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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge
J. Derham Cole, Sr., Circuit Judge

Appellate Case No. 2025-000627

PNC Bank, N.A., successor by
merger to PNC Equipment Finance,
LLC,

Respondent,

v.

S & J Asphalt Paving, LLC, Jose
Luis Guerrero, and Scott Robert
Ronson,

Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR BY REFUSING TO GRANT SUMMARY JUDGMENT, OR ALTERNATIVELY JUDGMENT ON THE PLEADINGS, WHERE RESPONDENT INITIATED THE ACTION IN THE NAME OF A NON-EXISTENT PLAINTIFF?
2. DID THE TRIAL COURT ERR BY ALLOWING RESPONDENT TO SUBSTITUTE PNC BANK, N.A., IN THE PLACE OF PNC EQUIPMENT FINANCE, LLC, WHERE SUIT WAS ORIGINALLY BROUGHT IN THE NAME OF A NON-EXISTENT PLAINTIFF AND SUCH DEFECT IS NOT CAPABLE OF BEING CURED BY AMENDMENT?
3. DID THE TRIAL COURT ERR BY ALLOWING RESPONDENT TO AMEND ITS COMPLAINT TO SUBSTITUTE PNC BANK, N.A., IN THE PLACE OF PNC EQUIPMENT FINANCE, LLC, WHERE SUCH AMENDMENT WAS FUTILE AND IN BAD FAITH?
4. DID THE TRIAL COURT ERR BY FAILING TO IMMEDIATELY END THE ACTION WHEN THE FACT THAT THE ACTION WAS BROUGHT IN THE NAME OF A NON-EXISTENT ENTITY WAS BROUGHT TO THE TRIAL COURT'S ATTENTION?
5. SHOULD THE ACTION BE DISMISSED AS PNC EQUIPMENT FINANCE, LLC, A NON-EXISTENT LEGAL ENTITY, LACKED STANDING TO PURSUE THIS CLAIM AND, THEREFORE, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION?

STATEMENT OF THE CASE

This matter arises from a promissory note, and accompanying guaranties, issued by the Appellants to Volvo Financial Services (“VFS”) to finance the purchase of a Mauldin 1860 Paver (“Paver”). (See **Summons and Complaint**, ¶¶5-9; **Exs. B-C to Summons and Complaint**). VFS’s rights in the promissory note were subsequently assigned to PNC Equipment Finance, LLC. (**Summons and Complaint** ¶7). After defaulting under the terms of promissory note Appellants voluntarily surrendered the Paver in lieu of repossession. (*Id.* ¶12). The Paver was subsequently sold at auction for \$23,000.00. (*Id.*). On May 1, 2022, PNC Equipment Finance, LLC merged into PNC Bank, N.A., the Respondent in this appeal. (See **State of Delaware Certificate of Merger**)

This action was initiated on April 19, 2024, in the Court of Common Pleas for Spartanburg County by PNC Equipment Finance, LLC, seeking a deficiency judgment against Appellant S & J Asphalt Paving, LLC, under the promissory note, and against the Appellants Jose Luis Gurrero and Scott Robert Ronson, individually, under the guaranties. (**Summons and Complaint**, ¶¶25-26). PNC Equipment Finance, LLC, verified its Summons and Complaint through Michael McGinley who attested he was employed by PNC Equipment Finance, LLC. (See **Corporate Verification of Summons and Complaint**). Appellants filed their Answer and Counterclaim on May 21, 2024, along with a demand for trial by jury. (See **Answer and Counterclaim**). Appellants moved for judgment on the pleadings, or in the alternative to dismiss pursuant to Rule 12(b)(6), *SCRPC*, for failure to state a cause of action, on May 24, 2024, based on PNC Equipment Finance, LLC’s failure to possess a Certificate of Authority pursuant to S.C. Code Ann. § 33-44-1008(a).¹ (See **Defendants’ Motion for Judgment on the Pleadings and Exhibit 1 to Motion for**

¹ Appellants’ also moved to strike Exhibit A of Respondent’s Complaint as immaterial to this action. This motion was also denied by the trial court; however, Appellants’ do not appeal the denial of their motion to strike.

Judgment on the Pleadings). Appellants filed a Memorandum of Law in support of their motion for judgment on the pleadings on June 23, 2024. **(See Defendants' Memorandum of Law in Support of Defendants' Motion for Judgment on the Pleadings)**. PNC Equipment Finance, LLC filed its Response to Appellants' motion for judgment on the pleadings on July 23, 2024, where, for the first time, it was admitted that PNC Equipment Finance, LLC had merged out of existence on May 1, 2022. **(See Plaintiff's Response in Opposition to Defendants' Rule 12 Motions ¶7 and Exhibit 1 to Plaintiff's Response in Opposition)**. Respondent attached to their Response matters outside of the pleadings, including another affidavit of Michal McGinley simultaneously attesting that PNC Equipment Finance, LLC no longer existed and that he was an officer of PNC Equipment Finance, LLC. **(See Plaintiff's Affidavit in Opposition to Defendants' Rule 12 Motions ¶¶1, 3)**. Appellants filed a Reply to PNC Equipment Finance, LLC's Response on July 26, 2024, arguing the action should be ended by the trial court as having been brought in the name of a non-existent plaintiff. **(See Defendants' Reply to Plaintiff's Return and Objection to Consideration of Matters Outside the Pleadings)**. Appellants' motion for judgment on the pleadings was heard by the Honorable J. Derham Cole, Sr., Circuit Judge, on July 31, 2024, and taken under advisement. **(See Transcript of July 31, 2024, Hearing)** It is unclear from Judge Cole's Order whether he considered the materials outside of the pleadings submitted by the Respondent. **(See Transcript of July 31 Hearing and Form 4 Order Filed November 21, 2024)**. However, Appellants counsel relied upon the materials presented by the Respondent to argue that the action was subject to dismissal for being brought in the name of a non-existent plaintiff. **(See Transcript of July 31 Hearing at pp. 4-6, ll.2-20)**. Judge Cole denied Appellants' motion for judgment on the pleadings by way of a Form 4 Order on November 21, 2024. **(See November 21 Form 4 Order)** Appellants moved for reconsideration pursuant to Rule 59, *SCRCP*, on November

21, 2024. **(See Defendants' Motion to Reconsider, Filed November 21, 2024)**. Judge Cole denied Appellants' motion to reconsider by way of a Form 4 Order dated April 4, 2025, and filed on April 8, 2025. **(See Form 4 Order Denying Reconsideration Filed on April 8, 2025)**.

