

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM LEE COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2026-000120

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

June 26, 2026

/s/ James A. Bradshaw

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CERTIFICATION OF COUNSEL

Counsel for Petitioner Thomas McElveen, as next friend of O.M., a minor child (“Petitioner”), certifies that a Petition for Rehearing and Request for Rehearing En Banc was filed and finally ruled upon by the South Carolina Court of Appeals on May 29, 2026.

QUESTIONS PRESENTED

1. **Did the Court of Appeals Decision Finding Petitioner’s Appeal of the Order Denying the Motion to Amend the Complaint to be Moot Conflict with the South Carolina Supreme Court’s Prior Decisions?**
2. **Should Petitioner’s Appeal of the Order Denying the Motion to Amend the Complaint Be Allowed Due to Novel Questions of Law Presented?**
3. **Did the Court of Appeals Fail to Properly Consider This Appeal Given the Exceptional Circumstances Presented?**

STATEMENT OF THE CASE

This Court should grant Petitioner’s Petition for a Writ of Certiorari, as the appeal is not moot as found by the Court of Appeals, and several important novel issues of law are presented,

which warrant review by this Court. This case stems from the horrific and unspeakable sexual assault and exploitation that Petitioner alleges the South Carolina Department of Corrections (“SCDC”) allowed to be perpetrated on a 3-year-old girl by allowing an inmate in the custody of SCDC continual access to contraband cellphones to orchestrate, direct, and disseminate video of the assaults, despite repeated warnings from the girl’s family members that this inmate was using cellphones to harass them.

Petitioner originally filed the Complaint in the Court of Common Pleas for Lee County on October 15, 2024. Ex. 1 to Pet. for Reh’g. SCDC filed a motion pursuant to Rule 12(b)(6), S.C.R.C.P. seeking to dismiss the Complaint on December 20, 2024, and after a hearing, the trial court granted SCDC’S motion in an order dated April 23, 2025. Ex. 2 to Pet. for Reh’g. The order outlined deficiencies in the Complaint such as, “[t]here are no allegations in the complaint that SCDC was given notice that Inmate Lance used the cell phone to harass O.M.’s mother” and that “[t]he complaint does not allege that Inmate Lance was using the cell phone to ‘harass’ O.M.’s mother and family.” Id. On May 2, 2025, Petitioner filed both a Rule 59(e), S.C.R.C.P. motion regarding the trial court’s order as well as a motion pursuant to Rule 15(a), S.C.R.C.P. for leave to file an Amended Complaint, which was attached thereto and addressed the deficiencies outlined by the trial court. Exs. 3 & 4 to Pet. for Reh’g. Both motions were heard via WebEx on September 30, 2025. On December 1, 2025, the trial court denied the motion to reconsider but did not issue an order on Petitioner’s motion to amend. Appellant immediately alerted the trial court of the need for a ruling on the motion to amend. Ex. 5 to Pet. for Reh’g. On December 11, 2025, with respect to the motion to amend, the trial court requested for the parties to “each submit proposed orders for Judge Griffin’s review within 30 days,” which both parties submitted. Id. On January 7, 2026, the trial court denied Petitioner’s Rule 15(a),

S.C.R.C.P. motion, finding that the “Proposed Amended Complaint would be futile.” Ex. 6 to Pet. for Reh’g.

Petitioner filed the Notice of Appeal on January 16, 2026, seeking to appeal the trial court’s order precluding Petitioner from filing an Amended Complaint to address the deficiencies outlined by the Court. On January 21, 2026, the Court of Appeals asked for memoranda addressing the issue of appealability of the January 7, 2026 order denying the motion to amend. After both parties submitted memoranda, the Court filed an Order on March 5, 2026 holding that “it appears the order on appeal is moot because the circuit court order dismissing the case was not appealed to this court and thus any judgment by this court will have no practical legal effect.” Mar. 5, 2026 Order. Petitioner petitioned the Court of Appeals for rehearing of that order and requested that the matter be heard en banc. The Court of Appeals denied the petition on May 29, 2026. May 29, 2026 Order. Petitioner now seeks a grant of certiorari from this Court within thirty (30) days of that order.

