

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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. 2025-000682

Gibbs International, Inc.,Petitioner,

v.

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

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

BRIEF OF RESPONDENTS SARMAD HARAKE AND EUROSA, INC.

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals properly concluded Respondents' fourth counterclaim contained a valid claim for relief.
2. Whether the Court of Appeals properly concluded the Circuit Court could not strike the fourth 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.
3. Whether the Court of Appeals properly disregarded Petitioner's arguments as to the prejudice and futility of Respondents' request for an opportunity to amend the fourth counterclaim given that the arguments were neither raised to nor ruled on by the Circuit Court.

I. STATEMENT OF THE CASE

This matter involves complex allegations and both corporate and individual parties, but at its core, it is a business dispute arising from an alleged breach of contract and request for accounting of an alleged investment agreement first discussed in 2015. Petitioner Gibbs International, Inc. ("Petitioner" or "Gibbs") essentially alleges that Respondents Sarmad Harake ("Harake") and Eurosa, Inc. ("Eurosa") (collectively, "Respondents") undertook certain responsibilities relative to multiple investments and were the *sole* cause of any investment failures, giving rise to an obligation to return all monies paid to Eurosa as well as liability for damages tied to, among other things, the investments made by Petitioner – even including investments made prior to and after Petitioner's business dealings with Respondents. Respondents deny Petitioner's allegations that they were solely responsible for any investment failure and deny they owe Petitioner any damages. Rather, Respondents allege Petitioner did not fulfill its promises, and those failures caused Respondents' damage.

Petitioner initially brought this lawsuit on March 7, 2017, but it was amended twice within the first few months, with the Second Amended Complaint filed on June 9, 2017. An entry of default

was entered against, among other parties, Harake, Eurosa, and their co-defendant Katherine Harake on July 17, 2017; however, Harake, Eurosa, and Katherine Harake timely answered the Second Amended Complaint on August 17, 2017, and the entry of default was set aside by Order of the Circuit Court on December 21, 2017.

The Second Amended Complaint, which spanned some thirty pages, alleged causes of action for: (1) breach of a contract between Harake and Eurosa on one hand and Gibbs on the other; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of fiduciary duties; (4) an accounting; (5) invasion of privacy; (6) a derivative action against IOtive and its Board Members and Shai Hemli; (7) an action for *quantum meruit* against Katherine Harake; (8) conversion; and (9) unfair and deceptive trade practices. (App. pp. 258-285, 2d Am. Complaint, ¶¶ 11-110). When Respondents timely answered the Second Amended Complaint, they also alleged counterclaims for breach of contract, negligent misrepresentation, and unjust enrichment. (App. pp. 306-315, Answer and Counterclaims, ¶¶ 124-176). Katherine Harake was voluntarily dismissed from this litigation on June 1, 2018.¹ Collectively since January 2018, the parties have produced tens of thousands of pages of documents in this litigation and taken more than 10 depositions.

Gibbs filed its Third Amended Complaint on August 3, 2020, but did not renew the derivative cause of action in its previous Complaints or the breach of fiduciary duty cause of action as to certain prior defendants, leaving only Harake, Eurosa, and Katherine Harake as defendants in this litigation. (App. p. 457, 3d Am. Complaint, p.1). The Third Amended Complaint contains causes of action for: (1) breach of contract and declaratory judgment, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) accounting, (5) invasion of privacy/wrongful intrusion,

¹ Katherine Harake was brought back into this litigation as part of Gibbs' Third Amended Complaint in 2020 pursuant to different claims than were originally brought against her; although some of those claims were dismissed, she is not a party to this appeal.

(6) conversion, (7) unfair and deceptive trade practices, (8) fraud, (9) civil conspiracy, (10) unjust enrichment/quasi contract/IMPLIED CONTRACT/quantum meruit, and (11) piercing the corporate veil. (App. pp. 458-484, 3d Am. Complaint, ¶¶ 6-119). On August 24, 2020, Respondents filed a partial motion to dismiss the Third Amended Complaint as well as their Answer to Plaintiff's Third Amended Complaint and Amended Counterclaims ("Answer and Amended Counterclaims"). In their Answer and Amended Counterclaims, Respondents asserted four counterclaims, including (1) breach of contract, (2) negligent misrepresentation, (3) unjust enrichment, and (4) tortious interference with economic interest (the "fourth counterclaim"). (App. pp. 505-520, Answer and Amended Counterclaims, ¶¶ 124-206).

Gibbs filed a "Motion to Dismiss and Strike Counterclaims of Sarmad Harake and Eurosa, Inc." ("Gibbs' Motion") on August 28, 2020, asserting Respondents failed to state facts sufficient to show a claim of negligent misrepresentation and that Respondents' fourth counterclaim for tortious interference with economic advantage is not a claim recognized by South Carolina law. (App. p. 523, Gibbs' Motion, p. 2; *see also* App. pp. 617-618, Gibbs Memo. in Supp., pp. 3-4). Gibbs' Motion further sought to strike "the intentional interference with prospective contractual relations claim" that Harake discussed during his deposition. Following several extension requests, Gibbs filed its Reply to Harake Defendants' Amended Counterclaims on September 18, 2020, denying some allegations and admitting some allegations in the Answer and Amended Counterclaims. (App. pp. 526-535, Reply, ¶¶ 5-86).

Both sides filed memoranda in support or opposition of their respective positions as to Gibbs' Motion. As the filing of Gibbs' supporting memorandum was very close in time to the hearing (approximately 90 minutes before the hearing), Respondents had already filed their opposition memorandum by the time they received Gibbs' supporting memorandum. Gibbs' supporting

memorandum contained a new ground for relief that was not stated in Gibbs' Motion: it requested Respondents' fourth counterclaim for tortious interference with economic interest be struck pursuant to Rule 37, SCRCPC, but it did so without having conferred with counsel pursuant to Rule 11, SCRCPC, or certifying that such conference would serve no useful purpose. (App. pp. 618-620, Gibbs Memo. In Supp., pp.4-6). Further, Gibbs' supporting memorandum did not identify an order that it believed Respondents had violated to justify Gibbs' request to strike a cause of action as a sanction, (App. pp. 618-620, Gibbs Memo. in Supp., pp. 4-6), which is a requirement of Rule 37 – the rule Gibbs invoked.

Due to COVID-19 conditions, a hearing on Gibbs' Motion, as well as other motions in this matter, was held via WebEx on September 22, 2020. On September 25, 2020, the Circuit Court entered a Form 4 Order ("September 25 Order"), ruling in part, that Gibbs' Motion should be denied as to Respondents' counterclaim of negligent misrepresentation and should be granted as to Respondents' counterclaim of tortious interference with economic advantage. The September 25 Order directed the respective parties to draft proposed orders "using language consistent with" their respective arguments by November 1, 2020. (App. p. 188, September 25 Order, p. 2).

