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**Mar 22 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM HORRY COUNTY  
Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge  
and  
R. Ferrell Cothran, Jr., Circuit Court Judge

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Case No. 2019-CP-26-01211  
Appellate Case No. 2022-000152

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Gregory Cutlip, individually and as a member  
of the Legends Property Owners Association, Inc.  
and Parkland Property Owners Association, Inc.,

Respondent,

v.

LDY Properties, LLC, Estate and/or Trust of Larry  
D. Young, Legends Property Owners Association, Inc.,  
Parkland Property Owners Association, Inc., Legends  
Properties, LLC, New Town Management, LLC,  
Michael R. Latta, Marianne Johnson, Carl A. Rubano,  
Camden C. McCarl, Robert L. Schechter, Richard Apolenis,  
John K. Manley, Michael Marino, Legends Golf Holding,  
LLC, Jigger Holding, LLC, and Daniel Larry Young, Jr.,

Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC; and Legends Golf  
Holding, LLC are the Appellants.

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RESPONDENT'S REPLY TO ALL RETURNS  
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For the sake of brevity, Respondent will provide one Reply brief to answer all issues raised in Appellant's Returns to Respondent's Motion to Dismiss, Motion to Lift Stay, and Motion for Attorney's Fees and Costs.

Appellant spends much of its 115-page brief (including exhibits) arguing the substantive merits of the appeal. However, that is not the issue before the Court. The two issues presented are whether a Circuit Court Order denying a Motion to Dismiss is immediately appealable, and whether a Circuit Court Order granting a Motion to Amend Complaint is immediately appealable 257 days after the Order was entered. In each instance the answer is "no" and accordingly this appeal should be dismissed.

S.C. Code § 14-3-330 provides, in relevant part:

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

As a general rule, an Order denying a Motion to Dismiss and an Order granting a Motion to Amend Complaint (even if timely appealed) are not immediately appealable. However, in an attempt to fit within the requirements of S.C. Code § 14-3-330, Appellant contends that the two Orders being appealed are either intermediate orders involving the merits, or orders affecting a substantial right which strike out an answer or any part thereof. Both arguments fail, and this Court should dismiss the appeal so the lawsuit can proceed in Circuit Court on the merits without further delay.

## 1. The Orders Appealed Do Not Involve the Merits

The denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings. McLendon v. SC Dept. of Hwy. & Pub. Transp., 313 S.C. 525, 443 S.E.2d 539 (1994) (footnote 2) (citing Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994)). In Ballenger, the appellant argued that an order denying summary judgment was immediately appealable because statements made in the order had the effect of striking appellant's defense of *res judicata*/collateral estoppel. In rejecting this argument, the Court maintained that, "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial...the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings."

In much the same way, the Circuit Court's denial of Appellant's Motion to Dismiss on the basis of *res judicata* did not serve to strike any portion of the Appellant's Answer, and the Appellant is free to make that argument at any future stage in the proceedings. This was not an adjudication on the merits.

The grant of a motion to amend complaint is likewise not a ruling on the merits and thus not immediately appealable. Pruitt v. Bowers, 330 S.C. 483, 488, 499 S.E.2d 250 (Ct.App. 1998) (appeal of an amendment order is interlocutory and generally not appealable); see also Garrett v. Snedigar, 293 S.C. 176, 359 S.E.2d 283 (Ct.App. 1987) (footnote 2). This is consistent with Rule 15, SCRPC's provision that leave to amend shall be freely given when justice requires and does not prejudice any other party, and the motion is addressed to the sound discretion of the trial judge.


## **2. The Orders Appealed Do Not Strike Appellant's Answer or Any Part Thereof**

The Circuit Court granted Respondent's Motion to Amend Complaint, in which Respondent asserted the derivative claims which Appellant claims are barred by *res judicata*. The Circuit Court also denied Appellant's Motion to Dismiss the derivative claims on the basis of *res judicata*.

Even if one assumes, *arguendo*, that *res judicata* is a substantive right (which Appellant admits is a novel issue in South Carolina), the other requirement of S.C. Code § 14-3-330(2)(c) upon which Appellant relies is clearly not met here. The Circuit Court did not expressly or impliedly strike any portion of the Appellant's Answer to the Amended Complaint. This is apparent after a careful reading of each Order being appealed. Under the plain language of the Orders on appeal, Appellant is free to make its *res judicata* argument and thus has not been prejudiced in any way.

### Conclusion

The Order granting Respondent's Motion to Amend Complaint and the Order denying Appellant's Motion to Dismiss the derivative claims fall within the general rule that interlocutory orders are not immediately appealable. No exception found within S.C. Code § 14-3-330 applies here. The Orders at issue do not address the substantive merits of the case, and they do not strike any portion of the Appellant's Answer. Therefore, Respondent respectfully requests that the Court dismiss this appeal. If the appeal is dismissed, the stay of the Circuit Court proceedings should also be lifted, and the Respondent is entitled to an award of attorney's fees and costs in accordance with Rule 222, SCACR ("costs shall be taxed against the appellant when the appeal is dismissed or judgment on appeal is affirmed").

  
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LLC, Jigger Holding, LLC, and Daniel Larry Young, Jr.,

Defendants,

Of which LDY Properties, LLC; Larry D. Young; Legends Properties, LLC; and Legends Golf  
Holding, LLC are the Appellants.

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PROOF OF SERVICE  
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Counsel for Respondent hereby certifies that he has served all counsel of record with the foregoing Reply to All Returns by e-mail and by causing a true and correct copy to be placed in an envelope, proper postage attached, and addressed as follows:

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