THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

Case No. 2011-CP-23-06482

Appellate Case No. 2013-000329

Harrison Partners, LLC, ... Appellant,

v.

Renewable Water Resources,................................... Respondent.

RESPONDENT'S REPLY TO APPELLANT'S RETURN

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Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Renewable Water Resources ("Respondent" or "ReWa") respectfully submits the instant Reply to Appellant Harrison Partners, LLC's ("Appellant" or "HP") Return.

INTRODUCTION

Riddled with preservation infirmities, which Appellant concedes, the instant appeal can never succeed, thereby warranting its immediate dismissal. Respondent moved to dismiss the instant appeal on April 4, 2013 demonstrating the lower court's November 16, 2012 Order ("Subject Order") contained five (5) alternative grounds ("Alternative Grounds"), which HP never contested. As a result, Appellant cannot now challenge the Alternative Grounds for the first time on appeal.

Appellant interposed a Return to ReWa's Motion to Dismiss ("Motion") on April 24, 2013. Importantly, Appellant's Return concedes the factual basis supporting ReWa's Motion. And, Appellant's Return raises no viable legal response to the Motion. Accordingly, the Court of Appeals should dismiss the instant appeal to avoid the needless expenditure of time and resources by both this Court and the parties.

I. BEFORE AND AFTER THE SUBJECT ORDER ISSUED, APPELLANT CONCEDES IT NEVER DISPUTED THE ALTERNATIVE GROUNDS.

Only one issue, strictly legal in nature, now remains in resolving Respondent's Motion. It is: Can Appellant raise arguments against the Alternative Grounds for the first time on appeal? This is true because Appellant's Return admits all the predicate facts supporting the instant Motion.

Appellant's Return fails to dispute any of the following:

(1) Respondent raised the Alternative Grounds to the Circuit Court.

(*See* App. Return, p. 1 ("Here, the issues [were] raised and the Circuit Court made a ruling which included the alternative sustaining grounds."); *see also* Resp. Mot. to Dism., Ex. A (Subject Order, pp. 13-14, "As raised by Respondent..." and, "While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal...").)[1]

(2) Appellant never responded to the Alternative Grounds in the lower court.

(*See* App. Return, p. 1 ("As a result, no further action was required to preserve...Appellant's right to appeal..."); *see also* Resp. Mot. to Dism., Ex. A (Subject Order, p. 14, "While Respondent raised all such issues in its brief opposing Appellant's grounds for appeal, Appellant provided no meaningful response to the same.").)

(3) Appellant's Motion for Reconsideration never challenged, questioned, or interposed any counter-arguments to any of the Alternative Grounds.

(*See* App. Return, p. 2 ("Here, the Appellant was not required to file a post trial motion in the Circuit Court regarding alternative sustaining grounds, or any other ruling that was expressly included in the Circuit's order."); *see also* Resp. Mot. to Dism., Ex. B (App. Mot. to Recon., p. 1 (Raising three grounds to "alter, amend, or reconsider" but embracing none of the Alternative Grounds.))

(4) Each Alternative Ground independently sustains the Subject Order.

(*See* App. Return, *passim* (Failing to address argument altogether); *see also* Resp. Mot. to Dism., p. 2 ("[E]ach of the Alternative Grounds created an independent basis to sustain the Subject Order.")

Thus, if the Court agrees South Carolina law required Appellant to raise arguments in the lower court before raising them in this Court, the Court should grant Respondent's Motion to Dismiss. As discussed *infra*, that is exactly what South Carolina law requires.

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[1] Respondent also raised all of the Alternative Grounds during the administrative hearing wherein Appellant similarly failed to respond to any of the same.

