THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Judge

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Appellate Case No. 2022-001070
Court of Common Pleas Case No. 2020-CP-18-02003

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ROSEN HAGOOD, LLC,

Respondent/Appellant,

v.

ALBERT T. HENSON, JR.,

Appellant/Respondent.

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# INITIAL RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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F. Truett Nettles, II, of counsel (SC Bar 4195)
ROSEN HAGOOD, LLC
40 Calhoun Street, Suite 450
Charleston, SC 29401
(843) 577-6726 telephone
tnetttles@rosenhagood.com
ATTORNEYS FOR RESPONDENT-APPELLANT

Other counsel of record:

Desa Ballard (SC Bar No. 498)
Harvey M. Watson III (SC Bar No. 74053)
Haley Hubbard (SC Bar No. 103195)
BALLARD & WATSON
226 State Street
West Columbia, SC 29169
(803) 796-9299 telephone
ATTORNEYS FOR APPELLANT-RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

I. Did Henson fail to properly preserve for appellate review his new arguments involving the purported expiration of the statute of limitations and Rosen Hagood's alleged breach of duty of loyalty when Henson did not present these arguments to the Circuit Court, the Circuit Court did not rule on them, and Henson failed to timely move the Circuit Court to alter, amend, or reconsider its Order to rule on his arguments?

II. Did Henson fail to demonstrate a genuine issue of material fact as to whether Rosen Hagood's claim for breach of contract is barred by the three-year statute of limitations when the attorney-client relationship did not terminate until November 25, 2019, the law firm's claim against Henson did not accrue until the attorney-client relationship was terminated, and the law firm commenced this action against Henson on December 16, 2020?

III. Did Henson fail to demonstrate a genuine issue of material fact as to whether Rosen Hagood breached a duty of loyalty to him when Henson did not serve or file an expert affidavit supporting his claim in compliance with S.C. CODE ANN. § 15-36-100?

IV. Did Henson fail to demonstrate a genuine issue of material fact as to whether Rosen Hagood breached a duty of loyalty to him when he provided no evidence of any instance in which Rosen Hagood was disloyal to him or failed to adequately represent him in the Probate Court?

## STATEMENT OF THE CASE AND FACTS

Respondent/Appellant Rosen Hagood, LLC (hereinafter "Rosen Hagood") is a law firm with offices in Charleston, South Carolina. See Verified Compl. ¶1. Appellant/Respondent Albert T. Henson, Jr. (hereinafter "Henson") formerly was a client of the law firm.

By written representation agreement dated and executed May 25, 2016, Henson retained Rosen Hagood to represent him individually and in his capacity as Personal Representative of the Estate of Ann Page Henson Pittillo against claims being pursued in the Dorchester County Probate Court by Richard S. Henson and Vann K. Henson involving Mrs. Pittillo's Estate and a Trust settled by the late Eunice I. Page, including claims alleging Mrs. Pittillo's will was invalid and the Pittillo Trust (rather than Henson) is the rightful owner of certain real property located at 605 North Main Street, Summerville, South Carolina.[1] See Answers to Req. to Admit; Blanchard Aff. ¶2 & Exh. A; Verified Compl. ¶3; Answer ¶4; Henson Depo. pp. 13-16. Daniel F. Blanchard, III, Esquire of Rosen Hagood was the attorney at the firm who primarily handled the representation. See Blanchard Aff. ¶3.

In the representation agreement, Henson agreed to pay attorney's fees to Rosen Hagood on an hourly fee basis and to reimburse the firm for disbursements and costs. See Blanchard Aff. Exh. A pp.2-3. The agreement provides for Henson to be billed for the firm's legal services on a monthly basis. It also expressly states in part:

> Our monthly statements submitted for our legal services are due upon receipt. If your account becomes delinquent for more than sixty (60) days, we may move to be relieved as counsel. If you fail to pay all amounts owed, then you agree to reimburse us for all costs incurred in collecting these amounts, including reasonable attorney's fees and costs.

Id. p.3. The agreement further provides that "[i]f a monetary judgment or award is made in favor

[1] Richard and Vann Henson are Henson's brothers. Mrs. Pittillo was Henson's mother and Mrs. Page was his maternal grandmother.

of the client, we shall have a lien on the proceeds to the extent of any unpaid fees, disbursements, or other charges." Id.

Beginning in May 2016 and continuing through December 2019, Rosen Hagood provided legal representation and services to Henson in the pending litigation and Henson received the benefit of the representation and services. See Verified Complaint ¶4. However, from March 14, 2017 through November 2019, Henson failed to make any payments to Rosen Hagood for the services provided to him despite being invoiced for these services on a monthly basis. See Blanchard Aff. ¶4 & Exh. B. The last payment that Henson made to Rosen Hagood was on March 2, 2017. See Blanchard Aff. ¶4 & Exh. B; Answer ¶8. Henson concedes he did not pay all amounts due to Rosen Hagood under the agreement. See Henson Depo. p. 23. He further admits he never sought to terminate Rosen Hagood or Mr. Blanchard as his legal counsel. Id. pp. 22-23.

As a result of Henson's failure to make payment of the attorney's fees and costs that were owed under the representation agreement, Rosen Hagood and Mr. Blanchard moved the Probate Court to be relieved as Henson's counsel. See Blanchard Aff. ¶4. After a hearing on Rosen Hagood's motion, which Henson attended, the Probate Court entered an Order dated November 25, 2019 relieving Rosen Hagood and Mr. Blanchard as Henson's legal counsel effective immediately. Id. & Exh. C.[2] As of the termination of the representation, the outstanding attorney's fees and costs that Henson owed to Rosen Hagood under the representation agreement totaled $161,671.96. See Verified Complaint ¶8.

