

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

JUL 20 2015

Edward W. Miller, Circuit Court Judge

S.C. SUPREME COURT

Op. No. 2015-UP-203 (S.C. Ct. App. filed April 15, 2015)

THE CALLAWASSIE ISLAND MEMBERS CLUB, INC..... Respondent,

v.

ARTHUR APPLGATE..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities.....ii

Questions Presented for Review.....1

Statement of the Case.....1

Argument in Opposition

 I. DID THE COURT OF APPEALS CORRECTLY APPLY RULE 210(H),
 SCACR, AND RULE 39(A)(2), SCRCR, TOGETHER WITH THE
 PRECEDENT IN *HUNDLEY V. RITE AID OF S.C., INC.*, 339 S.C. 285,
 529 S.E.2D 45 (CT. APP. 2000) IN DETERMINING PETITIONER
 FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUES
 RAISED ON APPEAL?.....2

 II. WAS THE COURT OF APPEALS CORRECT IN FINDING
 PETITIONER FAILED TO PRESENT THE COURT WITH AN
 ADEQUATE RECORD ON APPEAL?.....5

 III. WAS THE COURT OF APPEALS’ AFFIRMATION OF THE TRIAL
 COURT’S ORDER JUSTIFIED IN LIGHT OF PETITIONER’S
 FAILURE TO RAISE ANY FACTUAL ISSUES IN OPPOSITION TO
 RESPONDENT’S MOTION TO CONVERT TO NON-JURY TRIAL?
 7

 IV. THERE BEING NO EVIDENCE IN THE RECORD PETITIONER
 ARGUED TO THE TRIAL COURT THAT ITS ORDER EXCEEDED
 THE SCOPE OF RESPONDENT’S MOTION TO CONVERT TO NON-
 JURY TRIAL, WAS THE COURT OF APPEALS WRONG TO
 CONSIDER THE MATTER UNPRESERVED?.....8

Conclusion.....10

TABLE OF AUTHORITIES

South Carolina Supreme Court Opinions

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).....7

Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005).....4

Hundley v. Right Aid of S.C., Inc., 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000).....2, 4

Mize v. Blue Ridge Ry. Co., 219 S.C. 119, 64 S.E.2d 253, (1951).....4

Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton, 311 S.C. 56, 427 S.E.2d 673
(1993)9

Robinson v. Robinson, 365 S.C. 583, 619 S.E.2d 425 (2005).....6

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008).....8

York v. Conway Ford, Inc., 325 S.C. 170, 480 S.E.2d 726, (1997).....5

South Carolina Court of Appeals' Opinions

Chapman v. Upstate RV and Marine, 364 S.C. 82, 610 S.E.2d 852 (Ct. App. 2005).....7

Duncan v. Hampton County Sch. Dist. No. 2, 335 S.C. 535, 517 S.E.2d 449 (Ct. App.
1999).....4

First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998)..6

Hancock v. Wal-Mart Stores, Inc., 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003).....5

In re Timmerman, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998)..... 6, 9

Mains v. K. Mart Corp., 297 S.C. 142, 375 S.E.2d 311 (Ct. App. 1988).....9

McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App.
2004).....3

Middleton v. Eubank, 388 S.C. 8, 694 S.E.2d 31 (Ct. App. 2010).....7

<i>Morrow v. Dyches</i> , 328 S.C. 522, 492 S.E.2d 420 (Ct. App. 1997).....	8
<i>S.C. Second Injury Fund v. Liberty Mut. Ins. Co.</i> , 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003).....	5
<i>State v. Black</i> , 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995).....	7
<i>State v. Carlson</i> , 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005).....	5
<i>Wells Fargo Bank, N.A. v. Smith</i> , 398 S.C. 487, 730 S.E.2d 328 (Ct. App, 2012).....	9, 3
<i>Wierszewski v. Tokarick</i> , 308 S.C. 441, 418 S.E.2d 557 (Ct. App. 1992).....	4

South Carolina Rules

Rule 210(h), SCACR.....	1,2, 5
Rule 242(b), SCACR.....	5, 11
Rule 39(a)(2), SCRCPP.....	1, 2, 3
Rule 52(a), SCRCPP.....	10
Rule 53(b), SCRCPP.....	10
Rule 59, SCRCPP.....	6,7, 9

QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS CORRECTLY APPLY RULES 210(H) AND 39(A)(2), SCRPC, TOGETHER WITH THE PRECEDENT IN *HUNDLEY V. RITE AID OF S.C., INC.*, 339 S.C. 285, 529 S.E.2D 45 (CT. APP. 2000) IN DETERMINING PETITIONER FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUES RAISED ON APPEAL?

