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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court Of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2023-CP-26-06249, Circuit Court
Appeals Court Docket No.: 2024-000871

Horry Georgetown Technical College ..... Appellant,

v.

Claycon Pharma RE, LLC, Pathway Treatment Center, LLC,
Pathway Clinic, LLC, and City of Conway .....Respondents.

APPELLANT'S FINAL BRIEF

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Kenneth A. Davis (SC Bar No. 66416)
Tierney F. Goodwyn (SC Bar No. 102035)
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STATEMENT OF THE CASE

This matter is an appeal of the circuit court's order dismissing *with* prejudice Appellant Horry-Georgetown Technical College's (hereinafter "HGTC" or "Appellant") action seeking an order declaring as follows:

- That Unified Development Ordinance ("UDO") 5.1.32(B) is not preempted by S.C. Code Ann. § 44-7-78, S.C. Code Ann. Regs.;
- That HGTC's facility, located at 250 Allied Drive, Conway, SC 29526 ("HGTC's Facility"), is a "public or private educational facility" within the meaning of UDO 5.1.32(B)(3)(b);
- That no variance has been granted from UDO 5.1.32(B) that would allow Respondent Claycon Pharma RE, LLC, Pathway Treatment Center, LLC and Pathway Clinic LLC (hereinafter collectively referred to as "Claycon"), to establish an outpatient treatment facility at 1800 Husted Road, Conway, SC 29526. Alternatively, to the extent any variance to that effect was granted, that such a variance is unlawful under S.C. Code Ann. Regs. 61-93.2624;
- That HGTC's facility, located at 250 Allied Drive, Conway, SC 29526, is a "public or private educational facility" within the meaning of S.C. Code Ann. Regs. 61-93.2624;
- That no opioid treatment facility may be established at 1800 Husted Road, since establishing such a facility would be unlawful under S.C. Code Ann. Regs. 61-93.2624; and
- That injunctive relief be granted in favor of HGTC preventing Claycon or any of its members from establishing an opioid treatment facility on the property located at 1800 Husted Road, Conway, SC 29526.

See Complaint dated 10/10/2023. (ROA, pp. 19-29). Claycon, as a real party in interest, was named in this action, along with Respondent City of Conway (hereinafter the "City"), as further detailed below.

The circuit court ruled that HGTC's action against Claycon should be dismissed *with* prejudice because it found that HGTC did not have standing to bring this Action against Claycon. Accordingly, the circuit court denied HGTC's request to amend its Complaint and request for dismissal *without* prejudice. The facts surrounding this matter are further set forth below.

On October 10, 2023, HGTC filed its Complaint against Claycon seeking to prevent Claycon from establishing an opioid treatment center at 1800 Husted Road, Conway, SC 29526. See Complaint dated 10/10/2023. (ROA, pp. 19-29). On October 12, 2023, HGTC amended its Complaint to add the City as a defendant. See Amended Complaint dated 10/12/2023. (ROA, pp. 30-40). On December 4, 2023, Claycon filed a Motion to Dismiss. See Claycon's Motion to Dismiss dated 12/4/2023. (ROA, pp. 41-47). On March 15, 2024, HGTC filed a Memorandum in Opposition of Claycon's Motion to Dismiss. See HGTC's Memo in Opposition of Claycon's Motion to Dismiss dated 3/15/2024. (ROA, pp.53-59).

On March 26, 2024, Claycon's Motion to Dismiss was heard by the Honorable Benjamin H. Culbertson (the "Hearing"). After hearing arguments from all parties, the circuit court ruled in favor of Respondent. In issuing the ruling, the circuit court stated as follows:

> [Claycon's counsel], if I can get you to prepare an order that grants the motion to dismiss *for the reasons that you set forth*. [HGTC] is not, by statutory definition, a secondary school. Now, *I don't know* if this [HCS Early College High School (hereinafter "HCS")] is a separate entity that is a secondary high school or not. If it is and they may be able – that school might be able to come forward and assert its right. *I don't know* that [HGTC] has the right to assert that on behalf of [HCS]. I suspect that, like you argue, [Claycon's counsel], that this is not a separate high school, but it is a program within [HGTC] that allows high school students to come for some educational courses. But it does not – it is not a separate high school that gives its own diploma, has its own graduation, has its own administration, its own principal, its own set of teachers and things of that nature. *It may be* and if it does exist and *I've just never heard of it*, then [HCS], *I don't know what that does*. Whether they can come forward and assert it just like the church has not come forward and contested it. But put in your order that one of [HGTC's] arguments was that there is a separate high school on the college campus that is called [HCS] and my decision is that [HGTC] does not have standing to assert the relief that [HCS] might have in this case.

