THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley Price, Circuit Court Judge

Case No. 2021-CP-08-00513
Appellate Tracking Number 2021-00768

Aracelis Santos, ……. ……Appellant,

vs.

Harris Investment Holdings, L.L.C.
the City of Hanahan, John Doe #1 and
John Doe #2 ……..……..Defendants,

of whom

Harris Investment Holdings, L.L.C. is ……Respondent.

INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in dismissing the Appellant's complaint with prejudice without explaining the reasons for the dismissal with prejudice as required by Rule 52, *South Carolina Rules of Civil Procedure*, and does such a dismissal deny the Appellant due process by depriving her of an opportunity to understand why her case is dismissed with prejudice and prevents an appellate court from reviewing the decision for lack of an explanation?

Did the trial court err in dismissing the Appellant's complaint with prejudice on a 12(b)(6) motion by failing to apply the correct standard of review?

STATEMENT OF CASE

On February 11, 2021, the Appellant filed a summons and complaint (R.O.A. page ___[complaint] against the defendants alleging a total of eight causes of action against two defendants. Appellant alleged five of the causes of action against both defendants and three separate ones against Harris Investments Holdings, L.L.C. Harris Investment Holdings, L.L.C. is a Georgia company who was the Appellant's landlord who, as plaintiff alleges, conspired with the City of Hanahan to prevent the Appellant from operating a business serving a minority clientele. The eight causes of action are summarized as follows:

Harris Investment Holdings, Inc.	City of Hanahan
Conspiracy	Conspiracy
Abuse of process	Abuse of process
Outrage	Outrage
Tortious Interference with Business	Tortuous Interference with Business
Attorney's fees	Attorney's fees
Breach of quiet enjoyment	
Fraud	
Trespass to chattels (As discussed more fully below, Respondent conceded on the record before the Court on June 3, 2021, that this cause of action should be submitted to a jury as a disputed question of fact. Despite this admission, the trial court nonetheless dismissed it. See R.O.A. page ____[tr. page 9, lines 3-8])	

Neither defendant has answered the complaint, but on April 2, 2021, Harris Investment Holdings, Inc. filed a motion to dismiss under Rule 12(b)(6) (R.O.A. page ____[motion], and on May 7, 2021, the City of Hanahan filed its motion to dismiss under Rule 12(b)(6). (R.O.A. page ____[motion] Since Harris Investments filed its motion first, the Clerk's Office scheduled Harris Investments' motion to dismiss before the Honorable Bentley Price on June 3, 2021. (The twin motions to dismiss are not consolidated even though they are similar.) After both counsel filed memoranda of law with the circuit court (R.O.A. pages ___-___ and ____-_____) and both counsel

(and counsel for the City of Hanahan) appeared before the circuit court on June 3, 2021, Judge Price took the motion under advisement and issued a Form Order granting Harris Investment Holding's motion to dismiss on June 14, 2021. (R.O.A. page ____[Order]. The Order states in its entirety: "Defendant's Harris Investment Holdings, L.L.C. motion to dismiss is granted." The Form Order ending the case does not give the trial court's reasons or state whether the dismissal is with or without prejudice. The inference is clear that the dismissal was with prejudice because the trial court did not identify pleading deficiencies or provide the Appellant an opportunity to cure them as required by law. On June 15, 2021, Appellant timely filed a motion for reconsideration pointing out, among other things, that a trial court dismissing a case on the merits must set forth the reasons for the dismissal under Rule 52, *South Carolina Rules of Civil Procedure* and that a trial court cannot grant a motion to dismiss with prejudice because such a decision is a decision on the merits before discovery. See motion for reconsideration quoted below.) Appellant's June 15, 2021, motion for reconsideration (R.O.A. pages ___-____), which states in applicable part:

> 1. The Form Order does not identify if the complaint is dismissed as to Harris Investment Holdings, L.L.C. with prejudice or without prejudice. (As discussed more fully below, the complaint cannot be dismissed with prejudice.)
>
> 2. The Order fails to apply the correct standard of review governing peremptory motions to dismiss.
>
> 3. The Order denies the plaintiff procedural due process because it ends plaintiff's claims without identifying the basis for the dismissal, which is required under Rule 52 of the *South Carolina Rules of Civil Procedure*.
>
> A. By failing to identify the reason for the dismissal, the Court deprives the plaintiff of fundamental due process because she has no basis on which to decide whether to accept her loss or to seek appellate review.
>
> B. By failing to identify the reason for the dismissal, the Court deprives an appellate court of the ability to review the decision for error and thus denies the plaintiff a meaningful opportunity to exercise her right to judicial review.

On June 29, 2021, the trial court denied the motion for reconsideration. R.O.A. page ___. Once again, the record is not clear whether the circuit court dismissed the case with or without

prejudice, an ambiguity compounded by the Court's subsequent July 6, 2021 "declined to sign" entry. (R.O.A. page ____[docket entry] On June 28, 2021, Respondent's counsel sent an unsolicited proposed Order to the circuit court to which Appellant immediately objected. See R.O.A. page ____[June 28, 2021 correspondence to the Court]. The Record is not clear whether the circuit court judge adopted Respondent's proposed Order or not. In her June 28th correspondence to the presiding judge, the Appellant voiced her objection to the submission of an unsolicited proposed Order and asked to be heard regarding the submission. See Record on Appeal, page ____[June 28, 2021 correspondence to the Court] The Record is unclear because while the trial court electronically signed Respondent's proposed Order on June 29, 2021, it followed up this filing 7 days later with a subsequent filing on July 6, 2021, stating that the trial court "declined to sign" the Order. See R.O.A. pages ____ and ___[Order, Decline to Sign notation on docket sheet]. Because the *Rules of Procedure* do not allow successive requests for reconsideration, the *Rules* compelled Appellant to file a Notice of Appeal, which she filed on July 14, 2021. (R.O.A. page ____) Thus, the case arrives at the Court of Appeals with an unclear record despite Appellant's efforts to prevent such ambiguity. In an abundance of caution, Appellant will address both documents in her argument.

Following the notice, Appellant's efforts to obtain a transcript of the June 3rd oral argument presented difficulty because the court reporter retired. As a result, Appellant proposed to Respondent's counsel that the parties agree to move forward on the appeal without it on the ground that the June 3rd appearance before the trial court contains nothing but arguments of counsel, which are not evidence. However, Respondent rejected Appellant's proposal to move forward without it, and Appellant arranged for a substitute court reporter to provide the transcript, which she

received on February 1, 2022. As the Court will see, the inclusion of the short colloquy with the trial court on June 3rd sheds no light on the reasoning for that court's decision to end the case.

