RECEIVED
Mar 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2020-001164

---

159 Wellborn Street, LLC, on behalf of itself and the State of South Carolina

Respondent,

v.

Harold Means

Appellant

REPLY BRIEF OF APPELLANT

Frank L. Eppes
Eppes & Plumblee
Post Office Box 10066
Greenville, SC 29603

Hannah Rogers Metcalfe
Metcalfe & Atkinson, LLC
1395 S. Church Street
Greenville, South Carolina 29605

Attorneys for Appellant

Other Counsel of Record:
George Campbell
Jordan Teague
Molly Cash
16 W. North Street
Greenville, SC 29601
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

REPLY BRIEF OF APPELLANT

REPLY ARGUMENT

Appellant hereby responds to specific arguments set forth in Respondent's initial brief as follows and would argue that for the reasons set forth herein, as well as those set forth more fully in Appellant's initial brief, the Court should grant Appellant's appeal and reverse the circuit court's Order awarding Respondent default judgment.

I. Respondent Concedes That It Lacks Standing.

It is important to note that the Respondent implicitly concedes that it lacks standing. In fact, the Respondent does not deny or even address the Appellant's contention that Respondent lacked standing to assert claims for either injunctive relief or damages because it no longer owned either the City View or the Cedar Grove property as of the date of filing its Complaint and, in the case of City View, did not own the property at the time it allegedly incurred damages to the property. Ostensibly, Respondent concedes this point because the facts in the record are incontrovertible: on the very day Respondent filed this action alleging injury to its property, Respondent sold the property for six million dollars. A respondent may abandon an additional sustaining ground … by failing to raise it in the appellate brief. *See Maxey v. R.L. Bryan Co.,* 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988); *May v. Hopkinson*, 289 S.C. 549, 558, 347 S.E.2d 508, 513 (Ct.

App. 1986); *see also* Rule 208(b)(1)(B), SCACR ("ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal"). The real property records provided to the Court by the Appellant make plain the fact that the Respondent did not own the relevant properties as of the day it filed the underlying action and did not own many of the subject apartments during the time period when Respondent alleged to have suffered an injury as a result of the alleged nuisance activity. Thus, because the Respondent did not actually own these neighboring properties, there is no way the Respondent could have suffered an injury-in-fact, whether in the past for which it sought relief by way of damages for lost rental income, or prospectively for which Respondent sought relief by way of injunctive relief. The facts are unrefuted in the record and, as such, the Respondent wisely chooses not to contest what the record makes plain. As such, the Appellant respectfully contends that the Respondent's silence should be construed as a concession that the Respondent did not have standing to bring this case in the first instance.

II. Respondent Concedes That It's Claims Are Barred By The Statute of Limitations.

The Respondent similarly fails to address the Appellant's contention that a significant portion of the Respondent's claims are barred by the statute of limitations. As with Appellant's arguments as to his meritorious defense that Appellant lacks standing, the Appellant raised his concerns that Respondent's claims

were barred by the statute of limitations in his initial memorandum in support of his motion to set aside the default judgment, in his affidavit in support thereof, and in his rule 59(e) motion. The record is uncontroverted that Respondent was aware of – and sought damages for – injuries for alleged nuisance activity dating all the way back to 2010. As the Appellant stated in his initial brief, the Respondent not only did not own the relevant apartment complex for most of the period for which Respondent sought damages, but also sought those damages for the period from 2010 until 2016, which is barred by the statute of limitations. The Respondent appears to implicitly concede that these claims are barred by the statute of limitations as it does not refute this contention anywhere in its brief. In fact, the Respondent does not even address the substance of this argument in its brief to this Court. Therefore, Respondent should be considered to have conceded that Appellant possesses a meritorious defense that those claims prior to February 2016 are barred by the statute of limitations because Respondent has abandoned any argument to the contrary. *See Maxey v. R.L. Bryan Co.,* 295 S.C. 334, 336 n.2, 368 S.E.2d 466, 467 n.2 (Ct. App. 1988).

