STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi Lea Harrington, Circuit Court Judge

Opinion No. 2013-UP-034 (S.C. Ct. App. Filed January 16, 2013)

Clark D. Thomas, ... Petitioner,

V.

Bolus & Bolus
Attorneys Keith Bolus, Officially
Michael T. Bolus, Officially
and Individually, ...Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Petitioner, *pro se*, certifies that the *Petition for Rehearing En Banc* was made and finally ruled on by the Court of Appeals on March 12, 2013.

QUESTION PRESENTED

1. Did the Court of Appeals err in holding trial court did not err in granting Respondents' motion to dismiss because Petitioner did not plead he was innocent of the underlying criminal charges and, for failing to timely amend the complaint in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?

2. Did the Court of Appeals err in holding Petitioner's proposed amended complaint failed to state a cause of action because he did not allege facts that show he is innocent of all criminal charges filed against him in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?

3. Did the Court of Appeals err in holding Petitioner failed to preserve his remaining arguments for review in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

Nature of Action

This is an appeal from the trial court's dismissal of a legal malpractice action brought by Petitioner Clark D. Thomas against Respondents Michael Bolus, Keith Bolus and *Bolus & Bolus*. The *Summons* and *Complaint* were filed on June 15, 2010, in the Court of Common Pleas for Charleston County. (App. p. 6). The *Complaint* sets forth causes of action for legal malpractice, breach of fiduciary duty and breach of contract; all of which arise out of an underlying criminal matter in which Thomas was represented by Michael Bolus. (App. pp. 6-12). The *Complaint* prays for actual damages in the amount of $2,550,000; plus unspecified punitive damages and, pre-judgment and post-judgment interest. (App. p. 12).

Pleadings

The *Summons* and *Complaint* were served on Michael Bolus and Keith Bolus on June 21, 2010, and June 22, 2010, respectively. Michael Bolus filed his *Answer* and *Motion to Dismiss*, individually and on behalf of *Bolus & Bolus*, on July 12, 2010. (App. pp. 13-19, 27, 38-39). Keith Bolus filed his *Answer* and *Motion to Dismiss*, individually and on behalf of *Bolus & Bolus*, on July 14, 2010. (App. pp. 20-26, 32-33, 40-41). The *Motions to Dismiss* were brought pursuant to Rule 12(b)(6) and 12(c), SCRCP, and South Carolina Code §15-36-100 on grounds that Thomas (1) failed to file an expert affidavit as part of the *Complaint*; and (2), failed to state a claim upon which relief can be granted. Thomas served three separate replies to the *Motions to Dismiss* on August 9, 2010, asserting that (1) an expert affidavit was not required pursuant to the common knowledge exception; and (2), that his *Complaint* otherwise stated causes of action against Michael Bolus, Keith Bolus and *Bolus & Bolus*. (App. pp. 28-31, 34-37, 42-50).

Procedural History

On February 16, 2010, Thomas filed the expert *Affidavit of William Gary White, III*, (App. pp. 181-182), and Keith Bolus filed a *Memorandum in Support of Motion to Dismiss* on February 17, 2011. (App. pp. 51-58). The *Motions to Dismiss* were originally scheduled to be heard on February 17, 2011, but ultimately did not go forward because the South Carolina Department of Corrections (SCDC) failed to transport Thomas to the hearing; the *Motions* were then rescheduled for April 6, 2011.

Keith Bolus and Michael Bolus filed *Motions to Strike the Affidavit of William Gary White III,* on March 17, 2011, and March 21, 2011, respectively. (App. pp. 59-77, 78-79). The *Motions to Strike* were brought on grounds alleging (1) the *affidavit* was untimely and filed without leave of court; (2) the *affiant* was unqualified to render an expert opinion; and (3), the

substantive contents of the *affidavit* failed to comply with the requirements of South Carolina Code §15-36-100. Thomas filed a *Return to the Motion to Strike* on March 29, 2011. (App. pp. 80-83). On April 1, 2011, Thomas filed a *Memorandum in Opposition to the Motions to Dismiss* with the *Affidavit of Michael J. Virzi* marked as *Exhibit 150* in support thereof, (App. pp. 84-97; pp. 183-188), and a *Motion for Leave to Amend the Complaint* to conform to the evidence pursuant to Rule 15(b), SCRCP. (App. pp. 98-100). Thomas also filed a proposed *Amended Complaint* on April 1, 2011, with White's and Virzi's *affidavit* attached thereto. (App. pp. 101-108).

On April 6, 2011, a motion hearing was convened before the Honorable Kristi L. Harrington. (App. pp. 120-155). The trial court granted the *Motions to Dismiss* and *Motions to Strike the Affidavit of William Gary White, III,* and disregarded Thomas' *Motion for Leave to Amend the Complaint* by way of a *Form 4 Order* filed on April 19, 2011. (App. p. 4). Thomas filed a *Motion to Alter or Amend* on April 29, 2011, (App. pp. 109-119), that was denied by way of a *Form 4 Order* filed on May 23, 2011. (App. p. 5). Thomas then served the instant *Notice of Appeal* on June 22, 2011, and filed it with the trial court on June 23, 2011.