STATEMENT OF FACTS

Appellant rented a commercial building, commonly referred to as 5901 Loftis Road, from Francon L.L.C. in May, 2014. Francon sold the building to the defendant, Harris Investment Holdings, L.L.C. on or about December 1, 2015 at Deed Book 2071 at Page 749 while the Appellant occupied the property under a written lease. Even though Harris Investment Holdings, Inc. purchased the building subject to Appellant's lease, it persuaded her to sign new leases for two spaces in the same building with Harris—one for a Spanish grocery store, Latino Mix, and one for a restaurant/disco, El Alamo. (Appellant's proficiency in English is conversational, but not fluent, and she was not represented by counsel when she signed new leases with Harris Investment Holdings, Inc.)

The property is located just yards, and within the line of sight, from the City of Hanahan's municipal complex, including the Police Department. Both Latino Mix (which Appellant subsequently closed) and El Alamo are minority owned and both served a primarily Hispanic clientele. For reasons that are fully explained in a companion appeal that was pending in this Court at Appellate tracking Number 2019-001169, Hanahan saturated the appellant's business with its police presence, using that to manufacture a process to vacate her business license for nuisance. The City revoked the Appellant's business license; however, the appeal of that decision stayed enforcement, which is when the City turned to the landlord to do what it failed to do—eliminate the Appellant. After the magistrate entered an order of ejectment on the ground of nuisance, the appeal of that decision was pending before this Court when Harris Investment Holdings and the City of Hanahan decided to take matters into their own hands despite a pending appeal and despite

Appellant's pending application for injunction, the landlord bulldozed both the building and Appellant's commercial restaurant equipment to the ground. Once the Respondents destroyed the building, Appellant discontinued the 2019 appeal of her ejectment (Appellate Tracking Number 2019-00169) because the case was obviously moot. Since the destruction of the building foreclosed any relief for the Appellant under the ejectment appeal, she filed the present action for damages for the acts occurring in March 2021. After dismissing the 2019 appeal as being moot, that judicial finding of mootness became the law of the case. See Record on Appeal page ____[Order filed June 6, 2019, at Case No. 2018-CP-08-00266, Harris Investment Holdings Exhibit G]. This Order reads in its entirety: "The magistrate court judge's award of attorney fees is affirmed. All other issues in this appeal are now moot as the subject property has been demolished."

Prior to preventing review of the ejectment action by destroying the building, both the City of Hanahan and Harris Investment Holdings, Inc. coordinated their efforts to launch a three pronged attack to drive the Appellant out: (1) In the initial effort City adopted a series of ordinances, Ordinance 4-2, to eliminate the Appellant. When that failed, the City (2) moved against Appellant's business license, by declaring it a nuisance by saturating the Appellant's businesses with a police presence and systematically harassing Appellant and her patrons. This effort backfired when the Appellant sued the City for violation of her civil rights, which case was ended by a voluntary settlement in which the City paid Appellant a confidential amount to discontinue the action. After the ordinance failed to achieve its ends, and after the Business license termination failed because of the stay on appeal, the parties launched the third effort (3) the City called upon the Respondent, Harris Investment Holdings, and requested that Harris eject the

Appellant using the same witnesses and the same evidence amassed by the City and presented by the City at the Business License Revocation hearing.

The City of Hanahan's racial animus reflects its atavistic form of municipal government, a throwback to South Carolina's history of minority suppression. Hanahan still elects its entire governing body under an at-large system of government, which prevents any opportunity for minority representation on its governing Council even though the Hanahan has a significant minority population. The United States Supreme Court declared at-large form of government unconstitutional in 1984. *Rogers v. Lodge,* 458 U.S. 613, 102 S.Ct. 3272 (1982) See Hanahan Municipal Ordinance § 14-1 "Elections": "Pursuant to S. C. Code 1976, § 5-15-20, the mayor shall be elected at large, and councilmembers shall be elected from the municipality at large. (Ordinance No. 2-2018)" (R.O.A. page ____[ordinance])

The Supreme Court outlawed at large systems in *Rogers v. Lodge*, 458 U.S. 613, 102 S.Ct. 3272 (1982). There the Court declared Burke County Georgia's system of at-large legislative representation unconstitutional. (Interestingly, our General Assembly adopted § 5-15-20, S. C. Code, ann., the enabling statute cited by Hanahan, in 1962 so Hanahan's reliance on that statute is not on firm ground. For the historically minded reader, 1962 is also the year the General Assembly adopted a resolution to fly the Confederate States of America's battle flag above the statehouse.)

Almost immediately after Appellant opened, the City of Hanahan targeted the Appellant "because it served a minority clientele and in April, 2016, the City passed an ordinance, Ordinance 4-2 "Hours for public consumption of alcoholic beverages," which the City intended to close down the plaintiff's business." R.O.A. page ____[complaint ¶ 8] After the City enacted Ordinance 4-2, it realized it failed to achieve its objective because El Alamo did not sell or serve alcohol, so it immediately amended its ordinance to capture the Appellant. See R.O.A. page ___[complaint, ¶

8] The July, 2016 amended the ordinance to include a new section, "Section C," which required all business that allowed alcohol to be consumed on its premises to close from 2:00 a.m. until 7:00 a.m. This new "Section C" affected exactly one business—the Appellant's—and it required her to close her business from 2:00 a.m. until 7:00 a.m., which the Appellant avoided by prohibiting alcohol consumption. This further angered the City, which led to the City's beginning an action to terminate her business license. When the effort to revoke her business license failed, and when the police harassment failed, and when the police harassment resulted in the City having to pay damages to the Appellant for violating her civil rights (the City did not acknowledge any wrongdoing in the release), the City launched its final phase, when it entered into what Appellant alleges was an unlawful combination with the defendant, Harris Investment Holdings, L.L.C. to do what the City could not: eject the plaintiff from the property. (R.O.A. page ___[complaint ¶¶ 9-10]

Harris Investment Holdings, L.L.C. filed its ejectment action on November 14, 2016, and after a non-jury trial, the Magistrate issued an order of ejectment on December 7, 2017. Harris Investment Holdings, L.L.C. alleged three grounds for ejectment. The Magistrate found for the Appellant on two of the three alleged grounds for ejectment, but found that Harris Investment Holdings, L.L.C. proved by a preponderance of the evidence that El Alamo constituted a nuisance, based on the testimony and evidence of the same City officials and witnesses presented at the Business License Revocation hearing, and ordered ejectment on that ground alone.[1] The nuisance finding was the subject of the companion appeal pending in this Court at Appellate Tracking Number 2019-001169, which this Court never addressed because while that appeal was pending,

[1] In both self-revelation and low water mark for zealous advocacy, Harris Investment Holdings, L.L.C. put up a witness, a Mr. Ronald Newman, in the ejectment action to testify he examined excrement found on his nearby mobile home park and determined the source was Appellant's Hispanic clientele.

