THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
In the Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2017-CP-42-00740

Appellate Case No. 2020-001642

Gibbs International, Inc., Respondent,

v.

Sarmad Harake, Eurosa, Inc., and Katherine Harake, Defendants, of whom Sarmad Harake and Eurosa Inc. are the Appellants.

FINAL REPLY BRIEF OF APPELLANTS SARMAD HARAKE AND EUROSA, INC.

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Having used almost every one of its allotted fifty pages, Respondent Gibbs International, Inc. ("Respondent") is the party attempting to create a "cyclone of confusion." Respondent spends much of its time misstating facts, procedural history, and the issues properly before this Court seemingly in an effort to disparage Appellants Sarmad Harake and Eurosa, Inc. ("Appellants") and distract from the narrow issue before the Court — which is confined to the allegations in the Amended Answer and Counterclaims, as opposed to outside allegations or interpretations. The reasons and negotiations that led to Respondent's Third Amended Complaint or Respondent's unsupported interpretation of Appellants' litigation strategy should not be considered here. In addition to the fact those topics are not found on the face of the fourth counterclaim and therefore do not relate to the issues before this Court, Respondent has taken things out of context and conveniently omitted the actions it took that affected Appellants' actions. Rather than delving into such context and additional facts which do not have any bearing on the narrow issue of whether Appellants pleaded enough facts to state any valid claim for relief in their fourth counterclaim and whether they should have been given an opportunity to amend given the Circuit Court's reasoning, Appellants offer the following arguments, incorporating by reference the Statement of the Case, Statement of Facts, and arguments stated in its prior Brief in reply to Respondent's Brief, and in further support of Appellants' Brief.

I. The Fourth Counterclaim Contains Allegations That State A Valid Claim For Relief.

Appellants' fourth counterclaim contains "facts alleged and inferences reasonably deducible therefrom, [when] viewed in the light most favorable to [Appellants], . . .

entitle [Appellants] to relief" on a cognizable theory of recovery. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007). As a result, when looking at the face of the complaint in the light most favorable to Appellants and resolving any doubts on Appellants' behalf as required under the law of South Carolina, this Court should reverse the Circuit Court's dismissal of Appellant's fourth counterclaim.

A. There is no case law in South Carolina stating that a claim is required to be dismissed if it has not been formally recognized under South Carolina law.

In its Brief, Respondent appears to argue that only causes of action formally recognized by the courts may be pursued past the motion to dismiss stage of litigation. However, Respondent has not cited any South Carolina case noting such a proposition, and a review of case law has not revealed a South Carolina case stating such a proposition. South Carolina courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial,* 271 S.C. 79, 84, 245 S.E.2d 120, 123 (1978). Therefore, in determining whether a cause of action should be dismissed, the "question for the court is whether in the light most favorable to the [complainant], and with every doubt resolved in his behalf, the allegations set forth on the face of the complaint state ***any valid claim for relief***." *Sloan Const. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 112–13, 659 S.E.2d 158, 161 (2008), *holding modified on other grounds by Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778 (2013) (emphasis added); *see also Fabian v. Lindsay*, 410 S.C. 475, 765 S.E.2d 132 (2014) (reversing dismissal pursuant to Rule 12(b)(6) and permitting a third-party beneficiary of an existing estate plan to sue the drafting lawyer of that estate plan in tort and in contract for drafting errors); *Moriarty v. Garden Sanctuary Church of God*, 341

S.C. 320, 327, 534 S.E.2d 672, 675 (2000)[1] (holding that an appellate court does not have to provide any particular deference to a lower court when deciding whether to recognize a cause of action, among other things), *holding modified on other grounds by State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004) (citations omitted). When this Court affirmed a dismissal because South Carolina had not recognized a cause of action for intentional interference with inheritance, the Supreme Court found such a ruling was unnecessary if there were other reasons to dismiss the particular pleading. *Douglas ex rel. Louthian v. Boyce*, 344 S.C. 5, 9-10, 542 S.E.2d 715, 717 (2001) (affirming the dismissal because there was no duty owed by the tort attorneys to the child). Accordingly, if an alleged cause of action as named has not been recognized formally in South Carolina, it is not dispositive in determining whether such a claim may go forward. Consequently, since Appellants have alleged a tort cause of action in their fourth counterclaim against Respondent, and such tort has not been specifically barred, the Court should reverse the Circuit Court's November 18 Order as to the fourth counterclaim.

B. The title attached to a claim for relief is not dispositive as to whether such a claim entitles the pleader to relief on *any* theory.

