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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEE COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Civil Action No. 2024-CP-31-00253
Appellate Case No. 2026-000120

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

v.

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

RESPONDENT'S MEMORANDUM ON APPEALABILITY

Pursuant to the Court's letter dated January 21, 2026, Respondent South Carolina Department of Corrections (hereinafter, "SCDC" or "Respondent") respectfully submits this memorandum addressing the appealability of the circuit court's January 7, 2026 order, denying Appellant Thomas McElveen, as next friend of O.M., a minor child's ("Appellant") motion for leave to file an amended complaint. For the reasons set forth below, the order is not appealable, and the Court should enter an order dismissing this appeal.

BACKGROUND

This action arises out of criminal allegations that a non-party, Abbygale El-Dier ("Mother"), perpetuated horrific sexual abuse against her minor child ("O.M."). On October 15, 2024, Appellant filed suit against SCDC alleging that, prior to the abuse, SCDC was on notice that non-party inmate Jacob Lance had a contraband cell phone and had been contacting Mother via

said cell phone. Appellant claimed that SCDC was negligent and grossly negligent in failing to prohibit Inmate Lance from obtaining the cell phone, contacting Mother, and directing Mother to sexually abuse O.M.

On December 20, 2024, SCDC moved to dismiss Appellant's complaint pursuant to Rule 12(b)(6), SCRCP, arguing that SCDC owed no duty to Appellant as a matter of law. Appellant opposed the motion to dismiss but did not request leave to amend his complaint while the motion was pending. On April 23, 2025, the circuit court granted SCDC's motion to dismiss, ruling that SCDC did not owe a duty to Appellant under the facts alleged in the complaint.

On May 2, 2025, Appellant responded to the circuit court's order by filing two motions. First, pursuant to Rule 59(e), SCRCP, Appellant filed a motion to reconsider (hereinafter, the "motion for reconsideration"). In that motion, Appellant requested that the circuit court either: (i) permit Appellant to amend his complaint or (ii) reconsider the ruling that SCDC did not owe a duty under the facts alleged in the original complaint. Second, Appellant filed a standalone motion for leave to file an amended complaint, along with a proposed amended complaint (hereinafter, the "motion to amend").

On December 1, 2025, the circuit court entered an order denying Appellant's motion for reconsideration. The circuit court's order did not specifically address the request in the motion for reconsideration that Appellant be permitted leave to file an amended complaint. Nor did the order address Appellant's separately filed motion to amend. The same day, counsel for Appellant emailed the circuit court requesting a ruling on the motion to amend. On December 11, 2025, the circuit court responded, requesting that the parties submit proposed orders on the motion to amend within 30 days. Despite this indication that the motion to amend might not be decided prior to the expiration of time to appeal the December 1, 2025 order, Appellant did not file an appeal or a

second motion for reconsideration requesting that the circuit court address the request for leave to file an amended complaint.

On January 7, 2026, the circuit court entered an order denying Appellant's motion to amend. The circuit court determined that any amendment would be futile, as any pleading or drafting changes could not manufacture a duty between SCDC and O.M. where none exists under the law. On January 16, 2026, Appellant filed a notice of appeal from the January 7, 2026 order.

LEGAL STANDARD

"The determination of whether a trial court's order is immediately appealable is governed by statute." *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015). Section 14-3-330 of the South Carolina Code embodies the final judgment rule: "[a]n appeal ordinarily may be pursued only after a party has obtained a final judgment." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005). However, section 14-3-330 also provides appellate courts with jurisdiction to review certain categories of intermediate—or interlocutory—orders. *See EnerSys Delaware, Inc. v. Hopkins*, 401 S.C. 615, 617, 738 S.E.2d 478, 479 (2013) (noting "an order must fall within one of the enumerated subsections [of 14-3-330] to be immediately appealable"). Two such categories of intermediate orders that are immediately appealable are orders "involving the merits" under section -330(1) and orders "affecting a substantial right" under section -330(2).

ARGUMENT

Both the South Carolina Supreme Court and this Court have held that orders denying motions to amend are not immediately appealable under section 14-3-330. *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) (holding an order denying a motion to amend an answer is not immediately appealable); *Tatnall v. Gardner*, 350 S.C. 135, 138, 564

S.E.2d 377, 379 (Ct. App. 2002) (holding an order denying a motion to amend to assert third-party claims in not immediately appealable). Thus, to obtain appellate review, such an order must be appealed along with another appealable order that is properly before the appellate court, such as an order granting a motion to dismiss. *See Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (stating "an order that is not directly appealable will nonetheless be considered if there is an appealable issue before the [c]ourt and a ruling on appeal will avoid unnecessary litigation" (citation omitted)); *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001) ("Dismissal of an action pursuant to Rule 12(b)(6) is appealable."). For this reason, our Supreme Court has cautioned that plaintiffs should request—and circuit courts should ordinarily provide—leave to amend **before** the order of dismissal is issued. *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 179, 826 S.E.2d 585, 587 (2019) ("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 plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.").

Here, Appellant did not seek leave to amend prior to the April 23, 2025 order dismissing the complaint. Instead, Appellant made that request after receiving the order of dismissal, both in the motion for reconsideration and in the motion to amend. As a result of the motion for reconsideration, the time for appeal was tolled until December 1, 2025, when the circuit court denied that motion. *See* Rule 203(b)(1), SCACR. Thereafter, to preserve the opportunity for appellate review, Appellant was required to either (i) file a second motion for reconsideration asking the circuit court to expressly rule on the request to amend contained in the motion for reconsideration or (ii) file a notice of appeal within 30 days. *Id.* Appellant chose to forgo such

review, instead placing his exclusive reliance on the motion to amend that remained pending until January 7, 2026.

The circuit court's January 7, 2026 order is not appealable for three separate reasons. First, as noted above, our appellate courts have previously held that orders denying motions to amend are not immediately appealable. *See Baldwin Const.*, 357 S.C. at 230, 593 S.E.2d at 147; *Tatnall*, 350 S.C. at 138, 564 S.E.2d at 379. Second, under the unique facts of this case, Appellant's failure to timely appeal the December 1, 2025 order is fatal to his ability to obtain appellate review. As noted above, the December 1, 2025 order denied the motion for reconsideration in which Appellant urged the circuit court to reconsider dismissal *and* requested the opportunity to amend his complaint. Because Appellant did not appeal that order, the law of the case doctrine prevents him from appealing the denial of the subsequent order denying the motion to amend. *Bone v. U.S. Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) ("The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so."). Put differently, Appellant's failure to appeal the December 1, 2025 order denying Appellant the opportunity to amend foreclosed an appeal from the subsequent order denying the formal motion to amend.

Finally, it is worth noting that the January 7, 2026 order denying Appellant's motion to amend was not a final judgment within the meaning of section 14-3-330. Importantly, the April 23, 2025 order dismissing the complaint was entered 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."). As a result, Appellant was free to initiate a new action and replead a complaint. The circuit court's ruling on Appellant's motion to amend does not dictate otherwise.

Because Appellant's action has not been dismissed with prejudice, Appellant has not reached the "end of the road."

CONCLUSION

Accordingly, because the instant order on appeal is not appealable, the Court should dismiss this appeal.

Respectfully submitted,

SMITH | ROBINSON

/s/ Daniel C. Plyler

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CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the undersigned employee of Smith Robinson Holler DuBose and Morgan, LLC, counsel for the Defendant/Respondent South Carolina Department of Corrections, does hereby certify that service of the **Respondent's Memorandum on Appealability** in the above-captioned matter was made upon Appellant's counsel by email only this the 30th day of January, 2026, as follows:

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