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S.C. SUPREME COURT

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. 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.

PETITIONER GIBBS INTERNATIONAL, INC.'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

INTRODUCTION

The primary issues before the Court are whether the Court of Appeals erred in reversing the circuit court's order dismissing the Harake Appellants' counterclaim for "tortious interference with economic interest"—a claim that the Harake Appellants flatly admit is not recognized under South Carolina law—and whether the circuit court properly denied the Harake Appellants' request for leave to amend their pleading. Several sub-issues flow from these primary issues, including:

1. Whether it is proper for a circuit court to dismiss or strike a claim that is not recognized under South Carolina law;

2. Whether it is proper for a court—under applicable precedent providing that the test for claim viability is based solely on the allegations on the "face of the Complaint"—to re-draft, and infer, a party's allegedly intended claim that plainly is not stated on the face of a complaint, just to save it from dismissal;

3. Whether the allegations in the fourth counterclaim of the Harake Appellants' Amended Answer and Counterclaims state a valid claim for relief;

4. Whether the circuit court properly denied the Harake Appellants' motion to amend; and

5. Whether the circuit court properly struck the Harake Appellants' fourth counterclaim as a discovery sanction.

The dispute in this appeal arises from the circuit court deciding that the proper course of action, when confronted with an unrecognized cause of action, is to dismiss that cause of action. However, the Court of Appeals reversed the circuit court's decision to dismiss the Harake Appellants' admittedly unrecognized cause of action, stepped into the shoes of the Harake Appellants, searched the 206 paragraphs of allegations in the Harake Appellants' pleading, and manufactured a new claim for the Harake Appellants. The Court of Appeals' decision places defendants like Gibbs in the position of defending itself against amorphous pleadings containing hundreds of paragraphs and divining what potential causes of action could arise from those

allegations, despite the fact that the claims are not specifically stated and the pleading, plain and simple, does not contain all of the necessary allegations required under the case law to state the claim selected for the Harake Appellants by the Court of Appeals.

This Court should correct the Court of Appeals' erroneous reversal of the circuit court and its improper drafting of a cause of action for the Harake Appellants. Based on the pleadings, the Court of Appeals decided that the Harake Appellants were alleging a claim for intentional interference with contractual relations. In its opinion, the Court of Appeals stated the following analysis to support its conclusion:

> In the fourth counterclaim, which was labeled "tortious interference with economic interest," Appellants alleged Gibbs knew Harake was appointed as a director of, and had acquired a 100% interest in, Paysend UK. The counterclaims stated Gibbs refused without justification to allow another investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK, and this decision damaged Appellants because it forced Harake to divest his shares in Paysend UK. Therefore, we hold Appellants' pleadings included the elements required for an intentional interference with contractual relations claim despite the fact that it was labeled as a claim for tortious interference with economic interest.

Gibbs Int'l, Inc. v. Harake, Op. No. 2024-UP-385, 2024 WL 4764201, at *4 (S.C. Ct. App. filed Nov. 13, 2024).

There is no dispute that to state a claim for intentional interference with contractual relations a party must plead and 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 v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). However, review of the Court of Appeals' analysis and the Harake Appellants' pleading leads to the same questions:

1. What are the terms of a contract identified in the Harake Appellants' pleading that form the basis of the claim?

2. How did Gibbs intentionally, and without justification, cause a breach of those contractual terms?

The answers to those questions are not in the Court of Appeals' opinion, the Harake Appellants' pleading, or their Respondents' Brief. The absence of answers to those essential questions requires this Court to reverse the Court of Appeals and affirm the circuit court's dismissal of the Harake Appellants' fourth counterclaim. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 561 (Ct. App. 2000) (stating that the court "will not, however, write into the pleadings allegations and defenses that are not presented."); *see also Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) (explaining that the Court "will not, under the guise of liberal construction of the pleadings, write into the complaint allegations that are not presented"). Otherwise, parties like Gibbs are placed in a Sisyphean position of endlessly guessing the claims being asserted by the opposing party and conducting additional discovery on new issues and new claims years after commencement of the litigation.

