

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM LEXINGTON COUNTY

SC Court of Appeals

THE HONORABLE WALTON J. MCLEOD, CIRCUIT COURT JUDGE

Appellate Case No. 2022-001060

Emily P. Smith and Emily P. Smith and Associates, LLC, Appellants,

v.

Robert T. Smith, Southern Collection, LLC, Southern Collection
Brokerage, LLC, Terrence Smith and Associates, LLC, Robert B. Smith
and Sherry C. Smith, Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Trial Court properly dismiss the case pursuant to Rule 12(b)(1), SCRCPP, where the Family Court has exclusive jurisdiction over the parties' marital property, including the distributional interests of Southern Collection, LLC?
- II. Did the Trial Court properly dismiss the case pursuant to Rule 12(b)(1), SCRCPP, where the South Carolina LLC Act does not grant the Circuit Court exclusive jurisdiction to hear judicial dissolution actions?
- III. Should dismissal pursuant to Rule 12(b)(6), SCRCPP, be affirmed, where this issue is not preserved for appellate review, and, in any event, the Complaint failed to allege sufficient facts to support the causes of action in the Complaint?
- IV. Should the Trial Court's holding that the Family Court has jurisdiction against the causes of action against Terence Smith & Associates, LLC, Southern Collection Brokerage, LLC, Sherry C. Smith and Robert T. Smith be affirmed, where applicable South Carolina law supports that decision?
- V. Should the Order denying the Motion for Appointment of a Receiver be affirmed, where that issue has effectively been abandoned on appeal, and in any event, there is no support for any conclusion that the Trial Court abused its discretion?
- VI. Should the result in the Trial Court be affirmed, where Emily waived her right to a jury trial by first commencing an action in the Family Court, thereby invoking that court's exclusive jurisdiction over all disputes and parties involved in the subsequent Circuit Court action?

STATEMENT OF THE CASE AND RELEVANT FACTS¹

Appellant Emily P. Smith (“Emily”) and Respondent Robert T. Smith (“Terence”) married on November 3, 2012. [R. p. 42] On May 25, 2020, Emily and Terence formed Southern Collection, LLC, (“Southern Collection” or the “Company”) by filing Articles of Organization with the South Carolina Secretary of State’s office for the purpose of operating a real estate company. [R. p. 104] Terence and Emily were the sole members of Southern Collection and each owned 50% of the distributional interests in the Company.² [R. p. 104]

Emily filed an action for divorce on or about August 18, 2021, in the Lexington County Family Court, Case No.: 2021-DR-32-1578 (the “Divorce Action”) [R. pp. 42-47] In the Divorce Action, Emily requested a division of the marital assets and debts, as well as a Mutual Restraining Order prohibiting the parties from “encumbering, disposing of, hypothecating, or otherwise depleting marital assets. . .”. [R. p. 46] Terence filed an Answer and Counterclaim in the Divorce Action requesting the same, and also requesting that the Family Court equitably divide the marital property. [R. pp. 48-53] In the Financial Disclosures in the Divorce Action, Emily listed the membership interest in Southern Collection, LLC, as a marital asset. [R. p. 539] The Divorce Action is still pending.

¹ Almost all of the “facts” relevant to this appeal concern the history of the litigation between the parties, as the Trial Court dismissed the action based on Rule 12(b) motions. Thus, for brevity’s sake, the Respondents present a combined statement of the case and the facts.

² On April 27, 2022, Emily filed a Statement of Dissociation with the South Carolina Secretary of State’s office from Southern Collection. [R. pp. 579-581] Pursuant to S.C. Code Ann. §33-44-603(3), Emily has dissociated from Southern Collection and she is no longer a member and shall be treated as a transferee.

On April 27, 2022, Terence filed a Motion for Supplemental Relief in the Divorce Action, requesting that the Family Court add Southern Collection as a party defendant, among other requests for relief related to the parties' businesses. [R. pp. 56-57] That same day, Emily filed a Member's Statement of Dissociation from Southern Collection with the South Carolina Secretary of State's office. [R. pp. 579-581]

On or about April 28, 2022, Emily filed a Complaint in the Lexington County Circuit Court, from which this matter has been appealed ("Circuit Court Action"). [R. pp. 101-114] The Complaint purported to allege causes of action for the judicial dissolution and winding up of Southern Collection, the Emergency Appointment of a Temporary Receiver, Conversion, Attempted Tortious Interference with Contract, Imposition of Constructive Trust, and Attorney's Fees and Costs. [R. pp. 101-114] On the same day, Emily filed an Emergency Motion for an Appointment of a Receiver for Southern Collection. [R. pp. 58-100] The Motion for Appointment of a Receiver was fully briefed and the Trial Court heard oral arguments on the motion on May 5, 2022. On May 6, 2022, the Trial Court issued an Order denying Emily's Request for the Appointment of a Receiver ("Receiver Order"). [R. pp. 15-19]

