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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2022-000061
Trial Court Case No. 2017-CP-42-04476

Equinox, LLC ..... Plaintiff,

v.

Brandon Epps & Courtney Epps..... Appellants,

And

Brandon Epps and Courtney Epps, as Next of Friends of Alexis Marion Hucks, Adrianne Belle Hucks, Wells Skipper Hucks, Sawyer Lane Epps, Cooper Wade Epps, and Lili Madelyn Epps..... Appellants,

v.

Richard B. Dreskin.....Respondent.

INITIAL BRIEF OF RESPONDENT RICHARD B. DRESKIN

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2. DID THE LOWER COURT ERR WHEN IT DISMISSED APPELLANTS' CAUSE OF ACTION FOR ALTER EGO AGAINST RESPONDENT BECAUSE SOUTH CAROLINA LAW DOES NOT RECOGNIZE SUCH A CLAIM?

STATEMENT OF THE CASE

On or about October 17, 2017, this litigation began when the landlord, Equinox, LLC ("Equinox"), filed an ejectment action against the tenants, Defendants Brandon Epps and Courtney Epps, in the Spartanburg County Magistrate Court captioned, "*Equinox, LLC v. Brandon & Courtney Epps*, C.A. No. 2017CV4210108684." After the Magistrate Court held it lacked subject matter jurisdiction, Equinox filed a summons and complaint against Defendants Brandon Epps and Courtney Epps on December 7, 2017 seeking damages, ejectment, and equitable relief. Compl., filed Dec. 7, 2017. On February 14, 2018, Equinox filed an amended complaint against Brandon Epps and Courtney Epps alleging four causes of action for breach of contract, quantum meruit/unjust enrichment, conversion, and defamation. *See* Amd. Compl. On March 9, 2018, Defendants Brandon Epps and Courtney Epps filed their amended answer and amended counterclaims alleging four counterclaims solely against Equinox for breach of contract, breach of warranty of habitability, nuisance, and negligence. *See* Amd. Ans.

On November 21, 2018, Defendants Courtney Epps and Brandon Epps filed a motion to join additional parties, including their six minor children Alexis Marion Hucks, Adrianne Belle Hucks, Wells Skipper Hucks, Sawyer Lane Epps, Copper Wade Epps, and Lilli Madelyn Epps (collectively, the "Appellants"). *See* Joint Mot., filed Nov. 21, 2018. An order joining the six minor children and Outside of the Box Business Solutions, LLC as third-party parties was entered

on December 3, 2018, however no third-party complaint setting forth their claims was filed until nearly two years later. *See* Order, filed Dec. 3, 2018. After mediation resulted in an impasse on January 23, 2019, the Appellants' former counsel filed a motion for withdrawal on March 6, 2019, which was granted on March 11, 2019. *See* Mot. For Withdrawal, filed Mar. 6, 2019; Order, filed Mar. 11, 2019.

After no counsel appeared on behalf of the Appellants and no pleadings were filed for the newly joined parties, Equinox filed a motion to dismiss and for partial summary judgment on April 26, 2019. Mot. To Dismiss, filed Apr. 26, 2019. Before a hearing was held, the Appellants filed a motion *pro se* dismissing any claims brought on behalf of Outside of the Box Business Solutions, LLC, which was granted on May 15, 2019. Order filed May 15, 2019. On August 22, 2019, Equinox filed a motion for summary, which it withdrew after the Appellants' new counsel filed a notice of appearance on October 16, 2019. *See* Joint Mot. to Cont., filed Oct. 21, 2019.

On December 6, 2019, the Appellants filed a Motion for Leave to Amend Answer seeking to file a new pleading which included new third-party claims against Respondent Richard B. Dreskin, who had never before been named as a party to the litigation. Mot. For Leave to Amd., filed Dec. 6, 2019. Before the trial court ruled on the motion, the parties filed a consent order striking the case from the active docket pursuant to Rule 40(j), which the trial court granted on January 23, 2020. *See* Order, filed Jan. 23, 2020.