III. Appellant's Motion for Reconsideration Was Filed Within A Reasonable Amount of Time. Any Delay In Filing Was Due To Respondent's Failure To Properly Serve Appellant With The Court Order.

Respondent contends that the "record supports the circuit court's finding that Appellant did not act within a reasonable time" when filing his motion to set aside

the default judgment. Respondent's representation is incorrect.

In support of its argument, Respondent first states that the "record shows that Respondent properly served the final judgment upon Appellant." Respondent's Brief at 5. This statement is false. The record actually reveals that the Respondent did not properly serve the June 2019 judgment on the Appellant. The South Carolina Supreme Court specifically provides that, in a case, such as this, where a party appears *pro se*, that party may not be served with pleadings or other filings by way of the electronic filing system. Specifically, the rule provides:

> (5) Service By or Upon a Party Who is Not an E-Filer in a Case.
>
> (A) E-Filed motions, pleadings, or other papers that must be served upon a party who is not represented by an Authorized E-Filer in the case or who is a Traditional Filer must be served by a Traditional Service method in accordance with Rule 5, SCRCP. An Authorized E-Filer who has E-Filed a motion, pleading, or other paper prior to service of the pleading, motion, or other paper shall serve a paper copy of the corresponding NEF on the Traditional Filer(s). The Authorized E-Filer must also file proof of Traditional Service as to all other parties who are Traditional Filers.

See In re S.C. Elec. Filing Policies & Guidelines, 415 S.C. 1, 8-9, 780 S.E.2d 600 (2015). Rule 5(a) provides that service is required of all written orders. *See* Rule 5(a), SCRCP. Rule 5(b)(1) further provides:

> *How Made.* Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless

> service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

Rule 5, SCRCP(b)(1).

South Carolina courts have long held that in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process. *McCall v. IKON*, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005); *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). In this case, there is no presumption of proper service because the Respondent did not follow the rules. Service of the June 3, 2019 Order was complete upon mailing by way of regular United States mail. There is no requirement for use of certified mail, restricted delivery, or a return receipt in Rule 5. *Wiggins v. Todd*, 296 S.C. 432, 434, 373 S.E.2d 704, 705 (Ct. App. 1988). Nonetheless, despite the

fact that there is no requirement for service by certified mail, Respondent inexplicably *attempted* to serve Appellant with the June 3, 2019 Order via certified mail instead of simply placing it in the mail. As a result of Respondent's decision to require a signature and return receipt, Appellant never received notice of the June 3, 2019 decision because his mail was being held for reasons that are unclear in the record. Even more inexplicably, after receiving notice that the postal service was unable to deliver the certified mailing due to a temporary hold placed on the Appellant's mail, the Respondent again chose to serve Appellant with a copy of the Court's Order by way of certified mail with a return receipt requested. As a result of Respondent's failure to simply place the Order in the mail as required by Rule 5, Appellant never received a copy of the June 3, 2019 Order, as he testified in his affidavit in support of the motion to set aside the default judgment. This problem was further compounded by the fact that the court itself failed to serve the Appellant, who appeared *pro se* on his own behalf, with a copy of the Order as provided by the court's own rules regarding service of *pro se* litigants under the electronic court filing system.

Had the Respondent placed a copy of the June 3, 2019 Order in the regular United States mail as the rules provide without sending the Order via certified mail or requesting a return receipt, then service would have been effected when the Order was placed in the mail. Nonetheless, because the Respondent failed to comply with

the requirements of Rule 5, the Respondent failed to serve a copy of the June 3, 2019 Order on Appellant. In fact, what the record reveals is that the Respondent first *attempted* to serve the Appellant via certified mail with a return receipt requested on June 10, 2019 and then again on June 17, 2019. Neither of these *attempts* were successful as Appellant's mail was being held at that time.[1] Thus, the Appellant never received either documents from the Appellant. Moreover, neither of these attempts are considered proper service. *See Schleicher v. Schleicher*, 310 S.C. 275, 277, 423 S.E.2d 147, 148 (Ct. App. 1992)(citing 66 C.J.S. *Notice* § 18e, at 664 (1950) ("By force of statute . . ., service may be effective when the notice is *properly* mailed, regardless of its receipt by the addressee; in such case the risk of miscarriage or failure to deliver is on the addressee.").