On July 30, 2024, Respondent filed a Motion to Amend to substitute Respondent as plaintiff in place of PNC Equipment Finance, LLC. **(See Plaintiff's Motion to Amend)**. Appellants filed a Return in opposition to Respondent's Motion to Amend on August 28, 2024, again asserting that the action must be ended as it was brought in the name of a non-existent plaintiff and that such defect was incapable of being cured by amendment. **(See Defendants' Return to Plaintiff's Motion to Amend Complaint at pp. 3-4)**. Appellants further asserted that amendment would be improper as it was clearly futile and grounded in bad faith. **(Id. at 4-7)**. Respondent's motion to amend was heard by the Honorable R. Keith Kelly, Circuit Judge, on December 12, 2024, and was taken under advisement. **(See Transcript of December 12, 2024, Hearing)**. Judge Kelly granted Respondent's Motion to Amend by way of a formal order on February 20, 2025. **(See Order Allowing Plaintiff's Motion to Amend Complaint)**. Appellants filed a motion to reconsider pursuant to Rule 59, *SCRCP*, on February 25, 2025. **(See Defendant's Motion to Reconsider, Filed February 25, 2025)**. Judge Kelly denied Appellants' motion to reconsider on March 31, 2025. **(See Order Denying Defendants' Motion to Reconsider the Court's Order Filed on February 20, 2025)**.

Appellants filed their Notice of Appeal on April 1, 2025, with this Court and the Trial Court and served the Notice of Appeal upon counsel for the Respondent on April 1, 2025. **(See Appellants' Notice of Appeal, Dated April 1, 2025)**. Upon receipt of Judge Cole's April 4, 2025, Order denying Appellants' Motion to Reconsider, Appellants filed their Amended Notice of Appeal with this Court and the trial court and served their Amended Notice of Appeal upon counsel for

the Respondent all on April 8, 2025. (See **Appellants’ Amended Notice of Appeal, Dated April 8, 2025**).

STANDARD OF REVIEW

A. Motion for Judgment on the Pleadings and for Failure to State a Claim.

“Any party may move for a judgment on the pleadings under Rule 12(c), *SCRPC*.” *Ballard v. Admiral Ins. Co.*, 442 S.C. 22, 33, 897 S.E.2d 183, 188 (Ct. App. 2023) (quoting *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000)). “On review of the motion, the court may not consider matters outside the pleadings.” *Falk*, 341 S.C. at 286, 533 S.E.2d at 353 (citing *Firemen’s Ins. Co. v. Cincinnati Ins. Co.*, 302 S.C. 234, 394 S.E.2d 855 (Ct. App. 1990)). In considering a motion for judgment on the pleadings, the pleadings must be liberally construed to do substantial justice between the parties. *Pope v. Wilson*, 427 S.C. 377, 384, 831 S.E.2d 442, 446 (Ct. App. 2019) (quoting *Falk*, 341 S.C. at 287, 533 S.E.2d at 353). If matters outside the pleadings are presented to, and not excluded by, the trial court then the motion is treated as one for summary judgment under Rule 56, *SCRPC*. *Ballard*, 442 S.C. at 34, 897 S.E.2d at 189. An appellate court reviewing a motion for judgment on the pleadings applies the same standard as the trial court. *Id.* (quoting *Ziegler v. Dorchester County*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019)).

Appellants alternatively moved pursuant to Rule 12(b)(6), *SCRPC*, for an Order dismissing Respondent’s case on the grounds that Respondent failed to state a cause of action. “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court

must base its ruling solely on allegations set forth in the complaint.” *Id.*

B. Summary Judgment

As set forth above, Judge Cole may have considered matters outside of the pleadings in considering Appellants’ motion for judgment on the pleadings. Such matters were not specifically excluded by the trial court. “If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the [trial court], the motion shall be treated as one for summary judgment.” Rule 12(c), *SCRCP*. Summary judgment shall be granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Rule 56(c), *SCRCP*; *see also Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 463-64, 892 S.E.2d 297, 301 (2023) (holding that a party must present a genuine issue of material of fact, and not a scintilla of evidence, to survive a motion for summary judgment). “In any event, ‘whether reviewing a grant of summary judgment or a judgment on the pleadings, we apply the same legal standards as the trial court.’” *Ballard*, 442 S.C. at 34, 897 S.E.2d at 189 (*quoting Ziegler*, 426 S.C. at 619, 828 S.E.2d at 220).

C. Motion to Amend the Pleadings

Rule 15(a), *SCRCP*, allows a party to amend its pleadings upon leave of the trial court, and such “leave shall be freely given when justice so requires and does not prejudice any other party.” *Patton v. Miller*, 420 S.C. 471, 489, 804 S.E.2d 252, 261 (2017) (*quoting* Rule 15(a), *SCRCP*). A motion to amend is committed to the sound discretion of the trial court. *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812 (2013). Under Rule 15(a), the trial court must consider whether the defendants are prejudiced by the amendment, “or whether there was some other substantial reason to deny it.” *Patton*, 420 S.C. at 490, 804 S.E.2d at 262. The trial court’s order on a motion to amend will not be overturned unless it is

controlled by an abuse of discretion or manifest injustice has occurred. *Curry v. Carolina Ins. Grp. of SC, Inc.*, 428 S.C. 60, 76, 832 S.E.2d 760, 768 (Ct. App. 2019) (quoting *Berry v. McLeod*, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997)). “An abuse of discretion occurs when the trial court’s ruling is based on an error of law or is not supported by the evidence.” *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

ARGUMENT

I. DID THE TRIAL COURT ERR BY REFUSING TO GRANT SUMMARY JUDGMENT, OR ALTERNATIVELY JUDGMENT ON THE PLEADINGS, WHERE RESPONDENT INITIATED THIS ACTION IN THE NAME OF A NON-EXISTENT PLAINTIFF.

As set forth above, Judge Cole did not specifically exclude the materials presented by the Respondent consisting of the Certificate of Merger from the Delaware Secretary of State’s office; a printout from the Federal Deposit Insurance Corporation; and an affidavit of Michael McGinley. (See Transcript of July 31 Hearing at p. 2, ll.6-8; p.6, l.21; p.9, ll.7-8; p.13, ll.14-15; see also November 21 Form 4 Order). Appellants objected to the consideration of these documents in their written submissions. (See Defendants’ Reply to Plaintiff’s Return in Opposition to Defendants’ Rule 12 Motions at pp. 1-2). However, Appellants did not affirmatively object to consideration of these materials by the trial court at the hearing and explicitly relied upon the merger documents at the hearing. (See Transcript of July 31 Hearing at pp. 4-6, ll.2-20; pp.10-13, ll.5-13). Conceivably the motion was converted to one for summary judgment. However, even if the motion is still treated as one for judgment on the pleadings, or as a motion to dismiss, the Appellants are still entitled to judgment as a matter of law. See *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (“[W]hatever doesn’t make any difference, doesn’t matter.”).

