The Supreme Court of South Carolina

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September 30, 2004

REMITTITUR

The Honorable Mary Jean Carlson
Clerk of Court, Allendale County
611-A West Mulberry St
PO Box 126
Allendale, SC 29810-0126

Re Elam, Hattie Rose v SC Dept of Trans
1999-CP-03-00008

Dear Ms Carlson

The above referenced matter is hereby remitted to the trial court A copy of the judgment of this Court and the Court of Appeals is attached

Very truly yours,

CLERK

DES/dmh

Enclosures

cc Pete Kulmala, Esquire
H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Allendale County
Daniel E Martin, Sr , Circuit Court Judge

Opinion No 25869
Heard November 19, 2003 - Filed September 13, 2004

REVERSED

Pete Kulmala, of Harvey & Kulmala, of Barnwell, for Petitioner

H Woodrow Gooding, Jr and Mark B Tinsley, of Gooding and Gooding, of Allendale, for Respondent

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JUSTICE BURNETT We granted the petition for a writ of certiorari to review the Court of Appeals' unpublished order dismissing the appeal of the South Carolina Department of Transportation (SCDOT) as untimely Elam v South Carolina Dep't of Transp , S C Ct App Order dated July 25, 2002 We reverse

FACTUAL AND PROCEDURAL HISTORY

Respondent Hattie Rose Elam (Elam) sued Petitioner (SCDOT) under the South Carolina Tort Claims Act[1] for personal injuries and property damage sustained by Elam in a single-car accident which occurred in March 1998 Elam alleged the accident was caused by SCDOT's improper maintenance of a highway, which allowed excessive rain water to accumulate on the highway

At the conclusion of Elam's case, SCDOT moved for a directed verdict on various grounds The trial court denied the motion and submitted the case to the jury on January 10, 2001 The jury returned a verdict for Elam for $250,000 Immediately thereafter, SCDOT made oral motions for judgment notwithstanding the verdict (JNOV) and a new trial absolute, or in the alternative, for a new trial nisi remittitur SCDOT's motions were denied by the trial judge in an oral ruling from the bench, and a one-page Form 4 order was filed with the clerk on January 11, 2001, effecting entry of the jury's verdict

SCDOT timely filed a written motion pursuant to Rule 59(e), SCRCP The trial court denied the Rule 59(e) motion in a written order dated April 6, 2001 SCDOT served its notice of appeal on April 27, 2001, and in its appeal contested the trial court's denial of its motions for JNOV and new trial

The Court of Appeals, sua sponte, raised the issue of the timeliness of SCDOT's appeal in light of Quality Trailer Products v CSL

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[1] S C Code Ann §§ 15-78-10 to -200 (Supp 2003)

Equipment Co , 349 S C 216, 562 S E 2d 615 (2002), and directed the parties brief the issue The Court of Appeals subsequently concluded SCDOT's Rule 59(e) motion merely repeated grounds previously raised to and ruled on by the trial judge as a result of SCDOT's oral JNOV/new trial motions Therefore, the Rule 59(e) motion did not stay the running of the thirty-day deadline to appeal and SCDOT's appeal was dismissed as untimely

ISSUES

I Did the Court of Appeals err in finding SCDOT's appeal untimely because its written Rule 59(e) motion, which repeated grounds previously raised to and ruled on by the trial judge as a result of oral JNOV/new trial motions made immediately after the jury's verdict, did not stay the time to appeal?

II Did the trial court err in denying SCDOT's motion to amend its answer and its post-trial motions?

DISCUSSION

I Timeliness of SCDOT's appeal

We take this opportunity to clarify the limits and rationale of Quality Trailer, *supra*, and two Court of Appeals' opinions, Coward Hund Const Co v Ball Corp , 336 S C 1, 518 S E 2d 56 (Ct App 1999), and Collins Music Co v IGT, 353 S C 559, 579 S E 2d 524 (Ct App 2002) We conclude the Court of Appeals in the present case and in Matthews v Richland County School Dist One, 357 S C 594, 594 S E 2d 177 (Ct App 2004) has extended the holdings and rationale of those three cases in a manner which unnecessarily complicates post-trial and appellate practice

Post-trial motions such as a JNOV or new trial motion "shall be made promptly after the jury is discharged, or in the discretion of the court not later than 10 days thereafter " Rules 50(e) and 59(b), SCRCP In actions tried without a jury or with an advisory jury, a party may move the court to amend its findings or judgment or for a new trial not later than 10 days after receipt of written notice of entry of judgment Rule 52(a), SCRCP

The notice of appeal in a case appealed from the Court of Common Pleas must be served on all respondents within thirty days after receipt of written notice of entry of the order or judgment Rule 203(b)(1), SCACR The requirement of service of the notice of appeal is jurisdictional, *i e* , if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice Mears v Mears, 287 S C 168, 337 S E 2d 206 (1985) A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion See Rule 203(b)(1), SCACR, Rules 50(e), 52(c), and 59(f), SCRCP

The Court of Appeals in 1999 took the first step toward Quality Trailer in Coward Hund, 336 S C 1, 518 S E 2d 56 In that case, the trial court by written order granted summary judgment to the defendants Appellant Coward Hund timely served a written "motion for reconsideration" pursuant to Rule 59(e), SCRCP The trial court heard oral arguments on the Rule 59(e) motion and issued a written order denying the motion Coward Hund subsequently filed a second, written motion for reconsideration pursuant to Rule 59(e), seeking clarification of the court's ruling on an issue on which the court had ruled After a telephone conference, the trial court issued a supplemental written order again denying Coward Hund's Rule 59(e) motion Coward Hund served its notice of appeal within thirty days of receipt of written notice of entry of the order denying its second Rule 59(e) motion The issue, then, was whether Coward Hund's filing of a second, written Rule 59(e) motion stayed the time for serving a notice of appeal

Finding no South Carolina case directly on point, the Court of Appeals endorsed the prevailing view espoused by federal courts that a second motion for reconsideration under Rule 59(e) is appropriate only if it challenges something that was altered from the original judgment as a result of the initial motion for reconsideration The Court of Appeals reasoned nothing in the written order denying Coward Hund's first Rule 59(e) motion altered anything in the written summary judgment order Thus, the finality of the summary judgment order was restored and the time for serving a notice of appeal began to run upon Coward Hund's receipt of written notice of entry of

the order denying its first Rule 59(e) motion The Court of Appeals held Coward Hund's second Rule 59(e) motion did not stay the time for appeal and consequently dismissed the appeal as untimely Coward Hund, 336 S C at 4, 518 S E 2d at 58

In Quality Trailer, decided three years later, a jury returned a verdict in favor of Quality Trailer Appellant I Corp timely served a written post-trial motion for JNOV and a new trial The trial court issued a written order denying the motion and explaining the reasons for the denial I Corp then filed a written motion pursuant to Rules 52, 59, and 60, SCRCP, which was virtually identical to its written JNOV/new trial motion The only changes I Corp made were to caption the Rule 59(e) motion differently and to change the relief sought in the Rule 59(e) motion's final paragraph to coincide with the Rule 59(e) motion's caption I Corp 's Rule 59(e) motion did not identify a single issue raised but not ruled on, but merely recited, verbatim, the arguments made in the written JNOV/new trial motion

We held the filing of a written, successive, virtually identical post-trial motion – raising issues which already had been raised to and ruled on by the trial court in a previous written order – does not stay the time for serving notice of appeal "The time for filing appeal is not extended by submitting the same motion under a different caption " Quality Trailer, 349 S C at 220, 562 S E 2d at 618 We dismissed I Corp 's appeal as untimely because its written, successive, virtually identical post-trial motion did not stay the time for serving a notice of appeal

Thus, Quality Trailer took Coward Hund a step further Coward Hund barred as untimely an appeal from a second, written Rule 59(e) motion raising the same issues on which a ruling had been obtained by virtue of a previous, written Rule 59(e) motion, Quality Trailer barred as untimely an appeal from a first, written Rule 59(e) motion raising the same issues, verbatim, on which a ruling had been obtained in a previous, written JNOV/new trial motion

The Quality Trailer view of successive post-trial motions has been applied in only two other published opinions by the Court of Appeals

Collins Music, 353 S C 559, 579 S E 2d 524, and Matthews, 357 S C 594, 594 S E 2d 177

In Collins Music, the Court of Appeals found that an appeal was not timely by relying on Quality Trailer and Coward Hund From a verdict in favor of Collins, appellant IGT timely filed and served written post-trial motions for JNOV, new trial, and new trial *nisi remittitur*, asserting twenty-eight grounds as support for its requested relief The trial court denied all IGT's post-trial motions in a written order "after carefully reviewing the matter "

Seven days later, IGT served a substantively identical Rule 59(e) motion to alter or amend the judgment, asking the court to make specific rulings on each ground raised in the earlier motions The trial court issued a written order denying IGT's Rule 59(e) motion and specifically stating IGT failed to raise any issue not already considered IGT served a notice of appeal within thirty days of receipt of written notice of entry of the order denying its Rule 59(e) motion

The Court of Appeals concluded IGT's written Rule 59(e) motion merely restated the same twenty-eight grounds and arguments the trial court had denied in its written order made in response to IGT's initial, written JNOV/new trial motions Therefore, the time to appeal began to run from the date IGT received written notice of entry of the order denying its initial JNOV/new trial motions Consequently, the Court of Appeals dismissed IGT's appeal as untimely Collins Music, 353 S C at 565, 579 S E 2d at 526-527 Collins Music is similar to Quality Trailer because it barred an appeal as untimely from a first, written Rule 59(e) motion raising the same issues on which a ruling had been obtained in a previous, written, virtually identical JNOV/new trial motion

In Matthews, the defendant school district appealed a verdict in favor of Matthews The Court of Appeals, acting *sua sponte* because it correctly recognized the timeliness of an appeal is a jurisdictional requirement, raised the Quality Trailer issue even though the parties had not

The school district, immediately following the verdict, made oral motions for JNOV and new trial *nisi remittitur*, which the trial court orally denied The school district received a written copy of entry of the judgment almost a month later, at which time the school district timely filed a first, written Rule 59(e) motion

The school district's written Rule 59(e) motion restated its oral arguments made at the conclusion of the trial for remittitur of the verdict Matthews submitted a response to the motion, requesting the verdict stand or, in the alternative, a new trial *nisi* to allow her to recover attorney's fees The trial court reduced the verdict and awarded attorney's fees to Matthews The school district appealed the award of attorney's fees

