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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2015-001754

James and Marietta Chaffin, ... Appellants,

v.

Richland County Sheriff's Department, Deputy Brian Metz, Investigator Roy Livingston, Tallie and Devra Lackey, individually and as the Parents to the Minor Child, ... Respondents.

INITIAL BRIEF OF RESPONDENTS TALLIE AND DEVRA LACKEY, INDIVIDUALLY AND AS THE PARENTS TO THE MINOR CHILD

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II. Whether the trial court converted Respondents Tallie and Devra Lackey's motion to dismiss to a motion for summary judgment when there is no evidence in the record that the trial court considered any matters outside of the pleadings?

III. Whether the trial court erred by dismissing Appellants' claims when those claims were either time-barred or fail to state facts sufficient to constitute a cause of action?

IV. Whether the trial court erred by not holding Respondents Tallie and Devra Lackey in default when the Lackey Respondents' motion to dismiss was timely filed, Appellants failed to comply with the requirements of Rule 55, SCRCP, and the trial court did not rule on the issue?

STATEMENT OF THE CASE

On April 4, 2014, Appellant James Chaffin and his wife, Appellant Marietta Chaffin, filed a civil lawsuit against Respondents Richland County Sheriff's Department ("RCSD"), Deputy Brian Metz ("Metz"), Investigator Roy Livingston ("Livingston"), and Tallie and Devra Lackey, individually and as the parents to the Minor Child. ("the Lackey Respondents").[1] (*See generally* Compl.). Appellants alleged nine causes of action in their Complaint:[2] **(1)** violation of the South Carolina Constitution, Article 1, § 10 against Respondents RCSD, Metz, and Livingston; **(2)** wrongful failure to train and supervise police officers against Respondent RCSD; **(3)** false imprisonment as to all Respondents; **(4)** malicious

[1] The Complaint references several exhibits purportedly attached to the Complaint. However, these exhibits were not, in fact, and are not included in the Record on Appeal.

[2] Appellants' Complaint appears to include ten causes of action, but the sequentially numbered causes of actions skip from the Third Cause of Action to the Fifth Cause of Action, omitting a Fourth Cause of Action. (Compl. 8–9).

prosecution as to all Respondents; **(5)** defamation/slander/libel against the Lackey Respondents; **(6)** defamation/slander/libel *per se* against the Lackey Respondents; **(7)** assault and battery against Respondents RCSD, Metz, and Livingston; **(8)** abuse of process against the Lackey Respondents; and **(9)** loss of consortium as to all Respondents. (Compl. 5–16).

On May 16, 2014, the Lackey Respondents filed a motion to dismiss. Shortly thereafter, on June 11, 2014, the Lackey Respondents filed a memorandum in support of their motion to dismiss. On July 1, 2014, the parties were served with a notice of motion scheduling, setting a hearing date for this motions to dismiss as July 21, 2014 at 11:00 AM. The notice also required the parties to submit any briefs or memorandum the Wednesday before the week of the hearing. At 10:22 A.M. on July 21, 2014—approximately thirty-eight minutes before the hearing—Appellants filed a memorandum of law in opposition to the Lackey Respondents' motion to dismiss.

Judge Hood conducted a hearing, and three days later, on July 24, 2014, issued a Form 4 Order granting the Lackey Respondents' motion to dismiss. Thereafter, on September 8, 2014, Judge Hood issued a written order dismissing all causes of action against the Lackey Respondents. Appellants filed a timely motion to reconsider. No memorandum of law in support was filed. Judge Hood denied Appellants' motion to reconsider in a Form 4 order dated July 20, 2015. On August 14, 2015, Appellants mailed a copy of the notice of appeal to Respondents and the clerks of this Court and the lower court.

STATEMENT OF FACTS

In June 2006, the Minor Child, the daughter of Respondents Tallie and Devra Lackey, began counseling at Post Trauma Resources. (Compl. p. 2). On January 9, 2007, the Minor Child told a counselor that Appellant James Chaffin sexually assaulted her. (Compl. p. 2).

In February 2007, the counselor provided Respondents Metz and Livingston with information about the assault. (Compl. p. 3). Metz and Livingston then obtained a statement from the Minor Child, wherein she reported that Appellant James Chaffin groped her and tried to have sexual intercourse with her. (Compl. p. 3). The Minor Child also told these law enforcement officers that Appellant James Chaffin wanted to take nude photographs of her and post them on the Internet and that he used a condom. (Compl. p. 3). A condom was later located in the barn where the Minor Child reported that the assault occurred. (Compl. p. 3).

