

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2011-UP-519 (S.C. Ct. App. Filed November 29, 2011)

Stevens & Wilkinson of South Carolina, Inc. Respondent

vs.

City of Columbia, South Carolina.....Petitioner.

BRIEF OF THE RESPONDENT

RECEIVED

SEP 03 2013

S.C. Supreme Court

Richard A. Harpootlian
Graham L. Newman
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR RESPONDENT

September 3, 2013
Columbia, South Carolina

TABLE OF CONTENTS

Table of Authorities ii

Issues on Appeal.....1

Counterstatement of the Case2

Statement of Facts5

Argument7

 I. The trial court properly limited its ruling to the relief requested in the
 pending motion 8

 II. The trial court properly declined to address the Petitioner’s new argument
 contained within a Rule 59(e) motion 10

 III. Rule 56(d), SCRCP does not provide a basis for *sua sponte* summary
 adjudication, particularly in the presence of disputed facts 10

Conclusion 12

TABLE OF AUTHORITIES

South Carolina Cases

<u>Camp v. Camp</u> , 386 S.C. 571, 689 S.E.2d 634 (2010)	10
<u>Coogler v. California Ins. Co. of San Francisco, Cal.</u> , 192 S.C. 54, 5 S.E.2d 459 (1939)	8
<u>Cooper River Timber Co. v. Cone</u> , 181 S.C. 288, 187 S.E. 341 (1936)	9
<u>DeWalt v. Kinard</u> , 19 S.C. 286 (1886)	9
<u>Dixon v. Dixon</u> , 362 S.C. 388, 608 S.E.2d 849 (2005)	10
<u>Garrett v. Snedigar</u> , 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987)	11
<u>Hickman v. Hickman</u> , 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)	10

Statutes and Rules

Rule 7, SCRCF	9, 10
Rule 56, SCRCF	<u>passim</u>
Rule 59, SCRCF	10

Secondary Sources

J. Flanagan, <u>South Carolina Civil Procedure</u> at 470 (3d ed. 2010)	12
---	----

ISSUES ON APPEAL

- I. **The trial court properly limited its ruling to the relief requested in the pending motion**
- II. **The trial court properly declined to address the Petitioner's new argument contained within a Rule 59(e) motion**
- III. **Rule 56(d), SCRCP does not provide a basis for *sua sponte* summary adjudication, particularly in the presence of disputed facts**

COUNTERSTATEMENT OF THE CASE

This action commenced on July 12, 2005 in the Richland County Court of Common Pleas. Within the original complaint, Respondent Stevens & Wilkinson alleged claims of breach of contract, quantum meruit, and breach of duty of good faith and fair dealing. Respondent amended its complaint on November 14, 2005 to add a claim of estoppel. (R. p. 13)

On February 20, 2009, Stevens & Wilkinson moved for partial summary judgment, seeking the following finding:

Stevens & Wilkinson and the City of Columbia created a contractual agreement—separate and apart from the Memorandum of Understanding—in July of 2003 for the performance of and payment for architectural and design services.

(R. p. 21) Before the trial court, the Petitioner—the City of Columbia—opposed this motion on two specific grounds.

Stevens & Wilkinson cannot assert that the City's agreement to pay the interim architectural design fees created another agreement separate and apart from the MOU because this payment (1) was merely an advance on payments that were anticipated following the bond closing and (2) was made pursuant to an agreement with Turner Construction, if anyone.

(R. p. 29) The parties argued the motion before Judge L. Casey Manning on March 10, 2009. (R. p. 124 – p. 156)

The trial court filed an order granting the Respondent's motion for summary judgment on March 23, 2009. (R. p. 4)

While an issue may remain outstanding as to whether the July 30, 2003 agreement was later modified by the parties,

the existence of a contract between the two parties is not. Stevens & Wilkinson made an affirmative offer of services for compensation to the City of Columbia through its July 21, 2003 letter. The City affirmatively accepted this offer, albeit on seemingly modified terms, via its vote of July 30, 2003. The intent of the parties to enter into a contractual agreement is further confirmed by the \$697,084.79 paid to Stevens & Wilkinson by the City on December 29, 2003. Thus the three tenets of contract have been established: offer, acceptance and valuable consideration.