See p. 19, Line 18 through p. 20, Line 20, Hearing Transcript recorded 3/26/2024 (emphasis added). (ROA, pp.116-117).

The circuit court dismissed *with* prejudice HGTC's claim against Claycon. See p. 21, Lines 2-6, Hearing Transcript recorded 3/26/2024 (emphasis added). (ROA, p. 118). Following

the March 26, 2024, Hearing, the Court entered a Form 4 Order, dated March 26, 2024, granting Claycon's Motion to Dismiss and instructed Claycon's counsel to prepare a formal Order. See Form 4 Order dated 3/26/2024. (ROA, pp. 1-3).

On April 5, 2024, HGTC filed a Motion to Reconsider and Motion for Leave to Amend its Complaint in response to the March 26, 2024, Form 4 Order. On April 26, 2024, the circuit court entered its Order granting Claycon's Motion to Dismiss. (ROA, pp. 4-15). Specifically, the circuit court ruled as follows:

> [HGTC] generically asked the Court at the hearing whether it could amend the Complaint. In its Motion to Reconsider, [HGTC] makes the same generic request. However, at no point has [HGTC] presented to the Court any proposed changes that would cure the identified deficiencies. . . . Here, the issue is futility. Futility is a main reason for denying the opportunity to amend. Even though not made by [HGTC], a [circuit] court may deny a motion to amend if the amendment would be clearly futile. . . . [HGTC] has not offered any allegations or facts to show that it does not contain grades higher than twelfth. Therefore, any motion to amend would be futile.

See p. 11, n.8, Order Granting Claycon's Motion to Dismiss dated 4/26/2024. (ROA, p.14) On April 26, 2024, after entry of the formal Order, HGTC simultaneously filed its Amended Motion to Reconsider and Motion for Leave to Amend its Complaint. See HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, pp. 65-88).

On May 24, 2024, Claycon filed its Memorandum in Opposition of HGTC's Motion to Reconsider, Amended Motion to Reconsider and Motion for Leave to Amend Complaint. (ROA, pp. 89-92). Thereafter, on May 28, 2024, HGTC filed its Notice of Appeal with this Court. (ROA, pp. 93-97). On June 4, 2024, the Court, in a Form 4 Order, denied HGTC's Motion to Reconsider and Motion for Leave to Amend Complaint finding that:

> On 5/28/2024, the [P]laintiff filed a Notice of Appeal in this case, appealing this Court's "Order Granting Defendants Claycon Pharma Conway RE, LLC, Pathway Treatment Center, LLC, and Pathway Clinic, LLC's Motion to Dismiss or Judgment [o]n the Pleadings" filed 4/26/2024. Therefore, this Court does not have jurisdiction to rule upon the [D]efendants' Motion for Leave to Amend

Complaint" filed 4/5/2024 or "Amended Motion to Reconsider and Motion for Leave to Amend Complaint" filed 4/26/2024.

See Form 4 Order dated 6/4/2024. (ROA, pp.16-18).

STATEMENT OF THE FACTS

HGTC is a technical college, which also has an educational facility providing services to high school students, located at 250 Allied Drive, Conway, SC 29526 ("HGTC's Facility"). See p. 1, ¶ 3, HGTC's Memo in Opposition of Claycon's Motion to Dismiss dated 3/15/2024. (ROA, pp.53-59). At this location, HGTC provides courses in welding, plumbing and other manufacturing-related trades. Id. These courses are attended by students from various high schools throughout the County as part of a dual enrollment program. Id. Importantly, HCS is a state-recognized high school which enrolls students from grades nine (9) through twelve (12). Id. at p. 1, ¶ 3 through p. 2, ¶ 4. HCS's main campus is located on HGTC's main campus at 2050 US-501, Conway, SC 29526.

