

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

Richard L. Booth, Master-in-Equity

Common Pleas Case No. 2009-CP-43-2538  
Appellate Case No. 2013-000255

**RECEIVED**

JUL 10 2014

**SC Court of Appeals**

First Citizens Bank and Trust Company, Inc.,.....Respondent,

v.

Charles T. Brooks, III and the South Carolina Department of Revenue, Defendants,

Of Whom Charles T. Brooks, III, is.....Appellant.

PETITION FOR REHEARING  
AND MEMORANDUM IN SUPPORT

Appellant (hereinafter, sometimes, "Brooks") hereby moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing in this case and submits the memorandum below in support of the same. Appellant respectfully submits that the court may have overlooked or misapprehended certain points, as the following shows:

**I. The court erred in finding issues were not preserved for review.**

No magic words are required to be said below in order that an issue be preserved for review on appeal. See e.g. Toole v. Toole, 260 S.C. 235, 240, 195 S.E.2d 389, 390-91 (1973); State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (issue was preserved even though defendant did not use the exact words "corpus delicti" in his request for directed verdict); In re: Robert D., 340 S.C. 12, 530

S.E.2d 137 (Ct. App. 2000) *overruled on other grounds by State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) (although party did not specifically mention any constitutional provisions to the trial court, the record reflected that he complained the testimony would violate his right of confrontation). Our Supreme Court has noted that “civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party” in the context of issue preservation. Elam v. S.C. Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772, 780 (2004). Our Supreme Court has remarked upon “the need to approach issue preservation rules with a practical eye and not in a rigid, hypertechnical manner.” Herron v. Century BMW, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011). In consonance with the Supreme Court in this regard, this court recently held that an off-the-record argument noted in a general way in an order ruling against the party who advanced it was preserved for review. Allegro Inc. v. Scully, Op. No. 5245 (S.C. Ct. App. filed June 30, 2014) (Shearouse Adv. Sh. No. 26 at 118, 128).

Despite the marked similarity between this case and the situation in Allegro vis-à-vis preservation of the subject issues, the court here determined that two of the issues raised by Brooks in this appeal are not preserved for review. These issues are, however, fully preserved for review. The master noted Brooks’ argument that “all ambiguities in the operative documents should be construed against [First Citizens,]” (R. p. 2), and the master’s order rules on and against that argument in the particulars that this court found were unpreserved. (R. p. 5.)

While the court’s memorandum opinion does not articulate its analysis of the preservation questions, the court’s opinion seems to indicate that these issues are unpreserved because Brooks did not make a motion about them under Rule 59(e),

SCRCP. This is error. It is “[w]here a matter is not ruled on by the circuit court [that] the issue is not preserved for appellate review unless the complaining party moves to amend the judgment pursuant to Rule 59(e).” Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Rule 59 motions are not necessary to preserve issues that have been ruled upon by the circuit court; rather, “they are used to preserve issues that have been raised to the trial court but not yet ruled upon by it.” Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 734 (1998); accord Bailey v. Segars, 346 S.C. 359, 365, 550 S.E.2d 910, 913 (Ct. App. 2001). The master did rule on these issues. Just as Brooks need not have stated any magic words to preserve these arguments, neither did the master need to. See e.g. Toole, 260 S.C. at 240. His recognition of these arguments and ruling against them was enough to preserve these issues.

Furthermore, in light of the procedural posture of the case at the time of this appeal, Brooks had little choice but to bring the appeal without first making a Rule 59(e) motion on these points. The master’s order sets the case for trial on February 7, 2013, and Brooks received written notice of the entry of the order on February 4, 2013. (R. p. 52.) There was not time to make a motion to reconsider and have it heard and ruled upon before a trial would be had with the findings the master made in his order established for that trial’s purposes. The pendency of a motion to reconsider would not have stayed the trial. See Rule 62, SCRCP. Under the circumstances, which include the failure of the lower court or First Citizens (the moving party) to provide a court reporter, the master’s recognition of Brooks’ arguments is sufficient for their preservation for review by this court.

Appellant respectfully submits that this court overlooked or misapprehended the law in this regard and the aspects of the master's order that show that these issues are preserved. If this is a close question, the court should resolve that question in favor of preservation and reach the merits of the issues.

**II. The record contained at least a scintilla of evidence (and probably a lot more) showing a question of material fact as to whether Brooks withdrew his answer, and Brooks did not have to submit his own factual material to show that, since the Respondent's factual showing already did.**

The court's opinion, though it does not state its analysis, seems to indicate that the court believed that, to avoid summary judgment, Brooks was required to put some factual material into the record on the question of whether he violated the parties' agreement by failing to withdraw his answer. This is a misapprehension of the law.

