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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2025-001046

Cambridge Building, Inc. (License No. 117526)

Appellant,

v.

Robert S. Lotstein, Kristin Huffman, Robert S. Lotstein, Trustee of the Robert S. Lotstein Family Trust dated September 4, 2002, as Amended and Restated, and Kristin S. Huffman, Trustee of the Kristin S. Huffman Family Trust dated September 4, 2002, as Amended and Restated

Respondents.

APPELLANT'S FINAL REPLY BRIEF

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INTRODUCTION

Respondents' arguments do not alter the fundamental error below: the trial court dismissed Plaintiff's well-pleaded claims with prejudice on a Rule 12(b)(6) motion and denied leave to amend, in direct contravention of established precedent. The post hoc rationalizations now offered for the order—drafted by Respondents—are unpersuasive and cannot withstand appellate scrutiny. The order should be reversed.

BRIEF SUMMARY OF FACTS

Cambridge Building, Inc. (Cambridge or Appellant) built a large oceanfront vacation home for D.C. attorney Robert Lotstein (Husband) and wife Kristin Huffman (Wife) on the Palmetto Dunes lot owned by their family trusts (Husband's Trust and Wife's Trust). A contract listing Husband and Wife as owners requires them to pay a flat sum of $2,246,078; it is signed by Husband and Cambridge's qualifying contractor, Frank Guidobono (Guidobono). The house is complete and a certificate of occupancy has been issued. The Respondents refuse to pay Cambridge the remaining principal of more than $350,000 or any interest. In addition to a mechanic's lien claim, Cambridge alleged claims for breach of contract and unjust enrichment against Husband, Wife, and Husband and Wife's Trusts (which own the property). On a rule 12(b)(6) motion to dismiss, the trial court dismissed all claims (including breach of contract and unjust enrichment) against Wife, Wife's Trust and Husband's Trust with prejudice without allowing the Plaintiff an opportunity to amend. The trial court referred two claims against Husband — breach of contract and unjust enrichment — to arbitration.

ARGUMENT

I. The trial court erred in dismissing all claims, including unjust enrichment against Wife, Wife's trust and Husband's trust.

Respondents' assertion that their motion to dismiss encompassed all claims, including unjust enrichment, is not supported by the record. Their motion did not challenge the sufficiency of the unjust enrichment claims, nor did the order expressly dispose of them. Notably, the order referred the unjust enrichment claim against Husband to arbitration rather than dismissing it.

Respondents' brief mischaracterizes the record. (RIB pp. 5-6.) Cambridge respectfully directs the Court to review the Motion to Dismiss itself, which contains no argument or mention of unjust enrichment. (R. pp. 116-120.) Under Rule 7(b), a motion must "state with particularity the grounds therefor." A plaintiff cannot be expected to respond to grounds for dismissal that are neither stated nor particularized. The motion includes as a ground that the breach of contract claims against the Defendants who are not parties should be dismissed but makes no statement as to the unjust enrichment claims. (R. pp. 118.)

Respondents' reliance on a passing reference in the transcript (R. pp. 100, ll. 4–24) is misplaced; counsel merely recited the causes of action alleged, not the grounds for dismissal. The transcript suggests the trial court intended to dismiss only the mechanic's lien claim and refer the remaining claims to arbitration—not to dismiss all claims against certain parties outright.[1]

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[1] In addition, a review of the transcript indicates it is more likely that the judge intended to dismiss the mechanic's lien cause of action and send the other two causes of action to arbitration. His statement at the hearing does not indicate an intent to dismiss any parties completely or to dismiss the unjust enrichment claims. The transcript reads as follows:

THE COURT: All right. I am going to grant the motion to dismiss the mechanic's lien and the lis pendens, the breach of contract, and the unjust enrichment. I'm going to stay this action pending arbitration. We'll send those two to arbitration.
(R. pp. 113-114.)

However, with a slight change of punctuation, it reads,

Respondents argue that they moved to dismiss the entire complaint. Respondents argue all they were required to do was generally move to dismiss all causes of action without stating any grounds while simultaneously arguing that Appellant failed to preserve its arguments.[2] The Appellant was not aware that the unjust enrichment claims were at issue in the pending motion, and for that reason, counsel did not address the cause of action in Appellant's memorandum opposing the motion. (Compare R. pp. 116-120 with R. pp. 142-157.)

