

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

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OCT 25 2021

Thomas E. Player, Jr., Special Referee S.C. SUPREME COURT
Case No. 2013-CP-43-153
Appellate Case No. 2021-001159

Donna Erickson,

Respondent,

v.

Felicia Ruff,

Petitioner.

RESPONDENT'S RETURN TO THE PETITION
FOR WRIT OF CERTIORARI

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QUESTION PRESENTED¹

Did the Court of Appeals properly dismiss an appeal where the appellant failed to file a Record on Appeal in compliance with Rule 210, SCACR?

INTRODUCTION

It has been over three years since Petitioner filed a *pro se* appeal in this matter on July 9, 2018. The appeal has never been perfected as Petitioner has failed to file a Record on Appeal pursuant to Rule 210, SCRCR. Throughout the appeal, Petitioner has failed to follow the rules and meet deadlines resulting in *over twenty (20) deficiency letters*. While it is understandable that a *pro se* litigant be afforded some leeway, the continued deference to the Petitioner has worked an unfair prejudice to Respondent, who continues to incur attorney's fees in this meritless appeal. Moreover, the Court of Appeals properly dismissed this case due to Petitioner's failure to file a Record on Appeal despite repeated opportunities to do so.

STATEMENT OF THE CASE

This case involves the contract of sale for a parcel of land owned by Respondent Donna Erickson, along with a mobile home permanently affixed to the land, to Petitioner Felicia Roof. This matter was initiated by Respondent on January 28, 2013. (Cmpt.).² Petitioner was personally served on February 4, 2013 (Aff. Of Service filed Feb. 7, 2013). Petitioner filed an answer, *pro se*, on February 26, 2013. The matter was referred to the Master in Equity (Order dated May 9, 2013). Petitioner filed a petition for Bankruptcy and the case was stricken from the roster (Motion

¹ Rule 242(f), SCACR, allows a respondent to include a counter-statement of the case and the questions for review.

² As Petitioner has failed to file a Record on Appeal in the Court of Appeals or an Appendix in this Court, Respondent is unable to cite the page numbers as required by Rule 242(d)(4), SCACR, but does provide citations to the documents she has designated as matter to be included in the Record.

to Restore April. 5, 2017). Ultimately, the bankruptcy was dismissed and this matter resumed (Id.; Order reinstating case dated June 20, 2017). On May 22, 2019, the final hearing took place before the Special Referee Thomas E. Player, Jr.³ Respondent did not appear. On June 22, 2018, The Special Referee issued an order ruling that Respondent was entitled to \$13,321.04 and that the contract of sale was terminated.

On July 9, 2018, Petitioner attempted to appeal the order (Notice of Appeal dated 7/9/18). For *over three years*, her appeal has been plagued by failures to comply with the rules, such as, *inter alia*: failing to pay filing fees, failing to properly serve Respondent or file proof of service, and failing to file an initial brief that complied with the rules.⁴ The court has issued over twenty deficiency letters to Petitioner, as this matter has dragged on for over three years without being perfected, while Petitioner is still residing in Respondent's mobile home without made a payment in years.

Ultimately, the Court of Appeals dismissed the case due to Petitioner's failure to provide a record on appeal that was compliant with the rules. Petitioner moved to reinstate her appeal and the Court of Appeals issued an order dated July 15, 2021, requiring Petitioner to file a record on appeal in full compliance with the rules within 30 days. Petitioner failed to file the record and

³ Initially, the matter was referred to the Honorable Richard L. Booth, Master in Equity for Sumter County. However, trial counsel for Respondent was appointed as Master in Equity for Clarendon County (Order of Recusal filed Dec. 7, 2016). S.C. Code § 14-11-20 prohibits the Master of one county to appear before the Master of another county. Thus, Judge Booth recused himself and appointed Thomas E. Player, Jr. as Special Referee in this matter.

