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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-10-00209
Appellate Case No. 2019-001030

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe,
..... Respondents,

v.

Maybank 2754, LLC .....Appellant.

FINAL BRIEF OF RESPONDENT EUGENE J. ZURLO, INDIVIDUALLY AND AS CO-TRUSTEE OF THE EUGENE J. ZURLO LIVING TRUST DATED DECEMBER 11, 1997

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court have jurisdiction over Respondents' motions for summary judgment where the motions were not a matter affected by Appellant's appeal regarding the mode of trial, and where Appellant did not preserve, affirmatively waived, and is estopped from making its jurisdictional argument?
2. Did the trial court properly grant Respondents' motions for summary judgment where it is undisputed that the first-in-time mortgage on the property was never subordinated to Appellant's alleged unrecorded easement and where Appellant's alleged easement was extinguished by a foreclosure of the mortgage?
3. Did the trial court abuse its discretion in denying Appellant's motion to amend its complaint where the proposed amendments were futile in view of the legal grounds for granting summary judgment?

STATEMENT OF THE CASE

This action was commenced on January 13, 2020. It is one of several actions arising out of the operations of an LLC known as Penny Creek Associates, LLC. The five Respondents all filed responsive pleadings in a timely fashion to include Motions to Dismiss, Answers, Motions to Refer to the Master-in-Equity (all but Respondent Seamon Whiteside), and Motions for Summary Judgment.

The Motions to refer the entire matter to the Master-in-Equity were heard before the Honorable Bentley Price on June 16, 2020, and June 25, 2020, and by Form 4 Order dated June 30, 2020, the case was referred to the Master. (*See* Motions to Refer; Form 4 Order, R. pp. 176 –78.) A written Order dated July 13, 2020, confirmed the referral of the entire matter to the Master-in-Equity. (Order dated July 13, 2020, R. pp. 179 – 84.) After this referral, Appellant filed its first Notice of Appeal, dated July 15, 2020. (App. First Notice of Appeal, R. pp. 1931 – 42.) The ground for the appeal was that the referral to the Master affected Appellant's mode of trial (i.e., a jury trial), a substantial right. (*Id.*)

On August 18, 2020, the Master-in-Equity referred the entire case back to the Circuit Court, citing South Carolina Rules of Civil Procedure 38 and 53(b). (Order dated August 18, 2020, R. pp. 185 – 87.) This Order was not the subject of a Motion to Reconsider or an Appeal, so after thirty days, the Circuit Court set a hearing on all pending Motions.

Those pending Motions were heard by the Circuit Court on September 24, 2020. These Motions included: Beach Parties Motion to Dismiss filed on February 17, 2020; Seamon Whiteside Motion to Dismiss filed on February 20, 2020; Zurlo Parties Motion for Summary Judgment filed on August 14, 2020; Beach Parties Motion for Summary

Judgment filed on August 19, 2020; Seamon Whiteside Supplemental Motion to Dismiss/Motion for Summary Judgment filed on August 26, 2020; and 1776, LLC Motion for Summary Judgment filed on September 3, 2020. (*See* Motions filed by Respondents, R. pp. 532 – 33; 581 – 91; 740 – 925; and 1347 – 49.)

Appellant filed a Motion to Amend its Original Complaint, which was filed after all the pending Motions except for 1776, LLC's Motion for Summary Judgment, which merely incorporated by reference the legal arguments made by all the other Respondents in their filings, and Seamon Whiteside's Motion for Summary Judgment. (App. Mot. Am., R. pp. 1147 – 48.)

On October 7 and 8, 2020, the Circuit Judge issued separate Form 4 Orders granting four of the Defendants' Motions for Summary Judgment and granting Seamon Whiteside's Motion to Dismiss. (Orders dated October 7 and 8, 2020, R. pp. 188 – 93.) Those Form 4 Orders were followed by a comprehensive written Order dated October 12, 2020, granting summary judgment to all Respondents. (Order dated October 12, 2020, R. pp. 194 – 210.)

On October 16, 2020, Appellant filed a Motion to Alter or Amend the October 7 and 8, 2020 Form 4 Orders and the October 12, 2020, comprehensive written Order. (App. Mot. Alter or Amend, R. pp. 1493 – 1558.)

On November 6, 2020, the Circuit Court denied Appellant's Motion to Alter or Amend, *see* Order dated November 6, 2020, R. pp. 211 – 213, and Appellant's second Notice of Appeal followed on November 9, 2020. (App. Second Notice of Appeal, R. pp. 1990 – 93.)

Below is a description of the orders, judgments, decisions, and proceedings of related litigation that shed light upon the questions involved in the appeal.

STATEMENT OF FACTS

On January 18, 1999, Michel LaPlante ("LaPlante") and the Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Trust"), created Penny Creek Associates, LLC ("PCA") to purchase and develop approximately 60 acres of property along Maybank Highway on Johns Island, South Carolina. (*See* Articles of Organization of Penny Creek Associates, R. pp. 1840 – 42; Penny Creek Associates Third Amended and Restated Operating Agreement dated October 15, 2005, R. pp. 1858 – 96.) LaPlante and certain members of his family (the "LaPlante Family") were 50% members of PCA.[1] The Eugene J. Zurlo Living Trust Dated December 11, 1997 ("Zurlo Trust") was the other 50% member. Although the overall ownership was split 50/50 between the Zurlo Trust and the LaPlante Family, Michel LaPlante and the 1997 Zurlo Trust were the sole voting members of PCA, with each having a 50% vote. LaPlante was the Managing Member of PCA.

