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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2026-001628

Ann Louise Gibbs-Hunter and Raymond D. Gibbs, Jr., Appellants / Plaintiffs,

v.

Rilion Gracie Greenville, LLC, and TNB Financial Services, as Trustee of Gene Mark Brown's
Trust B-2 under The Doris P. Brown Revocable Trust Agreement Dated February 9, 2006, as
Amended, Respondents / Defendants.

BRIEF OF RESPONDENT

TNB FINANCIAL SERVICES, AS TRUSTEE OF GENE MARK BROWN'S TRUST B-2 UNDER THE DORIS
P. BROWN REVOCABLE TRUST AGREEMENT DATED FEBRUARY 9, 2006, AS AMENDED

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Trust B-2 under The Doris P. Brown

Revocable Trust Agreement Dated February

9, 2006, as Amended

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RESPONDENT TNB'S STATEMENT OF THE ISSUES ON APPEAL

1. Did the Circuit Court properly deny Appellants' Motion to Amend the Complaint to add a cause of action for prescriptive easement on the basis that such amendment would be futile, when Appellants failed to present sufficient new or additional facts on which relief may be granted, and when Appellants admitted at the lower court hearing that they could not meet an essential element of the prescriptive easement claim?
2. Did the Circuit Court properly deny Appellants' Motion to Amend the Complaint to add a cause of action for easement implied by necessity when Appellants failed to allege all the elements of the claim and failed to present sufficient new or additional facts on which relief may be granted, such that the proposed amendment would be futile?
3. Did the Circuit Court properly deny Appellants' Motion to Amend the Complaint to add a cause of action for easement implied by necessity when Appellants' untimely motion to amend was not warranted by any significant factual developments despite extensive discovery, and when the untimely motion to amend was an apparently dilatory tactic by Appellants to prolong the case after it became clear that Appellants would not prevail on their existing claims?

STATEMENT OF THE CASE

Procedural Background

This appeal arises out of a case filed in Greenville County in which the Appellants allege ownership or easement rights in some portion of real property adjacent to Appellants' current and/or former residences. Respondent TNB Financial Services, as Trustee of Gene Mark Brown's Trust B-2 under The Doris P. Brown Revocable Trust Agreement Dated February 9, 2006, as Amended ("TNB"), owned the property at issue from October 21, 2022, to August 7, 2024, when TNB sold it to Respondent Rilion Gracie Greenville, LLC ("RGG"), for \$385,000.00.¹ The entire parcel contains approximately 0.901 acres. The disputed area is only a portion of the 0.901 acres, and consists of a vacant grassy field which narrows to a rectangular section, approximately 20 feet wide by 116 feet long, terminating on Earl Street. This narrow section lies between the property owned by Appellant Ann Louise Gibbs-Hunter ("Mrs. Gibbs-Hunter") at 207 Earl Street, and the property owned by her nephew, Appellant Raymond D. Gibbs, Jr. ("Mr. Gibbs"), at 203 Earl Street.

Appellant's initial Complaint, filed on September 20, 2024, contained causes of action for quiet title to the disputed property pursuant to S.C. Code Ann. Sections 15-3-340 (recovery of real property), and 15-67-240 to -250 (adverse possession without color of title); quiet title pursuant to presumption of grant; and requesting a declaratory judgment stating that the Appellants were the fee simple owners of the Property. Appellants also filed a Motion for Temporary Injunction at the same time as the original Complaint. A hearing was held at some point prior to November 1, 2024, in which the presiding judge denied the injunction. There were no further proceedings on the injunction requested by Appellants.

¹ The value of the disputed area of real property at issue has not been determined.

On October 18, 2024, Appellants filed an Amended Complaint (the “**2024 Amended Complaint**”) which removed as defendants two of the former trustees of the Gene Mark Brown’s Trust B-2 under The Doris P. Brown Revocable Trust Agreement Dated February 9, 2006, as Amended. The 2024 Amended Complaint was filed as of right under Rule 15(a), SCRPC, and contained causes of action for quiet title to the disputed property pursuant to S.C. Code Ann. Sections 15-67-10 et seq. (adverse possession), 15-53-10 et seq. (declaratory judgment); the common law presumption of grant; and/or “S.C. Code Section 15-3-380 (1976 as amended)” (forty year lapse). Appellants requested that the Court grant them title ownership of the disputed property; or, in the alternative, Appellants requested “a permanent restraining order on the use of said property in accordance with applicable laws, regulations, and ordinances.”