On May 12, 2022, Respondents filed motions to dismiss the Circuit Court Action, pursuant to Rules 12(b)(1) and 12(b)(6), SCRCPP. [R. pp. 314-317; 319-401] The parties fully briefed those motions, and the Trial Court conducted a hearing on June 3, 2022. On June 17, 2022, the Trial Court issued an Order granting the motions to dismiss ("MTD Order"). [R. pp. 20-27] On June 22, 2022, Emily filed a Motion to Reconsider the MTD Order pursuant to Rule 59(e), SCRCPP. [R. pp. 415-418] On June 23, 2022, the Trial Court

issued an Amended Order granting the motions to dismiss [R. pp. 28-35]³ On June 29, 2022, Emily filed another Motion to Reconsider the Amended Order pursuant to Rule 59(e), SCRCP. [R. pp. 419-422] On July 20, 2022, the Trial Court issued an Order denying Emily’s Motion to Reconsider the Amended Order. [R. pp. 36-37]

On April 29, 2022, Emily filed a Motion to Amend her Petition in the Divorce Action to remove the parties’ interests in Southern Collection from the marital estate. [R. pp. 145-146] Terence did not consent to this removal, and he filed a motion in the Divorce Action to add Southern Collection as a named party. [R. pp. 56-57] Both motions are still pending in the Family Court.

On July 30, 2022, Emily filed a Notice of Appeal, challenging the Receiver Order, MTD Order, and Amended Order. [R. pp. 433-451]

STANDARD OF REVIEW

Subject Matter Jurisdiction

“The question of subject matter jurisdiction is a question of law for the court.” *Hammer v. Hammer*, 399 S.C. 100, 104-105, 730 S.E.2d 874, 876 (Ct. App. 2012) (quoting *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009)). The court is ““free to decide questions of law with no deference to the [circuit] court.”” *Id.* at 105, 730 S.E.2d at 876. *See also Thompson v. Swicegood*, 430 S.C. 648, 658, 845 S.E.2d 920, 925 (Ct. App. 2020) (subject matter jurisdiction is a question of law, and questions of law are reviewed de novo). ““The jurisdiction of a court is determined by the

³ The Trial Court indicated that the MTD Order inadvertently excluded Defendants Robert T. Smith, Robert B. Smith, and Sherry C. Smith. The Trial Court filed the Amended Order to include all Defendants involved. There were no other substantive changes between the MTD Order and the Amended Order. [R. p. 28]

sovereign creating it,' so reference must be made to local law, such as the constitution and laws of the state." *Seels v. Smalls*, 437 S.C. 167, 172, 877 S.E.2d 351, 353 (2022) (quoting *Peterson v. Peterson*, 333 S.C. 538, 548, 510 S.E.2d 426, 431 (Ct. App. 1998)). The subject matter jurisdiction of the Family Court comes from the South Carolina General Assembly. See S.C. Code Ann. § 63-3-530.

Failure to State a Claim

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010) (citing *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)). See also *Rice-Marko v. Wachovia Corp.*, 398 S.C. 301, 307, 728 S.E.2d 61, 65 (Ct. App. 2012) ("In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief."). "Under Rule 12(b)(6), SCRCP, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint." *Palmer v. State*, 427 S.C. 36, 42, 829 S.E.2d 255, 259 (Ct. App. 2019) (quoting *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). "If the facts and inference drawn from the facts alleged in the Complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." *Id.* at 43, 829 S.E.2d at 259.

ARGUMENT

This appeal revolves around Emily's clear dissatisfaction with the Family Court's rulings in the Divorce Action relating to Southern Collection. The underlying case further arises from Emily's ultimate desire to have her membership interest in the Company valued separately from Terence and Emily's other marital assets and liabilities when deciding the equitable division of marital assets in the Divorce Action. Emily filed the instant Complaint in an attempt to shift jurisdiction from the Family Court, which she originally chose, to the Circuit Court. In so doing, she tried to get more favorable treatment after the Family Court did not grant her requested relief as to the Southern Collection issues in preliminary hearings. Emily's counsel even acknowledged that if the Family Court had granted Emily's requests as to the Company, then the instant action would not have been filed. [R. pp. 510-511] The Trial Court correctly recognized that all of the requested relief in the Complaint is available to Emily in the Divorce Action, and since the Divorce Action was instituted prior to the filing of the Complaint, the Family Court had exclusive jurisdiction over those causes of action, including any actions related to Southern Collection. [R. pp. 28-35] Therefore, this Court should affirm the Trial Court's rulings.

I. This Court should affirm the Order dismissing the case pursuant to Rule 12(b)(1), SCRPC, because the Family Court has exclusive jurisdiction over the parties' marital personal property, including the distributional interests of Southern Collection.

Emily contends that the membership interest in Southern Collection is not personal property and not subject to the jurisdiction of the Family Court. This position is without merit and directly contradicts well-established South Carolina law. The Trial Court properly recognized as much, and its ruling should be affirmed.

