

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM JASPER COUNTY  
In the Court of Common Pleas

The Honorable R. Keith Kelly, Circuit Court Judge

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Appellate Case No. 2023-001003  
Court of Common Pleas No. 2022-CP-27-00524

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Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA  
“Eats & Sweets Bakery & Café,” and Albert Kleckley, Jr. .... Respondents,

v.

Nicole Burnham ..... Appellant

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**INITIAL BRIEF OF RESPONDENTS**

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Café,” and Albert Kleckley, Jr.*

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None.

**STATEMENT OF ISSUES ON APPEAL**

- A. **Did the trial judge properly determine that Plaintiff's claims against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. are time-barred, where the Amended Summons and Complaint joining them as Defendants was filed more than three years after the subject incident?**

**SUGGESTED ANSWER:** *Yes.*

- B. **Did the trial judge properly hold that Plaintiff's Amended Summons and Complaint — which joined Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. — did not relate back to the filing of the initial Summons and Complaint, where the amendment added new parties, rather than correcting or substituting parties?**

**SUGGESTED ANSWER:** *Yes.*

- C. **Did the trial judge properly dismiss Plaintiff's claims against "Eats & Sweets Bakery & Café," which was merely a fictitious name and not a legally recognized entity that could be sued under South Carolina law?**

**SUGGESTED ANSWER:** *Yes.*

## STATEMENT OF THE CASE

The allegations of Appellant's Complaint (as to which Respondents reserve all rights and which Respondents do not hereby admit) are as follows:

This cause of action arises out of an incident allegedly occurring in Jasper County on November 7, 2019. Plaintiff/Appellant Nicole Burnham ("Plaintiff") commenced this action by Complaint in the Court of Common Pleas of Jasper County, South Carolina on November 2, 2022 against "Eats & Sweets Bakery & Cafe." (*See generally* Pl.'s Nov. 2, 2022 Compl.). "Eats & Sweets Bakery & Cafe" is not the name of a corporate or other entity properly incorporated or created under South Carolina law (or the law of any other state). Plaintiff alleged that "Defendant Eats & Sweets Bakery & [C]afe . . . is the name of a business organized under the laws of and conducting business in the State of South Carolina and is subject to the jurisdiction of this Court." (*See id.* ¶ 2). Plaintiff's Complaint referred to "Eats & Sweets Bakery & Cafe" as the defendant.

Plaintiff alleges that on or about November 7, 2019, she entered "Defendant's" business establishment (the "Business") as a customer and was on its property. (*See id.* ¶ 5). Plaintiff avers that the Business is located at or near 68 S. Perry Street in Ridgeland, South Carolina. (*See id.* ¶ 6). Plaintiff's Complaint alleges that "Eats & Sweets Bakery & Cafe" "exercised ownership and/or control over the premises on which it operated its [B]usiness on November 7, 2019." (*See id.* ¶ 7). Plaintiff alleges that, while she was leaving the Business, she slipped and fell on the exterior staircase owned. (*See id.* ¶ 8). She asserts that, as a result of this slip and fall accident, she suffered severe injuries and substantial damages (*See id.* ¶ 9).

Plaintiff's first cause of action sounds in negligence, asserting that "Eats & Sweets Bakery & Cafe" breached a duty of care to her as a business invitee by failing to "adequately keep or maintain the exit and exterior staircase and otherwise provide a safe environment." (*See id.* ¶¶ 11-14). Plaintiff's second cause of action is for premises liability. (*See id.* ¶¶ 16-19). Plaintiff asserts that, as a result of the trip and fall, she sustained "[i]njuries to her left leg, left ankle, and left foot," as well as other injuries. (*See id.* ¶ 20). Plaintiff claims that the owner of the property negligently maintained the premises and created a dangerous condition. (Compl. ¶¶ 18).

On November 7, 2022, the three-year statute of limitations governing Plaintiff's claims expired. *See* S.C. Code § 15-3-530. On December 22, 2022, more than a month after the statute of limitations expired, Plaintiff filed her first Amended Complaint naming as Defendants: Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr. (*See generally* Pl.'s Dec. 22, 2022 Am. Compl.). With regard to the identity of the named defendants, Plaintiff's Amended Complaint alleges:

2. Upon information and belief, Defendant Eats & Sweets Bakery & Cafe (hereinafter "Defendant") is the name of a business organized under the laws of and conducting business in the State of South Carolina and is subject to the jurisdiction of this Court.

