THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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. 2020-001030
Opinion No. 6081, filed August 7, 2024

Maybank 2754, LLC.……Appellant

v.

Eugene 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

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RESPONDENT SEAMON, WHITESIDE & ASSOCIATES, INC.'S PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Respondent Seamon, Whiteside & Associates, Inc. ("SWA") certifies that SWA filed a Petition for Rehearing on August 22, 2024, and that the Court of Appeals denied the Petition by order dated September 17, 2024.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in overlooking or misapprehending SWA's appeal as to the Civil Conspiracy Claim in failing to separately consider SWA's argument?

2. Did the Court of Appeals err in overlooking or misapprehending that the Appellant's argument related to the Circuit Court's jurisdiction, or alleged lack thereof, has no bearing on SWA?

3. Did the Court of Appeals err in reversing the Circuit Court's Order Granting SWA's Motion to Dismiss?

STATEMENT OF THE CASE

SWA hereby adopts the Statement of the Case presented by its co-Respondents, Eugene Zurlo, Individually and as co-trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997 (hereinafter collectively "Zurlo Entities"); 1776, LLC; Beach Fenwick, LLC and The Beach Company (hereinafter collectively "Beach Entities"); and Penny Creek Associates, LLC, in their Joint Petition for Writ of Certiorari as their Statements likewise apply to SWA and recasting them here would simply force this Court to review an unnecessary regurgitation of the bounteous support for the Trial Court's Order and reversal of the Court of Appeals' erroneous holdings.

In addition to the Statement of Case as set forth by co-Respondents (which provide all necessary support for Respondents' positions), SWA further identifies for this Court an additional fact that will sustain SWA's position — Appellant's failure to record the alleged thirty (30) foot private right of way easement. SWA, a civil engineering firm, was tasked with preparing planned unit development ("PUD") guidelines for the property in question. SWA could not have included

any specific provisions for Appellant's alleged easement within those PUD guidelines because SWA did not have actual notice of any such easement recorded in public property records. Accordingly, with no knowledge of any recorded easement, SWA simply could not have "surreptitiously concealed" the easement as alleged by Appellant.

Appellant alleges that "upon information and belief" SWA acquired actual knowledge of the alleged easement due its "involvement with the development process and in working with Penny Creek, and later also with 1776 and Zurlo for the development of the Property." Appellant Br. at p. 8. However, Appellant fails to demonstrate a scintilla of evidence supporting that contention. Notably, Appellant's discussion of its pending legal malpractice lawsuit against Buist, Byars & Taylor, LLC actually supports the fact that SWA *could not have* had notice of the alleged easement. According to Appellant, Buist, Byars & Taylor, LLC failed to record the easement in the public record. Appellant claims "it has suffered and continues to suffer damages as a result of the . . . legal malpractice and breach of fiduciary duty in failing to properly record a document in the official records to put all future buyers and lenders on notice that the subject property is subject to an easement as would an attorney exercising proper judgment and oversight." Appellant Br. at p. 42-43. Appellant goes on to concede that a "document was not recorded to put all future buyers and lenders on notice that the subject property is subject to an easement." Appellant Br. at p. 42.

Indeed, Appellant presented very little argument related to SWA's actions or inactions in relationship to this matter, particularly as such may relate to a civil conspiracy to purposefully conceal the alleged easement. Moreover, in its brief, Appellant completely failed to address the merits of SWA's Rule 12(b)(6) arguments or the corresponding dismissal of SWA. SWA filed a Motion to Dismiss with supporting memorandum contemporaneously with its Answer on February 20, 2020. *See Def. Seamon Whiteside & Assoc., Inc.'s Mot. to Dismiss Pl.'s Compl. and Initial*