The label assigned to a cause of action is not dispositive as to whether the claim may proceed. Contrary to Respondent's arguments, Appellants cited cases containing instances in which a court looked at the substance of what was being alleged as opposed to form or title of the claims, which is not something the Circuit Court undertook in its November 18 Order.

[1] Although Respondent's Brief argues that *Moriarty* case has "nothing to do with the case before this Court," Appellants were not citing it for its factual relation to this matter; rather, it was cited for the standard of review applied to recognizing causes of action.

Notably, Respondent did not attempt to address all of the cases cited by Appellants for this proposition. In *Wellin v. Wellin,* 135 F.Supp.3d. 502 (D.S.C. 2015), a motion to dismiss multiple causes of action argued such causes of action had not been formally recognized in South Carolina. However, the district court "attempt[ed] to do as the state court would do if confronted with the same fact pattern." *Id.* at 511. In permitting the titled cause of action "intentional interference with prospective contractual advantage/prospective economic advantage" to go forward, the district court found that "South Carolina courts have noted that labeling the cause of action as interference with prospective economic advantage does not change the substance of the cause of action." *Id.* at 519, n. 15. Additionally, in *Williamson v. Bermuda Run Inv'r Dev. Grp., Inc*., No. 2006-UP-279, 2006 WL 7286063, at *7 (S.C. Ct. App. June 13, 2006), this Court looked beyond the title of the cause of action and construed the substance of the claim. There, the Court reversed a finding of liability against an owner of a condominium for tortious interference with economic relations by construing the claim as tortious interference with contract and finding that the first element of tortious interference with was missing.

In *Prior v. S.C. Med. Malpractice Liabl. Ins. Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655, 657 (Ct. App. 1991), the Court affirmed summary judgment, noting "despite the label of negligence, the act the [p]atient complained of was sexual assault, an intentional tort. Intentional torts are not covered in Prior's medical malpractice policy, therefore JUA had no duty to defend." In that case, the patient attempted to call something negligence in her complaint when it was not, and the Court looked beyond how she termed the claim to the substance of what was being alleged. Moreover, in *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 743 S.E.2d 778

(2013), the Supreme Court did not solely look at the title of the cause of action in determining whether the amended complaint pled a third-party beneficiary contract claim. Rather, it looked to the "Facts" section and disregarded the fact that certain words like "contract" or "tort" or "negligence" did not appear in the cause of action. *Id.* at 574, 743 S.E.2d at 785. Instead, it found "a fair reading of the Amended Complaint leads to the reasonable conclusion that the first cause of action is one for breach of contract," and it further pointed to its statutory construction ruling in the same case, which as a matter of first impression, held the only claim possible under the particular statute was a contract claim. *Id.* Further, in recognizing elements of a claim for intentional interference with prospective contractual relations, the Supreme Court in *Crandall Corp. v. Navistar Int'l Transp. Corp*., 302 S.C. 265, 395 S.E.2d 179 (1990), cites other jurisdictions that title the claim a "intentional interference with prospective economic relations" (*Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293 (Utah 1982)), "intentional interference with business relations" (*Blake v. Levy*, 464 A.2d 52 (Conn. 1983)), "wrongful interference with business relationship" (*Straube v. Larson*, 600 P.2d 371 (Or. 1979)), and "tortious interference with business relationships" (*Harsha v. State Sav. Bank*, 346 N.W.2d 791 (Iowa 1984)).[2] In *Crandall*, the Supreme Court was looking at the substance of the cause of action as opposed to its name.

Likewise, in *United Educational Distributors, LLC v. Educational Testing Svc.*, 350 S.C. 7, 10 at n.1, 564 S.E.2d 324, 326 at n.1 (Ct. App. 2002), while this Court affirmed the dismissal of the cause of action, it was not because of how the cause of

[2] Respondent's Brief appears also to misapprehend Appellants' arguments as they relate to the case law cited in other jurisdictions. (App. Initial Br. p. 19, n. 3). Appellants cited such as an example that other jurisdictions discussing comparable torts to the one presented in the fourth counterclaim use a number of different names for them; therefore, the name of such tort does not hold the weight Respondent tries to assign it.

action was labeled. Instead, the Court specifically notes that while the trial court in that case had identified the action as "tortious interference with prospective economic advantage," the "substance of [its] analysis" in determining whether the claim was sufficiently pled was not affected by how the cause of action was titled. *Id*. Given that the title of a cause of action is not dispositive, and giving a fair reading to Appellants' Answer and Amended Counterclaims, the Circuit Court's November 18 Order dismissing this claim should be reversed as to Appellants' fourth counterclaim.

