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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

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SC Court of Appeals

CASE NO.: 2015-002024

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.

PETITION FOR REHEARING

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RESPONDENTS, Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products, LP, Henry Wuertz, and Edward H. Girardeau, hereby respectfully Petition this Honorable Court of Appeals for a rehearing on its Order of May 23, 2018, which Reversed the ruling of the Dorchester County Court of Common Pleas. As grounds for this petition, Respondents hereby aver before this Honorable Court as follows.

I. This Court Lacks Jurisdiction Over the Appeal

As Respondents argued in their December 21, 2015 Motion to Dismiss, the Appeal should have been dismissed for lack of jurisdiction because Appellant Innovative Waster Management (hereafter "IWM") failed to file a timely Notice of Appeal.

As argued more thoroughly in that Motion, IWM filed a Notice of Appeal on September 16, 2015, which in all aspects sought relief from the April 20, 2015 Form 4 Order dismissing the case or, at best, the lower Court's July 22, 2015 Form 4 Order denying IWM's Rule 60(b) motion. IWM contends, and this Court previously held, that the subsequent Rule 59 Motion filed by IWM operated to toll the period for filing a Notice of Appeal. That ruling was error because IWM's July 31, 2015 "Motion to Reconsider", however designated, was nothing more than a successive post-trial motion. Therefore, IWM was barred from review in this Court by its failure to file a Notice of Appeal on or before August 22, 2015.

Rule 203(b)(1), SCACR requires an aggrieved party to serve a Notice of Appeal "within thirty (30) days after receipt of written notice of entry of the order or judgment." This requirement of service of the notice of appeal is jurisdictional. If a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority

or discretion to "rescue" the delinquent party by extending or ignoring the deadline for service of the notice. Elam v. S.C. DOT, 602 S.E.2d 772, 775 (S.C. 2004).

While a timely motion to alter or amend the judgment under Rule 52 or 59, SCRCP, would have stayed the thirty-day period for filing the appeal under Rule 203, IWM's first Motion to Vacate was filed thirty-seven days after the issuance of the Order dismissing the case. Therefore, that Motion was not a "timely motion to alter or amend the judgment", as any such motion would have had to have been filed within ten days of receiving written notice of the entry of judgment. See Rule 59, SCRCP. Unlike a Rule 50, 52, or 59, SCRCP, motion, a Rule 60(b) motion does not have any tolling effect on the right to appeal from the challenged judgment. Coward Hund Const. Co. v. Ball Corp., 518 S.E.2d 56,59 (S.C. App. 1999).

Assuming that an appeal from the denial of the Rule 60(b) motion would have been timely if filed within thirty days of that Order, IWM's "Motion to Reconsider" seeking relief under Rule 59, SCRCP cannot be construed to toll the period for filing the Notice of Appeal under Rule 203, SCACR. However captioned, that Motion was nothing more than a successive post-trial motion which South Carolina courts have continually stated do not toll the jurisdictional period for filing a Notice of Appeal. See Elam, 602 S.E.2d at 777-78; Quality Trailer Products v. CSL Equipment Co., 562 S.E.2d 615 (S.C. 2002); Collins Music Co. v. IGT, 579 S.E.2d 524 (S.C. App. 2002); Coward Hund, 518 S.E.2d at 59.

Regardless of the form in which the request for relief is framed, it is the substance of the requested relief that matters. Richland County v. Kaiser, 567 S.E.2d 260, 262 (S.C. 2002). Although a timely Rule 59(e) motion normally will toll the time within which an

appellant must serve his notice of appeal, a successive Rule 59(e) motion will not do so. Quality Trailer, 562 S.E.2d at 617. Therefore, when the first post-trial motion "does not result in a substantial alteration of the original judgment, an appeal will be barred due to untimely service when, instead of appealing the first post-trial motion, the party files a successive Rule 59(e) motion. Elam, 602 S.E. 2d at 778.

IWM's July 31, 2015 Motion to Reconsider was successive, as Judge Murphy's July 22, 2015 ruling did not alter the original judgment in any way, and the motion itself did not state any new grounds for relief that had not already been argued. In fact, Judge Murphy's August 19, 2015 order explicitly found that "all arguments properly raised to the Court have already been ruled upon". As IWM never challenged this finding in any way, this Court should have found the Motion to Reconsider to be a successive post trial motion and should not have subjected the Case to further review.

This issue should have been foreclosed by the Elam Court's opinion, which stated

> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review. But in filing the motion, he 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.

