THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson
Circuit Court Judge

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APPELLATE CASE NO. 2021-00217

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

v.

HORRY COUNTY ..... Respondent.

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# RESPONDENT'S INITIAL BRIEF

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Table of Contents

Table of Authorities

Page(s)

Cases

Statutes



Rules

## *Statement of Issues*

1. *The circuit court correctly denied Appellant's motion to amend.*

2. *The amendment sought by Skydive is futile under the futility doctrine.*

3. *In the present case, the statute of limitations should not be tolled under the doctrine of equitable tolling.*

4. *Skydive's motion to amend does not contain conflicting facts that would cause the case to go to the jury in connection with the discovery rule.*

5. *Skydive's appeal should be dismissed because it is an appeal from an interlocutory order.*

*Statement of Appeal*

Appellant's (Skydive) appeal arises on the underlying issue of whether Skydive can amend its complaint filed in 2014. In 2020, Skydive moved to allow it to substitute a new complaint for its 2014 complaint. The proposed complaint alleged new facts and added a new party. The circuit court denied Skydive's motion. Skydive then moved to have the court reconsider its denial. Skydive's motion to reconsider was denied and Skydive moved a second time for the court to reconsider its decision. Both Skydive and respondents (Horry County) filed memorandums in support of their positions. Before the second motion to reconsider could be heard, Skydive filed the present appeal.

Skydive claims the proposed amended complaint should be allowed because a disputed question of fact exists over when Skydive discovered the new facts alleged in the proposed amended complaint. Horry County contends Skydive's appeal should be dismissed because it is an appeal of an interlocutory order and because Skydive's motion to amend is futile due to the controlling statutes of limitations.

*Statement of Facts*

On February 28, 2014, Skydive filed its original complaint alleging fifteen causes of action: 1) Breach of Contract; 2)Breach of Contract Accompanied by a Fraudulent Act; 3) Breach of Fiduciary Duty; 4) Civil Conspiracy; 5) Constructive Fraud; 6) Defamation; 7) Fraud and Misrepresentation; 8) Interference with a Contractual Relationship; 9) Negligence; 10) Negligent Misrepresentation; 11) Negligent Supervision; 12) Promissory Estoppel; 13) Quantum Meruit; 14) Trespass; and 15) Unfair Trade Practice Violation. The causes of action arose from alleged acts

of individual defendants that occurred prior to the filing of the original complaint. Those individual defendants were H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal, acting in their capacity as agents of Horry County/ Horry County Department of Airports.

The individual defendants were dismissed with prejudice by order of Judge Larry B. Hyman dated October 13, 2014. Judge Hyman's order of dismissal was reversed by order of the S.C. Supreme Court and remitted to the Circuit Court on April 1, 2019. See Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019). The effect of the Supreme Court's order appears to have given Skydive the right to move to amend its complaint. On March 13, 2020, Skydive moved to amend the 2014 complaint. Skydive's motion incorporated a specific proposed amended complaint.

The new complaint contained eight causes of action: 1) Declaratory Relief from *ultra vires* Regulations; 2) Civil Conspiracy, Jackson and Teal; 3) Fraud; 4) Defamation; 5) Unfair Trade Practices Act; 6) Breach of Contract; 7) Breach of Contract Accompanied by a Fraudulent Act; and 8) Negligence.

Skydive's first claim for Declaratory Relief from *ultra vires* Regulations arises from an ordinance adopted on May 20, 2015. The basis for the claim is that Horry County did not follow proper procedures when it adopted the ordinance.

Skydive's second claim for civil conspiracy is that the named individual employees plus a new party, Horry County Attorney Arrigo Carotti, were acting outside the scope of their authority when they engaged in improper acts designed to

evict Skydive from an Horry County airport hangar. The only substantial difference between the new complaint and the original complaint is the addition of Arrigo Carotti as an individual defendant and the allegation that the individual employees of Horry County were acting outside the scope of their authority in 2013- 2014.

Skydive's third claim for fraud arises from Skydive's claim that Horry County and HCDA and Ramp 66 acting outside the scope of their authority represented in 2013 that a new County approved lease was needed for Skydive to continue occupancy of Hangar 7.

Skydive's fourth claim for defamation alleges that on multiple occasions Horry County through its employees made defamatory statements about Skydive. The substantial difference in the new complaint is that Arrigo Carotti is included in the group of individual defendants alleged to have made defamatory statements. Also, Skydive includes allegations of approximately 112 incidents of safety violations contained in the 2017 findings and order of the Federal Aviation Administration that Skydive claims were falsified by Respondent and its employees.

Skydive's fifth claim alleges Unfair Trade Practices. The substantial difference in the new complaint is that Arrigo Carotti is included in the group of individual defendants alleged to have engaged in the unfair trade practices.

