THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Honorable Edgar W. Dickson

Trial Court Case No. 2021-CP-10-01343

Appellate Case No. 2023-001779

Andrew Pampu; Amanda Pampu; and John Pampu, …… Appellants,

vs.

CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fargnoli, Esq.; Barrett R. Brewer, Esq.; and BREWER LAW FIRM, LLC, …… Respondents.

APPELLANTS' INITIAL BRIEF

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I. Whether the trial court erred by failing to consider the well-pled fact allegations in the Pampus' Second Amended Complaint supporting the legal malpractice claims against their former lawyers stemming from an insufficient settlement in the underlying matter.

II. Whether the trial court erred by disregarding well-pled fact allegations establishing a claim for breach of fiduciary duty, particularly where the facts alleged demonstrate breaches of loyalty and confidentiality resulting in actual losses.

III. Whether the trial court erred by disregarding fact allegations that showed the existence of a client-lawyer relationship between Mr. Pampu and Ms. Pampu, on one hand, and the Lawyers, one the other, thereby providing the Pampus with standing to sue.

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V. Whether the trial court erred by dismissing the Pampus' breach of fiduciary duty claim as "duplicative" of their legal malpractice claim.

VI. Whether the trial court erred by deeming Mr. Dillon's expert opinions supporting the Pampus' professional negligence claims as untimely and insufficient as a matter of law.

VII. Whether the trial court erred by failing to consider the timeliness of Mr. Dillon's expert affidavit, which was filed in accordance with S.C. CODE ANN. § 15-36-100(E) permitting an amended pleading with an expert affidavit to cure alleged defects.

VIII. Whether Mr. Dillon's qualifications and expertise in Title IX matters establish the legal sufficiency of his expert opinions.

IX. Whether the trial court erred by disregarding established South Carolina jurisprudence supporting legal malpractice claims arising from lawyers' errors during mediation and disregarding the exception to the ADR Rules on confidentiality permitting disclosure in a legal malpractice claim of otherwise confidential communications during mediation, in favor of public policy arguments supporting mediation and settlement.

Statement of the Case

On March 19, 2021, Appellants, Andrew Pampu; Amanda Pampu; and John Pampu (collectively "the Pampus"), filed a Summons and Complaint in the Court of Common Pleas for Charleston County, South Carolina, asserting claims for professional negligence, breach of fiduciary duty, and breach of contract against Respondents, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fargnoli, Esq.; BREWER LAW FIRM, LLC; and Barrett R. Brewer, Esq. (the individual Respondents will be referred to collectively as "the Lawyers" and the Limited Liability Company Respondents will be referred to as "the Law Firms"). The Lawyers are the attorneys and Members of the Law Firms whose errors caused financial losses to the Pampus during their representation of the Pampus in a) a federal court lawsuit against a University for violations of Title IX, the United States Constitution, and the University's own disciplinary process arising from errors and mishandling of an investigation of an incident of Andrew Pampu's alleged nonconsensual sex with another student and b) a state court lawsuit against the individuals and others who made false statements and gave false testimony supporting the University's investigation.

The Pampus' Complaint alleged facts showing the Lawyers were negligent in 1) allowing their client, Andrew Pampu, to sign a deficient handwritten settlement agreement that did not contain necessary language and terms dedicated to the University's future treatment of Andrew Pampu's academic records, the results of which were contrary to what the Lawyers knew were the clients' desires and objectives, which was a key component of the Pampus' "consideration" to settle, and without addressing multiple other issues necessary to resolve the underlying dispute with the University; 2) failing to explain to Andrew Pampu the full implication of this handwritten

settlement agreement and how the University could refer to his student records to future schools, especially medical or dental schools; and 3) in the manner in which they prosecuted the state court action, including substantial discovery deficiencies; and 4) the manner in which the Lawyers concluded the representation, including the manner in which they surrendered the materials related to their representation of the Pampus. One or more of these negligent actions or related omissions caused substantial financial losses to the Pampus, including their payment of and continuing payment of substantial legal fees to successor counsel to mitigate their damages caused by the Lawyers and frustrating the purpose of the underlying litigation. These same acts and omissions by the Lawyers form the basis for the Pampus' claim for breach of contract against the Law Firms.

After the Lawyers were discharged as counsel for the Pampus, the Lawyers acted in a manner establishing a clear and serious breach of their fiduciary duties of loyalty and confidentiality, including disclosing information related to their representation of the Pampus to counsel for the opposing parties without the Pampus' consent.

On April 30, 2021, the Pampus filed an Amended Complaint with the affidavit of Justin Dillon, Esq., an expert witness and lawyer with experience in litigating Title IX matters, which specifies at least one negligent act or omission by the Lawyers claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of his affidavit. (Amended Complaint, ROA ___).

On May 9, 2021 and May 10, 2021, respectively, the Respondents filed their motions to dismiss the Amended Complaint pursuant to Rule 12 (b)(6), SCRCP and Rule 12 (b)(1), SCRCP. (Motions to Dismiss Amended Complaint, ROA ___). The Respondents' motions both asserted that because no facts were stated in the Amended Complaint supporting a claim for relief.

On June 16, 2021, the Pampus filed a Second Amended Complaint asserting claims for professional negligence and breach of fiduciary duty against the Lawyers and a breach of contract claim against the Law Firms. (Sec. Amend. Complaint, ROA ___). The Second Amended Complaint is the operative pleading for this appeal.

On June 28, 2021 and June 30, 2021, respectfully, the Respondents filed motions to dismiss the Second Amended Complaint pursuant to Rule 12(b)(6), SCRCP and Rule 12(b)(1), SCRCP, asserting that the Second Amended Complaint failed to state facts sufficient to support a claim and asserting that Mr. and Ms. Pampu did not have standing to pursue any claims against the Respondents.

On March 2, 2022, a WebEx hearing on the motions to dismiss was held before the Honorable Edgar W. Dickson, during which the Second Amended Complaint, legal memoranda, and arguments of counsel were presented, and after which an Orders were entered on June 23, 2022 (collectively "the Orders"), granting the motions and dismissing the lawsuit. (Orders dismissing Sec. Amend. Complaint, ROA ___).

On July 5, 2022, the Pampus timely filed a Motion for Reconsideration and to Alter or Amended Orders Dismissing Second Amended Complaint. (Motion for Reconsideration and to Alter or Amended Orders Dismissing Sec. Amend. Complaint, ROA ___).

On October 23, 2023, Honorable Edgar W. Dickson entered an Order Denying Plaintiff's Motion for Reconsideration and to Alter or Amended Orders Dismissing Second Amended Complaint. (Order Denying Plaintiff's Motion for Reconsideration and to Alter or Amended, ROA ___) ("the Reconsideration Order").

The Pampus' Notice of Appeal was timely filed thereafter.

