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**SC Court of Appeals**

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas, 15<sup>th</sup> Circuit

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

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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 REPLY TO RESPONDENTS SONIA M. RAYMOND  
AND RAYMOND LAW FIRM, P.A.'S INITIAL BRIEF**

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## **REPLY**

For the reasons set forth below and in Appellant’s Initial Brief and Return in Opposition to Respondents Sonia M. Raymond and Raymond Law Firm, P.A. (“Respondents”) Motion to Dismiss Appeal, the orders of the lower court denying Appellant substantive relief, including specifically denying Appellant’s Motion to Amend under Rule 15, SCRCP (filed Dec. 5, 2023), should be reversed and this matter remanded for further proceedings.

Appellant herein addresses arguments of Respondents Sonia M. Raymond and Raymond Law Firm, P.A. (“Respondents”) in the order set forth in Respondents’ Initial Brief (“Resp. I.B.”), and with reference to the four (4) issues identified therein.

### **I. Statute of Limitations**

Appellant filed his Summons and Verified Complaint on April 19, 2023. (Verified Complaint). Respondents Sonia M. Raymond and Raymond Law Firm, P.A. (“Respondents”) rely upon “constructive notice,” of the undisputed defect in the deed recorded on March 6, 2020. (Resp. I.B. at pp. 10-12). The deed at issue was the subject of Respondents’ engagement to provide real estate closing services to Appellant. As such, Respondent had the highest of duties, namely a fiduciary duty, to Appellant to ensure the deed was properly prepared in accordance with the Contract of Sale (Verified Complaint at ¶¶’s 22-25) and recorded.

As set forth in Appellant’s Verified Complaint, “Plaintiff relied on the Original Survey,” and “Plaintiff was never informed by anyone that the Original Survey was not the survey that would be recorded to show the Property he was to receive from Janet under their Contract.” (Verified Complaint, at ¶¶’s 42-43; *see also* ¶¶’s 87, 98, 118). As was further and more specifically set forth in Appellant’s proposed Amended Verified Complaint, Respondents did not

provide Appellant with a copy of the deed, title policy or [substituted] plat until May 7, 2020, at the earliest. (proposed Amended Verified Complaint, at ¶¶'s 42-43; *see also* Exhibits 4 and 5). Exhibit 5 to the proposed Amended Verified Complaint shows Respondents mailed Appellant a copy of his “Deed” and “Owner’s Title Policy,” on May 7, 2020.<sup>1</sup>

Respondents acknowledge the “discovery rule” applies to this factual situation. (Resp. I.B. at p. 10, ¶ 2). Without citation to any authority, Respondents assert / declare, “the statute of limitations runs from the date of filing of the deed, March 6, 2020.” (Resp. I.B. at p. 12, ¶ 3). This argument, restated, is Appellant, or any objectively reasonable and diligent person, “should” have gone down to the Horry County RMC office on the date of the closing to search for the deed that his or her closing attorney failed to provide him a “copy” while at their offices for the closing.

Such a declaration makes no provision for the legal standards applicable to a “discovery rule” analysis, namely that the “statute begins to run when a reasonable plaintiff knew or should have known about the alleged negligence.” (Resp. I.B. at p. 10, ¶ 1) (underline emphasis added) (citing Christensen v. Mikell, 324 S.C. 70, 73, 476 S.E.2d 692, 693 (1996)). Such a declaration additionally makes no provision for application of S.C. Code Ann. § 15-3-535, which states a cause of action for legal malpractice “must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.” Id. (underline emphasis added).” (App. I.B. at p. 9, ¶ 3).

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<sup>1</sup> In Respondents’ Initial Brief at pp. 9-10, it is stated “Appellant would have known the contents of the deed had he examined them.” (Id.). The pleadings establish Appellant was not provided a copy of the deed until May 7, 2020, at the earliest.

Under Respondents' application of the law to the facts in the Verified Complaint and in the proposed Amended Verified Complaint, any closing attorney could fail to show his or her client a deed (or a plat), then record a deed (or a plat) entirely incompatible with the plain meaning of the subject real estate sales contract (*i.e.*, defective), yet the statute of limitations would still run on the date three (3) years from the date the (defective) deed was recorded. As set forth in *Florentine Corp., Inc. v. PEDDA I, Inc.*, 287 S.C. 382, 339 S.E.2d 112 (1985), "[t]he determination of what constitutes reasonable diligence and prudence must be made on a case-by-case basis." *Id.* (underline emphasis added) (cited in *Slack v. James*, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005)).

