THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Court of Common Pleas

R. Keith Kelly, Circuit Court Judge

Case No. 2021-CP-26-05377
Appellate Case No. 2023-000969

Terence Sullivan,

Appellant,

v.

Ocean 22 Vacation Owners' Association, Inc.,

Respondent.

FINAL BRIEF OF RESPONDENT

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A. Has Mr. Sullivan met his burden to demonstrate reversible error by the circuit court with respect to its finding that the Association is Mr. Sullivan's statutory employer?

B. Has Mr. Sullivan met his burden to demonstrate reversible error by the circuit court with respect to its finding that, as Mr. Sullivan's statutory employer, the Association is immune from tort liability to Mr. Sullivan?

STATEMENT OF THE CASE

The Association is the owners association for a Hilton[4] branded timeshare resort in Myrtle Beach known as Ocean 22 (the "Project"). (*See* R. pp. 69–70 ¶¶ 2–7.) The timeshare structure of the Project is formalized in the recorded Declaration of Covenants, Conditions and Restrictions and Vacation Ownership Instrument for Ocean 22 Vacation Suits (the "Declaration"). (R. p. 69 ¶ 6; *see also* R. pp. 72–217.)

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[1] The "Association" refers to Defendant/Respondent, Ocean 22 Vacation Owners' Association, Inc.

[2] "Mr. Sullivan" refers to Plaintiff/Appellant, Terence Sullivan.

[3] S.C. Code Ann. §§ 42-1-10 et seq.

[4] "Hilton" refers to Hilton Grand Vacations, Inc.

The Association has no direct employees. (R. p. 70 ¶ 8.) In accordance with the Declaration, the Association's duties and obligations are delegated to and carried out by a manager, namely, Hilton, pursuant to a written Timeshare Management Agreement (the "Management Agreement"). (*See* R. p. 70 ¶¶ 7–10; *see also* R. pp. 218–243.)[5]

[5] Technically, the Management Agreement is between the Association and Hilton Grand Vacations, Inc.'s wholly owned subsidiary Hilton Grand Vacations Management, LLC; however, for present purposes, the distinction between Hilton Grand Vacations, Inc., and Hilton Grand Vacations Management, LLC, is immaterial, because, as the circuit court correctly recognized (*see* R. p. 3 n.1; R. p. 11 n.2), and Mr. Sullivan does not dispute (*see* R. pp. 244–251 (not challenging the circuit court in this regard); Br. of Appellant pp. 1–7 (not challenging the circuit court in this regard)), Hilton Grand Vacations, Inc., and Hilton Grand Vacations Management, LLC, are properly considered a single employer for workers' compensation purposes. *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 405 S.C. 359, 374, 747 S.E.2d 757, 765 (2013) ("A holding company and its wholly owned subsidiary will be considered a single employer for workers' compensation purposes if the two corporations are so integrated and commingled that neither can be realistically viewed as a separate economic entity.") (quoting 1 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* § 43.80 (Supp. 2012)); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) ("'There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.'") (quoting Jean Hoefer Toal et al., *Appellate Practice in South Carolina* 57 (2d ed. 2002); *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993) (if an issue is not argued in the brief, it is deemed abandoned); *id.* at n.3 ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief."). Accordingly, the reference "Hilton" is sufficient to cover both Hilton Grand Vacations, Inc., and Hilton Grand Vacations Management, LLC.

Under the terms of the Management Agreement, Hilton "manage[s] and operate[s] the Project in accordance with the same practices and standards utilized in the management of other Hilton Grand Vacation Club projects;"[6] "maintain[s] and repair[s] the Project to a first class resort standard;"[7] and "employ[s], compensate[s] and supervise[s] all persons necessary to manage, maintain, administer and operate the Project." (R. p. 71 ¶ 12.)

Hilton employed Mr. Sullivan to serve as a bellperson at the Project. (R. p. 71 ¶ 14.) The role of bellperson required Mr. Sullivan to assist owners and guests with transporting and/or securing their luggage; to provide instructions regarding the amenities of the room and property services and activities offered; and to deliver messages, express checkout folios, newspapers, and other requested items to the owners and guests. (R. p. 71 ¶ 16.) The performance of this role was an important part of meeting Hilton's obligations under the Management Agreement and a necessary, essential, and integral part of the operation of the Project on behalf of the Association. (R. p. 70 ¶ 17.)

