THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY
In the Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2023-001657

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,

Petitioners,

v.

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

Respondents.

Return to Petition for a Writ of Certiorari

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Pursuant to Rule 245(f), Intralot, Inc. submits this return in opposition to the petition for a writ of certiorari. Petitioners now seek review of the court of appeals' decision affirming the dismissal of this case for Petitioners' failure to preserve arguments and exhaust administrative remedies. For the reasons that follow, this Court should deny certiorari. Alternatively, the Court should dispense with further briefing and summarily affirm. *See Jackson v. S.C. Dept' Corr*. 302, S.C. 519, 519, 397 S.E.2d 377, 378 (1990); Rule 220(b)(1), SCACR.

Counterstatement of the Questions Presented

I. Did the court of appeals properly apply well-settled preservation law?

II. Did the court of appeals correctly affirm the trial court's grant of the motions to dismiss when Petitioners failed to exhaust the administrative remedies, as well as failed to state a claim on which relief could be granted against Intralot?

Introduction

This case is a simple one, grounded in our general rules of pleadings, exhaustion of remedies, and preservation. There are no novel questions, federal questions, public interest concerns, or even complex issues. *See* Rule 245, SCACR. Instead, this matter involves the basic concepts that a party must (1) plead claims that relief may be granted, (2) properly raise issues to a lower court, and (3) exhaust administrative remedies before seeking further recourse. The trial court heard Intralot's and Respondent South Carolina Education Lottery Commission's (the Commission) motions to dismiss and properly granted the motions following reconsideration because Petitioners failed to meet the minimum requirements to proceed with their claims. The court of appeals later affirmed the trial court's ruling for two reasons. First, Petitioners raised several issues that were unpreserved for appellate review. Second, the court of appeals found that a plain reading of the South Carolina Education Lottery Act (the Act), along with the corresponding regulations, established an administrative remedy that must be exhausted prior to

seeking further redress. Moreover, Petitioners could not be excused based on a futility exception or their potential status as a putative class. This Court should therefore deny certiorari or summarily affirm.

Facts and Procedural History

On Christmas Day in 2017, there was a computer glitch that spanned for two-hours in which the Commission's Holiday lottery tic-tac-toe game, known as Holiday Cash Add-A-Play, malfunctioned.[1] As part of the glitch, most of the purchasers' tickets were produced or issued in error—displaying a winning ticket with the maximum award. Upon realizing these errors, the Commission issued a press release warning of the problem and asking for no further play to occur while the Commission investigated. The game was suspended. Additional press releases were issued asking for patience as the Commission undertook the investigation process as set forth by statute and regulations.

On February 1, 2018, before a decision was rendered on the investigation, Petitioners filed a class action lawsuit against the Commission and Intralot.[2] (R. 31-40). Petitioners contended they received winning tickets and alleged that "[s]ix months later, [Petitioners] and all other lottery players who played the Holiday Cash Add-A-Play game ha[d] still not received the benefit of their bargain, the winnings promised by [the Commission], in exchange for the purchase of the ticket." (R. 46-47). By way of background, the Commission hired Intralot to provide administrative and technical services.

[1] By way of reference, this game is an add on game that becomes available after a player purchases another game, such as Pick 3, Pick 4, or Palmetto Cash 5. After the purchase of a qualifying game, the player is given the option to purchase an add-on Holiday game for one dollar ($1). A player instantly knows if they have won the game based on whether the Christmas tree appears in a row or diagonally on the grid, and in statistically rare occurrences a player could have a Christmas tree appear in all nine squares.

[2] Petitioners later filed an amended complaint on May 29, 2018.

As to Intralot, Petitioners pled causes of action for unjust enrichment, breach of contract/implied contract, and promissory estoppel.[3] (R. 48-52). These claims mirrored the claims brought against the Commission. Notably, no allegation was pled nor evidence presented that *any Petitioner* exhausted their administrative remedies pursuant to the Act and corresponding regulations. *See*, S.C. Code Ann. § 59-150-230(C) &S.C. Code § 59-150-300; S.C. Reg. 44-70(F).