South Carolina law defines marital property as “all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of the filing or commencement of the marital litigation ... regardless of how title is held.” S.C. Code Ann. § 20-3-630(A). “[U]pon the institution or filing of marital litigation, the parties’ property acquired during the marriage becomes vested in an estate called marital property in which the parties have a vested interest subject to equitable distribution.” *Hodge v. Hodge*, 305 S.C. 521, 524, 409 S.E.2d 436, 438 (Ct. App. 1991). In other words, upon the filing of the marital litigation, parties have “a fixed estate in the marital property which is subject only to apportionment by the family court judge. . .” *Id.* at 525, 409 S.E.2d at 439. *See also Seels v. Smalls*, 437 S.C. 167, 174, 877 S.E.2d 351, 355 (2022) (“Section 20-3-610 provides each spouse has a ‘vested’ right in the ‘marital property,’ which is defined – and subject to apportionment ‘by the family courts of this State’ – at the moment the marital litigation is filed.”).

“A party claiming an equitable interest in property upon divorce bears the burden of proving the property is marital. If the party presents evidence to show the property is marital, the burden shifts to the other spouse to present evidence to establish the property’s nonmarital character.” *McMillan v. McMillan*, 417 S.C. 583, 591, 790 S.E.2d 216, 220 (Ct. App. 2016) (quoting *Wilburn v. Wilburn*, 403 S.C. 372, 382, 743 S.E.2d 734, 740 (2013)). “If the opposing spouse can show that the property was acquired before the marriage or falls within a statutory exception, this rebuts the prima facie case for its inclusion in the marital estate.” *McMillan*, 417 S.C. at 591, 790 S.E.2d at 220 (quoting *Pruitt v. Pruitt*, 389 S.C. 250, 261, 697 S.E.2d 702, 708 (Ct. App. 2010)). A party need not present documentary evidence at trial supporting the origin or value of property; rather,

uncontradicted testimony will suffice to carry one's burden of proof. *See Wilburn*, 403 S.C. at 385-386, 743 S.E.2d at 741.

S.C. Code Ann. § 20-3-630(A)(1-5) outlines the specific items that are not considered to be marital property. Emily has not argued that any of these exemptions apply to the instant facts, such that the parties' distributional interests in Southern Collection should be considered non-marital property. Nor does Emily dispute that Southern Collection was formed during the marriage. Instead, Emily argues only that because an LLC is a legal entity distinct from its members, it cannot be subject to the Family Court's jurisdiction. Respondents do not challenge that an LLC is a legally distinct entity from its members⁴, and they further agree that a member is "not a co-owner of, and has no transferable interest in, property of a limited liability company."⁵ However, the equitable distribution of property in the Family Court does not transfer the actual assets of the LLC, but rather apportions the members' rights to receive any distributions from the company or their distributional interests. Emily fails to acknowledge this significant distinction.

The South Carolina Code defines distributional interest as "all of a member's interest in distributions by the limited liability company." S.C. Code Ann. § 33-44-101(6). S.C. Code Ann. § 33-44-501(b) states: "[a] distributional interest in a limited liability company is personal property and ... may be transferred in whole or in part." The South Carolina Supreme Court confirmed in *Levy v. Carolinian, LLC*, that a "distributional interest in an LLC is personal property and may be transferred in whole or in part." 410 S.C. 140, 146, 763 S.E.2d 594, 597 (2014). Further, this Court recently held that a

⁴ See S.C. Code Ann. § 33-44-201.

⁵ See S.C. Code Ann. § 33-44-501(a).

distributional interest in property not inherited and obtained during the marriage is considered marital property and is subject to equitable distribution in Family Court. *See Jackson v. Jackson*, 432 S.C. 415, 434, 853 S.E.2d 344, 354 (Ct. App. 2020). Therefore, the distributional interests in Southern Collection fall squarely within the statutory definition of personal property, and they are properly subject to distribution in the Family Court.

S.C. Code Ann. § 63-3-530 (A)(2) unequivocally states that the Family Court has the exclusive jurisdiction “to hear and determine actions for [divorce], separate support and maintenance, legal separation, and in other marital litigation between parties, and for settlement of all legal and equitable rights of the parties in the actions in and to the real and personal property of the marriage and attorney’s fees, if requested by either party in the pleadings.” (emphasis added). Equitable distribution must be plead by the requesting party before the jurisdiction of the Family Court attaches. *See* S.C. Code Ann. § 20-3-620. It is undisputed that both Emily and Terence requested the equitable distribution of assets by the Family Court in the Divorce Action and that Southern Collection was formed during Emily and Terence’s marriage and was held at the time of the filing of the Divorce Action.

“The general rule is that the jurisdiction of a court depends on the state of affairs existing at the time it is invoked. If jurisdiction once attaches to the person and the subject matter of the litigation the subsequent happening of events will not ordinarily operate to oust the jurisdiction already attached.” *Gilley v. Gilley*, 327 S.C. 8, 10-11, 488 S.E.2d 310, 312 (1996) (citing *Gardner v. Gardner*, 253 S.C. 296, 302, 170 S.E.2d 372, 375 (1969)). *See also Terry v. Lee*, 308 S.C. 459, 461-462, 419 S.E.2d 213, 214 (1992) (“Separate actions to determine property rights will be considered ‘other marital litigation’ under §20-

44-101(2), thereby vesting exclusive jurisdiction in the family court, if the relief sought is incidental to the decree of divorce.”).

