

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maité D. Murphy, Circuit Court Judge

Case No. 2015-002024

Innovative Waste Management Inc., Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

Innovative Waste Management (hereinafter referred to as “Appellant”), in response to the Respondents’ Initial Brief of Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau (hereinafter collectively referred to as “Respondents”) hereby submits this Initial Reply Brief of Appellant.

ARGUMENT

I. Respondents’ Initial Brief was not properly served upon Appellant or filed with this Court in compliance with the South Carolina Appellate Court Rules.

As a threshold issue, Appellant contends that Respondents’ Initial Brief was not properly served upon Appellant or filed with this Court in compliance with the South Carolina Appellate Court Rules. This issue is twofold, in that: (A) Appellant contends that a Motion to Dismiss merely stays the timing requirements imposed by the South Carolina Appellate Court Rules and does not provide Respondents with an additional thirty (30) day period to serve upon Appellant and file with the Court Respondents’ Initial Brief, and as such Respondents have taken an untimely and improper sixty-three (63) days in total to serve and file Respondents’ Initial Brief; and (B) even if a Motion to Dismiss provides Respondents with an additional thirty (30) days to serve and file Respondents’ Initial Brief, Respondents served and filed Respondents’ Initial Brief in an untimely and improper fashion. These arguments will be addressed in turn.

A. Respondent’s Motion to Dismiss merely stayed the timing requirements imposed by the South Carolina Appellate Court Rules and did not provide Respondents with an additional thirty (30) day period to serve upon Appellant and file with the Court Respondents’ Initial Brief.

Rule 208(a)(2) of the South Carolina Appellate Court Rules states, in relevant part, that “[w]ithin thirty (30) days after service of appellant’s brief, respondent shall serve one copy of his brief on all parties to the appeal and file with the clerk of the appellate court one copy of the brief with proof of service.” “A motion to dismiss an appeal or a motion to relieve counsel shall, however, automatically stay the time limits for perfecting the appeal until the motion is decided.” SCACR 240(b). Black’s Law Dictionary defines the term “stay” as, “1. The postponement or halting of a proceeding . . . [or] 2. [a]n order to suspend all or part of a judicial proceeding” *Stay*, *Black’s Law Dictionary* (9th ed. 2011). Notably absent from the South Carolina jurisprudence or the South Carolina Appellate Court Rules, however, is any authority that would indicate that a respondent receives an additional thirty (30) days to file their initial brief after the Court has entered a decision on such a motion.

In the instant case, Appellant served upon Respondents and filed with the Court Appellant’s Initial Brief on November 20, 2015. Pursuant to Rule 208(a)(2), Respondents’ Initial Brief, or in the alternative a Motion to Dismiss or Motion to Relieve Counsel, was due to be served upon Appellant and filed with the Court within thirty (30) days – in other words, by no later than December 20, 2015. Respondents filed and served their Motion to Dismiss at the last possible moment on December 21, 2015, thereby automatically staying time limits imposed by the South Carolina Appellate Court Rules.¹

The Court issued its Order denying Respondents’ Motion to Dismiss on March 4, 2016. Upon the entrance of this Order, the automatic stay on the filing and service

¹ The allotted thirty (30) day response period elapsed on Sunday, December 20, 2015. Monday, December 21, 2015 was the next business day and, as such, Respondents’ Motion to Dismiss was served and filed in a timely fashion pursuant to Rule 263(a) of the South Carolina Appellate Court Rules.

requirements of Respondents' Initial Brief was lifted. Appellant contends that, in the absence of a provision granting Respondents more time to serve and file Respondents' Initial Brief, the normal calculation of time limits resumed as set forth within the South Carolina Appellate Court Rules. As Respondents utilized the entirety of the allotted thirty (30) day response period provided by SCACR 208(a)(2) to draft their Motion to Dismiss, Respondents' Initial Brief became due upon Respondents' receipt of service of the Court's Order. Respondents did not file Respondents' Initial Brief upon receipt of service of the Court's Order, however, as Respondents' Initial Brief was not served upon Appellant or filed with the Court until April 5, 2016, or thirty-two (32) days after the entrance of the Court's Order.