602 S.E.2d at 780. Following that ruling, this Court should have held that Judge Murphy's order, "right or wrong," became the law of the case, precluding any further review on the issues decided therein. See Ulmer v. Ulmer, 632 S.E.2d 858, 861 (S.C. 2006) (holding portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case).

II. The Court's Ruling was Based on Grounds that Were Never Argued by the Appellant.

This Court's May 23, 2018 Opinion reversing the lower court's ruling held that the April 20, 2015 Form 4 Order was void, and therefore was subject to relief in the lower court pursuant to Rule 60(b0(4), SCRCP. Even if the substance of this ruling was correct, this argument was never made by any party or argued to any court, and certainly was not the subject of any ruling below. Therefore, the Court's *sua sponte* ruling on those grounds is improper and must be vacated.

It is axiomatic that, in South Carolina courts, an issue must be raised to and ruled upon in the trial court before it can be heard on appeal. E.g., Wilder Corp. v. Wilke, 497 S.E.2d 71 (1998). The grounds must be specific, clearly stated, and argued in a manner that allows the issue to be reasonably understood by the trial judge. Id.

Any review of the record must compel the conclusion that IWM has never argued that any of the lower court's rulings were void or even voidable as this Court has held in its opinion. IWM never agued *any* specific standard under Rule 60 or 59 below that was properly preserved for review in this Court, and the word "void" appeared inconsequentially, if at all, in the record prior to this Court's opinion. Therefore, Rule 60(b)(4) was an improper grounds for the Court to grant relief to IWM.

III. The Court's Ruling was Legally Incorrect

This Court's opinion reversing the judgment below is based on several incorrect legal precepts. First, the Court's opinion either misstated or misapplied the standard under Rule 60(b)(4) by which a judgment can be held to be void. In Belle Hall Planation

Homeowner's Ass'n Inc. v. Murray, 709 S.E.2d 310 (S.C. App. 2017), cited in the May 23, 2018 opinion, this Court addressed the issue in greater detail, stating as follows:

> "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." Universal Benefits v. McKinney, 561 S.E.2d 659, 661 (S.C. App. 2002) (quoting Thomas & Howard Co. v. T.W. Graham & Co., 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995)). "The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Id. (quoting McDaniel v. U.S. Fid. & Guar. Co., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)). "Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property." Id.

In the instant case, there was no evidence or argument in the record that the April 20, 2015 order was issued without notice, or without jurisdiction, or that IWM was not granted due process in its opportunity to argue that the order should be vacated. Accordingly, there is no standard recognized by this Court under which the order could be found "void", as it was in this case.

Second, the Court's ruling presumes and implies that the Clerk of Court is without authority to issue a Form 4 Order of Dismissal by consent of the parties, as opposed to at the Plaintiff's insistence. This Court's ruling appears to be a novel reversal of a routine practice in South Carolina's trial courts.

Rule 77, SCRCP, explicitly states that "[a]ll motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk". The voluntary dismissal of a case by consent of the parties, on a form that explicitly provides for the

subsequent filing of a Rule 41(a)(1) voluntary dismissal, falls directly within the Clerk's powers as designated by Rule 77. That rule also includes its own provision for relief from error, allowing any clerks' "action may be suspended or altered or rescinded by the court upon motion for cause shown." Rule 77(c), SCRCP.

Third, the Court's opinion states that "[g]iven the stage of IWM's case, it could have been voluntarily dismissed only by a stipulation of dismissal signed by all parties. Rule 41(a)(1), SCRCP." This statement is legally incorrect, as it ignores the fact that Rule 41(a) is only applicable to voluntary dismissal at the request of the Plaintiff, not by consent of the parties, and ignores the power of the Court to enter an Order of Dismissal pursuant to Rule 41(a)(2), SCRCP.

The confluence of these three issues expose the primary errors made by IWM's counsel following the entry of the April 20, 2015 Order. Rather than filing a Rule 77(c) motion to rescind the Clerk of Court's dismissal, IWM filed its "Motion to Vacate Settlement Agreement, Restore to Active Docket, and Set for Trial". The lower court's summary denial of that motion does not explicitly state grounds for its ruling. Neither does the lower court's subsequent denial of IWM's Rule 59 Motion, although that Order did explicitly point out that all of the argument in that Motion had already been made to and ruled upon by the court. The fact the remains that IWM has never actually requested the relief that it may have been most entitled to, the rescinding of the April 20, 2015 Form 4 Order pursuant to a minimal "cause shown" burden under Rule 77(c).