On October 29, 2024, Respondent RGG filed its Answer and Counterclaim for trespass, and Cross-claims against TNB for warranty of title/indemnification pursuant to the general warranty deed from TNB to RGG. TNB filed its Answers on November 27, 2024.

Counsel for the Appellants and both Respondents proceeded to conduct extensive discovery, including depositions of twelve individuals who were parties or witnesses in this matter. On October 8, 2025, RGG filed a Motion to Compel Discovery against Appellants. On October 21, 2025, RGG filed a Motion for Summary Judgment against the Appellants on the basis that “Appellants cannot sustain their burden of proof on their actions of Adverse Possession or Presumptive Grant because they cannot prove the elements of exclusivity or hostility. Furthermore, the Appellant, Raymond D. Gibbs, Jr., has no standing because he is not an heir to the property which is the subject of this action.” RGG Motion for Summary Judgment, pg. 2, ¶2.

On October 29, 2025, Appellants filed a Motion to Amend the Complaint² a second time

² The amended complaint underlying this appeal actually would have been the Appellants’ Second Amended Complaint.

in order to assert additional, alternative claims under theories of prescriptive easement and implied easement by necessity (the “Proposed Amended Complaint”).

A virtual hearing was held on December 10, 2025, before The Honorable Courtney Clyburn Pope, Circuit Judge, concerning RGG’s Motion to Compel Discovery and Motion for Summary Judgment, and the Appellants’ Motion to Amend the Complaint. Counsel for all three parties appeared at and participated in the hearing.

On June 4, 2026, Judge Clyburn Pope issued her Order on all three motions. The Order granted RGG’s Motion for Summary Judgment, denied Appellant’s Motion to Amend the Complaint, and disposed of RGG’s Motion to Compel Discovery as moot in light of the grant of summary judgment.

On June 12, 2026, Appellants filed a Motion to Reconsider, asking the court to reconsider its denial of Appellant’s Motion to Amend the Complaint. Judge Clyburn Pope denied the Motion to Reconsider by Order dated June 25, 2026. Appellants served their Notice of Appeal on Respondents RGG and TNB via email on July 24, 2026.

STANDARD OF REVIEW

Although leave to amend should generally be “freely given,” this court has held that it may be denied where the proposed amendment would be futile. See *Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997).

Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671 (Ct. App. 2010), *rev’d. on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012).

The majority [in *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006)] then considered the question of futility. 368 S.C. at 131, 628 S.E.2d at 882. The majority noted the circuit court granted the Rule 12(b)(6) motion because the complaint gave “rise to no reasonable interpretation other than that the [new landowners] were bona fide purchasers for value.” 368 S.C. at 116, 628 S.E.2d at 874. The majority found a remand was not required because it determined no matter how the chain of title could be alleged, the new landowner was always going to be immune from liability as a bona fide purchaser. 368 S.C. at 122, 131, 628 S.E.2d at 877, 882. The majority stated the Appellant “failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against” the new landowner. 368 S.C. at 131, 628 S.E.2d at 882. Any amendment to the complaint in *Spence*, according to the majority, was clearly futile.

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

In the absence of any apparent or declared reason - - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - - the leave sought should, as the rules require, be “freely given.”

Higgins v. Med. Univ., 326 S.C. 592, 604, 486 S.E.2d 269 (Ct. App. 1997), citing *Foman v. Davis*, 371 U.S. 178, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) (emphasis added).

Rule 15, SCRCF, provides that “leave [to amend pleadings] shall be freely given when justice so requires and does not prejudice any other party.” Rule 15(a), SCRCF.

The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it. It is well established that a motion to amend is addressed to the sound discretion of the trial judge, and that the party opposing the motion has the burden of establishing prejudice. Courts have wide latitude in amending pleadings and while this power should not be used indiscriminately or to prejudice or surprise another party, the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred.

Duncan v. CRS Serrine Eng'rs, Inc., 337 S.C. 537, 542, 524 S.E.2d 115 (Ct. App. 1999) (citations omitted).