Claycon intends to open an opioid treatment center at 1800 Husted Road, Conway, SC 29526. Id. at p. 2, ¶ 2. 1800 Husted Road is approximately 250 feet from HGTC's Facility. Id. The City has enacted UDO § 5.1.32(B), which requires a 1,000-foot buffer between outpatient treatment facilities for drug or alcohol abuse and public . . . educational facilities. Id. at p. 2, ¶ 3. UDO § 2.2.1 defines educational facilities as "[a]ny building or part thereof which is designed, constructed, or used for education or instruction in any branch of knowledge and meets state requirements for . . . secondary education." Id.

On May 25, 2023, the City of Conway Board of Zoning Appeals granted Claycon a variance, allowing the operation of an outpatient treatment facility within 1000 feet of a religious institution. Id. at p. 2, ¶ 4. The order granting the variance states, "this Order does not determine whether any existing land use (including but not limited to any HGTC use) within the 500-foot

buffer requirement now applicable to the Property under UDO § 5.1.32(B)(3)(b) is or is not a Protected Use." Id.

Additionally, the South Carolina Department of Health and Environmental Control ("SCDHEC") has promulgated S.C. Code Ann. Regs. § 61-93.2624(D) (2020), regulating the operation of opioid treatment centers. In particular, the regulation provides that:

> Facilities providing an Opioid Treatment Program shall not operate within five hundred (500) feet of:
>
> 1. The property line of a church;
> 2. The property line of a public or private elementary or secondary school;
> 3. A boundary of any Residential district;
> 4. A public park adjacent to any Residential district; or
> 5. The property line of a lot devoted to Residential use.

S.C. Code Ann. Regs. § 61-93.2024(D) (2020).

HCTC filed a Complaint for Declaratory Relief on October 10, 2023, seeking to prevent Claycon from establishing an opioid treatment center at 1800 Husted Road. See p. 3, ¶ 1, HGTC's Memo in Opposition of Claycon's Motion to Dismiss dated 3/15/2024. (ROA, p.55). Thereafter, on October 12, 2023, HCTC amended its Complaint for Declaratory Relief to add the City of Conway as a defendant. See Amended Complaint dated 10/12/2023. (ROA, pp. 30-40). Claycon filed its motion to dismiss on December 4, 2023. See Claycon's Motion to Dismiss dated 12/4/2023. (ROA, pp. 41-47).

STANDARD OF REVIEW

I. MOTION TO DISMISS

"In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the [circuit] court should consider only the allegations set forth on the face of the plaintiffs complaint." Plyler v. Burns, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (S.C. 2007) (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (S.C. 1995)). "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." Plyler at 645, 647 S.E.2d at 192 (quoting Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (S.C. 1987)). "Pleadings in a case should be construed liberally so that substantial justice is done between the parties." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (S.C. Ct. App. 2010). The Court must deny a motion to dismiss under Rule 12(b)(6) if "'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.'" Plyler at 645, 647 S.E.2d at 192. If any valid claim is found, the motion to dismiss must be denied. Moreover, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Id.

II. STATUTORY CONSTRUCTION

"Questions of statutory interpretation are questions of law, which [the appellate court] is free to decide without any deference to the tribunal below." See Rent-A-Center East, Inc. v. S.C. Dep't of Revenue, 425 S.C. 582, 587, 824 S.E.2d 217, 219 (S.C. Ct. App. 2019) (quoting Duke Energy Corp. v. S.C. Dep't of Revenue, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (S.C. 2016). In particular, it is settled law that determining the proper interpretation of a statute is a question of law, and South Carolina courts review questions of law de novo. See State Farm Mut. Auto. Ins. Co. v. Windham, 438 S.C. 156, 159, 882 S.E.2d 754, 756 (S.C. 2022) (quoting Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (S.C. 2008)). Similar to questions of law surrounding statutes, regulations are interpreted using the same rules of construction as statutes. See Murphy v. S.C. Dep't of Health & Envtl. Control, 396 S.C. 633, 639, 723 S.E.2d 191, 195 (S.C. 2012).