In total, Respondents have taken sixty-three (63) days to draft and submit Respondents' Initial Brief.² Appellant contends that this extensive amount of time has unduly delayed these proceedings and has provided Respondents with an unfair advantage, thereby prejudicing Appellant. Rule 208(a)(4) of the South Carolina Appellate Court Rules states that "[u]pon the failure of a respondent to timely file a brief, the appellate court may take such action as it deems proper." Based upon the foregoing, Appellant requests that the Court exercise its authority and grant Appellant any such relief it may deem proper, including but not limited to striking Respondents' Initial Brief.

B. Should the Court rule that a Motion to Dismiss provides Respondents with an additional thirty (30) day period to serve upon Appellant and file with the Court Respondents' Initial Brief, Respondents' Initial Brief was still served and filed in an untimely and improper fashion.

² Respondents served and filed their Motion to Dismiss thirty-one (31) days after the service and filing of Initial Brief of Appellant as further set forth above within footnote 1; Respondents served and filed Respondents' Initial Brief thirty-two (32) days after the entrance of the Court's Order dismissing Respondents' Motion to Dismiss.

Should the Court disagree with Appellant's argument regarding SCACR 240(b) as set forth above and determine that Respondents were indeed allotted an additional thirty (30) day period following the entrance of the Court's Order denying Respondents' Motion to Dismiss, Respondents' Initial Brief was still not served upon Appellant or filed with the Court in a timely manner. Rule 262(a) of the South Carolina Appellate Court Rules states that "... filing may be accomplished by: (1) Delivering the document to the clerk of the appellate court. ... [or] (2) By depositing the document in the U.S. mail, properly addressed to the clerk, with sufficient first class postage attached. The date of filing shall be the date of delivery or the date of mailing." Furthermore, Rule 262(b) states that "[s]ervice upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address Service by mail is complete upon mailing." SCACR 262(b).

As set forth above, the Court issued its Order denying Respondents' Motion to Dismiss on March 4, 2016, and, if Respondent was in fact granted an additional thirty (30) days under the South Carolina Appellate Court Rules, Respondents' Initial Brief was due to be served upon Appellant and filed by no later than April 4, 2016.³ Respondents failed to comply with this date, however, and both served and filed Respondents' Initial Brief on April 5, 2016. Respondents incorrectly listed April 4, 2016 as the date of service within the Certificate of Service accompanying Respondents' Initial Brief that was filed with the Court, when in fact the postage placed upon the envelope in which Appellant received service of Respondents' Initial Brief was not printed until April 5, 2016.

³ The allotted thirty (30) day time period would have expired on Sunday, April 3, 2016. Monday, April 4, 2016 was the next business day and, as such, was the date upon which Respondents' Initial Brief was due pursuant Rule 263(a) of the South Carolina Appellate Court Rules.

Furthermore, Respondents' Initial Brief was not filed with the Court until April 5, 2016, as evidenced by the date on the accompanying Fed Ex Express shipping label that was filed with the Court.

Appellant contends that is another example of a pattern of untimeliness and purposeful delay that has been exhibited by Respondents throughout all levels of these proceedings. Based upon the foregoing, Appellant requests that the Court exercise its authority and grant Appellant any such relief it may deem proper, including but not limited to striking Respondents' Initial Brief.

II. Appellant properly preserved all of the arguments contained within its Rule 59(e) Motion for Reconsideration for appeal, as all arguments were raised and ruled upon by the Trial Court within the scope of the drafting and oral arguments regarding Appellant's underlying Rule 60(b) Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial.

Respondents allege within Respondents' Initial Brief that Appellant should be barred from making several legal arguments set forth within Initial Brief of Appellant as said arguments were only raised within Appellant's Rule 59(e) Motion to Reconsider and were absent from Appellant's underlying Rule 60(b) Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial. Specifically, Respondents contend that the following arguments were not preserved for appellate review: (1) that the Trial Court's April 20, 2015 Form 4 Order (hereinafter the "Judgment) does not comply with Rules 41 and 79(f), SCRCP; (2) that the Trial Court did not intend to dismiss this case; and (3) that the parties did not intend for the Trial Court to dismiss this case. This allegation is incorrect, however, as Appellant addressed all of these issues within its written Rule 60(b) motion, the evidence submitted by the Appellant that accompanied the

written Rule 60(b) motion, and the hearing conducted before the Trial Court on June 24, 2015.

“Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide [appellate courts] with a platform for meaningful appellate review.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (S.C. 2012) (*quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. Elam v. S. Carolina dep't of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Such “[i]ssues and arguments are preserved for appellate review . . . when they are raised to and ruled on by the lower court.” *Id.* at 9, 23, 602 S.E.2d at 772, 779-80.

An exception to this rule exists, however, “. . . when an issue or argument has been raised, but not ruled on” *Id.* at 9, 24, 602 S.E.2d at 772, 780. In such a situation, a party must bring a Rule 59(e) motion to preserve such an issue for appellate review. *Id.* “. . . Rule 59(e), SCRPC, provides for a motion to alter or amend judgment and preserve the record for appeal.” Pelican Build Centers v. Dutton, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (S.C. 1993). “Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised.” Coward Hund Const. Co. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct. App. 1999) (*quoting James F. Flanagan, South Carolina Civil Procedure* 475 (2d ed. 1996)).

The South Carolina Supreme Court has acknowledged that it is “. . . good practice for [appellate courts] to reach the merits of an issue when error preservation is

doubtful” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (S.C. 2012). Chief Justice Toal addressed the application of appellate preservation at length within a separate, written opinion in Atlantic Coast Builders & Contractors, LLC v. Lewis:

In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice. To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. As such, “it is axiomatic that an issue cannot be raised for the first time on appeal.” However, I do not believe it is our place to scour the records before us for the purpose of avoiding issues or, even worse, to play a “gotcha” game with attorneys by showcasing their alleged mistakes, at the expense of their clients. This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests. In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.”

398 S.C. 323, 730 S.E.2d 282 (S.C. 2012) (Toal, C.J., concurring in part, dissenting in part).

In the instant case, the record is replete with instances wherein the Appellant has plainly and openly contended that the Judgment dismissing this case was entered in error and should be vacated. Appellant’s Rule 60(b) motion and its related arguments are no exception. Each of the three arguments, which are set forth above, that Respondents contend are not preserved for appeal were raised and adjudicated on by the Trial Court within the scope of Appellant’s Rule 60(b) motion.

First and foremost, Appellant argued within its initial brief that the Judgment was entered in error, more specifically due to its failure to comply with Rules 41 and 79(f) of the South Carolina Rules of Civil Procedure, and as such should be vacated. Appellant

argued this very point at the June 24, 2015 hearing regarding Appellant's Rule 60(b) motion. At the hearing, Attorney Wm. M. Gruenloh, Counsel for Appellant, specifically stated that "[t]o the extent that a dismissal was entered in error or otherwise, we'd ask that that be vacated, and we're here asking for a trial date." *See* June 24, 2015 Transcript at pg. 3:21-23. Appellant specifically addressed the topic of the Judgment's validity and asked that it be vacated, and as such this issue has been preserved for purposes of appeal.

Second, Appellant contends within its Initial Brief that the Trial Court did not intend to dismiss this case. Once again, Appellant addressed this issue at the June 24th hearing by stating that "[t]he case was apparently dismissed, despite the fact that we didn't send in a stipulation of dismissal. I think that was done because the mediator sent in a statement saying the case was fully settled, but it did not indicate that the case had been dismissed." *See* June 24, 2015 Transcript at 3:8-12. The Trial Court indicated that it would "... take a look at the communications that were provided to the Court that led to the dismissal of the case along with the stipulation for the settlement agreement that was signed." *See* June 24, 2015 Transcript at 5:20-23. This exchange indicates that the Trial Court examined the totality of the communications with the Court regarding the dismissal of this case, and presumably evaluated its own intent within its ruling. As such, this issue was properly raised and has been preserved for purposes of appeal.