3. Upon information and belief, Defendant Leon Smith, and or Defendant Leon Smith doing business as (DBA) Eats & Sweets Bakery & Café (hereinafter referred to as "Leon") owns and or operates Eats & Sweets Bakery & Café doing business in Jasper County, South Carolina.

4. Upon information and belief, Defendant Albert Kleckley Jr., (hereinafter referred to as Albert) is an owner and or agent of the building and or land upon which Eats & Sweets Bakery & Café did business at the time that the facts of this lawsuit arose from.

(*See id.* ¶¶ 2-4). Like the original Complaint, Plaintiff's Amended Complaint alleges injuries sustained in a November 7, 2019 fall at Defendant Leon Smith's Business:

[O]n or about November 7, 2019, Plaintiff was a customer at Defendant Leon's business Eats & Sweets Bakery & Café, located in Defendant Albert's building and property located at 68 S. Perry Street in Ridgeland, South Carolina. As Plaintiff was exiting Defendant Leon's place of business and the building owned by Defendant Albert, Plaintiff, through no fault of her own, tripped on the rug and or matt (sic) materials that had been placed there by Defendants.

(*See id.* ¶ 7). The Amended Complaint further alleges that the named defendants "modified the subject stairway into the building rendering it an unsafe condition." (*See id.* ¶¶ 8-10). Like the original Complaint, the Amended Complaint asserts causes of action sounding in negligence and premises liability. (*See id.* ¶¶ 12-27).

Plaintiff's Amended Summons and Complaint was the first time that Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café," and Albert Kleckley Jr. have been named as

Defendants in this case. The Amended Complaint did not assert any additional causes of action against the original Defendant "Eats & Sweets Bakery & Café" beyond those in the original Complaint. It only added new Defendants to her existing causes of action sounding in negligence and premises liability.

On February 23, 2023, Defendant Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. (collectively "Defendants" or "Respondents") filed their Answer to Plaintiff's Amended Complaint. (*See generally* Defs.' Feb. 23, 2023 Answer to Pl.'s Am. Compl.). Among other defenses, the Answer to Plaintiff's Amended Complaint raised the statute of limitations as a defense to Plaintiff's claims. (*See id.* ¶ 30).

On February 24, 2023, Defendants filed their Motion to Dismiss, which has given rise to this appeal. (*See generally* Defs.' Feb. 24, 2023 Mot. to Dismiss). Defendants Motion to Dismiss made the following arguments:

Defendants Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. were not added as a party to this litigation until after the running of the statute of limitations and therefore, as a matter of law, the Plaintiff's claims against it are barred. The addition of [those] Defendants after the statute of limitations is improper and does not relate back in accordance with Rule 15(c), SCRCF.

Additionally, Defendant Eats & Sweets Bakery & Café, the only named Defendant in the original Complaint, would argue that pursuant to Rule 12, SCRCF, Plaintiff's Complaint should be dismissed because Defendant Eats & Sweets Bakery & Café is a nonexistent corporate entity, it is not capable of being sued.

(*See id.* at 2).

On March 31, 2023, Plaintiff filed her Response to Defendants' Motion to Dismiss. (*See generally* Pl.'s March 31, 2023 Resp. to Def.'s Mot. to Dismiss). Plaintiff argued in her Response that:

The addition of new defendants in the Amended Complaint's relates back to the original pleading as each Defendant was properly and timely served both the Summons and Complaint in accordance with Rule 4 and Rule 6, SCRCF. As such, Defendants received notice of the institution of the action that they will not be prejudiced in maintaining their defense on the merits, and the Defendants knew or should have known that, but for a mistake concerning the identity of the proper

party, the action would have been brought against each of them, in accordance with Rule 15(c), SCRCP.

(*See id.* at 2).

On May 16, 2023, the Honorable R. Keith Kelly entered an Order Dismissing Complaints, which is the subject of this appeal. (*See generally* May 16, 2023 Order Dism. Compl.). Judge Kelly's Order Dismissing Complaints: (a) held that Plaintiff's claims against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. in the Amended Complaint were time-barred and the that statute of limitations did not "relate back" to the time of the filing of the original complaint; and (b) Defendant "Eats & Sweets Bakery & Café" was not a legally-recognized entity that could be sued in South Carolina. (*See id.*). As a result, the trial judge dismissed both the initial Complaint and the Amended Complaint with prejudice. (*See id.*, at 7).

On June 15, 2023, Plaintiff filed her Notice of Appeal. For the reasons that follow, the Court should affirm Judge Kelly's Order Dismissing Complaints.