The Probate Judge's Order gave Henson thirty (30) days to obtain replacement or substitute legal counsel in the pending litigation. See Blanchard Aff. ¶4 & Exh. C. After Rosen Hagood's withdrawal, Henson did procure replacement counsel and eventually settled that

[2] Henson did not consent to the law firm's withdrawal as his legal counsel in the Probate Court, thus a hearing was necessary on the firm's motion. See Blanchard Aff. ¶4 & Exh. C.

litigation. As part of the settlement, Henson received an award of $275,000.00 from the Pittillo Trust and was to receive an additional $150,000.00 from the Trust once certain assets were sold by the Trustee. See Blanchard Aff. ¶5; Henson Depo. pp. 61-62.

On December 16, 2020, Rosen Hagood filed this action against Henson in the Dorchester Count Circuit Court arising from Henson's nonpayment of the attorney's fees and costs that were owed to the firm under the representation agreement. See Verified Complaint. The Verified Complaint avers causes of action against Henson for (1) Breach of Contract; (2) Money Had and Received; (3) Constructive Trust; and (4) Enforcement of Security Interest. On January 27, 2021, Henson filed a *pro se* Answer to the lawsuit denying liability. See Answer.

On April 7, 2022, Rosen Hagood moved for summary judgment involving its claims against Henson. The motion was supported by an Affidavit of Mr. Blanchard, excerpts of Henson's discovery deposition taken on March 23, 2022, and Henson's response to a request for admission. See Motion for Summ. Judg.; Blanchard Aff.; Henson Depo.; Answers to Req. to Admit. On May 26, 2022, Rosen Hagood submitted a Memorandum of Law in support of its motion to the Circuit Judge Dickson. See Hill email dated May 26, 2022 & Memo of Law.

On May 31, 2022, Henson filed his Opposition to the Motion for Summary Judgment. See Henson Opp. to Motion. Henson's opposition included his own one-page affidavit and excerpts (pages 17-20) from his own deposition transcript. His opposition nowhere raises the argument that Rosen Hagood was not entitled to compensation because it supposedly breached a duty of loyalty to him. Henson did not file any affidavit from any expert witness supporting any claim that Rosen Hagood had breached any duty owed to him. Id. Henson's opposition nowhere raised the expiration of the statute of limitations as a defense to Rosen Hagood's claims. Id.

While Henson's affidavit made a general statement that on some unspecified date, he "lost confidence in Mr. Blanchard's ability to serve [his] best interest and in his loyalty to [him]" allegedly because Mr. Blanchard told him that his boss was "best friends" with the opposing counsel, Henson's affidavit nowhere cites to any instance where Mr. Blanchard was disloyal to him in the Probate Court or failed to adequately represent him. See Henson Aff. ¶3. Henson's affidavit simply said he lost confidence in Mr. Blanchard because of his boss's relationship with opposing counsel, not that Mr. Blanchard failed to properly represent him in the Probate Court. Henson nowhere alleges that Mr. Blanchard failed to take some particular action on his behalf in the Probate Court or took some action which was against his best interest. Henson's affidavit fails to cite any instance or example of any hearing, pleading, motion, discovery matter, or some other event in the Probate Court where Rosen Hagood supposedly was disloyal to him or failed to adequately represent him.

On June 1, 2022, Circuit Judge Edgar W. Dickson conducted a hearing on Rosen Hagood's Motion for Summary Judgment. See Hearing Transcript pp. 1-25. Henson appeared at the hearing. Id. At the hearing, Rosen Hagood provided the Court with detailed entries showing the $161,671.96 in attorney's fees and costs provided to Henson in the underlying Probate Court litigation. See Detail Transaction Sheet. Rosen Hagood also provided a summary sheet itemizing the accrued prejudgment interest on the amounts owed, which interest totaled $57,083.46, as well as an affidavit of counsel supporting the attorney's fees and costs incurred in this suit to collect the payments owed by Henson, which comprised attorney's fees of $22,664.00 and costs of $1,904.89. See Interest Sheet; Affidavit of Plaintiff's Attorney.

At the motion hearing, Rosen Hagood requested summary judgment in its favor and asked that it be awarded damages in the amount of $161,671.96 for Henson's breach of his

contractual obligations in the representation agreement. Rosen Hagood further requested prejudgment interest on this amount totaling $57,083.46 based on the statutory rate of 8.75% per annum established in S.C. CODE ANN. § 34-31-20(A). Rosen Hagood also requested attorney's fees of $22,664.00 and costs of $1,904.89 that it incurred in the present lawsuit to enforce Henson's contractual obligations. The total that Rosen Hagood sought was as follows:

| | |
|---|---|
| Unpaid attorney's fees and costs in underlying representation | $161,671.96 |
| Prejudgment interest pursuant to § 34-31-20(A) | $57,083.46 |
| Attorney's fees incurred in suit to enforce contract | $22,664.00 |
| Costs incurred in suit to enforcing contract | $1,904.89 |
| Total: | $243,324.31 |

At the hearing, Henson again failed to raise the expiration of the statute of limitations as a defense to Rosen Hagood's claims. See Hearing Transcript pp. 1-25. Henson again failed to produce or file any expert affidavit. While Henson did argue that he had "lost confidence" in Mr. Blanchard, he again failed to cite any instance of any hearing, pleading, discovery matter, argument, or some other event in the Probate Court at which Rosen Hagood supposedly was disloyal to him or failed to adequately represent him.[3] In fact, Henson admitted at the hearing that Mr. Blanchard had done exactly what he had asked him to do. Henson said:

> And I told him, I said, I won't interrupt. I won't even say a word. I'll just listen and I did. But [Mr. Blanchard] did what I asked him to do and the judge went along with it. But he told me that it was no way and, and, you know, he just wasn't gonna do anything with it. And I told him I said, Frank, would you please do this and he said -- reluctantly he did and it, and it went fine. It went real good. Everything we could ask for at that point.

