

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

NOV 02 2020

APPEAL FROM HORRY COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Benjamin H. Culbertson,
Circuit Court Judge

Case No.: 2019-CP-26-03905

Appellate Case No.: 2019-001744

Resort Restaurants of Myrtle Beach, Inc. d/b/a Rossi's, Appellant,

vs.

Galleria Shopping Center, LLC, Respondent.

FINAL BRIEF OF RESPONDENT

James K. Gilliam
BURR & FORMAN LLP
104 South Main Street
Suite 700
Greenville, SC 29601
(864) 271-4940

Henrietta U. Golding, SC Bar #2173
BURR & FORMAN LLP
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
(843) 444-1107

Counsel for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson,
Circuit Court Judge

Case No.: 2019-CP-26-03905

Appellate Case No.: 2019-001744

Resort Restaurants of Myrtle Beach, Inc. d/b/a Rossi's,Appellant,

vs.

Galleria Shopping Center, LLC, Respondent.

FINAL BRIEF OF RESPONDENT

James K. Gilliam
BURR & FORMAN LLP
104 South Main Street
Suite 700
Greenville, SC 29601
(864) 271-4940

Henrietta U. Golding, SC Bar #2173
BURR & FORMAN LLP
2411 N. Oak Street, Suite 206 (29577)
Post Office Box 336
Myrtle Beach, SC 29578-0336
(843) 444-1107

Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES ON APPEAL.....	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS.....	4
STANDARD OF REVIEW	8
ARGUMENTS	9
I. The Magistrate Court did not issue a written order when it denied Rossi’s Motion to Return Bond Funds; therefore, Rossi’s appeal of this decision cannot be considered and must be dismissed.....	9
II. This Court should affirm the decision of the circuit court because the only evidence in the record on appeal supports the circuit court’s decision.	12
III. The Magistrate Court did not dismiss Galleria’s claims against Rossi’s and even if it did, Rossi’s still would not be entitled to a return of the bond.	12
A. This argument is not preserved for appellate review.	13
B. The Magistrate Court never issued an Order dismissing Galleria’s case against Rossi’s, and a stipulation of dismissal was never filed as contemplated by Rule 41.	14
C. Even if the case were dismissed by the Magistrate Court (it was not), the law did not require the Magistrate Court to return the bond to Rossi’s.	16
IV. The circuit court did not improperly consider any arguments.....	19
CONCLUSION	21
CERTIFICATE OF COUNSEL.....	23

TABLE OF AUTHORITIES

CASES

<i>Bowers v. Thomas</i> , 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007)	8
<i>Case v. Case</i> , 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964)	9
<i>Germain v. Nichol</i> , 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983)	10
<i>Hadfield v. Gilchrist</i> , 343 S.C. 88, 93, 538 S.E.2d 268, 271 (Ct. App. 2000)	8
<i>Herron v. Century BMW</i> , 395 S.C. 461, 470, 719 S.E.2d 640, 644–45 (2011)	14
<i>Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.</i> , 339 S.C. 285, 306–07, 529 S.E.2d 45, 57 (Ct. App. 2000)	14
<i>I’On, L.L.C. v. Town of Mt. Pleasant</i> , 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)	13,20
<i>Johnson v. S.C. Dep’t of Prob., Parole, & Pardon Servs.</i> , 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007);	9,11
<i>McCall v. IKON</i> , 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008)	14,20
<i>Parks v. Characters Night Club</i> , 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001)	8,11,12
<i>Polson v. Burr</i> 235 S.C. 216, 218–19, 110 S.E.2d 855, 856 (1959)	9,11
<i>Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.</i> , 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)	13
<i>Shirley’s Iron Works, Inc. v. City of Union</i> , 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013)	18
<i>State v. Crocker</i> , 366 S.C. 394, 399 n. 1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) ..	16
<i>Thomas v. Thomas</i> , 286 S.C. 294, 297, 333 S.E.2d 76, 77 (Ct. App. 1985)	10
<i>Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.</i> , 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984)	8
<i>Wilder Corp. v. Wilke</i> , 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)	13

STATUTES

S.C. Code §7-37-155(B)(5)	17,18
S.C. Code § 18-7-60.....	11
S.C. Code § 18-7-170.....	8
S.C. Code § 27-37-155(B)(5)	4,17,18
S.C. Code §§27-37-150 and 27-37-155(B)	16,17