On December 16, 2013, Zurlo initiated an action, individually and derivatively on behalf of PCA, against LaPlante and others seeking several remedies, to include an accounting, appointment of a new manager, and judicial dissolution of PCA. (*Eugene J Zurlo as Trustee v Penny Creek Associates, LLC, et. al.* 2013-CP-10-7280, R. pp. 216 – 302.) The case was ultimately resolved, with the terms of the settlement placed on the record before Judge Markley Dennis on February 29, 2016. The upshot of the settlement was that PCA was to wind up its business, sell its real estate, and ultimately terminate its LLC status. LaPlante never raised the alleged future easement in that litigation.

In 2014, Wells Fargo commenced a foreclosure action against PCA and its

[1] The LaPlante Family, as referenced herein, consists of John H. LaPlante (now deceased), Peter F. LaPlante and Marianne LaPlante-Scarlata, in addition to Michel LaPlante.

members, *see* Case No.: 2014-CP-10-04946, R. pp. 303 – 474, based upon various allegations and matters set forth in that action. The foreclosure case was referred to the Master-in-Equity for disposition. That matter was taken off the active roster pursuant to a Rule 40(j) Order on September 20, 2016 and restored to the active docket by Order dated April 10, 2017. A hearing was held before Master-in-Equity Mikell R. Scarborough on June 19, 2017, and the Master-in-Equity issued its Order and Judgment of Foreclosure and Sale dated June 21, 2017. (Foreclosure Order dated June 21, 2017 and filed on June 23, 2017, R. pp. 1 – 16.) The Foreclosure Order notes that "all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property" and specifically retained jurisdiction "to do all necessary acts incident to this foreclosure and to hear any post-judgment matters." (*Id.*) Pursuant to this Order, about 40 acres of PCA's property were sold to 1776, LLC at a master's Foreclosure Sale Auction on August 1, 2017.

In December of 2019, Beach Fenwick, LLC purchased a 22-acre tract of the referenced 40-acre property from 1776, LLC. LaPlante, individually, was a named party to the foreclosure action, and at the relevant time, was the managing member of PCA. Up until the date of the foreclosure hearing, LaPlante was a party to the Wells Fargo Action as a guarantor of the Note and Mortgage. LaPlante never, in discovery, at the foreclosure hearing, or at the auction sale, took the position that another LLC he was a member of had a 30-foot future right of way (ROW) easement over the PCA property that was ultimately sold to Beach Fenwick LLC.

Maybank 2754, LLC is a limited liability company organized pursuant to the laws of the State of South Carolina. LaPlante's son, John LaPlante (now deceased) was

Maybank 2754's managing member, and then LaPlante himself later became the managing member. In this action, Appellant relies upon a document entitled "Resolution of the Sole Shareholder of Penny Creek Associates, LLC," dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick, LLC from 1776, LLC ("Subject Property"). The referenced resolution provides, *inter alia*:

> ...the Company [PCA] has agreed to grant transfer, sell and convey to Purchasers [LaPlante, John H. LaPlante, Peter F. LaPlante, Marianne Laplante-Scarlata], their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller [PCA] known as "Residual Tract B-2-2"...[2]the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitchfork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

(Resolution, R. pp. 527 – 28.) Appellant avers in its Complaint that Pitch Fork Road has not been completed and admits the "Future Springing Easement" never was recorded. (Complaint, R. p. 479.) It is the claim of that future easement, and matters attendant thereto, that give rise to this action.

ARGUMENT

I. Appellant's challenge to the Circuit Court's jurisdiction fails.

Appellant's first argument on appeal is that this Court should not reach the merits of the appeal and should instead find that the Circuit Court lacked jurisdiction. Appellant more specifically argues that the Circuit Court lacked subject matter jurisdiction to rule on Respondents' motions for summary judgment because Appellant previously filed an interlocutory appeal regarding the mode of trial. The mode of trial issue presented in that appeal was whether a judge or jury should be the trier of fact in

[2] Residual Tract B-2-2 represents the Subject Property.

this case. The appeal was filed before the Master-In-Equity transferred the case back to the Circuit Court. Appellant frames its jurisdictional argument as one involving the Circuit Court's *subject matter* jurisdiction.