Appellant did not learn that the Respondents intended to have all claims against the other parties dismissed from the case entirely until counsel received a proposed order in an email from Terry Finger. (R. p. 158.) In response, Appellant's counsel sent a letter to the Judge objecting to the order (R. pp. 163-168.) The record is clear: the sufficiency of the unjust enrichment claims was never raised as a ground for dismissal.

For this reason alone, the dismissal of the claims against Wife and the Trusts should be reversed.

Respondents now argue, for the first time on appeal, that the unjust enrichment claims against Wife and the Trusts are barred by the existence of an express contract between Husband and Cambridge. This argument is: (1) new on appeal; (2) inconsistent with the order referring the unjust enrichment claim against Husband to arbitration; (3) unsupported by the facts; and (4) inappropriate at the pleading stage.

THE COURT: All right. I am going to grant the motion to dismiss the mechanic's lien and the lis pendens. The breach of contract and the unjust enrichment — I'm going to stay this action pending arbitration — We'll send those two to arbitration.
(R. p.113-114, **punctuation modified by counsel.**)

[2] Consider this scenario. The plaintiff files a complaint alleging negligence and violation of a statute. The Defendants move to dismiss the complaint on the grounds that there is no duty in negligence. The court, without noting a reason, dismisses all claims, including violation of the statute, against one of the defendants.

Respondents make this argument for the first time on appeal. It is not in the motion to dismiss. (R. pp. 116.) It was not made at the hearing. (R. pp. 97-115.) It was not made in response to a Motion to Reconsider.

The argument —that the unjust enrichment claims against the Wife and Trusts are barred— does not account for the fact that *the unjust enrichment claim against the Husband was not dismissed*; it was referred to arbitration. The Respondents argue that the trial court intended for the unjust enrichment claims against Wife and Trusts to be dismissed completely because there was an express contract between Husband and Cambridge (and Guidobono) while allowing the unjust enrichment cause of action against Husband (who they agree signed a contract) to proceed in arbitration.

As argued in the Initial Brief, South Carolina law permits unjust enrichment to be pleaded in the alternative to breach of contract. *Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 617, 703 S.E.2d 221, 225, n. 4 (2010) ("While the circuit court did find there was a contract between the two parties in this action, it never awarded damages because of a breach of that contract. Rather, the circuit court chose the theory of quantum meruit as an alternate remedy.") *Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 429 S.C. 502, 515, 839 S.E.2d 468, 474 (Ct. App. 2020), aff'd, 435 S.C. 594, 869 S.E.2d 812 (2022); *JASDIP Props. SC, LLC v. Est. of Richardson*, 395 S.C. 633, 641, 720 S.E.2d 485, 489 (Ct. App. 2011).

Respondents argue that *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 329, 734 S.E.2d 177, 182 (Ct. App. 2012) supports their position; it does not. *In Williams Carpet* — an appeal of am order granting a JNOV following a trial — this Court found that breach of contract and unjust enrichment could be alternative rather than inconsistent remedies and found only that case law bars ***recovering*** under both theories, not that it bars proceeding under both theories.

In any event, dismissal of unjust enrichment claims at this stage is premature. *See, e.g., Beverly v. Grand Strand Reg'l Med. Ctr., LLC*, 435 S.C. 594, 607, 869 S.E.2d 812, 819 (2022) ("As we stated in the procedural history section, the circuit court dismissed Beverly's unjust enrichment as a matter of fact. We adopt the explanation given by the court of appeals in reaching its conclusion "it was error for the circuit court to dismiss the quantum meruit claim at the 12(b)(6) stage."); *Melton v. Carolina Power & Light Co*., C/A No. 4:11-cv-00270-RBH, 2012 WL 2401635, at *3 (D.S.C. June 25, 2012) ("Even if Defendant is correct, at this stage, the question is not whether Plaintiff may ultimately recover on unjust enrichment, or even whether an unjust enrichment claim is meritorious. The question is simply whether an unjust enrichment claim may legally move forward."). *Fludd v. S. State Bank, 566 F. Supp. 3d 471, 489–90 (D.S.C. 2021); Besley v. FCA US, LLC*, No. 1:15-CV-01511-JMC, 2016 WL 109887, at *3 (D.S.C. Jan. 8, 2016) ("…the court finds it premature to dismiss Plaintiff's causes of action for unjust enrichment and promissory estoppel."); *King v. Carolina First Bank*, 26 F. Supp. 3d 510, 519 (D.S.C. 2014); *Donnelly v. Linden Cap. Partners III, L.P*., 2021 WL 5882002, at *4 (D.S.C. Feb. 1, 2021). The cases cited by Respondents do not hold otherwise. For example, *Swanson v. Stratos* involved a post-trial appeal and did not address unjust enrichment claims against non-contracting parties at the motion to dismiss stage. Here, the Wife and trusts have not answered the pleadings, and all Respondents have refused to participate in any discovery.

