RECEIVED
Jan 23 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants, of whom Sarmad Harake and Eurosa Inc. are the Appellants.

APPELLANTS' RETURN TO RESPONDENT'S PETITION FOR REHEARING AND REQUEST FOR HEARING EN BANC

John T. Lay, Jr. (S.C. Bar No. 64526)
Curtis L. Ott (S.C. Bar No. 66145)
Lindsay A. Joyner (S.C. Bar No. 77437)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 7368
Columbia, South Carolina 29205
Telephone: (803) 779-1833
Facsimile: (803) 779-1767
ATTORNEYS FOR APPELLANTS

Other Counsel of Record:
Kevin A. Dunlap
PARKER POE ADAMS & BERNSTEIN LLP
100 Dunbar St. Ste. 302

Spartanburg, South Carolina 29306
Telephone: (864) 253-6105
ATTORNEY FOR RESPONDENT

Pursuant to this Court's January 2, 2025, Request for a Return to Respondent's Petition for Rehearing and Request for Hearing *en banc*,[1] Appellants Sarmad Harake and Eurosa Inc. ("Appellants") respectfully submit this Return to the Petition for Rehearing and Request for Hearing *en banc* ("Return") filed by Respondent Gibbs International, Inc. ("Respondent" or "Gibbs"). Gibbs' Petition for Rehearing and Request for Hearing *en banc* asks this Court to rescind the Panel's well-reasoned determination in its November 13, 2024 Panel Opinion No. 24-UP-385 (the "Panel Opinion"), in which it reversed and remanded the dismissal of Appellants' fourth counterclaim. Specifically, the Panel Opinion found Appellants' fourth counterclaim contained a valid claim for relief such that Appellants did not need an opportunity to amend, and it determined the circuit court could not strike the counterclaim pursuant to Rule 12(f) or Rule 37, SCRCP, given the procedural history of the case and the Circuit Court's failure to address the appropriate factors before determining a sanction. (Panel Op. No. 24-UP-385, pp. 7-11).

ARGUMENT

Respondent's Petition for Rehearing and Request for Rehearing *en banc* does not address valid case law or appropriate issues that the Panel Opinion overlooked or misapprehended. Rather, like Respondent's arguments throughout this appeal, it attempts to distract from the narrow issue before the Court—the allegations in the Amended Answer and Counterclaims, as opposed to outside allegations or interpretations that lack support in the record. Respondent's attempts to list what it believes would remain in the underlying litigation should the Panel Opinion stand (such that the counterclaim is permitted) have no bearing on the issues before the Court. It is simple;

[1] The deadline for the Return was extended to January 24, 2025 pursuant to the Court's Order dated January 14, 2025.

Respondent decided to file a Third Amended Complaint more than three years after the filing of the initial Complaint, which in turn gave Appellants the ability to modify their Answer and Counterclaims without having to make a motion to do so. In turn, that procedural posture does not change the standard of review for this Court. Given that nothing has been overlooked or misapprehended by the Panel, Respondent's Petition for Rehearing and Request for Rehearing *en banc* should be denied.

I. The Panel Opinion Did Not Overlook Or Misapprehend Case Law In Determining Appellants' Fourth Counterclaim Contained A Valid Claim For Relief.

Respondent's Petition for Rehearing does not provide anything that the Panel has overlooked or misapprehended relative to the allegations in Appellants' fourth counterclaim. Instead, Respondent's Petition focuses on areas outside of the Panel's standard of review. Here, pursuant to the applicable standard for a Rule 12(b)(6), SCRCP, motion, the facts alleged by Appellants in their Answer and Amended Counterclaims – including those alleged with respect to the fourth counterclaim – must be viewed as true, both by the Circuit Court in the first instance and on review by this Court. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). "The question for the court is whether in the light most favorable to the [complainant], and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state ***any valid claim for relief***." *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the complainant, would entitle the [complainant] to relief on any theory, then dismissal under Rule 12(b)(6) is improper." *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247. Likewise, when a motion to strike pursuant to Rule

12(f), SCRCP, challenges a theory of recovery in a pleading, it "is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP." *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010). Although Respondent appears to argue there is or should be a different standard for Rule 12(b)(6), SCRCP, when it is at the start of litigation as opposed to when it is the result of a counterclaim added in response to the Third Amended Complaint filed by Respondent, no such separate standard exists. Therefore, the Panel applied the correct standard of review in the Panel Opinion, and the Panel Opinion did not create any conflict or confusion in the case law of this State.