Following receipt of the September 25 Order, Respondents timely filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure on October 5, 2020 ("Motion to Alter or Amend"). Following the proposed order submissions of the parties, the Circuit Court instructed counsel on November 17, 2020 that because Respondents' counsel had already filed a motion pursuant to Rule 59(e), SCRCPC, "a new one is not necessary." (App. p. 193, November 17, 2020 Email).

The Circuit Court entered its final Order on November 18, 2020 ("November 18 Order"). The November 18 Order contained the Circuit Court's rulings on multiple motions. However, in its appeal, Respondents only sought review of the portion of the November 18 Order that ruled on Respondents'

fourth counterclaim. (App. pp. 196-199, 206-209, 223, November 18 Order, pp. 1-4, 11-14, 28). Thereafter, the Circuit Court denied Respondents’ Motion to Alter or Amend on November 30, 2020 (“November 30 Order”) without additional briefing or argument. (App. p. 225, November 30 Order, p. 1). Respondents timely filed a Notice of Appeal as to the Circuit Court’s Orders on December 17, 2020.

Following briefing and oral argument, the Court of Appeals issued Panel Opinion No. 24-UP-385 (the “Panel Opinion”) on November 13, 2024, reversing and remanding the dismissal of Respondents’ fourth counterclaim. On March 12, 2025, the Court of Appeals denied Petitioner’s Petition for Rehearing and Request for Hearing *en banc*. (App. p. 14). Petitioner filed its Petition for Writ of Certiorari on April 10, 2025, and Respondents filed their Return on June 27, 2025. On November 18, 2025, this Court granted Petitioner’s Petition for Writ of Certiorari.

II. STATEMENT OF THE FACTS

The Order on appeal concerns the Court of Appeals’ reversal of the Circuit Court’s ruling on Gibbs’ Motion to Dismiss or to Strike that dismissed Respondents’ fourth counterclaim. Pursuant to the applicable standard for a Rule 12(b)(6), SCRPC, motion, the facts alleged by Respondents in its 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).

Respondents’ Answer and Amended Counterclaims

Respondents alleged more than thirty (30) paragraphs of background information in addition to claim-specific allegations supporting the four counterclaims they pled. (App. pp. 506-514, Answer and Amended Counterclaims, ¶¶ 128-160).² As this appeal relates only to

² Additionally, each of the counterclaims included an incorporation paragraph, restating Respondents’ previous allegations. (App. pp. 514-518, Answer and Amended Counterclaims, ¶¶

Respondents' fourth counterclaim of tortious interference with economic interest, the facts discussed herein are those alleged in relation to that cause of action.

Respondents alleged that around June 1, 2015, Respondents, through Eurosa, began doing business with Petitioner after a handshake with Petitioner's President and CEO, Jimmy I. Gibbs, and as part of this agreement, they agreed to create a limited liability company, Gibbs Investment Holdings ("GIH"), as a vehicle to work together on certain investment projects and under certain revenue sharing terms. (App. p. 506, Answer and Amended Counterclaims, ¶¶ 128-131). However, an operating agreement for GIH was never executed by Gibbs. (App. p. 507, Answer and Amended Counterclaims, ¶ 134).

As of June 2016, the parties further agreed that Harake would receive a monthly draw of approximately Thirty-Three Thousand and No/100 Dollars (\$33,000) from GIH, which would count as part of Petitioner's investment in GIH. (App. pp. 506-507, Answer and Amended Counterclaims, ¶ 133). As of August 5, 2016, Harake, on behalf of Eurosa, and Jimmy I. Gibbs, on behalf of Petitioner, signed a Memorandum of Agreement ("MOA") providing their agreement would be reevaluated on or before February 5, 2017. (App. p. 511, Answer and Amended Counterclaims, ¶ 143). The MOA provided that GIH would be owned in equal shares by the two sides, would not own any assets, would be managed by Harake, and would consist of unanimously chosen investment projects. (App. p. 511, Answer and Amended Counterclaims, ¶ 144). The MOA also provided that project and investment ownership would be divided equally and that Petitioner would provide Three Million Two Hundred Thousand And No/100 Dollars (\$3,200,000.00) in

161, 168, 182, and 191). The remaining paragraphs make up each of the four counterclaims, specifically (1) breach of contract (App. pp. 514-515, Answer and Amended Counterclaims, ¶¶ 161-167), (2) negligent misrepresentation (App. pp. 515-517, Answer and Amended Counterclaims, ¶¶ 168-181), (3) unjust enrichment (App. pp. 517-518, Answer and Amended Counterclaims, ¶¶ 182-190), and (4) tortious interference with economic interest (App. pp. 518-520, Answer and Amended Counterclaims, ¶¶ 191-204).

“cash to fully fund agreed investment projects.” (App. p. 511, Answer and Amended Counterclaims, ¶¶ 145-146).

Additionally, in July 2016, Petitioner agreed to certain obligations related to Paysend Processing, Inc. (“Paysend Processing”), which included providing \$1 million in investment money as long as it received money back during the second capital raise. (App. p. 512, Answer and Amended Counterclaims, ¶ 149). Pursuant to an agreement between Eurosa, Petitioner, and a third party, Eurosa owned a 13% interest in Paysend Processing based on a valuation of \$27 million. (App. p. 512, Answer and Amended Counterclaims, ¶ 150). As of September 2016, Jimmy I. Gibbs on behalf of Petitioner insisted that the \$33,000 draw promised to Harake from GIH should instead be drawn from Paysend Processing; however, Petitioner refused to make any investment over \$250,000 and refused to be bought out by the other investor. (App. pp. 512-513, Answer and Amended Counterclaims, ¶¶ 151-152, 155).

At the time, Harake had acquired a company in the United Kingdom which changed its name to Paysend PLC (“Paysend UK”), and Petitioner refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (App. pp. 512-513, 519, Answer and Amended Counterclaims, ¶¶ 153, 155, 197-198). Petitioner knew Harake had acquired 100% ownership interest of Paysend UK and that Paysend UK was going to continue to raise capital. (App. p. 519, Answer and Amended Counterclaims, ¶¶ 195-196). Yet Petitioner unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (App. p. 520, Answer and Amended Counterclaims, ¶ 202). As a result of Petitioner’s unjustified refusal: (1) Respondents were forced to purchase the other investor’s shares in Paysend Processing; (2) Respondents were forced to pay for expenses incurred by that investor; and (3) Harake was first diluted and then forced to sell his shares in Paysend UK, causing him damages related thereto. (App. pp. 513-514, Answer and

Amended Counterclaims, ¶¶ 155-160).