RULES

Rule 11(b) SCMCR	12
Rule 41 SCRCF	13
Rule 41(a)(1)	12
Rule 41(b)	12,15
Rule 41(a)(1)(A) SCRCF	15
Rule 41(a)(1)(B)	15
Rule 41(a)(1)(2) SCRCF	14
Rule 58(a)(2), SCRCF	9,11
Rule 208(b)(1)(E), SCACR.....	16

STATEMENT OF ISSUES ON APPEAL

- I. The Magistrate Court did not issue a written order when it denied Rossi's Motion to Return Bond Funds; therefore, Rossi's appeal of this decision cannot be considered and must be dismissed.
- II. This Court should affirm the decision of the circuit court because the only evidence in the record on appeal supports the circuit court's decision.
- III. The Magistrate Court did not dismiss Galleria's claims against Rossi's and even if it did, Rossi's still would not be entitled to a return of the bond.
- IV. The circuit court did not improperly consider any arguments.

STATEMENT OF CASE

This is a commercial eviction action, arising out of Resort Restaurants of Myrtle Beach, Inc. d/b/a Rossi's ("Rossi's") failure to pay rent to the landlord, Galleria Shopping Center, LLC ("Galleria"). (R. 49-51).

Galleria commenced this action in the Horry County Magistrate Court to eject Rossi's from its premises and to recover all amounts Rossi's owed Galleria pursuant to the lease agreement. (R. 49-51; R. 3). The Magistrate Court issued a judgment of ejectment, requiring Rossi's to vacate the premises. (R. 49-51). Rossi's requested a jury trial and a stay of the ejectment proceedings. (R. 49-51).

The Magistrate Court issued a Bond to Stay Jury Trial Order ("Stay Order") on July 31, 2017. (R. 3). The Stay Order stayed the ejectment proceedings and *ordered* Rossi's to do two things: (1) To post a bond in the amount of \$34,840.82;¹ and (2) To continue paying monthly rent to Galleria in the amount of \$15,152.92 on the first day of each month. (R. 3). The bond represented the amount of "rent due" from Rossi's to Galleria as of July 31, 2017. (R. 5-6).

Rossi's violated the Stay Order by failing to pay monthly rent to Galleria. (R. 74-76). Rossi's stopped paying rent to Galleria on November 3, 2017 and never made another payment to Galleria. (R. 74-76). Rossi's vacated Galleria's premises in November 2017. (R. 32-35).

¹ The Court subsequently reduced the bond to \$18,389.32 on September 14, 2017. (R. 4-5).

The jury trial was scheduled for May 8, 2018. (R. 100). By this time, Rossi's owed \$89,926.66 in back rent to Galleria, and Rossi's had been out of the premises for approximately eighteen (18) months. (R. 13; R. 74-76). Galleria decided not to pursue the jury trial against Rossi's, and Galleria advised the Court and Rossi's of its decision. (R. 100).

Despite receiving the aforementioned notice, counsel for Rossi's appeared before the Magistrate Court on May 8, 2018 and verbally asked the Magistrate Court to require Galleria to return the bond to Rossi's. (R. 13; R. 33). Rossi's requested the return of the bond based upon the mistaken belief that the bond was a "fine." (R. 40). The bond was not a fine but was the amount of "rent due" from Rossi's to Galleria as of July 31, 2017. (R. 41-44; R. 4-5).

The Magistrate Court initially entered an order directing Galleria to return the bond to Rossi's. (R. 8). The Magistrate Court then rescinded the Order, finding it was issued "inadvertently." (R. 9; R. 17-21). Thereafter, Rossi's filed a Motion to Return Bond Funds with the Magistrate Court on October 10, 2018. (R. 36-37).

A hearing was held on June 10, 2019 to consider Rossi's motion. (R. 49-51). Rossi's presented no evidence at the hearing. Galleria presented evidence demonstrating that Rossi's owed Galleria \$89,926.66 in back rent because of Rossi's failure to pay monthly rent to Galleria as required by the Stay Order. (R. 74-85).

Based on the foregoing, Judge Mayers verbally denied Rossi's motion for the bond to be returned. (R. 49-51). Judge Mayers never issued a written order, and

Rossi's never requested a written order from Judge Mayers. Rossi's also failed to hire a court reporter to record the proceedings before Judge Mayers.

Thereafter, Rossi's filed a Notice of Appeal to the circuit court on June 18, 2019. (R. 47-48). The circuit court affirmed the decision of the Magistrate Court. (R. 10-12). This appeal followed.