Appellant's jurisdictional argument fails because the Circuit Court's ruling on Respondents' motions for summary judgment has nothing to do with—and is "unaffected" by—Appellant's appeal relating to the mode of trial. Having the Circuit Court delay ruling on Respondents' motions for summary judgment while this Court considered whether any trial in this case would be to a judge or jury would have needlessly delayed this litigation and would have contravened South Carolina's appellate and procedural rules. Moreover, Appellant's appeal of the Order transferring the case to the Master-in-Equity was premature because Appellant appealed the Order before asking the Master-in-Equity to transfer the case back to the Circuit Court, which the Master-in-Equity was required to do under the Rules and did, in fact, do immediately after receiving the case from the Circuit Court. Also, Appellant failed to preserve its jurisdictional argument and, in any event, is estopped from making this argument. Finally, a finding that the Circuit Court lacked jurisdiction to rule on Respondents' motions for summary judgment would be an absurd result and would needlessly cause further delay in this litigation. This is especially true because all parties to this litigation, including Appellant, agree that the Circuit Court is the proper Court to rule on Respondents' motions for summary judgment. For all these reasons, the Court should reject Appellant's jurisdictional argument.

A. Standard of Review

In determining whether the trial court had jurisdiction to issue the Orders being

appealed, this Court exercises *de novo* review. *See Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009); *Sanders v. Savannah Highway Auto. Co.*, 432 S.C. 328, 334, 852 S.E.2d 744, 747 (Ct. App. 2020).

B. Appellant's jurisdictional argument contravenes this State's appellate and procedural rules.

Appellant's jurisdictional argument contravenes this State's appellate and procedural rules. The rules at issue involve the effect of an appeal, the procedural mechanism of summary judgment, and the duty of all courts in this State to efficiently adjudicate the matters pending before them. In pertinent part, such rules provide as follows:

Rule 205, SCACR, provides that "the appellate court shall have exclusive jurisdiction over the appeal," but expressly does not prohibit the Circuit Court from "proceeding with matters not affected by the appeal."

Rule 241(a), SCACR, similarly provides that the Circuit Court "retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal."

Rule 56, SCRCP, authorizes the Circuit Court to render "judgment as a matter of law," if there is "no genuine issue as to any material fact," in any civil case, whether it is to be tried by judge or jury.

Rule 1, SCRCP, mandates that "in all South Carolina courts in all suits of a civil nature," the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Applying these rules here, the Circuit Court's jurisdiction, authority, and duty to proceed with Respondents' pre-trial motions for "judgment as a matter of law" were

"unaffected" by the pending appeal regarding the mode of trial, specifically, who should ultimately be the trier of any "genuine issue as to any material fact." Appellant cannot make any serious argument construing these rules otherwise, and any such argument would require the Circuit Court to wait for an appellate decision about the mode of a trial that is needless to hold. The Circuit Court correctly and duly performed its duty to efficiently adjudicate matters before it that were unaffected by the appeal. *See Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 (Ct. App. 2012) (holding that, in determining whether a matter is "affected by the appeal" for purposes of Rule 205, the Court should carefully consider what exactly is being challenged on appeal, and the Court should determine whether any action the appellate court may take in the appeal could have a practical impact on the matter to be decided by the trial court).

Further, Appellant's indirect attack on the Circuit Court's summary judgment order, by way of attacking the Master-In-Equity's Order transferring the case back to the Circuit Court, contravenes an additional rule as well.

Rule 53(b), SCRCP, provides that "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter shall be returned to the circuit court."

Appellant itself requested a jury, and in turn, the Master-In-Equity issued an Order returning the case to the Circuit Court, as required by Rule 53(b). The matter of returning the case to the Circuit Court, therefore, was another matter "unaffected" by the appeal. Like the Circuit Court, the Master-In-Equity correctly and duly performed its duty. Appellant, again, cannot seriously argue that the Master-In-Equity should have delayed the case from proceeding by waiting for an appellate decision that would

not change its duty by Rule to return the case back to the Circuit Court. Such a delay by the Master-in-Equity would have delayed the Circuit Court from proceeding with other matters unaffected by the appeal, including the motions for summary judgment at issue here.

The Circuit Court and the Master-In-Equity both acted properly under the rules in proceeding with the matters before them that were "unaffected" by the appeal. Appellant's jurisdictional argument is thus meritless. Moreover, for the reasons that follow, Appellant's jurisdictional argument is procedurally improper and is not preserved for appellate review, and Appellant is estopped from making the argument on appeal.

C. Appellant's jurisdictional argument is incorrectly framed as one involving *subject matter* jurisdiction.

Appellant frames its jurisdictional argument as one involving the Circuit Court's *subject matter* jurisdiction. Quite simply, Appellant is misguided. Rules 205 and 241(a), SCACR, have nothing to do with subject matter jurisdiction, as this Court explained in *Tillman v. Oakes*, 398 S.C. 245, 256, 728 S.E.2d 45, 51 n.3 (Ct. App. 2012):

> The reference in Rules 205 and 241(a) to the "jurisdiction" of the lower courts does not refer to subject matter jurisdiction. Rather, the rules govern the circumstances under which the exclusive appellate jurisdiction Rule 205 grants to the appellate court deprives the lower court of the power to address a particular issue, or "matter," during the pendency of the appeal.