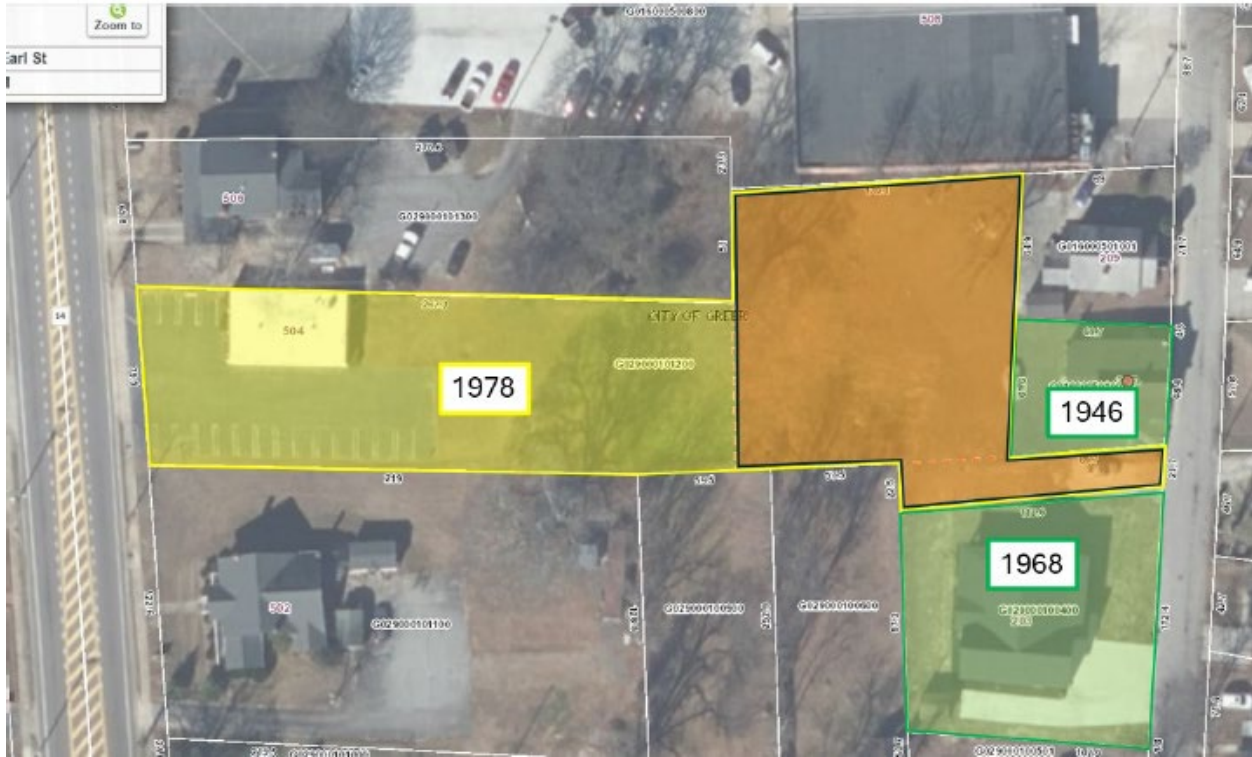
ARGUMENT

I. Factual Background

Doris P. Brown purchased the property known as 504 N. Main Street, Greer SC 29650, in 1999. She eventually placed it into a trust and Respondent TNB was appointed successor trustee to that trust in 2022. In 2024, TNB as trustee sold the property to Respondent RGG.

From at least 1999 to the present, the property was considered one parcel of land with one tax map number; however, it had previously been two different parcels that were combined at some point into one. Page 2 of the Affidavit of Raymond D. Gibbs, Jr., contains a helpful illustration (reproduced below) showing the layout of the relevant area. On the illustration, the yellow and orange areas together constitute the property known as 504 N. Main Street. The yellow portion contains a commercial building and parking lot fronting on N. Main Street, which runs vertically on the left hand side of the illustration. The yellow part is not at issue in this case.

The orange section contains a grassy field and gravel drive, and is otherwise vacant. It is the **orange portion** of the property that is the disputed area at issue in this matter. The green parcel stamped “1946” is the property known as 207 Earl Street, currently titled in the name of Appellant Anne Louise Gibbs-Hunter. The other green parcel, stamped “1968,” is the property known as 203 Earl Street, currently titled in the name of Appellant Raymond D. Gibbs, Jr. The narrow orange area that divides 207 Earl Street and 203 Earl Street is used as a driveway by the occupants of 207 Earl Street. Earl Street is visible running vertically on the right-hand side of the illustration. Both 203 Earl Street and 207 Earl Street front directly onto Earl Street, and neither of them is landlocked. The large gray rectangular building directly above the orange area is a Quality Foods grocery store.