STATEMENT OF FACTS

Galleria leased commercial real estate to Rossi's. (R. 3). Rossi's failed to timely pay rent to Galleria, and as a result, Galleria commenced ejectment proceedings against Rossi's in the Horry County Magistrate Court. (R. 3). On March 21, 2017, the Magistrate Court issued a judgment of ejectment, requiring Rossi's to vacate Galleria's premises. (R. 3). Rossi's requested a jury trial and a stay of the ejectment proceedings. (R. 3).

On July 31, 2017, the Magistrate Court held a hearing, as contemplated by Section 27-37-155(B)(5) of the South Carolina Code of Laws. (R. 3; R. 4-5). The purpose of this hearing was to determine the amount of "rent due" from Rossi's to Galleria as of the hearing date and to determine the amount of monthly rent to require Rossi's to pay Galleria. (R. 3-5). Following the hearing, the Magistrate Court issued the Stay Order. (R. 3). The Stay Order stayed the ejectment proceedings and *ordered* Rossi's to do two things: (1) To post a bond in the amount of \$34,840.82; and (2) To continue paying monthly rent to Galleria in the amount of \$15,152.92 on the first day of each month. (R. 3). The bond represented the amount of "rent due" from Rossi's to Galleria as of July 31, 2017. (R. 4-5).

On August 28, 2017, Rossi's moved to reduce the bond amount, arguing that the original bond of \$34,840.82 improperly included attorney's fees in the amount of \$16,451.50. (R. 4-5). On September 14, 2017, the Magistrate Court issued an order, removing the attorney's fees from the bond.² (R. 4-5). In doing so, the Magistrate Court stated, "At a hearing to set bond, the Court is limited by the statute to setting a bond based upon the alleged rent owed." (R. 4). The Magistrate Court's September 14, 2017 Order thus reduced the bond to \$18,389.32—the amount of rent due from Rossi's to Galleria as of July 31, 2017. (R. 4-5)

On October 25, 2017, the Magistrate Court issued a Consent Order continuing the trial. (R. 6-7). In the Consent Order, the Court stated, "the Parties are currently bound by this Court's Order of July 31, 2017, which requires [Rossi's] to pay monthly rent to [Galleria] and [Rossi's] shall continue to abide by such order." (R. 6). Counsel for Rossi's signed the Consent Order, confirming Rossi's agreement that the Stay Order required Rossi's to continue paying rent to Galleria. (R. 7)

Rossi's violated the Stay Order by failing to pay monthly rent to Galleria. (R. 74-76). Rossi's stopped paying rent to Galleria on November 3, 2017 and never made another payment to Galleria. (*Id.*). Rossi's vacated Galleria's premises in November 2017. (R. 32-35).

The jury trial in this case was set for May 8, 2018—approximately eighteen (18) months after Rossi's left the premises. (R. 13). At this time, Rossi's owed

² The Parties stipulated, and the Court ordered, that the amount of \$16,451.50 would be applied to Rossi's September rent obligations to Galleria. (R. 5; R. 87).

\$89,926.66 in back rent to Galleria. (R. 74-76). With Rossi's already out of the premises and Galleria aware that any further money spent would be the equivalent of "throwing good money after bad," Galleria decided not to go forward with the jury trial, and Galleria's counsel notified the Court and counsel for Rossi's of this decision. (R. 74-76; R. 100; R. 83).

Despite receiving this notice from Galleria, counsel for Rossi's appeared before Judge Margie B. Livingston on May 8, 2018. (R. 13). While before Judge Livingston, counsel for Rossi's, without any notice to Galleria, verbally asked the Court to order Galleria to return the bond to Rossi's. (R. 13; R. 33). Rossi's requested the return of the bond based upon the mistaken belief that the bond was a "fine." (R. 40). The bond, however, was not a fine; instead, it represented the amount of "rent due" from Rossi's to Galleria as of July 31, 2017. (R. 4-5).

On May 16, 2018, Judge Livingston entered an Order, directing Galleria to return the bond to Rossi's. (R. 8). Galleria moved for Relief from the Order. (R. 17-21). Judge Bradley D. Mayers granted Galleria's motion and ordered that Judge Livingston "inadvertently" entered the Order requiring Galleria to return the bond. (R. 9). Thus, Galleria remained in possession of the bond.

Thereafter, Rossi's filed a Motion to Return Bond Funds with the Magistrate Court on October 10, 2018. (R. 36-37). A hearing was held before Judge Mayers on June 10, 2019 in Conway, South Carolina. (R. 49-51). Rossi's presented no evidence at the hearing. Galleria presented the affidavit of Samantha Fasul and the exhibits attached thereto. (R. 74-85). The only evidence before Judge Mayers revealed that

Rossi's was required to post the bond for "rent due" as of July 31, 2017 pursuant to the Stay Order; Rossi's was required to pay monthly rent to Galleria in the amount of \$15,152.93 pursuant to the Stay Order; Rossi's stopped paying rent on November 3, 2017 and thus violated the Stay Order; and Rossi's owed \$89,926.66 to Galleria. (R. 74-76).