Facts

On or around November 2, 2017, the Lawyers accepted the representation of the Pampus to provide legal advice, services, and representation of the Pampus in a lawsuit pending in the United States District Court for the District of South Carolina (the "Federal Case") asserting Title IX and other claims against a University ("the University"); and representing the Pampus in a lawsuit pending in a lawsuit pending in the Court of Common Pleas in a County in South Carolina (the "State Case") asserting defamation, civil conspiracy, and other tort claims against individuals involved in submitting to the University false claims against Andrew Pampu, which led to a disciplinary action that was mishandled by the University. (Sec. Amend. Complaint, p. 4 at ¶ 13, ROA ___).

On or about November 2, 2017, Respondent Law Firms entered into a contract with Mr. and Mrs. Pampu to represent the Pampus in the Federal Case, the State Case, and "any other claims or causes of action arising from the facts, incidents, and allegations referenced in these lawsuits." (Sec. Amend. Complaint, p. 4 at ¶ 14; ROA ___).

At the commencement of this representation, the Federal Case, with its Complaint filed on June 15, 2016, had been pending approximately a year and a half while the State Case, with its Complaint filed on June 15, 2017, had been pending for approximately six months. (Sec. Amend. Complaint, p. 5 at ¶ 15; ROA ___). In the Federal Case, Andrew Pampu's lawsuit against the University and several related defendants (collectively "the University Defendants") alleged claims for violation of Title IX of the Education Amendments of 1972, failing to provide Andrew Pampu with procedural due process, breach of contract, breach of covenant of good faith and fair dealing, negligence, promissory estoppel, and for a declaratory judgment. (Sec. Amend.

Complaint, p. 5 at ¶ 16; ROA ___). The primary claims against the University Defendants in the Federal Case were premised on theories the University Defendants deprived Andrew Pampu of due process and certain protections under Title IX of the Education Amendments of 1972 and related federal regulations during: the investigation the University Defendants undertook regarding false allegations by a female student ("Jane Doe"); the deliberating processes that the University Defendants applied to conclude that Andrew Pampu had engaged Jane Doe in nonconsensual sexual activity; and the appeals process the University Defendants applied to Andrew Pampu's appeal. (Sec. Amend. Complaint, p. 5 at ¶ 17; ROA ___). The Federal Case and the State Case involved common facts in that both concerned the allegations by Jane Doe claiming Andrew Pampu engaged in nonconsensual sexual activity with her; and the allegations by a male student, "Charles Doe," made during the University's investigation allegedly corroborating Jane Doe's claims. (Sec. Amend. Complaint, p. 5 at ¶ 18; ROA ___).

Through a variety of errors and omissions by the University Defendants, in an administrative hearing conducted on February 26, 2016, Andrew Pampu was found to have engaged Jane Doe in nonconsensual sexual activities and punished with a one-semester suspension. (Sec. Amend. Complaint, pp. 5-6 at ¶ 19; ROA ___). Thereafter Andrew Pampu followed the University's appeal process to appeal the incorrect administrative hearing decision. (Sec. Amend. Complaint, p. 6 at ¶ 20; ROA ___). The appeals process actually resulted in greater sanctions imposed by the University upon Andrew Pampu, including an additional year of suspension. (Sec. Amend. Complaint, p. 6 at ¶ 21; ROA ___). On or about January 14, 2017, Charles Doe sent Andrew Pampu text messages admitting that he and Jane Doe lied regarding Jane Doe's allegations, both during the investigation of those allegations and at the hearing regarding

those allegations. (Sec. Amend. Complaint, p. 6 at ¶ 22; ROA ___). Despite receiving notice of the January 2017 texts sent by Charles Doe, the University Defendants refused or failed to undertake additional action to address the content of those text messages from Charles Doe to Andrew Pampu. (Sec. Amend. Complaint, p. 6 at ¶ 23; ROA ___).

On or about June 15, 2017, the State Case was filed against Jane Doe, Charles Doe, and Richard Doe (Charles Doe's father), asserting claims for defamation, intentional infliction of emotional distress, and civil conspiracy. (Sec. Amend. Complaint, p. 6 at ¶ 24; ROA ___). The State Case also asserted a claim for abuse of process against Jane Doe and Charles Doe based on the two strategically utilizing the University's Title IX process for an illegitimate objective, that is, to further harass, defame, retaliate against, and punish Andrew Pampu. (Sec. Amend. Complaint, p. 6 at ¶ 24; ROA ___). These three defendants will be collectively referred to as the "State Case Defendants").

By November 27, 2017, the Federal Court substituted the Lawyers for Andrew Pampu's previous counsel. (Sec. Amend. Complaint, p. 6 at ¶ 26; ROA ___). During the Lawyers' representation of the Pampus, the Lawyers drafted and, upon information and belief, disclosed to third parties an "apology letter" purportedly from Andrew Pampu to one of the State Case Defendants falsely conceding critical matters. (Sec. Amend. Complaint, p. 7 at ¶ 27; ROA ___). During the Lawyers' representation of the Pampus, the Lawyers served discovery requests tailored to personal injury claims when representing the Pampus on slander and defamation claims. (Sec. Amend. Complaint, p. 7, ¶ 28; ROA ___). During the Respondents' representation of the Pampus, the Lawyers did not provide the Pampus with copies of materials obtained during discovery. (Sec.

Amend. Complaint, p. 7 at ¶ 29; ROA ___). Following extensive written discovery, the parties to the Federal Case scheduled a meditation. (Sec. Amend. Complaint, p. 7 at ¶ 30; ROA ___).

In February of 2018, the Lawyers and the Pampus received an eighty-page report from expert witness Daniel C. Swinton, Ed.D., J.D., B.A. (the "Swinton Report"), detailing a variety of errors and omissions by the University Defendants in the procedural, investigatory, and adjudicative processes the University Defendants applied regarding Jane Doe's allegations and Andrew Pampu's prosecution. (Sec. Amend. Complaint, p. 7 at ¶ 31; ROA ___). Based on the text messages from Charles Doe and the content of the Swinton Report, the Lawyers knew or should have known that Andrew Pampu's claims against the University Defendants and the claims against the State Case Defendants were meritorious and very valuable, whether settled or tried to a verdict or decision. (Sec. Amend. Complaint, pp. 7-8 at ¶¶ 32-35; ROA ___).

Before the mediation, the Lawyers received an email from the Pampus stating their mediation goals, including:

> a. Based on the Charles Doe text messages and a lengthy and detailed report (the Swinton Report), the University vacate its findings and all related sanctions against Andrew Pampu, which by implication would have limited the University's future treatment of Andrew Pampu's academic records;
>
> b. The State Case remain separate and unaffected by any settlement of the Federal Case;
>
> c. there be no confidentiality or silencing provisions restricting sharing of the settlement terms; and
>
> d. Andrew Pampu's arguments regarding lack of due process afforded by the University during the investigation and adjudicatory process be buttressed by reference to the cases listed in the email.

(Sec. Amend. Complaint, p. 8 at ¶ 36; ROA ___).

