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**Jan 23 2026**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEE COUNTY  
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

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Appellate Case No. 2026-000120

Thomas McElveen, as next friend of O.M., a minor child,.....Appellant,

v.

South Carolina Department of Corrections,.....Respondent,

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APPELLANT’S MEMORANDUM CONCERNING APPEALABILITY

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Appellant Thomas McElveen, as next friend of O.M., a minor child (“Appellant”), per the court’s direction, submits this memorandum on appealability. This appeal is proper.

This is an appeal from an order that denied as futile the Appellant’s motion pursuant to Rule 15(a), S.C.R.C.P. to file an Amended Complaint in this case to correct deficiencies outlined by the trial court’s order dismissing the original Complaint without prejudice pursuant to Rule 12(b)(6), S.C.R.C.P.

The South Carolina Supreme Court and Court of Appeals have long held that orders denying Rule 15(a), S.C.R.C.P. motions to amend may be appealed after the lawsuit ends. In Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004), while the Supreme

Court found that a trial court's order denying a motion to amend was not immediately appealable prior to the trial of the case, it held, "Petitioners have not 'arrived at the end of the road' and will be able to appeal the decision after the trial is finished." 357 S.C. at 230, 593 S.E.2d at 147. In Tillman v. Tillman, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017), the Court of Appeals held that with respect to a motion to amend, "[I]n the unlikely event the motion to amend is denied, then Appellant retains the right, after the lawsuit ends, to appeal the denial" of the motion to amend. Id. Likewise, in Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 379 (Ct. App. 2002), the Court of Appeals held that with respect to the denial of a motion to amend to assert third-party claims, "[a]t the conclusion of the present action, [Appellant] may either appeal the trial court's order denying her motion to amend or file a separate, first-party suit against Gardner." Id.

In Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019), the South Carolina Supreme Court held that "[w]hen 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 plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." Skydive Myrtle Beach, Inc., 426 S.C. at 179, 826 S.E.2d at 587. The Court went on to hold that "[o]rdinarily, therefore, the time for requesting leave to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient." 426 S.C. at 181, 826 S.E.2d at 588. However, in Skydive, the trial court's order dismissing the Complaint was with prejudice, and the Supreme Court held, "the circuit court erred not only in refusing to consider the request to amend, but also in effectively preventing Skydive from litigating a post-ruling motion to amend by immediately dismissing the claims 'with prejudice.'" Skydive Myrtle Beach, Inc., 426 S.C. at 182, 826 S.E.2d at 588. Thus, the

Court remanded the case to the circuit court, finding that “[t]he circuit court should have allowed Skydive an opportunity to amend its complaint pursuant to Rule 15(a).” 426 S.C. at 192, 826 S.E.2d at 594.

Following the remand of the case, Skydive moved to amend its complaint pursuant to Rule 15(a), S.C.R.C.P., and the circuit court denied the motion to amend and a motion to reconsider, which Skydive appealed. Skydive Myrtle Beach, Inc. v. Horry County, No. 2021-000217, 2024 WL 3291602 (Unpub. Ct. App. Jul. 3, 2024). While the Court of Appeals held that the denial of the motion was not immediately appealable because the action remained pending against two other defendants and was not final, the court held, “Skydive may appeal the trial court’s order denying its motion to amend its complaint at the conclusion of the present action.” *Id.* at \*3.

Thus, the appealability of a trial court’s denial of a motion to amend following an order dismissing a Complaint pursuant to Rule 12(b)(6), S.C.R.C.P. falls squarely within S.C. Code Ann. § 14-3-330. S.C. Code Ann. § 14-3-330(2), provides appellate jurisdiction of “[a]n order affecting a substantial right made in any action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.” S.C. Code Ann. § 14-3-330(2). In other words, an order affects a substantial right “when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993). Likewise, under § 14-3-330(1), an order “involving the merits” is appealable. An order which involves the merits is one that “must finally determine some substantial matter forming the whole or a part of some cause of action or

defense.” Mid-State Distributors, Inc., 310 S.C. at 334, 426 S.E.2d at 780. In making these determinations, the Court of Appeals examines, the “nature and effect of the order, not merely its label.” Tillman, 420 S.C. at 250, 801 S.E.2d at 759.

In the case at bar, the trial court granted Respondent’s Rule 12(b)(6), S.C.R.C.P. motion to dismiss the Complaint on April 23, 2025 without prejudice. See Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006) (“When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice.”). On May 2, 2025, Appellant filed both a Rule 59(e), S.C.R.C.P. motion regarding the trial court’s order as well as a motion pursuant to Rule 15(a), S.C.R.C.P. for leave to file an Amended Complaint. Both motions were heard via WebEx on September 30, 2025. On December 1, 2025, the trial court denied the motion to reconsider but did not issue an order on Appellant’s motion to amend. On December 11, 2025, with respect to the motion to amend, the trial court requested for the parties to “each submit proposed orders for Judge Griffin’s review within 30 days,” which both parties submitted. On January 7, 2026, the trial court denied Appellant’s Rule 15(a), S.C.R.C.P. motion, holding that allowing the proposed amended complaint to be filed “would be futile.” In other words, the trial court found as a matter of law that it “would be impossible” for Appellant to succeed with an amended pleading. Skydive, 426 S.C. at 192, 826 S.E.2d at 594. Thus, the nature and effect of the trial court’s order denying the Rule 15(a), S.C.R.C.P. both discontinued the action and involved the merits, as it finally determined Appellant’s claims, bringing Appellant to the “end of the road” in the trial court. See Baldwin Const. Co., Inc., 357 S.C. at 230, 593 S.E.2d at 147. As such, with the trial court ending the lawsuit, Appellant has the right now to appeal the denial of the motion to amend, and an appealable decision is before the court in this case. Tillman, 420 S.C. at 250, 801 S.E.2d at

760.

Respectfully submitted,

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