THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

The Honorable Jessica A. Salvini, Circuit Court Judge

Case No.: 2024-CP-23-07485

Appellate Case No. 2025-001494

Joshua Hawkins ..... Appellant,

v.

Delta Air Lines, Inc. ..... Respondent.

INITIAL BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE CASE

Appellant Joshua Hawkins, a Greenville, South Carolina attorney, failed to file any Notice of Appeal in the Magistrate Court, pursuant to Rule 18(a), SCRMC and Rule 74, SCRCP, and thus this Court lacks appellate jurisdiction to hear this appeal. *De Witt v. S.C. Dep't of Highways & Pub. Transp.*, 274 S.C. 184, 186, 262 S.E.2d 28, 29 (1980). Consequently, this Court must immediately dismiss the appeal. Rule 12(h)(3), SCRCP.

Because the dismissal in this case came at the Motion to Dismiss stage, Delta presents the facts as alleged in the underlying Complaint, but Delta does not admit the accuracy of same. Appellant's underlying Complaint arose from three separate flights—two of which he took while he already had an action pending against Delta.

September 10, 2023: Domestic Flight Allegations ("September 2023 Domestic Flight").

Appellant purchased a round-trip ticket for a flight with Delta from Greenville-Spartanburg International Airport to LaGuardia International Airport, departing September 7, 2023 and returning September 10, 2023. (Initial Compl. at ¶¶ 10-11.) Appellant admits he took the first flight, using that portion of his ticket, and he asserts no claims related to that flight. (*See* Initial Compl. at ¶ 11.) On September 10, 2023, when Appellant travelled to LaGuardia to use the remaining portion of his ticket, the flight was delayed and then cancelled due to weather. (*See* Initial Compl. at ¶¶ 11-13.) Appellant refused to take the next available flight Delta offered him, which was scheduled to depart two days later. (*See* Initial, Compl. at ¶¶ 16-17, 19.) Instead, he voluntarily drove himself straight home through the night, which he alleges "deprived [him] of sleep, which constitutes a physical injury." (*See* Initial Compl. at ¶¶ 16-17, 19.) Appellant, from his observation at the airport, alleges the weather was fine and he observed "mostly clear conditions" from the ground as he drove himself home. (Initial Compl. at ¶¶ 11, 16.) Appellant

alleges that Delta never reimbursed him for the cost of "Uber rides, meals, a rental car, pet lodging fees, additional airport parking fees, and . . . 12 hours of personal time." (Initial Compl. at ¶ 16.) According to Appellant, Delta "[n]ever offered to correct the situation it created or damage it caused by offering compensation for . . . any other expenses and damages," yet, Appellant alleges that he refused a refund of SkyMiles. (Initial Compl. at ¶¶ 15, 19.)

<u>September 15, 2023</u>: Appellant Files His First Action Arising from the Domestic Flight in the East Greenville Summary Court (Case No.: 2023CV2310304093) ("First Action").

Five days after the cancelled flight, Appellant Hawkins filed a lawsuit against Delta in the Magistrate Court. (*See* Complaint, East Greenville Summary Court Magistrate Court, Case No. 2023CV2310304093 (filed Sept. 15, 2023).)[1] Appellant eventually amended his Complaint on January 24, 2024, to allege damages in excess of the Magistrate Court jurisdictional limit. A few days later, the case was transferred to the Greenville County Circuit Court. (*See* Certificate of Transmittal, Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (entered Jan. 26, 2024).)

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[1] Before the undersigned counsel was retained, Delta, pursuant to Rule 21, SRCMC, filed a form Answer with an Addendum in the Magistrate Court. The Answer included a hyperlink to the Air Traffic Control System Command Center's Ground Delay Program notification for the September 2023 Domestic Flight. Contrary to Appellant's representation to this Court in his Notice of Appeal, Delta never filed nor presented any "weather reports" to any Court in this matter. (Notice of Appeal at p. 6.) Delta's counsel, however, provided *Appellant* a copy of the National Weather Service's rainfall map for the date at issue in a Rule 408, SCRE Response to a Rule 408, SCRE Communication by Appellant. In fact, *Appellant himself* raised these Rule 408, SCRE Communications, and referenced the "weather reports," in the factual allegations of his eventual "Second Amended Complaint." (Second Am. Compl. at pp. 3-4, ¶ 12, Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed Mar. 15, 2024) ("This is important because after suit was filed, Delta sent a letter to the plaintiff with a weather map that is inconsistent with the plaintiff's observations.").)

January 2024: New Zealand International Flight Allegations ("January 2024 New Zealand Flight")

Ironically, also on January 24,[2] 2024, Appellant was "scheduled to leave for New Zealand on a Delta flight." (*See* Initial Compl. at ¶ 22.)[3] Delta cancelled this flight due to weather conditions. (*See* Initial Compl. at ¶ 22.) Appellant alleges he lost the value of the seat on his booked flight against the seat he accepted on the next available flight to Auckland, New Zealand. (*See* Initial Compl. at ¶ 22.) It is unclear whether that "upgraded" seat was specifically purchased by Appellant or was simply a complimentary seat upgrade given to Appellant as a part of his Delta loyalty club membership. (*See* Initial Compl. at ¶ 22.) Connected with this cancellation, Appellant alleges Delta "lost one of the plaintiff's bags containing thousands of dollars in equipment[.]" (Initial Compl. at ¶ 22.) Because the bag was "lost," Appellant had "no access to that equipment the entire time" he was on his vacation. (*See* Initial Compl. at ¶¶ 22, 44.)

Additionally, because of the flight cancellation, Appellant alleges he lost a separate flight from Auckland, New Zealand to Melbourne, Australia provided by Qantas (an Australian airline). (*See* Initial Compl. at ¶ 22.) Appellant similarly alleges he lost the value of the seat on his booked Qantas flight against the seat he accepted on the replacement Qantas flight to Melbourne. (*See* Initial Compl. at ¶ 22.)

Appellant advised Delta about the "lost" bag, but "Delta could not accurately tell [Appellant] where his bags were." (*See* Initial Compl. at ¶ 46.) After Appellant "spent significant time on wild goose chases effectuated by Delta," he found the "lost" bag in the possession of a

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[2] The specific date was revealed in the First Action, but this Court need not consider this exact date in rendering its decision.

[3] Appellant failed to allege the departure airport from which the claim arose. However, Delta assumes the January 2024 New Zealand Flight departed from Greenville-Spartanburg International Airport, because it is the same airport that underlies Appellant's initial claim for the September 2023 Domestic Flight.

third-party vendor in a "back room" at the Melbourne Airport. (*See* Initial Compl. at ¶¶ 45-46.) Appellant alleges he notified Delta that this bag was damaged. (*See* Initial Compl. at ¶ 45.) Appellant appears to have had no issues on his return to the United States. (*See* Initial Compl. at ¶¶ 22, 45-46.)

March and April 2024: Second Amended Complaint, Court of Appeals Ruling, and Joint Stipulation of Dismissal of First Action.

After his vacation to New Zealand and Australia, in March 2024, Appellant unilaterally filed a Second Amended Complaint in Circuit Court adding claims for the January 2024 New Zealand Flight. (*See* Second Am. Compl., Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed Mar. 15, 2024).) In total, Appellant alleged the following causes of action for both the September 2023 and January 2024 flights: (1) Negligence/Gross Negligence/Recklessness; (2) Unfair Trade Practices Act Violation; (3) Breach of Contract Accompanied by a Fraudulent Act; and (4) Montreal Convention. (*See* Second Am. Compl., Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed Mar. 15, 2024).)

