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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740
Appellate Case No. 2020-001642

Gibbs International, Inc.,Petitioner,

v.

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

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

**PETITIONER GIBBS INTERNATIONAL, INC.’S
PETITION FOR A WRIT OF CERTIORARI**

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CERTIFICATION BY COUNSEL

Counsel for Petitioner Gibbs International, Inc. (“Gibbs” or “Petitioner”) certifies that a Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 12, 2025.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals’ opinion conflicts with existing precedent by reversing the circuit court’s dismissal of a counterclaim that Defendants admitted has never been recognized in South Carolina.
2. Whether the Court of Appeals’ opinion conflicts with and misapplies existing precedent by re-drafting and interpreting the counterclaim to be for “intentional interference with contract” when the claim was expressly described as being for “tortious interference with economic interest” and it is undisputed that the claim nowhere asserts the existence of the required element of the intentional procurement of the breach of an existing contract.
3. Whether the Court of Appeals’ opinion conflicts with existing precedent because when “solely” looking at the allegations “on the face” of the pleading and reasonable inferences based “solely” on those allegations, the necessary allegations are indisputably absent and the only way to save the claim was by an improper and unjustified amendment.
4. Whether the Court of Appeals’ opinion eviscerates different legal elements and distinctions required to be proven for different claims under decades of existing precedent and inappropriately allows for one alleged economic tort to be re-characterized as another.
5. Whether the Court of Appeals erred in refusing to affirm the circuit court’s denial of Defendants’ motion to amend their pleadings because the proposed amendment would result in undue delay and prejudice to Gibbs given the undeniable extreme prejudice caused by the inclusion of a brand new, completely unrelated, claim when the case was to be ready for trial.
6. Whether the *Skydive* decision allowing for amendments under certain conditions overrules the *Holland* decision prohibiting amendments causing undue delay and prejudice.
7. Whether the Court of Appeals erred in refusing to address the merits of the argument that Defendants’ requested amendment is futile.
8. Whether the Court of Appeals’ opinion misapprehends and overlooks that the dismissal/striking of the counterclaim was independently appropriate due to the violation of a mandatory discovery obligation.

INTRODUCTION

This matter involves claims by Gibbs of shameful breaches of fiduciary duties and theft of money, among other things, by Sarmad Harake (“Harake” or “S. Harake”) and his wholly-owned company and alter ego, Eurosa, Inc. (“Eurosa”) (collectively, the “Harake Appellants”), among

others, resulting in millions of dollars of losses to Gibbs. However, this petition focuses on the Court of Appeals' reversal of the circuit court's order dismissing the Harake Appellants' counterclaim for "tortious interference with economic interest"—a claim that is not recognized under South Carolina law. Rather than simply affirming the dismissal of a cause of action that is not recognized under South Carolina law, the Court of Appeals effectively re-drafted the Harake Appellants' Answer and Counterclaims to change it into a cause of action for intentional interference with existing contract. This blue penciling conflicts with existing precedent by transforming the claim for "tortious interference with economic interest" into a purported claim for intentional interference with an existing contract.

If the Court of Appeals is permitted to re-draft and thereby salvage the Harake Appellants' counterclaim, the result will be that a claimant can simply plead one of many unique and distinct business torts and then convert it at will to whatever other tort it chooses to suit the party's particular purpose at that moment. Such a result is plainly unfair to Gibbs, which is entitled to meaningful notice of the claims asserted against it. The unfairness is exponentially unjustified when it takes place after expert deadlines have passed and the case is to be ready for trial.

The Court of Appeals' opinion eviscerates the distinctions between individual business torts. The different claims are "individual" because they are unique and the legal elements are different. The opinion enables unbridled abuse of the pleading process knowing it does not matter how a claim is pled because it can be rescued in the end by judicial blue penciling.

The error in redrafting the Harake Appellants' pleading was further compounded by the fact that the Court of Appeals decided that not only was the Harake Appellants' counterclaim one for intentional interference with contractual relations, but that the pleading supported such a claim. If the Court of Appeals is permitted to re-draft and craft its own interpretation of the Harake Appellants' counterclaim, then the Court of Appeals erred in refusing to affirm the dismissal of

that claim because the pleading contains no allegation that Gibbs intentionally interfered with and procured a breach of an existing contract—a required element of such a claim.

Furthermore, the Court of Appeals erred in refusing to address the merits of the circuit court’s denial of the Harake Appellants’ motion to amend their pleading. This Court should affirm the circuit court’s denial of the Harake Appellants’ motion to amend their pleading because to allow otherwise would run afoul of, and circumvent, decades of precedent prohibiting amendments that cause undue delay and prejudice—which undeniably exist in this case. *See Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 236, 754 S.E.2d 714, 719 (Ct. App. 2014) (stating that it is proper to deny a motion to amend a pleading that will result in prejudice and delay of the proceedings). This case also presents the opportunity for the Court to clarify *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019), and explain that it does not overrule *Holland* and that the rule prohibiting prejudicial amendments is alive and well.