In addition to failing to properly serve the Appellant with the June 3, 2019 Order, the Respondent also failed to serve the Appellant with a copy of the proposed order submitted to the circuit court in violation of both the Rules of Civil Procedure and the circuit court's express directive at the May 20, 2019 hearing on the motion for default judgment. Specifically, the circuit court directed the Respondent to serve Appellant with a copy of the proposed order to be submitted to the court along with any evidence relating to the Appellant's contention about ownership of the subject

[1] Respondent would like for this Court to assume, based solely upon the fact that Appellant's mail was being held, that Appellant did so with the intent to evade service. There is absolutely no evidence in the record that Appellant ever engaged in any action to evade service and this Court should not accept Respondent's invitation to assume otherwise.

property being previously transferred to another party. There is no evidence in the record that the Respondent ever served the Appellant with the proposed order or any other documents as required by the circuit court. In addition, Rule 5(b)(3) specifically provides: "[a]ny party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the same means." See Rule 5(b)(3) SCRCP. As this proposed order was submitted electronically, counsel for Respondent was required to also serve this proposed order on Appellant, a *pro se* litigant, by regular service through the US mail. Once again, the Respondent did not comply with the rules and failed to serve the Appellant by way of standard mail or in any way at all. As a result, the Appellant never received either the proposed order or the final June 3, 2019 Order because the Respondent failed to comply with the Rules of Civil Procedure and the circuit court's directives to ensure that the Appellant, a *pro se* litigant, received a copy of both documents.

South Carolina courts have noted, in determining whether to set aside a default judgment under Rule 60(b), the trial judge should consider the following relevant factors: (1) the promptness with which relief is sought, (2) **the reasons for the failure to act promptly**, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties. *Tobias v. Ric*e, 379 S.C. 357, 366, 665 S.E.2d 216, 221

(Ct. App. 2008); *Mictronics, Inc. v. S.C. Dep't of Revenue*, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct. App. 2001); *Hill v. Dotts*, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct. App. 2001); *New Hampshire Ins. Co. v. Bey Corp*., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct. App. 1993). As explained in Appellant's initial brief, the Appellant acted promptly to set aside the default judgment as soon as he learned of the existence of the Order in December 2019. Moreover, as previously discussed in Appellant's initial brief, the Appellant also has a number of meritorious defenses to Respondent's claims and setting aside the default judgment would not prejudice the Respondent, especially because the Respondent no longer even owns the property allegedly affected by the claimed nuisance activity. Nonetheless, the Respondent incorrectly argues that the circuit court appropriately declined to set aside the default judgment because the Respondent did not have a legitimate reason for failing to act promptly to set aside the default judgment.[2] This argument is without merit and should be summarily dismissed.

[2] As Appellant explained in his initial brief and as Appellant stated on the record at the May 2019 hearing, Appellant had valid reasons for failing to promptly move to set aside the initial default judgment entered in April 2019. The Appellant is an unsophisticated elderly man who has never appeared before in the circuit court. Appellant explained that he did not believe he was required to respond to the summons and complaint because he believed he was no longer the owner of the subject property. The Appellant explained that he understood the matter was being handled by the individual to whom he thought he had previously transferred ownership of the subject property. The Appellant further explained that he even met with this gentleman and another person he thought was an attorney who informed him that the matter would be handled. Based on these mistaken beliefs of an unsophisticated elderly defendant – in an action brought by a party who no longer even owned the property affected by the alleged nuisance activity – Appellant failed to timely file an answer or move to set aside the April 2019 default judgment. Nonetheless, he appeared *pro se* before the court the following month to explain the basis for his failure to respond.