Mr. Sullivan filed this personal injury lawsuit against the Association on August 16, 2021, in the Horry County Court of Common Pleas. (R. pp. 23–30.) It arises out of a work-related accident on August 9, 2019 (the "Underlying

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6 (R. p. 70 ¶ 11.)

7 (R. p. 71 ¶ 11.)

Accident"),[8] for which Mr. Sullivan had already sought and received workers' compensation benefits through Hilton prior to filing suit. (R. p. 71 ¶ 18.)[9] In his complaint, Mr. Sullivan describes the Underlying Accident as follows: "On August 9, 2019, [Mr. Sullivan] was working at the Ocean 22 resort owned by [the Association] as an employee for [Hilton]. While walking along a paved sidewalk on the property [Mr. Sullivan] slipped and fell after stepping in a low spot on the sidewalk in which a small amount of water had pooled and very slick algae/mold had also formed." (R. p. 26 ¶ 5.)

On October 15, 2021, the Association timely responded to the lawsuit with a motion to dismiss (the "Association's Motion to Dismiss"), arguing that it was immune from tort liability to Mr. Sullivan as his statutory employer. (R. pp. 50–243.) Following a hearing on February 14, 2022, the trial court, the Honorable R. Keith Kelly presiding, granted the Association's Motion to Dismiss by order filed September 2, 2022 (the "Order of Dismissal"). On September 12, 2022, Mr. Sullivan moved the trial court to reconsider, alter, or amend the Order of Dismissal,[10] which motion the trial court denied by order filed May 17, 2023. (R. pp. 10–22.)

This appeal follows.

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[8] (R. p. 26 ¶ 5.)

[9] To be clear, Mr. Sullivan's workers' compensation claim has been fully resolved. (R. p. 71 ¶ 18.; *see also* R. p. 62–68.)

[10] (R. pp. 244–251.)

STANDARD OF REVIEW

In his brief, Mr. Sullivan states that the standard of review in this appeal is the summary judgment standard. (Br. of Appellant p. 2.) Respectfully, he is mistaken. As explained above, this appeal challenges the circuit court's dismissal of Mr. Sullivan's case on the basis that the Association is immune from tort liability to Mr. Sullivan as Mr. Sullivan's statutory employer. "The determination of whether a worker is a statutory employee is jurisdictional and therefore the question on appeal is one of law." *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999). "As a result, th[e] [appellate court] has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence." *Id.*; *see also First Citizens Bank & Trust Co., Inc. v. Taylor*, 431 S.C. 149, 847 S.E.2d 249 (Ct. App. 2020) (instructing that the interpretation of a statute is a question of law that the appellate court reviews without deference to the lower court). "Any doubts as to a worker's status should be resolved in favor of including him or her under the Worker's Compensation Act." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 218–19, 661 S.E.2d 395, 400 (Ct. App. 2008).

ARGUMENT

I. Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court in dismissing this case on the basis that the Association was immune from tort liability to Mr. Sullivan as Mr. Sullivan's statutory employer under the South Carolina Workers' Compensation Law.

Appealed orders come to the appellate court with a presumption of correctness, and the burden is on the appellant to demonstrate reversible error. *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2sd 695, 701 (Ct. App. 2008). And to succeed, the appellant's demonstration of reversible error must be based on issues/arguments that are properly preserved and presented to the appellate court for review. *See Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322, 323 (2001) (recognizing that preserving issues for appellate review is a fundamental component of appellate practice, as South Carolina appellate courts do not recognize the plain error rule); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004) (noting that South Carolina's preservation requirements are "mandatory"); *id.* at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *id.* at 24, 602 S.E.2d at 780 ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e)[, SCRCP,] motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an

argument or issue, and the party wishes for the court to reconsider or rule on it. 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.") (emphasis in original). Here, Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court in dismissing this case on the basis that the Association was immune from tort liability to Mr. Sullivan as Mr. Sullivan's statutory employer under the South Carolina Workers' Compensation Law.

A. Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court with respect to its finding that the Association is Mr. Sullivan's statutory employer.