Based on the foregoing, Judge Mayers verbally denied Rossi's Motion for the bond to be returned to Rossi's. (R. 49-51). Judge Mayers never issued a written order, memorializing his verbal order. There is a Disposition Notice signed by Judge Mayers, which is dated June 10, 2019; however, the Disposition Notice makes no findings of fact and sets forth no order from the Court. (R. 86). Rossi's never requested a written order from Judge Mayers. Rossi's also failed to hire a court reporter to record the proceedings before Judge Mayers. Thus, in the record on appeal, the Court has neither the benefit of a written order from Judge Mayers or the transcript of the hearing before Judge Mayers.

Thereafter, Rossi's filed a Notice of Appeal to the Circuit Court on June 18, 2019. (R. 47-48). The Notice of Appeal sought to challenge the verbal ruling of Judge Mayers denying Rossi's motion for the return of the bond. (R. 47-48). The appeal was heard by the Honorable Benjamin H. Culbertson on September 11, 2019. (R. 39-46). After a brief hearing, Judge Culbertson issued a Form 4 Order, stating only, "Magistrate affirmed." (R. 10).

On October 9, 2019, Rossi's filed this Notice of Appeal to the South Carolina Court of Appeals. (R. 104-05). In the Notice of Appeal, Rossi's seeks only to appeal from the Form 4 Order issued by Judge Culbertson. (R. 104).

STANDARD OF REVIEW

While the circuit court maintains a broad scope of review in reviewing appeals from Magistrate Court, the standard of review the Court of Appeals must apply "is more limited." *Bowers v. Thomas*, 373 S.C. 240, 244, 644 S.E.2d 751, 753 (Ct. App. 2007); see S.C. Code § 18-7-170 (allowing the circuit court to make its own findings of fact in reviewing an appeal from Magistrate Court).³ The Court of Appeals must employ an "any evidence" standard in reviewing ejection proceedings initiated at Magistrate Court. *Bowers*, 373 S.C. at 244, 644 S.E.2d at 753; *Vacation Time of Hilton Head Island, Inc. v. Kiwi Corp.*, 280 S.C. 232, 234, 312 S.E.2d 20, 21 (Ct. App. 1984). Under the any evidence standard, the Court of Appeals must uphold the decision of the circuit court if there is any evidence to support it. *Id.*; *Parks v. Characters Night Club*, 345 S.C. 484, 490, 548 S.E.2d 605, 608 (Ct. App. 2001). To the extent a legal issue is raised, the Court of Appeals determines whether "the circuit court order is controlled by an error of law." *Id.*; *Hadfield v. Gilchrist*, 343 S.C. 88, 93, 538 S.E.2d 268, 271 (Ct. App. 2000).

³ Rossi's incorrectly cites Section 18-7-170 as the standard of review governing the Court of Appeals' review of this case. (Rossi's Final Brief P. 2). Section 18-7-170 sets forth the circuit court's standard of review, not that of the Court of Appeals. The standard of review employed by the Court of Appeals is much more limited and does not allow the Court of Appeals to make findings of fact. *Bowers*, 373 S.C. at 244, 644 S.E.2d at 753.

ARGUMENT

I. **The Magistrate Court did not issue a written order when it denied Rossi's Motion to Return Bond Funds; therefore, Rossi's appeal of this decision cannot be considered and must be dismissed.**

The Magistrate Court did not issue a written order when it denied Rossi's Motion to Return Bond Funds dated June 10, 2019. Without a written order, there is nothing for Rossi's to appeal, and the appeal must be dismissed.

"[A] judgment is effective only when reduced to writing and entered into the record." *Johnson v. S.C. Dep't of Prob., Parole, & Pardon Servs.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007); Rule 58(a)(2), SCRPC. An oral decision "is not a final ruling on the merits ... until it has been reduced to writing, signed by the Judge and delivered for recordation." *Case v. Case*, 243 S.C. 447, 451, 134 S.E.2d 394, 396 (1964). If a party on appeal fails to include the trial court's final order in the record on appeal, the appeal must be dismissed. *Johnson*, 372 S.C. at 284, 641 S.E.2d at 897. In *Polson v. Burr*, the appellant failed to include the order that was the subject of the appeal, and the Supreme Court dismissed the appeal. 235 S.C. 216, 218–19, 110 S.E.2d 855, 856 (1959). In *Polson*, the Court stated:

The record states that the Court below refused this motion, although for some unexplained reason the order is not included in the record [T]he appeal here is not in such shape as to allow us to properly consider the merits. Owing to the failure to incorporate in the record the order from which the appeal is taken, we are not advised as to the grounds upon which the motion was denied or the reasons assigned by the Court below Appeal dismissed.

