

RECEIVED

Jun 20 2024

SC Court of Appeals

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. Fagnoli, Esq.; Barrett R. Brewer, Esq.; and BREWER LAW FIRM, LLC, ... Respondents.

RECORD ON APPEAL VOLUME 2 OF 2

Thomas A. Pendarvis (SC Bar #064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary Street, Unit 1-A
Beaufort, SC 29902
(843) 524-9500
Thomas@PendarvisLaw.com

*Counsel for Appellants/Plaintiffs Andrew
Pampu; Amanda Pampu; and John Pampu*

James M. Dedman, IV (SC Bar # 70664)
Megan L. Allen (SC Bar # 103598)
GALLIVAN WHITE & BOYD, P.A.
6805 Morrison Blvd., Suite 200
Charlotte, NC 28211
704.552.1712
JDedman@gwblawfirm.com
MAllen@gwblawfirm.com

*Counsel for Respondents/Defendants CLAWSON
FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; and
Christina R. Fagnoli, Esq.*

R. Bruce Wallace (SC Bar # 11653)
MAYNARD NEXSEN, LLC
205 King Street, Suite 400
Charleston, SC 29401
843.577.9440
BWallace@MaynardNexsen.com

*Counsel for Respondents/Defendants Barrett R.
Brewer; and BREWER LAW FIRM, LLC*

INDEX

RECORD VOLUME II

PLEADINGS CONTINUED

Defendants’ Clawson-Fargnoli Motion to Dismiss Second Amended Complaint, June 28, 2021	169
Defendants’ Clawson-Fargnoli Motion to Prohibit Plaintiffs Using Pseudonyms, June 28, 2021	173
Defendants’ Brewers Answer to Second Amended Complaint and Counterclaim, June 30, 2021.....	176
Defendants’ Brewers Motion to Dismiss Second Amended Complaint, June 30, 2021	194
Plaintiffs’ Reply to Brewer Defendants’ Counterclaim, July 28, 2021	198
Plaintiffs’ Reply to Clawson-Fargnoli Defendants’ Counterclaim, July 28, 2021	203
Plaintiffs’ Stipulation Per Rule 43(k), August 16, 2021	208
Plaintiffs’ Corrected Stipulation Per Rule 43(k), August 17, 2021	212
Plaintiffs’ Combined Memorandum in Opposition to Defendants’ Motions to Dismiss Second Amended Complaint, October 20, 2021	217
Defendants’ Joint Memorandum in Support of Defendants’ Motions to Prohibit Plaintiffs’ from Using Pseudonyms, October 22, 2021	226
Defendants’ Joint Memorandum in Support of Defendants’ Motions to Dismiss, October 22, 2021	241
Plaintiffs’ Combined Memorandum in Opposition to Defendants’ Motions to Dismiss Plaintiffs’ Second Amended Complaint, December 15, 2021	264
Plaintiffs’ Motion for Reconsideration and to Alter or Amend the Orders Granting Defendants’ Motions to Dismiss, July 5, 2022.....	277

TRANSCRIPTS

Transcript of Hearing Defendants’ Motions to Dismiss Second Amended Complaint, March 2, 2022.....	285
--	-----

CERTIFICATE OF COUNSEL	338
------------------------------	-----

STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

IN THE COURT OF COMMONS PLAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-10-01343

John Doe; Jane Doe Mother; and
John Doe Father,

Plaintiffs,

v.

Clawson Fagnoli, LLC;
Samuel R. Clawson, Jr., Esq.;
Christina R. Fagnoli, Esq.;
Barret R. Brewer, Esq.; and
Brewer Law Firm, LLC,

Defendants.

**NOTICE OF MOTION AND
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) and South Carolina Code § 15-36-100, Defendants Clawson Fagnoli, LLC, Samuel R. Clawson, Jr., Esq., and Christina R. Fagnoli, Esq. (“Defendants”) move to dismiss all claims brought by Plaintiffs John Doe, Jane Doe Mother, and John Doe Father (“Plaintiffs”) in their Second Amended Complaint in this matter.

GROUND FOR MOTION

1. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Plaintiffs’ claims should be dismissed for failure to state a claim upon which relief can be granted.
2. Pursuant to South Carolina Rule of Civil Procedure 12(b)(1), the claims of Plaintiffs Jane Doe Mother and Jane Doe Father should be dismissed for lack of subject matter jurisdiction. Specifically, Plaintiffs Jane Doe Mother and John Doe Father lack standing to assert the claims set forth in the Second Amended Complaint, and as such, their claims should be dismissed.

3. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100, Plaintiffs' claims should be dismissed because they failed to timely provide the required expert witness affidavit. Specifically, when Plaintiffs filed their original Complaint against Defendants, they failed to contemporaneously file an affidavit of an expert witness specifying at least one negligent act or omission claimed to exist and the factual basis for each claim on the available evidence at the time of the filing of the affidavit as required by South Carolina Code § 15-36-100(B). Accordingly, Plaintiffs' claims against Defendants should be dismissed pursuant to South Carolina Code § 15-36-100(C)(1) for failure to state a claim.

4. To the extent that Plaintiffs have now filed a tardy affidavit following the filing of their original Complaint, Plaintiffs' claims should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100 because the exceptions to contemporaneously filing an expert witness affidavit found in § 15-36-100(C)(1) do not apply based on the facts and circumstances of this matter. Specifically, Plaintiffs did not show that the statute of limitations would expire on the claims in the original Complaint within ten (10) days of filing, and Plaintiffs did not allege that an affidavit of an expert could not be prepared due to time constraints. Plaintiff's attempts to correct or otherwise address these issues in their Second Amended Complaint fail as a matter of law. Therefore, Plaintiffs' claims against Defendants should be dismissed.

5. The claims set forth in Plaintiffs' Second Amended Complaint should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100(A)(3) due to the insufficiency of the credentials of Plaintiffs' purported expert, Justin Dillon. Although Mr. Dillon purports to offer opinions about the actions of South Carolina attorneys involved in litigation pending in federal court in South Carolina, Mr. Dillon is not, and

apparently has never been, licensed to practice in the state and federal courts of South Carolina or the U.S. District Court for the Fourth Circuit Court of Appeals. Further, Mr. Dillon makes no claim in his affidavit that he has ever been specially admitted to practice *pro hac vice* in any state or federal court in South Carolina. Further, in his affidavit, Mr. Dillon makes no claim of familiarity with the nature of federal practice in the U.S. District Court for the District of South Carolina, the Local Civil Rules for the U.S. District Court for the District of South Carolina, or the nature or manner of mediations conducted in South Carolina (including, but not limited to, the South Carolina state ADR Rules). Finally, Mr. Dillon notes in his affidavit that he has reviewed only scant materials related to the underlying federal and state litigation at issue (indicating that his review of materials is insufficient to render any opinions in this matter). As such, Mr. Dillon's credentials and affidavit are insufficient. For the same reasons, pursuant to South Carolina Code § 15-36-100(E), Mr. Dillon's affidavit is defective, and as such, Plaintiffs' claims set forth in the Second Amended Complaint should be dismissed.