## ARGUMENT

### A. Standard of Review

Under Rule 12(b)(6), SCRPC, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. *See Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, 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)). "In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint." *See Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011).

The standard of review "requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *See Grimsley v. South Carolina Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper." *See Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426 (citing *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008)).

For the reasons that follow, under this standard, Judge Kelly properly granted Defendants' Motion to Dismiss and dismissed all claims in this case with prejudice.

**B. The Trial Court Properly Dismissed All Claims Against Defendants Leon Smith, Leon Smith d/b/a Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. as Time-Barred Under the Governing Statute of Limitations.**

**1. Plaintiff's Claims Are Time-Barred Because the Statute of Limitations Began to Run on Plaintiff's Claims Against Newly Named Defendants Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. More Than Three-Years Prior to Plaintiff's Filing of the Amended Complaint.**

For the reasons that follow, Judge Kelly properly dismissed as time-bared the Amended Complaint's claims against newly-added Defendants Leon Smith, Leon Smith DBA "Eats & Sweets Bakery & Café, and Albert Kleckley, Jr.

Plaintiff does not dispute that the statute of limitations on all of her claims began to run on November 7, 2019 and expired on November 7, 2022. (*See* Pl.'s Init. Br. of Appellant, at 7 ("On November 7, 2022, the three-year statute of limitations governing Plaintiff's claims ran.")). She further concedes that "[o]n December 22, 2022, Plaintiff filed her first Amended Complaint naming Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA 'Eats & Sweets Bakery & Café' and Albert Kleckley Jr." (*See id.*). She additionally notes that "[t]he Amended Complaint did not assert any additional causes of action." (*See id.*). Plaintiff's Initial Brief of Appellant does not suggest that she properly named any of these Defendants prior to the expiration of the statute of limitations.

Plaintiff's Initial Brief of Appellant does not dispute the facts underlying Judge Kelly's Order Dismissing Complaints or his statement that "[i]t was not until December 22, 2022, more than three years after the alleged accident, that Plaintiff filed her Amended Complaint to add new Defendants, at which point, she was time-barred from proceeding with any claims against Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr." (*See* May 16, 2023 Order Dism. Compls., at 3). It is beyond any dispute that Plaintiff's claims against the newly-added Defendants were time-barred and stale when she filed them on December 22, 2022. Therefore, this Court should affirm the trial court's dismissal of the claims in the Amended Complaint against these newly-added parties.

**2. Plaintiff's Reliance on Rule 3(a) Is Misplaced.**

Plaintiff's Initial Brief of Appellant argues that her claims against newly-added Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. are timely under South Carolina Rule of Civil Procedure 3(a); which provides that:

A civil action is commenced when the summons and complaint are filed with the clerk of court if:

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or,
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.”

*See id.; accord* S.C. Code § 15-3-20(B) ("A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing."). Specifically, she argues:

[O]n November 2, 2022, Plaintiff filed a Summons and Complaint naming “Eats & Sweets Bakery & Café” as the Defendant, properly commencing a civil action. On November 7, 2022, the three-year statute of limitations governing Plaintiff’s claims ran. On December 22, 2022, Plaintiff filed her first Amended Complaint naming Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café” and Albert Kleckley Jr. The Amended Complaint did not assert any additional causes of action. Thereafter, on January 31, 2023, all Defendants were timely served within the one hundred twenty (120) days after filing with a true copy of the Summons and Complaint, as permitted by Rule 3(a)(2), SCRCF. In addition Defendants were also served with a true copy of the Amended Summons and Complaint. An Affidavit of Service for all Defendants was filed on April 14, 2023.

(*See* Init. Br. of Appellant, at 7).

For the reasons that follow, Plaintiff's reliance on Rule 3(a) does not support her contention that Judge Kelly erred in dismissing her late-filed claims against Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. As a result, the Court should affirm Judge Kelly's dismissal of those claims.

a. **Plaintiff Did Not Properly Preserve Any Argument Under S.C Code § 15-5-160 for Appellate Review.**

Initially, the Court may not consider Plaintiff's argument under South Carolina Rule of Civil Procedure 3(a) because she did not preserve this issue for appellate review.

"It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004); *accord Tucker v. Doe*, 413 S.C. 389, 409, 776 S.E.2d 121, 132 (Ct. App. 2015) ("[A]n 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.") (citation omitted); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). "An issue not presented to the trial court is not preserved for appellate review." *See State v. Dickey*, 380 S.C. 384, 403, 669 S.E.2d 917, 927 (Ct. App. 2008) (citing *State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). Under these standards, Plaintiff did not preserve her current argument that her amendment adding Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. was timely under Rule 3(a).