On March 21, 2018, the Lawyers, the Pampus, and the University Defendants and their counsel participated in a mediation for the Federal Case. (Sec. Amend. Complaint, p. 8 at ¶ 37;

ROA ___). After a grueling eleven (11) hour mediation, the terms that the parties allegedly came to agree upon were memorialized in a short-form "Settlement Agreement," which the Lawyers approved and strongly urged Andrew Pampu to sign. (Sec. Amend. Complaint, p. 8 at ¶ 38; ROA ___). To accomplish their objective to have the Pampus agree to settle so they could get their contingent fee, the Lawyers took advantage of an opportunity when Appellant, John V. Pampu (Andrew Pampu's Father) and Appellant, Amanda C. Pampu (Andrew Pampu's Mother) were out of the room to forcefully urge Andrew Pampu to agree to the University's proposed settlement terms. (Sec. Amend. Complaint, pp. 8-9 at ¶ 38; ROA ___). Andrew Pampu (and later Andrew Pampu's parents) conceded to the Lawyers' pressure to settle and signed a "Settlement Agreement." (Sec. Amend. Complaint, p. 9 at ¶ 38; ROA ___).

On March 23, 2018, the Lawyers received an email from the Pampus explaining Andrew Pampu's unawareness of the effect and import of the Settlement Agreement and the negative ramifications of the Settlement Agreement. (Sec. Amend. Complaint, p. 9 at ¶ 40; ROA ___). The Pampus explained that the Settlement Agreement conflicted with the goals explained in the March 2, 2018, email and conflicted with the goals of both the Federal Case and the State Case. (Sec. Amend. Complaint, p. 9 at ¶ 41; ROA ___). The Settlement Agreement the Lawyers convinced the Pampus to sign did not contain necessary language and terms dedicated to the University's future treatment of Andrew Pampu's academic records, the results of which were contrary to what the Lawyers knew or should have known were the Pampus' desires and objectives, which was a key component of the Pampus' "consideration" to settle, and the Settlement Agreement did not address many other issues necessary to resolve the underlying dispute with the University. (Sec. Amend. Complaint, p. 9 at ¶ 42; ROA ___).

On March 27, 2018, the District Court entered an Order of Dismissal in the Federal Case providing the parties an opportunity to consummate the settlement and providing either side sixty (60) days to file a petition to enforce the settlement. (Sec. Amend. Complaint, p. 10 at ¶ 46; ROA ___).

On May 4, 2018, counsel for the University Defendants forwarded a proposed release to the Lawyers as per the terms of the Settlement Agreement. (Sec. Amend. Complaint, p. 10 at ¶ 47; ROA ___). That same day, the Lawyers sent the Settlement Agreement with proposed revisions back to counsel for the University Defendants. (Sec. Amend. Complaint, p. 10 at ¶ 47; ROA ___). On May 8, 2018, the Lawyers informed counsel for the University Defendants their representation of the Pampus had been terminated and that the Pampus had not yet retained new counsel. (Sec. Amend. Complaint, p. 10 at ¶ 48; ROA ___). On May 9, 2018, the Lawyers memorialized the Pampus' May 8, 2018, termination of their representation in a letter to the Pampus, with language impliedly recognized the Pampus' terminated the attorney-client relationship for cause and attempting to refute some of the bases for termination of the representation for cause. (Sec. Amend. Complaint, p. 10 at ¶ 49; ROA ___). On May 10, 2018, counsel for the University Defendants sent Andrew Pampu a letter with a five (5) day deadline for response enclosing a Settlement Agreement and Mutual Release ("Release"), a Stipulation of Dismissal with Prejudice, and a copy of the settlement check, which would be provided upon execution of the Release and the Stipulation of Dismissal. (Sec. Amend. Complaint, pp. 10-11 at ¶ 50; ROA ___).

On May 11, 2018, Andrew Pampu emailed counsel for the University Defendants indicating he had received the May 8, 2018 letter, he wanted to make changes to the proposed Release, he was retaining new counsel, the five (5) day deadline was not feasible, and his new

attorneys would be in contact early the following week. (Sec. Amend. Complaint, p. 11 at ¶ 51; ROA ___). On May 16, 2018, newly retained counsel ("Successor Counsel") for the Pampus contacted counsel for the University Defendants requesting the proposed Release document in Word format to make revisions. (Sec. Amend. Complaint, p. 11 at ¶ 52; ROA ___). On May 18, 2018, upon consent motion, a text order was entered by the Federal Court this Court substituting Successor Counsel for the Lawyers as counsel of record for Andrew Pampu. (Sec. Amend. Complaint, p. 11 at ¶ 53; ROA ___). On May 23, 2018, Successor Counsel submitted revisions to the Release to counsel for the University Defendants. (Sec. Amend. Complaint, p. 11 at ¶ 54; ROA ___).

On May 24, 2018, counsel for the University Defendants contended that the revisions materially changed the terms of the Settlement Agreement reached in mediation and in response, the University Defendants moved the Federal Court to enforce the Settlement Agreement. (Sec. Amend. Complaint, p. 11 at ¶ 55; ROA ___). Thereafter, the Pampus expended substantial funds by way of legal fees and expenses in the Federal Case attempting to void the Settlement Agreement the Lawyers had directed Andrew Pampu to sign and oppose its enforcement because of the Lawyers' errors and omissions. (Sec. Amend. Complaint, p. 11 at ¶ 56; ROA ___).

The Federal Court's "Redacted Order" upheld and enforced the Settlement Agreement against Andrew Pampu, finding the Settlement Agreement terms were clear and unambiguous; and the plain and unambiguous language of the Settlement Agreement did not support the Pampus' representations the University promised more during the settlement negotiations. (Sec. Amend. Complaint, p. 12 at ¶ 57; ROA ___).

The Settlement Agreement:

a. did not contain the necessary language and terms dedicated to the University's future treatment of Andrew Pampu's academic records;

b. contained language leading to results contrary to what the Respondents knew were the Pampus' desires and objectives, which was a key component of the Pampus' "consideration" to settle;

c. did not address multiple issues necessary to resolve the underlying dispute with the University; and

d. did not contain the necessary language addressing the University's ability to disclose any settlement agreement when confronted with a public records information request for same and, if so, whether Andrew Pampu's identity would be safeguarded.

(Sec. Amend. Complaint, p. 12 at ¶ 58; ROA ___).

On January 1, 2019, the Federal Court entered an order by way of minute entry to the docket, requiring the University to make its counsel and an individual with decision-making authority available by telephone for an upcoming mediation in the State Court case, scheduled for March 1, 2019. (Sec. Amend. Complaint, p. 12 at ¶ 59; ROA ___). The Settlement Agreement had a negative impact on the State Case, where the Pampus have been forced to expend additional funds to litigate that case because of the impact of the Settlement Agreement. (Sec. Amend. Complaint, p. 12 at ¶ 60; ROA ___).