As noted in Appellant's Initial Brief, in *Slack v. James*, 364 S.C. 609, 615, 614 S.E.2d 636, 639 (2005), "[t]he Court of Appeals properly found a question of fact exists as to whether Buyers' reliance on the misrepresentation was reasonable although the falsity of the alleged misrepresentation could have been ascertained by examining the public records." *Id.* In *Slack*, which also involved a contract for the sale of residential property, the sellers sued for specific performance / breach of the sales contract. *Id.* at 637. In *Slack*, the buyers alleged the seller's real estate agent affirmatively misrepresented the non-existence of any easements, stating as follows, "prior to entering into the written contract, Buyers had asked Sellers' real estate agent whether there were any easements on the property and the agent informed them none existed." *Id.*

The "[b]uyers [then] brought counterclaims against Sellers alleging breach of contract, fraud, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act (UTPA)." *Id.* "The trial court further found Buyers failed to exercise reasonable diligence to protect their interests and had no right to rely on the real estate agent's alleged misrepresentation as to the existence of the sewer line easement." *Id.* at 638. However, "[t]he Court of Appeals

reversed,” (*Id.*), and the South Carolina Supreme Court affirmed the Court of Appeals. *Id.* at 641 (stating, “[w]e find the Court of Appeals properly concluded that whether Buyers’ reliance on the Sellers’ agent’s alleged misrepresentation was reasonable is a question of fact for the jury.”).

Respondents reference several times, but ignore the significance of the Verified Complaint allegation that Appellant “[a]t all times before and after Jan. 23, 2020, Plaintiff made it abundantly clear that he would not purchase the property unless he was going to be deeded the driveway.” (Verified Complaint, at ¶ 46; *see also* ¶¶’s 22, 42-43, 46, and proposed Amended Verified Complaint, at ¶¶’s 42-43, 46, 124). Such silence in either showing or explaining to Appellant he was not getting title to the 8.24 acres he specifically bargained for was a result of Respondents’ gross negligence and breach of fiduciary duty. As was the case in *Moseley*, the contents of the defective deed, as well as the substituted plat, were “peculiarly within the representor’s knowledge.” *Slack v. James*, 356 S.C. 479, 483, 589 S.E.2d 772, 774 (Ct. App. 2003), *aff’d Slack v. James*, 364 S.C. 609, 614 S.E.2d 636 (2005); *see also Reid v. Harbison Dev. Corp.*, 285 S.C. 557, 561, 330 S.E.2d 532, 534 (1985) (noting, when facts “concealed are peculiarly within the representor’s knowledge and the representee is ignorant thereof, ... although the real fact appears on the public records, the representee is under no obligation to examine the records, and his failure to do so does not defeat his right of action.”), *overruled on other grounds, O’Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

Despite Appellant’s well-known position regarding the driveway, Respondents now argue, “the Circuit Court dismissed the Complaint, based on *constructive notice of the recording of the deed on March 6, 2020.*” (Resp. IB at 13 (italics in original)). As shown in Appellant’s Initial Brief and in Appellant’s Return in Opposition to Respondents’ Motion to Dismiss Appeal (filed July 12, 2024), the lower court did not provide any such specifics. Instead, with respect to

the Motion to Dismiss of these Respondents, the subject lower court orders ruling on Respondents' Motion to Dismiss (dated Sept. 8, 2023 and Feb. 7, 2024) stated, respectively, as follows: (i) "Defendant, Raymond Law Firm's Motion to Dismiss is GRANTED. Plaintiff's action is barred by the Statute of Limitations," (Sept. 8, 2023 order), and (ii) "Plaintiff's Motion to Alter or Amend Order Filed Sept. 8, 2023, is DENIED ... This motion is decided on the contents of plaintiff's motion, prior arguments and memorandums of the parties, and letter dated January 29, 2024, from plaintiff's lawyer, without oral arguments." (Feb. 7, 2024 order).