⁴ This Court can take notice of the various deficiencies, letters, and orders issued by the Court of Appeals as well as the Motions to Dismiss filed by the Respondent. See, § 11:2. Procedural aspects of judicial notice, Trial Handbook for South Carolina Lawyers § 11:2 (5th ed.) (original judicial notice of adjudicative facts at the appellate level is limited to matters which are undisputable). The records of the Court of Appeals as to the parties' filing of documents and deficiency notices are indisputable.

instead submitted a letter on July 15, 2021, claiming the appeal should be reinstated because there was a third party who was never notified of the appellate proceedings. There was never any other party to the litigation other than Ms. Ruff and Ms. Erickson.

On September 10, 2021, the Court of Appeals issued an order in which it construed Petitioner's petition to reinstate as a petition for rehearing and declined to reinstate the appeal. Petitioner then filed the Petition for Certiorari. However, as she has done throughout this appeal, Petitioner failed to serve the undersigned and Respondent only learned of the Petition upon this Court's letter of October 13, 2021. The only question for review is whether the Court of Appeals properly dismissed the appeal for Petitioner's failure, despite repeated opportunities, to file a Record on Appeal in the Court of Appeals in compliance with Rule 210, SCACR.

STATEMENT OF FACTS

In 2010, Petitioner entered into a contract with Respondent (Cmpt; attachment to Cmpt.) for the purchase of land and the improvements (a mobile home) thereon. The contract provided that the purchase price was \$18,000.00 and that the mobile home would be purchased "as-is." (Id.). Petitioner was to pay \$350/month for twenty-four (24) months, with a balloon payment for the balance to be paid on December 1, 2012. (Id.). The contract specifically provided that in the event of a default by Petitioner, Respondent would be entitled to keep all monthly payments as rent and Petitioner would not be entitled to any reimbursement. After Respondent failed to make the December 1, 2012 balloon payment, Respondent filed a Summons and Complaint on January 28, 2013. Respondent was personally served and she filed an answer on February 26, 2013 (Aff. of Service; Answer of Ruff). The matter was referred to the Master in Equity. (May 9, 2013 Order of Reference).

After Respondent filed an answer, the case was stricken from the roster as a result of Petitioner's petition for bankruptcy, filed under Chapter 13 of the United States Bankruptcy Code. (Motion to Restore). That bankruptcy was ultimately dismissed due to Petitioner's failure to make required payments under the plan (Id.). Respondent then moved to restore the case and set it for a final hearing. (Id.) The case was restored to the active docket on June 20, 2017. (Order Restoring Case).

On February 6, 2018, Respondent sought to serve the Petitioner by publication because the Sumter County Sheriff's Office was unable to locate Petitioner to effect service. (Petition for Notice by Publication). This request was granted. The Motion and Order to Restore were published in The Sumter Item on February 11, 18, and 25, 2018 (Aff. of Kathy Stafford).

The final hearing was set for May 22, 2018 at 10 a.m. (Notice of Hearing dated April 18, 2018). Since the matter involved foreclosure pursuant to S.C. Code § 15-67-30 and real property located in Sumter County, and the sheriff had been unable to locate Petitioner, Respondent petitioned to file notice by publication and the motion was granted (Motion dated April 19, 2018; Order dated April 20, 2018). The hearing notice was published in The Sumter Item on April 25, May 2, and May 9, 2018. (Aff. of Kathy Swofford).

The hearing was held on May 22, 2018. Petitioner did not attend despite properly being served by publication. The Special Referee issued an order on June 22, 2018 finding that: service had been made upon Petitioner; Petitioner had been properly notified of the date, time and place of the final hearing; Respondent had the right to enforce contract of sale; Because Petitioner had not made payment as provided by the contract, Respondent could terminate the contract. (Order of June 22, 2018). The Special Referee also reviewed Respondent's accounting and determined that after all payments had been credited to the Contract, and a reasonable attorney's fee and costs of

the litigation added, Respondent was entitled to \$13,321.04 if Petitioner desired to purchase the property per the contract. (Id.). Respondent waived the right to a deficiency judgment and the property was to remain in Respondent's name. The Special Referee specifically acknowledged that Petitioner had alleged in her answer that she had equity in the property, but noted that no such evidence was introduced. (Id.) Thus, The Special Referee held that Petitioner had no right of redemption or other interest in the property. (Id.) Appellant then filed the appeal in July 2018.

