

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Court of Common Pleas

Courtney Clyburn Pope, Circuit Judge

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App. Case No. 2024-001206

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Janice Meusel and Adam Meusel,.....Appellants,

v.

Woodside Plantation Property Owners' Association, Inc., Woodside Plantation  
Country Club, Inc. d/b/a Woodside Country Club, and Invited,.....Defendants,

Of whom Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club and  
Invited are the..... Respondents.

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RETURN TO PETITION FOR REHEARING

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Appellants hereby submit this return to the Respondents' petition that this court rehear this case. The decision to reverse and remand reached in this court's opinion is correct, and Respondents have not shown the court misapprehended the record or the law. Indeed, under Supreme Court precedent, to reverse and remand here was the only outcome the law allowed.

Contrary to what this court has concluded from the record, Respondents argue that the complaint here stated no cause of action and, what is more, that it is impossible for the Appellants to state a cause of action in an amended complaint. The circuit court conducted no inquiry into whether amendment would be futile, and, because the lower court refused even to consider permitting amendment, the record contains no proposed

amended complaint that could be evaluated in such an inquiry. What Respondents are doing is contending the record shows such futility when what they actually argue is that this court should assume in Respondents' favor whether certain facts do or do not exist. To accept their argument would violate the law of how motions to dismiss are decided.

**I. What Skydive requires.**

In Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019), this state's supreme court required trial courts evaluating motions to dismiss to give plaintiffs an opportunity to amend if the court determines a complaint is insufficient as written. The Court in Skydive articulated a rule that requires reversal of a dismissal with prejudice unless the record demonstrates that amendment would be futile because it would be impossible for any complaint by the plaintiff to state facts sufficient to constitute a cause of action. Skydive Myrtle Beach, 426 S.C. at 179-92. The Court's opinion voices a deep reluctance for courts to engage in a futility analysis where the lower court has not gone through the process of permitting, receiving, and evaluating a proposed amended complaint. Id. The default position is that, where a complaint is deficient, amendment, not dismissal, is the next step. Id.

Below are the relevant portions of the Skydive opinion:

[Respondents] filed a motion to dismiss pursuant to Rule 12(b)(6). Following a hearing on Respondents' motion, the circuit court requested proposed orders from Skydive and Respondents. Skydive submitted two proposed orders to the court. Each time, Skydive requested in writing it be allowed to amend its complaint to cure any pleading defects in the event the court decided to grant Respondents' motion. Nevertheless, the court granted Respondents' motion and dismissed Skydive's claims against Respondents without considering Skydive's request to amend its complaint. The order specifically provided the dismissal was "with prejudice."

**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 plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal.**

...

**The circuit court erred by failing even to consider allowing Skydive to amend its complaint.**

...

Ordinarily, therefore, 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. In this case, because Skydive twice asked for leave to amend before its complaint was dismissed, it had the option of renewing its requests in a formal Rule 15(a) motion. However, **the circuit court's “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.**

...

A court’s decision to deny a motion to amend should not be based on the court’s perception of the merits of an amended complaint. ***In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile.***

...

**Here, the circuit court did not conduct an analysis to determine whether any amendment would be futile.** The court of appeals, however—without articulating any such analysis—found the “amendment would be futile.” We have attempted to conduct the analysis to determine whether, in fact, any amendment would be futile. Even on the limited record before us, as we will explain, it is clear to us that allowing Skydive to amend its complaint would not be “clearly futile.”

**We begin by stressing the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed**

amendment. In this case, the circuit court dismissed Skydive’s claims against Respondents without having seen any attempt at amending the complaint. *We cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.*

...

. . . we must remand unless we find any amendment would be clearly futile.

...

A circuit court does not have “discretion” to dismiss a complaint with prejudice for failure to state a claim under Rule 12(b)(6) without at least considering whether to allow leave to amend under Rule 15(a). **Under Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.**

...