Respondents' position would lead to the inequitable result that a contractor who builds a $2 million home for a couple on their jointly owned lot, and who is unpaid, has no claim against the wife or the trusts—even though they own, occupy, and profit from the property. Such a result is not supported by law or equity, especially at the pleading stage. Even if ultimately Plaintiff is

not allowed to *recover under both theories,* it should be allowed to proceed, provided it properly states a claim, which it has done.

The Respondents' reliance on the law of the case doctrine is misplaced and should be disregarded. This doctrine is limited to issues actually decided in prior appellate rulings and governs proceedings on remand; it does not serve as a substitute for a merits determination at the pleading stage, nor does it restrict the appellate court's authority. Here, Respondents attempt to invoke the doctrine based on (misquoted) language from the very trial court order currently under review. However, statements in the order being appealed do not establish law of the case and cannot be used to shield that ruling from appellate review or to justify dismissal at the Rule 12(b)(6) stage. Under South Carolina law, the law of the case doctrine applies "to subsequent proceedings in the same litigation following an appellate decision," and only to issues previously decided on appeal—not to interlocutory statements or unresolved merits issues in the order under review. *See Lifschultz Fast Freight v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999) (law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision"); *Builders Mut. Ins. Co. v. Bob Wire Elec*., *Inc.,* 424 S.C. 161, 165, 817 S.E.2d 807, 809 (Ct. App. 2018).

Also, Respondents should not be allowed to make this argument to the trial court. The law of the case doctrine "poses no bar to the assessment of past holdings based on a different procedural posture when, as is the case in the progression from review of a motion to dismiss to a motion for summary judgment, that later review expands the court's inquiry based on development of actual facts underlying a plaintiff's claims." *Graves v. Lioi*, 930 F.3d 307, 318 (4th Cir. 2019). On a motion to dismiss the court's role is to consider whether Appellant's *allegations* stated a claim against Respondents — not to resolve issues before the pleading stage is complete or make final

determinations. *Id.* As such, the court "need not box these shadows." *Builders Mut. Ins. Co. v. Bob Wire Elec., Inc.,* 424 S.C. at 166.

II. The trial court erred in considering an affidavit submitted by Respondent on a Rule 12(b)(6) motion because it was outside the pleadings and not converted to a summary judgment motion and Appellant made repeated objections.

a. The error preservation arguments on this issue and throughout have no merit.

Respondent's error preservation arguments are baseless. Respondents argue that Appellant's opposition to the Gleason affidavit were not preserved. This statement is also included in the trial court's order, drafted by Respondents. The truth is that Appellant raised its opposition to the Respondents' affidavit to the trial court multiple times: in a written memorandum, during oral argument, in several letters to the trial judge opposing Respondents' proposed order, and in a Rule 59 motion.

First, Appellant made the argument generally and specifically as to the Gleason affidavit submitted by the Respondents in its memorandum in opposition. The substance of the objection was basic and clear.[3] (R. pp. 142-157.) In the introduction to the memorandum, Appellant stated that Respondents' arguments involved factual disputes outside the pleadings. Plaintiff specifically argued: "The Defendants filed the Affidavit of Joanna 'Nicky' Gleason. As an initial matter, this affidavit should not be considered." (emphasis added). The memorandum further stated: "The Court may not consider facts outside of the Four Corners of the Complaint." It cited to *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) including a quote from the case. See Footnote 4. Appellant's counsel also raised the issue during the hearing on the motion to dismiss.

She -- the affidavit -- first of all, it's my position that it shouldn't be considered on a motion to dismiss.

[3] The Order inaccurately states that "the Affidavit of Joanna Nicky Gleason was not objected to by Plaintiff." (R. p. 9, Conclusion of Law 1(c) of the Order, page 3.)

(R. p. 109.)