ARGUMENT

A. THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE HGTC HAS STANDING PURSUANT TO S.C. CODE ANN. § 15-53-10 AND THE PUBLIC IMPORTANCE EXCEPTION.

In this case, the circuit court erred in granting Claycon's Motion to Dismiss. Specifically, HGTC has standing to request a declaratory judgment finding that it is an "education facility" within the meaning of S.C. Code Ann. § 15-53-10, UDO § 5.1.32(B) and S.C. Code Ann. Regs. § 61-93.2624. In addition, HGTC has standing pursuant to the public importance exception.

i. THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE HGTC HAS STANDING PURSUANT TO THE PLAIN LANGUAGE OF S.C. CODE ANN. § 15-53-10 BY WAY OF A DEED ESTABLISHING OWNERSHIP.

The circuit court erred in granting Claycon's Motion to Dismiss because HGTC has standing pursuant to the plain language of S.C. Code Ann. § 15-53-10 by way of a deed establishing ownership of property to be impacted by the opioid facility. The South Carolina Supreme Court has held that "[s]tanding, a fundamental prerequisite to instituting an action, may exist by statute, through the principles of constitutional standing, or through the public importance exception." Youngblood v. S.C. Dep't of Soc. Servs., 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013). Section 15-53-10 of the Uniform Declaratory Judgments Act provides in pertinent part that:

> [a]ny person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-10.

In this case, during the Hearing, the circuit court *sua sponte* raised the issue of HGTC's standing to bring this Action, and further ruled that HGTC lacked standing to bring this Action. See p. 2, ¶ 1, HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, p. 66). Notwithstanding the circuit court's ruling, pursuant to S.C. Code

Ann. § 15-53-10, HGTC has statutory standing to bring this declaratory judgment action. See S.C. Code Ann. § 15-53-10. HGTC is an interested party, by way of a deed establishing ownership, seeking to have its legal status determined under a municipal ordinance, as further detailed below.

HGTC is the owner of the properties located at 250 Allied Drive, Conway, SC 29526, and HGTC's main campus. See p. 2, ¶ 3, HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, p. 66). In this Action, HGTC seeks a declaratory judgment finding that its property located at 250 Allied Drive, Conway, SC 29526, is an "education facility" within the meaning of UDO § 5.1.32(B). Id. Pursuant to those deeds, HGTC has an interest in its legal status as an "education facility." Id. Having therefore shown that it is a party, interested under a deed, HGTC seeks to have this Court overturn the circuit court's ruling and remand the matter to allow the development of requisite record in order to determine the effect of UDO § 5.1.32(B) on HGTC's high school.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

ii. ADDITIONALLY, THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE HGTC HAS STANDING UNDER THE PUBLIC IMPORTANCE EXCEPTION.

Additionally, the circuit court erred in granting Claycon's Motion to Dismiss because HGTC has standing under the public importance exception. The public importance exception states that "standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance." ATC S., Inc. v. Charleston Cty., 380 S.C. 191, 198, 669 S.E.2d 337, 341 (S.C. 2008).

The South Carolina Supreme Court has held that "a party is not required to show [it] has suffered a concrete or particularized injury in order to obtain public importance standing." S.C.

Pub. Interest Found. v. S.C. DOT, 421 S.C. 110, 118, 804 S.E.2d 854, 858 (S.C. 2017). A party is also not required to show that it "has an interest greater than other potential plaintiffs." Id. In setting the balancing test for determining public importance standing, the South Carolina Supreme Court has found as follows:

> An appropriate balance between the competing policy concerns underlying the issue of standing must be realized. Citizens must be afforded access to the judicial process to address alleged injustices. On the other hand, standing cannot be granted to every individual who has a grievance against a public official. Otherwise, public officials would be subject to numerous lawsuits at the expense of both judicial economy and the freedom from frivolous lawsuits.

Id. at 118, 804 S.E.2d at 859.

