THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
Circuit Court Judge

APPELLATE CASE NO. 2021-00217

SKYDIVE MYRTLE BEACH, INC..... Appellant,

v.

HORRY COUNTY ..... Respondent.

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

In *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 192, 826 S.E.2d 55, 594 (2019), the South Carolina Supreme Court granted the Appellant the right to amend its Complaint. Appellant consequently attempted settlement negotiations, which were ultimately unsuccessful; it then filed its Motion to Amend on March 12, 2000. [Motion]. As an exhibit to the Motion, Appellant attached a thirty-seven (37) page proposed Amended Complaint (with 183 paragraphs) detailing the County's continued efforts, *inter alia*, to fraudulently, unfairly and in breach of contract deprive Appellant of its skydiving business. [Prop. Complaint].

This included allegations that the Respondent conspired with the FAA and tower control to provide "112" safety violations or "unusual incident reports" – 111 of which were never investigated by the FAA, and 79 of which were placed by the tower onto a form presented to it by the County – which were rife with inconsistency with FAA standards governing skydiving and outright falsehoods. [Prop. Compl.]. The Respondent used these "unusual incident reports" – which were the result of illegal resolutions in Horry County

ordinance 36-14 – to have the FAA deny a separate Part 16 Complaint that Appellants had filed with the FAA. The County then claimed that the FAA had investigated and found safety violations – which they did not. [Id.]. In fact, both the FAA and Horry County gave Freedom of Information Act returns which denied having records! Their smearing of Appellant was all a mirage!

This motion was in large part based upon the pleadings in *Michael Davis, et al v. Horry County Department of Airports et al.*, consolidated in 4:17-cv-00391-RBH (which were dismissed on other grounds) – which Respondent participate as a party. With eight causes of action (down from the fifteen in the February 28, 2014 complaint), Appellants were using similar evidence to show the years-long, ongoing effort of Horry County to illegally punish Appellant's skydiving operation and drive it from business.

Covid-19 Emergency Orders.

Chief Justice Beatty issued his *Trial Courts Memorandum* of March 16, 2020 in response to the Covid-19 pandemic; this was followed by the Supreme Court's *Operation of the Trial Courts During the Coronavirus Emergency* (2020-04-03-01) and its *Amended Operation of the Trial Courts During the Coronavirus Emergency* (2020-04-22-01).

In the Supreme Court's amended order of 4-22-01, it provided under (c)(3) [Hearings] that: "[a] hearing on a motion or other matter may be conducted using remote communication technology to avoid the need for a physical appearance by any party, witness or counsel..." [Order 2020-04-22-01].

The exception, at (c)(4) [Minimizing Hearings in Motions] was "[i]f, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or

parties. In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion. A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers...." [Order 2020-04-22-01].

Form 4 Denial of Motion to Amend by Judge Culbertson.

In this case, on July 10, 2020, Circuit Court Judge Benjamin Culbertson issued a Form 4 Order denying the Motion to Amend outright. The Order says "[t]he Plaintiff's Motion to Amend filed 3/12/2020 is DENIED." It goes on to say: "PURSUANT to South Carolina Supreme Court Order 2020-04-22-01(c)(4), this motion is decided without oral arguments and after affording all parties an opportunity to file written briefs in support of or in opposition to the motion." [7.10.20 Form 4].

However, Appellant never received any email or correspondence from Judge Culbertson's office prior to July 10, inviting the parties "to file written briefs in support of ... the motion. Likewise, the South Carolina e-Flex system shows nothing filed by the Court (relevant to the Motion to Amend) between March 12, 2020 and July 10, 2020 ... e.g., nothing like a roster notice or an invitation to brief it. [e-Flex]. Respondents certainly did not file a brief or memorandum in opposition – as Horry County admitted later on [Reply Brief].

Thus – notwithstanding the erroneous statement that all parties were afforded "an opportunity to file written briefs in support of or in opposition to the motion" – the only *lawful* way Judge Culbertson could have denied the motion under 2020-04-22-01(c)(4) was

to find it was lacking in merit. This would be strange finding for him to make, however, since Respondents did not oppose the motion to amend.

Motion to Alter or Amend/Appeal

Appellant filed a timely Rule 59 motion to alter, amend or reconsider on July 10, 2020. [Rule 59(e) Mot.]. Appellant also filed a Memorandum in Support at the same time. [Memo.]. After Horry County filed a Motion for Protective Order to stop discovery depositions on October 29, 2020, the Court scheduled a hearing on January 19, 2021 via WebEx.