And our Supreme Court likewise addressed this issue in *Metts v. Mims*, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009):

> Initially, we note that petitioner couches this argument as

> one involving the trial court's subject matter jurisdiction. Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. *E.g. Dove v. Gold Kist, Inc.*, 314 S.C. 235, 442 S.E.2d 598 (1994). Circuit courts have jurisdiction over general tort cases, such as the instant defamation case. *See Sabb v. South Carolina State Univ.*, 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). Accordingly, petitioner's "subject matter" jurisdiction claim is inapposite.

There is no question that the Circuit Court has subject matter jurisdiction over this case. Appellant, recall, is the plaintiff, and is the one who filed this action in the Circuit Court to begin with.

D. Appellant's appeal of the Order referring the case to the Master-in-Equity should be denied as premature.

South Carolina Rule of Civil Procedure 53 addresses the referral of cases to and from masters-in-equity and special referees. *See* Rule 53, SCRCP. As discussed above, Rule 53(b) provides that "[a]ny party may request a jury pursuant to Rule 38 on any or all issues triable of right by a jury and, upon the filing of a jury demand, the matter *shall be returned to the circuit court.*" Rule 53(b), SCRCP (emphasis added). Thus, when the Circuit Court transferred this case to the Master-in-Equity, Appellant's remedy was to request that the Master-in-Equity transfer the case back to the Circuit Court pursuant to Rule 53(b) on the basis that Appellant was demanding a jury trial. Indeed, on August 18, 2020, the Master-in-Equity, *sua sponte*, issued an Order transferring the case back to the Circuit Court pursuant to Rule 53(b). (*See* Master-in-Equity Order, R. pp. 185 – 87.) Appellant, however, filed its interlocutory appeal before the Master-in-Equity had the opportunity to transfer the case back to the Circuit Court pursuant to Rule 53(b).

Because Appellant had a clear remedy under the Rules that would have rendered its appeal of the Circuit Court's Order transferring the case to the Master-in-Equity unnecessary, Appellant's appeal of the Circuit Court's transfer Order was premature and unnecessary and therefore should be denied.

E. Appellant did not preserve, affirmatively waived, and is estopped from making its jurisdictional argument.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Issues not raised and ruled upon in the trial court will not be considered on appeal." *Id.*, 587 S.E.2d at 693-94 (holding that "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved"). "Imposing such a requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (internal quotation marks omitted).

Here, Appellant does not argue that it made its subject matter jurisdiction argument to the Circuit Court, much less that the Circuit Court ruled upon this argument. (App. Br. at 15-16). Indeed, rather than arguing to the Circuit Court that the appeal deprived the Circuit Court of subject matter jurisdiction, Appellant's counsel argued the opposite—affirmatively arguing to the Circuit Court that, despite Appellant's appeal, "I believe we can still proceed forward today [with hearing Respondents' motions for summary judgment and Appellant's motion to amend its complaint]." (September 24, 2020 Hr'g Tr. at 8:7-25, R. p. 1699).[3] Further, nowhere in Appellant's memorandum in opposition to Respondents'

[3] Appellant's counsel also stated to the Circuit Court:

motions for summary judgment or Appellant's 43-page motion to alter or amend the Circuit Court's Order granting summary judgment does Appellant argue that the Circuit Court lacked subject matter jurisdiction. (*See generally* App. Mem. Opp., R. pp. 1432 – 41; App. Mot. Alter or Am., R. pp. 1493 – 1558.) Likewise, because Appellant did not make this argument, the Circuit Court Orders granting Respondents' motions for summary judgment and denying Appellant's motion to alter or amend do not rule on the argument. (*See generally* Orders Granting Mot. Summ. J., R. pp. 188 – 210; Order Den. Mot. Alter or Am., R. pp. 211 – 213.)

In its Initial Brief, Appellant does not argue, nor could it argue, that it preserved this argument for review on appeal; rather, Appellant asks this Court to excuse its failure to preserve the argument because "[l]ack of subject matter jurisdiction may not be waived, even by the consent of the parties, and should be taken notice of by this court *ex mero motu*." (App. Br. at 15.) But, as recognized by this Court and the South Carolina Supreme Court, Appellant's argument under Rules 205 and 241(a) does not implicate subject matter jurisdiction. *See* Section I.C, *supra*. Thus, the subject matter jurisdiction exception to the general rule that an issue must be raised and ruled upon to be preserved for appeal does not apply here, and Appellant therefore has failed to preserve this argument for review on appeal. *See Bardoon Properties, NV v. Eidolon Corp.*, 326 S.C. 166, 170–71, 485 S.E.2d 371, 373–74 (1997) ("We hold the issue of whether a party is a 'real party in interest' does

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> We're ready to proceed. We have a pending motion to amend the complaint. And we're ready to proceed on that. And we're also ready to dive into the substance of the Defendants' motions for summary judgment, as well.