As the circuit court correctly explained, "In assessing whether the Association qualifies as [Mr. Sullivan's] statutory employer for the purposes of workers' compensation exclusivity, the court must make two (2) determinations: First, the Association must qualify as a business under the Act. Second, the work contracted out to [Mr. Sullivan's] employer, [Hilton], must have constituted part of the Association's 'trade, business, or occupation.'" (R. pp. 5–6 (citing *Harrell*, 337 S.C. at 321, 523 S.E.2d at 770).) The circuit court then correctly determined (1) that the Association qualifies as a business under the Act and (2) that the work in which Mr. Sullivan was engaged at the time of the Underlying Accident was an important part of the Association's trade, business, or occupation. (R. pp. 6–7.)

Mr. Sullivan does not even dispute the circuit court's first determination, i.e., its determination that the Association qualifies as a business under the Act. (*See* Br. of Appellant.) And Mr. Sullivan's dispute of the circuit court's second determination, i.e., its determination that the work in which he was engaged at the time of the Underlying Accident was an important part of the Association's trade, business, or occupation, is based on an erroneous (i.e., nonexistent) distinction he attempts to draw between the business of the Association and that of his direct employer, Hilton. According to Mr. Sullivan, Hilton's business is the "resort business,"[11] or "resort operation business;"[12] the Association's business is the "timeshare ownership and vacation suite ownership business;"[13] and the "resort business – for which Hilton was hired to manage – is wholly separate and distinct from the ownership of timeshares." (*Id.*; *see generally id.* at pp. 4–5.)

As an initial matter, in denying Mr. Sullivan's motion to reconsider, alter, or amend the Order of Dismissal, the circuit court ruled that Mr. Sullivan had not properly raised this argument prior to his motion to reconsider, alter, or amend, and accordingly, he could no longer raise it. (R. pp. 14-15.)[14] Having not challenged this

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[11] (Br. of Appellant p. 4.)

[12] (*Id.* at p. 5.)

[13] (*Id.* at p. 4.)

[14] In so ruling, the circuit court cited the following authorities: *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) ("[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not.") (citing

ruling in his principal brief,[15] Mr. Sullivan has abandoned any potential challenge to it,[16] which means it is an unappealed ruling and, thus, the law of the case. *Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the case."). And because it is an independent basis for affirmance of the circuit court's finding that the Association is Mr. Sullivan's statutory employer, affirmance of the circuit court's finding that the Association is Mr. Sullivan's statutory employer is required by the two issue rule. *Id.* at 328, 730 S.E.2d at 284 ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.'") (quoting *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010), abrogated on other grounds by *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018)).

Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)); *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482 (same) (citing *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F. Supp. 698, 701 (D.D.C. 1989), *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F. Supp. 1091, 1118 (N.D. Ind. 1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D. Va. 1984) ("I do not conceive of Fed. R. Civ. P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment."). (R. pp. 14–15.)

[15] (*See* Br. of Appellant.)

[16] *Fields*, 312 S.C. at 106, 439 S.E.2d at 285 (if an issue is not argued in the brief, it is deemed abandoned); *id.* at n.3 ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief.").

In any event, however, the circuit court correctly rejected Mr. Sullivan's argument on the merits, as Mr. Sullivan is plainly mistaken in claiming that the "resort business" is separate from the Association's business.

In support of this argument, Mr. Sullivan quotes the following language from the Declaration:

> Management of the Hotel Interests shall be independent of the management of the other Vacation Ownership Interests to the greatest extent practically and economically feasible, provided, however, this requirement does not contemplate any prohibition or restriction on the use of personnel hired to regularly furnish materials and services for the Hotel Interests in the Project and to furnish the same or similar services to the other Vacation Ownership Interests. Such use of common personnel shall not imply that the Hotel Interests and Vacation Ownership Interests are under common management.

(Br. of Appellant p. 4 (quoting R. pp. 86-87 § 6.1) (emphasis added by Mr. Sullivan omitted).)[17]

It is clear from Mr. Sullivan's reliance on the above-quoted language that he misunderstands the Declaration and, as a result, labors under the erroneous belief that the "resort" is only the "Hotel Interests" in the "Project," with the "Vacation

[17] The Association would note that, in the Declaration, the language that Mr. Sullivan quotes is immediately preceded by the following language explaining what is meant by "Hotel Interests:" "Declarant shall have the right to use and operate the Vacation Support Areas and Vacation Ownership Interests it owns as a hotel available to the public for nightly occupancy ('Hotel Interests')." (R. pp. 86–87 § 6.1.)

