THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2019-000502

Jamaine Holman, Victoria Lewis, Melanie Baker, Christopher Shipman, Robert Weaver, Vonetta Wilson, Francesca Worley, Brittany Johnson, Shirley Pearson, Robert Weaver, Gostonia Pearson, Rodney Leachman, Cassandra Pugh, and Krystal Bostinto, on behalf of themselves and all others similarly situated,

Appellants,

v.

South Carolina Education Lottery Commission d/b/a South Carolina Education Lottery, and Intralot, Inc.,

Respondents.

RESPONDENT INTRALOT, INC.'S RETURN TO APPELLANT'S PETITION FOR REHEARING

Respondent Intralot, LLC ("Respondent"), pursuant to Rule 221(a), SCACR, submits this Return to Appellants' Petition for Rehearing. On August 9, 2023, a panel of this Court affirmed the decision of circuit court concluding that Appellants failed to exhaust administrative remedies prior to filing their putative class action suit. Appellants timely filed a petition for rehearing on August 24, 2023, contending that this Court erred in determining that they failed to preserve arguments that the trial court converted the Rule 12(b)(6) motion to a Rule 56 Motion for Summary Judgment by referencing documents outside the pleadings.

Under Rule 221 of the South Carolina Rules of Appellate Procedure, "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Here, the only argument made by Appellants is that this Court erred in concluding that its conversion argument regarding Rule 12(b)(6) and Rule 56 was not preserved.

At the outset, it should be noted that Respondent Intralot is not alleged to have presented extraneous evidence outside of the pleadings. Only Respondent South Carolina Education Lottery ("SCEL") and Appellants are noted to have done so. Nonetheless, this Court correctly found that Appellant's failed to preserve the conversion argument. Specifically, this Court, citing *I'On, L.L.C. v. Town of Mt. Pleasant*, correctly noted 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." *Holman v. S.C. Educ. Lottery Comm'n*, Op. No. 6013 (S.C. Ct. App. filed Aug. 9, 2023) (Howard Adv. Sh. No. 31 at 68) (citing *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). This Court found that Appellants never raised the argument to the circuit court in any response to Respondents' motions to reconsider, alter, or amend. In fact, Appellants filed no response to these motions. Further, Appellants never filed their own Rule 59(e) motion contending circuit court error. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("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 for appellate review."); *see also id*. ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error."); *I'On, L.L.C.*, 338 S.C. at 422, 526 S.E.2d at 724 ("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."); *id*. ("It [also] 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.").

Appellants do not dispute these findings. Rather, they attempt to argue that a passing reference to matters outside the pleadings in the Order Denying Respondent's [SCEL's] Motion to Dismiss, which was ultimately changed by the circuit court following Motions to Alter or Amend Judgment, constitutes preservation of error. Appellant's argument fails for a number of reasons. First, Respondent Intralot presented none of the materials complained of by Appellants in their Motion for Reconsideration. Second, the alleged preservation of error argument by Appellants merely cites a footnote in the Order Denying the Motion to Dismiss stating:

> While this motion is couched as a 12(b)(6) motion to dismiss, both the Plaintiff and the Defendant [SCEL] in their respective memoranda make reference to matters outside of the pleadings on this issue. Defendant [SCEL] refers repeatedly to the SCEL website and Plaintiffs to a New York Times article that quotes SCEL's press release.

(R. 17, fn. 1.) There is no indication that this in any way affected the trial court's decision. This Order that Appellants claim preserves the error does not apply to Respondent Intralot, as the alleged offending language is not in the Order Denying Intralot's Motion to Dismiss. Third, two of the three documents attached to Respondent SCEL's Motion to Alter or Amend, Appellant's grievance letter and Respondent SCEL's response were actually previously raised by Appellant's counsel at the hearing on the Motion to Dismiss. (R. 202.) While arguing dismissal was improper, Appellants never suggested to the Court it was inappropriate to consider the grievance or the response. In fact, Appellants actually argued that the grievance and response demonstrated supported their argument that the administrative process was futile. (R. 202.) Thus, by making that argument, Appellants not only failed to preserve the conversion argument for appeal, they

waived any such arguments based upon the use of those documents in the motion hearing to support their futility argument. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 617, 503 S.E.2d 471, 474 (1998) ("An issue conceded in a lower court may not be argued on appeal.").

Based on the foregoing, Appellants' Petition for Rehearing should be denied.

Respectfully submitted,

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Columbia, South Carolina

September 14, 2023

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PROOF OF SERVICE

I certify that on September 14, 2023, I served Respondent Intralot, Inc.'s Return to Appellants' Petition for Rehearing on Appellants, by emailing a copy of the same to Appellants' attorney of record, Joseph Clay Hopkins, at clay@hopkinsfirm.com, and on Respondent South Carolina Education Lottery Commission, by emailing a copy of the same to Respondent SCEL's attorneys of record, William Stevens Brown, V, and Miles Edward Coleman, at william.brown@nelsonmullins.com and miles.coleman@nelsonmullins.com.

Signature included on the following page

Respectfully submitted,

*/s/ Mario A. Pacella*_____

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