On March 31, 2020, new counsel was substituted for the Appellants, and they filed a motion seeking to restore the case to the active docket on April 3, 2020. Mot. To Rest., filed Apr. 3, 2020. Prior to a hearing or ruling on their motion to amend, the Appellants filed a separate lawsuit on April 16, 2020 alleging substantially similar claims captioned "*Courtney Epps and Brandon Epps, individually, and as next of friends of Alexis Marion Hucks, Adrianne Belle Hucks, Wells Skipper*

Hucks, Sawyer Lane Epps, Cooper Wade Epps, And Lilli Madelyn Epps v. Richard B. Dreskin and Equinox, LLC, C.A. No. 2020-CP-42-01301" (the "2020 Action"). On May 12, 2020, the parties filed a consent order restoring this case to the active trial roster. Consent Order, filed May 12, 2020. On May 19, 2020, the Appellants filed a motion to consolidate the 2020 Action with the newly restored action. Mot. To Consolidate, filed May 19, 2020. On October 9, 2020, the court issued an order requiring the Appellants to dismiss the 2020 Action without prejudice and permitting the Appellants to file amended pleadings in the current litigation. Order, filed Oct. 9, 2020.

On October 12, 2020, the Appellants filed their Second Amended Answer and Counterclaims and Third-Party Claims naming Respondent Richard B. Dreskin as a party for the first time in this litigation. Sec. Amd. Ans., filed Oct. 12, 2020. The Appellants' amended pleadings alleges claims of (i) breach of contract, (ii) breach of warranty of habitability, (iii) nuisance, and (iv) negligence solely against Equinox and the remaining causes of action for (v) breach of contract accompanied by fraudulent act, (vi) violation of S.C. Unfair Trade Practices Act, (vii) conversion, and (viii) "alter ego" against both Respondent and Equinox. *See id.*

On November 12, 2020, Respondent filed a motion seeking dismissal pursuant to Rules 12(b)(6) and 12(c), SCRCP. Mot., filed Nov. 12, 2020. After the parties submitted memoranda, a hearing on Respondent's motion was held on March 24, 2021. *See* Order, filed Jan 14., 2022. On December 21, 2021, the trial court issued a Form Four Order (the "Form Four Order") setting forth its reasons for granting Respondent's motion and instructing Respondent's counsel to draft a formal order to that effect. *See* Order, filed Dec. 21, 2021. After submission of the proposed order, the trial court issued a formal order granting Respondent's motion to dismiss on January 14, 2022 (the "Order"). *See* Order, filed Jan. 14, 2022. Five days later, Appellants filed a notice of

appeal with the Court of Common Pleas of Spartanburg County relating to their appeal of the Order. Notice of Appeal, filed Jan. 19, 2022. Appellants did not file a motion seeking to alter or amend the Order pursuant to Rule 59(e), SCRCP prior to the notice of appeal.

STATEMENT OF FACTS

On February 1, 2016, Equinox, Defendant Courtney Epps, and Kathy Owens entered into a Lease Agreement (the "Lease") for the premises located at 618 Garden Rose Ct, Greer, SC 29651 (the "Premises"). Amd. Compl., ¶ 5. On October 1, 2017, Equinox, Defendant Courtney Epps, and Defendant Brandon Epps signed a document entitled "Lease Extension and Modification Agreement" which modified the Lease to add Defendant Brandon Epps as a lessee, remove Kathy Owens as a lessee, and extend the Lease term from October 1, 2017 until September 30, 2018. *Id.*, ¶¶ 10-11.

In May 2017, the Appellants notified Equinox for the first time that they believed mold was present at the Premises. *Id*., ¶ 13; *see also* Sec. Amd. Ans., ¶ 68. Although Equinox spent multiple weeks attempting to locate a water leak, including drywall removal and replacing an undamaged toilet seal, it did not locate any evidence of an active leak or visible mold. Amd. Compl., ¶¶ 13-14. Rather, Equinox located discolored floorboards in the guest bathroom where it appeared the toilet had overflowed due to a blockage caused by Appellants. *Id*.

