THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Civil Action Case No. 2019-CP-26-07922
Appellate Case No. 2021-000356

Sierra Doherty..... Appellant

v.

Coastal Carolina University..... Respondent

FINAL BRIEF OF THE APPELLANT

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STATEMENT OF THE CASE

On or about January 3, 2018, Winter Storm Grayson brought freezing rain, ice and snow to Horry County, South Carolina. At the time, Appellant Sierra Doherty (Doherty) was a full-time student, registered and attending classes at Respondent Coastal Carolina University (CCU). Due to known and acknowledged hazardous conditions created by Winter Storm Grayson, CCU activated their emergency operating levels and closed its campus January 3-4, 2018. On January 5, 2018, CCU re-opened campus, still under their emergency operating level system, on a delayed schedule resuming classes at 11:00 a.m. on Friday, January 5, 2018.

Specifically, the known and acknowledged hazardous conditions that caused, in part, CCU to activate their emergency operating levels were that the known and expected conditions, which were going to be in place over the weekend, were conditions that were right for melt/refreeze ice hazards to occur throughout campus (R. pp. 111 - 118).

On January 8, 2018, CCU deactivated their emergency operating levels, returning to normal operations. At approximately 08:45 a.m. the morning of January 8, 2018, Sierra was on the re-opened campus, walking to class on the sidewalk between the Wall Building and Brittain Hall, when she encountered a patch of ice, went airborne, tried to break her fall with her arm and suffered a serious injury to her arm which required surgery and therapy and left her with scarring.

It is uncontested that Sierra was a student and attending classes at CCU's Horry County campus and that she suffered this fall due to hazardous ice conditions on the sidewalk.

CCU originally filed an *Answer* in this matter on December 18, 2019, but subsequently moved to amend their answer via motion on April 22, 2020, to assert the ice exception of S.C. Code §15-78-60(8) as an affirmative defense. (R. pp. 19 - 21) (R. p. 52)

Doherty opposed that motion, arguing such amendment was unnecessary, as written discovery produced to date (specifically an email documenting the cause of Doherty's fall being a melt-refreeze hazard that had developed overnight) combined with the *Etheridge* requirement that the gross negligence standard of S.C. Code §15-78-60(23) be read into any application of the ice exception, would entitle Doherty to have the trial court consider matters outside the pleadings and convert any 12(b)(6) motion into a motion for summary judgment. (R. pp. 56 - 61)

The trial court granted CCU's motion to amend and CCU filed their amended answer November 5, 2020. (R. p. 1 - 3) (R. p. 28 – 31)

On November 24, 2020, Doherty's counsel sent CCU's counsel an email informing the defense of matters of designation for a 30(b)(6) deposition and asking for dates for such deposition:

Joe:

I'd like to take a 30(b)(6) of CCU on the following matters of designation:

1. What maintenance, inspection and precautions were taken for the inclimate weather in the lead up to Ms. Doherty's fall on Jan. 8, 2018;
2. What maintenance, inspection and precautions were taken for the inclimate weather on Jan. 8, 2018;
3. What maintenance, inspection and precautions are usually taken by CCU for inclimate weather;
4. The investigation and reporting of Ms. Doherty's fall;
5. Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
6. Other falls/slips/trips of similar nature during periods of similar inclimate weather (winter storms) for the 3 years preceding and 3 years since the fall.

If you can give me some dates that work for you and your folks, we can try to get that scheduled.

On December 1, 2020, having received no response, Doherty's counsel followed up about his 30(b)(6) request. CCU's counsel responded via email that same day, stating that he had the 12(b)(6) motion pending and preferred to postpone depositions until after the motion was heard and ruled upon.