ARGUMENT

I. The Court of Appeals’ Decision Finding Petitioner’s Appeal of the Order Denying the Motion to Amend the Complaint to be Moot Conflicts with this Court’s Prior Decisions.

Certiorari is properly granted “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.” Rule 242(b)(3), S.C.A.C.R. The Court of Appeals’ March 5, 2026 order dismissing the appeal on the basis that “the order on appeal is moot because the circuit court order dismissing the case was not appealed to this court and thus any judgment by this court will have no practical legal effect,” is in conflict with several decisions of this Court, including Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019); Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006); and Baldwin Const. Co., Inc. v.

Graham, 357 S.C. 227, 593 S.E.2d 146 (2004).

The trial court's January 7, 2026 order denying Petitioner's motion to amend is not moot on appeal and is appealable, as a decision by this Court or the Court of Appeals overturning the trial court's decision would allow the Amended Complaint to be filed, superseding the original Complaint and allowing the case to proceed in the trial court. "A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." Protopapas v. Wall, Templeton & Haldrup, P.A., 442 S.C. 217, 227, 898 S.E.2d 150, 155 (2023) (quoting Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006)); see Skydive Myrtle Beach, Inc. v. Horry County, 428 S.C. 638, 643, 837 S.E.2d 485, 487 (2020) ("This case is not moot because a decision to reverse the ejectment order could have the practical effect of putting Skydive back in possession of the bird hangar."). In terms of a "practical legal effect," if allowed to be filed, "an amended pleading generally supersedes the original, rendering the original of no legal effect." BAE Systems Tech. Solution & Servs., Inc. v. Republic of Korea's Defense Acquisition Program Administration, 884 F.3d 463, 474 (4th Cir. 2018).

The trial court's order granting SCDC's Rule 12(b)(6), S.C.R.C.P. motion was without prejudice. See Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006) ("When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice."). "Dismissal of a case 'without prejudice' means a plaintiff may reassert her complaint by curing defects that led to the dismissal." Spence, 368 S.C. at 128, 628 S.E.2d at 880-81.

In Skydive Myrtle Beach, Inc. v. Horry County, 426 S.C. 175, 826 S.E.2d 585 (2019),

this Court explicitly condoned plaintiffs, following a dismissal of the original complaint pursuant to Rule 12(b)(6), S.C.R.C.P. without prejudice, seeking to amend the complaint to correct the deficiencies and appealing that order if the motion to amend is not granted. The Court held that with respect to an order granting a Rule 12(b)(6) motion to dismiss, “any plaintiff is . . . entitled to accept the court’s ruling the original complaint was deficient, and replead in an attempt to fix the deficiency.” Skydive Myrtle Beach, Inc., 426 S.C. at 181, 826 S.E.2d at 588. In other words, when a “trial court dismisses [a] complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal.” Spence, 368 S.C. at 130, 628 S.E.2d at 881 (citing Swink v. Ernst & Young, 908 S.W.2d 660, 663 (Ark. 1995)). This Court held in Skydive that “the time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient.” Skydive Myrtle Beach, Inc., 426 S.C. at 181, 826 S.E.2d at 588. This can be done through “a formal Rule 15(a) motion,” which is precisely what was done in this case by Petitioner. Id.

This Court and Court of Appeals have long held that orders denying Rule 15(a), S.C.R.C.P. motions to amend may be appealed after the lawsuit ends to ensure that litigants are not foreclosed from advancing potentially meritorious claims due to an erroneous futility or prejudice determination. In Baldwin Const. Co., Inc. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004), while this Court found that a trial court’s order denying a motion to amend was not immediately appealable prior to the trial of the case, it held, “Petitioners have not ‘arrived at the end of the road’ and will be able to appeal the decision after the trial is finished.” 357 S.C. at 230, 593 S.E.2d at 147. In Tillman v. Tillman, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017), the Court of Appeals held that with respect to a motion to amend, “[I]n the unlikely event