(September 24, 2020 Hr'g Tr. at 6:11-15, R. p. 1697.)

not involve subject matter jurisdiction. Accordingly, the Court of Appeals correctly held the issues raised by Eidolon, not having been timely raised prior to the entry of default, were waived.").[4]

Even if Appellant's argument under Rules 205 and 241(a) did implicate the subject matter jurisdiction of the Circuit Court—which it plainly does not—Appellant would be estopped from challenging the subject matter jurisdiction of the Circuit Court. The South Carolina Supreme Court has held that, where a party "accepts the benefits of a void judgment [or order], he is estopped to assert its invalidity." *Edwards v. Edwards*, 254 S.C. 466, 470–71, 176 S.E.2d 123, 125 (1970) (quoting *Scheper v. Scheper*, 125 S.C. 89, 118 S.E. 178, 184 (1923)). Further, the Supreme Court has held that this estoppel rule applies even where the judgment or order is being challenged based on a lack of subject matter jurisdiction. *See id.*

Here, Appellant opposed Respondents' motions to transfer the case to the Master-in-Equity and argued that the Circuit Court should retain this case. Thus, the Master-in-Equity's Order transferring the case back to the Circuit Court moved this case back to Appellant's preferred forum. Appellant accepted the benefit of the Master-in-Equity's Order by welcoming the continued litigation of the case before the Circuit Court while its appeal was pending. Specifically, Appellant (1) failed to appeal the Master-in-Equity's Order transferring the case to the Circuit Court; (2) argued to the Circuit Court that, because

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[4] *See also In re Lehman Bros. Holdings Inc.*, 435 B.R. 122, 133 (S.D.N.Y.) (holding that appellant failed to preserve the argument that the court's order violated an automatic stay). *Cf. Bakala v. Bakala*, 352 S.C. 612, 629, 576 S.E.2d 156, 165 (2003) ("Objections to personal jurisdiction, unlike subject matter jurisdiction, are waived unless raised."); *Herron*, 395 S.C. at 465–66, 719 S.E.2d at 642 ("Constitutional arguments are no exception to the preservation rules, and if not raised to the trial court, the issues are deemed waived on appeal.").

Respondents did not appeal the Master-in-Equity Order within thirty days, their deadline to appeal the Order had run; argued that there was a "waiver of any type of any [sic] future argument . . . that this Court should send the case back down to the Master-in-Equity"; and argued, "I believe we can still proceed forward today [on Respondents' motions for summary judgment and Appellant's motion to amend its complaint]," (September 24, 2020 Hr'g Tr. at 8:7-26, R. p. 1699); and (3) filed multiple motions with the Circuit Court during the pendency of this appeal, including a motion to amend its complaint and a motion to compel discovery. (*See* App. Mot. Am.; App. Mot. Compel, R. pp. 1350 – 75; 1147 – 48.)

Notably, Appellant not only filed motions with the Circuit Court during the pendency of this appeal; Appellant began each of its motion with the following disclaimer:

> MAYBANK 2754, LLC, by and through the undersigned attorney, subject to the disposition of the pending appeal (Court of Appeals Case number 2020-001030), and while maintaining the pending appeal and also ***its objection to having any matter heard by the Master-in-Equity***, hereby moves before the presiding judge of the Court of Common Pleas . . ..

(*Id.*) (emphasis added). Thus, prior to this appeal, Appellant took the position with the Circuit Court that the Circuit Court *did* have jurisdiction to decide motions filed by the parties, and Appellant objected only to *the Master-in-Equity* taking any action during the pendency of the appeal. In other words, Appellant sought to reap the benefits of the Master-in-Equity's transfer Order—continuing to litigate the case in Appellant's preferred forum of the Circuit Court—but, on appeal, Appellant is taking the opposite position, arguing that the Circuit Court lacked subject matter jurisdiction to take any action during the pendency of this appeal because the case remains with the Master-in-Equity. Accordingly, under

South Carolina Supreme Court precedent, Appellant is estopped from challenging the Circuit Court's subject matter jurisdiction.

F. Appellant's jurisdictional argument leads to an absurd result and seeks no practical relief.

What makes Appellant's jurisdictional argument even more puzzling is that all the parties to this action, including Respondent, agree that the Circuit Court was the proper Court to decide Respondents' motions for summary judgment. Appellant merely contends that the Circuit Court should have decided Respondents' motions for summary judgment without first referring the case to the Master-in-Equity. That is, Appellant contends that the Circuit Court Order transferring the case to the Master-in-Equity, and the Master-in-Equity's Order promptly transferring the case back to the Circuit Court, never should have been issued. But these two Orders cancelled each other out and were of no practical effect whatsoever. If this Court were to accept Appellant's jurisdictional argument, the Circuit Court would be required to issue yet another Order granting Respondents' motions for summary judgment, at which point Appellant presumably would file yet another Notice of Appeal and make all the same arguments (other than lack of subject matter jurisdiction) that it is making in this appeal. What possible motivation, other than a desire to further delay this litigation, could Appellant have for seeking such an absurd result?[5]

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[5] Even if the Circuit Court had committed an error in ruling on Respondents' motions for summary judgment—which it did not—any such error would be harmless and therefore would not justify sending this case back to the Circuit Court and requiring the Circuit Court to rule on the same motions a second time before this Court reaches the merits of the appeal. *See State v. Jenkins*, 412 S.C. 643, 651, 773 S.E.2d 906, 909–10 (2015) ("Harmless error analyses are fact-intensive inquiries and are not governed by a definite set of rules. Rather, appellate courts must determine the materiality and prejudicial character of the error in relation to the entire case.") (internal citations omitted). After all, the parties now all agree that the Circuit Court is the proper court to hear Respondents' motions for summary

For all the above reasons, Appellant's jurisdictional argument fails. Appellant's argument is inconsistent with South Carolina appellate and procedural rules, is one of form over substance, and is seeking a distinction that makes no legal difference as to the Circuit Court proceedings regarding Respondents' Motions for Summary Judgment and the other motions filed by Appellant during the pendency of the Appeal.