On December 16, 2020, Doherty's counsel electronically served CCU's counsel with a *Notice of Video Deposition of Defendant Coastal Carolina University pursuant to Rule 30(B)(6) S.C.R.C.P*, said deposition scheduled to be conducted remotely via Zoom on January 12, 2021. That notice was accompanied by cover correspondence that noted:

> …I am sorry we keep missing each other. As you are aware, I sent you an email on November 24th that outlined matters of examination for a 30(b)(6) deposition so that you could provide me with some dates that worked for you and your client. After I followed up to check on getting the dates on December 1st, you replied stating you wanted to wait until **after** your 12(b)(6) was heard…
>
> As such, I have gone ahead and noticed the deposition for January 12, 2021. I do not like having to blind notice depositions. If this date does not work for you or your client, I would be more than willing to reschedule,

> provided there is an agreement to have the deposition take place **before** any hearing on the motion. Otherwise, I would be doing my client a disservice not to pursue this deposition pursuant to the rules, which allow for the deposition to take place with just ten (10) days notice. I have done my best to select the closest date that would hopefully not conflict with any holiday plans.
>
> Please feel free to contact me to discuss. I left my mobile number on my most recent voicemail since we have been playing phone tag, but will provide it again (843-XXX-XXXX).

Counsels spoke the next day about the matter with CCU's counsel indicating his intent to file a motion for protective order. Doherty's counsel indicated he would file a joint opposition to both motions so that the matters could be submitted to the Court as expeditiously as possible.

CCU filed a *Motion for Protective Order* on December 17, 2020.

Doherty filed a joint response in opposition to November 13th 12(b)(6) motion and December 17th motion for protective order. Those motions were placed on the January 27, 2021 roster with the Hon. Benjamin H. Culbertson.

At CCU's counsel's request, a status conference was requested with Judge Culbertson and took place remotely via WebEx on January 6, 2021. The purpose of that status conference was that CCU wanted to delay the scheduled January 12th deposition of their 30(b)(6) witness until after the January 27, 2021 motions hearing. The trial court denied that request.

CCU's counsel subsequently requested that the deposition be rescheduled with the understanding that CCU would withdraw their 12(b)(6) motion to give Doherty time to take the deposition and get the transcript before the motion was heard. Doherty agreed, CCU's counsel informed the Clerk of Court's office of his withdrawal of the motions with leave to refile at a later date and the deposition of CCU's 30(b)(6) witness, Stephen

K. Harrison, Vice President Auxiliary Enterprises was ultimately conducted on January 21, 2021.

The day after that deposition, January 22nd, CCU refiled their 12(b)(6) motion and a memorandum in support. (R. pp. 62 - 69)

Doherty filed a response in opposition on February 5, 2021. (R. p. 70 – 154)

A hearing was held on CCU's 12(b)(6) motion on March 2, 2021 via WebEx before the Honorable Benjamin H. Culbertson. At the conclusion of that hearing, the trial court asked both sides to submit proposed orders. Both sides did so. The trial court adopted CCU's proposed order, dismissing Doherty's case pursuant to Rule 12(b)(6) SCRCP on March 4, 2021. (R. pp. 32 – 48) (R. pp. 217 – 228) (R. pp. 4 – 9)

Doherty subsequently filed a timely motion to alter/amend/reconsider and a corresponding motion to amend on March 8, 2021. CCU filed a response in opposition to Doherty's motion to alter/amend/reconsider on March 15, 2021. (R. pp. 155 – 216)

The trial court denied Doherty's motion to alter/amend/reconsider via a Form 4 Order filed March 16, 2021. (R. pp. 10 - 12)

This appeal follows.

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING DOHERTY'S CASE BECAUSE A MATERIAL QUESTION OF FACT EXISTED FOR A JURY TO CONSIDER AS TO WHETHER CCU HAD COMMITTED AN ACT PROXIMATELY CAUSING DOHERTY'S INJURY.

CCU's 12(b)(6) motion was based on the ice exception to the waiver of liability under the SCTCA:

> The governmental entity is not liable for a loss resulting from: (8) snow or ice conditions or temporary or natural conditions on any public way or other public place due to weather conditions unless the

> snow or ice thereon is affirmatively caused by a negligent act of the employee..

S.C. Code §15-78-60(8).