On February 25, 2025, Judge Culbertson issued a Form 4 partially granting the motion and directing Terry Finger to prepare an order. After Mr. Finger emailed a copy of the proposed order, counsel wrote a letter objecting to it, which included a paragraph on "Improper Consideration of Affidavits at Dismissal Stage."[4] (R. pp. 165-166.) The letter included that the proposed order inaccurately claimed Plaintiff had not raised the issue. On March 7, 2025, Appellant filed a Rule 59(e) motion objecting to the Form 4 and the proposed order and then mailed and emailed the motion to Judge Culbertson, who denied the Rule 59 motion by Form 4 order dated April 24, 2025, and also entered the Respondents' proposed order as written. Appellant filed a second Rule 59(e) motion.

As Respondents concede, it is a fundamental principle of law—explicitly noted in Respondents' brief at page 4—that when ruling on a motion to dismiss for failure to state a claim, the trial court must confine its analysis to the allegations contained within the complaint and should not consider materials outside the complaint. *See, e.g., Beverly v. Grand Strand Reg'l Med. Ctr.*,

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[4] 2. **Improper Consideration of Affidavits at Dismissal Stage**: The proposed order improperly relies upon the affidavit of Joanna "Nicky" Gleason to make factual determinations at the Rule 12(b)(6) dismissal stage. The proposed order incorrectly states that Plaintiff did not raise this issue (conclusion of law 1(c)). As clearly demonstrated in our Memorandum in Opposition to Defendants' Motion to Dismiss filed on February 19, 2025, we specifically argued: "The Defendants filed the Affidavit of Joanna 'Nicky' Gleason. As an initial matter, this affidavit should not be considered." Our memorandum further cited Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006), expressly noting that "In considering... a [Rule 12(b)(6)] motion, the trial court must base its ruling solely on allegations set forth in the complaint." The South Carolina Supreme Court has clearly established that in considering a 12(b)(6) motion, the court must base its decision solely on the allegations set forth on the face of the complaint, and the motion cannot be supported by affidavits or other evidence outside the pleadings. By relying on Ms. Gleason's affidavit to determine service issues, rather than converting the motion to one for summary judgment with proper notice, the proposed order reflects a procedural error that substantially prejudices Plaintiff.

LLC, 429 S.C. 502, 507, 839 S.E.2d 468, 470 (Ct. App. 2020), aff'd, 435 S.C. 594, 869 S.E.2d 812 (2022); *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). This principle is well known to the trial court. Based on the record, this is not a situation where a party is "keeping an ace card up his sleeve." Nor is there any lack of specificity; the objection was "sufficiently clear" and could be "reasonably understood by the judge." *See Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). Respondent's comparison of Appellant's objection to consideration of the Gleason affidavit with the constitutional preemption argument in *Herron* is misplaced; a review of the two demonstrates that there is no valid comparison.

Our Supreme Court has cautioned that issue preservation is not a game – specifically not a "gotcha" game and should not be applied in a manner that elevates form over substance. *See Moses v. State,* 442 S.C. 263, 271, 898 S.E.2d 174, 178 (Ct. App. 2024). The primary purpose of preservation rules is to give the trial court an opportunity to rule and to give the parties an opportunity to present their arguments. *Id.* Counsel is not required to harass the trial judge after an issue has been ruled upon. *See Dunn v. Charleston Coca–Cola Bottling Co*., 311 S.C. 43, 45–46, 426 S.E.2d 756, 758 (1993). "This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review. *Staubes v. City of Folly Beach*, 339 S.C. 406, 415, 529 S.E.2d 543, 547 (2000).

b. It was not appropriate for the trial court to consider the Respondents' affidavit for a vague new reason they argue for the first time on appeal.

The motion to dismiss did not address jurisdiction. For the first time in this appeal, Respondents now argue that the Gleason affidavit was properly considered because the motion addressed jurisdiction; it did not. It is clear from the motion to dismiss itself that it did not address jurisdiction. (R. pp. 116-120.) The motion was brought pursuant to Rule 12(b)(6). The affidavit was used to contest the factual issue of whether the person served was related a proper agent of

the Respondents' property manager, a “person in possession." The Respondents have never argued jurisdiction. The cases cited by Respondent have no bearing. *Springmasters, Inc. v. D & M Mfg*., 303 S.C. 528, 530, 402 S.E.2d 192, 193 (Ct. App. 1991) addresses a motion regarding personal jurisdiction. *Williams v. Ray*, 232 S.C. 373, 378, 102 S.E.2d 368, 370 (1958) addresses a motion to set aside a default judgment.[5] There is simply no basis for arguing a "speaking motion" on a Rule 12(b)(6) motion.