On March 9, 2007, Appellant James Chaffin was arrested and charged with Criminal Sexual Conduct with a Minor in the Second Degree for sexually abusing the Minor Child (Compl. pp. 3–4). The Richland County Sheriff's Department ("RCSD") did not find Appellant James Chaffin's DNA on the condom, and the Solicitor's Office eventually decided not to pursue the case and dismissed the charge in 2012. (Compl. p. 5).

STANDARD OF REVIEW

"On appeal from a dismissal pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court—whether the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014) (citing *Grimsley v. S.C. Law Enforcement Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012); *Flateau v. Harrelson*, 355 S.C. 197, 201–03, 584 S.E.2d 413, 415–16 (Ct. App. 2003)). "The Court is required to view the allegations in the complaint in the light most favorable to the plaintiff and determine whether the facts alleged and the inferences reasonably deductible from the pleadings would entitle the plaintiff to relief under any

theory of the case." *Id.* (citing *Grimsley*, 396 S.C. at 281, 721 S.E.2d at 426). However, "[t]he Court may sustain the dismissal when 'the facts alleged in the complaint do not support relief under any theory of law.'" *Id.* (quoting *Flateau*, 355 S.C. at 202, 584 S.E.2d at 416). For example, dismissal is appropriate where it is apparent from the face of the complaint that the statute of limitations has run. *Gillman v. City of Beaufort*, 368 S.C. 24, 27–28, 627 S.E.2d 746, 748 (Ct. App. 2006).

ARGUMENTS

I. The trial court did not err by not recusing itself because Appellants never requested recusal, the trial court never ruled on recusal, and there is no evidence in the record to support recusal.

In their brief, Appellants contend that Appellant James Chaffin's mother, who allegedly attended the hearing below, worked with Judge Hood for over twenty years. Thus, according to Appellants, Judge Hood should have disclosed this relationship and recused himself from the proceedings. Appellants' argument fails on its face and this court should summarily dispose of this issue.

Appellants have offered no evidence that Judge Hood knows Appellant James Chaffin's mother or that she attended the hearing. No reference was made to her during the hearing, and Appellants have pointed to nothing in the record that indicates she was present at the hearing or that establishes any sort of relationship with Judge Hood. Instead, Appellants rest their argument on bare allegations in an appellate brief.

More importantly, Appellants *never* raised the issue of recusal below, and Judge Hood never ruled on the issue. Appellate courts are courts of last resort, not courts of first impression. To that end, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for

appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 34, 491 S.E.2d 571, 576 (1997)). Indeed, this Court has repeatedly rejected litigants' attempts to raise recusal for the first time on appeal. *See, e.g., Gaddy v. Douglass*, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004) (rejecting as unpreserved a litigant's "desperate, eleventh-hour attack" on a trial judge's impartiality when that issue was raised for the first time on appeal).

Accordingly, this Court should reject Appellants' recusal argument as unpreserved and wholly without merit.[3]

II. The trial court did not convert Respondents Tallie and Devra Lackey's motion to dismiss to a motion for summary judgment because there is no evidence in the record that the trial court considered any matters outside of the pleadings.

In their brief, Appellants allege that the trial court converted the Lackey Respondents' Motion to Dismiss into a Motion for Summary Judgment. Specifically, Appellants contend that the trial court considered matters beyond the pleadings without providing sufficient notice to the parties "or an opportunity to file counter affidavits." (Appellants' Br. at 3).

Appellants' argument is factually and legally baseless. Despite Appellants' contention, the Lackey Respondents submitted no affidavits in support of their Motion to Dismiss, nor did the trial court's order reference any documents or matters outside of the pleadings. Instead, the trial court's order cites the appropriate standard of review for a motion to dismiss and properly applies that standard to the facts of this case. (*See* Order at 2–3). Appellants have not pointed to *any* material outside of the pleadings considered or referenced by

[3] Appellants spend a large portion of their brief arguing ethical issues of dual representation of clients with adverse interest by Turner Padgett lawyers. It is entirely unclear what basis Appellants have for raising this argument as Turner Padgett is not involved in this case in any way and has never made an appearance for any of the parties.

the trial court in its order, instead again relying on conclusory accusations against the trial judge. This Court should disregard Appellants' argument as it is bereft of any factual or legal support.

