

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY

The Honorable B. Alex Hyman, Circuit Court Judge

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Appellate Case No. 2026-001591

SC Court of Appeals

Kenn Zou, Appellant,

v.

Mengjia Xia, Michael S. Cole, and Realty ONE Group Dockside, Respondents.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court abused its discretion under Rule 15(a), SCRCP, by denying Appellant's pending Motion for Leave to File a Second Amended Complaint while dismissing the action with prejudice, where the proposed pleading was before the court, added allegations specifically addressing the limitations deficiency asserted by Respondents, and no finding of prejudice was made.

2. Whether dismissal with prejudice should be vacated where the circuit court expressly acknowledged that the proposed Second Amended Complaint added allegations concerning delayed discovery, continuing concealment, and diligence, but sustained dismissal because the superseded Amended Complaint contained no discovery date, no concealed facts preventing earlier discovery, and no diligence.

3. Whether remand is required under *Patton v. Miller, Skydive Myrtle Beach, Inc. v. Horry County*, and *Spence v. Spence* because the proposed amendment was not clearly futile and the circuit court did not evaluate the proposed pleading under Rule 15(a).

STATEMENT OF THE CASE

This appeal concerns a pleading-stage dismissal with prejudice and the simultaneous denial of a pending, concrete motion for leave to amend. Appellant does not ask this Court to decide the ultimate truth of the allegations concerning Respondents. The narrower question is whether the action could properly be terminated with prejudice without evaluating the proposed Second Amended Complaint under Rule 15(a), SCRCP.

Appellant commenced this action on March 5, 2025. He filed an Amended Complaint on April 7, 2025, asserting claims arising from attempted real-estate transactions in 2019 and from alleged brokerage supervision. The Amended Complaint asserted fraudulent misrepresentation against Mengjia Xia, negligent supervision against Michael S. Cole and Realty ONE Group

Dockside, and breach of fiduciary duty against all Respondents. (Amended Complaint pp. 1-4.) The amount directly identified as lost earnest money was \$14,500, in addition to other relief requested. (Amended Complaint pp. 2-4.)

Respondents answered on May 7, 2025 and asserted, among other defenses, failure to state a claim and the statute of limitations. (Answer pp. 1-6.) On December 10, 2025, Respondents moved to dismiss under Rule 12(b)(6), arguing the claims were time-barred because the events occurred in 2019 and also arguing that the Amended Complaint failed to plead the elements of the asserted causes of action. (Motion to Dismiss pp. 1-10.) Appellant filed a written opposition on December 12, 2025, arguing in part that the limitations issue implicated delayed discovery and factual questions. (Opposition pp. 1-4.)

Before the circuit court ruled on dismissal, Appellant filed on February 27, 2026 a Motion for Leave to File Second Amended Complaint. The motion expressly stated that the proposed pleading added no new causes of action or parties, but "clarifies and supplements factual allegations relevant to Defendants' statute-of-limitations arguments, including Plaintiff's delayed discovery, continuing concealment, and Plaintiff's diligence." (Motion for Leave p. 2.) The proposed Second Amended Complaint added a separate section entitled "TOLLING, DELAYED DISCOVERY, AND CONTINUING CONCEALMENT," including a specific alleged discovery date of February 10, 2025, allegations concerning continuing outward-facing professional representations, lack of access to internal brokerage materials, and prompt investigation thereafter. (Proposed SAC pp. 4-5.)

The circuit court heard the motions on May 4, 2026. At the hearing, Appellant expressly requested leave to file the Second Amended Complaint and argued that the statute-of-limitations issue involved "late discovery and factual question." (Transcript p. 10, lines 17-24.) Respondents'

counsel acknowledged that Appellant had filed a motion for a second amended complaint and "added some allegations to try to address the discovery rule issue." (Transcript p. 13, lines 11-15.)

On May 5, 2026, the circuit court entered a Form 4 stating that both Respondents' Motion to Dismiss and Appellant's Motion for Leave to Amend, along with two other motions, were "Under Advisement." The Form 4 expressly stated that it did not end the case. (May 5 Form 4 p. 1.)