Moreover, even if the Respondents' self-serving affidavit were considered, the court erred in assigning it probative value and weight, failing to view the allegations in the Appellant's most favorable light. *See Keene v. CNA Holdings*, LLC, 426 S.C. 357, 374, 827 S.E.2d 183, 193 (Ct. App. 2019), aff'd, 436 S.C. 1, 870 S.E.2d 156 (2021). The standard on a motion to dismiss requires the trial court to construe the complaint in the light most favorable to the Plaintiff as the non-moving party and consider all well-pled allegations as true. *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) citing *Turner v. Daniels*, 404 S.C. 430, 431 n.1 (2013) (noting under the standard of review applicable to Rule 12(b)(6) motions, we construe all of the facts in the appellant's well-pled complaint in the light most favorable to the appellant and presume those facts to be true); *Grimsley v. S.C. Law Enf't Div*., 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (“If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper.”). The circuit court’s reliance on the affidavit without converting the motion or allowing discovery was error.

[5] Respondents argue *Williams v. Ray*, which refers to a footnote in *Graham v. Lloyd's of London*, 296 S.C. 249, 252, 371 S.E.2d 801, 802 (Ct. App. 1988), which still addresses personal jurisdiction.

III. The trial court erred in dismissing the Appellant's claim for foreclosure of the mechanic's lien.

The trial court ignored the standard of review and improperly accused Appellant of a flip flop. Respondents' arguments generally ignore the standard on a Rule 12(b)(6) motion. As Appellant has repeatedly argued, on a motion to dismiss, the allegations of the complaint must be construed in Appellant's favor and construed liberally to allow justice. If the facts alleged *would entitle the plaintiff to relief under any theory*, then dismissal is not appropriate. *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). A judgment on the pleadings is considered drastic. *Id*.

Respondents' initial "plain language" explanation of S.C. Code § 29-5-90 is incomplete. Although admittedly the statute's language is not plain – or easy to understand, Respondent's explanation fails to address the second sentence beginning: *Provided*, that in the event neither the owner nor the person in possession can be located after diligent search, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. S.C. Code Ann. § 29-5-90. There is a provision for alternative service.

> Such a lien shall be dissolved unless the person desiring to avail himself thereof, within ninety days after he ceases to labor on or furnish labor or materials for such building or structure, *serves upon the owner or, in the event the owner cannot be found, upon the person in possession* and files in the office of the register of deeds or clerk of court of the county in which the building or structure is situated a statement of a just and true account of the amount due him, with all just credits given, together with a description of the property intended to be covered by the lien sufficiently accurate for identification, with the name of the owner of the property, if known, which certificate shall be subscribed and sworn to by the person claiming the lien or by someone in his behalf and shall be recorded in a book kept for the purpose by the register or clerk who shall be entitled to the same fees therefor as for recording mortgages of equal length. *Provided, that in the event neither the owner nor the person in possession can be located after diligent search*, and this fact is verified by affidavit of the sheriff or his deputy, the lien may be preserved by filing the statement together with the affidavit. The delivery on the register or

> clerk for filing, as provided in this section, shall be and constitute the delivery contemplated with regard to such liens in Title 30 of this Code.

S.C. Code Ann. § 29-5-90

The first sentence of S.C. Code Ann. § 29-5-90 states the lien should be served on the owner *or* if the owner cannot be found, on the "person in possession." Person in possession is an undefined term.

In this case, the owner could not be located for service. The complaint alleges that the Beaufort County Sheriff's office served the property manager, Luxury Rentals of Hilton Head, as "person in possession." (R. p. 32.) A copy of the Sheriff's affidavit alleging compliance with service is attached to the complaint. (R. p. 49.). In the light most favorable to the Appellant, this allegation must be accepted as true.[6] As alleged, the service satisfies S.C. Code Ann. § 29-5-90. The Respondent's affidavit (essentially arguing the person served was not a proper agent of the property manager) should not be considered and should not be used to resolve a factual dispute in favor of Respondents.

