THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maité D. Murphy, Circuit Court Judge

Case No. 2018-001528

Innovative Waste Management Inc., Respondent,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals Properly Followed this Court's Holding in *Elam v. S.C. Dept. of Transportation* and Correctly Found that Respondent's Rule 59(e) Motion Was Not a Successive Motion and that it Tolled the Time for Respondent to Serve its Notice of Appeal Pursuant to Rule 203, SCACR.

II. Respondent's Argument that the Clerk's Dismissal Did not Comply with SCRCP 41(b) and Should Be Set Aside as Void was Properly Preserved Before the Lower Court.

III. The Court of Appeals Applied the Correct Standard in Reversing the Trial Court's Denial of Respondents Rule 60(b) Motion and Finding that the Clerk of Court's Dismissal was Void and, as Such, the Lower Court had no Discretion to Perpetuate the Void Judgment.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Petitioners, Crest Energy Partners GP, LLC, Crest Energy Partners LP, Dunhill Products LP, Henry Wuertz, and Edward H. Girardeau (hereafter "Petitioners") have filed a Petition for Writ of Certiorari seeking review of the decision of the South Carolina Court of Appeals vacating the trial court's order denying Respondent Innovative Waste Management Inc. (hereinafter "Respondent") relief from a void judgment and remanding the case back to the lower court for trial. The Petition should be denied for the reasons set out below.

COUNTER STATEMENT OF THE CASE

Respondents filed the underlying lawsuit in Dorchester County Court of Common Pleas on May 11, 2012. (App. p. 56). Respondents alleged that the Petitioners had breached a contract by failing to pay for petroleum products received and that Petitioners conspired with Respondent's former employees to abscond with Respondent's trade secrets and business. (App. p. 56). The case was assigned to The Honorable Maité D. Murphy who ordered that the parties mediate the case prior to trial. At the court-ordered mediation, the parties entered into a written settlement agreement whereby Respondents agreed to dismiss their lawsuit in exchange for, and only upon, the payment of Four Hundred and Fifty Thousand Dollars ($450,000) within thirty (30) days by Petitioners. (App. p. 56). The settlement agreement further stated the parties "hereby authorize and direct their attorneys to execute and file a stipulation of dismissal with prejudice" once payment was received. (App. p. 38-39). In the only communication with the trial court prior to dismissal of the action, Petitioner's counsel emailed the court advising that the parties had reached a settlement and stating "I am working on releases now, and we will file a stipulation of dismissal once the settlement is consummated." (App. p. 43-44). Less than a week later, the clerk of court generated and filed a Form 4 dismissal order, which reflected: "It is

Ordered and Adjudged: ☒See attached order, (formal order to follow)", and "This order ☒ends . . . the case." (App. p. 57). The Form 4, entitled "Judgment in a Civil Case," was signed by the clerk of court, not a circuit judge. No order was attached, but the Form 4 was accompanied by the mediator's "Proof of ADR" form, which indicated: "As a result of the ADR, this case should be considered . . . ☒Fully Settled . . . ☒Voluntary Dismissal to be filed by [counsel Respondents]." (App. p. 56).

Petitioners breached the settlement agreement, and, Respondent contacted the trial court and requested the first available date certain trial date. (App. p. 57). No notice was provided prior to the case being dismissed and it was on that date that Respondent was notified for the first time of the clerk of court's dismissal of the case. (App. p. 57). On May 27, 2015, Respondent filed a Rule 60(b) seeking to have the judgment set aside and have the case set for trial. (App. p. 58). The trial court heard the parties on June 24, 2015 and Respondent argued that the clerk of court's dismissal was entered in error by the clerk of court and should be set aside. (App. p. 58)

The lower court denied Respondent's 60(b) Motion on July 22, 2015 without providing any rationale to support the denial. (App. p. 58). On July 31, 2015, Respondent filed a Motion to Reconsider pursuant to Rule 59(e). (App. p. 58). In its Rule 59(e) Motion, Respondent argued that the clerk of court's April 20th Form 4 dismissal was void as it was not entered in accordance with SCRCP Rule 41. (App. p. 123). Appellant's Rule 59(e) Motion also contained two new pieces of evidence for the trial court to consider – the affidavits of the mediator Angus Lawton and C. Russ Lloyd, the owner and president of Innovative Waste Resources. (App. p. 218-220; 227-229). On August 18, 2015, the Trial Court denied Appellant's Rule 59(e) motion without hearing oral arguments and entered another Form 4 Judgment. (App. p. 58).