To support their position as to the Family Court’s alleged lack of jurisdiction of the parties’ distributional interests in Southern Collection, Emily cites *Whittaker v. Whittaker*, 717 S.E.2d 868 (W. Va. 2011), and *Whaley v. Whaley*, 261 So.3d 386 (Ala. Civ. App. 2017) as persuasive authority. Yet, those cases are distinguishable because South Carolina’s definition of marital property differs from those under West Virginia and Alabama law. In addition, the South Carolina Limited Liability Company Act, S.C. Code Ann. § 33-44-101, *et seq.*, (“SC LLC Act”) differs from the LLC Acts in both West Virginia and Alabama. Further, in the *Whittaker* case, the true dispute was over the transfer of the actual assets of the LLC, while as explained above, the issues in this case relate directly to the parties’ distributional interests in Southern Collection.

The facts of *Gilley v. Gilley*, 327 S.C. 8, 488 S.E.2d 310 (1997), are analogous to the instant action. In *Gilley*, the wife filed an action in the Circuit Court to partition property held with her husband. *Id.* at 9-10, 488 S.E.2d at 311. After the filing in the Circuit Court, the husband filed an action for separate support and maintenance in the Family Court, and moved to dismiss the Circuit Court Complaint. *Id.* at 10, 488 S.E.2d at 312. The South Carolina Supreme Court ruled that the Circuit Court properly maintained jurisdiction over the matter because jurisdiction attached in the Circuit Court prior to the filing of the Family Court Complaint. *Id.* at 11, 488 S.E.2d at 311-312. The Trial Court did not challenge or dispute the Supreme Court’s reasoning in *Gilley*. Rather, the Trial Court merely acknowledged that the critical facts are distinguishable from the present case

because the Family Court had jurisdiction before Emily ever filed anything in the Circuit Court.

Here, the litigation between the parties began in the Family Court. In that Family Court action, Emily undeniably requested that the Family Court apportion the marital assets, and Terence counterclaimed requesting the same relief. Emily also specifically asked the Family Court to order an accounting of the parties' marital assets, particularly the parties' business assets. Thus, jurisdiction attached in the Family Court well before the commencement of any action in the Trial Court. Indeed, Emily herself filed the original pleading that gave the Family Court jurisdiction. Those facts, coupled with the reasoning in *Gilley*, support the Trial Court's decision.

Furthermore, Emily has filed a Motion in the Family Court specifically asking it to divest itself of jurisdiction of the issues involving Southern Collection. [R. pp. 145-146] Terence has filed a motion asking the Family Court to add Southern Collection as a party. [R. pp. 56-57] Both of these motions are still pending before the Family Court. Unless and until the Family Court rules on the pending motions and specifically excludes Southern Collection from the equitable division, the Family Court retains exclusive jurisdiction over these claims. Therefore, the Trial Court properly granted the Motion to Dismiss pursuant to Rule 12(b)(1), SCRCF, and this Court should affirm.

II. This Court should affirm because the South Carolina LLC Act does not grant the Circuit Court exclusive jurisdiction to hear judicial dissolution actions.

S.C. Code Ann. § 33-44-801 provides the basis for the judicial dissolution of an LLC. The applicable portion of this statute to this case provides that the LLC can be dissolved:

(4) on application by a member or dissociated member, upon entry of a judicial decree that:

(a) the economic purpose of the company is likely to be unreasonably frustrated;

(b) another member has engaged in conduct relating to the company's business that makes it not reasonably practicable to carry on the company's business with that member;

(c) it is not otherwise reasonably practicable to carry on the company's business in conformity with the articles of organization and the operating agreement;

(d) the company failed to purchase the petitioner's distributional interest after giving effect to provisions of the operating agreement modifying or superseding the provisions of Section 33-44-701; or

(e) the managers or members in control of the company have acted, are acting, or will act in a manner that is unlawful, oppressive, fraudulent, or unfairly prejudicial to the petitioner;

S.C. Code Ann. § 33-44-801(4) (emphasis added). This statute requires the entry of a “judicial decree” for the judicial dissolution of an LLC, but does not provide exclusive jurisdiction to the Circuit Court. The only direct reference to the Circuit Court in Article 8 of the SC LLC Act is in S.C. Code Ann. § 33-44-803, which grants the Circuit Court the right to supervise the winding up of a company after dissolution. There have been no orders finding that a judicial dissolution is appropriate for Southern Collection. Therefore, the application of S.C. Code Ann. § 33-44-803 is premature and not warranted under the facts at hand.

Emily cites *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 869 S.E.2d 859 (Ct. App. 2022) for the position that only the Circuit Court can hear matters related to a judicial dissolution. However, *Palmetto Wildlife* is clearly distinguishable from the instant case. In *Palmetto Wildlife*, the Court was addressing the issue of whether claims for judicial dissolution, an accounting, or the appointment of receiver can be determined by an arbitrator. While this Court held the claims in that specific case could not be decided by an arbitrator and could only be resolved by the circuit court, that holding did not limit

the express language of S.C. Code Ann. § 33-44-801, which requires only the entry of “judicial decree.” Since the question of Family Court jurisdiction was not involved in *Palmetto Wildlife*, that case does not limit the Family Court’s right to issue a judicial decree under S.C. Code Ann. § 33-44-801. That issue simply was not before the Court in *Palmetto Wildlife* – a fact that makes Emily’s reliance on that case misplaced.