Court of Appeals

The *Appeal* was heard by the South Carolina Court of Appeals, wherein, Petitioner filed the *Final Brief of Appellant* arguing the following four issues:

1. The trial court erred in determining that the Respondents' conduct while representing Appellant in the underlying criminal matter could not have been determined within the ambit of common knowledge to have fallen below an acceptable standard of care in violation of Appellant's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3

and 22 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution, (App. pp. 226-232);

2. The trial court erred in failing to grant Appellant leave to amend and supplement the pleadings and, in granting Respondents' *Motion to Strike the Affidavit of William Gary White, III*, in violation of Appellant's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 22 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution, (App. pp. 233-238);

3. The trial court erred in granting Respondents' *Motion to Dismiss* Michael Bolus, Keith Bolus and *Bolus & Bolus* in violation of Appellant's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 22 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution, (App. pp. 239-240); and,

4. The Respondents engaged in deceptive trade practices and, participated with their attorneys in a civil conspiracy, by the subornation of perjury, constituting extrinsic fraud upon the court in their denial to practicing law as the *Bolus & Bolus Law Firm* in violation of Appellant's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 22 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution. (App. pp. 241-246).

An untimely *Brief of Respondents* was filed without consequence, (App. pp. 249-277), and Petitioner filed the *Final Reply Brief of Appellant.* (App. pp. 278-292). The Court of Appeals decided the case without oral arguments and affirmed the trial court's dismissal of the subject legal malpractice action and disinclination to address Petitioner's *Motion to Amend*, Opinion No. 2013-UP-034 (S.C. Ct. App. Filed January 16, 2013). (App. pp. 294-295).

Petition for Rehearing

Petitioner timely filed and served a *Petition for Rehearing En Banc* on January 31, 2012, (App. p. 297), arguing the Court of Appeals overlooked and/or misapprehended the following points and that consideration by the full court was necessary to secure and/or maintain uniformity of it decisions:

a. In holding the trial court did not err in declining to consider Appellant's (Petitioner's) *Motion to Amend* his complaint because he did not file the motion ten days prior to the hearing, (App. pp. 298-299);

b. In holding Appellant (Petitioner) to a higher standard than lawyers, (App. pp. 299-301);

c. In holding that Appellant's (Petitioner's) proposed *Amended Complaint* failed to state a cause of action because he did not allege facts that show he is innocent of all criminal charges filed against him, (App. pp. 301-302); and,

d. In holding that Appellant (Petitioner) failed to preserve his remaining arguments for review. (App. pp. 302-303).

The South Carolina Court of Appeals issued its *Order* denying *Petition for Rehearing En Banc* on March 12, 2013. (App. pp. 323). The *Petition for Writ of Certiorari* follows:

ARGUMENT
I.

The Court of Appeals erred in holding trial court did not err in granting Respondents' motion to dismiss because Petitioner did not plead he was innocent of the underlying criminal charges and, for failing to timely amend the complaint in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States.

Alleging Innocence

When charged in the underlying criminal matter with kidnapping, criminal domestic violence of a high and aggravated nature (CDVHAN) and sexual battery on spouse—that was later upgraded to CSC-1—Thomas proclaimed his innocence and demanded a trial by jury. Because of the Respondents' negligence, Thomas was erroneously convicted and sentenced to an aggregate term of 20 years in prison. To date: Thomas has diligently sought to prove his *actual innocence*. However: pursuant to Brown v. Theos, 550 S.E.2d 304, 306 (S.C. 2001), the Court of Appeals has affirmed the trial court's dismissal of the case at bar because Thomas failed to allege his innocence in the *Complaint*. (App. p. 295, ¶ 1).

In distinguishing *Brown*, the court determined the failure to allege innocence to be only one of several reasons to find there was no cause of action for legal malpractice. The most compelling of those reasons was the court's finding that *Brown's* no contest plea was equivalent to a conviction; and that "*Brown's* no contest plea, not his Attorney's negligence, caused his incarceration." *Id.* Therefore: in the case *sub judice*, it was clearly an error to dismiss Thomas' legal malpractice action pursuant to *Brown* because Thomas merely failed to allege his innocence.

Pro se Litigant

Furthermore: because Thomas is an unlearned *pro se* litigant, he was unaware that he should allege his innocence in the *Complaint*. The United States Supreme Court has consistently held that they "do not impose on persons unlearned in the law the same high standards of the legal art that they might place on the members of the legal profession." Pollard v. United States, 352 U.S. 354, 363 (1957). "As a *pro se* litigant, the Plaintiff's pleadings are accorded liberal construction, and held to a less stringent standard than formal pleadings drafted by lawyers."

(Emphasis added). Erickson v. Pardus, 551 U.S. 89, 94 (2007); Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978).