Id. p. 14 ll.5-12.

Although Henson now claims on appeal that the purported reason he did not make any

[3] Henson did not testify under oath at the hearing, but made *pro se* arguments. Such arguments are not evidence. Bowers v. Bowers, 304 S.C. 65, 68, 403 S.E.2d 127, 129 (Ct. App. 1991); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003).

payments to Rosen Hagood for over 2½ years—from March 2, 2017 until the law firm was finally relieved as his legal counsel via Order filed on November 25, 2019—is "due to concerns that [Mr.] Blanchard was not properly representing his interests in the probate matter," see Henson Initial Appellant's Brief p.3, Henson admits that not once during the Probate Court proceedings did he ever ask the Court to terminate Mr. Blanchard or Rosen Hagood as his counsel. See Henson Depo. pp.18, 20. Not once did Henson notify Mr. Blanchard or Rosen Hagood that he was terminating their services. Henson was perfectly content to allow Rosen Hagood to represent him in the Probate Court. He just doesn't want to pay for their services.

Judge Dickson took the matter under advisement at the conclusion of the June 1 hearing. On June 30, 2022, he entered a written Order granting Rosen Hagood's Motion for Summary Judgment as follows:

> On June 2 (sic), 2022, this Court took under advisement Plaintiff's Motion for Summary Judgment. After consideration of the arguments of the parties presented at the hearing, along with careful review of the memoranda and exhibits submitted by the parties, the Court finds that no genuine issue of material fact exists and Plaintiff's motion is hereby GRANTED. However, in awarding judgment and reviewing the retainer agreement between Plaintiff and Defendant, marked as Exhibit A to Plaintiff's motion, this Court finds no reference to Defendant being responsible for interest accrued on unpaid fees. Accordingly, the Court denies Plaintiff's request for $57,083.46 in accrued interest. Moreover, this Court finds that Plaintiff is not entitled to any attorney's fees or costs accrued after November 25, 2019, the date on which Judge Molly D. Edwards granted Rosen Hagood, LLC and Daniel F. Blanchard, III's motion to withdraw as counsel. According to Exhibit B of Plaintiff's motion, that would put Defendant's balance at $158,369.96. For the foregoing reasons, Plaintiff's Motion for Summary Judgment is GRANTED and Plaintiff is entitled to $158,369.96 in unpaid fees and expenses.

See Order filed 6.30.22. Judge Dickson entered a judgment in favor of Rosen Hagood in the amount of $158,369.96 based on this Order.

Henson did not make a motion to alter, amend, or reconsider Judge Dickson's Order pursuant to S.C. R. CIV. PRO. 59. He did not ask Judge Dickson to rule that Rosen Hagood's

claims are barred by the statute of limitations. He also did not ask Judge Dickson to rule that Rosen Hagood had breached a duty of loyalty owed to him, which would warrant denial of its entitlement to compensation.

On August 3, 2022, Henson filed a Notice of Appeal from Judge Dickson's Order to this Court. See Notice of Appeal. On August 4, 2022, Rosen Hagood filed a Notice of Cross-Appeal to this Court. See Notice of Cross-Appeal.

## ARGUMENTS

### I. THE STANDARD OF REVIEW.

"When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Id. "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." Id.

"[W]hen a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." Fowler v. Hunter, 380 S.C. 121, 125, 668 S.E.2d 803, 805 (Ct. App. 2008), aff'd, 388 S.C. 355, 697 S.E.2d 531 (2010). "Rather, the non-moving party must set forth specific facts demonstrating to the court there is a genuine issue for trial." Id. "Summary judgment should be affirmed if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Companion Prop. & Cas. Ins. Co., 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006).

## II. HENSON FAILED TO PRESERVE FOR APPELLATE REVIEW HIS NEW ARGUMENTS INVOLVING THE PURPORTED EXPIRATION OF THE STATUTE OF LIMITATIONS AND ROSEN HAGOOD'S ALLEGED BREACH OF DUTY OF LOYALTY.

As the Appellant (or losing party in the lower court) with respect to the Circuit Judge's Order granting summary judgment in favor of Rosen Hagood, Henson must show that he presented his issues and arguments involving the statute of limitations and breach of duty of loyalty to the Circuit Court *and* obtained a ruling on those issues before this Court can review them on appeal. Henson cannot satisfy either of these requirements.

"There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301–02, 641 S.E.2d 903, 907 (2007) (quoting JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2d ed. 2002)). South Carolina's "long-established preservation requirement[s]" mandate that an appellant "must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

"If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Id. "Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." Id. "An issue is not preserved where the trial court does not explicitly rule on an argument and the appellant does not make a Rule 59(e) motion to alter or amend the judgment."

Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 235, 612 S.E.2d 719, 726 (Ct. App. 2005).