Whereas the existence of a contract between Stevens & Wilkinson and the City of Columbia as a result of the July 30, 2003 agreement is the only issue now before the Court, the Court hereby grants the Plaintiff's motion for partial summary judgment.

(R. p. 9)

Petitioner, pursuant to Rule 59(e), SCRCP, filed a motion to alter or amend this order on April 1, 2009. (R. p. 98) Petitioner's Rule 59(e) motion did not request that the trial court reconsider its finding of the existence of a contract between the City and Stevens & Wilkinson, but rather requested that the trial court make an affirmative ruling as to the specific terms of that contract and, further, find that the City satisfied those terms.

[U]pon reconsideration, the City would respectfully show that this Court should correct the error of law and determine that the contract formed between Stevens & Wilkinson and the City resulted from Stevens & Wilkinson's acceptance of the City's counter-offer; that this contract's terms are clearly found in the counter-offer evidenced by the City Council's July 30, 2003 vote; and that the contract was fulfilled by the presentment by Stevens & Wilkinson of its December 18, 2003 invoice and its payment by the City.

(R. p. 110) The trial court declined to extend its ruling to these issues upon which Stevens & Wilkinson had not sought relief and which the Petitioner had not raised during the motion for summary judgment. (R. pp. 10 – 11)

The City thereafter filed the instant appeal with the Court of Appeals, arguing two issues of appeal.

- I. The trial court erred as a matter of law in finding that the vote of City Council on July 30, 2003 constituted an acceptance of the offer presented by Stevens & Wilkinson.
- II. The issue of whether, how and on what terms a contract was formed by the July 30, 2003 vote was argued before the trial court and, therefore, was preserved for consideration by that Court on the City's Rule 59(e) Motion and for review by the appellate court.

(R. p. 237) At oral argument, the City conceded a contract had been formed in relation to the July 30, 2003 vote, but requested the Court of Appeals find that the vote constituted an offer—not an acceptance of Stevens & Wilkinson's proposal—that was subsequently accepted by Stevens & Wilkinson via performance. The Court of Appeals agreed.

[T]he parties agreed at oral argument that a contract was formed for at least \$650,000.00. They disagreed as to how the contract was formed and as to its terms. As a result of our finding that the circuit court erred in adopting Stevens & Wilkinson's theory that the contract was formed by the City's July 2003 vote, we are left with the City's theory that the vote was a counteroffer that Stevens & Wilkinson accepted by performance. We find the contract was formed by a counteroffer and subsequently accepted by performance.

(R. p. 280) Thus the Court of Appeals affirmed the trial court's finding of a contract between the parties, but modified the order to hold that "the contract was formed by a

counteroffer (the July 2003 vote) and subsequently accepted by performance.” (R. p. 280)
The Court of Appeals declined to rule whether this contract was later satisfied by the City, finding “the circuit court did not rule on this issue, and thus it is not preserved for review.” (R. p. 280)

The City petitioned for rehearing on three grounds: first, that the Court of Appeals “that the terms of the contract are only the narrow terms identified in the Columbia City Council’s vote of July 30, 2003;” second, that the Court of Appeals “vacate its remand for a jury to determine the terms of the contract based on all surrounding circumstances;” and third, that the Court of Appeals “vacate the portion of its Opinion remanding to the jury the question of whether there was subsequent modification of the contract.” (R. pp. 284-286)

The Court of Appeals denied the petition for rehearing on January 27, 2012. (R. p. 289)

STATEMENT OF FACTS

Plaintiff Stevens & Wilkinson is an architectural firm based primarily in Columbia, South Carolina. On April 17th, 2003, Stevens & Wilkinson entered into an agreement with the City of Columbia and various other parties in the form of a “Memorandum of Understanding” (“MOU”) in which all parties would work to design, fund and construct a publicly-financed hotel in downtown Columbia (the “Hotel Project”). (R. p. 167) However, after nearly a year of watching Stevens & Wilkinson and the other members of the Project Team working on the project, the City approved a privately-financed project on May 28, 2004.