This Court should vacate its prior Opinion and rehear this case because these incorrect (or incomplete) statements of law unnecessarily complicate the issues in the case and confuse the procedures of the Clerks of Court. If IWM's counsel had properly

filed a Rule 77(c) motion, and assuming that motion had been granted, the issue before the trial court would have been to determine what relief was available given that the settlement remained unfunded. Rather, IWM sought, under Rule 60, to have the case immediately restored to the active docket and set for trial, and that relief was denied in addition to the lower court's refusal to vacate the judgment, which was the only issue articulated to or addressed by this Court. Respondents' only substantive argument below was simply that the settlement agreement was binding and enforceable under Rule 43(k), SCRCP and Ashfort Corp. v. Palmetto Const. Grp., Inc., 458 S.E.2d 533, 535 (1995). Accordingly, Respondents contended that the only relief available to IWM was to move to enforce the judgment.

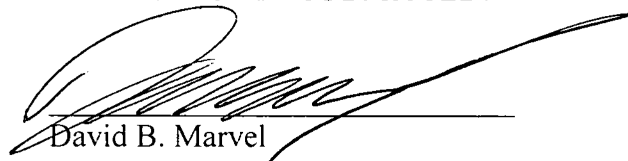
Therefore, denial of IWM's requests to vacate the settlement agreement, and to set the case for trial, have been denied, and were not articulately challenged on appeal. Those portions of the lower court's rulings are the law of the case, and remanding the case to the trial court in its current posture would seem to have little effect. See Anderson v. Short, 476 S.E. 2d 475 (S.C. 1996). Under the two-issue rule, this alone is grounds to vacate this Court's opinion and affirm the ultimate decision of the trial court. See Todd v. South Carolina Farm Bureau Mut., Ins. Co., 336 S.E. 2d 472 (S.C. 1985).

IV. CONCLUSION

The lower court's July 22 and August 19, 2015 rulings were within its discretion, given that IWM failed to follow the correct procedure for vacating the Clerk's order, never articulated a proper standard under which it could be granted relief, and then filed an improper successive post-judgment motion. This Honorable Court's rulings were in

error because the Court lacked jurisdiction over the appeal, reversed the lower court's ruling on grounds that were never argued before it or below, and failed to properly interpret the Rules of Civil Procedure in a manner that allow for the orderly disposition of the duties of the Clerk of Court. In the process, IWM failed to appeal two aspects of the lower court's ruling that bar it from any relief other than to move to enforce the settlement and, if proper, obtain an enforceable judgment upon that motion. [1] Accordingly, Respondents Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products, LP, Henry Wuertz, and Edward H. Girardeau respectfully request that this Honorable Court GRANT this Petition for Rehearing, Vacate its Opinion of May 23, 2018, and Affirm the judgment of the trial court, remanding this matter for further proceedings not inconsistent therewith.

RESPECTFULLY SUBMITTED:



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ATTORNEY FOR THE RESPONDENTS

July 9, 2018
Charleston, South Carolina

[1] Respondents note for the record that IWM is, in fact, seeking such relief in a separate action in the Charleston County Court of Common Pleas captioned Innovative Resources Management v. Crest Energy Partners, et al., Case No 2018CP10001730.

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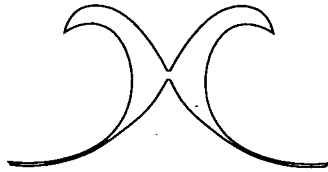
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this Ninth day of July, 2018, I served appellants' counsel with Respondent's Petition for Rehearing by mailing a copy to their counsel by U.S. Mail, postage prepaid, at the following address:

Wm. Michael Gruenloh
Gruenloh Law Firm, LLC
3 Broad St., Suite 400
Charleston, South Carolina 29401

David B. Marvel



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July 9, 2018

By Hand
Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Innovative Waste Management v. Crest Energy Partners GP, LLC
Case No. 2015-002024

Dear Ms. Kitchings,

I hope this letter finds you well. I have enclosed an original and six copies of a Petition for Rehearing in the referenced case. Please file these in your usual prompt and efficient manner.

If you have any other questions or concerns, please do not hesitate to call. With best regards, I remain

Sincerely,

David B. Marvel

/DBM
Enclosure
Cc: Wm. Michael Gruenloh