

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

John Hayes, III, Circuit Court Judge

Case No. 2013-001062

James H. Bailey, Jr.

Respondent,

v.

Development Systems
International, LLC, David
Auterson, John R. Curtis,
James P. LaRose, Robert C.
MacConnell and Sandra M.
Morckel, of whom David
Austerson, John R. Curtis,
James P. LaRose, Robert C.
MacConnell, and Sandra
Morkel are

Appellants.

INITIAL REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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TABLE OF AUTHORITIES

CASES

Hoffman v. Power 298 S.C. 338, 380 S.E.2d 821 (1989).

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

Roche v. S.C. Alcoholic Beverage Control Commission, 263 S.C. 451, 211 S.E.2d 243 (1975).

Wilder Corp. v. Wilke, 330 S.C. at 77, 497 S.E.2d at 734 (1998).

STATUTES

SC Code Ann. § 33-44-103 (1976)

S.C. Code Ann. § 15-38-15 (1976)

OTHER AUTHORITIES

ARGUMENTS

Respondent argues that the Appellants did not properly preserve their issues for appeal. An appellate court will not consider issues raised for the first on appeal. *Hoffman v. Power* 298 S.C. 338, 380 S.E.2d 821 (1989). The purpose of an appeal is to determine if the lower court did something that it should not have done, or omitted doing something it should have done. Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him. *Roche v. S.C. Alcoholic Beverage Control Commission*, 263 S.C. 451, 211 S.E.2d 243 (1975). When you are certain you raised a particular argument and obtained a definitive ruling during a trial or other proceeding which results in a final, appealable judgment, your issue is preserved for appellate review. The essential requirements are to raise the issue and obtain a ruling from the lower court. If the judge has had ample opportunity to make a correct ruling, and the judge has considered and rejected an argument, a Rule 59(e) motion is not always necessary, and an aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal. In *Wilder Corp.*, the court held "Post trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those which have been raised to the trial court but not yet ruled upon by it." *Wilder Corp.*, 330 S.C. at 77, 497 S.E.2d at 734.

Respondent uses a line of cases to support his argument that specific objections were not made to the lower court judge and therefore can not be raised on appeal. Our present case is distinguishable from those cases in that there was never a trial. The Appellants were held in default and we were at a damages hearing where the only issue is the trial judge awarding damages. The testimony put the judge on notice regarding the issues. The judge's order should always cover *the*

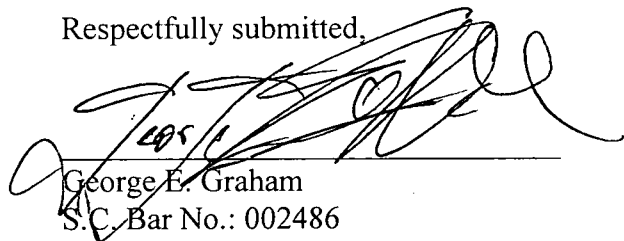
pertinent facts and the issues that arise. The judge was apprised of the damage issues before the court both through counsel's argument and testimony at the hearing. The issues regarding the operating agreement, apportionment of damages and speculative damages were raised before the court during argument of counsel. (Transcript pp. 6-7). The issues of operating agreement and apportionment of damages were also raised during cross examination of appellant. (Transcript pp. 32-33; p. 40 lines 13-24.) The Supreme Court held that a party *may* wish to file such a post trial 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." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772.

CONCLUSION

In conclusion, the court should remand this matter to the lower court for findings consistent with the evidence presented at trial.

October 30, 2013

Respectfully submitted,



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