On June 16, 2026, the circuit court entered a second Form 4 granting Respondents' Motion to Dismiss, denying Appellant's Motion for Leave to Amend, denying alternative service, and declaring Respondents' motion to enlarge time moot. The order stated that it ended the case. (June 16 Form 4 p. 1.)

Appellant filed a Rule 59(e) motion on June 17, 2026. He specifically argued that the proposed Second Amended Complaint had been filed to address the statute-of-limitations and pleading arguments and that the court denied leave "without addressing whether the proposed amendment cured the deficiencies identified by Defendants." (Rule 59(e) Motion pp. 2-3.) Respondents opposed the motion and argued, relying on *Spence v. Spence*, that Appellant had not demonstrated how amendment would cure the defects. (Rule 59 Opposition p. 2.)

The circuit court denied Rule 59(e) relief in an order signed July 2 and filed July 6, 2026. The order expressly recognized that the proposed Second Amended Complaint "added allegations regarding delayed discovery, continuing concealment, and Plaintiff's diligence." (July 6 Order p. 2.) Yet, in sustaining dismissal on limitations grounds, the court analyzed the earlier Amended Complaint and held that "[t]he pleading identifies no date of discovery, no concealed facts preventing earlier discovery, and no diligence undertaken." (July 6 Order pp. 3-4.) The

order did not analyze whether the allegations in the proposed Second Amended Complaint cured those identified deficiencies. It also found the earlier Amended Complaint deficient on alternative substantive grounds. (July 6 Order pp. 4-5.)

Appellant filed and served his Notice of Appeal on July 15, 2026. The Court of Appeals assigned Appellate Case No. 2026-001591.

STANDARD OF REVIEW

A Rule 12(b)(6) dismissal is reviewed under the same standard applied by the circuit court: the ruling must be based on the pleading, well-pleaded facts are accepted as true, and dismissal is improper if the facts alleged and reasonable inferences would entitle the plaintiff to relief under any theory. See *Charleston Cnty. Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011); *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). Rule 12(b)(6) tests pleading sufficiency; it is not a vehicle to resolve the underlying merits. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019).

A ruling on leave to amend under Rule 15(a) is ordinarily reviewed for abuse of discretion. *Patton v. Miller*, 420 S.C. 471, 489-90, 804 S.E.2d 252, 261-62 (2017). But a court's failure to exercise the discretion Rule 15 requires is itself an abuse of discretion. *Id.* Rule 15(a) strongly favors amendment and directs that leave be freely given when justice requires and the opposing party is not prejudiced. *Id.*; Rule 15(a), SCRPC.

ARGUMENT

I. THE CIRCUIT COURT ABUSED ITS DISCRETION BY DENYING LEAVE TO AMEND WITHOUT EVALUATING THE PROPOSED PLEADING UNDER RULE 15(a).

Rule 15(a) provides that, after the amendment permitted as a matter of course, a pleading may be amended by leave of court and "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRPC. South Carolina's Supreme Court has

emphasized that the rule "strongly favors amendments." Patton, 420 S.C. at 489-90, 804 S.E.2d at 261.

Patton is especially important here. The Supreme Court held that a circuit court must actually exercise Rule 15(a) discretion by considering prejudice or another substantial reason to deny amendment; failure to exercise that discretion is itself an abuse of discretion. *Id.* at 490, 804 S.E.2d at 262. Skydive later applied that principle in the Rule 12(b)(6) setting and held that, when a complaint is found deficient, the plaintiff generally should be given an opportunity to amend before a final dismissal with prejudice. 426 S.C. at 179-82, 826 S.E.2d at 587-89.

Appellant did substantially more than make a generalized request to amend. On February 27, 2026, more than two months before the hearing, he filed a written Motion for Leave and attached the proposed Second Amended Complaint. The motion identified the precise purpose of amendment: to supplement the allegations relevant to Respondents' limitations defense, including delayed discovery, continuing concealment, and diligence. (Motion for Leave p. 2.) The amendment added no new parties and no new causes of action. *Id.*

The record also eliminates any question whether the amendment was actually before the circuit court. At the hearing, the court initially questioned whether the motion to amend was on the calendar, then located it. (Transcript p. 6, lines 8-23.) Appellant expressly asked the court to grant leave. (Transcript p. 10, lines 17-24.) Respondents' counsel acknowledged the proposed pleading and its discovery-rule allegations. (Transcript p. 13, lines 11-15.) The next day, the court entered a Form 4 specifically stating that the Motion for Leave to Amend was "Under Advisement." (May 5 Form 4 p. 1.)