II. WAS THE COURT OF APPEALS CORRECT IN FINDING PETITIONER FAILED TO PRESENT THE COURT WITH AN ADEQUATE RECORD ON APPEAL?

III. WAS THE COURT OF APPEALS' AFFIRMATION OF THE TRIAL COURT'S ORDER JUSTIFIED IN LIGHT OF PETITIONER'S FAILURE TO RAISE ANY FACTUAL ISSUES IN OPPOSITION TO RESPONDENT'S MOTION TO CONVERT TO NON-JURY TRIAL?

IV. THERE BEING NO EVIDENCE IN THE RECORD PETITIONER ARGUED TO THE TRIAL COURT THAT ITS ORDER EXCEEDED THE SCOPE OF RESPONDENT'S MOTION TO CONVERT TO NON-JURY TRIAL, WAS THE COURT OF APPEALS WRONG TO CONSIDER THE MATTER UNPRESERVED?

STATEMENT OF THE CASE

Respondent, The Callawassie Island Members Club, Inc., brought the instant action against Petitioner Arthur Applegate, seeking recovery of approximately six years of unpaid dues, fees, and assessments owed to Respondent in connection with five memberships Petitioner holds in the Respondent Club. (App.15-34). By its Complaint, Respondent requested a nonjury trial on the matter; however, Petitioner asserted counterclaims against Respondent for breach of fiduciary duty, negligent misrepresentation, and an accounting and demanded a jury trial. (App.p.15; pp.35-48). Respondent sought dismissal of the action by motion for summary judgment which was not heard until May 9, 2013, and due in part to its proximity in time to the scheduled trial was denied. (App.pp.7-10).

A jury trial was scheduled for May 12, 2013. Prior to the trial date, on May 9, 2013, Petitioner voluntarily dismissed his counterclaims leaving only Respondent's original breach of contract claims. (App.p.13). Due to the absence of any triable issues of fact, Respondent moved to transfer the matter to the nonjury roster. (App.pp.50-57). Following a conference in his chambers without the benefit of a court reporter, the Honorable Edward W. Miller agreed, and filed a Form 4 Order on May 15, 2013, transferring the matter to the Honorable Marvin H. Dukes III, Beaufort County Master-in-Equity and Special Circuit Court Judge. (App.pp.3-4). Upon receipt of the Form 4 Order, Petitioner filed a motion to alter or amend. (App.pp.61-64). The trial judge issued an Order denying the motion to alter or amend, and in so doing, explained no issue of fact existed to be considered by a jury. (App.pp.5-6). Petitioner subsequently filed a Notice of Intent to Appeal. (App.pp.247-248).

The Court of Appeals affirmed the trial judge's order of reference. *The Callawassie Island Members Club, Inc. v. Applegate*, Op. No. 2015-UP-203 (S.C. Ct. App. filed April 15, 2015). The Petition for Rehearing was denied on May 19, 2015. (App.p.492).

ARGUMENTS IN OPPOSITION

I. DID THE COURT OF APPEALS CORRECTLY APPLY RULE 210(H), SCACR, AND RULE 39(A)(2), SCRCP, TOGETHER WITH THE PRECEDENT IN *HUNDLEY V. RITE AID OF S.C., INC.*, 339 S.C. 285, 529 S.E.2D 45 (CT. APP. 2000) IN DETERMINING PETITIONER FAILED TO PRESERVE FOR APPELLATE REVIEW THE ISSUES RAISED ON APPEAL?

Petitioner raised two issues on appeal. The first (and the one implicated in Petitioner's first question for review) asserts the trial court erred in denying his request for a jury trial because the underlying breach of contract action was an action at law.

Respondent argued, and the trial court concurred, that the right to a jury trial in an action at law only extends to questions of fact. When the court determines a contract is clear and unambiguous, there is no issue of fact for the jury to consider. (App. pp.5-6; p.56). Petitioner notes the appellate court is free to decide questions of law with no particular deference to the trial court.¹ In the case at hand, however, the Court of Appeals agreed with the trial court's interpretation of law. Citing Rule 39(a)(2), SCRCP, the Court of Appeals concluded the trial court was within its discretion to find the right to a jury trial did not exist in the absence of a question of fact for jury consideration.