On September 17, 2015, Respondent filed its Notice of Appeal. (App. p. 59). On December 21, 2015, Petitioner filed a Motion to Dismiss arguing the same issue as Petitioner now presents as its first issue on appeal – that Respondent's Rule 59(e) motion was a successive motion which did not toll the time for Respondent to file its appeal and therefore Respondent's appeal was not timely. On March 4, 2016 The Court of Appeals denied Petitioner's Motion to Dismiss finding that Respondent filed a timely Rule 59(e), SCRCP, motion, which tolled the time for Appellant to serve its notice of appeal pursuant to Rule 203, SCACR. (App. p. 234).

On May 23rd, 2018, the Court of Appeals reversed the decision of the lower court and remanded the case back to the trial court. The Court of Appeals found that the entry of dismissal by the clerk of court constituted a void judgment and that the trial judge had no discretion to perpetuate a void judgment. (App. p. 239). Petitioners sought rehearing in the Court of Appeals arguing the same issues now presented to this Court in its Petition for Certiorari. The Petition for Rehearing was denied by the Court of Appeals on July 18, 2018 and Petitioner filed its Petition for Writ of Certiorari on August 21, 2018.

LAW AND ARGUMENTS

I. The Court of Appeals Properly Followed this Court's Holding in *Elam v. S.C. Dept. of Transportation* and Correctly Found that Respondent's Rule 59(e) Motion Was Not a Successive Motion and that it Tolled the Time for Respondent to Serve its Notice of Appeal Pursuant to Rule 203, SCACR.

Petitioner argues that Respondent's Rule 59(e) motion was a successive motion that did not toll the time for Respondent to file its appeal and, therefore, Respondent's notice of appeal was not timely. (App. p. 241-242). There is no dispute that Respondent filed its Notice of Appeal within thirty (30) days of the date of the lower court's ruling on its Rule 59(e) motion. The only

issue raised by Petitioner is whether the Respondent's Rule 59(e) motion was a successive motion. This procedural issue was the subject of Petitioner's Motion to Dismiss, which was denied by the Court of Appeals on March 4, 2016, and which Petitioner again argued in its final Appellate Brief and Petition for Rehearing. (App. p. 104-110; 234-235 and 241-243)

Respondent filed its Rule 60(b) motion on May 27, 2015 when it discovered the Dorchester Clerk of Court had improperly dismissed the case. The Respondent's motion was denied on the July 22, 2015. Notably, the July 22nd ruling was the first instance in which a circuit court judge made a ruling regarding the dismissal of this case. (App. p. 168). Respondent timely filed its only Rule 59(e) motion on July 31, 2015, and the lower court denied the motion on August 18, 2015. Respondent then timely filed its Notice of Appeal on September 17, 2015. (App. p. 169).

In support of its argument that Respondent's Rule 59(e) motion was a successive post-trial motion, Petitioner cites the same authority as it cited in its Appellate Brief – *Coward Hund Construction Co., Inc. v. Ball Corp*, 518 S.E.2d 56 (Ct. App. 1999); *Quality Trailer Products v. CSL Equipment Co.*, 562 S.E.2d 615 (S.C. 2002); *Elam v. S.C. Dept. of Transportation*, 602 S.E.2d 772 (S.C. 2004). (App. p. 242). Petitioner provides no new authority in its Petition for Certiorari.

In *Coward Hund,* the court granted defendant's motion for summary judgment and plaintiffs then filed two successive Rule 59(e) motions on the same subject. 518 S.E.2d at 57. Both of the plaintiff's motions to reconsider were denied and the plaintiff filed a notice of appeal. *Id.* The South Carolina Court of Appeals stated that the plaintiff " . . . [was] not challenging a new ruling in its second motion," and found that plaintiff's second Rule 59(e) motion was merely successive. 518 S.E.2d at 58-59. Similarly, in *Quality Trailer*, the Court

expounded upon Coward Hund and a jury returned a verdict in favor of the plaintiff at trial and the defendant filed two post trial motions, including motions for judgment notwithstanding the verdict, new trial absolute, and new trial nisi remittitur. *Quality Trailer*, 562 S.E.2d 615 (2002). The trial court ruled against the defendants, who in turn filed a Motion to Reconsider pursuant to Rule 59(e), SCRCP. 602 S.E.2d at 774-76 (S.C. 2004). Court held that a " . . . first, written, virtually identical Rule 59(e) motion . . . " is merely successive and that appeal may be barred if the Rule 59(e) motion does not ". . . result in a substantial alteration of the original judgment . . ." or the moving party merely " . . . recaptions a written JNOV/new trial motion, which has been ruled upon . . . ." *Id.*