Skydive's sixth, seventh and eighth claims for breach of contract, breach of contract accompanied by a fraudulent act and negligence in the new complaint are substantially the same as the original complaint. The difference in the new complaint is that Arrigo Carotti is included in the group of individual defendants alleged to have

engaged in the fraudulent acts and negligence. Skydive's seven remaining original claims were either omitted or subsumed in other causes of action in the proposed amended complaint.

The circuit court denied Skydive's motion to amend its complaint by a Form 4 Order of Dismissal. The order was a simple denial of Skydive's request to file its proposed amended complaint. The order was not a dismissal of the lawsuit with prejudice or any individual party. Skydive moved twice to have its proposed complaint filed through consecutive SCRCP 59, motions to reconsider. Before the appeal time expired and before the circuit court ruled on the second motion to reconsider, Skydive filed the present appeal.

*Standard of Review*

A motion to amend is addressed to the sound discretion of the trial judge and the party opposing the motion has the burden of establishing prejudice. Pruitt v. Bowers, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). "The trial judge's finding will not be overturned without an abuse of discretion or unless manifest injustice has occurred." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). Curry v. Carolina Ins. Grp. of SC. Inc., 428 S.C. 60, 76, 832 S.E.2d 760, 768 (Ct. App. 2019)

*Discussion of Issues*

*1. The circuit court correctly denied Appellant's motion to amend.*

The impropriety of Skydive's proposed complaint incorporated in its motion to amend is self-evident on the face of the proposed amended complaint. Skydive made a

motion requesting an order allowing it to serve and file one specific amended complaint. Skydive's proposed amended complaint added a new party, Arrigo Carotti, and alleged he was also liable for acts that occurred six to seven years earlier. Skydive's complaint further sought to relitigate approximately 112 factual findings made in an Order dated August 4, 2016 by the Federal Aviation Administration in a Part Sixteen Administrative Proceeding and later affirmed by the Fourth Circuit U.S. Court of Appeals. See Skydive Myrtle Beach Inc. v. Horry Cty. Dep't of Airports, 735 F. App'x 810, 815 (4th Cir. 2018).

Horry County engaged in extensive discovery without knowledge of Skydive's intent to make claims in connection with Horry County's attorney or the 112 factual findings of the Federal Aviation Administration. If the circuit court had allowed Skydive's to amend its complaint as requested, Horry County contends discovery in connection with the new claims would have to occur and the trial of the 2014 lawsuit would be further delayed unduly. The prejudice of undue delay to Horry County from the proposed amended complaint is obvious and the circuit court did not abuse its discretion by denying Skydive's motion to file the proposed amended complaint. See Skydive Myrtle Beach, Inc., 426 S.C. at 182 ("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.") Also see Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988) (noting "bad faith, undue delay, or prejudice" as proper reasons to deny a motion to amend.

In addition, Skydive cannot show that it was prejudiced by the court's denial of its motion to amend. The circuit court's order denying appellant's motion did not

dismiss Skydive's pending lawsuit. It did not prevent the appellant from filing a separate lawsuit or from filing a general motion to amend its complaint in compliance with the issues decided in the order of the S.C. Supreme Court. See Skydive Myrtle Beach, Inc., 426 S.C. 175.

2. *The amendment sought by Skydive is futile under the futility doctrine.*

A trial court may deny a motion to amend if the amendment would be clearly futile. See Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), rev'd, 401 S.C. 1, 736 S.E.2d 242 (2012) ("Although leave to amend should generally be 'freely given,' ... it may be denied where the proposed amendment would be futile.") Skydive Myrtle Beach, Inc., 426 S.C. at 182. In the present case, the appellate court does not have the difficulty discussed in Skydive Myrtle Beach, Inc. v. Horry Cty., 426 S.C. 175, 826 S.E.2d 585 (2019), of determining whether allowing an amendment to a pleading would be futile without examining the proposed amendment. Skydive's proposed amended complaint was incorporated into its motion. The futility of Skydive's motion to amend is clear on the face of its proposed amended complaint.

The futility of Skydive's requested amendments in connection with Horry County's alleged actions on "safety violations" are shown in the factual allegations of the proposed amended complaint and the law of the discovery rule. Further, if necessary, the Court is requested to take judicial notice of the attached Director's Decision dated October 7, 2015, which was affirmed in Skydive Myrtle Beach Inc. v. Horry Cty. Dep't of Airports, 735 F. App'x 810 (4th Cir. 2018). The FAA did enter a final decision that the findings of fact in connection with Skydive were each supported by a preponderance of reliable, probative, and substantial evidence contained in the

record. See *Skydive Myrtle Beach, Inc. v Horry County Department of Airports* Docket 16-14-05 (August 4, 2016). The FAA expressly rejected Skydives claims that the FAA Director relied on improper *ex parte* communications, facts, and evidence in making his formal Determination in connection with Skydive. *Id.* The final order of the Federal Aviation Administration is binding as res judicata on Skydive. Hayes v. Hayes, 312 S.C. 141, 439 S.E.2d 305 (Ct. App. 1993). (the doctrine of res judicata originates from the principles that public interest requires an end to litigation and that no one should be sued twice for the same cause of action).