II. The Issue Before The Circuit Court Was Whether To Provide The Opportunity To Amend Based On The Motion To Dismiss; Accordingly, The Court Should Disregard Section III of Respondent's Brief.

Respondent spends more than one-third of its Brief arguing that Appellants were denied amendment pursuant to Rule 15(a), SCRCP, and that such denial should not be reversed. However, the Court, in ruling on Respondent's Motion to Dismiss only, simply ruled it was not going to provide Appellants the opportunity to amend; it never denied a motion to amend. [3] The Court's November 18 Order acknowledged Appellants made a verbal request during the hearing on Respondent's Motion for permission to amend the counterclaim to change the label, but the Court rejected that request, noting that Appellants' motion to reconsider renewed that request "and the Court will address the motion to reconsider by subsequent order." (Am. R. pp. 035-36, November 18 Order, pp. 12-13). The Court's November 30 Order contained a general denial based on previous arguments made as to the Motion to Dismiss, not a separate Motion to Amend the counterclaim. (Am. R. p. 053, November 30 Order, p. 1). Therefore, the Court should

[3] Moreover, even if the Rule 59(e) Motion to Alter or Amend is considered a motion to amend pursuant to Rule 15, SCRCP, motions to amend in which the ruling prevents a filing as opposed to striking a pleading are not generally immediately appealable. *See Baldwin Const. Co. v. Graham*, 357 S.C. 227, 593 S.E.2d 146 (2004).

disregard Respondent's arguments in Section III of its Brief because the remaining sections contain issues and facts that were not presented to the Circuit Court in order to rule on Respondent's Motion to Dismiss. Moreover, Respondent's arguments are not proper additional sustaining grounds. Such arguments would be the subject of a separate Motion to Amend made pursuant to Rule 15(a), SCRCP, as they attempt to ask the Court to look beyond the face of the Answer and Amended Counterclaims.

A. Appellants' Motion to Alter or Amend was made pursuant to Rule 59(e), SCRCP; therefore, there was neither a duty to nor a failure to file a proposed amendment.

Respondent appears to argue that Appellants should not be permitted an opportunity to amend as provided in *Skydive Myrtle Beach v. Horry Cnty*., 426 S.C. 175, 182, 826 S.E.2d 585, 589 (2019), because they filed a Motion to Alter or Amend[4] and did not file a proposed amended pleading with the Circuit Court. Respondent's argument is a red herring, confusing the posture and procedure under which Appellants' request for the opportunity to amend was being made. Appellants' Motion to Alter or Amend was brought pursuant to Rule 59(e), SCRCP. The title of that particular Rule is "Motion to Alter or Amend a Judgment." Rule 59(e), SCRCP. Therefore, Appellants titled their Motion as such, and the judgment Appellants wished to alter or amend pursuant to Rule 59(e), SCRCP, was the granting of Respondent's Motion to Dismiss as to Appellants'

[4] As a point of clarification, Appellants' Motion to Alter or Amend contained an argument section of six and one-half pages requesting reconsideration of the judgment granting in part Respondent's motion to dismiss. As is evident from the headings in that Motion, only Section III.3. relates to the request for an opportunity to amend, and that argument comprises two paragraphs totaling less than one page. (Am. R. pp. 457-458, Motion to Alter or Amend, pp. 8-9). The majority of the argument section relates to requesting reconsideration by distinguishing Respondent's cited case law from its supporting memorandum and the impropriety of inserting Rule 37, SCRCP, without proper consultation or notice. (Am. R. pp. 452-457, *Id.* at 3-8).

fourth counterclaim in the Court's September 25 Order.[5] (Am. R. p. 450, Motion to Alter or Amend, p. 1). The Circuit Court acknowledged it was a motion to reconsider pursuant to Rule 59(e), SCRCP, in its November 18 Order, stating Appellants "have since moved to reconsider these points" and noting "the Court will address the motion to reconsider by subsequent order." (Am. R. p. 036, November 18 Order, p. 13). As part of the Motion to Alter or Amend, Appellants requested an opportunity to cure, specifically 15 days. (Am. R. p. 458, Motion to Alter or Amend, p. 9). As such, Appellants' Motion to Alter or Amend was not a motion made pursuant to Rule 15(a), SCRCP. Rather, it contained a request pursuant to Rule 59(e), SCRCP, to proceed under Rule 15(a), SCRCP, within 15 days, and that request was rejected. Therefore, there was no duty to file a proposed amended pleading with the Circuit Court pursuant to a Rule 59(e), SCRCP, Motion to Alter or Amend. Moreover, Respondent fails to cite any South Carolina precedent supporting such an assertion under this posture.