Harris Investment Holdings, L.L.C. bulldozed the building and all of Appellant's restaurant equipment to the ground on or about March 18, 2019. During the appeal and just prior to knocking the building down, Harris Investment Holdings, Inc. and the City of Hanahan posted armed **city** police officers at the door to keep Appellant (and her lawyer) out in order to demolish the building and equipment.

As stated above, Harris Investment Holdings, L.L.C.'s presentation of the ejectment action to the Magistrate mirrored the City's revocation of business license hearing, presenting the same witnesses and the same evidence compiled by the City. As set forth above, the Magistrate entered an Order of Ejectment, which the plaintiff timely appealed, and on May 17, 2018, the Magistrate issued an Order to stay execution upon appeal, conditioned upon the plaintiff paying into Court an appeal bond of $5,500.00 and remaining current on the rent. The Appellant complied with these Orders (R.O.A. page ___[complaint ¶ 11] and was in compliance with them on the day Harris Investment Holdings knocked the building down. (The Appellant also had an emergency application pending to prevent Harris Investment Holdings from doing what it did. See R.O.A. page ___[Ex. 1]

As stated in the previous paragraph, while the ejectment case was on appeal, on or about March 18, 2019, the defendant, Harris Investment Holdings, L.L.C., using City of Hanahan police officers, broke down the plaintiff's door and arranged to have the electrical meters removed. Appellant successfully got her electrical service restored, and thereafter the City of Hanahan, again acting in concert with Harris Investment Holdings, L.L.C., **posted two uniformed Hanahan police officers in a Hanahan Police Department patrol car** to stand guard over the building to prevent the Appellant from entering her business. At the hearing before Judge Price on June 3, 2021, Respondent conceded this fact: "And then, on or about March 22nd, 2019, Harris

demolished the building **while police officers from the town of Hanahan** were present at the scene **to keep the peace**." R.O.A. page ___[tr. page 5, line 24—page 6, line 2, emphasis added] On March 19, 2019, the Appellant filed an application with the circuit court "directing the defendants immediately to cease and desist destroying the plaintiff's business and preserve the status quo until such time as the parties may be heard." (R.O.A. page ___ [Motion filed in Case Number 2018-CP-08-01008]) In March 2019, the Appellant occupied the space under the Magistrate's appeal bond Order, which Respondent never asked to be dissolved. In addition, Harris Investment Holdings' lease contains a holdover provision in the Appellant's lease, which sets the rental rate for Appellant if she improperly holds over. While the injunction motion was pending, sometime around March 21, 2019, Harris Investment Holdings, L.L.C. bulldozed the building to the ground, including the plaintiff's valuable commercial restaurant equipment, including, but not limited to commercial walk in freezer, commercial food preparation equipment, tables, chairs, electronic equipment, and inventory. R.O.A. page ___[complaint ¶ 12] Respondent, Harris Investment Holdings, L.L.C., destroyed the building without asking the Court for relief from the stay Order or without asking the Berkeley County Sheriff's Department to put it in peaceable possession of the premises and in the face of a pending motion for injunction. R.O.A. page ____[complaint ¶ 12] Once Harris Investment Holdings, L.L.C. destroyed the building and the Appellant's contents, Appellant discontinued her appeal of the ejectment Order because there was no longer relief available and commenced this action for damages.

STANDARD OF REVIEW

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts

alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*

Plyer v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007)

ARGUMENTS

1. The circuit court erred in dismissing the Appellant's complaint with prejudice.

A. Rule 52, *South Carolina Rules of Civil Procedure* requires a trial court to make findings and conclusions when ending a case with finality so the losing party can decide whether to accept her loss or appeal and to give the appellate courts something to review and to provide minimal due process.

B. A trial court cannot dismiss a complaint with prejudice on a 12(b)(6) Motion to Dismiss.

As set forth in the Statement of Facts, the circuit court's decision on Harris Investment Holdings' motion to dismiss is ambiguous, but appears to be with prejudice since it does not provide leave to amend or identify pleading deficiencies, which is required under *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). The circuit's June 14, 2021 form Order says that Harris Investment Holdings' motion to dismiss is granted without providing any information as to what fatal defect is contained in the pleadings or without providing an opportunity to correct any putative deficiency. Since the neither the Form Order nor the Order on reconsideration name any deficiencies in the pleadings, as required by Rule 52 *South Carolina Rules of Civil Procedure* or provide for leave to refile as required by *Spence v. Spence*, 368 S.C. 106, 628 S.E. 869 (2006), Appellant called these deficiencies—and the due process violation—to the trial court's attention

by way of Motion for Reconsideration. However, the trial court ignored them, either filing a Form Order denying the relief or by adopting a 3-page Order submitted *sua sponte* by Harris Investment Holdings' lawyer. If the unsolicited Order is the controlling Order, it sheds no useful light on the issues before the Court because it only discusses the standard for granting reconsideration, which is an irrelevant topic of conversation at this juncture. As set forth above in the Statement of Case, the Court followed its June 29, 2021 unsolicited Order 7 days later on July 6th with a notation that the Court "declined to sign" it. R.O.A. page ___[docket entry] Thus, as the record currently exists, the parties are not sure which Order controls. In an abundance of caution, the Appellant will treat both standards, but the inference is clear that the trial court dismissed the Appellant's complaint with prejudice.