6. Pursuant to South Carolina Rule of Civil Procedure 12(b)(1) and 12(b)(6), the claims of Plaintiff Jane Doe Mother and Plaintiff John Doe Father should be dismissed for lack of standing. Specifically, neither Plaintiff Jane Doe Mother nor Plaintiff John Doe Father were parties to the federal litigation brought by Plaintiff John Doe in the U.S. District Court for the District of South Carolina or the state court litigation brought by Plaintiff John Doe. Further, neither Plaintiff Jane Doe Mother nor Plaintiff John Doe Father signed the memorandum of understanding generated at the mediation in the federal litigation that serves as the primary basis for the claims asserted by Plaintiffs in this matter. Thus, Plaintiff Jane Doe Mother and Plaintiff John Doe Father lack standing to pursue the claims asserted against Defendants in this matter. For the same reasons, they fail to state a claim upon which relief can be granted in this matter.

7. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted because the gravamen of Plaintiffs' Second Amended Complaint is simply post-mediation "buyer's remorse." Plaintiff John Doe participated in a formal mediation in the federal litigation referenced in the Second Amended Complaint and personally signed a memorandum of settlement agreeing to the terms of a settlement to which he now objects. As such, Plaintiffs fail to state a claim upon which relief can be granted.

CONCLUSION

For these reasons, Defendants respectfully request that this Court grant their motion.

Respectfully Submitted,

June 28, 2021

/s/ James M. Dedman, IV

James M. Dedman, IV (S.C. Bar No. 70664)
GALLIVAN, WHITE, & BOYD, P.A.
6805 Morrison Blvd., Suite 200
Charlotte, NC 28211
704-552-1712
jdeman@gwblawfirm.com

*Attorneys for Defendants Clawson Fagnoli, LLC,
Samuel R. Clawson, Jr., Esq., and
Christina R. Fagnoli, Esq.*

STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

IN THE COURT OF COMMONS PLAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-10-01343

John Doe; Jane Doe Mother; and
John Doe Father,

Plaintiffs,

v.

Clawson Fargnoli, LLC;
Samuel R. Clawson, Jr., Esq.;
Christina R. Fargnoli, Esq.;
Barret R. Brewer, Esq.; and
Brewer Law Firm, LLC,

Defendants.

**NOTICE OF MOTION AND MOTION TO
PROHIBIT PLAINTIFFS FROM USING
PSEUDONYMS**

Pursuant to South Carolina Rules of Civil Procedure 10(a) and 17(a), Defendants Clawson Fargnoli, LLC, Samuel R. Clawson, Jr., Esq., and Christina R. Fargnoli, Esq. (“Defendants”) move to prohibit Plaintiffs John Doe, Jane Doe Mother, and John Doe Father (“Plaintiffs”) from using pseudonyms in this litigation. For the reasons set forth below, the Court should grant the Motion and require Plaintiffs to proceed in their proper true names.

GROUND FOR MOTION

1. On March 19, 2021, Plaintiffs filed this litigation under fictitious and/or pseudonymous names but elected to identify each of the five defendants by their true names. In footnote one to the original and Second Amended Complaint, Plaintiffs note that “[d]ue to the subject matter of these underlying cases, information in this Complaint will refer only to John Doe, Jane Doe Mother, and John Doe Father by those pseudonyms or will be otherwise redacted to preserve John Doe’s anonymity.” However, in one of those “underlying cases,” Plaintiff John Doe is litigating his claims under his own true name. In that underlying state court action

pending in South Carolina, Plaintiff John Doe is prosecuting the underlying claims at issue under his own true name and has been doing so for nearly two years. In fact, in September of 2019, the trial court in the underlying case specifically rejected Plaintiff John Doe's request to proceed under a pseudonym based upon the very same set of operative facts. Thus, there is no basis for any plaintiff to litigate this case under fictitious, anonymous, or pseudonymous names. This Court should disallow Plaintiffs from using pseudonyms for themselves in this action.

2. In South Carolina, there is a presumption of openness in judicial proceedings. South Carolina Rule of Civil Procedure 10(a) mandates that the summons and complaint "shall include the names of all parties" Further, South Carolina Rule of Civil Procedure 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." The exceptions to these rules in *Doe v. Howe*, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2005) simply do not apply to permit Plaintiffs to conceal their identities from the public in this matter. Here, Defendants will suffer great prejudice if Plaintiffs are permitted to litigate under pseudonyms (particularly when Plaintiff John Doe is simultaneously litigating the underlying facts under his own name in another county in this state).

3. Plaintiffs have waived any claim to litigate under fictitious and/or pseudonymous names because their own expert, Justin Dillon, disclosed sufficient information to identify Plaintiffs in his publicly filed expert affidavit (including Plaintiffs' surname). On April 30, 2021, Plaintiffs filed an Amended Complaint along with an affidavit of their purported expert, Mr. Dillon. On page seven of that affidavit, Mr. Dillon thrice disclosed the surname of Plaintiffs and also provided the case number of the underlying litigation in which Plaintiff John Doe is litigating the underlying claims under his own true name. As such, by filing this expert affidavit, Plaintiffs have already disclosed their own surnames and sufficient information to enable any

individual to locate the underlying litigation in which Plaintiff John Doe is litigating under his own name. On June 14, 2021, Plaintiffs filed the affidavit of Mr. Dillon a second time in conjunction with the Second Amended Complaint. Once again, it included the surname of Plaintiffs. Thus, there is no basis to permit Plaintiffs to continue using fictitious or pseudonymous names.

4. Defendants anticipate issuing a number of subpoenas to third parties and taking a number of depositions of third parties in this litigation. However, Defendants' ability to litigate this matter and defend themselves will be prejudiced if they are unable to issue proper subpoenas because of the fictitious and/or pseudonymous names utilized by Plaintiffs in this matter.

5. For the foregoing reasons, Plaintiffs should be prohibited from using any fictitious and/or pseudonymous names when prosecuting their claims in this litigation.