It is critical to note that the circuit court had issued a scheduling order that called for the disclosure of experts in January and February 2020, closed discovery in December 2020, and required the case to be ready for trial as of January 4, 2021. Despite the deadlines set forth in the scheduling order, the Harake Appellants asserted this new purported counterclaim—which interjected a brand-new allegation about an issue never previously raised in the pleadings and that would require additional international discovery and the retention and disclosure of new experts. Thus, this was no Rule 12(b)(6) dismissal of a claim at the outset of the litigation but, instead, the dismissal of an untimely counterclaim that was asserted entirely too late. The following are examples of the undue delay and extraordinary prejudice that would result from allowing the counterclaim to proceed:

- Inserting \$22 million in new damages on a claim completely unrelated to prior claims;

- Requiring written discovery on the new issues after the appeal including, but not limited to, the service of international subpoenas;
- Requiring new experts to be located and identified after Harake and his witnesses are deposed on this issue;
- Requiring motions to compel (based on prior experience); and
- Returning the parties to the “starting gate” when they were in the “final turn.”

These factors demonstrate prejudice and bar the Harake Appellants from filing an amended pleading at this stage of the case.

The Court of Appeals’ opinion also overlooked the independent grounds for dismissal since the claim is futile because:

- Gibbs acted within its rights in deciding not to be bought out or to roll over its corporate interest;
- There are no allegations of fraud, misappropriation, intimidation, molestation, or that Gibbs acted maliciously; and
- This type of claim cannot be based on the allegation that pending litigation caused a third-party decision not to do business with the other party.

The Harake Appellants have not responded meaningfully to any—not a single one—of these points. As a result, any amendment should be denied based on futility independent of even the undeniable prejudice that exists.

The Court of Appeals also erred in finding the dismissal/striking of the claim was also inappropriate due to the Harake Appellants’ violation of a mandatory discovery obligation. Violation of mandatory discovery obligations provides the necessary foundation for imposing sanctions, and prejudice is “presumed” when mandatory duties are violated.

Accordingly, Gibbs respectfully requests the Court grant this Petition for a Writ of Certiorari and consider whether the Court of Appeals erred in reversing the dismissal of a claim that is not recognized under South Carolina law.

STATEMENT OF THE CASE

On March 7, 2017, Gibbs initiated the underlying matter by filing its original complaint against Harake, Eurosa, and Katherine Harake (“K. Harake” and collectively with Harake and Eurosa, “Defendants”) and asserting claims regarding issues arising out of the business relationship between Gibbs and Defendants.¹ In the pleadings, Gibbs alleged that it entered into an agreement (the “Agreement”) with Defendants whereby Defendants agreed, among other things, to identify and evaluate viable investment opportunities, make and manage investments, make capital contributions, and invest funds to support the work under the Agreement. (Am. R. pp. 61–76). However, Defendants breached the Agreement by, among other things, failing to locate sufficient investment opportunities, failing to provide or locate additional capital, failing to properly manage the investments, and failing to manage Gibbs’ money. (Am. R. pp. 62–70).

After filing the original complaint, Gibbs amended the complaint twice, with the Second Amended Complaint being filed on June 9, 2017. (Am. R. p. 77). Harake, Eurosa, and K. Harake answered the complaint and asserted counterclaims against Gibbs. (Am R. p. 115). Thereafter, the parties engaged in extensive discovery.

In the course of discovery, Gibbs produced over 200,000 pages and the Harake Appellants produced over 30,000 pages. (Am. R. p. 504). The parties took sixteen (16) depositions, including evidentiary depositions of witnesses in Moscow, Mexico, California, and other locations. Included in that discovery was Gibbs’ July 25, 2019 deposition of Harake. During his deposition, Harake testified that Gibbs refused to become financially involved with Paysend UK. Paysend UK is an entity located in the United Kingdom that is not mentioned in Harake’s original Answer and Counterclaim. (Am. R. pp. 115–144). Harake explained during his deposition that because he

¹ Katherine Harake was voluntarily dismissed from the litigation but brought back in as part of the third amended complaint. She is not a party to this appeal.

brought Gibbs into Paysend Processing, he was forced to exit Paysend UK when Gibbs refused to take part in it. He stated the other investors did not want Harake involved in Paysend UK while he was in a dispute with Gibbs. (Am. R. 477; 290:10-24). While agreeing to produce the documentation regarding a loan, Harake stated, “Actually it will be part of . . . the next phase, because there’s a big damage that you caused me.” (Am. R. 477–480; 290:10–293:23). When asked for the amount of his damages, Harake’s counsel objected and instructed him not to answer the question on the ground that it related to information protected by the attorney work product doctrine. (*Id.*).