Id.

“[I]t is the responsibility of the appellant to provide the appellate court with a record upon which it can review the questions presented.” *Thomas v. Thomas*, 286 S.C. 294, 297, 333 S.E.2d 76, 77 (Ct. App. 1985); *see, e.g., Germain v. Nichol*, 278 S.C. 508, 509, 299 S.E.2d 335, 335 (1983) (“Appellant has the burden of providing this Court with a sufficient record upon which this Court can make its decision.”). “If the record does not contain the order or ruling appealed from, the court is required to dismiss the question presented since the omission has the effect of depriving the court of jurisdiction to review it.” *Thomas*, 286 S.C. at 297, 333 S.E.2d at 77.

According to Rossi’s Notice of Appeal to the circuit court, Rossi’s stated it was appealing “the Magistrate Court’s Ruling June 10, 2019.” (R. 47-48). The Notice of Appeal further states that the Magistrate Court “denied [Rossi’s] Motion to have the bond returned.” (R. 47). There is no written order from the Magistrate Court dated June 10, 2019, and there is no written order from the Magistrate Court denying Rossi’s motion to return the bond. Without a written order from the Magistrate Court, there is nothing for Rossi’s to appeal, and this Court must dismiss the appeal.

From other documents in the record on appeal (although none of them are an Order), it is clear that Judge Mayers presided over a hearing on June 10, 2019, where Judge Mayers considered Rossi’s motion filed on October 10, 2018, seeking a return of the bond. (R. 49-51). The first such document is the Disposition Notice signed by Judge Mayers and dated June 10, 2019. (R. 86). The Disposition Notice makes no findings of fact, sets forth no order from the Court, and is not clocked-in or entered in

the record; therefore, it is not a final order from which a party can appeal. *See* Rule 58(a)(2), SCRCP; *Johnson*, 372 S.C. at 284, 641 S.E.2d at 897.

There is also an Answer to Appeal signed by Judge Mayers and dated July 18, 2019. (R. 49-51). The Answer to Appeal is not an order at all; instead, it is a statutorily required return that the Magistrate Court was required to file with the circuit court. *See* S.C. Code § 18-7-60 (requiring the Magistrate Court to file a return to the appellate court of the testimony, proceedings and judgement and file it in the appellate court). In addition, the Answer to Appeal was filed *after* and in response to Rossi's Notice of Appeal to the circuit court. (R. 47-48). Thus, because it was filed after and in response to Rossi's Notice of Appeal, it cannot serve as the Order from which Rossi's is appealing.

Therefore, it is undeniable that there is no written order from the Magistrate Court from which Rossi's can appeal. The fact that other documents in the record on appeal reveal that Judge Mayers verbally denied Rossi's motion from the bench on June 10, 2019 is of no consequence. This was also the case in *Polson*, where "[t]he record states that the Court below refused this motion," but the order was not included in the record. 235 S.C. at 218, 110 S.E.2d at 856. This case is no different from *Polson* and *Johnson*. There is no written order forming the basis for Rossi's appeal. Without such an order, the Court of Appeals cannot perform its appellate function and review the order for errors of law or determine whether "any evidence" supports the circuit court's ruling. *See Parks*, 345 S.C. at 490, 548 S.E.2d at 608

(Appellate court must determine whether any evidence supports the decision or whether it is controlled by an error of law.).

Accordingly, for the foregoing reasons, this Court should dismiss Rossi's appeal.

II. This Court should affirm the decision of the circuit court because the only evidence in the record on appeal supports the circuit court's decision.

The only evidence in the record demonstrates that Rossi's violated the Stay Order by failing to continue paying rent to Galleria. (R. 74-76; R. 49-51). Ultimately, Rossi's owed \$89,926.66 in back rent to Galleria. (R. 74-76). This was the only evidence before the Magistrate Court, when it considered Rossi's June 10, 2019 motion. The circuit court affirmed the decision of the Magistrate Court. (R. 10-12). Therefore, under the "any evidence" standard of review this Court must employ, this Court should affirm the decision of the circuit court because there is evidence to support the circuit court's decision. *Parks*, 345 S.C. at 490, 548 S.E.2d at 608.