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Seels v. Smalls*, 437 S.C. 167, 176, 877 S.E.2d 351, 356 (quoting *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). “The plain language of a statute is the best evidence of the legislature’s intent.” *Id.* (citing *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012)). If the General Assembly had intended to make the Circuit Court the only court that could enter a “judicial decree” dissolving the LLC, under S.C. Code Ann. § 33-44-801, then it would have expressly granted the Circuit Court exclusive jurisdiction to perform that task just as it did in other sections of the SC LLC Act.⁶ Absent such a clear statement of intent from the legislature, there is no logical reason to restrict the term “judicial decree” to the Circuit Court. Emily’s interpretation of the statute inserts a limitation that simply does not exist, and the Trial Court correctly rejected her position.

While the Complaint in the present case sought the alleged judicial dissolution of the Company, Emily’s true goal appears to be to have Respondents buy out her membership interest in Southern Collection, separate from the consideration of the parties’ other marital

⁶ See S.C. Code Ann. §§ 33-44-210, 33-44-803 and 33-44-812 (both specifically providing jurisdiction to the Circuit Court for certain actions). *Cf.* S.C. Code Ann. §§ 33-44-504(a) (“a court having jurisdiction may charge...”), 33-44-601 (only requiring a court order, not a circuit court order); 33-44-702 (providing plenary and exclusive jurisdiction to the court where the proceeding is commenced).

assets and liabilities. Emily dissociated from Southern Collection, an at-will LLC, and in doing so triggered certain rights to have her membership interest purchased by the Company pursuant to S.C. Code § 33-44-701. This statute states that an LLC shall purchase the membership interest of an at-will company for its fair value determined as of the date of the member's dissociation if the member's dissociation does not result in a dissolution and winding up of the company's business under Section 33-44-801.” S.C. Code Ann. § 33-44-701(a)(1).

Ultimately, in this action, the Family Court has the jurisdiction to oversee the purchase of the dissociated member’s membership interest pursuant to S.C. Code Ann. §§ 33-44-701 and -702, but it will do so in the overall apportionment of Emily and Terence’s marital assets and liabilities. S.C. Code Ann. § 33-44-701 does not provide any exclusive jurisdiction to the Circuit Court, and instead, expressly states that the court’s jurisdiction where the litigation is commenced is plenary and exclusive. There is no applicable authority that would prohibit the Family Court from performing that function. Therefore, the Trial Court’s rulings on this issue are correct and should be affirmed.

III. This Court should affirm dismissal pursuant to Rule 12(b)(6), SCRPC, because this issue is not preserved for appellate review, and, in any event, the Complaint failed to allege sufficient facts to support the causes of action in the Complaint.

As discussed above, the Trial Court properly dismissed the action pursuant to Rule 12(b)(1), SCRPC, and for that reason, no further analysis is necessary. However, even if this Court were to disagree with the ruling on the Rule 12(b)(1) motion, the end result would be the same. Dismissal under Rule 12(b)(6), SCRPC, was also proper and should be affirmed because Emily has failed to preserve her arguments on this issue for appellate review.

In addition to the Rule 12(b)(1) motion, all Respondents moved for dismissal under Rule 12(b)(6), arguing that the Complaint failed to allege facts sufficient to constitute any cause of action. In her written response to that motion, Emily did not raise any substantive or specific arguments as to why the Trial Court should deny it. Instead, Emily set forth only a single, conclusory sentence stating that the allegations in the Complaint were sufficient to state causes of action. [R. p. 406] Again, though, Emily's memorandum did not identify which allegations she was referencing. Nor did she even attempt to explain how or why those allegations (whatever they might be) satisfied the pleading requirements for the causes of action she was trying to assert.

At the hearing, the Trial Court asked Respondents' counsel if they wished to present any oral arguments on the Rule 12(b)(6) motion, or whether they would rely on their written submission. Respondents' counsel opted to do the latter. [R. p. 537] When given a similar choice, Emily's counsel also chose not to present any substantive oral arguments in opposition to that motion. [R. p. 537] Thus, the record for this appeal does not contain anything demonstrating that Emily raised her specific arguments against the Rule 12(b)(6) motion to the Trial Court. As a result, even though the Trial Court granted the Rule 12(b)(6) motion as an additional basis for dismissal, Emily's arguments were never properly raised to that court, and those arguments are not preserved for review. *See State v. Eubanks*, 437 S.C. 458, 480, 878 S.E.2d 335, 347 (Ct. App. 2022) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal.").

Emily devotes considerable space in her Appellant's Brief to specific arguments as to why the Complaint alleged facts sufficient to state causes of action. As noted above,

however, she did not raise or assert any of those arguments in the Trial Court. As a result, this Court cannot consider or rule upon those arguments. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (an issue cannot be raised for the first time on appeal). Because Emily did not preserve this issue for appellate review, the Court should affirm the Trial Court's decision.