Mem. in Supp. Within that motion, SWA addressed the reasons why the one and only claim ever brought by Appellant against SWA — civil conspiracy — should be summarily dismissed. Thereafter, on August 26, 2020, SWA supplemented its motion to dismiss by seeking dismissal of Appellant's claims against SWA pursuant to Rule 12(b)(6), *or, in the alternative,* pursuant to Rule 56, SCRCP. *See Def. Seamon Whiteside & Assoc., Inc.'s Supp. to Mot. to Dismiss and/or Mot. for S. Judgment.* The grounds supporting SWA's Rule 12(b)(6) dismissal between the February and August 2020 motions remained unchanged, and were merely supplemented with the arguments presented by the Zurlo Entities and the Beach Entities in their respective motions for summary judgment. There was no argument which would have surprised Appellant in SWA's second motion adopting its co-Defendants' arguments, nor was there any necessity for the Trial Court to rule on new issues raised by Appellant in its motion or proposed amended complaint prior to granting the relief SWA had sought since February 20, 2020. Moreover, the Trial Court granted SWA's original Motion to Dismiss *in addition to* granting summary judgment to all Respondents. Appellant's brief did not address SWA's dismissal pursuant to South Carolina Rule of Civil Procedure 12(b)(6), which means that Appellant abandoned that issue.

Additionally, Appellant argued on appeal that the Trial Court did not have jurisdiction to issue the orders Appellant sought to overturn because the matter had been referred to the Master-in-Equity and then back to the Trial Court while Appellant's appeal regarding the mode of trial was pending. SWA did not oppose its co-Defendants' Motions to Refer to the Master-in-Equity, but SWA did not, itself, file a Motion to Refer to the Master-in-Equity; thus, Appellant's argument related to the Trial Court's jurisdiction, or alleged lack thereof, has no bearing on SWA.

Via order rendered on August 7, 2024, the Court of Appeals reversed and remanded this matter to the Circuit Court for further proceedings. *See Maybank 2754, LLC v. Zurlo, et al.,* 444

S.C. 47, 906 S.E.2d 94 (Ct. App. 2024). The Court of Appeals held that the Circuit Court erred in referring the matter to the master because Appellant was entitled to a trial by jury and sought to invoke that right in its complaint. *Id.* The Court of Appeals reversed the Circuit Court's grant of summary judgment because the parties' intention as to the character of the easement is a genuine issue of material fact. *Id.* Lastly, the Court of Appeals reversed the Circuit Court's denial of Appellant's motion to amend its complaint. *Id.* Respondents requested the Court of Appeals rehear the appeal and alter its decision following the Court of Appeals' erroneous holding. The Court of Appeals denied Respondents' petitions. Therefore, SWA requests this Court grant writ of certiorari and remedy the errors in the Court of Appeal's decision.

ARGUMENT[1]

I. The Court of Appeals overlooked or misapprehended SWA's appeal as to the civil conspiracy claim in failing to separately consider SWA's argument

In its Order, the Court of Appeals seemingly lumped SWA's appeal on its civil conspiracy claim in with the entirety of the arguments posed by Appellant and Respondents alike, without taking the time to consider the merits of SWA's argument and provide a distinct holding as to the civil conspiracy claim separately. Instead, the Court of Appeals overlooked and/or misapprehended SWA's written and oral argument as to the civil conspiracy claim and instead held that,

> the circuit court erred in referring the matter to the master because Maybank was entitled to a trial by jury and sought to invoke that right in its complaint. We also reverse the circuit court's grant of summary judgment because the parties' intention as to the character of the easement is a genuine issue of material fact. Finally, we reverse the circuit court's denial of Maybank's motion to amend its complaint.

[1] SWA hereby incorporates by reference herein all facts and arguments set forth in co-Respondents' Petition for Rehearing currently pending before this Honorable Court as they are all sufficient sustaining grounds for this Court to grant Respondents' Petitions for Writ of Certiorari and reverse the Appellate Court's rulings and reinstating the Trial Court's rulings.

Maybank 2754, LLC, 444 S.C. 47, 84, 906 S.E.2d 94, 114 (Ct. App. 2024).

The Court of Appeals' only mention of SWA's appeal on its civil conspiracy claim appears when the Court of Appeals reversed the Circuit Court's grant of summary judgment and remanded the matter to the Circuit Court for further proceedings; the Court of Appeals held that,

> Seamon argues the grant of its motion to dismiss must stand because Maybank failed to raise grounds to reverse and, thus, abandoned the issue. Maybank did not abandon any argument related to the motion to dismiss the circuit court's order, which was appealed, granted the motions for summary judgment, including Seamon's, and effectively denied Seamon's motion to dismiss.