To initiate the process of exhausting administrative remedies, a ticket purchaser first must file a grievance with the Commission, after which the Commission's executive director is mandated to determine the validity of lottery game ticket and prizes. § 59-150-230(C). Significantly, prizes cannot be paid if they "arise from claimed lottery game tickets that are . . . *produced or issued in error* . . . ." S.C. Code Ann. § 59-150-230(C); *see also,* S.C. Reg. 44-70(E)-(F) (stating the Commission's executive director may deny awarding a prize if the ticket was issued or produced in error). If the ticket purchaser is dissatisfied with executive director's decision, the purchaser may appeal the decision to the Commission's board, and the ticket purchaser may continue to seek review from the Administrative Law Court (ALC) and then the circuit court. S.C. Reg. 44-70(E)-(F) (providing "any lottery game ticket holder aggrieved by an action of the [Commission] board may appeal that decision to the [ALC]"); S.C. Code Ann. § 59-150-230(D). Significantly, no grievance was filed between December 25, 2018, and May 24, 2018, as required by statute and regulation to seek recourse.[4]

In response to the lawsuit, Intralot filed a motion to dismiss, as did the Commission, pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. (R. 61-83; 84-97). Intralot and the Commission argued the case should be dismissed because Petitioners

[3] Initially, Petitioners brought a cause of action for violation of the South Carolina Unfair Trade Practices Act but later withdrew the cause of action at the motions hearing. (R. 18, 195).
[4] Appellants only initiated the grievance process after Respondents filed motions to dismiss.

failed to comply with the statutory requirement of exhausting administrative remedies pursuant to section 59-150-10 of the South Carolina Code. Specifically, Petitioners did not file any grievance prior to filing, and argued they never alleged the tickets were "produced or issued in error." S.C. Code Ann. § 59-150-230(C). Moreover, Petitioners filed a lawsuit prior to the conclusion of the Commission's investigation—making the lawsuit premature.

As to the claims themselves, Intralot argued Petitioners' pleadings failed to state a claim upon which relief could be granted. As to unjust enrichment, Intralot argued the claim failed because the amended complaint failed to allege facts that demonstrate Intralot received payment from Petitioners or that there was any fashion of a contract between Petitioners and the company. As to breach of contract/implied contract, Intralot argued there could be no standing when Petitioners did not allege Intralot was in privity with Petitioners or that Petitioners were third-party beneficiaries. There were simply no allegations that Intralot played any role with the sale of the tickets or the retailers themselves. As to promissory estoppel, Intralot argued there were no allegations that the company made any misrepresentations. Finally, as to negligence, Intralot argued there were no facts that formed the requisite duty owed by Intralot to Petitioners.

Petitioners *only* filed a response to the Commission's motion to dismiss. Petitioners argued ticket purchasers were not required to exhaust administrative remedies because the grievance process was inapplicable. (R.101-02). Specifically, Petitioners asserted they were not subject to the statutory mandate because the tickets were not produced in error.[5]

Significantly, Petitioners' memorandum in opposition did not address *any* of Intralot's arguments. (R. 98-108). The only reference to Intralot was in one sentence on page three of its

[5] Petitioners argued the Commission was not entitled to sovereign immunity as to the causes of action. (R. 18, 204).

memorandum in which Petitioners stated ". . . Holiday Cash Add-A-Play, which was created, tested, managed, and advertised by [the Commission] and Intralot." (R. 100). Thus, Petitioners' *only* arguments pertaining to Intralot are those articulated at the hearing.

At the hearing, Petitioners' counsel argued the Act was not the exclusive remedy for redress, and alternatively it would be futile for Petitioners to exhaust administrative remedies because of the class size.[6] (R. 201-05). In turn, counsel argued Petitioners were third-party beneficiaries of the contract between Intralot and the Commission, and, thus, privity existed for their claims against Intralot. (R. 206). Thereby, implying that if Petitioners did not have to exhaust their remedies with the Commission, they should not have to exhaust their remedies with Intralot. *Id*. ("My clients are the third-party beneficiary of that contract between Intralot and [the Commission]. So as third-party beneficiaries, we believe privity exists, and we can pursue these claims.").

The trial court denied both motions to dismiss on the grounds that exhausting the administrative remedies would have been futile.[7] As to Intralot, the trial court specifically found Petitioners did not have to exhaust administrative remedies that were not statutorily contemplated by the General Assembly. (R.25) (holding "[t]he causes of action against Intralot are tort and implied contract claims, not a statutory violation for which the legislature has provided an administrative remedy"). This finding marked a significant departure and legal distinction from

[6] Intralot joined in the Commission's arguments about exhausting administrative remedies. (R. 193-95) (providing the administrative exhaustion arguments); (R.197) (explaining "[Respondent] Intralot joins in the motion and files its own motion for the failure to exhaust the administrative remedies . . .. I don't intend to restate that argument.").