On February 28, 2019, the Lawyers sent a letter to the mediator *and counsel for all parties in the State Case and other third parties* asserting an alleged lien on settlement proceeds in a total amount of $145,000; with $40,000 of the total attributed to attorney's fees allegedly owed from the outcome of the Federal Case and $105,000 of the total attributed to attorney's fees allegedly owed from the work performed by the Lawyers in the State Case. (Sec. Amend. Complaint, pp. 12-13 at ¶ 61; ROA ___). On March 26, 2019, Successor Counsel forwarded a letter to the Lawyers noting that the February 28, 2019, letter, sent to several third parties, and the State Case's opposing counsel and mediation mediator, interfered with the mediation process, disrupting and negotiations

and disadvantaging Andrew Pampu's position in the mediation, all of which added and continued to cause damages to the Pampus. (Sec. Amend. Complaint, p. 13 at ¶ 62; ROA ___).

The February 28, 2019, letter from the Lawyers interfered with the mediation process, disrupted the negotiations, and disadvantaged Andrew Pampu's positions. (Sec. Amend. Complaint, p. 13 at ¶ 63; ROA ___). Thereafter, the Pampus spent several hundred-thousands of dollars litigating the State Court case that was not resolved at mediation because the Pampus' positions on law and facts in dispute were irreparably damaged by errors and omissions by the Lawyers at the mediation of the Federal Case that directly, proximately and foreseeably caused damage to Andrew Pampu's position in the State Case. (Sec. Amend. Complaint, p. 13 at ¶ 65; ROA ___). The Lawyers have continued to assert a charging lien for legal fees against the Pampus' settlement proceeds from the University, despite Andrew Pampu having terminated the Fee Agreement with the Respondents for cause, thereby generating additional expenses for Andrew Pampu to contest those allegations. (Sec. Amend. Complaint, p. 13 at ¶ 66; ROA ___).

As a direct, proximate and foreseeable result of the Lawyers' actions and inactions before and after their being relieved as counsel, the Pampus suffered damages, including loss of settlement value of a settlement of the State Case; loss of value of the claims in the State Case, and expenditure of substantial legal fees necessary to mitigate or to rectify the harm caused by the Lawyers' acts and omissions. (Sec. Amend. Complaint, pp. 13-14 at ¶ 67; ROA ___).

Had the Lawyers met the standard of care by properly, accurately or timely attempting to assert a lien so as not to prejudice Andrew Pampu in the State Court mediation and litigation, a substantial portion of the damages sustained by the Pampus should have been avoided. (Sec. Amend. Complaint, p. 14 at ¶ 68; ROA ___). Had the Lawyers met the fiduciary standard of

conduct by properly, accurately or timely attempting to assert an alleged charging lien, a substantial portion of the damages sustained by the Pampus should have been avoided. (Sec. Amend. Complaint, p. 14 at ¶ 69; ROA ___). The Pampus suffered damages, including loss of settlement value of a settlement in the Federal Case; loss of the value of the claims in the Federal Case; loss of settlement value of a settlement of the State Case; loss of value of the claims in the State Case, and expenditure of substantial legal fees necessitated to mitigate or to rectify the harm caused by the Respondents' actions and inactions. (Sec. Amend. Complaint; p. 14 at ¶ 70; ROA ___).

Legal Standards

A. Motions to Dismiss.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the [circuit] court." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 631, 699 S.E.2d 699, 703 (Ct. App. 2010). *See also, Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) ("A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true."); *Wilkinson v. E. Cooper Cmty. Hosp., Inc.*, 410 S.C. 163, 169, 763 S.E.2d 426, 430 (2014) (*quoting Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "In deciding whether the [circuit] court properly granted the motion to dismiss, the appellate court must consider whether the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, state any valid claim for relief." *Id*. "The [circuit] court and this [c]ourt on appeal must presume all well pled facts to be true." *Id*. at 635, 699 S.E.2d at 705 (internal quotation marks omitted).

Since "a judgment on the pleadings is considered to be a drastic measure," a motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle a plaintiff to any relief under any theory of the case. *Gressette v. S.C. Elec. & Gas Co.*, 370 S.C. 377, 379, 635 S.E.2d 538, 538 (2006); *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

B. Motions to Reconsider

In South Carolina, Rule 59(e), SCRCP, motions have long been considered a vehicle to seek reconsideration of issues and arguments presented to the court. *See Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). It is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court "alter or amend the judgment," but also as a vehicle to seek "reconsideration" of issues and arguments. A party usually is allowed to ask the trial court to reconsider its decision, even if it means rehashing all or part of an argument previously presented. *Elam*, 361 S.C. at 21,602 S.E.2d at 778-79.

Rule 59(e) provides that a "motion to alter or amend the judgment shall be served no later than 10 days after receipt of written notice of the entry of the order," it does not set forth a defined legal standard for reconsideration. Rule 59(e), SCRCP. The South Carolina Supreme Court has established that, "a party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." *Id*, 361 S.C. at 24, 602 S.E.2d at 780. If a lower court fails to rule on an issue raised before it, a party must file a Rule 59(e) motion to preserve that issue for later appeal. *E.g., Bodkin v. Bodkin*, 388 S.C. 203, 219, 694 S.E.2d 230, 239 (Ct. App. 2010).

C. Factual Allegations Required to State Facts Sufficient to Support a Legal Malpractice Claim.

"A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 321, 732 S.E.2d 170 (2012).

D. Factual Allegations Required to State Facts Sufficient to Support a Claim for Breach of Fiduciary Duty.

"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. Co*. 399 S.C. at 335-36, 732 S.E.2d at 173.

E. Factual Allegations Required to State Facts Sufficient to Support a Claim for Breach of Contract.

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491-92, 732 S.E.2d 205, 209 (Ct. App. 2012).

F. Requirement for an expert affidavit to be filed with the pleadings.

South Carolina Code Section 15-36-100 requires a plaintiff to present expert testimony regarding the alleged "negligent act or omission" by a professional, including lawyers, to support a claim for professional negligence.

Arguments

I. The trial court committed reversible error by ignoring well-pled fact allegations stating claims for legal malpractice claims against their former lawyers based on an insufficient settlement in the underlying matter.

The thrust of the Pampus' legal malpractice claim is the Lawyers' acts and omissions below the standard of care directly resulted in financial losses to the settlement value of the Federal Lawsuit and the State Lawsuit, as well as losses associated with the failure to require the necessary language and terms dedicated to the University's future treatment of Andrew Pampu's academic records, and the legal fees the Pampus subsequently incurred. As to loss of settlement value, this Court has held,

> The client's burden of establishing proximate cause in a legal malpractice action requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. Stated otherwise, "the client need not show a perfect claim. But the client must show at least that he has lost a *probability* of success as a result of the attorney's negligence."

Doe v. Howe, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (emphasis added) (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass. L. Rev. 74, 79 (1993)). *See also*, *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (The former client "could satisfy the 'most probably' requirement and defeat [the lawyer's] summary judgment motion by establishing he 'most probably' would have received a larger settlement than [the settlement obtained by the lawyer] *or* that he 'most probably' would have prevailed on the underlying claim at trial.").

