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SC Court of Appeals

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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions, Statutes & Rules

The South Carolina Supreme Court gave the Skydive Myrtle Beach ("SDMB") the right to amend its Complaint in 2019. On March 12, 2020, however, the circuit court then denied SDMB the right to amend whatsoever – *apparently* sua sponte – requiring this third appeal. Horry Count's rationales in support in its response brief are incorrect, as set forth below.

1.

In Section 1 of its response brief, Horry County ignores the authority presented by SDMB in its Argument 1 of the Initial Brief. This is tantamount to a failure to respond at all and a confession that SDMB is correct. *See Turner v. South Carolina Dep't Environ. Control*, 377 S.C. 540, 547, 661 S.E.2d 118, 121 (Ct. App. 2008) ("[if a] respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct."); *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) ("Issues raised in a brief but not supported by authority may be deemed abandoned and not considered on appeal.").

Instead, Horry County argues – *but without showing anything or even describing it* – that Horry County had 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 Authority." [Resp. Br. p. 9]. This is simply not true; the parties never engaged in 'extensive' discovery in this case.

Its lack or prejudice argument is equally specious. *Pool v. Pool*, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998) ("the prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it."). The party *opposing* the motion to amend has the burden of establishing prejudice." *Pruitt v. Bowers*,

330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). The required showing of prejudice to Horry County is not met by Horry County saying that SDMB is not prejudiced; such an argument is ridiculous.

2.

In its second argument, Horry County contends that "the futility of Skydive's motion to amend is clear on the face of its proposed amended complaint." Again, this is specious. As argued in SDMB's initial brief, "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.'" [Initial Br., p. 9] (citing *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 183, 826 S.E.2d 585, 589 (2019)).

Basically, Horry County wants the Court of Appeals to find futility where the circuit court never did, nor where there is any there is any to be found – as s proposed amended complaint cannot be a source *of a defendant's prejudice*!

Likewise, raising the doctrine of *res judicata* is equally spurious. *Judy v. Judy,* 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) ("*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties."). Because this isn't the same action against the same parties, so res judicata could never apply here.[1]

[1] Again, the Appellant points to *Johnson v. Oroweat Foods Co.,* 785 F.2d 503, 510 (4th Cir. 1986) (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"); *Katyle v. Penn. Nat. Gaming, Inc.,* 637 F.3d 462, 471 (4th Cir. 2011) and *Davis v. Piper Aircraft Corp.,* 615 F.2d 606, 61 3 (4th Cir. 1980), *cert. dismissed,* 448 U.S. 911.

In the same manner, Horry County's reliance on *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000) is equally misplaced. Appellant did not amend in order to change the parties; it simply added one more party to its current list. Respondent seems to be arguing that the addition of Arrigo Carotti as a proposed defendant somehow serves to render the entire motion to amend moot. It does not.

Horry County finally argues that the Court of Appeals should rely on the case of *Couram v. Davis*, No. 2015-UO-065, 2015 WL 477266 (Ct. App. 2015). This case is not on point (even if the Court of Appeals could consider it) because Courland was not arguing – as SDMB does here – that the amendments support the same same causes of action. Here, in fact, the amended claims are part of a pattern by Horry County to deprive Appellant's of its rights. By contrast, *Courland* with a case that was unable to even get off the ground because of the statute of limitations, and also failed to state a claim upon which relief may be granted.

3.

In this argument, Horry County pays zero attention to the tortured procedural history of the case, but instead argues that the *only* way for the appellant to argue equitable tolling it to show *only an extraordinary event beyond the moving party's control* – and declares no such event took place. [Resp. Br., p. 14].

But this is *not* the holding of *Hooper v. Ebenezer Sr. Services & Rehabilitation Center*, 386 S.C. 108, 116-117, 687 S.E.2d 29, 33 (2009), which SDMB quoted fully in its initial brief. (Initial Br. p. 12). As *Hooper* states, "[t]he 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." *Id*. (quoting *Hausman v. Hausman,* 199 S.W.3d 38, 42 (Tex. App. 2006)). *Hooper* says each individual case must be judged according to its own merits as to whether equitable tolling applies, which Appellant go into in some detail. Here, Horry County's arguments are tantamount to a failure to respond at all to the Appeal points raised by SDMB in its Argument 3, and a confession that SDMB is correct. *See Turner v. South Carolina Dep't Environ. Control*, 377 S.C. at 547, 661 S.E.2d at 121; *Broom v. Jennifer J.,* 403 S.C. at 115, 742 S.E.2d at 391.

4.

In this section of its response brief, Horry County misstates the purpose of SDMB's proposed amended complaint. SDMB *knows* that Horry County supplied the FAA with 112 safety violations which were never substantiated by the FAA's reporting measure – instead they came from 'Unusual Incident Reports' formulated by Horry County. Thus, these are allegations of ongoing conduct for which SDMB does not even change its causes of action in the proposed amended complaint (but does reduce the number of such causes).

As Appellant argued in its initial brief, "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'. " [Initial Brief, p.14]. Once again, in its response brief, Horry County ignores the arguments made by Appellant. *See Turner v. South Carolina Dep't Environ. Control*, 377 S.C. at 547, 661 S.E.2d at 121; *Broom v. Jennifer J.,* 403 S.C. at 115, 742 S.E.2d at 391.

5.

In Argument 5 of its initial brief, SDMB contended that this appeal meets the standard of S.C. Code Ann. § 14-3-330(2)(a), pursuant to the holdings in *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017) and *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 183, 826 S.E.2d 585, 589 (2019). Therefore, SDMB argued that the Court of Appeals must follow *Patton* and *Skydive*. SOUTH CAROLINA CONST., Article V, § 9; *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").

In response, Respondent argues that the holdings of *Baldwin Construction Co. v. Graham*, 357 S.C. 227, 592 S.E.2d 136 (2004), *Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988) – and a number of even older cases – are cited as controlling. Respondent is missing the point. All of the cases cited by Respondent *predate* both *Patton* and *Skydive*, which are in fact controlling. Respondent has once again ignored the cases cited by SDMB. If Respondent wishes to have the appeal dismissed, it should move to do so, but it really knows that *Patton* and *Skydive* control.

CONCLUSION

SDMB respectfully requests that the Court exercise its power under *Turner v. South Carolina Dep't Environ. Control*, 377 S.C. at 547, 661 S.E.2d at 121 and *Broom v. Jennifer J.*, 403 S.C. at 115, 742 S.E.2d at 391 to reject Horry County's arguments, and to reverse the circuit court based on the Appellant's arguments (un-responded to by Respondent) in its initial brief.

Respectfully submitted,

/s Robert B. Varnado

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the ***Appellant's Reply 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 August 12, 2021, to the following

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August 12, 2021

Via Email only
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Re: ***Appeal: Skydive Myrtle Beach, Inc. v. Horry County***
Appellate Case No.: 2021-0217
Our File No. 6247

Dear Ms. Kitchings:

Enclosed for filing please find the ***Appellant's Reply Brief***. With best regards, I remain

Very truly yours,

BROWN AND VARNADO LLC

/s Robert B. Varnado

Robert B. Varnado

RBV
cc: Michael W. Battle, Esquire (via email only)
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