ARGUMENT

I. The Court of Appeal properly dismissed the appeal due to Petitioner's failure to file a Record on Appeal in compliance with the South Carolina Rules of Appellate Procedure.

The Court of Appeals dismissed the case, three years after the Notice of Appeal had been filed, for Petitioner's failure to file a Record on Appeal in compliance with Rule 210, SCACR. Whether that dismissal is proper is the only issue before this Court, despite Petitioner's attempt to inject the merits of the case in her Petition.⁵

The litigation between the parties has been ongoing since 2013. This purported appeal was filed over one year ago, and Appellant has repeatedly failed to comply with the Rules of Appellate Practice. Rule 260(a), SCACR provides that "[w]henver it appears that an appellant or petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." (emphasis added). In addition, Rule 269, SCACR, states:

Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or ***is not in compliance with these Rules***, the appellate court may upon its own motion or that of a

⁵ Respondent does respond, briefly herein, to the merit arguments raised in the Petition, but not to all of the merits of the case as a whole, as the Court of Appeals has not yet considered the merits. Thus, it would be improper for Respondent to raise additional arguments on the merits here.

party, after ten (10) days notice, impose upon offending attorneys *or parties* such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.

Id. (emphasis added).⁶ This Court has noted that:

[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review.

Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992).⁷

The Court of Appeals most likely provided Petitioner repeated opportunities to cure defects because she is a *pro se* litigant. However, as one noted treatise recognized, when granting a *pro se* litigant leeway, the court must also consider the rights of the opposing party:

Courts often state that a litigant acting in person has no greater rights than other litigants but must expect and receive the same treatment and consideration as if represented by an attorney. Nevertheless, it has also been indicated that great latitude is allowed to a litigant who, either by choice or necessity, represents himself or herself in legal proceedings **provided that this does not infringe on the just rights of the adverse party.**

7A C.J.S. Attorney & Client § 247 (emphasis added).

Petitioner claims that there is “documented proof” that she submitted court documents in a “timely manner.” However, Respondent’s motions to dismiss and the Court of Appeals’ own records show that claim is demonstrably false. From the initiation of this appeal, Petitioner has failed to comply with the rules. The notice of Appeal, filed July 9, 2018, was deficient in that, as

⁶ Respondent filed two motions to dismiss in the Court of Appeals, both of which were denied.

⁷ While the Appellant here is appearing *pro se*, unlike the party in the Henning case, she has been afforded multiple opportunities to comply with the rules and has failed to do so. Also, it has been more than three years since Appellant filed the Notice of Appeal and she has had ample opportunity to secure counsel but has opted not to do so.

the Court of Appeals noted in its first deficiency letter, Petitioner failed to submit the \$100.00 filing fee, failed to include a proof of service on Respondent, and failed to include proof that the notice had been filed with the lower court. This deficiency was just the beginning of a pattern in which Petitioner would make a deficient filing and then be given an opportunity to correct. In fact, before the most recent dismissal, the case has been dismissed **three** times (October 10, 2018; December 3, 2019, and January 7, 2020) only to be reinstated upon Petitioner's request, only for her to continue to her noncompliance with the rules.

Three years after the appeal was filed, it has not been perfected for review on the merits. In the meantime, Petitioner has continued to live on the property, without paying, and Respondent has continued to incur attorney's fees for this appeal. Respondent's rights have clearly been infringed upon and the Court of Appeals properly dismissed the case.

II. This matter does not meet the considerations for review under the rule governing a writ of certiorari.

Rule 242, SCACR governs certiorari and states:

(b) Considerations Governing Review. 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. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR.

Obviously, none of the above factors are present in this case, as the Court of Appeals dismissed this appeal due to Petitioner's failure to comply with the procedural rules requiring the filing of a Record on Appeal. It was within the Court of Appeals' authority to dismiss a case for non-compliance with the rules pursuant to Rule 260(a), SCACR, which states: "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk **shall** issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." (emphasis added).