The Harake Appellants' Fourth Counterclaim also does not include proper allegations about an absence of justification since there is no assertion in the counterclaim that Gibbs acted with an improper purpose or by improper methods. There are no allegations in the Fourth Counterclaim that Gibbs acted with any improper methods such as: violence; threats or intimidation; bribery; fraud; misrepresentation or deceit; defamation; duress; undue influence; misuse of inside or confidential information. *See Duggin v. Adams*, 234 Va. 221, 227, 360 S.E.2d 832, 836 (1987). So how many of these words are in the Fourth Counterclaim? None. Not a single word.

In addition, it is important to note that Gibbs did assert a breach of fiduciary duty claim against the Harake Appellants but the Harake Appellants asserted no such claim against Gibbs (even after Gibbs made such claim against them). In the end, the Fourth Counterclaim does not

state what the law requires. None of the words are present. Why not? These highly skilled practitioners made a judgment call not to plead the required words because they did not have the proof and the originally pled claim would be easier to try to prove. Simply put, it was a strategic judgment call to lower the burden of proof.

Moreover, the Harake Appellants also conveniently ignore the posture of the litigation when they filed their amended pleading—including the deadlines set forth in the controlling scheduling order—and its impact on the issues in this appeal. After the circuit court forced the Harake Appellants to produce documents they were hiding and engage in extensive discovery, Gibbs obtained new information and documentation supporting the assertion of additional claims. Based on that new information, Gibbs timely filed its Third Amended Complaint. (App'x pp. 454–485). In response, 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." (App'x pp. 518–520, ¶¶ 191–204). This counterclaim was asserted three (3) years and five (5) months after Gibbs filed its original Complaint.

When that counterclaim was asserted, (August 24, 2020), the governing scheduling order provided that discovery was to be complete by December 7, 2020, and expert identification was to be completed by January 2020 for Gibbs and February 2020 for the Harake Appellants—both of which had already passed. (App'x p. 227). The scheduling order also stated that the case was to be ready for trial on or before January 4, 2021. (App'x pp. 190–191). At that same time, the parties had engaged in years of discovery that included: (1) taking sixteen depositions (including evidentiary depositions of witnesses in Moscow, Mexico, California, and other locations); (2) Gibbs' production of over 200,000 pages; and (3) the Harake Appellants' production of over 30,000 pages. (App'x p. 676). Gibbs needed to engage in the aforementioned discovery to obtain

the information necessary to assert its new claims. Specifically, Gibbs needed certain bank records from Mr. Harake, which he had hidden through the discovery objection process and later through objections while simultaneously threatening Gibbs with a frivolous proceeding claim if it pursued the claims. (App'x pp. 343, 347–348; 383, 387; 447, 451). Conversely, Mr. Harake's own testimony demonstrates that he knew about this potential counterclaim at least thirteen (13) months before asserting the Fourth Counterclaim and was only waiting to file an amended pleading because he had not "finished calculating" the alleged damages. (App'x pp. 618–620; 650–651).

In response to the Harake Appellants' assertion of the Fourth Counterclaim, Gibbs filed a motion to dismiss pursuant to Rule 12(b)(6). However, as discussed herein, the delayed assertion of the new counterclaim—which was based on facts and issues that were not a part of the litigation—requires both parties to engage in additional discovery when the case was rapidly approaching the trial date established in the scheduling order. The undue delay caused by the Harake Appellants' assertion of the Fourth Counterclaim is highly prejudicial to Gibbs and plainly disrupts the timing set forth in the governing scheduling order. The following are examples of the undue delay and extraordinary prejudice that would result from allowing the counterclaim to proceed:

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

2. Requiring written discovery on the new issues after the appeal including, but not limited to, the service of international subpoenas;

3. Requiring new experts to be located and identified after Harake and his witnesses are deposed on this previously unasserted issue;

4. Requiring motions to compel (based on prior experience) to obtain the necessary documents; and

5. Returning the parties to the "starting gate" when they were in the "final turn."

This prejudice necessitates affirming the denial of the Harake Appellants' request for leave to file an amended pleading. Otherwise, parties like the Harake Appellants are given carte blanche to ignore scheduling orders and manipulate proceedings improperly during the late stages of litigation. Accordingly, the Court should reverse the Court of Appeals and affirm the circuit court's order dismissing the Fourth Counterclaim and denying the Harake Appellants' request for leave to file an amended pleading.

ARGUMENTS

I. The Court of Appeals erred in concluding the Harake Appellants' Fourth Counterclaim contained a valid claim for relief.