Ownership Interests" in the "Project" being somehow separate from the "resort." What Mr. Sullivan fails to understand is that the "Project" is the "resort" and the "resort" is the "Project." In other words, the "Project" and the "resort" are one and the same, and just as the "Vacation Ownership Interests" *in* the "Project" are, obviously, a part of the "Project," so, too, are they a part of the "resort." (*See* R. p. 82 § 2.56 (defining the "Project" as all real property and improvements thereon submitted to the terms of the Declaration and the South Carolina Timeshare Act); R. p. 83 § 4.1 ("Declarant hereby submits the Project, including but not limited to, the property, the buildings and all other improvements associated with the Project to the provisions of this Declaration and the Timeshare Act creating a Timeshare Plan. All of said Project is and shall be held, conveyed, hypothecated, encumbered, leased, subleased, rented, used and improved as a vacation ownership (timeshare) undivided interest project."); R. p. 82 § 2.53 (defining "Owner" as "[a]ny person or entity . . . owning an Ownership Interest within the Project."); R. p. 82 § 2.54 (defining "Ownership Interest" as "[a] Vacation Ownership Interest."); R. p. 82 § 2.68 (defining "Vacation Ownership Interest or Ownership Interest" as "[a]n undivided interest in a Phase of the Project together with (i) a membership in the Club, (ii) membership in the Association, and (iii) a recurring right (either annually or biennially) to occupy and use, on an exclusive basis as described hereinafter, a Suite in the Project in accordance with, and subject to, the terms of this Declaration and the

Project Documents."); R. p. 78 § 2.14 (defining "Club Member" as "[a]n Owner at the Project and/or an Affiliated Resort . . . ."); R. p. 80 § 2.37 (defining "Home Resort" as "[t]he Affiliated Resort at which a Club Member owns an ownership interest."); *see also* R. P. 69 ¶ 3 ("[Hilton] is a publically traded corporation which develops, manages, markets, and operates timeshare and vacation club ownership *resorts* whereby the [Hilton] properties are jointly owned by individual purchasers giving them use of the club properties for limited periods of time.") (emphasis added); R. p. 70 ¶ 10 ("[T]he Association entered into a management agreement with [Hilton] on October 25, 2013."); R. p. 70 ¶ 11 ("Under the terms of the management agreement, [Hilton] would 'manage and operate the Project in accordance with the same practices and standards utilized in the management of other Hilton Grand Vacation Club projects' and 'maintain and repair the Project to a first class *resort* standard.'") (emphasis added).)

As the circuit court duly recognized in the Order of Dismissal, "[t]he operation of the [Hilton] *Resort*, on behalf of the time-share owners, is the Association's sole business, and the work being performed by [Hilton, i.e., Mr. Sullivan's direct employer] was essential to its operation:"

> Here, the business of the Association is governed by the Declarations and is performed in its entirety by [Mr. Sullivan's] direct employer. The Association hired [Mr. Sullivan's direct employer] to manage, operate, and administer the [Hilton] *Resort*. The Association instructed [Mr. Sullivan's direct employer] to hire and

> employ all employees necessary for the operation of the [Hilton] *Resort* and empowered it to perform all necessary duties. The operation of the [Hilton] *Resort*, on behalf of the time-share owners, is the Association's sole business, and the work being performed by [Mr. Sullivan's direct employer] was essential to its operation. [Mr. Sullivan's direct employer] acts in every respect on behalf of the Association, employing [Mr. Sullivan] to perform certain duties essential to the operation of the [Hilton] *Resort*. Therefore, the Association is the [Mr. Sullivan's] statutory employer. Furthermore, as pointed out by authorities cited by the Association, the South Carolina Workers' Compensation Commission has held that *resort* subcontractors' work constitutes part of the *resort* operator's trade, business or occupation.

(R. p. 6 (emphasis added).)

Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court with respect to its finding that the Association is Mr. Sullivan's statutory employer.

B. Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court with respect to its finding that, as Mr. Sullivan's statutory employer, the Association is immune from tort liability to Mr. Sullivan.