Henson did not raise the new arguments he is now attempting to assert on appeal in either his opposition papers filed on May 31, 2022, or at the summary judgment hearing conducted by Judge Dickson on June 1, 2022. In fact, Henson's appellate brief readily concedes that he is asking this Court "to examine the underlying litigation in order to understand the issues that were not disclosed to the circuit court when granting summary judgment to Respondent-Appellant Rosen Hagood LLC." See Henson Initial Appellant's Brief p.2 (emphasis in original).

First, Henson never raised the supposed expiration of the statute of limitations in opposition to Rosen Hagood's motion for summary judgment. Henson did not mention the statute of limitations in his opposition memorandum or in his affidavit filed on May 31, 2022. See Opposition to Motion; Henson Aff. ¶¶1-6. He did not argue the statute of limitations at the June 1 hearing. See Hearing Transcript pp. 1-25.[4] In short, he did not preserve the issue for appellate review. See Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 652 n.12, 780 S.E.2d 263, 272 n.12 (Ct. App. 2015) ("Appellants did not make this argument in their memorandum in opposition to Palmetto's motion for summary judgment or at the motions hearing. Accordingly, we find this argument is not preserved for appellate review."); Kagan v. Simchon, 429 S.C. 516, 527 n.10, 839 S.E.2d 106, 112 n.10 (Ct. App. 2020) ("Kagan neither presented these arguments in his opposition memorandum to Simchon's motion for summary

[4] Henson's appellate counsel makes much of the fact that Rosen Hagood's counsel mentioned in passing at the June 1 hearing that Henson had raised the statute of limitations as a defense in his Answer to the Complaint. See Hearing Transcript p. 10 ll.17-20; Answer ¶¶ 26-28. However, Henson never argued in opposition to Rosen Hagood's summary judgment motion that the law firm's claim is supposedly time-barred under the statute of limitations. The fact that Henson pled the statute of limitations in his Answer is insufficient. The law is clear that "when a party has moved for summary judgment the opposing party may not rest upon the mere allegations or denials of his pleading to defeat it." Fowler, 380 S.C. at 125, 668 S.E.2d at 805.

judgment nor at the motion's hearing before the circuit court. Accordingly, we find Kagan failed to safeguard these arguments for appellate review.").

It comes as no surprise that Judge Dickson's Order does not discuss the statute of limitations and he made no ruling with respect to that issue. See Order filed 6.30.22. If Henson wanted to preserve this issue, he was required to file a motion to alter or amend Judge Dickson's Order and ask him to rule on the statute of limitations. Henson failed to do so. Consequently, this issue is not preserved for appellate review." I'On, 338 S.C. at 422, 526 S.E.2d at 724.

Second, Henson never argued to the Circuit Court that Rosen Hagood is prevented from enforcing its representation agreement because it supposedly breached a duty of loyalty owed to him. Henson never raised to the Circuit Court the so-called "faithless servant doctrine" that he is now attempting to assert for the first time in this appeal. Henson's appellate counsel is attempting to augment and contort the arguments that Henson actually made in the Circuit Court to avoid this Court's issue preservation requirements. Our law rejects this attempt.

In Jones, in the trial court, the appellant had asserted in his memorandum in opposition to summary judgment and in his argument to the trial judge that a document (a Form FR-10) had created an issue of fact, but "[h]e did not set forth a concomitant legal theory which would entitle him to recovery based on the FR–10" and he "did not make a Rule 59(e) motion to alter or amend the judgment." 364 S.C. at 234-35, 612 S.E.2d at 725-26. For the first time on appeal, the appellant argued the Form FR-10 had "estopped" the respondent from denying coverage. This Court held that because the appellant "did not present an estoppel argument to the trial judge …, this issue is not preserved." Id. at 235, 612 S.E.2d at 726; see also Walterboro Cmty. Hosp. v. Meacher, 392 S.C. 479, 493, 709 S.E.2d 71, 78 (Ct. App. 2011) (issue was not properly preserved for appellate review when it was "never specifically argued to the circuit court").

Likewise, in this case, Henson's affidavit merely made a generalized statement that on some unspecified date, he "lost confidence in Mr. Blanchard's ability to serve [his] best interest and in his loyalty to [him]" allegedly because Mr. Blanchard told him that his boss was "best friends" with the opposing counsel. See Henson Aff. ¶3. Although Henson's affidavit is rather cryptic, he apparently refers to his supposed lack of confidence in Mr. Blanchard along with Mr. Blanchard's statements to him that his law firm no longer wanted him to work on the matter without payment as an explanation for why Henson "was determined to find other counsel." Id. ¶4. However, Henson nowhere argued any concomitant legal theory that would constitute a defense to Rosen Hagood's claim. Specifically, Henson never argued that Rosen Hagood was not entitled to any compensation because it supposedly had been disloyal to him in the Probate Court. He never raised the "faithless servant doctrine" as a defense in his pleadings, in his affidavit or opposition memorandum, or at the hearing.

Henson's affidavit nowhere disputed that Rosen Hagood continued to represent him in the Probate Court until the law firm was relieved by Order filed on November 25, 2019. His affidavit nowhere claimed that Mr. Blanchard failed to properly represent him at any time in the Probate Court. Henson's affidavit nowhere alleges that Mr. Blanchard failed to take some particular action on his behalf in the Probate Court or took some action which was disloyal to him. Henson Henson's affidavit fails to cite any example of any hearing, pleading, motion, discovery matter, or some other event in the Probate Court where Rosen Hagood supposedly was disloyal to him or failed to adequately represent him. Henson nowhere claims that he terminated Rosen Hagood at any time.[5]

[5] Henson did not consent to Rosen Hagood's withdrawal as his counsel in the Probate Court, thus a hearing was necessary on the firm's withdrawal motion. See Blanchard Aff. ¶4 & Exh. C.

