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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

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SC Court of Appeals

Appellate Case No. 2015-001146

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II, Inc.,

Appellant/Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners Association, Inc.,

Respondent/Appellants.

PETITION FOR REHEARING OF RESPONDENT/APPELLANTS

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INTRODUCTION

Pursuant to Rule 221(a) and Rule 240(I), SCACR, the Respondent/Appellants Kiawah Property Owners Group, Inc. ("KPOG") and Inlet Cove Club Homeowners Association, Inc. ("Inlet Cove") respectfully petition this Court for a rehearing of Opinion No. 5517, dated September 27, 2017. Rehearing is warranted when the Court has overlooked or misapprehended an argument. Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001). When the Court fails to address some of the arguments raised in the appeal, "a *prima facie* case for rehearing has been made." Covar v. Sallat, 22 S.C. 265, 272 (1885).

Summary of Argument

This Court overlooked and misapprehended both factual and legal arguments presented by KPOG and Inlet Cove.

First, the Court erroneously attributed the testimony of Peter Mugglestone and Wendy Kulick to KICA. But these individual Kiawah Island property owners testified as members and on behalf of KPOG and/or Inlet Cove, not KICA. In addition to Dr. Greg VanDerwerker, Mr. Mugglestone and Ms. Kulick specifically testified regarding their use and enjoyment of the disputed 4.62 acres as Common Property as members of the intervening groups with whom their interests align, as opposed to KICA. The KPOG and Inlet Cove members are necessarily also KICA member by virtue of owning property on Kiawah Island; however, they testified and served as witnesses for KPOG and Inlet Cove.

Second, the Court overlooked the multiple instances where KPOG and Inlet Cove raised the intertwined issues of standing and intervention.[1] The record reflects multiple motions, responses and replies where both the test for intervention and the test for standing were raised to and ruled on by the master, starting with the motion to intervene and ending with the Master's ruling on KRA's 59(e) motion, as discussed more fully below. The confusion between the legal standards for intervention and standing was also fully raised to and ruled on by the master. Accordingly, these issues are preserved for review by this Court.

Finally, KPOG and Inlet Cove presented evidence at trial that was used and relied on by the master in issuing his final order denying reformation, as well as in affirming that denial on reconsideration. Therefore, KPOG and Inlet Cove's standing as parties to this action is an additional sustaining ground by which this Court should affirm the final decision on the merits.

ARGUMENT

I. The Court's Opinion Misapprehends the Testimony and Argument Presented by KPOG and Inlet Cove

In its Opinion, this Court stated "KICA presented testimony from two of its members that they actively use and enjoy the 4.62-acre property." That is an incorrect statement. KPOG and Inlet Cove presented the testimony from the KICA members who were also members of their groups.

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[1] The Court's Opinion seems to misapprehend KPOG and Inlet Cove's appeal. The key issue is whether the 59(e) Order failed to properly apply the standards for standing and intervention. The inconsistency with the master's prior ruling demonstrates that the master had previously used the correct standard and reached the correct result in his order granting intervention. The intermingling of the two standards was again raised by all parties in briefing the rule 59(e) motion, which was ruled on by the master.

Accordingly, evidence of the use and enjoyment of the 4.62 acres in dispute was presented by KPOG and Inlet Cove, not KICA.

At trial, KPOG and Inlet Cove presented the testimony of four witnesses: Bill Eiser; Wendy Kulick; Peter Mugglestone; and Greg VanDerwerker. (R.pp. 1264, line 7– 1382, line 7). Mr. Eiser testified about his role with the South Carolina Department of Health and Environmental Contol ("DHEC") and, in particular, the setting of the agency's beachfront jurisdictional lines which affected the developability of beachfront property, including the 4.62 acres in dispute. (R. pp. 1264, line 14–1305, line 9). This evidence was relied upon by the master in concluding reformation must be denied. (R. pp. 23-29).