The Appellant had a very good reason for failing to promptly move to set aside the judgment immediately after the entry of the June 3, 2019 Order. Specifically, the Appellant was unaware of the entry of the Order because both the court and the Respondent failed to serve the Appellant with a copy of the Order. The Appellant attested in his affidavit that he did not learn of the entry of the final Order until December 2019, despite appearing in court and informing the court of his address. The record reveals that the court did not mail a copy of the June 3, 2019 Order to the Appellant. The documents evidencing *attempted* improper service by the Respondent reveal that the Appellant never actually received the circuit court order. As it was the Respondent's own failure to comply with the Rules of Civil Procedure that resulted in the Appellant's ignorance of the entry of the final Order and resulting failure to promptly move to set aside the default judgment, the Respondent's contention that the Appellant failed to provide a valid reason for the delay in moving to set aside the default judgment is without merit and should be rejected outright.

IV. The Issues Raised By The Appellant Were Preserved For Appeal.

a. Appellant Was Not Required To File A Motion To Reconsider Court's February 2020 Decision In Order To Preserve Issues Contained Therein For Appeal.

Respondent incorrectly contends that Appellant failed to preserve for appellate review the circuit court's February 2020 denial of Appellant's Rule 60(b) motion to set aside the default judgment because the Appellant did not move for

reconsideration of the Order. Respondent's argument that Appellant was required to file a Rule 59(e) motion for reconsideration of the circuit court's order denying the motion to set aside the default judgment is incorrect as a matter of law. Appellant was not required to file a Rule 59(e) motion.

"It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). "The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the [circuit] court, a reviewing court simply would not be able to evaluate whether the [circuit] court committed error." *Staubes*, 339 S.C. at 412, 529 S.E.2d at 546. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." (emphasis added)). "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*, 338 S.C. at 422, 526 S.E.2d at 724. However, "[p]ost-trial motions are not necessary to preserve issues that have been ruled upon at trial . . . ." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). As such, the mere fact that a party received an unfavorable ruling does not require that party to re-raise the issue in a Rule 59(e) motion to preserve it. *See Ralph v. McLaughlin*, 428 S.C. 320, 342-43, 834 S.E.2d 213, 225 (Ct. App. 2019); *Eubank v. Eubank*, 347 S.C. 367, 373 n.2, 555 S.E.2d 413, 416 n.2 (Ct. App. 2001) ("The 'raised to and ruled on' rule of error preservation requires only a ruling, not necessarily a favorable one.").

The circuit court unfavorably ruled on Appellant's motion to set aside the default judgment. As such, that issue is preserved for appeal to this court. A Rule 59(e) motion was unnecessary. The circuit court's decision with regard to Appellant's motion to set aside the default judgment was clear. The circuit court denied Appellant's motion to set aside the default judgment and granted limited relief in setting aside the damages portion of the judgment so that a hearing could be held as to damages. The Appellant was not required to re-raise the issue in a Rule 59(e) motion to preserve it.[3]

[3] While Appellant was not required to file a Rule 59(e) motion to preserve the circuit court's February 2020 ruling, Appellant did file a Rule 59(e) motion after the circuit court entered a final Order with regard to the award of damages as a result of the default judgment. This motion specifically sought reconsideration of the final Order as well as the underlying orders granting default judgment and the order denying the motion to set aside the default judgment. Hence, any argument that the Appellant has not sufficiently preserved the denial of the motion to set aside the

b. Appellant Preserved For Appeal His Meritorious Defense That The Respondent Lacked Standing.

Respondent also contends that Appellant failed to preserve for appeal the meritorious defense that Respondent lacked standing to assert its claims. Respondent's contention is incorrect and should be rejected by this Court.