II. The trial court correctly held that the alleged easement did not survive the foreclosure.

The trial court's first ground for granting Respondents' motions for summary judgment was that, even if the alleged easement ever existed (which it did not), "it never was subordinated to the Wells Fargo Mortgage and was therefore foreclosed upon in 2017, rendering the easement void and of no effect." (Order, R. pp. 200 – 01.) In reaching this conclusion, the trial court relied upon South Carolina Code Section 30-7-20. (*Id.* (citing and quoting S.C. Code Ann. § 30-7-20)). Under this statute, a foreclosure of a first-in-time, prior-recorded, bank-owned mortgage extinguishes any later-in-time easement, unless the easement is subordinated to the earlier mortgage *and* the subordination agreement is recorded. *See* S.C. Code Ann. § 30-7-20. Here, it is undisputed that Wells Fargo did not agree to subordinate its mortgage to the later-in-time purported easement claimed by Appellant. It is likewise undisputed that Appellant did not record any subordination agreement.

Nowhere in its 50-page appellate brief does Appellant so much as mention this statute, which mandates the result reached by the trial court. (*See generally* App. Br.).

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judgment, so how was Appellant harmed by the Master-in-Equity's Order transferring the case to the Circuit Court? *See State v. Rivera*, 402 S.C. 225, 246, 741 S.E.2d 694, 705 (2013) ("Most trial errors, even those which violate a defendant's constitutional rights, are subject to harmless-error analysis.").

Instead, Appellant makes a variety of arguments that have no bearing on this primary and dispositive ground in the trial court's Order. Because Appellant has not explained (and cannot explain) how the purported easement survived the foreclosure of Wells Fargo's first-in-time, prior-recorded mortgage, this Court should affirm the holding of the trial court. This Court need not reach any of the arguments raised by Appellant because, as discussed in more detail below, the foreclosure sale and South Carolina Code Section 30-7-20 are fatal to any argument that Appellant holds an easement on the property.

A. Standard of Review

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 211, 826 S.E.2d 285, 290 (2019) (internal citation omitted).

B. There was no subordination prior to the foreclosure.

Even if the alleged easement ever existed (which it did not), it did not survive the recent foreclosure of first-in-time, prior-recorded, bank-owned mortgages arising in 2000 and 2006 that were never *subordinated* by the bank to the later-in-time, unrecorded purported easement, alleged by the Appellant to have arisen in 2013 by way of a "Resolution" referencing the grant of a future easement.

This conclusion is mandated by South Carolina statutory law. Under Title 30, Chapter 7 of the South Carolina Code of Laws, entitled "Recordation Essential to Validity," South Carolina Code Section 30-7-20 provides that: "The recordation of any contract in the nature of a *subordination*, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument . . . .") (emphasis added). Moreover, the law is well-settled that a

mortgage foreclosure extinguishes any junior liens or later-in-time easements on the property, unless the mortgagee agrees to subordinate its mortgage to the junior lien or easement. *See, e.g.*, 25 Am. Jur.2d. 515, *Easements and Licenses,* § 112 ("Generally, an easement is lost by the foreclosure of a mortgage or trust deed on the servient tenement, where such mortgage or trust deed was executed prior to creation of the easement."); *Minton v. Long*, 19 S.W.3d 231, 234–35 (Tenn. Ct. App. 1999) (holding that "[i]t is in the nature of the infirmity of a junior mortgage or lien that it may be extinguished in the enforcement of a superior mortgage or lien," and "[t]hat the same rule applies when the post-mortgage encumbrance is an easement appears to be settled."); *HSBC Bank USA v. Reg'l Specialty Food Mktg. & Distribution Servs., Inc.*, 294 A.D.2d 803, 804 (N.Y. App. Div. 4th Dep't 2002) ("Plaintiff's mortgages are prior in time to the easement granted in favor of Nicosia, and thus we conclude that Nicosia's easement is subordinate to plaintiff's mortgages and must be foreclosed."); *In re Eicher*, 574 B.R. 659, 668–70 (Bankr. E.D. Tenn. 2017) ("The courts reason that it has been 'well-settled for many years . . . that 'the purchaser at a regular foreclosure sale 'takes the mortgagor's title divested of all incumbrances made since the creation of the power' and that it is also settled that 'the same rule applies when the post-mortgage encumbrance is an easement.'") (internal quotation marks omitted); *Alabama Hist. Comm'n v. City of Birmingham*, 769 So. 2d 317, 320–21 (Ala. Civ. App. 2000) ("In Alabama, the general rule is that the foreclosure of a mortgage terminates an easement that is recorded after the mortgage, subject only to the junior easement holder's right to redeem under" the relevant statute).