In connection with the "discovery rule," the statute of limitations begins to run when the Skydive should know that it might have a potential claim against another person, not when the Skydive develops a full-blown theory of recovery. Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987); Snell v. Columbia Gun Exch., Inc., 276 S.C. 301, 278 S.E.2d 333 (1981). The law charges Skydive with discovery when the facts and circumstances of his injury would put a person of common knowledge and experience on notice that some claim might exist against the defendant. Wilson v. Shannon, 299 S.C. 512, 386 S.E.2d 257 (Ct. App. 1989); Tanyel v. Osborne, 312 S.C. 473, 475, 441 S.E.2d 329, 330 (Ct. App. 1994).

Skydive should have known that it might have a potential claim against Horry County in connection with its new claims arising from the FAA's findings of fact when it received notice the FAA's director's decision in 2015. *Skydive Myrtle Beach, Inc. v Horry County Department of Airports* Docket 16-14-05 (August 4, 2016). Therefore, Plaintiff's proposed amended complaint is improper because it seeks to add claims

approximately at least 4 years after they knew or should have known of those claims' existence. See Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987).

Even if the facts of the discovery date were contested, Skydive's owner, Aaron Holly, submitted and filed an affidavit claiming August 7, 2017 was the date when the statute of limitations for all new claims (sic) "accrued." Using Skydive's discovery date, Skydive's new claims against Horry County remain futile. Any action brought pursuant to South Carolina Tort Claims Act is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered. S.C. Code Ann. § 15-78-110. The new claims based on facts that occurred after 2014 do not relate back to the Skydive's original lawsuit. SCRCP 15(c) provides: 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. Gause v. Smithers, 384 S.C. 130, 132, 681 S.E.2d 607, 608 (Ct. App. 2009).

The SC Court of Appeals in Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), discussed the application of SCRCP 15(c) at length in connection with adding new parties. In that case, *Jackson* amended her complaint after the statute of limitations had expired in a John Doe hit and run action. Jackson added a named party as the defendant but did not dismiss John Doe as a defendant. Id. The majority of the court concluded the second paragraph of SCRCP 15(c) only applied to a substitution or change in party, not the addition of a defendant. Jackson, 537 S.E.2d at 570. ("The language of SCRCP 15(c) clearly speaks to a change in party, not the addition of a defendant to an already existing defendant. The addition of a party is not the same as a

substitution or change of the party."). See Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27 (Ct. App. 2004) n. 2, 597 S.E.2d 27, 29 n. 2 (Ct.App.2004) finding SCRCP 15(c) did not allow plaintiff to add a party to a negligence action after termination of statute of limitations. Skydive's claims against Arrigo Carotti do not relate back under SCRCP 15 (c).

Even if the Mr. Holly was correct in his claim that the alleged statutory period began on August 7, 2017, the statute of limitations expired on August 8, 2019, and Skydive's proposed amended complaint filed March 13, 2020 against Horry County contains time barred, futile claims. Also, any action for slander, libel, or defamation is also subject to a two year statute of limitations. S.C. Code Ann. § 15-3-550. For the same reasons stated herein, Skydive's attempt to add new claims and add a new party to its lawsuit against Horry County is an exercise of futility. In an unpublished opinion the SC Court of Appeals found that the circuit court properly denied a plaintiff's motion to amend her complaint on the grounds that any amendment would be futile because the SCTCA's two-year statute of limitations expired on all of her claims. See Couram v. Davis, No. 2015-UP-065, 2015 WL 477266, at *1 (S.C. Ct. App. Feb. 4, 2015) citing Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 632, 743 S.E.2d 808, 812–13 (2013) (affirming the circuit court's denial of a party's motion to amend its complaint when the amendment would be futile).

*3. In the present case, the statute of limitations should not be tolled under the doctrine of equitable tolling.*

Equitable tolling is a non-statutory tolling theory which suspends a limitations period. Equitable tolling is a doctrine that should be used sparingly and only when the interests of

justice compel its use. Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108. 117. 687 S.E.2d 29. 33 (2009). The party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use. Id. Equitable tolling typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control. Id.