In his motion to set aside the default judgment, Appellant specifically stated that he had numerous meritorious defenses including, "without limitation, the failure to name other owners of the property along Monroe Street as necessary parties, the statute of limitations, a lack of damages suffered by the plaintiff, a lack of notice to all hearings in this matter, false allegations, and improper affidavits used at the hearing on damages in this case." Specifically, the Appellant referred to the Respondent's lack of damages and false allegations as meritorious defenses, both of which go to the heart of Appellant's defense that Respondent lacked standing to assert its claims. While the motion does not specifically refer to Respondent's lack of standing, South Carolina courts have made it very clear that "a party need not use the exact name of a legal doctrine in order to preserve [an issue], but it must be clear that the argument has been presented on that ground." *State v. Dunbar*, 366 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). Appellant's reference to the lack of damages and the false allegations go to the heart of Appellant's meritorious defense that

---

default judgment, as well as the award of damages resulting from said judgment, by failing to file an appropriate 59(e) motion, is without merit.

Respondent lacks standing. In *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court set out the three "irreducible constitutional minimums of standing." 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations omitted)). First, to have standing, a plaintiff must have suffered an "injury in fact." The court defined "injury in fact" as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." Second, a causal connection must exist between the alleged injury and the conduct from which the plaintiff complains. The injury must be "traceable to the challenged action of the defendant," and not "the result of the independent action of some third party not before the court." Third, it must be "likely" rather than merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* The lack of any "injury-in-fact" is what Appellant is referencing when he points to the lack of any damage and the false allegations in his memorandum in support of his motion to set aside the default judgment. While Appellant did not specifically reference Respondent's lack of standing, the intent is clear. Moreover, to the extent there is any confusion, where an argument is neither clearly preserved nor clearly unpreserved, courts should resolve this dispute "in favor or preservation." *See Johnson v. Roberts*, 422 S.C. 406, 412, 812 S.E.2d 207, 210 (Ct. App. 2018).

The Appellant did not just preserve the issue of standing in its memorandum in support of the motion to set aside the default judgment. The Appellant himself references the issues with Respondent's standing in his affidavit submitted in support of the motion to set aside the default judgment. Specifically, as the Respondent notes in its own brief, the Appellant attested: "I have good defenses to this case because the plaintiff did not name necessary parties who own or control the property along Monroe Street, … there were no damages suffered by the plaintiff, the properties did not have diminished value, the claims are for times beyond the statute of limitations, and many of the other allegations in the plaintiff's Complaint are false." The Appellant quite plainly references Respondent's lack of standing when he mentions the fact that other entities own the properties allegedly owned by the Respondent along Monroe Street and these "necessary parties" are not named. The Appellant goes further when he references the absences of any "injury-in-fact" by pointing out that "there were no damages suffered *by the plaintiff*" and "other allegations in the plaintiff's Complaint are false".

The Appellant did not rest his standing argument on just these references. In paragraph 16 of his affidavit, which the Respondent blatantly ignores in its brief in response, the Appellant specifically states that "the plaintiff in this case filed the Summons and Complaint on February 15, 2019 alleged that the activities at 18 Monroe Street created a public and private nuisance for the 114 apartments owned

by the plaintiff. **On the same day that the plaintiff filed this lawsuit**, February 15, 2019, the plaintiff sold 94 of its apartments for $6,000,000.00." In support of this statement, the Appellant provided real estate records evidencing the fact that the Respondent was no longer the owner of the properties as of the day of filing. Thus, the Appellant directly raised the fact that the Respondent did not have standing to assert claims, including claims for injunctive relief or any prospective relief, because it no longer owned the properties allegedly affected by the alleged nuisance activities. The Appellant then went on to detail the fact that an entity other than the Respondent owned the remaining properties for which the Respondent claimed to have suffered an injury as a result of the alleged nuisance activities. The Appellant again provided real estate records to support this statement. As such, the Appellant again raised the issue of standing by pointing out that the Appellant did not own the properties and, as such, did not suffer an injury-in-fact. All of these references make it plain that the Appellant preserved the issue of whether he has the meritorious defense of standing for consideration on appeal.[4]

V. Appellant Has Not Waived Its Defense That Respondent Lacks Standing. Subject Matter Jurisdiction Can Not Be Waived.

Finally, the Respondent appears to imply that, to the extent it lacks standing

[4] Even if Appellant had failed to preserve the question of Respondent's standing, issues raising questions of subject-matter jurisdiction may be raised for the first time on appeal. *See State v. Sheppard*, 391 S.C. 415, 422, 706 S.E.2d 16, 19 (2011)(citing *State v. Gentry*, 363 S.C.93, 610 S.E.2d 494 (2005)).

to assert any or all of the claims sought in the underlying action, any objection to its lack of standing was waived by the Appellant when he failed to respond to the summons and complaint. This argument relies on the line of cases from South Carolina courts that hold that a party may waive its defense that the Plaintiff is not the real party in interest.