Rule 260 indicates that dismissal for failure to follow the rules of appellate procedure is mandatory, and not discretionary. However, even if the issue of dismissal is considered discretionary, such a decision is not appropriate for review. "Certiorari will not ordinarily lie to review merely discretionary action of any tribunal or to control the exercise of discretion." 14 *Am. Jur. 2d, Certiorari*, §2, *Discretionary Acts*. "A writ of certiorari is a common law remedy to correct errors of law of inferior jurisdictions and the writ will not lie to review errors or mistakes in matters of discretion." Jacoby v. South Carolina State Board of Naturopathic Examiners, 219 S.C. 66, 88, 64 S.E.2d 138, 148 (1951). The Court of Appeals has permitted Petitioner many opportunities to correct deficiencies over the past three years and specifically, multiple opportunities in the last three months to file the Record on Appeal. The dismissal for Petitioner's failure to do so, whether a mandatory or discretionary act by the Court of Appeals, is not a proper matter for a Writ of Certiorari.

III. The issues raised in the Petition were not preserved before the Circuit Court nor ruled upon by the Court of Appeals and should not be considered for the first time on a Petition for Certiorari.

While the merits are not at issue, Petitioner attempts to introduce arguments as to whether the Circuit Court's ruling was proper and makes assertions that are not included in the record

before the Circuit Court. Petitioner failed to appear at the foreclosure hearing before The Special Referee. She did not assert any counterclaims and did not present any witnesses or evidence to contradict the evidence submitted by Respondent. “It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.” Pye v. Estate of Fox, 369 S.C. 555, 564–65, 633 S.E.2d 505, 510 (2006). Here, none of the issues or arguments Petitioner attempts to assert inject in her Petition have been preserved for appeal, nor are they proper for consideration of the question presented.

There are four basic requirements to preserve issues for appellate review. Toal, Jean H. Appellate Practice in South Carolina (2d Ed. 2002). First, the issue must be raised in the lower court and ruled upon (or the court must have an opportunity to rule upon the issue). Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); State v. McDaniel, 320 S.C. 33, 462 S.E.2d 882 (Ct. App. 1995). Secondly, the issue must have been raised by the Petitioner and not a co-defendant. Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997). The third requirement for preservation is that the appellant must have raised the issue in a timely manner. Toal, *supra*. For example, an appellant’s objection at trial must be contemporaneous to the introduction of objectionable evidence. State v. Aldret, 333 S.C. 127, 509 S.E.2d 811 (1999). Finally, an appellant must clearly state the specific grounds in support of the objection. Wilder Corp., *supra*.

None of the four requirements has been met in this case. Respondent has previously noted the failure to preserve in her initial brief to the Court of Appeals. However, the merits of the case, including the arguments on issue preservation, have not been considered by the Court of Appeals. Thus, it would be premature for the merits to be considered at this stage of the proceedings.

The factual issues raised in the Petition, even if they were properly before the Court of Appeals (though Respondent strongly disputes that) have not been ruled upon by the Court of Appeals and thus are not preserved for review by this Court. In Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329-30, 730 S.E.2d 285 (2012), this Court considered issue preservation and the majority applied the strict view that, when the record shows an issue is not preserved, the court should find the issue unpreserved and decline to reach the merits. While this can result in a harsh result in some cases, the basis for issue preservation is actually one of fairness: “Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful review.”). Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Petitioner’s attempt to inject arguments on the merits in the pending Petition and her claim these proceedings have been unfair or fraudulent is not only contrary to issue preservation, it is disingenuous.

IV. Petitioner’s attempt to raise issues and evidence that are outside the record in this matter should be disregarded.

An appellate court will not consider any fact which does not appear in the record on appeal. Toal, *supra*, p. 76. The records should reflect that the issues on appeal were raised below and ruled upon by the trial court. Medlock v. One 1985 Jeep Cherokee, 322 S.C. 127, 470 S.E.2d 373 (1996). “The appellant has the burden of providing this court with a sufficient record upon which to make a decision.” Id. 322 S.C. at 132; 470 S.E.2d at 376. “The Record shall *not*, however, *include matter which was not presented to the lower court or tribunal.*” Rule 267, SCACR (emphasis added). Petitioner has failed to provide an Appendix that is required to include the Respondent’s motions to dismiss the Court of Appeals’ case or any of the Court of Appeals’ orders dismissing the case. That failure alone should warrant the denial of the instant Petition. However,

Petitioner has also made statements in her Petition that are unrelated to the Court of Appeals' dismissal for non-compliance with the rules and outside the record, such as it is, in this case.