In the Respondents' Brief, the Harake Appellants correctly state that a claim for intentional interference with contractual relations a party must plead: (1) a contract's existence, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's 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) (quoting *Eldeco, Inc. v. Charleston Cnty. Sch. Dist.*, 372 S.C. 470, 480, 642 S.E.2d 726, 731 (2007)), *reh'g denied* (Apr. 26, 2018); *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). The Harake Appellants argue erroneously that the Fourth Counterclaim set forth in their pleading states a claim for intentional interference with contractual relations. The Harake Appellants ignore the fact that the allegations on the face of the pleading do not address all of the necessary elements to state such a claim, and they sprint past the bounds of allowable inferences to try to save their insufficiently pled claim.

Our courts should not become advocates for claimants, review pleadings, and decide what parties and their counsel should or could have decided to assert as a claim. Otherwise, defendants are faced with defending themselves against the claimants and the court.

A. The Harake Appellants' allegations regarding the existence of a contract that was breached as a result of Gibbs' alleged actions are insufficient to state a claim for intentional interference with contractual relations.

Review of the Harake Appellants' Respondents' Brief demonstrates that their pleading fails to allege a contract between the Harake Appellants and a third party that was breached. The Harake Appellants argue on page sixteen of their brief that this element was sufficiently pled because they alleged, "Gibbs, Eurosa, and another investor in Paysend Processing had an agreement related to the capital investments needed for Paysend Processing." (Resp. Br. p. 16; App'x pp. 518-519). However, on the next page of the brief, the Harake Appellants concede that "the Paysend Processing contract is not the contract that [the Harake Appellants] argue was interfered with by [Gibbs] as such would create a different cause of action." (Resp. Br. p. 17).[1] Since the aforementioned contract concerning Gibbs' investment in Paysend Processing is not the contract the Harake Appellants are alleging was interfered with, the question remains, "What contract is described in the pleadings, and what are the terms that the Harake Appellants are alleging was interfered with by Gibbs?"

In the Respondents' Brief, the Harake Appellants attempt to shed light on this issue in their discussion of the second element of the claim (the alleged wrongdoers' knowledge of the contract that was interfered with). Regarding that element of the claim, the Harake Appellants contend that Gibbs had knowledge of a purported "agreement between Harake and the third party related to Paysend UK." (Resp. Br. p. 16; App'x pp. 512-513). There are no allegations setting out the actual terms of the purported agreement. The purported agreement also has never been attached

[1] Since the Harake Appellants concede that this contract is not the basis for their claim, Gibbs does not need to continue to further address the arguments related to the application of the Stranger Doctrine—a claimant cannot pursue a claim for tortious interference with a contract to which the defendant is a party.

to any pleading in the matter. It is also telling that the Harake Appellants do not refer to the "agreement with a third party" as a contract in their pleadings or submissions to the Court.

As *Black's Law Dictionary*, states, "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." *In re Nat'l Gas Distribs., LLC*, 556 F.3d 247, 255 (4th Cir. 2009) (quoting *Black's Law Dictionary* 74 (8th ed. 2004)). Under South Carolina law, a contract is formed between two parties when there is "a mutual manifestation of assent to [its] terms." *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 247 S.E.2d 434, 436 (1978); *see also Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696, 701 (2014) ("A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement.").

A plain reading of the first two elements of the claim requires "a contract's existence," and "knowledge of the contract." This Court must find the Harake Appellants have failed to state a claim because the "contract" they allege exists is not the same as the "agreement" for which they claim Gibbs had knowledge. Again, there is nothing in the pleading that alleges the actual terms of the purported contract between the Harake Appellants and a third party.

Without an allegation of a valid contract with a third party, there can be no claim for intentional interference with contractual relations. *See BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010). In *BCD*, the Fourth Circuit dismissed a claim for intentional interference with contractual relations on summary judgment on the grounds that the plaintiff had not put forth any evidence of a valid contract between the plaintiff and a third party. The court in *BCD* affirmed the grant of summary judgment in favor of the defendant because even taking all of the plaintiff's allegations as true, there was not a valid, enforceable contract to support the

plaintiff's claim. The court noted that there was no evidence in the record of a meeting of the minds between the plaintiff and a third party with respect to all of the essential and material terms of a purported contract and, instead, the agreement at issue was "an 'agreement to agree'" that did "not amount to a contract under South Carolina Law." *Id.* at 435.