Maybank 2754, LLC, 444 S.C. 47, 906 S.E.2d 94 n. 11 (Ct. App. 2024).

The only claim filed against SWA is for civil conspiracy. *See Maybank 2754, LLC's Verified Compl., January 13, 2020*. In response, SWA filed a Motion to Dismiss with supporting memorandum contemporaneously with its Answer on February 20, 2020. *See Def. Seamon Whiteside & Assoc., Inc.'s Mot. to Dismiss Pl.'s Compl. and Initial Mem. in Supp*. SWA argued that Appellant's claim for civil conspiracy against SWA failed as a matter of law because Appellant failed to properly plead all elements to allege a claim for conspiracy under South Carolina law. First, Appellant failed to allege that any relationship existed between SWA and Appellant to support a finding that SWA acted with specific intent to harm. Second, Appellant did not allege that SWA entered into any agreement with another party to purposely harm Appellant. Third, Appellant did not allege or plead sufficient facts to support the claim under Rule 8, SCRCP or otherwise per South Carolina law. Fourth, Appellant did not allege any additional overt act in furtherance of the alleged conspiracy. Thus, SWA sought dismissal of Appellant's civil conspiracy claim against SWA pursuant to Rule 12(b)(6), SCRCP — which the Trial Court properly granted.

Despite SWA's arguments, the Court of Appeals provided no further reasoning for its reversal of the Circuit Court's granting of SWA's motion to dismiss as to the civil conspiracy

claim, but rather lumped together all Respondents' arguments, even though the civil conspiracy claim as it involves SWA has no relationship to the Court of Appeals' reasoning for the Master in Equity's involvement; but instead, should be considered distinctly on its merits.

As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous decision.

A. The Court of Appeals' holding that the Circuit Court erred in referring the matter to the Master has no bearing on SWA.

The Court of Appeals held that the Circuit Court erred in referring the matter to the master because Appellant was entitled to a trial by jury and sought to invoke that right in its complaint. *Maybank 2754, LLC*, 444 S.C. 47, 906 S.E.2d 94 n. 11 (Ct. App. 2024). Appellant argued on appeal that the Circuit Court did not have jurisdiction to issue the orders Appellant sought to overturn because the matter had been referred to the Master-in-Equity and then back to the Circuit Court while Appellant's appeal regarding the mode of trial was pending. However, as noted in the Court of Appeals' Order, "[a]ll Respondents—except for Seamon—filed motions for reference to the master on the ground that the Foreclosure Order required the master to retain jurisdiction over 'all necessary acts incident to this foreclosure and to hear any post-judgment matters.'" *Maybank 2754, LLC*, 444 S.C. 47, 60, 906 S.E.2d 94, 101 (Ct. App. 2024).

While SWA did not oppose its co-Respondents' Motions to Refer to the Master-in-Equity, SWA did not, itself, file a Motion to Refer to the Master-in-Equity; thus, Appellant's argument related to the Circuit Court's jurisdiction, or alleged lack thereof, has no bearing on SWA. As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous decision.

B. Appellant abandoned any argument related to SWA's Motion to Dismiss, however, even presuming Appellant did not abandon any argument related to the motion to dismiss, the Trial Court's Order Granting SWA's Motion to Dismiss must be affirmed.

For an issue or an argument to be properly preserved for appellate review, it is well settled that it must have been raised to and ruled upon by the trial court. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 24, 531 S.E.2d 282, 284(2000). Simply, "[a]n issue that was not preserved for review should not be addressed by the Court of Appeals…." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Furthermore, in situations where it is not clear whether issues were raised or ruled upon, courts will find that those issues are not preserved. *See Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) ("At a minimum, issue preservation requires that an issue be raised and ruled upon by the trial judge. The issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.") (internal citations omitted); *Carolina First Bank v. Ashley Tower, LP*, 2005 WL 7084806 at *2 (Ct. App. Nov. 21, 2005) ("[T]here is no way for this court to determine if the issues asserted on appeal have been raised to and ruled upon by the trial court. As such, we find none of the issues are preserved for our review.").