It is undisputed that PNC Equipment Finance, LLC, merged with PNC Bank, N.A., on May 1,

2022. (See Ex. 1 “State of Delaware Certificate of Merger” to Plaintiff’s Response in Opposition to Defendant’s Rule 12 Motions ¶2). It is further undisputed that PNC Bank, N.A., was the sole survivor of this merger. (*Id.* at ¶6). It is further undisputed that PNC Equipment Finance, LLC’s existence, as a limited liability company organized under the laws of the State of Delaware, is governed by the laws of the State of Delaware. Delaware Code title 6, §18-209(e) provides that “A certificate of merger or consolidation or a certificate of ownership and merger shall act as a certificate of cancellation for a domestic limited liability company which is not the surviving or resulting entity in the merger or consolidation.” See *MPEG LA, L.L.C. v. Toshiba Am. Info. Sys., Inc.*, No. 15-CV-3997 JMF, 2015 WL 6685523 *1, *6 (S.D.N.Y. Oct. 29, 2015) (holding that under Delaware law a limited liability company which is not the surviving entity in a merger ceases to exist). A limited liability company in Delaware continues to exist as a legal entity “until cancellation of the limited liability company’s certificate of formation.” 6 Del. C. §18-201(b); see also *In re Reinz Wisconsin Gasket, LLC*, No. CV 2022-0859-MTZ, 2023 WL 3300042 *1, *2 (Del. Ch. May 8, 2023) (holding, under Delaware law, that when a certificate of cancellation is filed a limited liability company’s legal existence ceases). In this regard Delaware’s law is the same as South Carolina’s where the legal existence of every entity, but the surviving entity, ceases upon the completion of the merger. *Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 560, 738 S.E.2d 251, 252fn.1 (2013) (*citing* S.C. Code Ann. §33-11-106(a)(1)).

Accordingly, it is patently clear that PNC Equipment Finance, LLC, ceased to have any legal existence on May 1, 2022. The key question then before the Court is whether this renders Respondent’s action a legal nullity *ab initio*. Under South Carolina law it does. The long-standing rule in South Carolina is “[I]f there is a lack of legal entity, the whole action fails....If an action is brought in the name of that which under the *lex fori* has no legal entity, it is as if there was no

plaintiff in the record and therefore no action before the Court .” *McCullar v. Estate of Campbell*, 381 S.C. 205, 207, 672 S.E.2d 784, 785 (2009) (quoting *Com. & Sav. Bank of Lake City v. Ward*, 146 S.C. 77, 143 S.E. 546, 548² (1928)). “A civil action may be maintained only in the name of a person in law, an entity, which the law of the forum may recognize as capable of possessing and asserting a right of action. A suit brought in a name which is not a legal entity is a nullity and the action fails.” *Glenn v. E. I. Du Pont De Nemours & Co.*, 254 S.C. 128, 133, 174 S.E.2d 155, 157-58 (1970).

The facts of the *Ward* case are directly on point with the facts of this case. In that case suit was brought in Florence County to foreclose a mortgage by the Commercial & Savings Bank of Lake City, S.C. *Ward*, 146 S.C. 77, 143 S.E. at 546. The foreclosing bank alleged in its complaint that it was a corporation organized and existing under the laws of South Carolina at the time it filed its complaint. *Id.* However, later the plaintiff moved before the special referee to amend its complaint to substitute the Commercial & Savings Bank of Florence, S.C., as the plaintiff. *Id.* The apparent reason for this amendment was that the original plaintiff was in fact not a separate corporation but instead was merely the Lake City branch of the Florence bank. *Id.* The Supreme Court, in reversing the trial court, specifically found that suit, instituted in the name of the branch bank, was a nullity as there was no such legal entity as the “Commercial & Savings Bank of Lake City, S.C.” *Id.*, 143 S.E. at 548.

Furthermore, this rule is not a quirk of South Carolina law but instead represents the general black letter rule regarding plaintiffs who lack legal existence. Particularly instructive in this case is *Smith v. CDI Rental Equip., Ltd.*, 310 S.W.3d 559 (Tex. Ct. App. 2010). In the *Smith* case the

² Full citations for the pages of the reporter for *Ward* are provided only as to the Southeastern Reporter as the South Carolina Reporter page citations are not available on Westlaw.

plaintiff, CDI Rental Equipment, Ltd., merged with Equipment Support Services, Inc. prior to the initiation of its lawsuit against Smith. *Id.* at 564-65. In reversing the trial court’s denial of the defendant’s motion to dismiss the Texas court noted “Civil suits may be maintained only by or against parties having an actual or legal existence. Accordingly, CDI Rental Equipment, Ltd. was not a proper party to the suit and judgment cannot be rendered in its favor.” *Id.* at 565. (citation omitted). The overwhelming federal authority stands for the same proposition. *See, e.g., Branch of Citibank, N.A. v. De Nevares*, 74 F.4th 8, 21 (2nd Cir. 2023) (holding branch of Citibank, N.A. had no legal existence and remanding with instructions to dismiss for lack of jurisdiction); *House v. Mitra QSR KNE LLC*, 796 Fed.Appx. 783, 788 (4th Cir. 2019) (holding a plaintiff’s lack of legal existence is a non-curable jurisdictional defect); *In re: 2016 Primary Election*, 836 F.3d 584, 587 (6th Cir. 2016) (“There is no plaintiff with standing if there is no plaintiff.”); *Brown v. Fifth Jud. Dist. Drug Task Force*, 255 F.3d 475, 477 (8th Cir. 2001) (affirming dismissal of plaintiff’s complaint as defendant lacked legal existence); *In re Asbestos Prods. Liab. Litig. (No. VI)*, 311 F.R.D. 152, 155 (E.D. Pa. 2015) (holding actions to be a legal nullity *ab initio* as plaintiffs lacked legal existence); *Adelsberger v. United States*, 58 Fed. Cl. 616, 618 (Ct. Fed. Cl. 2003) (same); *United States v. 82,656 Red Bull Energy Drinks*, No. 23-CV-04183 (SDW)(JRA), 2025 WL 1747129 *1, *2 (D.N.J. May 30, 2025), *report and recommendation adopted*, No. CV 23-4183 (SDW) (JRA), 2025 WL 1747061 (D.N.J. June 24, 2025) (holding in forfeiture action that dissolved limited liability company could not contest forfeiture as it lacked legal existence); *PrimeSource Bldg. Prods., Inc. v. United States*, 494 F.Supp.3d 1307, 1321 (Ct. Int’l Trade 2021) (Baker, J., concurring) (“An entity lacking legal existence cannot sue or be sued, not because it lacks capacity, but rather because the entity simply does not exist in the eyes of the law. In the absence of legal existence or specific statutory authorization, a federal court filing by a purported

entity is a nullity.”).

Before the trial court the Respondent did not seriously attempt to argue that the foregoing authority was incorrect. Instead, Respondent asserted that the decisions in *McCullar*, *Glenn*, and *Ward* were implicitly overruled by the adoption of the *South Carolina Rules of Civil Procedure*. **(See Transcript of December 12 Hearing at pp. 7-8)**. Respondent’s sole citation of authority to the trial court was our Supreme Court’s decision in *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017)³. There are two glaring errors in Respondent’s argument. First, *Patton* concerned a parent who sued solely on behalf of her minor child for medical expenses as “next friend.” 420 S.C. at 478, 804 S.E.2d at 255. The primary issue before the court was whether the parent, in a representative capacity, was the real party in interest regarding the minor’s medical expenses incurred before she turned eighteen (18). *Id.* at 481-82, 804 S.E.2d at 257. The Supreme Court acknowledged that Rule 17, *SCRCP*, had changed prior law as far as it relates to the real party in interest. Prior to the adoption of the *South Carolina Rules of Civil Procedure* the failure to bring the case in the name of the real party in interest was a jurisdictional defect which required dismissal. *Id.* at 487, 804 S.E.2d at 260. Respondent’s argument, at the bottom, was simply a reliance on this one part of *Patton*. However, as our Supreme Court explained, lack of legal existence is fundamentally different than whether the party is the real party in interest. “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” capable of being suing or being sued. *McCullar*, 381 S.C. at 207, 672 S.E.2d at 784-85⁴.