The Court of Appeals concluded the school district had restated the same grounds in its first, written Rule 59(e) motion as it had in its oral JNOV/new trial motion made at the end of the trial The trial court lacked jurisdiction to entertain an identical, successive post-trial motion Relying on Quality Trailer, Collins Music, and Coward Hund and finding the case before it factually similar, the Court of Appeals held the school district had filed a successive post-trial motion that did not raise any new issue, but merely repeated the same arguments made in an earlier motion

Although the trial court had granted the school district's successive motion – unlike precedent in which the successive motion was denied – the Court of Appeals reasoned that distinction made no difference in the outcome The school district's first, written Rule 59(e) motion, which followed oral JNOV/new trial motions in which the same issues had been raised and ruled on, was not proper and did not toll the time for appeal The school district's appeal was dismissed as untimely Matthews, 357 S C at 597-600, 549 S E 2d at 178-180

Matthews is similarly postured to the case now before us In both cases, the Court of Appeals has expanded the reach of Quality Trailer and Collins Music by applying them to cases in which a first, written Rule 59(e) motion was deemed to raise issues and arguments which already had been raised to and ruled on by virtue of previous, oral JNOV/new trial motions

We conclude Coward Hund correctly stated and applied the prevailing view among federal courts that a second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal *E g*, Aybar v Crispin-Reyes, 118 F 3d 10, 13-14 (1st Cir 1997) (subsequent Rule 59 motion served within 10 days after denial of initial Rule 59 motion for reconsideration, but more than 10 days after entry of original judgment, does not toll time for appeal), Glinka v Maytag Corp , 90 F 3d 72, 74 (2d Cir 1996) ("[a]llowing subsequent motions to repeatedly toll the filing period for a notice of appeal would encourage frivolous motions and undermine a fundamental canon of our legal system, to promote the finality of judgments", court noted this view is "well-established" in federal circuits), Wright v Preferred Research, Inc , 891 F 2d 886, 889 (11th Cir 1990) ("the language and purpose of [federal] Rule 4(a)(4) indicate that the time for appeal is postponed only by an *original* motion of the type specified *I e* , a motion to reconsider an order disposing of such a motion will not further postpone the time to appeal") (emphasis in original), 12 Moore's Federal Practice § 59 32[2] (3d ed 2003), 11 Wright, Miller & Kane, Federal Practice and Procedure Civil 2d § 2817 (1995) However, "if the disposition of the first motion results in a judgment which is substantively altered, a subsequent motion will again postpone the appeal period " Wright, 891 F 2d at 889, 12 Moore's Federal Practice §§ 59 35 and 59 37

We further conclude Quality Trailer and Collins Music – which involved written JNOV/new trial motions, a written ruling by the trial court, followed by a first, written, virtually identical Rule 59(e) motion – were correctly decided See Ex parte Mutual Sav Life Ins Co , 765 So 2d 649 (Ala 1998) (in case involving successive written motions, court explained the recourse following denial of a party's own post-judgment motion is by timely appeal because the rules do not provide for a "motion to reconsider" such a denial, however, a motion to reconsider is proper and will toll the time for appeal when post-judgment motion is granted and new judgment is entered), Wenzoski v Central Banking System, Inc , 736 P 2d 753 (Cal 1987) (in case involving successive written motions, appeal was untimely because second separate motion for new trial, filed because party feared his first motion was filed too early, did not toll time to appeal), Sears v Sears, 422 N E 2d 610 (Ill 1981) (successive written post-trial motion which

repeats what was raised or could have been raised in first written motion is not authorized by rules and does not extend time for appeal, losing litigant is not entitled to return to trial court indefinitely hoping for change of heart or a more sympathetic judge, or string out arguments one at a time over months because "[t]here must be finality, a time when the case in the trial court is really over and the loser must appeal or give up"), State ex rel Douglas v Bible Baptist Church of Lincoln, 353 N W 2d 20 (Neb 1984) (in case involving successive written motions, appeal was untimely because second motion for new trial, based in part on events which occurred after denial of first motion for new trial, was not proper and did not toll time for appeal), Kaufman v Oregonian Pub Co , 245 P 2d 237 (Or 1952) (in case involving successive written motions, a party may not extend time for appeal from an order denying a motion for reinstatement of action by filing a second, substantively identical motion with a different judge), Gassaway v Patty, 604 S W 2d 60 (Tenn App Ct 1980) (in case involving successive written motions, appeal was untimely where a party filed second post-judgment motion seeking reconsideration of order denying first post-judgment motion, rules are meant to prevent filing of repetitive post-trial motions and avoid undue delays), 5 Am Jur 2d Appellate Review §§ 303-310 (1995)

Accordingly, we reaffirm the rationale and principles expressed in Coward Hund, Quality Trailer, and Collins Music An appeal may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – files a successive Rule 59(e) motion, where the trial judge's ruling on the first Rule 59(e) motion does not result in a substantial alteration of the original judgment Coward Hund An appeal also may be barred due to untimely service of the notice of appeal when a party – instead of serving a notice of appeal – recaptions a written JNOV/new trial motion, which has been ruled on, and resubmits it as a virtually identical, written Rule 59(e) motion Quality Trailer, Collins Music [2]

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[2] We are aware that a party may attempt to file both a Rule 59 motion and a notice of appeal If this does occur, one or the other will be inappropriate depending on whether the motion is both timely under Rule 59 and permissible under our ruling today Cf Hudson v Hudson, 290 S C 215, 349 S E 2d 341 (1986) (holding that when a timely post-trial motion is

continued

We have found no foreign case similarly postured to the present case or Matthews, *i e* , a case in which a court held a written Rule 59(e) motion following an oral JNOV/new trial motion did not toll the time for appeal At least one court has drawn a distinction between "perfunctory" oral motions made at the end of trial and more thoughtful written post-trial motions, concluding the former will not bar the latter or result in an appeal being dismissed as untimely Sherrod v Nash Gen Hosp , Inc , 500 S E 2d 708, 710-711 (N C 1998)

After studied review, we reject the rationale and result reached by the Court of Appeals in the present case and in Matthews We conclude a party usually is free to file an initial Rule 59(e) motion, regardless of whether the previous JNOV/new trial motions were made orally or in writing, without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court Again, we caution a party who files post-trial motions to note carefully the exceptions to this general rule as expressed in Coward Hund, Quality Trailer and Collins Music

We believe this view of the propriety of post-trial motions to be the correct approach for several reasons First, it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule Consequently, a party usually is allowed to ask the court to reconsider its

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pending before the lower court, any notice of appeal will be dismissed without prejudice as premature) It is, of course, the party's responsibility to determine whether a Rule 59 motion or notice of appeal is appropriate under the facts of the case, and we caution parties not to attempt to avoid this responsibility by the simple expedient of filing both

decision even if it means rehashing all or part of an argument previously presented See, e g , Arnold v State, 309 S C 157, 420 S E 2d 834 (1992) ("purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"), Curcio v Caterpillar, Inc , 355 S C 316, 585 S E 2d 272 (2003) (an example of the many cases in which trial and appellate courts describe a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"), James Flanagan, South Carolina Civil Procedure 474-475 (2d ed 1996) There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument It is inherently unfair to disallow such an opportunity

Rule 59(e) in the South Carolina and federal rules of civil procedure is practically identical [3] Neither contains any provision for a motion for "reconsideration " However, federal courts consider it appropriate for a party to make a "motion for reconsideration" under Rule 59(e) even though the rule mentions only a "motion to alter or amend a judgment " This view holds true even when a party mislabels a post-trial motion See Blair v Equifax Check Services, Inc , 181 F 3d 832, 837 (7th Cir 1999) (Rule 4(a)(4), FRAP, restates long-accepted practice of considering motions for reconsideration, a practice independent of any appellate rule), 12 Moore's Federal Practice § 59 30[2][a] and[7], 11 Wright, Miller & Kane § 2810 1, 20 Moore's Federal Practice §§ 304 13[2] and 304 13[4][b] (3d ed 2003) "[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for the practice of freely allowing a motion for reconsideration Blair, 181 F 3d at 837

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[3] Rule 59(e), SCRCP, provides

Motion to Alter or Amend a Judgment A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order

Rule 59(e), FRCP, provides

Motion to Alter or Amend Judgment Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment

In fact, the United States Supreme Court explicitly has described a motion under federal Rule 59(e) as one which "involves *reconsideration* of matters properly encompassed in a decision on the merits " Osterneck v Ernst & Whinney, 489 U S 169, 174, 109 S Ct 987, 990, 103 L Ed 2d 146, 154 (1989) (a request relating to discretionary prejudgment interest is a part of the plaintiff's compensation and thus a part of the decision on the merits, which means a Rule 59(e) motion raising prejudgment interest tolled the time for appeal, Court cited precedent in which Rule 59(e) motions relating to attorney's fees and case costs are deemed collateral issues, thus such motions did not toll the time for appeal) (emphasis added) The Court explained its decision furthered the goals of avoiding piecemeal appeals and fostering informed appellate review Osterneck, 489 U S at 177-178, 109 S Ct at 992, 103 L Ed 2d at 156

The commentators explain that the approach taken in today's rules allowing a motion for reconsideration which addresses the merits of the case at hand originated in the common law "It is absolutely necessary *to justice*, that there should, upon many occasions, be opportunities of *reconsidering* the cause by a new trial " 11 Wright, Miller & Kane § 2801 (quoting a 1757 opinion written by an English judge) (emphasis in original), 12 Moore's Federal Practice § 59 App 102 (even before 1946 amendment adding subdivision (e) to Rule 59, courts routinely found that motions seeking such relief as rehearing or reconsideration were proper under Rule 59, although the motions were not literally or technically motions for a new trial)

Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court E g , Wilder Corp v Wilke, 330 S C 71, 76, 497 S E 2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review "), Long v Dunlap, 87 S C 8, 68 S E 801 (1910) (Supreme Court will not consider any point which was not presented and considered below

unless it involves jurisdiction of the court), Gaffney v Peeler, 21 S C 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal), Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court)

In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, we emphasized we did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling " I'On, L L C v Town of Mt Pleasant, 338 S C 406, 421, 526 S E 2d 716, 724 (2000),[4] see also Jean Hoefer Toal, et al , Appellate Practice in South Carolina 55-60 (2002)

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[4] In discussing the need for a Rule 59(e) motion, we explained that

> [t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred This principle underlies the long-established preservation requirement 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
>
> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review 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 The requirement also serves as a keen incentive for a party to prepare a case thoroughly It 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

I'On, 338 S C at 422, 526 S E 2d at 724

Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) 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