Furthermore, as a result of information obtained in the course of discovery, Gibbs filed a Third Amended Complaint. (Am. R. pp. 282–313). On August 24, 2020, the Harake Appellants filed their Answer to the Third Amended Complaint and Amended Counterclaims asserting—for the first time—a new counterclaim for “tortious interference with economic interest.” (Am. R. pp. 346–48, ¶¶ 191-204). This counterclaim was asserted three (3) years and five (5) months after the litigation was filed. At the time it was asserted (August 24, 2020), the governing scheduling order provided that discovery was to be complete by December 7, 2020, and expert identification completed by January 2020 for Gibbs and February 2020 for the Harake Appellants, both of which had already passed. (Am R. p. 55). Moreover, the scheduling order stated that the case was to be ready for trial on or before January 4, 2021. (Am R. p. 18–19).

The Harake Appellants’ counterclaim for “tortious interference with economic interest” alleged that Gibbs, Eurosa, and another investor in Paysend Processing came to an agreement on the capital investments Paysend Processing needed. (Am. R. pp. 346–348). The Harake Appellants alleged that Gibbs agreed to invest \$1 million in Paysend Processing but, despite their agreement, Gibbs later refused to invest more than \$250,000 in the company. (Am. R. p. 346). They also alleged that Gibbs knew Harake was the appointed director of Paysend UK and had acquired a

100% interest in it. (Am. R. p. 347). The Harake Appellants further alleged that Gibbs had a meeting with a potential investor that caused the investor to renege on his investment. (Am. R. p. 347). The Harake Appellants also contended that Gibbs refused to allow another investor to buy it out of Paysend Processing or to transfer its investment in Paysend Processing to Paysend UK, which would have rolled the two entities into one. The Harake Appellants stated Gibbs' unjustified refusal forced Harake to purchase the other investor's shares in Paysend Processing and to divest his shares of Paysend UK, and if Gibbs had agreed to combine Paysend Processing and Paysend UK, Eurosa would have owned 6.5% of the combined businesses. (Am. R. p. 347). They also argued Gibbs' refusal to allow the other investor to buy Gibbs out of Paysend Processing or to roll Paysend Processing into Paysend UK led to Harake's interest in Paysend UK being diluted because he was unable to participate in the later rounds of investments made by other Paysend UK investors. (Am. R. p. 348).

The Harake Appellants' Third Amended Answer and Amended Counterclaims does not use the words "intentional interference," "intentional procurement of a breach of an existing contract," or "intentional" anywhere in the entire thirty-six (36) pages of the pleading. (Am. R. p. 314–349). The factual basis for the counterclaim was entirely new and presented facts not previously addressed in the Harake Appellants' prior counterclaims. By way of example, Paysend UK's name was not used a single time in the Harake Appellants' prior pleadings. (Am. R. pp. 115–144).

Gibbs filed a Motion to Dismiss in response to the Harake Appellants' Answer to the Third Amended Complaint and Amended Counterclaims. (Am. R. p. 350). A hearing was held on September 22, 2020. (Am. R. p. 481). On September 25, 2020, the circuit court entered a Form 4 Order (the "September 25 Order") directing the preparation of an order, among other things, dismissing the Harake Appellants' Fourth Counterclaim. (Am R. p. 15).

The Harake Appellants filed a Motion to Alter or Amend/Brief on October 5, 2020. (Am R. p. 450). The Motion to Alter or Amend sought to amend the Fourth Counterclaim. On November 18, 2020, the circuit court entered an order (the “November 18 Order”) dismissing the Harake Appellants’ counterclaim for “tortious interference with economic interest.” (Am R. p. 18). The circuit court also rejected the verbal request made at the time of the hearing for the Harake Appellants to be allowed to amend their pleadings. The circuit court also noted that it would address the amendment issue if raised in the subsequent, written Motion to Alter or Amend. (Am. R. pp. 35–36).

The November 18 Order also found that the dismissal/striking of the fourth counterclaim was appropriate pursuant to Rule 12(f), SCRCP, because of Harake’s refusal to answer certain deposition questions about his claim pursuant to an instruction not to answer by counsel. The circuit court concluded that because the Harake Appellants did not move for a protective order with regard to certain questions that related to what eventually became the fourth counterclaim, the counterclaim should be dismissed or stricken. (Am. R. pp. 36–37). Prior to the circuit court dismissing that counterclaim, Gibbs had given notice to the Harake Appellants that a protective order motion was necessary. Gibbs did so when it filed its motion to dismiss/strike, when it gave notice in open court during the hearing on September 22, 2020, and with the submission of the proposed order on this issue on November 2, 2020, and the circuit court found that the Harake Appellants did not file a motion for a protective order within five business days of any of those events. (Am. R. pp. 36–37).

