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Supreme Court provides confusing clarification on preservation by motion for reconsideration

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Virginia Supreme Court Rule 4:15 (Motions Practice) provides, in its subsection (d), that a trial court "shall hear oral argument on a motion" upon the request of counsel of record for any party or at the court's request, "[e]xcept as otherwise provided in this subparagraph." It then states that "[o]ral argument on a motion for reconsideration ... shall be heard orally *only* at the request of the court." (Emphasis added.)

The Court has held that a party may preserve an argument that it did not assert at trial by presenting it in a motion for reconsideration. *Majorana v. Crown Central Petroleum Corp.*, 260 Va. 521, 525 n.1, 539 S.E.2d 426, 428 n.1 (2000) ("having briefed the issue in a post-trial motion for reconsideration, Majorana adequately preserved the issue for review in this appeal"). (There are limits to that rule, of course. A hearsay objection or a challenge to a juror or a jury instruction, for example, must be asserted at trial or it is waived. Those are not appropriate circumstances for preservation by motion for reconsideration, because such a motion would come too late to allow the trial court "to rectify the effect of the asserted error," *Scialdone v. Commonwealth*, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) – although issues of that nature might possibly support a motion for a new trial.)

The Supreme Court reiterated but narrowed the *Marjorana* rule in its recent decision in *Brandon v. Cox*, Record No. 111396 (June 7, 2012, as amended Sept. 24, 2012), leaving attorneys scratching their heads in an effort to discern how they may take advantage of *Marjorana* under the constraint imposed by Rule 4:15(d).

The Court held in its initial opinion that the appellant, Torri Brandon, waived an argument asserted in a motion for reconsideration by failing either to "file a notice of hearing to definitively place the matter before the trial court" or to obtain a ruling on it. Brandon then filed a petition for rehearing, pointing out that she was barred by Rule 4:15(d) from taking the action that was necessary, according to the opinion, to preserve her argument for appeal.

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The Court responded by granting the petition and filing an amended opinion which contained only minor revisions and did not alter the result. The Court removed the suggestion that Brandon could have "file[d] a notice of hearing to definitively place the matter before the trial court" but adhered to its ruling that Brandon waived her argument by "fail[ing] to obtain a ruling on her motion to reconsider." *Brandon*, amended slip op. at 6. *See also id*. at 7:

> Because there is no evidence in the record that the trial court had the opportunity to rule upon the argument that Brandon presents on appeal, it cannot be said that the case can be heard in this Court upon the same record upon which it was heard in the trial court and, therefore, the purpose of Rule 5:25 is defeated. Thus, we must hold that she has waived her argument by failing to preserve it. [Footnote omitted.]

Aside from removing its "notice of hearing" requirement, the Court responded to the Rule 4:15(d) argument by adding this, in a footnote:

> Although Rule 4:15(d) provides for a hearing only at the request of the court, it is incumbent upon the party seeking an appeal to provide us with a record that shows, beyond a mere filing in the clerk's office, that the court had an opportunity to rule.

Id. at 6 n.2. The Court also observed, in the same footnote, that in *Marjorana* it "held that an argument is adequately preserved where the appellant *obtained a ruling on*, i.e. denial of, her post-trial motion for reconsideration." *Id.* at 6-7 n.2 (emphasis added in amended opinion). But it ignored the fact, noted in Brandon's Petition for Rehearing, that *Marjorana* was decided before the adoption of Rule 4:15 and that there was no similar provision in the prior Rules.

Justice Mims dissented, reading *Marjorana* as holding more broadly that a written post-trial motion for reconsideration is sufficient to preserve an argument for appeal (consistent with the Court's stated rationale in that case, which did not rely on the fact that the trial court had ruled on the motion for reconsideration) and advancing the common sense notion that "parties who file such motions do so with every intention that the court review the issues they raise."

> The filing of such a motion is evidence that the movant "requested a ruling" on it. This is especially true regarding motions for reconsideration because Rule 4:15(d) prohibits a party from requesting a hearing; rather, no hearing may be had except at the court's request. The Rule therefore places a special obligation upon the court to review such motions without prompting by the parties, since it is otherwise unable to determine whether a hearing is necessary.
>
> Thus, taken together, *Majorana* and Rule 4:15(d) create a conundrum: if a motion for reconsideration is sufficient to preserve an argument for appeal under *Majorana*, yet a party may not request a hearing on such a

> motion under Rule 4:15(d), how does the appellant establish for the record that the trial court had an opportunity to rule intelligently on the motion? I would resolve the question by holding that, at least with respect to motions for reconsideration, mere filing is sufficient.

Id., dissenting opinion at 2-3 (footnote omitted). Justice Mims also commented that "a separate letter to the clerk of court presumably would be no more effective in bringing the motion to the court's attention than the filing of the motion itself," while "a letter or phone call to the chambers secretary or law clerk may be more effective in bringing the motion to the court's attention, but the record would be unlikely to reveal any trace of the effort." *Id*. at 3.

What, then, is the solution to the conundrum described in the dissenting opinion? Three points appear obvious, but the frontiers are uncharted. First, it seems obvious that if a trial court *actually rules* on a motion for reconsideration, arguments presented in that motion are preserved. Second, it least *appears* obvious, in light of the removal of any reference to a notice of hearing in the Court's amended opinion – seemingly a concession to the plain language of Rule 4:15(d) – that parties seeking rehearing are not yet required to flout the provisions of that Rule outright by noticing hearings on motions for reconsideration. And third, "a mere filing in the clerk's office" is not sufficient to show "that the court had an opportunity to rule."

Beyond those points, the solution (if it exists) lies in the realms of ingenuity and common sense. Counsel's first priority in such a case should be to induce the trial court to rule on the motion for reconsideration – and to do so within 21 days after entry of a final order, of course. One tactic may be to tender alternative forms of orders granting or denying the motion, ideally with endorsements of all counsel but absent opposing counsel's endorsement if necessary. Those sketch orders may be mailed or delivered directly to the trial judge with a cover letter calling attention to the motion and respectfully requesting a timely ruling. The letter and enclosures also should be copied to the clerk with a request to place them in the file, in the hope that a reviewing court will conclude that the trial court "had the opportunity to rule upon the argument" (*Brandon*, slip op. at 7) and therefore that it was preserved, even if the judge ignores it.

If opposing counsel decline to endorse proposed orders (or drag their feet), then a moving party might justifiably invoke the portion of Rule 1:13 that provides for service of "reasonable notice of the time and place of presenting such drafts [of orders and decrees] ... upon all counsel of record who have not endorsed them," thus *in effect* scheduling a hearing on the motion for reconsideration despite the prohibition in Rule 4:15(d).

At minimum, a party who files a motion for reconsideration should ask the clerk, in a cover letter filing the motion, to present the motion to the judge as soon as possible and note the Rule 1:1 deadline. Sketch orders also should be provided, as noted above. That alone may not satisfy the Court's requirement of a showing "beyond a mere filing in the clerk's office, that the court had an opportunity to rule," however, so it would be

wise also to note in the cover letter that a courtesy copy of the letter and its enclosures are being delivered directly to the judge as well.

There is no assurance at this point that all or any of the above tactics will suffice, in view of the hard line taken by the 6-Justice majority in *Brandon*, but those are at least some of the tactics on the available menu. To reiterate, finally, the real goal in these circumstances is to induce the trial judge to rule, one way or another, on the motion for reconsideration.