A. Rule 52, *South Carolina Rules of Civil Procedure*

Rule 52(b) says in applicable part: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion **except as provided in Rule 41(b)**." (emphasis added) Rule 41(b) is, of course, the Rule that governs the dismissal of actions with prejudice. See Rule 41(b), *South Carolina Rules of Civil Procedure*. The purpose of the Rule is obvious. If an Order discontinues a case, then a party is entitled to know why she lost so she can decide whether to accept her loss or seek judicial review, and the trial court's failure to provide a litigant with an explanation denies her fundamental due process because she must grope in the dark as to why her claim failed. (The due process component of this analysis is discussed separately in Argument 3 below.) Of course an appellate court can review the record and make its own findings of fact and conclusions of law, which saves the parties the dilatory effect of a remand on a 12(b)(6) motion since the standard of review on a "demurrer" requires the Court to confine its inquiry to the four corners of the plaintiff's complaint, which the circuit court erroneously failed

to do. Here, the record consists of nothing more than the Appellant's complaint, the Respondent's motion to dismiss, and the memoranda and arguments of counsel, and arguments of counsel are insufficient as a substitute for evidence. Moreover, in colloquy with the circuit court, Respondent conceded that one cause of action, trespass to chattels, was for a jury. R.O.A. page ___[tr. page 8, line 23—page 9, line 8]) As discussed more fully in the next section, the standard of review on a motion to dismiss standard requires the Court to accept all of the allegations of the complaint as true. The Court is required to accept all of Appellant's pleadings and "facts alleged and inferences reasonably deducible therefrom [that] would entitle the plaintiff to any relief on any theory of the case." *Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007) citing *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) Since neither defendant filed an Answer, there is nothing in this record controverting the plaintiff's allegations other than the arguments of counsel, which are neither evidence nor accurate because they are not in context. For example, Respondent's counsel argues that his client did nothing wrong in destroying a "vacant" building, but it takes a strong dose of factual chutzpah to argue that a building containing commercial restaurant equipment is "vacant." For example, if Appellant bulldozed Respondent's building to the ground, then Harris Investment Holdings would not accept that there was no harm done because only files, computers, and office furniture were destroyed. The definition of "vacant" depends on whose ox is being gored, and it is not within the province of Harris Investment Holdings to declare—at least at the 12(b)(6) stage—that Appellant's commercial restaurant equipment is equivalent to a vacuum. Moreover, the only reason the Appellant did not physically occupy the building on the date Harris demolished it is because the City of Hanahan unlawfully dispatched city police officers to keep her out even though the deployment of city police officers in an ejectment action is illegal. § 27-37-160, S. C. Code, Ann. The City of Hanahan and Harris Investment Holdings cannot profit from

their own wrongdoing. As set forth above, even the Respondent, quoted below on page 20, conceded that the destruction of the Appellant's property was a question for a jury.

Harris Investments' entire theory is that because the Magistrate found Appellant to be operating a nuisance, it had the right literally to bulldoze her restaurant equipment into the ground, and the destruction of the tenant's property is not a breach of the peace, a novel theory. This legal chutzpah matches the factual chutzpah of the preceding paragraph. This Court can take judicial knowledge of the companion appeal at 2019-001169, where Appellant appealed the Magistrate's finding of nuisance, and it is indisputable that the destruction of the building ended the ejectment appeal by rendering it academic. In March 2021, when Harris Investment Holdings bulldozed the building, Appellant filed her Briefs and her Record on Appeal, but despite the pending appeal, Harris Investment Holdings decided to take matters into its own hands and destroy the subject matter of the appeal. The only reason Appellant discontinued her appeal is because once Harris Investment Holdings destroyed the building instead of waiting for the Court's decision, the appeal became purely academic. At that point, her only remedy was a suit for damages as provided by § 27-37-140, S. C. Code, ann., a claim she now brings.

Because the defendants have not answered the complaints, there is nothing in this record controverting the plaintiff's allegations other than legal arguments, and these are legally insufficient to controvert the allegations of a well pleaded (or even a poorly pleaded) complaint.

Thus, the initial legal issue—before we reach the analysis of whether 12(b)(6) is applicable here—is that the circuit court never explained why it was ending the case with prejudice, and thus not only this Court, but also the Appellant are left to grope in the dark as to why the circuit court found the Appellant failed to state a cause of action that "would entitle the plaintiff to any relief on any theory of the case." *Plyer v. Burns,* 373 S.C. 637, 647 S.E.2d 188 (2007) The Appellant

has the right to appeal under Article I, § 9 of the South Carolina Constitution and under Rule 201 of the *South Carolina Appellate Court Rules*, "Right to Appeal," and the circuit court erred in failing to explain the basis for its decision to terminate the Appellant's claims. The circuit court's error not only deprives the Appellant of an opportunity to understand why her case is ended, but also deprives this Court of an opportunity to review the decision.

As set forth above, Rule 52 requires courts to state why they end cases if they are ending the case with prejudice. This is especially true where the lower court's failure to explain it decision deprives the Appellant of her opportunity to have her case reviewed because the trial court lack of explanation forces her to guess as to the reasons. More fundamentally, by not ruling on the legal issues, the trial court deprived this Court of an opportunity to evaluate or understand its reasoning, and this vacuum denies Appellant fundamental due process because a one-sentence denial does not inform the parties or a reviewing court of the basis for the decision:

> Second, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review only when they are raised to **and ruled on** by the lower court. *E.g., 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 have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); [361 S.C. 24] Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court...
>
> *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (S.C. 2004) (emphasis added)

Here, the circuit court never explained why it ended the case with prejudice, and this procedural vacuum remains unfilled even though the Appellant brought the error to the circuit court's attention through her motion for reconsideration. See motion for reconsideration in Record

on Appeal at page _____. The circuit court took a pass on fixing the problem, and now all the parties are hamstrung by this procedural vacuum. Not only are the parties and the Court left to guess as to the reasons for dismissal, but the lack of explanation raises grave procedural due process errors that cannot now be cured because South Carolina law does not allow successive motions for reconsideration.