In *Elam v. S.C. Dept. of Transportation*, this Court held that *Quality Trailer* represented an unwarranted expansion of the successive post trial motion rule. 602 S.E.2d 772 (2004). In *Elam*, the jury entered a verdict in favor of the plaintiff and the defendant immediately made oral motions for JNOV, new trial absolute, and new trial nisi remittitur. 602 S.E.2d at 774. The trial judge denied all of the defendant's motions and the defendant then filed a Rule 59(e) motion to reconsider the trial judge's ruling. *Id.* The Rule 59(e) motion was denied and defendant filed a notice of appeal. *Id.* The Court of Appeals following *Quality Trailer*, found that defendant's Rule 59(e) motion was a successive motion and dismissed the appeal as untimely. *Id.* This Court reversed the Court of Appeals ruling, holding that the appellant's Rule 59(e) motion was not merely successive and therefore the appellant's notice of appeal was filed in a timely manner. See *Elam*, 602 S.E.2d 772. This Court stated that " . . . civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party, but a careful consideration of this issue has led us to conclude that is precisely the effect of an unwarranted expansion of *Quality Trailer*." *Elam*, 602 S.E.2d at 780.

The facts of the instant case are distinguishable from *Coward Hund* and *Quality Trailer*, and are far more similar to the circumstances presented in *Elam*. In the instant case, no trial, hearing, or any argument of the substantive issues was ever held prior to the clerk of court's errant April 20, 2015 dismissal of this matter. (App. p. 176). Similar to *Elam*, Respondents filed a single Rule 59(e) motion. Contrary to the situation presented in *Coward Hund*, this motion was filed to challenge a new ruling, as the July 22nd Judgment was the first ruling on the substantive matters regarding the improper dismissal of this case. Furthermore, Appellant's Rule 59(e) motion was not merely a recapitulation of its Rule 60(b) motion but in fact provided new, substantive arguments regarding the invalidity of the April 20th Judgment and new evidence in the form of the affidavits. (App. p. 218-220; 227-229).

In denying Petitioners' Motion to Dismiss on this subject, the Court of Appeals relied heavily upon this Court's holding in *Elam*, 602 S.E.2d 772, 778 (concluding a party usually is free to file an initial Rule 59(e) motion "without unnecessary concern the repetition of an issue or argument made in a previous motion will result in a subsequent appeal being dismissed as untimely"); (App. p. 235, citing Elam at 778) (finding the use of oral or written judgment notwithstanding the verdict/new trial motions, followed by an initial Rule 59(e) motion, are "part and parcel of a party's 'single bite at the apple' in presenting [a] case to the trial court"); (App. p. 235, citing *Elam* at 778) ("There is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.") *Id.*

The Court of Appeals correctly applied this Court's reasoning and finding in Elam and found Respondent's Rule 59(e) motion was not a successive post trial motion. There is

nothing ambiguous or novel about this issue requiring the Supreme Court's consideration. The Court of Appeals' decision and this Court's holding in *Elam* should be left undisturbed.

II. Respondent's Argument that the Clerk's Dismissal Did not Comply with SCRCP 41(b) and Should Be Set Aside Pursuant to SCRCP 60(b) was Properly Preserved Before the Lower Court.

Petitioner's next argument is that the Court of Appeals erred in finding that the clerk of court's dismissal of the underlying action did not comply with SCRCP 41 and was void because Respondent's "arguments were not preserved for appellate review." (App. p. 248). Petitioner raised this issue before the Court of Appeals and Respondent addressed it in its Reply. (App. p. 176-177). Contrary to Petitioner's assertion, Respondent preserved these issues before the lower court in its Rule 60(b) motion, oral arguments and in its Rule 59(e) motion.