On October 9, 2017, Equinox notified the Appellants that they were months behind on rent and would be evicted unless payment was received. *Id.*, ¶ 15. The Appellants abandoned the Premises, refused to pay back rent, and claimed various health ailments due to alleged mold exposure. *Id*., ¶¶ 15-16; *see* Sec. Amd. Ans., ¶¶ 14, 62, 68. On October 17, 2017, Equinox filed an ejectment action against Defendants Brandon Epps and Courtney Epps in the Spartanburg County Magistrate Court. Amd. Compl., ¶ 17.

STANDARD OF REVIEW

On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Grimsley v. S.C. Law Enforcement Div*., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003). The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief under any theory of the case. *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426. The Court may sustain the dismissal when "the facts alleged in the complaint do not support relief under any theory of law." *Flateau*, 355 S.C. at 202, 584 S.E.2d at 416.

ARGUMENT

With respect to the Appellants' claims against Respondent, the instant appeal presents the following questions: (i) whether the lower court correctly determined that the applicable statute of limitations bars Appellants' first three claims against Respondent individually for breach of contract accompanied by fraudulent act, violation of S.C. Unfair Trade Practices Act, and conversion and (ii) whether the lower court correctly determined that Appellants cannot maintain their final cause of action for "alter ego" against Respondent as a matter of law. As argued below, the position of both the trial court and Respondent is that Appellants' motion to amend did not stop the running of the statute of limitations and that South Carolina law does not recognize an independent cause of action for "alter ego."

I. THE LOWER COURT CORRECTLY HELD THAT THE STATUTE OF LIMITATIONS BARS APPELLANTS' CLAIMS AGAINST RESPONDENT FOR BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT, VIOLATION OF THE SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT, AND CONVERSION

In this case, the parties and the lower court agree that a 3-year statute of limitations governs Appellants' causes of action for breach of contract accompanied by fraudulent act, violation of S.C. Unfair Trade Practices Act, and conversion. *See* S.C. Code Ann. § 15-3-530(1) (breach of contract accompanied by fraudulent act); §§ 15-3-530(4), (5) (conversion); § 39-5-150 (unfair trade practices). The only preserved issue presented by this appeal is whether Appellants' motion to amend filed within the statute of limitations saves their claims against Respondent. Appellants acknowledge these actions would be otherwise untimely.

A. The Lower Court Correctly Held that Appellants' Motion to Amend Did Not Extend or Toll the 3-Year Statute of Limitations

i. Appellants Failed to Commence a Claim within the 3-Year Statute of Limitations

A statute of limitations reduces the interval between the accrual and commencement of a right of action to a fixed period, thereby putting to rest claims after the passage of time. *See* 51 Am.Jur.2d Limitations on Actions 15 (1970); *Nowlin v. General Tel. Co*., 310 S.C. 183, 426 S.E.2d 114 (Ct. App. 1992), aff'd, 314 S.C. 352, 444 S.E.2d 508 (1994). Unless an action is commenced before expiration of the limitations period, the plaintiff's claim is normally barred. *See McLain v. Ingram*, 314 S.C. 359, 444 S.E.2d 512 (1994). "[S]tatutes are designed to promote justice by forcing parties to pursue a case in a timely manner. Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs." *State ex rel. Condon v. City of Columbia*, 339 S.C. 8, 19, 528 S.E.2d 408, 413–14 (2000).

In South Carolina, an action is barred unless it is "commenced" within the period set forth in statute. S.C. Code Ann. § 15-3-20(a). In order to commence a civil action, the action must be filed and served either within the applicable statute of limitations or 120 days after the statute of limitations expires. Rule 3, SCRCP; *see also* S.C. Code Ann. § 15-3-20(b).

