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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas  
Robin B. Stilwell, Judge

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Case No. 2020-000668

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Mary Kimbrell.....Appellant,

v.

Walmart Stores, Inc., Claims Management, Inc., and Josh  
Johnson.....Respondents,

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**FINAL BRIEF OF RESPONDENTS**

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December 1, 2020

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**STATEMENT OF ISSUES ON APPEAL**

- I. Appellant's argument that the circuit court erred in restoring Appellant's initial action is rendered moot by the circuit court's grant of her Motion to Amend her initial Complaint filed on November 16, 2017.
- II. The circuit court did not err in granting Respondent's Motion to Restore the underlying action.
- III. The circuit court did not err in granting Respondent's Motion to Dismiss Pursuant to Rule 12(b)(8), SCRCP.

## STATEMENT OF THE CASE

Appellant Mary Kimbrell (hereinafter, "Appellant" or "Plaintiff") and a companion, Amanda Mayers, were arrested for shoplifting at the Walmart store located at 6134 White Horse Road, Greenville, South Carolina, on March 4, 2017. Appellant was properly notified of trial and on June 15, 2017, she failed to appear for trial and in her absence was found guilty of the charge of shoplifting, value \$2,000 or less. (Supp. R. pp. 3-4; R. pp. 165). Mayers was also found guilty of the charge of shoplifting, value \$2,000 or less, in a trial held in her absence at the West Greenville Summary Court. (R. pp. 171).

On November 16, 2017, although her conviction was readily accessible on the Greenville County Public Index, Appellant filed a civil action against Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson (hereinafter, "Respondents" or "Defendants") alleging she was falsely arrested for the charge of shoplifting (hereinafter referred to as "Appellant's First Action"). (R. pp. 31-64; Supp. R. pp. 3-4). Respondents timely filed an Answer and on January 9, 2018, served Requests for Admission on Appellant, which included a request that Appellant "[a]dmit that Plaintiff was found guilty of the criminal shoplifting charge referenced in Plaintiff's Complaint." (R. pp. 120-122). On January 11, 2018, despite her conviction being publicly and readily accessible on the Greenville County Public Index, Appellant responded that she needed "to conduct further investigation, and at this time the request is denied." (Supp. R. pp. 1-2).

On February 21, 2018, Appellant's counsel acknowledged that Appellant had been found guilty by a trial in her absence in regard to the underlying shoplifting. (R. pp. 162). On March 20, 2018, Appellant filed, unbeknownst to Respondents, an untimely Motion to Re-Open her criminal conviction with the Magistrate Court while simultaneously continuing litigation in Appellant's First Action. (R. pp. 141-142). Indeed, from November 16, 2017, to March 20,

2018, the parties litigated several motions in Appellant's First Action, including Defendants' Motion to Dismiss certain causes of action, which the Court partially granted. (R. pp. 138-140; R. pp. 1-3).

After discovering that Appellant filed a Motion to Re-Open the underlying criminal conviction with the Magistrate Court, Respondents filed a Motion to Compel against Appellant to obtain any and all materials and/or information related to the underlying criminal proceedings on which the First Action was based. (R. pp. 147-150). In response, Appellant filed a Motion to Enjoin Defendants from Interfering in the Plaintiff's Defense of Criminal Charges.<sup>1</sup> (R. pp. 143-144). On July 3, 2018, the circuit court granted Respondents' Motion to Compel and denied Appellant's Motion to Enjoin, thereby allowing Respondents to be present at any of the underlying criminal proceedings and to obtain any materials related to the underlying criminal proceedings. (R. pp. 6-8).