Mr. Sullivan argues to this Court that "[t]he trial court erred in holding *Harrell* controlled and ignoring the Supreme Court's precedent in *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, which requires statutory employers to procure worker's compensation insurance." (Br. of Appellant p. 5 (bold print in original omitted).

Before the circuit court, however, Mr. Sullivan's counsel expressly argued that *Harrell* (incorrectly referred to in the transcript as "Harold") applied,[18] and accordingly, Mr. Sullivan cannot now argue to the contrary. *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."). Moreover, having only argued *Harrell* to the circuit court, Mr. Sullivan never argued *Poch* to the circuit court, and accordingly, he cannot now argue that the circuit court erred by ignoring *Poch*. *Elam*, 361 S.C. at 23, 602 S.E.2d at 779–80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court."); *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006). ("[A] party may not complain on appeal of error or object to a trial procedure which his own conduct has induced.").

In any event, however, the circuit court correctly rejected the argument that Mr. Sullivan made below on the merits. Pointing to "South Carolina precedent that ha[s] consistently interpreted statutory employer liability as providing 'double protection' for employees,"[19] Mr. Sullivan argued that, even if the Association was correctly found to be his statutory employer, to avail itself of immunity from tort liability a statutory employer had to secure the payment of workers' compensation. The circuit

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[18] (R. p. 45:19–46:17.)

[19] (R. p. 250; *see also* R. p. 45:19–46:17 (relying on what was transcribed as "Harold," i.e., *Harrell*).)

court correctly determined that Mr. Sullivan's argument did not account for—and was undermined by—the legislature's enactment and subsequent amendment of S.C. Code Ann. § 42-1-415, as explained as follows in *Harrell's* progeny, *Glover v. U.S.*:

> *[P]rior to the enactment and amendment of S.C. Code § 42-1-415 (Supp.1998)*, the fact that the immediate employer had properly secured the payment of compensation did not remove the statutory employer's obligation under the Act. As observed by this Court in *Harrell*, *the Act imposed a scheme where the owner and the immediate employer were subjected to the requirements of the Act, and the employees received "double protection." See Long v. Atlantic Homes*, 311 S.C. 237, 428 S.E.2d 711 (1993); *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 267 S.E.2d 524 (1980).
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> Finally, we noted in *Harrell* that our conclusion on this point was supported by the enactment and subsequent amendment of S.C. Code Ann. § 42–1–415 (Supp.1998). *Under section 42-1-415, as amended, a statutory employer no longer needs to secure the payment of compensation to avail itself of tort immunity under the Act, if the requirements of section 42-1-415 are met*.

337 S.C. 307, 311, 523 S.E.2d 763, 764–65 (1999) (emphasis added); *see also Harrell*, 337 S.C. at 330, 523 S.E.2d at 775 (explaining that, "[t]he result [of § 42-1-415(A) and (D)] is that *a statutory employer need not secure the payment of compensation to avail itself of tort immunity under the Act, if the requirements of section 42–1–415 are met*") (emphasis added).[20] [21]

[20] To be clear, the result in both *Harrell* and *Glover* (that the statutory employer did have to secure payment of workers' compensation in order to claim tort immunity) was driven by the fact that the cases were decided under the law

And as for whether the requirements of § 42-1-415 are met here, the circuit court ruled that Mr. Sullivan had waived any argument that they were not. (R. p. 19.) And here again, having not challenged this ruling in his principal brief,[22] Mr. Sullivan has abandoned any potential challenge to it,[23] which means it is an unappealed ruling and, thus, the law of the case. *Atl. Coast Builders*, 398 S.C. at 329, 730 S.E.2d at 285 ("[A]n unappealed ruling, right or wrong, is the law of the

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that applied prior to passage of § 42-1-415 and its 1997 amendment. *Glover*, 337 S.C. at 311, 523 S.E.2d at 765 ("As in *Harrell*, the important implication for this case is that *prior to the passage of section 42–1–415 and its 1997 amendment*, a statutory employer, in order to claim tort immunity under the Act, *was* required to secure the payment of compensation as prescribed by section 42–5–20. *See Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964) (in adopting an amendment to a statute, the legislature is presumed to have intended to make some change in existing law).") (emphasis added).

