

RECEIVED

Jul 15 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas, 15th Circuit

Benjamin H. Culbertson, Circuit Court Judge
H. Stephen DeBerry, IV, Circuit Court Judge

COMMON PLEAS CASE NO.: 2023-CP-26-02475

Appellate Case No. 2024-000440

Nicholas F. Wilson,

Appellant,

v.

Janet P. Gochenour; Janet P. Gochenour Trustee; James B. Parker; James B. Parker,
Sr.; Mary Ann Parker; Kenneth Gregory Moore; R&G Corp. d/b/a Century 21 The
Harrelson Group; Patton Development SC, LLC; Flagstar Bank, N.A.; Sonia M.
Raymond; Raymond Law Firm, P.A.;

Respondents.

**APPELLANT'S RETURN TO RESPONDENTS SONIA M. RAYMOND AND
RAYMOND LAW FIRM, P.A.'S MOTION TO DISMISS, FILED JUNE 26, 2024**

Wesley D. Few (Bar # 15565)
Wesley D. Few, LLC
Post Office Box 9398
Greenville, SC 29604
(864) 527-5906 | wes@wesleyfew.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PROCEDURAL HISTORY	1
STATEMENT OF ISSUES IN MOTION TO DISMISS	1
STANDARD OF REVIEW / APPLICABLE LAW	1
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases

<i>Allwin v. Russ Cooper Assocs.</i> , 426 S.C. 1, 825 S.E.2d 707 (Ct. App. 2019)	2
<i>Arant v. Kressler</i> , 327 S.C. 225, 489 S.E.2d 206 (1997)	2
<i>Brown v. Finger</i> , 240 S.C. 102, 124 S.E.2d 781 (1962)	2, 7
<i>Forrester v. Smith & Steele Bldrs, Inc.</i> , 295 S.C. 504, 369 S.E.2d 156 (Ct. App. 1988) ..	3
<i>Mid-State Dis., Inc. v. Century Importers</i> , 310 S.C. 330, 426 S.E.2d 777 (1993)	5
<i>Skydive Myrtle Beach v. Horry Cty.</i> , 426 S.C. 175, 826 S.E.2d 585 (2019)	2-4, 6, 7
<i>Stone v. Thompson</i> , 426 S.C. 291, 295, 826 S.E.2d 868, 870 (S.C. 2019)	5
<i>Taylor v. Springs</i> , 2020 S.C. App. Unpub. LEXIS 125, *2-3, (Ct. App. 2020)	2

Statutes

S.C. Code Ann. § 14-3-330	4,5
S.C. Code Ann. § 14-3-430	5

Rules

Rule 201, SCACR	5
S.C. R. Civ. P. Rule 8(c)	7
S.C. R. Civ. P. Rule 12(b)(6)	2, 3, 6
S.C. R. Civ. P. Rule 15(a)	3, 6
S.C. R. Civ. P. Rule 41(b)(1)	2, 6
S.C. R. Civ. P. Rule 59(e)	3, 4, 6

PROCEDURAL HISTORY

Appellant does not dispute the accuracy of the procedural posture provided by Respondents Sonia M. Raymond and Raymond Law Firm, P.A. (hereafter “Respondents”) in their Motion to Dismiss, filed June 26, 2024. However, to provide a complete picture of the relevant procedural history, Appellant would add the following:

On December 5, 2023, Appellant filed his Motion to Amend his Verified Complaint. On February 26, 2024, that motion was heard via Webex by The Honorable H. Stephen DeBerry, IV. On March 12, 2024, Appellant’s Motion to Amend the Verified Complaint was denied.

On March 15, 2024, Appellant filed his Notice of Appeal¹ of both the February 7, 2024 and March 12, 2024 orders.

STATEMENT OF ISSUES IN MOTION TO ADDRESS

1. Whether or not Appellant’s entire appeal must be dismissed when Appellant timely noticed its appeal of multiple orders, just three days after the March 12th Order was filed.

STANDARD OF REVIEW / APPLICABLE LAW

“Skydive was—any plaintiff is—entitled to accept the court's ruling the original

¹ In filing the Notice of Appeal on March 15, 2024, the undersigned counsel to Appellant mistakenly saved the February 7, 2024 order as being issued on February 17, 2024. The resultant docketing date was also mistakenly 10 days later than it should've been. This was due to an error on the part of the undersigned in saving the subject order, and in docketing the deadline to appeal. Appellant herein corrects his mistake and amends his Notice of Appeal at page 2 to state as follows: “The undersigned counsel certifies that this appeal is timely filed within 30 days of receipt of notice of the March 12, 2024 order identified above.”

complaint was deficient, and replead in an attempt to fix the deficiency.” Skydive Myrtle Beach v. Horry Cty., 426 S.C. 175, 181, 826 S.E.2d 585, 588 (2019) (underline emphasis added).