³ Respondent did not cite any authority to the trial court at the July 31, 2024, hearing other than vague references to Rule 15, *SCRCP*, and general notions of unfairness. **(See Transcript of July 31 Hearing at pp. 7-9)**.

Patton simply has no bearing on the issues in this case. Furthermore, and conveniently omitted by the Respondent to the trial court, is the simple fact that, regardless of what capacity she sued in, the plaintiff mother in *Patton* was a flesh and blood human being who of course had legal existence.

Secondly, and more glaringly, is the fact that Respondent's argument is simply trumped by the Supreme Court's decision in *McCullar*. The Supreme Court in *McCullar* reaffirmed, albeit in the reverse context, the rule set forth in the *Ward* decision. 381 S.C. at 207, 672 S.E.2d at 785. The *McCullar* decision was handed down in 2009, decades after the adoption of the *South Carolina Rules of Civil Procedure*. Additionally, *Patton*, which in addition to involving a separate legal issue, gives no indication of its intent to overrule *McCullar*, *Glenn*, or *Ward*. As such this Court is still bound by those decisions pursuant to Article V, Section 9 of the South Carolina Constitution of 1895. *See State v. Cheeks*, 400 S.C. 329, 342, 733 S.E.2d 611, 618 (Ct. App. 2012) (holding Court of Appeals "lacks the authority to rule against prior published precedent from our supreme court but is bound by the decisions of the supreme court.").

There is no genuine dispute of fact that PNC Equipment Finance, LLC ceased to exist as of May 1, 2022. **(See Transcript of July 31 Hearing at p. 7)**. Additionally, there is no genuine dispute of fact that PNC Bank, N.A., is a separate legal entity from PNC Equipment Finance, LLC, even as the successor to the merger. The sole issue, which is an issue of law, is whether this terminated PNC Equipment Finance, LLC's legal existence. The answer, from both Delaware and South Carolina, is yes. The second question, again an issue of law, is whether the action having

⁴ Of course, as PNC Equipment Finance, LLC no longer existed this also meant that it lacked standing, capacity to sue, and was not the real party in interest. However, as *McCullar* makes clear whether or not the plaintiff legally exists is the first step in determining whether it fits these other categories. *See Wright & Miller, Federal Practice & Procedure* §3530 (3d. edition 2023) ("The most elemental requirement of adversary litigation is that there be two or more parties.").

been brought in the name of PNC Equipment Finance, LLC, was a nullity as such an entity did not legally exist. Again, the South Carolina Supreme Court's precedent in this area is clear that the action was indeed a nullity *ab initio*. Therefore, the trial court erred in failing to grant Appellants judgment on the pleadings.

II. DID THE TRIAL COURT ERR BY ALLOWING RESPONDENT TO SUBSTITUTE PNC BANK, N.A., IN THE PLACE OF PNC EQUIPMENT FINANCE, LLC, WHERE SUIT WAS ORIGINALLY BROUGHT IN THE NAME OF A NON-EXISTENT PLAINTIFF AND SUCH DEFECT IS NOT CAPABLE OF BEING CURED BY AMENDMENT?

As set forth above, it is undisputed that no such legal entity known as PNC Equipment Finance, LLC, existed at the time this action was brought against the Appellants. (*Id.*) The Respondent has attempted an end run around our Supreme Court's decision in *McCullar, Glenn, and Ward* by arguing that it could amend the complaint to substitute PNC Bank, N.A., for PNC Equipment Finance, LLC. Secondly, Respondent has taken the rather novel position that, while swapping two separate and distinct corporate entities, it has not actually made a substitution of the parties. (*Id. at p. 8; see also Respondent's Memorandum of Appealability at p.5*). Again, Respondent's positions are clearly forestalled by controlling precedent from our Supreme Court.

As our Supreme Court explained in *Ward* this type of defect is not one that is capable of being corrected through amendment but instead is an inherently fatal defect. In examining the amendment granted by the special referee in *Ward*, which worked the same relief as sought by the Respondent, the Supreme Court held the amendment should have been refused as "The action being a nullity, there was nothing to amend by." 146 S.C. 77, 143 S.E. at 548. Continuing in the same vein the Supreme Court stated " 'In strictness of principle, if there be no legal entity, there is no foundation upon which to base an amendment.' " *Id.* (citation omitted) Affirming this principal

42 years later our Supreme Court again held such defects are incapable of amendment: “The court has no authority, over objection, to convert a pending action which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff.” *Glenn*, 254 S.C. at 134, 174 S.E.2d at 158.

Respondent’s sole contention, as explained above, is that the adoption of the *South Carolina Rules of Civil Procedure* has implicitly abrogated these decisions. **(See Transcript of December 12 Hearing at p.7, ll. 1-17)** Relying upon *Patton* Respondent has insisted that it may amend its complaint to substitute the correct party and that such amendment relates back to the initial filing of the complaint. **(Id. at p.8, ll.11-23)**. However, *Patton* does not stand for this broad proposition, and it certainly does not hold that these prior precedential opinions are abrogated.

Appellants freely admit that Rule 15(a), *SCRCP*, requires the trial court to grant leave to amend “freely” when “justice so requires.” However, Rule 15(a)’s language is not *carte blanche* for a party to amend all defects in its pleadings. Again, *Patton* was strictly concerned with whether a plaintiff mother, who originally sued solely in a representative capacity for her minor child, could amend her complaint to assert claims directly for the child’s medical expenses until the child turned eighteen (18). 420 S.C. at 481-82, 804 S.E.2d at 257-58. The sole decision reached, at least in regard to Rule 15, in *Patton*, was that the trial court erred in not allowing the mother to amend her complaint to assert a claim in her individual capacity, as opposed to solely in her representative capacity, for the child’s medical expenses. *Id.* at 497-98, 804 S.E.2d at 266. Again, the most striking difference between *Patton* and the facts of this case is that in *Patton* the mother, regardless of whether she sued in an individual capacity or a representative capacity, was a flesh and blood person who had legal existence. Contrary to the mother in *Patton*, PNC Equipment Finance, LLC, clearly had no legal existence at the time it commenced this action.

Respondent's position that *Patton*, and coincidentally the *South Carolina Rules of Civil Procedure*, abrogated these prior decisions is unsupported. *Patton* does not purport to overrule any prior decisions of the Supreme Court. The sole area in which it recognized a change in prior law by adoption of the *Rules of Civil Procedure* was that, prior to their adoption, a suit brought in the name of a party who was not the real party in interest mandated dismissal. 420 S.C. at 487, 804 S.E.2d at 260. However, as *McCullar* noted, the issue before the Court is not one concerning the real party in interest but "something much more fundamental," *i.e.*, whether the plaintiff even legally exists. 381 S.C. at 207, 672 S.E.2d at 785. Importantly, *McCullar* was decided decades after the adoption of the *Rules of Civil Procedure* and affirmed that actions containing non-existent entities were legal nullities. It would strain all logic to argue that an action which was a nullity *ab initio* can be transformed into a viable action simply through an amendment. When the Supreme Court in *McCullar* stated such actions were a nullity it meant exactly that, there is nothing which can fix it. The adoption of the *Rules of Civil Procedure* did nothing to change the elemental requirement that there be a juridical entity on both sides of the "v."