Stevens & Wilkinson served as the chief architect and head of the design team responsible for much of the preliminary planning of the Hotel Project. The preliminary

planning was geared towards the completion of a hotel design that was sufficient to formulate a “guaranteed maximum price.” Once the preliminary designing was complete, this “guaranteed maximum price” would be utilized by the City to obtain municipal bond financing sufficient to cover the final cost of the Hotel Project.

On June 26, 2003, John Lumpkin—who served as the Development Team’s liaison with the City—penned a letter on behalf of Stevens & Wilkinson to Assistant City Manager Steven Gantt notifying the City that the design team had completed the preliminary planning necessary to reach a “guaranteed maximum price” as envisioned by the MOU. (R. p. 190) As a result, Stevens & Wilkinson announced their intention to “put our pencils down” until the bond financing of the Hotel Project was finalized.

As an alternative to this delay, Stevens & Wilkinson offered to continue the design team’s work on finalizing the Hotel Project plans in exchange for a promise of payment.

The issue/opportunity presented under this scenario relates to the time period between obtaining the GMP and bond closing (approximately 90 days). Provided the architectural team continues its work during this ninety (90) day period, (which work is not required for bond closing), it would enable the contractor to commence its work ninety (90) days earlier, thereby directly affecting the timeframe of the Hotel opening. In order for this to happen, the architectural team would need assurance that it would receive payment for its work performed during this particular time frame.

I enclose an estimate of the fees, which would be incurred during this 90-day period, and a weekly estimate of the fees after that, should the bond closing be delayed beyond the week of October 13, 2003. Please advise.

(R. p. 190) Stevens & Wilkinson submitted two different estimates. The first totaled \$450,000 and \$60,000 per week after October 13th and was limited to Stevens & Wilkinson's individual expenses. (R. p. 191) The second estimate totaled \$650,000 through October 13, 2003 and \$75,000 per week thereafter and included additional expenses Stevens & Wilkinson would be required to pay subcontractors. (R. p. 192). On July 30, 2003, the City responded to this offer by approving an allocation of \$650,000 to Stevens & Wilkinson "for Interim architectural design services for a period of 90 days prior to Bond Closing." (R. p. 194)

Bond closing did not proceed as scheduled on October 13th, but Stevens & Wilkinson continued to work in conjunction with the City. On December 18, 2003, Stevens & Wilkinson submitted an invoice to the City for \$697,084.79 for services rendered through December 15th. (R. p. 198) The City released a check to Stevens & Wilkinson on December 29, 2003 in the amount of \$697,084.79 (R. p. 199).

Subsequent to this initial payment, Stevens & Wilkinson continued to work closely with the City to prepare a final set of architectural drawings for the proposed hotel. On April 2, 2004, however, the City issued a Request for Proposals for a privately-financed hotel, essentially cancelling the hotel project envisioned within the April 2003 MOU. (R. p. 222). Stevens & Wilkinson received no further compensation for its work performed subsequent to the July 30, 2003 approval of "Interim architectural fees." This litigation ensued.

ARGUMENT

This appeal pertains to one motion: Stevens & Wilkinson's motion for partial summary judgment seeking to establish that a contract existed between it and the

Petitioner as a result of the City's July 2003 vote. The trial court granted that motion. The Petitioner does not dispute that its July 2003 vote and Stevens & Wilkinson's subsequent performance formed a contract. Rather the Petitioner alleges the trial court and the Court of Appeals erred in failing to extend its ruling beyond the relief sought by Stevens & Wilkinson: adjudicating that that this contract was not breached.

The City's appeal fails for three reasons: first, the relief requested by the moving party (Stevens & Wilkinson) was limited to the existence of a contract as a result of the July 2003 City Council vote, thus the trial court properly limited its analysis to this question; second, Petitioner did not request the trial court extend its ruling to other matters until it moved for reconsideration, thus even if the trial court had the power to do so this issue is not preserved for review; and third, even if the City's argument is preserved, Rule 59(d), SCRCP does not empower the trial court to *sua sponte* issue summary judgment, particularly when genuine issues of material fact exist.