Even if the Court determines that Emily preserved this issue for appellate review, the Trial Court's Order should still be affirmed based on the merits of the Respondents' Rule 12(b)(6) motions. When the Trial Court issued its Amended Order, it had already effectively disposed of the second cause of action,⁷ and the Fourth Cause of Action pertains solely to Terence. With respect to the remaining causes of action, to varying degrees the Complaint does not make clear if Emily is seeking relief against the Defendants, individually or collectively. Therefore, the Respondents will collectively address the First Cause of Action for Judicial Dissolution, the Third Cause of Action for Conversion, the Fifth Cause of Action for Constructive Trust, and the Sixth Cause of Action for Attorney's Fees and Costs.

A. Judicial Dissolution and Winding up

Through the cause of action for judicial dissolution, Emily seeks to dissolve Southern Collection pursuant to S.C. Code Ann. § 33-44-801(4). While this statute does provide a mechanism by which a member or dissociated member may seek a dissolution of a limited liability company and the winding up of its business, it does not give rise to a separate cause of action directly against the company. The proper real parties in interest

⁷ Pursuant to Emily's Emergency Motion for Appointment of a Receiver that was filed in conjunction with the Complaint, the Court entered an Order denying that motion on May 6, 2022. That Order effectively dismissed the second cause of action.

for an action for judicial dissolution are the members and dissociated members of the limited liability company, not the limited liability company itself. Therefore, this cause of action should not be directed toward any Respondents other than Terence as he and Emily were the only members of Southern Collection.

It is also clear from the allegations in the Complaint that neither Respondent Terence Smith & Associates, LLC, (“TSA”) nor Respondent Southern Collection Brokerage, LLC, (“Brokerage”) would have any interest in the dissolution of Southern Collection. While it is unclear whether TSA and/or the Brokerage are purposely included in this cause of action, in the event that Emily requests relief related to these entities, there are no supporting facts or law to include outside entities in the judicial dissolution of another entity. In addition, Emily has no standing to request the judicial dissolution of TSA or Brokerage, as she is not a member of either entity.

Therefore, the Trial Court’s Amended Order dismissing the cause of action for Judicial Dissolution should be affirmed.

B. Conversion

“Conversion is defined as the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights.” *Moseley v. Oswald*, 376 S.C. 251, 254, 656 S.E.2d 380, 382 (2008) (citing *SSI Med. Servs., Inc. v. Cox*, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990)). “To establish the tort of conversion, the plaintiff must establish either title to or right to the possession of the personal property.” *Id.* (citing *Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (superseded by statute on other grounds)).

This cause of action fails because Emily alleges that Terence, not the other Respondents, took the acts necessary to exercise the right of ownership of the assets, inventory, and income described in the Complaint. Specifically, Emily alleges that “[Terence] took possession of” and “converted” a portion of the staging inventory for his personal use. [R. p. 109] Emily states that “[Terence] misappropriated funds, inventory and assets” from Southern Collection and converted them for the use of TSA and Brokerage. [R. p. 109] The Complaint does not allege that any Respondents other than Terence assumed or converted these funds, inventory and assets. Assuming Emily’s allegations to be true, as is necessary when reviewing a 12(b)(6) Order, the conversion by Terence of these items for the benefit of Brokerage and TSA would not entitle Emily to relief for conversion against any Respondents other than Terence, as they did not engage in the alleged wrongful conduct. Because the Complaint failed to establish this element to the cause of action of conversion against all other Respondents, the Trial Court properly dismissed that cause of action.

Furthermore, it should be noted that the remaining conversion claim regarding Terence involves the alleged conversion of personal property that is squarely within the exclusive jurisdiction of the Family Court as is explained in detail above.

C. Imposition of Constructive Trust

“[A] constructive trust arises whenever one party has obtained money, which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it; as, for example, when money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty, and the like.” *Wolfe v. Wolfe*, 215 S.C. 530, 534, 56 S.E.2d

343, 345-346 (1949); *see also SSI Med. Services, Inc. v. Cox*, 301 S.C. 493, 500, 392 S.E.2d 789, 793-794, (1990). “In addition, the standard of proof is high, in that ‘to establish a constructive trust, the evidence must be clear, definite, and unequivocal.’” *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 879 (2012) (quoting *Lollis v. Lolis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987); citing *Whitmire v. Adams*, 273 S.C. 453, 458-61, 257 S.E.2d 160, 163-65 (1979)). An action for a constructive trust “is resorted to by equity to vindicate right and justice or frustrate fraud.” *Whitmire v. Adams*, 273 S.C. 453, 457, 257 S.E.2d 160, 163 (1979).