In this case, we **cannot definitively say it would be impossible for Skydive to succeed with an amended pleading. Allowing leave to amend the complaint, therefore, was not clearly futile.** The circuit court should not have denied—and we will not deny—Skydive the opportunity to amend its complaint.

Skydive Myrtle Beach, 426 S.C. at 179-92 (emphasis added, some internal citations omitted).

Futility under the Skydive analysis is a high bar. Id. Its stringent requirement is that the record must put the appellate court in a position to “definitively say it would be impossible for Skydive to succeed with an amended pleading.” Id. at 192. Since an amended pleading would undoubtedly contain added allegations that are not already in a complaint, making this determination before an amended complaint is even offered

(because the lower court has cut off the ability to offer one) is itself virtually impossible. Id. at 183. In light of “the difficulty of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment[,]” our Supreme Court has held that it “cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like.” Id.

Here, the lower court refused the Appellants’ requests for an opportunity to provide an amended complaint if that court determined the complaint to be insufficient. (R. pp. 1-11, p. 22, p. 43 ln. 5-8, p. 59.) As in Skydive, the lower court here prevented there from being a record on which a court – the lower court, this court, the Supreme Court, any court – could undertake to determine whether amendment would be futile. Skydive Myrtle Beach, 426 S.C. at 183, 192. As in Skydive, that requires reversal and remand. Id. It was right of this court to adhere to precedent, reverse, and remand.

## **II. The record does not prove the futility of a negligence cause of action.**

Respondents’ petition assumes that an amended complaint by the Appellants would not and could not state that either of the Appellants sustained *any* physical harm, not even “physical harm consisting of the physical manifestations caused by emotional distress.” K.S. ex rel. Seeger v. Richland Sch. Dist. Two, 445 S.C. 111, 120, 912 S.E.2d 240, 245 (2025). The existing record does not put this court or any court in a position to “definitively say” no such harm exists or could be pled. Skydive Myrtle Beach, 426 S.C. at 192. Respondents urge the court to do what Judge Pope did below: construe every doubt and inference in *Respondents’* favor – in the dismissal *movants’* favor – to assume that the facts are what the dismissal movants say they are and decide on the

basis of those unsupported representations of facts that are outside the record altogether and certainly outside the allegations of the complaint. That flies in the face of a 12(b)(6) standard that requires the opposite. Benedict Coll. v. Natl. Credit Systems, Inc., 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012).

Respondents say it is impossible for the Appellants to have sustained any physical harm as the result of Respondents' negligence. But, on this record, i.e., solely within the complaint before the court, there is nothing that establishes the absence of such physical harm, and the complaint does not exclude physical harm from being within the scope of the Appellants' damages. (R. pp. 12-18.) The facts alleged do not make it impossible that such damage was sustained and leave the door open for reasonable inferences that damages such as "physical harm consisting of the physical manifestations caused by emotional distress" may have been sustained by the Appellants. K.S., 445 S.C. at 120. The absence of support in the record for the definitive nonexistence of such harm nips Respondents' argument in the bud, as that puts the high futility bar out of reach. Skydive Myrtle Beach, 426 S.C. at 192.

Accordingly, regardless of whether Respondents are right about the parameters of the voluntary undertaking doctrine – which is a proposition of doubtful validity, as the briefs discuss – this court's decision to reverse and remand was correct.

Even if the Respondents were right about their underlying substantive legal premise, that would not make the decision court reached a wrong one. Their petition for rehearing should be denied.

**III. The record does not prove the futility of a cause of action for intentional infliction of emotional distress.**

Respondents' argument about intentional infliction of emotional distress is grounded in a principle of law that our appellate courts have never said exists – that, for this tort, there can never be vicarious liability of any sort. That is at odds with our Supreme Court, which has recognized that general vicarious liability principles apply to intentional infliction of emotional distress. McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (corporation may be liable for intentional infliction of emotional distress committed by its president under *respondeat superior* circumstances). The notion that no one can ever be held liable on an intentional infliction of emotional distress cause of action for acts physically committed by another is just not the law. See id.