The second sentence of S.C. Code Ann. § 29-5-90 (the alternative service provision) states that if the sheriff or deputy (not a process server but the sheriff or his deputy) verifies that neither the owner nor "person in possession" is located after diligent search, the lien is preserved. Appellant argues that this second alternative is also satisfied. Even if the Court agrees with the Respondents' arguments that either 1) the property manager does not qualify as a "person in possession" or 2) service on the property manager was not adequate, the statute is still satisfied. The Complaint also alleges that the BCSO searched for the owners and was not able to locate them

[6] Respondents complain the service affidavit attached to the complaint includes PMIC (an acronym) in front of the name of the property manager, Luxury Rentals. The affidavit also states a mechanic's lien etc. was served and was made in accordance with the rules. A copy linking the service affidavit to the property was filed with the Register of Deeds. The service was alleged in the complaint.

for service. The BCSO affidavit attached as Exhibit D is clear that the Sheriff's office could not locate anyone at the residence – 8 Iron Clad –for service. If the requirement for a "person in possession" is a person living at the home, then BCSO could not, after due diligence, serve any owner or "person in possession." (Complaint, Exhibit D.) The statute allows for preservation of the lien by affidavit when the owner or "person in possession" cannot be found; Appellant's affidavits were sufficient or, at minimum, created a factual issue precluding dismissal.

This is not a "flip-flop"[7] as the Respondents and the trial court's order suggest. It is pleading in the alternative, which is entirely appropriate. To the extent, this is not clear from the current complaint, it can be cured by amendment. It is entirely appropriate for Cambridge to allege that both the "person in possession" was served and that no "person in possession" could be located. *See Skydive Myrtle Beach, Inc. v. Horry Cnty.,* 426 S.C. 175, 187, 826 S.E.2d 585, 591 (2019) (quoting the 11th Circuit):

> We are not troubled by what the district court saw as inconsistent allegations. Rule 8(d) of the Federal Rules of Civil Procedure expressly permits the pleading of both alternative and inconsistent claims. Thus, [the] complaint is not subject to dismissal simply because it alleges that both Mazer, individually, and West–Hem committed the tortious conduct, even if it would be impossible for both to be simultaneously liable (which question of impossibility we need not, and do not, resolve).

Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 188, 826 S.E.2d 585, 592 (2019) (quoting *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273–74 (11th Cir. 2009).

It is also appropriate to plead because it represents what occurred. A process server could not locate the owners or anyone at 8 Iron Clad or at their other home in the Washington DC area. Because the statute requires a sheriff's affidavit to prove no one could be located at the residence,

[7] The use of this language itself confirms that the trial court did not consider whether the facts alleged in the light favorable to the Appellant stated a claim under any theory.

the lien was sent to the BCSO for service. The sheriff's office went to 8 Iron Clad at least 6 times for service attempts and found no one at the home.[8] This was verified by affidavit. The home had a sign for Luxury Rentals. BCSO served Luxury Rentals.

IV. The trial court erred in not allowing or addressing Appellants' right to amend before dismissing its well-pleaded claims with prejudice.

The trial court's failure to allow amendment was in error. *See Jane Doe v. Oconee Mem'l Hosp*., 437 S.C. 574, 878 S.E.2d 920 (S.C. App. 2022) (holding that failure to allow amendment was an abuse of discretion). Appellant filed a motion to amend the complaint before the hearing on Respondents' motion to dismiss. Appellant also raised the right to amend in the memorandum in opposition, during the hearing, in a letter to the court and in two 59(e) motions. (R. pp. 147, 110, 140, 166.) The order on appeal does not address amendment. (R. pp. 7-10.) The pending motion to amend has not been heard but has been stayed pending the appeal. The court has made no finding regarding futility. The Respondents have made no arguments on the right to amend other than to argue to the trial court, it had no right to hear the motion.

CONCLUSION

Appellant respectfully requests that the Court reverse the lower court's Order and remand for further proceedings. The lower court disregarded the well-established standard governing motions to dismiss, improperly considered the Respondent's affidavit, and unjustly dismissed Plaintiff's routine and well-pleaded claims with prejudice, without affording an opportunity to

[8] The Respondents argue that the owner was "found" because in attempting service the sheriff's deputy talked to the owner by phone. This is clearly not what is contemplated by the statute, and if it is, then telling the owner the nature of the civil action and advising him of the attorney's info and to meet him constitutes service. After all, the goal of service is to provide the owner with notice. The Respondents make no argument, nor can they now make one now, that a "person in possession" existed or that anyone was at the residence who was proper to serve.

amend. Respondents' subsequent attempts to justify the overreaching order they drafted are unavailing. Accordingly, Appellant respectfully requests that the order be reversed.

RESPECTFULLY SUBMITTED,

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