Gibbs' Motion to Dismiss

Gibbs' Motion argued that Respondents' fourth counterclaim for "tortious interference with economic advantage" should be dismissed pursuant to Rules 12(b)(6) and 12(f), SCRCF, because the "claim does not exist under South Carolina law" and past attempts to bring tortious interference claims resulted in treatment of the claim as one for intentional interference with contractual relations. (App. pp. 522-523, Gibbs' Motion, pp. 1-2). Gibbs' Motion further argued that the claim should be struck because Harake was aware of the potential claim when he began to testify about it during his deposition (and was instructed not to answer) but only added it after Gibbs filed its Third Amended Complaint. (App. p. 524, Gibbs' Motion, p. 3). In Gibbs' supporting memorandum – filed 90 minutes before the hearing – Gibbs raised an entirely new ground for relief that was not stated in its Motion, *to wit*: Gibbs claimed the fourth counterclaim for tortious interference with economic interest also should be struck pursuant to Rule 37, SCRCF. (App. p. 618, Gibbs Memo. in Supp., p. 4). This new, surprise ground for dismissal violated Rule 11, SCRCF, as Gibbs never conferred with counsel or certified that such conference would serve no useful purpose, as that rule requires. Gibbs argued that striking the fourth counterclaim was appropriate because discovery had been withheld, but Gibbs identified no order it believed Respondents had violated that warranted sanctions pursuant to Rule 37. (App. pp. 618-620, Gibbs Memo. in Supp., pp. 4-6).

Deposition Testimony of Harake

The reopened deposition of Harake (to which Gibbs referred in its supporting memorandum) took place on July 25, 2019, over a year prior to the filing of the Third Amended Complaint by Gibbs which added more causes of action against Harake. (App. p. 634, Harake

Depo. Tr., Vol. 2, p. 1). Harake was permitted to testify as to Paysend Processing and Paysend UK, including that Harake received a \$1.5 million loan from a fund in Switzerland to use as capital to create Paysend UK, that as of July 2019 Paysend UK was worth around \$173 million, that Jimmy I. Gibbs refused to be a part of Paysend UK and refused to be bought out of Paysend Processing, and that Harake was forced to divest from Paysend UK. (App. p. 645, line 9- p.650, line 17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). That testimony is consistent with the allegations pled in Respondents' fourth counterclaim. However, when Harake began to testify about work product-protected information regarding the "next phase" and "damage" caused to him – and Gibbs' counsel asked questions about that, Harake was instructed by his counsel not to answer as further testimony would have revealed attorney-client and work product protected information. (App. p. 650, line 17-p. 652, line 23, Harake Depo. Tr., Vol. 2, pp. 291:18-293:23).

Following the multiple depositions that were taken during the same week as Harake's reopened deposition, counsel agreed off the record that should a motion for protective order need to be filed related to the instructions not to answer or refusal to answer given in either of the depositions of Jimmy I. Gibbs or Harake, opposing counsel was to let the counsel who gave the instruction know. (App. p. 570, Memo. in Opp. to Gibbs' Motion, p. 9). At no time was such a request made to Respondents' counsel. (App. p. 570, Memo. in Opp. to Gibbs' Motion, p. 9). Petitioner's counsel argued during the hearing on the matter that such a request should have been clear when Petitioner filed its motion to dismiss. (App. p. 664, lines 1-11, Hrg. Tr., p. 12:1-11). However, Petitioner's counsel noted that "what [he] really care[d] about" was whether Respondents would "agree to let [him] depose [Respondent Harake] about" the fourth counterclaim. (App. p. 664, lines 12-15, Hrg. Tr., p. 12:12-15). During the hearing, Respondents' counsel agreed that should the counterclaim proceed, Petitioner's counsel would not be precluded

from reopening Harake's deposition for the limited purpose of inquiring about it. (App. p. 674, lines 5-12, Hrg. Tr., p. 22:5-12). The Circuit Court thereafter noted that any limits of the deposition testimony were not before it. (App. p. 674, lines 13-24, Hrg. Tr., p. 22:13-24).

The Circuit Court's Orders

In the September 22, 2020 hearing on Gibbs' Motion, Respondents argued that just because the title of a particular cause of action has not been recognized formally in South Carolina, the claim does not automatically require dismissal. (App. p. 672, lines 1-8, Hrg. Tr., p. 20:1-8). Additionally, Respondents argued that even if their tortious interference with economic interest claim was unable to stand, it still pled a valid cause of action, such as tortious interference with contractual relations. (App. p. 673, line 2 - p. 674, line 4, Hrg. Tr., pp. 21:2-22:4). However, Petitioner responded that Respondents were trying to allege intentional interference when only pleading tortious interference. (App. p. 675, lines 11-25, Hrg. Tr., pp. 23:11-25).

The September 25 Order, among other things, granted Gibbs' Motion as to the fourth counterclaim, which the Circuit Court referred to as "tortious interference with economic advantage" as opposed to "tortious interference with economic interest" as it was pled. (App. p. 187, September 25 Order, p. 1). Thereafter, it directed Petitioner's counsel to "prepare a proposed Order incorporating the findings on his client's behalf using language consistent with his arguments." (App. p. 188, September 25 Order, p. 2).

The Circuit Court's November 18 Order, which as to the fourth counterclaim was the result of the proposed order submitted by Petitioner, dismissed the fourth counterclaim because as titled, the claim was not formally recognized in South Carolina. (App. p. 207, November 18 Order, p. 12). Additionally, the November 18 Order found that since the fourth counterclaim did not allege "intentional interference," it should be dismissed. (App. p. 207, November 18 Order, p. 12).

Although acknowledging Respondents made a verbal request during the hearing on Gibbs’ Motion for permission to amend the counterclaim to change the label as to a cause of action, the Court rejected that request, noting Respondents’ motion to reconsider requested amendment and that such issue would be dealt with in ruling on that motion. (App. pp. 207-208, November 18 Order, pp. 12-13). The Circuit Court’s November 30 Order denied Respondents’ Motion to Alter or Amend, providing that it “fully considered the arguments . . . as well as the motions, arguments, and briefings submitted in connection with the related hearing held September 22, 2020.” (App. p. 225, November 30 Order, p. 1). Finally, the Circuit Court’s November 18 Order seems to conclude that because Respondents did not move for a protective order with regard to certain questions about the claim that eventually became the fourth counterclaim, the counterclaim should be dismissed or stricken pursuant to Rules 12(b)(6) and 12(f), SCRCF. (App. pp. 208-209, November 18 Order, pp. 13-14). Respondents timely filed a Notice of Appeal as to the Circuit Court’s Orders on December 17, 2020.