I. The trial court properly limited its ruling to the relief requested in the pending motion

In response to Stevens & Wilkinson's motion for partial summary judgment on the existence of a contract, the Petitioner did not file a cross-motion for summary judgment seeking the adjudication of that contract's satisfaction or breach. Rather the Petitioner opposed the motion by arguing that no contract was ever formed. (R. p. 29) Despite this fact, Petitioner argues the trial court erred in failing to find that the contract at issue was not breached. However, "[t]he general rule undoubtedly is that the moving party should be confined to the relief asked for in his motion or specified in the notice thereof, or at most to relief necessarily incident thereto." Coogler v. California Ins. Co. of San Francisco, Cal., 192 S.C. 54, ___, 5 S.E.2d 459, 460 (1939). As a result, the trial court

was correct in limiting its holding to the motion presented by Stevens & Wilkinson and the Court of Appeals correctly affirmed this ruling.

The policy of limiting the scope of an order to the relief requested is deeply rooted in South Carolina jurisprudence. See, e.g., Cooper River Timber Co. v. Cone, 181 S.C. 288, ___, 187 S.E. 341, 343 (1936) (“[T]he court, as a general rule, when a motion is made preliminary to the hearing of a case upon the merits, may not grant relief beyond the limits or scope of the notice of the motion...”), DeWalt v. Kinard, 19 S.C. 286, 294 (1886) (“[T]here is error in going beyond what the party is notified will be asked for, as it may be that he would not desire to oppose the granting of that, but would be disposed to contest the granting of anything more...”). This policy has manifested itself in the notice and specificity provisions of Rule 7, SCRCP.

An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.

Rule 7(b)(1), SCRCP.

Here, Petitioner never “applied to the court for an order.” Thus the most basic requirement for an order granting summary judgment—that a motion requesting such relief has actually been filed—was not satisfied. Furthermore, had the trial court chosen to entertain the City’s request for relief first stated within its Rule 59(e) motion, it would have violated the notice provisions and policies underlying Rule 7(b)(1).

By requiring notice to the court and the opposing party of the basis for the motion, Rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that ‘the court can comprehend the basis of the motion and deal with it fairly.’

Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (string citation omitted).

Due to the foregoing both the trial court and the Court of Appeals correctly limited their rulings to the existence of a contract between Petitioner and Stevens & Wilkinson.

II. The trial court properly declined to address the Petitioner's new argument contained within a Rule 59(e) motion

Petitioner's Rule 56(d) argument was not presented to the trial court in its memorandum in opposition to summary judgment. (R. pp. 24 – 31) Nor did Petitioner request such relief during the March 10, 2009 argument of the motion for summary judgment. (R. pp. 124 – 156) The first request for such relief, in fact, appeared within the Petitioner's Rule 59(e) motion to alter or amend the order now on appeal.

The parameters of a Rule 59(e) motion, however, prohibit the Petitioner from raising this argument for the first time in a motion to alter or amend. "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) (string citation omitted). See also Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) ("Mother raised this issue for the first time in a Rule 59, SCRPC, motion. We hold that this issue is not preserved for review.").

Because the Petitioner never requested the relief it now seeks from the trial court prior to its Rule 59(e) motion to alter or amend, the matters it argues are not preserved for review. The Court of Appeals correctly declined to address such matters in accordance with the aforementioned authority.

III. Rule 56(d), SCRPC does not provide a basis for *sua sponte* summary adjudication, particularly in the presence of disputed facts

Petitioner seeks to evade the problems demonstrated above by arguing that the trial court should have, *sua sponte* and pursuant to Rule 56(d), SCRPC, issued an order determining that the contract recognized in its ruling was, in fact, later satisfied. The text of the rule sets forth the following.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 56(d), SCRPC. Petitioner asks the Court to utilize Rule 56(d) to find that “Stevens & Wilkinson is precluded from seeking additional damages arising from the July 30, 2003 vote of Columbia City Council.” (Petitioner’s Brief at 12-13). Petitioner’s request, however, exceeds the scope of the rule’s utility.

The only reported South Carolina case referring to this rule merely establishes that it allows the trial court to “make an order specifying the facts that appear without substantial controversy and what material facts are actually and in good faith controverted.” Garrett v. Snedigar, 293 S.C. 176, 187, 359 S.E.2d 283, 289 (Ct. App. 1987) overruled on other grounds by Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003). The leading treatise on our state’s civil procedure, however,

reveals that the subsection is not to be used to dispose of legal questions or causes of action.