In its order granting CCU's 12(b)(6) motion, the trial court stated: "The complaint does not allege that a negligent *act* of [CCU] caused the ice to be on the sidewalk. It only alleges that a negligent *omission* of [CCU] caused the ice to be on the sidewalk." (R. p. 5)

Doherty specifically pled the following:

> ¶5: Due to inclement weather and dangerous travel conditions, CCU closed its campus January 3-4, 2018 and re-opened on a delayed schedule resuming classes at 11:00 a.m. on Friday, January 5, 2018;
>
> ¶12a: Failing to adequately and property treat the ice covered walkways before re-opening campus to the students, creating an unsafe condition for students at Coastal Carolina University, South Carolina in a reasonably safe condition;
>
> ¶12b: Failing to adequately and properly remedy the unsafe condition that the Defendant knew or should have known existed;
>
> ¶12c: Failing to adequately and properly warn of the unsafe condition of the walkway.
>
> ¶16: That the Defendant CCU owed a duty to the Plaintiff and any patron/invitee of Coastal Carolina University, to properly and adequately maintain the premises in question in a safe condition so there was no hazard to anyone making use of the walkways;
>
> ¶18: That the Defendant CCU breached its duty to the Plaintiff…in the following particulars: a) creating an unsafe condition by failing to adequately and properly keep the walkway clear and in a reasonably safe condition; b) failing to adequately and properly remedy the unsafe condition that Defendant CCU knew or should have known existed;

(R. pp. 24 – 26).

The factual allegations that CCU closed and then reopened campus due to the hazardous conditions are not omissions. They are affirmative acts taken by CCU.

Allegations of failing to adequately and properly perform certain acts (like inspections, treating sidewalks, warning students) are allegations of "acts" sufficient to

satisfy the requirements of S.C. Code §15-78-60(8), as failing to "adequately and properly" do something can be inferred to be "action" and not just omission. Performing a task insufficiently or improperly is an action.

To ensure substantial justice to the parties, the pleadings must be liberally construed. Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

"[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

If someone fails to "properly treat the ice covered walkways before reopening campus" and "properly remedy the unsafe condition that [they] knew or should have known existed," that is not necessarily an "omission." Merriam-Webster's defines "properly" as "in a way that is acceptable or suitable" or "in a way that is accurate or correct."[1] Inadequately or improperly doing something is still action.

Similarly, if someone fails to "properly treat the ice covered walkways before reopening campus" and "properly remedy the unsafe condition that [they] knew or should

[1] Merriam-Webster online definition search conducted on 12/17/2020 from https://www.merriam-webster.com/dictionary/properly

have known existed," that is not just an "omission" of adequacy and propriety. It is also an act of substandard care.

"The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

If any triable factual issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402 (1991).

In short: bad, improperly performed or insufficient acts are still acts. As to whether the "acts" as pled in the complaint "affirmatively caused" the ice that injured Doherty, that issue presents a material question of fact for a jury to consider.

II. THE TRIAL COURT ERRED IN FAILING TO APPLY THE GROSS NEGLIGENCE STANDARD OF §15-78-60(25) TO THE ICE EXCEPTION OF §15-78-60(8).

Under the "Exceptions to waiver of immunity" section of the S.C. Tort Claims act, it states that "the governmental entity is not liable for a loss resulting from...(25) responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student...**except when the responsibility or duty is exercised in a grossly negligent manner**." S.C. Code 15-78-60(25), emphasis added.

"When an exception containing the gross negligence standard applies, **that same standard will be read into any other applicable exception**." Steike v. SCDLLR, 336 S.C. 373 (S.C. 1999); Etheredge v. Richland School Dist. 1, 330 S.C. 447, 463 (Ct. App. 1998). In *Etheredge*, the trial court had originally granted summary judgment to the School District on several of the exceptions to the waiver of immunity under S.C. Code §15-78-60. In reversing the trial court, the *Etheredge* court specifically found:

> Where an action is brought against a governmental entity for injuries or death allegedly caused to a student by the entity's gross negligence in the exercise of its duty of supervision, protection and control of the students in its custody in accordance with subsection (25) of 15-78-60, **all other subsections of 15-78-60 providing exceptions to the waiver of governmental immunity, must be read in light of subsection (25), which provides an exception to immunity where the governmental entity exercises its responsibilities or duties in a grossly negligent manner**.