Additionally, the South Carolina Supreme Court has held that "[t]he key [to finding a public interest standing] . . . is whether a resolution is needed for future guidance." Id. at 119, 804 S.E.2d at 859. Notably, "[a] further indicator of [an] issue's [public] importance is that . . . a decision on the merits of the issue may have far-reaching . . . consequences for the safety of . . . [South Carolina] citizens." Id. (internal quotations omitted). Importantly, "[f]or a court to relax general standing rules, the matter of [public] importance must, in the context of the case, be inextricably connected to the public need for court resolution for future guidance." ATC S. at 199, 669 S.E.2d at 341.

Public education of high-school students is immensely important to the public at-large. Here, a state-recognized high school, HCS, is located on HGTC's main campus and its students attend classes at the 250 Allied Drive location. See p. 3, ¶ 2, HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, p. 67). HGTC brought this Action to ascertain its legal status as an "educational facility" in order to determine whether high school students on its campus are entitled to the same level of protection as other high school students. Id.

Significantly, and despite Respondent's argument during the Hearing, HCS and dual enrollment are not the same and such a comparison is inapplicable in this case. Id. at p. 3, ¶ 3. Dual enrollment is a program where students enrolled in *various high schools* throughout the county take college classes at HGTC. See HGTC, Pace Dual Enrollment FAQ, https://www.hgtc.edu/academics/high_school_programs/pace/faq.html (last visited 4/5/2024); see also p. 3, ¶ 3, HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, p. 67).

HCS's students are members of the public and will be adversely impacted by Claycon's proposed opioid treatment center being so near HCS. The Court's decision in this case will determine future guidance related to the question of how close drug treatment centers may be situated in proximity to educational facilities. A reversal of the circuit court's decision to dismiss HGTC's Complaint is necessary to afford HGTC and other educational facilities the same protection to its high school students on its campus as those of other high school students.

Moreover, HCS is a secondary school, recognized by the South Carolina Department of Education ("SCDOE"). Id. at p. 3, ¶ 4. HCS's main campus is located on the main campus of HGTC. Id. Students enrolled in HCS are in grades nine (9) through twelve (12), are enrolled in high school courses and receive Carnegie units,[1] which are required by SCDOE for high school students to graduate. Id. HCS students may also enroll in college courses as their circumstances permit. Id. Finally, HCS students attend certain classes at HGTC's facilities, including the facility at 250 Allied Drive. Id.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

[1] "South Carolina uses a 'Carnegie unit' to measure the volume of credits a student must acquire to qualify for a high school diploma. To graduate, a student must accumulate 24 Carnegie units of credit." Moss v. Spartanburg Cty. Sch. Dist. No. 7, 775 F. Supp. 2d 858, 864 n. 2 (4th Cir. 2011) (citing 43 S.C. Regs. 234).

B. ALTERNATIVELY, THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE THE CIRCUIT COURT IMPROPERLY DISMISSED HGTC'S COMPLAINT *WITH* PREJUDICE AND IMPROPERLY DETERMINED THAT AMENDMENT OF HGTC'S COMPLAINT WOULD HAVE BEEN FUTILE.

The circuit court erred in granting Claycon's motion to dismiss because (a) the circuit court erred in dismissing HGTC's complaint *with* prejudice; and (b) the circuit court erred by determining that amendment of HGTC's complaint would have been futile.

i. THE CIRCUIT COURT ERRED IN DISMISSING HGTC'S COMPLAINT *WITH* PREJUDICE.

The circuit court erred in dismissing HGTC's complaint *with* prejudice because the court should have granted HGTC leave to amend its Complaint, as further detailed below.

Dismissal of a case *without* prejudice "means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. In contrast, a dismissal with prejudice is intended to bar relitigation of the same claim." McEachin v. Black, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (S.C. Ct. App. 1998). A dismissal *with* prejudice "operates as an adjudication on the merits terminating the action and concluding the rights of the parties." Freeman v. McBee, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (S.C. Ct. App. 1984).