Despite that record, the June 16 Form 4 simply denied leave while granting dismissal and ending the case. (June 16 Form 4 p. 1.) It made no finding of prejudice, bad faith, undue delay,

or other substantial Rule 15 reason. The later Rule 59(e) order did not supply that missing analysis. It described the new allegations, but then sustained dismissal by identifying omissions in the superseded Amended Complaint. (July 6 Order pp. 2-4.)

This is the analytical disconnect. The court acknowledged that the proposed pleading added delayed discovery, continuing concealment, and diligence, yet held the claims time-barred because the earlier pleading contained "no date of discovery, no concealed facts preventing earlier discovery, and no diligence undertaken." (July 6 Order pp. 2-4.) Those are the very categories the proposed pleading added. The order never determined whether those new allegations were sufficient, insufficient, or clearly futile.

The absence of a prejudice finding is also material. The proposed pleading was filed more than two months before the hearing, added no party and no cause of action, and responded to a defense Respondents themselves had placed at the center of the case. Respondents' counsel demonstrated actual notice at the hearing. The burden of establishing a proper reason to deny amendment rests on the party opposing amendment. *Patton*, 420 S.C. at 490 & n.9, 804 S.E.2d at 262 & n.9; see also *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

The circuit court therefore did not perform the Rule 15(a) analysis required by *Patton* and *Skydive* before permanently terminating the action.

II. THE PROPOSED SECOND AMENDED COMPLAINT WAS NOT CLEARLY FUTILE BECAUSE IT SUPPLIED THE VERY DELAYED-DISCOVERY ALLEGATIONS THE CIRCUIT COURT FOUND MISSING.

Skydive recognizes a narrow futility exception. A court may deny amendment when the amendment would be clearly futile. 426 S.C. at 182-84, 826 S.E.2d at 589-90. But *Skydive* also explains that if the proposed amendment is not clearly futile, denial of leave is improper; in the

context of a dismissal with prejudice, remand is required unless amendment is clearly futile. *Id.*; see also *Spence*, 368 S.C. at 129-31, 628 S.E.2d at 881-82.

This case is materially different from a case in which a plaintiff merely says that some unspecified future amendment might cure a defect. The proposed pleading is in the record. It can be compared directly with the deficiency the circuit court identified.

Respondents' limitations motion argued that the Amended Complaint concerned 2019 events, that Appellant filed in 2025, and that he had not alleged why the facts could not have been discovered earlier. (Motion to Dismiss pp. 3-5.) The earlier Amended Complaint indeed said only that Appellant "later discovered" Xia may not have had lawful authorization or qualifications. (Amended Complaint p. 2.) It did not identify a discovery date or set out a developed diligence theory.

The proposed Second Amended Complaint materially changed that pleading. Paragraphs 29 through 36 added a separate tolling and delayed-discovery section. The proposed pleading alleged continued intermittent contact after 2019; continuing outward-facing conduct that allegedly reinforced Appellant's belief that Xia was properly authorized and supervised; a specific February 10, 2025 event that allegedly triggered reasonable suspicion; lack of access before that date to internal brokerage records, commission statements, property-management agreements, supervisory documentation, and other materials; and prompt investigation after February 10, 2025. (Proposed SAC pp. 4-5.)

These allegations do not establish, as a matter of appellate adjudication, that Appellant will ultimately prevail on tolling or delayed accrual. They do establish that the proposed amendment was not merely repetitive on the issue the circuit court treated as dispositive. The amendment supplied a discovery date, facts asserted to explain delayed discovery, and

allegations of diligence - the precise subjects the July 6 Order found absent from the earlier pleading.

