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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

S. Phillip Lenski, Administrative Law Judge

Case No. 2020-000950

Dr. Agnes Slayman Appellant

v.

South Carolina Department of Education Respondents.

APPELLANT'S RETURN TO MOTION

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TABLE OF CONTENTS

Table of Contents.....2

Table of Authorities.....3

Standard of Review.....4

Argument.....4

 I. A MOTION FOR RECONSIDERATION IS NOT A PREREQUISITE TO
 APPELLANT’S APPEAL.....4

 II. RESPONDENT’S POSITION MISINTERPRETS THE RULES.....5

Conclusion.....6

TABLE OF AUTHORITIES

CASES

Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234 (1933).....6

Britton v. Charleston Cty., No. 2016-000595, 2018 WL 4501212 (S.C. Ct. App. Sept. 19, 2018).....4

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).....5

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005).....4

First Union Nat. Bank of S.C. v. Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).....4

Hartman v. City of Columbia, 268 S.C. 44, 232 S.E.2d 15 (1977).....4

Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 564 S.E.2d 322 (2001).....6

Munn v. Price, 160 S.C. 186, 159 S.E. 369 (1931).....4

Olsen v. S.C. Dep't of Health & Envtl. Control, 379 S.C. 57, 663 S.E.2d 497 (Ct. App. 2008).....5

State Farm Mut. Auto. Ins. Co. v. Goyeneche, 429 S.C. 211, 837 S.E.2d 910 (Ct. App. 2019), reh'g denied (Feb. 20, 2020).....5

Swiger by & through DeHaven v. Smith, 426 S.C. 408, 827 S.E.2d 200 (Ct. App. 2019).....4

Thomas v. Lynch, 85 S.C. 529, 67 S.E. 1135 (1910).....4

Young v. Fla. Cent. & P. R. Co., 46 S.C. 567, 27 S.E. 1008 (1896).....4

RULES

Rule 59(e), SCRCF.....4,5

Rule 40, SCALC.....4

OTHER AUTHORITIES

Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999).....6

STANDARD OF REVIEW

Motions to dismiss appeal are uncommon in South Carolina, vary in reason, and are typically denied. See e.g. *Swiger by & through DeHaven v. Smith*, 426 S.C. 408, 827 S.E.2d 200 (Ct. App. 2019)(motion to dismiss appeal denied); *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 36, 609 S.E.2d 506, 514 (2005)(motion to dismiss appeal denied); *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 573, 511 S.E.2d 372, 382 (Ct. App. 1998)(motion to dismiss appeal previously denied); *Hartman v. City of Columbia*, 268 S.C. 44, 232 S.E.2d 15 (1977)(Supreme Court of South Carolina affirmed appellee's motion to dismiss appeal was properly denied); *Munn v. Price*, 160 S.C. 186, 159 S.E. 369 (1931)(motion to dismiss appeal denied); *Thomas v. Lynch*, 85 S.C. 529, 67 S.E. 1135 (1910)(motion to dismiss appeal denied on condition); *Young v. Fla. Cent. & P. R. Co.*, 46 S.C. 567, 27 S.E. 1008 (1896)(motion to dismiss appeal denied).

ARGUMENT

I. A motion for reconsideration is not a prerequisite to Appellant's appeal.

A motion for reconsideration was unnecessary in this case. Motions for reconsideration are permissive. Rule 40, SCALC, states, “[m]otions for rehearing may be allowed in the discretion of the presiding administrative law judge.” Rule 40, SCALC, uses the word “may”; it does not use the word “must” or “shall” or other language that connotes a mandatory requirement.