CONCLUSION

Defendants respectfully request that this Court prohibit Plaintiffs from using pseudonyms in this action and order Plaintiffs to file amended pleadings in their true names. Defendants further request that this Court deny Plaintiffs' March 19, 2021 motion to seal.

Respectfully Submitted,

June 28, 2021

/s/ James M. Dedman, IV

James M. Dedman, IV (S.C. Bar No. 70664)

GALLIVAN, WHITE, & BOYD, P.A.

6805 Morrison Blvd., Suite 200

Charlotte, NC 28211

704-552-1712

jdeman@gwblawfirm.com

*Attorneys for Defendants Clawson Fagnoli, LLC,
Samuel R. Clawson, Jr., Esq., and
Christina R. Fagnoli, Esq.*

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

JOHN DOE, et al.,
Plaintiffs,
vs.
CLAWSON FARGNOLI, LLC, et al.,
Defendants.

Case No. 2021-CP-10-1343

**ANSWER OF BARRETT R. BREWER
AND THE BREWER LAW FIRM, LLC TO
THE SECOND AMENDED COMPLAINT
AND COUNTERCLAIMS**

JURY TRIAL DEMANDED

Defendants Barrett R. Brewer and The Brewer Law Firm, LLC, (collectively, "Brewer Lawyers") answering the Second Amended Complaint filed herein (hereafter, the "Complaint"), would allege and show unto this Honorable Court:

FOR A FIRST DEFENSE

1. Brewer Lawyers deny each and every allegation of the Complaint not specifically admitted herein.
2. Brewer Lawyers deny the allegations of Paragraphs 1 and 2 of the Complaint.
3. Brewer Lawyers admit the allegations of Paragraphs 3, 4, 5, 6, 7, and 8 of the Complaint.
4. Brewer Lawyers deny the allegations of Paragraphs 9 and 10 of the Complaint upon information and belief.
5. The allegations of Paragraphs 11 and 12 of the Complaint constitute legal conclusions to which no answer is required.
6. In answer the allegations of Paragraphs 13 and 14 of the Complaint, Brewer Lawyers crave reference to that certain written retainer agreement for the scope

of representation to which Brewer Lawyers agreed to represent Plaintiff John Doe. Brewer Lawyers deny all allegations inconsistent therewith.

7. In answer to the allegations of Paragraph 15 of the Complaint, Brewer Lawyers admit the Federal Case was filed June 15, 2016 and the State Case was filed June 15, 2017.

8. In answer to the allegations of Paragraphs 16 and 17 of the Complaint, Brewer Lawyers crave reference to the Complaint filed in the Federal Case described therein for the allegations and causes of action alleged therein, and deny any allegations inconsistent therewith.

9. In answer to the allegations of Paragraph 18 of the Complaint, Brewer Lawyers will show John Doe engaged in sexual intercourse with a female student in October 2015. Brewer Lawyers also admit that the Federal Case and the State Case involved claims that Plaintiff John Doe engaged in a nonconsensual sexual intercourse with said female student.

10. In answer to the allegations of Paragraph 19 of the Complaint, Brewer Lawyers admit only that Clemson University conducted a hearing on February 26, 2016, found Plaintiff John Doe engaged in nonconsensual sexual intercourse with the female student, and issued a one-semester suspension of John Doe. Brewer Lawyers would show that John Doe alleged Clemson University committed errors in that hearing. Brewer Lawyers lack sufficient information to form a belief as to the remaining allegations contained in paragraph 19 and, therefore, deny them.

11. In answer to the allegations of Paragraph 20 of the Complaint, Brewer Lawyers admit only that John Doe followed Clemson University's appeal process.

12. Brewer Lawyers admit the allegations of Paragraph 21 of the Complaint.

13. In answer to the allegations of Paragraph 22 of the Complaint, Brewer Lawyers crave reference to the text messages described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

14. The allegations of Paragraph 23 of the Complaint reference a “Charles Doe”, who is not identified in any other fashion in this litigation. As such, Brewer Lawyers lack sufficient information to form a belief as to the truth of the allegations contained in paragraph 23 of the Second Amended Complaint and, therefore, deny them.

15. In answer to the allegations of Paragraph 24 of the Complaint, Brewer Lawyers crave reference to the Complaint filed in the State Case described therein for the allegations and causes of action alleged therein, and deny any allegations inconsistent therewith.

16. The allegations of Paragraph 25 of the Complaint require no answer of Brewer Lawyers.

17. Brewer Lawyers deny the allegations of Paragraph 26 of the Complaint.

18. Brewer Lawyers deny the allegations of Paragraph 27 of the Complaint.

19. In answer to the allegations of Paragraph 28 of the Complaint, Brewer Lawyers admit so much of the allegations contained in paragraph 28 of the Complaint as allege that there were some references to bodily injuries in an initial set of discovery requests. Defendants deny the remaining allegations contained in paragraph 28 of the Complaint.

20. Brewer Lawyers deny the allegations of Paragraph 29 of the Complaint.

21. Brewer Lawyers admit the allegations of Paragraph 30 of the Complaint.

22. In answer to the allegations of Paragraph 31 of the Complaint, Brewer Layers crave reference to the Report described therein for the findings thereof, and deny all allegations inconsistent therewith.

23. Brewer Lawyers deny the allegations of Paragraphs 32, 33, 34, and 35 of the Complaint.

24. In answer to the allegations of Paragraph 36 of the Complaint, Brewer Lawyers admit that John Doe and his parents set forth, in an email, five mediation goals, which is incorrectly set forth in Paragraph 36. One of these alleged goals was “[u]nderstand monetary limitations of negligence and the IRF”. In further answer to the allegations of Paragraph 36, Brewer Lawyers crave reference to the email described therein for the goals thereof, and deny all allegations inconsistent therewith. Brewer Lawyers would also show that a subsequent meeting was conducted with the Does wherein their mediation goals were discussed at length and substantially revised. Plaintiffs rejected recommendations to mediate the State Case and the Federal Case together. Any remaining allegations are denied.

25. Brewer Lawyers admit the allegations of Paragraph 37 of the Complaint.

26. In answer to the allegations of Paragraph 38 of the Complaint, Brewer Lawyers admit so much of the allegations contained in Paragraph 38 as allege that Plaintiff John Doe, after consulting in private with his parents, agreed to settle the litigation that he had initiated in the Federal Case, pursuant to the Settlement Terms presented. Brewer Lawyers deny the remaining allegations contained in paragraph 38 of the Second Amended Complaint.

27. In answer to the allegations of Paragraph 39 of the Complaint, Brewer Lawyers admit only that John Doe signed the settlement agreement freely and voluntarily, without duress, after private consultation with his attorneys, the mediator, and Plaintiff Doe's parents who were present to advise and support him during the entire mediation process, and who had consulted with him privately prior to his decision.