Finally, even assuming Henson's general statement that he "lost confidence in Mr. Blanchard's ability to serve [his] best interest and in his loyalty to [him]" would be sufficient to raise a defense to Rosen Hagood's claim based on an alleged breach of duty of loyalty, Judge Dickson's Order nowhere discusses—much less rules on—any such defense. His Order contains no discussion at all of any alleged breach of a duty of loyalty by Rosen Hagood. See Order filed 6.30.22. If Henson wanted to preserve this argument, he was required to file a motion to alter or amend Judge Dickson's Order and ask him to rule on this issue, but Henson failed to do so. Consequently, this issue is not preserved for appellate review.

## III. THE STATUTE OF LIMITATIONS DOES NOT BAR ROSEN HAGOOD'S BREACH OF CONTRACT CLAIM.

Henson claims on appeal that the three-year statute of limitations for contract claims set forth in S.C. CODE ANN. § 15-3-530(1) supposedly expired on Rosen Hagood's claim before the law firm commenced this lawsuit against him. He points out that his last payment to Rosen Hagood was made on March 2, 2017, and that Rosen Hagood filed this lawsuit against him on December 16, 2020, thus he claims the three-year limitations period expired. Even assuming *arguendo* that Henson properly preserved for appellate review his new argument involving the statute of limitations, this argument fails as a matter of law.

First, Henson's argument is nonsensical because it ignores the fact that Rosen Hagood continued to provide legal services to Henson for over 2½ years after March 2, 2017. Henson never terminated Rosen Hagood's services. The law firm provided legal services to Henson each month until November 25, 2019, as shown on its billing records. See Blanchard Aff. & Exh. B; Detail Transaction Sheet. To adopt Henson's argument would mean the statute of limitations began to run on March 2, 2017, for legal services that Rosen Hagood had not yet performed. Henson cites no legal support for such an absurd proposition.

Second, Henson's argument also disregards the express provisions of the representation agreement he entered with Rosen Hagood. This agreement is explicit that if Rosen Hagood withdrew from the matter because of Henson's nonpayment of the firm's bills, Henson was contractually obligated to pay for *all* legal services the law firm rendered before the date the relationship was terminated. The representation agreement states in pertinent part:

> We reserve the right to withdraw from our representation with your consent or for good cause. Good cause may include your failure to honor the terms of the engagement letter [or] your failure to pay amounts billed in a timely manner …. If we elect to do so, you agree to take all steps necessary to free us of any obligation to perform further, including the execution of any documents (including forms for substitution of counsel) necessary to complete our withdrawal, ***and we will be entitled to be paid for all services rendered and disbursements and other charges made or incurred on behalf of the client prior to the date of withdrawal***.

See Blanchard Aff. Exh. A p.3 (emphasis added).

Third, Henson's argument further ignores the rule that an attorney's cause of action against his or her client for nonpayment of fees in litigation does not accrue for purposes of the statute of limitations until the attorney-client relationship has been terminated. The settled rule is that "the statute of limitations commences to run against a claim for legal services at the time the employment was terminated." J.J. Marticelli, When Statute of Limitations Begins to Run Against Action by Attorney, 60 A.L.R.2D 1008 §1 (1958) (collecting cases). In this case, Rosen Hagood's attorney-client relationship with Henson did not terminate until November 25, 2019, which is when the Probate Court entered an Order granting its motion to be relieved as Henson's counsel. Rosen Hagood commenced this lawsuit on December 16, 2020, well within three years after the attorney-client relationship was terminated.

In a breach of contract action, the general rule is that the statute of limitations begins to run on the date that the breach occurs. However, when an attorney-client relationship is involved and the attorney is representing the client in litigation, an exception to the general rule is applied

when the client breaches the agreement during the attorney's representation. In such cases, the statute of limitations does not begin to accrue until the attorney-client relationship has been terminated. This is because of the unique status of the attorney-client relationship which distinguishes that professional relationship from other forms of commercial and business contractual relationships. An attorney representing a client in litigation cannot sue the client for nonpayment of fees during the representation because it would create a conflict of interest and would disrupt the attorney-client relationship. See S.C. RULES PROF. RESP. 1.17(a) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if … (2) there is a significant risk that the representation of one or more clients will be materially limited … by a personal interest of the lawyer.").

An attorney representing a client in litigation is not free to unilaterally stop representing the client despite nonpayment because of the restraints on the attorney imposed by the Rules of Professional Conduct. Pedersen & Scott, P.C. v. Braswell Services Group, Inc., No. 2001-CP-10-4530, 2002 WL 34129822, at *6 (S.C. Com. Pl. May 02, 2002) ("An attorney who undertakes representation is not at liberty to abandon the case without cause and reasonable notice. An attorney impliedly stipulates to carry a case to termination. However, when an attorney gives reasonable warning that he is withdrawing from representation unless a fee obligation is fulfilled, then nonpayment for services may be a basis for withdrawal." (citing cases)). Even if a client is not paying the attorney's fee in accordance with their representation agreement, the attorney still must obtain the court's permission to terminate the attorney-client relationship. See S.C. RULES PROF. RESP. 1.16(c); S.C. R. CIV. PRO. 11(b).