As homeowners on Kiawah Island, Mrs. Kulick, Mr. Mugglestone and Dr. VanDerwerker are necessarily members of KICA; however, their participation in this case extends further and is distinguishable because they are also members of KPOG and Inlet Cove, both of which have distinct interests in preserving the aesthetic and recreational values, uses and enjoyment of the natural environment and the attendant quality of life for Kiawah Island property owners, as opposed to KICA's interests. (R. pp. 7-8). Mrs. Kulick, Mr. Mugglestone and Dr. VanDerwerker each testified to regular use and enjoyment of the 4.62-acre property for aesthetic and recreational purposes. (R. pp. 1305, line 13–1382, line7).

The only testimony presented by KICA was from Tammy McAdory, KICA's custodian of records and chief operating officer. (R. pp. 1209, line 5–1264, line 6). Ms. McAdory's testimony evidenced a lack of intent on the part of KICA to receive and hold anything as Common Property subject to KICA's governing covenants other than the property as described in the deed transferring the 4.62 acres. Evidence that the 4.62 acres was in fact used and enjoyed by KICA members as

Common property was presented by KPOG and Inlet Cove. Indeed, that is why KPOG and Inlet Cove members sought intervention in this matter in the first place – to ensure those interests were adequately protected. Moreover, the master relied, in part, on the group members' testimony in reaffirming the denial of reformation in the Order on reconsideration:

> Testimony was presented at the trial of this matter as to individual KICA members' use of that easement [for use and enjoyment of Common Property] and reliance on same which has been in existence for nearly two decades. To disturb those rights now with no consideration given to the holders of those rights is something this court is unwilling to do in like of no precedent authorizing such action.

(R. p. 48).

All along, KPOG and Inlet Cove argued that KRA intended to convey, and KICA intended to receive, the 4.62 acre property as Common Property for the use and enjoyment of KICA members, and the groups presented evidence in support of this argument, including the testimony of Mrs. Kulick, Mr. Mugglestone and Dr. VanDerwerker. In this Court's Opinion, however, the testimony and argument regarding individual members' use and enjoyment of the 4.62 acre property was erroneously attributed to KICA when, in fact, KICA consistently maintained that it had no intent and presented evidence solely to that effect.

II. The Issues of KPOG and Inlet Cove's Standing and Intervention, and the Blending of Those Legal Standards, Are Preserved for Review

The general rule of issue preservation requires that an issue must be raised to and ruled on by the court below in order to be reviewed on appeal. "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." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Issues and arguments are preserved for appellate review only when they are raised to and

ruled on by the lower court." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004).

If an issue has been raised but not ruled on by the lower court, then a party intending to raise such issue on appeal must file a motion pursuant to Rule 59(e), SCRCP. Elam, 361 S.C. at 24, 602 S.E.2d at 780; Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct.App.1999) (citing Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) ("The purpose of Rule 59(e), SCRCP, to alter or amend the judgment [,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'")). However, there is an exception to this rule when an issue is raised to, but not ruled on by, the court on reconsideration. Pye v. Estate of Fox, 369 S.C. 555, 565–66, 633 S.E.2d 505, 510 (2006). "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." Pye, 369 S.C. at 565 (quoting James F. Flanagan South Carolina Civil Procedure 475 (2d ed.1996)).

Moreover, while a party may wish to file a motion for reconsideration if it believes the court misunderstood, failed to fully consider, or failed to rule on an issue or argument the party desires a ruling on, in so moving the party "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." Elam, 361 S.C. at 24-25, 602 S.E.2d at 780.

Here, KPOG and Inlet Cove appealed the Order on Motion to Alter or Amend the Final Order arguing that the master erred in dismissing the groups for lack of standing. Specifically, KPOG and Inlet Cove argued that the master misapplied and confused the legal standards for standing and intervention. The issues of whether KPOG and Inlet Cove met the test for intervention, whether

KPOG and Inlet Cove have standing as parties, and whether KPOG and Inlet Cove claim sufficiently separate and distinct interests to confer standing–an inquiry that interjects the legal standard for intervention into the standing analysis–were all raised to and ruled on by the master below. Therefore, these issues are preserved for appellate review.