To the extent the Respondent is arguing that Appellant has waived its objection to Respondent's standing as the real party in interest, this argument misapprehends Appellant's argument as to standing. Specifically, Appellant does not contend that this court lack subject matter jurisdiction because the Respondent is not the real party in interest. Rather, the Appellant contends that this court may not exercise subject matter jurisdiction over some or all of this matter because the Respondent lacks standing in the traditional sense of the word.

Appellant acknowledges that the failure to raise the issue of "real party in interest" results in waiver. *WeSavFinancial Corp. v. Lingefelt*, 316 S.C. 442, 450 S.E.2d 580 (1994). Obviously, if the matter may be waived, it cannot involve subject matter jurisdiction. *See Atlanta Skin and Cancer v. Hallmark Gen'l Partners*, 320 S.C. 113, 463 S.E.2d 600 (1995)(subject matter jurisdiction may not be waived or conferred by consent). Similarly, Rule 17(a); SCRCP, specifically provides that "No actions shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for

ratification of commencement of the action by, or … substitution of the real party in interest….” This rule clearly indicates the question of real party in interest does not involve subject matter jurisdiction. *See Bardoon Props, N.V. v. Eidolon Corp.*, 326 S.C. 166, 170; 485 S.E.2d 371, 373 (S.C. 1997). Thus, any defense by the Appellant that this action was not brought by the correct party in interest – namely the current owners of the apartment complexes previously owned by Respondent – such a defense may be deemed to have been waived.[5]

Nonetheless, the Appellant’s defense that the Respondent lacks standing to assert its claims is most certainly not waived to the extent it was not raised in the circuit court below.[6] It is well-settled that issues relating to subject matter jurisdiction may be raised at any time. *See Johnson v. State*, 319 S.C. 62, 459 S.E.2d 840 (1995); *GNOC Corp. v. Estate of Rhyne*, 312 S.C. 86, 439 S.E.2d 274 (1994); *State v. Gorie*, 256 S.C. 539, 183 S.E.2d 334 (1971). Subject matter jurisdiction

[5] While the real party in interest defense may have been waived by the Appellant’s default, this Court should not ignore the fact that the Respondent instituted this action seeking both damages and prospective injunctive relief, including foreclosure on an unsophisticated elderly defendant’s property, with full knowledge that it sold the affected properties for a multi-million-dollar profit on the same day that it filed this action and, as such, with full knowledge that it was not the proper party in interest. Certainly, the Respondent’s decision to knowingly prosecute this case as the improper party in interest after it no longer owned the properties cannot be considered an “honest mistake”. In addition, the decision to seek damages – and submit affidavits in support thereof – for lost rental income for apartments Respondent knew it did not own – should also not be considered an “honest mistake”. To the contrary, an argument could be made that such intentional acts might be construed as a fraud upon the court that, if allowed to stand, will result in significant injustice to the Appellant.

[6] As noted above, *supra*, the Appellant respectfully contends that he raised a concern as to Respondent’s lack of standing when he moved to set aside the default judgment.

refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong. *Dove v. Goldkist*, 314 S.C. 235, 442 S.E.2d 598 (1994); *Watson v. Watson*, 319 S.C. 92, 460 S.E.2d 394 (1995).