III. The Magistrate Court did not dismiss Galleria's claims against Rossi's, and even if it did, Rossi's still would not be entitled to a return of the bond.

Rossi's contends that the Magistrate Court "properly dismissed" Galleria's case against Rossi's pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure and Rule 11(b) of the South Carolina Rules of Magistrates Court. With the case dismissed, Rossi's argues that the court was required to return the parties to a position as if the action was never filed. Rossi's argument is incorrect for the following reasons: (A) This argument is not preserved for appellate review; (B) The

Magistrate Court never issued an Order dismissing Galleria's case against Rossi's, and there was no stipulation filed as required by Rule 41 of the South Carolina Rules of Civil Procedure; and (C) Even if the case were dismissed (it was not), the law did not require the Magistrate Court to return the bond to Rossi's.

A. **This argument is not preserved for appellate review.**

There is no evidence to demonstrate that Rossi's preserved this argument for appeal by raising it to the Magistrate Court and by the Magistrate Court ruling on it. Because there is no such evidence, this issue is not preserved for appellate review, and this Court should not consider it.

"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." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* 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." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

As set forth in Roman numeral I, the fatal flaw of this appeal from a procedural perspective is there is no record of what transpired before the Magistrate Court. Without such a record, there is no opportunity for appellate review. Furthermore,

without such a record, Rossi's cannot carry its burden of demonstrating that issues are preserved for appellate review. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644–45 (2011) (refusing to consider argument that appellant did not make to lower court); *McCall v. IKON*, 380 S.C. 649, 659–60, 670 S.E.2d 695, 701 (Ct. App. 2008) (noting the order on appeal comes to the appellate court with a presumption of correctness and the burden is on appellant to demonstrate reversible error); *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 306–07, 529 S.E.2d 45, 57 (Ct. App. 2000) (noting it is the appellant's burden to "provid[e] the court with a record sufficient to allow appellate review").

Because this argument is not preserved for appellate review, this Court should not consider it, and it should affirm the decision of the circuit court.

B. The Magistrate Court never issued an Order dismissing Galleria's case against Rossi's, and a stipulation of dismissal was never filed as contemplated by Rule 41.

The Magistrate Court never issued a written order dismissing Galleria's claims against Rossi's.

On May 7, 2018 (the day before the scheduled jury trial in this case), counsel for Galleria wrote to the Magistrate Court and to counsel for Rossi's and informed them that "tomorrow's, May 8, 2018, civil jury trial with Judge Livingston is no longer necessary. Therefore, please remove the above-referenced case from tomorrow's civil jury trial roster." (R. 100). The Magistrate Court could have responded to this letter by issuing a written order dismissing Galleria's lawsuit against Rossi's pursuant to Rule 41(a)(1)(2) of the South Carolina Rules of Civil Procedure or pursuant to Rule

11(b) of the Magistrates Court Rules, but the Magistrate Court issued no such written order. On appeal, Rossi's, while arguing the Magistrate Court dismissed Galleria's case, points to no specific order from the Magistrate Court to this effect.

The record reveals that the only order the Magistrate Court entered following Galleria's May 7, 2018 letter was the order entitled "Order to Return Bond," which was filed on May 16, 2018. (R. 8). Neither the "Order to Return Bond," nor any subsequent order from the Magistrate Court says anything about dismissing Galleria's lawsuit against Rossi's. (R. 8).

Without an order dismissing Galleria's case against Rossi's, the only way the lawsuit could have been dismissed is by stipulation pursuant to Rule 41(a)(1)(A) of the South Carolina Rules of Civil Procedure. Rule 41(a)(1)(A) empowers the plaintiff to dismiss a lawsuit "by filing and serving a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment, whichever occurs first." While Rossi's fails to identify what document it contends dismissed the lawsuit, the only document worth analyzing is the May 7, 2018 letter from counsel for Galleria. This letter does not meet the requirements of a dismissal for two reasons. Number one, it was not filed. In order for a dismissal to be effective under Rule 41(a)(1)(A), the dismissal has to be filed. Number two, Galleria, as the plaintiff in this action, could not unilaterally dismiss the action against Rossi's without the signature of all parties. By May 7, 2018, Rossi's had appeared in the action and filed the equivalent of an answer; therefore, the only way the case could be dismissed was in accordance with Rule 41(a)(1)(B), which required the filing of a

stipulation of dismissal “signed by all parties who have appeared in the action.” There is no document meeting this criteria.

