STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Appellate Case No. 2015-001041
Circuit Court Case No. 2014-CP-07-01811

Daniel T. Bryan, Lisa D. Bryan and Beach Deli Enterprises d/b/a Munchies,

Plaintiffs,

Of Whom Daniel T. Bryan and Lisa D. Bryan are.....Appellants,

v.

Dr. Marnix Snijder, USA Limited Partnership V, L.P., Merrelyn Rogers, Renita Bryant, Dimara Atlanta Investment Corp., and Superior Heating and Air, Inc.,.....Respondents.

INITIAL RESPONDENTS' BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Should this Court affirm the trial court's ruling that the Complaint fails to state any personal claims by the Bryans, where the Bryans have failed to present any arguments against that merits ruling in their Appellants' Brief?

II. Did the trial court properly address the Respondents' motions, where all previous motions had been ruled upon, the rulings on those previous motions were interlocutory and not immediately appealable, and the trial court's decision to grant judgment on the pleadings rendered all previous rulings moot?

III. Did the trial court properly decline to treat the Respondents' motion as one for summary judgment, where the motion solely addressed the allegations of the Complaint, and the Respondents did not present or rely upon any outside materials in support of the motion?

IV. Did the trial court properly hear and decide the motion for judgment on the pleadings, where that motion was appropriately before the court?

V. Is the Bryans' sixth issue on appeal preserved for appellate review, where that issue was neither raised nor ruled upon in the trial court?

STATEMENT OF THE CASE

This case involves a dispute between a business entity and its commercial landlords and associated parties regarding alleged breaches of the lease. Those allegations are, and always have been, the entire subject matter of the case. Litigation of that dispute is free to continue, as the Order on appeal does not affect the business entity's claims. The appeal addresses only the business' owners as individuals, who put

their name on the Complaint, but did not plead any basis for personal claims, as opposed to the causes of action asserted by the business entity itself.

Beach Deli Enterprises d/b/a Munchies ("Munchies") is a restaurant located in a commercial complex in Hilton Head, SC. Munchies remains a plaintiff in the case and is not a party to this appeal. The Appellants Daniel T. Bryan and Lisa D. Bryan ("the Bryans") are residents of Hilton Head and the owners of the business that operates Munchies. The Bryans appear to be the sole owners of the business, but Munchies is a separate and distinct business entity. Indeed, it is Munchies, not the Bryans, that entered into the commercial lease that lies at the heart of this case.

The Respondents are a collection of individuals and entities that are connected in some way with the commercial complex in which Munchies is situated. Dr. Marnix Snijder is a resident of Switzerland who owns, or at least has an ownership interest in, two of the corporate entities named as defendants. USA Limited Partnership V, L.P., Inc. owns the commercial complex involved in this case, and it is Munchies' actual landlord.[1] As such, this entity is arguably the only proper defendant in the case. Dimara Atlanta Investment Corp. is the property manager for the commercial complex. Merrelyn Rogers and Renita Bryan are employees of Dimara Investment Corp. who have some involvement with the commercial complex.

Munchies entered into a lease with the Landlord and began operating its restaurant. At some point during the term of the lease, Munchies began claiming that the Landlord was breaching the lease and engaging in conduct detrimental to Munchies' business. Based on those allegations, Munchies commenced the present action by filing a

[1] Any uses in this brief of the term "the Landlord" will refer to USA Limited Partnership V, L.P.

Summons and Complaint on July 29, 2014. [Summons and Complaint.] Those pleadings listed as defendants Dr. Marnix Snyder, USA Limited Partnership V, L.P., Merrelyn Rogers, Renita Bryant, Dimara Atlanta Investment Corp. and Superior Heating and Air, Inc. [Summons and Complaint.] The Complaint included the Bryans as named plaintiffs, although it did not contain any allegations by the Bryans that were different or in addition to those asserted by Munchies.

The Respondents served a timely Answer and Counterclaim on September 3, 2014. [Answer and Counterclaim.] The Respondents later filed a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, on October 23, 2014, and a motion for judgment on the pleadings under Rule 12(c), SCRCP, on November 12, 2014. [Motions.] The motions argued, among other things, that the Bryans lacked standing to assert any of the causes of action set forth in the Complaint.

On November 7, 2014, the case came before the Honorable Maite Murphy for a hearing on several motions. The hearing addressed the following motions: (1) the Bryans' motion for entry of default, (2) the Bryans' motion for default judgment, (3) the Bryans' motion to dismiss the counterclaim, (4) the Bryans' motion to compel discovery responses, (5) the Bryans' motion to compel attendance at depositions, and (6) the Respondents' motion for a protective order. Judge Murphy denied the first three motions and stayed the motion to compel pending further discovery negotiations. The parties withdrew the final two motions in light of their agreement to schedule and conduct the requested depositions pursuant to the South Carolina Rules of Civil Procedure. Judge Murphy ultimately filed an Order memorializing those results on March 13, 2015. [Order.]