Initially, it should be noted that Plaintiff's Response to Defendants' Motion to Dismiss does not cite or reference Rule 3(a) or the argument that she currently makes. (See Pl.'s March 31, 2023 Resp. to Def.'s Mot. to Dismiss). Respectfully, Plaintiff did not properly raise this issue for the trial judge to consider and rule upon in the first instance. As a result, she cannot now seek appellate review or consideration of this issue.

Even if Plaintiff sufficiently made this argument to the trial judge, she did not preserve the issue for appellate review because Judge Kelly did not rule on it. The May 16, 2023 Order Dismissing Complaints does not reference, in any way, whether Plaintiff timely commenced this action against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. under Rule 3(a) because she originally sued *other* defendants within the statutory period and served process within 120 days. (See generally May 16, 2023 Order Dism. Compls.). With regard to Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert

Kleckley, Jr., Judge Kelly held only that the claims were time-barred because it "was not until December 22, 2022, more than three years after the alleged accident, that Plaintiff filed her Amended Complaint to add new Defendants, at which point, she was time-barred from proceeding with any claims against" them. (*See id.* at 3).

"When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion." *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009); *accord BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 454, 731 S.E.2d 902, 908 (Ct. App. 2012) ("Additionally, the record is devoid of any evidence BMW ever filed a Rule 59(e) motion. As a result, this issue is not preserved for our review."). Plaintiff never filed a Rule 59(e) motion to request that Judge Kelly rule on this issue. As a result, she has waived any right to appellate review of this question.

Therefore, for the foregoing reasons, the Court should affirm Judge Kelly's dismissal of Plaintiff's claims against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr.

**b. Even If She Preserved This Issue for Appellate Review, S.C.R. Civ. P. 3(a) Does Not Make Plaintiffs' Claims Against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. Timely.**

Even if Plaintiff preserved this issue for appellate review, the law is clear that Judge Kelly's dismissal of the claims against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. was proper under Rule 3(a).

In her Brief of Appellant, Plaintiff cites *Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 347, 732 S.E. 2d 395, 398 (2012), in support of this argument. In *Mims*, on May 29, 2007, the plaintiff sued Babcock Center and the Department of Disabilities and Special Needs, claiming sexual abuse while under their care. Plaintiff never served process, but an attorney indicated that Babcock Center had received process and that he would be appearing for it. Almost a year later, on May 7, 2008, plaintiff amended the complaint that, *inter alia*, added two defendants. The trial court dismissed the action without prejudice because the original and amended complaint were not

served within 120 days of the filing of the lawsuit. As a result, the lawsuit never "commenced" and the amendment almost a year after the suit was filed was a nullity.

Unlike this case, the statute of limitations was not the issue in *Mims*. Rather, the question was whether service within 120 days was a requirement for the commencement of *any* action (even one that is not time-barred):

In the current appeal, the trial court read section 15-3-20(B) to require actual service to be made within 120 days of filing in all cases. *However, under this interpretation, an action filed and served within the statute of limitations could be deemed untimely and subject to dismissal.* In amending Rule 3(a), SCRPC, this Court recognized that the legislative intent in amending section 15-3-20(B) in 2002 was to provide a safety net for cases where filing of the summons and complaint occurs near the end of the statute of limitations and service is made after the limitations period has run. The statute and the rule, read together, provide that (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing.

*See id.*, 399 S.C. at 346, 732 S.E.2d at 397-98.

As to the originally-named Defendant ("Eats & Sweets Bakery & Café"), Rule 3(a) would provide that this action was timely because it was: (a) filed before the statute of limitations expired as to that party; and (b) was served within 120 days of filing (even if service occurred after the statute of limitations expired). However, Defendants do not argue that the claim against Eats & Sweets Bakery & Café are time barred, as it was named as a defendant within the statutory period. On the other hand, Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. were never named in any pleading prior to the expiration of the statute of limitations. Therefore, Plaintiff's claims against those Defendants are absolutely time-barred.

A necessary condition precedent to the application of Rule 3(a) is that the Defendant be sued within the statute of limitations. Rule 3(a) merely gives the plaintiff who files a lawsuit at the last minute some time to serve process after the statute expires. However, Rule 3(a) does not do what Plaintiff claims that it does. Plaintiff has not cited to any authority that would allow a plaintiff to *name* a defendant outside of the statute of limitations, which is precisely what occurred

in this case. Rule 3(a) only allows an action that is timely filed as to a defendant to be served outside of the statute of limitations (within 120 days after filing of the lawsuit).