Generally, an issue must be raised to and ruled upon by the circuit court to be preserved. *Elam at* 780. Such "[i]ssues and arguments are preserved for appellate review . . . when they are raised to and ruled on by the lower court." 602 S.E.2d at 772, 779-80. This Court has noted 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). In her concurring opinion in *Atlantic Coast Builders*, Chief Justice Toal stated: "In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary . . . 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).

Here it is clear that the issues argued and therefore preserved at the lower court. The Respondent argued that the clerk's Form 4 dismissal was entered in error, did not comply with

SCRCP 41 and should be vacated. First, Respondent filed a Rule 60(b) Motion seeking relief from the void judgment. (App. p. 97). Second, at the June 24, 2015 oral argument of Respondent's 60(b) motion, Respondent argued that the clerk of court's dismissal was entered in error and should be set aside:

> "[t]he case was apparently dismissed, despite the fact we didn't send in a stipulation of dismissal. ... The only communication either of us had with the Court was an email from Mr. Marvel shortly after the mediation saying, we will send in a stipulation of dismissal once the settlement has been consummated. Settlement has never been consummated, so we, again, we are here today asking the Court to put this back on the roster. To the extent that a dismissal was entered in error or otherwise, we'd ask that be vacated, and we're here asking for a trial date."

(App. p. 98). (emphasis added)

While oral arguments on Respondents Rule 60(b) motion are admittedly brief, Respondent's counsel argued that 1) the clerk of court's dismissal was improper, 2) in error and 3) should be set aside.

Third, in its July 31, 2015 Rule 59(e) motion, Respondent argued that the April 20th Form 4 dismissal did not comply with SCRCP 41 and should be vacated because the judgment was unilaterally entered by the clerk of court without motion, stipulation or notice to the parties nor any apparent action by the trial judge. (App. p. 176-177).

As each of these arguments were raised, they were all properly preserved for purposes of appeal. Petitioner's statement that "IWM's counsel did not articulate a single mistake or impropriety that induced the April 20, 2015 order" is incorrect and the issue was properly preserved for appeal. There is nothing ambiguous or novel about this issue requiring the Supreme Court's attention and the Court of Appeals finding should be left undisturbed.

III. The Court of Appeals Applied the Correct Standard in Reversing the Trial Court's Denial of Respondents Rule 60(b) Motion and Finding that the Clerk of Court's Dismissal was Void and, as Such, the Lower Court had no Discretion to Perpetuate the Void Judgment.

Petitioner's third question presented is that the Court of Appeals misstated or misapplied the standard under Rule 60(b)(4) by which a judgment can be held void and that Respondent failed to meet its burden establishing an abuse of discretion by the lower court. Petitioner's third question presented is essentially an amalgamation of arguments made in Petitioners prior briefing. Petitioners' arguments are dealt with in turn below. As an initial matter, the Court of Appeals correctly determined that the lower court had no discretion or authority to perpetuate a void judgment and therefore Respondent was not required to show an abuse of discretion. (App. p. 238-239).

First, Petitioner argues that the Court of Appeals misunderstood or misstated the legal definition of void thereby creating a confusing precedent. (App. p. 244-245). However, the Court of Appeals thoroughly analyzed the legal definition of a void judgment. (App. p. 237-238). A void judgment is one that, from its inception, is a complete nullity and is without legal effect. (App. p. 237); See also *Bell Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017) (quoting *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002)).

The Court of Appeals also specifically discussed and analyzed instances in which a clerk of court or some other individual without authority purported to dismiss a case. (App. p. 238). See also *Rose v. Himley*, 8 U.S. 241, 268-69. (Holding that a judicial proceeding without lawful judicial authority present could not yield a valid judgment) and *Turner v. Malone*, 24 S.C. 398, (1886) (Holding that since the record did not disclose action of the court authorizing the Form 4 dismissal, much less after notice and hearing, as due process required, the dismissal was void and

all acts performed under it are void) *Id.* at 401. And *Downing v. O'Brien*, n325 A.2d 526, 528 (Me.1974) (Holding that since the clerk is only performing a ministerial function and is not empowered to perform a judicial function, whenever a clerk purports to enter a judgment in a case where he has no authority to do so, the judgment is void.)

Contrary to Petitioner's assertion, the Court provided a thorough and legally correct analysis citing longstanding precedent and dispelling any existing confusion as to whether a clerk of court may unilaterally, without notice, consent or authority dismiss a case. They may not and any subsequent acts performed under or pursuant to the void judgment have no legal effect. (App. p. 237-238).