In February 2015, the trial court notified the parties that it would conduct a hearing on the Respondents' motion to dismiss and motion for judgment on the pleadings on March 18, 2015. The Bryans filed a motion to continue the hearing because they had not yet received an order on the motions addressed at the previous hearing. The Honorable Marvin Dukes, who was scheduled to preside at the March 18th hearing, denied the continuance request.[2]

The hearing took place as scheduled on March 18, 2015. Although Judge Dukes heard arguments on the Respondents' two motions, the primary issue was the same for both: whether the Bryans had standing to assert any personal claims based on the facts alleged in the Complaint. After Judge Dukes considered the parties' respective arguments and submissions, he decided to grant the Respondents' motion for judgment on the pleadings. Judge Dukes filed an Order to that effect on April 24, 2015. [Order.] The Bryans then commenced this appeal.

ARGUMENTS

I. This Court should affirm the trial court's ruling that the Complaint does not state any personal claims by the Bryans because the Bryans have failed to present any arguments against the merits of that ruling in their Appellants' Brief.

Although the Bryans raise several procedural issues on appeal, they never argue in their brief that the trial court's substantive ruling was incorrect. The Bryans make the following arguments in their Appellants' Brief: (1) the trial court should have continued the motions hearing; (2) the trial court should have converted the motions into a summary judgment motion; (3) the trial court should not have considered the motion for judgment

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[2] Judge Dukes did not file an order specifically addressing the Bryans' request for a continuance. However, in the Order currently on appeal, Judge Bryan noted the Bryans had asked for a continuance, but that request had been denied. [April 24, 2015 Order, p. 1, n. 1.]

on the pleadings; and (4) the trial court should have permitted the Bryans to amend the Complaint. None of those arguments address the actual ruling stated in the trial court's Order – *i.e.* that the Complaint does not state any basis for personal claims by the Bryans. The failure to present arguments on this issue is fatal to any attempt by the Bryans to challenge the trial court's decision.

Where a party fails to specifically argue an issue in its appellant's brief, that issue is deemed waived on appeal. *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977); *see also Shannon v. Shannon*, 301 S.C. 107, 110, 390 S.E.2d 380, 382 (Ct. App. 1990) ("[A] review of the wife's brief does not show she argued error in the trial court's ruling on the validity of the 1977 order. **Failure to argue an issue in a brief amounts to an abandonment of that issue.**") (emphasis added). The abandonment of an issue due to a failure to include it in the brief means the appellate court will not consider that issue in its review of the case. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994).

The Bryans' Appellants' Brief does not even identify the merits of the trial court's ruling as an issue on appeal, let alone present arguments against that decision. The brief does not disclose any allegations of the Complaint that purportedly establish a basis for personal claims by the Bryans.[3] Nor does the brief cite any case law to demonstrate that the Complaint's allegations are sufficient to state personal claims. The brief is entirely silent on the question of the trial court's actual decision to grant judgment on the pleadings as to any attempted personal claims by the Bryans. It is not up to the

[3] In fact, the Bryans tacitly admit there are no such allegations when they attempt to argue, as their final issue on appeal, that they should have been allowed to amend the Complaint to include a personal claim for defamation.

Respondents to justify the trial court's ruling on that issue; rather, it is the Bryans' responsibility to challenge it. By omitting any argument on that issue from their Appellants' Brief, the Bryans have failed to carry that burden. Therefore, the Bryans have not appealed the trial court's ruling that the Complaint fails to state any facts sufficient to constitute any personal claims by the Bryans, and this Court should affirm that decision.

II. The trial court properly addressed the Respondents' motions because no good cause existed to continue the hearing on those motions.[4]

The Bryans argue the trial court erred in proceeding with the motions hearing on March 18, 2015, because they had not yet received any order regarding several previous, unrelated motions. The Bryans filed a motion for a continuance of the hearing, but the trial court denied the request. For the reasons set forth below, the trial court acted well within its discretion in conducting the hearing as scheduled, and this Court should affirm.

"The granting of a motion for a continuance is within the sound discretion of the trial court and will not be disturbed absent a clear showing of an abuse of discretion." *State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). "Reversals for the denial of a continuance 'are about as rare as the proverbial hens' teeth.'" *Id.* (quoting *State v. McMillian*, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002)).