In the Orders granting the Respondents' motions to dismiss, the trial court made the following findings:

> While Plaintiffs are correct in stating that there may be grounds for a malpractice suit where a client alleges his former attorney was negligent in advising him to accept a settlement, there is no allegation in the Second Amended Complaint giving rise to a colorable claim the [Respondents] committed professional error in advising Plaintiff Andrew Pampu whether or not to accept the settlement. There are no

> allegations of professional error on the part of the [Respondents] in advising Plaintiff Andrew Pampu as to whether he should accept the terms of the settlement in the Federal Lawsuit. There are also no allegations that the [Respondents] induced Plaintiff Andrew Pampu into signing the mediation agreement.

(Orders granting Respondents' motions to dismiss, p. 5, filed on June 23, 2022).

The trial court's Orders erred in ignoring the specific allegations in the Second Amended Complaint establishing for the purposes of the Motions to Dismiss clearly supporting the Pampus' professional negligence claims. The fact allegations in Paragraph 1 standing by themselves state claims against the Lawyers for legal professional negligence and are patently inconsistent with the trial court's findings:

> ¶1. [ ] Lawyers were negligent in 1) allowing their client, [Andrew Pampu], to sign a deficient handwritten settlement agreement that did not contain necessary language and terms dedicated to the University's future treatment of [Andrew Pampu]'s academic records, the results of which were contrary to what the Lawyers knew were the clients' desires and objectives, which was a key component of the [Pampus]' "consideration" to settle, and without addressing multiple other issues necessary to resolve the underlying dispute with the University; 2) failing to explain to [Andrew Pampu] the full implication of this handwritten settlement agreement and how the University could refer to his student records to future schools, especially medical or dental schools; and 3) in the manner in which they prosecuted the state court action, including substantial discovery deficiencies; and 4) the manner in which the Lawyers concluded the representation, including the manner in which they surrendered the materials related to their representation of the [Pampus]. One or more of these negligent actions or related omissions resulted in substantial financial losses to the [Pampus], including their payment of and continuing payment of substantial legal fees to successor counsel to mitigate their damages caused by the Lawyers and frustrating the purpose of the underlying litigation.

(Sec. Amend. Complaint, pp. 1-2, ¶ 1; ROA ___).

The trial court erred in ignoring the specific allegations in the Second Amended Complaint that were contained in Mr. Dillon's expert affidavit establishing for the purposes of the Motions to Dismiss the following fact allegations and expert opinions clearly supporting the Pampus' professional negligence claims:

¶6. The Lawyers failed to perform their duties and were professionally negligent in multiple ways, including but not limited to:

> a. Accepting a monetary settlement from Clemson University that contained no provision for cleaning up Mr. Doe's disciplinary record regarding the sexual misconduct and related findings that Clemson had made against him. I am not aware of any Title IX lawyer who believes that one files these lawsuits simply for money. What matters most, and certainly matters more than money, is cleaning up the student's disciplinary record. It is inconceivable to me that the attorneys who settled this case would have done so for only an amount of money ($100,000.00) that, I suspect, constituted just a fraction of the Plaintiffs' actual litigation costs.
>
> b. Moreover, as far as I am aware, the original negative finding against Mr. Doe was never struck from Clemson's records, so there was no need to agree that it would be "reinstated," as the settlement agreement did. One need not reinstate something that was never "de-instated." So it was all the more strange to see that not only would the Lawyers fail to secure a clean record, but that they would affirmatively agree to a dirty one. It is the equivalent of steering the Titanic into the iceberg in exchange for free gas.
>
> c. Any attorney who practices in the Title IX area would be well aware of the downstream implications of a sexual misconduct finding and the paramount importance of a clean disciplinary record. Many schools to which a student might transfer will ask if he has ever been disciplined, as will most graduate or professional schools to which he applies. Moreover, there could be future professional-licensing implications of a negative finding for anyone who is interested in practicing medicine, law, or the like. My understanding is that Mr. Doe hopes to practice medicine and that the Lawyers knew that at the time—and that, indeed, they knew that safeguarding those hopes was the reason Plaintiffs sued in the first place. So the harm of a sexual misconduct finding to a future doctor or lawyer is potentially even worse than it is to a student who does not intend to pursue one of the professions—which is all the more reason why settling solely for money made so little sense in this case.
>
> d. Moreover, schools will often agree to clean up a student's record during settlement negotiations. Schools, like courts, can vacate and expunge disciplinary findings.
>
> e. It is particularly striking that the Lawyers settled the case without cleaning up Mr. Doe's disciplinary record given that Plaintiffs sent them a five-page, single-spaced written document, entitled "Mediator Proposed Mediation Terms," that contemplated exactly what such a resolution would look like. The Lawyers appear to have ignored virtually that entire document and settled only for money—and, incredibly, for an amount of money that was a mere 25% of the $400,000 contemplated in the document.

(Expert Affidavit by Justin Dillon, Esq., pp. 2-4, ¶ 6, Ex. 1 to Second Amended Complaint; ROA ___).

The trial court's Orders dismissing the Pampus' Second Amended Complaint did not accept the facts alleged as true and failed to view the facts and inferences drawn from the facts alleged in the Second Amended Complaint in the light most favorable to the Pampus.

The trial court also erred in creating its own "fact" allegations. On page 3 of the Order granting the Respondents' motions to dismiss, the trial court "found" that "Plaintiff Andrew Pampu developed 'buyer's remorse' in the days after the mediation and attempted to abandon the settlement." (Orders granting Respondents motion to dismiss, p. 3). There are no such allegations of fact in the Second Amended Complaint.

The facts alleged in Paragraph 1 of the Second Amended Complaint and Mr. Dillon's expert opinions state facts supporting a "valid claim for relief" under South Carolina's legal malpractice jurisprudence. The trial court's Orders dismissing the Pampus' Second Amended Complaint should be reversed and this matter should be remanded for trial.

II. The trial court committed reversible error by ignoring well-pled fact allegations stating claims under established South Carolina law permitting former clients to bring breach of fiduciary duty claims when the facts alleged show the fiduciary breached duties of loyalty and confidentiality causing actual losses.

The Pampus' Second Amended Complaint alleges the Lawyers breached their duties of loyalty and confidentiality by disclosing information related to the representation to third parties without the Pampus' knowledge or consent that caused financial losses. The trial court's Orders erred in ignoring the specific allegations in the Second Amended Complaint establishing the Pampus' breach of fiduciary duty claims.

In the Orders granting the Respondents' motions to dismiss, the trial court made the following findings:

> In their Memorandum Law in Opposition to the Motion to Dismiss, Plaintiffs claimed that the [Respondents] committed tortious conduct after the mediation. That allegedly tortious conduct pertains to the [Respondents]' assertion of a lien for their attorney's fees on the settlement amounts for their work in the Federal Lawsuit and State Lawsuit. First, asserting such a lien was permissible under the terms of the representation agreement between Plaintiff Andrew Pampu and the [Respondents]. Second, there are no allegations (beyond conclusory ones) that tortious conduct occurred in the assertion of that lien. To the extent Plaintiffs claim that Plaintiff Andrew Pampu's position in the Federal Lawsuit and/or State Lawsuit was damaged due to the assertion of the lien, the Second Amended Complaint lacks proper allegations demonstrating proximate cause for such harm.

