

RECEIVED

Jul 27 2026

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

SMITH | ROBINSON

DANIEL C. PLYLER, SC Bar #72671
AUSTIN T. REED, SC Bar #102808
3200 Devine Street
Columbia, SC 29205
T: 803-254-5445
F: 803-254-5007
Daniel.Plyler@SmithRobinsonLaw.com
Austin.Reed@SmithRobinsonLaw.com

Counsel for Respondent SCDC

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

- I. Did the court of appeals correctly dismiss as moot Petitioner's appeal of the denial of a motion to amend the complaint because any decision from the court of appeals with respect to amendment would have no practical legal effect considering Petitioner failed to appeal the circuit court's prior order dismissing the case without prejudice?
- II. Should Petitioner's appeal be allowed to proceed, regardless of the appeal's mootness, because Petitioner erroneously believes he has asserted novel claims?
- III. Should Petitioner's appeal be allowed to proceed, regardless of the appeal's mootness, based on other exceptional circumstances?

STATEMENT OF THE CASE

No one disagrees that this civil action arises out of unspeakable criminal allegations that a non-party, Abbygale El-Dier ("Mother"), perpetuated sexual abuse against her minor child ("O.M."). On October 15, 2024, Petitioner Thomas McElveen, as next friend of O.M. ("Petitioner"), filed this lawsuit against Respondent South Carolina Department of Corrections ("SCDC"). As told by Petitioner in his Complaint, shortly prior to Mother's decision to sexually abuse her child, SCDC was on notice that non-party Inmate Jacob Lance had access to a contraband cell phone and had been using it to contact Mother. Petitioner claimed that SCDC was both negligent and grossly negligent in failing to prohibit Inmate Lance from obtaining the cell phone, contacting Mother, and directing Mother to sexually abuse O.M.

On December 20, 2024, SCDC moved to dismiss Petitioner's Complaint pursuant to Rule 12(b)(6), SCRCF, arguing *inter alia* that, although a horrific set of facts are present, SCDC owed no legal duty to O.M. as a matter of law under these circumstances. Petitioner opposed the motion to dismiss but did not request leave to amend his complaint while the motion was pending. After

a lengthy argument, on April 23, 2025, the circuit court granted SCDC's motion to dismiss, ruling that SCDC did not owe a legal duty to the minor child under the facts alleged in the Complaint. Accordingly, the Complaint was dismissed without prejudice.

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

On December 1, 2025, after a hearing on the pending motions, the circuit court entered an order denying Petitioner's motion for reconsideration. The circuit court's order did not specifically address the request in the motion for reconsideration that Petitioner also be permitted, in the alternative, leave to file an amended complaint. Nor did the order specifically address Petitioner's separately filed motion to amend. The same day, counsel for Petitioner emailed the circuit court requesting it issue a ruling on the motion to amend. On December 11, 2025, the circuit court responded, requesting that the parties submit proposed orders on the motion to amend within 30 days. Despite this clear indication that the motion to amend would likely not be decided prior to the expiration of time to appeal the December 1, 2025 order dismissing the case without prejudice, Petitioner did not file an appeal or a second motion for reconsideration requesting that the circuit court address the request for leave to file an amended complaint in its original order.

On January 7, 2026, the circuit court entered an order denying Petitioner's motion to amend. The circuit court, after thoughtfully considering the proposed amended complaint,

determined that the proposed amendment would be futile, as any pleading or drafting changes could not manufacture a duty between SCDC and O.M. where none exists under the law based upon this set of facts.

On January 16, 2026, Petitioner filed a notice of appeal from the January 7, 2026 order denying the motion to amend. No appeal was filed with respect to the December 1, 2025 order that had already dismissed the case without prejudice. Soon after the filing of the notice of appeal, and before any briefing on the merits of Petitioner's appeal had commenced, the court of appeals sent a letter on January 21, 2026, requesting the parties submit briefing on the issue of appealability. Both parties complied and submitted briefing on that narrow standalone issue.

On March 5, 2026, the court of appeals issued an order dismissing the appeal. The court of appeals explained in pertinent part:

After considering both parties' memoranda, 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. *See Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009).

Petitioner filed a timely petition for rehearing and request for en banc consideration on March 18, 2026. It was denied by order of the court of appeals on May 29, 2026.

Petitioner filed a petition for writ of certiorari on June 26, 2026. SCDC now opposes the petition.

ARGUMENT

This Court should respectfully deny Petitioner's petition for writ of certiorari. None of the issues set forth by Petitioner warrant this Court's review.

