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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

Perry M. Buckner, III, Circuit Court Judge

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Case No. 2014-CP-15-135

Appellate Case No. 2019-001756

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Ashley Reeves as Personal Representative for the Estate of Albert Carl "Bert" Reeves,..... Petitioner,

v.

South Carolina Municipal Insurance and Risk Financing Fund, ..... Respondent.

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**Respondent's Motion to Strike Portions of Petitioner's Brief and to Stay Deadline for Respondent's Brief**

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Pursuant to Rules 208, 221, 240, and 242, of the South Carolina Appellate Court Rules ("SCACR"), Respondent South Carolina Municipal Insurance and Risk Financing Fund, moves this Court to strike the portions of Section II of Petitioner's Brief set forth below. The basis for this motion is that Section II of Petitioner's Brief includes an issue and argument that was not raised by Petitioner to the trial court, not raised in Petitioner's merits briefing to the Court of Appeals, not raised in her Petition for Rehearing, and not raised in her petition for a writ of

certiorari to this Court.[1] As such, the argument is not properly before this Court and should be stricken from Petitioner's Brief. Alternatively, Respondent moves this Court to withdraw its grant of a writ of certiorari as to Issue 2 in the Petition for Writ of Certiorari as being improvidently granted, which would have the same effect.

Respondent also moves this Court for a stay of the deadline for Respondent's Brief (currently due in eight (8) days on July 15, 2020) until this Court has ruled upon this motion, and requests that Respondent be granted eight (8) days from the date of such ruling to file its Respondent's Brief.

In Argument II of her Brief to this Court, Petitioner focuses almost exclusively upon an argument that Tort Claims Act immunity does not extend to Respondent because it allegedly is "controlled" by a "private entity"–the Municipal Association of South Carolina ("Municipal Association"). Petitioner's Brief at pp. 34-41. This issue and argument are the crux of Sections II.A., II.B., and II.C of Petitioner's Brief. However, this issue and argument were never raised by Petitioner to the trial court, the Court of Appeals, or in the petition for a writ of certiorari to this Court, and thus are improperly included in Petitioner's Brief.

The second question identified in the petition for a writ of certiorari was:

> Whether the South Carolina Municipal Insurance and Risk Financing Fund is a political subdivision of South Carolina subject to the Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.* for a tort claim for bad faith.

(Reeves' Petition for Writ of Certiorari at p. 1). This second question stems from one of two issues specifically stipulated to by the parties as the questions to be litigated in conjunction with a

[1] Respondent notes that there are certain points asserted in Petitioner's Argument I that were also not properly preserved. Without waiving those preservation issues, Respondent intends to address those in its Respondent's Brief. However, the new issue and argument asserted in Petitioner's Argument II is so pervasive that it should be stricken by Order of this Court.

resolution of remaining issues and liability. *See* Stipulated Issue No. 2 at App. 90. The two stipulated issues were resolved by the trial court on cross-summary judgment motions. {App. 5}. In her motion for summary judgment, as to this issue Petitioner argued that Respondent is not a political subdivision based upon the definition of "political subdivision" in S.C. Code Ann. 15-78-30, and that Respondent was merely a "fund" and was not an agency or department, unlike the Insurance Reserve Fund, which is a division of the State. {App. 415-422}. In her response to Respondent's motion for summary judgment, Petitioner repeated these arguments and made an effort to support it by reference to the factors set forth in *Health Promotion Specialists, LLC v. S.C. Bd. Of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013). {App. 530-534}. Similarly, Petitioner's oral argument to the trial court on this question focused upon the assertion that Respondent did not qualify under the statutory definition of "political subdivision," that Respondent was merely a fund distinguishable from the Insurance Reserve Fund, and that the *Health Promotion Specialists* factors supported her position. {App. 299-303, 341}. The trial court ruled in Respondent's favor on this issue. {App. 8-9}. In her motion to the trial court to alter or amend its summary judgment ruling on this issue, Petitioner raised only the same points on this question. {App. 651-657}. At no point did Petitioner raise to the trial court the issue of the alleged "control" of Respondent by the Municipal Association as a basis for denying Tort Claims Act immunity to Respondent.

At the Court of Appeals stage on this issue, in her Respondent/Appellant's Final Brief Petitioner again asserted the arguments she previously made to the trial court –*viz.*, the statutory definition of "political subdivision," the assertion that Respondent is merely a "fund" and not an agency or department like the Insurance Reserve Fund, and that the *Health Promotion Specialists* factors supported that argument.{App. 794-801}. Like the trial court, the Court of Appeals ruled

in favor of the Respondent on the Tort Claims Act issue. {App. 846-852}. Petitioner then filed a petition for rehearing with the Court of Appeals, and again argued that Respondent was not within the statutory definition of "political subdivision," contrasted Respondent with the Insurance Reserve Fund, and asserted that the *Health Promotion Specialists* factors weighed in her favor in support of that argument. {App. 877-879}. At no point did Petitioner ever raise to the Court of Appeals the issue of the alleged "control" of Respondent by the Municipal Association as a basis for denying Tort Claims Act immunity to Respondent. In fact, the Municipal Association is never even mentioned in Petitioner's briefing or petition to the Court of Appeals.