Likewise, the law is well-settled that the label assigned to a cause of action is not dispositive as to whether ***any claim for relief*** has been pled sufficiently. *See Prior v. S.C. Med. Malpractice Liabl. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991); *see also Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (finding that although the words "contract," "tort," or "negligence" were not in the cause of action, subcontractors sufficiently pled a third-party beneficiary claim given allegations in the "Facts" section that the subcontractors were "third-party beneficiaries"). Further, in *Crandall Corp. v. Navistar Int'l Transp. Corp*., 302 S.C. 265, 395 S.E.2d 179 (1990), the Supreme Court found that a cause of action labeled "intentional interference with prospective economic advantage" could be construed to be a claim for "intentional interference with contractual relations." Rule 8(f), SCRCP, echoes this principle by providing "[a]ll pleadings shall be so construed as to do substantial justice to all parties." *See also United Educational Distributors, LLC v. Educational Testing Svc.*, 350 S.C. 7, 10 at n.1, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002) (stating it would analyze the plaintiff's cause of action which the trial court labeled as tortious interference with economic advantage as that of intentional interference with prospective

contractual relations because how it was labeled did not affect the substance of its analysis). Moreover, Respondent has not cited any South Carolina precedent, nor does such appear to exist, for the proposition that because a titled cause of action has not been formally recognized in South Carolina, such cause of action should be automatically dismissed.

Rather, the federal case cited by Respondent in its Petition for Rehearing is neither mandatory nor persuasive precedent here as it is clearly distinguishable. Specifically, in *Matin v. Duffy*, No. CV 4:18-317-DCN-TER, 2018 WL 11462188, at *2 (D.S.C. Feb. 14, 2018), *report and recommendation adopted*, No. 4:18-CV-0317 DCN, 2018 WL 11462186 (D.S.C. Mar. 12, 2018), *aff'd*, 732 F. App'x 197 (4th Cir. 2018), the district court dismissed a claim of a state prisoner proceeding *pro se* and *in forma pauperis* as duplicative of a prior procedural due process claim that had been filed, dismissed, and ultimately resulted in a published opinion from the United States Court of Appeals for the Fourth Circuit. That case had nothing to do with what the claim was titled or whether the court could interpret the claim as anything else; instead, it focused on the fact the claim was substantively duplicative of a claim that had already been brought in another pending action by the same party and because the complaint failed to allege prison conditions that were atypical and substantially harsh in relation to ordinary incidents of prison life. *Id.* Additionally, Respondent's reliance on *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012), is likewise inapposite. While the Rule 12(b)(6) standard for review cited in that case is correct—and in fact is the standard the Panel applied, there is nothing in that case that stands for the proposition that you have to use "required words" in order to establish an alleged element. Rather, the case makes clear a court can, taking all facts in the light most favorable to the pleader, reasonably make inferences from the words used to determine whether any cause of action has been pled for purposes of a Rule 12(b)(6), SCRCP, motion.

The Panel Opinion specifically considered the allegations pled in Appellants' fourth counterclaim, agreeing the words used satisfied the elements of a claim for tortious interference with contractual relations. (Panel Op. No. 24-UP-385, pp. 7-8; *see also* Am. R. pp. 340-341, 346-348, Ans. and Am. Counterclaims, ¶¶ 153, 155, 192-204; Am. R. p. 362, Reply, ¶ 70). Accordingly, the Panel Opinion has not overlooked or misapprehended any case law, and it should not be subject to rehearing.

II. The Panel Opinion Did Not Overlook Or Misapprehend Anything In Determining It Did Not Need To Address Amendment Given The Dispositive Nature Of The Remaining Issues.

It is axiomatic in South Carolina that an appellate court need not address an appellant's remaining issues if its determination of a prior issue is dispositive of the appeal. *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999); *see also Whiteside v. Cherokee Cnty. Sch. Dist. No. One*, 311 S.C. 335, 340-41, 428 S.E.2d 886, 889 (1993). Therefore, given its ruling on the valid claim for relief as it relates to Appellants' fourth counterclaim, the Panel Opinion did not overlook or misapprehend anything in making that determination as to the amendment issue.