The trial judge noted in his final order that Petitioner only put forth *legal* arguments involving the interpretation of various statutes in support of his position and failed to raise any *factual* questions in opposing Respondent's motion. (App.p.6). Petitioner cannot raise an issue on appeal that was raised by Respondent, but on which Petitioner advanced no arguments to the trial court. The argument must have been raised by appellant in order for it to be raised on appeal. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 381-82, 597 S.E.2d 181, 186 (Ct. App. 2004) (holding although an argument was raised by respondent, the issue was not preserved for review as no argument on the issue was advanced by appellant). As it was Respondent who raised the lack of any factual question for jury consideration, it was incumbent on Petitioner to refute that argument. Petitioner failed to do so and cannot now raise it for the first time on appeal.

¹ Petitioner cites to *Wells Fargo Bank, N.A. v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct.App, 2012), for the proposition that the Court of Appeals may decide questions of law with no deference to the trial court. While the proposition relied upon is believed to be good law, Respondent notes this opinion has been de-published.

Even though the trial judge addressed the lack of factual dispute, the issue was not preserved for appeal as it was not properly raised by Petitioner. *Cf. Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951) (stating defendant could not argue on appeal that the trial judge erred in refusing his motion for a directed verdict on grounds defendant never raised at trial even though trial judge discussed the grounds in his ruling on the motion); *Duncan v. Hampton County Sch. Dist. No. 2*, 335 S.C. 535, 517 S.E.2d 449 (Ct. App. 1999) (cert. denied); *Wierszewski v. Tokarick*, 308 S.C. 441, 444 n.2, 418 S.E.2d 557, 559 n.2 (Ct. App. 1992) (stating issue not preserved for review merely because trial judge mentions it).

The Court of Appeals cites *Hundley v. Right Aid of S.C., Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000) in support of its decision, finding Petitioner bore the burden of providing the court with a record sufficient to allow appellate review. Because the oral arguments made to the trial court at the hearing of Respondent's Motion to Convert to Non-Jury Trial ("Motion to Convert") were not placed on the record, the Court of Appeals was constrained to review what had been reduced to writing in the case, namely, Respondent's motion, Petitioner's memorandum in opposition thereto, the orders, and Petitioner's Motion to Alter or Amend, none of which put forth any factual questions for jury consideration. (App.pp.3-5; pp.50-64).

Petitioner's assertion that the Court of Appeals erred as a matter of law and abused its discretion in relying upon *Hundley* completely misunderstands the Court of Appeals' reasoning. It is clear *Hundley* is put forth by the Court of Appeals for the proposition that Petitioner bears the burden of presenting a sufficient record to allow review. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 611 S.E.2d 485 (2005).

Although Petitioner claims he brought various factual questions to the trial court's attention, the trial judge's order reflects otherwise. (App.p.2). Arguments made during an off-the-record conference which are not made a part of the record do not preserve the question for review. *York v. Conway Ford, Inc.*, 325 S.C. 170, 173, 480 S.E.2d 726, 728 (1997) (stating an objection made during off-the-record conference which is not made part of the record does not preserve the question for review); *State v. Carlson*, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (stating where an objection and the ground therefore is not stated in the record, there is no basis for appellate review). As the Court of Appeals acknowledges, Rule 210(h), SCACR dictates that it cannot consider any fact which does not appear in the Record on Appeal.

Accordingly, because the Court of Appeals correctly determined Petitioner's argument was not properly preserved for appellate review, the Petition should be denied. *See* Rule 242(b), SCACR (stating a writ of certiorari will be granted only where there are special and important reasons).

II. WAS THE COURT OF APPEALS CORRECT IN FINDING PETITIONER FAILED TO PRESENT THE COURT WITH AN ADEQUATE RECORD ON APPEAL?

Petitioner's second argument on appeal asserts the trial court's order denying his Motion to Alter or Amend exceeded the scope of Respondent's Motion to Convert. (App.p.440). There is no indication in the record this argument was ever presented to, nor ruled upon, by the trial court. (App.pp.58-64). Our courts have consistently adhered to the rule that where an issue has not been ruled upon by the trial judge nor raised in a post-trial motion, such issue may not be considered on appeal. *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 584 S.E.2d 398 (Ct. App. 2003) (cert. denied); *S.C. Second*

Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 199 (Ct. App. 2003); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); *In re Timmerman*, 331 S.C. 455, 502 S.E.2d 920 (Ct. App. 1998).