Again, the Respondents did not submit an brief or memorandum in opposition prior to hearing; only at the WebEx hearing did they advance a futility argument for the first time (memorialized in a 1-22-21 memorandum). [Resp. 1-22 Memo.]. The Court denied the Appellant's Motion to Reconsider again by Form Order on January 22, 2021. [1.22.21 Order]. Appellant filed a timely Second Motion to Alter or Amend on February 1, 2021, [Mot.- which Respondent responded to on February 3, 2021. [Resp.].

However, the Appellant elected not to have its Second Motion to Alter or Amend heard, and timely filed the instant appeal on February 18, 2021 (which was filed by Horry County on March 3, 2021).

STANDARD OF REVIEW

Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Patton v. Miller*, 420 S.C. 471, 489, 804 S.E.2d 252, 262 (2017). While the South Carolina Supreme Court "has consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion, a court's failure to exercise its discretion

is itself an abuse of discretion. *Id.*, 420 S.C. at 490, 804 S.E.2d at 262. Under Rule 15(a), the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it. *Id.* A trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019). "In the absence of a proper reason, ... a denial of leave to amend is an abuse of discretion. *Id.* Even where "a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, ... that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial." *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir.1986).

ARGUMENT I

The circuit court should have granted the Motion to Amend.

In *Patton v. Miller*, a 2017 South Carolina Supreme Court case, the Court analyzed both the real-party-in-interest rule (Rule 17) and then the amendment rule (Rule 15). 420 S.C. 471, 489, 804 S.E.2d 252, 262 (2017).

Under Rule 15, the *Patton* Court affirmed the fact that the "rule strongly favors amendments and the court is encouraged to freely grant leave to amend." *Id.* 420 S.C. at 490, 804 S.E.2d at 262. This is black letter law. The *Patton* Court also cited the well-known United States Supreme Court case of *Forman v. Davis*, which held:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. 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."

Id. (citing *Foman*, 371 U.S. 178, 182 (1962)); *see also*, *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 127, 647 S.E.2d 249, 251 (Ct. App. 2007) ("To establish prejudice, the **non-moving party** must show something more than 'mere inconvenience" (emphasis added)).

Here by contrast, the Court never considered the required Rule 15 grounds in denying the motion to amend on July 10, 2020. Thus, there was simply no basis for finding prejudice (i.e., whether Respondent can show it is disadvantaged because it has a problem that it would not have had to have faced but for for the amended claim, rather than merely the showing it has to defend a case on the merits). Respondent never offered any such a ground to the Court.

Moreover, Respondent (as the non-moving party) had the burden of proof of showing a valid reason to deny the motion – but admittedly filed nothing, nor made any showing whatsoever. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019); *Rhodes*, 374 S.C. at 127, 647 S.E.2d at 251. Therefore, this is a case where: (1) Respondent did not show prejudice resulting from the amendment [*Patton*, 420 S.C. at 491, 804 S.E.2d at 262-263]; but (2) the circuit court went ahead anyway in contravention of the law. 426 S.C. at 182, 826 S.E.2d at 588. This is reversible error.

Unpersuasive is Respondent's anticipated argument that it was not required to do anything in response to the motion to amend except at oral argument. First, there was no oral argument in the first instance. Second, the law of South Carolina generally holds that "[i]f the opposite party shall not appear to oppose, the party making the motion or obtaining **the order shall be entitled to the rule or judgment moved for** on proof of due

service of the notice, or order, and papers required to be served by him (emphasis added)." *United Mach. Works, Inc. v. Williams,* 268 S.C. 600, 605, 235 S.E.2d 711, 714 (1977); *see also Aaron v. Maul,* 281C.C. 585, 591, 674 S.E.2d 483, 485 fn. 9 (2009) (holding that respondent's counterclaims were dismissed because she did not oppose appellant's directed verdict motion). The County did, in fact, have to file a brief.

Consequently, in a motion un-responded to by Respondent, the circuit court should not have substituted its own judgement, but rather it had a duty to grant the motion to amend because "[Rule 15] strongly favors amendments and the court is encouraged to freely grant leave to amend".)." *United Mach. Works,* 268 S.C. at 605, 235 S.E.2d at 714; *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005).

The fact that the circuit court made its ruling during the Covid emergency does not matter either. The Covid-19 order of April 22, 2020 is quite clear:

> "[i]f, upon reviewing a motion, a judge determines that the motion is without merit, the motion may be denied without waiting for any return or other response from the opposing party or parties. **In all other situations except those where a motion may be made on an ex parte basis, a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion.** A trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers...."