Here, the Bryans based their continuance request on their failure to get an order setting forth the rulings on previously heard motions. However, even if the Bryans did

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[4] The Appellants address this topic as two separate issues, but the arguments contained in the corresponding sections of their Appellants' Brief are essentially the same. To avoid repetition, the Respondents will treat this topic as a single issue.

not receive such an order before the March 18th hearing,[5] that did not mean a continuance was necessary. The previous hearing had addressed motions relating to discovery issues and to the Bryans' request for an entry of default against the Respondents. None of those motions had any bearing or impact on the two motions that Judge Dukes considered at the second hearing. Those subsequent motions by the Respondents dealt solely with the issue of whether the Complaint stated (or could state) any personal claim by the Bryans. Judge Dukes did not need any order from the first hearing to decide the Respondents' motions. Based on the applicable standard of review, Judge Dukes was required to consider only the actual allegations contained in the Complaint. Thus, the previous motions and the issues they addressed had no relevance to Judge Dukes, and there was no reason to continue the hearing on March 18.

The Bryans appear to argue that Judge Dukes' decision to proceed as scheduled prevented them from filing motions to reconsider and/or appeals as to the rulings on the previously heard motions. This contention is without merit. The judge who conducted the first hearing (Judge Murphy) filed an Order on March 13, 2015. [Order.] Under Rule 59(e), SCRCP, the Bryans had ten days from receipt of that order to file a motion to reconsider. And, in fact, the Bryans **did** file a motion to reconsider on March 23, 2015. [Motion to Reconsider.] The Bryans neglect to mention this fact in their brief, although they included a copy of that motion in the Record on Appeal. Thus, the denial of the continuance request clearly had no impact on the Bryans' ability to pursue relief under Rule 59(e) as to Judge Murphy's previous rulings.

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[5] Counsel for the Respondents received a copy of Judge Murphy's Order on March 16, 2015, and forwarded that Order to the Bryans and to Judge Dukes by e-mail that same day. [E-Mail.]

In addition, Judge Dukes' decision on the Respondents' motions rendered moot any reconsideration of the issues addressed in the first hearing. Judge Dukes determined the Bryans did not have standing to assert any personal claims based on the allegations of the Complaint. This means they could not possibly be entitled to any entry of default or default judgment against the Respondents. It also means they had no right to make discovery requests to the Respondents or to seek any order compelling responses to such requests. As a result, any motion to reconsider Judge Murphy's rulings would have been pointless.

Proceeding with the second hearing as scheduled also did not cost the Bryans any opportunity to seek relief in this Court. In the Order stemming from the first hearing, Judge Murphy denied the Bryans' motion for entry of default and a default judgment, denied their motion to dismiss, and denied their motion to compel. [Order.] None of those rulings were immediately appealable under South Carolina law. *See Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000) (denials of motions to dismiss are not immediately appealable); *Jefferson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) (no immediate appeal lies from an order granting or refusing a request for an entry of default); *Lowndes Prods., Inc. v. Brower*, 262 S.C. 431, 205 S.E.2d 184 (1974) (an order refusing to compel discovery is interlocutory and not immediately appealable). Even if the second hearing had never taken place, therefore, the Bryans would not have been able to appeal the rulings from the first hearing.

Perhaps ironically, the second hearing actually gave the Bryans an opportunity to pursue an appeal of the Order from the first hearing. Although that Order was not immediately appealable on its own, it arguably became so when Judge Dukes issued a

final order as to the Bryans (i.e. when he dismissed them as parties). At that point, the Bryans could have included the previous Order in their appeal of Judge Dukes' decision. *See Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The Bryans did not do that, however. They did not reference Judge Murphy's Order in their Notice of Appeal, nor did they attach a copy of that Order to the Notice of Appeal. [Notice of Appeal.] Furthermore, even if the Notice of Appeal could be interpreted as implicitly appealing all previous rulings,[6] the Bryans did not raise or present arguments on any of the issues decided by Judge Murphy in their Appellants' Brief. As a result, they waived any appeal as to those issues. *See Video Gaming Consultants, Inc. v. South Carolina Dept. of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000) (when a party fails to argue an issue in the brief, the party has waived that issue and it is not preserved for appellate review).

Judge Dukes acted well within his broad discretion by denying the Bryans' continuance request. The motions addressed in the first hearing had no conceivable impact on the motions he was scheduled to hear, and his decision to proceed with the hearing did not deprive the Bryans of any rights to seek reconsideration or appellate review. Indeed, Judge Dukes' decision ultimately opened the door for the Bryans to appeal the earlier rulings; they simply failed to take advantage of that opportunity. Therefore, the Bryans have not demonstrated any reversible error, and this Court should affirm on this issue.

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[6] The Respondents submit that not even the most generous reading of the Notice of Appeal could discern such an implication.