On the morning of April 9, 2024, the day Delta's Motion to Dismiss was set to be heard, Appellant and Delta entered into and filed a Joint Stipulation of Dismissal. (*See* Joint Stipulation of Dismissal without Prejudice, Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed Apr. 9, 2024).) In the Joint Stipulation, Appellant agreed to dismiss the following causes of action *with* prejudice (1) Negligence/Gross Negligence/Recklessness; (2) Unfair Trade Practices Act Violation; and (3) Breach of Contract Accompanied by a Fraudulent Act. (Joint Stipulation of Dismissal without Prejudice at ¶ 1, Greenville County Court of Common Pleas, Case No. 2024-CP-23-00556 (filed Apr. 9, 2024).) All other causes of action, Plaintiff dismissed without prejudice, with Plaintiff allowed to refile an action on or before October 12, 2024. (Joint Stipulation of Dismissal without Prejudice at ¶ 1, Greenville County Court of Common Pleas, Case

No. 2024-CP-23-00556 (filed Apr. 9, 2024).)

Eight days later, and in a separate matter, the Court of Appeals affirmed the Circuit Court's Order dismissing a 2020 lawsuit Appellant Hawkins filed against American Airlines and other defendants arising from similar flight and baggage delays. *See Hawkins v. Am. Airlines*, No. 2020-001150, 2024 WL 1655457, 2024 S.C. App. Unpubl. LEXIS 126 (S.C. Ct. App. Apr. 17, 2024) (unpublished). The Court of Appeals affirmed the Circuit Court's ruling that Appellant could not bring his state law claims, because they were preempted by the Montreal Convention and the Airline Deregulation Act. *See id.* (The Montreal Convention and Airline Deregulation Act bear directly on the claims brought by Appellant in the underlying Complaint filed in the Second Action/Underlying Action.)

<u>April 2024</u>: Portugal International Flight Allegations ("April 2024 Portugal Flight").

At some time in April 2024, Appellant purchased tickets from Delta to Lisbon, Portugal. (Initial Compl. at ¶ 23.)[4] While this flight was not cancelled or delayed by weather, Appellant alleges that Delta "failed to deliver the [Appellant's] luggage to his destination as scheduled." (Initial Compl. at ¶ 23.) Without this luggage, [Appellant] was "without clothing and essential items for a significant period of time." (Initial Compl. at ¶ 23.) Appellant claims the luggage was damaged, and that Delta never reimbursed him for these expenses. (Initial Compl. at ¶¶ 23, 44, 51-52.)

<u>June 2024</u>: Plaintiff Files a New Action in the Magistrate Court, Bringing Claims He Knows Are Preempted and Claims He Voluntarily Dismissed with Prejudice ("Second Action" or "Underlying Action") (Case No.: 2024CV2310302415)

On June 11, 2024, Appellant filed the Second Action/Underlying Action in the East

[4] Appellant failed to allege the departure airport for this flight also. Delta assumes the April 2024 Portugal Flight also departed from Greenville-Spartanburg International Airport, because it is the same airport that underlies Appellant's initial claim for the September 2023 Domestic Flight.

Greenville Summary Court bringing four causes of action ([1] "Montreal Convention"; [2] "Warsaw Convention"; [3] "Claim for a Declaratory Judgment and Breach of Contract"; and [4] "Fraud") in connection with all three flights. (*See* Initial Compl. at pp. 14-17.) In the Complaint, however, Appellant brought causes of action that he knew or should have known were preempted by the Montreal Convention and/or the Airline Deregulation Act. Appellant referenced or quoted portions of the respective Domestic Contract of Carriage and International Contract of Carriage in his "Claim for a Declaratory Judgment and Breach of Contract" cause of action but did not attach the Contracts to the Complaint. Further, Appellant set forth the same types of claims he previously voluntarily dismissed with prejudice claiming new causes of action regarding the September flight.

Delta filed a Motion to Dismiss in Lieu of Answer, raising numerous issues with respect to the Complaint, including but not limited to: (1) the Court's lack of subject matter jurisdiction over the causes of action with respect to the September 2023 Domestic Flight, (2) the Court's lack of subject matter jurisdiction over the state law causes of action related to the January 2024 New Zealand Flight and April 2024 Portugal Flight, (3) Appellant's inability to recover "inconvenience damages" under the Montreal Convention with respect to the January 2024 New Zealand Flight and April 2024 Portugal Flight, and (4) the preclusive effect of the "with prejudice" provisions of the Stipulation to Dismiss without Prejudice filed in the First Action. (*See* Motion to Dismiss in Lieu of Answer, filed Aug. 15, 2024.)[5] Because Appellant incorporated these Contracts by reference in his Complaint and they were central to Appellant's third cause of action, Delta attached them to its Motion to Dismiss. *See, e.g.*, *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) ("In our view, allowing a trial court to consider documents that are incorporated

[5] The Magistrate Court never filed a Return in this Court, ostensibly because Appellant never filed a Notice of Appeal with the Magistrate Court.

by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.") Appellant and Delta briefed the issues raised in Delta's Motion to Dismiss in Lieu of Answer.

December 2024: Motion to Dismiss Heard, Order, and Incomplete Notice of Appeal.

Magistrate Judge Matthew Hubbard heard oral arguments on December 3, 2024. In his Notice of Appeal to the Circuit Court, Appellant incorrectly represents: "The defendant relied on weather reports and other evidence outside of the complaint and even handed up materials at the hearing which were outside of the complaint." (Notice of Appeal to Circuit Court at p. 6.) However, during the hearing, Delta's counsel provided the Magistrate Judge and Appellant printed copies of cited cases, statutes, and the Montreal Convention. Delta's counsel did not "hand[ ] up" any "weather reports" at the hearing.[6] At the end of the hearing, Magistrate Judge Hubbard made an oral ruling granting Delta's Motion to Dismiss and dismissing the entire Complaint for other independent reasons. Magistrate Judge Hubbard requested a formal written order, which was provided and which he executed on December 4, 2024 (hereinafter, the "Order"). Appellant never moved for a new trial.

Appellant admits he received written notice of the Magistrate Court's judgment on December 4, 2024. (*See* Notice of Appeal to the Circuit Court at p. 1.) Therefore, Appellant's thirty-day period to appeal the Order began on Wednesday, December 4, 2024, and ended on Friday, January 3, 2025. *See* Rule 18(a), SCRMC; Rule 74, SCRCP. On December 26, 2024, Appellant filed his "Notice of Appeal to the Circuit Court" in the Circuit Court only. (*See* Notice

[6] If any "weather reports" were referenced, it was in the context of Delta's argument that even *threatened* weather conditions triggered the *force majeure* provisions of the Contracts, and therefore whether bad weather materialized is not dispositive. (*See, e.g.*, Delta's Brief in Support of Defendant's Motion to Dismiss in Lieu of Answer at pp. 26-30.)

of Appeal to the Circuit Court at p. 1; Delta's Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction.) On January 3, 2025, Appellant caused a copy of his "Notice of Appeal to the Circuit Court" to be hand delivered to an individual at the undersigned law firm as service upon Delta. However, Appellant failed to file a Notice of Appeal with the Magistrate by January 3, 2025, as required by Rule 18(a), SCRMC and Rule 74, SCRCP. (*See* Magistrate Return at p. 14)

April 2025:Motion to Dismiss Appeal Heard, Order Granting Motion.

Upon Appellant's faulty appeal, Delta filed a Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction with the Circuit Court on April 4, 2025. (*See* Delta's Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction.) The motion was heard on April 24, 2025 and Judge Jessica A. Salvini entered an order granting Delta's motion to dismiss on May 9, 2025 citing Delta's arguments that the Circuit Court did not have jurisdiction due to Appellant's faulty Notice of Appeal. (*See* Order Granting Respondent's Motion to Dismiss). Within 10 days, on May 15, 2025, Appellant filed a Motion to Reconsider with the Circuit Court. (*See* Plaintiff's Motion to Reconsider.) Both parties briefed the motion and, on July 1, 2025, Judge Salvini denied the Motion to Reconsider. (*See* Final Order Regarding Motion to Reconsider.).