Mrs. Gibbs-Hunter's grandparents purchased the house and property at 207 Earl in the 1940s. Aff. Ann Gibbs-Hunter, pg. 1. Her grandfather, George Gibbs, purchased what was then a vacant lot at 203 Earl in 1968. Aff. Ann Gibbs-Hunter, pg. 2.

Mrs. Gibbs-Hunter grew up in the house at 207 Earl Street and lived there until approximately 2023, when she moved in to the new house at 203 Earl Street. Aff. Ann Gibbs-Hunter, pg. 1; Depo. Ann Gibbs-Hunter, pg. 6, ll 10-14; Depo. Raymond Gibbs, Jr., pg. 78, ll 8. Mr. Gibbs has never lived in the house at 207 Earl Street, and occasionally stays at the house at 203 Earl Street. Depo. Raymond Gibbs, Jr., pg. 14, ll 5-10, pg. 15, ll 21-22. Mrs. Gibbs-Hunter is Mr. Gibbs' aunt. Depo. Raymond Gibbs, Jr., pg. 14, ll 5-6. The property at 203 Earl Street was a vacant lot owned by the Gibbs family until Mr. Gibbs built a house on it in 2022-2023. Depo. Ann Gibbs-Hunter, pg. 31, ll 13-18. The lot at 203 Earl Street used to have a carport and a semi-circular driveway on it, both of which were owned and used by the Gibbs family residents

who lived at 207 Earl Street for parking their cars. Depo. Ann Gibbs-Hunter, pg. 15, ll 9-22, pg. 16, ll 2-21.

Both the 2024 Amended Complaint and the 2025 Proposed Amended Complaint describe an incident in which the true owners of 504 N. Main Street came to the property and removed a concrete slab that the Gibbs family had installed on a portion of the disputed area. 2024 Am. Compl., ¶ 15-16; Prop. Am. Compl., ¶ 19-21. In her deposition, Mrs. Gibbs-Hunter explained further that there was a concrete sidewalk or walkway connecting the house at 207 Earl Street “to where 203 was built,” and it was this sidewalk area that was removed. Depo. Ann Gibbs-Hunter, pg 13, ll 20-25, pg 14, ll 1-22.

Further deposition testimony showed that the grassy field and driveway area was frequently used by others in the neighborhood as a cut-through to the Quality Foods store, and that the Gibbs family did not stop people from using it as such until around 2022 when Respondent Raymond D. Gibbs, Jr., was building the house at 203 Earl Street and decided to put up a fence along a section of the property near the corner of the Quality Foods store. Aff. Raymond Gibbs, Jr., pg. 2; Depo. Raymond Gibbs, Jr., pg. 58, ll 18-20.

The illustration from Page 2 of the Affidavit of Raymond D. Gibbs, Jr., illustrating the location of the fence is reproduced below (fence location shown in blue):



Appellants originally filed this action in 2024 with claims of adverse possession and presumption of grant, with the goal of having title to the orange area put into their names and thereby completely divesting RGG of title to that area altogether. Compl., pg. 1, pg. 5-7; 2024 Am. Compl., pg. 1, pg. 5-11. After discovery and depositions took place, it became clear that Appellants would have difficulty proving certain elements of the adverse possession claim; specifically exclusivity and hostility. Counsel for Appellants admitted as much (at least as to the exclusivity element) at the Circuit Court hearing on December 10, 2025. Hearing transcript, pg. 269, ll 18-25, pg. 270, ll 16-24. Faced with the imminent collapse of their case, Appellants filed their Motion to Amend the Complaint on October 29, 2025, just eight days after Respondent RGG filed its Motion for Summary Judgment. Hearing transcript, pg. 270, ll 2-7. The proposed Amended Complaint was nearly identical to the Amended Complaint filed on October 18, 2024, with the addition of alternative causes of action for prescriptive easement and easement implied by necessity, and allegations that the property at 207 Earl Street would become “inaccessible by vehicle and its value will substantially decrease” without the alleged easements. Plts Motion to Alter/Amend; Prop. Am. Compl., pg. 5-6, ¶ 24.