Notwithstanding, by the issuance of the circuit court's order on July 3, 2018, the Magistrate Court had re-opened Appellant's criminal conviction. (R. pp. 4-5). Appellant thereafter filed and argued a Motion to Dismiss her criminal charge based upon a theory of double jeopardy, notwithstanding the fact that the Magistrate Court re-opened her criminal conviction due to Appellant's argument that a full and final adjudication had not been reached because of her absence at the court proceeding. (R. pp. 9-12). The Magistrate Court thereafter dismissed the criminal charge on the theory of double jeopardy. *See id.*

Following the dismissal of Appellant's criminal charge, the parties conducted two depositions in Appellant's First Action, discussed the scheduling of mediation at length, and held at least two in-person status conferences with the Court regarding the scheduling of trial.

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<sup>1</sup> In addition to Defendants' Motion to Compel and Plaintiff's Motion to Enjoin, the parties litigated several other motions that were ruled upon in the Court's Order dated July 3, 2018.

Ultimately, upon Appellant's counsel's representation that additional time was needed to conduct at least one additional deposition as well as the parties' need to complete mediation, the parties filed a Consent Order Pursuant to Rule 40(j), SCRCF, which explicitly stated "the parties agree to strike this action from the docket, to be restored pursuant to the appropriate motion. . . . The parties stipulate and agree that they will continue to conduct discovery and mediation while the case is stricken from the docket, or after its restoration, if necessary." (R. pp. 13-15).

Despite the parties' stipulation and agreement as set forth in the Consent Order Pursuant to Rule 40(j), Appellant filed a new civil action on November 20, 2019 (hereinafter referred to as "Appellant's Second Action"), which set forth nearly the identical causes of action and allegations against Respondents as the causes of action and allegations set forth in Appellant's First Action, including the causes of action that had previously been dismissed pursuant to Rule 12(b)(6), SCRCF. (R. pp. 84-119). Additionally, Appellant served written discovery on Respondents in Appellant's Second Action that was nearly identical, if not identical, to the extensively and previously litigated discovery in Appellant's First Action. Appellant's Complaint in her Second Action referenced transcripts to the underlying criminal proceedings that had not been produced in Appellant's First Action, and when asked to produce those materials pursuant to the circuit court's order to compel filed in Appellant's First Action, Appellant's counsel stated that Respondents' counsel could enter an appearance in Appellant's Second Action and serve discovery requests if Respondents wanted the requested materials and/or information. (R. pp. 166-168).

Thereafter, Respondents filed a Motion to Restore Appellant's First Action and then filed a Motion to Dismiss Appellant's Second Action pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure. Appellant opposed both Motions. Following arguments by the parties,

the circuit court granted Defendants' Motion to Restore and then Defendants' Motion to Dismiss pursuant to Rule 12(b)(8) on March 17, 2020. (R. pp. 156-161; R. pp. 16-21). On March 24, 2020, Appellant filed a Motion to Reconsider the circuit court's rulings as to the restoration of Appellant's First Action and the dismissal of Appellant's Second Action pursuant to Rule 12(b)(8), and the Court denied reconsideration of both issues on Mar. 25, 2020. (R. pp. 153-154; R. pp. 22-27).

On April 16, 2020, Appellant filed a Notice of Appeal, appealing the circuit court's order dated March 25, 2020.

## ARGUMENT

### **I. THE CIRCUIT COURT PERMITTED APPELLANT TO AMEND HER COMPLAINT IN APPELLANT'S FIRST ACTION, THEREBY RENDERING APPELLANT'S ARGUMENT ON APPEAL MOOT.**

The circuit court restored Appellant's First Action, and noted that Appellant could file a Motion to Amend her initial Complaint pursuant to the South Carolina Rules of Civil Procedure to include the additional allegations and causes of action that were purportedly set forth in her Second Action. Thereafter, Appellant filed a Motion to Amend her Complaint in Appellant's First Action, which the circuit court granted. (R. pp. 155; R. pp. 28-30). Thus, Appellant's argument on appeal is moot because Appellant has been allowed to proceed with the same causes of action that were set forth in the Second Action and no effectual relief would be granted by this Court allowing Appellant to proceed with the Second Action. (R. pp. 125-137).

