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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James B. Jackson, Master-in-Equity

Case No. 2020-001254

Kacey Green and Charinrath Green, Appellants-Respondents,

v.

Mervin Lee Johnson, Respondent-Appellant.

INITIAL REPLY BRIEF OF APPELLANTS-RESPONDENTS

s/ Virginia W. Williams
David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

E. Mason West, Esquire
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
(843) 761-5626

Attorneys for Appellants-Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

INTRODUCTION

The Respondent-Appellant, Mervin Lee Johnson ("Johnson" or "Defendant"), begins his brief by stating that "[t]he Greens' argument that Johnson's June 17, 2019 Motion to Dismiss . . . was an untimely Rule 59(e) motion is without merit." Johnson Br. at 3. Even a cursory reading of the Appellants' brief reveals, however, that motion challenged as untimely is Johnson's November 14, 2019 motion. *See* Green Br. at 3 ("[t]he Amended Order in dispute was issued **in response to a motion filed by Johnson on November 14, 2019**") (emphasis added). Johnson's brief is littered with this type of mischaracterization and argument against imaginary positions. *Compare* Johnson Br. at 16 ("the Greens cite no authority barring introduction of evidence in a litigant's effort to obtain relief from default judgment") *with* Green Br. at 6-10 (arguing that previously available evidence cannot be submitted for the first time on the morning of a Rule 59(e) hearing). It is not clear from Johnson's brief whether these mischaracterizations are the result of confusion on the part of the Respondent or a deliberate attempt to district this Court by building up strawmen so that the same can be easily knocked down. Regardless of the reason, an extensive reply is not necessary to defend positions which the Appellants-Respondents have not advanced. To the extent that Respondent's brief raises issues addressing Appellants' arguments, the following reply is respectfully submitted:

REPLY ARGUMENT

I. The Appellants' Issues Were Adequately Preserved

At several points in his brief, Johnson argues that the Appellants' issued were not preserved for appeal in the absence of a Rule 59(e) motion. *See e.g.*, Johnson Br. at 9

("Plaintiffs were required to file a Rule 59(e) motion seeking specific factual findings.")[1]; *id*. at 11-12 (applying same argument to challenged introduction of evidence at Defendant's Rule 59(e) hearing)[2]. It is true that a party is required to file such a motion to preserve an issue for appeal when an argument has been raised, but not ruled on by a lower court, *see Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). South Carolina courts have been clear, however, that "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial[.]" *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998); *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011); *Ralph v. McLaughlin*, 428 S.C. 320, 343, 834 S.E.2d 213, 225 (Ct. App. 2019), *reh'g denied* (Nov. 15, 2019), *cert. granted* (Apr. 24, 2020) (quoting *Wilder Corp*.). As a result, "the mere fact that a party received an unfavorable ruling does not require that party to re-raise the issue in a Rule 59(e) motion to preserve it." *Ralph*, 428 S.C. at 343, 834 S.E.2d at 225.

This rule applies equally both explicit and necessary, implicit holdings. *See Elam v. Elam*, 275 S.C. 132, 135, 268 S.E.2d 109, 110 (1980) (where trial court held statute which abolished the common-law parental immunity doctrine only in motor vehicle

[1]While this discussion once again mischaracterizes the Appellants' argument as one challenging the timeliness of the June 15, 2019 Motion to Dismiss, the Appellants will assume arguendo that Johnson challenges the preservation of Appellants' actual argument: i.e., the timeliness of Johnson's November 14, 2019 motion.

[2]In a tangential argument, Johnson cites to *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986), for the proposition that "[t]he supreme court has unequivocally stated that *an appeal noticed after a timely Rule 59(e) motion* should be dismissed without prejudice to allow the trial court to consider the issues raised in such a motion." Johnson Br. at 12 (emphasis added). The language cited by Johnson, however, demonstrates that the Respondent has managed to reverse the timeline addressed in Hudson. *See Hudson*, 290 S.C. at 216, 349 S.E.2d at 341–42 (1986) (in the event timely post-trial motions are filed under Rule 59, *simultaneously with or subsequent[1] to the filing of a Notice of Appeal* . . .) (emphasis added); *see also id.* at 216, 349 S.E.2d at 342 n.1 ("[t]his case does not present the situation where post-trial motions are filed before a Notice of Appeal.").

accident cases to be unconstitutional, and thus, implicitly held that no cause of action existed due to the immunity doctrine, issue of the viability of the common-law immunity doctrine was preserved for appeal); *Church v. McGee*, 391 S.C. 334, 347, 705 S.E.2d 481, 488 (Ct. App. 2011) ("Here, the circuit court's ruling that Church was entitled to prejudgment interest implied by necessity that she met the standard for an award of prejudgment interest. Further, the circuit court's ruling that the interest would start running as of the date of Decedent's death implied that Church's claim arose on that date. Therefore, the grounds presented on appeal are preserved for review."). The case at bar presents examples of both such possibilities.