The Petition for Certiorari referenced Petitioner's 2013 bankruptcy which was outside the record of this case.⁸ She claims that when the bankruptcy was dismissed, she had \$12,000 in equity in the property. There is no evidence or testimony of this equity. Likewise, her claim that that by June 2016, the asking price of \$18,000 had been satisfied is unsupported by the record. No evidence of any payments were submitted to the Circuit Court. In fact, the Motion to Restore the case to the Circuit Court roster (dated March 20, 2017) after the dismissal of the bankruptcy specifically stated that no payments had been made since April 1, 2016. Petitioner did not submit any testimony or evidence to refute that fact. There was never any other party to this case in the Circuit Court other than Ms. Ruff and Ms. Erickson, as demonstrated by caption in the June 22, 2018 order of the Special Referee. Thus, Petitioner's claim that there is a third party who "made bankruptcy payments (equity) but was not notified of the hearing held in the lower court" is meaningless, unsupported by the record, and provides no support for her Petition for Writ of Certiorari or the merits of her appeal.⁹

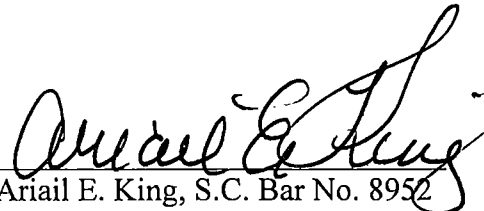
⁸ The only documents before the Circuit Court involving the bankruptcy were the Motion to Restore after the dismissal of the bankruptcy and the Order Restoring the Case on June 20, 2017. Petitioner filed multiple Designations of Matter in the Court of Appeals, that attempted to include many documents that were never before the Circuit Court. On July 30, 2020, the Court of Appeals granted Respondent's motion to strike, ruling that Petitioner's designation should only include documents presented to the Circuit Court.

⁹ As noted previously, since the Court of Appeals has not ruled on the merits of the appeal, it is premature for the merits to be considered in this Petition. However, in an abundance of caution, Respondent has addressed the Petitioner's arguments so as not to have deemed to waive any opposition. Respondent included many other arguments on the merits in her initial brief to the Court of Appeals that are outside the scope of the pending Petition.

Petitioner's bankruptcy case was dismissed, with prejudice, by order dated March 4, 2014, for failure to make required payments under the plan (Motion to Restore, April 5, 2017). Respondent noted that Petitioner had not made any payments since April 1, 2016. Id. There is no evidence in the record that the debt was reduced or extinguished, other than the evidence of the total payments made by Petitioner through 2016, which were submitted to the lower court and for which the Special Referee gave credit to Petitioner. Because the appeal was not perfected due to Petitioner's non-compliance, the Court of Appeals has not considered nor ruled upon any of these claims (which Respondent has argued are outside of the record in that appeal). However, regardless of whether Petitioner's arguments regarding the bankruptcy or equity were preserved for appeal, they are not relevant to the issue of certiorari.

CONCLUSION

The Court of Appeals properly dismissed this case due to Petitioner's repeated failure to comply with the South Carolian Rules of Appellate Procedure. That is the only issue before this Court, despite Petitioner's attempts to insert arguments on the merits. In an abundance of caution, Appellant has responded briefly to those arguments. However, this Court need not consider the merits as the procedural dismissal was warranted. This appeal has been pending for over **three years**. Petitioner has been given multiple chances to perfect her appeal so that the Court of Appeals could consider the case on the merits (while Petitioner has continued to live on the property without any further payments to Respondent). In addition, Petition for Writ of Certiorari has failed to meet the standards for review on certiorari and no Appendix has been filed. The latitude granted Petitioner has clearly infringed upon the rights of Respondent for years. Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari so this matter can finally be remitted by the Court of Appeals to the lower court.



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