

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Mar 13 2023**

**SC Court of Appeals**

APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Kristi F. Curtis, Circuit Court Judge  
(Tracking No. 2019-001169)  
Bentley Price, Circuit Court Judge  
(Tracking No. 2021-000768)

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Opinion No.: 2023-UP-027  
Appellate Tracking No.: 2019-001169

Opinion No.: 5964  
Appellate Tracking No. 2021-000768

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Aracelis Santos, .....Appellant,

vs.

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

**&**

Aracelis Santos, .....Appellant,

vs.

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

of which

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

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REPLY TO RESPONDENT'S RETURN TO  
PETITION FOR REHEARING *EN BANC*

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Pursuant to *South Carolina Appellate Court Rules*, Rules 240(f), the appellant offers this brief reply to Respondent's March 9, 2023 Return.

Counsel misstates the issues before the Court. Respondent repeats that the lease between the parties ran out and Respondent "exercised its right under the Lease and South Carolina law and retook the possession of its Leased Premises **while officers of the Hanahan Police Department were present.**" Return, page 4, emphasis added First, as set forth in the record, the Appellant held the premises under an appeal bond Order (R.O.A. page 10). Second the Lease contained a "holdover" provision requiring Appellant to pay 150% of the base rent. (R.O.A. page 88) Third, Appellant filed a motion for temporary restraining Order on March 19, 2019, with a supporting affidavit explaining how the Hanahan Police officers would not even let him in the building. (R.O.A. pages 181-183) Finally, Respondent continuously conflates "retaking possession" with destruction of the Appellant's kitchen equipment. Every case in South Carolina holds that a Landlord can retake premises provided it can be accomplished **without a breach of the peace**. And finally, Respondent highlights its own unlawful conduct by declaring that its destruction was done under the watchful eye of Hanahan Police Officers who are statutorily prohibited from participating. See § 27-37-160, S. C. Code, Ann.: In executing a writ of ejectment, the constable or deputy sheriff shall proceed to the premises, present to the occupants a copy of the writ and give the occupants twenty-four hours to vacate voluntarily." Here, not only did the Respondent not do this, but also it hurried the destruction because it knew the Appellant had a motion pending to enjoy the destruction. (R.O.A. page 181) There is not a case in South Carolina that says a Landlord may intentionally destroy a Tenant's property as part of an ejectment proceeding.

Respondent also misleads by stating that the Magistrate ejected the tenant on “nuisance,” but leaves out the fact that while that case was on appeal, the Respondent destroyed the premises and the equipment thereby denying the Appellant judicial review of this finding. Judge Curtis declared the ejectment action moot, and entered an Order on June 6, 2019, (R.O.A. page 49) holding so. That un-appealed Order is the law of the case.

The Respondent’s Argument I runs counter to South Carolina law, Rule 52, because that rule is clear that a trial court is required to explain why a case is being dismissed, and until the holding in this case, no South Carolina Court has ever held that a plaintiff’s complaint can be dismissed with prejudice on a 12(b)(6) motion without affording the pleader and opportunity to fix deficiencies. 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), SCRCPP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)); *Davis v. Luncford*, 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).

Twelve years later, the Supreme Court reaffirmed its holding in *Spence in Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2018):

When a trial court finds a complaint fails “to state facts sufficient to constitute a cause of action” under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. See *Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S.Ct. 227, 228, 230, 9 L.Ed.2d 222, 224, 226 (1962) where a complaint is dismissed “for failure to state a claim upon which relief might be granted,” leave to amend the complaint “should, as the rules require, be ‘freely given’” (quoting Rule 15(a), Fed. R. Civ. P.); *Dockside Ass’n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding “Dockside should have been given leave to amend its complaint” before it was finally dismissed pursuant to Rule 12(b), SCRPC (citing *Foman*, 371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed.2d at 226)). Rule 15(a) “strongly favors amendments and the court is encouraged to feely grant leave to amend.” *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017) (quoting *Parker v. Spartanburg Sanitary Sewer Dist.* 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) ).

The circuit court erred by failing even to consider allowing Skydive to amend its complaint. See *Patton*, 420 S.C. at 490, 804 S.E.2d at 262 (holding the trial court’s failure to exercise its discretion under Rule 15(a) is itself an abuse of discretion).