Etheredge at 463, 246, emphasis added. *See* Jackson v. S.C. Dept. of Corr., 301 S.C. 125, 390 S.E.2d 467 (Ct. App. 1989).

Doherty argued that *Etheredge* represents an "exception to the exception" by imposing the gross negligence standard on all exceptions if it is alleged that a student's loss was suffered by a governmental entity's gross negligence. The complaint in this matter alleges gross negligence against CCU (R. pp. 25 – 26) in duties they owed Doherty, an admitted full-time student, alleging loss suffered on a campus that CCU controlled to the point of admittedly closing and reopening said campus to students like Doherty.

Notably, S.C. Code §15-78-60(25) does **not** contain the limiting "act" language CCU relied on so heavily and upon which the trial court's order of dismissal was based. It simply states that if the duty owed to any student is "exercised in a grossly negligent manner," then there is, as Doherty argued, an "exception to the exception."

"Gross negligence is the intentional, conscious failure to do something which one ought to do or the doing of something which one ought not to do." Etheredge at 454-455.

Since *Etheredge* states that the gross negligence "exception to the exception" applies, then Doherty has a valid claim even if the only conduct she alleged is the "conscious failure to do something which one ought to do."

CCU argued and the trial court agreed that there was no need to look at S.C. Code §15-78-60(25) because "when the accident occurred, defendant was not supervising,

protecting, or controlling the plaintiff/student who was merely walking to class on campus" citing to the South Carolina Supreme Court's decision in Gardner v. Biggart, 308 S.C. 331, 417 S.E.2d 858 (1992).

However, in finding that the gross negligence standard of §15-78-60(25) did not apply to the defendant Department of Education in a bus accident, the *Gardner* court specifically noted that the State had been liable for bus accidents upon a showing of simple negligence since 1977, when the General Assembly had expressly waived sovereign immunity of the State for bus transportation students. Gardner at 334, 860 (*citing* S.C. Code §59-67-765 (1990)).

Doherty's factual allegations specifically pled that Defendant CCU changed their operating levels due to the severe winter conditions. (R. p. 24). It is a reasonable inference those actions were taken to "protect" students like Doherty.[2] The specific allegations that CCU closed and reopened its campus due to the dangerous conditions creates a question of fact for a jury to consider as to whether or not CCU acted in a grossly negligent manner in supervising/protecting/controlling Doherty.

"Gross negligence is a mixed question of law and fact and should be presented to a jury unless the evidence supports only one reasonable inference." Etheredge at 462 (citing to Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 451 S.E.2d 855 (1994) and Doe v. Orangeburg County Sch. Dist. No. 2, 329 S.C. 221, 495 S.E.2d 230 (Ct. App. 1997).

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[2] This was more than a reasonable inference, as the materials outside the pleadings submitted by Doherty show that CCU activated their emergency operating levels, in part, to specifically protect students like Doherty from the exact hazardous condition she encountered and that caused her injury.

"Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care." Hendricks v. Clemson Univ., 353 S.C. 449, 457, 578 S.E.2d 711, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991).

"While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Wright v. PRF Real Estate Mgmt., 426 S.C. 202, 217, 826 S.E.2d 285, 293 (2019) (internal citations omitted). "The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Id. at 217-218, 293 (*quoting* Miller v. City of Columbia, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)). The materials submitted by Doherty outside the pleadings (see section III below) support that CCU voluntarily undertook the duty to restrict access to campus until it was "safe" for students like Doherty to return.

