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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No.: 2017-CP-42-02834

Appellate Case No.: 2018-001443

Phillip Francis Luke Hughes, on behalf of the Estate of Jane K. Hughes ……Respondent,

v.

Bank of America National Association .....Appellant.

PETITION FOR REHEARING *EN BANC*

Respondent respectfully moves this Honorable Court for a rehearing *en banc* pursuant to South Carolina Appellate Rules 219 and 221. Respondent respectfully submits that the circuit court's decision that Appellant's Motion for Sanctions under Rule 11, SCRCP, and Section 15-31-10(A) of the Frivolous Civil Proceedings Sanctions Act (FCPSA) was premature and untimely was reasonably based, fell within the discretion of the circuit court, and did not, nor could it have risen to an abuse of discretion on the facts of this case as a matter of law. Thus, the proper standard for reversing the circuit court has either been overlooked or misapprehended by this Court and

reconsideration, after rehearing on this issue, is necessary and appropriate for a fair resolution of the issue.

Critically, concluding that a vague reference in a footnote is sufficient to "present" an issue for consideration by a trial court, undermines the standard for preserving an issue for appeal. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised and ruled upon by the trial court to be preserved." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006). Nor may an argument be raised on appeal unless it has been presented to the lower court for its consideration. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

"Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments." *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 372, 628 S.E.2d 902, 919 (Ct. App. 2006). "[A]n objection must be sufficiently specific to inform the trial court of the point being urged by the objector." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). Here, as discussed below, Appellant neither "enabled" the circuit court to properly consider the timeliness issue, nor was it sufficiently specific to permit a fair consideration by the court.

I. Appellant failed to preserve the issue of timeliness.

Appellant failed to submit even the bare minimum of what was required to preserve this issue for appeal by neglecting to raise the issue of timeliness in its Motion for Sanctions, Memorandum in Support of Motion for Sanctions, or at the hearing before the circuit court. Appellant then had yet another opportunity to raise its objection to the circuit court's ruling on timeliness through a Rule 59(e) motion, but yet again failed to raise the issue. Allowing a

sophisticated litigant like Appellant to redefine the standard for "issue preservation" to a mere mention of a general topic in a footnote risks the unraveling of long existing standards.

Appellant, as the losing party, was required to first try to convince the circuit court that it ruled wrongly. *See, I'On v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). The record before this Court is devoid of any attempt by Appellant to present the issues and arguments of timeliness to the circuit court. The inclusion of a footnote vaguely referencing jurisdiction in Appellant's Memorandum in Support of Motion for Sanctions is not the equivalent of addressing the issue of timeliness and cannot suffice as satisfying the existing standards of issue preservation.

The nebulous footnote in Appellant's Memorandum in Support of Motion for Sanctions did not serve to inform the circuit court about the issue of timeliness. Appellant undeniably failed to raise the issue of timeliness at any point to the circuit court, and a passing footnote about jurisdiction cannot salvage preservation of the issue.

II. The circuit court acted well within its discretion by declining to award sanctions.

The circuit court, in concluding that Appellant's Motion for Sanctions was premature, did so under its discretionary authority to make such a determination, thus presenting this Court with review under the abuse of discretion standard. An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. *Ex parte Gregory*, 378 S.C. 430, 437 (2008) (citing *Father v. South Carolina Dep't of Soc. Servs*., 353 S.C. 254 (2003)). It is settled in South Carolina that where "the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Id.; see also Runyon v. Wright*, 322 S.C. 15 (1996)) (the imposition of sanctions will not be disturbed on appeal absent a clear abuse of discretion by the

lower court). As there is no factual dispute regarding the filings below, the proper consideration is *not* whether a footnote could be read in a particular way, but instead whether the circuit court abused its discretion. *See also, e.g., Pee Dee Health Care, P.A. v. Estate of Thompson*, 424 S.C. 520, 818 S.E.2d 758 (2018) (circuit court did not abuse its discretion in declining to award sanctions before the appeal was decided).