The Harake Appellants filed a Motion to Alter or Amend the circuit court’s order, which was denied on November 30, 2020. The Harake Appellants filed a Notice of Appeal on December 17, 2020. On November 13, 2024, the Court of Appeals issued an opinion reversing and remanding

the circuit court’s dismissal of the Harake Appellants’ counterclaim for “tortious interference with economic interest.”

ARGUMENTS

Rule 242(b) of the South Carolina Appellate Court Rules supports the issuance of a writ of certiorari when a Court of Appeals decision conflicts with a prior decision of the Supreme Court. Rule 242(b), SCACR. Such a conflict exists here, and as a result this petition should be granted.

I. The Court of Appeals erred in reversing the circuit court’s dismissal of a counterclaim for “tortious interference with economic interest” and this error conflicts with existing precedent.

The Court of Appeals erred in reversing the circuit court’s dismissal of a counterclaim that the Harake Appellants admit does not exist and is not recognized as a valid cause of action under South Carolina law. To reach this conclusion, the Court of Appeals re-drafted the Harake Appellants’ counterclaim for “tortious interference with economic interest.” Rather than simply dismissing a cause of action that is not recognized under South Carolina law, the Court of Appeals judicially amended the Harake Appellants’ Answer and Counterclaims to craft a cause of action for tortious interference with contractual relations. This error in blue penciling the Harake Appellants’ pleading is further compounded by the fact that the Court of Appeals decided that not only was the Harake Appellants’ counterclaim one for intentional interference with existing contractual relations, but also that the pleadings supported such a claim.

A. The Court of Appeals erred in reversing the circuit court’s dismissal of a cause of action the Harake Appellants have repeatedly admitted does not exist under South Carolina law.

The Harake Appellants admit the counterclaim they refer to as “tortious interference with economic interest” has not been recognized in South Carolina. (Harake Respondent’s Br. at 20 n.4). The circuit court correctly found, among other things, that “the fourth counterclaim for relief

is dismissed because the claim that [the Harake Appellants] chose to assert is not recognized in South Carolina.” (Am. R. p. 35).²

A counterclaim that is not recognized under South Carolina law should not be permitted to survive a motion to dismiss pursuant to Rule 12(b)(6), SCRCP. *See also Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) (affirming the dismissal of a cause of action for intentional infliction of emotional distress based on bystander liability because the claim is not recognized under South Carolina law). Pursuant to Rule 12(b)(6), SCRCP, it is appropriate to dismiss a cause of action when a party fails to state facts sufficient to constitute a cause of action. Therefore, dismissal of such a purported claim is appropriate when a party’s claim (or counterclaim) is premised on a cause of action that has not been recognized in South Carolina. What would be expected of the circuit court when confronted with a claim everyone agrees has not been recognized under South Carolina law? Dismiss it. The circuit court “did the right thing” in dismissing the claim. Accordingly, the Court of Appeals erred in reversing the circuit court’s dismissal of the Harake Appellants’ counterclaim and Gibbs respectfully requests that the Court grant this Petition and affirm the dismissal of the Harake Appellants’ counterclaim.

B. The Court of Appeals erred in re-drafting the Harake Appellants’ counterclaim.

In this case, the Harake Appellants admit that their counterclaim is not recognized under South Carolina law. Nevertheless, the Court of Appeals tried to salvage that counterclaim by re-drafting (blue penciling) it into something that it plainly is not. A court “may not rewrite a complaint to include claims that were never presented, construct the plaintiff’s legal arguments for him, or conjure up questions never squarely presented to the court.” *Martin v. Duffy*, No. CV 4:18-

² At a minimum, the Court of Appeals should have affirmed the circuit court on that point and proceeded to an analysis of whether the Harake Appellants have the right to amend their counterclaims another time.

317-DCN-TER, 2018 WL 11462188, at *1 (D.S.C. Feb. 14, 2018) (emphasis added), *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); *see also Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006) (stating that, in ruling on a motion to dismiss, a court must rely “solely on allegations set forth in the complaint”).