"When the United States Supreme Court enunciates a rule based upon the Fourteenth Amendment, that rule is binding upon state courts through the *Supremacy Clause*." (Emphasis added). Keeler v. Mauney, 500 S.E.2d 123, 125 (S.C.App. 1998) (citing Henry v. City of Rock Hill, 376 U.S. 776 (1964)). It should be duly noted that when Thomas sought to enjoy his right to equal protection of these foregoing *pro se* litigant rulings in the case at bar, the trial court accused him of exploiting the proceedings to impose a vendetta against the Respondents and denied Thomas' invocation thereof. (App. P. 126, lines 17-25—p. 127, lines 1-8).

Meritorious Pleadings

Thomas' causes of action clearly fall within the ambit of common knowledge: thereby, precluding the call for the *affidavit* of an expert pursuant to South Carolina Code §15-36-100(C)(2). However: Thomas' mother, Carol Ann Cook, loaned him the money when it became available to her to procure the expert *affidavit* of Attorney William Gary White, III. Because the Respondents argued that White is unqualified to render an expert opinion, Thomas secured the *affidavit* of Attorney Michael J. Virzi's qualified evaluation.

In support of his capacity as an authority on legal malpractice, Virzi (1) is one of six instructors for the *South Carolina Bar* and this Court's ongoing *Legal Ethics and Practice Program*; (2) is a former *Assistant Disciplinary Counsel* to this Court; (3) served as *Chairman* of the *South Carolina Bar Ethics Advisory Committee* for three years; (4) has authored two published articles, numerous *Ethics Advisory Opinions*, and a book chapter on matters involving lawyer ethics and malpractice; and (5), is a frequent *CLE* speaker and law school guest lecturer on the topics of lawyer malpractice and ethics. (App. p. 183, ¶ 2).

Upon review of the Respondents' conduct during the course of representing Thomas in the underlying criminal matter and the allegations in Thomas' *Complaint*: Virzi confirmed that the errors and omissions identified therein (1) can reasonably be expected to adversely affect Thomas; (2) *most probably* contributed to the guilty verdicts and the length of Thomas' sentences; and (3), the Respondents' conduct fell below the standard of care, competence, diligence, communication, and loyalty expected of lawyers. (App. p. 188, ¶ 13). It should be duly noted that when Thomas asked Virzi why he did not express his opinion on a number of other alleged acts of negligence on the part of the Respondents: Virzi said he was disinclined to do so because Thomas' allegations were already superfluously corroborated with the Respondents' conduct that he did review with specificity. (App. pp. 184-188).

Consequently: it appears that as an unlearned *pro se* litigant, Thomas' failure to allege his innocence amounts to the inartful drafting of meritorious pleadings that have been dismissed on the grounds of legal sufficiency. "[I]nartfully drawn but meritorious pleadings are upheld against a demurrer challenging their legal sufficiency." Moore v. City of Columbia, 326 S.E.2d 157, 160 (S.C.App. 1985). In the case *sub judice*, because the pleadings in *Moore* were drafted by lawyers: Thomas has also been held to a higher standard of the legal art than members of the legal profession. *Pollard, 352 U.S. at 363.*

Motion to Amend

Moreover, Virzi's new evidence confirms the Respondents have injured Thomas and, that justice requires that he be permitted to seek redress through the courts. There is "a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." Marbury v. Madison, 5 U.S. 137, 147 (1803). Therefore, because justice so requires and, in order to amend the pleadings as is necessary to conform to the evidence in the

instant matter: Thomas filed his *Motion* to do so pursuant to Rule 15, SCRCP, on April 1, 2011, (App. p. 98); which was four days after obtaining Virzi's *affidavit*.

However: Thomas' due process right to amend in accordance with Rule 15, SCRCP, was violated and, his objective of avoiding the delay, trouble, and expense of bringing a new action was dashed when the trial court declined to consider Thomas' *Motion to Amend* and dismissed his *Complaint* for mere insufficiency. (App. p. 145, lines 4-9). "[W]hen a demurrer is sustained for mere insufficiency, the complaint should not be absolutely dismissed, if the omission can be supplied by amendment, for the latter course saves the delay, trouble, and expense of bringing a new action." Portman v. Garbade, 522 S.E.2d 830, 832-833 (S.C.App. 1999); Owens v. Atlantic Coast Lumber Co., 94 S.E. 15 (S.C. 1917).

Ten Day Notice

The Court of Appeals also held that the trial court did not err in declining to consider Thomas' *Motion to Amend* his complaint because he did not file the *Motion* ten days prior to the hearing pursuant to Rule 6(d), SCRCP. In response: the Court of Appeals has overlooked the fact that Thomas was seeking to amend the pleadings to conform to proof. "Simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late." Soil & Material Engineers, Inc. v. Folly Associates, 361 S.E.2d 779, 781 (S.C.App. 1987). There are other contrary rulings against Thomas this Court should take *judicial notice* of that occurred on September 11, 2012. In his action for a marital dissolution captioned *Thomas v. Crowley*: the court denied Thomas' request made pursuant to Rule 6(d), SCRCP, that Attorney Edward L. Knisley, Jr., not be heard on his *Motion to Quash* filed five days prior. (See pp. 305-309).