In support of Respondents' "constructive notice" position, as described above, Respondents rely upon *Fuller-Ahrens Partnership v. S.C. Dept. of H'ways and Pub. Trans.*, 311 S.C. 177, 180, 427 S.E.2d 920, 922 (Ct. App. 1993), and *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997). (Resp. I.B. at pp. 10-14, 16). As noted in Appellants' Initial Brief at pages 13-14, the publicly recorded document at issue in *Fuller-Ahrens* was of record since 1956, and it did not involve the same parties to the transaction resulting in it being recorded, which is the case here. *Id.* In *Berry*, the publicly filed document (*i.e.*, a "sewer system" bond) was "filed with the clerk of court in Aiken County on June 28, 1990." *Id.* at 797. The *Berry* lawsuit was not filed until "July 1995." *Id.* at 800.

In addition, each of these cases were decided before *Slack* and *Moseley v. All Things Possible*, 395 S.C. 492, 498, 719 S.E.2d 656, 659 (2011), cited in Appellant's Initial Brief. In addition, *Fuller-Ahrens* and *Berry* each involved "constructive notice," of publicly recorded documents that were of record years (or decades) before the subject transaction was ever even contemplated. In contrast, Respondents here wish to apply constructive notice to Appellant of his own (defective) deed, as of the date it was recorded.

Respondents additionally argue the Original Survey shows “[Appellant] was on notice then that he would not receive unencumbered fee simple title to the driveway.” (Resp. I.B. at 5, ¶ 1). This contention continues to ignore the Verified Complaint allegation, which states, “[a]t all times before and after Jan. 23, 2020, Plaintiff made it abundantly clear that he would not purchase the property unless he was going to be deeded the driveway.” (Verified Complaint, at p. 8, ¶ 46).

Respondents’ Brief ignores that portion of the Original Survey (Exhibits 1 and 2 to Verified Complaints) immediately above the signature line for the licensed surveyor, Mr. Jordan, which states, “~Plat~ of a Subdivision Survey **creating** Tract 1 having 8.24 acres and a 0.23 Acre Utility Easement Serving Address 4704 Hwy 90 Both being located in Conway Township, Horry County, S. C. surveyed for Janet P. Gochenour.” (Exhibits 1 and 2 to Verified Complaints; see also Verified Complaint at ¶ 25) (bold and underline emphasis added). Appellant’s January 23, 2020, Addendum to the January 22, 2020 Contract of Sale with Seller, Janet P. Gochenour, Janet P. Gochenour, Trustee, stated, “Seller shall have the property surveyed, including the additional acreage listed as being included in this sale to reach no less than 8 acres and recorded as part of this parcel confirming total acreage. Seller to include the deed of the driveway as part of the sale.” (Verified Complaint, at ¶¶’s 21-22, proposed Amended Verified Complaint, at ¶¶’s 21-22) (underline emphasis added).

Appellant did not receive more “than 8 acres,” as required by the Addendum. (Verified Complaint, at ¶¶’s 43, 118, proposed Amended Verified Complaint, at ¶¶’s 42-43, 104, 124). Appellant received title to only 7.79 acres, which consisted of the 8.24 acres shown on the

Original Survey, less the 0.49 acres as Tract D (*i.e.*, the driveway). (Exhibits 1 and 2,<sup>2</sup> Verified Complaint, at ¶ 25, proposed Amended Verified Complaint, at ¶ 25). What Appellant received from the subject closing and resultant deed and plat did not include “the deed of the driveway as part of the sale.” (*Id.*). The pleadings show Respondents: (i) never provided Appellant with a copy or a filed copy of the substituted survey / plat, and (ii) only provided the “Deed and Owner’s Title Policy,” by mail on May 7, 2020 (Amended Verified Complaint, at ¶ 43, Exhibits 4 and 5).

Further review of the Original Survey shows Tract D as consisting of 0.49 acres, which is drawn out in solid lines (not dotted or dashed lines) on the Original Survey by the “driveway” portion of the Original Survey (Exhibit 2 to Verified Complaint (in yellow highlighting)). An even further review of the dimensions associated with the “driveway” portion of the Original Survey shows its beginning width (L10) at 29.95 feet, and its ending width as 30.37 feet (L14).<sup>3</sup> (Exhibit 1, Verified Complaint). The length of this 30 foot wide “driveway,” according to the Original Survey (measuring from the distances shown on the western side of the driveway), is 712.70 feet,<sup>4</sup> wherein  $712.70 \text{ feet} * 30 \text{ feet} = 21,381 \text{ ft}^2 / ( 43,560 \text{ ft}^2 / \text{acre} ) = 0.49 \text{ acres}$  (or

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<sup>2</sup> Exhibit 2 is essentially / substantially identical to Exhibit 1, excepting Exhibit 2 is taken from the lender’s March 4, 2020 Appraisal, showing the lender was also led to believe Appellant was to receive deed / title to a new “Tract 1 having 8.24 acres and a 0.23 Acre Utility Easement.” (*Id.*).