[Order 2020-04-22-01]. How could Judge Culbertson have found that the motion to amend was without merit, when he did not officially solicit any input from the Respondent – which he had to do under *Patton*, *Skydive* and *Rhodes*? He could not. The plain language of Order 2020-04-22-01 states that "[i]n all other situations [i.e. unless a judge determines it is without merit]... a ruling shall not be made until the opposing party or parties have had an opportunity to file a return or other response to the motion." *See Personal Care v.*

Theos, 426 S.C. 78, 82, 825 S.E.2d 281, 285 (2019) (applying the same rules of construction in interpreting rules).

Here, it was impossible for the circuit court to have rejected the Appellant's motion to amend without a hearing – i.e., to find it meritless – if the Respondent did not first make a showing of prejudice. The circuit court should have known of its need to conduct a prejudice analysis, but obviously failed to do so. Instead, it did the same thing that the circuit court did in *Patton* – denial of "the motion to amend the complaint on its perception of the merits of the amended claims, not under the criteria for amendment the court was required to consider under Rule 15(a)." As the Supreme Court found in *Patton*, this was error warranting reversal. *Patton,* 420 S.C. at 490, 804 S.E.2d at 262.

It is anticipated that Respondents will also argue that the circuit court has discretion to rule on the motion to amend. However, it is clear the trial court has discretion to deny a motion to amend if the party opposing the amendment can show a valid reason for denying the motion. *Skydive,* 426 S.C. at 182, 826 S.E.2d at 588. Also, in *Patton*, the Supreme Court discussed what is meant by discretion:

> "While we have consistently held that a circuit court's ruling on a Rule 15 motion to amend is within its discretion, a court's failure to exercise its discretion is itself an abuse of discretion. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). Under Rule 15(a), the circuit court should have considered whether the defendants were prejudiced by the amendment, or whether there was some other substantial reason to deny it. Instead, the circuit court denied the motion to amend based solely on its mistaken belief that the amendments could not relate back under Rule 15(c). The circuit court thus denied the motion to amend the complaint on its perception of the merits of the amended claims, not under the criteria for amendment the court was required to consider under Rule 15(a). This was error, regardless of the soundness of the Rule 15(c) analysis. *See Tanner v. Florence Cty. Treasurer*, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999)."

Patton, 420 S.C. at 489-491, 804 S.E.2d at 260-262. Here, the circuit court did the exact same thing as in *Patton* – i.e., it failed to exercise its discretion by not requiring any showing of prejudice by Respondent. For this additional reason, it's decision should be overturned.

ARGUMENT II

The amendment sought by Appellant is not futile under the futility doctrine.

Neither should the Court of Appeals be swayed by "a finding" that the circuit court "made" of futility because no such finding was ever specifically made by the circuit court. Rather, the Plaintiff argued futility for the first time at the hearing on the Plaintiff's motion to reconsider (surprising the Appellant with the argument).

Despite this, the circuit court simply denied the motion to reconsider – just as it had done the motion to amend – via a Form 4 Order without ever making a finding of futility. Because the circuit court never made a finding of futility, then just as in *Skydive* I, we are presented with the same situation where the circuit court: "did not conduct an analysis to determine whether any amendment would be futile." 426 S.C. at 183, 826 S.E.2d at 589. Obviously, such a determination should have been done at the time the circuit court considered the underlying motion, but was absent from both orders. And, unlike *Skydive* I, there is not even a decision an un-articulated finding in the record. Here, nothing exists in the record on appeal to even allow the Court to inquire about futility. As set forth in *Patton*, this is reversible error.

Second, it has been held that "in rare cases" a trial court may deny a motion to amend if the amendment would be clearly futile. *Skydive.*, 426 S.C. at 182-183, 826 S.E.2d at 589. However, futility is apparent if the proposed [amendment] fails to state a claim

under the applicable rule and accompanying standards." *Katyle v. Penn. Nat. Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011). "A review for futility is not equivalent to an evaluation of the underlying merits of the case. To the contrary, '[u]nless a proposed amendment may clearly be seen to be futile because of substantive or procedural considerations, ... conjecture about the merits of the litigation should not enter into the decision whether to allow amendment.'" *Davis v. Piper Aircraft Corp.,* 615 F.2d 606, 61 3 (4th Cir. 1980), *cert. dismissed,* 448 U.S. 911. Therefore, leave to amend "should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986).

Thus, based on the foregoing citations, the record does not reflect enough evidence for the circuit court to make the "rare" finding of futility, based on the relation back of Rule 15(c), S.C.R.Civ.P.