“[T]he time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient.” Id. at 588 (underline emphasis added); see also Taylor v. Springs, 2020 S.C. App. Unpub. LEXIS 125, *2-3, 2020 WL 1723216 (Ct. App. 2020) (stating, “Taylor was not required to move to amend her complaint unless and until the circuit court found her pleading to be deficient.” (applying Skydive, 826 S.E.2d at 588).

“Rule 12(b)(6) permits the trial court to address the sufficiency of a pleading stating a claim; it is not a vehicle for addressing the underlying merits of the claim.” Id. at 587. A “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.” Id. at 592-593. “Nevertheless, when the parties present conflicting evidence, application of the discovery rule and the determination of the date the statute began to run in a particular case are questions of fact for the jury.” Allwin v. Russ Cooper Assocs., 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019) (citing Arant v. Kressler, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997)). “The burden of establishing the bar of the statute of limitations rests upon the one interposing it . . . , and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.” Brown v. Finger, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) (internal citations omitted).

“[W]hen a complaint is dismissed under S.C. R. Civ. P. 12(b)(6), the dismissal generally is without prejudice.” Skydive, 826 S.E.2d at 586; see also S.C. R. Civ. P. Rule 41(b)(1) (stating, “Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . .”). A “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

[an] amended complaint.” *Id.* at 592. “But even if a plaintiff has an argument the complaint was valid, filing a Rule 59(e) motion is not a mandatory option.” *Id.* at 588.

As further stated in *Skydive*:

A circuit court does not have ‘discretion’ to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.

Id. at 592 (underline emphasis added).

“‘[A] proper reason’ to deny a motion to amend could be ‘bad faith, undue delay, or prejudice,’ ... ‘In the absence of a proper reason, . . . a denial of leave to amend is an abuse of discretion.’” *Id.* at 588-589 (quoting *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988)).

ARGUMENT

The timeline here is critical, because it shows that Appellant did exactly as the Supreme Court’s *Skydive* decision prescribed:

- On **Sept. 8, 2023**, the circuit court granted Respondent’s Rule 12(b) Motion to Dismiss Appellant’s claims. The order does not specify that the dismissal is with prejudice.
- On **Sept. 18, 2023**, Appellant filed his Rule 59 Motion, asking the court to reconsider the dismissal.
- On **Dec. 5, 2023**—while the Rule 59 Motion was pending—Appellant filed a Motion to Amend his Verified Complaint.
- The circuit court denied Appellant’s Rule 59 Motion in a Form 4 Order, filed **Feb. 7, 2024**.

- Meanwhile, the court held a hearing on Appellant’s Motion to Amend, on **Feb. 26, 2024**.
- The court then denied Appellant’s Motion to Amend, in a written order, dated **March 12, 2024**, which had the effect of depriving Appellant of substantive claims and material issues.

In other words, Appellant moved to amend his Verified Complaint on Dec. 5, 2023, **after** the initial decision granting the motions to dismiss on Sept. 8, 2023, but before Appellant’s optional Rule 59 motion was denied on Feb. 7, 2024. *See Skydive*, 526 S.E.2d at 588 (noting “even if a plaintiff has an argument the complaint was valid, filing a Rule 59(e) motion is not a mandatory option.”). This was Appellant’s right. *Id.* (stating a Plaintiff is “entitled to accept the court’s ruling the original complaint was deficient, and replead in an attempt to fix the deficiency.”).

Importantly, the substantive claims and defenses in this case revolve around material, factual questions pertinent to the statute of limitations. Appellant’s desired amendment sought to plead facts necessary to further demonstrate that the statute of limitations does not bar Appellant’s claims against Respondent. At the initial pleading stage, Appellant is unequivocally entitled to allege verified facts—and engage in discovery—on a disputed material question.

For this reason, in denying Appellant’s Motion to Amend, the circuit court deprived Appellant of key claims, and it finally determined the (disputed) factual question of the running of the statute of limitations. The court’s order was therefore immediately appealable. S.C. Code Ann. § 14-3-330 addresses appellate jurisdiction:

The [appellate] Court shall have appellate jurisdiction for correction of errors of

law in law cases, and **shall** review upon appeal:

(1) Any intermediate judgment, **order** or decree in a law case **involving the merits in actions commenced in the court of common pleas** and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;

S.C. Code Ann. § 14-3-330(1) (2019 edition) (emphasis added);² *see also* S.C. R. App. P. 201 (appeal may be taken from any final order, by a party aggrieved by the order).