III. The trial court correctly granted the Lackey Respondents' motion to dismiss on the basis that Appellants' claims are either time-barred or fail to state facts sufficient to constitute a cause of action.

At every stage of the proceedings, Appellants have failed to address the Lackey Respondents' arguments in support of dismissal. Although Appellants filed a Memorandum in Opposition to the Lackey's Motion to Dismiss, that memorandum was not filed until the morning of the hearing on July 21, 2014. The Notice of Motion Scheduling, which was sent out almost three weeks before the hearing, stated: "ALL ATTORNEYS MUST SEND A PROPOSED ORDER OR MEMORANDUM OF LAW BY Wednesday, July 16, 2014 FOR THE MOTION HEARING THAT IS BEING HEARD." (*See* July 1, 2014 Notice). Appellants disregarded this Notice from the trial court.

Moreover, in the Memorandum in Opposition, Appellants do not address any of the substantive arguments made by the Lackey Respondents. Nor did Appellants make any substantive arguments at the hearing. (*See generally* Transcript 16–18). On appeal, Appellants continue to ignore the substance of the trial court's order, instead relying on general statements that "questions of fact" remain in the case. South Carolina's Appellate Court Rules and issue preservation case law require more of an Appellant. *See, e.g.*, Rule 208(b)(1)(B) ("Broad general statements [of issues on appeal] may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Accordingly, this Court should summarily dispose of Appellants' appeal.

A. Appellants' false imprisonment claim is time-barred and fails to state facts sufficient to constitute a cause of action.

"The essence of the tort of false imprisonment consists of depriving a person of his liberty without legal justification." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 440, 629 S.E.2d 642, 651 (2006) (citations omitted). To prevail on a false imprisonment claim, a plaintiff must establish the following: "(1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Id.* (citations omitted).

The statute of limitations for false imprisonment in South Carolina is two years. S.C. Code Ann. § 15-3-550. The question of when a cause of action for false imprisonment accrues appears to be an unsettled question in this State. One South Carolina Supreme Court case indicates that the limitations period begins to run at the time of the alleged false imprisonment. *Miller v. Dickert*, 259 S.C. 1, 3, 190 S.E.2d 459, 460 (1972). However, a majority of jurisdictions follow an approach wherein the statute of limitations for false imprisonment begins to run when the plaintiff is released from imprisonment. *See, e.g., Stafford v. Muster*, 582 S.W.2d 670, 680 (Mo. 1979) ("[F]or false imprisonment in particular, the authorities overwhelmingly hold that a cause of action for false imprisonment accrues on the discharge from imprisonment." (citations omitted)); 8 S.C. Jur. *False Imprisonment* § 17 (noting that the general rule is that a false imprisonment cause of action accrues upon release from confinement).

Here, Appellants ran afoul of the statute of limitations under either approach. Appellants pled that Appellant James Chaffin was arrested on March 9, 2007 and released from custody on March 13, 2007. (Compl. at ¶¶ 17, 20). Appellants did not file their Complaint until more than seven years later—five years after the statute of limitations had elapsed.

Even assuming that Appellants' false imprisonment claim is not time-barred, it would fail on its face. Appellant James Chaffin was not imprisoned by the Lackey Respondents. Instead, the Lackey Respondents' daughter went to a therapist, and the therapist then reported the crime to the police. While Respondent Devra Lackey provided statements and evidence to law enforcement officers after being contacted, that is insufficient to support a cause of action for false imprisonment. While a party does not need to physically restrain a defendant to be liable for false imprisonment, Appellants have cited no authority to even suggest that responding to a law enforcement officer's questions constitutes false imprisonment.

In fact, Appellants have cited no authority whatsoever in their brief as to the false imprisonment claim. Thus, Appellants have abandoned this issue on appeal, and the trial court's dismissal of Appellants' false imprisonment claim is law of the case. *See First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (holding that an "unchallenged ruling, right or wrong, is the law of the case and requires affirmance").

B. Appellants' malicious prosecution claim fails to state facts sufficient to constitute a cause of action.

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a

preponderance of the evidence." *Law*, 368 S.C. at 435, 629 S.E.2d at 648 (citing *Parrott*, 246 S.C.at 322, 143 S.E.2d at 609).