In this case, the circuit court erred in dismissing HGTC's Complaint *with* prejudice. HGTC's case had not moved past the initial pleadings when the circuit court granted Claycon's Motion to Dismiss. The parties had not developed a factual record to adjudicate the merits of HGTC's claims. HGTC requested twice that the circuit court grant it leave to amend. See HGTC's Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/5/2024 (ROA, pp. 60-64); see also HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, pp. 65-88).

However, because of the circuit court's ruling, the action ended abruptly, terminating HGTC's right to pursue its claims. At a minimum, the circuit court should have dismissed the Complaint *without* prejudice, thus allowing HGTC to address those parts of its Complaint which may have been in need of adjustment in order to avoid the granting of a motion to dismiss. As such, dismissal *with* prejudice was inappropriate and cut off HGTC's ability to seek redress from the court.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

ii. THE CIRCUIT COURT ERRED BY DETERMINING THAT AMENDMENT OF HGTC'S COMPLAINT WOULD HAVE BEEN FUTILE.

The circuit court erred by determining that amendment of HGTC's complaint would have been futile because, as the circuit court acknowledged, amendment of HGTC's Complaint to include HCS may have changed the outlook of this case and, thus, would not have been futile.

The South Carolina Supreme Court has held that "[w]hen a [circuit] 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." Skydive Myrtle Beach v. Horry Cty., 426 S.C. 175, 179, 826 S.E.2d 585, 587 (S.C. 2019) (internal quotations omitted). As held by our Supreme Court, "Rule 15(a) 'strongly favors amendments and the court is encouraged to freely grant leave to amend.'" Id. at 180, 826 S.E.2d at 587 (quoting Patton v. Miller, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (S.C. 2017)).

Although "[a circuit] court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion," the circuit court's "decision to [do so] should not be based on the court's perception of the merits of an amended complaint."

Skydive at 182, 826 S.E.2d at 588-89. The Rules of Civil Procedure and caselaw indicate that motions to amend a complaint should be liberally granted. It is only in those *rare cases* where a circuit court genuinely finds that amendment would be an exercise in futility, may a court properly deny a motion to amend. Id. at 182, 826 S.E.2d at 589 (emphasis added).

In this case, the circuit court incorrectly held that granting HGTC leave to amend its Complaint would be futile. See p. 11, n.8, Order Granting Claycon's Motion to Dismiss dated 4/26/2024. (ROA, p. 14). Specifically, the circuit court's reasoning for not allowing HGTC to amend its Complaint was that HGTC had not offered any allegations or facts to show that it does not contain grades higher than twelve. Id. This is not accurate.

Importantly, the circuit court acknowledged a material question of fact in the existence of HCS and its relationship to HGTC – whether HCS was in fact a bona fide secondary school operating on the campus of HGTC. See p. 19, Lines 18-20, Hearing Transcript recorded 3/26/2024. (ROA, p. 116). The circuit court cited the case Jennings v. Jennings in support of its ruling that allowing HGTC to amend its Complaint would be futile. See p. 11, n.8, Order Granting Claycon's Motion to Dismiss dated 4/26/2024. (ROA, p. 14) The Court in Jennings based its rationale on the fact that amendment of the plaintiff's complaint to add a third-party as a defendant would have been futile because the third-party would have been entitled to summary judgment the same as the named defendants. See Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671, 680 (S.C. Ct. App. 2010). Here, HCS would have been added as a plaintiff and would have made some difference in the outlook of this case, as the circuit court itself acknowledged. See p. 19, Lines 18-20, Hearing Transcript recorded 3/26/2024. (ROA, p. 116). As such, given HGTC's proprietary interest in the properties at issue and the implications of

HCS's existence on the properties' status as an "educational facility," a dismissal *with* prejudice at the pleading stage is premature.