Vicarious liability for intentional infliction of emotional distress is not likely to come up commonly, in light of the nature and elements of the tort. But the circumstances of this case are far from typical in more ways than one. (R. pp. 12-18.) The complaint alleges that the country club “expressly undertook a duty to stop the offending behavior and control the actions of those who have been doing it.” (R. p. 15 ¶ 19.) The Respondents argue, essentially, that it is impossible for their undertaking of responsibility to have any legal significance. *That* is an argument that finds no support in existing law.

Especially in light of these allegations, Respondents have not shown that the existing complaint is defective, much less that a more detailed amended complaint would of necessity also be defective. The high futility bar has not been reached, and

the record lacks what would be needed to perform a futility evaluation. Skydive Myrtle Beach, 426 S.C. at 192.

This court correctly reversed the lower court's dismissal with prejudice. Whether facts exist that uphold the Appellants' allegations is a matter to be explored on a factual record.

**IV. The record does not prove the futility of an unfair trade practices cause of action.**

Respondents contend that there can be no liability for them under South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, because their conduct was not committed in the course of commerce.

But the premise of that argument is flawed. The court has already considered this argument, which was addressed by the parties' briefs, and found it lacking, since the complaint alleges that Respondents' actions were committed in course of their commercial activities. The following passage from the Appellants' brief sums up the flaw in the Respondent's argument:

Were the country club's acts performed in the course of its business? They were, or at least it is reasonable to infer that they were. They were performed in the course of its activities in the management of the golf course it operates as a business, in the course of providing services for golfers and things of value – rounds of golf, a golf course – to its members. (R. pp. 14-17.) That is in "trade or commerce." S.C. Code Ann. § 39-5-10(b). It matters not that the Meusels were not on the other side of a financial transaction with the country club.

(Final Reply Brief of Appellants p. 11.)

The existing complaint sufficiently alleges an unfair or deceptive practice in the course of trade or commerce that has caused damage to the Appellants, including to the

value of their property, as specifically alleged. (R. pp. 12-18.) Respondents have certainly not shown that a more detailed amended complaint would of necessity be defective, especially since the lower court never gave Appellants the opportunity to present one. Skydive Myrtle Beach, 426 S.C. at 192.

This court made the correct decision in reversing and remanding a lower court order that refused to account for what is in the complaint, refused to draw reasonable inferences in the Appellants' favor, refused to permit amendment, and refused even to allow a record to be made to determine whether the high bar of Skydive futility was met. (R. pp. 1-8.)

**V. Precedent and logic dispose of Respondents' argument the requirement to allow amendment should be dispensed with and dismissal with prejudice should be upheld.**

Our Supreme Court "cannot imagine a circumstance in which a trial court should refuse to allow an amendment on the ground of futility without seeing what the amendment would look like." Skydive Myrtle Beach, 426 S.C. at 183. Respondents ask this court to frame the instant case as a circumstance in which this court can not only imagine but also affirmatively and definitively determine that it is impossible for the Appellants to plead facts sufficient to constitute a cause of action. That is a task that would require this court to abandon the required standard of review and rely on inferences and assumptions that would favor the parties that *moved* for dismissal. Benedict Coll., 400 S.C. at 544. That would both turn the standard on its head and contravene the letter and the spirit of the Skydive decision. Skydive Myrtle Beach, 426 S.C. at 183; Benedict Coll., 400 S.C. at 544.

WHEREFORE Appellants pray for an order denying Respondents' petition for rehearing.

Respectfully submitted,

/s/ Andrew S. Radeker

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October 1, 2026

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Invited are the..... Respondents.

PROOF OF SERVICE

I certify that I have served the foregoing return to petition for rehearing on the  
date given below by emailing it to the other counsel of record in this appeal at the  
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Respectfully submitted,

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October 1, 2026