(Orders granting Respondents' motions to dismiss, p. 6, filed on June 23, 2022).

It was error for the trial court to conclude that "asserting such a lien was permissible under the terms of the representation agreement between Plaintiff Andrew Pampu and the [Respondents]" because there are no such allegations anywhere in the Second Amended Complaint.

The fact allegations in Paragraphs 2, 61, and 62 state facts sufficient to establish breach of fiduciary duty claims against the Lawyers:

> ¶2. After the Lawyers were discharged as counsel for the [Pampus], the Lawyers acted in a manner establishing a clear and serious breach of their fiduciary duties, including disclosing information related to their representation of the [Pampus] to counsel for the opposing parties without the [Pampus]' consent.
>
> ¶61. On February 28, 2019, the Lawyers sent a letter to the mediator ***and counsel for all parties in the State Case and other third parties*** asserting a lien on settlement proceeds in a total amount of $145,000; with $40,000 of the total attributed to attorney's fees allegedly owed from the outcome of the Federal Case and $105,000 of the total attributed to attorney's fees allegedly owed from the work performed by the Lawyers in the State Case.
>
> ¶62. On March 26, 2019, Successor Counsel forwarded a letter to the Lawyers noting that the February 28, 2019, letter, sent to several third parties, and the State Case's opposing counsel and mediation mediator, interfered with the mediation

> process, disrupting and negotiations and disadvantaging [Andrew Pampu]'s position in the mediation, all of which added and continued to cause damages to [Andrew Pampu].

(Second Amended Complaint, pp. 2, 12-13, ¶¶ 2, 61, and 62; ROA ___) (emphasis in original).

The allegations that the Lawyers' letter "interfered with the mediation process, disrupting and negotiations and disadvantaging [Andrew Pampu]'s position in the mediation, all of which added and continued to cause damages to [Andrew Pampu]", which should have been taken as true by the trial court, all establish a proximate link between the Lawyers' actions and the Pampus' damages.

Fiduciary duties are duties of the highest standard required by law of any agent relative to his/her/its principal, which include the duties of loyalty, disclosure, confidentiality, obedience, reasonable care and diligence, and full accounting. *See, e.g.,* Henry Campbell Black, *et al.*, BLACK'S LAW DICTIONARY 625 (6th ed. 1990); *see generally* Ernest Weinrib, *The Fiduciary Obligation*, 25 U. Toronto L.J. 1, 5-6 (1975) (discussing judicial determination of fiduciary relationship). Fiduciary law encompasses the specific set of actors who furnish services to others and who are subject to a legal doctrine that embodies remedial measures intended to prohibit fiduciaries from misappropriating or misusing entrusted property or power. Likewise, when a fiduciary breaches the duty of loyalty, not only is the beneficiary permitted to recover actual damages, but an additional distinctive remedy is available to the beneficiary – disgorgement of the benefit that the fiduciary obtained through the breach. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (proof of actual damages not necessary to obtain disgorgement of fees due to lawyers' breach of fiduciary duty to client); *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907 (S.D.N.Y. 1997) (Sotomayor, J.) (client can maintain breach of fiduciary duty action against lawyers despite dismissal of malpractice and contract claims).

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another, *Ellis v. Davidson*, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004), and a client-lawyer relationship is by its nature a fiduciary relationship. *RFT Management Co., L.L.C. v. Tinsley & Adams, L.L.P.,* 399 S.C. 321, 732 S.E.2d 170 (2012); *Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011); *Holtz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991).

As fiduciaries, lawyers owe their clients a duty of loyalty and a duty of confidence, which is separate from their professional duties of competence and care. *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005). *See also, First Am. Corp. v. Al-Nahyan*, 17 F. Supp.2d 10, 27 (D.D.C.1998); *BCCI Holdings v. Clifford*, 964 F. Supp. 468, 481 (D.D.C.1997). The allegations in Paragraphs 2, 61, and 62 state facts sufficient to establish breach of fiduciary duty claims based on the Lawyers' letter to third-parties asserting an alleged charging lien wreaked havoc in the Pampus' attempts to resolve their claims against the University defendants in the Federal Lawsuit. The information contained in the Lawyers' letter was confidential and his disclosure was a breach of the Lawyers' fiduciary duties of loyalty and confidentiality.

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Davis v. Greenwood School Dist*. 50, 365 S.C. 629, 620 S.E.2d 65 (2005); *Moore v. Benson*, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010); *Smith v. Hastie*, 367 S.C. at 417, 626 S.E.2d at 17; *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). *See also*, RESTATEMENT (SECOND) OF TORTS § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

To recover on a claim for breach of fiduciary duty, the plaintiff must prove by a preponderance of the evidence that a fiduciary duty existed between the parties, that the defendant violated that fiduciary obligation, and that the plaintiff suffered damages resulting from the violation. *Walbeck v. I'On Co., LLC*, 439 S.C. 568, 585, 889 S.E.2d 537, 546 (2023), *reh'g denied* (July 26, 2023); *Smith*, 367 S.C. at 417, 626 S.E.2d at 17. There is no requirement that the plaintiff show "he or she most probably would have been successful in the underlying suit". *Smith*, 367 S.C. at 417, 626 S.E.2d at 17.

The trial court committed reversible error by ignoring well-pled fact allegations in the Second Amended Complaint stating claims for breach of fiduciary duty to recover damages caused by the Lawyers' breach of their duties of loyalty and confidentiality. The Orders granting the Respondents' motions to dismiss should be reversed and this case should be remanded.

III. The trial court committed reversible error by ignoring specific fact allegations establishing a client-lawyer relationship between Mr. Pampu and Ms. Pampu and the Lawyers that provided standing to sue.

The trial court dismissed the claims by Mr. and Ms. Pampu for lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP. This ruling constitutes reversible error, because the trial court ignored the specific allegations in the Complaint establishing a client-lawyer relationship between Mr. Pampu and Ms. Pampu, on one hand as clients, and the Lawyers, on the other as the attorneys concerning the "Federal Case" and the "State Case." See (Sec. Amend. Complaint, ¶¶ 1, 2, 13-14, 28-29, 36-37, 40, 49, 56, 61, and 66). Here a few examples:

> ¶1. This case seeks recovery of damages caused by the Lawyers' errors during their representation of *the [Pampus]* in a) a federal lawsuit against … The Lawyers were negligent in 1) allowing their client, John Doe, to sign a deficient handwritten settlement agreement that did not contain necessary language and terms dedicated to the University's future treatment of John Doe's academic records, the results of which were contrary to what the Lawyers knew were the clients' desires and objectives, which was a key component of *the [Pampus]*' "consideration" to settle,

…. and 4) the manner in which the Lawyers concluded the representation, including the manner in which they surrendered the materials related to their representation of *the [Pampus]*. One or more of these negligent actions or related omissions resulted in substantial financial losses to *the [Pampus]*, ….

¶2. After the Lawyers were discharged as counsel for *the [Pampus]*, the Lawyers acted in a manner establishing a clear and serious breach of their fiduciary duties, including disclosing information related to their representation of *the [Pampus]* to counsel for the opposing parties without *the [Pampus]*' consent.