The Complaint does not allege sufficient facts to show that the income and assets were paid by accident, mistake or fraud. In addition, the Complaint does not specifically allege that they have been acquired through a breach of trust or the violation of a fiduciary duty. Indeed, the Complaint does not include causes of action for fraud or breach of fiduciary duty. In fact, the Complaint contains no reference whatsoever to the term fiduciary duty. Furthermore, Emily already has means by which she could recover any income, assets, and inventory through the Family Court Action. The Family Court will allocate the distribution of these marital assets. As a result, equity does not require that a constructive trust be imposed in the within action. Therefore, the Trial Court’s Amended Order dismissing this cause of action pursuant to Rule 12(b)(6), SCRPC, should be affirmed.

D. Attorney’s Fees and Costs

The Complaint seeks attorney’s fees and costs resulting from the pursuit of this action. This cause of action fails because it was made pursuant to S.C. Code Ann. § 33-

44-702(d), yet Emily has not brought a cause of action on behalf of Southern Collection to purchase a distributional interest and, thereby, determine its fair value under this statute.

S.C. Code Ann. § 33-44-702 relates to S.C. Code Ann. § 33-44-701 in that it affords a party the right to file a cause of action to determine the fair value of a distributional interest in a limited liability company when the company is purchasing a member's distributional interest upon that member's dissociation. If a cause of action is brought under this section, the presiding court shall determine the fair value of the interest, specify the terms of the purchase of the interest, and require the dissociated member to deliver an assignment of the interest to the purchaser. S.C. Code Ann. § 33-44-702(a). As discussed above, Emily's true intent was never to dissolve the Company, but rather have Terence purchase her distributional interest in the Company. However, she could not file a cause of action to accomplish that buyout under this statute, because the Circuit Court is not mentioned in Article 7 of the SC LLC Act, thereby preventing her from trying to shift the jurisdiction from the Family Court to the Circuit Court.

S.C. Code Ann. § 33-44-702(d) provides that “[i]f the court finds that a party to the proceeding acted arbitrarily, vexatiously, or not in good faith, it may award one or more other parties their reasonable expenses, including attorney's fees and the expenses of appraisers or other experts, incurred in the proceeding.” S.C. Code Ann. § 33-44-702(d), (emphasis added). The “arbitrary, vexatiously, or not in good faith” conduct discussed in the statute applies to the action to determine the fair value of the distribution interest. Emily has not asserted any cause of action under S.C. Code Ann. §§ 33-44-701 or 702 and therefore, the conduct described cannot apply to the valuation.

S.C. Code Ann. § 33-44-701, or the valuation of the distributional interest, does not apply if there is a cause of action for Judicial Dissolution under Article 8 of the SC LLC Act. Article 8 of the SC LLC Act solely applies to any judicial dissolution actions. Article 8 is void of any provisions for the payment of attorney's fees related to an action for judicial dissolution.

Therefore, the Trial Court's Amended Order dismissing the request for attorney's fees and costs should be affirmed.

IV. This Court should affirm the Trial Court's holding that the Family Court has jurisdiction to determine the causes of action against Terence Smith & Associates, LLC, Southern Collection Brokerage, Sherry C. Smith, and Robert T. Smith.

The Trial Court correctly held that the causes of action against TSA, Brokerage, Sherry C. Smith and Robert T. Smith can be pursued in the Divorce Action. S.C. Code Ann. § 20-3-630 defines marital property as "all real and personal property which has been acquired by the parties during the marriage and which is owned as of the date of filing or commencement of marital litigation... regardless of how legal title is held..." (emphasis added). In order to determine whether the property is marital, the Family Court has the authority to join the alleged owner of the property as a necessary party to the action. S.C. Code Ann. § 63-3-530(19) grants the Family Court exclusive jurisdiction "in furtherance of the complete disposition of cases in the jurisdiction of the court, to bring in and make parties to any proceedings pending in the court any person or persons ... whose presence to the proceedings may be found necessary to a complete determination of the issues therein, or the relief to which the parties thereto ... may be entitled."

The South Carolina Supreme Court has held that:

when property is alleged to be marital property, but it is owned by a third party, the Family Court has the subject matter jurisdiction to

join all persons with a possible interest in the property as parties to the action and to determine if the property constitutes marital property as defined in § 20-7-473. If it is determined that the property is marital property, then the Family Court has the authority to determine the parties' equitable rights therein.

In re Sexton, 298 S.C. 359, 380 S.E.2d 832 (1989).

In order to join a third party in an action for equitable distribution, a litigant only needs to make allegations to support a contention that property titled in the third-party's name is action marital property. *See Williams v. Williams*, 374 S.C. 149, 154, 647 S.E.2d 256, 259 (Ct. App. 2007). Emily clearly alleges that the property held by these parties is marital property, and therefore, the issues relating to that property can be decided in the Family Court. Accordingly, the Trial Court's ruling should be affirmed.

V. This Court should affirm the Order denying the Motion for Appointment of a Receiver.

Emily has appealed the Receiver Order, but the Appellant's Brief offers only sparse arguments as to any real issues with the Order other than to again argue that the Circuit Court is the only Court that can appoint a Receiver. Thus, this Court should decline to consider the issue. *See S.C. Dept. of Probation v. Reynolds*, 343 S.C. 465, 468, 540 S.E.2d 480, 482, n. 1 (Ct. App. 2000) (declining to consider an issue where the brief cited no authority and the discussion was "so conclusory as to be an abandonment of [the] issue on appeal").