July 2025: Appeal of Motion to Reconsider and Respondent's Motion to Dismiss.

On July 21, 2025, Appellant filed his Notice of Appeal with this Court. On October 16, 2025, he filed with this Court and served upon Delta the transcript of the proceeding in the Circuit Court. Under Rule 208(a)(1), SCACR and Rule 263(a), SCACR, Appellant was then required to file with this Court and serve upon Respondent a copy of his Initial Brief by Monday, November 17, 2025. He did not. On November 24, 2025, seven days after this deadline, Delta filed a motion to dismiss. (*See* Delta's Motion to Dismiss Appeal from Circuit Court.) Only after Respondent drew his attention to his error did Appellant file a Motion for Extension on November 25, 2025.

(*See* Appellant's Motion for Extension of Time to File and Serve Appellant's Initial Brief.)

<u>March 2026</u>: Denial of Motion to Dismiss and Filing of Appellant's Initial Brief.

On March 4, 2026, this Court denied Respondent's Motion to Dismiss and granted Appellant an extra ten days to file his initial brief, which he did on March 12, 2026.

STANDARDS OF REVIEW

"The question of subject matter jurisdiction is a question of law for the court." *Hammer v. Hammer*, 399 S.C. 100, 104-105 (2012) (reviewing the Circuit Court's dismissal for lack of subject matter jurisdiction) (citing *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009)). However, "[t]he appellate court must always take notice of the lack of subject matter jurisdiction" and "[t]he lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal." *Town of Hilton Head Island v. Godwin*, 370 S.C. 221, 223 (2006) (citing *Amisub of S.C., Inc. v. Passmore*, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994) and *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998)).

Review of a motion to dismiss is a question of law and should be reviewed de novo. *S.C. Pub. Interest Found v.* Wilson, 437 S.C. 334, 340 (2022) (citing *Capital City Ins. Co. V. BP Staff Inc.*, 382 S.C. 92 674 S.E.2d 524, 528 (Ct. App. 2009) All documents referenced herein are thus incorporated by reference will also be a part of the Record on Appeal and are deemed to be part of the pleadings. When this Court considers its own subject matter jurisdiction, this Court is permitted to "consider[ ] affidavits or other evidence proving lack of jurisdiction." *Baird v. Charleston Cnty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Rule 12(h)(3), SCRCP. If the Court grants a Rule 12 Motion, the Court is not required to include specific findings of facts or conclusions of law in its order. Rule 52(a), SCRCP; *Santos v. Harris Inv. Holdings, LLC*, 439 S.C. 214, 219, 886 S.E.2d 483, 485–86 (Ct. App. 2023) (collecting cases), *reh'g denied* (May 15, 2023).

ARGUMENT

The Court must dismiss this appeal because Appellant Hawkins failed to timely file his Notice of Appeal in the Magistrate Court and is now raising issues on appeal that he waived by not arguing at the trial court. Even if Appellant Hawkins timely filed a Notice of Appeal, the Court should affirm the dismissal.

I. THIS COURT DOES NOT HAVE SUBJECT MATTER JURISDICTION TO REVIEW THE CIRCUIT COURT'S ORDER GRANTING DELTA'S MOTION TO DISMISS.

Appellant clearly failed to meet the deadline to file his initial brief with this Court. He also failed to meet the deadline to properly serve his Notice of Appeal with the Magistrate Court when he appealed to the Circuit Court. There was no jurisdiction for the Circuit Court to review his case, as that court ruled, and there remains no jurisdiction for the appeal to be heard in this Court. This Court must either dismiss the case or uphold the Circuit Court's dismissal.

a. Appellant missed his deadline to file his brief with this Court on an appeal resulting from another missed deadline.

After missing the appropriate deadline to properly file his appeal in the Circuit Court, Appellant then missed the deadline to file his initial brief with this Court. Rule 208(a)(4), SCACR clearly and simply states that "**Upon** the failure of the appellant to file and serve his brief within the time prescribed, the clerk of the appellate court **shall** sign an order dismissing the appeal, and the appeal shall not be reinstated except as provided by Rule 260." (emphasis added). "Whenever it appears that an appellant . . . has failed to comply with the requirements of these Rules, the clerk **shall** issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties." Rule 260(a), SCACR (emphasis added). If a court rule is plain and unambiguous, the Court "applies the same rules of construction used to interpret statutes" and must

apply the rule as written. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003); *see also Swing v. Swing*, 445 S.C. 340, 346, 914 S.E.2d 158, 161 (2025) ("In recent years, the Court has refocused the analysis of our Rules onto their plain language."). "The term '**shall**' in a statute means that the action is **mandatory**." *Wigfall v. Tideland Utils.*, 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (emphasis added).[7]

Here, Appellant is a licensed South Carolina attorney and is a named partner at his own law firm has the responsibility (as an attorney and to himself as the client) to know this Court's

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[7] However, if it is "necessary" to fulfill the intent of the statute or constitutional provision by interpreting "shall" to be permissive, then "shall" may be construed as permissive rather than mandatory. *See Williams v. Benet*, 35 S.C. 150, 158, 14 S.E. 311, 313 (1892). In its 1892 decision, the Supreme Court interpreted whether the Constitution mandated that Supreme Court Justices "shall" complete their six-year terms, without being able to resign:

> The view contended for rests largely upon the assumption that the words, "*shall* continue in office until their successors shall be elected and qualified," must be construed as imperative, and that the effect of these words is to forbid a Justice of the Supreme Court from vacating his office by resignation or otherwise, before the expiration of the term for which he has been elected. But this view ignores the well settled rule that in the construction of a statute or a constitution, the word "shall" may receive a permissive, rather than an imperative, interpretation, when necessary to carry out the true intent of the provision in which such word is found.

Williams, 35 S.C. at 158, 14 S.E. at 313 (emphasis in original). But when the meaning is unambiguous, the rules of statutory interpretation do not apply. *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."); *Richland Cty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 309, 811 S.E.2d 758, 767 (2018) ("'Under the rules of statutory interpretation, use of words such as "**shall**" or "**must**" indicates the legislature's intent to enact a **mandatory** requirement.' *Collins v. Doe*, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002).") (emphases added).

Rules and deadlines.[8] He cannot completely outsource that responsibility to his non-attorney staff,[9] as he has done here. Appellant allows the fault of the missed deadline to fall entirely to his paralegal and takes no responsibility for the mistake. The Court does have the authority to allow for an extension when there has been no demonstration of good cause for the missed deadline, so the Court does not have authority to allow for an extension here.

b. This Court cannot cure the issues of subject matter or appellate jurisdiction from the lower courts and cannot rescue Appellant from his mistake.

Failure to comply with the procedural requirement of proper notice to appeal divests the reviewing court of jurisdiction to hear the appeal. Whether a court has subject matter jurisdiction is "fundamental," and therefore no one can "waive" a court's lack of subject matter jurisdiction. *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989). Even this Court has the responsibility to examine its own subject matter jurisdiction and may do so at any time upon the Court's own motion. *Tatnall v. Gardner*, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002); *Nix v. Columbia Staffing, Inc.*, 322 S.C. 277, 280, 471 S.E.2d 718, 719 (Ct. App. 1996); Rule 12(h)(3), SCRCP.