II. RULE 59(e) OPERATES THE SAME WHEN THE CIRCUIT COURT SITS IN AN APPELLATE CAPACITY.

Appellant's Return principally argues that Rule 59(e) somehow functions differently when a Circuit Court sits in an appellate capacity.[2] (*See* App. Return, p. 1 ("The Order under appeal in the present case is an order from the Circuit Court *sitting as an appellate court.*") Not so. The South Carolina Supreme Court decision of *Pikaart v. A & A Taxi, Inc., et al.*, 393 S.C. 312, 324, 713 S.E.2d 267, 273 (2011) squarely belies Appellant's argument.

Mirroring the instant facts, in *Pikaart*, the Circuit Court issued an opinion containing additional findings beyond what the administrative body found in the administrative decision presented on appeal. *Id.* at 324. Appellants thereafter failed to, "present[] any argument to the circuit court" challenging the additional findings thereby allowing "it the opportunity to amend its ruling." *Id.* As a consequence, on appeal, the Supreme Court ruled: "[A]ny error was not preserved and it is not properly before this Court." *Id.*

Here, without explanation and citing no authority, Appellant announces the Circuit Court's "*sitting as an appellate court*" excused its procedural obligation to afford the lower court an opportunity to correct potential errors infecting its ruling. (App. Return, p. 1.) But, the *Pikaart* Court squarely rejected Appellant's argument:

> Although Rule 59(e), SCRCP motions are not applicable in matters before the Commission itself, such motions are applicable when the circuit court sits in an appellate capacity, and they are required to preserve an issue for review by the Court of Appeals or this Court. *See Shealy*, 341 S.C. at 460, 535 S.E.2d at 444 (holding, in a workers' compensation case, that the alleged error was not preserved for appellate review where the circuit court did not rule on the issue and no Rule 59(e), SCRCP motion was made); *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 530 S.E.2d 127 (2000) (observing neither party filed a timely

[2] Appellant fails to explain how it contends a Rule 59(e), SCRCP Motion differs in relation to an order issued while the Circuit Court sits in an appellate capacity. Indeed, as explained *infra*, it does not.

> motion under Rule 59(e), SCRCP seeking clarification of the circuit court's order in an appeal from the Commission); *see also Hill v. South Carolina Dep't. of Health & Envt'l Control*, 389 S.C. 1, 698 S.E.2d 612 (2010) (stating Rule 59(e), SCRCP motions are necessary to preserve issues not ruled upon for review when the circuit court sits in an appellate capacity (citing City of Rock Hill v. Suchenski, 374 S.C. 12, 646 S.E.2d 879 (2007)).

Pikaart v. A & A Taxi, Inc., 393 S.C. 312, 324-325 (2011). This analysis controls and warrants the immediate dismissal of Appellant's appeal.

Just like in *Pikaart*, Appellant failed to respond to the Alternative Grounds. Just like in *Pikaart*, Appellant failed to present "any argument to the circuit court" allowing an "opportunity to amend its ruling." *Pikaart*, at 324. Just like in *Pikaart*, the Circuit Court sat in an appellate capacity reviewing an administrative decision. *Id.* at 324. Just like in *Pikaart*, then, Appellant cannot contest any of the Alternative Grounds included in the Subject Order. *Id.*; *see also Hill v. S.C. Dep't. of Health & Envtl. Ctrl.*, 389 S.C. 1, 17, 698 S.E.2d 612, 621, FN11 (2010) (Rule 59 Motions required to preserve issues for appeal even when Circuit Court sits in an appellate capacity.)

III. THE SUBJECT ORDER'S FINDINGS AGAINST APPELLANT DO NOT PRESERVE COUNTER-ARGUMENTS NEVER MADE BY APPELLANT.

Appellant mistakes the Subject Order's inclusion of Alternative Grounds as sufficient to preserve Appellant's unmade counter-arguments. (App. Return, p. 1 ("Here, the issues [were] raised and the Circuit Court made a ruling which included the alternative grounds. As a result, no further action was required to preserve [the] Appellant's right to appeal from the Circuit Court.") Appellant's analysis errs by conflating its own error preservation obligations with the lower court's adverse findings. If such logic held true, a litigant would never have to

respond to arguments in the Circuit Court since it could withhold points of error until it reached the Court of Appeals. This is the exact opposite of the law.