Fourth, South Carolina appellate courts do not recognize the "plain error rule," under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party Dykema v Carolina Emergency Physicians, P C , 348 S C 549, 554, 560 S E 2d 894, 896 (2002), Kennedy v South Carolina Retirement System, 349 S C 531, 564 S E 2d 322 (2001) Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a first, written Rule 59(e) motion without concern a later appeal will be deemed untimely

Fifth, civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of Quality Trailer Cf Gamble v State, 298 S C 176, 379 S E 2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in manner which operate as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition), Rule 1, SCRCP (civil procedure rules "shall be construed to secure the just, speedy, and inexpensive determination of every action")

If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review But in filing the motion, he may unwittingly forfeit the right to an appeal if an appellate court later determines the Rule 59(e) motion was unnecessary because he already had raised the issue and obtained a ruling We strive to

avoid an interpretation of procedural rules which routinely would place a party between the proverbial rock and a hard place [5]

Turning to the present case, SCDOT argued, *inter alia*, in its first, written Rule 59(e) motion, which followed oral JNOV/new trial motions made immediately after the jury's verdict, the trial court misapplied the appropriate standard for notice SCDOT asserted that notice of a hazard is "interrupted" by responsive action to correct the defect SCDOT contended, although the trial court had instructed the jury correctly on its notice theory, the court in denying SCDOT's JNOV/new trial motions considered evidence of notice at any time sufficient to create a factual issue for the jury, regardless of whether the notice occurred before or after the remedial work SCDOT in its Rule 59(e) motion also raised other issues and arguments it had previously addressed in its JNOV/new trial motions

While SCDOT in its written Rule 59(e) motion may have revisited some issues and arguments raised in its oral JNOV/new trial motions, we conclude the Rule 59(e) motion was proper for the reasons we explain today This case is not factually similar to Coward Hund because it involves a first, written Rule 59(e) motion, not a second one It is not factually similar to Quality Trailer or Collins Music because SCDOT did not simply resubmit a virtually identical, written Rule 59(e) motion raising the same issues on which it already had obtained a ruling by virtue of a previous, written JNOV/new trial motion

SCDOT timely served its notice of appeal within thirty days after receipt of written notice of entry of the order denying its Rule 59(e) motion Consequently, we reverse the Court of Appeals' order dismissing SCDOT's

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[5] We are presented in this case with a party which believed a Rule 59(e) motion was necessary and appropriate We do not mean to imply by our emphasis on the potential importance of such a motion that one is necessary or desirable in every case 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

appeal as untimely We also overrule Matthews, 357 S C 594, 594 S E 2d 177, because it is inconsistent with the view of post-trial motions we set forth today

II Denial of SCDOT's motions

In the interest of judicial economy, we address the merits of SCDOT's appeal See Floyd v Horry County School Dist , 351 S C 233, 234, 569 S E 2d 343, 344 (2002), Faile v S C Dep't of Juvenile Justice, 350 S C 315, 328, 566 S E 2d 536, 543 (2002)

SCDOT argues (1) the trial court erred in denying its motion for new trial absolute based upon the excessiveness of the verdict, (2) the trial court erred in denying it's motion for leave to amend to assert the statutory defense of immunity for design, and (3) the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict based upon the absence of proof of causative negligence on the part of SCDOT and the absence of notice of defect to SCDOT after its remedial actions and prior to Elam's accident We disagree

When considering a motion for a new trial based on the inadequacy or excessiveness of the jury's verdict, the trial court must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice Allstate Ins Co v Durham, 314 S C 529, 431 S E 2d 557 (1993) The decision to grant or deny a new trial absolute based on the excessiveness of a verdict rests in the sound discretion of the trial court and will not ordinarily be disturbed on appeal South Carolina State Highway Dep't v Clarkson, 267 S C 121, 226 S E 2d 696 (1976) We conclude the record reflects the jury was presented with uncontradicted evidence that, as a result of the accident, Elam suffered physical and mental injuries sufficient to support the jury's verdict The trial court did not abuse its discretion in denying SCDOT's motion for a new trial absolute based on the amount of the verdict

Further, the trial court did not err in denying SCDOT's motion for leave to amend to assert the statutory defense of immunity of design During Elam's case in chief, SCDOT moved the trial court to allow it to

amend its answer to assert the design defense of S C Code Ann § 15-78-60(15) (Supp 2003) SCDOT sought to amend its answer to conform to the evidence presented that the water on the roadway, which allegedly caused Elam's accident, was a result of an inadequate drainage pipe The trial court ruled there was no competent evidence the water on the highway was due to a design error The decision whether to allow a party to amend a pleading to conform to the evidence is left to the sound discretion of the trial judge Foggie v CSX Transp , Inc , 313 S C 98, 431 S E 2d 587 (1993) We conclude the trial court did not abuse its discretion in denying SCDOT's motion

Finally, we find no error on the part of the trial judge in denying SCDOT's motions for a directed verdict and JNOV based on the absence of negligence on the part of SCDOT When reviewing the denial of a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party Strange v South Carolina Dep't of Highways & Pub Transp , 314 S C 427, 445 S E 2d 439 (1994) The appellate court will reverse the trial court only where there is no evidence to support the ruling below Id

Viewing the evidence in the light most favorable to Elam, it is reasonably inferable the jury could find SCDOT's negligence caused the accident The jury heard the testimony of several witnesses, including SCDOT's former resident maintenance engineer for Allendale County, who testified SCDOT had actual notice the site of Elam's accident was a flood hazard Sergeant G F King, a trooper with the South Carolina Highway Patrol, testified there had been numerous accidents during the past eight years at the same location Sergeant King testified he had reported the condition to SCDOT on numerous occasions Given the testimony of these witnesses and others, the jury could reasonably have found SCDOT negligent in failing to properly maintain the highway

SCDOT argues the trial court erred in denying its motions for a directed verdict and JNOV based on the absence of notice of the defect after the department's remedial work actions and prior to Elam's accident We

affirm the trial court's ruling the evidence presented a jury question on whether SCDOT took any remedial actions See Strange, supra

CONCLUSION

We reaffirm the principles set forth in Coward Hund, 336 S C 1, 518 S E 2d 56, Quality Trailer, 349 S C 216, 562 S E 2d 615, and Collins Music, 353 S C 559, 579 S E 2d 524 We reverse the Court of Appeals' order in the present case and overrule the Court of Appeals' opinion in Matthews, 357 S C 594, 594 S E 2d 177 We conclude SCDOT timely served its notice of appeal after receipt of written notice of entry of the order denying its Rule 59(e) motion

On the merits of SCDOT's appeal, the trial court did not err in denying SCDOT's motion to amend its answer or its motions for a directed verdict, JNOV, and new trial Accordingly, we reinstate the jury's verdict in favor of Elam and remand this case to circuit court for entry of judgment on the verdict

REVERSED

TOAL, C J , and MOORE, J , concur WALLER, J , dissenting in a separate opinion in which PLEICONES, J , concurs

JUSTICE WALLER I respectfully dissent In my opinion, SCDOT's Rule 59(e) motion, raising the same issues orally raised to and ruled upon in its motions for directed verdict, JNOV, and a new trial, did not stay the time for filing a notice of appeal I would affirm the Court of Appeals' holding that SCDOT's appeal was untimely

Post-trial motions are required in two primary circumstances to preserve issues that have been raised to the trial court but not yet ruled upon or when the trial court grants relief not requested or rules on an issue never raised at trial Jean Hoefer Toal, et al, Appellate Practice in South Carolina 59-60 (2d ed 2002) Issues are preserved for appeal even where a JNOV motion is denied in a form order, if the issues have been adequately raised and argued to the court and the record on appeal contains transcripts of the court proceedings Bailey v Segars, 346 S C 359, 550 S E 2d 910 (Ct App 2001)

Here, SCDOT repeatedly argued its position to the trial court in its directed verdict motion, in renewing its directed verdict motion, in its motion for JNOV, and in its motion for a new trial Each time the trial judge denied SCDOT's motions Two years ago, in Quality Trailer Products v CSL Equipment Co Inc , 349 S C 216, 565 S E 2d 615 (2002), we held the filing of a successive motion, raising issues already raised to and ruled upon by the trial judge, does not stay the time to appeal Nothing in Quality Trailer limited our holding to the filing of **written** post-trial motions In my opinion, once a litigant has fully argued, either orally or in writing, its post-trial motions to a judge, and obtained a ruling thereon, there is simply no need to permit the same exact arguments to be re-raised in a subsequent Rule 59(e) motion

I would hold SCDOT had its one full bite at the apple such that the filing of its written Rule 59(e) motion did not stay the time for filing an appeal in this case I would affirm the Court of Appeals' opinion [6]

PLEICONES, J , concurs

---

[6] I would also affirm the opinion in Matthews v Richland County School Dist One, 357 S C 594, 594 S E 2d 177 (Ct App 2004)

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
DEPUTY CLERK

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November 12, 2003

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H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire
Gooding & Gooding
P O Box 1000
Allendale, SC 29810

Re Elam, Hattie Rose v SC Dept of Trans

Dear Counsel

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows

Petitioner 10 minutes

Respondent 10 minutes

Petitioner in Reply 5 minutes

This case is scheduled for hearing at 9 30 a m on Wednesday, November 19, 2003

Very truly yours,

Daniel E Shearouse, Clerk

By Jean J. Peebles
Administrative Assistant

DES/jjp

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September 12, 2003

Daniel E Shearouse
Clerk of Couth Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

Re Hattie Rose Elam vs SCDOT

Dear Mr Shearouse

Upon receiving your letter dated September 5, 2003 I have checked my calendar for November, and find that I have no conflict with the date reflected in your letter Please accept my kind regards

Most Respectfully,

Pete Kulmala

PK/alh
Cc Mark Tinsley, Esquire

The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

P O BOX 11330
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PHONE NO 734 1080

To H Woodrow Gooding Jr Esquire
Mark B Tinsley Esquire

From Daniel E Shearouse

Date September 05 2003

RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the November 2003 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of November 4 5 6 18 and 19 2003 Please notify this office in writing prior to September 12 2003 as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

Elam, Hattie Rose v SC Dept of Trans

The South Carolina Supreme Court

DANIEL E SHEAROUSE
CLERK OF COURT
BRENDA F SHEALY
DEPUTY CLERK

P O BOX 11330
COLUMBIA S C 29211
PHONE NO 734 1080

To Pete Kulmala Esquire

From Daniel E Shearouse

Date September 05 2003

RE November Preliminary List

Pursuant to the provisions of Rule 216 of the South Carolina Appellate Court Rules this is to advise that the following case(s) will probably be reached for hearing at the November 2003 term of the South Carolina Supreme Court Our records indicate that you are counsel of record in one or more of these case(s)