With respect to the Greens' challenge to the timeliness of Johnson's November 14, 2019 motion, the court in the Amended Order expressly holds that "[b]ecause the Court finds Plaintiffs' arguments on the timing of Defendant's motion unavailing, its rulings from the bench [granting, in part, the requested relief] stand." Am. Order at 2. While the Amended Order does not contain a parallel statement that the Court finds "Plaintiffs' argument on the timing of Defendant's [introduction of evidence] unavailing," it unquestionably relies on the challenged evidence in reaching its conclusion. *See* Am. Order at 3, ¶¶ 5-6 (referencing correspondence and emails between Plaintiffs' counsel and Defendant's insurer as well as a copy of a check issued by Plaintiffs' insurer); *id*. at 6 ¶ 14 ("Defendant's supplemental filing also included a photograph purporting to show the rear of Plaintiff's vehicle after the collision"); *id.* at 9 ¶¶ 10-11 (implicitly referencing the check copy as evidence of "previously settled property damages"); *id.* at 12 (decision is based

upon "uncontested medical bills of $12,826.00; *and the additional evidence presented at the hearing*.") (emphasis added).

Johnson's brief implicitly concedes this point by arguing that "[a]lthough the lower court addressed the Greens' objection to the evidence presented at the hearing, the amended order does not discuss their objections to the evidence." Johnson Br. at 12 n.9. By relying on the challenged evidence, however, the lower court implicitly held that the introduction of such evidence was proper on the morning of the Rule 59 hearing. While additional discussion of the objects may have been preferable, "the rule in South Carolina [is] that counsel is not required to harass the trial judge by making continued objections after an issue has been ruled upon." *State ex rel. Wilson v. Ortho–McNeil–Janssen Pharmaceuticals, Inc.*, 414 S.C. 33, 60, 777 S.E.2d 176, 190 (2015). Given that the lower court ruled upon the issues presently on appeal, a post-trial motion was not necessary to preserve these issues for review.

II. Johnson's Evidence Introduced on the Morning of the Rule 59(e) Hearing is Not Issue Exempt from the Prohibition Against the Introduction of New Matter

As outlined in the Greens' initial brief, while Johnson sought to introduce evidence for the first time on the morning of his Rule 59(e) hearing, "[a] party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990). In response, Respondent states that "Johnson simply could not have offered this evidence prior to judgment because judgment was entered by default, prior to his appearance." Johnson Br. at 14; *see also id.* at 16 ("the Greens cite no authority barring the introduction of evidence

in a litigant's effort to obtain relief from default judgment."). While this appears to be a mischaracterization of the Appellants' argument, it also inadvertently offers support for the argument it seeks to undermine.

Johnson made his first appearance in this case on June 17, 2019, Johnson made his first appearance, filing a Motion to Dismiss, or in the Alternative, to Set Aside Entry of Default and Order of Damages and Allow Defendant to Responsively Plead. Four months later, on October 17, 2019, Johnson filed two affidavits in support of his motion and a hearing on the motion was conducted on October 21, 2019. While his motion, affidavits, and the subsequent hearing provided Johnson with an opportunity for "the introduction of evidence in a [his] effort to obtain relief from default judgment," Johnson Br. at 16, none of the challenged evidence was introduced at this time. Instead, this evidence was introduced on the morning of a Rule 59(e) motion. Even assuming, arguendo, that "[i]t is entirely routine for . . . briefs to be exchanged for the first time at a hearing," Johnson Br. at 14 n. 11, it is not routine for new matter to presented to the court for first time in support of a Rule 59 motion; rather, such efforts are routinely denied. *See Hickman*, 301 S.C. at 456, 392 S.E.2d at 482.

CONCLUSION

For the foregoing reasons, and those discussed in their initial brief, Appellants-Respondents respectfully request that this court vacate Amended Order of the Honorable James B. Jackson, dated August 10, 2020, and reinstate the Order of Damages dated June 5, 2019.

[*Signature page to follow*]

Dated: January 25, 2021

Respectfully submitted,

s/ Virginia W. Williams

David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

E. Mason West, Esquire
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
(843) 761-5626

Attorneys for Appellants-Respondents

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing Initial Brief of Appellants-Respondents was served via email to opposing counsel, Todd Flippin, on January 25, 2021, at tflippin@holcombebomar.com.

Dated: January 25, 2021

Respectfully submitted,

s/ Virginia W. Williams

David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

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Attorneys for Appellants-Respondents