Here, the Appellants' failed to "commence" any action against Dreskin within the 3-year statute of limitations. Under South Carolina's discovery rule, Appellants' claims accrued no later than May 2017 when they "delivered a written notice to the Plaintiff specifying the acts and omissions constituted the breach." Sec. Amd. Ans., ¶ 68; *see also* Appellants' Initial Brief, p. 3 ("The Epps first discovered the water and mold problems in May 2017."). Therefore, Appellants had until at the latest May 30, 2020 to "commence" an action against Respondent under the statute of limitations. *See* S.C. Code Ann. §§ 15-3-530(1), (4), (5); S.C. Code Ann. § 39-5-150 (unfair trade practices). Appellants concede that if the applicable statute of limitations is applied to their claims for breach of contract accompanied by a fraudulent act and violation of the S.C. Unfair Trade Practices Act, their claims are time-barred. *See* Appellants' Initial Brief, pp. 7-8 ("[T]he Epps allege that these defects remained hidden from them until May 2017, when they first discovered the water and mold issues and notified Equinox.").

The first pleading filed in this Action asserting any claims against Respondent was not filed until October 12, 2020. *See* Sec. Amd. Ans. Therefore, this pleading was filed 5 months after the expiration of the statute of limitations in May 2020. To save their claims against Respondent, Appellants argue that the statute of limitations should be tolled because they filed a motion to amend their pleadings within the statute of limitations, point to North Carolina law in support of their position, and claim that no South Carolina court has considered whether a motion to amend tolls the applicable statute of limitations. *See* Appellants' Initial Brief, pp. 5-6.

ii. Equitable Tolling Does Not Apply to Appellants' Claims

While it is true that no South Carolina appellate court has issued an opinion on the narrow question of whether filing a motion to amend instead of a pleading "commences" an action under the statute of limitations, Appellants' general argument relates to the concept of equitable tolling. "South Carolina has rarely applied the doctrine of equitable tolling to halt the running of the statute of limitations. Equitable tolling is reserved for extraordinary circumstances." *Am. Legion Post 15 v. Horry Cty*., 381 S.C. 576, 582, 674 S.E.2d 181, 184 (Ct. App. 2009); *Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) ("Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations."). "Equitable tolling…is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." *Am. Legion Post 15*., 381 S.C. at 583. South Carolina has specifically rejected equitable tolling because of errors or deficiencies in pleadings:

> A pleading error by Respondents does not serve as a justification for tolling the statute of limitations. Respondents bear the burden of protecting their claim from procedural bars and may not use tolling to save their claim. No rule or statute exists which tolls statute of limitations periods based on improper pleadings.

City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 234, 599 S.E.2d 462, 466 (Ct. App. 2004). Similarly, "when an action is dismissed without prejudice, the statute of limitations will bar another suit if the statute has run in the interim." *Id*.

Appellants point to no law, decision, or circumstance that would justify the "extraordinary circumstances" required for equitable tolling to apply. Appellants have known all of the facts relevant to their claims against Respondent since May 2017 yet chose to wait until October 2020 to assert those claims. While Appellants cite the coronavirus pandemic as a reason for their delay,

the pandemic's existence during the last 2 months of the statute of limitations does not warrant the "extraordinary circumstances" necessary for equitable tolling. This litigation had been pending for more than 2 years when Appellants first sought to amend their pleadings to name Respondent as a defendant. No discovery was done prior to Appellants' motion to amend that revealed facts previously unknown to Appellants, and there are few, if any, new facts included in the Appellants' amended pleadings beyond Respondent's name in the caption. If Appellants were concerned about the expiration of the statute of limitations and the time it would take to obtain the court's permission to amend their pleadings, their decision to dismiss this case under Rule 40(j) while they had a pending motion to amend less than 4 months before the statute of limitations expired jeopardized their ability to timely commence their claims against Respondent far more than the first two months of the pandemic. Regardless, nothing "extraordinary" prevented Appellants from timely seeking the Court's permission to amend their claims.

iii. Multiple Jurisdictions Have Rejected Appellants' Argument that a Motion to Amend "Commences" An Action under the Statute of Limitations

Appellants readily admit their position has no basis in South Carolina law as our appellate courts have never considered the narrow question of whether filing a motion to amend is the equivalent of "commencing" an action under S.C. Code Ann. § 15-3-20. While Appellants urge the Court to adopt a single holding by the North Carolina Court of Appeals, they ignore the numerous courts which have expressly held otherwise.