Following briefing and oral argument, the Court of Appeals issued Panel Opinion No. 24-UP-385 (the “Panel Opinion”) on November 13, 2024, reversing and remanding the dismissal of Respondents’ fourth counterclaim. Specifically, the Panel Opinion found Respondents’ fourth counterclaim contained a valid claim for relief such that Respondents did not need an opportunity to amend, and it determined the Circuit Court could not strike the counterclaim pursuant to Rules 12(f) or 37, SCRCF, given the procedural history of the case and the Circuit Court’s failure to address the appropriate factors before determining a sanction. (App. pp. 7-11).

III. STANDARD OF REVIEW

When reviewing a dismissal pursuant to Rule 12(b)(6), SCRCF, an appellate court applies the “same standard of review as the trial court.” *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (citing *Williams*, 347 S.C. 227, 553 S.E.2d 496). “In considering a motion to dismiss a complaint

based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.” *Id.* (citing *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). A counterclaim is treated similarly, in that the trial court and reviewing court must base their decision whether to dismiss a counterclaim exclusively “on the allegations set forth in the counterclaim.” *Charleston Cnty. Sch. Distr. V. Laidlaw Transit, Inc.*, 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001).

“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); *see also Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007); *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). “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. A pleading should not be dismissed merely because the court doubts the complainant will prevail in the action. *Charleston Cnty. Sch. Distr.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364; *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Likewise, on appeal, a motion to strike pursuant to Rule 12(f), SCRPC, which challenges a theory of recovery in a pleading, “is in the nature of a motion to dismiss under Rule 12(b)(6), SCRPC.” *Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (citing *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also*

Menezes v. WL Ross & Co. LLC, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011) (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCP, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCP), *rev'd in part on other grounds*, *Menezes v. WL Ross & Co. LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013). Therefore, this Court should “base its decision solely on the allegations set forth on the face of the” pleading, and such motion “cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the [complainant] to any relief on any theory of the case.” *Grazia*, 390 S.C. at 567, 703 S.E.2d at 199.

Sanctions issued by a circuit court pursuant to Rule 37, SCRCP, are reviewed for abuse of discretion. “The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court.” *Davis v. Parkview Apartments*, 409 S.C. 266, 281–82, 762 S.E.2d 535, 543 (2014) (quoting *Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App.1987)). To be considered an abuse of discretion, “the appellant [must] show[] that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.” *Id.* (citing *Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)).

IV. ARGUMENT

As has been Petitioner’s modus operandi throughout the appellate process, it attempts to distract from the narrow issue actually appealed: whether the allegations in the fourth counterclaim of Respondents’ Amended Answer and Counterclaims state a claim for any theory of relief. Rather, Petitioner has sought to focus on outside allegations, interpretations, or speculation of motive that lack support in the record and are not proper for appellate review. Petitioner’s attempt to create a list of what it believes would remain in the underlying litigation should the Court of Appeals’ decision stand (such that Respondents’ fourth counterclaim is permitted) also has no bearing on

the issues before the Court. Simply put, Petitioner independently made the decision to file a Third Amended Complaint more than three years after the filing of its initial Complaint, which in turn gave Respondents the ability to modify their Answer and Counterclaims without having to make a motion to do so. Such procedural posture does not change the appellate standard of review on a motion to dismiss, and as will be discussed herein, there is not a conflict between the case law applied by the Court of Appeals and a prior decision of this Court.

The Court of Appeals appropriately determined Respondents' fourth counterclaim contained a valid claim for relief such that Respondents did not need an opportunity to amend, and it was correct in finding that the Circuit Court could not strike the counterclaim pursuant to Rule 12(f) or Rule 37, SCRPC, given the procedural history of the case and the Circuit Court's failure to address the appropriate factors before determining a sanction. (App. pp. 7-11).

A. The Court of Appeals Properly Concluded Respondents' Fourth Counterclaim Contained A Valid Claim For Relief.

The Court of Appeals applied the correct standard in coming to its decision that Respondents' fourth counterclaim contained a valid claim for relief as the standard of review does not change based on where the litigation is in its lifecycle. When reviewing a dismissal pursuant to Rule 12(b)(6), SCRPC, an appellate court applies the "same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007) (citing *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001)). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* (citing *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). A counterclaim is treated similarly, in that the trial court and reviewing court must base its decision whether to dismiss a counterclaim exclusively "on the allegations set forth in the counterclaim." *Charleston Cnty. Sch. Distr. V.*

Laidlaw Transit, Inc., 348 S.C. 420, 559 S.E.2d 362 (Ct. App. 2001).

“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); *see also Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007); *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999); *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). “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(emphasis added). A pleading should not be dismissed merely because the court doubts the complainant will prevail in the action. *Charleston Cnty. Sch. Distr.*, 348 S.C. 420, 424, 559 S.E.2d 362, 364; *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987). Given that Respondents’ fourth counterclaim contains “facts alleged and inferences reasonably deducible therefrom, [when] viewed in the light most favorable to [Respondents], . . . entitle [Respondents] to relief” on a cognizable theory of recovery, *Doe*, 373 S.C. 390, 395, 645 S.E.2d 245, 247, the Court of Appeals’ decision should be upheld. *See also Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010).

1. Respondents’ Fourth Counterclaim contains allegations that state a valid claim for relief.

As the Court of Appeals reasoned, the question is whether Respondents’ fourth counterclaim states **any** valid theory of relief using the standard established by Rule 12(b)(6), SCRPC. Here, the facts alleged in the fourth counterclaim sufficiently state a cause of action for

tortious interference with contractual relations.

To allege and maintain a cause of action for tortious interference with contractual relations, a party must show: (1) a contract's existence, (2) knowledge of the contract, (3) deliberate or intentional procurement of its breach, (4) the absence of justification, and (5) damages. *Gecy v. S.C. Bank & Tr.*, 422 S.C. 509, 520, 812 S.E.2d 750, 756 (Ct. App. 2018), *reh'g denied* (Apr. 26, 2018) (citation omitted). Viewing the facts alleged in support of the fourth counterclaim in the light most favorable to Respondents (which the Court of Appeals did using the Rule 12(b)(6) and Rule 12(f), SCRCP, analysis), the elements of a claim for tortious interference with contractual relations were pled. Specifically, the fourth counterclaim alleged that Gibbs, Eurosa, and another investor in Paysend Processing had an agreement related to the capital investments needed for Paysend Processing and for the overall plan for growth of that company, and part of that agreement required Gibbs to invest \$1 million. (App. pp. 518-519, Ans. and Am. Counterclaims, ¶¶ 192, 195, and 196). Gibbs does not deny an agreement between these parties existed; rather, Gibbs disagrees with the substance of that agreement and refers the Court to the Third Amended Complaint for what it believes to be the accurate description of the agreement. (App. p. 534, Reply, ¶ 70). At the time, Petitioner was also aware of agreement between Harake and the third party related to Paysend UK, and Gibbs refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (App. p. 512-513, 519, Answer and Amended Counterclaims, ¶¶ 153, 155, 195-198). Further, Petitioner unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (App. p. 520, Answer and Amended Counterclaims, ¶ 202). Therefore, Respondents alleged Gibbs was aware that it was supposed to invest \$1 million as part of a contract and that there were other agreements between Respondents and the third party related to Paysend UK, satisfying pleading of the first two elements of tortious interference with contractual relations, existence, and