The forbearance agreement document at issue states that Brooks "hereby withdraws its [sic] answer and defenses with prejudice[.]" (R. p. 44.) This statement is contained in the forbearance agreement document attached to the affidavit that Respondent (hereinafter "First Citizens") served in support of its motion for summary judgment. (R. p. 44.)

Under Rule 56, SCRC, "the party seeking summary judgment has the initial responsibility of demonstrating the absence of any genuine issue of material fact." Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545-46 (1991). "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill, 308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992). "A party who fails to show the absence of genuine issue of material fact is not entitled to summary

judgment even though his adversary does not come forward with opposing materials.”  
Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

First Citizens did not meet its initial burden of demonstrating the absence of a material fact on this point. In fact, the factual showing it made in support of its motion demonstrated the existence of an issue of material fact. Brooks did not have to submit still more material on this point to argue that First Citizens was not entitled to summary judgment on this question. See id.

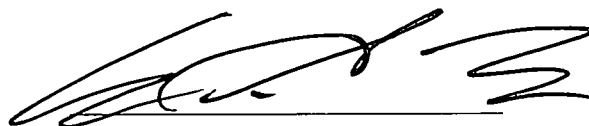
Where an agreement between parties is embodied in more than one document, as here, the documents are considered as a whole and construed together. E.g., Klutts Resort Realty, Inc. v. Down’Round Dev. Corp., 268 S.C. 80, 232 S.E.2d 20 (1977). When the settlement agreement document and the forbearance agreement document are construed together, they show at least an ambiguity about whether Brooks withdrew his answer by signing the forbearance agreement document. (R. pp. 40-46.) That is an issue of fact that is material to whether summary judgment on this point was proper. The law is that “summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law[.]” Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986), and that “[e]ven when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied[.]” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). There was at least a genuine issue of material fact here, and summary judgment on this point should have been denied. It was error for this court to affirm

the grant of summary judgment on this point. This was particularly so if the court's reasoning was, as it appears to be, that Brooks was required to put his own factual material in the record in order to survive summary judgment, as First Citizens' showing revealed it was not entitled to summary judgment on this issue.

Appellant respectfully submits that this court overlooked or misapprehended the law and the record in this regard.

WHEREFORE Appellant prays for an order granting rehearing in this case.

Respectfully submitted,



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Attorney for Appellant

July 9, 2014

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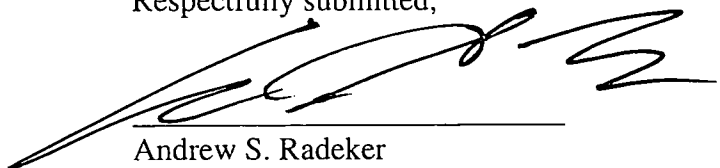
PROOF OF SERVICE

I certify that I served the foregoing petition for rehearing on the Respondent by depositing a copy of it on the date shown below in the United States Mail, postage prepaid, addressed as follows:

Damon C. Wlodarczyk, Esq.  
Riley Pope & Laney, LLC  
P.O. Box 11412  
Columbia, SC 29211

July 9, 2014

Respectfully submitted,



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July 9, 2014

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**VIA HAND DELIVERY**

The Hon. Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals of South Carolina  
Edgar Brown Building  
1205 Pendleton Street  
Columbia, South Carolina 29201

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RE: First Citizens Bank v. Charles T. Brooks, III  
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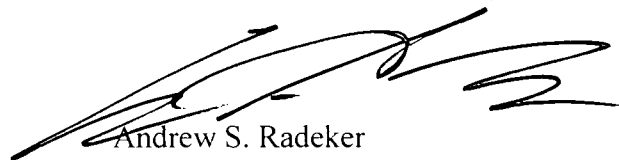
Dear Ms. Kitchings:

Enclosed herewith for filing in the above-referenced case are an original and seven copies of a petition for rehearing in this case, with attached proof of service thereof. Also enclosed is this firm's check in the amount of \$25.00 as the fee for the motion.

Kindly file these documents and return a file-stamped copy thereof to the bearer of this letter. Of course, if you or your staff have any questions or concerns, please do not hesitate to contact me.

With kind regards, I am,

Very truly yours,  
**HARRISON & RADEKER, P.A.**



Andrew S. Radeker

ASR/

Enclosures

cc: Charles T. Brooks, III, Esq.  
Damon C. Wlodarczyk, Esq.