As the trial court held below, Appellants have failed to make any showing of the second element. The Lackey Respondents did not institute any criminal proceedings. Rather, the Lackey Respondents' daughter discussed her abuse with a therapist and Respondent Devra Lackey merely answered the questions posed by investigators. Appellants' Complaint simply does not allege that the Lackey Respondents insisted on criminal charges. As the Supreme Court of South Carolina has explained, a plaintiff in a malicious prosecution case must show "that [a defendant] was affirmatively active in instigating or participating in the prosecution." *Gibson v. Brown*, 245 S.C. 547, 550, 141 S.E.2d 653, 654 (1965).

Moreover, putting the merits aside, Appellants do not challenge the trial court's finding that the Lackey Respondents did not institute the criminal proceedings in this case. Instead, Appellants only argue that there was a lack of probable cause and that the proceedings were terminated in Appellants' favor. (Appellants' Br. at 6). Even assuming that was true, Appellants have failed to challenge the trial court's dispositive finding that they failed to adduce evidence on the second element of a malicious prosecution claim. Thus, that ruling is the law of the case, and this Court should affirm the trial court's ruling. *Cont'l Ins. Co. v. Shives*, 328 S.C. 470, 474, 492 S.E.2d 808, 810 (Ct. App. 1997) (holding that a "trial court's unappealed ruling becomes the law of the case, and [this Court] must assume the trial court was correct in [its] ruling"); *see Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (finding that an unchallenged trial court ruling "is the law of th[e] case and requires affirmance").

C. Appellants' defamation and defamation *per se* claims are time-barred and fail to state facts sufficient to constitute a cause of action.

In bringing a claim of defamation or defamation *per se*, a plaintiff must prove: "(1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault, and (4) either the statement was actionable irrespective of harm or the publication of the statement caused special harm." *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002) (citation omitted). Both defamation and defamation *per se* have two-year statutes of limitation that begin to run when the defendant makes the alleged defamatory statement. S.C. Code Ann. § 15-3-550; *Jones v. City of Folly Beach*, 326 S.C. 360, 368–69, 483 S.E.2d 770, 774–75 (Ct. App. 1997) (affirming a trial court ruling that applied the "date of utterance" rule and noting that "South Carolina has not adopted the discovery rule in libel and slander cases").

By Appellants own admission, the only statements referenced in their Complaint occurred in 2007—more than seven years prior to the filing of the Complaint. (*See* Compl. at ¶¶ 7–8, 10–15, 54). Thus, Appellants' defamation and defamation *per se* actions are plainly outside of the two-year statute of limitations. *See* S.C. Code Ann. § 15-3-550.

Even if these causes of action were timely filed, they nonetheless fail on the merits. The Lackey Respondents merely responded to questions asked by law enforcement and did not publish any defamatory statements. *See, e.g.*, *Bell v. Bank of Abbeville*, 208 S.C. 490, 494, 38 S.E.2d 641, 643 (1946) ("The protection of privilege extends generally to remarks made in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing the criminal to punishment.").

In any event, Appellants have not challenged the trial court's ruling on the merits. Thus, the trial court's dismissal of Appellants' defamation and defamation *per se* causes of action

is law of the case. *See Cont'l Ins. Co.*, 328 S.C. at 474, 492 S.E.2d at 810 (holding that a "trial court's unappealed ruling becomes the law of the case, and [this Court] must assume the trial court was correct in [its] ruling"); *see also Buckner*, 255 S.C. at 161, 177 S.E.2d at 544 (finding that an unchallenged trial court ruling "is the law of th[e] case and requires affirmance").

D. Appellants' abuse of process claims fails to state facts sufficient to constitute a cause of action.

A plaintiff alleging abuse of process in South Carolina must assert two essential elements: (1) an "ulterior purpose," and (2) a "willful act in the use of the process not proper in the conduct of the proceeding." *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997). The Supreme Court of South Carolina has expounded upon the second element and stated that "[s]ome definite act . . . not authorized by the process or aimed at an object not legitimate in the use of the process is required." *Id.* (quoting *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967)).