This Court should also take *Judicial notice* that during the trial in that same case on September 20, 2012: Attorney Joseph K. Qualey introduced his *Motion to Quash* filed two days prior. Again, Thomas cited Rule 6(d) and the binding authority of Dedes v. Strickland, 414 S.E.2d 132, 133 (S.C. 1992) in support of an *oral motion* seeking that Qualey's motion not be heard; this request was denied as well. (App. pp. 310-319). In other words: likewise to the case at bar, Thomas has also been held to a higher standard of the legal art than members of the legal profession during the course of prosecuting his divorce. *Pollard, 352 U.S. at 363.* An appeal was filed in the Court of Appeals on January 17, 2013, on these issues, *inter alia*, and assigned Appellate Case No. 2012-213714.

In light of the foregoing decisions in the *Thomas v. Crowley* case and, the trial court's decision to disregard Thomas' *Motion to Amend* pursuant to Rule 6(d) in the instant case: it appears that this Rule is not regularly or consistently applied. "For a state-law ground to be 'adequate,' ... it must be applied regularly or consistently." Bostick v. Stevenson, 589 F.3d 160, 164 (4th Cir. 2009)(quoting Johnson v. Mississippi, 486 U.S. 578, 587 (1988). "Where a procedural rule is inconsistently applied, we will not allow a state's invocation of that rule to thwart ... issues that the adequacy requirement was designed to prevent." (Internal quotations omitted). *Bostick, id., (citing Brown v. Lee, 319 F.3d 162, 169 (4th Cir. 2003)).*

Notwithstanding the fact that Rule 6(d), SCRCP, does not control motions to amend when justice requires and/or to conform to the evidence pursuant to Rule 15, SCRCP: in the interest of *judicial economy*, this Court should distinguish in a principle way those cases in which it would apply Rule 6(d). "We decline to hold Bostick responsible for failing to comply with a rule when, at the time his case was decided, the state courts did not distinguish, in any

principled way, those cases in which it would apply the rule from those in which it would not." *Bostick, supra at 165.*

Abuse of Discretion

Thomas sought to amend the *Complaint* with his pleading of innocence of all the underlying criminal charges and Virzi's expert testimony to conform to the evidence pursuant to Rule 15(b), SCRCP, wherein it states in pertinent part:

> ""[A]mendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party *at any time*, even after judgment[ ].... If evidence is objected to at trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and *shall do so freely* when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."" (Emphasis added).

This Rule clearly articulates the court, at any time, may allow the pleadings to be amended and, *shall* do so freely. "Use of word 'shall' in a statutory provision indicates the provision is mandatory." Calhoun v. Calhoun, 529 S.E.2d 14, 18 (S.C. 2000).

Moreover, the Respondents failed to state how they were prejudiced by the amended pleadings in the case at bar and there was no finding thereof. In other words: the trial court abused its discretion in (1) failing to make a finding of prejudice; and (2), failing to grant Thomas' *Motion to Amend.* In support of this observation, it was determined in the case of *Soil & Material Engineers, 361 S.E.2d at 781* that the trial court abused its discretion in denying amendment to pleadings to conform to proof where "[t]rial judge ... made no finding of prejudice and [party opposing amendment] made no showing of any."

It was also held that pursuant to Rule 15(b), "amendments to conform to proof should be liberally allowed when no prejudice to opposing party will result therefrom." *Id.* "It is an equal

abuse of discretion to refuse to exercise discretionary authority where it is warranted as it is to exercise the discretion improperly." State v. Smith, 280 S.E.2d 200, 202 (S.C. 1981). The court in Ex Parte U-Drive-It, Inc., 630 S.E.2d 464, 467 (S.C. 2006) held that:

> ""[a]n abuse of discretion occurs when the judge's ruling is based upon an error of law, such as application of the wrong legal principle; or, ... when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case.""

It should be duly noted that in the case *sub judice*, the trial court declined to hear Thomas' *Motion to Amend* because the Respondents claimed to have only received notice thereof within the two previous days. (App. p. 21, lines 23-25—p. 32, lines 1-21). However: (1) the Respondents set forth an *affirmative defense* in their *Answers* filed nine months prior on July 12, 2010, that Thomas' *Complaint* should be dismissed because he failed to attach the *affidavit* of an expert, (App. p. 17, ¶ 21; p. 23, ¶ 17); and (2), the Respondents contemporaneously filed *Motions to Dismiss* arguing Thomas' *Complaint* should also be dismissed because of his failure to allege his innocence of the underlying criminal charges against him. (App. p. 17, ¶ (d); p. 32, ¶ (d)).