Following the Court of Appeals' denial of the petition for rehearing {App. 883}, Petitioner sought a writ of certiorari from this Court. As with her petition for rehearing, the petition for a writ of certiorari asserted that Respondent was not within the statutory definition of "political subdivision," contrasted Respondent with the Insurance Reserve Fund, and asserted that the *Health Promotion Specialists* factors supported that argument. (Reeves' Petition for Writ of Certiorari at pp. 20-23). Again, there was no mention in the petition for writ of certiorari of the Municipal Association or the assertion that the alleged "control" of Respondent by the Municipal Association was a basis for denying Tort Claims Act immunity to Respondent.

Petitioner's failure to previously raise and preserve this issue warrants the striking of Section II.A, II.B, and II.C, of Petitioner's Brief.[2] There are multiple layers of preservation error that apply to this situation. As an initial matter, Petitioner failed to preserve this issue because it was never raised to the trial court. "It is well-settled that an issue cannot be raised for the first time

[2] Additionally, the last two paragraphs of Argument II.E. should be struck as they seek to inject the Municipal Association issue into the *Health Promotion Specialists* factors argument, despite its omission from that argument to the trial court and the Court of Appeals.

on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (citing *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). In *Elam v. S.C. DOT*, this Court characterized this rule as "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004). Thus, where a party fails to raise the issue in its briefing and argument to the trial court, that party is precluded from raising that issue on appeal. *Easterling v. Burger King Corp.*, 416 S.C. 437, 452-453, 786 S.E.2d 443, 451-452 (Ct. App. 2016).

As this Court explained in *Herron v. Century BMW*:

> Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. It is axiomatic that an issue cannot be raised for the first time on appeal. Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.

395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal citations and quotations omitted). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *I'On, L.L.C.*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Petitioner never raised this issue to the trial court. Therefore, as the trial court never had an opportunity to address or rule on this issue, it should not be considered by an appellate court.

Next, Petitioner failed to raise this issue to the Court of Appeals. It is well settled that for an issue to be preserved for review for the Supreme Court on writ of certiorari to the Court of Appeals, the argument must have first been raised in the arguments made to the Court of Appeals.

*See* Rule 242(d)(2), SCACR; *Kleckley v. Northwestern Nat'l Cas. Co.*, 338 S.C. 131, 138, 526 S.E.2d 218, 221 (2000) (holding that an issue not raised to or addressed by the trial court or the Court of Appeals is not properly preserved for review by the Supreme Court on certiorari); *City of Columbia v. Ervin*, 330 S.C. 516, 519-20, 500 S.E.2d 483, 485 (1998) (holding that an argument not made to an intermediate appellate court is not preserved for review by the Supreme Court). This mandate is further stressed by South Carolina's requirement that, in order to be preserved for Supreme Court review, all issues must have been raised not only on the merits to the Court of Appeals, but also in any petition for rehearing. *See Kleckley*, 338 S.C. at 138, 526 S.E.2d at 221; *see also* Rule 242(d)(2), SCACR; *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 235, 797 S.E.2d 387, 393 (2016) (rejecting an argument as unpreserved because it was not previously raised in the petition for rehearing with the Court of Appeals); *Sloan v. Dep't of Transp.*, 365 S.C. 299, 307-308, 618 S.E.2d 876, 880 (2005). Here, petitioner failed to raise this new issue in either its briefing to the Court of Appeals or its petition for rehearing.

Finally, in order for an issue to be properly included in a brief to the Supreme Court it must have been raised in the petition for a writ of certiorari. *McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (rejecting an issue briefed in Petitioner's Supreme Court brief because it was not raised in his petition for a writ of certiorari). Petitioner failure to raise this issue to the trial court and Court of Appeals was repeated in her petition of a writ of certiorari.

## Conclusion

For the reasons set forth herein, Respondent respectfully requests that this Court strike Section II.A, II.B., II.C., and the last two paragraphs of Section II.E. of Appellant's brief as they raise an issue that has never before been raised in this litigation and has not been properly preserved for review by this Court. Alternatively, Respondent asks that the writ of certiorari be withdrawn

as improvidently granted as to Issue No. 2 in this appeal (the Tort Claims Act issue). Finally, Respondent requests that its current deadline to file its Respondents brief (currently due eight (8) days from the filing of this motion on July 15, 2020) be stayed until this Court has ruled upon this motion, and that Respondent be granted the corresponding period of eight (8) days from such ruling to file its Respondent's Brief.

Respectfully submitted,

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