The South Carolina Supreme Court has explained the intent of the statute:

an order which “involves the merits,” [is] an order which “must finally determine some substantial matter forming the whole or a part of some cause of action or defense ...“

Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (internal citations omitted). “[T]he question of whether an order is immediately appealable is determined on a case-by-case basis ...” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (S.C. 2019); *see also id.* (“Accordingly, the court weighed the evidence and finally determined a substantial matter forming part of Stone’s causes of action, as well as Thompson’s defense, which satisfies the test we clarified in *Mid-State* ...”). Moreover, when a party appeals a final order, he has the right to appeal other, previously-filed orders. (S.C. Code Ann. § 14-3-430).

Because the orders from which Appellant has appealed “involve the merits” of Appellant’s claims (indeed, the orders dismiss and deny the claims), and because the effect of the

² Arguably, sections 14-3-330(2) and (3) apply here as well. This Return will address the arguments under § 14-3-330(1) because that section appears to be most on-point; however, the same arguments apply as to §§ 14-3-330(2) and (3), and those points are asserted and preserved.

orders is to finally and fully determine the substantive question of the running of the statute of limitations, the orders are immediately appealable. This Court should deny Respondent's Motion to Dismiss Appellant's Appeal and proceed with briefing on the merits of this appeal.

As this appeal proceeds, Appellant will argue the lower court did not have "discretion" to deny Appellant the right to amend his pleading to set forth more specific facts in support of his claims and in opposition to the drastic application of the statute of limitations at the motion to dismiss stage. The *Skydive* case is directly on point, and it controls the outcome of this appeal. *Skydive* placed express limits on the discretionary powers of the lower court under Rules 12 and 15, and the circuit court's decisions here, to apply the statute of limitations—by fiat, and without discovery—violates those limitations. *Id.* at 592. Appellant was not provided any opportunity, much less any "meaningful" opportunity, to amend his pleadings to cure any alleged deficiencies.

Because neither the Sept. 8, 2023 or Feb. 7, 2024 orders stated whether or not the dismissal was with or without prejudice, the presumption is that they were without prejudice and with leave to refile. S.C. R. Civ. P. Rule 41(b)(1) ("Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice ..."); *see also Skydive*, 826 S.E.2d at 586 (stating, "[W]hen a complaint is dismissed under S.C. R. Civ. P. 12(b)(6), the dismissal generally is without prejudice." (emphasis added)). Plaintiff sought clarification of this from the lower court in both the Rule 59(e) Motion to Alter or Amend, filed Sept. 18, 2023, and in the Dec. 5, 2023 Motion to Amend the Verified Complaint. As set forth in Appellant's proposed Amended Verified Complaint, at the closing on March 6, 2020, Respondent Raymond did not provide Appellant with a copy of the deed or the survey / plat that was recorded on March 3, 2020. (proposed Amended Verified Complaint at ¶¶'s 42-43, Verified Complaint at ¶ 43).

The lower court’s decisions here have not set forth any rationale or analysis of why Appellant’s proposed Amended Verified Complaint is “futile.” *Id.* at 593 (noting “an appellate court must find the dismissal was without prejudice and remand for the filing of an amended complaint unless the court concludes any amendment would be clearly futile.”). Respondents cannot possibly have carried their “burden” at the motion to dismiss stage to show the application of the statute of limitations in their favor is inevitable under any set of facts. *See supra.*, *Brown v. Finger*, 124 S.E.2d at 786; and *Skydive*, 526 S.E.2d at 588 (noting motion to dismiss “does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses,” such as the statute of limitations. *See e.g.*, S.C. R. Civ. P. Rule 8(c) (identifying the “statute of limitations” specifically as one of approximately twenty-three enumerated “affirmative defenses”)).

Under the principles set forth in *Skydive* and recounted above, it was not necessary for Appellant to have appealed the Feb. 7, 2024 order. This is because Appellant was only required to seek to amend his pleading “after” the decision on the initial motion to dismiss. *Id.* at 588. Still further, that decision was to be “without prejudice,” unless stated otherwise. *Id.* at 593 (noting “appellate court must find the dismissal was without prejudice and remand ...”). Therefore, the March 12, 2024 order denying the Motion to Amend was a true final order, from which an immediate appeal could be taken as a matter of right. Appellant timely filed his Notice of Appeal on March 15, 2024—just three days after the final order was filed. For this reason, Respondent’s Motion to Dismiss is groundless; this Court should deny it and order the parties to proceed with briefing.

CONCLUSION

For the reasons set forth herein, Appellant respectfully requests the motion to dismiss be denied.