In response: Thomas filed *Returns* on August 12, 2010, alleging his innocence, (App. pp. 30-31; p. 37; p. 50); and on February 16, 2011, Thomas filed the expert *Affidavit of William Gary White, III.* (App. pp. 181-182). Therefore: "prejudice could not properly have been found since" the foregoing filings "were enough to alert" the Respondents months in advance for the probability that—notwithstanding his status of an unlearned, *pro se* litigant—Thomas would seek to amend the pleadings to conform to the evidence. *Soil & Material Engineers, supra at 781-782.*

Additionally, Virzi's expert *affidavit* confirms justice requires Thomas be allowed to amend the pleadings, (App. pp.183-188), and Thomas did not seek to raise any new issues. "Under rule providing leave to amend pleadings shall be freely given when justice so requires and does not prejudice any other party, prejudice in question is lack of notice that new issue is going to be tried, and lack of opportunity to refute it." Duncan v. CRS Sirrine Engineers, Inc., 524 S.E.2d 115 (S.C.App. 1999). Furthermore, the Court of Appeals has allowed new issues to be amended to the pleadings up to two days prior to trial. "Wife was not prejudiced by grant of husband's motion to amend pleadings to allege adultery two days before trial...." Griffith v. Griffith, 506 S.E.2d 526 (S.C.App. 1998).

Frivolous Civil Proceedings

The Respondents have also argued in the instant matter that Thomas' *Complaint* is defective because he failed to attach the affidavit of an expert pursuant to S.C. Code §15-36-100. However, no special learning is needed to evaluate the conduct of the Respondents because the subject matter lies within the ambit of common knowledge. In support thereof are the *Facts* revealed in the *Final Brief of Appellant.* (App. pp. 202-221). Therefore, Thomas was not required to attach the affidavit of an expert to his *Complaint. Id., at (C)(2).* However: Thomas included as an *Exhibit* the expert *affidavit* of Michael J. Virzi in his *Memorandum Opposing Motion to Dismiss Michael Bolus, Keith Bolus and Bolus & Bolus*, (App. p. 90), and sought to amend the pleadings to conform to the evidence of, among other things, Virzi's irrefutably reliable testimony pursuant to Rule 15(b), SCRCP, on April 1, 2011. "[A]mendments of pleadings are allowed even after judgment to conform to the evidence...." Staubes v. City of Folly Beach, 529 S.E.2d 543, 547 (S.C. 2000).

In the case at bar, unlike the Respondents' triumphant *Motion to Strike Affidavit of William Gary White, III*, (App. pp. 59-60; 78-79), they did not seek to strike Virzi's *affidavit*. Instead, the Respondents improperly relied upon §15-36-100(C)(1) wherein it states that Thomas had 45-days after filing the *Complaint* to supplement the pleadings with an expert affidavit. Moreover, the Respondents set forth in their *Brief of Respondents* that the trial court properly dismissed Thomas' *Complaint* for failure to comply with §15-36-100. (App. p. 269). It should be duly noted that the *Orders* handed down by the trial court do not articulate the grounds for dismissal nor was Thomas otherwise notified thereof, (App. pp. 4-5); which suggests there were *ex parte* communications between the Respondents and trial court.

Inasmuch as the trial court's dismissal of Thomas' *Complaint* appears to be predicated on his failure to seek to amend the pleadings with the *affidavit* pursuant to §15-36-100(C)(1): this line of reasoning is flawed because (1) Thomas was not required to attach the *affidavit* of an expert whereas his allegations fall well within the ambit of common knowledge exception, *id., at (C)(2)*; (2) Virzi's *affidavit* remains in the record unchallenged by the Respondents; and (3), Thomas filed his *Motion to Amend* pursuant to Rule 15(b), SCRCP, to amend the pleadings to conform to the evidence of, *inter alia*, Virzi's *affidavit*. (App. p. 98). "Amendments of pleadings are controlled by Rule 15, SCRCP." *Staubes, supra at 546.*

Moreover: because §15-36-100 is a statute under *Frivolous Civil Proceedings*, it seems obvious that the legislative intent of this statute is to ensure that lawsuits without merit will not be heard by the courts; which Virzi's *affidavit* confirms does not apply to the instant case. "[T]he legislative intent must prevail if it can be reasonable discovered in the language used, which must be construed in the light of the intended purpose of the statutes." Gambrell v. Travelers Ins. Companies, 310 S.E.2d 814, 816 (S.C. 1983). In other words, the trial court

abused its discretion in the case at bar if Thomas' *Complaint* was dismissed on the grounds that he failed to timely amend the pleadings pursuant to §15-36-100.

ARGUMENT
II.

The Court of Appeals erred in holding Petitioner's proposed amended complaint failed to state a cause of action because he did not allege facts that show he is innocent of all criminal charges filed against him in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, §§ 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution.