the motion to amend is denied, then Appellant retains the right, after the lawsuit ends, to appeal the denial” of the motion to amend. Id. Likewise, in Tatnall v. Gardner, 350 S.C. 135, 139, 564 S.E.2d 377, 379 (Ct. App. 2002), the Court of Appeals held that with respect to the denial of a motion to amend to assert third-party claims, “[a]t the conclusion of the present action, [Appellant] may either appeal the trial court’s order denying her motion to amend or file a separate, first-party suit against Gardner.” Id. Declaring such appeals moot would conflict with these decisions and encourage piecemeal, duplicative filings to preserve review.

For instance, in Schein v. Lamar, 284 S.C. 252, 325 S.E.2d 573 (Ct. App. 1985), several defendants filed demurrers to the First Amended Complaint challenging the sufficiency of the allegations, and the plaintiff also filed a motion to amend to file a Second Amended Complaint. The demurrers and motion to amend were heard the same day. The circuit court entered an order sustaining the demurrers to the First Amended Complaint, but reserved decision on the motion for leave to file the Second Amended Complaint. The order sustaining the demurrers was appealed, and the trial court subsequently granted the motion to amend to file the Second Amended Complaint while the appeal of the demurrers was pending. The Court of Appeals dismissed the appeal of the demurrer on the First Amended Complaint as moot, holding that “[s]ince the First Amended Complaint has been superseded by the Second Amended Complaint, it is no longer the operative pleading in the case. Thus, any questions as to the sufficiency of the First Amended Complaint are now moot. . . . Our dismissal of the appeal from the order of November 25, 1980, is without prejudice to the Directors’ right to demur, answer, or otherwise plead to the Second Amended Complaint as amended by the order of April 5, 1982.” Schein, 284 S.C. at 255, 325 S.E.2d at 574-75.

In this case, the trial court granted Petitioner’s Rule 12(b)(6), S.C.R.C.P. motion to

dismiss the Complaint on April 23, 2025 without prejudice. Petitioner then had the option “to replead in an attempt to fix the deficiency.” Skydive Myrtle Beach, Inc., 426 S.C. at 181, 826 S.E.2d at 588. On May 2, 2025, Petitioner filed both a Rule 59(e), S.C.R.C.P. motion regarding the trial court’s order as well as a motion pursuant to Rule 15(a), S.C.R.C.P. for leave to file an Amended Complaint. Both motions were heard via WebEx on September 30, 2025. On December 1, 2025, the trial court denied the motion to reconsider but did not issue an order on Petitioner’s motion to amend. On December 11, 2025, with respect to the motion to amend, the trial court requested for the parties to “each submit proposed orders for Judge Griffin’s review within 30 days,” which both parties submitted. Had the trial court granted the motion to amend it would have “superseded” the original Complaint, making it “no longer the operative pleading in the case.” Schein, 284 S.C. at 255, 325 S.E.2d at 574-75.

On January 7, 2026, despite this Court’s holding that “[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint,” the trial court denied Petitioner’s Rule 15(a), S.C.R.C.P. motion, effectively ending Petitioner’s ability to file an Amended Complaint. See Spence, 368 S.C. at 129, 628 S.E.2d at 881. While the original Rule 12(b)(6) order dismissing the case without prejudice was not appealed, as set forth above, it did not have to be. Skydive Myrtle Beach, Inc., 426 S.C. at 181, 826 S.E.2d at 588 (holding that “any plaintiff is . . . entitled to accept the court’s ruling the original complaint was deficient, and replead in an attempt to fix the deficiency.”). It also does not make the January 7, 2026 Order denying the motion to amend moot, as if this Court or the Court of Appeals takes up the appeal and decides that it was error to deny Petitioner the opportunity to file the Amended Complaint, the decision will have a substantial practical legal effect upon this case and allow it to proceed.

Therefore, because the Court of Appeals’ decision finding this appeal to be moot directly

conflicts with several decisions of this Court, certiorari should be granted by this Court.