CCU argued that "snow and ice are different." While that may be, so are students. The South Carolina Tort Claims Act says they are different and South Carolina's Appellate Courts have said that difference gets read into every applicable exception in cases involving student's alleging loss due to the gross negligence of a school's duty to supervise, protect and control. This recognized difference is why CCU's reliance on the North Carolina case of Flynn v. N.C. State Highway and Public Works Comm'n, 244 N.C. 617, 94 S.E.2d 571 (N.C. 1956) is not persuasive. Stieke and Etheredge are controlling precedent on the trial court, Flynn is not.

Taking the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the Doherty, granting CCU's motion to dismiss for

failure to state a claim was error. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

III. THE TRIAL COURT ERRED IN NOT CONSIDERING MATERIAL OUTSIDE THE PLEADINGS.

In opposing the motion to dismiss, Doherty specifically requested that:

> If the Court does not believe the allegations of the Complaint and the reasonable inferences that can be drawn from those factual allegations are sufficient to deny the Defendant's motion, the Plaintiff requests that the Court consider matters outside the pleadings and convert the motion to one for summary judgment.

(R. p. 83)

Doherty's response provided the legal authority for "conversion to summary judgment":

> The trial court may treat a motion under S.C. R. Civ. P. 12(b)(6) as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). The notice provisions in Rule 56 are incorporated into S.C. R. Civ. P. 12(b)(6). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987).

(R. p. 76)

Doherty filed her *Response* "well before the scheduled motion hearing date[3]...to afford CCU a reasonable opportunity to respond to such matters in accordance with S.C. R. Civ. P. 56(c), (e). Brown v. Leverette, 291 S.C. 364, 365-367, 353 S.E.2d 697, 698-699 (1987)." (R. p. 83)

CCU did not submit any reply to Doherty's Response or provide any authority on why the trial court should not consider the submitted matters outside the pleadings other

[3] Doherty's *Response* was filed February 5, 2021, the hearing was March 2, 2021. Rule 56(c) SCRCP requires ten (10) days notice.

than arguing at the hearing that they had filed a 12(b)(6) motion, not a motion for summary judgment. (R. pp. 44 – 45)

A defendant does not have to consent to a 12(b)(6) being converted to a motion for summary judgment. As long as a reasonable opportunity has been afforded to respond, the trial court may consider matters outside the pleadings, pursuant to *Brown*.

Doherty argued that the procedural timeline of the case, was specifically relevant to her request to consider matters outside the pleadings. That timeline shows:

-*Amended Summons & Complaint,*[4] December 12, 2019;

-*Answer*, December 18, 2019;

-*Motion to Alter/Amend Answer* and *Memo in Support*, April 22, 2020;

-*Response in Opposition to Motion to Alter/Amend Answer*, October 7, 2020;

-*Order Granting Leave to File Amended Answer*, November 5, 2020;

-*Amended Answer*, November 5, 2020;

-*Motion to Dismiss I* and *Memo in Support*, November 13, 2020;

-*Motion for Protective Order* and *Memo in Support*, December 17, 2020;

- *Joint Response in Opposition to Motion For Protective Order and Motion to Dismiss*, December 17, 2020;

As Doherty had originally noted in opposing CCU's motion to amend their answer:

> ...allowing the Defendant to amend their answer and assert a 12(b)(6) defense was unnecessary and would be a waste of time. Plaintiff argued that Etheredge v. Richland School Dist. 1, 330 S.C. 447 (Ct. App. 1998) would require that the snow/ice exception be read in light of the gross negligence standard imposed by S.C. Code 15-78-60(25) since this case involved a student and that initial written discovery had already produced an email from Defendant CCU's Fire Inspector that documented the

[4] The initial *Summons & Complaint* was filed December 11, 2019 and amended the next day solely due to numbering errors within the paragraphs.

> hazardous condition of the sidewalk, that it was "extremely slick" and had gotten that way overnight. *See* Exhibit 1 to 10/7/2020 *Response*. **Plaintiff argued that email was enough to create a question of material fact as to whether Defendant CCU had been grossly negligent and that for any 12(b)(6) motion in the future, the Plaintiff would be entitled to submit that email and have the motion converted to a motion for summary judgment** and that there was nothing in their answer preventing the Defendant from making that S.C. Code §15-78-60(8) argument through a Rule 56 SCRCP motion for summary judgment. In essence, allowing the amendment would only serve to waste time having what would turn out to be a premature motion for summary judgment ruled on by the Court.