Third and finally, Appellant contends within its Initial Brief that the parties did not intend for the Trial Court to dismiss this case. This fact is clearly set forth within Appellant's written 60(b) motion and the attached Settlement Agreement. Appellant's 60(b) motion states that "[t]he parties did not file a stipulation of dismissal, and dismissal was conditioned upon the Defendants payment under the Settlement Agreement." *See*

Plaintiff's Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial at paragraph 3. Additionally, a copy of the Settlement Agreement was attached to Appellant's Rule 60(b) motion and was provided to the Trial Court. The Settlement Agreement states, in relevant part, that "[t]he Parties hereby authorize and direct their attorneys to execute and file a stipulation of dismissal with prejudice in exchange for the \$450,000.00 payment, once payment is made." See Settlement Agreement at paragraph 5 (emphasis added). Appellant also explicitly stated at the June 24th hearing that the parties ". . . never communicated any intent to dismiss the case" See June 24, 2015 Transcript at 5:3-4. Attorney David Marvel, Counsel for Respondents, did not dispute this assertion. As such, this issue has also been preserved for purposes of appeal.

Furthermore, not only was each of these topics addressed by Appellant's within the scope of its Rule 60(b) motion, but each was adjudicated on by means of the Trial Court's July 22, 2015 Order denying Appellant's Rule 60(b) motion. In relevant part, the Order states that the Trial Court ". . . review[ed] all the testimony and other evidence presented at the hearing, along with the records provided to the Court . . ." in ruling against Appellant. See Trial Court's July 22, 2015 Order. As such, the Trial Court took into account all of Appellant's aforementioned arguments, including those made orally at the June 24, 2015 hearing, in issuing a final ruling. As each argument was raised and adjudicated upon by the Trial Court, they are all preserved for purposes of appeal. In the alternative, however, should this Court determine that the any of the aforementioned issues was raised but not adjudicated on within the Trial Court's July 22, 2015 Order, they were again raised in further detail within Appellant's Rule 59(e) motion and are still properly preserved for appeal.

As such, Appellant properly raised all of its arguments within the scope of its Rule 60(b) motion and the Trial Court ruled upon such arguments within a final order. Based upon the foregoing, each of the issues raised within the Initial Brief of Appellant was preserved for purposes of appeal. Additionally, any further elaboration upon such arguments contained within Appellant's Rule 59(e) motion was also proper and any such elaboration is also preserved for purposes of appeal.

III. Appellant provided sufficient evidence to establish that the Trial Court abused its discretion in denying Appellant's Rule 60(b) motion under numerous grounds, which were properly raised and argued within the scope of Appellant's Rule 60(b) Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial and further detailed within Appellant's Rule 59(e) Motion to Reconsider and Initial Brief of Appellant.

Rule 60(b) of the South Carolina Rules of Civil Procedure allows a trial court, upon motion, to relieve a party from a final judgment for the following reasons:

- (1) [M]istake, 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.

The decision whether to grant or deny a motion requesting relief under Rule 60(b) of the South Carolina Rules of Civil Procedure lies within the sound discretion of the trial court. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (S.C. 2004). The standard of review upon appeal is limited to determining whether there was an abuse of discretion. Id.

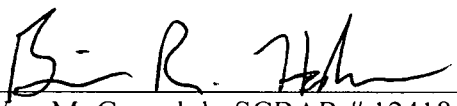
As set forth above, Appellant addressed a number of issues within the scope of its Rule 60(b) motion that would indicate that the Trial Court abused its discretion in

denying Appellant's Rule 60(b) motion and upholding the Judgment. *See* Argument Section II, *supra* pg. 5. All of these relevant arguments were presented to the Trial Court within the scope of the Rule 60(b) motion and were ruled upon within the Trial Court's July 22, 2015 Order. Appellant then provided further detail to the Trial Court by means of its Rule 59(e) motion. All of Appellant's arguments regarding the Trial Court's abuse of discretion in denying both its Rule 60(b) and Rule 59(e) are preserved for purposes of appeal and are set forth in full detail within Initial Brief of Appellant, which is incorporated by reference herein and upon which Appellant hereby relies.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests this Court to reverse the Trial Court's denial of Appellant's Motion to Vacate Settlement Agreement. Restore to Active Docket, and Set for Trial, vacate the Judgment, and remand this action back to the Dorchester County Court of Common Pleas thereby restoring it to the active docket.