III. The trial court properly declined to treat the Respondents' motion as one for summary judgment and applied the correct legal standard in deciding the motion.

In their third argument section, the Bryans claim the trial court should have converted the Respondents' motion to dismiss into a motion for summary judgment. The Bryans base that contention on the filing date of the motion to dismiss, which was after the filing date for the Respondents' Answer. The Bryans are correct that the Rule 12(b)(6) motion was technically untimely under the language of the rule because it was not filed "before pleading if a further pleading is permitted." Rule 12(b), SCRCP. As demonstrated in this argument section and the next, however, the Bryans are incorrect about the actual effects of the untimely filing of the motion to dismiss. Therefore, this issue does not provide any basis for reversal.

The Bryans contend that because the Respondents filed the Rule 12(b)(6) motion after their Answer, the trial court was required to treat that motion as one seeking summary judgment. Yet, the untimely filing of that motion did not convert it into a summary judgment motion. In fact, as discussed below in Section III of this brief, the late filing date had no practical effect at all on the proceedings before Judge Dukes.

Rule 12(b), SCRCP, addresses the question of when it is proper to convert a motion to dismiss into a motion for summary judgment. In relevant part, the rule states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, **matters outside the pleading** are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 12(b), SCRCP (emphasis added).[7] For present purposes, the key phrase to consider from this passage is "matters outside the pleading." If the trial court had considered such "outside matters" in conjunction with the Respondents' motion, then the motion would have been converted into one seeking summary judgment motion. No such consideration of outside materials occurred, however, which means the Bryans' argument on this issue must fail.

The Bryans do not specifically identify any outside materials that the trial court considered when deciding the Respondents' motions. Indeed, the Bryans do not even discuss the "outside materials" standard for the conversion of a motion. They appear to rely solely on the fact that the Rule 12(b)(6) motion was filed after the Answer. The Bryans' reliance on that fact implies a belief that the Answer itself was the kind of "outside matter" that warranted conversion of the motion. If this is, in fact, the Bryan's argument, it is erroneous for at least two reasons.

First, the Bryans have not presented any authority for the proposition that the existence of some other pleading besides the Complaint and a Rule 12(b) motion automatically converts that motion into one for summary judgment. The passage from Rule 12(b) quoted above does not define "matters outside the pleading," and the Respondents have not found any South Carolina authority that explicitly creates or provides such a definition. Yet, there are numerous reported cases reviewing "converted" summary judgment motions, and those cases suggest that "matters outside the pleading" usually consist of evidentiary materials that seek to explain, support or challenge the actual allegations of the Complaint. *See, e.g., Carolina Care Plan, Inc. v. United*

[7] Rule 12(c) contains a similar provision for motions for judgment on the pleadings.

HealthCare Services, 361 S.C. 544, 606 S.E.2d 544 (2004) (the submission of supporting or opposing affidavits, if considered by the trial court, converts a motion to dismiss into a motion for summary judgment); *Gilbert v. Miller*, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003) (the trial court's consideration of photographs, affidavits, and the actual contract at issue in the case converted Rule 12(b)(6) motion into a summary judgment motion); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 798 (Ct. App. 1997) (conversion to a summary judgment motion occurred when the trial court considered the bond ordinance that lay at the heart of the dispute). *But see Brazell v. Windsor*, 384 S.C. 512, 682 S.E.2d 824 (2009) (a trial court can consider the actual terms of a contract, without converting the motion into one for summary judgment, where the complaint incorporates the contract by reference and/or attaches a copy of the contract).

Given the types of things that have been considered "outside matters" in the reported cases, it is doubtful, at best, whether the existence of an Answer (or some other pleading unrelated to the motion) is sufficient to trigger the summary judgment standard. This is especially true in light of the Bryans' failure to cite any legal authority to support that proposition. Therefore, to the extent the Bryans argue that the earlier filed Answer somehow made the summary judgment standard applicable, they are mistaken.

Yet, even if the existence of a previously filed Answer **could** theoretically convert a dismissal motion into one for summary judgment, that result would not occur in the present case. The reason is simple: the trial court did not consider or rely upon the Respondents' Answer in reaching its decision. Judge Dukes' Order makes no reference to the Respondents' Answer. It does not indicate that the Answer was part of the record,

nor does it list or even mention what defenses the Answer contains.[8] Thus, no reasonable reading of the Order could lead to the conclusion that the Answer factored into the trial court's consideration of the motion.

In addition, the Order expressly states what the trial court **did** consider for purposes of deciding the motion. The following sentence appears on the fourth page of the Order: "The Court has read and considered **all the allegations and causes of action set forth in the Complaint.**" [Order, p. 4 (emphasis added).] The Order does not contain any statements that the trial court read or considered any other materials. This demonstrates that the trial court relied solely on the allegations of the Complaint, as was proper.