Multiple jurisdictions outside South Carolina have rejected the argument that merely filing a motion to amend within the statute of limitations satisfied a party's obligation to timely commence a claim. For example, the Supreme Court of Mississippi adopted the bright line rule that an amended complaint must be filed within the statute of limitations against newly named parties to be timely regardless of the timing of a motion to amend. *Wilner v. White*, 929 So. 2d

315, 319 (Miss. 2006) ("[I]f an amended complaint is filed after the statute of limitations has run—regardless of when the motion to amend was made—the statute of limitations bars suits against newly named defendants."). A similar result was reached in Georgia. In construing Georgia's civil action commencement statute, the Court of Appeals of Georgia observed that statute is clearly premised on the filing of a pleading. A mere motion to amend is not sufficient. *Exel Transp. Services, Inc. v. Sigma Vita, Inc*., 288 Ga.App. 527, 530, 654 S.E.2d 665, 669 (Ga. App. 2007) (observing that the appellant "cited no authority for the proposition that the mere filing of a motion for a permissive counterclaim is the equivalent of bringing a claim."). Much like Georgia's statute, S.C. Code Ann. § 15-3-20 mentions only a "summons and complaint" and makes no mention of a motion. In contrast, the North Carolina statutes at issue in *Simpson* are silent as to whether the filing of a summons and complaint (or a motion) are required to commence an action. *See* N.C. Gen. Stat. Ann. § 1-15 (West).

Even the cases cited by Appellants cut against their argument. Where courts have been willing to suspend the statute of limitations due to a pending motion to amend, these courts have required that both the motion to amend and the proposed pleading must be served on the new parties within the statute of limitations. Citing the same case relied upon by Appellants, a Colorado appeals court noted, "[I]f a plaintiff files a motion to amend the complaint, accompanied by an amended complaint, and serves both upon the defendant before the expiration of the statute of limitations, the statute is tolled until the trial court rules on the motion." *Moore v. Grossman*, 824 P.2d 7, 9 (Colo. App. 1991) (emphasis added). The Court of Appeals of Indiana made the same observation that the motion to amend and proposed pleading must be served on the newly named parties within the statute of limitations for the tolling period to occur:

> We find no Indiana case that holds that the filing of a motion to amend a complaint for the purpose of adding a new defendant tolls the running of the statute of

> limitations until the court rules on the motion…Even if we were inclined to adopt the rule in Indiana, the record does not reflect that the Freets met the requirements for tolling. That is, although the Freets filed both a motion to amend the complaint and the amended complaint before the expiration of the limitations period, there is no indication that the motion and amended complaint were served upon A.J.'s before the limitations period expired.

A.J.'s Automotive Sales, Inc. v. Freet, 725 N.E.2d 955, 966 (Ind. App. 2000).

Here, Respondent was not served with an amended pleading or a motion to amend Appellants' pleading until well after the statute of limitations expired. As the lower court records demonstrate, Appellants filed a motion for leave to amend their answer on December 6, 2019. *See* Mot. for Leave, filed Dec. 6, 2019. As the Notice of Electronic Filing indicates, only Plaintiff Equinox, LLC was served electronically with Appellants' motion. *See* Notice of Electronic Filing, Dec. 9, 2019. Instead of opting to serve the motion or proposed pleading upon Respondent, Appellants dismissed this action pursuant to Rule 40(j), SCRCP, on January 23, 2020, effectively removing their motion to amend from the docket. *See* Order, filed Jan. 23, 2020. Therefore, to the extent that the Court could impute any "tolling" to the pendency of the motion to amend filed December 6, 2019, any such tolling was effectively terminated on January 23, 2020 as neither the motion nor this litigation was "pending" after January 23, 2020.