"The appellate court must always take notice of the lack of subject matter jurisdiction. *Amisub of S.C., Inc. v. Passmore*, 316 S.C. at 114. The lack of subject matter jurisdiction can be raised **at any time**, can be raised for the first time **on appeal**, and can be raised *sua sponte* by the

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[8] *See* Rule 1.1, RPC, Rule 407, SCACR ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

[9] *See* Rule 5.3(a), RPC, Rule 407, SCACR ("[A] partner . . . shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer[.]"); Rule 5.3(b), RPC, Rule 407, SCACR ("[A] lawyer having direct supervisory authority over the nonlawyer. . . shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer[.]")

court. *See, e.g., Lake v. Reeder Constr. Co.*, 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct. App. 1998) (holding issues related to subject matter jurisdiction may be raised at any time) (emphasis added)." *Town of Hilton Head Island*, 370 S.C. at 223. (holding that the Circuit Court erred in failing to grant a motion to dismiss for lack of subject matter jurisdiction after Godwin did not timely file an appeal). "The acts of a court with respect to a matter as to which it has no jurisdiction are void." *State v. Guthrie*, 352 S.C. 103, 107, 572 S.E.2d 309, 311-12 (Ct. App. 2002).

If the Court lacks subject matter jurisdiction, it has no power to hear the case and it must dismiss the action. *See Myers v. Town of Calhoun Falls & Savannah Valley Trails*, 441 S.C. 146, 153, 892 S.E.2d 514, 518 (Ct. App. 2023); Rule 12(h)(3), SCRCP. A case can be dismissed for lack of subject matter jurisdiction at any time, and this case must be dismissed now because there is no remedy for Appellant's mistakes and he must face the consequences of his own actions.

II. THE QUESTION OF NOTICE OF THE ORDER OF DISMISSAL WAS WAIVED BY APPELLANT'S ACKNOWLEDGEMENT OF DELIVERY OF THE ORDER.

Appellant did not raise any arguments or questions regarding the delivery of the order of dismissal from the Magistrate Court through the entirety of his Circuit Court appeal. Rather, he argued questions of notice for the first time in his Motion to Reconsider, once his case had been dismissed due to his error. Even if this Court determines that notice of the dismissal was improper, Appellant has waived the opportunity to argue improper notice. "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial [court]." *Herron v. Centruy BMW*, 395 S.C. 461, 465 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). This Court must hold Appellant to his prior statements and his arguments made on his appeal to the Circuit Court.

a. Appellant admitted he received notice of the Order of Dismissal and that the 30-day deadline to appeal was January 3, 2025.

Appellant has repeatedly confirmed that he received notice of the Magistrate Court's order and that the 30-day deadline for filing his Notice of Appeal was January 3, 2025. He now contradicts his own pleadings by seeking to argue that he did not receive this notice. Appellant should be held to his own statements of the facts. He cannot be permitted to revoke his prior statements in an attempt to save his case on appeal.

"Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions." *Johnson v. Alexander*, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015). Attorneys are bound by their factual admissions contained in Court filings and may not contradict the facts admitted by the pleadings, without the Court necessarily making a "judicial estoppel" finding. *See In re Murdaugh,* 437 S.C. 15, 15, 875 S.E.2d 625, 626 (2022) ("Respondent [Murdaugh] has admitted in various court proceedings and filings that he engaged in financial misconduct involving theft of money from his former law firm; that he solicited his own murder to defraud his life insurance carrier; and that he is liable for the theft of $4,305,000 in settlement funds."); *In re Murdaugh*, 436 S.C. 636, 638, 875 S.E.2d 58, 59 (2022) ("Respondent [Murdaugh] is bound by the admissions contained in the documents he filed in the *Satterfield* case."); *Elrod v. All*, 243 S.C. 425, 437 (1964).[10]

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[10] In a recent unpublished case (which has no precedential value), even a non-attorney, *pro se* appellant was bound by his representation to the Circuit Court that "he was unsure if" he filed a notice of appeal with the Magistrate Court. *Grate v. Brown*, No. 2025-UP-026, 2025 S.C. App. Unpub. LEXIS 34, at *2 (Ct. App. Jan. 29, 2025) (unpublished) ("We hold the circuit court did not err in dismissing Grate's appeal because Grate did not file his notice of appeal with the magistrate's court. . . . We find no merit in Grate's contention that he was not given an opportunity to argue against dismissal because the circuit court asked Grate if he filed his appeal with the magistrate's court and Grate indicated he was unsure if he did.").

Appellant Hawkins, a South Carolina attorney, is bound by his admissions that "[t]he Magistrate Court's dismissal . . . was entered on December 3, 2024," that he "received notice the case had been dismissed via email from the Magistrate Court on December 4, 2024," that "[t]he operative 30-day period began on December 4, 2024, the date that the Magistrate Court delivered its written notice of judgment to the parties," and that "the applicable 30-day deadline for filing and service of the Notice of Appeal [was] January 3, 2025." (Notice of Appeal, filed Dec. 26, 20245 at p. 1; Memo. In Opp. At p. 4; Memo. In Opp. At p. 2). These unambiguous factual admissions made by Appellant in his own pleadings are binding. He states that he received notice of the dismissal and clearly knew the date his 30-day window would close. This Court should now hold Appellant to his own factual admissions which supported the Motion to Dismiss.

b. Appellant did not raise any concerns with the delivery or notice of the dismissal until his Motion to Reconsider.

The Court cannot consider arguments on appeal that were not previously raised. Appellant has abandoned his various arguments that notice was improper by not raising them prior to his Motion to Reconsider. "[A] party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

In order for an appellate court to review an issue, it must have been both argued and ruled upon in the lower court; any issue that was not properly "preserved for review should not be addressed by the Court of Appeals." *S.C. DOT v. M & T Enters. Of Mt. Pleasant, LLC*, 379 S.C. 645, 658-659 (2008) (citing *Staubes v. City of Folly Beach,* 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)); *State v. Dunbar*, 356 S.C. 138, 142 (2003) (citing *Hendrix v. Eastern Distribution, Inc.*, 30 S.C. 218, 464 S.E.2d 112 (1995)). Additionally, "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error."

S.C. DOT v. First Carolina Corp., 372 S.C. 295, 301 (2007) (citing *Parks v. Morris Homes Corp.*, 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)).

Here, Appellant did not raise the arguments he now presents regarding the notice he received of the order of dismissal in his appeal to the Circuit Court. Instead, he only made arguments regarding notice in his Motion to Reconsider, after his case was dismissed for his failure to follow the proper rules and procedures. Not only did Appellant clearly have actual notice of the dismissal, as evidenced by his own admissions and his filing of his appeal with the Circuit Court, but he did not claim any issues with the notice until he was facing the consequences of his own errors. Appellant is bound by his own admissions that he received notice of the dismissal and is limited to the arguments he had raised in his appeal. This Court must hold Appellant to the limitations he has set for himself and affirm the dismissal.

III. THE CIRCUIT COURT PROPERLY FOUND THAT IT DID NOT HAVE APPELLATE JURISDICTION OVER THE APPEAL BECAUSE APPELLANT FAILED TO TIMELY FILE A NOTICE OF APPEAL WITH THE MAGSTRATE COURT.

A litigant's failure to timely file a notice of appeal in all required tribunals is a jurisdictional issue, which the Court cannot remedy or cure for a litigant. "The requirement of service of the notice of appeal is jurisdictional, *i.e.*, **if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal** and has no authority or discretion to 'rescue' the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. DOT*, 361 S.C. 9,14-15, 602 S.E.2d 772, 775 (2004). (emphases added); *see also In re Estate of Cretzmeyer v. Bloch*, 365 S.C. 12, 14, 615 S.E.2d 116, 116-117 (2005) (affirming circuit court's dismissal of probate court appeal, where appellant was required to serve respondent the notice of appeal and file the notice in both the probate court and in circuit court but appellant failed to file the notice in circuit court).

a. Delivery of the order of dismissal from the Magistrate Court was proper and started the 30-day clock for appeal, making the deadline to file a Notice of Appeal January 3, 2025.