Further, Respondent's reliance on an Eighth Circuit case is misplaced as it is neither comparable to, nor should be persuasive in, the case before this Court. Specifically, in *In re 2007 Novastar Financial, Inc., Securities Litigation*, 579 F.3d 878 (8th Cir. 2009), the Eighth Circuit was addressing a dismissal pursuant to the heighted pleading requirements of a specific federal statute, the Private Securities Litigation Reform Act ("PSLRA"). As an initial matter, these are not the pleading requirements as required under Rule 8(a), SCRCP, which state only that the claim "shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court's jurisdiction depends, . . . , (2) a short and plain statement of the facts showing that

[5] As noted in Appellants' Statement of the Case (App. Initial Br., p. 5), at the time of the final November 18 Order, the Circuit Court provided that a new Motion to Alter "is not necessary." (Am. R. p. 021, November 17, 2020 Email).

the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled." In *Novastar*, the defendants also alleged in their motion to dismiss that plaintiffs should not be allowed leave to amend their complaint because such effort would be futile. 579 F.3d at 881. No comparable allegations were made by Respondent at the time of its motion to dismiss. Moreover, at the time of the motion in *Novastar*, there was already precedent in the Eighth Circuit providing that a proposed amendment should accompany a request for leave to amend in response to a motion to dismiss.[6] *Id.* at 884-85. Appellants have identified no such precedent in South Carolina. Accordingly, since there was no such duty to file a proposed amendment when the request for amendment was denied, the Court need not consider it as a reason to affirm the Circuit Court's dismissal of Appellants' fourth counterclaim.

B. *Skydive Myrtle Beach* is an appropriate cure in this case.

Should this Court decline to recognize a cause of action for tortious interference with economic interest under South Carolina law or even decline to re-label the fourth counterclaim as one for tortious interference with contractual relations, the Circuit Court's November 18 Order still must be reversed in order to permit an opportunity to cure. *See Skydive Myrtle Beach*, 426 S.C. 175, 182, 826 S.E.2d 585, 589 (finding the dismissal of a commercial lessor's claims against the county without leave to amend was improper and noting that when a "trial court finds a complaint fails 'to state facts

[6] Notably, since *Novastar*, Rule 15(a) of the Federal Rules of Civil Procedure was revised to be substantially different than Rule 15(a), SCRCP. Specifically, Rule 15(a)(1)(B), FRCP, provides that a pleader may amend once as a matter of course within "21 days after service of a motion under Rule 12(b), (e), (f), whichever is earlier." Therefore, *Novastar* is not even necessary in the Eighth Circuit anymore because Rule 15, FRCP, has provided a remedy. Neither *Novastar* nor Rule 15, FRCP, is the law of South Carolina, which is the only law at issue in this case.

sufficient to constitute a cause of action' under Rule 12(b)(6), the court should give" the party an opportunity to amend pursuant to Rule 15(a)). Respondent's unsupported assertion that filing a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, somehow distinguishes this case from *Skydive Myrtle Beach* is inapposite.

In *Skydive Myrtle Beach*, the circuit court dismissed certain of the commercial lessor's claims pursuant to Rule 12(b)(6), SCRCP, without permitting leave to amend. 426 S.C. at 179, 826 S.E.2d at 587. In drafting proposed orders for the circuit court, the commercial lessor asked in writing that it be allowed the chance to cure prior to a final order being entered. *Id.* The circuit court went on to grant the county's motion to dismiss. *Id.* Additionally, the circuit court in *Skydive Myrtle Beach* had not conducted an analysis to determine whether an amendment would be clearly futile. *Id.* at 183, 826 S.E.2d at 589. Such is the case here.

Appellants requested the opportunity to amend and renewed that request pursuant to Rule 59(e) prior to the entry of the November 18 Order. Here, the Circuit Court did not offer any analysis of the futility or prejudice of an amendment in either the November 18 Order or the November 30 Order. (Am. R. pp. 035-36, November 18 Order, pp. 12-13; Am. R. p. 053, November 30 Order, p.1). Instead, the Circuit Court simply denied Appellants the opportunity to cure the perceived deficiency. (Am. R. pp. 035-36, November 18 Order, pp. 12-13; Am. R. p. 053, November 30 Order, p.1).

C. An amendment to Appellants' fourth counterclaim would neither be prejudicial nor futile.

Since Appellants' Motion to Alter or Amend was brought pursuant to Rule 59(e), SCRCP, as a request for the Circuit Court to reconsider its dismissal of Appellants' fourth counterclaim, the Circuit Court did not consider whether Respondent had a valid

reason for amendment to be denied. However, should the Court consider Respondent's arguments in Section III, Respondent's arguments still fail, and the November 18 Order should be reversed.