Like the plaintiff in *BCD*, the Harake Appellants have not alleged a valid contract between themselves and a third party that can form the basis of the Fourth Counterclaim. There is nothing in the pleadings or record that provides the Court—or Gibbs—with knowledge of the contract's terms or that such a contract even exists. Without an allegation of the terms of a valid contract with a third party, there can be no claim for tortious interference with contractual relations.

B. The Harake Appellants never allege the terms of a contract that was purportedly breached as a result of Gibbs' alleged intentional interference.

As to the third element—intentional procurement of the contract's breach—the Harake Appellants failed to allege the terms of the contract that were purportedly breached, or how Gibbs intentionally caused those terms to be breached. In their Brief, the Harake Appellants argue the contract that was interfered with was "Respondents' agreement for Paysend UK"; however, they failed to allege the terms of that "agreement" that were allegedly breached.

The Harake Appellants' pleading suffers the same deficiencies as the plaintiff's complaint in *Alexander v. South Carolina Department of Transportation*, No. CV 3:20-4480-TLW-SVH, 2021 WL 5167807, at *12 (D.S.C. Aug. 23, 2021), *report and recommendation adopted*, 2021 WL 5166400 (D.S.C. Nov. 4, 2021). In *Alexander*, the United States District Court for the District of South Carolina dismissed the plaintiff's cause of action for tortious interference with contractual relations because the plaintiff "failed to identify the terms of the contract at issue that were allegedly breached, how those terms were breached, or how those terms were intentionally breached by Defendants."

Nowhere in the Harake Appellants' pleading or their Respondents' Brief do they state the terms of a contract that were purportedly breached as a result of Gibbs' purported intentional interference. Instead, the Harake Appellants rely on an amalgamation of allegations regarding an "agreement"—to which they never identify any term that was breached—and then simply state that Gibbs' "refus[al] to be bought out" caused a breach of the unidentified agreement. (Resp. Br. p. 17).

Furthermore, when "solely" looking at the allegations, it is readily apparent that the Harake Appellants never plead the required element of the claim (intentional procurement of the breach of a contract) or use the word "intentional," much less the phrase "intentional interference" in the thirty-six-page pleading. *See Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (stating that dismissal of a cause of action pursuant to Rule 12(b)(6) must be based "solely on the allegations set forth in the complaint"). 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. 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.

In fact, the pleading merely alleges that Gibbs—acting within its rights—simply chose not to transfer its own investment in Paysend Processing to Paysend UK. There is no allegation of malintent or that Gibbs had the obligation—contractual or otherwise—or legal duty to sell its interest in Paysend Processing or allow its investment in Paysend Processing to be rolled into Paysend UK. Thus, even when reading all of the allegations in a light most favorable to the Harake

Appellants, there is no assertion that Gibbs *intentionally* procured the breach of an existing contract. Rather, the Harake Appellants asked the Court of Appeals to re-draft their pleading and add this pivotal element by inference. It is a step too far to take to infer something so conspicuously, and deliberately, absent.

C. The Harake Appellants' pleading fails to adequately allege an absence of justification by Gibbs for Gibbs' refusal to be bought out of Paysend Processing or to allow the investment to be rolled into Paysend UK.

The Court of Appeals parrots the Harake Appellants' position that "Gibbs refused without justification to allow another investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK"; however, that bald and conclusory allegation is insufficient to satisfy the third element of a claim for tortious interference with contractual relations—the absence of justification.

The "absence of justification" means conduct that is carried out for an improper purpose, such as malice or spite, or through improper methods. *BCD LLC*, 360 F. App'x at 435 (citing *Waldrep Bros. Beauty Supply, Inc. v. Wynn Beauty Supply Co.*, 992 F.2d 59, 62 (4th Cir. 1993) (applying South Carolina law)). Courts have recognized that "improper methods may include violence, threats or intimidation, bribery, unfounded litigation, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship." *Duggin v. Adams*, 360 S.E.2d 832, 837 (Va. 1987), *cited with approval in Crandall Corp. v. Navistar Int'l Transp. Co.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990); *Waldrep Bros. Beauty Supply*, 992 F.2d at 63–64. Conversely, "[a] party is justified, however, when acting in the advancement of its legitimate business interests or legal rights." *BCD LLC*, 360 F. App'x at 435.