The Circuit Court properly held that it did not have appellate jurisdiction over this case and properly dismissed the appeal. Delta incorporates herein by reference the arguments and case law outlined in its Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction at pp. 1-2 and Memo in Opposition to Appellant's Motion to Reconsider at pp. 4-7. This Court should now uphold the Circuit Court's decision to dismiss the appeal for lack of jurisdiction.

i. An email providing written notice is sufficient to start the clock for an appeal.

Appellant received notice of the Order dismissing the appeal from the Magistrate Court via email, which is a valid means to notify parties of a dismissal judgment and therefore starts the 30-day clock to file a notice of appeal. In 2022, the South Carolina Supreme Court permitted service to be completed via e-mail. *In re Service by E-Mail in the Trial Courts*, 2022 S.C. LEXIS 62, at *1, Order No. 2022-05-06-04 at (b) (May 6, 2022) ("In addition to the methods of service that may be provided for in the rules governing service of pleadings and other papers in the circuit, . . . and summary courts of this state, pleadings and other papers may be served by e-mail pursuant to the provisions of this order."). In addition, the South Carolina Supreme Court has also held that "an email providing written notice of entry of an order or judgment . . . triggers the time to appeal as long as the email is received from the court, an attorney of record, or a party." *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 422 S.C. 211, 217 (2018).[11]

[11] The Court in Wells Fargo applied this rule specifically to Rule 203(b)(1), SCACR which states that "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." While the applicable rule here is Rule 74, SCRCP, this rule states that "Notice of appeal to the circuit court must be served on all parties within thirty (30) days after receipt of written notice of the judgment, order or decision appealed from." While the South Carolina Supreme Court has not yet had a chance to contemplate whether

Here, Appellant has admitted on multiple occasions that he received notice via email that his appeal had been dismissed.[12] Only after missing the deadline for appeal and having his claims dismissed again does he now seek to claim that this notice was invalid.[13] Since Appellant did receive the email notice alerting him to the dismissal of his appeal on December 3, 2024, the last day to file his Notice of Appeal with all parties was January 3, 2025.

ii. *Appellant did not have 35 days to file his Notice of Appeal and Rule 6(e) in inapplicable here.*

In this appeal, Appellant raises arguments that should have been made in his first appeal and argues that, despite his acknowledgement of the written notice of dismissal via email, notice did not begin until the Magistrate Court mailed the Order explaining the judgment, and such mailing adds five extra days to the 30-day deadline to file a Notice of Appeal in Rule 18(a), SCRMC. (*See* Motion to Reconsider at pp. 5-6; Brief of Appellant at pp. 8-9.) His argument is incorrect and he did not have 35 days to file his Notice of Appeal under Rule 6(e), SCRCP.

Rule 6(e), SCRCP states that an additional 5 days will be added when "the notice or paper **is served upon him by mail** or upon a person designated by statute to accept service." (emphasis added). Appellant fails to acknowledge that notice was not served upon him by mail but rather by email.

In *Wells Fargo*, the Supreme Court of South Carolina confirms that an email providing

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email specifically is sufficient under Rule 74, SCRCP, the almost identical language between these two rules demonstrates that they should be subject to the same interpretation.

[12] *See* Notice of Appeal at p. 1 ("The Magistrate Court's dismissal, which is appealed here, was entered on December 3, 2024, and **the undersigned received notice the case had been dismissed via email** from the Magistrate Court on December 4, 2024.") (emphasis added).

[13] Appellant raises *Robinson v. Hassiotis*, 364 S.C. 92, 610 S.E.2d 858 (Ct. App. 2005) This case was remanded because the appellant only received oral notice of his *trial date* which has more stringent requirements than notice of a judgment. In addition, Robinson only requires that written notice be provided, which it was here via email.

written notice of an order does start the clock to serve a notice of appeal. In this decision, the Court did not consider adding an extra five days for the emailed notice of the judgment:

> Although Petitioners also received written notice by mail three days after receiving the email, the time to serve the notice of appeal commenced at the time the parties *first* received written notice of entry of the order. Accordingly, we find the Court of Appeals correctly determined the time to appeal was triggered on the day the parties received the email; therefore, the notice of appeal served thirty-one days thereafter was untimely.

Wells Fargo, 422 S.C. at 217, 810 S.E.2d at 859 (italics in original; underlines added).

Additionally, the South Carolina Supreme Court's 2022 Order outlining email service rules does *not* apply Rule 6(e) to all things transmitted in an email. Rather, the 2022 Order only applies Rule 6(e) to deadlines for "responses," *not* for statutory,[14] jurisdictional filing deadlines, such as a Notice of Appeal. *See In re Service by E-Mail in the Trial Courts* at *1; *see also Witzig v. Witzig*, 325 S.C. 363, 366, 479 S.E.2d 297, 299 (Ct. App. 1996) ("Rule 6(e), SCRCP, does not provide an additional five days to file a notice of intent to appeal.").

The Court need not consider Appellant's abandoned various "anti-email" arguments. Even if considered, Appellant's previous calculation of his deadline was correct, when he admitted: "The operative 30-day period began on December 4, 2024, the date that the Magistrate Court delivered its written notice of judgment to the parties. Based on this timeline, the last day to file and serve the Notice of Appeal was January 3, 2025." (Memo. in Opp., filed Apr. 21, 2025, at p.

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[14] The jurisdiction of a Circuit Court to hear and decide appeals from the Magistrate Court is set by statute. S.C. Code § 18-7-10. So is the 30-day deadline for a notice of appeal to be filed with the Circuit and Magistrate Courts. *See* S.C. Code §§ 18-7-10, 18-7-20, 18-7-60. The South Carolina court rules are subordinate to statutory law. *See Stokes v. Den. Emergency Med. Servs.*, 315 S.C. 263, 266-67, 433 S.E.2d 850, 852 (1993). It is doubtful the Supreme Court's 2022 Order attempted to apply Rule 6(e) to provide five extra days to the 30-day deadline to file a Notice of Appeal. But even if the 2022 Order did apply Rule 6(e) here, such application of the Order would be unconstitutional for extending the 30-day statutory deadline to file a notice of appeal. *See Stokes*, 315 S.C. at 266-67, 433 S.E.2d at 852; *see also De Witt v. S.C. Dep't of Highways & Pub. Transp.*, 274 S.C. at 186.

4.). Here, Appellant simply failed to file his Notice of Appeal with the Magistrate Court on or before January 3, 2025. This Court should uphold the dismissal of the appeal for lack of appellate jurisdiction.

iii. Notice of the judgment can be oral under Rule 18(a).

Though Appellant argues that notice could not have been given orally, he neglects to read the entirety of the rule he cites. Rule 18(a), SCRMC does require that notice be "delivered," as Appellant notes in his Brief and Motion to Reconsider. Rule 18(a), SCRMC *also* states that "[i]f the judgment **is announced** at the trial **in the presence of the parties or their attorneys**, the notice of appeal **shall be served and filed within thirty (30) days** of the date the judgment is **announced**." (emphases added); *see also* S.C. Code § 18-7-10.

Appellant also relies on a case, *Robinson v. Hassiotis*, where the Court of Appeals held actual, oral notice of a trial date (not a judgment) was insufficient. (*See* Brief of Appellant at pp. 6-7 and Motion to Reconsider at pp. 3-4 (citing *Robinson v. Hassiotis*, 364 S.C. 92, 610 S.E.2d 858 (Ct. App. 2005).) As previously noted, Appellant fails to note the distinction between notice of a trial date and notice of a judgment. This case does not carry weight to override the validity of the notice he received.

Appellant was present in the courtroom on December 3, 2024 when Judge Hubbard orally dismissed Appellant's entire Complaint and asked for a written order memorializing his ruling. Appellant's reliance on *Robinson* is unfounded and ignores the full text of Rule 18(a), SCRMC. This new argument has been waived and should not be considered. But even if considered, it lacks merit and does not change the reasoning or result of the Court's Order.

iv. The Court properly distinguished between filing rules and service rules while Appellant continues to conflate the two.