The first sentence of Rule 15(c) of the South Carolina Rules of Civil Procedure states that: "whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." In the 1999 Court of Appeals case of *Whitfield Construction Co. v. Bank of Tokyo Trust Co.*, Judge Goolsby wrote for the Court that: "**the central requirement here is that the party defending against the new claim have sufficient notice of it"** (emphasis added). 338 S.C. 207, 223, 525 S.E.2d 888, 897 (Ct. App. 1999) (quoting James F. Flanagan, *South Carolina Civil Procedure*, 127 (2d ed.1996)).

Judge Goolsby then explained: "[i]n federal practice, he factors to determine whether or not a claim arose out of the same conduct, transaction, or occurrence set forth

in the original pleading include: (1) whether the party defending against the new claim had notice of it; (2) whether the party seeking to add the new claim will rely on the same kind of evidence offered in support of the original claim to prove the new claim; and (3) whether unfair surprise to the defending party would result if the amendment were to relate back. *Id.* (citing James Wm. Moore, *Moore's Federal Practice* § 15 .192 (Daniel R. Coquillete *et al* Eds., 3d 1999)).

Here, the amended claims were well known to the Respondents. In the federal cases of *Michael Davis, et al v. Horry County Department of Airports et al.*, consolidated in 4:17-cv-00391-RBH, many of the same or substantially similar claims from the motion to amend in the instant-case were made against the Respondent in the federal case.[1] The Respondent, therefore, cannot say it did not know about the claims included in the motion to amend, *as it defended them from 2017.* It had notice. The same and similar evidence was offered in support to prove the new claim. And it came as no surprise to the county. Plus, eve where "a proposed amendment raises a new legal theory that would require the gathering and analysis of facts not already considered by the opposing party, ... that basis for a finding of prejudice essentially applies where the amendment is offered shortly before or during trial." *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir.1986).

Thus, the proposed amendments should not have been denied under the futility doctrine, because they were not on their face either clearly insufficient or frivolous. *Johnson.*, 785 F.2d at 510 (4th Cir. 1986). The new claims clearly relate back to the

[1] The attorney for Respondent in the instant matter, Mr. Michael W. Battle, was counsel for the County during *Michael Davis, et al v. Horry County Department of Airports et al.*, consolidated in 4:17-cv-00391-RBH. Although filed as a pro se case, counsel for the undersigned also became counsel for the Plaintiffs in that case, as well. It was dismissed primarily because the federal court found that individual officers and employees of a corporation did not have standing to sue for torts sustained by the corporation.

original pleading, which uses the same causes of action and the same kind of evidence to support the claim. *Whitfield*, 338 S.C. at 223, 525 S.E.2d at 897 (Ct. App. 1999).

ARGUMENT III

In this case, the statute of limitations should be tolled under the doctrine of equitable tolling.

In *Hooper v. Ebenezer Sr. Services & Rehabilitation Center*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009), the Supreme Court analyzed the doctrine of equitable tolling:

> In our view, the situations described above do not constitute an exclusive list of circumstances that justify the application of equitable tolling. "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use.

Here, the doctrine of equitable tolling should be applied. Plaintiff moved swiftly to file a Motion to Amend once the Supreme Court's ruling remanding the case back to the Circuit Court was denied rehearing. On March 13, 2019, the South Carolina Supreme Court reversed the Court of Appeals ruling affirming the Circuit Court's dismissal of Plaintiff's claims without granting Plaintiff leave to amend its complaint. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 182, 826 S.E.2d 585, 588 (2019). In citing *Foman*, the Court opined 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." *Id.* The Court further relied on *Patton* in stating that the "circuit court erred by failing even to consider allowing Skydive to amend its complaint." *Id.* (citing *Patton v. Miller*, 420 S. C.

471, 489-90, 804 S. E. 2d 252, 261 (2017)). The Supreme Court denied rehearing on January 20, 2020. Then, Reese R. Boyd, III entered his appearance on behalf of Plaintiff on February 20, 2020 and the Motion to Amend was filed by Plaintiff on March 12, 2020.

In *Skydive I*, the South Carolina Supreme Court concluded that the circuit court should have allowed Plaintiff an opportunity to amend its complaint. The Supreme Court reversed the Court of Appeals decision and remanded the matter to the circuit court, specifically stating that "[t]he circuit court should not have denied – and we will not deny – Skydive the opportunity to amend its complaint." But the circuit court, in its July 10,. 2020 Order, has denied the Appellant the opportunity to amend its complaint.

In light of the tortured procedurally history – requiring certiorari to the Supreme Court to obtain the right to amend, and the fact that virtually the same claim was made in *Michael Davis, et al v. Horry County Department of Airports et al.*, 4:17-cv-00391-RBH, a 2017 District of South Carolina case – then equitable tolling is justified, even under the two year statute for violations of the South Carolina Tort Claim Act, S.C. Code Ann. § 15-78-110 (notwithstanding the points made in Argument I and II, *infra*).