“To establish intentional interference with a contractual relationship[,] the plaintiff must prove: (1) a contract; (2) the wrongdoer’s knowledge thereof; (3) intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom.” *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993) (emphasis added). Rather than affirming the dismissal of a claim that is not recognized, the Court of Appeals re-labeled it as something not supported by the underlying allegations. However, such re-drafting violates the established principle that a court should not rewrite a complaint to construct legal arguments for a party and conjure up questions that are not presented properly to the circuit court. *See Martin*, 2018 WL 11462188, at *1; *see also Peterson v. Burgess*, No. CIV.A. 7:14-141-TMC, 2015 WL 4644465, at *3 (D.S.C. Aug. 4, 2015) (stating that a “court may not rewrite a complaint to include claims that were never presented.”); *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Moreover, the labeling of the original counterclaim was by no means a mistake. Instead, it was a deliberate choice by the Harake Appellants to assert a claim for interference with economic interest so an argument could be made that no intentional conduct need be shown and there was no need to show intentional procurement of a breach of an existing contract. The circuit court correctly recognized this and dismissed the claim.

On appeal, the Harake Appellants rely on cases from other jurisdictions to argue that “[o]ther states have recognized [tortious interference with contractual relations] under multiple names.” (Harake Def. Br. at 19). However, none of the cases relied upon by the Harake Appellants

support the conclusion that economic relations torts are interchangeable or that other jurisdictions have adopted multiple names for the same tort within their jurisdiction. In fact, several cases explicitly find the opposite. *See, e.g., Ixchel Pharma, LLC v. Biogen, Inc.*, 470 P.3d 571, 575–76 (2020); *Gieseke ex rel. Diversified Water Diversion, Inc. v. IDCA, Inc.*, 844 N.W.2d 210, 218 (Minn. 2014); *Dunlap v. Cottman Transmission Systems, LLC*, 754 S.E.2d 313, 318 (Va. 2014). And notably, not a single case cited by the Harake Appellants expressly identified a claim for “tortious interference with economic interest” that the court redrafted and renamed as a claim for intentional interference with existing contract.

Furthermore, no South Carolina court has recognized that an appellate court may re-frame and convert a claim for tortious interference with economic interest (a prospective contract) as a claim for intentional interference with contractual relations (an existing contract).

C. The Harake Appellants failed to state a claim for intentional interference with contractual relations.

The Court also should reverse the Court of Appeals on the grounds that the Harake Appellants failed to state required facts to state a claim for intentional interference with an existing contract.

Dismissal of a cause of action pursuant to Rule 12(b)(6), SCRPC, must be based “**solely on allegations set forth in the complaint.**” *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (emphasis added). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, dismissal is improper.” *Id.* (citation omitted). The bedrock foundation to test claim viability is “solely” based on “allegations” on the “face of the complaint.” In addition, the fact that the claim is to be judged “solely” on the allegations on the face of the complaint means that “inferences reasonably deducible therefrom” must also be judged “solely” on those allegations. *See also Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)

(stating legal conclusions pled in a complaint can be disregarded on a motion to dismiss); *Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013) (“It is now well established that mere conclusory and speculative allegations are not sufficient to withstand a motion to dismiss. As the Supreme Court has stated, to withstand a motion to dismiss, a complaint must allege ‘enough facts to state a claim to relief that is plausible on its face.’” (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007))); *E. Shore Mkts., Inc. v. J.D. Assocs. Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000) (stating that although a court must “take the facts in the light most favorable to the plaintiff,” a court “need not accept the legal conclusions drawn from the facts” and “need not accept as true unwarranted inferences, unreasonable conclusions, or arguments”).

“To establish intentional interference with a contractual relationship[,], the plaintiff must prove: (1) a contract; (2) the wrongdoer’s knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) the damage resulting therefrom.” *Kinard*, 315 S.C. at 240, 433 S.E.2d at 837 (emphasis added).

In the case at hand, it is apparent that—based “solely” on the Harake Appellants’ allegations—the Harake Appellants failed to state a claim for tortious (or intentional) interference with contractual relations. The Harake Appellants never—not once—use the word “intentional,” much less the words “intentional interference,” in their thirty-six-page pleading. South Carolina case law does not allow a court to re-write a party’s pleading, as the test is “solely” reliant upon “allegations” on the “face of the complaint.” Plain and simple, the required allegations absolutely are not present here.

Thus, the Court of Appeals exceeded its authority in reframing the Harake Appellants’ counterclaim as a new and different claim, and it compounded that error by concluding that the pleadings stated a claim for intentional interference with existing contractual relations—a claim that is not properly pled and was not alleged by the Harake Appellants. Accordingly, the Court

should grant this petition so that it may consider the scope of an appellate court's authority to re-draft pleadings to save an untimely counterclaim based on a legal theory that the Harake Appellants admit has never been recognized in South Carolina.

