THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAAL FROM DORCHESTER COUNTY
George M. McFaddin, Jr., Circuit Court Judge

Appellate Case No. 2019-002081
Case No. 2018-CP-18-1960

Carl Michael Funny, …… Respondent,

v.

Waffle House, Inc. and Christopher Heithaus, …… Appellants.

RETURN TO APPELLANT'S PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

Appellants/Defendants seek to appeal the trial court's order compelling complete discovery productions and awarding, pursuant to SCRCP 37(a), reimbursement of Respondent/Plaintiff's costs and fees in the amount of $784.74. (May 31, 2019 Order). The basis of the trial court's award of Rule 37 costs and fees is that Appellants missed two discovery deadlines, including extensions they requested, ignored multiple reminder emails, and waited until the afternoon before the hearing on Respondent's motion to compel to send partial discovery responses. (Id.)

Appellants filed a "motion to alter or amend" with the trial court, which was denied, and then filed a second "motion to alter or amend", which was also denied. A summary of the arguments made in these motions is in order so this Court can consider whether Appellants are

raising new arguments in their petition. Appellants made the following arguments in their first motion: (1) defense counsel felt the proposed order submitted by Plaintiff's counsel did not follow the court's emailed instructions in regards to the award of sanctions and manner of e-filing; (2) the court declined to consider the sufficiency of Defendants' responses and ruled that objections were waived because they were not timely made; (3) the court relied on federal case law to rule that objections were waived; (4) Defendants wanted to be heard on the sufficiency of their discovery responses and objections; and (5) the award of money sanctions was not addressed in the court's email instructing a proposed order. (Defendants' June 10, 2019 Motion to Alter or Amend Order). The court issued a brief order denying this motion. (November 21, 2019 Order).

Appellants' second motion made the following arguments: (1) the first order denying the "motion to alter or amend" failed to address Defendants' arguments individually; (2) that Defendants' due process rights were violated because the court did not hear arguments about the sufficiency of Defendants' discovery responses and ruled that objections were waived; and (3) incorporating by reference the five arguments made in the first motion and asking they be addressed by the court. (Defendants' December 2, 2019 Motion to Alter or Amend Order).

The trial court issued a four page ruling addressing Appellants' arguments as follows: (1) defense counsel was copied on Plaintiff's counsel's email submitting the proposed order and "had ample time to review it before it was then later uploaded to efile; (2) defense counsel "took out of context" and was "misleading" in its excerpts from the hearing, but Defendants were instructed to request a hearing on specific discovery issues if still contested[1]; (3) Defendants' repeated missed discovery deadlines and waiting until the day before the hearing on Plaintiff's motion to compel

[1] Defendants have not availed themselves of the opportunity to be heard on any specifically contested discovery issues.

were not justified; (4) Defendants were granted "leave to amend" and be heard on the merits of discovery responses (see footnote 1); and (5) Plaintiff's motion to compel asked for sanctions and SCRCP 37 requires sanctions, as ordered by the court. (March 4, 2020 Order).

Before the trial court ruled on Defendants' second motion to alter or amend (and over a year after service of the initial discovery requests that are at the root of this discovery order appeal), Appellants filed a notice of appeal on December 23, 2019. The Court of Appeals correctly identified this as an interlocutory appeal and dismissed it on January 6, 2020.

Appellants filed a petition for rehearing on January 21, 2020 arguing that the trial court's award of Rule 37(a) money sanctions is or should be subject to immediate appeal like an order of contempt. (Defendants' January 21, 2020 Memorandum in Support of Petition for Rehearing). No argument was made regarding "equal protection," constitutional issues, or any other constitutional implications. Respondent filed a return on May 15, 2020 and Appellants filed a reply on June 11, 2020. On July 1, 2020, the Court of Appeals issued an order denying Appellants' petition for rehearing.

On July 31, 2020, Appellants filed the current petition, seeking what amounts to their fifth attempt to overturn the trial court's interlocutory discovery order dated May 31, 2019 regarding discovery requests that were served in December 2018. To date, Appellants still have not provided full discovery responses to the initial discovery requests and have not paid the Rule 37(a) costs and fees ordered by the trial court.

ANALYSIS

I. Appellants' arguments in support of their petition for writ of certiorari are waived because they were not made before the trial court or Court of Appeals.

"It is axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76 (1997) (citing *Creech v. South Carolina Wildlife and Marine Resources*

Dep't, 328 S.C. 24 (1997)). This principle applies to raising "novel" issues of law on appeal. *See*, *Novak v. Joye, Locklair & Powers, P.C.*, Opinion No. 2010-UP-225 (Ct. App. 2010). Similarly, where a party does not address an issue in a brief to the Court of Appeals, the issue is deemed abandoned. *Wright v. Craft*, 372 S.C. 1, 20 (Ct. App. 2006); *Hurst v. Sumter County*, 189 S.C. 376 (1939) (noting the general rule in civil cases that issues must be raised at the earliest opportunity or they are deemed waived).