Rule 15(a), SCRCP, provides that, if after the time as of right has passed, a party may amend a pleading by leave of court or by written consent, and "leave shall be freely given when justice so requires and does not prejudice any other party." Trial courts are permitted to deny such a motion if the opposing party shows a valid reason for such denial. *See Skydive Myrtle Beach*, 426 S.C. 175, 182, 826 S.E.2d 585, 589. However, 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 claim, and a court's "failure to exercise its discretion is itself an abuse of discretion." *Patton v. Miller*, 420 S.C. 471, 490–91, 804 S.E.2d 252, 262 (2017).

1. *An amendment to Appellants' fourth counterclaim does not amount to undue delay and would not prejudice Respondent.*

Respondent has not experienced undue delay and would not be prejudiced by an amendment of Appellants' fourth counterclaim; therefore, it should not be considered an additional sustaining ground. While Rule 15, SCRCP, protects a party from being prejudiced, having to defend on the merits of a valid claim is not prejudice. *Patton,* 420 S.C. at 491–92, 804 S.E.2d 252, 262–63. "Rule 15 prejudice is some result flowing from the amendment that puts the non-moving party at a disadvantage in defending the merits." *Id.*

As an initial matter, Respondent's arguments and procedural history narrative

should not be considered as they go far afield of what is before the Court.[7] Although this case was initially filed on March 7, 2017, it was not until December 21, 2017 that the Circuit Court set aside Respondent's entry of default against Appellants for an earlier version of the Complaint because Respondent refused to let Appellants out of default when asked and even though Respondent nullified the earlier version of its Complaint when it amended the Complaint for a second time on June 9, 2017, such that Appellants could timely answer on August 17, 2017. The delay from August to December 2017 is of Respondent's own making. As a result, the litigation could not really commence until 2018.

As to the argument there was a delay in bringing a claim since Appellant Harake testified about the potential damages, Respondent fails to take into account that the only duty on parties when a cause of action begins to accrue is to bring the claim within the relevant statute of limitations. *See e.g., Dean v. Ruscon Corp.*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996) (defining the discovery rule as it relates to statutes of limitation and noting that the statute of limitations only begins to run "when a cause of action

[7] Appellants' silence should not be taken as consent to the way in which Respondent has spun the procedural history of this matter. Appellants deny the commentary Respondent has inserted as procedural history in its Brief and again point out the Respondent has omitted many of its own actions in drafting its narrative. By way of example, there has been no confirmation any money was used "inappropriately" as Respondent alleges. That is an issue in the underlying litigation that Respondent must prove before a jury and which Appellants wholeheartedly deny. Moreover, since Respondent insists on bringing up defendant Katherine Harake who was not a party to this litigation on June 1, 2018 until August 3, 2020, it should be noted that the claim made against her in the Second Amended Complaint was simply untrue, and when documents were produced showing it was false, it was properly dismissed. However, the claims brought against her in the Third Amended Complaint and that survived her motion to dismiss, are wholly separate from the initial claim, and such claims have been denied. Contrary to many assertions made by Respondent, when Katherine Harake was not a party to this litigation, she was not under a duty to respond to discovery, and any documents sought from her should have been pursued by subpoena.

reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct."). As to the fourth counterclaim, the statute of limitations is three years, and Appellants first asserted it with well over a year left in the statute of limitations. Rather than citing authority, Respondent engages in wild speculation about how it believes Appellants came to their decision to file when they did. As Appellants asserted the fourth counterclaim while they were still well within their rights under the statute of limitation and within the scheduling order, there was no undue delay.

Additionally, Respondent is not at a disadvantage in "defending the merits." As admitted by Respondent, discovery is not complete. In fact, Respondent has stated multiple times it has a pending motion requesting additional discovery time with Appellant Sarmad Harake of which he informed the Circuit Court during the September 22 hearing.[8] (Am. R. p. 492, lines 15-18, Hrg. Tr. p.12:15-18). Appellants' counsel even agreed during the hearing that should the fourth counterclaim proceed, Respondent's counsel would not be precluded from reopening Harake's deposition for the limited purpose of inquiring about it. (Am. R. p. 502, lines 5-12, Hrg. Tr., p. 22:5-12). Further, Respondent already knows a good portion of what Appellant Harake's testimony will be as Respondent admits Appellant Harake previously testified about the basis for the fourth counterclaim. (Am. R. p. 473, lines 1-17, Harake Depo. Tr., Vol. 2, pp. 286:9-291:17). Respondent has also noted it already intends to depose Appellants' accountant, Morris

[8] Importantly, while Respondent's Brief insinuates that this pending motion is about asking Appellant Harake only about new documents, the reason for the opposition was that Respondent indicated it was not going to be limited in time or topics. (Am. R. p. 230, 8/3/20 Memo. in Opp., p. 7).