[7] Notably, the trial court in footnote 1 of the Order dismissing the Commission's motion to dismiss found both Petitioners and the Commission relied on material outside the pleadings. (R.17) ("both [Petitioners] and [the Commission] in their respective memoranda make reference to matters outside of the pleadings on this issue." . . .).

Petitioners' actual argument that Respondents alleged privity allowed Petitioners to bypass exhausting administrative remedies as to Intralot.

Both Intralot and the Commission filed motions for reconsideration. Petitioners did not file a memorandum in opposition to the motions. In seeking reconsideration, the Commission provided the trial court with several materials for context as allowed pursuant to Rule 12(b)(1). This included a letter that informed Petitioners of the Commission's decision following the investigation and provided each purchaser with three options to pursue for relief. (R.175-77). Additionally, the Commission included a letter advising Petitioners that they could seek review of the Commission's decision at the ALC. (R.179-80). For these reasons, the Commission argued that merely having a potential class could not sidestep established procedures to exhaust administrative remedies. In similar fashion, Intralot argued the trial court erred in finding that exhausting administrative remedies would be futile, and that class status supported futility of such an act. (R. 182-89). No hearing was held.

Following Respondents' motions for reconsideration, the trial court reversed its decision and granted the motions to dismiss—finding Petitioners had not exhausted their administrative remedies nor pled why they were excused from exhaustion. Petitioners did not file a motion for reconsideration. Yet, on appeal Petitioners took issue with the trial court's reliance on the materials provided with the motion for reconsideration, along with the corresponding arguments and rulings. The court of appeals affirmed. Petitioners now seek relief through a petition that is nearly an identical copy of its brief to the court of appeals.

Arguments

I. The court of appeals properly applied preservation law in finding Petitioners failed to preserve their arguments pertaining to materials outside the pleadings, the exhaustion of equitable and tort claims, and their mootness argument.

Petitioners adamantly contend they should be allowed to raise errors surrounding Respondents' motions to reconsider and the trial court's reconsideration order granting the motions to dismiss. Yet, Petitioners made no effort to address these now perceived (1) improper filings and (2) erroneous rulings before the trial court. While Petitioners take issue with the trial court's reliance on "new" materials and subsequent rulings, these assertions are simply too late and unpreserved for appellate review. Petitioners were required to assert these alleged errors to the trial court through a motion for reconsideration, and their failure to do so bars their review on appeal.

As discussed in the prior section, the trial court referenced submitted material attached to the Commission's motion for reconsideration for the purpose of stating the basis of the Commission's opinion. In so doing, the trial court gave no weight to the materials nor made findings on the materials. Moreover, the trial court reversed its findings as to the exhaustion of remedies based on Respondents' arguments. The court of appeals upheld these decisions based on well-settled preservation law that required Petitioners to first address these concerns with the lower court.

In claiming error for these decisions, Petitioners direct this Court to generalized preservation law and civil procedure rules to assert the trial court exceeded the bounds of a 12(b) motion. In so doing, Petitioners ignore three key principles of preservation.

First, the trial court must be given an opportunity to consider whether it ruled incorrectly. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails,

convince the appellate court that the lower court erred."); *Id*. ("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."); *S.C. Dept. of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 641 S.E.2d 903 (2007) ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Second, this opportunity requirement flows to a second or subsequent motion for reconsideration. Our appellate courts have continually held a second motion for reconsideration is necessary when the original judgment is altered by the order regarding the first motion for reconsideration. *Robinson v. Robinson*, 365 S.C. 583, 585, 619 S.E.2d 425, 426 (2005); *In re Estate of Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998)(explaining when a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal).

Third, failing to object to the introduction of evidence at the time constitutes waiver of that issue on appeal. *Holroyd v. Requa*, 361 S.C. 43, 60, 603 S.E.2d 417, 426 (Ct. App. 2004) ("Failure to object to the introduction of evidence at the time the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.").