Respectfully Submitted
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Counsel for the Appellant

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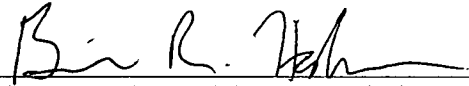
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of **Initial Reply Brief of Appellant** in the above-referenced matter was served on the below named parties and/or their respective counsel and/or agents by depositing true and accurate copies of the same in the U.S. mail, first class, properly addressed, with sufficient postage affixed, on the date below.

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April 14, 2016

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Case No.: 2015-002024

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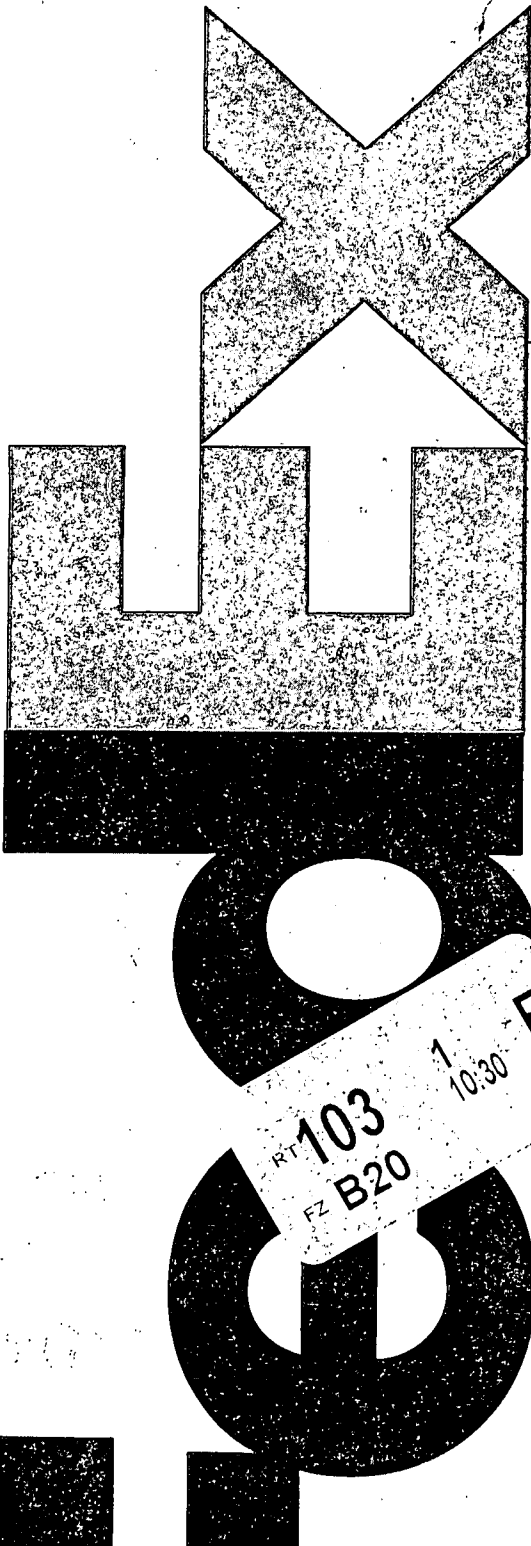
Enclosed please find the original and one file copy of the Initial Reply Brief of Appellant for purposes of filing in the above-referenced matter. Please file this brief upon your receipt and return the clocked file copy to me in the enclosed self-addressed, stamped envelope at your earliest convenience.

If you have any questions or concerns, please don't hesitate to contact our office.

Respectfully,

Brian R. Holmes, Esq.

Enclosures
CC: David Marvel



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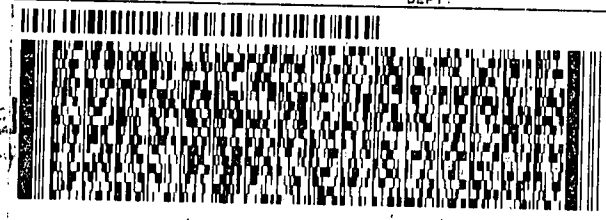
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