Our courts strictly enforce the requirement that counsel of record obtain an order from the court prior to withdrawal. Ex parte Strom, 343 S.C. 257, 262, 539 S.E.2d 699, 701 (2000) ("We

hold that after entering an appearance with the court, an attorney must receive a court order pursuant to Rule 11(b) in order to be relieved as counsel."). It is discretionary with the court whether to allow the attorney to withdraw from the representation based on nonpayment of fees, thus the attorney can be compelled to continue the representation even though the client is not compensating the lawyer for doing so. See S.C. RULES PROF. RESP. 1.16(c) ("A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. *When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.*" (emphasis added)).

"Because 'of the unique and special relationship between an attorney and a client, ordinary contract principles governing agreements between parties must give way to the higher ethical and professional standards" governing the attorney's obligations owed to the client. Pellettieri, Rabstein & Altman v. Protopapas, 890 A.2d 1022, 1027 (N.J. App. Div. 2006) (citation omitted). Thus "'[a] contract for legal services is not like other contracts.'" Id. "[A]n attorney's cause of action does not accrue based upon non-payment alone." Id. "More is needed." Id. "Specifically, absent completion of services under a retainer agreement, the attorney-client relationship must be terminated before plaintiff's cause of action accrues." Id. In Pellettieri, the Court framed the issue as follows:

> The central issue raised in this appeal, which has not previously been addressed in our jurisdiction, is when does the statute of limitations commence to run in an attorney's action against a client for fees pursuant to a retainer agreement calling for services at an hourly rate, billed on an interim basis, and payable within thirty days of receipt of the bill. The Law Division judge essentially found that the limitation period begins to run when payment is first overdue. We disagree with the judge's analysis and *hold that the statute of limitations for attorney fees arising from a retainer agreement, permitting periodic hourly billing, commences when the services are concluded or attorney-client relationship is ended, whichever occurs first*.

890 A.2d at 1023 (emphasis added).

Although it does not appear that South Carolina's courts have addressed the question, the clear majority of courts adhere to this rule that the statute of limitations does not begin to accrue until the services are completed or the attorney-client relationship has been terminated. See, e.g., Mitchell v. Guardian Sys., Inc., 804 A.2d 1004, 1009 (2002) (Conn. App. Ct. 2002) (Attorney's cause of action against client for payment of fees accrued, and statute of limitations began to run, when court granted attorney's motion to withdraw from representation.); Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi, 750 N.W.2d 633, 640 (Mich. Ct. App. 2008), aff'd in pertinent part, 771 N.W.2d 411 (Mich. 2009) ("[W]e agree that in the litigation context, where, as here, legal services are no longer being provided and a dispute over fees exists, an attorney's action for unpaid legal fees accrues on the date a court orders the termination of the attorney-client relationship."); Campbell Arellano & Rich v. Davis, No. ST-07-CV-602, 2009 WL 10742655, at *2 (V.I. Super. Ct. May 12, 2009) ("Plaintiff was counsel of record for Defendant until the Court's January 10, 2002, Order dismissing Defendant's case with prejudice. As a result, Plaintiff's action is not time barred because the statute of limitations did not begin to run until Plaintiff was relieved from its obligation to represent the Defendant."); Halstrom v. Dube, 116 N.E.3d 626, 630 (Mass. 2019) ("Ordinarily an attorney's cause of action for legal fees accrues no later than the date his or her services are terminated unless the parties enter into a new, enforceable agreement concerning the payment of outstanding fees."); Clark v. Est. of Elrod, 61 So. 3d 416, 418 (Fla. Dist. Ct. App. 2011) (Attorney's action against client for nonpayment of fees accrued when attorney ended the attorney-client relationship.); Sohn v. Oriental Mission Church, No. B279950, 2018 WL 1372594, at *5 (Cal. Ct. App. Mar. 19, 2018).

In Seyburn, Kahn, Ginn, Bess, Deitch & Serlin, P.C. v. Bakshi, 771 N.W.2d 411 (Mich. 2009), a law firm brought a breach of contract action against its client for unpaid legal fees. The

Court held the statute of limitations for such a claim accrues on the date the attorney-client relationship is terminated, not the date on which the client ceases making payments to the client. The Court explained the rationale supporting this rule as follows:

> A contract is breached when one party fails to perform its portion of the contract. Thus, under general contract principles, an attorney's cause of action to recover attorney fees would accrue on the date the client breached the parties' agreement by failing to pay in accordance with its terms. We conclude that, in the context of litigation, the special features of the attorney-client relationship necessitate an exception to the general rule where the client breaches the agreement during the representation. Once litigation has commenced, an attorney cannot discontinue serving his or her client without an order of the court because an attorney's ability to terminate the representation may be limited by his or her responsibilities to the client. Although the client may have ceased making payments to the attorney, the attorney's representation of the client continues until the court has permitted the termination.
>
> *In the present case, defendant had stopped making payments to plaintiff in late 1992, but defendant never terminated the attorney-client relationship.* It was plaintiff that filed a motion in the Court of Appeals seeking to withdraw from the case. Withdrawal was finally granted on September 30, 1993, and the attorney-client relationship was then terminated. *Because plaintiff's obligations to defendant continued until the Court of Appeals terminated the relationship, we hold that plaintiff's cause of action to recover attorney fees accrued on the date that the attorney-client relationship was terminated: September 30, 1993.*

Id. at 418–19 (footnotes omitted) (emphasis added).

The Probate Court issued its Order allowing Rosen Hagood to withdraw from its representation of Henson on November 25, 2019, thus the law firm's representation of Henson terminated on that date. Rosen Hagood subsequently commenced this lawsuit against Henson for nonpayment of fees on December 16, 2020, which is less than three years after the attorney-client relationship was terminated. This action was timely filed.