II. Did the Circuit Court properly deny Appellant’s Motion to Amend the Complaint to add a cause of action for prescriptive easement on the basis that such amendment would be futile, when Appellant failed to present sufficient new or additional facts on which relief may be granted, and when Appellants admitted at the lower court hearing that they could not meet an essential element of the prescriptive easement claim?

Pursuant to *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671 (Ct. App. 2010), *rev'd. on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012), a court may deny leave to amend where the proposed amendment would be futile.

In this case, the Circuit Court properly denied Appellants' Motion to Amend the Complaint to add a cause of action for prescriptive easement, since it had already found that Appellants could not meet the hostility requirement of their adverse possession claim and, as a result, would also not be able to meet the hostile/adverse element of a prescriptive easement claim. In its discussion of the hostility requirement of an adverse possession claim, the Court explained that hostility requires the adverse possessor's possession must be **"without subserviency to, or recognition of, the title of the true owner [...]"** Clyburn Pope Order dated 06/04/2026, pg. 8, ¶ B, citing *Mullis v. Winchester*, 237 S.C. 487, 118 S.E.2d 61 (1961), *Gregg v. Moore*, 226 S.C. 366, 85 S.E.2d 279 (1954), and *Lynch v. Lynch*, 236 S.C. 612, 115 S.E.2d 301 (1960).

The South Carolina Supreme Court set out the elements of a prescriptive easement claim in *Pittman v. Lowther*, 363 S.C. 47, 610 S.E.2d 479 (2005): "To establish a prescriptive easement, there must be continued and uninterrupted use or enjoyment of the right for a period of twenty years, identity of the thing enjoyed must be proven, and use must be adverse or under claim of right" (citing *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993)).

In *Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 797 S.E.2d 387 (2016), the Court further enunciated the third element, explaining "the third element of a prescriptive easement should be interpreted as requiring the claimant's use be adverse or, in other words, under a claim of right contrary to the rights of the true property owner." "Adverse" and "hostile" are synonyms in the context of legal claims for adverse possession and prescriptive easement. **"Adverse**

possession is hostile possession, and hostile possession is possession with intention to dispossess the owner.” *Ouzts v. McKnight*, 114 S.C. 303, 103 S.E. 561 (1920). Indeed, even Merriam-Webster’s Dictionary defines the word “adverse” as “acting against or in a contrary direction : HOSTILE.” Merriam Webster Dictionary online; definition of “adverse” (last visited October 7, 2026); <https://www.merriam-webster.com/dictionary/adverse>.

Appellants appear to misapprehend the requirements of a prescriptive easement, since they base their entire appeal on the erroneous contention that “the elements of a prescriptive easement claim...do not include [...] hostility.” Appellant’s Initial Brief, Pg. 5. Regardless of this misapprehension, Appellants’ claim must fail. Because Appellants cannot meet the requirement of hostility in their adverse possession claim, then they necessarily cannot meet the requirement of use that is adverse or under claim of right in their prescriptive easement claim.

Furthermore, as pointed out in the Circuit Court hearing, Mr. Gibbs admitted in his deposition that he had previously inquired about purchasing the disputed land with the landowner on several occasions prior to filing this lawsuit: around 2007, 2015, and 2022. Depo. Raymond Gibbs, Jr., pg. 40, ll. 24-25 through pg. 42, ll 15; pg. 47, ll. 22-25.

22	When you wrote those letters to the owners in
23	'06, 2015, and 2022, those were letters that expressed
24	your interest to buy some property back there?
25	A. Yes.

Harold Jenkins, who managed the property for TNB, stated in his affidavit that Mr. Gibbs approached him more than once about purchasing a portion of the property, but that the owners at the time were not interested in selling off only part of it. Aff. Harold Jenkins, pg. 2.

Max Otarola-Nietzen is the brother of Jose Otarola-Nitezen, owner of Respondent RGG. Max is also a realtor and represented RGG in its purchase of the property from TNB. He

testified in his deposition that Mr. Gibbs approached him on several occasions about purchasing a portion of the property.

5 Q. what did you do to ensure that there would not be an
6 issue with that property?
7 A. Well, we spoke to Mr. Gibbs.
8 Q. To who?
9 A. Mr. Gibbs, the Plaintiff.
10 Q. Okay.
11 A. We met him right there (indicating.) Well, on that
12 little piece of land.
13 Q. Okay. Tell me about that conversation.
14 A. The first time, he was by himself. Then, he was with
15 me.
16 Q. Okay. Tell me -- tell me about the conversation you
17 had. I'll talk to him a little later about that.
18 A. Okay. Basically, by this time, because it was probably
19 the third time they met, and he reiterated his interest
20 on purchasing a portion of the property.