Here, the record demonstrates that the trial judge was highly reticent about his reasoning, saying only he would let the parties know something, followed by a Form 4 Order. While the Opinion under review offers an appellate rationale for dismissing the complaint, it is analyzing a pleading that does not exist. The record demonstrates the Appellant learned of the Court’s reasoning **for the first time on appeal** when it is impossible to respond or replead to address deficiencies, and even if she could, there is no way for the Court to evaluate them. The Appellate Court is not permitted to predict how it might react to a potential amendment not yet put forward. “[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” *Herron v. Century BMW*, S.C. 395 S.C. 461, 719 S.E.2d 640 (2011) Any process of an appellate court making a prediction about potential amendments and then evaluating them makes a mockery of the *Rules of Civil Procedure*: “[These

Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.” Rule 1.

Finally, Appellant agrees with the Respondent that a Form 4 can be sufficient if, and only if, there is a well established record sufficient to allow the reviewing court to understand how the lower court reached its conclusions. Respondent’s reliance on *Easterling v. Burger King Corp.*, 416 S.C. 437, 786 S.E.2d 443 (Ct. App. 2016), for example, is entirely misplaced for that was a summary judgment decision rendered after all discovery was complete;

“Following the completion of discovery, Burger King moved for summary judgment on the grounds that no genuine issue of material fact existed and it owed no legal duty to Easterling. The parties both filed memoranda addressing whether summary judgment was appropriate.” *Easterling v. Burger King Corp.*, 416 S.C. 437, 444 (S.C. Ct. App. 2016)  
In granting summary judgment, the Court quotes from the deposition evidence as well as the memorandum of counsel. Here, Respondent conceded that Appellant was entitled to a trial on at least the destruction of the restaurant equipment (R.O.A. page 174, lines 1-8), and the trial judge still dismissed the case with prejudice. More importantly, when a separate circuit judge evaluated the co-defendant’s motion to dismiss on the same grounds, the second trial court denied the motion. Thus we have two judges evaluating the same motion in the same case and reaching contradictory results.

Likewise, Respondent’s reliance on *Porter v. Labor Depot*, 372 S.C. 560, 643 S.E.2d 96 (Ct. App. 2007) is even more surprising. In that workers’ compensation appeal, the Court of Appeals found that the record was sufficiently developed for judicial review because the circuit court adopted the extensive findings of fact and conclusions of law entered by the S. C. Workers’ Compensation Commission Appellate Panel, but went out of its way to remind litigants that there must be a sufficiently developed record to allow judicial review:

Advancing his contention, Porter relies on *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), wherein this court remanded the trial court’s grant of summary

judgment for an order more specifically identifying the grounds for its ruling. In *Bowen*, we were unable to discern from the trial court's decision "whether the court found Defendants owed no duty to [Plaintiff], whether they owed a duty to [Plaintiff] and breached it, or whether they were negligent, but not grossly negligent." *Bowen*, 342 S.C. at 240, 536 S.E.2d at 90. In order to review the issue adequately, we required the trial court to articulate its rationale and legal analysis more precisely. Similarly, in *B B Liquors, Inc. v. O'Neil*, 361 S.C. 267, 271, 603 S.E.2d 629, 631-32 (Ct. App. 2004), we instructed:

On appeal from the grant of summary judgment, an appellate court must determine whether the trial court's stated grounds for its decision are supported by the record. It is our duty to undertake a thorough and meaningful review of the trial court's order and the entire record on appeal. Where, as here, the trial court fails to articulate the reasons for its action on the record or enter a written order outlining its rationale, we simply cannot perform our designated function.

*Porter v. Labor Depot*, 372 S.C. 560, 568 (S.C. Ct. App. 2007)

These cases demonstrate how the Opinion under review is contrary to the established precedent of the State of South Carolina and why the matter deserves a second look *en banc*. If the Court intends to depart from established precedent, then it should do so with a single voice.

Likewise in Argument II, the Respondent disingenuously suggests that the Court "may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." (Respondent's Return at page 7) Appellant agrees, but it is a hard sell—at least with a straight face—to assert that grounds appear in a record on a Motion to Dismiss under 12(b)(6), which is why until Opinion No. 5964, litigants were permitted an opportunity to address deficiencies prior to being thrown out of Court. Once the case is on appeal from the granting of a demurer, the Appellant has no opportunity to make a record, especially when he learns—for the first time on appeal—why the case is being ended. Not to put too fine a point on it but Opinion 5964 overturns hundreds of years of precedent and stands alone.