Moreover, as this Court has correctly noted, there is an absence of authority in which South Carolina courts have considered sanctions solely under subsection (A) of the post-2005 FCPSA. This Court also acknowledged that its holding can leave circuit courts in an awkward position. Given such awkwardness, the rulings in *Ex parte Gregory* and *Pee Dee Health Care*, and the absence of any authority on subsection (A) of the FCPSA, there is no basis for a conclusion that the circuit court abused its discretion in declining to award sanctions. To the contrary, the circuit court's decision is well within the guard rails of controlling law. Thus, because no abuse of discretion occurred here, application of the proper standard is critical, if not dispositive.

"Rule 11 permits a trial court to award sanctions 'upon its own initiative,' Rule 11, SCRCP, and there is no stated restriction on when the trial court must do so." *Id.* 242 S.C. at 538, 818 S.E.2d at 768. In *Pee Dee Health Care,* the Supreme Court of South Carolina held that there is no abuse of discretion should the circuit court wait for the resolution of a pending appeal before ruling on sanctions. The court reasoned that the circuit court is entitled to consider "all relevant circumstances in the context of the litigation" when determining the timeliness of a motion for sanctions. *Id.*, 242 S.C. at 537, 818 S.E.2d at 767. Thus, the holding in *Pee Dee Health Care* ratified a circuit court's decision to abstain from issuing sanctions during the pendency of an appeal.

This Court was persuaded by the concurrence in *Pee Dee Health Care,* in which Justice Kittredge ultimately concluded that there was not an abuse of discretion in the trial court's determination of reasonableness concerning the timing of the motion for sanctions. Justice Kittredge also provided that policy considerations espoused in the majority opinion "weigh heavily in favor of allowing a party to delay filing a Rule 11 sanctions motion." *Id.* 242 S.C. at 541, 818 S.E.2d at 769. The current ruling conflicts with the holding of *Pee Dee Health Care*. *Ex parte Gregory* and *Pee Dee Health Care* establish that the circuit court did not abuse its discretion and provide further support for reconsidering this Court's current decision.

III. This court did not properly apply the two issue rule.

Respondent respectfully submits that the Court misapprehended or overlooked arguments precluding Appellant's appeal under the two issue rule. "A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *See, Jones v. Lott*, 387 S.C. 339, 346-347, 692 S.E.2d 900, 904 (citing *I'On v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

An objective reading of the circuit court's Order denying Appellant's Motion for Sanctions indicates that the denial was based, in part, on Judge R. Keith Kelly's decision not to award sanctions at the hearing on February 22, 2018. The circuit court found that Appellant, "before filing the current Motion for Sanctions, raised the same issues set forth in this motion to the Court, Judge Kelly", and that "[a]lthough Defendant raised the question of sanctions at that hearing, Judge Kelly did not impose sanctions…." (R. at 3; ¶ 7).

The record establishes that the circuit court specifically found that Judge Kelly had previously considered the same issues raised by Appellant but declined to impose sanctions. Rule 11's allowance for a trial court to award sanctions upon its own initiative in combination with Judge Kelly's refusal after considering the same issues further supports that the circuit court's denial of Appellant's motion was based, in part, on Judge Kelly's prior decision. There is a ground for the circuit court's decision declining to award sanctions from which no appeal was taken. Thus, the two issue error preservation rule bars Appellant's arguments. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012).

Respondent does not challenge the Court's opinion that Appellant has abandoned its argument under subsection (C) of the FCPSA. Finally, Respondent does not challenge the Court's ruling to decline ruling on the merits of whether sanctions are justified.

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PROOF OF SERVICE

The undersigned, attorneys in this matter for the Respondent, certifies that we have this 26th day of October 2021, served copies of the Petition for Rehearing *En Banc* upon counsel of record for the Appellant by causing them to be deposited in the United States mail, first class postage paid addressed to Robert A. Muckenfuss/Elizabeth M.Z. Timmermans, 201 N. Tryon Street, Suite 3000, Charlotte, NC 28202 and 501 Fayetteville St., Suite 500, Raleigh, NC 27601.

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