The Harake Appellants' pleading contains no allegation that Gibbs acted with an improper purpose or through any improper methods. Instead, the Harake Appellants' pleading baldly states

that Gibbs "unjustifiably refused to allow the other investor to buy it out of Paysend Processing or to roll Paysend Processing into Paysend UK." (App'x p. 520). There are no allegations that Gibbs caused a contract between the Harake Appellants and a third party to be breached as a result of violence, threats or intimidation, bribery, fraud, misrepresentation or deceit, defamation, duress, undue influence, misuse of inside or confidential information, or breach of a fiduciary relationship. The lack of factual allegations supporting the absence of justification element of the purported claim for intentional interference with contractual relations requires dismissal of the claim.

D. Gibbs was justified in refusing to be bought out or allow its investment to roll over.

The Harake Appellants offer no response to Gibbs' argument that the exercise of a legal right by a party to a contract does not provide a basis for a claim of intentional interference with contract even if the exercise of the legal right causes another to not perform a contract. Therefore, regardless of whether the bald allegation that Gibbs was not justified in its refusal to be bought out or to allow its investment to be rolled over into Paysend UK, Gibbs was justified in its decision not to sell its interest in Paysend Processing or to allow its investment to be rolled over into a foreign entity. *See Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 11–12, 620 S.E.2d 326, 329 (2005) ("The existence of a duty owed is a question of law for the courts.").

As stated in Gibbs' Petitioner's Brief, "[t]he 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 exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party." *Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) (emphasis added); *see also Gecy*, 422 S.C. at 521, 812 S.E.2d at 756–57 (affirming 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).

The Harake Appellants had no legal right to force Gibbs to be bought out or agree to the rollover of the investment into a foreign entity, and as a result Gibbs is entitled to the dismissal of the claim for that reason as well. *See Santoro v. Schulthess*, 384 S.C. 250, 265–67, 681 S.E.2d 897, 904–05 (2010) (stating that the assertion and pursuit of legal rights does not provide a basis for a claim of intentional interference). Since Gibbs was acting within its rights and was justified in refusing to be bought out or agree to the rollover of the investment into a foreign entity, any such amendment to add a claim for intentional interference with contractual relations would be futile.

II. The Court of Appeals reinvented the Harake Appellants' fourth counterclaim.

Existing precedent does not allow writing allegations into pleadings that are not present. *See Unisun Ins. v. Hawkins*, 342 S.C. 537, 541–42, 537 S.E.2d 559, 561 (Ct. App. 2000) (stating that the Court "will not . . . write into pleadings allegations and defenses that are not presented"); *see also Martin v. Duffy*, No. CV 4:18-317-DCN-TER, 2018 WL 11462188, at *1 (D.S.C. Feb. 14, 2018) (stating 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"), *report and recommendation adopted*, 2018 WL 11462186 (D.S.C. Mar. 12, 2018), *aff'd*, 732 F. App'x 197 (4th Cir. 2018). Judicial reinvention of a claim by re-drafting and adding an entire pivotal element of a cause of action goes too far—and that is what the Court of Appeals did in its opinion.

The Court of Appeals was confronted with the issue of whether the Harake Appellants' fourth counterclaim states a claim for intentional interference with contractual relations based solely on the allegations set forth in the Harake Appellants' pleading. It does not. To affirm the

Court of Appeals, this Court must review the Harake Appellants' pleading and be able to answer the following questions based solely on the allegations on the face of the pleadings:

1. What are the terms of a contract identified in the Harake Appellants' pleading that form the basis of the claim?

2. How did Gibbs intentionally, and without justification, cause a breach of those contractual terms?

The answers to those questions are not in the pleadings. Therefore, the Court of Appeals could only find such a claim if it inferred a contract exists, assumed its terms, and decided—without any supporting allegation—that Gibbs' intentional action caused the breach of this unidentified contract.

Rather than evaluate whether the Harake Appellants should be permitted to amend their pleading so that they may attempt to allege a claim for intentional interference with contractual relations—and they should not—the Court of Appeals stepped into the shoes of the Harake Appellants and de facto re-drafted their pleading to include elements of a claim that plainly are not present on the face of the pleading.