I. The court of appeals correctly dismissed Petitioner's appeal as moot.

Our appellate courts do not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jones v. Dillon–Marion Human Resources Dev.*

Comm’n, 277 S.C. 533, 291 S.E.2d 195 (1982). Mootness has been regularly defined by our courts as follows: “A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” *Mathis v. South Carolina State Highway Dep’t*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

A. The appeal is moot because no appellate judgment could provide Petitioner any effectual relief.

Two independent features of this record make effectual relief impossible here. First, there is no longer a pleading to amend or an action in which to file one. Second, the relief Petitioner seeks is already available to him without this Court’s intervention. Under these circumstances, a decision reversing the denial of leave to amend would have no practical legal effect.

Rule 15(a), SCRCP, authorizes the amendment of pleadings in a pending action. It presupposes both a live case and an operative pleading. Neither exists here.

The circuit court dismissed Petitioner’s Complaint on April 23, 2025. Petitioner moved for reconsideration under Rule 59(e), SCRCP, which tolled the time for appeal. *See* Rule 203(b)(1), SCACR. When the circuit court denied that motion on December 1, 2025, the thirty-day period for filing a notice of appeal began to run. Petitioner did not appeal that order. Consequently, the judgment dismissing the action became final and is no longer subject to appellate review.

That procedural posture is dispositive. Because the dismissal became final, reversing the subsequent order denying leave to amend would not revive this action or restore a complaint capable of amendment. Leave to amend is simply unavailable once judgment is final unless the judgment is first vacated or set aside. *See Brewton v. Shirley*, 93 S.C. 365, 76 S.E. 988 (1913) (noting that “until the judgment dismissing the complaint was set aside or modified, there was no

complaint before the court, which could be amended.”); *Oulla v. Velazques*, 427 S.C. 428, 437, 831 S.E.2d 450, 454 (Ct. App. 2019) (agreeing with the “majority view applying Rule 60(b)’s more stringent standard before allowing a postjudgment motion to amend to be considered under Rule 15.”); *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (“There is one difference between a pre- and post-judgment motion to amend: the district court may not grant the post-judgment motion unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b).”). Petitioner’s own authority confirms why relief is impossible. He relies on the principle that an amended complaint “supersedes the original, rendering the original of no legal effect.” *BAE Sys. Tech. Solution & Servs., Inc. v. Republic of Korea’s Def. Acquisition Program Admin.*, 884 F.3d 463, 474 (4th Cir. 2018). But supersession necessarily requires an existing pleading and a pending action in which the amended pleading can operate. Here, there is neither. The original Complaint was terminated by a final judgment that Petitioner elected not to appeal.

The without-prejudice nature of the dismissal further confirms that any relief from this Court would have no practical legal effect because it permits Petitioner to attempt to cure the pleading deficiencies by filing a new action. *See Spence v. Spence*, 368 S.C. 106, 128, 628 S.E.2d 869, 880-81 (2006). Indeed, because the statute of limitations is not an issue in this case, Petitioner remains free to commence a new action asserting the same allegations contained in his proposed amended complaint. He needs no leave, no reversal, and no writ. Regardless of whether this Court agrees or disagrees with the circuit court’s futility analysis, Petitioner’s practical position is identical either way: he may commence a new action, and Respondent may test that pleading under Rule 12(b)(6) in the ordinary course of litigation.

In sum, Petitioner cannot amend a complaint in case that has already been dismissed, yet he remains free to commence a new action because the dismissal was without prejudice. Because

reversal of the order denying leave to amend would not alter either of those realities, no judgment by an appellate court could provide effectual relief. Accordingly, the appeal is moot.

B. No conflict exists with *Skydive* or *Spence*; both turn on a feature absent here.

Petitioner contends that the court of appeals' order conflicts with *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 826 S.E.2d 585 (2019), and *Spence*. However, Petitioner's reliance on these cases is misplaced. Both decisions addressed dismissals *with prejudice*, where the plaintiff would forever lose the opportunity to replead absent appellate intervention. That concern is entirely absent here because the Complaint was dismissed *without prejudice*.

In *Skydive*, the circuit court dismissed the complaint with prejudice, refused to even consider amendment, and never reviewed a proposed amended complaint. 426 S.C. at 179-83, 826 S.E.2d at 587-89. The Court's specific concern was practical: the immediate with-prejudice order "put Skydive in a difficult position because it made Skydive practically unable to litigate a motion to amend before it must file the appeal," since the thirty-day deadline is tolled only by a Rule 59(e) motion. *Id.* at 181, 826 S.E.2d at 588. That is a trap created by finality. A dismissal *without prejudice* creates no such trap, as the Plaintiff who prefers to replead may simply do so in a new action rather than litigate for the right to do so in the old one. *Spence* likewise addressed the consequences of a dismissal with prejudice. There, this Court addressed the situation in which "a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint." 368 S.C. at 130, 628 S.E.2d at 882.