Additional support for Appellant's contention is found in the interpretation of the *Federal Rules of Civil Procedure*. The *South Carolinian Rules of Civil Procedure* are based upon the federal rules and our courts may look to the construction placed upon the corresponding federal rule in interpreting them. *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991)⁵. As the Fourth Circuit has explained, a case brought by a plaintiff who lacks legal existence, as opposed to a plaintiff who lacks capacity to sue or who is not the real party in interest, is a non-curable defect. *House*, 796 Fed.Appx. at 788. The Fourth Circuit further reasoned that the

⁵ However, such interpretation is only persuasive where "there is an absence of prior state law on the issue in question." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561-62 (Ct. App. 2000). Here the prior state law clearly supports the Appellants.

same is true for dissolved corporations as “they have no legal existence under state law.” Likewise, the District of Columbia Circuit held a notice of appeal filed by a dissolved corporation was a “legal nullity” as it had legally ceased to exist. *FBME Ltd. v. Mnuchin*, 709 Fed.Appx. 4, 5-6 (D.C. Cir. 2017). As the United States Supreme Court explained, at nearly the same time as our Supreme Court issued the *Ward* decision, “It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of natural person in its effect.” *Okl. Nat. Gas. Co. v. State of Oklahoma*, 273 U.S. 257, 259 (1927). Under the federal court’s interpretation of their rules the result is the same as under South Carolina law, the defect in this action cannot be cured by amendment.

Respondent appears to have argued that this is not a case of substitution, but instead a type of misnomer. **(See Transcript of July 31 Hearing at p.8, ll.3-16)**. Indeed, Respondent as gone as far as to argue that Judge Kelly’s Order did not work a substitution, but merely “amended the name of the Plaintiff” in Respondent’s Memorandum of Appealability. **(See Respondent’s Memorandum of Appealability at p.5)**. However, it is plainly clear that PNC Bank, N.A., and PNC Equipment Finance, LLC, are two legally separate and distinct entities, even if PNC Equipment Finance was PNC Bank’s subsidiary. *Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106-07, 313 S.E.2d 649, 651 (Ct. App. 1984). The Respondent’s assertion to the trial court in this regard was not only wrong but a total red herring.

In South Carolina, amendments to substitute a party have been analyzed as an amendment to the pleadings under Rule 15. In short, Rule 15 can serve as the vehicle by which the substitution, which is governed under different rules, is brought before the court. *See Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 147, 564 S.E.2d 681, 685 (Ct. App. 2002) (analyzing substitution order made

pursuant to both Rules 15 and 25, *SCRCP*). However, the key is what relief the party making the motion actually seeks, *i.e.*, to replace one party with another. Here the Respondent attained an order replacing PNC Bank, N.A., as plaintiff in place of PNC Equipment Finance, LLC. If this is not a substitution it is difficult to imagine what a substitution would be. Respondent is of course free to call its motions as they like it, but “That which we call a rose by any other name would smell as sweet.” William Shakespeare, *Romeo and Juliet*, Act II, Scene 2.

As the order is clearly one substituting PNC Bank, N.A., for PNC Equipment Finance, LLC, the question becomes whether such an amendment is allowed. Again, long standing South Carolina precedent says its not. The trial court erred by granting the substitution order when such substitution is not allowed. The only option open to the trial court, especially as this issue was brought to its attention by the Appellants and was fatally defective to Respondent’s case, was to immediately end the case. *See McCullar*, 381 S.C. at 208, 672 S.E.2d at 785fn.5 (“We hesitate to say “dismissed” as there was “no action before the Court ...” to be dismissed.”). As noted above, motions to amend are governed by the abuse of discretion standard⁶. A trial court abuses its discretion when its decision is controlled by an error of law. *Hamilton v. Reg’l Medical Ctr.*, 440 S.C. 605, 638, 891 S.E.2d 682, 700 (Ct. App. 2023). Here the trial court’s decision was grounded on two errors of law as the amendment was barred by South Carolina precedent and by failing to immediately end the action.

III. DID THE TRIAL COURT ERR BY ALLOWING RESPONDENT TO AMEND ITS COMPLAINT TO SUBSTITUTE PNC BANK, N.A., IN PLACE OF PNC EQUIPMENT FINANCE, LLC, WHERE SUCH AMENDMENT WAS FUTILE AND IN BAD FAITH?

Generally, the trial court should freely grant leave to amend a complaint as Rule 15 strongly

⁶ Likewise, so are decisions concerning the substitution of parties. *Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000)

favors amendments. *Patton*, 420 S.C. at 489-90, 804 S.E.2d at 261-62. However, the trial court may deny leave to amend where the party opposing the amendment can show a valid reason. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019). A motion to amend may be denied, amongst other reasons, where the proposed amendment would be clearly futile or the motion is made in bad faith. *Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)). An amendment is clearly futile where the action would still be dismissed, or judgment would be granted as a matter of law, even with the proposed amendment. *Skydive Myrtle Beach, Inc.*, 426 S.C. at 191, 826 S.E.2d at 593fn.8.

In this case the trial court erred in not finding Respondent's amendment clearly futile. As set forth above, the controlling precedent in South Carolina is that an action brought in the name of a non-existent entity is defect which is not capable of being cured by amendment. *See Glenn*, 254 S.C. at 134, 174 S.E.2d at 158 ("A complaint brought in the name of a plaintiff which is not a legal entity as a nullity and there is no foundation upon which to base an amendment"); *see also Ward*, 146 S.C. 77, 143 S.E. at 548 ("In strictness of principle, if there be no legal entity, there is no foundation upon which to base an amendment."). The sole duty of the trial court when an action is brought by, or against, a non-existent entity is to end the case upon this fact being brought to its attention. *McCullar*, 381 S.C. at 208, 672 S.E.2d at 785. As Respondent's action was a nullity *ab initio* the trial court abused its discretion by failing to find its amendment clearly futile as the defect in Respondent's case was simply incapable of being cured.

Furthermore, leave to amend may be denied where the motion is made in bad faith by the party. There appear to be no cases in South Carolina defining what is meant by "bad faith." Federal courts have defined "bad faith" under Federal Rule 15 as "acting with intent to deceive, harass, mislead, delay, or disrupt." *Wizards of the Coast LLC v. Cryptozoic Ent. LLC*, 309 F.R.D. 645, 651 (W.D.