[21] Regarding Mr. Sullivan's citation to *Poch* for the proposition that "section 42-1-415 . . . 'applies only in cases involving reimbursement from the Uninsured Employer's Fund . . ." (Br. of Appellant pp. 6–7), besides the fact that, as explained above, Mr. Sullivan never made such an argument to the circuit court, the *Poch* Court did not refer to the whole of § 42-1-415 as applying only in cases involving reimbursement from the Uninsured Employer's Fund but rather specifically to subsection (B) of § 42-1-415. *Poch*, 405 S.C. at 379, 747 S.E.2d at 768 ("[W]e find Petitioners' reliance on section *42-1-415(B)* misplaced as that provision applies only in cases involving reimbursement from the Uninsured Employer's Fund . . . .") (emphasis added). The subsections of § 42-1-415 on which *Harrell* and, in turn, *Glover* rely are (A), which is not limited to cases involving reimbursement from the Uninsured Employer's Fund and expressly applies "[n]otwithstanding any other provision of law" to "relieve[] [the statutory employer] of any and all *liability under this title* except as specifically provided in this section" (emphasis added) and (D), which expressly provides that "nothing in this section shall be construed to abrogate the immunity to tort liability of any" statutory employer.

[22] (*See* Br. of Appellant.)

[23] *Fields*, 312 S.C. at 106, 439 S.E.2d at 285 (if an issue is not argued in the brief, it is deemed abandoned); *id.* at n.3 ("[A]n appellant may not use the reply brief to argue issues not argued in his brief in chief.").

case."). And because it is an independent basis for affirmance of the circuit court's finding that the requirements of § 42-1-415 are met here, affirmance of the circuit court's finding that the requirements of § 42-1-415 are met here is required by the two issue rule. *Id.* at 328, 730 S.E.2d at 284 ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become law of the case.'") (quoting *Jones*, 387 S.C. at 346, 692 S.E.2d at 903, abrogated on other grounds by *Repko*, 424 S.C. 494, 818 S.E.2d 743).

In any event, however, the circuit court correctly found that the requirements of § 42-1-415 are met here. In pertinent part, § 42-1-415(A) provides as follows:

> Notwithstanding any other provision of law, upon the submission of *documentation* to the commission *that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work*, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section.

(emphasis added).

The "documentation" referenced in § 42-1-415(A), i.e., "documentation . . . that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform

work," is present here in the form of the Management Agreement, which, in pertinent part, provides as follows:

> 4. Powers and Duties of Management Firm; Services.
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> ***
>
> (a) Employment of Personnel. [Hilton] shall employ, compensate and supervise all persons necessary to manage, maintain, administer and operate the Project. Such persons shall be employees of [Hilton] and not of the Association. All matters pertaining to employment, interviewing and screening process, supervision, compensation, promotion, and discharge of employees of [Hilton] are the responsibility of [Hilton].
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> ***
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> (d) Compliance with Laws. [Hilton] shall take such actions as may be necessary to operate and manage the Project in compliance in all material respects with all applicable federal, state and local laws, statutes, ordinances, orders, rules, regulations and other requirements including, but not limited to any requirements of the Timeshare Act (as defined in the Declaration).
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(R. pp. 222–223.)

The Management Agreement thus makes clear that Hilton is responsible for "employ[ing], compensate[ing] and supervis[ing] all persons necessary to manage, maintain, administer and operate the Project;" that Hilton is responsible for "[a]ll matters pertaining to employment, interviewing and screening process, supervision,

compensation, promotion, and discharge of [such] employees," which necessarily includes securing required workers' compensation insurance; and, further, that Hilton expressly recognized and agreed that, in carrying out its responsibilities under the Management Agreement, it must comply with all applicable laws, which necessarily includes complying with the insurance requirements of the Act. And, of course, Hilton did in fact comply with the insurance requirements of the Act, as undeniably shown by the workers' compensation settlement reached between Mr. Sullivan and Hilton and its workers' compensation insurance carrier, Starr Indemnity & Liability Company. (*See* R. pp. 62–68.)

Mr. Sullivan has not met his burden to demonstrate reversible error by the circuit court with respect to its finding that, as Mr. Sullivan's statutory employer, the Association is immune from tort liability to Mr. Sullivan.

CONCLUSION

For the foregoing reasons, the Association asks this Honorable Court to affirm the circuit court's dismissal of this case.

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Respectfully submitted,

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