The parties did not submit any outside materials to the trial court for purposes of the Respondents' motion, and Judge Dukes did not factor any such materials into his decision. The Respondents asked only that the judge evaluate the sufficiency of the Complaint's allegations as they related to the Bryans individually, and that is what he did. Accordingly, there was no reason or basis for the trial court to treat the motion as one seeking summary judgment, and the Court should affirm on this issue.

IV. The trial court properly heard and decided the Respondents' motion as a Rule 12(c) motion for judgment on the pleadings.

The Bryans next argue that the trial court should not have considered the Rule 12(c) motion at all because it was duplicative of the previously filed Rule 12(b)(6) motion. Actually, though, addressing the Respondents' arguments in the context of a motion for judgment on the pleadings is exactly what the trial court was supposed to do

[8] Indeed, a person reading only this Order would have no idea that the Respondents had even filed an Answer.

under the circumstances presented in the case. This result finds support in both the applicable rule and the manner in which the case law interprets that rule.

As a threshold matter, it is debatable, at best, whether the Bryans' argument on this issue is sufficient to warrant consideration by this Court. The section in the Appellants' Brief that addresses this issue does not cite any relevant legal authorities or present any substantive arguments. *See R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (where no authority is cited and argument in brief is conclusory, issue is deemed abandoned). Here, the only cited legal authority is Rule 12(g)(2) of the Federal Rules of Civil Procedure, which is not applicable here. Even if this is construed as an attempt by the pro se Bryans to reference South Carolina's Rule 12(g), the Bryans do not cite any interpreting case law to support their reading of the rule. In terms of substantive argument, the Bryans rely solely on the unsupported statement that "[t]he Motion for Judgement [sic] on the Pleadings should never have been heard." [Appellants' Brief, p. 22.] Indeed, the Bryans devote the vast majority of this section to a long quotation from Judge Dukes' Order, which obviously does not support their position.

Even if the Court chooses to address this issue, however, there is no reversible error. The Bryans rely solely on Rule 12(g) of the Rules of Civil Procedure,[9] which states, in relevant part:

> If a party makes a motion under this rule but omits therefrom any defense or objection then available to him

[9] Again, the Bryans erroneously quote Rule 12(g)(2) of the Federal Rules of Civil Procedure. Although South Carolina's Rule 12(g) does not include a subsection (2), the overall language of South Carolina's version is substantially similar to its federal counterpart. Therefore, the Respondents will assume the Bryans intended to cite and rely upon Rule 12(g), SCRCP.

> which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, **except as provided in subdivision (h)(2) hereof or any of the grounds there stated.**

Rule 12(g), SCRCP (emphasis added). The Bryans contend this language means the Respondents waived any right to seek judgment on the pleadings when they first filed a Rule 12(b)(6) motion to dismiss. Any such argument overlooks the significance of the final clause of subsection (g). The rule does provide for waiver in some circumstances, but it specifically excludes any situations covered by Rule 12(h)(2). Thus, an examination of that subsection is necessary.

In relevant part, Rule 12(h)(2) states:

> **A defense of failure to state a cause of action upon which relief can be granted** ... **may be made** in any pleading permitted or ordered under Rule 7(a), or **by motion for judgment on the pleadings** ...

Rule 12(h)(2), SCRCP (emphasis added). As this language demonstrates, a party can use "failure to state a claim" as the basis for a motion for judgment on the pleadings. This is true regardless of whether or not the party previously filed a motion under Rule 12(b)(6). Accordingly, there is no merit to the Bryans' argument that the trial court could not hear or consider a second-filed motion for judgment on the pleadings because there was a previously filed motion to dismiss.

In addition, the Bryans' argument on this issue elevates form over substance. The Bryans appear to focus entirely on the titles of the Respondents' two motions – i.e. "Rule 12(b)(6) motion to dismiss" and "Rule 12(c) motion for judgment on the pleadings." In doing so, the Bryans overlook the actual basis for the motions. The Respondents asserted in the motion to dismiss that the Complaint did not state a sufficient legal basis for any

recovery by the Bryans in their personal capacities. The Bryans made the same assertion in the motion for judgment on the pleadings. In other words, the second motion was reasserting the ground stated in the first. There was no substantive difference between the two motions. Both of them sought the exact same relief for the exact same reason. For all practical purposes, the first motion simply merged into the second.