Via Order dated October 7, 2020, the Circuit Court granted SWA's Motion to Dismiss. *See Form 4 Order, October 7, 2020.* Appellant did not address, in its appeal, SWA's grounds for its Motion to Dismiss or the Circuit Court's grounds for granting SWA's motion; therefore, the issue has been abandoned by Appellant and the Circuit Court's Order should be affirmed. Appellant had the burden to present a sufficient record for the Court of Appeals to make a decision. *See Goode v. St. Stephens United Methodist Church*, 329 S.C. 433, 494 S.E.2d 827, 834 (Ct. App. 1997); *Medlock v. One 1985 Jeep Cherokee*, 322 S.C. 127, 470 S.E.2d 373 (1996); *Germain v. Nichol*, 278 S.C. 508, 299 S.E.2d 335 (1983); *Vespazianni v. McAlister*, 307 S.C. 411, 415 S.E.2d 427 (Ct.

App. 1992). "An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Wright v. Craft,* 372 S.C. 1, 640 S.E.2d 486, 497 (Ct. App. 2006); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993); *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992).

In *Wright*, the appellee Craft was deemed to have abandoned two issues because he failed to address them in his appellate brief. First, while he mentioned the denial of a motion to strike damages in his statement of issues on appeal, he did not address the merits of the denial in his brief. *See Wright,* 640 S.E.2d at 497. Second, the appellee cited that the jury's verdict was the result of undue passion and prejudice in his statement of issues on appeal, but the appellee failed to include anything further on that point in his brief. *See id.* As such, the issues were not properly before the appellate court for consideration. *See id.*

Here, Appellant failed to address SWA's grounds for its Rule 12(b)(6) dismissal. Accordingly, as in *Wright,* that issue has been abandoned by Appellant, and the Circuit Court's order granting SWA's Rule 12(b)(6) motion to dismiss must be affirmed.

Simply, Appellant failed to preserve on appeal the ability to challenge Circuit Court's Order Granting SWA's Motion to Dismiss. The Court of Appeals overlooked Appellant's failure and nonetheless held that, "Maybank did not abandon any argument related to the motion to dismiss because the circuit court's order, which was appealed, granted the motions for summary judgment, including Seamon's, and effectively denied Seamon's motion to dismiss." *Maybank 2754, LLC,* 444 S.C. 47, 906 S.E.2d 94 n. 11 (Ct. App. 2024). However, the Court of Appeals assertion that the Circuit Court "effectively denied" SWA's motion to dismiss is incorrect; as referred to earlier, the Circuit Court's October 7, 2020 Order ruled that, "Defendant Seamon Whiteside and Associates Inc.'s Motion to Supplement/Motion to Dismiss is GRANTED." *Form*

4 Order, October 7, 2020. As such, the Court of Appeals erred in considering Appellant's arguments not preserved upon Appeal in its reversal of the Circuit Court's Granting of SWA's Motion to Dismiss. SWA respectfully requests, therefore, that this Court grant the petition for writ of certiorari to correct the erroneous decision.

Even if the Court of Appeals' holding is correct, that "Maybank did not abandon any argument related to the motion to dismiss . . ." SWA's Motion to Dismiss the only claim filed against SWA, civil conspiracy, must be affirmed. *Maybank 2754, LLC*, 444 S.C. 47, 906 S.E.2d 94 n. 11 (Ct. App. 2024).

When reviewing motions to dismiss, the appellate court applies the same standard of review as the trial court. *See Carolina Park Assoc., LLC v. Marino,* 400 S.C. 1, 732 S.E.2d 876, 878 (2012). "Under Rule 12(b)(6), a defendant may move to dismiss a complaint due to its 'failure to state facts sufficient to constitute a cause of action.'" *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n,* 407 S.C. 67, 753 S.E.2d 846, 850 (2014). "In considering a motion to dismiss under Rule 12(b)(6), a court must base its ruling solely on the allegations set forth in the complaint." *Id.* at 850; *Doe v. Marion,* 373 S.C. 390, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal under Rule 12(b)(6) is improper." *Carnival Corp.,* 753 S.E.2d at 850; *Doe,* 645 S.E.2d at 247.