First, it was substantially the same complaint which the County had been defending in *Michael Davis, et al v. Horry County Department of Airports et al.*, 4:17-cv-00391-RBH, which was closed in 2019. *Whitfield*, 338 S.C. at 223, 525 S.E.2d at 897. Second, the amendments were clearly mandated by the Supreme Court. 426 S.C. at 182, 826 S.E.2d at 588 (2019). Third, the fairness and flexibility of the doctrine of equitable tolling are all met in the instant appeal. *Hooper v. Ebenezer Sr. Services & Rehabilitation Center*, 386 S.C. at 116-117, 687 S.E.2d at 33. Thus, the commencement of the statute in S.C. Code Ann. § 15-78-110 should be tolled.

ARGUMENT IV

Even if the Court of Appeals rejects Arguments I, II and III, South Carolina law still mandates that conflicting evidence of the application of the discovery rule still goes to the jury.

It is black letter law in South Carolina that "when the parties present conflicting evidence of the application of the discovery rule, then the determination of the date the statute began to run in a particular case are questions of fact for the jury. *See Allwin v Russ Cooper Associates, Inc.,* 426 S.C. 1, 12, 825 S.E.2d 707, 713 (Ct. App. 2019); *see also Arant v. Kressler*, 327 S.C. 225, 229, 489 S.E.2d 206, 208 (1997) (when testimony conflicts regarding time of discovery of a cause of action, it becomes an issue for the jury to decide); *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993) ("Whether a claimant knew or should have known that they had a cause of action is question for the jury."); *Brown v. Finger*, 240 S.C. 102, 113, 124 S.E.2d 781, 786 (1962) ("The burden of establishing the bar of the statute of limitations rests upon the one interposing it, and where the testimony is conflicting upon the question, it becomes an issue for the jury to decide.").

Thus, while Horry County can *argue* that Plaintiff knew or should have known much earlier of its claims specifically regarding the "unusual incident reports", nevertheless all the evidence presented by Horry County is conflicting with Appellant's position. This matter should therefore go to the jury, and the motion to amend was not and is not 'clearly futile'.

The Court additionally erred when it allowed Horry County to speak generally of the statute of limitations as a basis to deny the Plaintiff's motion to amend, because in effect the Court was granting summary judgment without the required showing of anything from Defendants. *See* Rule 56, S.C. R. Civ. P.

ARGUMENT V

The circuit court's denial of the motion to amend is subject to immediate appeal.

S.C. Code Ann. § 14-3-330(2)(a) provides for "appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal ... [a]n order affecting a substantial right made in an action when such order ... in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action." Here, in failing to grant the motion to amend, the circuit court was in effect granting a motion to dismiss in favor of the Respondent." *See also* SOUTH CAROLINA CONST., Article V, § 5; S.C. R. Civ. P. Rule 12(b)(6) ("The granting of a motion to dismiss for failure to state a claim is immediately appealable.").

The instant action is also in line with the holding in *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017), which post-dates *Tillman v. Tillman*, 420 S.C. 346, 801 S.E.2d 757 (Ct. App. 2017) by a month. Therefore, the Court of Appeals must follow *Patton* and *Skydive*. SOUTH CAROLINA CONST., Article V, § 9 ("Decisions of the supreme court shall bind the court of appeals as precedents"); *State v. Phillips*, 416 S.C. 184, 194, 785 S.E.2d 448, 453 (2016) ("It is incumbent upon the court of appeals to apply [the supreme court's] precedent").

CONCLUSION

SDMB respectfully requests that this Honorable Court reverse the circuit court's ruling as it is based on numerous procedural errors and errors of law, furthermore, SDMB respectfully requests that this Honorable Court vacate the magistrate's judgment based on its errors of law.

Respectfully submitted,

/s Robert B. Varnado

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM HORRY COUNTY
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The Honorable Benjamin H. Culbertson
Circuit Court Judge

APPELLATE CASE NO. 2021-00217

SKYDIVE MYRTLE BEACH, INC..... Appellant,

v.

HORRY COUNTY ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Appellant's Initial Brief*** in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on June 25, 2021, to the following

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June 25, 2021

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
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RE: ***Skydive Myrtle Beach, Inc. v. Horry County***
Appellate Case No.: 2021-00217
Our File No.: 6247 - 5

Dear Ms. Kitchings:

Enclosed please find Appellant's Initial Brief.

Should there be any questions or concerns, please do not hesitate to contact my office.

With kindest regards, I remain,

Very truly yours,

VARNADO LAW FIRM, LLC

/s Robert B. Varnado

Robert B. Varnado

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