Gocial, and any questions related to the fourth counterclaim can be asked then as well. Additionally, documents, including the lending agreements, evidencing the transactions in the Amended Answer and Counterclaim related to the fourth counterclaim were produced in this litigation before the fourth counterclaim was asserted. Accordingly, Respondent would not be prejudiced.

2. *An amendment to Appellants' fourth counterclaim would not be clearly futile.*

Only in rare cases, a "trial court may deny a motion to amend if the amendment would be clearly futile." *Skydive Myrtle Beach*, 426 S.C. 175, 182-83, 826 S.E.2d 585, 589. This is not that rare case, and Appellants' amendment would not be clearly futile. As the Supreme Court explained in *Skydive Myrtle Beach*, the case of *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010), *rev'd on other grounds,* 401 S.C. 1, 726 S.E.2d 242 (2012), exemplified a "clearly futile" amendment as the "proposed new defendant was the attorney who was given printed emails, but had no direct access to the email account, and the alleged liability extended under the law only to persons who 'actually engaged' in accessing the email account." 426 S.C. at 182-83, 826 S.E.2d at 589, n.2. Likewise, in *Higgins v. Med. Univ. of S.C.*, this Court found an amendment was futile because the specific services being complained of were protected by qualified immunity under a statute. 326 S.C. 592, 604-05, 486 S.E.2d 269, 275 (Ct. App. 1997). In finding that Skydive's dismissed claims were not clearly futile, the Supreme Court noted that "it is not our role to determine whether the allegations Skydive might make in an amended pleading will state a valid claim," but the Supreme Court found it "could not definitively say it is impossible for Skydive to plead a valid claim." *Skydive Myrtle Beach*, 426 S.C. at 187, 826 S.E.2d at 591.

Should the Court decide to entertain Respondent's additional sustaining ground, the fourth counterclaim is not clearly futile such that an amendment should not be permitted. To avoid rearguing the validity of the claim, Appellants crave reference to the arguments they have made herein and in Appellants' Initial Brief. Accordingly, the Circuit Court's November 18 Order should be reversed.

3. *Bad faith is not an element of the Rule 15 analysis, but even considering such allegations arguendo, Appellants did not act in bad faith.*

In suggesting an additional sustaining ground based on unfounded allegations of bad faith, Respondent relies exclusively on a Michigan district court case and a Third Circuit case. However, Respondent's allegations of bad faith are untrue in the first instance and regardless are unrelated to the issue on appeal. Respondent tries to insert unrelated discovery matters into this appeal, and that attempt should be rejected. Moreover, as stated in Appellants' Answer and Amended Counterclaims, Appellants deny Respondent's allegations and legal conclusions regarding such claims against them.

Appellants have not identified any instance of a South Carolina court upholding denial of a motion to amend a pleading for bad faith, nor have they found an example of what would be bad faith in South Carolina in such a context. *Minor v. Northville Pub. Sch.*, 605 F.Supp. 1185 (E.D. Mich. 1985) is inapposite. In that case, although noting that bad faith "is interrelated with inquiry into the excuse for delay," the Eastern District of Michigan found the defendant's claim that the plaintiff acted in bad faith was not supported by the record. *Id* at 1201. Likewise, the Third Circuit in *Adams v. Gould, Inc.*, found that although "delay can itself be evidence of bad faith," without extrinsic evidence of bad faith, there was not "any bad faith justifying the denial of leave to amend." 739

F.2d 858, 868 (3d Cir. 1984).

While Respondent points to five potential areas of "bad faith," Respondent cites no case law to provide that the issues of which he claims are bad faith, and several of the reasons alleged have nothing to do with the fourth counterclaim. Generally, acting within the statute of limitations and within the scheduling order for a particular case, as was done by Appellants here, is not considered bad faith. Additionally, as discussed above, Respondent has already included the reopening of Appellant Harake's deposition in the discovery it believes remains.[9]

Moreover, Respondent's second assertion of "bad faith" has nothing to do with Appellants' fourth counterclaim, and it appears Respondent is trying to distract from the issues at hand by presenting its theory of how other discovery motions and objections were made. Nonetheless, Respondent does not cite any authority to support its position.