A. Intervention Was Raised to and Ruled on by the Master

On May 28, 2013, KPOG and Inlet Cove filed a motion to intervene in the action brought by KRA over 4.62 acres of beachfront property that KRA claimed was deeded to KICA by mistake. In the motion to intervene, KPOG and Inlet Cove asserted distinct interests relating to the disputed 4.62 acre property that would be impaired without their direct involvement, and which would not be adequately represented by the existing parties. (R. pp. 287-291). Counsel for KRA represented to counsel for KPOG and Inlet Cove that it objected to intervention (R. p. 292), but only KICA, and not KRA, filed a written response in opposition to the motion. (R. p. 334).

On reply, KPOG and Inlet Cove set forth in further detail how their interests were distinct and neither adequately represented by, nor aligned with, KICA (R. pp. 343-350), as well as raised for the first time the issue relating to misapprehension of the correct legal standard for intervention.[2] (R. pp. 344). In pertinent part, "Inlet Cove and KPOG assert distinct, legally protectable interests in the use and enjoyment of the [4.62 acre property and] seek intervention in order to ensure that

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[2] Rule 24(a), SCRCP, provides for intervention as of right when: (1) a statue confers an unconditional right to intervene; or (2) the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Rule 24(b), SCRCP, provides for permissive intervention when: (1) a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

their interest in the use and enjoyment of the [4.62 acres] for aesthetic and recreational purposes is adequately represented because KICA, at a minimum, has created an appearance to membership that it may not vigorously defend such interest." (R. p. 348). "Moreover, Inlet Cove and KPOG offer a different perspective from KICA for they constitute the individual members living on Kiawah Island and actually using and enjoying the [4.62 acre property] . . . An important perspective is the value to the groups' membership if the property remains Common Property, specifically the aesthetic and recreational values." (R. pp. 348-349).

The master heard oral arguments from KPOG and Inlet Cove in support of, and KRA and KICA in opposition to, the motion for intervention. On November 1, 2013, the master issued an Order Granting Intervention, in which it concluded KPOG and Inlet Cove met the test for both intervention as of right and permissive intervention. (R. pp. 1-11).

Specifically, the master ruled that KPOG and Inlet Cove's interests are two-fold: "First, as members of KICA, they share easement rights in property held as Common Property under KICA's Covenants. Second, Inlet Cove and KPOG hold aesthetic and recreational interests in viewing, using and enjoying the 4.62 acres and surrounding wildlife in its natural state." (R. pp. 7-8). Recognizing that our courts have found aesthetic interests a sufficient basis for challenging an activity, the master concluded that KPOG and Inlet Cove alleged sufficiently distinct interests in the 4.62 acre property and that such interests would be impaired without their direct participation in the matter. (R. p. 8).

Furthermore, the master determined that "there exists a reasonable concern that [KPOG and Inlet Cove's] interests in protecting the 4.62 acre parcel for aesthetic and recreational use and enjoyment as Common Property will not be adequately represented by KICA" and that "KICA will not 'undoubtedly' make all the same arguments as proposed intervenors in protecting their interests

because KICA is not taking a position on the intention of the parties or whether there was a mutual mistake in transferring the 4.62 acres." (R. p. 9).

Finally, the master "perceive[d] three separate and distinct positions" regarding the disputed 4.62 acre property: (1) KPOG and Inlet Cove arguing the property was intentionally conveyed by KRA and received by KICA, and should remain as Common Property; (2) KRA arguing there was a mutual mistake, and that neither party intended the conveyance; and (3) KICA disclaiming any intention as to whether the property was to be conveyed and maintained as Common Property. (R. p. 10).

Based on the foregoing, it is indisputable that the issue of KPOG and Inlet Cove's intervention was raised to and ruled on in great detail by the master below. Significantly, the Order Granting Intervention was not timely challenged or appealed and is controlling, or at a minimum persuasive authority, on the issue of intervention. Upon obtaining permission to intervene, KPOG and Inlet Cove participated fully in the trial of this case, presenting testimony and evidence that the master then relied upon in reaching and reaffirming the decision to deny reformation.

