

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

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CASE NO.: 2015-002024

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SC Court of Appeals

Innovative Waste Management Inc., Crest Energy Partners,  
LP, Edward Girardeau, Plaintiffs, Of Whom,

Innovative Waste Management, Inc. is the Appellant,

v.

Crest Energy Partners, GP, LLC, Dunhill Products GP,  
LLC, Henry Wuertz, Innovative Waste Management, Inc.,  
Crest Energy Partners LP, Dunhill Products LP, Edward H.  
Girardeau, C. Russ Lloyd, Defendants, Of Whom,

Crest Energy Partners GP, LLC, Crest Energy Partners LP,  
Dunhill Products, LP, Henry Wuertz, and Edward H.  
Girardeau are the Respondents.

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**RESPONDENTS' INITIAL BRIEF**

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## STATEMENT OF THE CASE

Appellant Innovative Waste Management Inc. (hereafter "IWM") filed this action against the Respondents on May 11, 2012, alleging numerous causes of action relating to a series of petroleum transactions in Mobile, Alabama and St. Rose, Louisiana in early 2010.<sup>1</sup> The Respondents filed counter claims and claimed set-off on those transactions and a previous transaction. The parties litigated the matter for nearly three years, during which it was designated a Complex Case and assigned to the Honorable Maite D. Murphy. The parties ultimately reached a settlement agreement during mediation on April 8, 2015. The Mediator, Angus M. Lawton, transmitted a Proof of ADR to the Clerk of Court on April 10, 2015, pursuant to Rule 7(f), SCADR.

On April 14, 2015, the Clerk of Court transmitted a Notice of Jury Roster to the parties, setting the case on the May 4, 2015 jury trial roster. In response, the undersigned transmitted an email to Judge Murphy's Clerk, with a copy to all counsel, informing the Court that parties had reached a settlement. On April 20, 2015, the Court received the Proof of ADR. The Clerk of Court issued a Form 4 Order dismissing the case on that same date, referring to the Proof of ADR as an "attached order". IWM's counsel did not respond to the Form 4 Order.

On May 27, 2015, IWM filed "Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial" pursuant to Rule 60(b), SCRCPP. The motion argued

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<sup>1</sup> The case was filed in the Dorchester County Court of Common Pleas after a case between the parties including the same allegations was dismissed by the United States District Court for the District of South Carolina for lack of subject matter jurisdiction on May 10, 2012. Innovative Waste Management, Inc. v. Crest Energy Partners GP, LLC, Civil Action No. 2:11-cv-1023-RMG (D.S.C. May 10, 2012).

simply that the settlement had not been consummated, and therefore the case should be set for trial. This Motion was heard by Judge Murphy on June 24, 2015.

On July 22, 2015, Judge Murphy issued a Form 4 Order denying the 60(b) Motion. The Statement of Judgment in that Order stated "After reviewing all testimony and other evidence presented at the hearing, along with a review of the records provided to the Court, Plaintiff's 60(b) motion . . . , is hereby denied." (Record Exhibit F).

On July 31, 2015, IWM filed a "Motion to Reconsider" pursuant to Rule 59(e), SCRC, asking the Court once again to vacate the settlement agreement and restore the case to the active docket. On August 18, 2015, Judge Murphy issued a Form 4 Order dismissing IWM's Rule 59 motion, stating as follows:

Pursuant to this Court's authority under Rule 59, SCRC, the Plaintiff's Motion to Reconsider is dismissed without oral argument and determined upon the briefs filed by the parties. I find that all arguments properly raised to the Court have already been ruled upon and this Court will not consider further arguments on the matter.

(Record Exhibit I).

On September 16, 2015, IWM filed and served its Notice of Appeal, purporting to appeal "the orders of the Honorable Maite D. Murphy dated July 22, 2015 and August 18, 2015 and, by reference, the Form 4 judgment signed by the Clerk of Court, Cheryl Graham, on April 20, 2015." Respondents filed a Motion to Dismiss, contending that this Court lacked subject matter jurisdiction because IWM's Rule 59(e) motion was a successive post-trial motion that failed to toll the time for filing a Notice of Appeal. The Court denied respondents' motion on March 4, 2016. This brief follows.

## LAW AND ARGUMENT

### I. IWM's Arguments Are Not Preserved for Appellate Review

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. Any objections and arguments must be sufficiently specific to inform the trial court of the point being urged by the objecting party. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997); Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986)). Further, an otherwise unpreserved argument may not be preserved in a Rule 59(e) motion, if it was not raised to the circuit court prior to the issuance of that court's ruling. Lyons v. Fid. Nat'l Title Ins. Co., 415 S.C. 115, 135, 781 S.E.2d 126, 137 (Ct. App. 2015) (citing Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C., 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004)).

As the appellant, IWM bears the burden of furnishing the Court with a sufficient record on which this Court can base its decision. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339-340, 611 S.E.2d 485, 487-488 (S.C. 2005). If it fails in this burden, the Court must assume the regularity of the proceedings below and the correctness of the ruling appealed from. Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 97, 352 S.E.2d 302, 304-305, (Ct. App. 1986) (citing Germain v. Nichol, 278 S.C. 508, 299 S.E. (2d) 335 (1983). 5 Am. Jur. (2d) Appeal and Error § 704 at 151 (1962)).