With these well-settled principles in mind, a review of Petitioners' arguments demonstrates they failed to alert the trial court to the errors they now claim, as well as waived any evidentiary argument. While Intralot did not present any of the materials that Petitioners now take issue with (Petitioners' Issues I & II A), Intralot contends most of these materials were previously referenced at the motion to dismiss and in the Commission's memorandum. (R. 102-03, 194, 196, 200, 202, & 208). Regardless, there is no question that Petitioners were required to raise their concerns

about the materials to the trial court and not for the first time on appeal. Yet, Petitioners did not file a memorandum in opposition to the motion to reconsideration objecting to the materials being attached nor did they file a separate motion for reconsideration to alert the trial court of this perceived error. In the absence of Petitioners raising their concerns they have conceded any argument regarding these materials and the procedural posture. *TNS Mills, Inc. v. SC 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.").

As to Petitioners' claims for equitable and tort claims (Petitioners' Issue II B), Petitioners seek to sidestep their preservation problems by arguing they were not required to exhaust administrative remedies against a third-party. This argument was never raised to the trial court. To allow such legal contortion to proceed would absolve Petitioners from having any role or responsibility in this litigation.

For the first time on appeal, Petitioners argued they were not required to exhaust administrative remedies to pursue claims against Intralot.[8] Significantly, Petitioners' counsel *never argued* that Petitioners were *not statutorily required* to exhaust administrative remedies as to Intralot. (Tr. 205-07). In fact, it was quite the opposite.

A plain reading of the hearing transcript demonstrates Petitioners' counsel never asserted this argument. Petitioners' counsel argued that Petitioners were third-party beneficiaries and privity existed for their claims against Intralot. (R. 206). Thereby, implying that if Petitioners did

[8] As previously noted, Petitioners did not file a memorandum in opposition to Intralot's motion to dismiss. They responded only to the Commission's motion to dismiss. In so doing, they made no argument as to the exhaustion for administrative remedies related to equitable claims or tort claim against the Commission. Instead, Petitioners argued that the grievance procedure was inapplicable because they asserted the ticket were not pled to be issued in error. Furthermore, because the Commission later denied claims for ticket refunds Respondents' argument on exhaustion was moot. (R. 102).

not have to exhaust their remedies with the Commission, (R. 201-05), they should not have to exhaust their remedies with Intralot. *Id*. ("My clients are the third-party beneficiary of that contract between Intralot and [the Commission]. So as third-party beneficiaries, we believe privity exists, and we can pursue these claims.").

Petitioners' argument is derived from the trial court's first order in which the trial court made that finding—not an argument asserted by Petitioners. On appeal, the issue must be the same issue that was raised to the trial court. Not only did Petitioners never independently make this argument to the trial court, but Petitioners also failed to file a motion to reconsider to attempt to keep the original order in place. *In re Estate of Timmerman*, 331 S.C. at 455, 502 S.E.2d at 920 (holding that when a party receives an order that grants certain relief *not previously contemplated or presented to the trial court*, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal). By failing to ever raise the issue to the trial court, Petitioners are prohibited from advancing this argument for the first time on appeal.[9] Therefore, this argument is also unpreserved.[10]

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[9] Similarly, Petitioners are also prohibited from asserting their mootness argument (Petitioners' Issue II G) regarding statutory construction in connection with their futility arguments. *See Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997) (explaining a party may not raise an issue for the first time on appeal).

[10] It is worth noting that Petitioners' substantive argument on this issue is also without merit. Petitioners direct this court to *Thomas Sand v. Colonial Pipeline*, for the proposition that they are not required to exhaust administrative remedies against a third-party. 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). While the court of appeals did find that administrative remedies against a third party do not have to be exhausted, Petitioners ignore the sentences preceding that statement. *Id*. at 413, 563 S.E.2d at 115. In *Thomas Sand*, the court of appeals held in determining whether exhaustion of remedies is required turns on who is the appropriate fact finder. *Id*.

The court of appeals noted that if it were addressing the denial of a permit, then exhausting DHEC administrative remedies would be a prerequisite to brining a lawsuit. *Id*. By contrast, if the inquiry was instead whether there was an injury in fact for the purpose of damages caused by expense or delay then administrative exhaustion would not be needed. *Id*. Here, the inquiry is whether a prize should be paid—only once that question is answered may Petitioners get to their

For each of these reasons, the court of appeals should be affirmed. *See generally, B & A Dev., Inc. v. Georgetown County*, 372 S.C. 261, 641 S.E.2d 888 (2007) (explaining issues that are not preserved should not be addressed by the court of appeals).