Petitioner made no objection to the materials relied upon by the trial court prior to the appeal. (App.pp.58-64). Nor does the record show Petitioner presented the trial court with any factual questions that would warrant a jury trial beyond referencing his earlier arguments in opposition to summary judgment, which did not establish the law of the case. (App.p.6; p.480). Since Petitioner failed to raise this issue in any writing, and there is no transcript of oral arguments to indicate it was raised verbally to the trial court (nor would such a transcript have availed Petitioner here as no such argument was made), the Court of Appeals was right to conclude Petitioner failed to provide it with an adequate record on appeal.

Petitioner, however, misapprehends the Court of Appeals' reasoning and wrongly assumes its ruling was based on the lack of a subsequent motion to alter or amend. Nothing in the Court of Appeals' Opinion, or the Order denying the petition for rehearing, indicates Petitioner was required to file a second Rule 59, SCRPC motion following the trial court's denial of the first. To the contrary, because the trial court's order denying Petitioner's Motion to Alter or Amend simply affirmed its initial order and nothing from that order was altered beyond an explanation of its decision, a subsequent Rule 59 Motion would have been pointless. *Robinson v. Robinson*, 365 S.C. 583, 586, 619 S.E.2d 425, 426 (2005) (stating because award of attorney's fees was affirmed and nothing from original judgment was altered, second motion was not appropriate and did

not toll time for appeal); *see also Chapman v. Upstate RV and Marine*, 364 S.C. 82, 610 S.E.2d 852 (Ct. App. 2005).

To the extent Petitioner argues Respondent proffered, or the trial court considered, documents and information at the hearing of the Motion to Convert that were not properly in evidence (which Respondent denies) it was incumbent for Petitioner to challenge it immediately and to create a record of such objection. *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995) (stating proper course to be pursued when counsel makes an improper argument is for opposing counsel to immediately object and to have a record made of the statements or language complained of and to ask the trial court for a distinct ruling thereon). Because the Court of Appeals decision was based on the lack of any record of such objections, rather than the absence of a second and redundant motion to reconsider, its decision is not in conflict with *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 20, 602 S.E.2d 772, 778 (2004) (stating an appeal may be deemed untimely if a successive Rule 59 Motion is filed rather than a Notice of Appeal). Therefore, the Petition should be denied.

III. WAS THE COURT OF APPEALS' AFFIRMATION OF THE TRIAL COURT'S ORDER JUSTIFIED IN LIGHT OF PETITIONER'S FAILURE TO RAISE ANY FACTUAL ISSUES IN OPPOSITION TO RESPONDENT'S MOTION TO CONVERT TO NON-JURY TRIAL?

The trial court found the contract which formed the basis of this action was "clear and unambiguous". (App.pp.5-6). In reaching this conclusion, it correctly interpreted and relied upon the rule of law established in *Middleton v. Eubank*, 388 S.C. 8, 14, 694 S.E.2d 31, 34 (Ct. App. 2010) (*citing, McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574), that "[i]t is a question of law for the court whether the language of

a contract is ambiguous.” As has already been addressed above, the trial court was not bound by the earlier denial of summary judgment in the case, nor was it faced with the same standard of review when evaluating Respondent’s Motion to Convert. As reflected in the Order by the Hon. J. Ernest Kinard, Jr., denying Respondent’s motion to reconsider its motion for summary judgment the applicable standard of review “makes summary judgment exceedingly difficult to grant”. (App.p.10). It does not follow that because Respondent was unable to meet this exacting standard it was error for the trial court to later conclude the contract was clear and unambiguous for the purposes of referring the matter to the Master-in-Equity.

Further, in the absence of any transcript to indicate otherwise, the Court of Appeals was justified in relying upon the trial court’s assertion that Petitioner only “raised legal issues” in contesting Respondent’s motion. (App.p.6). As acknowledged by this Court in *Town of Summerville v. City of N. Charleston*, “[d]etermining the proper interpretation of a statute is a question of law....” 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Accordingly, the Court of Appeals did not err in reaching its decision; the petition should be denied.

