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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

William C. McMaster, III, Circuit Court Judge

Circuit Court Case No. 2023CP2306646

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Appellate Case No. 2025-001316

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Robark Properties LLC .....Appellant,

v.

Northwestern Mutual Life Insurance Company ..... Respondent.

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**APPELLANT’S REPLY TO FINAL BRIEF OF RESPONDENT**

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Northwestern Mutual's response makes this appeal more complicated than it actually is. This Court does not need to reach the issue of whether Robark is entitled to the declaratory judgment sought or not (though it is). There are three basic questions this Court should first consider. The answer to each independently calls for the reversal of the circuit court's grant of summary judgment and remand to the circuit court for further discovery and proceedings. The three questions are below.

- (1) Can Northwestern Mutual (a) only submit a single employee's affidavit in support of a motion for summary judgment that claims everything Northwestern Mutual did is standard practice, (b) avoid any discovery on such claim and (c) prevail on summary judgment?
- (2) Can Northwestern Mutual's litigation counsel (a) assert for the first time in a post-summary judgment hearing court filing that Northwestern Mutual owes no fiduciary obligation to Robark, (b) avoid any discovery on same and (c) prevail on summary judgment?
- (3) Should Robark's *first* request for leave to amend its complaint have been rejected by the circuit court?

The answer to each of these questions is no. Otherwise, in every case, large defendant companies such as Northwestern Mutual would just refuse to participate in basic discovery, move for summary judgment based on self-serving affidavits from within featuring factual assertions not tested in discovery and then win, all without a circuit court granting even a single request for the plaintiff to amend its complaint. This is just not how civil litigation is supposed to work in South Carolina. This Court should not permit it here.

**I. Robark sought and is entitled to discovery on Northwestern Mutual's claim that everything it did was standard practice.**

In its Response, even Northwestern Mutual acknowledges Robark should have had "ample time to attempt any discovery it truly believed was necessary." (Brief of Northwestern Mutual, p. 20). Northwestern Mutual then states that "at no point during those six months did Robark serve

discovery requests seeking information about Northwestern Mutual's standard practices." (*Id.*). This is demonstrably false.

On July 17, 2024, well before Northwestern Mutual moved for summary judgment, Robark served Northwestern Mutual with a second set of interrogatories and a second set of requests for production. (R. pp. 284-97). Below are some of Robark's interrogatories (the first three are standard interrogatories):

1. Give the name and address of each person known to you or your counsel to be a witness concerning the facts of the case, set forth a summary sufficient to inform Robark of the facts known to or observed by the witness, and indicate whether or not any written or recorded statement(s) have been taken from the witness and, if so, indicate who has possession of such statement(s).
2. List the names and addresses of any expert witness(es) whom you propose to use as a witness at the trial of this case.
3. Set forth a list of photographs, plats, sketches or other prepared documents in Your possession that relate to a claim or defense in this case.
4. State the factual basis for each affirmative defense you allege in your answer to the Amended Complaint.

(*See* R. pp. 288-89). No response was provided to same. Robark's first two requests for production are:

1. Produce all documents identified by You in response to Robark's interrogatories or which are responsive to Robark's interrogatories.
2. Produce all documents referred to or reviewed in the preparation of Your answers to Robark's interrogatories, or relied upon by You or Your attorneys in responding to Robark's interrogatories.

R. p. 293). No response was provided to these requests either.

Interrogatory 1 above (a standard interrogatory) should have been answered. That answer should have included, at the very least, the sole person who submitted an affidavit in support of Northwestern Mutual's motion for summary judgment, its employee M. Christine Cowles. That

answer should have also “set forth a summary sufficient to inform Robark of the facts known to or observed by the witness” as requested. None of that happened. Cowles then represented to the Court in an affidavit first served with *a summary judgment motion* that what Northwestern Mutual did was standard practice. (*See* R. pp. 141-150). Cowles did not provide any support for her representation. Interrogatory 1 asks for that. Requests for Production 1 and 2 above asked for the documents relating to that claim. None of this was provided. Moreover, contrary to Northwestern Mutual’s repeated assertion otherwise, Robark submitted an affidavit affirming that the requested documents and information were not provided and explaining why such documents and information are essential to the case. (*See* R. p. 347, ¶ 6; R. pp. 307-10).

The circuit court’s decision to preclude Robark from any discovery on the unsupported claim made in a self-serving affidavit of a Northwestern Mutual employee first served with a motion for summary judgment violates basic due process. Robark should have the opportunity to investigate whether or not Cowles’ claim is accurate.