Facts Purporting Innocence

The Court of Appeals held that Thomas' proposed *Amended Complaint* failed to allege facts that show innocence pursuant to *Brown, 550 S.E.2d at 306.* This finding is also accompanied with the decision in Sullivan v. Hawker Beechcraft Corp., 723 S.E.2d 835, 841 (S.C.App. 2011) that the trial court properly denied the plaintiff's motion to amend his complaint because the plaintiff failed to cite any new factual allegations that would impact the issue. (App. p. 295).

In distinguishing *Brown*, the complaint in that case only made conclusory statements alleging (1) the defendants performed deficiently and failed to provide *Brown* with reasonably effective representation; and (2), that the PCR court reversed *Brown's* convictions because he had been denied effective assistance of counsel. (See pp. 13-14 of the *Appendix* in Appellate Case No. 2000-015049). In distinguishing *Sullivan*: the appellant failed, in both his 59(e) motion and appellant brief, to cite any new factual allegations that would impact a jurisdictional issue. *Sullivan, id.* Moreover, this case did not encompass a review of the sufficiency of a proposed amended complaint.

Therefore: the findings in *Brown* and *Sullivan* are irrelevant in the case at bar because (1) Thomas' 59(e) *Motion* and *Final Brief of Appellant* are both well-supplied with new factual allegations that clearly impact the issue of legal malpractice, (App. pp. 111-112; pp. 202-221); and (2), Thomas has set forth numerous facts in both the initial *Complaint* and proposed *Amended Complaint* that show he is innocent of all charges in the underlying criminal matter. To wit, among other things, Thomas alleged in both *Complaints* that the Respondents:

1. Failed to subpoena numerous witnesses whose testimony would have been favorable to Thomas, (App. p. 11, ¶ b; p. 107, ¶ b);

2. Failed to challenge testimony presented by the prosecution which clearly contradicted previous testimony and written statements by the same witness, (App. p. 11, ¶ c; p. 107, ¶ c); and,

3. Failed to obtain medical information to corroborate or discount alleged physical injuries to the [alleged] victim. (App. p. 11, ¶ e; p. 107, ¶ e).

Pursuant to Rule 8(a)(2), SCRCP, these are short and plain statements of facts showing Thomas' innocence and, that Thomas is entitled to relief. "This requires a litigant to plead ultimate facts which will be proven at trial, not the evidence which will be used to prove the facts." Clark v. Clark, 361 S.E.2d 328 (S.C. 1987).

Amended Facts

Rule 15(b), SCRCP, states in pertinent part that motions to conform to the evidence shall be allowed at any time, even after judgment. Therefore, as a precautionary measure focused on the Court of Appeals holding that Thomas has failed to allege facts that show innocence: pursuant to Rule 15(b), Thomas respectfully requests that this Court grant him leave to amend the foregoing statements of fact. This request is made because the merits of this action will be

subserved thereby and, because Thomas has irrefutably reliable evidence to prove the following amendments:

1. The Respondents refused to compel the testimony of witnesses or, even allow those who appeared at trial to testify that would have corroborated Thomas' testimony that the prosecutrix (1) knowingly and willfully sought the use of a stun gun during sex; (2) had fabricated the underlying criminal allegations against Thomas because he wanted a divorce from her; and (3), then stalked Thomas seeking to reunite despite his having been placed on GPS monitoring because the prosecutrix claimed to be in fear of her life;

2. The Respondents failed to impeach the prosecutrix by revealing over 46 inconsistencies therein her testimony, sworn statements, and affidavit; and,

3. The Respondents failed to procure medical records that would have confirmed the prosecutrix gave false testimony regarding injuries she claimed Thomas inflicted upon her.

Burdon of Proof

The jury in the underlying criminal trial was instructed that Thomas' guilt or innocence is to be determined beyond a reasonable doubt. However, Thomas is prepared to present clear and convincing evidence to prove the foregoing facts showing he is innocent of all the underlying criminal charges against him. In other words, had the foregoing facts showing Thomas' innocence been revealed to the jury: the outcome would have been a determination beyond any reasonable doubt that Thomas was not guilty. Moreover, the State would *most probably* have dismissed all charges but for the Respondents' *gross negligence*.

Therefore, it should be obvious that Thomas will prevail in a hearing on the merits under the *trial within a trial* doctrine. In fact: Thomas' expert witness, Michael J. Virzi, expressed his opinion that the testimony suppressed by the Respondents supporting Thomas' claim that the

prosecutrix enjoyed the use of a stun gun during sex, in and of itself, would have given him reasonable doubt of Thomas' guilt. Virzi also told Thomas that the Respondents would settle as opposed to revealing their negligence during a public trial. It should also be duly noted that the Respondents have not refuted the allegations herein but are relying on erroneous technicalities to escape culpability for their egregious conduct. "In passing on demurrer, complaint's allegations are deemed true and are liberally construed in favor of pleader." Hill v. Watford, 278 S.E.2d 347-348 (S.C. 1981).

ARGUMENT
III.