III. It is proper to dismiss an unrecognized claim on a motion to dismiss pursuant to Rule 12(b)(6).

Contrary to the Harake Appellants' argument, the Court of Appeals' decision should be reversed because it overstepped its authority in transforming an unrecognized cause of action into a claim for intentional interference with contractual relations. In arguing that the Court of Appeals did not err in reversing the dismissal of an unrecognized counterclaim, the Harake Appellants assert that *Doe v. Greenville County School District*, 375 S.C. 63, 651 S.E.2d 305 (2007), does not support the dismissal of an unrecognized claim because the court in *Doe* analyzed whether the plaintiffs' claim fit within other recognized causes of action.

Review of the procedural history in *Doe* reveals that it supports Gibbs' argument that the appropriate action by a circuit court confronted with a litigant's assertion of an unrecognized claim is to dismiss the claim pursuant to Rule 12(b)(6). In *Doe*, the circuit court dismissed a claim for loss of filial consortium because the claim was not recognized in this State. *Id.* at 66, 651 S.E.2d at 306. On appeal, the court considered whether it would be appropriate to recognize such a claim and determined that it was not. Therefore, the court held that "the trial court did not err in dismissing" the unrecognized claim, and it affirmed the dismissal. *Id.* at 70, 651 S.E.2d at 309.

IV. The Circuit Court's denial of the Harake Appellants' Motion to amend was proper and within its discretion.

Rather than arguing about the merits of a denial of a motion to amend a pleading, the Harake Appellants only argue two points: (1) they disingenuously contend that they did not move to amend their pleading; and (2) the issue of the prejudice and futility of the amendment is not preserved for appellate review. The Harake Appellants are wrong on both points.

A. The Harake Appellants did request leave to amend their pleading under Rule 15.

The Harake Appellants disingenuously argue that they did not move to amend their pleading under Rule 15(a). The Record and the Harake Appellants' submissions to the appellate courts directly, and unequivocally, contradict this position.

In the Harake Appellants' brief to the Court of Appeals, the second issue listed in their Statement of Issues on Appeal was, "The Circuit Court erred in dismissing Appellants' Fourth Counterclaim without permitting them an opportunity to amend." (App'x p. 76). In support of their argument on that issue, the Harake Appellants stated,

> Appellants timely requested an opportunity to amend relative to Gibbs' Motion, both in the hearing and in their Motion to Alter or Amend, noting that the claim could be recast as one for tortious interference with contractual relations. . . . In the November 30

> Order, the circuit court rejected the amendment request by denying Appellants' Motion to Alter or Amend.

(App'x pp. 97–98). Thereafter, the Harake Appellants argued that "[t]he Rule 15(a) standard warranted permission to amend under these circumstances, and the Circuit Court erred in denying Appellants the opportunity to do so." (App'x p. 98).

It is nonsensical that the Harake Appellants are taking the position that the analysis of the request for leave to amend—which was, in fact, requested during a hearing before the circuit court prior to their Motion to Alter or Amend and included as part of the Motion to Alter or Amend—should not be judged by the standard for reviewing whether it is proper to allow a party to amend a pleading. Again, the Harake Appellants requested leave to amend pursuant to Rule 15(a) during the hearing on the Motion to Dismiss, and again in their Motion to Alter or Amend. (App'x pp. 630, 670 (stating "we would request that we be able to do that under Rule 15")). It is critical to emphasize that in the October 5, 2020 Motion to Alter or Amend, the Harake Appellants unequivocally requested permission to amend under Rule 15 by saying "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))." That **Rule 15 Motion**, as noted above, was subsequently denied. (App'x p. 225). Thus, any consideration of the Harake Appellants' request for leave to amend must be, necessarily, judged under the Rule 15 standard. Any contention to the contrary is simply not credible. Moreover, the Harake Appellants have no one to blame but themselves for not fully, completely, and properly pursuing a Rule 15 motion for leave to amend, if it is their position they did not do so. Abundant opportunity existed for them to do so, and yet they chose only to make a request for leave to amend in open court at the conclusion of the hearing on Gibbs' Motion to Dismiss and later in their Motion to Alter or Amend the circuit court's order dismissing their claim.

B. The issue of whether the circuit court properly denied the Harake Appellants' request for leave to amend is ripe for appellate review.