II. The circuit court's denial of the Harake Appellants' Motion to Amend was proper and within its discretion.

Because the Court of Appeals reversed the dismissal of the Harake Appellants' counterclaim, it declined to rule on the circuit court's denial of the Harake Appellants' Motion to Amend pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999). As stated herein, the Court of Appeals erred in reversing the dismissal of the Harake Appellants' counterclaim; therefore, this Court should consider whether the circuit court abused its discretion in denying the motion to amend or remand this appeal to the Court of Appeals for reconsideration of this issue. If the Court chooses to consider this issue, it should affirm the circuit court because the Harake Appellants' untimely assertion of this new counterclaim will cause undue delay and prejudice to Gibbs.

A court may deny a motion to amend a pleading pursuant to Rule 15(a), SCRCP, based on “[u]ndue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” *Patton v. Miller*, 420 S.C. 471, 490, 804 S.E.2d 252, 262 (2017) (emphases added) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). Prejudice “occurs when the amendment states a new claim or defense that would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 235, 754 S.E.2d 714, 719 (Ct. App. 2014).

In *Holland*, the court affirmed the circuit court's denial of a plaintiff's motion to amend their pleadings, as the amendment would have prejudiced the defendant manufacturer because the

moving party had the knowledge necessary to alert defendants to the existence of the issue, and the new claim would require additional depositions and the hiring of additional experts.

Similarly, in *Health Promotion Specialists, LLC v. South Carolina Board of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), the court held that the circuit court did not abuse its discretion in denying a motion to amend a pleading because the plaintiff's motion was untimely. There, the court considered the inexplicable delay between the filing of the original complaint and the plaintiff's motion to amend. The court affirmed the circuit court, which also found that "the amendment would unduly prejudice the [defendant] as it would be forced to defend against 'arguably new theories of the case when so much time ha[d] elapsed.'" *Id.* at 632, 743 S.E.2d at 812–13.

In *Skydive Myrtle Beach v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), the court distinguished *Health Promotion Specialists* from the facts and procedural history at issue in that case. Similar to *Health Promotion Specialists*, this case is entirely different from *Skydive*. First, *Skydive* holds that it is error to grant a Motion to Dismiss "without considering [a] request to amend the complaint." Here, the Motion to Amend was considered twice—first at the September 22 hearing, and again in the written Motion to Amend contained in the Rule 59 motion filed on October 5, 2020. Gibbs' counsel even asked if the Harake Appellants were going to submit additional argument on that motion, and they said not unless the Court asked for it. (Am. R. p. 22). The circuit court entered its Form 4 Order on September 25, 2020, its first formal order on November 18, and the final order on November 30. The Harake Appellants had more than an adequate opportunity to try to amend and submit any additional filings they chose before the final order of dismissal; however, they chose not to do so. *Skydive* simply holds that a party's request for amendment needs to be considered. *Skydive* does not mean that every party is automatically entitled to amend if their complaint is dismissed. The liberal Rule 12(b)(6) standard and *Skydive*

in no way override the *Holland* rule, which requires denial of amendments causing undue delay or prejudice. This case also presents the Court with the opportunity to clarify *Skydive* and explain that it does not overrule *Holland* and that the rule prohibiting prejudicial amendments is alive and well.

As set forth below, this case is similar to *Holland* and *Health Promotion Specialists* in that the requested amendment will prejudice Gibbs and cause undeniable delay in the trial court proceedings.

A. The Harake Appellants' requested amendment is prejudicial to Gibbs.

The prejudice to Gibbs in the case at bar unquestionably falls within the above definition of prejudice because: (1) Gibbs will have to conduct international discovery late in the case; (2) Gibbs will have to retain and identify new expert witnesses (long after the passage of the expert discovery deadline); and (3) the late amendment was delayed unduly. “Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action.” *Ball v. Canadian Am. Exp. Co.*, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994); *Holland*, 407 S.C. at 236, 754 S.E.2d at 719. As set forth below, that absolutely is the case here.

The Court of Appeals' creation of a counterclaim for intentional interference with contractual relations is a new—never previously asserted—counterclaim that will require the gathering and analysis of new facts. For example, Gibbs will have to reopen Harake's deposition and examine him about the counterclaim, and that examination will likely lead to the identification of other lay witnesses who have to be deposed. That examination will also likely lead to the identification of records that need to be produced and international third-party subpoenas that need to be issued. The new claim would also require additional discovery because it involves issues never previously raised in this case, as the dispute regarding investment into Paysend UK was

never raised in the prior pleadings. These issues were not addressed in the Harake Appellants' original counterclaims.