The vacuum in the record is further compounded because it is also impossible to know why the trial court denied reconsideration. On one hand, the record reflects the trial court signed an unsolicited Order prepared by Respondent's counsel on June 29, 2021 (to which Appellant objected on June 28, 2021, R.O.A. page ___) but then entered a notation 7 days later on July 6, 2021, that the trial judge "declined to sign." See Record on Appeal page ____ for June 29th putative Order on Reconsideration and page ____ for Berkeley County Clerk of Court docket entry "decline to sign: Order of dismissal" and page ____ for Appellant's June 28, 2021 objection. If the Order filed June 29, 2021 (the unsolicited Order prepared by Respondent's counsel) is the operative Order, then it sheds no light on the issues before the Court because it limits itself to a discussion of issues not remotely related to Appellant's motion for reconsideration. It does not even mention, let alone discuss, the standard of review on a "demurrer." The Appellant's motion for reconsideration (R.O.A. page ___) raised two broad issues: 1. That a trial court cannot end a case with prejudice on a 12(b)(6) motion (addressed in the next section) and 2. By failing to inform the Appellant why her case was being ended with prejudice, the trial court did not conform to the *Rules of Civil Procedure*, denying the Appellant fundamental due process. The putative Order on reconsideration does not address either of these, and because the Appellant cannot file successive motions for reconsideration, the trial court essentially froze her out of the process because she had no opportunity either to know why she was being thrown out of court or provide her an opportunity

to address the reasons—be heard in a meaningful manner—whatever they might be. This lack of opportunity prevented the Appellant an opportunity to make a full record by asking the Court for reconsideration of overlooked facts or misapplied law because the trial court dismissed the action in a vacuum. The trial court seems to have recognized the procedural cul-de-sac and attempted to cure it by issuing a subsequent "decline to sign" notation, but this did nothing either to address Appellant's motion or relieve Appellant of her obligation to appeal to preserve her rights and succeeded only in further confusing the record.

Moreover, failing to provide reasons for dismissal in the original Order is not an error that can be cured on reconsideration consistent with due process because if a litigant learns the reasons for dismissal for the first time on reconsideration, she has no opportunity to identify or discuss identified errors with the trial court because procedural rules preclude her from filing successive applications for reconsideration. Therefore, she is foreclosed from participating **meaningfully** in her own case, a profound deprivation of fundamental procedural due process. In *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972), discussed in more detail in Argument 3, the United States Supreme Court identified the minimal standards for the repossession of personal property to meet due process: "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes* involved a similar procedure as here because Florida and Pennsylvania law allowed a creditor to pick up a debtor's property and grant a hearing afterwards, a procedure similar to the case now before the Court where the Appellant learns for the first time on reconsideration why the Court dismissed her case, too late to be heard "meaningfully." Here, the Form Order dismissing her complaint (R.O.A. page ___) drives the plaintiff into a procedural cul-de-sac because even if the Court entertains reconsideration and issues a fuller explanation following reconsideration, this procedure denies

the plaintiff an opportunity to be heard on such an Order "at a meaningful time and in a meaningful manner."

Therefore, whether the proposed Order prepared by Respondent's counsel is or is not the controlling Order, either way, the trial court failed to adhere to the requirements of Rule 52 and in doing so, deprived the Appellant of fundamental procedural due process. The decision below is controlled by a substantial error of law.

B. A trial court cannot dismiss a complaint with prejudice on a 12(b)(6) Motion to Dismiss.

As set forth above, if the complaint is not well-pleaded, then the Court is required to give the plaintiff an opportunity to cure technical deficiencies before dismissing a complaint with prejudice. Because the form Order gives no explanation as to the basis for the dismissal, both Appellant and this Court lack the ability to comprehend why her case is being discontinued, a violation of procedural due process, and deprives her of even having a basis to evaluate whether she should accept her loss or seek judicial review.

The standard of review governing motions to dismiss under Rule 12(b)(6) is well known and set forth above on page 12. As set forth in the Appellant's June 15, 2021, motion for reconsideration to the trial court, the Appellant stated in applicable part (R.O.A. page _____):

On a motion to dismiss, the Court is required to confine itself to the plaintiff's complaint and it does not matter if opposing counsel has a different view of the strength of plaintiff's evidence. However, the Court's Form Order fails to recognize, discuss, or apply this mandatory standard, which it is required to apply under the under the Rule 12(b)(6) standard of review as the South Carolina Supreme Court said in *Plyer v. Burns*:

In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and

with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*
Plyer v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007)

Both the June 14, 2021 Form Order dismissing the complaint and the putative June 29, 2021 Order denying reconsideration fail to acknowledge or apply this standard because under this standard, the plaintiff has pled multiple, viable theories of recovery under well-recognized and well-developed statutory and common law tort standards, and as set forth above, at the brief appearance before the circuit court, Respondent conceded that trespass to chattels was for the jury, and yet the court dismissed that cause of action as well:

> And, finally, he'll [Goldstein] say that, when the property was bulldozed, his client's valuable restaurant equipment was destroyed in the process. Okay. Our position is that—what he's talking about primarily is a walk in cooler. The walk-in cooler was there before his client ever got to the property. I will rant you, that's a factual issue, and if we want to have a trial on whether there was personal property in the building when it was demolished, who it belonged to, and whether—even if any of it belonged to her, she should have removed it, having received two notices to get her belongings out of the building, we can do that.
>
> R.O.A. page ___[tr. page 8, line 23—page 9, line 8]

Of course, it matters little what "Goldstein says." What matters is evidence, and at the 12(b)(6) stage, the only "evidence" in this record, which is presumed true, are the allegations of the complaint. Standing against the complaint are nothing but the unsupported statements of Respondent's counsel, which are at best careless misrepresentations or at worst, deliberate obfuscations without affording the plaintiff an opportunity to conduct discovery to gather evidence to refute them. Take, for example, counsel's statement "the walk-in cooler was there before his client ever got to the property." The Appellant occupied the property 18 months before Harris Investment Holdings, L.L.C. was ever on the scene. Despite the numerous, specific, well-plead allegations against Harris Investment Holdings, apparently the trial court accepted Respondent's

counsel's unsupported statements of fact as evidence and assigned them more weight to counsel's argument than to the factual allegations set forth in the complaint. This was error.

Respondent's counsel also informed the trial court a preposterous assertion that when his client bulldozed the building, it was "vacant." This statement too is, at best, recklessly inaccurate because, as the complaint, R.O.A. page ___, ¶ 47, makes clear, the building contained the Appellant's "commercial restaurant equipment, including, but not limited to a commercial walk-in freezer, a commercial stove and hood, dishwasher, food prep equipment, buffet bar, tables, chairs, electronic equipment, *etc*." The only reason Appellant was not inside when the bulldozers arrived was because the City of Hanahan, for reasons not yet discovered, posted armed **city** police officers at the door to keep her out. At the time Harris Investment Holdings knocked the building to the ground, Appellant not only possessed the space under an appeal bond Order, (R.O.A. page ___), but also had pending an emergency application with the Court of Common Pleas for an emergency injunction to prevent the very destruction that gives rise to this claim. See R.O.A. page ____[motion for injunction and supporting affidavit] The plaintiff's factual allegations, and the reasonable inferences deducible from them, are deemed to be true at the 12(b)(6) stage, a settled principle of law erroneously ignored by the circuit court. Moreover, as the record in the case makes clear, the only reason Appellant was not physically in the building was because the City of Hanahan, which is statutorily prohibited from involving its police department in ejectment actions, posted two armed guards at the entrance to keep the Appellant out. See Record on Appeal page ___[complaint §¶ 4]:

> 4. The defendants, John Doe #1 and John Doe #2 are uniformed police officers of the City of Hanahan, who, during the events described in detail below, denied the plaintiff or her representatives access to the building she had rented. At the time of filing, the plaintiff is unaware as to whether the two police officers standing guard over the building and preventing her from access were acting as private contractors for the defendant, Harris Investment Holdings, L.L.C. In

whatever capacity they were acting, the bore the indicial of authority of the City of Hanahan as City police officers.