Nonetheless, and even if we are to assume that Appellant did not abandon its argument against SWA's Motion to Dismiss, Appellant's claim for civil conspiracy against SWA failed, and continues to fail, as a matter of law because Appellant failed to properly plead all elements to allege a claim for conspiracy under South Carolina law.

For these reasons, and the reasons noted above, the Court of Appeals erred in reversing the Circuit Court's granting of SWA's Motion to Dismiss. As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous overlook and subsequent decision.

i. Appellant failed to allege that any relationship existed between SWA and Appellant to support a finding that SWA acted with specific intent to harm, nor did Appellant allege that SWA entered into any agreement with another party to purposely harm Appellant.

"A civil conspiracy is a combination of two or more persons joining *for the purpose of* injuring and causing special damage to the plaintiff." *McMillan v. Oconee Mem'l Hosp., Inc.,* 626 S.E.2d 884, 886 (S.C. 2006) (emphasis added); *see also Todd v. S.C. Farm Bureau Mut. Ins. Co.,* 292, 278 S.E.2d 607, 611 (S.C. 1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); *Vaught v. Waites*, 208, 387 S.E.2d 91, 95 (S.C. Ct. App. 1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.").

The focus of the inquiry is thus on the purpose of the agreement: "the essential consideration is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the *primary purpose* or object of the combination is to injure the plaintiff." *Lee v. Chesterfield Gen. Hosp., Inc.,* 344 S.E.2d 379, 383 (S.C. Ct. App. 1986) (emphasis added). Some evidence that the alleged conspirators "acted with malice towards" the plaintiff is required. *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co., Inc.,* 992 F.2d 59, 63 (4th Cir. 1993) (applying South Carolina law).

Importantly, when "alleged conspirators acted out of a general desire to make a profit rather than to harm the plaintiff, a claim for civil conspiracy cannot lie." *Sizemore v. Ga-Pac. Corp.,* Civ.

A. No. 6:94-2894, 1996 WL 498410 (D.S.C. 11/8/96); *Bivens v. Watkins,* 437 S.E.2d 132, 136 (S.C. Ct. App. 1993); *see also Stiles v. Onorato,* 457 S.E.2d 601, 603 (S.C. 1995) (Third party complaint alleging civil conspiracy was dismissed for failure to state a claim since the complaint failed to allege in what manner defendant attorney acted outside his role as plaintiff's attorney and did not allege breach of any independent duty owed to the third party; only reasonable inference was that at all times defendant attorney was acting in his capacity as an attorney). "Thus, a claim for civil conspiracy requires at least some degree of relationship between the plaintiff and the alleged conspirators." *Sizemore,* 1996 WL 498410, at *13.

In *Sizemore,* the plaintiff alleged that defendant HPVA, a non-profit trade association supporting manufacturers of hardwood plywood and veneer products, engaged in a civil conspiracy with defendant Georgia-Pacific and other manufacturers to conceal the flammability properties of hardwood plywood paneling from disclosure to federal and state agencies, building code officials, consumer groups, and the general public. *Id.* Specifically, the plaintiff asserted that HPVA's research and advocacy activity on behalf of the industry, including Georgia-Pacific, was evidence of the conspiracy. *Id.* The *Sizemore* court held that the alleged acts by HPVA complained of did not satisfy, as a matter of law, the requirements of a South Carolina civil conspiracy claim. *Id.* There was no evidence in the record which suggested that there was any type of relationship between plaintiffs and HPVA, "let alone the type of relationship that could give rise to a claim that HPVA conspired with the specific intent to harm the plaintiffs." *Id.*; *Swartzbauer v. Lead Indus. Ass'n, Inc.*, 794 F. Supp. 142, 145 (E.D. Pa. 1992) ("court dismissed a civil conspiracy claim against an industry trade association because plaintiffs did not allege 'that the object of defendants' alleged agreement was to injure plaintiffs.'") The mere allegation made by plaintiff was "that HPVA was aware that its actions were injuring 'members of the [p]laintiffs' class, the users and

consumers of plywood wall paneling products. This generalized statement is an insufficient factual predicate upon which to rest a finding that HPVA acted with the specific intent to harm the plaintiffs." *Id.*