"This court does not concern itself with moot or speculative questions." *Skydive Myrtle Beach, Inc. v. Horry Cty.*, 424 S.C. 298, 303, 818 S.E.2d 224, 227 (Ct. App. 2018) (quoting *Sloan v. Greenville Cty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). "An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists." *Id.* (quoting *Sloan*, 380 S.C. at 535, 670 S.E.2d at 667). "A case becomes moot when judgment, if rendered, will have no practical effect upon the existing controversy." *Id.* "Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief." *Id.* (quoting *Sloan*, 380 S.C. at 535, 670 S.E.2d at 667).

In light of the circuit court's restoration of the Appellant's First Action, the circuit dismissed Appellant's Second Action pursuant to Rule 12(b)(8), noting that there was an action

pending between the same parties for the same claims. In its order dated March 17, 2020, the circuit court further noted that Appellant retained the ability to move for amendment of her Complaint in the restored action to include any additional allegations and/or causes of action. (R. pp. 16-21; R. pp. 16-21). Thereafter, Appellant filed a Motion to Amend her Complaint in Appellant's First Action, which the circuit court granted on July 20, 2020. By doing so, the circuit court permitted Appellant to assert all allegations and causes of action in Appellant's First Action that were set forth in the Complaint in Appellant's Second Action. Thus, Appellant's appeal of the dismissal of Appellant's Second Action is moot as any judgment by the appellate court, if rendered, will have no practical effect upon the existing controversy.

**II. THE CIRCUIT COURT DID NOT ERR IN GRANTING RESPONDENTS' MOTION TO RESTORE APPELLANT'S FIRST ACTION.**

**a. Standard of Review**

The appellate court reviews questions of law *de novo*. *Pers. Care, Inc. v. Theos*, 426 S.C. 78, 85, 825 S.E.2d 281, 284 (Ct. App. 2019). "In other words, a reviewing court is free to decide questions of law with no particular deference to the trial court." *Id.* (quoting *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)).

**b. The circuit court properly restored Appellant's action that was initially filed on November 16, 2017.**

Appellant argues that the circuit court erred in granting Respondents' Motion to Restore Appellant's First Action because the parties "were not required to restore the original action in this case and that striking the case pursuant to Rule 40(j) constituted a voluntary dismissal of the case."

Appellant cites to *Maxwell v. Genez*, 356 S.C. 617, 591 S.E.2d 26 (2003) in support of her argument that the circuit court erred in granting Respondents' Motion to Restore the First Action. However, *Maxwell* does not compel the result sought by Appellant. In *Maxwell*, this Court addressed the issues of whether a motion to restore pursuant to Rule 40(j) must be filed within one year and whether such a motion may be extended for good cause pursuant to Rule 6(b). Neither of these issues are before the Court in this appeal. Accordingly, *Maxwell* is distinguishable and does not support Appellant's argument. 356 S.C. at 619-20, 591 S.E.2d at 27.

Appellant also cites *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 779 S.E.2d 826 (Ct. App. 2015) in support of her argument; however, the appeal in *Goodwin* arose from the circuit court's denial of a plaintiff's motion to restore because the plaintiff's claims were barred by the statute of limitations. In the present appeal, Appellant does not raise any issue as to statute of limitations, the one-year deadline to file a motion to restore, or the extension of the one-year deadline to file a motion to restore. Appellant simply argues the circuit court erred in permitting the Respondents to restore an action. In short, the decisions of the appellate court in *Goodwin* and *Maxwell* have no bearing upon the present appeal.

The Consent Order entered into between the parties pursuant to Rule 40(j), SCRCP, states in pertinent part that “the parties agree to strike this action from the docket, to be restored pursuant to the appropriate motion. . . . The parties stipulate and agree that they will continue to conduct discovery and mediation while the case is stricken from the docket, or after its restoration, if necessary.” (R. pp. 13-15). Thus, Respondents agreed that while the parties were not required to restore Appellant's First Action, Respondents certainly were permitted to restore Appellant's First Action upon the appropriate motion. Respondent filed the appropriate motion

to restore Appellant's First Action, which the circuit court granted for the reasons set forth in its order. Appellant fails to establish any error of the circuit court in restoring Appellant's First Action, and accordingly, the Court should affirm the circuit court's ruling.