The South Carolina General Assembly specifically prohibits the City of Hanahan from using its municipal police force to dispossess a tenant from property and vests that power expressly in the Sheriff's Department, § 27-37-160, S. C. Code, ann., and, just as a book burning is not a valid exercise of editing, there is not a single instance in all of American jurisprudence where a court condoned a landlord bulldozing a tenant's valuable possessions into dust as a means of retaking premises without a breach of the peace. As the Appellant said in her motion for reconsideration, R.O.A. page ___:

> The forcible dispossession of an occupant of real property without legal process by one entitled to possession is looked upon with considerable disfavor by the Courts, and in many, if not all jurisdictions the dispossessor is liable in damages, compensatory if not exemplary, for his act; but where the dispossession has been performed peaceably upon the termination of the tenancy, or after notice to quit, the majority of the Courts, including our own, refuse to allow any recovery by the one dispossessed.
>
> *Barbee v. Winnsboro Granite Corporation*, 190 S.C. 245, 2 S.E.2d 737 (1939)

The *Barbee* Court gives examples of "peaceable" dispossession, such as when the landlord provides notice and places the tenant's possessions **unharmed** on the street. Moreover, the Court erroneously ignored the requirements of South Carolina law, §§ 27-37-140, 160, S. C. Code, Ann., which specifically give the plaintiff a cause of action for destruction of her property. The wanton destruction of the plaintiff's valuable commercial restaurant equipment in the face of Court Orders and pending litigation does not fit any definition of peaceable, and the General Assembly made clear that in matters of forcible ejectment, **only a Sheriff's Deputy** can effect the ejectment, which did not happen here: "Twenty four hours following the posting of the writ, if the occupants have not vacated the premises voluntarily, **the deputy sheriff, but not a constable**, may then enter the

premises by force, using the least destructive means possible, in order to effectuate the ejectment." § 27-37-160, S. C. Code, Ann. (emphasis added)

Assuming *arguendo* that counsel's misrepresentations were accurate, even then the Sheriff's Department did not put the landlord in **peaceable** possession here. Instead, what happened here is that the City of Hanahan extended its long practice of harassment of a minority business to assist Harris Investment Holdings in an illegal act, despite having to pay the Appellant to settle one lawsuit against the City when it, among other things, put Appellant in handcuffs and lodged her in jail overnight for an alleged zoning violation. See summary of municipal citations that Appellant attached to her brief to the circuit court as Exhibit 1 in her pending application for injunction. (R.O.A. page ___[Exhibit 1] Most importantly, Harris Investment Holdings' destruction of the premises prevented this Court from reviewing all its activities leading up to the destruction by rendering moot the Appellant's pending appeal at Case Number 2019-001169. Once Harris Investments destroyed the building while the appeal was pending, it prevented this Court from rendering anything but an academic Opinion since the Court could not issue an order allowing the Appellant to remain in possession. It is undisputed that "peaceable possession" does not mean willful, malicious destruction of Appellant's property, something even the Respondent conceded raised a jury question. R.O.A. page ___[tr. page 9, lines 2-8] Here, the landlord, in furtherance of its conspiracy with the City of Hanahan to destroy a minority owned business that served a minority clientele deemed undesirable by the City, deployed two **City Police Officers**, who are statutorily barred from participating in an ejectment, to stand guard over the premises and keep the plaintiff out while Harris Investments bulldozed the building to the ground. In oral argument to the Court on June 3rd, opposing counsel recited a long list of **alleged** criminal activity at the plaintiff's business, but this is another misrepresentation. The facts demonstrate that the

City of Hanahan, in combination with Harris Investments, manufactured charges as part of is three pronged attack to run the Appellant out of town, but these manufactured charges resulted in only a few municipal zoning violations. To create the appearance of nuisance, Hanahan saturated El Alamo with a constant police presence to make it appear there was criminal activity even though all of the charges, most of which were dismissed, were for minor zoning violations. See R.O.A. page ____[Ex. 1 to Appellant's memorandum of law for injunction] All the convictions were in Municipal Court for municipal zoning violations, which are not "crimes." See *South Carolina Rules of Evidence*, Rule 609.) City police officers may have broad law enforcement authority in the municipal limits of Hanahan, but they have no authority when it comes to matters of landlord and tenants. The General Assembly specifically prohibits their participation for obvious reasons, and the violation of the statutes governing ejectment not only give rise to Appellant's claims for damages, but also is evidence of at least gross recklessness and at worst intentional civil rights violations. In dismissing the Appellant's case on a 12(b)(6) motion, the circuit court never addressed, let alone "ruled on" any of these issues, and this is an error of law that requires reversal.

Finally, and most importantly, the circuit court lacks authority to dismiss a claim with prejudice on a 12(b)(6) motion. Wright & Miller's *Federal Practice & Procedure 3d* discusses the creation and "purpose" of Federal Rule 12(b)(6), which is identical to the State rule, as follows:

> As the numerous illustrative cases from throughout the federal judicial system cited in the note below make clear, the purpose of a motion under Federal Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case. Thus, the provision must be read in conjunction with Rule 8(a), which sets forth, the requirements for pleading a claim for relief in federal court and calls for "a short and plaint statement of the claim showing that the pleader is entitled to relief." Only when the plaintiff's complaint fails to meet this liberal pleading standard is it subject to dismissal under Rule 12(b)(6).
>
> . . .
>
> The Rule 12(b)(6) motion also must be distinguished from a motion for summary judgment under Rule 56, which goes to the merits of the claim—indeed, to its very existence—and is designed to test whether there is a genuine issue of material fact. The Rule 12(b)(6) motion, as

been mentioned above, only tests whether the claim has been adequately stated in the complaint. Thus, as the many cases cited in the note below make clear, on a motion under Rule 12(b)(6), the district court's inquiry essentially is limited to the content of the complaint; a motion for summary judgment, on the other hand, often involves the use of pleadings, depositions, answers to interrogatories, and affidavits.