28. In answer to the allegations of Paragraph 40 of the Complaint, Brewer Lawyers crave reference to the email described therein for the statements contained therein, and deny all allegations inconsistent therewith. Other than the receipt of the alleged email, Brewer Lawyers deny the allegations of Paragraph 40 and any implications about the veracity of the communications contained therein.

29. Brewer Lawyers deny the allegations of Paragraphs 41, 43, 44, and 45 of the Complaint.

30. In answer to the allegations of Paragraph 46 of the Complaint, Brewer Lawyers crave reference to the Order described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

31. In answer to the allegations of Paragraph 47 of the Complaint, Brewer Lawyers crave reference to the emails described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

32. Brewer Lawyers admit the allegations of Paragraph 48 of the Complaint.

33. In answer to the allegations of Paragraph 49 of the Complaint, Brewer Lawyers crave reference to the Letter described therein, and deny all allegations inconsistent therewith. Brewer Lawyers specifically deny they were fired for cause.

34. In answer to the allegations of Paragraph 50 of the Complaint, Brewer Lawyers crave reference to the letter described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

35. Brewer Lawyers lack sufficient information on which to form a belief as to the allegations of Paragraphs 51 and 52 of the Complaint, and therefore deny the same.

36. In answer to the allegations of Paragraph 53 of the Complaint, Brewer Lawyers crave reference to the text order described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

37. Brewer Lawyers lack sufficient information on which to form a belief as to the allegations of Paragraphs 54, 55, and 56 of the Complaint, and therefore deny the same.

38. In answer to the allegations of Paragraph 57 of the Complaint, Brewer Lawyers crave reference to the Order described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

39. Brewer Lawyers deny the allegations of Paragraph 58 of the Complaint.

40. In answer to the allegations of Paragraph 59 of the Complaint, Brewer Lawyers crave reference to the minute entry described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith.

41. Brewer Lawyers deny the allegations of Paragraph 60 of the Complaint.

42. In answer to the allegations of Paragraphs 61 and 62 of the Complaint, Brewer Lawyers crave reference to the letters described therein for the terms and conditions thereof, and deny all allegations inconsistent therewith. Defendants deny that said correspondence had any negative effect on Plaintiffs' litigation.

43. Brewer Lawyers deny the allegations of Paragraph 63 of the Complaint.

44. Brewer Lawyers lack sufficient information on which to form a belief as to the allegations of Paragraph 64 of the Complaint, and therefore deny the same.

45. Brewer Lawyers deny the allegations of Paragraph 65 of the Complaint.

46. In answer to the allegations of Paragraph 66 of the Complaint, Brewer Lawyers admit they continue to assert a lien for legal fees against the settlement proceeds from Clemson University. Brewer Lawyers deny the remaining allegations of Paragraph 66.

47. Brewer Lawyers deny the allegations of Paragraphs 67, 68, 69, 70, 71, and 72 of the Complaint.

48. In answer to the allegations of Paragraph 73 of the Complaint, Brewer Lawyers admit only that Mr. Clawson and Ms. Fagnoli were members of Clawson Fagnoli, LLC.

49. Brewer Lawyers deny the allegations of Paragraphs 74 and 75 of the Complaint.

50. In answer to the allegations of Paragraph 76 of the Complaint, Brewer Lawyers admit only that Mr. Brewer was a member of The Brewer Law Firm, LLC.

51. Brewer Lawyers deny the allegations of Paragraphs 77 and 78 of the Complaint.

[As to the First Cause of Action](#)

52. In answer to the allegations of Paragraph 79 of the Complaint, Brewer Lawyers incorporate the foregoing allegations of this Answer as if set forth herein *verbatim*.

53. In answer to the allegations of Paragraph 80 of the Complaint, Brewer Lawyers admit only that there existed an attorney-client relationship between Brewer Lawyers and Plaintiffs for that scope of representation set forth in the written retainer agreement signed by Brewer Lawyers and Plaintiffs.

54. In answer the allegations of Paragraph 81 of the Complaint, Brewer Lawyers crave reference to that certain written retainer agreement for the scope of representation to which Brewer Lawyers agreed to represent Plaintiff John Doe. Brewer Lawyers deny all allegations inconsistent therewith.

55. Brewer Lawyers admit the allegations of Paragraph 82 of the Complaint constitute a general statement of the legal obligations owed by lawyers, but deny that such allegations constitute the appropriate standard of care for a legal malpractice claim in South Carolina.

56. Brewer Lawyers deny the allegations of Paragraphs 83, 84, 85, and 86 of the Complaint.

57. Brewer Lawyers deny the allegations of the first Paragraph 87, and the first Paragraph 88 of the Complaint.¹

[As to the Second Cause of Action](#)

58. In answer to the allegations of the second Paragraph 87 of the Complaint under the Second Cause of Action, Brewer Lawyers incorporate the foregoing allegations of this Answer as if set forth herein *verbatim*.

59. In answer to the allegations of the second Paragraph 88 of the Complaint, Brewer Lawyers crave reference to that certain written retainer agreement for the scope

¹ Plaintiffs' Second Amended Complaint contains two paragraphs numbered 87 and two paragraphs numbered 88.

of representation to which Brewer Lawyers agreed to represent Plaintiff John Doe. Brewer Lawyers deny all allegations inconsistent therewith.

60. In answer to the allegations of the Paragraph 89 of the Complaint, Brewer Lawyers admit only that they owed fiduciary duties to Plaintiffs by virtue of serving as their attorney. Brewer Lawyers deny the remaining allegations of Paragraph 89.

61. Brewer Lawyers admit the allegations of Paragraph 90 of the Complaint constitute a general statement of fiduciary duties owed by lawyers, but deny that such allegations constitute the appropriate standard of care for a breach of fiduciary duty claim in South Carolina.

62. Brewer Lawyers deny the allegations of Paragraphs 91, 92, 93, 94, 95, and 96 of the Complaint.

As to the Third Cause of Action

63. In answer to the allegations of Paragraph 97 of the Complaint, Brewer Lawyers incorporate the foregoing allegations of this Answer as if set forth herein *verbatim*.

64. In answer to the allegations of Paragraph 98 of the Complaint, Brewer Lawyers crave reference to that certain written retainer agreement for the scope of representation to which Brewer Lawyers agreed to represent Plaintiff John Doe. Brewer Lawyers deny all allegations inconsistent therewith.