IV. THERE BEING NO EVIDENCE IN THE RECORD PETITIONER ARGUED TO THE TRIAL COURT THAT ITS ORDER EXCEEDED THE SCOPE OF RESPONDENT’S MOTION TO CONVERT TO NON-JURY TRIAL, WAS THE COURT OF APPEALS WRONG TO CONSIDER THE MATTER UNPRESERVED?

Petitioner contends the trial court’s ruling “exceeds the limits and scope of the particular motion before it;” however (and at the risk of being redundant), this issue was not raised to the trial court. *Morrow v. Dyches*, 328 S.C. 522, 530-31, 492 S.E.2d 420,

425 (Ct. App. 1997) (stating where the trial court does not explicitly rule on a question and appellant fails to make a Rule 59 motion on that ground, the issue is not properly before the appellate court and should not be addressed). Respondent moved to have the matter tried by the court without a jury on the grounds that Petitioner's contractual obligations were clear and unambiguous and Petitioner's only defenses to same were based on statutory grounds. (App.pp.50-56). The trial court's determination that the matter should be referred to the Master-in-Equity clearly reflected its agreement with Respondent's arguments. To the extent Petitioner considered a reference to the Master-in-Equity on these grounds to be in excess of the limits and scope of the motion, he should have raised the argument in his Motion to Alter or Amend. *See Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993); *In re Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (stating when a party receives an order granting certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), to alter or amend the judgment in order to preserve the issue for appeal). As Petitioner clearly did not include this argument in his Rule 59, motion, and neglected to have any oral arguments committed to the record, the Court of Appeals was correct to hold Petitioner failed to preserve his position on this issue. *Mains v. K. Mart Corp.*, 297 S.C. 142, 145, 375 S.E.2d 311, 313 (Ct. App. 1988).

The Petitioner confuses the foregoing with several other arguments in support of his fourth question submitted for review, including the assertion that the case at hand is analogous to *Wells Fargo Bank, N.A. v. Smith*. As noted in Footnote 1 hereinabove, that opinion has been de-published and is of no precedential value. Petitioner further

completely misstates the trial court's ruling when he claims in his petition that it concluded "a breach of contract claim is not an action at law". (Petition, p. 12).

Lastly, Petitioner alleges the trial court essentially ruled on the merits of the case by referring the matter to the Master-in-Equity and such determination was made without evidentiary support. Not only was this issue not raised as an objection before the trial court, it completely overlooks the obvious fact that the matter has yet to be finally ruled upon. Final adjudication of this matter has yet to take place and will only come after the case is remitted to the Master-in-Equity for a non-jury trial and a decision is rendered. Under Rule 53(b), SCRCF, having determined the contract was unambiguous and the only remaining defenses involved matters of statutory interpretation, the trial court was permitted to refer the matter to the Master-in-Equity. As for the alleged lack of evidentiary support, the absence of a transcript in this case rendered it impossible for the Court of Appeals to evaluate Petitioner's assertion that the decision was wholly unsupported by any evidence. Nevertheless, the trial court presumably had the entire court file at its disposal when making its determination. Respondent notes the trial court was under no obligation to include its findings of fact or conclusions of law when addressing the Motion to Convert, as indicated in Rule 52(a), SCRCF.

The Court of Appeals correctly determined this argument was not properly preserved for appellate review. Accordingly, this argument is without merit and does not justify the grant of the Petition.

CONCLUSION

The Court of Appeals did not err in its analysis of Petitioner's challenge to the trial judge's order of reference. Petitioner has failed to preserve his arguments for

appellate review and failed to present the Court with an adequate record on appeal. Moreover, the trial judge and the Court of Appeals correctly held that a right to a jury trial did not exist in this instance as the only issues awaiting adjudication were issues at law which were clearly within the purview of the Master-in-Equity. Further, this matter does not encapsulate any of the considerations governing review by this Court enumerated by Rule 242(b). Accordingly, as the Petition does not set forth any special or important reasons justifying the grant of a Writ of Certiorari and for the reasons discussed hereinabove, the Petition should be denied.

Respectfully submitted,

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v.

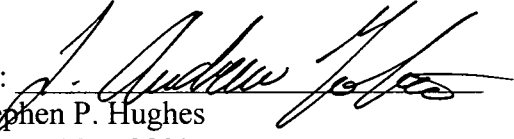
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PROOF OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Respondents' Return to Petition for Writ of Certiorari upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 15th day of July, 2015 addressed to the following:

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