Depo. Max Otarola-Nietzen, pg. 33, ll 5-20.

Mr. Gibbs' repeated inquiries about purchasing the property, from both Respondent TNB (through its property manager, Harold Jenkins) and Respondent RGG during their respective periods of ownership, clearly show that Appellants knew that they did not have rights in the land at issue. In addition, these facts are fatal to Appellants' claims for both adverse possession and prescriptive easement, as they nullify their assertion that they acted with hostility or in a way that was adverse to the rights of the true owner. Instead, it shows that they knew that their use of the property was with the permission of the owner. Such use with the permission of the true owner

In *Williamson v. Abbott*, 107 S.C. 397, 93 S.E. 15 (1917), the Court explained that permissive use defeats any claim by prescription:

'It is the well settled rule that use by express or implied permission or license, no matter how long continued, cannot ripen into an easement by prescription, since user as of right,

as distinguished from permissive user, is lacking, if permissive in its inception, such permissive character will continue of the same nature, and no adverse user can arise, until there is a distinct and positive assertion of a right hostile to the owner, and brought home to him.’ [...] The asking and obtaining of permission, whether from the tenant or owner of the servient estate, stamps the character of the use as not having been adverse, or under claim of right, and, therefore, as lacking that essential element which was necessary for it to ripen into a right of prescription.

Williamson v. Abbott, 107 S.C. 397, 400, 93 S.E. 15 (1917).

As a result, the Circuit Court properly denied Appellant’s Motion to Amend the Complaint to add a cause of action for prescriptive easement since such an amendment would be futile.

III. Did the Circuit Court properly deny Appellant’s Motion to Amend the Complaint to add a cause of action for easement implied by necessity when Appellant failed to allege all the elements of the claim and failed to present sufficient new or additional facts on which relief may be granted, such that the proposed amendment would be futile?

In *Skydive Myrtle Beach v. Horry Cty.*, 426 S.C. 175, 826 S.E.2d 585 (2019), the South Carolina Supreme Court explained that a court may consider whether a plaintiff “failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted [...]” when deciding whether to grant a motion to amend the complaint or to deny such a motion on the basis that the requested amendment would be futile.

First, Appellants’ Proposed Amended Complaint fails to properly state the elements of the claimed cause of action. The only element recited and alleged in the Proposed Amended Complaint, and the only element raised by Appellants’ counsel at the hearing, is “necessity.”

According to *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002), “The legal requirements of an easement by necessity are: (1) unity of title, (2) severance of title, and (3) necessity. To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person. In other words, petitioners have to show that their land-locked tract and respondent's tract were, at one time, owned by the same owner” (citations omitted). It is apparent on the face of the Proposed Amended Complaint that the allegations therein fail to state a cause of action on which relief may be granted.

Second, Appellants’ Proposed Amended Complaint completely fails to allege any facts that support or even tangentially address the first two elements of the claim of easement implied by necessity: unity of title and severance of title. There is no evidence in the record that would suggest that any such facts exist. The existence of necessity in this context is irrelevant if Appellants cannot also carry their burden of proof as to the first two elements.

Third, the owners of 207 Earl Street also owned the property at 203 Earl Street, which until 2022 was a vacant lot with a semi-circular driveway and carport which they used for parking their cars. Depo. Ann Gibbs-Hunter, pg. 15, ll 9-22, pg. 16, ll 2-21; Aff. Ann Gibbs-Hunter, pg. 1-2. Mr. Gibbs built a house on what was essentially 207 Earl’s driveway. That is the reason why the occupants of 207 Earl do not have anywhere to park, other than the disputed property. Any supposed necessity for the driveway on the disputed area was created by the Appellants themselves, and is therefore not subject to the equitable relief requested by the Appellants.

As a result, the Circuit Court properly denied Appellant’s Motion to Amend the Complaint to add a cause of action for easement implied by necessity where Appellants failed to

present sufficient additional facts which could give rise to a cause of action upon which relief may be granted, and therefore the requested amendment would be futile. In the alternative, the denial of the amendment by the Circuit Court constituted harmless error.