65. Brewer Lawyers deny the allegations of Paragraph 99, 100, and 101 of the Complaint.

66. The allegations of Paragraph 102 of the Complaint constitute legal conclusions to which no answer is required.

67. Brewer Lawyers deny the allegations of Paragraph 103 of the Complaint, and the unnumbered paragraphs that follow Paragraph 103. Brewer Lawyers specifically deny the allegations regarding time constraints. Brewer Lawyers would further show that on February 26, 2021, counsel for Plaintiffs sent to Defendants a draft, unfiled Verified Complaint consisting of the same three causes of action, containing 93 paragraphs over 23 pages, and which specifically referenced an expert affidavit of an unnamed Expert Witness.

FOR A SECOND DEFENSE

Rule 12(b)(6)

68. One or more of Plaintiffs' claims fail to allege sufficient facts to constitute a cause of action, such that those claims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE

Comparative Negligence

69. Plaintiffs acts and omissions, including without limitation, their voluntary consent to settle the Federal Case, constitute comparative negligence, such that Plaintiffs' claimed damages, which are denied, should be reduced in accordance with their fault, or the claims barred, as found by the trier of fact.

FOR A FOURTH DEFENSE

Assumption of the Risk

70. Plaintiffs assumed the risk of litigation, such that their claims should be barred or Plaintiffs' claimed damages, which are denied, should be reduced in accordance with their fault in assuming the risk.

FOR A FIFTH DEFENSE

Ratification

71. Plaintiffs accepted and ratified the settlement of the Federal Case described in the Complaint, and such ratification bars Plaintiffs' claims.

FOR A SIXTH DEFENSE

Intervening Acts

72. The intervening acts of third parties, over whom Brewer Lawyers exercised no control, constitute an intervening cause of Plaintiffs' damages, which are denied.

FOR A SEVENTH DEFENSE

Duplication of Causes

73. One or more of Plaintiffs' causes of action are duplicative and should be dismissed as a matter of law.

FOR AN EIGHTH DEFENSE

Election of Remedies

74. Plaintiffs must elect their remedy.

FOR A NINTH DEFENSE

Statute of Limitations

75. Plaintiffs' claims are barred by the applicable statute of limitations.

FOR A TENTH DEFENSE

S.C. Code Ann. § 15-36-100

76. Plaintiffs' Complaint and Expert Affidavit fail to comply with the requirements of S.C. Code Ann. § 15-36-100, such that Plaintiffs' Complaint should be dismissed.

FOR AN ELEVENTH DEFENSE

Standing

77. Plaintiffs' Jane Doe Mother and John Doe Father lack standing to maintain this action such that their claims should be barred.

78. As a result of Jane Doe Mother's and John Doe Father's lack of standing, this court lacks subject matter jurisdiction to hear their claims.

FOR A TWELFTH DEFENSE

Punitive Damages

79. Brewer Lawyers plead all statutory and common law defenses to Punitive Damages, including without limitation, those contained in Article 5, Chapter 32 of Title 15 of the S.C. Code.

80. Brewer Lawyers also plead protection of S.C. Code Ann. § 15-33-135.

FOR A THIRTEENTH DEFENSE

81. Plaintiffs' Complaint may be barred by the doctrines of waiver, laches, and unclean hands.

FOR A FOURTEENTH DEFENSE

82. Plaintiffs' claim for punitive damages is barred by S.C. Code Ann. § 15-78-180.

FOR A FIFTEENTH DEFENSE

83. Plaintiffs' failed to mitigate their damages and therefore, all claims alleged by Plaintiffs against Defendants should be barred or reduced to the extent Plaintiffs could have taken prompt and reasonable action to avoid the occurrence of the alleged damages, which are denied.

FOR A SIXTEENTH DEFENSE AND BY WAY OF A COUNTERCLAIMS
AGAINST PLAINTIFFS JOHN DOE, JANE DOE MOTHER, AND JOHN DOE
FATHER

84. Brewer Lawyers incorporate the foregoing allegations of this Answer as if set forth herein verbatim, to the extent not inconsistent herewith.

PARTIES

85. Counterclaim-Plaintiff Brewer Law Firm, LLC is a limited liability company organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina.

86. Counterclaim-Plaintiff Barrett R. Brewer is a citizen and resident of Charleston County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

87. Upon information and belief, Counterclaim-Defendant John Doe is a citizen and resident of Charleston County, South Carolina.

88. Upon information and belief, Counterclaim-Defendant Jane Doe Mother is a citizen and resident of Berkeley County, South Carolina.

89. Upon information and belief, Counterclaim-Defendant John Doe Father is a citizen and resident of Berkeley County, South Carolina.

JURISDICTION AND VENUE

90. Counterclaim Plaintiffs expressly incorporate by reference their other pleadings and motions, and repeats all allegations asserted therein as if fully set forth herein verbatim.

91. A portion of the events upon which these counterclaims are based occurred in Charleston County, South Carolina, or, to the extent any events occurred

outside of Charleston County, South Carolina, they are inextricably linked to Plaintiffs' Second Amended Complaint, which was filed in Charleston County, South Carolina.

92. These matters are compulsory counterclaims, therefore this Court has jurisdiction and venue is proper.

FACTUAL ALLEGATIONS

93. In late 2017, Counterclaim-Plaintiff Barrett R. Brewer and Brewer Law Firm, LLC (collectively the "Counterclaim Plaintiffs"), along with Christy Fagnoli, Sam Clawson, and Clawson Fagnoli, LLC (collectively "Clawson Fagnoli"), agreed to represent Counterclaim-Defendant John Doe, Counterclaim-Defendant Jane Doe Mother, and Counterclaim-Defendant Father John Doe (collectively the "Counterclaim Defendants") in a lawsuit pending in the United States District Court for the District of South Carolina (the "Federal Case").

94. At or around the same time, Counterclaim Plaintiffs, along with Clawson Fagnoli, agreed to represent the Counterclaim Defendants in another lawsuit pending in the Court of Common Pleas in a County in South Carolina (the "State Case").

95. Counterclaim Plaintiffs and Counterclaim Defendants had a contingency fee agreement setting the fee for Counterclaim Plaintiffs' services at forty (40) percent of any recovery by Counterclaim Defendants. The contingency fee was to be divided equally between Counterclaim Plaintiffs and Clawson Fagnoli.

96. On or about March 21, 2018, Counterclaim Plaintiffs and Counterclaim Defendants participated in mediation of the Federal Case. Counterclaim Defendants agreed to settle the case for \$100,000 and executed a Mediation Settlement Agreement indicating such agreement to settle for that amount.