The South Carolina Supreme Court explicated a litigant's preservation obligations in *I'on, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 526 S.E.2d 716 (2000). In so doing, the *I'on* Court expressly rejected Appellant's argument concerning unmade counter-arguments:

> [T]he 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. This principle underlies the long-established preservation requirement that the losing party generally **must both present his issues and arguments to the lower court and obtain a ruling** before an appellate court will view those issues and arguments...**If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review**...Imposing this preservation requirement is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. The requirement also serves as a keen incentive for a party to prepare his 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, and give him another opportunity to prove his case.

Id. at 422 (emphasis added). Here, no dispute exists: Appellant never argued against any of the Alternative Grounds raised by Respondent; Appellant never challenged the Alternative Grounds in a Rule 59(e) Motion; Appellant never gave the lower court an opportunity to correct potential infirmities; and the Alternative Grounds independently sustain the Subject Order. Appellant, therefore, cannot now challenge the Alternative Grounds for the first time on appeal.

IV. RESPONDENT NOWHERE MISCONSTRUED SOUTH CAROLINA LAW.

Lacking any *bona fide* arguments and in search of *any* response, Appellant remarkably suggests *Respondent* has mis-cited case holdings in its Motion to Dismiss. This is untrue.[3] An actual review of the authority cited by Respondent unmasks Appellant's argument for what it really is—legerdemain—a dust-up--aimed at confusing the Court to conceal Appellant's lack of a cogent response.

Every decision cited by Respondent stands exactly for the contention cited:

- *Hill v. S.C. Dep't. of Health & Envtl. Ctrl.*, 389 S.C. 1, 17, 698 S.E.2d 612, 621 (2010)[4] held:

  "In contrast, **to preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.**" *Id.* (emphasis added.)

  Compare Resp. Mot. to Dismiss, p. 3 (quoting *Hill*, "**[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been both raised to and ruled upon by the trial court.**")(emphasis added.)

- *Elam v. S.C. Dep't of Transp.,* 361 S.C. 9, 23, 602 S.E.2d 772, 780-81 (2004) held:

  "Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. **Issues and arguments preserved for appellate review only**

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[3] By contrast, Appellant's Return tellingly cites no authority of its own.

[4] Without elaboration, Appellant suggests *Hill* "involved an issue that was not ruled on by the trial court but argued on appeal." (App. Return, p. 2.) Respondent cannot discern what Appellant references. *Hill* involved a wide variety of issues raised by both Appellant and Respondent. It also involved jurisdictional issues. Respondent cannot identify any unpreserved issues in *Hill*.

when they are raised to and ruled on by the lower court." *Id.* (emphasis added.)

Compare Resp. Mot. to Dismiss, p. 3 (quoting *Elam*, "**Issues and arguments preserved for appellate review only when they are raised to and ruled upon by the lower court.**")

- *RO-LO Enterprises v. Hicks Enterprises, Inc.*, 294 S.C. 111, 112, 362 S.E.2d 888, 889 (Ct. App. 1987) held:

  "During oral argument, counsel for Hicks conceded the defense of waiver had not been presented to the trial judge for consideration...**We cannot grant relief on issues argued for the first time on appeal.**" *Id.* (emphasis added.)

  Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *RO-LO*, "**We cannot grant relief on issues argued for the first time on appeal.**") (emphasis added.)

- *Biales v. Young*, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) held:

  "**Failure to argue is an abandonment of the issue and precludes consideration on appeal**. SCACR Rules 207(b)(1)(B)(D). *See also Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987). Accordingly, we affirm the trial court's ruling on this issue."

  Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *Biales*, "**Failure to argue is an abandonment of the issue and precludes consideration on appeal.**")[5]

- *Duck v. Jenkins*, 297 S.C. 136, 375 S.E.2d 178 (Ct. App. 1988) held:

  "**An unchallenged finding of fact will not be disturbed by this court on appeal**. *Evans v. Bruce*, 245 S.C. 42, 138 S.E.2d 643 (1964) (absence of an exception precludes review").

  Compare with Resp. Mot. to Dismiss, p. 3 (Quoting *Duck*, "**An unchallenged finding of fact will not be disturbed by this court on appeal.**")

- *Ransom v. S.C. Water Res. Comm'n*, 321 S.C. 211, 219, 467 S.E.2d 463, 467 (Ct. App. 1996) held:

[5] Failing to respond constitutes an abandonment of an issue in all judicial proceedings. For example, Appellant's failure to respond to various contentions raised in Respondent's Motion to Dismiss constitutes abandonment of those issues.

> "This issue was not raised in Ransom's response to the Commission's motion for summary judgment, in the order, or in Ransom's motion to alter or amend the judgment, pursuant to Rule 59, SCRCP. An appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Id.*
>
> *Compare with* Resp. Mot. to Dismiss, p. 4 (Citing *Ransom* as "Declining to address an issue not raised in response to Respondent's summary judgment motion, in the order, or in Appellant's Rule 59 motion.")

Accordingly, Appellant's argument in this regard wholly lacks merit.

V. RESPONDENT NEVER SUGGESTED APPELLANT'S FAILURE TO PRESERVE ISSUES IMPLICATED JURISDICTION.

Appellant's Return later cites the *Hill* decision arguing the failure to preserve an issue does not impact this Court's jurisdiction to hear the appeal. (App. Return, p. 2.) But such argument has no bearing on the instant Motion. Respondent never argued Appellant's preservation failures impaired the Court's jurisdiction.[6] By contrast, Respondent *did* argue Appellant's appeal wholly lacks viability.

Respondent's argument is simple: (1) Appellant never challenged the Alternative Grounds below; (2) Appellant cannot now challenge the Alternative Grounds on appeal; (3) the Alternative Grounds independently sustain the Subject Order; (4) thus, even if Appellant wins all other issues, the Subject Order still must be affirmed. Thus, Appellant's argument lacks merit and the instant appeal warrants dismissal.

VI. THE ALTERNATIVE GROUNDS RIPENED TO FINALITY SUSTAINING THE SUBJECT ORDER.

Whether intentionally or by confusion, Appellant misapprehends the issues relating to the Alternative Grounds ripening to finality. A litany of decisions (cited in Respondent's

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[6] The analogy of a cause of action where Plaintiff fails to allege the *prima facie* elements of a claim proves similar. A court has jurisdiction to hear the claim but the litigant has no right to proceed with its prosecution. Here, the Court of Appeals has jurisdiction to hear the appeal but Appellant has no right to proceed with its prosecution.

Motion to Dismiss, pp. 4-5) expressly establish unchallenged alternative grounds will support affirming a trial court order. Appellant's Return fails to refute such legal tenet.

The instant case presents this exact situation. Appellant never challenged—and cannot now challenge—the Alternative Grounds. Appellant has, therefore, failed to preserve any arguments it can raise against the Alternative Grounds, which will consequently sustain the Subject Order. Appellant offers no reason why its inability to challenge the Alternative Grounds does not foreclose its ability to prevail on appeal. This is because none exists. As a consequence, the Alternative Grounds have ripened to finality and the Court should grant Respondent's Motion to Dismiss.

CONCLUSION

Contrary to Appellant's assertions, no right exists to pursue an unwinnable appeal. For the reasons stated in Respondent's Motion, and for the reasons set forth above, the Court should grant Respondent's Motion to Dismiss.

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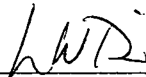
By: 

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PROOF OF SERVICE

I, the undersigned Attorney of the law offices of Nelson Mullins Riley & Scarborough, LLP, attorneys for Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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April 30, 2013