For the foregoing reasons, the Court should affirm Judge Kelly's dismissal of Plaintiff's Amended Complaint against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr.

c. **Judge Kelly Correctly Concluded that Plaintiff's Amendment to Add Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. Was Improper and Did Not Relate Back to the Original Filing of the Complaint.**

Defendant Plaintiff argues in this appeal that her claims against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. are timely because her Amended Complaint "related back" to the date of the filing of her initial Complaint. For the reasons that follow, Plaintiff's arguments are in error.

First, while Defendants do not dispute that Plaintiff had a right to amend her Complaint, she did not have the right to add additional new parties to her initial Complaint outside of the statute of limitations. "Rule 15(a) only permits an existing plaintiff to add, modify, delete, or change claims against an existing defendant." *Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995). Since Rule 15(a) does not contemplate the addition of new parties, Plaintiff's Amended Complaint, which sought to add three new defendants, was improper and a nullity as to Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr. Therefore, Judge Kelly correctly dismissed the Amended Complaint as to Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley, Jr.

Moreover, even if it was proper, Plaintiff's Amended Complaint does not relate back to the filing date of her original Complaint under Rule 15(c). South Carolina Rule of Civil Procedure 15(c) allows a party, in certain and specific circumstances, to relate an amended pleading back to the date of the original pleading:

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.

An amendment changing the party against whom a claim is asserted relates back if the forgoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

*See* S.C.R. Civ. P. 15(c). "Rule 15(c) is based on the concept that once litigation involving particular conduct or a given transaction or occurrence has been instituted, the parties are not entitled to the protection of the statute of limitations against the later assertion by amendment of defenses or claims that arise out of the same conduct, transaction, or occurrence as set forth in the original pleading" *See Patton v. Miller*, 420 S.C. 471, 496-97, 804 S.E.2d 252, 265 (2017) (citation and internal quotation marks omitted).

The South Carolina Supreme Court has adopted a four-part test under Rule 15(c), which requires that the following four factors be met to allow a party to relate an amended pleading back to the date of the original pleading:

(1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; *and* (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

*See Hughes v. Water World Water Slide, Inc.*, 314 S.C. 211, 213-14, 442 S.E.2d 584, 586 (1994) (*quoting Schiavone v. Fortune*, 477 U.S. 21, 29, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)).

Under this four-part test, South Carolina courts have consistently limited Rule 15(c) to amendments that either correct a defendant's name or substitute one defendant for another. South Carolina has differentiated the *substitution* of a party from the *addition* of a party. In the latter instance, South Carolina has rejected the application of the relation back doctrine.

For example, in *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), the appellant filed an action against an unknown John Doe driver. Four and a half years after the accident, she sought to amend her complaint to add Milligan as a defendant. This Court concluded that Rule 15(c)'s relation back provision did not apply and that the statute of limitations had expired:

Jackson did not simply correct the defendant's name or substitute one defendant for another. Rather, she *added* Milligan as a defendant because he may have been the driver. **The language of Rule 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant.** In our view, the addition of a party is not the same as a substitution or change of a party.

342 S.C. 552, 557, 537 S.E.2d 567, 570 (Ct. App. 2000) (emphasis added).

Citing *Jackson*, this Court confirmed the above principles in *Cline v. JE Faulkner Homes, Inc.*, 359 S.C. 367, 397, n.2., 597 S.E.2d 27, 29, n.2 (Ct. App. 2004), stating that "relation back applies **only when an existing party is changed, not when a new party is added to a complaint.**" (Emphasis added). Addressing the statute of limitations issue under Rule 15, *Cline* stated that "because three years had expired by the time Cline named Modular Home as a defendant, his negligence claim against Modular Home was barred by the statute of limitations." *See id.* at 371.

Applying the above principles, the trial judge correctly held that Plaintiff's Amended Complaint — which added new Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley Jr.— could not relate back to the date of her original Complaint. Plaintiff original November 2, 2022 Complaint named only non-entity Eats & Sweets Bakery & Café as a Defendant. On November 7, 2022, the three-year statute of limitations expired. On December 22, 2022, more than a month after the statute of limitations expired, Plaintiff finally filed her first amended complaint adding multiple **new** Defendants: Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley Jr. The Amended Complaint did not simply correct a mistake in the naming of a party. **It named new Defendants.** As a result, the Amended Complaint adding new parties would not relate back to the original commencement of this lawsuit; as a result, Plaintiff's claims against these newly-added Defendants are time barred.