Respondent's Argument III is nothing more than repetition of the foregoing. Once again, the Respondent stands on the parties' lease giving it the right to bulldoze the Respondent's

equipment, something that counsel conceded was a question of fact. Assuming *arguendo* that the Respondent had the right to retake the property, it was required to do so **peaceably**:

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)

A landlord driving a bulldozer over Appellant’s valuable commercial kitchen equipment instead of removing it, especially when done in unlawfully in the absence of a Sheriff’s Deputy as required by § 27-37-160, S. C. Code, especially when done in the face of a pending application for injunction (R.O.A. page 181) is powerful evidence of tortious conduct. Had Respondent followed the requirements of § 27-37-160, S. C. Code, which directs the Sheriff’s Deputy to provide 24 hours’ notice, the parties would likely not be here, but Respondent has never been shy about flouting the law and now asks this Court to reward it for its misconduct once again.

The Respondent’s final argument—that Santos could not amend to satisfy the Court—is risible. On page 12, Respondent has the chutzpah to argue: “Moreover, the Court correctly noted that Santos has never attempted to explain how she would amend the Complaint to state a claim or what additional fact she could allege that would entitle her to relief under any theory of recovery.” Respondent, logically, never identifies when Appellant had this opportunity because it does not exist. When the parties were before the Court, Appellant stated:

We’re her on a motion to dismiss under Rule 12(b). I have cited the applicable standard under the *Spence* case, citing all sorts of things. If there are any deficiencies in my complaint, the Court can point them out, and I’ll be happy to file an amended complaint to conform to any deficiencies in the pleading.

So, unless you have any other questions, that’s it. I didn’t come here to argue the case today. We’re here on a motion to dismiss.

. . .

THE COURT: All right. All right. I'll take it under advisement and put you on my expedited, end of the day.

R.O.A. page 176, line 9—177, line 17

That is it. That is the entire colloquy. The plaintiff's complaint, pages 53—64 sets forth eight causes of action including conspiracy, fraud, abuse of process, breach of quiet enjoyment, intentional infliction of mental distress, trespass to chattels, tortious interference with business, and attorney's fees. The circuit court never explained how it reached its decision, and the Court of Appeals analyzed the case on an incomplete record with no opportunity for Appellant to amend. It is impossible to conclude that an amendment would be futile without providing an opportunity to do so, and Appellant plead colorable claims under Rule 8: "A pleading which sets forth a cause of action. Whether an original claim . . . shall contain (1) a short and plain statement of the grounds including facts and statutes, upon which the court's jurisdiction depends, unless the court already has jurisdiction to support it, (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." Respondent never identifies when Appellant where the procedure of this case would have allowed Appellant to amend. Moreover, it seems highly likely that the Appellant would prevail on conspiracy—**especially where a separate circuit court judge already ruled against Hanahan's Motion to Dismiss** in the same case! Likewise, Appellant's claim for trespass to chattels is extremely strong since counsel already conceded that claim goes to a jury: "The walk-in cooler was there before his client ever got to the property."<sup>1</sup> I will grant 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 I belong to her, she should

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<sup>1</sup> Respondent's counsel is wrong. Appellant was a tenant in the building prior to Harris Investment Holdings, L.L.C. acquiring it. See ¶ 1, Complaint, R.O.A. page 53

have removed it, having received two notices to get her belongings out of the building, we can do that.” R.O.A. page 174

Based on the foregoing, the Appellant respectfully requests that if the Court is going to deviate from established precedent so broadly, it should do so with a single voice. The Court overlooks that the record in this case is undeveloped, and all the cases relied upon by Respondent are cases that were before the Court **at the completion of discovery**. The Appellant has received rough justice in Opinion 5964, and the Court should allow the parties an opportunity to reargue the case to the entire Court because the holding represents such a radical departure from established precedent.

Respectfully submitted,

March 13, 2023

/s/ Thomas R. Goldstein  
Thomas R. Goldstein, S.C. Bar #2186  
Belk, Cobb, Infinger & Goldstein, P.A.  
Attorneys for Respondent  
P. O. Box 71121  
Charleston, South Carolina 29415-1121  
(843) 554-4291 (843) 554-5566 (fax)  
E-mail: [tgoldstein@cobblaw.net](mailto:tgoldstein@cobblaw.net)  
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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PROOF OF SERVICE

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I certify that I have served the Appellant's Reply to Respondent's Return to Petition for Rehearing on the Respondent, Harris Investment Holdings, L.L.C., by depositing a copy of it in the United States Mail, postage prepaid, on March 13, 2023, 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.)

March 13, 2023

/s/Thomas R. Goldstein  
Thomas R. Goldstein, S. C. Bar # 2186  
BELK, COBB, INFINGER, & GOLDSTEIN, P.A.  
Post Office Box 71121  
Charleston, South Carolina 29415-1121  
[tgoldstein@cobbllaw.net](mailto:tgoldstein@cobbllaw.net)  
(843) 554-4291; (843) 554-5566 (fax)  
ATTORNEYS FOR APPELLANT