II. Certiorari Should be Granted Given the Novel Issues of Law Presented by the Order on Appeal.

Certiorari is also properly granted “[w]here there are novel questions of law.” Rule 242(b)(1), S.C.A.C.R. “[A]ppellate courts are free to decide novel questions of law with no particular deference to the trial court.” Longshore v. Saber Sec. Services, Inc., 365 S.C. 554, 560, 619 S.E.2d 5, 9 (Ct. App. 2005); see State ex rel. Condon v. City of Columbia, 339 S.C. 8, 13, 528 S.E.2d 408, 410 (2000) (“This case raises two novel questions of law. We are free to decide these questions of law with no particular deference to the lower court.”). This case involves SCDC’s duties of supervision over its employees and inmates in its custody and whether those duties include the prevention of the provision of contraband cellphones to inmates and the allowance of those inmates to use contraband cellphones to perpetrate crimes on members of the public outside of the SCDC facility. The trial court in the January 7, 2026 order denying Petitioner’s Motion to Amend and finding that the Amended Complaint would be futile held that with respect to the Amended Complaint, “[t]he new allegations do nothing to change the analysis and fall short of manufacturing a duty recognized under South Carolina law between SCDC and O.M. where none exists.” Jan. 7, 2026 Order, Ex. 6 to Pet. for Reh’g. The duty of SCDC under the facts alleged in the Amended Complaint has not been specifically addressed by this Court, and therefore, as the January 7, 2026 Order involves novel issues of law, certiorari should be granted.

III. Certiorari Should Be Granted Given the Exceptional Circumstances Presented In This Case and to Provide Clear Guidance in This Common Situation.

Finally, “a writ of certiorari may be issued when exceptional circumstances exist.” Laffitte v. Bridgestone Corp., 381 S.C. 460, 471, 674 S.E.2d 154, 160 (2009). For instance, in

Laffitte, a decision by this Court dealing with an order compelling discovery of trade secrets, the Court held that the “case presents such exceptional circumstances as it involves a novel question of law in a matter that has been the subject of numerous claims in state and federal courts. A decision by this Court at this time best serves the interests of judicial economy by eliminating the numerous inevitable appeals raising this novel issue of significant public interest.” Laffitte, 381 S.C. at 471-72, 674 S.E.2d at 160-61; see Hollman v. Woolfson, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (granting certiorari to review a discovery order based on exceptional circumstances).

Such exceptional circumstances exist in this case that warrant the Court granting certiorari. Again, as instructed by this Court in Skydive, following the trial court’s initial order granting the 12(b)(6), Petitioner filed a Motion to Amend to attempt to correct the deficiencies outlined by the trial court. However, the trial court did not decide the Motion to Amend and preclude Petitioner from filing an Amended Complaint until more than thirty (30) days after the trial court had denied Petitioner’s motion to reconsider. It is a fairly common procedural sequence for there to be a dismissal of a case without prejudice followed by a denial of leave to amend. It is also fairly common for trial courts to decide motions after differing times and issue order more than thirty (30) days apart. In fact, Skydive and the other cases cited above show just how often our appellate courts deal with such a sequence. Insulating denials of motions to amend from appellate review following a without prejudice dismissal invites repetition and evasion, as denials paired with dismissals will routinely end actions without an avenue for appellate correction unless separately and immediately appealed in a manner that is often impractical. In fact, this case shows the impracticality of such an appeal, given the delay by the trial court in ruling on the Motion to Amend following the denial of the motion to reconsider.

Given how common this situation is in the trial courts and the capability of repetition of this situation, guidance is needed from this Court to prevent inconsistent outcomes and judicial inefficiency. As such, certiorari should be granted based on these exceptional circumstances.

CONCLUSION

For the foregoing reasons, Petitioner Thomas McElveen, as next friend of O.M., a minor child respectfully requests that the Court grant a Writ of Certiorari to consider the Court of Appeals' decision dismissing the appeal as moot, as the decision conflicts with authority from this Court, and the appeal presents novel issues of law and presents exceptional circumstances on which guidance from this Court is needed.

Respectfully submitted,

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