¶13. On or around November 2, 2017, the Lawyers accepted the representation of *the [Pampus]* to provide legal advice, services, and representation of *the [Pampus]* in a lawsuit ….

¶14. On or about November 2, 2017, [the Law Firms] contracted to represent *the [Pampus]* in the Federal Case, the State Case, and "any other claims or causes of action arising from the facts, incidents, and allegations referenced in these lawsuits."

The trial court's findings on pages 6-7 of the Orders that Mr. and Ms. Pampu lacked standing were premised on the fact that neither Mr. Pampu nor Ms. Pampu were parties to the Federal Lawsuit or the State Lawsuit. The existence of a client-lawyer relationship is not dependent on whether the client is a party to a lawsuit or later becomes a party to a lawsuit. Taking the allegations in the Second Amended Complaint is true, Mr. Pampu and Ms. Pampu specifically alleged they were clients of the Lawyers and parties to contracts of representation with the Law Firms.

It was clear error by the trial court to dismiss the claims asserted by Mr. Pampu and Ms. Pampu for alleged lack of subject matter jurisdiction under Rule 12(b)(1), SCRCP. These findings should be reversed, and the entire matter should be remanded to the Circuit Court.

IV. The trial court committed reversible error by ignoring specific fact allegations establishing the Pampus' breach of contract claim.

The Orders summarily dismissed the Pampus' claims for breach of contract without making or identifying any findings of fact or specific conclusions of law. The Orders did not

properly treat the specific allegations in the Second Amended Complaint that established, for the purposes of a motion to dismiss, a contractual relationship between Mr. Pampu and Ms. Pampu and the Law Firms for the Law Firm to provide legal services to pursue the Pampus' claims in "Federal Case" and the "State Case." These allegations provide standing for Mr. Pampu and Ms. Pampu to assert the breach of contract claims stated in the Second Amended Complaint.

The Second Amended Complaint contains these allegations of fact concerning the Pampus' breach of contract claim:

> ¶14. On or about November 2, 2017, CLAWSON FARGNOLI and BREWER LAW FIRM (collectively "the Law Firms") contracted to represent the [Pampus] in the Federal Case, the State Case, and "any other claims or causes of action arising from the facts, incidents, and allegations referenced in these lawsuits."
>
> ¶98. Law Firms entered into a Contract with the Does agreeing and contracting to provide legal services to represent the [Pampus] in the Federal Case, the State Case, and "any other claims or causes of action arising from the facts, incidents, and allegations referenced in these lawsuits."
>
> ¶99. Law Firms breached the contract by failing to provide such services.
>
> ¶100. The [Pampus] satisfied all necessary preconditions, if any, and performed their part of the contract, and/or was, at the appropriate time, able, ready, and willing to perform.
> ¶101. As a direct and proximate result of the Law Firms' breach of their contractual duties, the [Pampus] sustained actual, consequential and incidental damages in an amount to be determined by the jury at the trial of this case.

The trial court erred in ignoring the specific allegations in the Complaint that Mr. Pampu and Ms. Pampu entered into a contract of representation with the Law Firms, thereby providing standing for Mr. Pampu and Ms. Pampu to assert the breach of contract claims stated in the Second Amended Complaint. *See* (Sec. Amend. Complaint, pp. 4, 19-20, ¶¶ 14, 98-101, and Wherefore clause on p. 20). This result should be reversed, and the entire matter should be remanded to the Circuit Court.

V. The trial court committed reversible error by dismissing the Pampus' breach of fiduciary duty claim as "duplicative" of their legal malpractice claim.

The Orders should be reversed and allow the Pampus to proceed with their breach of fiduciary duty claim because the Second Amended Complaint alleges facts supporting their breach of fiduciary duty claim as argued above. Notwithstanding the fact that the Pampu's' Second Amended Complaint states facts sufficient to support a breach of fiduciary duty claim, the Pampus should be permitted to pursue that claim, along with their legal malpractice claim and breach of fiduciary duty claim because Rule 8(a), SCRCP permits filing alternative claims. *See* Rule 8(a), SCRCP ("Relief in the alternative or of several different types may be demanded."); *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 187, 826 S.E.2d 585, 591 (2019) (finding the pleadings appropriately alleged alternative theories of liability). The trial court's findings effectively take away a legal malpractice plaintiff's ability to assert alternative claims in their pleadings as Rule 8(a) permits for all other litigants.

In addition, the trial court's reliance on the Supreme Court's opinion, *RFT Mgmt. Co. v. Tinsley & Adams, LLC*, 732 S.E.2d 166, 173 (S.C. 2012), does not support the ruling as that case dealt with a motion made at trial, and not before trial under Rule 12, SCRCP. Similarly, the trial court's reliance on the Supreme Court's opinion in *Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 182 (Ct. App. 2019), is also misplaced because that matter was before the trial court on a motion for summary judgment, and not a motion to dismiss. In addition, this Court previously recognized the propriety of pleadings alleging a legal malpractice claim and a breach of fiduciary duty claim. *See Smith v. Hastie*, 367 S.C. 410, 419, 626 S.E.2d 13, 18 (Ct. App. 2005) ("We therefore hold Smith presented adequate evidence on the merits of her claims for negligence and breach of fiduciary duty.") (Emphasis added).

Based on the express language in Rule 8(a), SCRCP, it was error for the trial court to conclude that the Pampus' breach of fiduciary duty claim was duplicative of their professional negligence claim. These findings should be reversed, and the entire matter should be remanded to the Circuit Court.

VI. The trial court committed reversible error by concluding Mr. Dillon's expert opinions supporting the Pampu's professional negligence claims were untimely and insufficient as a matter of law.

Mr. Dillon has substantial experience in representing clients on Title IX matters and in litigating disputes under Title IX. Mr. Dillon's expert affidavit was timely filed with the Amended Complaint, and also with the Second Amended Complaint under S.C. CODE ANN. § 15-36-100(E).

A. The trial court committed reversible error by ignoring the allegations in the Second Amended Complaint showing Mr. Dillons' expert affidavit was timely filed under S.C. CODE ANN. § 15-36-100(E) permitting an amended pleading with an expert affidavit to be filed to cure alleged defects.

The trial court erred in ignoring the dates of filing and the statements in the Second Amended Complaint establishing for the purposes of a motion to dismiss the fact that Mr. Dillon's expert affidavit was timely filed and satisfied all aspects of S.C. CODE ANN. § 15-36-100(C)(1).

The trial court also erred in ignoring the specific allegations in Paragraph 103 in the Second Amended Complaint, which should have been taken as true for the purposes of the Lawyers' Motions:

> ¶103. In February and early March 2021, *the Lawyers refused to enter into a statute of limitations tolling agreement to toll the statute of limitations* on Plaintiffs' legal professional negligence claims against the Lawyers. As stated in Paragraphs 37-39, a substantial portion of the Lawyers' liability arises from the Lawyers' acts and omissions during a mediation on March 21, 2018 in the Federal Case. As a result, Plaintiffs had a good faith basis to believe the three-year statute of limitations on Plaintiffs' legal professional negligence cause of action against the Lawyers would expire on March 21, 2021, which was within 10 days of the date the Summons & Complaint was filed on March 19, 2021. *Because of time constraints*, an affidavit of an expert could not be prepared in

time to file the Summons & Complaint before March 21, 2021.