As to Respondent's third assertion of "bad faith," agreeing to an amendment does not somehow make a valid responsive pleading bad faith. Under the South Carolina Rules of Civil Procedure, an amended pleading gives rise to the right to a responsive pleading, and there is nothing precluding a party from amending its responsive pleading at that time. Further, there is no evidence supporting Respondent's fourth assertion of "bad faith" that Appellants were "playing the market in the hope that the value of Paysend UK would continue to rise." Again though, Respondent fails to cite authority that filing a claim within the applicable statute of limitations constitutes bad faith. Moreover, the portion of Appellant Harake's deposition cited by Respondent does not

[9] Although Respondent points to the November 4, 2020 Consent Amended Scheduling Order and the December 1, 2020 Consent Amended Scheduling Order, such orders were requested by Respondent after the filing of the fourth counterclaim and consented to prior to the November 18 Order, November 30 Order, and timely Notice of Appeal.

mention the market at all. (Am. R. p. 478, lines 4-8, Harake Depo. Tr., Vol. 2, pp. 291:4-8).

Finally, Respondent does not explain how it is bad faith, as alleged in its fifth assertion, to file a claim that is "factually and legally independent of the" other counterclaims in the Answer and Amended Counterclaims. Accordingly, even if the Court considers Respondent's arguments in Section III of its Brief (which it should not), Respondent's arguments do not rise to the level of an additional sustaining ground. Rather, Appellants should have been given the opportunity to cure by the Circuit Court, and as such, the November 18 Order should be reversed.

III. The Circuit Court erred in Dismissing And/Or Striking The Sufficiency Of A Theory Of Relief Based On A Discovery Issue That Was Not Properly Before It.

It was error for the Circuit Court dismiss or strike Appellants' fourth counterclaim pursuant to "Rules 12(b)(6) and/or Rule 12(f), SCRCP" for lack of a motion for protective order, especially given the agreement between counsel as raised by Appellants.[10]

A. Failing to file a Motion for Protective Order is not a valid reason to strike Appellants' Fourth Counterclaim.

Respondent has not cited any authority for the proposition that failing to file a motion for protective order is a valid reason to strike a counterclaim for insufficiency in pleading. Appellants have not identified any support for this theory in South Carolina

[10] While Respondent's Brief claims Appellants "argued" the existence of the agreement between parties, Appellants' counsel, as an officer of the Court, made the representation because it happened. Although Respondent's counsel acknowledged the existence of that agreement was not going to be fought in the hearing, Respondent now appears to ask the Court to question it. (Am. R. p. 481, Hrg. Tr. p. 12).

law. Appellants also have not located a South Carolina case in which a counterclaim was stricken when a motion for protective order was not filed after an instruction not to answer. Rather, Rule 30(j)(3), SCRCP, provides that the remedy for not filing a motion for protective order is that "the deposition may be reconvened" to ask the question previously objected to as the objection would have been waived. No such request was made to reopen Appellant Sarmad Harake's deposition after Respondent provided its so-called notice. [11] Therefore, there has not been a discovery violation.

The cases Respondent cites do not stand for the proposition that "sanctions" are available when a motion for protective order is not filed after an instruction not to answer. *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003), does not use the word "sanctions" anywhere in the opinion and finds only that the case should be remanded for a new trial after the deposition was reconvened because the circuit court erred in denying the plaintiff the right to reconvene a deposition pursuant to Rule 30(j)(3), SCRCP. Likewise, *Richardson on Behalf of 15th Cir. Drug Enf't Unit v. Twenty-One Thousand & no/100 Dollars ($21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 597, 846 S.E.2d 14, 15 (Ct. App. 2020), is inapposite because it invokes Rule 37(d), SCRCP, which governs instances in which a party does not attend its own deposition or in which there has been a failure to answer written discovery at all. In *Richardson*, a civil forfeiture case, the defendant served discovery, the Solicitor never responded, and the Solicitor was allowed to call witnesses in a bench trial that had not

[11] While Respondent attempts to argue its Motion to Compel requesting additional deposition time with Sarmad Harake should have made it "clear that consultation was futile," Respondent neither raised the instruction not to answer in consultation about whether that motion would have to be filed nor in the motion itself. (Am. R. p. 270, Gibbs Supp. Memo. Mot. to Compel, pp. 1-12).

been provided in discovery responses. *Id.* As a result, the Court found the defendant had the right to request sanctions without a motion to compel pursuant to Rule 37(d), SCRCP. *Id.* at 599, 846 S.E.2d at 17. Thereafter, it went on to find the trial court's failure to address the sanctions request prior to trial was enough to reverse the trial court's forfeiture order and remand to allow discovery to be completed before a new trial. *Id.* at 601, 846 S.E.2d at 18.