This might lead to the following question: Why was the second motion necessary? The answer is that the second motion was simply a means of correcting a procedural irregularity. As discussed above in Section III, the Respondents were technically supposed to file the Rule 12(b)(6) motion prior to filing their Answer. Reasserting the "failure to state a claim" defense in a motion for judgment on the pleadings, as Rule 12(h)(2) allowed them to do, simply assured that the issue would be before the trial court in the correct procedural posture.

This was not an improper tactic and it did not produce any unjust result. Indeed, even if the Respondents had not filed the second motion, the trial court almost certainly would have analyzed the Respondents' argument under the standards for a motion for judgment on the pleadings. It is widely established that courts should treat Rule 12(b)(6) motions filed after an Answer as mislabeled motions for judgment on the pleadings. As the United States Court of Appeals for the Fourth Circuit has explained:

> Rule 12(b) provides that "[a] motion making any [Rule 12(b)] defenses shall be made before pleading if a further pleading is permitted." Rule 12(b), Fed. R. Civ. P. However, Rule 12(h)(2) provides that the defense of failure to state a claim upon which relief can be granted as set forth in Rule 12(b)(6) may be raised "by motion for judgment on the pleadings, or at the trial on the merits." Fed. R. Civ. P. 12(h)(2); *see* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1367 at 514-15 (2d ed. 1990). **Therefore, as a matter of**

> **motions practice, the Defendants' motion should be viewed as a Rule 12(c) motion for judgment on the pleadings raising the defense of failure to state a claim upon which relief can be granted.**

Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999) (emphasis added). The rationale for this approach is that "converting" the motion into one for judgment on the pleadings does not harm the opposing party because the standards applied by the trial court are the same for both motions. *Id.*

It does not appear that South Carolina's appellate courts have directly addressed this precise issue, but the federal circuit courts, as a whole, agree with the Fourth Circuit's position. *See, e.g.*, *Patrick v. Rivera-Lopez*, 708 F.3d 15, 18 (1st Cir. 2013) (trial courts should treat untimely Rule 12(b)(6) motions as Rule 12(c) motions, which does not affect the court's analysis because the standards are the same for both types of motions); *Dukes v. Lancer Ins. Co.*, 390 Fed. Appx. 159, 163 (3rd Cir. 2010) (any error in considering an untimely Rule 12(b)(6) motion is harmless because courts can address the same defense, under the same standard of review, in a Rule 12(c) motion); *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2nd Cir. 2001) ("a motion to dismiss for failure to state a claim ... that is styled as arising under Rule 12(b) but is filed after the close of pleadings, should be construed by the district court as a motion for judgment under the pleadings under Rule 12(c)"); *Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999) (courts should treat a Rule 12(b)(6) motion filed after an Answer as a motion for judgment on the pleadings); *Westcott v. Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990) (based on Rule 12(h)(2), courts can treat untimely Rule 12(b)(6) motions as if the party had styled it a Rule 12(c) motion). Given this weight of authority, there is no reason to believe South Carolina's courts would adopt any other approach to this issue.

In the present case, the trial court could have heard the Respondents' Rule 12(b)(6) motion and treated it as a motion for judgment on the pleadings under the widely established rule. The trial court ultimately did not have to do that, however, because the Respondents filed an actual Rule 12(c) motion for judgment on the pleadings well in advance of the hearing date. That second motion made it unnecessary for the trial court to convert the original motion to dismiss into anything else. The Respondents performed that task instead by filing a new motion asserting the same defense (i.e. failure to state a claim) under a different subsection of Rule 12.

Even if there were no established rule governing the interplay of Rule 12(b)(6) and Rule 12(c), the Bryans' argument on this issue would not demonstrate any reversible error. The trial court's consideration of the Rule 12(c) motion did not result in any conceivable prejudice to the Bryans. The original Rule 12(b)(6) motion asserted that the Bryans should be dismissed as parties (in their individual capacities) because the Complaint did not state any basis for personal claims by the Bryans. The Rule 12(c) motion raised the **exact same defense**. This is not a situation in which the second motion ambushed the Bryans with new defenses or new issues for the hearing. The question for the trial court's consideration remained the same, as did the applicable legal standard. The only thing that changed was the subsection appearing after the number "12" on the second motion. The Bryans cannot credibly argue that this one inconsequential difference made the Rule 12(c) motion prejudicial to them.

The Bryans' argument on this issue must fail. Far from committing any reversible error, the trial court did exactly what it was supposed to do by considering the

Respondents' defense of "failure to state a claim" as stated in the Rule 12(c) motion. Therefore, this Court should affirm.

V. The Bryans' sixth issue on appeal is not preserved for appellate review.

For their final issue on appeal, the Bryans claim the trial court should have allowed them to amend their Complaint to add a personal cause of action for defamation. Significantly, the Bryans do not argue the Complaint, in its current form, actually **does** state a personal claim for defamation. They argue only that the trial court should have allowed an amendment. The Court should not consider this issue, however, because it is not preserved for appellate review.

"Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide the [appellate] Court with a platform for meaningful appellate review." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014). "At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge." *Malloy v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014). *See also Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal."). Thus, in order for this issue to be preserved, the Bryans must be able to demonstrate that they raised it to the trial court, and the trial court ruled it. The record does not satisfy either part of that test.

First, there is no indication that the Bryans properly moved to amend the Complaint in the trial court. The Record on Appeal does not contain any actual motion by the Bryans to amend the Complaint, and the Bryans never claim they filed such a motion. In their Appellants' Brief, the Bryans state only the following: "Since the

Appellants did not have a claim of defamation in their complaint, the request of Appellants to allow them to add defamation as a claim was dismissed." [Appellants' Brief, p. 22.] As this statement indicates, the Bryans asked Judge Dukes during the hearing if they could add a defamation claim. However, the trial court's Order makes no mention of any motion to amend, and no other evidence of a formal motion to amend appears in the Record.

Yet, even if Court assumes the Bryans' oral request at the hearing served as a motion to amend the Complaint, the issue is still not preserved because the trial court never ruled on that request. All of the rulings stemming from the hearing on March 18, 2015, appear in the trial court's Order.[10] In terms of a potential defamation claim, the Order contains only the following paragraph:

> At the hearing, the Bryans argued that the Complaint alleged a defamation claim against Defendants. However, the Complaint does not set forth a claim for defamation (either by the Bryans or by Munchies), does not mention or allege the legal elements required to establish a cause of action for defamation under South Carolina law, and does not seek damages arising from defamation. This deficiency is apparent even when the Complaint is liberally construed in the Bryans' favor. Therefore, to the extent this argument was properly before the Court, it does not support the Bryans' opposition to the present motions.

[Order, p. 4.] This passage does not identify or discuss any request to amend the Complaint to add a claim for defamation, and it certainly does not rule on such a request. Rather, the passage constitutes a ruling that the Complaint in its current form fails to state any cause of action for defamation. As argued in the first section of this brief, this is a

[10] It is significant to note that the Order referenced the trial court's ruling on the Bryans' pre-motion request for a continuance, but it is silent as to any purported motion to amend the Complaint.

ruling the Bryans have not appealed. The Bryans instead challenge only their inability to amend the Complaint, but no ruling to that effect appears in the Order or anywhere else in the Record. Thus, the second element for issue preservation fails.

Our Supreme Court has clarified a party's obligation when the party raises an issue to the trial court, but the court does not address that issue in its order. "A party *must* file [a Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. DOJ*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). As this language indicates, filing a Rule 59(e) motion is mandatory when a party faces this situation. Failure to file a Rule 59(e) motion prevents the issue that was not ruled upon from being preserved for appeal.

Here, the Bryans did not file a Rule 59(e) motion as to Judge Dukes' Order. The Bryans clearly knew that type of motion was an option, as they had, just a few weeks before the Order, filed a motion to reconsider as to Judge Murphy's previous rulings. Whether or not the Bryans knew such a motion was **necessary** in this situation is immaterial for present purposes. Regardless of the Bryans' subjective knowledge, the law as it currently stands required them to seek a ruling via Rule 59(e) on their request to amend the Complaint (assuming, of course, they had previously made such a request). They failed to do so, which means the issue is not preserved for review by this Court.

In addition, any attempt to amend the Complaint to add personal claims by the Bryans would be improper under the applicable law. As Judge Dukes correctly found, the Bryans were not proper parties to this lawsuit because the Complaint did not state any basis for the Bryans to assert personal claims. Thus, an amendment to add such claims by the Bryans would have been tantamount to adding the Bryans as new plaintiffs. South

Carolina law does not permit an amendment to a Complaint to add new plaintiffs. *See Valentine v. Davis*, 319 S.C. 169, 172, 460 S.E.2d 218, 219 (Ct. App. 1995).

It is of no consequence that the original Complaint's caption listed the Bryans as plaintiffs. That did not make the Bryans **proper** parties. The true test was whether the Bryans stated any basis for personal claims against the Respondents. Judge Dukes concluded they did not, and the Bryans have failed to challenge that ruling. Thus, the Bryans could not have been actual parties to the case, regardless of what the original caption included. From a legal standpoint, any addition of personal claims by the Bryans would have meant bringing them into the case as plaintiffs. Again, this is not a permissible result under South Carolina law, and even if the Bryans' arguments on this issue were preserved for review, no basis for reversal would exist.