Court will meet the days of November 4 5 6 18 and 19 2003 Please notify this office in writing prior to September 12 2003 as to any scheduling conflicts for the November term and any changes or additions of counsel that should be made to the record for the purpose of argument If you do have a scheduling conflict please advise as to the specific nature of the conflict

Elam, Hattie Rose v SC Dept of Trans

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May 5, 2003

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

Re Hattie Rose Elam v SCDOT,
Case # 99-CP-03-008

Dear Mr Shearouse

Enclosed for filing is an original and fifteen copies of Petitioner's Reply, together with Proof of Service in the above case I would appreciate your filing the original and fourteen copies, and returning to me the final copy reflecting filing date and time

Please accept my kind regards,

Most Respectfully,

Pete Kulmala
HARVEY & KULMALA
Attorneys at Law
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(803) 259-5531
Attorney for Petitioner

cc H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire

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April 24, 2003

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re Hattie Rose Elam vs SCDOT
C/A #99-CP-03-008

Dear Mr Shearouse

Enclosed for filing is the original Certificate of Service by Mail and one (1) copy for filing I would appreciate your returning a clocked copy to me in the envelope provided

With kindest personal regards, I remain

Sincerely,

Mark B Tinsley

MBT/rfl
enc
cc Pete Kulmala, Esquire

HARVEY & KULMALA

Attorneys at Law
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March 26, 2003

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

Re Hattie Rose Elam v SCDOT,
Case # 99-CP-03-008

Dear Mr Shearouse

Enclosed for filing is an original and fifteen copies of Petitioner SCDOT's Brief in the above-captioned certiorari case, together with Proof of Service I would appreciate your filing the original and fourteen copies, and returning to me the final copy reflecting filing date and time

I am also enclosing thirteen additional copies of the Appendix, as indicated by the Rules

Please accept my kind regards,

Most Respectfully,

Pete Kulmala
HARVEY & KULMALA
Attorneys at Law
110 Main Street
Post Office Box 705
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(803) 259-5531
Attorney for Petitioner

cc H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire

The Supreme Court of South Carolina

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March 20, 2003

Pete Kulmala, Esquire
Harvey & Kulmala
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Barnwell, SC 29812

Re Elam, Hattie Rose v SC Dept of Trans

Dear Counsel

This is in response to your telephone inquiry on today's date Please be advised that this Court's letter of February 24, 2003 reflects an incorrect due date for the brief of petitioner and additional copies of the appendix in the above entitled matter

The due date for these documents is March 26, 2003 Please accept our apologies for any inconvenience this may have caused

Very truly yours,

CLERK

DES/dmh

cc H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire

The Supreme Court of South Carolina

DANIEL E SHEAROUSE
CLERK OF COURT

BRENDA F SHEALY
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February 24, 2003

Pete Kulmala, Esquire
Harvey & Kulmala
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Barnwell, SC 29812

Re Elam, Hattie Rose v SC Dept of Transportation
1999-CP-03-00008

Dear Counsel

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter

It will be necessary for you to furnish this office with an additional thirteen (13) properly indexed copies of the appendix within thirty (30) days from the date of this letter

Brief of Petitioner should be served and filed on or before March 24, 2003 The brief is not properly filed until we have proof of service

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed We must have proof of service Any reply brief should be served and filed within ten (10) days after filing of respondent's brief

Very truly yours,

CLERK

DES/dmh

Enclosure

cc H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire
The Honorable Mary Jean Carlson
The Honorable Kenneth A Richstad

The Supreme Court of South Carolina

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' order dismissing petitioner's appeal as untimely pursuant to Quality Trailer Products v CSL Equipment Company, 349 S C 216, 562 S E 2d 615 (2002) The parties shall proceed to serve and file the appendix and briefs as provided by Rule 226(1), SCACR

C J

J

J

J

J

Columbia, South Carolina

February 24, 2003

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E Martin, Sr , Circuit Court Judge

Case No 99-CP-03-008

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner

PETITION FOR A WRIT OF CERTIORARI

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Attorneys for Petitioner, SCDOT

OTHER COUNSEL OF RECORD

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Allendale, South Carolina 29810

Attorneys for Respondent,
Hattie Rose Elam

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on September 18, 2002

QUESTIONS PRESENTED

1 Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal?

2 Did the Court of Appeals err in extending the principle of Quality Trailer Products to Petitioner SCDOT's Rule 59(e) motion by finding that motion repeated arguments made in the JNOV motion, when such arguments must be repeated if an appellant desires to preserve an argument previously made but not ruled upon?

3 Did the Court of Appeals err when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice, when the denial was an implicit ruling because it could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury?

4 Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling?

5 Did the Court of Appeals err in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court provided a ruling on each point and preserved each argument for appeal?

6 Did the Court of Appeals err by so expanding the holding of Quality Trailer Products and its interpretation of the use of Rule 59(e) for error preservation, that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for appeal?

STATEMENT OF THE CASE

This personal injury lawsuit was commenced by the service of Respondent, Hattie Rose Elam's Summons and Complaint, which were filed on January 19, 1999, seeking actual damages for personal injury and property damage sustained in a one-car collision on Highway 125 in Allendale County on Sunday March 8, 1998 Petitioner, South Carolina Department of Transportation (SCDOT) answered on

February 18, 1999, invoking Tort Claims Act immunities for temporary or natural conditions due to weather, Elam's sole negligence and comparative negligence Elam filed an amended Complaint, to include allegations of scarring, on July 30, 1999 SCDOT answered on August 10, 1999 Elam later filed a second amended complaint to add property damage for her vehicle on September 29, 2000 Prior to trial, SCDOT sought to amend its answer, so as to assert the Tort Claims Act immunity for design, which was denied

The case was tried before a jury, which rendered a verdict on January 10, 2001, for Elam in the amount of two hundred fifty thousand ($250,000 00) dollars SCDOT moved for directed verdict at the close of Elam's case and again at the close of all the evidence At the conclusion of trial, SCDOT moved before the trial court for a judgment notwithstanding the verdict, and for a new trial absolute and in the alternative, for a new trial *nisi remittitur* All motions were denied, and SCDOT timely moved for reconsideration under Rule 59(e), which was also denied by the trial court's order of April 6, 2001 SCDOT's Notice of Appeal was served on counsel for Elam on April 28, 2001, and filed May 2, 2001 At the request of the Court of Appeals, counsel for both parties briefed the question of whether or not this appeal was untimely, in light of this Court's decision in Quality Trailer Products, 349 S C 216, 562 S E 2d 615 (2002) On July 25, 2002, the Court of Appeals issued its Order dismissing the appeal as untimely On August 8, 2002, Petitioner filed its Petition for Rehearing, which was denied by order of the Court of Appeals on September 18, 2002

ARGUMENT

1 The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal because that motion followed an oral denial of petitioner's JNOV motion which could have been based on either of two independent grounds, and well established precedent required the filing of a Rule 59(e) motion so that the trial court rule on each ground to preserve each for appeal

This Court and the Court of Appeals require that, in order for a losing party in the trial court to present an argument on appeal, the appellant must preserve the issue by first presenting it to the trial court and have the trial court rule upon all grounds that it wishes preserved for appeal "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred" I'On L L C v Town of Mt Pleasant, 338 S C 406, 422, 526 S E 2d 716, 724-725 (2000) A specific ruling on each ground is required "An issue is not preserved for appellate review where the trial court did not explicitly rule on the appellant's argument and the appellant made no Rule 59(e) motion to alter of amend the judgment" Noisette v Ismail, 304 S C 56, 403 S E 2d 122 (1991)

Implicit rulings are ineffective for error preservation purposes In Walker v The Bluffs Apartments, 324 S C 350, 477 S E 2d 472(Ct App 1996), the appellant (who had not made a Rule 59(e) motion), sought, on appeal, to argue the common knowledge exception in connection with expert testimony Concluding that the issue had not been preserved, despite having been presented by argument to the trial court, the Court of Appeals said "The record shows that Walker argued the common knowledge exception in opposition to Narmour's motion for summary judgment The

trial court ruled that Walker's expert was not qualified, but did not explicitly rule on Walker's argument for application of the common knowledge exception " Walker v The Bluffs Apartments, at 474 This reasoning is directly applicable in the case at bar SCDOT argued both the existence of evidence of notice and the legal standard for notice, but the trial court's denial gave no indication of which argument drove his decision

In Van Blarcum v City of North Myrtle Beach, the appellant (who had not made a Rule 59(e) motion), asserted that the Master had implicitly addressed the particular question which was on appeal This Court rejected the appellant's argument, noting that "an implicit ruling will not suffice" Van Blarcum v City of North Myrtle Beach, at 490

Whenever an order presents these problems the courts have specifically directed appellants to file a Rule 59 motion to provide the trial court an opportunity to rule upon and issue and correct the error

In the case at bar, at the conclusion of trial, counsel for SCDOT moved for JNOV, asserting a lack of evidence of notice to SCDOT, and citing Summer v Carpenter, 328 S C 36, 492 S E 2d 55 (1997) for its reasoning on "interrupted notice" Elam's counsel responded that there was notice on the part of the Department (R p 426, l 16 – p 427, l 8), after which the trial court referred to the testimony of Sergeant King, and his having reported the condition of the road to SCDOT, and ruled "The Court is of the opinion that the Department and the State has been placed on notice And the question as to whether or not the defendant was negligent under these circumstances was a matter to be determined by the

Constitutionally empaneled triers of the facts, the jury The jury had made that determination Your motion is respectfully denied " (R p 427, l 16 - 24)

Counsel for SCDOT persisted in its efforts to focus on the question of "interrupted notice", asserting that "there's no evidence in the record of any notice or any indication of a problem, or that the repairs were inadequate Subsequent to, that is, after the time that the Highway Department completed its work on February 10th and prior to the events of March 8th, 1998" (R p 428, l 8 - 14) Elam's counsel responded that "[t]he evidence shows that, under their own witness, Mr Jones, he testified that when he was out there, that they had a continuing problem from December, January, and February" (R p 429, l 2-5) The trial court ruled simply "[y]our motion is denied and still stands " (R p 429, l 15-16) The court gave no basis or reasoning for the denial following argument on the issues of "interrupted notice"