As the prevailing party, Gibbs was not required to request specific findings on a motion that was decided in its favor. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the "winner" in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court. It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review."). Thus, Gibbs was not required to file a Motion to Alter or Amend and request a specific ruling as to the circuit court's basis for denying the Harake Appellants' request for leave to amend their pleadings. The Harake Appellants' arguments to the contrary are without merit and should be disregarded, and this Court may consider Gibbs' argument on this issue as an additional sustaining ground. *See* Rule 220(c), SCACR.

To the extent the Harake Appellants wanted a further ruling and an explanation from the circuit court as to the basis for the denial of their request for leave to file an amended pleading, the Harake Appellants did have the obligation to request a specific ruling from the circuit court. *See Elam v. S.C. DOT*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). As the prevailing party, Gibbs was not required to request any further ruling.

V. The Harake Appellants are wrong and the Court does have authority to strike an unrecognized claim under South Carolina law.

The Harake Appellants claim that *Robinson v. Code*, 384 S.C. 582, 682 S.E. 2d 495 (2009), does not stand for the proposition that this Court can strike a claim if a party asserts a claim that does not exist under South Carolina law. (Resp. Br. at 25–26). That is flat wrong. In *Robinson*, the Court of Appeals affirmed the circuit court's order striking certain allegations because South Carolina "does not create a cause of action" for the alleged claim. *Id.* at 585, 682 S.E. at 496. The

Harake Appellants also argue that this Court is required to treat the Rule 12(f) motion to strike as a Rule 12(b)(6) motion to dismiss. (Resp. Br. p. 25). The Harake Appellants argue: "when a motion to strike challenges a theory of recovery . . . the motion is to be treated as a Rule 12(b)(6) motion." (*Id.*). *Robinson* completely rejects the Harake Appellants' direct mischaracterization of the law. That court merely stated that a motion to strike challenging the theory of recovery is "comparable" to a motion to dismiss—but it did not say, as the Harake Appellants have represented, that it must be treated as a motion to dismiss. *Robinson* explains the difference between a motion to strike and a motion to dismiss by explaining that in ruling on a motion to strike the court "decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." (Citation omitted.) So, the Harake Appellants mis-stated to the Court that it is mandatory that this Court treat the motion to strike in a certain way when that is not the situation at all. Motions to dismiss and motions to strike are based on different grounds under the Rules. At the end of the day, the *Robinson* court affirmed the motion to strike challenging the theory of recovery.

The mere fact that there was a statutory obstacle to the claim in *Robinson* in addition to no common law support of the claim does not mean the circuit court was divested of the power to strike a claim without recognition in South Carolina. Again, the Harake Appellants have conceded that the claim they asserted has not been recognized in South Carolina case law (or by statute, for that matter). (App'x p. 95 n.4). The circuit court was well within its authority to strike a claim never previously recognized under South Carolina common law by the Supreme Court or the Court of Appeals. Otherwise, a court could only strike a claim when there was a statutory obstacle to the claim, and there certainly is no such prohibition of the court's power to strike a claim.

Finally, the *Robinson* court also explained:

> [T]he matter of striking from a pleading is largely within the discretion of the trial judge (citation omitted). Thus, the grant of a motion to strike will not be reversed except for an abuse of discretion or error of law.

Id. The circuit court's decision was correct and, at an absolute minimum, a completely proper exercise of its discretion.

VI. The Court of Appeals erred in reversing the circuit court's dismissal of the Harake Appellants' counterclaim for "tortious interference with economic interest" based on their violation of the discovery rules.

The Court of Appeals erred in reversing the circuit court's dismissal of the Fourth Counterclaim as a discovery sanction. The Court of Appeals based its decision on the circuit court's purported failure to consider certain factors when determining the appropriate sanction. As stated in *Richardson v. Halcyon Real Est. Servs., LLP*, 439 S.C. 419, 426, 887 S.E.2d 153, 157 (Ct. App. 2023), "[a]ctions taken in a deposition designed to prevent justice, delay the process, or drive up costs are improper and warrant sanctions." (quoting *In re Anonymous Member of S.C. Bar*, 346 S.C. 177, 194, 552 S.E.2d 10, 18 (2001)).