At the Hearing, Claycon introduced documents and exhibits that reached beyond the pleadings. See p. 5, ¶ 1, HGTC's Amended Motion to Reconsider & Motion for Leave to Amend Complaint dated 4/26/2024. (ROA, p. 69). Significantly, HGTC was not given an adequate opportunity to assess the outside documents and develop theories articulating allegations or facts in response. Id. Had HGTC been given an adequate opportunity to review and assess Claycon's documents and exhibits, HGTC could have presented arguments and evidence that would have addressed the grades existing at HGTC's secondary school.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

C. THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE THE COURT RELIED ON DOCUMENTS OUTSIDE OF THE PLEADINGS.

The circuit court erred in granting Claycon's Motion to Dismiss because the court relied on documents outside of the pleadings. The circuit court improperly allowed Claycon to introduce into the Hearing documents that were outside the pleadings as they existed at the time. The circuit court thereafter relied on Claycon's documents to support its granting of Claycon's Motion to Dismiss. Such reliance by the court on documents not a part of the original pleadings effectively converted Claycon's Motion to Dismiss into a Motion for Summary Judgment. As a result, HGTC was entitled under Rule 56, SCRCP to an opportunity to present its own evidence in support of its case in order to establish the basis for a denial of Claycon's converted motion for summary judgment.

"In considering a 12(b)(6) motion, the [circuit] court must base its ruling solely upon the allegations set forth on the face of the complaint." Brazell v. Windsor, 384 S.C. 512, 516, 682

S.E.2d 824, 826 (S.C. 2009). "However, on a 12(b)(6) motion, if matters outside of the pleading are presented to and not excluded by a court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, SCRCP, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion by Rule 56." Id. For summary judgment to be granted, the evidence and pleadings must show that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

During the March 26, 2024, Hearing, Claycon introduced documents in support of its Motion to Dismiss. The documents consisted of a map, a course listing from HCS, and promotional materials issued by HGTC. See p. 5, Lines 10-16, 22-24, p. 6, Lines 2-8, & p. 7, Line 22 through p. 8, Line 6, Hearing Transcript recorded 3/26/2024. (ROA, pp.102, 103, 104-105). The circuit court further ventured outside of the pleadings by referencing HGTC's website in the court's Order Granting Defendants Motion to Dismiss. See p. 6, ¶ 4, Order Granting Motion to Dismiss dated 4/26/2024. (ROA, p. 9). These materials were not contained in the pleadings, and therefore, should not have been relied upon by the circuit court. At a minimum, the circuit court should have continued the Hearing to allow HGTC the chance to review Claycon's documents as well as allowing HGTC the opportunity to present its own evidence to support its argument for denial of Claycon's Motion to Dismiss.

Accordingly, the Court erred by issuing definitive rulings regarding the merits of HGTC's causes of action while considering documentary evidence that was not contained in the pleadings and without giving HGTC a reasonable opportunity to review Claycon's documents and to introduce evidence of its own.

Additionally, the Court instructed Defendants' Counsel to draft the Order Granting Defendants' Motion to Dismiss while specifically instructing Defendants' Counsel to include an acknowledgement that HGTC raised the existence of HCS in its Memorandum and during the Hearing. See p. 20, Lines 15-20, Hearing Transcript recorded 3/26/2024. (ROA, p. 117). Importantly, the Court acknowledged that HCS's status as a high school was unknown. Id. at p. 19, Lines 18-20. (ROA, p. 116). The Court further expounded that if HCS was in fact a high school, it would have standing to bring this Action. Id. at p. 19, Line 25 through p. 20, Line 1. There is no mention of HCS in the Order Granting Defendants' Motion to Dismiss. See Order Granting Motion to Dismiss dated 4/26/2024. (ROA, pp. 4-15).

HCS's presence *on the property of HGTC* necessarily effects the status of HGTC's properties at issue under UDO § 5.1.32(B) and S.C. Code Ann. Regs. § 61-93.2624. The Court's acknowledgement of the uncertainty regarding HCS's status constitutes a genuine issue of material fact which renders summary judgment improper. HCS is a state-recognized high school. See p. 14, Line 20 through p. 16, Line 17, Hearing Transcript recorded 3/26/2024. (ROA, pp. 111-113). Because it is a genuine issue of fact and the Court did not allow HGTC a reasonable opportunity to produce evidence of HCS's legal status, it would be improper to grant summary judgment.