Wash. 2015). Bad faith requires more than mere negligence or bad judgment but involves the conscious doing of a wrong act. *ecoNugenics, Inc. v. Bioenergy Life Sci., Inc.*, 355 F.Supp.3d 785, 791 (D. Minn. 2019). Where a party withholds evidence from the court it is permissible for the court to presume bad faith where no satisfactory explanation is given. *United States ex rel. Nicholson v. MedCom Carolinas, Inc.*, 42 F.4th 185, 199 (4th Cir. 2022). Use of Rule 15 to make a change in the plaintiff also implicates consideration under Rule 17 as well. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 19 (2nd Cir. 1997). The purpose of Rule 17, which generally allows a party to avoid dismissal for failure to bring the action in the name of the real party in interest, is to prevent forfeitures in those cases where the determination of the proper party is difficult or there has been an honest mistake. *Fisher ex rel. Estate of Shaw-Baker v. Huckabee*, 422 S.C. 234, 239, 811 S.E.2d 739, 741 (2018) (citing Reporter’s Note to Rule 17(a), *SCRCP*). If an action is brought in the name of an incorrect party the court should at least inquire as to whether the party did so in good faith, *i.e.*, due to an honest and understandable mistake. *Feist v. Consol. Freightways Corp.*, 100 F.Supp.2d 273, 276 (E.D. Pa. 1999).

The record before the trial court lacked any evidence showing why this action was brought in the name of PNC Equipment Finance, LLC, when that company ceased to exist years ago. Indeed, counsel for the Respondent argued to the trial court that it was improper for the trial court to even consider why the action was brought in the name of legally non-existent company. **(See Transcript of December 12 Hearing at pp.17-18, ll.17-16)**. The sole reason advanced by counsel for the Respondent was that Respondent’s counsel had been provided the wrong information by the Respondent.⁷ **(Id. at pp. 3-4, ll.23-2, pp.4-5, ll.24-1)**. There are two errors with Respondent’s

⁷ Respondent’s counsel stated at the December 12, 2024, hearing: “We were working with our clients. We were, you know, doing what we could with the information provided, and as soon we became aware of the issue, we started working towards renaming the plaintiff.” **(p.5, ll.6-12)**.

position before the trial court. First, the arguments of Respondent's counsel are not evidence for the trial court to consider. *In re Gonzalez*, 409 S.C. 621, 636, 763 S.E.2d 210, 218fn.3 (2014). Second, even if Respondent provided its counsel with the wrong information this hardly justifies the finding of an understandable and honest mistake. Respondent PNC Bank, N.A., as successor to PNC Equipment Finance, LLC, must have assuredly been aware that PNC Equipment Finance, LLC, no longer existed. Indeed, compounding this error is the fact that Michael McGinley, who is the officer who verified that PNC Equipment, LLC, no longer existed, was the same officer who previously verified Respondent's complaint.⁸ **(Compare Corporate Verification of Summons and Complaint ¶2 with Plaintiff's Affidavit in Opposition to Defendants' Rule 12 Motions ¶¶1, 3)**. Indeed, even after admitting that PNC Equipment Finance, LLC, ceased to exist due to the merger Respondent continued to provide affidavits, which are of course executed under oath, from purported "officers" of PNC Equipment Finance, LLC. **(See Plaintiff's Affidavit in Opposition to Defendants' Rule 12 Motions ¶1, see also Transcript of December 12 Hearing at pp.17-18, ll.17-9; pp. 25-26, ll.20-7; p.31, ll.11-15,)**. Respondent indeed acknowledged that these affidavits were incorrect, and knew as much when they provided them, but justified its actions on the basis of "uniformity" with the pleadings. **(Id. at p.18, ll.1-9)**. Appellants are unaware of any "uniformity" exception to axiomatic rule of law that a party may not present evidence it knows to be false.

In the present case the Respondent, who was assuredly aware that PNC Equipment Finance, LLC, no longer existed, continued to press forward with two contradictory positions. First, that

⁸ Even more bizarrely Mr. McGinley certified that PNC Equipment, LLC, no longer existed due to its merger with PNC Bank, N.A., *in his capacity as Vice-President of PNC Equipment Finance, LLC*. **(See Corporate Verification of Summons and Complaint ¶1)**. How a defunct limited liability company has any officers is a metaphysical question which confounds Appellants.

PNC Equipment Finance, LLC, no longer existed as it merged with PNC Bank, N.A. Second, that due to “uniformity” considerations it would continue to knowingly present incorrect affidavits to Appellants and the Court. In short, Respondent not only failed to explain how it did not operate in bad faith but doubled down on its bad faith. It would appear that the trial court failed to consider these facts in granting the motion for leave to amend. Conversely, any finding of lack of bad faith was devoid of evidentiary support.

A trial court abuses its discretion when its decision is based on an error of law or on a factual conclusion which lacks evidentiary support. *Hamilton*, 440 S.C. at 629, 891 S.E.2d at 695. Additionally, the failure of the trial court to exercise discretion is itself an abuse of that discretion. *Sellers v. Nicholls*, 432 S.C. 101, 114, 851 S.E.2d 54, 60 (Ct. App. 2020) (citation omitted). Here the trial court’s ruling on Respondent’s motion was controlled by an error of law in that Respondent’s amendment was clearly futile. Additionally, to the extent that the trial court found that Respondent did not act in bad faith such a finding of fact was devoid of evidentiary support. Finally, to the extent that the trial court failed to exercise its discretion by considering Appellants’ arguments such a failure to exercise its discretion amounted to an abuse of discretion.

IV. DID THE TRIAL COURT ERR BY FAILING TO IMMEDIATELY END THE ACTION WHEN THE FACT THAT IT WAS BROUGHT IN THE NAME OF A NON-EXISTENT ENTITY WAS BROUGHT TO THE TRIAL COURT’S ATTENTION?

Regardless of the form of Appellants’ request it was plainly clear that Appellants sought to draw the trial court’s attention to the fact that the action had been brought in the name of a non-existent entity. In so doing Appellants repeatedly brought to the trial court’s attention the decisions in *Ward*, *Glenn*, and *McCullar*. Appellants first brought this matter to the trial court’s attention in their Reply to Respondent’s Return to Appellants’ motion for judgment on the pleadings. (See **Defendants’ Reply to Plaintiff’s Return at pp.7-9**) It was reiterated in Appellants’ November

21, 2024, motion to reconsider. **(See Defendants’ Motion to Reconsider Filed November 21 at pp.1-4).** Appellants, again, brought this authority to the trial court’s attention in response to Respondent’s motion for leave to amend. **(See Defendants’ Return to Plaintiff’s Motion to Amend Complaint at pp.3-4; see also Transcript of December 12 Hearing at pp.10-17, ll.25-5).** Appellants reiterated it in their February 25, 2025, motion to reconsider. **(See Defendants’ Motion to Reconsider Filed on February 25 at pp.2-4).**

In examining the lack of a non-existent defendant in *McCullar* the Supreme Court found that where the issue was raised promptly and the defect was fatal to the action the trial court has a duty to end the case. *McCullar*, 381 S.C. at 208, 672 S.E.2d at 785. Where objection is made to the jurisdiction of the court such a motion can be entertained as a motion for an involuntary nonsuit. *Ward*, 146 S.C. 77, 143 S.E. at 548; *see also* Rule 41(b), *SCRCP* (allowing court to enter involuntary dismissal or nonsuit for failure of a plaintiff to “comply with these rules.”)⁹

In short, the defect in this case was repeatedly brought to the trial court’s attention. The trial court owed a duty to “end” the case as soon as the defect was brought to its attention. *See McCullar*, 381 S.C. at 208, 672 S.E.2d at 785fn.5 (“We hesitate to say ‘dismissed’ as there was ‘no action before the Court...’ to be dismissed.”). The failure of the trial court to terminate the case was error requiring reversal.