Skydive claims that equitable tolling should be applied to its amendment because it moved swiftly to amend once the Supreme Court's ruling remanding the case back to the Circuit Court was denied rehearing. Court records reveal Skydive's case was remitted to the circuit court on April 1, 2019. Notwithstanding the remittitur. Skydive waited approximately one year before filing its motion to amend on March 13, 2020. During that one year period no known extraordinary event occurred and the SCTCA two year statute of limitations expired even according to Mr. Holly's estimate on August 8, 2019. Skydive was not prevented from filing its motion to amend because of an extraordinary event beyond its control. The SCTCA two year statute of limitations should not be equitably tolled in the present case. S.C. Ann. S.C. Code Ann. § 15-78-110. See Maher v. Tietex Corp., 331 S.C. 371. 500 S.E.2d 204 (Ct. App. 1998)

*4. Skydive's motion to amend does not contain conflicting facts that would cause the case to go to the jury in connection with the discovery rule.*

In an affidavit filed February 1, 2021, Aaron Holly. owner of Skydive, declared: "SDMB cites the FOIA letter of Arrigo Carotti of August 7. 2017 as the date when the statute of limitations for all the new claims accrued for the same." Negligence claims against Horry County are governed by the two year statute of

limitations contained in the SCTCA. S.C. Code Ann. § 15-78-110. As stated above the statute of limitations for new claims against Horry County expired August 8, 2019.

Skydive's time barred claim that Horry County engaged in a scheme to falsely accuse Skydive of 112 safety violations before the FAA causes substantial prejudice to Horry County in the trial of the present lawsuit. Instead of addressing acts that occurred before 2014, Skydive seeks to force Horry County to prove that the FAA properly found Skydive was responsible for 112 safety violations that occurred from 2014 – 2015. Such a requirement is prejudicial given the statute of limitations and given the fact that the FAA Final Decision expressly found the 112 safety violations were supported in the record. The prejudice to Horry County is that it may have to find witnesses to 112 incidents that occurred six or seven years ago. The 112 violations were not part of the discovery efforts of Horry County in the present lawsuit. Further, the case is now on the active trial roster. The case is only stayed now because of the present appeal.

*5. Skydive's appeal should be dismissed because it is an appeal from an interlocutory order.*

In the present case, the circuit court did not strike any portion of Skydive's original complaint. The court only refused to allow Skydive to file its proposed amended complaint incorporated in its motion to amend. The circuit court's order is not immediately appealable. See Baldwin Const. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) (holding an order denying a motion to file an amended answer was not immediately appealable because the court did not strike a pleading on its merits but refused to allow its filing).

Under Section 14–3–330(2), an appellate court may "review upon appeal (2)[a]n order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action." The only subsection that might conceivably be implicated by the circuit court's order denying Skydive's request to be allowed to file its amended complaint is subsection (c). Baldwin Const. Co., 593 S.E.2d at 147.

In Jefferson by Johnson v. Gene's Used Cars, Inc., 295 S.C. 317, 368 S.E.2d 456 (1988), the SC Supreme Court held that an order denying a party's motion to file a late answer was a not directly appealable. The Court reached this conclusion because the trial judge did not rule on the substantive contents of the answer, nor did the order strike a pleading, but refused to allow its filing. The present case is similar, because the circuit court did not strike a pleading but refused to allow its filing. Skydive will be able to appeal the circuit court's decision to deny the filing of the proposed amended complaint after the trial is finished. Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 426 S.E.2d 777 (1993).

Horry County contends that the fact that Skydive moved to file an amended complaint instead of an amended answer does not distinguish the present case from Baldwin Const. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146 (2004) The court of appeals did an analysis of whether the simple denial of a motion to amend a complaint was immediately appealable in the unpublished opinion of S. Sales & Mktg. Grp., Inc.

v. AMCO Const. Co., No. 2006-UP-278, 2006 WL 7286061, at *1 (S.C. Ct. App. June 13, 2006).

In Southern Sales and Marketing Group, Inc., 2006 WL 7286061 the appellate court determined the ultimate result in the two cases was the same, i.e., the court's decision, like the court in *Graham*, refused Southern Patio's request to file an amended pleading. Thus, the order neither finally determined a "substantial matter forming the whole or part of some cause of action or defense" nor "discontinue[d] an action, prevent[ed] an appeal ... or [struck] out an action or defense." Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). The court of appeals concluded the circuit court's order was not immediately appealable. See Tatnall v. Gardner, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (holding trial court's order denying defendant's motion to amend her answer to assert third-party claims was not immediately appealable because the order "neither determine[d] a substantial matter 'forming the whole or part of some cause of action,' nor prevented 'a judgment from being rendered in the action' from which the third-party claimant could then seek review."

## CONCLUSION

For the reasons stated above, Respondent Horry County requests that the appeal be dismissed and the case be remanded to the circuit court for a trial on the existing complaint.

July 11, 2021

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