The Court of Appeals erred in holding Petitioner failed to preserve his remaining arguments for review in violation of Petitioner's right to due process and equal protection of the laws as guaranteed by Article I, § 3 and 23 of the South Carolina Constitution and Fourteenth Amendment to the United States Constitution

Judicial Bias

A hearing before the Honorable Kristy L. Harrington was convened in the case at bar on April 6, 2011. As Thomas was entering the courtroom, Respondent Michael Bolus deserted the defense table and asked the bailiff if he was supposed to be seated with Thomas; then attempted to shake Thomas' hand. Because Michael Bolus refused to take measures that would have easily proven Thomas was innocent of all the underlying criminal charges, Thomas reacted with an expression of incredulity and declined to embrace Bolus' hand. (App. pp. 116-117). It should be duly noted that Thomas did not raise his voice or, make any gestures of obscenity or aggression: the trial court merely observed Thomas refuse to shake Michael Bolus' hand.

Soon thereafter, Thomas respectfully sought to enjoy the protection of a United States Supreme Court ruling on *pro se* litigants. In response, the trial court accused Thomas of

disrespect and exploiting the proceedings to foist a personal vendetta upon the Respondents: then ranted on about how Thomas was not entitled to equal protection of the law he requested and how he was otherwise going to be dealt with. (App. p. 126, lines 17-25—p. 127, lines 1-22). When Thomas was later permitted to speak: he expressed the importance of his *Motion to Amend*, (App. p. 134, lines 20-21), and explained that in the proposed *Amended Complaint* he (1) had asserted his innocence of all the underlying criminal charges against him, (App. p. 136, lines 3-5); (2) had affidavits from two experts attached, (App. p. 140, lines 4-21); and (3), had thereby cured all the alleged deficiencies in the original *Complaint*. (App. p. 152, lines 3-7).

Notwithstanding the fact that the foregoing amendments were clearly made to conform to the evidence, the trial court only observed and granted the Respondents' *Motions*. (App. pp. 4-5). Therefore: it appears the trial court's biased and erroneous determination that Thomas' objectives were nefarious as opposed to justiciable compelled her to arbitrarily dismiss Thomas' *Complaint* and, deny Thomas his right to due process and equal protection of the laws. "[T]he complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." (Citation omitted). Plyler v. Burns, 647 S.E.2d 188, 192 (S.C. 2007). "A decision lacking a discernible reason is arbitrary and constitutes an abuse of discretion." Johnson v. Johnson, 372 S.E.2d 107, 115 (S.C.App. 1988). "[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." State v. Langford, 735 S.E.2d 471, 479 (S.C. 2012)(quoting Schweiker v. McClure, 456 U.S. 188, 195 (1982)). "The trial judge must act with absolute impartiality in the performance of judicial duties." State v. Pace, 447 S.E.2d 186, 187 (S.C. 1994).

Preservation of Issues

In the case *sub judice*: at Thomas' request, the trial court confirmed that she would be reviewing everything that had been filed up to April 6, 2011. (App. p. 135, lines 3-17). Thereafter, Thomas raised the issue of fraud wherein the Respondents advertised they were practicing as a law firm with *Over 50 years of combined experience*, (App. pp. 145-147, lines 1-11; p. 162): then denied this fact when seeking to dismiss *Bolus & Bolus* on the grounds that this is a non-existent entity. (App. p. 57). Thomas' arguments concluded that day with an *oral motion* seeking that should the trial court grant the Respondents' *Motions to Dismiss*: that it be done without prejudice to include tolling of the statute of limitations and, he expressed the intent to appeal any unfavorable rulings. (App. p. 152, lines 18-25—p. 153, line 1).

Furthermore: Thomas filed a 59(e) *Motion* on April 29, 2011, wherein he noted the trial court's confirmation that all pleadings up to April 6, 2011, would be reviewed prior to ruling on the Respondents' *Motions*; and, he listed these pleadings with specificity in order to preserve all of his issues for appellate review. (App. pp. 109-110). In other words: therein Thomas' *Reply to Defendant's Motion to Dismiss Bolus & Bolus* filed on August 12, 2010, (App. p. 42), Thomas set forth arguments alleging *extrinsic fraud* because the Respondents had fraudulently advertised they were a law firm with *Over 50 years of combined experience* to inveigle clients; these arguments are supported by photographic and documentary evidence. (App. pp. 44-47). Moreover: on April 1, 2011, Thomas filed a *Memorandum Opposing Motion to Dismiss Michael Bolus, Keith Bolus and Bolus & Bolus*, (App. p. 84), wherein he again raised this issue of *intrinsic fraud* with the inclusion of allegations of a *conspiracy* connected with fraudulent advertising. (App. pp. 95-97).