knowledge of a contract. *Gecy*, 422 S.C. at 520, 812 S.E.2d at 756. Additionally, Respondents alleged Gibbs refused without justification to meet its obligation under the agreement, acted deliberately to discourage other investment, unjustifiably refused to roll Paysend Processing into Paysend UK, and refused to be bought out from the agreement in an effort to salvage the company, intentionally causing a breach. (App. pp. 518-519, Answer and Amended Counterclaims, ¶¶ 193, 194, 197, and 198). Thereafter, Respondents alleged the damages that resulted from Gibbs' actions. (App. pp. 519-520, Answer and Amended Counterclaims, ¶¶ 199-204).

Respondents' fourth counterclaim pleads facts to meet each element of a claim for tortious interference with contractual relations, and taking those facts in the light most favorable to Respondents, as any court must do at the Rule 12(b)(6) stage, the fourth counterclaim was sufficiently pled. *Gentry*, 337 S.C. 1, 522 S.E.2d 137.

However, for the first time in the Reply to its Petition for Writ of Certiorari, Petitioner argues that Respondents' fourth counterclaim is not sufficient because the Paysend Processing contract cannot provide the basis for the claim of tortious interference with contract. This argument is unavailing for two reasons. First, it is not preserved and should not be considered as it was not raised to or ruled upon by the Circuit Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal."); *see also Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("At a minimum, issue preservation requires that an issue be raised to and ruled upon by the [circuit court]."). Second, the Paysend Processing contract is not the contract that Respondents argue was interfered with by Petitioner as such would create a different cause of action. Rather, as argued herein, the contract that was interfered with by Petitioner was Respondents' agreement for Paysend UK with a third party of which Petitioner was aware. (App. pp. 512-513, 518-519, Ans. and Am.

Counterclaims, ¶¶ 153, 155, 192, 195-198, 195; App. p. 534, Reply, ¶ 70). Further, Petitioner argues that the cause of action is not sufficient because incorporating other allegations by reference is insufficient and because the issues as to Paysend UK were not addressed in Harake’s original counterclaims. There is no rule that says in answering an amended complaint and re-asserting counterclaims that *only* those counterclaims previously pled may be pled again, and pleaders routinely use facts they pleaded in a “facts” section to support the causes of action they are pleading without restating each fact. Accordingly, the Court of Appeals’ decision should be affirmed.

2. The Court of Appeals’ decision is consistent with prior rulings of this Court.

In its Brief, Petitioner argues the Court of Appeals’ opinion conflicts with prior decisions of this Court because the label on the fourth counterclaim was for a cause of action that has not been formally recognized in South Carolina; however, that is simply untrue. As is consistent with South Carolina case law, the label on Respondents’ fourth counterclaim is not dispositive³ of

³ The law is well-settled that the label assigned to a cause of action is not dispositive as to whether it 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) (providing that the court must look beyond the labels of a cause of action to the actions themselves when examining a Complaint); *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) (affirming dismissal of the cause of action, not because of how the cause of action was labeled but rather noting that while trial court in that case had identified the action as “tortious interference with prospective economic advantage,” the “substance of [its] analysis” in determining whether the claim was sufficiently pled was not affected by how the cause of action was titled). Rule 8(f) of the South Carolina Rules of Civil Procedure echoes this principle by providing “[a]ll pleadings shall be so construed as to do substantial justice to all parties.” Further, in *Wellin v. Wellin*, 135 F.Supp.3d. 502 (D.S.C. 2015), a motion to dismiss multiple causes of action argued such causes of action had not been formally recognized in South Carolina. However, the district court “attempt[ed] to do as the state court would do if confronted with the same fact pattern.” *Id.* at 511. In permitting the titled cause of action “intentional interference with prospective contractual advantage/prospective economic advantage” to go forward, the district court found that “South Carolina courts have noted that labeling the cause of action as interference with prospective economic advantage does not change the substance of the cause of action.” *Id.* at 519, n. 15.

whether a claim can pass a challenge pursuant to Rule 12(b)(6), SCRCPP, nor is it grounds for automatic dismissal if a cause of action is pled that has not been formally recognized. Although Petitioner argues that automatic dismissal is automatic if a party pleads a cause of action that has not been formally recognized, Petitioner fails to cite any case law standing for such a proposition.⁴

Petitioner points to the case of *Doe v. Greenville Cnty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) as evidence that this Court has ruled that a counterclaim that is not recognized should not be permitted to survive a motion to dismiss. There is no conflict with that case and other case law in South Carolina permitting causes of action that have not been previously recognized, though, as it does not stand for the proposition that a claim that has not been formally recognized in South Carolina must be dismissed without further review. Rather, in *Greenville Cnty. Sch. Dist.*, the Court reviewed the facts alleged in the complaint as they related to each of the dismissed claims and distinguished why they did not fit other causes of action. *Id.* at 68-70, 651 S.E.2d at 307-09. That posture does not create a conflict between the Court of Appeals' decision in the instant matter and *Doe v. Greenville Cnty. Sch. Dist.*; it is simply the application of the respective facts as pled to potential claims for relief.

This Court has held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial*, 271 S.C. 79, 84, 245 S.E.2d 120, 123 (1978). Therefore, in determining whether a cause of action should be dismissed, 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.***”

⁴ Notably, in *Mallory v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014), this Court refused to adopt or reject the tort of Intentional Interference with Inheritance under the facts of that case as presented, holding instead that the appellant failed to preserve the issue on appeal and emphasizing that the opinion was not to be understood as adopting or rejecting the tort. At no point did the Court say that because the cause of action has not yet been recognized in South Carolina that it should be dismissed automatically.

