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Feb 03 2022

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
COURT OF COMMON PLEAS

The Honorable Alex Kinlaw, Jr., Circuit Court Judge

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Appellate Case No.: 2021-001096

Jeremy Wilson

*Respondent,*

v.

Jeffrey G. Hedges and JH3 Consulting, LLC,

*Appellants,*

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MOTION TO DISMISS

COMES NOW Respondent, by and through his undersigned Counsel, and pursuant to SCACR Rule 240(a) hereby respectfully moves the Court for an order dismissing Appellants' appeal. This motion is supported by the South Carolina Appellate Court Rules, applicable statutes and case law, and Respondent's Memorandum of Points and Authority.

Respectfully submitted this 3<sup>rd</sup> day of February, 2022.

CAMPBELL TEAGUE LLC

s/ Molly H. Cash

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## MEMORANDUM OF POINTS AND AUTHORITY

### I. INTRODUCTION AND BACKGROUND

Respondent moves this Court for an order dismissing Appellants' improper appeal from the circuit court's denial of their Motion to Dismiss and/or Stay and Compel Mediation and Arbitration (hereinafter "Motion"). Appellants request appellate review of an issue neither explicitly ruled upon by the circuit court nor preserved for appellate review by Appellants. As such, Appellants' appeal is not properly before this Court for consideration and is therefore subject to dismissal pursuant to SCACR Rule 240(a).

On May 27, 2021, Respondent Jeremy Wilson (hereinafter "Respondent") filed his Complaint against Appellants' Jeffrey G. Hedges ("Hedges") and JH3 Consulting, LLC ("JH3") (collectively "Appellants") alleging causes of action for (1) unjust enrichment; (2) promissory estoppel; (3) violation of the South Carolina Unfair Trade Practices Act; and (4) fraud and misrepresentation. (Complaint). Appellants filed their Motion on August 25, 2021. (Defs.' Motion to Dismiss.) The circuit court heard oral arguments on Appellants' Motion on September 16, 2021, and entered a Form 4 Order denying the motion filed that same day. (September 16, 2021 Order.)

Appellants filed their Notice of Appeal on September 23, 2021, without moving for reconsideration pursuant to rule 59(e) or making any other post-judgment motions. To date, Appellants have not moved the circuit court for any post-judgment relief other than for a stay of proceedings pending this appeal. Appellants filed and served Appellants' Initial Brief on January 4, 2022, stating their sole and only issue for appeal as follows:

- (1) Whether the circuit court erred by finding that Plaintiff's claims do not fall within the scope of the Mediation and Arbitration Provision included in the Agreement?

(Appellants' Initial Brief, p. 1).

## **II. ARGUMENT**

Appellants' stated issue for appeal (1) misconstrues the circuit court's September 16, 2021 Order to the extent Appellants' assert the circuit court made an explicit finding that Respondent's claims do not fall within the scope of the Mediation and Arbitration Provision included in the Agreement and (2) seeks appellate review of an issue which Appellants failed to preserve by bringing an appropriate post-judgment motion. As such, Appellants' appeal is not procedurally ripe for appellate review and must be dismissed pursuant to SCACR Rule 240(a).

**A. Appellants' stated issue is not ripe for appellate review because the circuit court did not address whether Respondent's claims fall within the scope of the Mediation and Arbitration Provision included in the Agreement at issue in its September 16, 2021 Order.**

Pursuant to Rule 52(a), SCRCP, the circuit court is not required to state its findings of fact and conclusions of law in decisions on motions to dismiss. As Appellants themselves concede, the circuit court provided no findings of fact or conclusions of law in its September 16, 2021 Order.<sup>1</sup> Using a Form 4, SCRCP, form order, the circuit court merely checked the box marked for "Decision by the Court", and provided in the space reserved for "Statement of Judgment by Court", in pertinent part, the following: "After hearing the arguments of Counsel, the Court is inclined to deny the Motion filed." (September 16, 2021 Order.) Indeed, the September 16, 2021 Order makes no mention of the arbitration issue Appellants raise.

Appellants look outside the scope of the September 16, 2021 Order and reference the hearing transcript from oral argument in contending that the circuit court "committed error in ruling that Plaintiff's argument at the hearing was valid". (Appellants' Initial Brief, p. 8.) Thus, Appellants argue the circuit court "effectively f[ound] that Plaintiff's causes of action fall outside the scope of the Mediation and Arbitration Provision included in the Agreement at issue." (*Id.*)

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<sup>1</sup> See Appellants' Initial Brief, p. 6.