The facts supporting this conclusion are all matters of public record over which there can be no dispute. (*See* Compl. at ¶ 14, *Wells Fargo v. Penny Creek Associates, et*

al., Civil Action No. 2014-CP- 10-4946 (Charleston County, Filed August 14, 2014), R. p. 307; Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-352, at Page 613, R. pp. 1843 – 57; Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249, R. pp. 1897 - 1909.)

Appellant simply makes no allegation of the requisite subordination agreement, and one is not of record with the Register of Deeds in Charleston County. (Of course, it would have been contrary to the bank's interests to grant such a subordination agreement if Appellant had asked for one).

Accordingly, Appellant can make no argument to get around the dispositive absence of a recorded subordination of the bank's mortgages. Appellant claims no interest that could have survived the foreclosure. This entire appeal can be decided on that ground alone. The following related points only further display the lack of merit in Appellant's position.

C. Appellant judicially admitted the alleged easement was lost in the foreclosure.

Appellant has already judicially admitted that its alleged easement was lost in the bank's foreclosure action. In a separate legal malpractice action that Appellant filed against its own former attorney, Appellant alleged:

> 21. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.
>
> 22. As a direct and proximate result of the Defendants' breach of the above-described duty owed to Maybank, Maybank has suffered, and continues to suffer, damage.

> 23. Additionally, Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

(*Maybank 2754, LLC v. Buist, Byars & Taylor, LLC et al.*, Civil Action No. 2020-CP-10-2180 (Charleston County, Filed May 14, 2020), R. pp. 520 – 31.) Additionally, the affidavit that Appellant filed in support of its legal malpractice claim stated that:

> the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that [the property] is subject to an easement.

(*Id.* (Affidavit of Lisa Brown, Filed May 14, 2020), R. pp. 529 – 31.)

Appellant cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits in the record irrelevant. *See Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) ("[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader."); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000) ("[T]he fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances."); *see also Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) ("plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment").

D. The foreclosure sale cannot be undone to revive the alleged easement.

What Appellant asked the Circuit Court to do below, and what it now asks this Court of Appeals to do, is to effectively revive and rewrite an alleged easement into existence, after the Master-in-Equity foreclosed upon the bank's mortgages and sold the property at a public auction. That would be contrary to law and long-standing precedent. "[I]t is the long-established policy in South Carolina that '[t]he courts should be

particularly jealous of the integrity of judicial sales." *Ex parte Johnson*, 371 S.C. 614, 618, 640 S.E.2d 887, 890 (Ct. App. 2006) (internal citation omitted). Further, "[t]here is a long-standing rule in this State that one judge of the same court cannot overrule another." *Charleston Cnty. Dep't of Soc. Servs. v. Father, Stepmother, & Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995).

The purchaser at the foreclosure sale (and its assigns) is entitled to rely on the final orders of the Master-in-Equity and the terms of the sale at the public auction. Appellant cannot seek to overturn and upset that judicially administered sale to cure its own failure to obtain and record a subordination agreement, as statutorily required.

E. Appellant's arguments relating to the foreclosure sale are meritless.

In its Brief, Appellant briefly argues that the foreclosure sale did not extinguish the purported easement because Maybank was not named as a defendant in the foreclosure action.[6] (App. Br. at 27). But Appellant cites no law in support of this argument. Moreover, Appellant's argument makes no sense. When Wells Fargo filed its foreclosure action in 2014, why would Wells Fargo have named Appellant as a defendant? After all, it is undisputed that Appellant did not record any purported easement, much less seek to subordinate Wells Fargo's mortgage to the purported easement. Under South Carolina Code Section 30-7-20, the foreclosure sale extinguished any unrecorded easements that purportedly arose after the recording of the mortgage, irrespective of what parties were named as defendants to the foreclosure action.

Appellant also briefly argues that the foreclosure sale did not extinguish the purported easement because the Master-in-Equity Order ordering the sale of the property

6 Michel Laplante was a defendant in the foreclosure action, and he never raised any issues relating to a purported easement.

states that "[t]he sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record." (App. Br. at 27-28). Though Appellant's argument is not entirely clear, Appellant apparently contends that this boilerplate language in the Order means that Appellant's unrecorded, later-in-time easement was automatically subordinated to the prior-in-time, recorded bank mortgage. Appellant's contention is meritless and squarely at odds with South Carolina Code Section 30-7-20 and the well-settled law that a foreclosure sale extinguishes later-in-time easements. *See Alabama Hist. Comm'n*, 769 So. 2d at 320–21 (rejecting the argument that "the easement is preserved because language in the City's redemption deed states that the property is 'subject to easements, rights of way, reservations, agreements, and restrictions and set back lines of record,'" and holding: "There is nothing in the redemption deed to support the conclusion that the historical easement, having been terminated by foreclosure, was reestablished by the boilerplate language in the redemption deed."). *Cf. In re Eicher*, 574 B.R. at 668–70 ("The plaintiff would have this court hold that a foreclosure that would have extinguished any subordinate express easement or other subordinate interest, instead created an implied easement that survived foreclosure. This the court will not do.").