**II. Robark sought and is entitled to discovery on Northwestern Mutual’s post-summary judgment hearing claim that it owes no fiduciary obligations to Robark.**

Interrogatory 4 above asks for the factual basis for each affirmative defense Northwestern Mutual alleges in its answer to Robark’s operative complaint. Northwestern Mutual’s second affirmative defense states that Robark failed to state a claim and its eighth affirmative defense asserts lack of justiciable controversy. (R. pp. 125-26, ¶¶ 34, 40). Northwestern Mutual did not answer Interrogatory 4 and instead waited until *after* the hearing on its motion for summary judgment to first assert that Northwestern Mutual did not accept or induce the confidence Robark placed in it. This is despite the fact that the Policies list John F. Mitchell as Robark’s “Financial Representative.” (R, p. 304). John F. Mitchell is identified by Northwestern Mutual as its “Wealth

Management Advisor” and “Private Wealth Advisor.” (*Id.*). Mitchell has provided advice to Robark concerning the Policies, including, but not limited to QPP. (*See* R. pp. 346-47, ¶¶ 5-6; R. pp. 304-05, 310). Indeed, after the summary judgment hearing – for the first time – Northwestern Mutual attempted to push fiduciary obligations owed to Robark away to an unidentified corporation. (*See* R. p. 356, n.4).

This specific dispute between Robark and Northwestern Mutual turns on the facts and circumstances. *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004). The factual basis for Northwestern Mutual’s position should have been provided in response to Interrogatory 4 and related documents for same should have been produced in Response to Requests for Production 1 and 2. Again, contrary to Northwestern Mutual’s repeated assertion, Robark submitted an affidavit affirming that the requested documents and information were not provided and explaining why such documents and information are essential to the case. (*See* R. p. 347, ¶ 6; R. pp. 310-11).

**III. Robark sought leave to amend its complaint and should have been permitted to do so to the extent necessary.**

Northwestern Mutual claims in its response that Robark did not seek to leave to amend its complaint and thus failed to preserve that issue. This too is false. In its supplemental brief on the motion for summary judgment, Robark stated:

To the extent Northwestern Mutual’s eleventh-hour attempt to rid itself of its fiduciary obligations to Robark somehow warrants amendment of Robark’s pleading or the Court finds any other deficiencies with Robark’s claims as pled, Robark respectfully requests that leave to amend be granted under SCRCP 15(a) to, among other things, add in any necessary subsidiaries identified and, if necessary, address any other deficiencies Court finds.

(R. p. 368, n.2). In its Motion to Reconsider the order granting summary judgment, Robark specifically stated “Robark preserves and incorporates all arguments made in all other documents

previously filed with court [including Robark’s Reply Memorandum] and in oral argument.” (R. p. 375, n.1). At the hearing on that very motion, as Northwestern Mutual even acknowledges, Robark noted on the record that the request was made in the motion and again asked for leave to amend to address any deficiencies:

15            getting discovery. But to the extent and I sought  
16            this in -- in my filing to the extent that is a  
17            defect that the court feels needs to be corrected.  
18            We would just simply ask for leave to amend our  
19            pleading and we would allege we would put that  
20            statement in there to remedy that issue. But

(R. p. 447:15-20).<sup>1</sup> Northwestern Mutual cites to no authority supporting its claim that Robark did not preserve this issue and undersigned counsel is not aware of any. The issue was properly preserved.

The circuit court did not grant Robark’s request. It should have. Especially here, where the circuit court cited to a case where an action was dismissed pursuant to the equivalent of Rule 12(b)(6) at the time as its only authority for what it did. (*See* R. p. 9 (citing only to *Plenge v. Russell*, 236 S.C. 473, 486, 115 S.E.2d 177, 183 (1960))).<sup>2</sup> Indeed, when a circuit court finds a complaint fails “to state facts sufficient to constitute a cause of action” under Rule 12(b)(6), the

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<sup>1</sup> Robark maintains its complaint was not deficient (as confirmed by Northwestern Mutual’s decision not to file a motion to dismiss pursuant to Rule 12(b)(6)). Its operative complaint alleges Northwestern Mutual is obligated to produce the documents and information at issue. (R. p. 75, ¶ 32). Still, in the event the circuit court disagreed (which it apparently did), Robark sought leave to amend.

<sup>2</sup> “Rule 12(b)(6) of the South Carolina Rules replaces and performs the same function as the old statutory pleading rules regarding demurrers.” *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987).

court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal. *See Foman v. Davis*, 371 U.S. 178, 179, 182, 83 S.Ct. 227, 228, 230, 9 L.Ed.2d 222, 224, 226 (1962) (where a complaint is dismissed “for failure to state a claim upon which relief might be granted,” leave to amend the complaint “should, as the rules require, be ‘freely given’ ” (quoting Rule 15(a), Fed. R. Civ. P.)); *Dockside Ass’n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (holding “Dockside should have been given leave to amend its complaint” before it was finally dismissed pursuant to Rule 12(b), SCRCF (citing *Foman*, 371 U.S. at 182, 83 S.Ct. at 230, 9 L.Ed.2d at 226)). Rule 15(a) “strongly favors amendments and the court is encouraged to freely grant leave to amend.” *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261 (2017).

For these reasons, as well as those stated in Robark’s Final Brief which are incorporated herein by reference, Robark requests this Court reverse the order granting summary judgment and remand the matter to the circuit court for further discovery and proceedings.

Date: April 9, 2026

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