Yet, in construing Form 4 orders, South Carolina courts give effect to the actual written contents of the order—not issues raised at oral argument but which the circuit court leaves unmentioned. Kinghorn as Tr. for the Mildred Ann Kinghorn Tr. dated 28 Apr. 2004 v. Sakakini, 426 S.C. 147, 152, 825 S.E.2d 748, 750 (Ct. App. 2019) (holding Form 4 order granting motion did not constitute explicit ruling awarding attorney’s fees and costs where movant raised the issue but the circuit court did not mention attorney’s fees and costs in its order). Accordingly, the circuit court’s September 16, 2021 Order denying Appellants’ motion was not an explicit ruling affirmatively agreeing with Respondent and finding against Appellants as to the unmentioned issue of arbitration. Since the circuit court has yet to rule as to whether Respondent’s claims fall within the scope of the Mediation and Arbitration Provision included in the Agreement at issue, Appellants’ appeal on that ground must be dismissed.

**B. Appellants Failed To Preserve For Appellate Review The Circuit Court’s September 16, 2021 Order.**

As noted above, Appellants filed and served their Notice of Appeal without moving for reconsideration pursuant to Rule 59(e), SCRCP or seeking any other post-judgment relief. It is well settled under South Carolina law that “A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original); *see e.g.*, Berry v. Spang, 433 S.C. 1, 10, 855 S.E.2d 309, 314 (Ct. App. 2021), reh’g denied (Mar. 29, 2021) (Appellants’ arguments circuit court failed to take judicial notice held unpreserved where circuit court declined to rule on Appellants’ request in denying their motion to compel and Appellants failed to raise the issue in their motion to reconsider); Summersell v. S.C. Dep’t of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145–46 (1999) (“where an issue presented to the circuit court in a civil case is not explicitly ruled upon . . . , the issue must be raised by an appropriate post-trial

motion to be preserved for appellate review”); Fraternal Ord. of Police v. S.C. Dep’t of Revenue, 332 S.C. 496, 501 (1998) (standing argument raised but not ruled upon was not preserved for appeal where no Rule 59(e) motion was made; Talley v. South Carolina Higher Educ. Tuition Grants Comm., 289 S.C. 483, 347 S.E.2d 99 (1986) (finding issue raised below but not ruled upon by the trial judge was not preserved and citing failure to move under Rule 59(e)).

In discussing the need for a Rule 59(e) motion, the South Carolina Supreme Court explained that:

[t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the 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....

If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review.... Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve intentionally or by chance in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.

Elam, 361 S.C. at 24, 602 S.E.2d at 780, fn. 4 (2004) (quoting I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000)).

Appellants made no attempt to convince the circuit court that it ruled incorrectly in its September 16, 2021 Order. Because Appellants did not move for reconsideration of the circuit court’s order, they failed to preserve their arbitration arguments for appellate review. Appellants’ appeal is therefore procedurally barred and subject to dismissal pursuant to SCACR Rule 240(a).

### **III. CONCLUSION**

The circuit court did not address arbitration in its September 16, 2021 Order and has yet to rule as to whether Respondent’s claims fall within the scope of the Mediation and Arbitration

Provision included in the Agreement at issue. Appellants never moved for reconsideration of the circuit court's order but now seek appellate review of arbitration arguments which Appellants failed to preserve by bringing an appropriate post-judgment motion. Accordingly, Respondent respectfully requests that this Court dismiss Appellants' appeal as procedurally barred pursuant to SCACR Rule 240(a).

Respectfully submitted this 3<sup>rd</sup> day of February, 2022.

CAMPBELL TEAGUE LLC

s/Molly H. Cash

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Beau B. Brogdon (SC Bar #103803)

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*Attorneys for Respondent*

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*Appellants,*

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PROOF OF SERVICE

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I certify that on February 3, 2022, I served Respondent's Motion to Dismiss by placing a copy into the U.S. Mail, postage prepaid, addressed to the Appellants' counsel, by way of counsels' AIS email address, as well as by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to:

Graves & Davis, LLC  
Tyler Graves & Logan Davis  
125E Wappoo Creek Drive, Suite 102  
Charleston, South Carolina 29412

CAMPBELL TEAGUE LLC  
s/ Molly H. Cash  
\_\_\_\_\_  
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*Attorneys for Respondent*

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**FORM 8  
LETTER TO THE APPELLATE COURT CLERK  
FILING THE NOTICE OF MOTION TO  
DISMISS APPEAL**

February 3, 2022

**SENT VIA USPS MAIL & EMAIL:**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211  
Email: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)  
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RE: Jeremy Wilson, Respondent, v. Jeffrey G. Hedges and JH3 Consulting, LLC, Appellants, Case No. 2021-001096, Lower Court Case No. 2021-CP-23-02564

Dear Ms. Kitchings:

Enclosed for filing is Respondent's Motion to Dismiss the Appeal filed in the above case. Also enclosed are the following:

- (1) Proof of service of the motion to dismiss on the Appellant[s].
- (2) A filing fee of \$50.

Sincerely,  
s/Molly H. Cash  
Molly H. Cash.  
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