Sloan Const. Co., 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc.*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added); *see also Fabian*, 410 S.C. 475, 765 S.E.2d 132 (2014) (reversing dismissal pursuant to Rule 12(b)(6) and permitting a third-party beneficiary of an existing estate plan to sue the drafting lawyer of that estate plan in tort and in contract for drafting errors); *Moriarty*, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (holding that an appellate court does not have to provide any particular deference to a lower court when deciding whether to recognize a cause of action, among other things), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted). Moreover, when the Court of Appeals affirmed a dismissal because South Carolina had not recognized a cause of action for intentional interference with inheritance, this Court instead found such a ruling was unnecessary if there were other reasons to dismiss the particular pleading. *Douglas ex rel. Louthian v. Boyce*, 344 S.C. 5, 9-10, 542 S.E.2d 715, 717 (2001) (affirming the dismissal because there was no duty owed by the tort attorneys to the child); *see also Mallory v. Thompson*, 409 S.C. 557, 561, 762 S.E.2d 690, 692 (2014) (refusing to adopt or reject the tort of Intentional Interference with Inheritance under the facts of that case as presented, holding instead that the appellant failed to preserve the issue on appeal, and emphasizing that the opinion was not to be understood as adopting or rejecting the tort). At no point in these cases did the Court hold that because the cause of action has not yet been recognized in South Carolina that it should be dismissed automatically. Accordingly, as Petitioner has not identified a prior decision of this Court standing for the proposition that only causes of action labeled and formally recognized by the courts may be pursued past the motion to dismiss stage of litigation, there is neither a conflict between the Court of Appeals' decision in this matter and a prior decision of this Court nor should the Court of Appeals' decision be overturned for such a reason.

3. The Court of Appeals did not “reinvent” or “re-draft” Respondents’ fourth counterclaim.

Following the standard of review for a Rule 12(b)(6), SCRCP, motion and determining that Respondents pled facts sufficient to state a claim for relief is not reinventing or rewriting Respondents’ fourth counterclaim. The Court of Appeals’ decision should be upheld, and Respondents should be able to proceed with their fourth amended counterclaim.

Petitioner argues that two unpublished federal cases, a United States Fourth Circuit Court of Appeals case, and *Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874, stand for the proposition that an appellate court cannot rewrite a complaint, which it contends the Court of Appeals did in this case. Those cases are inapposite and have no applicability here. Specifically, in *Spence*, the Court affirmed the dismissal from the circuit court because when given the opportunity to present a different theory of recovery or additional factual allegations, the pleader did not do so but instead presented the same allegations and theory of relief. *Id.* at 131, 628 S.E.2d at 882. That is simply not the procedural posture of this case or the actions taken by the Court of Appeals in reversing the dismissal of Respondents’ fourth counterclaim. Likewise, *Martin v. Duffy*, *Peterson v. Burgess*, and *Beaudett v. City of Hampton*, are *pro se* prisoner cases that had vaguely identified potential legal issues, including some that were duplicative of prior cases by the same litigant. *Beaudett v. City of Hampton*, 775 F.2d 1274, 1276 (4th Cir. 1985); *Martin v. Duffy*, No. CV 4:18-317-DCN-TER, 2018 WL 11462188, at *1 (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); *Peterson v. Burgess*, No. CIV.A. 7:14-141-TMC, 2015 WL 4644465, at *3 (D.S.C. Aug. 4, 2015). There is nothing about these cases that changes the standard of review for appellate courts in South Carolina pursuant to Rule 12(b)(6), SCRCP, which was properly applied by the Court of Appeals. As explained in Section A.1., *supra*, Respondents pleaded the elements of a

cause of action for tortious interference with contractual relations.

4. South Carolina case law does not require that specific words have to be used to plead a cause of action.

There is no case in South Carolina of which Respondents are aware that requires specific words to be used to allege an element in a claim; therefore, Petitioner's argument that failure to use the word "intentional" is fatal to Respondents' fourth counterclaim and makes the Court of Appeals' decision conflict with the settled case law of this State is unsupported.

Rather, the settled law in South Carolina is that a court, taking all facts in the light most favorable to the pleader, may 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), SCRCPP, motion. The case of *Shirley's Iron Works*, 403 S.C. 560, 743 S.E.2d 778, is instructive here. In that case, this Court did not solely look at the title of the cause of action or for exact words in determining whether the amended complaint pled a third-party beneficiary contract claim. Rather, it looked to the "Facts" section and disregarded the fact that certain words like "contract" or "tort" or "negligence" did not appear in the cause of action. *Id.* at 574, 743 S.E.2d at 785. Instead, this Court found "a fair reading of the Amended Complaint leads to the reasonable conclusion that the first cause of action is one for breach of contract," and it further pointed to its statutory construction ruling in the same case, which as a matter of first impression, held the only claim possible under the particular statute was a contract claim. *Id.*

The Court of Appeals specifically considered the facts pled in Respondents' fourth counterclaim, agreeing the words used satisfied the elements of a claim for tortious interference with contractual relations. (App. pp. 7-8; *see also* App. pp. 512-513, 518-520, Ans. and Am. Counterclaims, ¶¶ 153, 155, 192-204; App. p. 534, Reply, ¶ 70). As previously provided above, such allegations included: (1) that Gibbs, Eurosa, and another investor in Paysend Processing had

an agreement related to the capital investments needed for Paysend Processing and for the overall plan for growth of that company, and part of that agreement required Gibbs to invest \$1 million. (App. pp. 518-519, Ans. and Am. Counterclaims, ¶¶ 192, 195, and 196); (2) Gibbs was also aware of agreement between Harake and the third party related to Paysend UK, and Gibbs refused to allow the investment in Paysend Processing to be transferred to Paysend UK. (App. p. 512-513, 519, Answer and Amended Counterclaims, ¶¶ 153, 155, 195-198); and (3) Gibbs unjustifiably refused to be bought out or to roll Paysend Processing into Paysend UK. (App. p. 520, Answer and Amended Counterclaims, ¶ 202). The first two elements of tortious interference with contractual relations (existence and knowledge of a contract) were pleaded when Respondents alleged Gibbs was aware that it was supposed to invest \$1 million as part of a contract and that there were other agreements between Respondents and the third party related to Paysend UK. *Gecy*, 422 S.C. at 520, 812 S.E.2d at 756. Respondents also alleged Gibbs refused without justification to meet its obligation under the agreement, acted deliberately to discourage other investment, unjustifiably refused to roll Paysend Processing into Paysend UK, and refused to be bought out from the agreement in an effort to salvage the company, satisfying the element of deliberately or intentionally causing a breach. (App. pp. 518-519, Answer and Amended Counterclaims, ¶¶ 193, 194, 197, and 198). And finally, Respondents alleged the damages that resulted from Gibbs' actions. (App. pp. 519-520, Answer and Amended Counterclaims, ¶¶ 199-204). Thus, Respondents alleged facts that were sufficient to plead each element of a cause of action for tortious interference with contract, and the Court of Appeals' decision should be upheld.

B. The Court of Appeals Properly Concluded The Circuit Court Could Not Strike Respondents' Fourth Counterclaim Pursuant To Rule 12(f) Or Rule 37, SCRPC.