Thus, the trial judge could have based his ruling on either of two reasons First, the trial judge's oral ruling denying the motion for JNOV could mean that, as a matter of law, the remedial measures performed on February 10, 1998 did not break the chain of notice which existed prior to repairs, thereby rejecting the Summer v Carpenter interrupted notice If this was the court's ruling, which is implied by its reliance on Trooper King's testimony of pre-repair notice only, then its decision was inconsistent with its charge on interrupted notice and was a significant change in its view of the law of the case, because the court was now holding that any notice, before or after the repairs, was sufficient This ruling would be a new issue, raised for the first time in the trial court's denial of the JNOV motion, and at odds with the court's

instruction to the jury, and in and of itself, justify a Rule 59(e) motion to elicit the basis of the ruling and to preserve the issue for appeal

Second, the trial judge's order could be interpreted to be ruling that even under the theory of interrupted notice of Summer v Carpenter, charged by the court, there was evidence in the record to support a finding that DOT has post-repair notice of the condition after February 10, 1998 If this was the court's ruling, and the court relied only on Trooper King's testimony about conditions before the repairs cited during his oral ruling, then the ruling was not supported by Trooper King's testimony, and in the view of SCDOT, any other evidence in the record

The transcript of the court's ruling on the post-trial motions may reasonably be read as saying that the evidence was sufficient to support the verdict This would not resolve SCDOT's concern or provide a specific ruling on each branch of the notice issue, the need for which was manifested by the trial court's confusing denial The proper resolution of the sufficiency of the evidence question on JNOV, a fact question, depended upon the applicable legal standard for notice, and whether the legal standard was satisfied by pre-repair notice, as provided by Trooper King, or post-repair notice as charged to the jury under Summer v Carpenter A motion under Rule 59(e) was SCDOT's first opportunity to challenge the trial court's notice ruling

It is undeniable that the trial court "ruled" on SCDOT's JNOV motion, but, there is no way to discern from the trial transcript which of these two equally plausible rationales underlie the "ruling" At best, the denial is ambiguous, more appropriately, it is internally inconsistent "When an order is internally inconsistent, that inconsistency must be raised to the trial court by way of post-trial motion before

it is preserved for appellate review Parker v Shecut, 340 S C 460, 531 S E 2d 546 (Ct App, 2000), *reversed on other grounds,* 349 S C 226, 562 S E 2d 620 (2002)

SCDOT desired to preserve both the legal and factual issues for appeal If it had not filed the Rule 59 motion it would not have been able to challenge the court's shift in legal rationale because there was no specific ruling that the trial court had rejected the Summer v Carpenter standard Likewise, SCDOT also desired to preserve the factual argument that under the Summer v Carpenter standard, there was no evidence of post-repair notice Under caselaw which existed at the time of trial, the only way for SCDOT to be able to appeal from the trial court was to first preserve the issues by making a motion under Rule 59(e)

2 The Court of Appeals erred in extending the principle of Quality Trailers to Petitioner SCDOT's Rule 59(e) motion on the ground that motion repeated arguments made in the jnov motion when such arguments must be repeated if appellant desires to preserve an argument previously made but not ruled upon

SCDOT does not challenge the central holding of Quality Trailer Products, Inc v CSL Equipment, Co , 349 S C 216, 562 S E 2d 615 (2002) – that a duplicative and successive motion that does not toll the time for appeal Petitioner maintains that the Court of Appeals improperly applied that principle in the present case In its order dismissing the appeal, the Court of Appeals described the holding of Quality Trailer Products

> [W]here the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion JNOV and new trial and did not toll the time for serving the notice of appeal

(Order, p 2)

The Court of Appeals ruled that SCOT's 59(e) motion was not entitled to tolling, noting that it "mirrored all of the grounds raised at trial in its motions for JNOV and new trial" (Order, p 2), that SCDOT "concedes its Rule 59(e) motion reiterated the issues previously argued in its post-trial motions for JNOV and new trial" (Order, p 2), and that SCDOT acknowledges "it was clear the judge denied the motion for JNOV" (Order, p 3)

The Court of Appeals erred in applying Quality Trailer Products to this case for two reasons First, the court's reliance on the similarity of arguments in the JNOV motion and the Rule 59 motion is not a true indicator of whether a motion is successive In fact, a proper motion to preserve an argument presented but not ruled upon must necessarily repeat the arguments previously made because new arguments cannot be made for the first time in a post trial motion Moreover, the purpose of the Rule 59 motion is to provide an opportunity for the court to correct its error, and hence it was necessary to repeat the arguments The proper focus for determining whether a motion is properly made for error preservation purposes is not whether the same arguments are made, but whether the order of the court sufficiently ruled upon each of the arguments presented See, Noisette v Ismail, Van Blarcum v City of North Myrtle Beach, and Walker v The Bluffs Apartments

3 The Court of Appeals erred when, contrary to well established precedent that implicit rulings do not preserve error, the Court of Appeals held that the trial court's oral denial of Petitioner SCDOT's JNOV motion preserved all of petitioner's arguments on notice when the denial was an implicit ruling on each ground because the denial could have rested on either of two independent grounds and the expressed rationale for the denial was internally inconsistent with the charge to the jury

The Court of appeals also erred in holding that the trial court had clearly ruled on all of SCDOT's arguments by virtue of the trial court having denied its JNOV motion There is no dispute that the court did not grant the JNOV motion However, the critical question is whether that denial was a specific ruling on each argument made because the issue on appeal would be whether all arguments were preserved, not whether the verdict had been reversed See, Noisette v Ismail, Van Blarcum v City of North Myrtle Beach, and Walker v The Bluffs Apartments As discussed above, the denial of the JNOV can be sustained on either (a) that Summer v Carpenter is a correct statement of the law and that evidence of post-repair notice was provided or (b) that Summer v Carpenter is not a correct statement of the law and any notice was sufficient

Petitioner maintains that the ambiguity or inconsistency was sufficient to require a Rule 59 motion to obtain a specific ruling on the issue as required by long standing precedent The Court of Appeals however seems to hold that the denial, as an implied ruling on each issue, was sufficient, citing Bailey v Segars, 346 S C 359, 550 S E 2d 910 (Ct App 2001) To the extent that the Court of Appeal holds that an implicit ruling is sufficient, that holding is inconsistent with many other holdings of this Court that implicit rulings do not preserve arguments for appeal See, Noisette v Ismail, Van Blarcum v City of North Myrtle Beach, and Walker v The Bluffs Apartments At the very least this holding generates confusion and uncertainty in the law of post trial motions and error preservation and exposes counsel to the dilemma of whether to make a Rule 59(e) motion for error preservation and risk an untimely appeal, or refrain from filing the motion at the risk of the appellate court concluding

that the argument or error was not preserved

4 The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the trial court, in denying SCDOT's JNOV motion, apparently reversed its view of the law on which it instructed the jury and for the first time ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling

The Court of Appeals held in Coward-Hund Const Co v Ball Corp, 336 S C 1, 518 S E 2d 56 (Ct App 1999), that a Rule 59(e) motion is proper if it challenges something that was altered by the previous motion Here, the trial court had instructed the jury on interrupted notice as provided in Summer v Carpenter (R p 417) The Rule 59(e) motion was directly challenging the trial court's denial of the JNOV While the trial court's ruling on the JNOV motion did not expressly reject Summer v Carpenter, its ruling on the question was ambiguous because of the evidence relied upon by the court in denying JNOV and the trial court was apparently rejecting the law which it had charged

SCDOT's argument on Summer v Carpenter in the JNOV motion had not sought a ruling on that point because at that time of the JNOV motion the court had accepted it as the correct statement of the law on notice because it had charged the jury to that effect That case was cited to lay the legal foundation for the argument that there was no evidence of post-repair notice However, when the trial court denied the JNOV motion citing only pre-repair notice the court, *for the first time,* was apparently rejecting SCDOT's legal position on notice At this point a Rule 59 motion was necessary to now argue that Summer v Carpenter was the correct statement of the law, and to provide the trial court the opportunity of correcting its error made in denying the JNOV and to rule consistently with its prior charge to the

jury there must be post-repair evidence of notice

5 The Court of Appeals erred in holding that Petitioner SCDOT's Rule 59(e) motion did not toll the time for appeal when the motion complied with the precedent at the time it was filed, the trial court and opposing counsel treated the motion as proper and it served the purpose established in case law because the trial court then provided a ruling on each point and preserved each argument for appeal

Finally, the Court of Appeals faults SCDOT's Rule 59(e) motion because it "nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds," citing Quality Trailer Products SCDOT filed its rule 59(e) motion on January 19, 2001, some 14 months before Quality Trailer Products was decided Consequently the Court of Appeals was applying a standard that SCDOT could not reasonably have known at the time it made its motion, resulting in a fundamentally unfair result Moreover, page 1 of the Rule 59(e) motion specifically points to the trial court's misapplication of the legal standard for notice in ruling on the JNOV motion so that the court and counsel were well aware of the issues to be ruled upon

The most revealing evidence that SCDOT's Rule 59(e) motion was proper and appropriate, when made in January 2001, is the response of the trial court and opposing counsel The trial court received memoranda and heard oral argument and then issued a detailed ruling That Order discussed the testimony and evidence of pre-repair notice over 3 ½ pages and concluded that, "given the *aforementioned testimony* the Court is of the opinion that there was evidence, direct and circumstantial, justifying submission of the case to the jury" (R p 011) (Emphasis added)

Then, even though he had charged "interrupted notice" of Summer v

Carpenter, the trial judge referred to SCDOT's 59(e) argument on interruption of notice and stated, "[T]his Court notes that the language in that case to which Defendant refers is dictum and does not represent the applicable law in this State" (R p 011) Thus, only when the trial judge denied the Rule 59(e) motion did he finally and clearly rule that he did not accept the validity of Summer v Carpenter's "interruption of notice "

Thus, unlike Quality Trailer Products, where the trial court immediately recognized the motion as duplicative, the court properly treated it as raising unresolved issues and specifically ruled on those presented Opposing counsel never objected to the Rule 59(e) motion as successive The issue was raised *sua sponte* by the Court of Appeals after the case had been pending there for more than 13 months, and only after Quality Trailer Products had been decided

6 The Court of Appeals erred by so expanding the holding of Quality Trailer Products and its interpretation of the use of Rule 59(e) for error preservation that lawyers and parties are now uncertain when Rule 59(e) motions are required to preserve error and when such motions may be held successive and not toll the time for noticing an appeal