No such concern exists here. Unlike the plaintiff in *Skydive*, Petitioner was never deprived of the opportunity to replead. Because the dismissal was without prejudice, Petitioner remains free to file a new action asserting the allegations contained in his proposed amended complaint. Thus, the practical harm that animated *Skydive* simply does not exist.

Indeed, Petitioner’s reliance on *Skydive* underscores Respondent’s point. Petitioner quotes *Skydive* for the proposition that a Plaintiff is “entitled to accept the court’s ruling the original complaint was deficient, and replead in an attempt to fix the deficiency,” 426 S.C. at 181, 826 S.E.2d at 588. That is precisely what Petitioner remains free to do. What *Skydive* does not hold is that a plaintiff may allow a final judgment dismissing an action to become unappealable and then resurrect that action through an appeal solely from a later order denying leave to amend.

Nor was Petitioner denied the procedure required by *Skydive*. Unlike the circuit court in *Skydive*, the circuit court here reviewed Petitioner’s proposed amended complaint, heard argument, invited proposed orders from both parties, and ruled on the actual proposed pleading. *Skydive* faulted the court for refusing amendment “without seeing what the amendment would look like.” *Id.* at 183, 826 S.E.2d at 589. The circuit court in this case saw exactly that and made a reasoned futility determination on the document before it. Petitioner’s quarrel therefore is not with the procedure employed by the circuit court, but with the merits of its futility determination. The proper vehicle for challenging that determination was a timely appeal from the order dismissing the action. Petitioner elected not to pursue that appeal.

C. Petitioner had adequate routes to review and declined them.

Petitioner suggests he was trapped by the sequence of rulings below. He was not.

Orders denying leave to amend are ordinarily not immediately appealable—but the rationale of those cases is that review remains available at the conclusion of the action. *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004); *Tatnall v. Gardner*, 350 S.C. 135, 138-39, 564 S.E.2d 377, 379 (Ct. App. 2002); *Tillman v. Tillman*, 420 S.C. 246, 250, 801 S.E.2d 757, 760 (Ct. App. 2017). Respondent does not dispute that principle. The point is that the vehicle for such review is an appeal from an appealable order—here, the dismissal. *See*

Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (Ct. App. 2001) (“Dismissal of an action pursuant to Rule 12(b)(6) is appealable”); *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 163 (Ct. App. 2014) (noting that a non-appealable order will be considered where an appealable issue is properly before the court). Petitioner did not perfect that appeal. The consequence is not that the amendment ruling became independently appealable; it is that no appealable order remains.

To the extent Petitioner suggests that noticing an appeal from the December 1, 2025 order would have stripped the circuit court of jurisdiction to rule on the pending motion to amend, the premise is mistaken. Rule 205, SCACR, divests the lower court of jurisdiction only as to matters affected by the appeal. Our appellate courts routinely accommodate precisely this situation by staying briefing, holding the appeal in abeyance, or remanding for a ruling on the outstanding motion. Accordingly, Petitioner could have filed a timely notice of appeal and sought a temporary stay pending the circuit court’s ruling, then raised both rulings together. He chose instead to rely exclusively on a motion that remained pending until January 7, 2026, and to let the appeal period lapse. A litigant’s tactical election does not convert an ordinary procedural sequence into a jurisdictional trap.

Moreover, *Skydive* itself provided the very procedure Petitioner now claims was unavailable. This Court instructed that “the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) *before filing the final order of dismissal.*” 426 S.C. at 179, 826 S.E.2d at 587 (emphasis added). Petitioner, however, never sought leave to amend before the circuit court entered its April 23, 2025 dismissal order. Instead, he waited until after judgment had been entered. Having declined to follow the procedure outlined in *Skydive*, Petitioner cannot now argue that *Skydive* creates a conflict requiring this Court’s review.

II. The Petition presents no novel question for review.

Certiorari may issue where a case presents a novel question of law. Rule 242(b)(1), SCACR. Petitioner contends this case presents such a question—namely, the scope of SCDC’s duty with respect to contraband cellphones used by inmates to facilitate harm to persons outside its facilities. But that issue is not before this Court. The court of appeals did not address the existence or scope of any duty; it held only that the appeal was moot. Because there is no appellate decision resolving the duty question, there is nothing for this Court to review. Whatever the contours of SCDC’s duty may be, they can be litigated in a properly pleaded action and reviewed on a developed record after an appeal from a ruling that actually decides the issue. To reach the question here would require this Court to look past a jurisdictional defect and render an advisory opinion on a superseded pleading in an action that no longer exists. Novelty cannot create appellate jurisdiction here, and this case is an improper vehicle for the question Petitioner seeks to present.