Gibbs will also need additional expert witnesses, which will necessitate a re-opening of expert identification for this new claim. The original expert deadlines passed in January and February of 2020. The equivalent of eighty-five (85) banker's boxes of documents were produced by Gibbs alone. (Am. R. p. 504). Depositions of all experts and numerous others were taken. The case has been pending since March 7, 2017. Harake did not pursue the amendment until its filing on August 24, 2020—over 3 years and 5 months after the original filing. It is highly prejudicial for Gibbs to have to defend a \$22 million counterclaim that was raised for the first time years into litigation, and after so many depositions have been taken and the expert discovery deadline has passed.

The Harake Appellants were the architect of their late-stage amendment, and they should not be rewarded for their calculated, dilatory tactics with an unrelated claim being shoehorned in at this late stage. The Harake Appellants were aware of this purported counterclaim for at least thirteen (13) months before asserting claims against Gibbs; however, they never filed a motion to amend their pleadings on their own initiative and clearly should have done so if they were going to pursue the claim. Claims are routinely asserted before damages are finalized, so this was no excuse for such delay.

Moreover, adding the untimely counterclaim was not excused simply because Gibbs amended its complaint. Gibbs' motion to amend its complaint was filed in December 2019—just days after a document production confirmed that its money had been used inappropriately. Conversely, the Harake Appellants did not need more documents from Gibbs to assert their new claim—Harake admitted in his July 2019 deposition that he was just waiting to conclude “calculating” his damages before bringing the claim. (Am. R. pp. 447, 479). In stark contrast,

Gibbs needed the bank records from the Harake Appellants, which they had concealed through the discovery objection process. (Am. R. pp. 171, 175–76, 211, 215, 275, 279).

B. The Harake Appellants’ proposed amendment is futile.

Furthermore, the Harake Appellants’ proposed amendment is futile. In their own counterclaim, the Harake Appellants concede that they would not have been damaged if Gibbs had agreed to allow the other investors to buy Gibbs out of Paysend Processing or if Gibbs had agreed to roll Paysend Processing into Paysend UK. (Am. R. pp. 347–48). This claim is thus irretrievably flawed because, as a matter of law, Gibbs had no legal duty to agree to allow the other investor to buy Gibbs out or to agree for the shares to be rolled from Paysend Processing into Paysend UK. *See Miller v. Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App. 1999) (stating the “existence and scope of [a] duty are questions of law for the Court to determine”). “Generally, there can be no finding of intentional interference with prospective contractual relations if there is no evidence to suggest any purpose or motive by the defendant other than the proper pursuit of its own contractual rights with a third party.” *United Educ. Distribs., LLC v. Educ. Testing Serv.*, 350 S.C. 7, 14, 564 S.E.2d 324, 328 (Ct. App. 2002). Gibbs was entitled to pursue, or not to pursue, a relationship with Paysend UK. *See Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) (“The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.”). Therefore, the proposed counterclaim is futile because the proposed allegations demonstrate that Gibbs did not owe the Harake Appellants a duty or obligation to allow another investor to buy Gibbs out or to agree for its shares to be rolled from Paysend Processing into Paysend UK.

Second, a claim for intentional interference with an existing contract fails when a defendant acts within its rights. *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 812 S.E.2d 750 (Ct. App. 2018). In *Gecy*, 422 S.C. 509, 812 S.E.2d 750, the court affirmed the dismissal of a claim for intentional interference with contract because the defendant acted within its rights, so there was no legal basis to show an intentional procurement of a breach of contract without justification. *See Webb*, 308 S.C. at 448, 418 S.E.2d at 561. The assertion and pursuit of legal rights does not provide a basis for a claim of intentional interference. *See Pactiv, LLC v. Multisorb Technologies, Inc.*, 63 F.Supp. 3d 832, 842 (N.D. Ill. 2014) (stating that the “mere filing of a lawsuit cannot serve as a basis for a tortious interference claim when there has been no showing that the litigant knew or should have known the case was meritless or otherwise unjustified”). Like in *Gecy*, Gibbs acted within its rights in declining to agree to be bought out or to roll over its stock into Paysend UK. *See also United Educ. Distribs., LLC*, 350 S.C. at 14, 564 S.E.2d at 328. In this case, Gibbs was entitled to pursue, or not to pursue, a relationship with Paysend UK.

Accordingly, granting this Petition is appropriate so the Court may evaluate the futility issue, as well as the prejudice and delay created when a party amends a pleading to assert a new claim that requires additional discovery when the case has progressed well into discovery and the deadline for expert discovery has passed.

III. The Court of Appeals incorrectly found the circuit court erred in dismissing the Harake Appellants’ counterclaim for “tortious interference with economic interest” based on their violation of the discovery rules.