It was an error for the Circuit Court to premise its dismissal of Respondents' fourth counterclaim on an alleged failure to file a motion for protective order following counsel's

instruction for Harake not to answer a question regarding protected information during his deposition. Accordingly, the Court of Appeals' decision should be upheld.

Petitioner has not cited any authority for the proposition that failing to file a motion for protective order is a valid reason to strike a counterclaim for insufficiency in pleading or to strike a counterclaim as a sanction. Respondents likewise have neither identified any support for this theory in South Carolina law nor 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. Rather, Rule 30(j)(3), SCRCPP, 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. No such request was made to reopen Respondent Sarmad Harake's deposition after Petitioner provided its so-called notice that such a motion should be filed.⁵ Therefore, there was no discovery violation.

Further, the cases cited by Petitioner do not address 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; Petitioner did not inform Respondents such motion needed to be filed prior to asserting failing to file such motion was a reason to dismiss Respondents' fourth counterclaim; no motion for protective order was filed; no request to reconvene the deposition was made by Petitioner; and the Circuit Court thereafter struck Respondents' fourth counterclaim. Rather, the cases cited by Petitioner as a reason for this Court to reverse the Court of Appeals and affirm the Circuit Court are inapposite under both Rule 12(f)

⁵ While Petitioner attempts to argue its Motion to Compel requesting additional deposition time with Sarmad Harake should have made it "clear that consultation was futile," Petitioner neither raised the instruction not to answer in consultation about whether that motion would have to be filed nor in the motion itself. (App. pp. 442-453, Gibbs Supp. Memo. Mot. to Compel, pp. 1-12).

and Rule 37, SCRCP.

Petitioner's request to strike pursuant to Rule 12(f), SCRCP, was part of its motion to dismiss, so it served as an additional challenge to the sufficiency of the pleading, which is treated as a Rule 12(b)(6), SCRCP, motion. *See Grazia*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (stating “[a] motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the [pleading], is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP”) (citing *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also Menezes v. WL Ross & Co.*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011) (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCP, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCP). Petitioner has never provided any authority holding that an instruction not to answer during a prior deposition somehow warrants striking a later-amended counterclaim, especially when the pleading does not contain “redundant, immaterial, impertinent or scandalous matter.” S Rule 12(f), SCRCP. Further, Petitioner's reliance on *Robinson v. Code*, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009) -- a case on which the Circuit Court also relied—is misplaced. (App. p. 207, November 18 Order, p. 12). *Robinson* does not change how a Rule 12(f), SCRCP, challenge in a motion to dismiss is analyzed by the Court and is distinguishable from the instant matter.

Robinson involved litigation arising out of a landlord-tenant relationship. Specifically, the personal representatives of the tenant and a guest who died in a rental house fire brought negligence causes of action against the landlord for failure to install smoke detectors. *Id.* at 584-85. 682 S.E.2d at 496. As a threshold matter, the Court of Appeals noted that when a motion to strike challenges a theory of recovery—such as it is here—the motion is to be treated as a Rule 12(b)(6), SCRCP, motion to dismiss and the court should not strike a cause of action “merely because the court

doubts the plaintiff will prevail in the action.” *Id.* at 585, 682 S.E.2d at 496. After examining the substance of the allegations pled, the Court of Appeals found the appellant’s claims did not allege violations permitted under the specific statutory scheme of the Landlord-Tenant Act, *id.* at 586, 682 S.E.2d at 496-97, and further found that Article 11 of the building codes *explicitly excluded* causes of action for “a per se statutory violation of liability, or for negligence-based liability, for death, injury, or damages” – which was the very cause of action pled by the plaintiffs in that case.⁶ *Id.* at 586-87, 682 S.E.2d at 497. This Court therefore affirmed the trial court’s dismissal, after specifically noting the basis for the original motion to strike was that the cause of action pled was excluded by Article 11. *Id.* at 587-88, 682 S.E.2d at 497-98. In *Robinson*, the claims pled not only had not been recognized under South Carolina law, but they were *explicitly excluded* under the *specific* statutory schemes under which they were alleged. *Id.* Accordingly, the Court of Appeals’ decision should be upheld.

Although Rule 37, SCRCP, was not raised in Petitioner’s initial motion to dismiss and was first raised in its supporting memorandum, attempting to make Rule 37, SCRCP, a ground for relief remains flawed under the facts presented. Moreover, the cases cited by Petitioner relative to discovery sanctions invoke Rule 37(d), SCRCP. *Richardson on Behalf of 15th Cir. Drug Enft Unit v. Twenty-One Thousand & no/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 597, 846 S.E.2d 14, 15 (Ct. App. 2020).; *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317

⁶ Likewise, Petitioner’s citation to a quote from *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 390 S.E.2d 370 (Ct. App. 1990) does not change the analysis for a Rule 12(f), SCRCP, motion when it is about the sufficiency of a pleading. In that case, which dealt with the enforcement of a judgment obtained from Tennessee to which the defendant answered and asserted defenses. The plaintiff in that case then moved to strike the defenses, which was granted by the circuit court. The Court of Appeals reversed and remanded the case finding that the circuit court should have considered whether to give full faith and credit to the Tennessee judgment given the jurisdictional defense raised by the defendant rather than striking the defense. In that case, the Court of Appeals found that it was a sufficiently pled defense under the circumstances.

(Ct. App 1987) (noting the “single issue presented” was whether the trial court erred in ruling on the appellant’s sanctions motion for the respondent’s “failure to answer interrogatories or attend his deposition”). Rule 37(d), SCRC, governs instances in which a party does not attend its own deposition or in which there has been a failure to answer written discovery at all. This record contains no such facts.

In *Richardson*, a civil forfeiture case, the defendant served discovery, the Solicitor never responded, and the Solicitor was allowed to call witnesses in a bench trial that had not been provided in discovery responses. *Id.* As a result, the Court of Appeals found the defendant had the right to request sanctions without a motion to compel pursuant to Rule 37(d), SCRC. *Id.* at 599, 846 S.E.2d at 17. Thereafter, it went on to find the trial court’s failure to address the sanctions request prior to trial was enough to reverse the trial court's forfeiture order and remand to allow discovery to be completed before a new trial. *Id.* at 601, 846 S.E.2d at 18. As the Court of Appeals found, if a sanction is to be awarded pursuant to Rule 37, SCRC, 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*, 430 S.C. at 600, 846 S.E.2d at 17. If a court neglects to consider the factors, which the Circuit Court in this case failed to do, “an abuse of discretion occurs.” *Id.*

Under the facts in this case, *arguendo*, Petitioner could only request relief pursuant to Rule 37(b), SCRC, as the other subsections unquestionably do not apply. Specifically, Rule 37(b), SCRC, which is titled “Failure to Comply with Order” provides that if “a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . , the court in which the action is pending may make such orders,” including striking pleadings. Ordering sanctions pursuant to Rule 37(b), SCRC, “should not be administered lightly” and is

considered a “severe remedy, [in which] the trial court must determine there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). Additionally, “[t]he sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case.” *Id.*

Here, Petitioner never identified an actual order it believed Respondents violated, nor did the Circuit Court determine such an order existed. Since there is no order here to permit an analysis under Rule 37(b), SCRPC, and Rule 30(j)(3) provides the remedy of reopening the deposition to ask the particular question—not to strike a pleading, the Circuit Court abused its discretion in determining Rule 37, SCRPC, was a proper basis under which to dismiss Respondents’ fourth counterclaim. Accordingly, the Court of Appeals’ decision should be affirmed.