Through Quality Trailer Products, this Court for the first time, imposed the penalty of not allowing the benefit of tolling of the time for filing notice of appeal, based upon the appellant's 59(e) motion raising issues already raised to and ruled upon by the trial judge Since issuance of that ruling, the Court of Appeals' efforts to apply the holding in at least two cases have brought a dramatic and troublesome change to post-trial practice in South Carolina

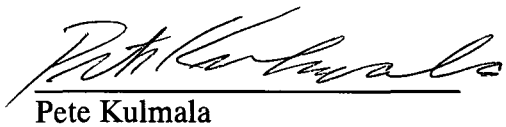
Prior to Quality Trailer Products, the trial lawyer who failed to make a motion to reconsider under Rule 59(e) risked dismissal of his appeal for failure to satisfy the requirement that the matter first be raised to and ruled upon by the trial court To this risk of dismissal for failure to make a 59(e) motion, there is now added the risk of dismissal for making a 59(e) motion which the Court determines is a successive reiteration of JNOV or new trial motions Unfortunately, the basis for making this choice is rarely clear and knowable in advance to the lawyer who must make the decision

As in the case at bar, it is not always easy, nor possible, to determine whether or not the trial court's ruling on an issue presented in JNOV or new trial motions is a sufficient ruling for the issue preservation requirement of "raised to and ruled upon" The determination is further confounded where, as in this case, the trial court's ruling on JNOV is internally inconsistent with the court's own prior ruling in the case, presenting the issue to the lawyer for the first time in the JNOV ruling The determination is certainly not so simple as observing that the trial court has denied a motion

The Court of Appeals' application of Quality Trailer Products has extended that holding so that the need for discerning which issues have been explicitly ruled upon and which issues have not, poses a nearly impossible conundrum for trial lawyers

CONCLUSION

Wherefore, based upon all the foregoing reasons, Petitioner prays that this Court issue its Writ of Certiorari to the South Carolina Court of Appeals, to consider the questions presented, and to reverse the decision of the Court of Appeals



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October 18, 2002
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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E Martin, Sr , Circuit Court Judge

Case No 99-CP-03-008

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner,

PROOF OF SERVICE

I certify that I have served the Petition for Writ of Certiorari on Hattie Rose Elam by depositing a copy of it in the United States Mail, postage prepaid, on October 18, 2002, addressed to her attorney of record, H Woodrow Gooding, Jr and Mark B Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810

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October 18, 2002

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E Martin, Sr , Circuit Court Judge

Case No 99-CP-03-008

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

This Court should deny the South Carolina's Department of Transportation's ("SCDOT") Petition on all questions presented because the Court of Appeals properly dismissed its appeal in this action pursuant to the holding of Quality Trailer Products v CSL Equipment Co , 349 S C 216, 562 S E 2d 615 (2002)

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STATEMENT OF THE CASE

On March 8, 1998, Hattie Rose Elam was injured when she lost control of her vehicle and struck a utility pole while traveling on South Carolina Highway 125 in Allendale County Elam brought this action against the South Carolina Department of Transportation under the South Carolina Tort Claims Act, S C Code Ann §§15-78-10 to 200 (Supp 2001) She alleged her accident was caused by excessive water on the highway and SCDOT was grossly negligent in failing to properly maintain the road

At the close of Elam's case in chief SCDOT argued in its motion for a directed verdict, among other things, that it had made repairs to the road in February 1998 and was not thereafter put on notice of any continuing problems before Elam's wreck occurred Citing Summer v Carpenter, 328 S C 36, 492 S E 2d 55 (1997), SCDOT contended a governmental entity must be on notice that the problem is continuing for liability to be imposed after remedial measures have been taken, referring to this as the concept of "interrupted notice " SCDOT maintained the trial court should grant its motion for a directed verdict on the ground that Elam had failed to establish notice of the problem with the roadway in light of the remedial actions taken by SCDOT just prior to Elam's wreck pursuant to its theory of " interrupted notice " (R p 254, l 7 - p 255, l 6)

The trial court denied SCDOT's request for a directed verdict and submitted the case to the jury, stating "the question as to whether or not there was or was not any signs or remedial action taken is the question that should be determined by the jury and because of that fact, motion is denied " (R p 256, lines 1-4)

Again at the close of SCDOT's case, SCDOT renewed its motion for a directed verdict on the same basis (R p 329, line 7 - p 331, line 3) This time SCDOT was more elaborate in its

argument citing both the "standard" of Summer v Carpenter and an purported lack of evidence of notice SCDOT's counsel argued "There is nothing whatsoever in the record [that] suggests SCDOT was on notice of any deficiency in repairs until the accident of March 8 There is no notice under Summer v Carpenter they are relieved of the duties to respond, having performed remedial services and having no reason to believe the remedial services were deficient in that time frame " (R p 330, lines 4-10) Again, the trial court rejected SCDOT's contention and denied the motion The trial court concluded that, "based on the information supplied to the court, the court is of the opinion that all of the questions posed are questions that should be determined by the triers of fact, that is the jury, and because of that fact I'm gonna respectfully [deny] " (R p 335, line 23 - p 336, line 2)

On January 10, 2001, immediately after the jury returned a verdict for Elam of $250,000 00, SCDOT made motions for a JNOV and a new trial As to the motion for JNOV, SCDOT argued in relevant part that there was no evidence of notice according to the concept of interrupted notice in Summer v Carpenter (R D 424, 1 16-20)

The trial court stated it was of the opinion SCDOT had notice of the problem with the road (R D 427, line 16) The court explicitly denied the motion for JNOV on this basis stating

> "[T]he question as to whether or not the defendant was negligent under these circumstances was a matter to be determined by the Constitutionally empaneled tiers of facts, the jury The jury has] made that determination Your motion is respectfully denied "

(R p 427, lines 17-24) SCDOT continued, arguing that

> [T]he context in which [the] testimony [the trial court cited as supporting its decision to deny SCDOT's JNOV motion] was presented related to notice prior to December 1997 circumstances

> And what I point out is that there's no evidence in the record of any notice or any indication of a problem, or that the repairs were inadequate Subsequent to, that is, after the time that [SCDOT] completed its work on February 10th and prior to the events of March 8th, 1998, and, therefore, [SCDOT] would be entitled to JNOV

(R d 428, lines 4-15) After further colloquy, the court stated "Your motion is denied and still stands " (R d 429, lines 15-16) The court also denied the motion for a new trial

SCDOT thereafter filed a motion under Rule 59 (e), SCRCP, that mirrored all of the grounds raised at trial in its motions for JNOV and new trial In pertinent part, SCDOT specifically moved for an order reconsidering on the ground that

> In denying SCDOT's Motion for Judgment notwithstanding the verdict, the court apparently misapplied the appropriate standard for notice, where the evidence indicates that, in response to notice, the Defendant undertakes measures to correct the problem or eliminate the defect, and thereafter, receives no indication or notice of ineffectiveness of the corrective measures until the occurrence of the incident giving rise to Plaintiff's claim According to Summer v Carpenter, Opinion #24689 (SE 1997), notice of a hazard is essentially interrupted by responsive action to correct the defect, and absent notice of problems after the corrective measures, the Defendant has no duty to make further improvement or corrective measures

SCDOT Notice of Motion and Motion to Reconsider Pursuant to Rule 59(e), p 1

The trial court denied the Rule 59(e) motion in an order dated April 6, 2001 SCDOT served its Notice of Appeal on April 21, 2001, more than thirty days after the trial court originally ruled on SCDOT's motions for JNOV and new trial in January 2001

On July 25, 2002, the Court of Appeals dismissed SCDOT's appeal as untimely because it concluded SCDOT's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in the post-trial motion for JNOV and new trial, such that it amounted to a successive motion for JNOV and new trial and did not toll the time for serving the notice of appeal, citing, Quality Trailer Products v C L Equipment Co , 349 S C 216, 562 S E 2d

615 (2002) On August 8, 2002, SCDOT filed its Petition for Rehearing, which was denied by the Court of Appeals on September 18, 2002

ARGUMENT

1 Did the Court of Appeals err in holding that SCDOT's Rule 59(e) motion did not toll the time for appeal when that motion followed an oral denial of SCDOT's JNOV motion which could have been based on either or two independent grounds?

The Court of Appeals was correct in holding that SCDOT's Rule 59(e) motion did not toll the time for appeal, because the motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV It is not significant that SCDOT's Rule 59(e) motion followed an oral denial of its motion for JNOV that could have been based on either of two independent grounds Further, established precedent did not require SCDOT to file its Rule 59(e) motion to preserve either of the "two independent grounds" which had been previously raised and ruled upon by the trial court

In Quality Trailer Products, Inc v C L Equipment Co , 349 S C 216, 562 S E 2d 615 (2002), this Court held that where the appellant's Rule 59(e) motion merely reiterated, with a few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial that did not toll the time for serving the notice of appeal This Court noted, "Despite its caption [the] second motion was not a Rule 59(e), SCRCP, motion The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion " Id at ___, 562 SE 2d at 617 See also, Collins Music Co , Inc v IGT, No 2002-OR-405 (South Carolina Court of Appeals, filed September 4, 2002) (dismissing IGT's appeal as untimely pursuant to Quality Trailer Products and Coward Hund where IGT filed a Rule 59(e) motion, after its post-trial motions were denied, seeking

an order altering or amending the post-trial order to more specifically address each separate ground raised in the post-trial motions)

Similarly in this case, SCDOT's Rule 59(e) motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion In fact, as SCDOT conceded to the Court of Appeals, its Rule 59(e) motion reiterated the issues previously argued in its post-trial motions for JNOV and new trial SCDOT asserts, however, the trial court never "explicitly" ruled on the "notice" issues in regard to its JNOV motion SCDOT contends the time for appeal was stayed while it attempted to satisfy what it perceived as a requirement of Noisette v Ismail, 304 S C 56, 403 S E 2d 122 (1991), to obtain specific findings

