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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2010-2011

2090532

Hillcrest, Ltd.

v.

City of Mobile

Appeal from Mobile Circuit Court
(CV-03-3091)

On Application for Rehearing

PITTMAN, Judge.

On application for rehearing, the appellee City of Mobile posits, and the dissent agrees, that this court has reversed the trial court's judgment, in part, on a ground not asserted

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by the appellant, Hillcrest, Ltd. Suffice it to say that after the appellant's brief had challenged the correctness of the summary judgment in its entirety, particularly arguing that the condemnation action brought by the state did not have any preclusive effect, the City of Mobile's appellee's brief sought to defend the trial court's summary judgment as it applied to the claimed intrusions of surface water between 1979 and the subsequent construction of the drainage ditch on the basis that those claims had been "abandoned." Although it is, of course, proper for an appellee to seek affirmance of a summary judgment upon any ground that might appear of record "unless due-process constraints require otherwise" (Wheeler v. George, 39 So. 3d 1061, 1083 (Ala. 2009)), it is likewise proper for an appellate court to determine whether those arguments are valid (and to decide, when appropriate, that they are not, as in this case). Because the opinion on original deliverance is responsive to the issues presented by the parties, the application for rehearing is overruled.

APPLICATION OVERRULED.

Thompson, P.J., and Bryan and Thomas, JJ., concur.

Moore, J., dissents, with writing.

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MOORE, Judge, dissenting.

I concurred in this court's opinion issued in this case on November 19, 2010. In its application for rehearing, the City of Mobile argues that Hillcrest, Ltd., did not raise as an issue on appeal that the trial court erred in entering a summary judgment on Hillcrest's claim arising from water intrusion onto Hillcrest's property. I agree. Nowhere in its initial appellate brief to this court did Hillcrest make that argument. Although the opinion on rehearing notes that "the appellant's brief had challenged the correctness of the summary judgment in its entirety, particularly arguing that the condemnation action brought by the state did not have any preclusive effect," ___ So. 3d at ___, there was no argument addressed specifically to the claim arising from water intrusion. "[W]e cannot create legal arguments for a party based on undelineated general propositions unsupported by authority or argument." Spradlin v. Spradlin, 601 So. 2d 76, 79 (Ala. 1992). "An argument not made on appeal is abandoned or waived." Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003). Accordingly, I conclude that the opinion issued by this court on original submission is

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incorrect insofar as it reverses the summary judgment on Hillcrest's claim arising from water intrusion onto its property.

Based on the foregoing, I dissent to the overruling of the City of Mobile's application for rehearing.