Under S.C. CODE ANN. § 15-36-100(C)(1), included with the filing of the Amended Summons & Amended Complaint and marked as Exhibit 1 was the affidavit of Justin Dillon, Esq., an expert witness and lawyer licensed to practice law in the Commonwealth of Virginia and in the District of Columbia, which satisfies S.C. CODE ANN. § 15-36-100(A)(1) to qualify Mr. Dylan to serve as an expert in this matter. Another copy of Mr. Dillion's affidavit is filed with this Second Amended Summons & Amended Complaint as Exhibit 1. Mr. Dillon has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in the active practice litigating Title IX matters for at least three of the last five years immediately preceding his opinions, which satisfies S.C. CODE ANN. § 15-36-100(A)(2)(b)(i) to qualify Mr. Dylan to serve as an expert in this matter. Mr. Dillion has been invited to speak before organizations including the American Bar Association, the National Association of Criminal Defense Lawyers, the Association of Title IX Administrators, the Higher Education Consultants Association, the Colorado Bar Association, the Virginia State Bar, the District of Columbia Bar, and has guest lectured on Title IX matters at Harvard Law School, George Washington University, American University, and the University of Maryland. Mr. Dillion has other specialized knowledge in Title IX matters, which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of his study, experience, or both, which satisfies S.C. CODE ANN. § 15-36-100(A)(3) to qualify Mr. Dylan to serve as an expert in this matter.

Mr. Dillon's affidavit specifies 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 Mr. Dillion's affidavit.

This Second Amended Summons & Amended Complaint is being filed under S.C. CODE ANN. § 15-36-100(E), which permits an amended pleading to be filed to cure the alleged defects. This Second Amended Summons & Amended Complaint is being filed based on the specious arguments contained in the Lawyers' respective Motions to Dismiss claiming Mr. Dillon's affidavit is defective because he is not licensed in South Carolina, when the Lawyers knew or should have known there is no such requirement under S.C. CODE ANN. § 15-36-100.

It was reversible error for the trial court to conclude that Mr. Dillon's expert affidavit was not timely filed. This ruling should be reversed, and the matter should be remanded.

B. Mr. Dillon's qualifications and expertise in Title IX matters establish the legal sufficiency of his expert opinions.

The Orders did not accept as true Mr. Dillon's qualifications for serving as an expert as stated in his curriculum vitae included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint, which identifies his specialized, technical knowledge regarding the Title IX and related matters at issue in the underlying lawsuits. The standard of review under Rule 12(b)(6), SCRCP, required the trial court to accept all such allegations as true and all inferences from those allegations in favor of the Pampus.

The trial court erred in refusing to accept Mr. Dillion's opinions in the expert affidavit because the affidavit is facially sufficient given it is sworn and identifies a potentially meritorious legal malpractice claim. *See Ranucci v. Crain*, 409 S.C. 493, 508, 763 S.E.2d 189, 196–97 (2014) ("As to Dr. Crain's assertions regarding defects in the authorship and content of Dr. Boortz–Marx's affidavit, we find this is not an appropriate ground to affirm the circuit court's order because the affidavit is facially sufficient given it is sworn and identifies a potentially meritorious medical malpractice claim.").

The provisions in S.C. CODE ANN. § 15-36-100(E) do not permit the trial court to address the substance of an expert's opinions. The trial court erred in ignoring Mr. Dillon's qualifications for serving as an expert as stated in his curriculum vitae included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint, which identifies his specialized, technical knowledge regarding the Title IX and related matters at issue in the underlying lawsuits. The trial court erred in accepting the Lawyers' arguments challenging the weight of Mr. Dillon's experience, and not the lack thereof, because S.C. CODE ANN. § 15-36-100(E) does not permit challenging an expert's the substance of an expert's opinions.

The trial court erred in accepting the Lawyers' arguments that Mr. Dillion is not qualified

to serve as an expert because he has not actually practiced in South Carolina federal or state court when the Order acknowledges federal Title IX claims were involved in Lawyers' underlying representation of the Pampus and ignores Mr. Dillon's vast experience handling Title IX litigation. In addition, South Carolina has long since abandoned the "locality rule" in the context of expert opinions for legal malpractice claims. *See*, *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 438, 472 S.E.2d 612, 614 (1996) (the fact that Professor Gregory B. Adams was not licensed to practice law in this state and is not regularly handle real estate matters did not disqualify him as an expert).

The trial court incorrectly found that "Mr. Dillon holds himself out to be an expert in legal malpractice claims in South Carolina district court litigation." There is no such statement in any materials filed with the Complaint, Amended Complaint, or Second Amended Complaint.

The trial court erred in incorrectly imposing a "sufficiently related" standard for an expert witness affidavit filed in a professional liability matter under S.C. CODE ANN. § 15-36-100, which is not stated in the Statute or in any case law interpreting the Statute. See (Orders on p. 9; "Mr. Dillon's purported experience relates mainly to Title IX claims with no claimed familiarity with South Carolina federal or state court procedures or litigation. As such, Mr. Dillon's experience is not sufficiently related to Plaintiffs' allegations of legal malpractice as contained in the Second Amended Complaint.").

This ruling should be reversed, and the matter should be remanded.

VII. It was error for the trial court to ignore South Carolina jurisprudence under the guise of public policy arguments in support of mediation and settlement.

The trial court's public policy basis to dismiss the Pampus' claims arguably founded on concerns about protecting the "finality" of mediation are misplaced and contrary to controlling

South Carolina law. Notwithstanding the cases permitting clients to bring legal malpractice claims based on their former lawyers' errors in handling a settlement, *e.g.*, *Doe v. Howe*, the South Carolina Rules for Alternative Dispute Resolution have specific controlling provisions permitting communications during a mediation to be disclosed, for the purpose of a professional malpractice proceeding. *See* Rule 8(c)(3), SCADR Confidentiality ("There is no confidentiality attached to information that is disclosed during a mediation: (3) **offered to** report, **prove**, or disprove p**rofessional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding**[.]") (Emphasis added). The provisions in Rule 8(c)(3), SCADR creating an exception to the general confidentiality provisions contemplate legal malpractice lawsuits based on lawyers' conduct during a mediation that adversely affects their clients. The South Carolina Supreme Court would not have included this provision in the "finality" of mediation was sacrosanct in its view.

The trial court's rulings on this basis should be reversed, and this matter should be remanded.

CONCLUSION

Appellants, Andrew Pampu; Amanda Pampu; and John Pampu, respectfully request this Court to reverse the trial court's ruling dismissing their Second Amended Complaint with prejudice and remanding the matter to allow them to maintain their legal malpractice, breach of fiduciary duty, and breach of contract claims against the Respondents.

Respectfully submitted,

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