97. On or about March 23, 2018, Counterclaim Defendant John Doe signed Counterclaim Plaintiffs' Disbursement Statement, which specifically indicated that Counterclaim Defendant John Doe had read and understood the Disbursement Statement, and that he consented to the disbursement.

98. On or about May 8, 2018, Counterclaim Defendants met with Counterclaim Plaintiffs and terminated their representation and attorney-client relationship.

99. On or about May 9, 2018, Counterclaim Plaintiffs sent a letter to Counterclaim Defendant John Doe asserting a lien for \$40,000 on the Federal Case (i.e., 40% of the \$100,000 settlement amount).

100. On or about May 24, 2018, the defendant in the Federal Case filed a Motion to Enforce Settlement.

101. On or about June 15, 2018, Counterclaim Defendant John Doe filed a Memorandum in Opposition to the Motion to Enforce, as well as a Cross-Motion to Void Settlement in Principle and Reopen the Instant Action.

102. On or about November 9, 2018, the United States District Court conducted a hearing on the Motion to Enforce and took the matter under advisement.

103. On or about March 25, 2019, the district court issued an Order granting the Motion to Enforce the Settlement Agreement and denying Counterclaim Defendant John Doe's Cross-Motion to Void Settlement in Principle and Reopen the Instant Action.

104. On or about May 21, 2019, the district court held a status conference to discuss the disbursement of the settlement. The district court issued a Minute Entry

stating that any disputed attorneys' fees were to remain in a South Carolina trust account pending resolution of any liens.

105. Counterclaim Plaintiffs have not yet received their portion of the settlement funds, despite numerous requests to Counterclaim Defendants and their various attorneys.

AS A FIRST CAUSE OF ACTION AGAINST COUNTERCLAIM DEFENDANTS
JOHN DOE, JANE DOE MOTHER, AND JOHN DOE FATHER
(Breach of Contract)

106. Counterclaim Defendants incorporate the foregoing allegations of this Answer as if set forth herein verbatim, to the extent not inconsistent herewith.

107. Counterclaim Defendants entered into valid contractual obligations with Counterclaim Plaintiffs, whereby Counterclaim Defendants agreed to pay Counterclaim Plaintiffs for legal representation in the two underlying lawsuits.

108. Counterclaim Plaintiffs fully performed all obligations owed to Counterclaim Defendants.

109. In spite of Counterclaim Plaintiffs' good faith performance, Counterclaim Defendants breached their contractual obligations by, among other things, failing to pay Counterclaim Plaintiffs the amounts owed for legal services rendered.

110. As a result of Counterclaim Defendants' breaches, Counterclaim Plaintiffs have suffered actual damages.

111. Counterclaim Plaintiffs are entitled to judgment against Counterclaim Plaintiffs for its actual, general, compensatory, special, and consequential damages relating to Counterclaim Defendants' contractual breaches, including attorneys' fees incurred in pursuing these counterclaims.

AS A SECOND CAUSE OF ACTION AGAINST COUNTERCLAIM DEFENDANTS
JOHN DOE, JANE DOE MOTHER, AND JOHN DOE FATHER
(Unjust Enrichment)

112. Counterclaim Defendants incorporate the foregoing allegations of this Answer as if set forth herein verbatim, to the extent not inconsistent herewith.

113. Counterclaim Defendants have performed certain services for the benefit of and at the request of Counterclaim Plaintiffs.

114. In connection with the provision of these services, Counterclaim Plaintiffs incurred certain costs.

115. Counterclaim Defendants realized the benefit of these services and expenditures.

116. Counterclaim Defendants retained the benefit of these services and expenditures.

117. Counterclaim Plaintiffs did not authorize Counterclaim Defendants to retain these benefits without compensating Counterclaim Plaintiffs.

118. Permitting Counterclaim Defendants to retain the benefit of these services and expenditures without compensation to Counterclaim Plaintiffs would be unjust and inequitable.

119. Counterclaim Defendants have been unjustly enriched and should pay restitution such that Counterclaim Plaintiffs are fairly compensated for the services provided to Counterclaim Defendants in the underlying lawsuits.

WHEREFORE, having fully answered each and every allegation contained in Plaintiffs' Second Amended Complaint, Defendants Barrett R. Brewer and the Brewer Law Firm, LLC pray to this Honorable Court as follows:

- (a) That Plaintiffs have and recover nothing of Defendants Barrett R. Brewer, and Brewer Law Firm, LLC;
- (b) For dismissal of Plaintiffs' action with prejudice;
- (c) Judgment in favor of Defendants Barrett R. Brewer, and Brewer Law Firm, LLC on their counterclaims;
- (d) An award of prejudgment and post-judgment interest at the maximum rates allowed by law;
- (e) A trial by jury;
- (f) The recovery of their costs and fees to the extent permitted by law; and
- (g) Such other and further relief as this Honorable Court may deem just and proper.

s/ Bruce Wallace

R. Bruce Wallace, SC Bar No. 11653
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Facsimile: 843.720.1777
BWallace@nexsenpruet.com

Attorneys for Defendants
BARRETT R. BREWER and
THE BREWER LAW FIRM, LLC

June 30, 2021

STATE OF SOUTH CAROLINA

CHARLESTON COUNTY

JOHN DOE; JANE DOE MOTHER; and
JOHN DOE FATHER,

Plaintiffs,

v.

CLAWSON FARGNOLI, LLC;
SAMUEL R. CLAWSON, JR., ESQ.;
CHRISTINA R. FARGNOLI, ESQ.;
BARRET R. BREWER, ESQ.; and
BREWER LAW FIRM, LLC,

Defendants.

IN THE COURT OF COMMONS PLAS
NINTH JUDICIAL CIRCUIT

Case No. 2021-CP-10-01343

**NOTICE OF MOTION AND
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) and South Carolina Code § 15-36-100, Defendants Barrett R. Brewer and Brewer Law Firm, LLC ("Defendants") move to dismiss all claims brought by Plaintiffs John Doe, Jane Doe Mother, and John Doe Father ("Plaintiffs") in this matter.

GROUND FOR MOTION

1. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted.

2. Pursuant to South Carolina Rule of Civil Procedure 12(b)(1), the claims of Plaintiffs Jane Doe Mother and Jane Doe Father should be dismissed for lack of subject matter jurisdiction. Specifically, Plaintiffs Jane Doe Mother and Jane Doe Father lack standing to assert the claims set forth in the Complaint, and as such, their claims should be dismissed.

3. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100, Plaintiffs' claims should be dismissed because they failed to timely provide the required expert witness affidavit. Specifically, when Plaintiffs filed their Complaint against Defendants, they failed to contemporaneously file an affidavit of an expert witness specifying at least one negligent act or omission claimed to exist and the factual basis for each claim on the available evidence at the time of the filing of the affidavit as required by South Carolina Code § 15-36-100(B). Accordingly, Plaintiffs' claims against Defendants should be dismissed pursuant to South Carolina Code § 15-36-100(C)(1) for failure to state a claim.

4. Plaintiffs have now filed a tardy affidavit following the filing of their original Complaint, such that Plaintiffs' claims should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100 because the exceptions to contemporaneously filing an expert witness affidavit found in § 15-36-100(C)(1) do not apply based on the specific facts and circumstances of this matter. Specifically, Plaintiffs have not shown the statute of limitations will expire on the claim set forth in the Complaint within ten (10) days of filing, and Plaintiffs did not allege that an affidavit of an expert could not be prepared due to time constraints. Plaintiff's attempts to correct or otherwise address these issues in their Second Amended Complaint fail as a matter of law. Therefore, the Court should dismiss Plaintiffs' claims against Defendants.

5. Plaintiffs' expert affidavit is deficient because the expert is not licensed in South Carolina and the affidavit fails to comply with S.C. Code Ann. § 15-36-100(B) as a matter of law for the reasons set forth in the Motion to Dismiss filed by Defendants Christy Fargnoli, Sam Clawson, and Clawson Fargnoli, LLC on June 28, 2021.

6. Pursuant to South Carolina Rule of Civil Procedure 12(b)(1) and 12(b)(6), the claims of Plaintiff Jane Doe Mother and Plaintiff John Doe Father should be dismissed for lack of standing. Specifically, neither Plaintiff Jane Doe Mother nor Plaintiff John Doe Father were parties to the federal litigation brought by Plaintiff John Doe in the U.S. District Court for the District of South Carolina or the state court litigation brought by Plaintiff John Doe in the Pickens County Court of Common Pleas. Further, neither Plaintiff Jane Doe Mother nor Plaintiff John Doe Father were signatories to the memorandum of understanding generated at the mediation in the federal litigation that serves as the primary basis for the claims asserted by Plaintiffs in this matter. Accordingly, Plaintiff Jane Doe Mother and Plaintiff John Doe Father lack standing to pursue the claims asserted against Defendants in this matter. For the same reasons, they fail to state a claim upon which relief can be granted in this matter.

7. Pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Plaintiffs' claims should be dismissed for failure to state a claim upon which relief can be granted because the gravamen of Plaintiffs' complaint is simply post-mediation "buyer's remorse." Plaintiff John Doe participated in a formal mediation in the federal litigation referenced in the Complaint and personally signed a memorandum of settlement agreeing to the terms of a settlement to which he now objects. As such, Plaintiffs fail to state a claim upon which relief can be granted.

8. Alternatively, Plaintiff's second cause of action for breach of fiduciary duty should be dismissed pursuant to Rule 12(b)(6), because it is duplicative of the first cause of action.

CONCLUSION

For these reasons, Defendants respectfully request that this Court grant their motion.

s/ Bruce Wallace

R. Bruce Wallace, SC Bar No. 11653
NEXSEN PRUET, LLC
205 King Street, Suite 400 (29401)
P.O. Box 486
Charleston, SC 29402
Telephone: 843.577.9440
Facsimile: 843.720.1777
BWallace@nexsenpruet.com

Attorneys for Defendants
Barrett R. Brewer and Brewer Law Firm, LLC

June 30, 2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-10-01343

John Doe; Jane Doe Mother; and John Doe Father,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' REPLY TO BREWER
DEFENDANTS' COUNTERCLAIM
(Jury Trial Demanded)**

TO: R. BRUCE WALLACE, ESQ., COUNSEL FOR BREWER DEFENDANTS:

Plaintiffs, John Doe; Jane Doe Mother; and John Doe Father, (collectively "the Does" or "Plaintiffs"), serve their Reply to the Counterclaim filed on behalf of Defendants, BREWER LAW FIRM, LLC; and Barrett R. Brewer, Esq. (collectively "the Brewer Defendants" or "Defendants") and would respectfully show the Court as follows:

GENERAL OBJECTIONS

Plaintiffs generally and specifically deny each and every allegation, statement, matter, and/or thing set forth and alleged in the Counterclaim portions of the "Answer of Barrett R. Brewer and the Brewer Law Firm, LLC to the Second Amended Complaint and Counterclaims" filed on June 30, 2021, unless specifically and expressly admitted, qualified, or explained.

Plaintiffs object to the extent any allegation in Defendants' Answer to the Second Amended Complaint and Counterclaim calls for a legal conclusion.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim fails to state facts sufficient to constitute a cause of action against Plaintiffs.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Set Off.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Estoppel.

REPLY TO COUNTERCLAIM

The paragraph numbers on the left margin of each response are intended to correspond to the paragraph numbers before the allegations contained in the Counterclaim portion of "Answer of Barrett R. Brewer and the Brewer Law Firm, LLC to the Second Amended Complaint and Counterclaims".

84. Plaintiffs restate the factual and jurisdictional allegations in their Second Amended Complaint as though set forth verbatim.

85. Admitted, upon information and belief.

86. Admitted, upon information and belief.

87. Admitted.

88. Admitted.

89. Admitted.

90. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

91. Admitted.

92. The allegations in Paragraph 92 of the Counterclaim are legal conclusions, to which no answer or response is required to the extent an answer or response is required, Plaintiffs admit the allegations.

93. Admitted.

94. Admitted.

95. Admitted.

96. Plaintiffs admit they participated in mediation of the federal case on March 21, 2018. Plaintiffs deny the remaining allegations as stated.

97. Plaintiffs admit John Doe signed Defendants' Disbursement Statement on March 28, 2018. The remaining allegations are denied as stated.

98. Admitted.

99. Admitted.

100. Admitted.

101. Admitted.

102. Admitted.

103. Admitted.

104. Admitted.

105. Plaintiffs admit that Defendants have not been paid any legal fees, because Defendants' acts and omissions were below the standard of care for lawyers causing Defendants to be terminated for cause and not entitled to any compensation; and because of Defendants' conduct in clear and serious breach of their fiduciary duties to Plaintiffs, Defendants have forfeited their claim for legal fees.

106. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

107. Admitted.

108. Denied.

109. Denied.

110. Denied.

111. Denied.

112. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

113. Admitted.

114. Admitted, upon information and belief.

115. Plaintiffs admit they may have benefited from certain expenses incurred by Defendants but deny the remaining allegations.

116. Plaintiffs admit they may have benefited from certain expenses incurred by Defendants but deny the remaining allegations.