In this case, Mr. Harake refused to testify as to the basis for the purported Fourth Counterclaim. In its November 18, 2020 order, the circuit court exercised its discretion and struck the Harake Appellants' Fourth Counterclaim on the ground that the refusal to allow Mr. Harake's testimony justified dismissal of the claim. In denying the Harake Appellants' Motion to Alter or Amend the November 18, 2020 order, the circuit court stated that it considered "the arguments made in the Harake Defendants' motions/brief, as well as the motions, arguments, and briefings submitted in connection with the related hearing held September 22, 2020." (App'x p. 225).

Based on the party's submissions, which the circuit court expressly stated it considered, it is abundantly clear that the circuit court was aware of the nature of the discovery sought—testimony as to the basis of the Fourth Counterclaim. The discovery stage of the case was raised

to the court by Gibbs in its motion to dismiss and, therefore, also considered by the circuit court. (App'x p. 620). The willfulness of the refusal to testify is also apparent from Gibbs' submissions to the circuit court. (App'x pp. 617-620). Last, the resulting prejudice is apparent based on the simple fact that the circuit court acknowledged that the requested testimony related to the Harake Appellants' purported Fourth Counterclaim. The circuit court's consideration of the parties' submissions and filings demonstrates that the circuit court considered each of the necessary elements when it exercised its discretion and dismissed the fourth counterclaim as an appropriate discovery sanction. Accordingly, the circuit court's dismissal of the Fourth Counterclaim as a discovery sanction should not be reversed. *Cf. Farmer v. Farmer*, 388 S.C. 50, 57, 694 S.E.2d 47, 51 (Ct. App. 2010) (affirming an award of attorney's fees despite the fact that the family court "did not delineate its consideration of the [required] factors" because "awarding attorney's fees was proper").

CONCLUSION

For these reasons, and for the other reasons provided in Gibbs' Petitioner's Brief, Gibbs respectfully requests that this Court reverse the Court of Appeals and affirm the circuit court's order dismissing the Harake Appellants' Fourth Counterclaim. The Harake Appellants admitted to all of the courts that have heard arguments in this case that this claim has not been recognized in South Carolina. In addition, as the circuit court found, the Harake Appellants never pled the "intentional procurement of the breach of an existing contract," and did not even use the words "intentional," or "intentional interference," anywhere in their thirty-six-page pleading. The Harake Appellants' admission that the asserted claim was unrecognized, coupled with the complete absence of any allegation of intentional conduct, made dismissal the appropriate and necessary result. It would be a great injustice to allow the Harake Appellants to file a claim they

admit has never been recognized and then for the courts to re-draft it for them through the work of unsubstantiated inference.

Timing. The stage of the litigation. These factors are almost everything here. 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, and the expert deadlines had passed for both parties in early 2020.

All of this, coupled with the previously unasserted claim that involved brand new facts never previously asserted and will require extensive additional discovery (including international subpoenas, identification of additional experts, written discovery, re-deposing Mr. Harake, new international depositions, and so on) easily constitute undue delay and cause extraordinary prejudice—prejudice that is so undeniable that even the Harake Appellants offer no response in their Respondents' Brief. It is these timing circumstances that easily support the conclusion at the very end of a scheduling order that converting the pled claim into a brand new claim should not be allowed through inference by the court. It simply is too late to allow this by inference or amendment. The circuit court was right and the dismissal of the unrecognized cause of action should be reinstated.

Ultimately, the Court of Appeals improperly inferred a contract exists that could form the basis of the claim and also inferred that the pleading contains allegations that Gibbs intentionally and without justification caused a breach of this unidentified contract. Without allegations to satisfy the basic requirements to state a claim for intentional interference with contractual relations, the claim must be dismissed. Should unsubstantiated inferences at the end of a scheduling order

be allowed to cause substantial prejudice to Gibbs that even the Harake Appellants chose not to contest in their submission to the Court? Surely not.

This appeal also presents the ideal opportunity to send this message to the circuit court judges of the State: Rule 12(b)(6) is not a forgotten rule; it is appropriate to dismiss or strike a claim that the claimant admits is not a recognized cause of action; a court (just as the circuit court chose here) should not re-draft a claim through unsubstantiated inference to include an entire pivotal element that was missing from the pleading; and amendment or redrafting through inference are inappropriate when prejudice results.

Respectfully submitted this 19th day of March, 2026.

s/Kevin A. Dunlap

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