Under the rules and laws of South Carolina, filing and serving are not the same thing. While

the process for each is often similar, the requirements are not exactly the same, despite what Appellant argues. Rule 18(a), SCRMC clearly states that "a party wishing to appeal **shall** serve on the respondent **and file** a notice of appeal . . . **with the magistrate** rendering the judgment **and with the Circuit Court** . . . ." Rule 18(a), SCRMC (emphasis added). To file a document in the Magistrate Court, one must provide the document to "the clerk of the court, except that the judge may permit the papers to be filed with him[.]" Rule 5(e), SCRCP ("Filing with the Court Defined"); Rules 1 ("Scope of Rules"), 81 ("Applicability"), SCRCP; Rule 2 ("Application of . . . Circuit Court Practice in Absence of Rule"), SCRMC. If the provision of the document to the clerk of court is done by means of mailing, the document must be "delivered and received by the proper officer," *i.e.*, the clerk of court, to be "filed." *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

"There is nothing in our appellate court rules suggesting that the manner in which a party may receive notice is limited to the methods used to effectuate service, that is, by mail or hand delivery." *Wells Fargo Bank*, 422 S.C. at 216. Since Delta notes that service to the Magistrate Court is only proper once it has been received, Appellant argues that "delivery" of the dismissal must be held to the same standard and absurdly claims that the 30-day clock cannot have started at all since he did not receive a physical piece of paper notifying him of the dismissal. (*See* Brief of Appellant p. 8). The Courts have repeatedly held that an email is sufficient to satisfy delivery of a notice of dismissal, as outlined in section II of this brief. These decisions are independent of the rules regarding filing.

Appellant also attempts to rescue his "date of mailing" argument by citing the South Carolina Appellate Court Rules. (*See* Brief of Appellant at p. 9 (citing Rule 262(a), SCACR).) Rule 262(a), SCACR applies to the Court of Appeals and the Supreme Court—*not* to the Circuit

Courts or the Magistrate Courts. *See* Rule 101(a), SCACR; Rules 1, 74, 81, SCRCP; Rules 2, 18, SCRMC. Rather, Rule 5(e), SCRCP applies, and Appellant had to deliver the Notice of Appeal to the Magistrate Court. Clearly, a United States postal worker is not also the clerk of a South Carolina trial court. *See Gary*, 347 S.C. at 629, 557 S.E.2d at 663.

Here, Appellant placed the Notice of Appeal in the U.S. mail[15] on December 30, 2024. (Brief of Appellant at p. 4.) The mailing date is legally irrelevant for filing. The date which *is* legally relevant, and dispositive here, is the date of delivery *to the Magistrate Court*. *See Id.* at 663. Appellant admits this date was Monday, January 6, 2025. (*See* Memo. in Opp. at p. 2) This January 6 filing was three days late, and the Court correctly dismissed the appeal.

b. On appeal to the Circuit Court, Appellant did not serve the Magistrate Court with the notice of appeal as required by Rule 18(a), SCRMC. There was therefore no appellate jurisdiction in the Circuit Court, and the case was properly dismissed.

The South Carolina Rules of Civil Procedure, South Carolina Rules of Magistrates Court, and relevant case law make clear that there is a straightforward process for filing an appeal and that failing to properly follow these steps will result in a dismissal of the appeal. Specifically, Rule 18(a), SCRMC and Rule 74, SCRCP, set out clear steps to file an appeal from a Magistrate Court's judgment. Within 30 days the Appellant must (1) file a Notice of Appeal in the Circuit Court, (2) file a Notice of Appeal with the Magistrate Court, and (3) serve the respondent(s) with a copy of the Notice of Appeal.[16]

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[15] Appellant writes that "electronic filing is not available for the Magistrate Court, so the parties must use U.S. Mail for filing." (Motion to Reconsider at p. 15.) Of course, Appellant ignores the fact he simply could have gone to the Magistrate Court and filed his Notice of Appeal in person before January 3, 2025.

[16] Rule 18(a), SCRMC states in relevant part ". . **Within thirty (30) days** after delivery of written notice of judgment to the parties or their attorneys, **a party wishing to appeal shall serve on the respondent and file a notice of appeal . . . with the magistrate rendering the judgment *and***

"A circuit court's jurisdiction over a magistrate court's judgment is appellate in nature. . . . Moreover, it has been the established rule that a **circuit judge cannot reverse a magistrate's judgment when the appellant has failed to serve on the magistrate the proper notice** and grounds of appeal within the prescribed time limits. **Neither does the circuit judge have the right to extend the time** within which to make an appeal or move for a new trial." *De Witt*, 274 S.C. 184, 186, 262 S.E.2d 28, 29 (internal citations omitted) (emphases added).

As has been established, the Magistrate's order dismissing Appellant's complaint was entered on December 4, 2024, and Appellant admits he was notified that day of the Magistrate Court's judgment. (*See* Delta's Motion to Dismiss Appeal at Exhibit A; Notice of Appeal to Circuit Court at pp. 1, 9.) His thirty-day period to appeal the Order began on Wednesday, December 4, 2024, and ended on Friday, January 3, 2025. *See* Rule 18(a), SCRMC; Rule 74, SCRCP. On December 26, 2024, Appellant filed his "Notice of Appeal to the Circuit Court" in the Circuit Court only. (*See* Notice of Appeal to the Circuit Court at p. 1; Delta's Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction.) On January 3, 2025, Appellant caused a copy of his "Notice of Appeal to the Circuit Court" to be hand delivered to an individual at the undersigned law firm as service upon Delta. Appellant, however, did not file a notice of appeal "with the magistrate rendering the judgment" within the thirty (30) day time period provided by Rule 18(a), SCRMC and Rule 74, SCRCP. This fact is dispositive. The Circuit Court could not rescue

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with the Circuit Court of the County where the judgment was rendered. . . . The right of appeal from a judgment exists for thirty (30) days after the denial of a motion for a new trial." Rule 18(a), SCRMC (emphases added). Likewise, Rule 74, SCRCP states in relevant part: ". . . **Notice of appeal** to the circuit court **must be served on all parties within thirty (30) days** after receipt of written notice of the judgment, order or decision appealed from. In all such appeals **the notice of intention to appeal shall be filed with the clerk of the court to which the appeal is taken *and* with the inferior court** . . . within the time provided by the statute, or by this rule when no time is fixed by statute, for service of the notice of intention to appeal. . . ." Rule 74, SCRCP (emphases added). The words "shall" and "must" are not optional and are dispositive.

Appellant from his failure and properly held that it did not have jurisdiction and thus dismissed the appeal. (*See* Order Granting Delta's Motion to Dismiss.) Neither can this Court now rescue Appellant from his mistake.

Appellant made a critical error in his own case and properly faced the consequences of his own actions (or lack thereof). This Court is obligated to enforce the rules as written.

IV. THE MAGISTRATE COURT PROPERLY RULED THAT IT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER APPELLANT'S COMPLAINT WHEN IT GRANTED DELTA'S MOTION TO DISMISS.

The Circuit Court focused its review on the question of timeliness of Appellant's Notice of Appeal, so this Court need not review further than that question. However, should this Court look far enough back to the Magistrate case, Delta incorporates herein by reference the arguments and case law outlined in its Motion to Dismiss in Lieu of Answer at pp. 1-5; Delta's Brief in Support of its Motion to Dismiss in Lieu of Answer at pp. 8-33; Delta's Reply Brief in Support of its Motion to Dismiss in Lieu of Answer at pp. 1-6).