Motions for reconsideration, motions for rehearing, and petitions for rehearing are analogous. See e.g. Rule 59(e), SCRCF. This issue, of whether such motions are prerequisites to an appeal, was recently addressed by this Court in *Britton v. Charleston Cty.* This Court held that a motion for rehearing is not required. *Britton v. Charleston Cty.*, No. 2016-000595, 2018 WL 4501212, at *7 (S.C. Ct. App. Sept. 19, 2018). Specifically, “...the motion for a rehearing [is] a motion not required for Appellants to preserve their right to further appellate review...”. *Id.* at 7

(citing e.g. *Olsen v. S.C. Dep't of Health & Envtl. Control*, 379 S.C. 57, 69, 663 S.E.2d 497, 503–04 (Ct. App. 2008)).

“[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This Court has made it abundantly clear that motions for reconsideration are permissive. *State Farm Mut. Auto. Ins. Co. v. Goyeneche*, 429 S.C. 211, 227, 837 S.E.2d 910, 918 (Ct. App. 2019), reh'g denied (Feb. 20, 2020). The only mandatory motions for reconsideration are to preserve an unaddressed error by the lower court. *Id.* The preservation requirement derives from the principle that appellate courts should not fault a lower court for failing to address an issue if the parties did not tell the lower court it needed to be considered. See e.g. *Id.*

Here, there are no unaddressed errors by the Administrative Law Court. The Administrative Law Judge received the briefing from the respective parties and thereafter ruled on the issues. Appellant appeals the decisions made on those issues that were preserved, briefed, and decided upon prior to appeal to the Court of Appeals. Accordingly, there is no legal basis for Respondent’s motion to dismiss appeal.

II. Respondent’s position misinterprets the Rules.

Respondent misses the mark on the purpose of a motion for reconsideration. The Respondent’s position is that for every decision of a lower court, a motion for reconsideration must be filed. Such a position defies logic, defies the purpose of motions for reconsideration, and would

bog the court system in South Carolina so much so that the actual purpose of a motion for reconsideration would be a nullity.

“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)). Following that same legal conclusion, that is the law of South Carolina, motions for reconsideration and petitions for rehearing are not for the purpose of merely having the case tried a second time. That is exactly Respondent’s argument for dismissal of Appellant’s appeal, that the rules require the parties argue the same issues twice. Respondent’s interpretation of the Administrative Law Court Rules of Procedure and Rules of Appellate Practice merely seeks to bog down the Administrative Law Court with duplication and create procedural traps for disposition of the legal issues on appeal. That position is firmly established as not the law in South Carolina, with forceful language from the Supreme Court of South Carolina to accompany its interpretation of the appellate rules. See *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 564 S.E.2d 322 (2001). The Rules do not require a motion for reconsideration and if Appellant had filed a motion for reconsideration in this case, prior to appeal, it would have merely duplicated the work for the Administrative Law Court.

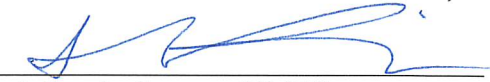
CONCLUSION

For the foregoing reasons, Appellant asks that the Respondent’s Motion to Dismiss Appeal be denied.

Respectfully Submitted,

CROMER BABB PORTER & HICKS, LLC

BY: _____



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PROOF OF SERVICE

I certify that I, the undersigned employee of Cromer Babb Porter & Hicks, LLC, caused to have served Appellant’s Return to Motion on counsel for by emailing and mailing a copy of same in the on August 19, 2020, addressed to the following:

V. Henry Gunter, Jr., Esquire
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BY:



Kate M. Hesik, Litigation Paralegal

C | B | P | H

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August 19, 2020

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Hon. Jenny Abbott Kitchings, Clerk
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**Re: Dr. Agnes Slayman v. South Carolina Department of Education
Case No.: 2020-000950**

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of Appellant's Return to Motion in the above-referenced matter, along with a Proof of Service. Please return a filed copy to us in the self-addressed, stamped envelope enclosed for your convenience. Please feel free to contact me should you have any questions.

With kind regards, I am

Sincerely,



Kate M. Hesik
Litigation Paralegal

/kmh
Enclosures

Cc: V. Henry Gunter, Jr., Esquire
Client