<sup>3</sup> L18 is designated in the “Line, Bearing and Distance” chart on the left side of the Original Survey as 20.09 feet. Accordingly, any reference to a “new 50 [foot] Shared Private Drive with Utility Easement,” on the Original Survey is only shown in dotted lines, and does not extend the entire length (e.g., approximately 711 feet) of the “driveway.” Instead, the 50 foot dotted line corridor extends only as far as the sums of L17, L16, L13 and L15 to the “50’ Radius Cul De Sac.” The length’s respectively of these portions are as follows: (L17) 203.39, (L16) 19.72, (L13) 28.41, and (L15) 130.83, totaling 382.5 feet.

<sup>4</sup>  $201.31 \text{ feet} + 19.72 \text{ feet (L11)} + 336.06 \text{ feet} + 155.61 \text{ feet} = 712.70 \text{ feet}$ .

0.4894 acres when showing 4 decimals). (*Id.*). Measuring the distances shown on the eastern side of the driveway of the Original Survey, is 709.23 feet,<sup>5</sup> wherein  $709.23 \text{ feet} * 30 \text{ feet} = 21,276.9 \text{ ft}^2 / (43,560 \text{ ft}^2 / \text{acre}) = 0.49 \text{ acres (or } 0.4885 \text{ acres)}$ . (*Id.*).

Respondents' Brief additionally ignores that portion of the Original Survey (Exhibits 1 and 2 to Verified Complaints), which identifies Tracts A, B, C and D with acreages, respectively, as follows: (A) 1.29, (B) 3.77, (C) 2.70, and (D) 0.49, totaling exactly 8.24 acres. (*See e.g.*, Verified Complaint, at ¶ 25).

At best, and *only for sake of argument*, Respondents reliance on the above-identified portions of the Original Survey could show a disputed question of fact as to what might happen in the future with respect to a so-called "50 [foot] Shared Private Drive."

## **II. Futile (to Attempt) to Amend the Verified Complaint**

In *Skydive*, our Supreme Court stated as follows with respect to the interplay between Rules 12 and 15, SCRPC:

In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile. *See Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile."), *rev'd on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 (3d ed. 2010) ("If a proposed amendment is not clearly futile, then denial of leave to amend is improper.").

*Id.* at 589.

As set forth above, the existing Verified Complaint set forth allegations which stated a claim and avoided application of any Statute of Limitations defense by setting forth allegations

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<sup>5</sup>  $221.78 \text{ feet} + 28.41 \text{ feet (L13)} + 152.52 \text{ feet} + 152.86 \text{ feet} + 153.66 \text{ feet} = 709.23 \text{ feet}$ .

that showed Appellant acted reasonably and diligently, including as follows: (i) retaining the services of a licensed real estate agent, (ii) retaining the services of a licensed [real estate closing] attorney, (iii) having a survey prepared, (iv) having a title search conducted, and (v) obtaining owners title insurance. *See e.g., Moseley*, 694 S.E.2d at 46 (stating “evidence in the record supports the circuit court’s determination that the Moseleys did everything reasonable to inspect and obtain information concerning the property. The Moseleys hired an attorney, conducted a title search, and obtained a plat from [the Seller].”).

The proposed Amended Verified Complaint even further and more specifically showed Appellant “was never informed by anyone that the Original Survey was not the survey that would be recorded to show the Property he was to receive from Janet under their Contract.” (Verified Complaint at ¶ 43).