V. SHOULD THE ACTION BE DISMISSED AS PNC EQUIPMENT FINANCE, LLC, A NON-EXISTENT LEGAL ENTITY LACKED STANDING TO PURSUE THIS CLAIM AND, THEREFORE, THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION?

⁹ Appellants admit that in *McCullar* the Supreme Court held that the issue there, the lack of a legally existent defendant, did not bear upon the Circuit Court’s subject matter jurisdiction. 381 S.C. at 206-07, 672 S.E.2d at 784. While not impact the trial court’s subject matter jurisdiction the lack of a legally existent plaintiff does affect the jurisdiction of the court to “render the particular judgment requested.” *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (citation omitted).

Appellants acknowledge at the outset that this argument was neither explicitly raised to, nor ruled upon, by the trial court. Ordinarily issues which have been neither raised to, nor ruled upon by, the trial court are not preserved for appellate review. *Allendale Cnty. Bank v. Cadle*, 348 S.C. 367, 375, 559 S.E.2d 342, 346 (Ct. App. 2001). However, arguments based upon a lack of subject matter jurisdiction may be raised at any time, including for the first time on appeal. *Gantt v. Selph*, 423 S.C. 333, 338, 814 S.E.2d 523, 525-26 (2018). “A motion to dismiss for lack of standing challenges the court’s subject matter jurisdiction.” *S.C. Pub. Int. Found. v. Wilson*, 437 S.C. 334, 340, 878 S.E.2d 891, 894 (2022). Whether subject matter jurisdiction exists is a question of law which the appellate court decides with no particular deference to the trial court. *Id.*

Again, it is undisputed that PNC Equipment Finance, LLC ceased to exist as of May 1, 2022. **(See Ex. 1 to Plaintiff’s Response in Opposition to Defendants’ Rule 12 Motions)**. The question for this Court is whether a non-existent plaintiff can possess standing to prosecute a claim. “In its most basic sense, ‘[s]tanding refers to a party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Pres. Soc’y of Charleston v. S.C. Dep’t of Health & Env’t Control*, 430 S.C. 200, 209, 845 S.E.2d 481, 486 (2020) (quoting *S.C. Dep’t of Soc. Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018)). “Standing to sue is a fundamental requirement in instituting an action.” *Joytime Distributors & Amusement Co. v. State*, 338 S.C. 634, 639, 528 S.E.2d 647, 649 (1999). A party may acquire standing under: (1) constitutional standing; (2) the “public importance” exception; or (3) by statute. *Freemantle v. Preston*, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012). This case clearly does not present one of “public importance¹⁰” nor are Appellants aware of any statute which would have conferred standing upon a defunct entity such as PNC

¹⁰ To acquire standing under the public importance exception the issue must be one so important as to require guidance from the courts for future resolution. *Freemantle*, 398 S.C. at 193, 728 S.E.2d at 44 (citation omitted).

Equipment Finance, LLC. Therefore, the sole measure of standing is constitutional standing.

Constitutional standing requires a plaintiff to show that they have: (1) suffered an injury in fact, “ i.e., an invasion of a legally protected interest that is concrete and particularized, and actual or imminent;” (2) a causal connection between the injury and the conduct complained of; and (3) likelihood that the injury will be readdressed by a favorable decision. *Pres. Soc’y of Charleston*, 430 S.C. at 210, 845 S.E.2d at 486 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Constitutional standing is based upon Article III of the United States Constitution and which limits the federal courts’ jurisdiction to actual cases and controversies. *Pres. Soc’y of Charleston*, 430 S.C. at 210, 845 S.E.2d at 486. In evaluating whether a party has standing the court looks to the facts as they existed at the time the complaint was filed. *Wild Va. v. Council on Env’t Quality*, 56 F.4th 281, 293 (4th Cir. 2022).

Here it is beyond debate that PNC Equipment, LLC, the alleged plaintiff, did not exist at the time that it filed its complaint. As cited above, the statutes from the state in which it was organized and South Carolina law agree that it had legally ceased to exist. A non-existent entity, as a matter of law, cannot possess constitutional standing as it cannot meet the three requirements set forth in *Lujan*. As the Fourth Circuit has explained, “Absent a plaintiff with legal existence, there can be no Article III case or controversy.” *House*, 796 Fed.Appx. at 787. “[A] plaintiff without legal existence is a poor fit for the Article III standing trifecta of injury, causation, and redressability; it is not clear, for example, how a favorable court ruling could offer redress to a deceased person, or a party otherwise lacking legal existence.” *Id.* As the Sixth Circuit succinctly explained the issue, “There is no plaintiff with standing if there is no plaintiff.” *In re: 2016 Primary Election*, 836 F.3d at 587. Applying the foregoing standards to this case it is clear that PNC Equipment Finance, LLC, lacked standing in this matter.

As a first matter, PNC Equipment Finance, LLC, suffered no “injury in fact” because, as of the date of the merger, it ceased to own the claim upon which Respondent’s action is founded. The merger of PNC Equipment Finance, LLC, into PNC Bank, N.A., immediately transferred LLC’s property rights to PNC Bank. Without any type of interest in the claim against the Appellants it cannot be said that PNC Equipment Finance, LLC, has suffered an invasion of its “legally protected interests.” Furthermore, it is impossible to say that PNC Equipment Finance, LLC, could obtain redress by a favorable decision as it does not own the debt it sought to collect. As set forth above, the time for determination of standing is the time when the complaint was filed. At the time PNC Equipment Finance, LLC’s complaint was filed it clearly lacked standing to prosecute this claim. Appellants acknowledge that in *McCullar* the Supreme Court did not consider this issue to be one of standing. However, in *McCullar* the non-existent party was the defendant, not the plaintiff. The courts should not concern themselves with the idea of whether a defendant lacks standing, indeed the concept of a defendant having standing is rather non-sensical.¹¹ The focus of standing rests solely upon the plaintiff as standing is a requirement to institute an action. *Joytime Distributors & Amusement Co.*, 338 S.C. at 639, 528 S.E.2d at 649. Therefore, *McCullar*’s holding that the case did not involve standing was due solely to the fact that the non-existent party was the defendant and not the plaintiff.