Appellants' petition raises the issue of equal protection under the South Carolina Constitution and "classifications." Setting aside the dubiousness of the argument Appellants' constitutional rights were violated, this issue is not preserved because it was neither raised in two motions to the trial court nor in Appellants' petition and reply filed with the Court of Appeals. Of course, Appellants also did not present any citations of authority to support that un-made argument in their filings to the Court of Appeals, as required by SCACR 208(b)(1). Similarly, Appellants cite several authorities in the current petition that were never cited in any of their previous briefing at the levels below. These include: *In the Interest of Shaw*, 274 S.C. 534 (1980), *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414 (2004)

Additionally, Appellants did not identify the issues it is now arguing as novel legal issues to the court below and brief them as such.

Therefore, this Court should dismiss Appellants' current petition because the issues presented and arguments raised were not preserved and were abandoned.

II. Appellants have not presented a constitutional issue to be resolved by the Court.

If the Court decides that the equal protection issue was somehow properly preserved, Appellants still have not presented any support for how a substantial constitutional issue is directly involved as contemplated by SCACR 242(b). Rather, Appellants simply cite to the South Carolina

constitution and a totally inapposite case, *In the Interest of Shaw*, and make no connection from the law cited to the facts of this case. They conclude their analysis of the (nonexistent) constitutional issue with unrelated conclusory statements.

III. Appellants have not identified a novel issue.

As Appellants acknowledge in their petition, South Carolina law is clear: a party must refuse to comply with an order and be held in contempt before the decision becomes appealable. *Tucker v. Honda of South Carolina, Inc.*, 354 S.C. 574, 582 (2003). In South Carolina, the award of attorneys fees is not considered a punishment, but rather an indemnification of the other party. *Cannon v. Ga. Attorney General's Office*, 397 S.C. 541, 546 (2012). Additionally, a contempt order is issued against one who refuses or fails to do what a court had previously ordered him to do. *Id*. (citing *Turner v. Rogers*, 131 S.Ct. 2507, 2516 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)); *Price v. Turner*, 387 S.C. 142, 144 (2010) (noting "the purpose of civil contempt is to coerce the defendant to comply with the court's order."). This is in contrast to the simple award of costs and fees as required by Rule 37(a)(4), which, under South Carolina law, is not a contempt order, not a punishment, and not a final judgment of the merits of a case; instead it is a remedial sanction for unjustified conduct requiring a motion.

Appellants have not identified a novel issue for the Court. Instead, they attempt to conflate the remedial award of costs and fees under Rule 37(a)(4) with an order of contempt for violating a court's order. It is not and South Carolina law is clear on this point. Appellants have not been held in contempt for violating the trial court's order, and so do not have a right to appeal under South Carolina law, and no amount of casting different legal theories at the situation changes that fact.

IV. Allowing Appellants to proceed with their appeal will gut Rule 37 and attempts by trial courts to enforce compliance with discovery rules.

South Carolina Rule of Civil Procedure 37(a) governs motions to compel discovery when a party does not answer discovery requests. Subsection (a)(4) provides that if a motion to compel discovery is granted:

> "the court shall, after opportunity for hearing, require the party … whose conduct necessitated the motion … to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

This rule is necessary because, without it, litigants would be able to unjustifiably refuse to cooperate in discovery without consequence. At least one judge in South Carolina has lamented the discovery disputes the trial courts are confronted with:

> "In my 22 years as a judge I have grown to truly loathe discovery motion hearings. Both sides are guilty, as are large and small firms. Computers have made it simple to cut and paste stock objections. The result is a non-jury docket cluttered with motions to compel, a large number of which are settled last-minute. However, a number of them do not, and judges have to sift through some of the most tedious objections you can imagine. It's the only time I ever seriously consider retirement…"

(Ninth Judicial Circuit Chief Administrative Judge Roger Young's July 2, 2018 letter to the Charleston County Bar). Both this Chief Administrative Judge, and other judges[2], have instructed parties moving to compel discovery to bring to the hearing affidavits, briefs, and proposed orders "granting the relief and leaving a blank for the amount of fees and costs to be awarded." (August 29, 2019 Memorandum to Attorneys and Parties with Discovery Motions).

Here, the trial court found Appellants were not justified in missing a discovery deadline, requesting an extension, missing that extension, then ignoring Plaintiff's counsel's offer of another

[2] See, also, Judge Edgar W. Dickson's February 5, 2019 "Notice Regarding All Motions to Compel" instructing parties to request costs and fees at such hearings.

extension and repeated emails asking for discovery, and then waiting until the day before the hearing to produce partial discovery. (March 31, 2019 Order). As a result of this finding, the trial court found that an award of costs of $34.74 and attorney fees of $750.00 was reasonable and required under SCRCP 37(a)(4).

Although the subject motion to compel hearing on April 11, 2019 predated Judge Young's and similar memoranda by a few months, Plaintiff's counsel's request for costs and fees for Appellants' unjustified conduct was in line with the trial courts' attempts to reign in discovery abuses.

Allowing Appellants to continue to appeal this discovery order will have the exact opposite effect by rewarding unjustified conduct with a year-and-a-half long delay of the most basic discovery issue, and thus a year-and-a-half long delay in the administration of justice. It would also set a terrible precedent that will drag the Court of Appeals into a morass of discovery disputes and minor remedial sanctions.

CONCLUSION

For the foregoing reasons, the trial court's discovery order is not immediately appealable and the Court of Appeals was correct when it dismissed this appeal on January 6, 2020 and then dismissed it again on July 1, 2020. Accordingly, Appellant's petition for writ of certiorari should be denied.

Respectfully,
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