The Magistrate Court properly granted Delta's Motion to Dismiss in Lieu of Answer because the court found that it did not have subject matter jurisdiction over the following causes of action with respect to all three flights: the "Warsaw Convention" cause of action, the "Claim for a Declaratory Judgment and Breach of Contract" cause of action, and the "Fraud" cause of action. The Magistrate Court also dismissed the rest of the claims *sua sponte* because it determined that Greenville County was not the proper forum for claims arising out of Spartanburg County and the remaining claims were too intertwined with the dismissed claims to be heard without substantial prejudice to the parties. (*See* Order Dismissing Case at p. 2.)

To summarize the primary grounds for dismissal: the Airline Deregulation Act ("ADA") deprives all courts—state and federal—from hearing state law claims with respect to an air

carrier's "price, route, or service." 49 U.S.C. § 41713(b)(1). The Montreal Convention[17] preempts all causes of action against air carriers for international fights except for the limited causes of action provided by the Montreal Convention. *We CBD, LLC v. Planet Nine Priv. Air, LLC*, 109 F.4th 295, 303 (4th Cir. 2024); Montreal Convention, art. 29 ("In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention[.]"). The ADA preempts state law claims with respect to United States domestic flight services (and United States international flight services to the extent not covered by the Montreal Convention), while the Montreal Convention applies with respect to flight services starting and ending in two Convention countries.[18] Montreal Convention, arts. 1, 29. These clear rules should have been familiar to Appellant.[19]

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[17] The full name of the Montreal Convention is "The Convention for the Unification of Certain Rules for International Carriage by Air." Convention for the Unification of Certain Rules for Int'l Carriage by Air, May 28 1999, S. Treaty Doc. No. 106-45, 2242 U.N.T.S. 309, 1999 WL 33292734 (entered into force Nov. 4, 2003), (hereinafter, "Montreal Convention").

[18] The United States, New Zealand, and Portugal are all signatories to the Montreal Convention. *See* International Civil Aviation Organization, Current Lists of Parties to Multilateral Air Law Treaties, Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal on 28 May 1999 (available at www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf).

[19] Appellant should have known his non-Montreal Convention causes of action were preempted. Before he filed the Second Action/Underlying Action, Appellant Hawkins sued American Airlines and others over another international flight, and the Greenville County Circuit Court dismissed his state law claims. *Hawkins v. American Airlines, et al.*, Order Granting Defendant American Airlines, Inc.'s Motion to Dismiss at pp. 2-3 ¶¶ 4-8, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (entered Aug. 5, 2020); *see also* Complaint at pp. 4-6, Greenville County Court of Common Pleas, Case No. 2020-CP-23-01364 (filed March 3, 2020) (bringing causes of action in Negligence, Violation of the South Carolina Unfair Trade Practices Act, and Breach of Contract Accompanied by Fraudulent Act, among others).

The South Carolina Court of Appeals affirmed that Order in April 2024, writing: "Specifically, we hold the circuit court did not err in finding Hawkins's tort and Unfair Trade

a. The Airline Disregulation Act deprives all courts from hearing state law claims regarding an air carrier's "price, route, or service."

The [ADA] expressly preempts state efforts to regulate the prices, routes, and services of certain air carriers." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 755 (4th Cir. 2018); *see also* 49 U.S.C. § 41713(b)(1) ("Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."). "To determine whether a claim has a connection with, or reference to an airline's prices, routes, or services, we must look at the facts underlying the specific claim." *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998).

Here, it is clear Appellant's claims relating to airport staffing and the failure to credit him airline rewards miles fall within the scope of claims preempted by the ADA. *See id.* at 257 (noting the United States Supreme Court previously held "the ADA preempted the specific application of general state consumer protection statutes to airline fare advertising"); *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 226-228, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995) (holding federal law preempts application of states' general consumer protection statutes to airlines' frequent flyer programs).

Practices Act (UTPA) claims for damages due to flight delays and delayed baggage were preempted by the Montreal Convention. As to Hawkins's claims regarding insufficient services rendered, the circuit court properly found these claims were preempted by the Airline Deregulation Act of 1978 (ADA). . . . Here, it is clear Hawkins's claims relating to airport staffing and the failure to credit him airline rewards miles fall within the scope of claims preempted by the ADA." *Hawkins v. Am. Airlines*, No. 2020-001150, 2024 WL 1655457 at *1, 2024 S.C. App. Unpub. LEXIS 126 at *2-3 (S.C. Ct. App. Apr. 17, 2024) (footnote omitted) (unpublished). The Court of Appeals has previously refused to reverse a trial court decision which used an unpublished opinion as persuasive authority because it involved the same party with the same lawyer making the same argument. *Hodge v. UniHealth Post-Acute Care of Bamberg, LLC,* 422 S.C. 544, 813 S.E.2d 292 (Ct. App. 2018).

b. The Montreal Convention applies only to international flights and preempts all causes of action against air carriers for international flights.

Pursuant to Rule 12(b)(6), SCRCP, the Magistrate Court properly dismissed "[t]he Montreal Convention cause of action with respect to the Domestic Flight; and [t]he Montreal Convention cause of action with respect to the two International Flights to the extent [Appellant] seeks damages for [Appellant's] inconvenience." (Motion to Dismiss Appeal for Lack of Subject Matter Jurisdiction, Exhibit A at pp. 1-2.)

The Montreal Convention only applies to flight services between two Convention countries. Montreal Convention, arts. 1, 29. Because the September 2023 Domestic Flight was not an international flight, Appellant failed to state a claim under the Montreal Convention, and the Magistrate Court properly dismissed the claim under Rule 12(b)(6), SCRCP.

With respect to the International Flights, Appellant alleged he suffered "some or all of the following," including "psychological trauma," "mental anguish," "mental distress," "anxiety," "emotional injury," "discomfort and inconvenience," "loss of enjoyment of life," and "inconvenience." (*See* Initial Compl. at ¶¶ 28, 50.). Purely mental damages such as these are not recoverable under the Montreal Convention.[20] *See Lee v. Am. Airlines Inc.*, 355 F.3d 386, 387 (5th Cir. 2004) (affirming partial judgment on the pleadings dismissing claims for "inconvenience" and finding the loss of a "full day of a memorable refreshing vacation" not recoverable); *see Seshadri v. Brit. Airways PLC*, No. 3:14-CV-00833-BAS, 2014 WL 5606542, at *10 (S.D. Cal. Nov. 4, 2014) (collecting cases). Appellant failed to state facts sufficient to constitute a cause of action for

[20] The Montreal Convention replaced the Warsaw Convention but cases interpreting the Warsaw Convention's similarly worded provisions are honored as persuasive authority. *See, e.g.*, *We CBD, LLC*, 109 F.4th at 302 n. 4 (joining five other circuit courts of appeals in recognizing such authority). Under the Warsaw Convention, the United States Supreme Court held that a plaintiff could "not allow recovery for purely mental injuries." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 534, 111 S. Ct. 1489, 1493, 113 L. Ed. 2d 569 (1991).

"inconvenience damages," and the Magistrate Court properly dismissed them under Rule 12(b)(6), SCRCP.

c. The Warsaw Convention does not, and never did, apply to domestic flights.

The Magistrate Court correctly dismissed the "Warsaw Convention" cause of action with respect to all three flights. The Montreal Convention replaced the Warsaw Convention. *We CBD, LLC*, 109 F.4th at 301. The Montreal Convention preempts any claim not brought pursuant to the Montreal Convention, which includes Warsaw Convention claims. *Id.* at 303; Montreal Convention, art. 29. The Warsaw Convention never applied to domestic flights. *See* Warsaw Convention ("Convention & Additional Protocol Between the United States of Am. & Other Powers Relating to Int'l Air Transportation"), ch. I ("Scope-Definitions"), art. 1, 49 Stat. 3000, 1934 WL 29042 (Oct. 29, 1934). Thus, the Magistrate Court correctly dismissed the Warsaw Convention cause of action.

d. The Magistrate Court acted properly by not converting Delta's motion to dismiss to a motion for summary judgment.