(R. p. 72, emphasis added).

The trial court allowed CCU to amend their answer via an Order filed November 5, 2020 and CCU's initial 12b(b)(6) motion followed. (R. pp. 1 – 3)

Subsequent to CCU amending their Answer, Doherty attempted to obtain additional discovery in this matter by noticing a 30(b)(6) deposition of CCU for January 12, 2021, said notice being served on December 16, 2020. The matters of examination for that 30(b)(6) witness were specifically matters which would provide Doherty information to counter the new affirmative defense CCU had been allowed to assert via their amended complaint:

1. What maintenance, inspection and precautions were taken for the inclimate weather in the lead up to Ms. Doherty's fall on Jan. 8, 2018;
2. What maintenance, inspection and precautions were taken for the inclimate weather on Jan. 8, 2018;
3. What maintenance, inspection and precautions are usually taken by CCU for inclimate weather;
4. The investigation and reporting of Ms. Doherty's fall;
5. Information related to student pedestrian traffic on campus. Specifically, where the area of the fall stands relative to other areas of campus as far as foot traffic;
6. Other falls/slips/trips of similar nature during periods of similar inclimate weather (winter storms) for the 3 years preceding and 3 years since the fall.

(R. p. 158)

CCU attempted to block that 30(b)(6) deposition by filing for the protective order. In opposing that motion for protective order, Doherty quoted the designated matters and argued:

> It is telling that Defendant CCU wants to deny the Plaintiff the opportunity to discover such evidence, especially in light of their argument to dismiss. If the Court were to accept Defendant's argument that the Plaintiff can only have a claim based on the affirmative acts of the Defendant, denying the Plaintiff the right to discover additional affirmative acts by the Defendant prior to deciding the motion to dismiss would be unfair and unjust.

(R. p. 158)

At CCU's counsel's request, a status conference was requested with the trial court and took place remotely via WebEx on January 6, 2021. The purpose of that status conference was that CCU wanted to delay the scheduled January 12th deposition of their 30(b)(6) witness until after the then-scheduled January 27, 2021 motions hearing. The trial court denied that request. (R. p. 190)

CCU's counsel subsequently requested that the deposition be rescheduled with the agreement that CCU would withdraw their 12(b)(6) motion to give Doherty time to take the deposition **and get the transcript** before the motion was heard. Doherty agreed, CCU's counsel informed the Clerk of Court's office of his withdrawal of the motions with leave to refile at a later date and the deposition of CCU's 30(b)(6) witness, Stephen K. Harrison, Vice President Auxiliary Enterprises was ultimately conducted on January 21, 2021. (R. p. 200)

In short, Doherty argued and noticed that materials outside the pleadings should be considered since before the trial court allowed CCU to amend their Answer to assert the affirmative defense the March 4, 2021 order was based on. Doherty specifically opposed attempts to deny her discovery of evidence which she could use to counter that

affirmative defense and the trial court agreed to allow her to obtain that discovery. CCU proposed moving the date of the deposition after the trial court refused to stop the deposition before the 12(b)(6) hearing, specifically proposing allowing Doherty time "to allow you to get the transcript back." (R. p. 200)

Despite Doherty having noticed both the trial court and CCU as far back as October 22, 2020 that matters outside the pleadings would be submitted, and despite CCU specifically confirming their understanding that Doherty would require the transcript of the 30(B)(6) deposition before any hearing by proposing postponement of the hearing until after such could occur, the trial court did not even address the additional material Doherty had provided in support of arguing against dismissal and for her right to amend her complaint.