Here, the Lackey Respondents did not use process. Rather, Respondent Devra Lackey and her daughter simply responded to interview questions posed by law enforcement officials and provided evidence in aid of an investigation. Appellants' bare allegations that the Lackey Respondents had a bad motive or ulterior purpose in cooperating with law enforcement is plainly insufficient to support an abuse of process claim. *See Pallares v. Seinar*, 407 S.C. 359, 371, 756 S.E.2d 128, 133 (2014) ("[A]n allegation that a party had a 'bad motive' or an 'ulterior purpose' in bringing an action, standing alone, is insufficient to sustain an abuse of process claim." (quotation and citation omitted)). Thus, the trial court properly dismissed Appellants' abuse of process claim.

Additionally, Appellants have entirely failed to challenge the trial court's ruling on their abuse of process claim. Thus, the trial court's ruling is law of the case and should be affirmed by this Court. *See Cont'l Ins. Co.*, 328 S.C. at 474, 492 S.E.2d at 810 (holding that a "trial court's unappealed ruling becomes the law of the case, and [this Court] must assume the trial court was correct in [its] ruling"); *see also Buckner*, 255 S.C. at 161, 177 S.E.2d at 544 (finding that an unchallenged trial court ruling "is the law of th[e] case and requires affirmance").

E. Appellants' loss of consortium claim is time-barred and fails to state facts sufficient to constitute a cause of action.

Appellants' claim for loss of consortium fails for three reasons.

First, the loss of consortium claim fails to state facts sufficient to constitute a cause of action. Under South Carolina law, loss of consortium is an independent cause of action rather than a derivative cause of action. *Preer v. Mims*, 323 S.C. 516, 521, 476 S.E.2d 472, 475 (1996). However, a plaintiff must still demonstrate wrongful conduct on the part of a defendant. *Lee v. Bunch*, 373 S.C. 654, 663, 647 S.E.2d 197, 202 (2007). In fact, as the South Carolina Supreme Court has explained, "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." *Id.* (quoting 41 Am. Jur. 2d *Husband and Wife* § 227 (2007)).

As discussed above, Appellants have not adequately alleged any viable causes of action against the Lackey Respondents. Further, the language of the loss of consortium claim states no factual allegations apart from the alleged wrongful conduct complained of elsewhere in the Complaint. (*See* Compl. at ¶¶ 74–77). Therefore, Appellants have failed to

show any wrongdoing on behalf of the Lackey Respondents and Appellants' loss of consortium claim fails as a matter of law. *See Lee*, 373 S.C. at 663, 647 S.E.2d at 202 (holding that a loss of consortium claim fails if the impaired spouse's claim fails).

Second, the loss of consortium claim is barred by the statute of limitations. Loss of consortium claims are subject to a three-year statute of limitations. *See* S.C. Code Ann. § 15-3-530(5) (2009). The right of action begins to accrue when a spouse first sustains the loss of his or her spouse's services, society, and companionship. *Preer*, 323 S.C. at 521, 476 S.E.2d at 475. Here, the Complaint alleges that Appellant Marietta Chaffin's injuries began upon Appellant James Chaffin's arrest on March 9, 2007. The Complaint in this case was not filed until April 4, 2014. Thus, Appellants' loss of consortium claim is plainly time-barred as Appellants waited more than seven years to bring their lawsuit. *See* S.C. Code Ann. § 15-3-530(5); *Preer*, 323 S.C. at 521, 476 S.E.2d at 475.

Finally, Appellants have again failed to challenge the trial court's ruling in any respect. Thus, the trial court's ruling is law of the case and should be affirmed. *See Cont'l Ins. Co.*, 328 S.C. at 474, 492 S.E.2d at 810 (holding that a "trial court's unappealed ruling becomes the law of the case, and [this Court] must assume the trial court was correct in [its] ruling"); *see also Buckner*, 255 S.C. at 161, 177 S.E.2d at 544 (finding that an unchallenged trial court ruling "is the law of th[e] case and requires affirmance").

IV. The trial court did not err by failing to hold the Lackey Respondents in default.

Appellants spend a large portion of their brief arguing that the Lackey Respondents failed to timely file their Motion to Dismiss. This argument fails for two reasons. First, Appellants have not preserved the issue for this Court's review as the trial court never ruled on whether the Lackey Respondents were in default and Appellants failed to comply with

the requirements of Rule 55, SCRCP. Second, even assuming the issue is preserved, the Lackey Respondents' Motion to Dismiss was timely filed.

A. The issue is not preserved because the trial court never ruled on whether the Lackey Respondents were in default and Appellants failed to comply with the requirements of Rule 55, SCRCP.