Appellant next argues that based on Rule 12(b)(8), SCRCF, the circuit court should have dismissed Respondents' Motion to Restore.<sup>2</sup> However, Appellant failed to file a Motion to Dismiss pursuant to Rule 12(b)(8), SCRCF, with the circuit court. *See 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, but must be raised and ruled upon to be preserved for appellate review.”). Indeed, even if Appellant had filed such a motion, it would not have been applicable or timely, as a motion pursuant to Rule 12(b) must be filed at the pleadings stage and provides for defenses that shall be asserted by pre-answer motion. See Rule 12, SCRCF. Accordingly, Appellant fails to establish any error of the circuit court in restoring Appellant's First Action and this Court should affirm the circuit court's ruling.

**III. THE CIRCUIT COURT DID NOT ERR IN DISMISSING APPELLANT'S SECOND ACTION, WHICH ASSERTED THE SAME CLAIMS AND INVOLVED THE SAME PARTIES AS APPELLANT'S FIRST ACTION.**

**a. Standard of Review**

Pursuant to Rule 12(b)(8), SCRCF, the movant seeks dismissal of a case because another action is pending between the same parties for the same claim. *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). While the appellate court utilizes the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each

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<sup>2</sup> Appellant includes this argument as a separate section in her Brief. However, Respondents submit that this argument ultimately is an alternative ground presented by Appellant to support her argument that the circuit court erred in restoring Appellant's First Action.

of the components of the rule are determined as a matter of law, and, thus, the appellate court applies a *de novo* standard of review to the grant or denial of this motion. *Id.* In other words, the appellate court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law. *Id.* at 100, 674 S.E.2d at 528.

**b. The circuit court properly dismissed Appellant's action that was filed on November 20, 2019, pursuant to Rule 12(b)(8), SCRPC.**

Appellant abandoned any argument that the dismissal of Appellant's Second Action, pursuant to Rule 12(b)(8), SCRPC, was improper as she has offered no argument in support of this position on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating appellant was deemed to have abandoned issue for which he failed to provide any argument or supporting authority); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) (ruling that an issue is deemed abandoned if argument in appellate brief is only conclusory). Thus, the Court should affirm the circuit court's ruling.

### **CONCLUSION**

For the reasons set forth herein, Respondents respectfully request that this Honorable Court affirm the circuit court's rulings in their favor.

Respectfully submitted,

*s/Randi Lynn Roberts*

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*Attorney for Respondents*

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Mary Kimbrell.....Appellant,

v.

Walmart Stores, Inc., Claims Management, Inc., and Josh  
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**CERTIFICATE OF SERVICE**

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I do hereby certify, on this 1<sup>st</sup> day of December 2020, that a copy of the foregoing **Respondents' Final Brief** was served by electronic mail, addressed to counsel of record as follows:

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December 1, 2020

**VIA EMAIL - ctappfilings@sccourts.org**

Ms. Jenny Abbott Kitchings  
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South Carolina Court of Appeals  
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**Re: *Mary Kimbrell v. Walmart Stores, Inc., Claims Management, Inc. and Josh Johnson***  
**Civil Action No: 2019-CP-23-06795**  
**Appellant Case No.: 2020-000668**

Dear Ms. Kitchings:

Enclosed please find Respondents Walmart Stores, Inc., Claims Management, Inc. and Josh Johnson's Final Brief and Certificate of Service.

With kind regards,

Sincerely,

*s/Randi Lynn Roberts*

Randi Lynn Roberts

RLR/ash

Enclosures

cc: Joshua T. Hawkins, Esquire (w/enclosures, via email)  
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