II. The court of appeals correctly found Petitioners failed to exhaust administrative remedies and were not excused from exhaustion based on an exception or their status as a potential class.

Petitioners further contend the court of appeals erred in finding they were subject to the grievance procedure and thereby required to exhaust administrative remedies. To the contrary, the Act is dispositive of this issue, and the court of appeals' application of this State's well-settled administrative exhaustion policy coupled with a plain reading of the Act was proper. Moreover, Petitioners failed to satisfy their burden for an exhaustion exception to apply.

At the outset, the exhaustion of administrative remedies is both a judicial policy and a discretionary decision. *Capital City Ins. Co v. BP Staff, Inc*., 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009). The basis of such a requirement is grounded in the desire to "prevent premature interference" with an agency's established process. *Video Gaming, Inc. v. S.C. Dep't Revenue*, 342 S.C. 34, 38, 535 S.E.2d 642, 644 (2000). In turn, exhaustion provides an agency the opportunity to address errors while also providing institutional insight and record development for the court and the parties. *Id*. It is well-settled that when an administrative remedy will determine a question of fact, a party must exhaust the administrative remedy first—regardless of whether a statute expressly mandates the exhaustion. *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 583 (1994). A court may only deviate from the established principle of exhaustion if a sound basis exists. *Id*.

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claim that they did not receive a benefit. The paramount determination vests solely with an administrative agency that is subject to review by the ALC.

The Act and its corresponding regulations provide an administrative remedy to determine whether a prize should be paid from a lottery ticket. As discussed *supra*, the Act vests the Commission with the authority to establish a system to verify the validity of lottery tickets or claims to prizes. S.C. Code 59-150-230(C). In so doing, regulations allow the executive director to deny a prize if a ticket was issued or produced in error. SC. Reg.44-70(E)-(F). Section 59-150-300 (A) expressly provides that a ticket purchaser may appeal the executive director's decision to the Commission and if dissatisfied with the Commission's ruling the ticket purchaser may appeal the decision to the ALC. Moreover, that decision may then be appealed to the circuit court and so on. S.C. Code Ann. § 59-150-230(D).

Section 59-150-230(C)(3)(a) provides a litany of reasons that a ticket may not be paid including if it is produced or issued in error. Relying on the exhaustion of administrative remedies principle, the court of appeals found that determining whether a ticket was issued or printed in error is a factual determination to be made through the Commission. The court of appeals noted that this determination is needed regardless of whether a party alleges that a ticket was issued in error or alleges it was not properly paid/a party did not receive the benefit. In reaching this decision, the court of appeals rationally connected that a factual determination will always underly the prohibition of a benefit because of the very nature of the lottery's limited scope. This holding aligns with precedent like *Thomas Sands*, as discussed in footnote 10.

Moreover, the court of appeals correctly concluded this circumstance did not rise to a futility exception nor would filing a grievance with the Commission be a futile act because class actions are not allowed in the ALC. Turning first to the exception, Petitioners, at best, argue the exception applied because the Commission's decision would likely be unfavorable, filing a grievance would be futile, and the administrative remedies would be inadequate. This cursory

assertion is a far cry from demonstrating that the Commission's or the ALC's rulings would be an adverse ruling. The court of appeals properly found that Petitioners failed to satisfy the burden of demonstrating that the Commission had taken "'a hard and fast position that makes an adverse ruling certainty.'" *Brown v. James*, 389 S.C. 41, 54, 697 S.E.2d 604, 611 (Ct. App. 2010) (quoting *Law v. SC. Dep't of Corr*., 368 S.C. 424 438, 629 S.E.2d 642, 650 (2006)). The mere fact that there was an initial denial of a grievance cannot satisfy a burden when arguments and evidence demonstrate the Commission was not finished with its investigation and that the Commission was continuing to work through the process of next steps.

As to the argument that exhausting administrative remedies would be a futile act because Petitioners are attempting to be a class, the court of appeals correctly rejected such a contention on the grounds that other members of classes have been required to exhaust administrative remedies. *See Brackenbrook North Charleston, LP v. County of Charleston*, 360 S.C. 390, 602 S.E.2d 39 (2004). To allow otherwise, would be nonsensical. For these reasons, the court of appeals should be affirmed.

Conclusion

For these reasons, Petitioners' request should be denied.

Signature page to follow

Respectfully submitted,

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