F. There can be no conspiracy regarding the alleged easement.

In its Complaint, Appellant alleges that the several Respondents conspired to deprive it of the alleged easement. Appellant does not discuss its civil conspiracy claim in its Initial Brief. In any event, the alleged easement is defeated, not because of any overt act of Respondents, but because it was not subordinated to the foreclosed bank mortgages, as required by statute, S.C. Code Ann. § 30-7-20. *See Pinion ex rel. Montague v. Pinion*, 611 S.E.2d 271, 272, 363 S.C. 564, 566-67 (2005) ("[A] civil conspiracy is actionable only

if overt acts pursuant to the conspiracy proximately cause damage to the plaintiff."). Further, the preparation and performance of the "Resolution" document was the responsibility of LaPlante, as the manager of Penny Creek. He cannot blame the several Respondents in this litigation for anything he may have failed to do. Lastly, the complaint does not allege special damages beyond the claim for an easement, and indeed there are none. *See Pye v. Estate of Fox*, 633 S.E.2d 505, 511, 369 S.C. 555 (2006) ("[T]he damages alleged must go beyond the damages alleged in other causes of action.").

III. Appellant's argument that it should have been allowed to amend its complaint should be rejected.

A. Standard of Review

A trial court's decision on a motion to amend a pleading "will not be overturned without an abuse of discretion or unless manifest injustice has occurred." *Duncan v. CRS Sirrine Engineers, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115, 118 (Ct. App. 1999).

B. Appellant does not argue, and has no basis to argue, that the trial court abused its discretion in denying Appellant's motion to make a futile amendment to its Complaint.

The trial court simultaneously denied Appellant's motion to amend in the same October 7, 2020 Order in which it granted summary judgment. (Order, R. pp. 188 – 90.) Appellant contends that the trial court should have heard its motion to amend its complaint *before* the motions for summary judgment. (App. Br. at 49 – 50.) Appellant, however, does not explain, and cannot explain, how the amendment it sought to make to its complaint would have changed the Court's decision to grant Respondents' motions for summary judgment. (*Id.*) Indeed, in its Brief, Appellant says nothing about the nature of the amendment it sought to make. (*Id.*) Moreover, Appellant does not even argue, much less establish, that the trial court's decision to deny Appellant's motion to amend was an abuse

of discretion or resulted in manifest injustice. (*Id.*) (arguing only that the trial court "erred" in denying Appellant's motion to amend). Thus, Appellant has failed to carry its burden on appeal with respect to the trial court's decision to deny its motion to amend.

Further, Appellant's argument that the trial court should have decided the motion to amend before the motions for summary judgment, like Appellant's other arguments, is one of form over substance. But even as to form, the argument is misplaced because it ignores the trial court's discretion to deny futile amendments. Given the trial court's legal grounds, discussed above, for deciding the case on summary judgment, Appellant's attempt to amend its complaint in ways that would have had no impact on the Court's ruling was futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' . . . it may be denied where the proposed amendment would be futile.").

The amendments proposed by Appellant principally consisted of adding the City of Charleston as a seventh defendant. (*See generally* App. Mot. to Amend Compl., R. pp. 1147 – 68.) Needlessly allowing Appellant to add more defendants to this litigation would have no bearing on the trial court's summary judgment ruling. *See Jennings*, 389 S.C. at 209, 697 S.E.2d at 681 ("[A]dding Neal as a party defendant would have been futile. Like Wife, Cooke, and BJR, Neal would have been entitled to summary judgment if he had been added as a defendant."). Appellant could not and did not attempt to change the dispositive and undisputed fact that there was no recorded subordination saving the alleged easement from the foreclosure. Nor could Appellant change the terms of the pertinent document, the "Resolution," from which Appellant argued the alleged easement arose. There was and could be no prejudice or manifest injustice to Appellant, and the trial court's decision to

deny the motion to amend certainly was not an abuse of discretion.

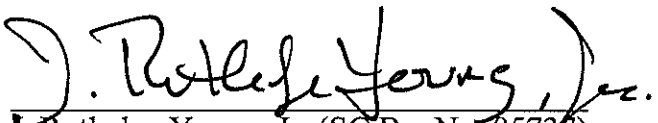
IV. This Respondent incorporates by reference the arguments set forth in the Initial Briefs filed by the other Respondents in this action.

Pursuant to South Carolina Appellate Court Rule 208(b)(6), this Respondent hereby incorporates by reference all arguments advanced in the Initial Briefs filed by the other Respondents in this matter.

CONCLUSION

For the foregoing reasons, this Respondent respectfully requests that this Court affirm the Orders of the trial court.

Respectfully submitted,



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Date: August 16, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Case No. 2020-CP-10-00209
Appellate Case No. 2019-001030

Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe, ... Respondents,

v.

Maybank 2754, LLC, ...Appellant.

CERTIFICATE OF COUNSEL

I, J. Rutledge Young, Jr. certify that the Final Brief of Respondent Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 complies with Rule 211(b) of the South Carolina Rules of Appellate Practice.

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