The trial court in this case, however, was not required to provide a detailed analysis respecting each ground offered in support of SCDOT's motion for JNOV As the Court of Appeals pointed out in its Order dismissing this appeal, the requirement of Noisette is not applicable to the situation in this case In Noisette, this Court, citing Rule 52(a), SCRCP, held that where the circuit court did not explicitly rule in a declaratory judgment on the argument that Noisette failed to prove, Ismail was a permissive user of a vehicle, it was not available for consideration on appeal Because Noisette involved a declaratory judgment, heard by the trial court alone, the trial court was required to make special findings of fact and law See Rule 52(a), SCRCP ("In all actions tried upon facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon ") However, this case was tried to a jury, therefore, the provisions of rule 52(a) are not applicable See, Rule 52(a), SCRCP ("Findings of fact and conclusions of law are unnecessary on decisions of motions [except those made pursuant to Rule 41(b)] ") See also, Folkens v Hunt, 300 S C 251, 254, 387 S E 2d 265, 267 (1990) ("We have refused to require trial judges to explain

reasons for ruling on [the request for a new trial as the thirteenth juror] "), Bailey v Segars, 346 S C 359, 550 S E 2d 910 (Ct App 2001) (stating a form order denying a motion for JNOV and new trial coupled with the transcript of the proceedings was sufficient to allow appellate review and a Rule 59(e) motion was not required to preserve issues for appeal), cert granted on other grounds (Jan 10, 2002)

Moreover, the record indicates the trial court considered all of SCDOT's arguments several times and, as SCDOT acknowledges, it was clear the judge denied the motion for JNOV[1] See, Armstrong v Union Carbide, 308 S C 235, 417 SE 2d 597 (Ct App 1992)(stating that while the order of the circuit court did not separately list and specifically address each of the twenty-nine exceptions raised, it was clear from reviewing the order that all grounds raised below were considered Once the trial court has considered all of the relevant argument and clearly denies a motion for JNOV, the trial court's failure to detail all of the arguments that were rejected in its ruling does not make the denial of the motion any less explicit See, e g , Bailey v Segars, 346 S C 359, 366, 550 S E 2d 910, 914 (Ct App 2001)(finding that a Rule 59(e) motion is not necessary where post-trial motion is denied in a form order, "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial, they are used to preserve those that have been raised to the trial court but not ruled upon ") Additionally, this Court and the Court of Appeals affirms or reverses rulings, orders and judgments, not reasons for or the analysis used to reach or decide the ruling, order or judgment See, Rule 220 (c), SCACR (allowing the Court to affirm any ruling, order, or judgment upon any ground appearing in the Record on Appeal)

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[1] In its memorandum filed with Court of Appeals on the issue of timeliness of the appeal, SCDOT acknowledges ' At the end of the day of January 10, 2001 it was clear that SCDOT s JNOV motion had been denied Appellants Brief on Timeliness of Appeal p 7

Finally, as noted by the Court of Appeals, in its Rule 59(e) motion SCDOT nowhere asserts or alleges the trial court failed to rule on any of the previously-raised grounds Rather, it admittedly lists all issues that were raised to the trial court in support of its motions for JNOV and new trial and argues the trial court erred in denying those motions See, Quality Trailer Products, 349 S C at _____, 562 S E 2d at 617 ("The motion did not ask the trial court to rule on an issue presented but not ruled upon in any previous motion ") Furthermore, in its Rule 59(e) motion SCDOT did not argue to the trial court that it was seeking relief on issues coming to light as a result of an order following the initial post-trial motion that altered or amended the judgment

2 Did the Court of Appeals err in applying the holding of Quality Trailer Products to SCDOT's appeal?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing Moreover, this issue cannot be deemed a subsidiary question fairly comprised in the questions presented to the Court of Appeals Therefore, the issue is not preserved for review Rule 226(d)(2), SCACR, Darby v Southern Ry Co , 194 S C 421, 10 S E 2d 465 (1940) Graniteville Mfg v Renew, 113 S C 171, 102 S E 18 (1920) State v Johnson, 334 S C 78, 512 SE 2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing Norton v Opening Break of Aiken, Inc , 313 S C 508, 462 Se 2d 861 (1995) (only those questions raised in the Court of Appeals and in a petition for rehearing shall be included in a petition for a writ of certiorari)

Nonetheless, for the reasons stated above, the Court of Appeals was correct in applying the holding of Quality Trailer Products to SCDOT's appeal SCDOT's Rule 59(e) motion was merely a successive motion for JNOV that did not present any new issue upon which the trial court had not

ruled SCDOT argues that the "similarity of arguments in the JNOV motion and the Rule 59 motion is not a true indicator of whether a motion is successive " However, SCDOT fails to point out that its Rule 59 motion sought the same relief on the same grounds as it did its motion for JNOV See, e g Quality Trailer Products, Inc v C L Equipment Co , 349 S C 216, 562 SE 2d 615 (2002), Coward Hund Construction Co v Ball Corp , 336 S C 1, SE 2d 56 (Ct App 1999)

3 Did the Court of Appeals err in concluding the trial court's oral denial of SCDOT's motion for JNOV preserved all of its arguments on notice?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing Moreover, this issue cannot be deemed subsidiary question fairly comprised in the questions presented to the Court of Appeals Therefore, the issue is not preserved for review Rule 226(d)(2), SCACR, Darby v Southern Ry Co , 194 S C 421, 10 SE 2d 465 (1940), Graniteville Mfg v Renew, 113 S C 171, 102 SE 18 (1920) State v Johnson, 334 S C 78, 512 SE 2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing Norton v Opening Break of Aiken, Inc , 313 S C 508, 462 SE 2d 861 (1995) (only those questions raised in the Court of Appeals and in petition for rehearing shall be included in a petition for a writ of certiorari)

Nonetheless, it is clear from the record that the trial court had expressly and explicitly rejected SCDOT's motion for JNOV on all bases (R P 428, 1 4 - p 429, 1 16) At that point, all issues regarding SCDOT's motion for JNOV were resolved by the circuit judge and were ripe for appellate review Wilder Corp V Wilke, 330 S C 71, 497 SE 2d 731 (1998), I'On, L L C v Town of Mt Pleasant, 338 S C 406, 422, 526 SE 2d 716, 724 (2000), Hubbard v Rowe, 192 S C 12, 19, 5 SE 2d 187, 189 (1939)("In matters of appeal, so far as it appears, all that this Court has ever required is

that the questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that court ") In other words, if SCDOT wanted to appeal the issues at that point, it could

Interestingly, the questions regarding the explicitness of the trial court's rulings only surfaced after the Court of Appeals asked the parties to brief the issue of timeliness of SCDOT's appeal in light of Quality Trailer Products Additionally, there is no mention of any ambiguity or inconsistency in the trial court's ruling with regard to the jury charge on notice in SCOOT's Rule 59(e) SCDOT never thought there was any inconsistency in the trial court's ruling until the timeliness of its appeal was brought up

4 Did the Court of Appeals err in holding SCDOT's Rule 59(e) motion did not toll the time for appeal even if, in denying motion for JNOV, the trial court reversed its view of the law on which it instructed the jury and for the first time, ruled that pre-repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling?

Elam contends that this specific question was not raised in the initial arguments to the Court of Appeals and was not raised in SCDOT's petition for rehearing Moreover, this issue cannot be deemed subsidiary question fairly comprised in the questions presented to the Court of Appeals Therefore, the issue is not preserved the review Rule 226(d)(2), SCACR, Darby v Southern Ry Co , 194 S C 421, 10 SE 2d 465 (1940), Graniteville Mfg V Renew, 113 S C 171, 102 SE 18 (1920) State v Johnson, 334 S C 78, 512 SE 2d 795 (1999) (Court of Appeals did not address issue and petitioner did not raise issue in petition for rehearing Norton v Opening Break of Aiken, Inc , 313 S C 508, 462 SE 2d 861 (1995) (only those questions raised in the Court of Appeals and in petition for rehearing shall be included in a petition for a writ of certiorari)

Nevertheless, in its Rule 59(e) motion, SCDOT never challenged any "new ruling" as a result

of the trial court's denial of its motion for NOV SCOOT's Rule 59(e) motion is void of any reference to any inconsistency between the trial court's prior charge and its denial of SCOOT's motion for NOV Instead, SCOOT's Rule 59(e) motion reiterates almost verbatim the same grounds set forth in its motion for NOV

Again, the issue of Summer v Carpenter setting forth the applicable standard of notice was raised to the trial court and ruled upon (Rp 330, line 4-10 and p 335, line 23-p 336, line 2, and p 424, line 16 - p 429, line 16) At that point the issue was preserved for appellate review Collins Music co , Inc v IGT, No 2002-OR-405 (S C Ct App , filed Sept 4, 2002), Wilder Corp v Wilke, 330 S C 71, 497 SE 2d 731 (1998), Hubbard v Rowe, 192 S C 12, 19, 5 SE 2d 187, 189 (1939)

5 Did the Court of Appeals err in holding SCDOT's Rule 59(e) motion did toll the time for appeal because this Court's opinion in Quality Trailer Products was not issued until after SCDOT's Rule 59(e) motion was filed and because the trial court and opposing counsel did not object to the motion as being improper?

The decision in Quality Trailer Products was a mere logical extension of the holding in Coward Hund Const Co v Ball Corp , 336 S C 1, 518 SE 2d (56 (Ct App 1999), which was decided prior to SCDOT filing its Rule 59(e) motion In both Quality Trailer Products and Coward Hund, it is the "successive" nature of the post-trial motion that is important, not the type of post-trial motion Therefore, SCDOT should have known that its 59(e) motion would not toll the time for appeal

Moreover, Quality Trailer Products did not create any new substantive rights or liability where formerly none existed As such, there is nothing to limit the holding of Quality Trailer Products to prospective application only See, e g Osborne v Adams, 346 S C 4, 550 SE 2d 319 (2001), Steinke v S C D L L R 336 S C 373, 520 SE 2d 142 (1999), Simmons v South Carolina Farm Bureau

Mutual Insurance Co , 301 S C 267, 391 SE 2d 560 (1990), Toth v Square D Co , 298 S C 6, 377 SE 2d 584 (1989) Besides that, the holding of Quality Trailer Products obviously is not limited to prospective application because this Court dismissed the appeal in that case

Finally, whether or not opposing counsel or the trial court objected to SCDOT's Rule 59(e) motion is not an issue Timely service of the notice of intent to appeal is a jurisdictional requirement, and neither this Court nor opposing counsel has the authority to extend or expand the time in which the notice of intent to appeal must be served See, Quality Trailer Products, Inc , v C L Equipment Co 349 S C 216, 562 SE 2d 615 (2002) citing, Mears v Mears, 287 S C 168, 337 SE 2d 206 (1985)

6 Does the Court of Appeals application of the holding of Quality Trailer Products create uncertainty for lawyers and parties with respect to error preservation?