Accepting the facts pled in Plaintiff's Amended Complaint, it is beyond doubt that the three-year statute of limitations for Plaintiff to sue Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley Jr. expired by the time she filed her Amended Complaint. She does not set forth a proper basis for the Court to relate the Amended Complaint back to the original complaint. Therefore, the Court should affirm the trial judge's dismissal of the Amended Complaint at to Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley Jr. because those claims were obviously time-barred.

In support of her relation-back argument, Plaintiff cites *Gause v. Smithers*, 384 S.C. 130, 681 S.E.2d 607 (Ct. App. 2009). In that case, the plaintiff sued the owner of a car which the plaintiff police officer had stopped, seeking damages for injuries suffered when a second car struck the officer. Later, the officer filed an amended complaint adding the driver of that stopped car — who was the owner's son and had a similar name — as another defendant. The Court held that this amendment would not relate back under Rule 15(c): "Gause named Son as a defendant with respect to the direct negligence claims. *However, he also kept Father in the case.* We conclude this amounted to the addition of a defendant, the action Jackson sought to proscribe in keeping with the plain language of Rule 15(c)." *See Gause*, 384 S.C. at 133, 681 S.E.2d at 608-09. Likewise in this case, Plaintiff did not merely substitute the correct party for one that had been erroneously named. The Amended Complaint still names original defendant "Eats & Sweets Bakery & Café." The amendment did not substitute or correct the identify of a party. It **added several new parties.** Rule 15(c) does not apply to relate back in this case.

Plaintiff also cites *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007), concerning relation-back. In *Goodman*, plaintiff filed a breach of contract action against a parent corporation in state court. After the action was removed to federal court, plaintiff amended his complaint to allege that a subsidiary — which acquired the research company after the breach — was liable for the breach. Under those unique circumstances, the Fourth Circuit held that relation back was proper because the amendment merely substituted the correct party for the incorrect one that was sued in error (and all of the factors for relation back were met). This case is distinguishable. As

noted above in Defendants' discussion of *Gause*, the Amended Complaint did not simply substitute the right party for an incorrectly named one; it *added new parties*. The Amended Complaint did not merely rectify a scrivener's error or a mistake that confused two similarly named entities. It did not substitute a related company that was actually involved in the conduct at issue in place of a parent or subsidiary. As Judge Kelly held, the Amended Complaint added new Defendants, bringing it outside of the scope of Rule 15(c).

Because the Amended Complaint added new parties and did not merely substitute, Rule 15(c) does not apply here. As a result, Judge Kelly correctly dismissed Plaintiff's Amended Complaint against Defendants Leon Smith, Leon Smith DBA Eats & Sweets Bakery & Café, and Albert Kleckley Jr.

**C. The Trial Judge Properly Concluded That Defendant "Eats & Sweets Bakery & Café" Is Not a Legal Entity and, Therefore, Cannot Be Sued.**

**1. Plaintiff May Not Sue a Nonexistent Entity.**

Rule 17(a), SCRCP states that “[e]very action shall be prosecuted in the name of the real party in interest.” It is well settled that an action against a nonexistent legal entity is a nullity. *See McCullar v. Estate of Campbell*, 381 S.C. 205, 207, 672 S.E.2d 784, 785 (2009). In *McCullar*, an action brought against the estate of a deceased physician, the South Carolina Supreme Court reinforced the “general rule” that “[i]f there is a lack of legal entity, the whole action fails.” The Supreme Court explained:

What is at issue here, however, is not capacity, standing, or party in interest, but something much more fundamental: whether, at the time the suit was purportedly commenced, there existed a juridical entity known as Estate of Dr. William Cox Campbell. Since it is undisputed that Dr. Campbell's Estate was closed months before this action was allegedly commenced by the then *pro se* respondents, the answer is no.

381 S.C. at 207, 672 S.E.2d at 784-85.

Defendant "Eats & Sweets Bakery & Café" was named in the original Complaint and Amended Complaint despite not being an existing corporate entity. A certificate of formation was never filed for such a corporate entity with the Secretary of State. Because Eats & Sweets Bakery

& Café is a nonexistent entity, it is not capable of being sued. The trial court did not have subject matter jurisdiction or personal jurisdiction over a nonexistent corporate entity. Judge Kelly correctly held that Plaintiff cannot, and has not, validly stated a claim against original Defendant "Eats & Sweets Bakery & Café."