In its brief, IWM argues that the circuit court erred in denying its Rule 60(b) and 59(e) motions because

- 1) the Judgment does not comply with Rules 41 and 79(f), SCRCPC;
- 2) the trial court did not intend to dismiss the case;
- 3) the parties did not intend for the lower court to dismiss the case; and
- 4) the Respondents breached the settlement agreement.

The Record on Appeal establishes that the only argument properly raised below was that the case should be restored and set for trial because the respondents were unable to fund the agreed settlement. The respondents countered that the settlement agreement fully complied with Rule 43(k), and was enforceable by any party. (Record Ex. E, p 2, line 11-p. 5, line 2).

When IWM was given the opportunity to make any argument it could, its counsel explicitly stated “[o]ur argument will be very short.” (Record Ex. E, p. 2, line 13). IWM’s own brief admits that the record is insufficient to ascertain the lower court’s intent. (Appellant’s Initial Brief, p. 9). IWM’s brief also urges the court to assume the intent of other parties, while the respondents have always contended that IWM’s remedy was to seek enforcement of the settlement agreement. (Appellant’s Initial Brief p.10-11; Record Ex. E, p. 4, lines 18-22). The only thing that can actually be gleaned from the record is that, when given the opportunity to rescind the April 20, 2015 Form 4 Order dismissing the case and/or to restore the case to the trial docket, the lower court declined.

The only argument IWM properly raised below was that respondents breached the settlement agreement, and the case should have been set for trial. The lower court properly held that this was an insufficient basis to grant IWM’s Rule 60(b) motion. Therefore, the arguments raised in IWM’s brief are not preserved for review, and the lower court’s ruling must be affirmed.

**II. IWM has Failed to Meet its Burden of Establishing that the Lower Court Abused its Discretion.**

Substantively, IWM has appealed the circuit court's Order denying its "Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial". IWM sought this relief from the lower court under Rule 60(b).

Rule 60(b) allows a trial court to relieve a party from a final judgment or order when the moving party establishes one of the following grounds :

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

Rule 60, SCRPC.

The decision to grant relief pursuant to Rule 60(b) lies within the sound discretion of the circuit court, and this Court will not reverse a trial court's decision regarding the grant or denial of a Rule 60(b) motion unless it amounts to an abuse of discretion. E.g., Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2005).

As the party seeking relief under Rule 60(b), IWM bore the burden to present evidence entitling it to the requested relief. Jamison v. Ford Motor Co., 373 S.C. 248, 271-272, 644 S.E.2d 755, 767 (Ct. App. 2007); Perry v. Heirs at Law of Gadsden, 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct. App. 2003). As part of that burden, the party seeking relief pursuant to Rule 60(b) must establish the applicability of one of the

qualifying grounds. Paul Davis Sys. v. Deepwater of Hilton Head, LLC, 362 S.C. 220, 225, 607 S.E.2d 358, 360-361 (Ct. App. 2004)

IWM's brief fails to identify a single portion of the Record on Appeal establishing that it was entitled to relief under any of the grounds contained in Rule 60(b). This is because IWM failed to identify any such grounds before the circuit court, and never even mentioned Rule 60(b) other than a passing reference in its Motion. In fact, as the caption of its Rule 60(b) motion indicated, IWM sought relief from a settlement agreement, not a "final judgment, order, or proceeding". See Rule 60, SCRCP.

Presumably, IWM intended to seek relief from the April 20, 2015 Form 4 Order under Rule 60(b)(1), SCRCP, which allows for relief from a final order if it was induced by mistake, inadvertence, surprise, or excusable neglect.<sup>2</sup> This rule is an appropriate remedy for good faith mistakes of fact if all other applicable factors are met. See Columbia Pools, Inc. v. Galvin, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). However, in order to gain relief under Rule 60(b)(1), SCRCP, a party must first show a good faith mistake of fact has been made. Williams v. Watkins, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009). A party may not use Rule 60(b)(1) as a vehicle for relief from an error of law. Hillman v. Pinion, 347 S.C. 253, 256-257, 554 S.E.2d 427, 429 (Ct. App. 2001).

During the hearing on its motion, IWM's counsel did not articulate a single mistake or impropriety that induced the April 20, 2015 order. More importantly, there was no evidence before the lower court, and there is none before this court, supporting a

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<sup>2</sup> A Form 4 order is a final order within the meaning of Rule 60. See Cheap-O's Truck Stop, Inc. v. Cloyd, 350 S.C. 596, 604, 567 S.E.2d 514, 518 (Ct. App. 2002)

conclusion that there was a mistake of fact, or any other ground for relief contemplated by Rule 60(b).

IWM failed to meet its burden under Rule 60(b) before the trial court, and it has patently failed to meet its burden of establishing an abuse of discretion here. The record simply contains no evidence that would support relief under that Rule. Accordingly, this Court must affirm the decision of the trial court.