## IV. ROSEN HAGOOD'S BREACH OF CONTRACT CLAIM IS NOT BARRED BY ANY ALLEGED BREACH OF DUTY OF LOYALTY.

On appeal, Henson argues that Rosen Hagood's claim is barred because Mr. Blanchard allegedly "breached his duty of loyalty to his employer, Mr. Henson, thus forfeiting the right to

compensation pursuant to South Carolina law." See Henson Initial Appellant's Brief p.8. As purported support for this position, Henson relies upon Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 518 S.E.2d 591 (1999).

In Futch, an employee sued his employer for failure to pay wages that were overdue. The employer defended against the claim by raising the so-called "faithless servant doctrine" and argued the employee had violated his duty of loyalty to the employer by starting a new business competing with the employer, thus forfeiting his right to compensation. Our state Supreme Court rejected a "bright-line rule" holding that a disloyal employee forfeits all compensation. Instead, the Court adopted a "balancing approach." Under this approach, "[t]he general rule is that an employee is not entitled to any compensation for services performed during the period he engaged in activities constituting a breach of his duty of loyalty even though part of those services may have been properly performed." Futch, 335 S.C. at 607-08, 518 S.E.2d at 596 (citing Jet Courier Serv., Inc. v. Mulei, 771 P.2d 486 (Colo. 1989)). "However, even when an employee breaches the duty of loyalty during some periods, he may 'still recover compensation for services properly rendered during periods in which no such breach occurred and for which compensation is apportioned in his employment agreement.'" Id. This approach requires the court "to identify loyal and disloyal periods." Id. at 611, 518 S.E.2d at 598.

In the present case, Henson's appellate brief glosses over the fact that he did not have an employer-employee or master-servant relationship with Rosen Hagood. Henson never made any claim or argument in the Circuit Court that he was Rosen Hagood's employer. The Circuit Court certainly never ruled on any such claim. Assuming for argument's sake that Henson properly raised the "faithless servant doctrine" in the Circuit Court and on this appeal, Henson cites to no case law in South Carolina extending or applying this doctrine to a lawyer's representation of a

client. Rosen Hagood is unaware of any such law. Nevertheless, presuming the "faithless servant doctrine" could apply, Henson's argument fails on the merits for at least two reasons.

First, Henson is now belatedly attempting to raise a claim alleging that Rosen Hagood breached a fiduciary duty owed to Henson when he failed to file an expert affidavit supporting such a claim as mandated by S.C. CODE ANN. § 15-30-100. In RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012), our state Supreme Court held that a breach of fiduciary duty claim is duplicative of a legal malpractice claim where the claim for breach of fiduciary duty "arose out of the duty inherent in the attorney-client relationship." Id. at 336, 732 S.E.2d at 173. In David v. Savage, No. 2:19-CV-3139-SAL, 2020 WL 12618896 (D.S.C. July 6, 2020), the Court applied RFT Mgmt. and found that "if a plaintiff fails to come forward with an argument to support a relationship other than or in addition to the one of attorney-client, the breach of fiduciary duty claim is synonymous to" a legal malpractice claim. Id. at *4.

When breach of fiduciary duty and professional negligence claims arise out of the same set of facts, out of the same attorney-client relationship, and allege the same duties owed, the claims "present duplicative questions in both law and equity." Haney v. Kavoukjian, No. 2:19-CV-2098-RMG, 2021 WL 3190401, at *12 (D.S.C. July 27, 2021); see also Vieira v. Simpson, No. 2:13-CV-2610-DCN, 2015 WL 1299959, at *3 (D.S.C. Mar. 23, 2015) (holding breach of fiduciary duty and negligence claims were based entirely on the attorney-client relationship and no pleading demonstrated the claims arose out of a duty other than the one created by the attorney-client relationship).

When "the same operative facts support actions for legal malpractice and breach of fiduciary [duty] resulting in the same injury to the client, the actions are identical and the latter should be dismissed as duplicative." Doe v. Howe, 367 S.C. 432, 449 n.27, 626 S.E.2d 25, 33

n.27 (Ct. App. 2007) (citation omitted); Lighthouse Grp., LLC v. Strauss, No. 9:15-CV-02463-DCN, 2016 WL 562100, at *3 (D.S.C. Feb. 12, 2016) (client's breach of contract claim against lawyer essentially restated legal malpractice allegations because it arose solely out of lawyer's failure to comply with the standard of care and related solely to lawyer's conduct as a lawyer and the legal services he provided); Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP, 357 F. Supp. 2d 951, 961 (E.D. Va. 2005) (holding plaintiff's breach of contract and breach of fiduciary duty claims were "mere disguises for plaintiffs' legal malpractice claims").

In this case, Henson never alleged any relationship with Rosen Hagood other than an attorney-client relationship. He failed to file any expert affidavit in compliance with § 15-30-100. This statute requires a plaintiff to file with the complaint a contemporaneous affidavit from an expert specifying negligent acts or omissions by the professional in performing his or her professional responsibilities. The statute mandates in pertinent part that "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) …, the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." See S.C. CODE ANN. § 15-30-100(B). The professionals listed in subsection (G) include "attorneys at law." Id. § 15-30-100(G)(2). If an expert affidavit is not filed as required by the statute, then "the complaint is subject to dismissal for failure to state a claim." Id. § 15-30-100(C)(1).