Following trial, but prior to the issuance of a final decision, KRA filed an untimely motion for relief from the Order Granting Intervention, in which it sought dismissal of KPOG and Inlet Cove as parties to the case. (R. p. 589). **As KPOG and Inlet Cove raised in their written response in opposition, KRA's motion** was not only procedurally improper, but also **confused the related but distinct legal standards of intervention Article III standing.** (R. pp. 611-624). KICA also filed a written response stating it had no objection to the Court ruling on the merits of the motion as presented by KRA. (R. p. 608).

KRA purportedly sought reconsideration of the master's ruling on intervention, taking issue with the groups' "'distinct' interests" and arguing that neither KPOG nor Inlet Cove should be permitted to "continue as Intervenors." (R. p. 589-90). Yet, KRA failed to actually challenge whether the standard for intervention was properly met–*i.e.*, whether KPOG and Inlet Cove possess sufficiently distinct interests that are not adequately represented and will be impaired without their direct participation. Instead, KRA questions KPOG and Inlet Cove's standing, which entails a different inquiry–*i.e.*, whether KPOG and Inlet Cove will suffer an injury-in-fact as a result of the dispute that is redressable by a favorable outcome. **This issue involving the blending of the legal standards for standing and intervention was expressly raised by KPOG and Inlet Cove in their response.**[3]

The master heard oral arguments by KRA and KICA in support of, and KPOG and Inlet Cove in opposition to, the Motion for Relief from the Order Granting Intervention. On June 4, 2014, the master denied the motion and that decision went unchallenged. (R. p. 12).

KRA again moved, in part, for the dismissal of KPOG and Inlet Cove on reconsideration of the final decision under the same theory previously raised in KRA's Motion for Relief from the

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[3] R. p. 611 at fn. 1 ("Plaintiff's motion fatally confuses a party's standing and intervention and misstates the requisite inquiries thereunder."); R. p. 616 (citing legal standard for intervention under Rule 24, SCRCP), ("Plaintiff's motion does not contain any allegations that the Court improperly applied the standard for intervention, and instead treats the Order Granting Intervention as a final judgment on standing."); R. pp. 617-618 ("Contesting the Order Granting Intervention for lack of standing is plainly misplaced. While the Order Granting Intervention does provide preliminary determinations regarding Intervenors' standing – at this stage in the case, the Court's standing inquiry include consideration of the evidence and live testimony presented at trial, which bolster the pre-trial allegations upon which the Order Granting Intervention touched."); R. pp. 618-620 (citing legal standard to establish standing); R. pp. 621-623 (summarizing group members' testimony relating to interests in 4.62 acres and their use and enjoyment for aesthetic and recreational purposes).

Order Granting Intervention, which was denied by the master. (R. pp. 653). KPOG and Inlet Cove filed a written response supporting the master's final decision on the merits but opposing their dismissal. (R. pp. 699-716). **KPOG and Inlet Cove incorporated by reference their arguments in response to KRA's Motion for Relief from the Order Granting Intervention, as well as reasserted the groups' satisfaction of the correct legal standards for both intervention and standing.** KICA, too, filed a written response supporting the master's final decision on the merits but also supporting the dismissal of KPOG and Inlet Cove under the recurring hybrid standing/intervention theory.[4] (R. p. 734). **This time, though, the master granted dismissal, adopting the improperly intertwined interpretation of party standing with intervention and concluding that KPOG and Inlet Cove should be dismissed for lack of such standing**. (R. p. 53). It is from this Order that KPOG and Inlet Cove appeal.

As set forth above, both the issues of intervention and whether KPOG and Inlet Cove met the requisite standard thereunder, as well as whether KPOG and Inlet Cove met the amalgamated standard of intervention and standing, were undoubtedly and repeatedly raised to and ruled on by the master. Therefore, these issues are properly preserved for review. See, e.g., Elam v. S.C. Dep't of Transp., 361 S.C. at 23, 602 S.E.2d at 779–80.

