(d)(4), SCACR (requiring legal claims to "include citation of authority").

that an un-appealed ruling "right or wrong, is the law of this case"). *See also State v. Dunbar*, 356 S.C. 138, 142 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal." (citation omitted)).[3]

Further, because this Court is a court of final review, not of review in the first instance, this Court requires that "[o]nly those questions raised in the Court of Appeals and in the petition for rehearing …be included in the petition for writ of certiorari as a question presented…." Rule 242(d)(2), SCACR. The Question Presented here was not raised in merits briefing—because none was ever filed. Nor was the Question Presented specifically enumerated in the Petition for Rehearing below. Questions not actually raised and ruled upon in the Court of Appeals are not suitable for *certiorari*. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422 (2000) (noting South Carolina's "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments").

For one or both reasons, this Petition has procedural problems that prevent it from being a suitable vehicle to actually resolve the Question Presented.

[3] Petitioner does not discuss, much less refute, the cases that the Court of Appeals cited establishing the lack of subject-matter jurisdiction.

III. The Trial Court's Judgment Would Ultimately Be Affirmed Even if Certiorari Were Granted.

Even if the Court could reach the merits at this time (as opposed to—later—upon an appeal from a final judgment), the trial court's order would be sustained for at least two reasons.

First, the generous standard of review precludes this Court from second guessing the trial judge. Whether to grant relief from a judgment is committed to the discretion of the trial judge. *E.g.*, *Brown v. Weathers*, 251 S.C. 67, 72 (1968). Because there is "no hard and fast rule [that] can be laid down for the exercise of judicial discretion," beyond that the trial judge should bear in mind South Carolina's policy that "cases …be tried and disposed of upon their merits," *id.* (citation omitted), Petitioner faces an uphill battle to defend a judgment obtained without adversarial presentation. Further, Petitioner does not dispute that abandonment by counsel is an appropriate ground for setting aside a judgment. *See* [Pet. at 5-7]. While Petitioner thinks that the trial court was wrong to have found abandonment, "[t]his Court will not reverse the Circuit Court in its finding of fact, where there is any evidence to sustain that finding." *O'Dell v. McElmurray*, 110 S.C. 80, 81 (1918). The fact that counsel did not ever appear in the trial court is at least some evidence to support that finding of

abandonment.[4] Thus, no basis exists to disturb the trial court's exercise of its discretion.

Second, even if abandonment were somehow not a correct basis to set aside the judgment, this Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." R. 220(c), SCACR. As Petitioner himself admits, "neither respondent nor her counsel appeared" at any pre-judgment hearing below, and no answer to the Complaint was ever filed in the Circuit Court before judgment. [Pet. at 4]. As a matter of federal law, in any civil action "in which the defendant does not make an appearance," 50 U.S.C. § 3931(a), "the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit" indicating whether the defendant is in military service, 50 U.S.C. § 3931(b). Petitioner does not, however, claim to have ever provided such an affidavit to the Circuit Court. *See* [Pet. at 3-5]. Thus, the judgment that was set aside never should have issued in the first place, as the procedural requirements of federal law were not followed.

[4] Given the lack of jurisdiction on appeal and the lack of the preparation of a Record on Appeal, Ms. Middleton's treatment of the merits has been intentionally brief here.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Dated this 22nd day of June 2020.

JOSEPHINE MIDDLETON

Howard W. Anderson III
SC Bar No. 100329
Lead Counsel for Respondent

LAW OFFICE OF
HOWARD W. ANDERSON III, LLC
P.O. Box 661
Pendleton, SC 29670
howard@hwalawfirm.com
864-643-5790 (p)