### **III. Additional Sustaining Grounds**

As set forth above, Respondents’ efforts to misconstrue the Original Survey as somehow being a document that put Appellant “on notice then that he would not receive unencumbered fee simple title to the driveway,” fall flat. (Resp. I.B. at p. 5, ¶ 1). Elsewhere in Respondents’ Initial Brief, it is argued, “Appellant would have known the contents of the deed had he examined them.” (Resp. I.B. at pp. 9-10). The pleadings state, “Plaintiff never received a copy of the deed or title policy from Sonia Raymond until it was mailed to him by her office on May 7, 2020.” (proposed Amended Verified Complaint at ¶ 43; *see also Exhibits 4 and 5*). Respondents attempt to revise and re-state the Original Survey, stating “Tract D itself states it is subject to the 30’ Access Road.” (Resp. I.B. at 16). As set forth above and as is stated on the Original Survey, “Tract ‘D’ [is the] Existing 30’ Access Road,” and it is “0.49 acres,” and is part of the plat “creating Tract 1 having 8.24 Acres.” (Verified Complaint, Exhibits 1 and 2). Any so-called “50

[Foot] Shared Private Drive,” at best, is shown in dotted lines and is stated as something that is “To Be,” and only extends as far as the “50’ Radius Cul De Sac.” (*Id.*).

#### **IV. Appellant Failed to Timely Serve his Notice of Appeal<sup>6</sup>**

On June 26, 2024, Respondents filed their Motion to Dismiss Appellant’s Appeal on grounds it was untimely filed. On July 15, 2024, Appellant filed his Return in Opposition to Motion to Dismiss. On July 26, 2024, Respondents filed their Reply. On Sept. 3, 2024, this Court’s order denied Respondents’ Motion to Dismiss, stating, “Respondents’ motion to dismiss without prejudice to the parties presenting these arguments in their briefs.” (*Id.*).

### **PROCEDURAL HISTORY**

Appellant did 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 added 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 Appeal<sup>7</sup> of both the February 7, 2024 and March 12, 2024 orders.

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<sup>6</sup> The arguments set forth in Section IV of Appellant’s Reply are largely the same as were set forth in Appellant’s Return in Opposition to the Motion to Dismiss the Appeal, filed July 15, 2024.

<sup>7</sup> As noted in Appellant’s Return, filed July 15, 2024, in filing the Notice(s) of Appeal on March 15, 2024, the undersigned counsel to Appellant mistakenly saved the February 7, 2024 order as

## STATEMENT OF ISSUES IN MOTION TO ADDRESS

1. Whether or not Appellant's entire appeal must be dismissed when Appellant timely noticed his appeal of multiple orders, just three days after the March 12<sup>th</sup> Order was filed.

### STANDARD OF REVIEW / APPLICABLE LAW

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

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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 has since corrected that mistake in the Return by amended 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.”

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 (bold emphasis added); *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 procedural timeline here is critical, as it shows 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. 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 and more specifically demonstrate a three (3) year statute of limitations does not bar Appellant’s claims against Respondents. 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);<sup>8</sup> *see also* S.C. R. App. P. 201

(appeal may be taken from any final order, by a party aggrieved by the order).

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<sup>8</sup> Arguably, sections 14-3-330(2) and (3) could also apply here. Appellant herein addresses arguments under § 14-3-330(1); however, the same arguments apply as to §§ 14-3-330(2) and (3), and those points are asserted and preserved.

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 orders is to finally and fully determine the substantive question of the running of the statute of limitations, the orders are immediately appealable. As set forth in the Return, it was proper for this Court to deny Respondent’s Motion to Dismiss Appellant’s Appeal and proceed with briefing on the merits of this appeal.

As noted in Appellant’s Return, 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)). Appellant sought clarification of this from the lower court in both the Rule 59 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, Respondents did not provide Appellant with a copy of the deed, his title policy, or the substituted survey / plat 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, Respondents’ Motion to Dismiss should be denied.

## CONCLUSION

For the reasons set forth herein, Appellant respectfully request the order(s) of the lower court be reversed and this matter be remanded for further proceedings.

Respectfully submitted,

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Greenville, South Carolina  
January 9, 2025

**RECEIVED**

**Jan 09 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

IN THE COURT OF  
COMMON PLEAS  
15<sup>th</sup> 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 January 9, 2025, Appellant's Reply to Raymond Defendants' Initial Brief was served on all counsel of record and the Court of Appeals Clerk of Court via E-File/ Email/ Hand-Delivery/U.S. Mail as follows:

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January 9, 2025  
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January 9, 2025

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SC Court of Appeals

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**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 Reply to Raymond Defendants' Initial Brief and Proof of Service for same.

If you have any questions or need anything further, please do not hesitate to contact me at either number above.

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*)