IV. Did the Circuit Court properly deny Appellants' Motion to Amend the Complaint to add a cause of action for easement implied by necessity when Appellants' untimely motion to amend was not warranted by any significant factual developments despite extensive discovery, and when the untimely motion to amend was an apparently dilatory tactic by Appellants to prolong the case after it became clear that Appellants would not prevail on their existing claims?

In *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013), the South Carolina Supreme Court affirmed the lower court's denial of the Appellant's motion to amend the complaint on the basis that the motion was untimely and prejudicial to the other parties. The Court explained:

In denying the motion, Judge Keesley noted the case was filed in 2001 and that the Complaint was initially amended in 2004. Recognizing that **extensive discovery** had been conducted in the federal case involving the same parties, Judge Keesley deemed the motion **untimely** and declined to permit Health Promotion to supplement its case with additional theories. Additionally, he found the **amendment would unduly prejudice** the Board as it would be forced to defend against "arguably new theories of the case when so much time ha[d] elapsed." Even if the motion had been timely, Judge Keesley found the amendments involving civil conspiracy would be "**futile**" as the Board would be immune from suit for claims involving the commission of intentional torts under the TCA.

We find Judge Keesley did not abuse his discretion as **Health Promotion's delay in moving to amend the Complaint was inexplicable** given the seven-year lapse between the filing of the initial complaint and the oral motion. Moreover, despite the extensive federal court proceedings, **there were no significant factual developments that**

warranted the untimely amendment. Furthermore, even if the amendment had been permitted, it would not have affected the grant of summary judgment to the Board.

Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013) (emphasis added).

In *Higgins v. Med. Univ.*, 326 S.C. 592, 604, 486 S.E.2d 269 (Ct. App. 1997), the Court recognized that a motion to amend the complaint may be denied when it is apparent that there are good reasons for doing so, including “undue delay, bad faith or dilatory motive on the part of the movant.” *Higgins v. Med. Univ.*, 326 S.C. 592, 604, 486 S.E.2d 269 (Ct. App. 1997). The Circuit Court in this case found apparent reasons for denying Appellants’ motion as well, whether or not such reasons were specifically declared in the Order.

In the instant case, Appellants filed their Motion to Amend the Complaint more than a year after filing the initial Complaint; after they had already amended their Complaint once; and after twelve depositions and written discovery had been completed. Despite the extensive, voluminous and expensive amount of discovery, Appellants still have not presented any new factual developments that would merit this particular amendment at this late stage.

Furthermore, Appellants’ counsel admitted during the lower court hearing that “After depositions and looking at some of the facts that we’re developing, I felt that my client (inaudible) the best way to represent them was to give an alternative cause of action.” Hearing transcript, pg. 279, ll 8-12. It appears that, after RGG filed its Motion for Summary Judgment, Appellants realized that they were unlikely to prevail on their existing causes of action and filed a Motion to Amend the Complaint just eight days later in hopes of keeping their case alive. As RGG’s counsel noted at the hearing, “[I]t’s just another attempt to continue this case.” Hearing transcript, pg. 280, ll 18-19.

As a result, the Circuit Court properly denied Appellant's Motion to Amend the Complaint to add a cause of action for easement implied by necessity because Appellants' untimely motion to amend was not warranted by any significant factual developments despite extensive discovery, and because the untimely motion to amend was an apparently dilatory tactic by Appellants to prolong the case after it became clear that Appellants would not prevail on their existing claims.

CONCLUSION

The standard of review applicable in this matter was stated succinctly by the Court in *Duncan v. CRS Sirrine Eng'rs, Inc.*, 337 S.C. 537, 542, 524 S.E.2d 115 (Ct. App. 1999):

Courts have wide latitude in amending pleadings [...] [and] the decision to allow an amendment is within the sound discretion of the trial court and will rarely be disturbed on appeal. The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred.

As explained above, the Circuit Court's denial of Appellants' Motion to Amend the Complaint was proper because the proposed amendments would have been futile. Furthermore, the record shows that the untimely motion to amend was not the result of new factual developments, but rather was an apparently dilatory tactic by Appellants to prolong the case after it became clear that they would not prevail on their existing claims. Undue delay, dilatory motive on the part of the movant, and futility are all proper reasons for denying a plaintiff's motion to amend the complaint. Therefore, the Circuit Court's decision should be upheld.

Respectfully Submitted,

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Revocable Trust Agreement Dated February
9, 2006, as Amended*

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