As articulated above, in *Sea Pines Association for Protection of Wildlife, Inc. v. South Carolina Department of Natural Resources*, the South Carolina Supreme Court set out the three "irreducible constitutional minimums of standing." 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001) (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations omitted)). First, the plaintiff must have suffered an "injury in fact." The court defined "injury in fact" as "an invasion of a legally protected interest" which is "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." In this case, Respondent did not suffer an injury in fact for those time periods for which it sought damages and did not, in fact, own the apartment complex where it claims it lost rental income. Moreover, the Respondent cannot claim that it has suffered an "actual or imminent" injury with regard to its request for prospective injunctive relief. *Id.* As the Respondent no longer owns the apartment complexes near the subject property, there can be no "actual or imminent" injury in fact. Second, a causal connection must exist between the alleged injury and the conduct from which the plaintiff complains. The injury must be "traceable to the challenged action of the defendant," and not "the result of the independent action of some third party not

before the court." *Id.* Again, for the period in which the Respondent did not own the properties or the period going forward from the date the apartment complexes were sold, there can be no causal connection. Third, it must be "likely" rather than merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* Yet again, because the Respondent no longer owns the apartment complexes there can be no way that the injury can be redressed by a favorable decision awarding injunctive relief because the Respondent no longer owns the apartment complexes allegedly affected.

The Respondent has not suffered an "injury in fact" and, as such, it cannot meet the "irreducible constitutional minimums of standing". As the Respondent lacks standing, both the circuit court and this court lack subject matter jurisdiction over this matter. Thus, while the Respondent appears to contend that the Appellant somehow waived its defense that the Respondent lacks standing, the lack of subject matter jurisdiction may not be waived. *Johnson v. South Carolina Dep't of Probation, Parole, and Pardon Servs.* 372 S.C. 279, 641 S.E.2d 895, 897 (2007). In fact, issues raising questions of subject matter jurisdiction may be raised for the first time on appeal, *State v. Sheppard*, 391 S.C. 415, 422, 706 S.E.2d 16, 19 (2011)(citing *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)), and can even be "taken notice of by an appellate court". *Johnson*, 372 S.C. at 284. As such, to the extent the Respondent incorrectly contends that the Appellant somehow waived its

defense that the Respondent lacks standing to bring this action, the Appellant has not waived such a defense and respectfully contends that this Court should dismiss this action in its entirety. Respondent lacks standing to bring this action and was aware that it lacked standing to bring this case at the time this action was filed on the very same day the Respondent sold its apartment complexes for a profit of several million dollars.

CONCLUSION

For all of the reasons set forth above, as well as those already set forth more fully in Appellant's initial brief, Appellant respectfully requests that this Court dismiss this action for lack of subject matter jurisdiction, reverse the decision of the circuit court, and/or remand the case for further proceedings.

Respectfully submitted,

s/ Frank L. Eppes
Frank L. Eppes, SC Bar 7839
Eppes & Plumblee
Post Office Box 10066
Greenville, SC 29603

Hannah Rogers Metcalfe, SC Bar 73046
Metcalfe & Atkinson, LLC
1395 South Church Street
Greenville, SC 29601
(864) 214-2319

Attorneys for Appellant

RECEIVED
Mar 04 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Perry H. Gravely, Circuit Court Judge
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No.: 2020-001164

---

159 Wellborn Street, LLC, on behalf of itself and the State of South Carolina

Respondent,

v.

Harold Means

Appellant

PROOF OF SERVICE

I certify that I have submitted for filing the Appellant's Reply Brief, by electronic mail, to the South Carolina Court of Appeals to ctappfilings@sccourts.org on March 4, 2021. I further certify that I have emailed Appellant's Reply Brief to the Respondent's attorneys via electronic mail as follows:

George Campbell
george@campbellteague.com

Jordan Teague
jordan@campbellteague.com

Molly Cash
molly@campbellteague.com

s/Frank L. Eppes

Frank L. Eppes, SC Bar 7839
Eppes & Plumblee
Post Office Box 10066
Greenville, SC 29603

Hannah Rogers Metcalfe, SC Bar 73046
Metcalfe & Atkinson, LLC
1395 South Church Street
Greenville, SC 29601
(864) 214-2319

Attorneys for Appellant