B. Standing Was Raised to and Ruled on by the Master

The issue of party standing and whether KPOG and Inlet Cove met the correct legal standard thereunder was raised first in the motion for intervention. (R. pp. 288 (asserting group members'

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[4] Notably, KICA's repeated and consistent opposition to KPOG and Inlet Cove's participation in this case gives credence to the serious concerns expressed by the groups that their interests would be adequately protected without their direct involvement.

quality of life with regard to aesthetic and recreational use and enjoyment of the natural environment of the 4.62 acres will be directly and adversely impacted by the outcome of this litigation); R. pp. 288-289 (citing case law in which courts recognize aesthetic and recreational interests can provide basis for standing); R. p. 290 ("As demonstrated by the allegations set forth above, the Inlet Cove HOA and KPOG also meet the test for standing. . .").

As discussed above, on reply following KICA's written motion in opposition to intervention, KPOG and Inlet Cove raised the confusion of the legal standards between intervention and standing. (R. pp. 343-350). In addition, KPOG and Inlet Cove cite further case law in support of their party standing:

> South Carolina courts have routinely held that a plaintiff's injuries may stem from aesthetic interest in viewing private property . . . S.C. Wildlife Fed'n v. S.C. Coastal Council, 296 S.C. 187, 190, 371 S.E.2d 521, 523 (1988); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision), 332 S.C. 551, 505 S.E.2d 598 (Ct. App.1998) (rev'd on other grounds). Those aesthetic and recreational interests are sufficient to allow a party to vindicate its rights. For instance, in Ogburn-Matthews, the Court held that plaintiffs that live adjacent to a privately owned wetland had a sufficient interest at stake to confer standing to challenge the issuance of a permit to fill the wetland because the permit would adversely affect their use and enjoyment in viewing the wetland and surrounding wildlife.

(R. p. 344).

KPOG and Inlet Cove also presented arguments on the issues of standing[5] and, as discussed above, the co-mingling of legal standards between standing and intervention in response to KRA's Motion for Relief from the Order Granting Intervention. (R. pp. 611-624). Specifically, KPOG and Inlet Cove presented a thorough summary of the case law on party standing, and in the context of

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[5] KPOG and Inlet Cove's response includes a full discussion of standing in the context of each of the issues raised in KRA's Motion for Relief from the Order Granting Intervention.

aesthetic and recreational use and enjoyment in particular. (R. pp. 618-20 (*e.g.*, "Our courts have long held that precisely the type of aesthetic and recreational interests at stake here are sufficient to confer standing. In Smiley, the Supreme Court held that a plaintiff must make claims as to "use and enjoyment of an affected area."). Further, KPOG and Inlet Cove went through in detail the testimony presented by their members at trial:

> Wendy Kulick testified . . . that she often walks along the area of the beach in, on and around the 4.62 acre parcel; that the 4.62 acre parcel is special in that it remains one of the few pristine areas left on Kiawah Island and a reminder of what attracted her to move to the island; and that by experiencing the 4.62 acres in its current state, she derives aesthetic enjoyment as well as an escape from the daily stressors of life . . . but if the 4.62 acres were no longer Common Property . . . then she would no longer be able to use, access or enjoy that property as she currently does, thereby diminishing her aesthetic and recreational interests.
>
> Peter Mugglestone testified . . . he regularly uses and enjoys the 4.62 acre parcel in conjunction with his morning runs along the beach, afternoon walks out to Captain Sam's Spit, and general use of the access boardwalk from Beachwalker Park that crosses the 4.62 acres . . . and testified that it is one of the more desirable areas along the Kiawah Island beachfront and particularly special in the amount of small vegetation, flora and wildlife it sustains . . . he derives benefits from the 4.62 acres by walking through the parcel, by observing the scenery and wildlife, and by taking photographs . . . and if the 4.62 acres were no longer Common Property, then his use and enjoyment would be adversely affected because the parcel would most likely be developed, lose its unique desirability and his access would be eliminated without trespassing.
>
> Dr. VanDerwerker testified . . . to the recreational activities he enjoys on Kiawah Island, which include walking, jogging, bicycling, beachcombing and kayaking . . . that he is familiar with the 4.62 acre parcel; that it remains in its natural state of beach dunes and maritime forest; that he regularly uses the 4.62 acres for beach access; and that he derives aesthetic enjoyment from the 4.62 acres through observation of the natural scenery and wildlife as well as physical benefits in the form of hurricane protection. One of the most attractive features that drew him to move to Kiawah Island was the unique beach landscape that supported forests and various native flora and wildlife, and which is exhibited on the 4.62 acres . . . but he would lose his access rights if KRA were deemed to own that parcel, thereby lessening his use and enjoyment of the area in dispute.