Even if the duty issue were properly before this Court, it would not present a novel question of law. South Carolina has long recognized that the common law imposes no general duty to act. *See Rayfield v. S.C. Dep’t of Corrs.*, 297 S.C. 95, 100, 374 S.E.2d 910, 913 (Ct. App. 1988). More directly, “South Carolina does not recognize a general duty to warn a third party or potential victim of danger or to control the conduct of another.” *Doe 2 v. Citadel*, 421 S.C. 140, 146, 805 S.E.2d 578, 581 (2017). This Court has recognized only five exceptions to that rule: “1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant.” *Faile v. S.C. Dep’t of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002).

Throughout the proceedings below, Petitioner relied principally on the second exception, arguing that SCDC's custodial relationship with Inmate Lance gave rise to a duty to protect O.M. That theory fails for the reason identified by the circuit court: Inmate Lance was not the injurer. The special relationship exception imposes a duty to protect others from harm inflicted by the person with whom the defendant has the special relationship. *See Faile*, 350 S.C. at 334, 566 S.E.2d at 546 (explaining the exception may apply "where the defendant has a special relationship to the injurer"). Here, the injurer was O.M.'s mother, Abbygale El-Dier—not Inmate Lance. SCDC had no custodial or other special relationship with Abbygale El-Dier and no ability to control her conduct.¹

Petitioner nevertheless seeks to extend the special relationship exception far beyond its established limits. His theory would require the Court to recognize a duty flowing from SCDC's custodial control over an inmate, to the inmate's use of contraband to communicate with a third party outside the prison, and ultimately to injuries inflicted by that third party upon another member of the public with whom SCDC has no relationship. Whether the existing duty framework reaches that far is not a novel legal question; it is simply an application of settled principles governing duty and special relationships to a particular set of alleged facts. That is the routine work of judicial decision-making, not the type of unresolved legal issue that warrants this Court's discretionary review.

III. No exceptional circumstances warrant review.

Petitioner relies on *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 674 S.E.2d 154 (2009), and *Hollman v. Woolfson*, 384 S.C. 571, 683 S.E.2d 495 (2009). Neither case supports review here.

¹ This analysis concerns the circumstances existing at the time of the injury. Although Abbygale El-Dier has since been convicted of crimes against O.M. and is now in SCDC's custody, SCDC had no custodial relationship with her at the time of the events at issue.

Both involved interlocutory discovery orders entered in ongoing litigation, where compliance would have caused irreparable harm that could not be remedied on appeal after final judgment. *See Laffitte*, 381 S.C. at 464, 674 S.E.2d at 156 (granting certiorari to review an order compelling production of trade secrets); *Hollman*, 384 S.C. at 576, 683 S.E.2d at 497 (granting certiorari to review an order permitting ex parte interviews of the petitioner's nonparty patients). Here, by contrast, no irreparable consequence has occurred. Nothing has been irrevocably lost, and Petitioner remains free to pursue his claims in a properly commenced action.

Petitioner's assertion that the issue is likely to recur is likewise unpersuasive. He argues that dismissals without prejudice followed by denials of leave to amend present a recurring procedural problem warranting this Court's guidance. But this Court has already provided that guidance. A plaintiff may seek leave to amend before entry of the dismissal order, *see Skydive*, 436 S.C. at 179, 826 S.E.2d at 587, or, if the ruling is adverse, appeal the dismissal and obtain review of the amendment ruling alongside it, *see Baldwin*, 357 S.C. at 230, 593 S.E.2d at 147. Petitioner simply failed to pursue either course. A rule does not become uncertain because a litigant declines to follow it, and the recurrence of a procedural sequence does not justify certiorari where settled law already governs the result.

Nor is review necessary to prevent Petitioner's claims from escaping appellate scrutiny. Because the Complaint was dismissed with prejudice, the circuit court's futility ruling did not finally adjudicate or extinguish Petitioner's claims. Rather, it left him in the same position as any plaintiff whose complaint has been dismissed without prejudice: free to commence a new action asserting properly pleaded claims. If a circuit court errs in a future action by dismissing those claims on the merits, Petitioner will have the ordinary right to appellate review.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

SMITH | ROBINSON

/s/ Daniel C. Plyler

DANIEL C. PLYLER, SC Bar #72671

AUSTIN T. REED, SC Bar #102808

3200 Devine Street

Columbia, SC 29205

T: 803-254-5445

F: 803-254-5007

Daniel.Plyler@SmithRobinsonLaw.com

Austin.Reed@SmithRobinsonLaw.com

Counsel for Respondent SCDC

Columbia, South Carolina

July 27, 2026