Appellants' argument that their motion to amend relieved their obligation to file and serve a summons and complaint should be rejected. South Carolina's statute clearly defines commencement upon two actions by the plaintiff - the filing of a "summons and complaint" with the clerk of court and the subsequent service of that pleading. S.C. Code Ann. § 15-3-20(b). A motion to amend satisfies neither criteria.

B. Appellants' Remaining Arguments Were Not Preserved for Appeal and Should Be Rejected

South Carolina's appellate courts, with very limited exceptions, have "consistently refused to apply the plain error rule. ... Instead, it is the responsibility of trial counsel to preserve issues for

appellate review." *Jackson v. Speed*, 326 S.C. 289, 306-07, 486 S.E.2d 750, 759 (1997). A party must raise his issues and arguments in the trial court and obtain a ruling. When a party raises an issue and the judge does not rule on it, the party must file a Rule 59(e), SCRCP, motion in order to preserve the issue for appellate review. *See, e.g. I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000) (noting the "important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling"); *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, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Summer v. Carpenter*, 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997) (where trial judge did not rule on issue at trial and party did not make Rule 59(e) motion for a ruling, issue is not preserved for review); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).

Here, Appellants appear to argue that because they filed a separate lawsuit within the statute of limitations asserting the same claims as this litigation, the claims they raised in their October 12, 2020 pleading are not untimely. Despite Appellants' obligation to preserve this issue for appeal, this argument was never raised before the lower court, and the lower court never made a ruling on whether the 2020 Action preserved any statute of limitations in this action. While both the Form Four Order and the Order discuss Appellants' arguments on whether their motion to amend extended any statute of limitations, neither order mentions the 2020 Action or any effect it had on the statute of limitations analysis. *See* Order, filed Dec. 21, 2021; Order, filed Jan. 14, 2022. Appellants had an affirmative duty to file a motion under Rule 59(e), SCRCP and to obtain a ruling on this issue. Appellants filed no such motion and instead filed only their Notice of Appeal

5 days after the Order was issued. Notice of Appeal, filed Jan. 19, 2022. Because the lower court's orders do not address or make any rulings on this argument, the issue was not preserved for appeal.

Even if Appellants had preserved their argument, it is without merit. Filed months after the parties dismissed this litigation pursuant to Rule 40(j), SCRCP, the 2020 Action pled no facts that had not already been raised in this litigation either in previously filed pleadings or pleadings that Appellants had moved the lower court to allow them to file on December 6, 2019. Rather than pursuing their December 6, 2019 motion to amend in this litigation, Appellants instead opted to dismiss this action pursuant to Rule 40(j) without having obtained the lower court's permission to amend as required by Rule 15(a), SCRCP. Their failure to comply with Rule 15(a) was not relieved by filing a duplicative lawsuit, which culminated in the lower court ordering Appellants to dismiss the 2020 Action. Order, filed Oct. 9, 2020.

Despite the dismissal of the 2020 Action, Appellants believe that these dismissed claims preserved the statute of limitations in this action because a single line from the Order issued October 9, 2020 reads, "[T]he parties agreed it is in the interests of judicial economy for all of the claims at issue in the 2017 Action and 2020 Action to proceed under one civil action number." *Id.* Appellants' argument is erroneous because this statement is not evidence of any waiver by Respondent of any defense under the statute of limitations. Rather, the order merely acknowledges Respondent's argument that Appellants were required to first obtain court permission under Rule 15(a), SCRCP to amend their pleadings in this action rather than filing a separate, duplicative lawsuit requiring dismissal under Rule 12(b)(8).