(R. pp. 621-623).

Finally, KPOG and Inlet Cove presented arguments on the issue of standing and the blending of the inquiry between standing and intervention, as discussed above, in response to KRA's motion on reconsideration. (R. pp. 713-715). "[W]itnesses for both KPOG and Inlet Cove sufficiently established standing in this action and presented relevant evidence to this Court regarding intent of the conveyance of the Beachfront Strip and the inclusion of the 4.62 acres." (R. p. 714).

Both the issues of KPOG and Inlet Cove's party standing, and the incorrect hybrid standing/intervention standard, were raised to and ruled on by the master. Therefore, these issues are properly preserved for review. See, e.g., Elam v. S.C. Dep't of Transp., 361 S.C. at 23, 602 S.E.2d at 779–80; Pye v. Estate of Fox, 369 S.C. 555, 566, 633 S.E.2d 505, 511 (2006) (assertion of theory on summary judgment and on motion for reconsideration preserved issue for review even though judge did not rule on theory).

C. KPOG and Inlet Cove Were Not Required to File a Subsequent Rule 59(e) Motion

The issues raised by KPOG and Inlet Cove on appeal were preserved because they were raised to and ruled on by the master on multiple occasions, as set forth in detail above, including on a Rule 59(e) motion for reconsideration.[6] And because these issues were raised to and ruled on by the master, it was not necessary for KPOG and Inlet Cove to file a Rule 59(e) motion at all, let alone a successive one. Elam, 361 S.C. at 24, 602 S.E.2d at 780 (stating a party *must* file Rule 59(e)

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[6] See Elam, 361 S.C. at 21, 602 S.E.2d at 778 ("A motion under Rule 59(e) long has been viewed as "motion for reconsideration" despite the absence of those words from the rule.").

motion if an issue is raised but not ruled on, and a party *may* file such motion if wish the court to reconsider its ruling on an issue).

"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 yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (concluding seller not required to make post-trial motion to preserve issue for appeal where court ruled on seller's argument on disputed amortization schedule by adopting that amortization schedule in its order); Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (2000) (concluding issue preserved for review where party pleaded and obtained trial court ruling on the issue and discussed the issue in brief in connection with similar but distinct issue)[7]; Spence v. Wingate, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (concluding issue preserved for review when order granting summary judgment on precise grounds argued by prevailing party also addressed argument raised by opposing party, even if order did not restate grounds on which party opposed, for ruling was sufficient to preserve such argument).

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[7] In concluding that the issue was preserved, the Supreme Court in Holy Loch pointed to the fact that "Holy Loch specifically raised the express warranty issue" in its complaint and that "breach of express warranty was not only before the trial court for consideration, but it was also specifically ruled on by the trial court." 340 S.C. at 24–25, 531 S.E.2d at 284–85. Moreover, the Supreme Court rejected a restrictive interpretation of preservation for an issue that is compounded by more than a single inquiry: in raising below the issue of whether the breach of express warranty claim was properly disposed of due to the statute of limitations, the Court determined the issue of the underlying validity of that claim was also presented. "If a court applies a statute of limitations to a cause of action, it is logical that the court issuing the ruling recognized the applicability of the cause of action." 340 S.C. at 25, 531 S.E.2d at 285. Notably, the Court also found persuasive the fact that the briefing below included a discussion of the validity of the claim. Id.