Rule 56(d) is similar to the procedure in a pre-trial conference and is not a summary judgment. No judgment is entered, and hence the order is a pretrial adjudication that certain issues are established for purposes of the trial. It may be modified at any time and is not final because it does not dispose of the case.

J. Flanagan, South Carolina Civil Procedure at 470 (3d ed. 2010). Furthermore, as Petitioner notes, the Reporter's Notes to Rule 56(d) state that "this rule makes the findings of uncontested facts discretionary rather than mandatory." Whereas, here, the trial court used this discretion in limiting its order to that which is in the record, no reversible error exists under Rule 56(d).

Finally, Petitioner makes one important concession in its brief that highlights why the resolution of the breach of the contract established by the City's July 2003 vote would have been inappropriate.

The City acknowledges that the payment of \$697,084.79 is \$47,084.79 more than the amount voted on by City Council on July 30, 2003. However, there is nothing in the record to explain the difference between the amount approved by the City and the amount invoiced by Stevens & Wilkinson other than the bill as presented and the fact that the City paid it.

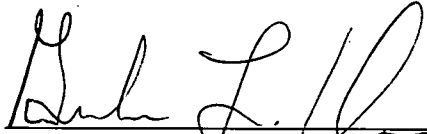
(Petitioner's Brief at 6) The absence of any explanation for this discrepancy is due to the fact that the question of the contract's breach was never presented to the trial court. This absence also underscores the fact that the alleged breach of the contract is not a "fact that appears without substantial controversy," as envisioned by Rule 56(d), SCRCF, and thus

is particularly ill-suited for summary resolution under this subsection of our Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, Respondent Stevens & Wilkinson respectfully requests the Court affirm the ruling of the Court of Appeals.

Respectfully submitted,



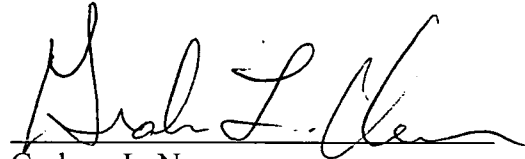
Richard A. Harpootlian, Esq.
Graham L. Newman, Esq.
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Post Office Box 1090
Columbia, South Carolina 29202
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR RESPONDENT STEVENS
& WILKINSON

Columbia, South Carolina
September 3, 2013

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that the Brief of the Respondent, Stevens & Wilkinson of South Carolina, Inc., complies with rule 211(b) of the SCACR.



Graham L. Newman
RICHARD A. HARPOOTLIAN, P.A.
1410 Laurel Street
Columbia, South Carolina 29201
(803) 252-4848
(803) 252-4810 (facsimile)

ATTORNEYS FOR RESPONDENT

September 3, 2013
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2011-UP-519 (S.C. Ct. App. Filed November 29, 2011)

Stevens & Wilkinson of South Carolina, Inc. Respondent

vs.

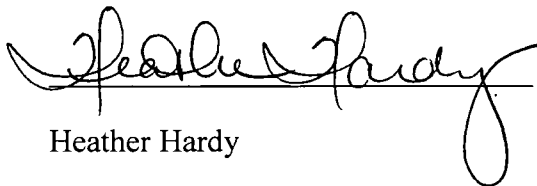
City of Columbia, South Carolina.Petitioner.

CERTIFICATE OF SERVICE

I, Heather Hardy, Legal Assistant to the attorneys Richard A. Harpootlian, PA, who represent the Respondent in this case, with offices at 1410 Laurel Street, Post Office Box 1090, Columbia, South Carolina 29202, certify that on September 3, 2013, did serve by Hand Delivery the following documents to the below mentioned person(s):

Documents: *Brief of the Respondent, Stevens & Wilkinson of SC, Inc.*

Served: Michael Tighe, Esquire
 D. Reece Williams, Esquire
 Kathleen M. McDaniel, Esquire
 Richard C. Detwiler, Esquire
 Callison Tighe & Robinson, LLC
 Palmetto Armory Office Building
 1812 Lincoln Street, Suite 200
 Columbia, South Carolina 29201


Heather Hardy