Regardless, Emily's attempt to have a receiver appointed to handle the wind-up of Southern Collection is premature and inappropriate, as Southern Collection is an ongoing entity and Emily's dissociation did not actually start the dissolution process, but only triggered the process to buy-out her membership interest in the Company. The Family

Court is well-equipped to handle that process as part of the parties' equitable distribution of marital assets. *See* S.C. Code Ann. § 33-44-701.

While Emily takes the position that the Circuit Court has the sole authority to appoint a receiver, the Receiver Order cites to examples of the Family Court appointing a receiver to handle certain corporate matters within the Family Court context to support its holding that the Family Court has the ability to provide the same remedy Emily is requesting in the Circuit Court. *See Whetstone v. Whetstone*, 309 S.C. 227, 420 S.E.2d 877 (Ct. App. 1992). Emily ignores this case and argues solely that the Family Court lacks the jurisdiction to appoint a receiver.

“The appointment of a receiver is a drastic remedy, and should only be granted with reluctance and caution.” *Midlands Utility, Inc. v. South Carolina Dept. of Health and Envtl. Control*, 301 S.C. 224, 228, 391 S.E.2d 535, 538 (1989). In order to warrant the appointment of a receiver prior to the entry of judgment, Emily must prove (1) that she has an apparent right to the property; which is (2) subject to the action; (3) in possession of the adverse party; and (4) in danger of being lost, materially injured, or impaired. S.C. Code Ann. § 15-65-10. Assuming *arguendo* that the Circuit Court is the only proper court to appoint a receiver and that the Circuit Court had subject matter jurisdiction to hear the underlying case, the Trial Court ultimately considered Emily's request.

The Receiver Order states “this court is solely focused on whether emergency appointment of the Receiver is necessary and proper. This court finds in the negative – emergency appointment is not necessary at this time.” Ultimately, the Trial Court considered the request and denied the motion based not on the subject matter issue, but on

the motion's merits. The appointment of the Receiver is solely in the judge's discretion⁸, and Emily has not provided any argument that the judge's decision constitutes an abuse of discretion and should be overturned. Therefore, this Court should affirm the Receiver Order.

VI. This Court should affirm the result below because the Complaint's request for a jury trial did not require that the litigation between the parties proceed in the Circuit Court, as opposed to the Family Court.⁹

Emily argues that the Trial Court denied her constitutional right to a jury trial to litigate the issues involving the recovery of money and assets relating to Southern Collection. This argument ignores the facts and procedural history of this matter. It was Emily who chose the Family Court as the appropriate venue to litigate the matters by filing the Divorce Action and seeking the Family Court's jurisdiction to oversee the equitable distribution of the marital estate. Emily fails to cite any authority for the proposition that the Family Court loses its subject matter jurisdiction when a party to the Family Court case files a subsequent action in Circuit Court seeking a jury trial. Instead, Rule 38(a), SCRCF, provides a right to a jury trial unless the right to the jury trial is waived. In this case, Emily clearly waived the right to the jury trial by initiating the action in the Family Court and vesting it with exclusive jurisdiction to hear all matters relating to the divorce. *See S.C.*

⁸ *See Andrick Development Corp. v. Maccaro*, 280 S.C 103, 106, 311 S.E.2d 95, 97 (Ct. App. 1984).

⁹ Respondents do not believe that the issue relating to the jury trial demand is properly before this Court, as it was not addressed in the Amended Order. *See State v. Eubanks*, 437 S.C. 458, 480, 878 S.E.2d 335, 347 (Ct. App. 2022) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal."). Since the alleged denial of her constitutional right to a jury trial is raised in the Appellant's Brief, Respondents will briefly address the argument.

Code Ann. § 63-3-530(A)(2). Therefore, this Court should affirm the Trial Court's decision on this issue.

CONCLUSION

Emily filed the Divorce Action in the Family Court and requested equitable distribution of all marital property. That action gave the Family Court exclusive jurisdiction over the matter. Subsequently, after becoming dissatisfied with the Family Court's initial decisions, Emily attempted to circumvent the Family Court's exclusive jurisdiction – which she originally helped to create – by filing a second action in Circuit Court. The Trial Court properly rejected that attempt and returned the dispute to the Family Court, where it belongs. Therefore, based on the arguments and authorities set forth above, this Court should affirm all of the Trial Court's Orders.

Respectfully submitted,

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Jun 09 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY

THE HONORABLE WALTON J. MCLEOD, CIRCUIT COURT JUDGE

Appellate Case No. 2022-001060

Emily P. Smith, Appellant,

v.

Robert T. Smith, Southern Collection, LLC, Southern Collection
Brokerage, LLC, Terrence Smith and Associates, LLC, Robert B. Smith
and Sherry C. Smith, Respondents.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

The undersigned, an attorney in this matter for the Respondents, certifies that this Final Brief of Respondents complies with Rule 211(b) of the South Carolina Appellate Court Rules.

s/ Mark B. Goddard

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