South Carolina's discovery rule asks when a person knew or should have known through reasonable diligence that a cause of action might exist. *Moore v. Benson*, 390 S.C. 153, 161, 700 S.E.2d 273, 277 (Ct. App. 2010). The inquiry is objective. *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). When the facts permit competing inferences, the date of discovery can present a factual question. See *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 13, 825 S.E.2d 707, 713 (Ct. App. 2019).

Respondents will emphasize that Appellant knew in 2019 that the earnest-money transaction had failed and that Xia did not assist him in recovering the deposit. The transcript reflects that point. (Transcript pp. 11-13.) But the proposed pleading does not allege ignorance of the economic loss itself. It alleges later discovery of the alleged wrongful conduct and supervisory failures on which the pleaded theories depend, and it alleges circumstances asserted to have delayed reasonable notice of those theories. (Proposed SAC pp. 4-5.) Whether those allegations ultimately withstand factual development is not the same question as whether amendment was clearly futile at the pleading stage.

Most importantly, the circuit court never answered that question. Its July 6 Order recognized the new delayed-discovery allegations but did not analyze them. Instead, it returned to the earlier Amended Complaint and identified the absence of allegations that the proposed pleading actually contained. (July 6 Order pp. 2-4.) Under *Skydive*, that is not a sufficient basis to treat amendment as clearly futile.

III. RESPONDENTS' ANTICIPATED FUTILITY AND ALTERNATIVE-GROUND ARGUMENTS DO NOT JUSTIFY AFFIRMANCE OF A DISMISSAL WITH PREJUDICE.

Respondents argued below that Appellant had failed to demonstrate how amendment would cure the defects and cited Spence. (Rule 59 Opposition p. 2.) They may likewise invoke Rule 220(c), SCACR, and ask this Court to affirm on any ground appearing in the record. But neither Spence nor Rule 220(c) eliminates the controlling clear-futility inquiry.

Skydive carefully explained Spence. When a complaint has been dismissed with prejudice and amendment was erroneously denied, an appellate court may affirm only when the plaintiff fails to present additional factual allegations or a different theory that may give rise to a claim - that is, when amendment is clearly futile. Skydive, 426 S.C. at 186-88, 826 S.E.2d at 591-92. Spence itself involved a legal barrier that no repleading could overcome: the challenged purchasers were bona fide purchasers under the facts and theory presented, and no additional allegation was offered that could change that result. Spence, 368 S.C. at 130-31, 628 S.E.2d at 881-82; Skydive, 426 S.C. at 186-88, 826 S.E.2d at 591-92.

Here, by contrast, Appellant actually presented additional factual allegations. The proposed pleading materially changed the limitations allegations on the exact subjects later identified by the circuit court as missing. (Proposed SAC pp. 4-5; July 6 Order pp. 2-4.) This record therefore does not fit Spence's no-possible-cure circumstance.

The circuit court also identified alternative deficiencies in the earlier Amended Complaint concerning fraud, tortious interference, negligent supervision, and breach of fiduciary duty. (July 6 Order pp. 4-5.) Appellant does not ask this Court to declare that every count of the proposed pleading is perfectly pleaded or ultimately meritorious. The proposed fraud allegations, for example, remain subject to Rule 9(b)'s particularity requirement. Rule 9(b), SCRPC. The

negligent-supervision theory likewise must ultimately satisfy the requirements recognized in *Doe v. Bishop of Charleston*, 407 S.C. 128, 139, 754 S.E.2d 494, 500 (2014).

But those potential issues do not justify affirmance with prejudice on this record for two reasons. First, the July 6 Order again analyzed the Amended Complaint, not the proposed Second Amended Complaint, when stating the alternative pleading deficiencies. (July 6 Order pp. 4-5.) It never performed a claim-by-claim futility analysis of the actual proposed pleading. Second, *Skydive* instructs that a court ordinarily should not deny amendment based simply on its perception of the merits; only clear futility warrants that exceptional result. 426 S.C. at 182-84, 826 S.E.2d at 589-90.

This appeal therefore does not require the Court to decide the ultimate sufficiency of every cause of action in the first instance. It requires the Court to decide whether the entire action could be terminated with prejudice while a timely, concrete proposed pleading was pending, where that pleading materially addressed the dispositive limitations defect and no Rule 15 prejudice or clear-futility determination was made.