Consequently: in light of the trial court's assurance that all pleadings would be reviewed prior to ruling, (App. p. 135, lines 3-17), Thomas merely raised the issue of the Respondents' fraudulent advertising devoid recounted arguments grounded on *intrinsic fraud* and *conspiracy* therein his 59(e) *Motion.* (App. p. 115). "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon." (Citation omitted). Jean Hoefer Toal, Shahin Vafai, Robert A. Muckenfuss, Appellate Practice in South Carolina at 59 (2nd Edition 2002). "Once the issue has been properly raised by a Rule 59(e) motion, it is preserved, and a second motion is not required if the trial court does not specifically rule on the issue so raised." (Citation omitted). *Id. At 55-60.*

Moreover, because the trial court in the case at bar only issued a *Form Order* when granting the Respondents *Motions* without giving reasons for the decisions, (App. pp. 4-5), and the foregoing *fraud* and *conspiracy* arguments are in the *Record on Appeal*: these issues are thereby preserved. "Even if the court only issues a form order in response to a[n] ... [issue], and a party does not make Rule 59(e) motion, if the arguments in support of the [issue] are included in the record on appeal, they are preserved." (Citation omitted). *Id. At 60.* Therefore: *Argument IV* in Thomas' *Final Brief of Appellant* focused on deceptive trade practices, conspiracy, perjury, and fraud in the instant matter is likewise ripe for appellate review. (App. pp. 241-246).

Futile Objections

When Respondent Michael Bolus approached Thomas at the hearing on April 6, 2011, seeking a handshake and to be seated with him, (App. pp. 116-117): this was clearly a calculated maneuver designed to incite an unfavorable reaction in the presence of the trial court. To believe otherwise is contrary to reason because Michael Bolus abandoned the defense table with co-

counsel and asked a bailiff if he was supposed to be seated with his adversary. Moreover, Thomas' reaction of incredulity did not exceed the boundaries of normalcy given the catastrophic losses he has sustained at the hands of the Respondents. Be that as it may: the trial court appears to have inappropriately allowed her impartiality to be compromised after having witnessed Michael Bolus' ploy, because, Thomas was scorned for merely seeking to enjoy his right to the equal protection of a United States Supreme Court ruling. (App. p. 126, lines 17-25—p. 127, lines 1-21).

Thomas was also denied his right to due process when, *inter alia*, his *Motion to Amend* to conform to the evidence was not granted. However, in light of the trial court's tone and tenor and, because nothing Thomas requested was entertained to include tolling of the statute of limitations: an objection to these violations of due process and equal protection would have been futile. Therefore, the foregoing constitutional infringements and tolling issues are preserved for review. "[P]arty need not engage in futile act in order to preserve issue." (Citation omitted). *Appellate Practice, at 63*. "[N]o waiver where objection would be futile." (Citation omitted). *Id.*

It should be duly noted that notwithstanding the fact that the fraud and deceptive trade practice issues were properly preserved in the case at bar: these matters are also preserved pursuant to the foregoing *futility* precept. Moreover, this Court should apply the doctrine of *equitable tolling* to toll the statute of limitations because, thus far, erroneous technicalities have unjustifiably prevented a trial on the merits of the case. "The doctrine of equitable tolling may be applied to toll the ... statute of limitations to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits." (Internal quotations and citation omitted). Kimmer v. Wright, 719 S.E.2d 265, 270 (S.C.App. 2011).

Furthermore, inasmuch as the appellate review of constitutional infringements in this state is normally predicated on their having been preserved in the lower court: the violation of Thomas' right to due process and equal protection of the laws under the United States Constitution are nonetheless preserved for federal review. By way of explanation, because Thomas informed the trial court that he was trying to protect his interests, (App. p. 144, lines 24-25—p. 145, line 1), labeled his federal claims (1) in his 59(e) *Motion*, (App. pp. 118-119); (2) on direct appeal in his *Final Brief of Appellant*, (App. pp. 191-247); and (3), herein this *Petition for Writ of Certiorari*: this state's courts have been given the opportunity to correct the violation of Thomas' federal rights.

In the case of Duncan v. Henry, 513 U.S. 364, 365 (1995), the United States Supreme Court reversed the prior ruling because "in his direct appeal in state court, [appellant] did not label his claim a federal due process violation...." "If state courts are to be given the opportunity to correct alleged violations of [a litigant's] federal rights, they must surely be alerted to the fact that the [litigants] are asserting claims under the United States Constitution." *Id. at 365-366.*

CONCLUSION

The Petitioner prays that in light of the facts presented herein and for the following character of reasons, this Court will issue the *Writ of Certiorari*:

1. The facts in this legal malpractice action as distinguished from those in the case of *Brown v. Theos* present novel questions of law;

2. The decision of the Court of Appeals regarding amendments to conform to the evidence is in conflict with prior decisions in the Supreme Court;

3. The erroneous application of Rule 6(d), SCRCP, in this case and inconsistent application of this Rule in the lower courts and, the failure of the Court of Appeals to observe binding case law involve substantial state constitutional issues of due process and equal protection of the laws; and,

4. There is also a federal question of due process and equal protection of the laws regarding paragraphs 2 and 3 above and the standards imposed upon unlearned *pro se* litigants in that the decisions of the Court of Appeals conflict with decisions of the United States Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy this *Petition for Writ of Certiorari* has been sent by U.S. Mail to:

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