Next Petitioner argues that the facts in the instant case do not support a finding that the clerk's dismissal was void because there was no evidence in the record that the "April 20, 2015 Order was issued without notice, or without jurisdiction, or that IWM was not granted due process . . ." (App. p. 245). However, as noted above, Respondent specifically asked the lower court to vacate the April 20th Form 4 dismissal pursuant to Rule 60(b) because the judgment was unilaterally entered by the clerk of court without motion, stipulation or notice to the parties nor any apparent action by the trial judge. (App. p. 57; 176-177). The Court of Appeals recognized this fact and noted that "...given the stage of IWM's case, it could have been voluntary dismissed only by stipulation of dismissal. (App. p. 238).

Next, Petitioner argues that the Court of Appeals opinion presumes that a clerk of court is without authority to issue a Form 4 Order of dismissal by consent of all parties and that Rule 77 authorizes a clerk to do just that. (App. p. 245-246). Petitioner argues that clerks of court routinely dismiss cases without stipulation or being directed to do so a by a judge. (App. p. 245). This is factually and legally incorrect. To the extent that other legal practitioners are under the

misapprehension that clerks of court have judicial authority, the Court of Appeals opinion in this case correctly settles the issue. As the Court of Appeals correctly noted, a clerk of court may only sign and enter judgment without court discretion and approval when the judgment merely confirms a jury's general verdict, or upon court's decision. (App. p. 238). The Court of Appeals noted that clerks of court have ministerial duties and are not granted judicial duties. (App. p. 239). In the instant case there is no evidence of any action on the part of the court authorizing the Form 4 dismissal, much less after notice and hearing, as due process required. It is therefore void. (App. p. 238).

Next, Petitioner argues that Rule 77(c) is the relief to which Respondent was most entitled as a result of the clerk's void dismissal of the case. However, Petitioner's argument ignores the fact that Rule 60(b) provides a procedure for vacating void judgments and Petitioner provides no authority that Rule 77(c) is the exclusive remedy for addressing such errors by the clerk. The Court of Appeals correctly found that Respondents 60(b) arguments were properly raised and preserved before the lower court and were the proper procedure for vacating the clerk's void dismissal.

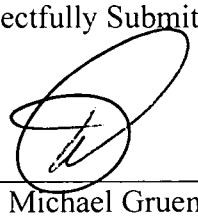
Finally, Petitioner argues that remanding in the current posture has "little effect" as the lower court's rulings on Respondents Rule 60(b) and 59(e) motions are "the law of the case." Pet. For Cert. at 17. This is incorrect. The Court of Appeals Opinion clearly indicates the clerk's Form 4 dismissal was void and that all other actions taken under or after the void judgment are, likewise, without legal effect. (App. p. 238) (emphasis added). Petitioners passing reference to the two issue rule is not applicable given that the lower court had no discretion or authority to perpetuate a void judgment and any actions taken under the void judgment are also void. The Court of Appeals correctly ruled that the Form 4 was vacated, and the order of the trial court

denying IWM relief from the void judgment is reversed and remanded. (App. p. 239). There is nothing unclear about the Court of Appeals' Opinion or Its instructions to the lower court and the Court of Appeals decision should be left undisturbed.

CONCLUSION

Respondent's Rule 59(e) motion was an appropriate and timely attempt under this Court's ruling in *Elam* to persuade the trial court to reconsider the issues raised in its earlier Rule 60(b) motion and was not a successive Motion. Likewise, the lower court's record contains numerous instances where Respondent argued, pursuant to SCRCP 60(b), that the clerk of court's dismissal of this action did not comply with the requirements of SCRCP 41 and should be vacated. Finally, given that the dismissal in this matter was unilaterally entered by the clerk of court without motion, stipulation, prior notice to the parties or any action of the lower court, the Court of Appeals correctly determined that he dismissal was definitionally void pursuant to Rule 60(b). There is nothing ambiguous or novel about this issue requiring the Supreme Court's time and the Court of Appeals finding should be left undisturbed.

Respectfully Submitted:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 20, 2018 he served Petitioners' counsel with **RETURN TO PETITION FOR WRIT OF CERTIORARI**, by U.S. Mail, postage pre-paid, as follows:

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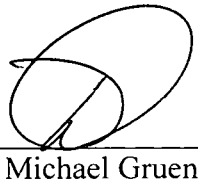

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