To the extent the Bryans intend the sixth issue to challenge the trial court's actual ruling (*i.e.* that the Complaint does not state a claim for defamation), their argument fails.[11] The Bryans do not cite or discuss any legal authorities regarding the allegations that are necessary to plead a defamation claim.[12] They also do not list the elements of a defamation cause of action under South Carolina law or attempt to explain why the Complaint alleges those elements. Indeed, the only statement about the Complaint in terms of a *current* defamation claim appears to be an admission that the Complaint did not include such a cause of action. *See* Appellants' Brief, p. 22 ("Since the Appellants did not have a claim of defamation in their complaint ...").

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[11] The Respondents dispute that the Bryans have appealed or challenged the trial court's ruling as to the purported defamation claim. Thus, the Court need not (and should not) proceed with a substantive analysis of that ruling. In an abundance of caution, however, the Respondents will present a brief argument on this issue.

[12] The Bryans do cite some cases in this section, but they deal only with the liberal interpretation of pro se pleadings.

The trial court granted a judgment on the pleadings in the Respondents' favor as to the absence of any defamation claim. This Court has explained the standards governing motions for judgment on the pleadings in the following terms:

> Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. When considering such motion, the court must regard all properly pleaded factual allegations as admitted. ... On review of the motion, the court may not consider matters outside the pleadings. ... A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. ... When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. ... Furthermore, "a judgment on the pleadings is considered to be a drastic procedure by our courts."

Falk v. Sadler, 341 S.C. 281, 286-87, 533 S.E.2d 350, 353 (Ct. App. 2000) (internal citations omitted). Thus, if this Court were to address this issue, it should affirm the trial court's decision unless a liberal reading of the Complaint could demonstrate facts sufficient to state a claim for defamation. As discussed below, that is not the situation that exists in this case.

A plaintiff seeking to state a claim for defamation must allege: (1) a false and defamatory statement concerning another, (2) an unprivileged publication to a third party, (3) fault on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *McNeil v. S.C. Dept. of Corrections*, 404 S.C. 186, 195, 743 S.E.2d 843, 848 (Ct. App. 2013).

The Complaint in this action does not allege any of those elements, either directly or by implication. Despite its 31-page length, the Complaint does not even come close to alleging facts that could state a claim for defamation under South Carolina law. This is true even when the facts pled in the Complaint are liberally construed in the light most favorable to the plaintiffs. Simply put, there is no way to read or interpret the Complaint so that it states a claim for defamation. Again, the Bryans have not argued otherwise in their Appellants' Brief and they appear to concede that no defamation claim appears in the Complaint. Therefore, this Court should affirm the trial court's decision on this issue.[13]

CONCLUSION

The Bryans have either waived or failed to preserve most of their arguments on appeal. To a large extent, therefore, this Court can affirm the result in the trial court based on the rules governing issue preservation. The arguments the Bryans have preserved are all based on misunderstandings of the procedural rules and the applicable law. Consequently, those arguments do not present any basis for reversing the trial court's decision as to the Bryans.

It is important to note that the trial court's decision did not end the entire case. To the extent Munchies, as the actual tenant, has any legitimate claims against the Respondents (which the Respondents obviously deny), Munchies can still pursue those claims. The trial court's Order merely dismissed the Bryans as plaintiffs because the Complaint did not state any basis for personal claims by the Bryans. This is the correct

[13] As previously discussed, the Court should not even reach this issue because the Bryans failed to argue it in their brief. Even if the Court were to consider this issue, however, the end result would be the same.

result under the law, and the Bryans have failed to demonstrate otherwise. Therefore, this Court should affirm the trial court's decision granting judgment on the pleadings to the Respondents as to any purported personal claims by the Bryans.

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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Special Circuit Court Judge

Appellate Case No. 2015-001041
Circuit Court Case No. 2014-CP-07-01811

Daniel T. Bryan, Lisa D. Bryan and Beach Deli Enterprises d/b/a Munchies,

Plaintiffs,

Of Whom Daniel T. Bryan and Lisa D. Bryan are.....Appellants,

v.

Dr. Marnix Snijder, USA Limited Partnership V, L.P., Merrelyn Rogers, Renita Bryant, Dimara Atlanta Investment Corp., and Superior Heating and Air, Inc.,.....Respondents.

PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **6th day of August, 2015**, served copies of the Respondents' **Initial Respondents' Brief** and **Designation of Matter to be Included in the Record on Appeal** upon the pro se Appellants by causing them to be deposited in the United States mail with sufficient postage attached, addressed to: Daniel T. Bryan and Lisa D. Bryan; 4 Royal Crest Drive; Hilton Head, SC 29928.

(signature on next page)

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August 6, 2015