Courts have rejected client attempts to circumvent § 15-30-100's requirement by characterizing a legal malpractice claim as a claim for breach of fiduciary duty or breach of contract. In In re Steinmetz, No. ADV 10-80177, 2011 WL 4543894 (Bankr. D.S.C. Mar. 18,

2011), for example, the Court held that "[to] allow Plaintiffs to state a claim for breach of fiduciary duty based on the same facts [as a legal malpractice claim] would merely allow a way around the requirement of an expert affidavit under § 15-36-100." Id. at 86. The Court dismissed the plaintiffs' cause of action for breach of fiduciary duty brought against their lawyer and law firm when the plaintiffs failed to file an expert affidavit in accordance with § 15-30-100. Id.; see also Zulveta v. State Auto. Mut. Ins., Co., No. CV 6:15-2880-HMH-KFM, 2015 WL 9286698, at *8 (D.S.C. Nov. 30, 2015), report and recommendation adopted, No. CV 6:15-2880-HMH-KFM, 2015 WL 9305663 (D.S.C. Dec. 21, 2015) (dismissing client's claim for breach of fiduciary duty against law firm for failure to file expert affidavit in compliance with § 15-30-100); Barnes v. Seigler, No. CIV.A. 5:11-1156-MBS, 2012 WL 265409, at *3 (D.S.C. Jan. 30, 2012) (dismissing client's breach of fiduciary duty claim against attorney for failure to file expert affidavit as required under § 15-36-100); Green v. McClain, No. CV 6:19-3270-TMC-SVH, 2020 WL 8413555, at *4 (D.S.C. Oct. 1, 2020), report and recommendation adopted, No. 6:19-CV-3270-TMC, 2021 WL 129265 (D.S.C. Jan. 14, 2021) (dismissing breach of contract claim against attorney for failure to submit expert affidavit as required under § 15-36-100).

Because Henson never filed an expert affidavit as required by § 15-30-100, he fails to state a claim against Rosen Hagood as a matter of law.

Second, the evidence that Henson submitted in the Circuit Court fails to support any finding that Rosen Hagood was disloyal to him in the Probate Court or that it breached any fiduciary duty owed to him. "To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." RFT Mgmt., 399 S.C. at 335-36, 732 S.E.2d at 173. As discussed above, Henson submitted no

expert testimony opining that Rosen Hagood breached any fiduciary duty owed to Henson. See Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (explaining the client in a legal malpractice action must generally establish the standard of care by expert testimony).

Henson's own affidavit merely makes a general statement that on some unspecified date, he "lost confidence in Mr. Blanchard's ability to serve [his] best interest and in his loyalty to [him]," allegedly because Mr. Blanchard told him that his boss was "best friends" with opposing counsel. See Henson Aff. ¶3.[6] Henson fails to cite any legal support for his spurious claim that Mr. Blanchard allegedly breached a duty of loyalty to Henson because his boss purportedly was "best friends" with the opposing lawyer.

Henson's affidavit nowhere cites to any instance where Mr. Blanchard was disloyal to him in the Probate Court. Henson did say he lost confidence in Mr. Blanchard because of his boss's alleged relationship with opposing counsel, but he does not state that Mr. Blanchard ever failed to properly represent him in the Probate Court. Henson nowhere alleges that Mr. Blanchard failed to take some particular action on his behalf in the Probate Court or took some action which was against his best interest. Henson's affidavit fails to cite a single instance or example of any hearing, pleading, motion, discovery matter, or some other event in the Probate Court where Rosen Hagood supposedly acted in a manner disloyal to him or failed to adequately represent him. As a matter of law, Henson's evidence is insufficient to create a genuine issue of material fact showing that Rosen Hagood breached any duty of loyalty owed to Henson.[7]

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[6] Rosen Hagood disputes that Mr. Blanchard told Henson that his boss was "best friends" with the opposing counsel. However, even if so, this is not evidence of a breach of loyalty and is meaningless to the outcome. McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

[7] Henson nowhere claims Mr. Blanchard damaged him. Indeed, after Rosen Hagood withdrew from the representation, Henson hired new counsel and he later settled the case in Probate Court. See Blanchard Aff. ¶5; Henson Depo. pp. 61-62. Under the settlement, Henson received

Henson has also failed to present any evidence showing when or during what periods any such disloyalty by Mr. Blanchard supposedly occurred. As our Supreme Court ruled in Futch, even if an employee is disloyal, the disloyal employee does not forfeit the right to all compensation. Instead, the employee may still recover compensation for the services properly rendered during periods in which no such breach occurred. In this case, Henson failed to present any evidence identifying when and how Mr. Blanchard was supposedly disloyal, thus neither the Circuit Court nor this Court would have any factual basis to find that Mr. Blanchard's purported disloyalty caused Rosen Hagood to forfeit its right to compensation for the entirety of the time it was representing Henson in the Probate Court. Henson simply failed to present sufficient evidence in the Circuit Court supporting his belated argument that Rosen Hagood allegedly forfeited its right to compensation.

## CONCLUSION

For the reasons stated, this Court should affirm those portions of the Circuit Court's Order granting a judgment in favor of Rosen Hagood.

Respectfully submitted,

ROSEN HAGOOD, LLC

By:*/s/ F. Truett Nettles, II*
F. Truett Nettles, II, of counsel (SC Bar 4195)
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726 telephone
tnetttles@rosenhagood.com
ATTORNEYS FOR RESPONDENT-APPELLANT

February 24, 2023.

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$275,000.00 from the Pittillo Trust and was to receive an additional $150,000.00 from the Trust once certain assets were sold. Id.