Appellant incorrectly claims that "Respondent relied on weather reports and other evidence outside of the complaint and even handed up materials at the hearing which were outside of the complaint." (Brief of Appellant p. 15.) Rule 12(b)(8), SCRCP requires that a motion be treated as one for summary judgment when evidence outside the pleadings are presented only on **12(b)(6)** motions for failure to state a claim. Here, the claims were dismissed under **Rule 12(b)(1)**, SCRCP. Even so, Delta's counsel only provided the Magistrate Court with copies of statutes, cases, and the Montreal Convention as controlling legal authorities. When reviewing a Rule 12(b)(1), SCRCP Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Court is allowed to consider evidence—not to test the legal sufficiency of a plaintiff's factual allegations—but rather to determine the Court's *own* subject matter jurisdiction. *See Baird*, 333 S.C. at 529, 511 S.E.2d at

74.

Delta attached to its Motion to Dismiss full copies of the Contracts referenced, partially quoted, and "incorporated herein by reference" in the Complaint. (*See* Initial Compl. at ¶¶ 17, 19-24, 31, 60-64, 66.) When a plaintiff attaches a document as an exhibit to a pleading, the document "is a part thereof for all purposes[.]" Rule 10(c), SCRCP. Consequently, if there is a conflict between the exhibit and the plaintiff's allegations, the exhibit controls. *See Estate of Revis by Revis v. Revis*, 326 S.C. 470, 480, 484 S.E.2d 112, 118 (Ct. App. 1997); *see also Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016) ("[I]f a plaintiff 'attaches documents and relies upon the documents to form the basis for a claim or part of a claim, dismissal is appropriate if the document negates the claim.'") (quoting *Thompson v. Illinois Dep't of Prof'l Regulation*, 300 F.3d 750, 754 (7th Cir. 2002)).

If the plaintiff incorporates documents by reference in the complaint but fails to attach them to the complaint, the document may still be considered part of the pleading for all purposes, even if the document is only presented to the Court as part of a defendant's Rule 12(b)(6) Motion to Dismiss. *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826 ("In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based."); *see also Santos*, 439 S.C. at 221 n. 1, 886 S.E.2d at 486 n. 1; *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005). If the Court considers such documents, the Rule 12(b)(6) Motion to Dismiss does not convert to a Rule 56 Motion for Summary Judgment. *Brazell*, 384 S.C. at 516, 682 S.E.2d at 826. The Magistrate Court did not err to the extent it considered full copies of the Contracts attached to Delta's Motion to Dismiss. Appellant himself cites *Baird v. Charleston County*, which also states

that "evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction," including "when the allegations of the complaint are factually sufficient under Rule 8(a)(1), SCRCP, but do not affirmatively show subject matter jurisdiction." *Baird v. Charleston County*, 333 S.C. 519, 529 (1999).

There is no evidence the Magistrate Court relied on "weather reports" or other "evidence" to make this analysis. The Magistrate Court's Order dismissed the majority of the Complaint, because it had no subject matter jurisdiction over the claims Appellant proffered. To the extent Appellant argues that "weather reports" or other "materials" outside the pleadings were considered by the Court, Appellant fails to show which part of the Court's Order is reliant upon them.

e. The Magistrate Court properly ruled that a case arising out of events in Spartanburg County should not be heard in Greenville County.

The Magistrate Court, *sua sponte*, ruled that Appellant's Complaint, arising from flights alleged to be initiated in Spartanburg County, should not be heard in a Greenville County Court. (Order Dismissing Case at p. 2.) The Magistrate Court Rules are "construed to secure the just, speedy, and inexpensive determination of every civil case within the jurisdiction of the magistrates court." Scope & Purpose, SCRMC. Therefore, "[a]ll civil actions in the magistrates court shall be conducted in such a manner as to do substantial justice between the parties according to the rules of substantive law." Scope & Purpose, SCRMC.

For the September 2023 Domestic Flight, Appellant alleged he departed from the Greenville-Spartanburg International Airport and was "stranded in New York with no flights available for two more days." (Initial Compl. at ¶¶ 10-12.) For the January 2024 New Zealand Flight, Appellant was slated to take a Delta flight from an un-alleged airport of departure with several connecting flights ultimately arriving in Auckland, New Zealand. (*See* Initial Compl. at ¶ 22.) Such flight was canceled, rescheduled, and allegedly caused a baggage delay. (*See id.*) For

the April 2024 Portugal Flight, Appellant again chose to fly with Delta to Lisbon, Portugal, departing from an un-alleged airport of departure, and he allegedly suffered a baggage delay in Lisbon. (*See* Initial Compl. at ¶ 23.)

Under South Carolina law, lawsuits against "foreign corporations" must be brought "in the county in which the: (1) most substantial part of the alleged act or omission giving rise to the cause of action occurred; or (2) foreign corporation . . . has its principal place of business at the time the cause of action arose." S.C. Code § 15-7-30(F)(1)-(2) Appellant did not allege Delta had its principal place of business in Greenville County, South Carolina, (which it does not). Appellant's allegations demonstrate that the most substantial part of the alleged act or omissions he describes did not occur in Greenville County, South Carolina. Therefore, the Magistrate Court had grounds to dismiss the Complaint, pursuant to S.C. Code § 15-7-30(F) and pursuant to the justice of the case. *See* Scope & Purpose, SCRMC.

V. THIS COURT NEED ONLY CONSIDER THE QUESTION OF TIMELINESS OF THE APPEAL AS THE CIRCUIT COURT DID NOT MAKE ANY RULINGS ON THE MERITS OF THE CASE.

Appellant's case has been dismissed for lack of subject matter jurisdiction, dismissed again for lack of appellate jurisdiction, and received a denial to a Motion to Reconsider before making it to this Court. Now, this Court need only look to the question of whether the appeal to the Circuit Court was timely to determine that the dismissal should be upheld. As has been established, Appellant's Notice of Appeal was faulty, and he has waived any other arguments regarding notice of dismissal from the Magistrate Court.

"In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the [circuit court]."*State v. Bonilla*, 429 S.C. 253, 284 (2019) (quoting *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003)). "[Appellate courts] cannot consider

issues raised for the first time on appeal." *Id.* (quoting *State v. Morris*, 307 S.C. 480, 485, 415 S.E.2d 819, 822 (Ct. App. 1991)). Thus, "[i]ssues not raised and ruled upon in the [circuit] court will not be considered on appeal." *Id.* (quoting *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693-94).

The Circuit Court was not able to cure Appellant's failure and properly dismissed the appeal as it did not have subject matter jurisdiction over the issue. *De Witt; Elam*. The Circuit Court made no rulings on the merits of the case. Therefore, this Court is limited to reviewing this question of timeliness. Should the Court determine the appeal was timely, it should remand to the Circuit Court to rule on the merits rather than making its own determinations.

CONCLUSION

Appellant has missed multiple deadlines over the course of this case, has contradicted his own factual statements, and now asks the Court to overlook these shortcomings so that he can seek relief for claims over which the Magistrate Court did not have jurisdiction in the first place. The Circuit Court could not rescue Appellant from his errors and neither can this Court.

This case should not be here because the appeal to the Circuit Court was improper. This Court need only look to the lack of jurisdiction in the Circuit Court to end the case. This leaves Appellant without ground to stand on as he raised no issues with the dismissal from the Magistrate Court until his case was dismissed again. He waived his new arguments and already admitted to receiving notice of the initial dismissal. Should this Court look beyond the question of timeliness, it will see that Appellant's initial case was legally insufficient and was properly dismissed because the Magistrate Court did not have jurisdiction to review his claims. Given the multiple faults with Appellant's case, the Magistrate Court did not have jurisdiction, the Circuit Court did not have jurisdiction, and this Court must affirm the denial of the Motion to Reconsider and the Dismissal of the Appeal to the Circuit Court.

Respectfully submitted,

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