THE STATE OF SOUTH CAROLINA
In the Supreme Court

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JUN 20 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2016-000460

DomainsNewMedia.com, LLC..Respondent,

v.

Hilton Head Island-Bluffton Chamber of Commerce ....Appellant.

RESPONDENT'S REPLY TO APPELLANT'S RETURN TO PETITION FOR REHEARING

The Respondent, DomainsNewMedia.com, LLC, hereby respectfully submits this reply to the Appellant's return to Respondent's petition for rehearing.

Rather than rehash what is already set out in the petition for rehearing, Respondent replies as follows to contentions made by the Appellant in its return to the petition:

I. The Appellant's interpretation of issue preservation is contrary to this Court's precedent.

The Appellant asserts that "[t]he issue presented to the trial court was whether the Chamber is a public body" and that "[i]n *reversing* the trial court, this Court is free to analyze the issue through a different lens than the appellant or the respondents[.]"

(Return p. 5) (emphasis added).) The Appellant's contentions ignore longstanding principles of this Court's issue preservation jurisprudence.

As pointed out in the Respondent's petition, to preserve an issue for review, an appellant must have made the same, consistent argument on that issue "all the way up" from the trial court, through reconsideration proceedings occasioned by the lack of a ruling on the argument, and on through its appellant's brief. See S.C. Dept. of Social Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001); In re: Bruce O., 311 S.C. 514, 429 S.E.2d 858 (Ct. App. 1993); Vespazziani v. McAlister, 307 S.C. 411, 413, 415 S.E.2d 427, 428 (Ct. App. 1992). Conspicuously, the Appellant does not contend that Respondent was wrong in saying that, throughout the case below and this appeal, the Appellant's sole assertion about why it does not believe itself to be a public body has been that its relationship with the local governments it serves is an arm's-length relationship. The Appellant does not contend that it argued that the General Assembly, in enacting the A-Tax statute, S.C. Code Ann. §§ 6-4-5 to -35 (2004 & Supp. 2017), made an implicit repeal, exception, or qualification of FOIA's definition of public body. The Appellant, rather, basically contends that it does not matter that the opinion issued in this case reversed on a different basis than that argued by the Appellant.

The Appellant, however, is bound to the same issue preservation rules that bind any appellant. These rules require that the Appellant's appeal stand or fall on the argument it made, and nothing else.

There are a number of cases that this Court could not have decided the way it did if the Appellant's idea of issue preservation were accurate. The Appellant would

have this Court accept that, because whether the Appellant was a public body for FOIA purposes is at issue, the Court may decide in the Appellant's favor for a completely different reason than what the Appellant argued, preserved, and briefed in this case.

If that were true, this Court could not have reached the conclusion it reached in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011). In Herron, the ultimate question was whether the trial court erred in denying the appellant's motion to compel arbitration. Id. at 463. Before this Court, after remand from the Supreme Court of the United States, the appellant in Herron made a federal preemption argument, which this Court rejected as unpreserved. Id. at 465 & n. 6, 469. The Court observed as follows:

> At oral argument on rehearing, counsel for Appellant went beyond its brief and claimed it had made the argument to the effect that "federal law controls," and that such argument was sufficient to preserve the preemption argument. We would agree that the argument was preserved if Appellant had ever made that argument in any manner related to the issue of preemption, but it did not. Just as the word "preemption" appears nowhere in the briefs filed with this Court, neither does the argument that the "federal law controls." In short, Appellant presented no argument (prior to its rehearing petition) that could reasonably be construed to embrace the matter of preemption.

Id. at 465 n. 6.

In deciding the case, the Court stated that

> because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. . . . Under even the most liberal approach to issue preservation principles, we could not treat Appellant's preemption argument as preserved in our courts as a matter of state law.

> Because the matter of preemption was not raised to and ruled upon in any of the South Carolina proceedings, we find the issue of preemption is procedurally barred as matter of state law[.]

Id. at 469.

Since appellants can prevail only on their preserved arguments, the Court ruled against the appellant without even analyzing the issue. Id. If this Court endorsed the extremely broad notion of issue preservation advanced by the Appellant, it could never had reached that conclusion in Herron, since the new argument indeed spoke to whether it was proper that the motion to compel arbitration was denied.

Similarly, in Platt v. CSX Transp., Inc., 388 S.C. 441, 697 S.E.2d 575, 578 (2010), the Court declined to address an argument that an appellant had not made below or in her appellant's brief, as it was not properly preserved for appellate review, even though that argument spoke to whether the underlying grant of summary judgment was proper.

In Johnson v. Lloyd, 407 S.C 620, 757 S.E.2d 705 (2014), the State argued different grounds on appeal than what it had asserted in motion to reconsider below. This Court, quite rightly, held that the State had failed to preserve the issue, even though both of the different arguments concerned the question of whether Mr. Johnson should have received the relief granted by the trial court. Id.

This Court's discussion and holding in a post-conviction relief case also shows that, in order to preserve an issue for review, an appellant must have made the same, consistent argument on the issue all the way through the proceedings:

> At trial, trial counsel objected to Detective McPherson's testimony on the ground that he was not competent to give testimony on petitioner's demeanor and on *Miranda* grounds. However, at the PCR hearing, petitioner stated

> he wanted appellate counsel to argue on appeal that the testimony should have been objected to because the testimony was an attempt to show petitioner lacked remorse. Because *the issue would not have been preserved for appeal*, appellate counsel cannot be ineffective for failing to raise the issue.

Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 616 (2002) (emphasis added, footnotes omitted).

These are but a few of the many cases that showcase the longstanding principles of issue preservation which demonstrate how wrong the Appellant's contention in this regard really is.

This Court may *affirm* on a basis not preserved and not argued by the parties to an appeal. Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church, 421 S.C. 211, 258, 806 S.E.2d 82, 107 (2017) (Kittredge, J., concurring in part and dissenting in part, citing Rule 220(c), SCACR).

> In contrast, different preservation rules apply to an *appellant*—the losing party in the lower court. An appellate court may not, of course, *reverse* for any reason appearing in the record. The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.

I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716 (2000) (emphasis in original).

Further, this principle remains the same when issues of statutory construction are involved. City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879, 880 (2007)

(statutory construction argument not preserved for review where not argued in Rule 59(e) motion); Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 96, 530 S.E.2d 890 (2000) (same).

The Appellant contends now that "the Court's analysis and the Chamber's analysis are virtually the same"; however, that contention is not borne out by the record. The Appellant's argument in its brief was that its relationship to the governments with which it deals as a DMO was an arm's-length relationship, and so it did not qualify as a public body for FOIA purposes. The Court did not accept that argument.

Respectfully, this Court cannot both be consistent with its issue preservation jurisprudence and allow the opinion issued in this case to stand.

II. The Appellant makes several misstatements and mischaracterizations.

In its return, the Appellant has misstated and mischaracterized a number of things. The Appellant asserts that "Domains is also incorrect in arguing that the A-Tax statute somehow impliedly repealed FOIA when the Court concluded that the FOIA statute is a general statute, and the subsequently enacted A-Tax statute is a specific statute." (Return p. 2.) Respondent is certainly not arguing that any part of the A-Tax statute in any way repealed any part of FOIA; rather, the reasoning of the opinion in this case was that the A-Tax statute made an implicit partial repeal of or exception to FOIA's definition of "public body" with regard to designated marketing organizations ("DMOs").

The Appellant states that "Domains suggests that 'already stretched-thin' and 'few' government officials must carry the FOIA burden." (Return p. 4.) The Appellant has, again, misstated what Respondent has stated. As shown in the following paragraph

from the petition for rehearing to which the Appellant cites, Respondent has noted that the opinion as it now stands casts upon certain government officials the sole burden of ferreting out corruption, despite that not being those officials' jobs:

> Further, the governments served by Appellant in its role as DMO benefit from their citizens' ability to use FOIA to inquire into their DMO's activities. *Curtailing citizens' rights to do so under FOIA means that those citizens will likely not ferret out whatever corruption, if any, may be lurking behind the veil of a DMO's summary budget and accounting entries. Instead, the entire burden of undertaking to look for such nefarious behavior is borne by already stretched-thin government officials.* DMOs are, by statute, the guardians entrusted to watch over vast sums of public money. S.C. Code Ann. § 6-4-10(3). But *quis custodiet ipsos custodes*? Who watches the watchmen? The opinion issued in this case has taken off the table a kind of *oversight that may be undertaken by any South Carolina citizen and placed it solely on the shoulders of a few government officials whose job is not to investigate potential corruption or theft*. This opinion has policy implications that weigh heavily toward negative outcomes in the long run.

(Petition p. 12 (emphasis added).)

Perhaps most prominent among the Appellant's misstatements is that "Domains acknowledges that citizens can obtain the information they seek through their public officials." (Return p. 4.) The only part of the petition for rehearing to which the Appellant might be alluding is the following passage:

> The citizens of Hilton Head and Bluffton are at the mercy of their public officials when it comes to getting information of any real detail about how the Appellant has spent their money. Citizens can, through FOIA, obtain records that the governments served by a DMO have obtained from that DMO, but the governments are under no obligation to go out and get any specific information or records from a DMO just because a citizen requests it from the government. S.C. Code Ann. § 30-4-30. Those governments are only required under

> FOIA to produce the documents that they have already received from a DMO. Id. As the record shows in this case, the level of detail typically provided in those documents is quite low.

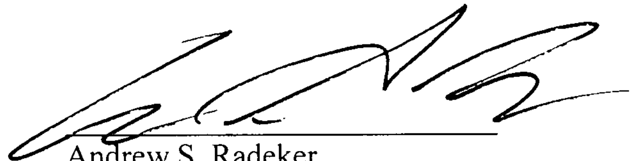
(Petition p. 11.)

That is just about the opposite of what the Appellant has said that Respondent has said.

It is telling that the Appellant feels the need to mischaracterize Respondent's argument to oppose the petition for rehearing.

WHEREFORE Respondent prays that the Court grant its petition for rehearing in this case.

Respectfully submitted,



Andrew S. Radeker
S.C. Bar No. 73743
Taylor M. Smith IV
S.C. Bar No. 101584
Harrison, Radeker, & Smith, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
Attorneys for Respondent

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PROOF OF SERVICE

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

Robert E. Stepp, Esq.
Tina M. Cundari, Esq.
Bess J. DuRant, Esq.
Sowell Gray Robinson Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

William W. Wilkins, Esq.
Kirsten E. Small, Esq.
Nexsen Pruet, LLC
P.O. Drawer 10648
Greenville, SC 29603

Jay Bender, Esq.
Baker, Ravenel & Bender, L.L.P.
P.O. Box 8057
Columbia, SC 29202

June 20, 2018

Andrew S. Radeker