However, since Respondent's request to strike as part of its motion to dismiss served as an additional challenge to the sufficiency of the pleading, it is treated as a Rule 12(b)(6), SCRCP, motion. *See Grazia v. S.C. State Plastering, LLC*, 390 S.C. 562, 567, 703 S.E.2d 197, 199 (2010) (stating "[a] motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the [pleading], is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP") (citing *McCormick v. England,* 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct. App. 1997)); *see also Menezes v. WL Ross & Co.*, 392 S.C. 584, 709 S.E.2d 114 (Ct. App. 2011) (utilizing same standard of review to evaluate a motion to strike a counterclaim under Rule 12(f), SCRCP, as when reviewing a motion pursuant to Rule 12(b)(6), SCRCP). To the extent Respondent argues it is not challenging the sufficiency of the pleading by raising Rule 12(f), SCRCP, Respondent still has not provided authority finding that an instruction not to answer during a prior deposition somehow warrants striking a later-amended counterclaim, especially when the pleading does not contain "redundant, immaterial, impertinent or scandalous matter." *See* Rule 12(f), SCRCP.

B. Arguments pursuant to Rule 37, SCRCP, were not properly before the Circuit Court and should not be an additional sustaining ground.

Respondent's request for Rule 37, SCRCP, to be an additional sustaining ground

is another failed red herring. Although Rule 37, SCRCP, was not raised in Respondent's initial motion to dismiss and was first raised in its supporting memorandum, attempting to make Rule 37, SCRCP, a ground for relief at all is inappropriate. Respondent did not have any consultation as to such ground as required pursuant to Rule 11, SCRCP (stating "***[a]ll*** motions filed shall contain an affirmation that the movant's counsel ***prior to filing the motion*** has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion, unless the movant's counsel certifies that consultation would serve no useful purpose, or could not be timely held.") (emphasis added). While Rule 11, SCRCP, provides limited exceptions, a motion pursuant to Rule 37, SCRCP, is not one of them. Therefore, Rule 37, SCRCP, was not properly before the Circuit Court and is not properly before this Court. While Respondent appears quick to point out communications it does not believe happened ***after*** it filed its motion to dismiss, it had an obligation to communicate ***before*** its motion if it intended to pursue sanctions under Rule 37, SCRCP. Respondent has not provided authority to the contrary.[12]

Assuming *arguendo* the Court considers Respondent's request, Respondent could only request relief pursuant to Rule 37(b), SCRCP, as the other subsections unquestionably do not apply. Specifically, Rule 37(b), SCRCP, which is titled "Failure to Comply with Order" provides that if "a party . . . fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule . . . , the

[12] Although Respondent cites *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App 1987), that case is not comparable to this one as the underlying motion in *Downey* was related to a total failure to participate in discovery. In that case, the "single issue presented" was whether the trial court erred in ruling on the appellant's sanctions motion for the respondent's "failure to answer interrogatories or attend his deposition." *Id.* at 43, 362 S.E.2d 317. The Court remanded for a new trial finding that the sanction of $50 was not enough under the particular circumstances. *Id.*at 45, 362 S.E.2d at 318-19.

court in which the action is pending may make such orders," including striking pleadings. Ordering sanctions pursuant to Rule 37(b), SCRCP, "should not be administered lightly" and is considered a "severe remedy, [in which] the trial court must determine there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 542-43, 489 S.E.2d 679, 682 (Ct. App. 1997). Additionally, "[t]he sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case." *Id.*

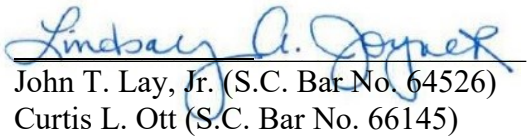
Here, Respondent never identified an order it believed Appellants violated, nor did the Circuit Court determine such an order existed. Since there is no order here to permit an analysis under Rule 37(b), SCRCP, and Rule 30(j)(3) provides the remedy of reopening the deposition to ask the particular question—not to strike a pleading, Rule 37, SCRCP, is not a proper additional sustaining ground.

CONCLUSION

This Court should reverse the Circuit Court's dismissal of Appellants' fourth counterclaim. Appellants' fourth counterclaim pleads facts sufficient to state a valid claim or theory of relief, or to the extent the Court believes such claim should have a different title, Appellants should be given the opportunity to cure.

Respectfully Submitted,

GALLIVAN, WHITE & BOYD, P.A.



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