Accordingly, there is no written order dismissing Galleria’s claims against Rossi’s.

C. **Even if the case were dismissed by the Magistrate Court (it was not), the law did not require the Magistrate Court to return the bond to Rossi’s.**

Rossi’s argues that when the Magistrate Court dismissed Galleria’s case against Rossi’s, “[u]nder well settled South Carolina law, this dismissal returns the parties to a position as if the action was never filed.” (Rossi’s Final Brief P. 4). While Rossi’s argues “well settled law” supports this position, Rossi’s cites no law in support of it. Because Rossi’s cites no law in support of this position, this Court should not consider it. *See* Rule 208(b)(1)(E), SCACR (requiring the argument section of the brief to contain discussion and citations of authority); *State v. Crocker*, 366 S.C. 394, 399 n. 1, 621 S.E.2d 890, 893 n. 1 (Ct. App. 2005) (holding conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review, and noting failure to provide such argument and citation renders an issue abandoned).

Furthermore, Rossi’s argument disregards Sections 27-37-150 and 27-37-155(B) of the South Carolina Code of Laws. These statutes establish a procedure for the Court to follow when a landlord files an ejectment proceeding and the tenant requests a jury trial, as happened here. In such a circumstance, these statutes plainly allow for the Magistrate Court to issue an order, requiring a tenant to pay “all rent

due and accruing as of and during the pendency of the action” S.C. Code § 27-37-155(B)(5). These statutes do not require the landlord to return any amounts of rent paid or bond posted if the landlord decides not to pursue the action to a verdict. *Id.*

Here, the Magistrate Court followed the statutory scheme established by Sections 27-37-150 and 27-37-155(B) of the South Carolina Code of Laws. Galleria commenced ejectment proceedings against Rossi’s, due to Rossi’s failure to pay rent. (R. 3). Rossi’s requested a jury trial. (R. 3). The Magistrate Court held a hearing on July 31, 2017 to determine the amount of “rent due” and the amount of rent “accruing ...during the pendency of the action.” (R. 3-5). The bond set by the Magistrate Court represented the amount of “rent due” from Rossi’s to Galleria. (R. 4-5).

At the July 31, 2017 hearing, the Magistrate Court initially determined that the bond should be set at \$34,840.82. (R. 3-5). The initial bond included \$16,451.40 in attorney’s fees. (R. 4-5). On September 14, 2017, the Magistrate Court determined that attorney’s fees could not be included, so the Magistrate Court reduced the bond to \$18,389.32—the amount of back rent owed by Rossi’s to Galleria. (R. 3-5). Also, at the July 31, 2017 hearing, the Magistrate Court determined that Rossi’s was obligated to pay monthly rent to Galleria in the amount of \$15,152.92. (R. 3). Thus, with the Stay Order (and the September 14, 2017 Order reducing the bond amount), the Magistrate Court did exactly what it was required to do by Section 7-37-155(B)(5): it issued an order *requiring* Rossi’s to pay: (a) the rent due to Galleria, and (b) monthly rent to Galleria.

Rossi's did not follow the Stay Order. Rossi's did not continue paying rent. (R. 74-76). Rossi's stopped paying rent to Galleria on November 3, 2017 and never made another payment to Galleria. (R. 74-76). As of May 3, 2019, Rossi's owed Galleria \$89,926.66 in back rent. (R. 74-76). This is the only evidence in the record as it pertains to the balance owed for the landlord-tenant relationship between Galleria and Rossi's. Because Rossi's owed almost \$90,000 in back rent to Galleria, Rossi's was not entitled to a return of the bond, even after Galleria decided not to pursue the action to a verdict.

Rossi's theory of this case fails to take into account what the bond represents. Rossi's believes the bond was a "fine," as this is what Rossi's argued to the circuit court. (R. 40). It is unclear why Rossi's harbors this belief. However, the Magistrate Court made clear that the bond represented the amount of rent due from Rossi's to Galleria. (R. 4-5). The Magistrate Court, pursuant to Section 27-37-155(B)(5), could make this determination and could order Rossi's to pay it. That is exactly what the Magistrate Court did that with the Stay Order.

If Rossi's wished to demonstrate to the Magistrate Court that it was entitled to a return of the bond, it was incumbent upon Rossi's to make the appropriate motion to the Magistrate Court to modify or rescind the Stay Order. Rossi's did not. Instead, the Stay Order became the law of the case. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). As the law of the case, the Stay Order required Rossi's to pay the bond for all rent due and to continue paying monthly rent

to Galleria. The only evidence reveals that Rossi's violated that Stay Order and owed almost \$90,000 in back rent to Galleria. For the same reasons Rossi's is not entitled to a return of the rent it paid after the Stay Order, it is not entitled to a return of the bond. The Stay Order required Rossi's to make these payments.

