Rel: August 13, 2021

ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2021

2190999

Alabama Department of Environmental Management

v.

Wynlake Development, LLC

Appeal from Jefferson Circuit Court (CV-19-901762)

On Application for Rehearing

THOMPSON, Presiding Judge.

On application for rehearing, Wynlake Development, LLC ("Wynlake"), contends that this court erred in reversing the Jefferson Circuit Court's judgment because, it asserts, the Alabama Department of Environmental Management ("ADEM") did not calculate its fine against Wynlake according to fixed mathematical standards.

In its appellee's brief submitted to this court on original submission, Wynlake responded to ADEM's arguments on appeal by maintaining that the trial court had correctly analyzed certain factors under § 22-22A-5(18)c., Ala. Code 1975, in determining that the fine imposed by ADEM was improper. Wynlake asserted in that brief that its violations of ADEM regulations were "merely technical," that no harm had been caused by its violations, that it had not taken any action in 10 years because of its financial inability to remedy the violations, and that its violations did not threaten the environment.

On application for rehearing, however, Wynlake, for the first time, cites caselaw concerning "fixed standards" as they relate to decisions of administrative agencies. See Ex parte Department of Pensions & Sec. of Alabama, 437 So. 2d 544, 547 (Ala. Civ. App. 1983) (" 'In the present case

the probate court found that [the Department of Pensions and Security] had arbitrarily and unreasonably withheld its consent to the adoption. However, a determination by an administrative agency is not "arbitrary" or "unreasonable" where there is a reasonable justification for its decision or where its determination is founded upon adequate principles or fixed standards.' " (quoting State Dep't of Pensions & Sec. v. Whitney, 359 So. 2d 810, 812 (Ala. Civ. App.1978))). Wynlake did not argue the applicability of, or rely upon, the "fixed standard" caselaw in its appellee's brief submitted to this court on original submission, nor did it mention that concept or supporting law at any point before the trial court. "It is for the court to address the merit of the claim as framed by the [parties], not to reframe it." Wright v. Cleburne Cnty. Hosp. Bd., Inc., 255 So. 3d 186, 192 (Ala. 2017). Furthermore, a party generally may not raise an issue or argument for the first time on application for rehearing. Fort James Operating Co. v. Stephens, 996 So. 2d 833, 843-44 (Ala. 2008); Stover v. Alabama Farm Bureau Ins. Co., 467 So. 2d 251, 253 (Ala. 1985) ("New supporting arguments presented for the first time on rehearing generally will not be considered."); Banks v. Harbin, 500 So. 2d 1027, 1030 (Ala.

1986); and Williams v. Limestone Cnty. Water & Sewer Auth., 223 So. 3d 240, 249 (Ala. Civ. App. 2016). See also Millar v. Wayne's Pest Control, 804 So. 2d 213, 217 (Ala. Civ. App. 2001) ("[T]his court may not consider arguments not raised before the trial court ...."). Accordingly, we do not reach Wynlake's argument pertaining to "fixed standards" that it has asserted for the first time on application for rehearing.

Wynlake also claims that this court ignored its argument, asserted in its appellee's brief on original submission, that ADEM had waived any argument that the trial court had erred in concluding that ADEM's imposition of the fine against Wynlake was arbitrary and capricious. In its appellee's brief, Wynlake cited Walden v. Alabama State Bar Ass'n, [Ms. 1180203, Mar. 27, 2020] __ So. 3d __ (Ala. 2020), a case in which the defendants had moved to dismiss Gatewood Walden's claims seeking monetary relief on the grounds of State immunity, qualified or State-agent immunity, and/or absolute judicial or quasi-judicial immunity. The trial court in Walden entered a judgment dismissing those claims on the basis that it lacked jurisdiction, but without specifying which of the three bases argued by the defendants upon which it had relied. __ So. 3d at __. On

appeal, Walden argued only the issue of State-agent immunity; he did not address the defendants' arguments concerning State immunity or quasi-judicial immunity. Id. Our supreme court held that Walden's failure to address two of the three possible bases upon which the trial court might have based its judgment warranted affirming the trial court's judgment. In so holding, the supreme court explained:

> "[Walden] has wholly failed to address the State Bar defendants' arguments -- which were clearly articulated before the trial court -- that State immunity shields the State Bar from being ordered to pay monetary damages and that quasi-judicial immunity, as codified in Rule 15(b), Ala. R. Disc. P., similarly protects the individual State Bar defendants.
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> "That omission is fatal to Walden's appeal. In Soutullo v. Mobile County, 58 So. 3d 733, 739 (Ala. 2010), this Court explained that 'the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment[ ] results in an affirmance of that judgment.' See also Devine v. Bank of New York Mellon Corp., 296 So. 3d 840, 843 (Ala. 2019) ('When a trial court has stated that a judgment is warranted on multiple grounds, it is incumbent upon a party that subsequently appeals that judgment to address all of those grounds in the opening appellate brief because any issue not argued at that time is waived.'); Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006) ('When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the

> appellant's principal brief constitutes a waiver with respect to the issue.'). Because Walden has failed to address the State Bar defendants' arguments that the trial court had no ability to award him monetary damages because of the doctrines of State immunity and quasi-judicial immunity as codified by Rule 15(b), the trial court's dismissal of the claims upon which his requests for monetary damages were based must be affirmed."

__ So. 3d at __ (footnote omitted).

Wynlake contended on original submission that ADEM had failed to argue on appeal that the trial court had erred in finding that the fine assessed was arbitrary and capricious, and, therefore, that this court should deem that argument waived and affirm the judgment. In both its statement of the issue to be raised on appeal and its summary of the argument in its principal brief on original submission, ADEM argued that the trial court had erred in determining that its imposition of the fine against Wynlake was arbitrary and capricious. Although ADEM did not primarily focus on the arbitrary-and-capricious standard in its argument in its brief, the crux of ADEM's argument was that the trial court had erred in finding its fines to be arbitrary and capricious because, it argued, it had the sole authority to determine the amount of the fines, subject to

the factors set forth in § 22-22A-5(18)c., Ala. Code 1975. For that reason, although this court's opinion on original submission did not address Wynlake's waiver argument, we concluded that that argument was without merit and addressed ADEM's argument.

On application for rehearing, Wynlake argues a different basis for waiver than it did in its appellee's brief on original submission. Wynlake argues on application for rehearing that ADEM did not argue that it had "acted in accordance with any standards," and, Wynlake says, ADEM waived any such argument. To the extent that this issue is raised for the first time on application for rehearing, we cannot consider it. Even if, however, this court was to generously construe Wynlake's waiver argument on application for rehearing as again asserting that ADEM had failed to address the trial court's determination that ADEM's imposition of the fine was arbitrary and capricious, for the reasons discussed above, we would reject that argument.

APPLICATION FOR REHEARING OVERRULED.

Moore, Edwards, and Hanson, JJ., concur.

Fridy, J., recuses himself.