Therefore, HGTC requests that the Court alter the judgment to eliminate any ruling that HGTC is not a public education facility within the meaning of UDO 5.1.32(B). HGTC further requests that this Court revise the circuit court's judgment to eliminate any ruling that HGTC is not a public secondary school within the meaning of S.C. Code Ann. Regs. 61-93.2624.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

D. THE CIRCUIT COURT ERRED IN GRANTING CLAYCON'S MOTION TO DISMISS BECAUSE, IF HGTC LACKED STANDING TO BRING THIS ACTION, THEN THE CIRCUIT COURT LACKED SUBJECT MATTER JURISDICTION TO HEAR THIS MATTER.

The circuit court erred in granting Claycon's Motion to Dismiss because, if HGTC lacked standing to bring this Action, then the circuit court lacked subject matter jurisdiction to hear this matter.

The South Carolina Supreme Court has held that "[a] motion to dismiss for lack of standing challenges the court's subject matter jurisdiction." See S.C. Pub. Interest Found v. Wilson, 437 S.C. 334, 878 S.E.2d 891 (2022); see also Bardoon Props., NV v. Eidolon Corp., 326 S.C. 166, 169 485 S.E.2d 371, 372 (1997) ("We have previous indicated that a party's lack of standing as a real party in interest deprives a court of subject matter jurisdiction."). "Subject matter jurisdiction is 'the power to hear and determine cases of the general class to which the proceedings in question belong.'" Dove v. Gold Kist, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). Additionally, the South Carolina Supreme Court has held that "[a] court lacking subject matter jurisdiction, however, has no authority to act. . . ." Id. at 238, 442 S.E.2d at 600.

Therefore, if HGTC lacks standing to bring this Action, the circuit court necessarily lacks subject matter jurisdiction and, thus, cannot rule on the merits of any of HGTC's claims. HGTC, in its Second Cause of Action, seeks a declaratory judgment "finding that HGTC's Facility, located at 250 Allied Drive, is a 'public or private educational facility' within the meaning of UDO 5.1.32(B)(3)(b)." See p. 5, ¶ 27, Amended Complaint dated 10/12/2023. (ROA, p. 36). In its Third Cause of Action, HGTC seeks "a declaratory judgment finding that there has been no variance granted from UDO 5.1.32(B) allowing [Claycon] to establish an outpatient treatment facility within 1000 feet of an educational facility." Id. at p. 6, ¶ 30. In its Fourth Cause of Action, HGTC seeks "a declaratory judgment finding that HGTC's Facility, located at 250

Allied Drive, is a public or private secondary school within the meaning of S.C. Code Ann. Regs. 61-93.2624 (2020)." Id. at p. 6, ¶ 33.

In the Order Granting Defendants Motion to Dismiss, the Court rules on HGTC's Second Cause of Action and Third Cause of Action together, finding that "neither is possible based on the clear and unambiguous language in the applicable ordinances." (See p. 10, ¶ 1, Order Granting Motion to Dismiss dated 4/26/2024). (ROA, p.13). As to HGTC's Fourth Cause of Action, the Court ruled that it "cannot grant this requested relief based on clear statutory language." (See id. at p. 10, ¶ 4). Both of these rulings address the merits of HGTC's claim. However, if HGTC lacks standing to bring this Action, this court lacks subject matter jurisdiction to make these rulings. Accordingly, HGTC asks that this Court alter the circuit court's judgment to remove any rulings on the merits of HGTC's claims.

Accordingly, the Court should reverse the circuit court's dismissal of HGTC's claims and remand this case back to the circuit court for further factual determination.

CONCLUSION

For the reasons set forth above and those stated in the Initial Brief of Appellant, we respectfully request that this Court reverse the circuit court's dismissal of Appellant's claims and remand this case back to the circuit court for further factual determination.

Respectfully Submitted,

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September 27, 2024
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court Of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2023-CP-26-06249, Circuit Court
Appeals Court Docket No.: 2024-000871

Horry Georgetown Technical College ..... Appellant,

v.

Claycon Pharma RE, LLC, Pathway Treatment Center, LLC,
Pathway Clinic, LLC, and City of Conway .....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **APPELLANT'S FINAL BRIEF** contains no matter which is irrelevant to the appeal.

Dated this 27th day of September 2024.

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