Respondent's Petition for Rehearing reargues its prior points but does not raise any issue that has been overlooked or misapprehended by the Panel. Moreover, the Petition for Rehearing assumes an opportunity to amend was given to Appellants, which is simply not what happened. During the hearing and in Appellants' Rule 59(e), SCRCP, Motion to Alter or Amend, Appellants requested an opportunity to cure, specifically 15 days. (Am. R. p. 458, Motion to Alter or Amend, p. 9). As such, Appellants' Motion to Alter or Amend was not a motion made pursuant to Rule 15(a), SCRCP. Rather, it contained a request pursuant to Rule 59(e), SCRCP, to proceed under Rule 15(a), SCRCP, within 15 days, and that opportunity was rejected. Here, the cure for perceived

insufficient pleading by the Circuit Court should have been amendment, not dismissal. *See Skydive Myrtle Beach v. Horry Cnty*., 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019 (finding the dismissal of a commercial lessor's claims against the county without leave to amend was improper and noting that when a "trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give" the party an opportunity to amend pursuant to Rule 15(a)).

Therefore, to the extent Respondent is arguing that the Panel should have undergone an analysis pursuant to Rule 15, SCRCP, Respondent has misapprehended the procedural posture of this case. The Circuit Court did not offer any analysis of the futility or prejudice of an amendment in either the November 18 Order or the November 30 Order addressing Appellants' Motion to Alter or Amend. (Am. R. pp. 035-36, November 18 Order, pp. 12-13; Am. R. p. 053, November 30 Order, p.1). Instead, the Circuit Court simply denied Appellants the opportunity to cure the perceived deficiency. (Am. R. pp. 035-36, November 18 Order, pp. 12-13; Am. R. p. 053, November 30 Order, p.1). Accordingly, such analysis was neither overlooked nor misapprehended by the Panel; instead, it was not properly before the Panel. [2]

III. There Was No Violation Of A Discovery Obligation; Therefore, The Panel Opinion Did Not Overlook Or Misapprehend Anything In Finding The Circuit Court Erred In Striking The Fourth Counterclaim Based On Rule 37, SCRCP.

The Panel Opinion found that it was improper for the Circuit Court to strike Appellants' fourth counterclaim as a sanction, because there was not a violation of Rule 30(j)(3), SCRCP, and the cure for failing to file a motion for protective order after giving an instruction not to answer during a deposition is for the deposition to be reconvened, not striking a pleading as a sanction.

[2] In the interest of efficiency and brevity on this Return, to the extent the Court believes it is necessary or wishes to review a Rule 15, SCRCP, analysis on this Petition for Rehearing, Appellants crave reference to Section II of their Reply. (App. Reply Br., pp. 6-17).

(Panel Op. No. 24-UP-385, pp. 8-11). Respondent's Petition for Rehearing fails to cite any authority that the Panel Opinion overlooked or misapprehended. Rather, Respondent cites one of the same cases cited in the Panel Opinion. However, it neglects to explain how the Panel Opinion misapprehends that case. Further, neither case cited in the Petition for Rehearing deals with the procedural situation presented in this case: counsel has an agreement to let each other know whether the other needed to file a motion for protective order following the respective depositions of their clients; Respondent did not inform Appellants such motion needed to be filed prior to asserting failing to file such motion was a reason to dismiss Appellants' fourth counterclaim; no motion for protective order was filed; no request to reconvene the deposition was made by Respondent; and the Circuit Court thereafter struck Appellants' fourth counterclaim.

Respondent has not cited authority in any of its briefing that supports the proposition that failing to file a motion for protective order is a valid reason to strike a counterclaim for insufficiency in pleading. Likewise, Appellants have not identified any support for this theory in South Carolina law, and Appellants also have not located a South Carolina case in which a counterclaim was stricken when a motion for protective order was not filed after an instruction not to answer. As a result, there is no case law the Panel Opinion overlooks. While Rule 30(j)(9), SCRCP, provides that failure to abide by Rule 30 can lead to sanctions under Rule 37, SCRCP, it does not provide in what context. Instead, Rule 30(j)(3), SCRCP, provides that the remedy for not filing a motion for protective order is that "the deposition may be reconvened" to ask the question previously objected to as the objection would have been waived. In this case, no such request to reconvene the deposition was made and therefore is not present in the record. As the Panel Opinion found, if a sanction is to be awarded pursuant to Rule 37, SCRCP, a "court must consider four factors when determining the appropriate discovery sanction: the nature of discovery sought, the

discovery stage of the case, willfulness, and the degree of prejudice." *Richardson ex rel. 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020). If a court neglects to consider the factors, which the Circuit Court in this case failed to do, "an abuse of discretion occurs." *Id.* Accordingly, the Panel Opinion has neither overlooked nor misapprehended any issue relative to the instruction not to answer, and as such, rehearing is unnecessary.