C. The Court of Appeals Properly Disregarded Petitioner’s Arguments As To The Prejudice And Futility Of A Potential Amendment of Respondents’ Fourth Counterclaim.

Petitioner spends almost half of its Brief arguing that, because the Court of Appeals erred in reversing the dismissal of the fourth counterclaim, this Court should consider whether the Circuit Court abused its discretion in denying “the motion to amend.” Petitioner’s arguments, however, are based upon a false premise: that there was a motion to amend filed by Respondents. Rather, the issue before the Circuit Court was whether to provide the *opportunity* to amend based on the motion to dismiss. Petitioner’s attempt to expand the scope of the Circuit Court’s Orders was properly disregarded by the Court of Appeals.

The Circuit Court’s November 18 Order acknowledged Respondents made a verbal request during the hearing on Gibbs’ Motion for permission to amend the counterclaim to change the label, but the Circuit Court rejected that request, noting that Respondents’ motion to reconsider renewed

that request “and the Court will address the motion to reconsider by subsequent order.” (App. pp. 207-208, November 18 Order, pp. 12-13). The Circuit Court’s November 30 Order contained a general denial based on previous arguments made as to the Motion to Dismiss, not a separate Motion to Amend the counterclaim. (App. p. 225, November 30 Order, p. 1). Since Respondents’ Motion to Alter or Amend was brought pursuant to Rule 59(e), SCRCF, as a request for the Circuit Court to reconsider its dismissal of the fourth counterclaim, the Circuit Court did not consider whether there was a valid reason for amendment to be denied.⁷ As a result, this Court should disregard Petitioner’s arguments in Section III of its Brief because that Section, including subsections A through D, contains issues and alleged facts that were not presented to the Circuit Court in order to rule on Gibbs’ Motion to Dismiss and are therefore not preserved for review. Rule 210(c), SCACR; *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004)(finding that in order to be preserved for appellate review, an issue must be “raised to and ruled on by the lower court”). 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 Respondents’ Motion to Alter or Amend. (App. pp. 207-208, November 18 Order, pp. 12-13; App. p. 225, November 30 Order, p.1). Therefore, such arguments are not preserved for review here⁸ and were

⁷ Moreover, even if the Rule 59(e) Motion to Alter or Amend is considered a motion to amend pursuant to Rule 15, SCRCF, motions to amend in which the ruling prevents a filing as opposed to striking a pleading are not generally immediately appealable. *See Baldwin Const. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004)

⁸ To the extent the Court determines such arguments are preserved for review or wishes to consider, Respondents crave reference to and incorporate as if restated herein the arguments made in Section II of their Reply Brief to the Court of Appeals. (App. pp. 111-122). Further, Respondents’ silence, which is for purposes of judicial economy, should not be taken as consent to the way in which Petitioner has spun the procedural history of this matter. Respondents deny the commentary Petitioner has inserted as procedural history in its Brief and again point out the Petitioner has omitted many of its own actions in drafting its narrative. By way of example, there has been no confirmation any money was used “inappropriately” as Petitioner alleges. That is an issue in the underlying litigation that Petitioner must prove before a jury and which Respondents

properly disregarded by the Court of Appeals.⁹

Finally, affirming the Court of Appeals' decision neither creates a conflict between *Skydive Myrtle Beach* and *Holland* nor causes *Holland* to be overruled, and Petitioner's arguments otherwise are simply a red herring. In *Skydive Myrtle Beach v. Horry Cnty.*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019), the Court found the dismissal of a commercial lessor's claims against the county without leave to amend was improper and noted 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). In *Holland ex rel. Knox v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014), the Court of Appeals upheld a denial of a motion to amend filed pursuant to Rule 15(a), SCRCP, because it was prejudicial given that it was filed after the expiration of all scheduling order deadlines, the conclusion of liability depositions, and the transfer of the case to the trial roster.

As an initial matter, *Skydive Myrtle Beach* and *Holland* do not address the same stage of motions practice, and the opinion by the Court of Appeals in this case—that Respondents' fourth counterclaim should not have been dismissed because it states a claim for tortious interference

wholeheartedly deny. Moreover, since Petitioner insists on bringing up defendant Katherine Harake who was not a party to this litigation on June 1, 2018 until August 3, 2020, it should be noted that the claim made against her in the Second Amended Complaint was simply untrue, and when documents were produced showing it was false, it was properly dismissed. However, the claims brought against her in the Third Amended Complaint and that survived her motion to dismiss, are wholly separate from the initial claim, and such claims have been denied. Contrary to many assertions made by Petitioner, when Katherine Harake was not a party to this litigation, she was not under a duty to respond to discovery, and any documents sought from her should have been pursued by subpoena.

⁹ 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, which it was in this instance. *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).

with contractual relations—does not suggest there is any conflict between *Skydive Myrtle Beach* and *Holland*. Respondents simply sought an opportunity to amend pursuant to *Skydive Myrtle Beach*, if the Court of Appeals declined to recognize a cause of action for tortious interference with economic interest under South Carolina law or declined to re-label the fourth counterclaim as one for tortious interference with contractual relations. The Court of Appeals did not get to whether denying the request for an opportunity to amend was proper, and as previously stated, no arguments were heard or ruled on by the Circuit Court about the propriety of such an amendment because an amendment was not presented to the Circuit Court. Therefore, no conflict was created between *Skydive Myrtle Beach* and *Holland* in this case, and *Holland*, which addresses a procedural posture not before this Court, has not been overruled by the Court of Appeals’ decision here.

V. **CONCLUSION**

The law of this State simply does not support the Circuit Court’s findings as to Respondents’ fourth counterclaim, and the Court of Appeals correctly reversed the dismissal of Respondents’ fourth counterclaim. Based upon the foregoing, Respondents respectfully request this Court affirm the finding of the Court of Appeals and remand the matter to Circuit Court.

Respectfully Submitted,

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