Here, there is no relationship alleged between Appellant and SWA to support a claim for civil conspiracy. Taking the allegations of the *Verified Complaint* as true, SWA was engaged by Penny Creek to prepare planned unit development guidelines for the Servient Property sometime after the derivative and judicial dissolution action was commenced on December 16, 2013. *Verified Complaint*, at ¶¶ 22 & 32. At that time, Penny Creek had already allegedly transferred its membership interest in Appellant to the Laplante family by Resolution dated October 4, 2013. As such, there would have been no relationship—contractual or otherwise—between Appellant and SWA. Thus, no special relationship existed between Appellant and SWA to give rise to a claim that SWA conspired with the *specific intent or purpose* to harm Appellant. SWA was simply engaged by another Respondent, Penny Creek, to prepare documents on behalf of Penny Creek as a standard business transaction for profit. Because the requisite relationship does not exist—nor has it been alleged to exist—between Appellant and SWA, the cause of action for civil conspiracy against SWA must be dismissed and the Circuit Court's holding as to SWA's Motion to Dismiss must be affirmed.

As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous decision.

ii. Appellant did not allege or plead sufficient facts to support the claim under Rule 8, SCRCP or otherwise per South Carolina law.

"The Rules 'govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity." *Justice v. Perry*, 496 S.E.2d 871, 872 (S.C. Ct. App. 1998); SCRCP, Rule 1. "The Rules clearly set forth the required contents of pleadings.

Pleadings shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.'" *Justice,* 496 S.E.2d at 872; SCRCP, Rule 8(a). "'All pleadings shall be so construed as to do substantial justice to all parties." *Id.*; SCRCP, Rule 8(f). "Therefore, in deciding whether a dismissal under Rule 12(b)(6), SCRCP, is proper, the adequacy of a plaintiff's complaint must be determined through application of the pleading rules of Rule 8, SCRCP." *Id.*

"In this state Rule 8, SCRCP, mandates that a pleading contain 'ultimate facts' rather than 'evidentiary facts' to state a cause of action." *Watts v. Metro Sec. Agency,* 550 S.E.2d 869, 871 (S.C. Ct. App. 2001); *Jeffords v. Lesesne,* 541 S.E.2d 847 (S.C. Ct. App. 2000). "'Ultimate facts fall somewhere between the verbosity of 'evidentiary facts' and the sparsity of 'legal conclusions.'" *Watts,* 550 S.E.2d at 871; *Jeffords,* 541 S.E.2d at 847.

While "Rule 12(b)(6) SCRCP, 'retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules,'" the pertinent language of Rule 8, SCRCP is substantially similar to Rule 8, Federal Rules of Civil Procedure, and, thus, related federal case law provides guidance here. *See Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 541 S.E.2d 269, 271 (S.C. Ct. App. 2000); Harry M. Lightsey, Jr. & James F. Flanagan, *S.C. Civ. Proc.* 93 (2nd Ed. 1996); *see* S.C. Rules of Civ. Proc., Rule 8(a), Fed. Rules of Civ. Pro., Rule 8(a). "In construing the South Carolina Rules of Civil Procedure, . . . [South Carolina] courts look for guidance to cases interpreting the federal rules." *Maybank v. BB&T Corp.,* 787 S.E.2d 498, 510 (S.C. 2016); *Gardner v. Newsome Chevrolet-Buick, Inc.,* 404 S.E.2d 200, 201 (S.C. 1991). "The United States Supreme Court has made clear that, under Rule 8 of the Federal Rules of Civil

Procedure, the complaint must contain sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *James v. Richland Cty Recreation Comm'n,* 2016 WL 6892806, at *2 (D.S.C. 11/1/16), *see Ashcroft v. Igbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). "Expounding on its decision in *Twombly*, the United States Supreme Court stated in *Igbal*:

> The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation. A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

James, 2016 WL 6892806 at *2-3; *Igbal*, 556 U.S. at 677-78 (quoting *Twombly*, 550 U.S. at 555, 556, 557, 570).