CONCLUSION

Appellants urge this Honorable Court to deny Respondent's Petition for Rehearing and Request for Hearing *en banc*. As to Respondent's Petition for Rehearing, Respondent has not identified anything that the Panel Opinion overlooked or misapprehended. Instead, it has regurgitated its previously unsuccessful arguments. Finally, with regard to Respondent's Request for Hearing *en banc*, such hearing is not required as it is neither necessary to secure or maintain uniformity of the Court's decisions nor does this appeal involve a question of exceptional importance. *See* Rule 219, SCACR. The case law of this State simply does not support the Circuit Court's findings as to Appellants' fourth counterclaim, and the Panel Opinion correctly reversed the dismissal of Appellants' fourth counterclaim.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.

/s *Lindsay A. Joyner*
John T. Lay, SC BAR NO. 64526
Curtis L. Ott, SC BAR NO. 66145
Lindsay A. Joyner, SC BAR NO. 77437
1201 Main Street, Suite 1200
Post Office Box 7368
Columbia, South Carolina 29202
jlay@GWBlawfirm.com
cott@GWBlawfirm.com

ljoyner@GWBlawfirm.com

Attorneys for Appellants Sarmad Harake and Eurosa, Inc.

January 23, 2025

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc.,.....Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake, ...Defendants

Of whom Sarmad Harake and Eurosa, Inc. are the.....Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on January 23, 2025, she has caused to be served **Appellants' Return to the Petition for Rehearing and Request for Hearing En Banc** upon all parties of record via e-mail. A copy of the email serving all parties of record is attached hereto.

Kevin A. Dunlap (S.C. Bar No. 13081)
PARKER POE ADAMS & BERNSTEIN LLP
110 East Court Street, Suite 200
Greenville, SC 29601
Telephone: (864) 253-6105
ATTORNEYS FOR RESPONDENT

Robert E. Stepp (S.C. Bar No. 5335) Benjamin R. Gooding (S.C. Bar No. 100620)

K

ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Columbia, SC 29201
Telephone: (803) 929-1400
ATTORNEYS FOR KEVIN A. DUNLAP AND PARKER POE ADAMS & BERNSTEIN, LLP

Respectfully submitted,

/s/ Lindsay A. Joyner
John T. Lay, Jr. (S.C. Bar No. 64526)
Curtis L. Ott (S.C. Bar No. 66145)
Lindsay A. Joyner (S.C. Bar No. 77437)
GALLIVAN, WHITE & BOYD, P.A.
P.O. Box 7368
Columbia, South Carolina 29205
Telephone: (803) 779-1833
ATTORNEYS FOR APPELLANTS

From:	Lindsay Joyner
To:	Dunlap, Kevin A.; John T. Lay; Curtis Ott; Victoria Buckley
Cc:	Nowend, Melanie P.
Bcc:	9567_1 Gibbs International__Inc__Individually and on behalf of IOTive__Inc__v__Sarmad Harake__Eurosa__Inc__Katherine Harake__IOTive__Inc__Gocial Morris__Pavel Polukhin__and Shai Hemli C__A__Number__2017_CP_42_00740 Client No__N_A Date of Email__9567_1_
Subject:	Gibbs International, Inc. v. Sarmad Harake and Eurosa, Inc. 2020-001642 [IMAN-IMANMAIN.FID542496]
Date:	Thursday, January 23, 2025 5:25:12 PM
Attachments:	2025.01.23 Return to Petition for Rehearing and Request for hearing en banc.pdf 2025.01.23 POS Return to Pet for Rehearing and Req for Hrg en banc.pdf

Kevin,

Hope you're doing well. The snow and ice in Charleston this week have been crazy. I hope y'all haven't had this weather. Attached is Appellants' Return to the Petition for Rehearing and Request for Hearing *en banc*. Momentarily, I will attach this email to the POS and file electronically with the Court of Appeals as permitted by Rule 262, SCACR.

Thanks,
Lindsay

Lindsay Anne Joyner
Partner
ljoyner@gwblawfirm.com

Gallivan, White & Boyd P.A.
40 Calhoun Street | Suite 315 | Charleston SC 29401
843 414 8107 Direct | 843 735 7600 Main | 843 414 8070 Fax
Mailing Post Office Box 22768 | Charleston SC 29413

vCard | BioURL | Website