Indeed, our courts look disfavorably upon successive post-trial motions that raise identical issues and arguments already considered by the trial court. "This Court does not require parties to engage in futile actions in order to preserve issues for appellate review." Staubes v. City of Folly Beach, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000) (finding claim not expressly asserted in complaint preserved for review, even though party did not file Rule 59(e) motion for specific ruling on amending complaint to add claim, where order reflected that trial court effectively treated pleadings as amended, and seeking amendment would have been futile); see also 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"); Gassaway v. Patty, 604 S.W.2d 60 (Tenn. Ct. App.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).

The Supreme Court in Elam reaffirmed the rationale and principles expressed by this Court in Coward Hund Const. Co., Inc. v. Ball Corp., 336 S.C. 1, 518 S.E.2d 56 (Ct.App.1999), that a subsequent 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, and thus an appeal from such a subsequent motion may be barred as untimely. 361 S.C. at 16-20, 602 S.E.2d at 776-78. Similarly, the Supreme Court "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." Elam, 361 S.C. at 16, 602 S.E.2d at 776 (discussing Quality Trailer Prods., Inc. v. CSL Equip. Co., Inc., 349 S.C. 216, 562 S.E.2d 615 (2002)).

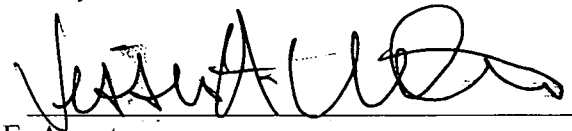
Moreover, in Elam the Supreme Court was presented with a party which believed a Rule 59(e) motion was necessary and appropriate, but the Court noted that such a motion may not be necessary or desirable in every case; rather, "[a]n aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal." Elam, 361 S.C. 9, 602 S.E.2d 772 at fn. 5. "At the very least, the matter must have definitely been called to the attention of the trial court sufficiently to obtain a ruling thereon." Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting 4 C.J.S. Appeal and Error § 213 (1993)).

In this case, a thorough review of the record reveals that KPOG and Inlet Cove repeatedly raised the legal standards for both standing and intervention, specifically including arguments about the intertwining of those two legal standards, and that those arguments were ruled on by way of the master's Order on KRA's 59(e) motion.

CONCLUSION

WHEREFORE, the Respondent/Appellants KPOG and Inlet Cove seek an Order granting Rehearing, and ultimately reversing the master's conclusion with respect to standing; upholding the conclusion granting intervention; and upholding the conclusion denying reformation.

Respectfully submitted,



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Attorneys for the Respondent/Appellants

Georgetown, South Carolina

October 11, 2017

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

RECEIVED
OCT 12 2017
SC Court of Appeals

Appellate Case No. 2015-001146

Kiawah Resort Associates, L.P., a Delaware Limited Partnership, and Kiawah Development Partners II, Inc.,

Appellant/Respondents,

vs.

Kiawah Island Community Association, Inc., a South Carolina Not-for-Profit Corporation,

Respondent,

and

Kiawah Property Owners Group, Inc. and Inlet Cove Club Homeowners Association, Inc.,

Respondent/Appellants.

CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing Petition for Rehearing of Respondent/Appellants on counsel for the parties by placing copies of same in the U.S. Mail addressed to:

Ellis R. Lesemann, Esq.
80 Alexander Street, 2nd Floor
Charleston, SC 29403

Allison C. Jett, Esq.
One Alliance Center, 4th Floor
3500 Lenox Road
Atlanta, GA 30326

Jessie A. White

Georgetown, South Carolina
October 11, 2017

South Carolina Environmental Law Project

Lawyers for the Wild Side of South Carolina

a 501c3
non-profit organization

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October 11, 2017

RECEIVED
OCT 12 2017
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Kiawah Resort Associates, L.P., et al. v. Kiawah Island Community Association, Inc.
Appellate Case No. 2015-001146

Dear Ms. Kitchings:

Enclosed for filing please find the original and seven (7) copies of the Petition for Rehearing of Respondent/Appellants KPOG and Inlet Cove in the above-referenced matter, along with my certificate of service and filing fee.

Please return a clocked-in copy of each in the self-addressed, stamped envelope provided.

Thank you very much for your kind cooperation and assistance.

Yours very truly,

Jessie A. White

cc: Ellis Lesemann, Esq.
Allison C. Jett, Esq.