In *Spence*, the South Carolina Supreme Court specifically cited to cases which discussed the importance of plaintiffs being allowed to show how they would cure defects and trial court's consideration of such when dismissing cases:

> When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure **when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted**. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 1998 ME 70, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) **where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it**); Barkley v. Good Will Home Asso., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff and opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6); Baker v. Town of Middlebury, 753 N.E.2d 67, 74 (Ind. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with prejudice was harmless error **because plaintiff failed to show how he would have amended his complaint to avoid dismissal**).

Spence at 130, 881-882, emphasis added.

Doherty specifically submitted the discovery materials within Section III of her *Response* arguing that they supported not only denying CCU's motion, but also that she be given opportunity to file and serve an amended complaint. (R. pp. 83 – 98). Over the course of 15-pages, the Plaintiff presented 30(b)(6) testimony and supporting evidentiary documents used in obtaining that testimony arguing those matters supported that CCU had "acted" affirmatively in causing her loss and been grossly negligent in their duties to her.

Doherty argued the additional materials were especially relevant given the trial court's March 4 order citation to Gardner v. Biggart, 308 S.C. 331, 333-34, 417 S.E.2d 858, 859-60 (1992) in finding that the gross negligence standard of S.C. Code §15-78-60(25) did not apply. As Doherty argued at the hearing (and in her proposed order), in finding that the gross negligence standard of §15-78-60(25) did not apply to the defendant Department of Education in a bus accident, the *Gardner* court specifically noted that the State had been liable for bus accidents upon a showing of simple negligence since 1977, when the General Assembly had expressly waived sovereign immunity of the State for bus transportation students by statute. Gardner at 334, 860 (*citing* S.C. Code §59-67-765 (1990)). (R. p. 42, lines 4-17) (R. pp. 224 – 225)

The *Gardner* court finding about the bus driver having exercised no duty involving supervision, custody, control or protection came after discussion of the above and in comparison to Richardson v. Hambright, 296 S.C. 504, 374 S.E.2d 296 (1988), which the DOE had relied on in arguing the gross negligence standard should apply. In finding DOE's reliance on *Richardson* was misplaced, the *Gardner* court noted:

> *Richardson* involved the school district's exercise of its supervision, control and protection of students. There, the conduct complained of was

> school district's failure to conduct random ID checks to enforce its policy requiring parental permission for students to be transported in private vehicles. Clearly, this was a supervisory responsibility to which the gross negligence applied.

Gardner at. 334, 860.

The *Richardson* court had found that there was no gross negligence in the district's failure to conduct ID checks pursuant to its policy, because it was the first week of school and the policy only required the "all school" checks to be made once or twice a month, finding that "the District's failure to conduct an ID check during the one week of school when this accident occurred simply does not constitute an intentional and conscious failure." Richardson at 505-506, 297-298.

Doherty's submitted additional materials support a much stronger argument of intentional and conscious failure than in *Richardson*, involving actions and omissions which go beyond Doherty "merely being a student walking across campus" (as argued by CCU). Specifically, the materials support an intentional and conscious failure to protect Doherty, **after** CCU voluntarily undertook the duty to protect, by deactivating the emergency operating level and specific precautions CCU knew addressed the very hazard that wound up injuring Doherty. (R. pp. 202 – 216).

In short, unlike the plaintiff in *Richardson*, the discovery to date that Doherty submitted to the trial court, and which is reflected in her proposed amended complaint, creates a material question of fact as to whether CCU, at a minimum, voluntarily undertook a duty to protect Doherty and was grossly negligent in performing it. The reasonable inferences from that material goes further, showing that CCU took precautionary safety measures pursuant to their own emergency management policy (or plan), that were targeted at the very hazard that wound up injuring Doherty.

Doherty can show those measures and that emergency policy/plan exists specifically to protect students like her.

Doherty can show that CCU was taking those precautions and following that plan, when they took the intentional and conscious action of deactivating the precautions, despite having notice that the specific conditions justifying those precautions and that plan being activated continued to exist. That is enough to create a material question of fact as to whether CCU was grossly negligent in how they activated and deactivated those precautionary safety measures and it goes well beyond what the plaintiff in *Richardson* was able to plead or prove.