Additionally, Appellants also appear to advance a new argument that their conversion claim against Respondent accrued after May 2017. As with the above arguments relating to the 2020 Action, the Order makes no reference to any separate accrual or statute of limitations analysis

for the conversion claims, and Appellants did not raise this issue in a timely Rule 59(e) motion before appeal. Therefore, it has not been preserved for appeal by Appellants. Moreover, even if the argument was properly preserved for appellate review, the argument is erroneous because Appellants have failed to plead a cause of action for conversion or identify when such a claim accrued. Although Appellants' seventh cause of action identifies it is asserted against both Equinox and Respondent, Appellants make no factual allegations describing any conduct by Respondent relevant to conversion. Rather, all such allegations are solely directed at the "Plaintiff," which is Equinox. *See* Sec. Amd. Ans., ¶¶ 64, 102-105. Moreover, while Appellants' initial brief claims that the date when "Plaintiffs sold all of Defendants' belongings to unwitting buyers" occurred after the Lease's effective termination of November 18, 2017, *see* Appellants' Initial Brief, p. 8, neither their pleading nor any evidence in the record substantiates their new claims. Ultimately, Appellants fail to provide any evidence which would compel this Court to overrule the trial court.

II. THE LOWER COURT CORRECTLY DISMISSED APPELLANTS' CLAIM FOR ALTER EGO AGAINST RESPONDENT AND APPELLANTS FAILED TO PRESERVE THEIR REMAINING ARGUMENTS AS TO THE SUFFICIENCY OF THEIR ALLEGATIONS OF CORPORATE DOMINATION AND INEQUITABLE CONSEQUENCES

Having disposed of the first three claims against Respondent as untimely under the statute of limitations, the Order concludes by finding that Appellants' sole remaining cause of action for "alter ego" must be dismissed because it is not an independent cause of action recognized by South Carolina law, citing *Drury Dev. Corp. v. Found. Ins. Co*., 380 S.C. 97, 668 S.E.2d 798 (2008). Appellants appear to concede that South Carolina law does not recognize a claim for alter ego as they make no arguments to the contrary. Instead, Appellants dedicate the last 5 pages of their initial brief to issues that were never decided by the lower court – namely what elements Appellants

may have been required to plead to pierce Equinox's corporate veil and whether the allegations of the Second Amended Answer meet Rule 12 pleading standards.

Appellants' position is futile because, as they readily admit, Appellants did not preserve this issue for appeal. As previously set forth in detail, *supra*. at 12, South Carolina law is clear that, 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. *I'On, L.L.C.*, S.C. at 422, 526 S.E.2d at 724. The Order neither makes a ruling nor does it undertake any analysis of whether Appellants sufficiently pled Respondent's domination and control of Equinox or whether his domination of Equinox lead to inequitable consequences. *See* Order, issued Jan. 14, 2022. Appellants concede the lower court did not issue any ruling on this subject. *See* Appellants' Initial Brief, p. 10 ("The trial court did not substantively address the sufficiency of Appellants' allegations given its belief about the viability of Appellants' claims. Appellants, therefore, deal with them here."). Instead of attempting to obtain a ruling from the lower court as to what elements they were required to plead and whether they sufficiently pled them, Appellants instead opted to forgo any motion under Rule 59(e) and filed the instant notice of appeal 5 days after the issuance of the Order. *See* Notice of Appeal, Jan. 19, 2022. Accordingly, Appellants have abandoned any argument concerning whether the trial erred in finding that South Carolina does not recognize a cause of action for alter ego liability and their remaining arguments are not preserved for appeal.

CONCLUSION

For the reasons stated above, this Court should affirm the order of the lower court issued January 14, 2022 granting Respondent Richard B. Dreskin's motion pursuant to Rules 12(b)(6) and 12(c) of the *South Carolina Rules of Civil Procedure*.

Signature page follows

June 20, 2022

Respectfully submitted,

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