Wright & Miller, *Federal Practice and Procedure Civil 3d*, § 1356 Purpose of the Rule 12(b)(6) Motion

Here, both the parties and the Court are all left to grope in the dark as to what deficiencies the circuit court found in the complaint because it never said, and when asked on a proper motion for reconsideration to address this unanswered question, declined. South Carolina case law makes clear that the circuit court lacks authority to dismiss a complaint with prejudice on a 12(b)(6) motion as the plaintiff is entitled to know what the deficiencies are and an opportunity to correct them. See *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869 (2006):

When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442-44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice); *accord Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (2003) (complaint dismissed for failure to state facts upon which relief can be granted should be dismissed without prejudice in order for plaintiff to decide whether to serve amended complaint or appeal); *Thacker v. Bartlett*, 785 N.E.2d 621, 624 (Ind. App. 2003) (dismissal for failure to state a claim is without prejudice because the complaining party may either file an amended complaint or stand upon complaint and appeal); *Giuliani v. Chuck*, 1 Haw. App. 739, 620 P.2d 733, 737 (1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

Thus it is clear that the lower court's decision to dismiss Appellant's case with prejudice is controlled by palpable errors of law. The circuit court failed to apply the correct standard of review, apparently relied entirely on Respondent's counsel's representations as a substitute for evidence, failed to identify deficiencies in the pleading, and improperly arguments of counsel evidentiary weight, and finally, when asked to explain why the Court was dismissing Appellant's without an opportunity to amend to correct any alleged deficiencies, the Court ignored her. The trial court's lack of explanation deprived the Appellant of even minimal procedural due process because she has no idea why her complaint is allegedly deficient.

2. The circuit court failed to apply the proper standard of review in evaluating a Motion to Dismiss under Rule 12(b)(6)

The standard of review on a dismissal under Rule 12(b)(6) is the same for the Court of Appeals as it is for the trial court.

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

Grimsley v. S. C. Law Enforcement Div., 396 S.C. 276, 721 S.E.2d 423 (S.C. 2012)

As discussed fully above, neither the Appellant nor this Court can discern why the trial court granted a motion to dismiss, so the appellate court must necessarily grope in the dark for the reasons. However, for purposes of evaluating the decision to dismiss, we can compare the allegations of the complaint, which are true at the 12(b)(6) juncture, and measure them against the demonstrably false allegations made by Harris Investment Holdings, L.L.C., which is all the trial court had to rely on in ending the case. Perhaps the best example is Harris Investment Holdings,

L.L.C.'s demonstrably false allegation contained in its Exhibit F, where it misrepresents to the Court that Harris Investments demolished her building in order to remediate asbestos. This is an easily disprovable misrepresentation. First, it is in conflict with the allegations of Appellant's complaint, and the trial court erred in elevating counsel's argument—without factual support—to weigh the allegations and decide whom to believe. Appellant's complaint lays clear that the asbestos allegation is fiction. See Complaint in the Record on Appeal at page ___[complaint], which alleges in applicable part:

16. The defendant, Harris Investment Holdings, L.L.C., applied to the defendant, City of Hanahan, for a demolition permit in 2019 and falsely represented to the City that the demolition permit was necessary to abate asbestos.

17. The defendant's Harris Investment Holdings, L.L.C.'s representations to the City were false, and the defendant knew they were false at the time it made them.

18. The defendant Harris Investment Holdings, L.L.C. knowingly made false representations to the City of Hanahan to induce it to issue a demolition permit, which the City issued without restrictions governing alleged asbestos abatement. The demolition permit covered only the plaintiff's space, leaving intact the remainder of the shopping center even though all the buildings were constructed at the same time. By issuing a demolition permit for alleged asbestos removal with no mitigation requirements for alleged asbestos removal demonstrated that the City of Hanahan was a willing participant in creating a false pretext that the presence of alleged asbestos required demolition of the building.

19. At the time the City issued a demolition permit, it was aware of the extensive litigation then pending between the defendant, Harris Investment Holdings, L.L.C., and the plaintiff because the City had been involved in the litigation both as a party and as a witness.

20. The representation of a need for extensive asbestos remediation was false, and Harris Investment Holdings L.L.C. and the City of Hanahan both knew it was false, and the real reason for the demolition was to drive the plaintiff out of her space because they were both frustrated by the plaintiff seeking judicial review of the decisions to revoke her license (the City) and eject her (Harris Investment Holdings, L.L.C.).

21. As a direct and proximate result of the false representations and the City's turning a blind eye to the reality of plaintiff's then pending legal dispute with the defendant, the defendant, Harris Investment Holdings, L.L.C., improperly applied for and the City of Hanahan improperly issued a demolition permit under false pretenses, which the City knew were false and pretext. If the City were issuing a permit for asbestos remediation, it would not allow a landowner to address an alleged asbestos abatement by knocking the building to the ground and releasing the alleged asbestos to the air. Moreover, both defendants, Harris Investment Holdings, L.L.C. and the City of Hanahan were aware that an asbestos report of the building identified only trace amounts of asbestos.

Second, the Appellant has not conducted discovery in this case other than opening interrogatories and requests for production, and is prepared to show through documentary evidence maintained by the City of Hanahan that Harris Investment Holdings, L.L.C. did not undertake any asbestos remediation on the site. It strains both credulity and common sense to contemplate that a landlord attempting to remediate asbestos would do so by (1) knocking the building to the ground, and (2) destroy valuable restaurant equipment as part of the process, and (3) would knock down **only** the Appellant's space while leaving the other allegedly asbestos ridden building standing. Respondent's reliance on such an easily disprovable and absurd justification for tearing down just so much of a building as housed the Appellant and not the other tenants hoists the Respondent upon its own petard.