By not considering and addressing this material after affording Doherty the opportunity to obtain it through the 30(b)(6) deposition, after both the trial court and CCU were on notice that Doherty would be submitting additional material, the trial court's March 4 order was unfair and unjust.

To refuse to consider the submitted additional materials and grant a motion to dismiss, on a ground that the trial court had just recently allowed CCU to assert, over Doherty's objection to the amendment because she specifically argued she would be entitled to have the trial court consider additional material outside the pleadings, is unfair and unjust. To deny this while also denying Doherty the right to amend (*see* below) was irreparably prejudicial.

IV. THE TRIAL COURT ERRED IN FAILING TO ALLOW DOHERTY TO AMEND HER COMPLAINT.

"When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. The

Plaintiff in most cases should be given opportunity to file and serve and amended complaint." Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

"When a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under Rule 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." Skydive Myrtle Beach v. Horry Cty., 426 S.C. 175, 179 826 S.E.2d 585, 587 (2019).

In opposing CCU's motion to dismiss, Doherty specifically requested:

> In the alternative, and at a minimum, the Plaintiff would argue that based on the discovery to date (*see* below), she should be given opportunity to file and serve and amended complaint. Spence v. Spence, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006).

(R. p. 83)

As documented in Section III above, Doherty submitted additional materials outside the pleadings in her response in opposition to CCU's motion to support not only denying CCU's motion, but also, in the alternative, supporting her right to amend her complaint.

Upon the issuance of the March 4, 2021 order dismissing her case, Doherty not only filed a timely Rule 59(e) motion to alter/amend/reconsider, but she also filed contemporaneously a Rule 15 motion to amend her complaint. Doherty's proposed amended complaint was made an exhibit to both motions. (R. pp. 169 – 183) (R. pp. 202 – 216)

Rule 15(a) states that "leave [to amend] shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a) SCRCP.

At no point below did CCU object to Doherty being afforded the right amend her complaint.

"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 complaint." Skydive Myrtle Beach at 182, 588, citing to Patton v. Miller, 420 S.C. 471, 490-491 804 S.E.2d 252, 262 (2017) and Tanner v. Florence Cty. Treasurer, 336 S.C. 552, 558-60, 521 S.E.2d 153, 156-57 (1999).

"In rare cases, however, a trial court may deny a motion to amend if the amendment would be clearly futile." Skydive Myrtle Beach at 182, 589, citing to Jennings v. Jennings, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010).

In reversing the trial court in *Skydive*, the South Caroline Supreme Court specifically noted that the trial court "did not conduct an analysis to determine whether any amendment would be futile." Skydive Myrtle Beach at 183, 589.

"When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case…when the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." Spence v. Spence, 368 S.C. 106, 130 628 S.E.2d 869, 881-882 (2006).

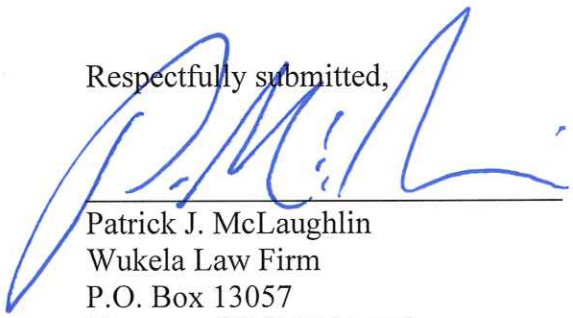
In the present case, while the trial court has not officially ruled on Doherty's motion to amend, given the statute of limitations has expired, Doherty is, similarly to the plaintiff in *Skydive*, placed in the difficult position of being unable to litigate the motion to amend before she had to file her appeal, because the trial court did deny her Rule 59(e) motion. In short, Doherty had to treat the denial of her motion to alter/amend/reconsider as a denial of her motion to amend and accordingly appeal to preserve her rights.

Doherty argues her proposed amended complaint would not be futile and respectfully asks that this Court exercise its discretion and grant her right to amend her complaint.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,



September 2, 2021

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