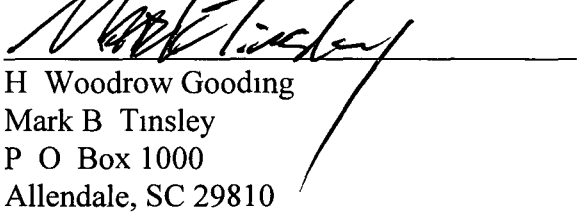
SCDOT argues that Quality Trailer Products creates a Hobson's choice for trial lawyers who must decide whether to file a Rule 59(e) motion and run the risk of having their appeal dismissed as untimely or risk not making the motion and having the appeal dismissed because the issue to be appealed is not preserved due to the fact that a 59(e) motion was not filed

As explained above, and by the Court of Appeals in this case and in Collins Music Co , Inc v IT, a Rule 59(e) motion is not necessary to preserve an issue of appellate review if that issue has been raised to and ruled on by the trial court Nonetheless, there is nothing that prevents a lawyer from filing a Rule 59(e) motion and then filing a timely appeal If the particular issue appealed is not preserved, then upon dismissal of the appeal, the trial court could then hear the 59(e) motion There is no "impossible conundrum "

CONCLUSION

For the reasons stated above, Elam requests that this Court deny SCDOT's Petition on all questions presented

GOODING AND GOODING, P A

BY 

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THE STATE OF SOUTH CAROLINA
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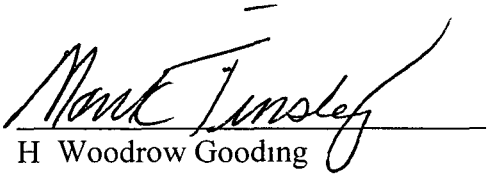
South Carolina Department of Transportation, Petitioner

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Petition for a Writ of Certiorari on South Carolina Department of Transportation by depositing a copy of it in the United States Mail, postage prepaid, on November 15, 2002, addressed to its attorney of record, E Pete Kulmala, P O Box 705, Barnwell, SC 29812



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South Carolina Department of Transportation, Petitioner

PETITIONER'S REPLY TO RESPONDENT'S RETURN

I Respondent's Return Further Emphasizes the Need for The Supreme Court to Grant the Petition for Certiorari and Resolve the Significant Issues regarding Error Preservation and Post-Trial Motions

Respondent's Return to the Petition for Certiorari merely reasserts arguments previously made and further emphasizes the need for review and clarification on error preservation and post-trial motions by its concluding argument There, Respondent implicitly recognized that counsel are faced with determining whether an issue has been preserved by suggesting that in those situations, counsel file a Rule 59(e) motion and then file a timely appeal Respondent's suggestion necessarily means that the issue is not resolved by the trial court before the appeal is filed and inevitably leads to cases being remanded to the trial court for a ruling before returning to the court of Appeals, with accompanying delay, expense, and diversion of judicial resources entailed in that procedure

It should now be evident that the simple statement from Quality Trailer Products, cited by the Court of Appeals, that "where the appellant's Rule 59(e) motion merely reiterated, with a

few procedural alterations, the grounds previously raised and ruled upon in its prior motion for JNOV and new trial, its Rule 59(e) motion amounted to a successive motion for JNOV and new trial and did not toll the time for serving notice of appeal" is not susceptible of ready application without further elucidation from this Court It is of utmost importance to litigants and counsel as well, that the holding of Quality Trailer Products be placed in context with the kinds of issues raised in this case, involving implicit rulings, internal inconsistencies, and the apparent conflict between the need for a sufficient ruling for issue preservation versus the timeliness of filing notice of appeal

This Court has now accepted review of another case (Collins Music Co , Inc v IGT) involving a number of the same issues as this case, with factual differences regarding the presentation of post-trial motions Petitioner respectfully urges his Court to grant Certiorari and to consider both cases in consolidation, so that all issues raised may be reviewed comprehensively and a clarifying ruling may be issued

II Petitioner SCDOT Properly Presented All Arguments to the Court of Appeals

In her return to the Petition for Certiorari, Respondent suggests that three of Petitioner, SCDOT's Questions Presented were not raised in either Petitioner's initial argument to the Court of Appeals or SCDOT's Petition for Rehearing That suggestion is simply incorrect and without any basis

In effect, Respondent is asserting that the applicability to this case of the Supreme Court opinion that caused the Court of Appeals to raise, *sua sponte*, the issue of the timeliness of SCDOT's appeal, and the arguments based on two important facts which distinguish this case from Quality Trailer Products, Inc v CSL Equipment Co , 349 S C 216, 562 S E 2d 615 (2002), were not presented to the Court of Appeals, either in first attempting to convince that

Court not to dismiss SCDOT's appeal as untimely, or in SCDOT's Petition for Rehearing after the Court of Appeals had held the appeal untimely

In asserting that the issues were not raised, Respondent cites only the initial part of SCDOT's Questions Presented 2 and 3 and the complete Question 4, (Respondent's Return to Petition for Certiorari pp 9-10) as follows

2 Did the Court of Appeals err in applying the holding of Quality Trailers Products to SCDOT's appeal?

3 Did the Court of Appeal err in concluding the trial court's oral denial of SCDOT's motion for JNOV preserved all of its arguments on notice?

4 Did the court of Appeals err in holding SCDOT's Rule 59(e) motion did not toll the time for appeal even if, in denying the motion for JNOV, the trial court reversed its view of the law on which it instructed the jury and for the first time, rule that pre- repair notice was sufficient, thereby making the Rule 59(e) motion the first opportunity to challenge this new ruling?

To the extent that Respondent is challenging only the cited portions of the Questions Presented 2 and 3, it is amply clear that all of these arguments were made to the Court of Appeals First, as summarized in Question 2, SCDOT consistently and repeatedly argued before the Court of Appeals that Quality Trailer Products did not apply to the facts presented here (Appellant's Brief on Timeliness pp 3-7, 9-11, Petition for Rehearing 9-10) Hence, SCDOT argued that it was error for the Court of Appeals to conclude that SCDOT's motion for JNOV was a successive motion under the standard of Quality Trailer Products SCDOT also argued, as stated in its Question 2 that merely because the same issue was be raised in both motions should not be determinative in applying the sanction of Quality Trailer Products (Petition for Rehearing p 11)

Second, as summarized in Question 3, SCDOT also argued that the written Rule 59(e) motion was made necessary because the trial judge's oral denial of the post-trial motions did not

provide a specific ruling on each of its contentions on the issue of notice that Summer v Carpenter, 328 S C 36, 492 S E 2d 55 (1997), was a correct statement of the law, and that under that standard, there was no evidence of post repair notice of the condition to SCDOT Also, the trial court's recitation of only pre-repair notice revealed an internal inconsistency, since the court had previously instructed the jury on interrupted notice Hence, SCDOT argued that the trial court's oral ruling was at best an implicit ruling and did not preserve both arguments on notice (Brief on Timeliness pp 7-9, Petition for Rehearing pp 2-6) Appellant specifically argued, as stated in Question 3 that the trial court's oral ruling was an implicit ruling on the notice issues (Petition for Rehearing pp 2-7 and 6-7)

Third, as stated in Question 4, SCDOT argued that the trial court shifted the legal basis for its ruling in denying the oral post-trial motions Originally the trial judge charged the jury on interrupted notice However, it orally denied the post-trial motions on the grounds that there was adequate notice and in support of its conclusion, cited only the testimony of one witness who testified only to pre-repair conditions, thereby creating ambiguity in its ruling and raising for the first time, the issue of internal inconsistency in its decision (Appellant's response to Respondent's Return to Petition for Rehearing pp 2-3), (Petition for Rehearing pp 3-7)

CONCLUSION

For all of the foregoing reasons, as well as those set forth in the Petition, Petitioner respectfully requests this Court grant Certiorari to review the decision of the Court of Appeals

Pete Kulmala
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Attorneys for Petitioner, SCDOT

November 22, 2002
Barnwell, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ALLENDALE COUNTY
Court of Common Pleas
Daniel E Martin, Sr , Circuit Court Judge

Case No 99-CP-03-008

Hattie Rose Elam, Respondent,

v

South Carolina Department of Transportation, Petitioner,

PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to Respondent's Return on Hattie Rose Elam by depositing a copy of it in the United States Mail, postage prepaid, on November 22, 2002, addressed to her attorney of record, H Woodrow Gooding, Jr and Mark B Tinsley, Esquires, PO Box 1000, Allendale, South Carolina 29810

Pete Kulmala
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Attorneys for Petitioner, SCDOT

4c

November 22, 2002

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November 22, 2002

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

Re Hattie Rose Elam v SCDOT,
Case # 99-CP-03-008

Dear Mr Shearouse

Enclosed for filing is an original and six copies of Petitioner's Reply to Respondent's Return, together with Proof of Service in the above case

Please accept my kind regards,

Most Respectfully,

Pete Kulmala
HARVEY & KULMALA
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(803) 259-5531
Attorney for Petitioner

cc H Woodrow Gooding, Jr , Esquire
Mark B Tinsley, Esquire

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November 15, 2002

The Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Re Hattie Rose Elam vs SCDOT
C/A #99-CP-03-008

Dear Mr Shearouse

Enclosed please find the original and six (6) copies of Respondent's Return to Petition for a Writ of Certiorari and Proof of Service for filing

With kindest personal regards, I remain

Sincerely,

Mark B Tinsley

Mark B Tinsley

MBT/rfl
enc

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October 18, 2002

Honorable Daniel E Shearouse
Clerk, South Carolina Supreme Court
P O Box 11330
Columbia, South Carolina 29211

Re Hattie Rose Elam v SCDOT,
Case # 99-CP-03-008

Dear Mr Shearouse

Enclosed for filing is an original and six copies of Petition for Writ of Certiorari, together with two copies of the Appendix, and Proof of Service in the above case

Please accept my kind regards,

Most Respectfully,

Pete Kulmala
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Attorney for Petitioner

cc H Woodrow Gooding, Jr , Esquire
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2002-24741

Op #25869
remitt on 9-30-04

Kerri Brown
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Debbie Reynolds
The Supreme Court of South Carolina
1231 Gervais Street
Columbia, South Carolina 29201

To Whom It May Concern

Professor Michael Virzi would like to request a copy of the oral arguments for Elam v South Carolina Department of Transportation, 361 S C 9, 602 S E 2d 772 (2004) I have enclosed the $20 payment

I will be able to pick the copy of the oral argument from the court when it is ready Please call me at 404-593-6048 when the recording is ready for pick up Thank you for assisting me in requesting a copy of the oral arguments in this case

Sincerely,

Kerri Brown

heard 11-19-03
#3784 NO

Check # 508
$80.00 for 4 oral argument tapes