### **III. The Settlement Agreement is Binding on All Parties and Enforceable**

The settlement agreement appears as Exhibit A in the Record on Appeal. During the hearing on its motion, IWM's counsel admitted that it was agreed to and signed by the parties and their attorneys. (Record Exhibit E, p. 3, line 24-p.4, line 3). Therefore, the agreement satisfies Rule 43(k), SCRPC, and is enforceable, as it is "reduced to writing and signed by the parties and their counsel." Cf. Ashfort Corp. v. Palmetto Constr. Group, 318 S.C. 492, 493-494, 458 S.E.2d 533, 534, (1995).

Settlement agreements are viewed as contracts between the parties. Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 177-178, 557 S.E.2d 708, 711, (Ct. App. 2001) As such, the breach of a settlement agreement will support a separate action at law. See Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 540 S.E.2d 843 (2001). Once a case is proper and enforceable settlement is reached, the settlement cannot be repudiated unless fraud exists. Arnold v. Yarborough, 281 S.C. 570, 316 S.E.2d 416 (Ct. App. 1984).

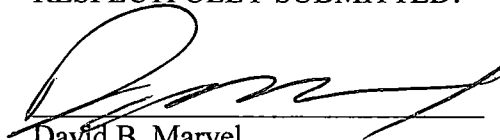
In this matter, the parties reached a settlement that contemplated the dismissal of claims, counter-claims, and third party claims, in addition to a certain payment from

respondent Crest Energy Partners, L.P. ("Crest") to IWM. This settlement was properly documented according to Rule 43(k). Crest was unable to fund the settlement due to factors outside of the control of the settling parties. As such, IWM's remedy is to seek a judgment on the contractual settlement agreement, as there is no evidence in the record supporting a Rule 60(b) motion for relief from the Court's order dismissing the case. Without having done so, IWM has no avenue for redress in this Court, and the lower court's orders must be affirmed.

**CONCLUSION**

IWM has failed to preserve its issues for appeal, has failed in its burden to provide this Court with a record sufficient for review, and has failed to make any argument on the merits sufficient to justify a finding that the lower court has abused its discretion. Accordingly, Respondents Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products, LP, Henry Wuertz, and Edward H. Girardeau, hereby respectfully request that this Honorable Court AFFIRM the rulings of the Honorable Maite D. Murphy in the court below.

RESPECTFULLY SUBMITTED:



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*Apr. 14/2016*  
*Charleston SC*

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM DORCHESTER COUNTY  
Court of Common Pleas

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APR 05 2016

Maite D. Murphy, Circuit Court Judge

SC Court of Appeals


CASE NO.: 2015-002024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing Initial Brief of Respondents on all counsel of record, by U.S. Mail, properly addressed and postage pre-paid, as follows:

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Date of Service: April 4, 2016

# David B. Marvel

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Certified Civil and Federal Court Mediator  
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April 4, 2016

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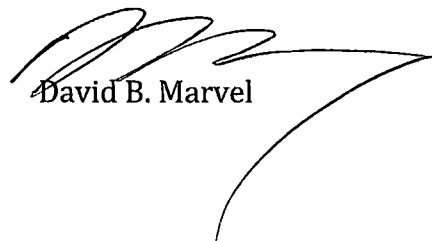
Re: Innovative Waste Management v. Crest Energy Partners, L.P. et al.  
Case No. 2015-002024

Dear Ms. Kitchings,

I hope this letter finds you well. I have enclosed the Initial Brief of Respondents in this matter.

Please file this brief in your usual prompt and efficient manner and return a clocked copy to me in the self-addressed, postage paid envelope provided. If you have any questions, comments, or concerns, please do not hesitate to contact me at any time. With best regards, I remain

Sincerely,



David B. Marvel

/DBM

Enclosures

Cc: Wm. Michael Gruenloh  
Frederick "Fritz" Jekel



Package  
US Airbill

FedEx  
Tracking  
Number

8088 4369 3126

0200 Form  
ID No.

FedEx Copy

1 From  
Date 4/5/2016 Sender's FedEx Account Number 2516 0058 9  
Sender's Name COA Phone

Company  
Address 1220 Senat St Dept./Floor/Suite/Room  
City Columbia State SC ZIP 29201

2 Your Internal Billing Reference

3 To Recipient's Name Marcel Phone 843 212694

Company  
Address 49 Calhoun St 01 Dept./Floor/Suite/Room  
We cannot deliver to P.O. boxes or P.O. ZIP codes.  
Address Suit A 31  
Use this line for the HOLD location address or for continuation of your shipping address.  
City Charleston State SC ZIP 29401

Hold Weekday  
FedEx location address  
REQUIRED. NOT available for  
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51  FedEx 2 Day Noon  
52  FedEx Express Saver

5 Packaging \* Declared value limit \$500.

06  FedEx Envelope\* 02  FedEx Pak\* 03  FedEx Box 04  FedEx Tube 01  Other

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03  Saturday Delivery  
 No Signature Required  
 Direct Signature  
 Indirect Signature  
Does this shipment contain dangerous goods?  
No 04 Yes  
Restrictions apply for dangerous goods — see the current FedEx Service Guide.

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1  Sender  
2  Recipient  
3  Third Party  
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