Respectfully submitted,

/Wesley D. Few/

Wesley D. Few, LLC

Post Office Box, 9398

Greenville, SC 29604

(864) 527-5906 | wes@wesleyfew.com

ATTORNEYS FOR APPELLANT NICHOLAS F. WILSON

Greenville, South Carolina
July 15, 2024

RECEIVED

Jul 15 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

IN THE COURT OF
COMMON PLEAS
15th Judicial Circuit

Benjamin H. Culbertson, Circuit Court Judge
H. Steven DeBerry, IV, Circuit Court Judge

CASE NO.: 2023-CP-26-02475

Appellate Case No. 2024-000440

Nicholas F. Wilson,

Appellant,

v.

Janet P. Gochenour; Janet P. Gochenour Trustee; James B. Parker;

James B. Parker, Sr.; Mary Ann Parker; Kenneth Gregory Moore; R&G Corp., d/b/a

Century 21 The Harrelson Group; Patton Development SC, LLC; Flagstar Bank, N.A.;

Sonia M. Raymond; and Raymond Law Firm, P.A.,

Respondents.

PROOF OF SERVICE

On behalf of Appellant Nicholas F. Wilson, the undersigned hereby certifies that on July 15, 2024, Appellant's Return to Respondents Sonia M. Raymond and Raymond Law Firm, P.A.'s Motion to Dismiss, Filed June 26, 2024, was served on all counsel of record and the Court of Appeals Clerk of Court via E-File/ Email/ Hand-Delivery as follows:

The Hon. Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211
ctappfilings@sccourts.org

William James Luse - bill@getlusenow.com
Law Office of William J. Luse
917 Broadway Street
Myrtle Beach SC 29577
843-839-4795

Counsel to Defendants / Respondents Janet P. Gochenour; Janet P. Gochenour Trustee;

James B. Parker (pro se); James B. Parker, Sr.(pro se); Mary Ann Parker (pro se);
919 Waterton Avenue
Myrtle Beach SC 29579

Claude Townsend Prevost, III - cprevost@collinsandlacy.com
Joseph Lucas Richardson - lrichardson@collinsandlacy.com
Collins & Lacy, PC
P.O. Box 12487 (29211)
1330 Lady Street
Columbia SC 29201
803-256-2660

Counsel to Defendants / Respondents Kenneth Gregory Moore and R&G Corp., d/b/a Century 21
The Harrelson Group;

Alexander Hray - lex@lexhray.com
389 E. Henry Street., Suite 107
Spartanburg SC 29302
864-342-1111

Counsel to Defendant / Respondent Patton Development SC, LLC;

Matthew Douglas Patterson - matt.patterson@nelsonmullins.com
Blake T. Williams - blake.williams@nelsonmullins.com
Nelson Mullins Riley & Scarborough, LLP
1320 Main Street, 17th Floor (29201)
P.O. Box 11070
Columbia SC 29201
803-799-2000

Counsel to Defendant / Respondent Flagstar Bank, N.A.;

Rhett Douglas Ricard - RRicard@maynardnexsen.com
Robert Bruce Wallace - [BWallace@maynardnexsen.com](mailto:Wallace@maynardnexsen.com)

Maynard Nexsen
205 King Street, Suite 400
P.O. Box 486 (29402)
Charleston SC 29401
843-577-9440

Counsel to Defendants / Respondents Sonia M. Raymond and Raymond Law Firm, P.A.

/s/Cassy Young
Cassy Young

July 15, 2024
Columbia, South Carolina

WESLEY D. FEW, LLC

Attorney at Law

P.O. Box 9398, Greenville, South Carolina 29604

www.wesleyfew.com | wes@wesleyfew.com

O: 864-527-5906 | M: 864-404-7792

RECEIVED

Jul 15 2024

SC Court of Appeals

July 15, 2024

Via E-File:

The Hon. Jenny Abbott Kitchings, Clerk of Court

South Carolina Court of Appeals

P.O. Box 11629

Columbia, South Carolina 29211

ctappfilings@sccourts.org

RE: Nicholas Wilson v. Janet P. Gochenour; Janet P. Gochenour Trustee et al
Case No.: 2023-CP-26-02475
Appellate Case No. 2024-000440
Our File No.: 00334-001

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Return to Respondents Sonia M. Raymond and Raymond Law Firm, P.A.'s Motion to Dismiss, Filed June 26, 2024, and Proof of Service for same.

Sincerely Yours,



Wesley D. Few

Enclosures

WDF/cgy

CC: Counsel of Record (*Via E-File*)
Pro Se Defendants (*Via U.S. Mail*)
Client (*Via email*)