Appellants have never properly moved for entry of default in this case. Rule 55(a), SCRCP provides "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default upon the calendar." "[T]he entry of default is a purely ministerial act," which clerks of court are required to perform when a request for default is properly presented. *Thynes v. Lloyd*, 294 S.C. 152, 153–54, 363 S.E.2d 122, 123 (Ct. App. 1987). Here, it is undisputed that Appellants never filed a Request for Entry of Default. It is also undisputed that Appellants never submitted an Affidavit of Default. Instead, Appellants argued that the Lackey Respondents were in default in their Memorandum in Opposition to the Lackey's Motion to Dismiss. This is simply not how a party seeks an entry of default in this State.

Moreover, even assuming Appellants properly raised the issue to the trial court, the trial court never ruled on the issue of whether the Lackey Respondents were in default. Of course, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 733 (citing *Creech*, 328 S.C. at 34, 491 S.E.2d at 576). "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments."

I'on, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (citation omitted). "The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." *Id.* (citation omitted).

Accordingly, the Lackey Respondents respectfully request that this Court find that Appellants failed to preserve any arguments as to default. However, as detailed below, even if the Court determines the issue is preserved, the Lackey Respondents' Motion to Dismiss was timely filed.

B. Even assuming the issue is preserved, the Lackey Respondents' Motion to Dismiss was timely under Rules 4(d)(8) and 6(e), SCRCP.

Rule 4(d)(8) of the South Carolina Rules of Civil Procedure states that service upon a party by certified mail "is effective upon the date of delivery as shown on the return receipt." Rule 6(e) of the South Carolina Rules of Civil Procedure further states that "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or upon a person designated by statute to accept service, five days shall be added to the prescribed period."

Based on the plain language of these rules, the Lackey Respondents had thirty-five days to respond to Appellants' Summons and Complaint.[4] While South Carolina does not appear

[4] Respondent Devra Lackey was never properly served with the Summons and Complaint in this case and could not have been in default. The Return Receipt included as an attachment to Appellants' Memorandum in Opposition to the Lackey's Motion to Dismiss only includes Respondent Tallie Lackey. Rule 4(d)(8) plainly states that service by certified mail "shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant."

to have any cases directly on point, when a rule or statute is unambiguous this Court must apply the plain language of that rule or statute. Here, Rule 6(e), SCRCP adds five days to all pleadings served "by mail." Black's Law Dictionary defines "mail" as "[o]ne or more items that have been properly addressed, stamped with postage, and deposited for delivery in the postal system." Certainly certified mail satisfies that definition. Put differently, while all "mail" may not be "certified mail," all "certified mail" is a type of "mail." *See* Mail, *Black's Law Dictionary* (10th ed. 2014); *see also Tanner v. Pizatella*, 89 F.3d 846 (9th Cir. 1996) (finding that, under the comparable Federal Rules of Civil Procedure, defendant was entitled to the extra time in Rule 6(e) when the Complaint was served via certified mail).

In any event, this Court need not reach this question of statutory construction, for as detailed above, Appellants failed to preserve the issue for this Court's review and failed to comply with the requirements of Rule 55, SCRCP in attempting to seek an Entry of Default.

CONCLUSION

Judge Hood issued a well-reasoned and legally sound order dismissing Appellants' claims. Rather than addressing the merits of that ruling, Appellants spend the bulk of their brief attacking the integrity of Judge Hood and raising unpreserved issues. This Court should summarily dispose of those arguments and affirm the judgment of the circuit court.

(Signature Page Follows)

February 12, 2016

Respectfully submitted,

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellants James and Marietta Chaffin and Respondents Richland County Sheriffs Department, Deputy Brian Metz, and Investigator Roy Livingston with a copy of the *Initial Brief of Respondents Tallie and Devra Lackey* by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 12th day of February, 2016, addressed as follows:

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By: _____
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Richland County Sheriff's Department, Deputy Brian Metz, Investigator Roy Livingston, Tallie and Devra Lackey, individually and as the Parents to the Minor Child, ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Appellants James and Marietta Chaffin and Respondents Richland County Sheriffs Department, Deputy Brian Metz, and Investigator Roy Livingston with a copy of the *Designation of Matters to be Included in the Record on Appeal* by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelope this the 12th day of February, 2016, addressed as follows:

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By: _____
John L. Warren III, Attorney