If Rossi's did not believe it owed \$18,389.32 in "rent due" as determined by the Magistrate Court, it was incumbent upon Rossi's to appeal the Stay Order and/or the September 14, 2017 Order. (R. 4-5). Rossi's did not. Rather than appeal, Rossi's, one month later, consented to a subsequent Order from the Magistrate Court, stating, "the Parties are currently bound by this Court's Order of July 31, 2017, which requires [Rossi's] to pay monthly rent to [Galleria] and [Rossi's] shall continue to abide by such order." (R. 6).

Alternatively, if Rossi's did not believe it owed the amount of \$18,389.32 in "rent due" to Galleria, it should have proceeded forward with its case on May 8, 2018 and demonstrated to the Court that it did not owe such money to Galleria. Rossi's did not. Rossi's failure to do so constitutes a waiver of such arguments, and it leaves the Stay Order (and the September 14, 2017 Order reducing the bond amount) as the law of the case.

In sum, as the foregoing arguments make clear, the Magistrate Court never dismissed Galleria's claims against Rossi's, and Rossi's is not entitled to a return of the bond.

IV. The circuit court did not improperly consider any arguments.

Rossi's argues the circuit court improperly considered arguments from Galleria about the "alleged" back rent owed by Rossi's to Galleria. Rossi's argues the circuit court could not consider this information because it "was never submitted to a jury or ruled upon by the magistrate court." (**Rossi's Final Brief P. 4**).

As an initial matter, there is no record of what transpired before the Magistrate Court. There is no written order, and there is no transcript of the proceedings. For this reason alone, this Court should disregard all of Rossi's arguments because there is no appellate record for this Court to decide what was and what was not presented to the Magistrate Court. *McCall*, 380 S.C. at 659–60, 670 S.E.2d at 701.

Additionally, to the extent Galleria made improper arguments, it was incumbent upon Rossi's to bring this to the attention of the Magistrate Court and the circuit court. *See I'On*, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."). Rossi's did neither. The transcript before the circuit court does not reflect any objection made by Rossi's to the circuit court concerning arguments made by Galleria. Likewise, nothing in the record on appeal demonstrates that Rossi's made any of these type of objections to the Magistrate Court. Therefore, these arguments are not preserved for appellate review.

Substantively, Rossi's completely disregards the Stay Order in making its argument. The Stay Order required Rossi's to pay all rent due to Galleria and to

continue making monthly rent to Galleria. Therefore, there was nothing inappropriate about Galleria presenting evidence to the Court regarding Rossi's failure to make payments as required by the Stay Order. (R. 3). As set forth above, if Rossi's believed something occurred to mitigate the amount due, it was incumbent upon Rossi's to present such evidence to the Magistrate Court. Rossi's failed to do so, and the Stay Order (which required Rossi's to make payments to Galleria) remained the law of the case.

For these reasons, the circuit court appropriately considered Galleria's arguments about the failure of Rossi's to make the payments required by the Stay Order.

CONCLUSION

For the foregoing reasons, this Court should dismiss the appeal of Rossi's and/or affirm the decision of the circuit court and grant such other and further relief to Galleria as this Court deems just and proper under the circumstances.

[Signature page to follows]

BURR & FORMAN LLP

s/James K. Gilliam

James K. Gilliam, SC Bar #0076695
104 South Main Street, Suite 700 (29601)
Post Office Box 447
Greenville, SC 29602
864-271-4940 (Telephone)
864-271-4015 (Facsimile)
jgilliam@burr.com

Henrietta U. Golding, SC Bar#002173
2411 Oak Street, Suite 206 (29577)
P. O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107 (Telephone)
(843) 444-4729 (Facsimile)
hgolding@burr.com

Counsel for Respondent

October 30, 2020
Greenville, South Carolina

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR.

s/James K. Gilliam

James K. Gilliam, SC Bar #0076695
104 South Main Street, Suite 700 (29601)
Post Office Box 447
Greenville, SC 29602
864-271-4940 (Telephone)
864-271-4015 (Facsimile)
jgilliam@burr.com

Henrietta U. Golding, SC Bar#002173
2411 Oak Street, Suite 206 (29577)
P. O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107 (Telephone)
(843) 444-4729 (Facsimile)
hgolding@burr.com

Counsel for Respondent

RECEIVED
NOV 02 2020
SC Court of Appeals