The trial court clearly erred by treating arguments of counsel as evidence, weighing it, and deciding to rule in favor of the Defendant without affording the Appellant an opportunity to prove her case, or at the least, develop her legal theories through discovery. Courts are not authorized to grant a summary judgment, let alone a "demurrer" until a litigant has had a "full and fair opportunity" to gather evidence through discovery:

> Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F.Supp. 483, 486 (D.S.C.1975); see also *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); *6 Moore's Federal Practice* p 56.02, p. 56-39 (2d ed. 1990); see, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F.2d 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So.2d 951 (Ala.1988); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz.App. 534, 478 P.2d 532 (1970); *Commercial Bank of Kendall v. Heiman*, 322 So.2d 564 (Fla.Dist.Ct.App.1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W.Va. 140, 267 S.E.2d 440 (1980); cf. Rule 56(f), S.C.R.C.P.
>
> *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (S.C. 1990)

The trial court erroneously dismissed the Appellant's case, and the Orders granting the dismissal and denying reconsideration should be reversed.

Argument 3.

The dismissal with prejudice by Form Order denied the Appellant fundamental due process.

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983 (1972), briefly mentioned above, sets the minimal standards necessary to provide due process:

> For more than a century, the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right, they must first be notified." *Badwin v. Hale*, 1 Wall. 223, 68 U.S. 223. See Windsor v. McVeigh, 93 U.S. 274; *Havey v. Elliot*, 167 U.S 409; *Grannis v. Ordean*, 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 389 U.S. 545, 380 U.S. 552.

The nexus between fundamental due process and the court's obligation to refrain from peremptorily dismissing a case on a 12(b)(6) motion without explanation, especially with prejudice, is the application of Rule 52. Rule 52 provides that a litigant can understand why her case is being dismissed in order to reach a decision as to whether accept her loss, amend the complaint, or seek judicial review. When the circuit court dismissed the Appellant's case without explanation, it prevented her from receiving minimal due process because she cannot ask a court to reconsider its erroneous conclusions when they remain secret.

The federal rule and the state rule 52 are materially the same. § 2571 of Wright & Miller's *Federal Practice and Procedure Civil 3d* explains the purpose of the rule:

> One purpose of requiring findings of fact by the trial court as has been recognized in a significant number of cases, is to aid the appellate court by affording it a clear understanding of the ground or basis of the decision of the trial court. Another purpose is to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata and promote confidence in the trial judge's decision making. The final, and possibly most important, function of the requirement that findings of fact be made is to evoke care on the part of the trial

judge in ascertaining an applying the facts. All three of these very important purposes are served by Rule 52.

As the United States Supreme Court said in *U. S. v. Merz*, 643U.S. 192, 199, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964): ". . . judges will give more careful consideration to the problem if they are required to state not only the end result of their industry, but he process by which they reached it." The state version of the rule requires that a judge ending a case with prejudice make specific findings of fact and conclusions of law: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion **except as provided by Rule 41(b)**" (emphasis added) Rule 41(b) is the rule governing dismissal with prejudice. It allows a party to move for an involuntary nonsuit **at the close of the evidence at trial.** "After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." The federal rule is slightly different, including a subsection (c), which allows a trial court to enter judgment against a plaintiff after she "had been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a clam or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue."

Here, the circuit court prematurely granted a motion to dismiss before the Appellant "had been fully heard on the issue," and it did not reveal anything about its decision. After the Appellant timely and properly called this defect to the court's attention, it signed an unsolicited proposed Order objected to by the plaintiff, and then, 7 days later purported to rescind it, leaving the parties in a no-man's-land of procedural irregularities. Because the plaintiff could not file a successive

motion for reconsideration, the lower court forced her to appeal the case even though she has no idea the basis for the court's decision to end her case on a demurrer. The lower court's failure to apply the correct 12(b)(6) standard of review and its refusal to provide an explanation for its dismissal is a gross deprivation of fundamental procedural due process and has creates a wasteful and dilatory drain on the limited judicial resources of this State.

Conclusion

This case should not be before this Court. The circuit court failed to discharge its responsibilities to adjudicate a serious case as required by the *Rules of Civil Procedure*. Rule 1 of the *South Carolina Rules of Civil Procedure* says the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." The case law in South Carolina law is clear in requiring trial courts to accept the plaintiff's allegations in her complaint as true, and if there are deficiencies in her pleadings that prevent the action from going forward, the circuit court is obligated to identify these and afford the plaintiff an opportunity to correct them. ". . . plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)." *Spence v. Spence*, 368 S. C. 106, 628 S.E.2d 869 (2006)

The procedural vacuum created in this case benefits no one, and the orders under review are controlled by palpable errors of law. The case should be remanded, and the Appellant should be afforded her opportunity to engage in discovery and assemble the facts for proper presentation to the court.

As set forth above, the trial judge erroneously granted Respondent's motion to dismiss, and even if a motion to dismiss properly lay, the trial court compounded its error by failing to identify the alleged deficiency or provide Appellant an opportunity to correct it. If there were a summary judgment procedure in the appellate courts, this would be the case for it. It is not fair to the

Appellant to incur the expense and delay associated with an appeal of a decision so obviously erroneous. It is also not fair to the Appellate Court to be burdened with taking up an appeal of a decision so blatantly erroneous. If there are deficiencies in the Appellant's complaint, then the trial court is required to identify them and provide her an opportunity to correct them. She has alleged serious and severe intentional torts, one of which the Respondent concedes is for a jury to determine, and South Carolina law is devoid of a case allowing a landlord to retake possession of a disputed leasehold by driving a bulldozer over it in the face of pending litigation and destroying the Appellant's valuable restaurant equipment. The arrogance of Harris Investment Holdings, L.L.C. is unparalleled in the case law of South Carolina.

This Court should remand this case to the circuit court and entertain a motion for enhanced fees under Rule 222(b) at the appropriate time for Harris Investment Holdings' unconscionable conduct because its willful destruction of Appellant's property represents "the most extraordinary of circumstances."

Respectfully submitted,

February 9, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Bentley Price, Circuit Court Judge

Case No. 2021-CP-08-00513
Appellate Tracking No.: 2021-00768

Aracelis Santos, ……Appellant,

vs.

Harris Investment Holdings, L.L.C.,
the City of Hanahan, John Doe #1,
and John Doe #2 ……..……..Defendants,

of whom

Harris Investment Holdings, L.L.C. is ……..Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief, Designation of Contents of Record on Appeal on the Respondent, Harris Investment Holdings, L.L.C., by depositing a copy of it in the United States Mail, postage prepaid, on February 9, 2022, addressed to the attorneys of record, Merritt Abney, 151 Meeting Street, Sixth Floor, Charleston, S. C. 29401-2239. (I also sent a copy to counsel for the City of Hanahan and John Doe #1 and John Doe #2, Stafford J. McQuillin at P. O. Box 340, Charleston, S. C. 29402.)

February 9, 2022

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