If the circuit court on remand concludes that a particular claim in the proposed pleading remains deficient, Respondents retain the ordinary procedural tools to challenge that claim. Remand does not decide liability; it restores the proper pleading process.

IV. THE RULE 15 ISSUE WAS PRESERVED AT EVERY MATERIAL STAGE.

The amendment issue was not raised for the first time on appeal. Appellant filed the Motion for Leave and proposed pleading on February 27, 2026. (Motion for Leave pp. 1-3.) He expressly requested leave at the May 4 hearing. (Transcript p. 10, lines 17-24.) Respondents' counsel acknowledged the amendment and its discovery-rule purpose. (Transcript p. 13, lines 11-

15.) The court formally took the motion under advisement on May 5. (May 5 Form 4 p. 1.) It expressly denied leave on June 16. (June 16 Form 4 p. 1.)

Appellant then filed a Rule 59(e) motion the next day and squarely asserted that the court had denied leave without determining whether the proposed amendment cured the deficiencies identified by Respondents. (Rule 59(e) Motion pp. 2-3.) The July 6 Order responded to the Rule 59(e) motion and discussed the proposed pleading. (July 6 Order pp. 1-5.) Thus, the circuit court had repeated opportunities to address the precise issue now presented.

This preservation record is stronger than the concern discussed in the separate opinion in *Skydive*, where the request to amend had been informal and no proposed amended complaint had been attached before dismissal. Here, Appellant filed the actual proposed pleading months before the ruling, the court expressly took it under advisement, and Appellant used Rule 59(e) to identify the omission after judgment.

V. VACATUR AND REMAND ARE THE APPROPRIATE RELIEF.

The requested relief is deliberately narrow. Appellant does not ask this Court to enter judgment against Respondents, determine Xia's qualifications or immigration status, decide disputed facts concerning the 2019 transactions, or hold that delayed discovery is conclusively established. Those matters are not necessary to resolve this appeal.

The appropriate relief is to vacate the dismissal with prejudice, reverse or vacate the denial of leave to amend, and remand for proceedings consistent with Rule 15(a). That remedy follows the approach of *Patton* and *Skydive*: the circuit court should evaluate the amendment actually proposed under the governing Rule 15 standards, including prejudice and any properly supported claim of clear futility.

This remedy also respects the respective roles of the appellate and trial courts. The Court of Appeals need not become the first court to conduct a detailed merits review of the proposed pleading. On remand, Respondents may answer or otherwise respond to the pleading as permitted by the Rules, and the circuit court may address any properly preserved pleading or limitations issues on the actual pleading before it.

CONCLUSION

Appellant filed a concrete proposed Second Amended Complaint before the circuit court ruled on Respondents' Rule 12(b)(6) motion. The proposed pleading added no new parties or causes of action and specifically added delayed-discovery, continuing-concealment, and diligence allegations directed to Respondents' statute-of-limitations defense. The court took the Motion for Leave under advisement, then denied leave while dismissing the action with prejudice and ending the case.

The later Rule 59(e) Order expressly acknowledged the new allegations, yet sustained dismissal because the superseded Amended Complaint contained no discovery date, no concealed facts preventing earlier discovery, and no diligence. The court did not determine whether the proposed pleading cured those deficiencies, did not find prejudice, and did not find the proposed amendment clearly futile.

Under Rule 15(a), Patton, Skydive, and Spence, the dismissal with prejudice should not stand on this record. Appellant respectfully requests that this Court vacate the judgment of dismissal, reverse or vacate the denial of leave to amend, and remand the matter to the Horry County Court of Common Pleas for further proceedings consistent with Rule 15(a), SCRCP.

Respectfully submitted,

/s/ Kenn Zou

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Date: September 8, 2026

A handwritten signature in black ink, appearing to be 'Kenn Zou', written in a cursive style.

CERTIFICATE OF SERVICE

I certify that on September 8, 2026, I served a true and correct copy of the foregoing upon counsel of record for Respondents by U.S. Mail, postage prepaid, addressed as follows:
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/s/ Kenn Zou

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