For the foregoing reasons, the Court should affirm Judge Kelly's dismissal of the claims against "Eats & Sweets Bakery & Café."

**2. Plaintiff's Reliance on S.C Code § 15-5-160 Is Misplaced.**

In her Initial Brief, Plaintiff argues that she could sue "Eats & Sweets Bakery & Café" as an unincorporated association pursuant to S.C. Code § 15-5-160: "[a]ll unincorporated associations may be sued and proceeded against under the name and style by which they are usually known without naming the individual members of the association." For the reasons that follow, the Court should affirm the dismissal of Plaintiff's Complaint against "Eats & Sweets Bakery & Café," because Section 15-5-160 does not rescue Plaintiff's flawed claims against that non-existent entity.

**a. Plaintiff Did Not Properly Preserve Any Argument Under S.C Code § 15-5-160 for Appellate Review.**

Initially, the Court may not consider Plaintiff's argument under Section 15-5-160 because she did not preserve this issue for appellate review.

"It is well settled that, but for a very few exceptional circumstances, an appellate court cannot address an issue unless it was raised to and ruled upon by the trial court." *Lucas v. Rawl Family Ltd. P'ship*, 359 S.C. 505, 510-11, 598 S.E.2d 712, 715 (2004); *accord Tucker v. Doe*, 413 S.C. 389, 409, 776 S.E.2d 121, 132 (Ct. App. 2015) ("[A]n 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.") (citation omitted); *In re Michael H.*, 360 S.C. 540, 546, 602 S.E.2d 729, 732 (2004). "An issue not presented to the trial court is not preserved for appellate review." *See State v. Dickey*, 380 S.C. 384, 403, 669 S.E.2d 917, 927 (Ct. App. 2008) (*citing State v. Johnson*, 324 S.C. 38, 41, 476 S.E.2d 681, 682 (1996)). Under these standards, Plaintiff did not preserve her current

argument that she properly sued "Eats & Sweets Bakery & Café" as an unincorporated association under S.C. Code § 15-5-160.

Initially, it should be noted that Plaintiff's Response to Defendants' Motion to Dismiss does not cite or reference Section 15-5-160. (*See* Pl.'s March 31, 2023 Resp. to Def.'s Mot. to Dismiss). Respectfully, Plaintiff did not properly raise and frame this issue for the trial judge to decide it. As a result, she cannot now seek appellate review or consideration of this issue.

In any event, even if Plaintiff sufficiently raised Section 15-5-160 to the trial judge, she did not preserve the issue for appellate review because the trial judge never ruled on it. Judge Kelly's May 16, 2023 Order Dismissing Complaints does not reference, in any way, whether Plaintiff properly named "Eats & Sweets Bakery & Café" under Section 15-5-160. (*See generally* May 16, 2023 Order Dism. Compls.). With regard to the propriety of "Eats & Sweets Bakery & Café" as a party Defendant, Judge Kelly based his dismissal solely on the "'general rule' that '[i]f there is a lack of legal entity, the whole action fails.'" (*See id.* at 7). As Judge Kelly wrote, "Defendant Eats & Sweets Bakery & Café is a nonexistent corporate entity, it is not capable of being sued." (*See id.*). He never decided Plaintiff's current argument that she properly sued "Eats & Sweets Bakery & Café" as a "unincorporated association" under Section 15-5-160.

"When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion." *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009); *accord BMW of N. Am., LLC v. Complete Auto Recon Servs.*, 399 S.C. 444, 454, 731 S.E.2d 902, 908 (Ct. App. 2012) ("Additionally, the record is devoid of any evidence BMW ever filed a Rule 59(e) motion. As a result, this issue is not preserved for our review."). Plaintiff never filed a Rule 59(e) motion to request that Judge Kelly rule on this issue. As a result, she has waived any right to appellate review of this question.

Therefore, for the foregoing reasons, the Court should affirm Judge Kelly's dismissal of Plaintiff's claims against Defendant "Eats & Sweets Bakery & Café."

b. **Even If She Preserved This Issue for Appellate Review, S.C Code § 15-5-160 Did Not Authorize Plaintiff to Sue "Eats & Sweets Bakery & Café."**

Additionally, even if she preserved the question of whether she properly sued "Eats & Sweets Bakery & Café" under Section 15-5-160, her arguments are without merit.