Here, it is not enough for Appellant to simply lump SWA in its general allegation that all of the Respondents "at the direction, guidance, and/or persuasion of Zurlo" concealed the easement by omitting references to the easement when seeking approval for the development of the Servient Property. *See Verified Complaint,* ¶ 61. Appellant was required to include allegations of specific facts in its Complaint to allow the Circuit Court to draw the reasonable inference of liability, and Appellant failed to do so in its claim for civil conspiracy. Further, along those same lines, the Complaint is devoid of any allegation that an agreement was entered into by SWA with the other alleged conspirators to conspire against Appellant for the specific purpose of harming Appellant. Those key omissions are fatal to Appellant's claim for civil conspiracy, such that Appellant's

general allegations of conspiracy are just a "naked assertions" devoid of "factual enhancement" that are far from being "plausible on their face."

Without sufficient factual content to support, or allegations to establish, any specific agreement by SWA to conspire with the other Respondents to purposefully harm Appellant, it was impossible for the Court of Appeals to test whether the claim had facial plausibility. Accordingly, the Circuit Court's holding which granted SWA's Motion to Dismiss Appellant's claim for civil conspiracy against SWA must be affirmed as Appellant failed to state facts sufficient to constitute a cause of action as required under Rule 8, SCRCP's pleading standard and otherwise per South Carolina law.

As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous decision.

iii. Appellant did not allege any additional overt act in furtherance of the alleged conspiracy.

"A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. . . . Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Hackworth v. Greywood at Hammett, LLC*, 682 S.E.2d 871, 874 (S.C. Ct. App. 2009) (internal citations omitted). "As a unique feature of the tort of civil conspiracy, 'an action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues.'" *Roddey v. Nations Waste, Inc.*, 2005 WL 7084315, at *5 (S.C. Ct. App. July 28, 2005; *Kuznik v. Bees Ferry Assocs.*, 538 S.E.3d 15, 31 (S.C. Ct. App. 2000), *cert. dismissed* (Jan. 1, 2004). This case law is consistent with the premise of Rule 8(e)(2), which provides a party the ability "to set forth two or more statements of a cause of action or defense *alternatively or hypothetically* [not cumulatively]… regardless of consistency and whether based

on legal or on equitable grounds or on both." *Roddey*, 2005 WL 7084315, at *5; SCRCP Rule 8(e)(2).

Here, Appellant has failed to allege any particular additional overt act in furtherance of the alleged conspiracy beyond what was alleged throughout the remainder of its pleading and other causes of action. The allegations of conspiracy are not plead "in the alternative," and are essentially the same allegations contained elsewhere within Appellant's Complaint—that is, the Respondents allegedly knew of the alleged easement but failed to include it in their submissions, and thus Appellant is now deprived of its easement. Because Appellant has failed to plead any additional overt act to support its civil conspiracy claim, the claim must be dismissed and the Circuit Court's ruling as to SWA's Motion to Dismiss affirmed.

Thus, the Court of Appeals erred in reversing the Circuit Court's decision to grant SWA's request for dismissal of Appellant's civil conspiracy claim against SWA pursuant to Rule 12(b)(6), SCRCP. As such, SWA respectfully requests that this Court grant the petition for writ of certiorari to correct the Court of Appeals' erroneous decision.

CONCLUSION

SWA respectfully requests this Court grant the petition for writ of certiorari and reverse the Court of Appeals thereby upholding the lower court's decision to dismiss all claims against SWA. The Court of Appeals overlooked or misapprehended the aforementioned points in reversing and remanding the Circuit Court's decision specific to the only claim filed against SWA in the underlying matter. Therefore, this Court should grant the petition for writ of certiorari to correct the overlooked and misapprehended points which led to the Court of Appeals' erroneous decision.

This 6th day of November, 2024.

Respectfully submitted,

s/ Jordan N. Teich

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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. 2020-001030
Opinion No. 6081, filed August 7, 2024

Maybank 2754, LLC, ... Appellant,

v.

Eugene 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.

PROOF OF SERVICE

I certify that I have served the Respondent Seamon, Whiteside & Associates, Inc.'s Petition for Writ of Certiorari on the following parties' counsel, at the addresses listed below by electronic mail on November 6, 2024.

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