The circuit court did not abuse its discretion in dismissing and/or striking the fourth counterclaim due to the Harake Appellants’ violation of a mandatory discovery obligation. Specifically, the circuit court exercised its discretion properly and dismissed the fourth counterclaim because (1) the Harake Appellants’ did not file a motion for a protective order after Harake was instructed not to answer certain deposition questions about the fourth counterclaim,

(Am. R. pp. 447–48; 479–80); (2) Gibbs gave the Harake Appellants’ notice of the need to file the required motion for a protective order, (Am. R. p. 352); and (3) Rule 30(j)(3), SCRCF places a mandatory obligation on a party who is instructed not to answer a question to move for a protective order.³

The Harake Appellants were required under Rule 30(j)(3), SCRCF, to file a motion for a protective order. Violation of a court order is not required sanctions to be imposed. *See Richardson on Behalf of 15th Circuit Drug Enf’t Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 599, 846 S.E.2d 14, 16 (Ct. App. 2020); *Downey v. Dixon*, 294 S.C. 42, 44, 362 S.E.2d 317, 318, n.1 (Ct. App. 1987). And prejudice is presumed where mandatory duties are violated. *Id.* Harake’s refusal to answer deposition questions regarding the damages associated with the new counterclaim, coupled with Harake Appellants’ failure to comply with mandatory obligations over a period of three months, all justify the dismissal/striking of the claim under Rules 12(b)(6), 12(f), and 37, SCRCF. *See* Rule 30(j)(9), SCRCF (“Violation of this rule may subject the violator to sanctions under Rule 37, SCRCF.”).

CONCLUSION

As part of its twenty-nine-page Order, the circuit court dismissed the Harake Appellants’ counterclaim for “tortious interference with economic interest.” The Harake Appellants admitted to the circuit court that this claim has not been recognized in South Carolina. In addition, as the circuit court found, the Harake Appellants did not even use the words “intentional” or “intentional interference” anywhere in its thirty-six-page Answer and Counterclaims. The admission that the asserted claim was unrecognized, coupled with the complete absence of any allegation of

³ The Court of Appeals correctly found the circuit court did not err in considering Gibbs’ argument regarding sanctions under Rule 37, SCRCF, because such consultation would have been futile.

intentional conduct, made dismissal the necessary result. The claim was properly dismissed, and amendment was properly denied.

It is critical to remember that this was no Rule 12(b)(6) dismissal of a claim asserted at the outset of litigation, but instead it was a claim asserted three and a half years in, with the governing scheduling order providing that the case was to be ready for trial as of January 4, 2021, and that date was not changed by subsequent order. The governing discovery deadline was December 7, 2020. The expert deadlines were January 20, 2020 for Gibbs and February 20, 2020 for the Harake Appellants. All of this, coupled with the previously unasserted claim that involved new facts and will require additional discovery (including international subpoenas and identification of experts) easily constitute undue delay and cause extraordinary prejudice.

For the foregoing reasons, Gibbs respectfully requests that the Court grant this Petition and affirm the circuit court.

This 10th day of April, 2025.

s/Kevin A. Dunlap

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740
Appellate Case No. 2020-001642

Gibbs International, Inc.,Petitioner,

v.

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

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

PROOF OF SERVICE

The undersigned hereby certifies that on April 10, 2025, he has caused to be served **Petitioner Gibbs International, Inc.’s Petition for a Writ of Certiorari and Appendix** upon all parties of record via e-mail. A copy of the email serving all parties of record is attached hereto.

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Respectfully submitted,

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Apr 10 2025

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April 10, 2025

VIA HAND-DELIVERY AND E-MAIL:

The Honorable Patricia A. Howard
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201
supctfilings@sccourts.org

**Re: Gibbs International, Inc. v. Sarmad Harake, Eruosa, Inc., and Katherine Harake
Unpublished Opinion No. 2024-UP-385 (S.C. Ct. App. Filed November 13, 2024)
Appellate Case No.: 2020-001642**

Dear Mrs. Howard,

In connection with the above-referenced matter and in satisfaction of the Court's filing fee requirements, please find Check No. 521125 in the amount of \$250 for the Petition for Writ of Certiorari.

In conjunction with the delivery of the enclosed check, the following documents are being filed electronically with the Court:

1. Petitioner Gibbs International, Inc.'s Petition for Writ of Certiorari and Proof of Service;
2. Petitioner Gibbs International, Inc.'s Appendix.

As copied on this letter, and as evidenced by the Proof of Service, we have filed a copy of the Petition with the Clerk of the Appellate Court, and have served all counsel of record with a copy of the same.

April 10, 2025

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Should you have any questions or need anything further, please do not hesitate to contact me.

Sincerely,

s/Kevin A. Dunlap.

Kevin A. Dunlap

KAD/tlc

Enclosures

cc: The Honorable Jenny Abbott Kitchings (via email to ctappfilings@sccourts.org)

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