As noted above, South Carolina law has long treated standing as involving the courts’ subject matter jurisdiction. Generally, challenges to subject matter jurisdiction may be raised at any time. *Sheila R. v. David R.*, 396 S.C. 41, 52, 719 S.E.2d 682, 687 (Ct. App. 2011). However, our Supreme Court has also seemed to indicate that “standing,” even though it has been construed as touching

¹¹ Appellants admit that standing may apply as it relates to a defendant asserting a counterclaim. However, that issue is not before the Court.

upon the court's subject matter jurisdiction, is subject to the normal error preservation rules. *Williams v. Jeffcoat*, 444 S.C. 224, 237, 906 S.E.2d 588, 594 (2024). Appellants are unclear as to how to resolve this seeming tension between our Supreme Court's pronouncements. However, in this case, where standing is clearly tied to the courts power to hear a case Appellants believe it implicates the trial court's subject matter jurisdiction.

Appellate courts in South Carolina have inherent authority to consider issues justiciability. *James v. Anne's Inc.*, 390 S.C. 188, 193, 701 S.E.2d 730, 733 (2010). The concept of justiciability encompasses the doctrine of standing. *Crescent Homes SC, LLC v. CJN, LLC*, 445 S.C. 164, 182, 912 S.E.2d 389, 398 (Ct. App. 2024). Even if the question were not to be raised on appeal this Court may do so *sua sponte* "because the parties cannot by consent or agreement confer jurisdiction on the court...in the absence of an actual justiciable controversy." *Carolina All. for Fair Emp. v. S.C. Dep't of Lab., Licensing, & Regul.*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999). In the present case the action was initiated by a non-existent plaintiff and "Absent a plaintiff with legal existence, there can be no [justiciable] case or controversy." *House*, 796 Fed.Appx. at 787.¹²

As the plaintiff in this action lacked legal existence it *per se* lacked standing to assert the claim against the Appellants.' As there was a lack of standing the trial court lacked subject matter

¹² Again, Appellants must acknowledge that our Supreme Court has found the issue of justiciability, including standing, may be barred by error preservation rules. *James*, 390 S.C. at 193, 701 S.E.2d at 732. However, the Supreme Court has consistently recognized standing as touching upon the court's subject matter jurisdiction. *S.C. Pub. Int. Found.*, 437 S.C. at 340, 701 S.E.2d 732. "Obviously, if the matter maybe (sic) waived, it cannot involve subject matter jurisdiction." *Bardoon Props., NV v. Eidolon Corp.*, 326 S.C. 166, 170, 485 S.E.2d 371, 373 (1997). Appellants are at a loss as to how to square these two lines of inconsistent precedent from our Supreme Court. However, this may render the case one which is appropriately certified to the Supreme Court pursuant to Rule 204, *SCACR*. (holding Supreme Court may certify case for review upon request of the Court of Appeals).

jurisdiction over this action. This Court should vacate the trial court's orders and remand with instructions to dismiss the case for lack of subject matter jurisdiction.

CONCLUSION

It is beyond dispute that at the time this action was initiated there was no legally existent plaintiff by the name of "PNC Equipment Finance, LLC." Under long standing precedent this rendered the action a nullity. Appellants raised this issue promptly, indeed as soon as Appellants learned of it, the defect is fatal to the action, and the sole proper action for the trial court was to end the case. *McCullar*, 381 S.C. at 208, 672 S.E.2d at 785. Additionally, long standing precedent makes clear that the defect in the case is not one which can be cured through amendment of the complaint and substitution of the Respondent. As there was no live case before the court, and the action was a nullity *ab initio*, there was simply nothing to amend.

Respondent's arguments to the trial court are belied by precedent and common sense. The Supreme Court's decision in *Patton* did nothing to overrule its prior decisions in *McCullar*, *Glenn*, and *Ward*. Furthermore, Respondent's contention, drawn from *Patton*, that the adoption of the *South Carolina Rules of Civil Procedure* abrogated these earlier decisions cannot be squared with the Supreme Court's affirmation of these cases in *McCullar*, decades after the adoption of the civil procedure rules. Furthermore, the overwhelming weight of authority in this country is in support of Appellants' position. The lack of a legally existent plaintiff at the outset of the case renders the action a nullity *ab initio*. Respondent provided the trial court with no authority to support its position that this unforced error may be corrected by an amendment of the complaint and substitution of the plaintiff.

Additionally, the trial court abused its discretion in allowing an amendment of the pleading where Respondent failed to provide any rational reason this action was brought in the name of a

non-existent plaintiff in the first place. Respondent's sole contention in this regard was to plead that it was an "honest mistake." However, Respondent's plea in this regard disregards two key facts. First, that the merger had occurred years before this action was filed and, second, that Respondent's agent, Michale McGinley, presumably read the Complaint he swore was true and failed to correct any honest mistake on the part of Respondent's counsel. Additionally, Respondent, even after admitting that PNC Equipment Finance, LLC, no longer existed continued to present affidavits, which it knew were factually incorrect, to Appellants and the trial court alleging to be executed by officers of PNC Equipment Finance, LLC. These types of actions can only be described as bad faith. Furthermore, as Respondent failed to present any evidence justifying this shocking failure there existed no good reason to allow it to amend its complaint under Rule 15.

Finally, the lack of a legally existing plaintiff in a case *ipso facto* means there was no standing on the part of the purported plaintiff to prosecute the action. Lack of standing goes to the court's subject matter jurisdiction which may not be waived and may be raised for the first time on appeal. Accordingly, this Court may vacate the trial court's orders and remand with instructions to dismiss the action for lack of subject matter jurisdiction.

As set forth above, the trial court's orders were devoid of evidentiary support and were clearly controlled by errors of law. This Court should reverse the trial court's orders granting leave to amend and denying Appellants' motion for judgment on the pleadings and remand this action with instructions to the trial court to end the action as a nullity *ab initio*.

Respectfully submitted,

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Jul 22 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

R. Keith Kelly, Circuit Judge
J. Derham Cole, Sr., Circuit Judge

Appellate Case No. 2025-000627

PNC Bank, N.A., successor by
merger to PNC Equipment Finance,
LLC,

Respondent,

v.

S & J Asphalt Paving, LLC, Jose
Luis Guerrero, and Scott Robert
Ronson,

Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Initial Brief upon the Respondent by sending the same to Respondent's attorneys of record at the e-mail addresses listed for said counsel in the AIS system this 16th day of April 2025, in accordance with *In re Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024)* (d)(4), S.C. Sup. Ct. Order filed April 24, 2024. A copy of the e-mail to opposing counsel is attached hereto and incorporated by reference. I further certify that I have caused a copy of the Appellants' Memorandum in Support of Appealability to be sent to counsel for the Respondent by depositing the same in the United States Mail, with sufficient postage attached, addressed as follows: Smith Debnam Narron Drake Saintsing & Myers, LLP, 4601 Six Forks Road, Suite 400, Raleigh, NC 27609.

Respectfully submitted,

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Subject: Appellate Case No. 2025-000627
Date: Tuesday, July 22, 2025 4:07:00 PM
Attachments: [Appellants' Initial Brief v.2.pdf](#)
[image001.png](#)
[Appellants' Designation of Matter.pdf](#)
[Proof of Service for Initial Brief.pdf](#)
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Counselors:

Please find attached Appellants' Initial Brief and Designation of Matter in regards to the above referenced appeal. Please also find attached our Proof of Service for each filing. I will be placing these in the mail today as well. Please do not hesitate to contact me if you require anything further.

Best regards,

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