Non-existent Defendant "Eats & Sweets Bakery & Café" is merely a name under which business is conducted. "Eats & Sweets Bakery & Café" is not an association of a number of individuals banding together as members. Plaintiff can cite to no authority permitting a plaintiff to sue a sole proprietorship or unincorporated small business under the statute allowing suits against unincorporated associations. As to large unincorporated associations, the alternative route for suit allowed in Section 15-5-160 is a matter of ease and simplicity for injured parties who might now know every member of a large organization. There is no authority allowing suit against a fictitious name that a small business uses to conduct its trade.

In support of her argument, Plaintiff relies on *Graham v. Lloyd's of London*, 296 S.C. 249, 371 S.E.2d 801 (Ct. App. 1988), which involved a suit against underwriters at Lloyd's of London. The evidence showed that the underwriters at Lloyd's are a group of natural persons — who belong to more than 400 syndicates — who provide an insurance market for the placement of risks. Underwriters conduct the day-to-day affairs of each syndicate, with authority to act for each underwriter in the syndicate. A policy of insurance is procured through a specially-designated broker, who first obtains the agreement of one syndicate to insure a portion of the risk. On the strength of that "lead syndicate" agreement, the broker obtains the agreement of other syndicates to insure the remainder of the risk. By the terms of the Lloyd's policy issued to the insured, the members of the subscribing syndicates bind themselves "each for his own part and not one for another" for that portion of the risk to which they individually subscribe. If it cannot place 100% of the risk with the underwriters at Lloyd's, the broker places the remaining portion of the risk with insurance companies in London. The nonsubscribing underwriters asserted that "Lloyd's" is not an insurance company, a corporation, an association, or a society. They urged that it is a

marketplace where individual underwriters do business, with the name Lloyd's being simply a servicemark.

Examining whether Lloyd's of London was a proper defendant, the Court of Appeals held that it could be sued under Section 15-5-160:

The statute does not alter the substantive rule that an unincorporated association has no legal capacity as such. *See Medlin v. Ebenezer Methodist Church*, [132 S.C. 498, 129 S.E. 830 (1925).] It does, however, provide a convenient procedure by which a plaintiff can bring the members of an association before the court without naming and serving process upon them individually. *Id.* Once they are before the court, the liability of the members of the association, if any, is determined by the applicable substantive law. The statute neither creates nor destroys any substantive liabilities. *Id.* . . .

In this case, there can be no doubt the underwriters at Lloyd's are members of a society organized for the purpose of insuring risks. By law, the society is recognized as a legal entity with perpetual succession and a common seal. Lloyd's Act of 1871, 34 Vict., c. 21. The objects of the society include the carrying on by members of the business of insurance of every description. Lloyd's Act of 1911, 1 & 2 Geo. 5, c. 62. These facts alone bring the underwriters within the legal definition of an association. The record before us also shows that "Lloyd's of London" and "Underwriters of Lloyd's" are names by which the members of Lloyd's are usually known. Whatever else it may be, "Lloyd's" is the common name under which a particular group of insurance underwriters conduct their business. Therefore, under Section 15-5-160, Graham may proceed against the underwriters under that name.

*See Graham*, 296 S.C. at 255-56, 371 S.E.2d at 804-05. This case does not support Plaintiff's contention that she may sue an unincorporated small business using its fictitious trade name.

As this Court noted in *Graham*, "[a]n unincorporated association is a body of individual persons organized without a charter for the prosecution of some common enterprise." *See id.* at 255. It is undisputed that the business called "Eats & Sweets Bakery & Café" is not a legal entity in any way; it is simply a name under which its owners conduct business. It is not an amalgamation of individuals joining together for some common purpose. It is not a sophisticated syndicate of underwriters. It is not a community or homeowners' association. It is not a labor union. It is not a trade organization. It is a small business operated by individuals. Plaintiff cannot cite to an application of Section 15-5-160 in similar circumstances.

For all of the foregoing reasons, the Court should affirm Judge Kelly's dismissal of Plaintiff's claims against Defendant "Eats & Sweets Bakery & Café."

**CONCLUSION**

For all of the foregoing reasons, Defendants Eats & Sweets Bakery & Café, Leon Smith, Leon Smith DBA “Eats & Sweets Bakery & Café,” Albert Kleckley Jr. respectfully request that the Court affirm Judge Kelly's Order Dismissing Complaints, which granted their Motion to Dismiss all causes of action against them.

September 18, 2023

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