117. Denied as stated.

118. Denied.

119. Denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father, pray for judgment against Defendants, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fargnoli, Esq; Barrett R. Brewer, Esq., and BREWER LAW FIRM, LLC, for all actual damages, consequential damages, and incidental damages; punitive damages,

and prejudgment interest, all in an amount to be more specifically proven at trial; for an Order dismissing the Brewer Defendants' counterclaims with prejudice; together with the costs of this action and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

s/ Thomas A. Pendarvis
Thomas A. Pendarvis (SC Bar #64918)
710 Boundary St., Unit 1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

July 28, 2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-10-01343

John Doe; Jane Doe Mother; and John
Doe Father,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' REPLY TO
CLAWSON FARGNOLI
DEFENDANTS' COUNTERCLAIM
(Jury Trial Demanded)**

TO: JAMES M. DEDMAN, IV, ESQ. AND MEGAN L. ALLEN, ESQ., COUNSEL FOR THE CLAWSON FARGNOLI DEFENDANTS:

Plaintiffs, John Doe; Jane Doe Mother; and John Doe Father, (collectively "the Does" or "Plaintiffs"), serve their Reply to the Counterclaim filed on behalf of Defendants, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fargnoli, Esq (collectively "the Clawson Fargnoli Defendants") and would respectfully show the Court as follows:

GENERAL OBJECTIONS

Plaintiffs generally and specifically deny each and every allegation, statement, matter, and/or thing set forth and alleged in the Counterclaim portions of Defendants' Answer to the Second Amended Complaint and Counterclaim filed on June 28, 2021, unless specifically and expressly admitted, qualified, or explained.

Plaintiffs object to the extent any allegation in Defendants' Answer to the Second Amended Complaint and Counterclaim calls for a legal conclusion.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim fails to state facts sufficient to constitute a cause of action against Plaintiffs.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Unclean Hands.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Set Off.

FOR A DEFENSE TO THE COUNTERCLAIM

Defendants' Counterclaim is barred by the Doctrine of Estoppel.

REPLY TO COUNTERCLAIM

The paragraph numbers on the left margin of each response are intended to correspond to the paragraph numbers before the allegations contained in the Counterclaim portion of Defendants' Answer to the Second Amended Complaint and Counterclaim.

1. Plaintiffs restate the factual and jurisdictional allegations in their Second Amended Complaint as though set forth verbatim.
2. Admitted, upon information and belief.
3. Admitted, upon information and belief.
4. Admitted, upon information and belief.
5. Admitted.
6. Admitted.
7. Admitted.

8. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

9. Admitted.

10. The allegations in Paragraph 10 of the Counterclaim are legal conclusions, to which no answer or response is required to the extent an answer or response is required, Plaintiffs admit the allegations.

11. Admitted.

12. Admitted.

13. Admitted.

14. Plaintiffs admit they participated in mediation of the federal case on March 21, 2018. Plaintiffs deny the remaining allegations as stated.

15. Plaintiffs admit John Doe signed Defendants' Disbursement Statement on March 28, 2018. The remaining allegations are denied as stated.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. Admitted.

23. Plaintiffs admit that Defendants have not been paid any legal fees, because Defendants' acts and omissions were below the standard of care for lawyers causing Defendants to be terminated for cause and not entitled to any compensation; and

because of Defendants' conduct in clear and serious breach of their fiduciary duties to Plaintiffs, Defendants have forfeited their claim for legal fees.

24. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

25. Admitted.

26. Denied.

27. Denied.

28. Denied.

29. Denied.

30. Plaintiffs restate their prior responses to the Counterclaim as though set forth verbatim.

31. Admitted.

32. Admitted, upon information and belief.

33. Plaintiffs admit they may have benefited from certain expenses incurred by Defendants but deny the remaining allegations.

34. Plaintiffs admit they may have benefited from certain expenses incurred by Defendants but deny the remaining allegations.

35. Denied as stated.

36. Denied.

37. Denied.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father, pray for judgment against Defendants, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr.,

Esq.; Christina R. Fagnoli, Esq; Barrett R. Brewer, Esq., and BREWER LAW FIRM, LLC, for all actual damages, consequential damages, and incidental damages; punitive damages, and prejudgment interest, all in an amount to be more specifically proven at trial; for an Order dismissing the Clawson Fagnoli Defendants' counterclaims with prejudice; together with the costs of this action and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

s/ Thomas A. Pendarvis
Thomas A. Pendarvis (SC Bar #64918)
710 Boundary St., Unit 1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

Beaufort, South Carolina

July 28, 2021

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE CIRCUIT COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-10-01343

John Doe; Jane Doe Mother; and
John Doe Father,

Plaintiffs,

vs.

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

Defendants.

**STIPULATIONS
PER RULE 43(k), SCRPC**

Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father (collectively “the Plaintiffs”), and Defendants, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fargnoli, Esq. (collectively “the Clawson Fargnoli Defendants”); BREWER LAW FIRM, LLC; and Barrett R. Brewer, Esq. (collectively “the Brewer Defendants”), through their respective counsel, stipulate to the following under Rule 43(k), SCRPC:

RELEVANT PROCEDURAL BACKGROUND

1. On March 19, 2021, Plaintiffs filed a “Summons and Complaint” to commence this lawsuit against the Clawson Fargnoli Defendants and Brewer Defendants. The allegations in the Complaint generally assert professional liability allegations.

2. On April 30, 2021, Plaintiffs filed an “Amended Summons and Complaint” to include 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 claimed to exist and the factual basis for each claim based on the available evidence at the time of filing the affidavit.

3. On May 9, 2021, the Clawson Fagnoli Defendants filed a “Motion to Dismiss Complaint.”

4. On May 10, 2021, the Brewer Defendants filed a “Motion to Dismiss Complaint.”

5. On June 16, 2021, Plaintiffs filed “Plaintiffs’ Motion for Default Judgment Against All Defendants, Alternatively, Plaintiffs’ Motion to Strike Defendants’ Motion to Dismiss” (“Plaintiffs Motion for Default”), claiming the Defendants were in default because they did not simultaneously file Answers to the Amended Complaint as required under S.C. CODE ANN. § 15-36-100(C)(1) or S.C. CODE ANN. § 15-36-100(E).

6. On June 16, 2021, Plaintiffs filed a “Second Amended Summons and Complaint” based on the arguments in the Defendants’ respective Motions to Dismiss filed on May 9 and May 10, 2021.

7. On June 21, 2021, Plaintiffs filed “Rule 11(a) Certification concerning Plaintiffs’ Motion for Default Judgment Against All Defendants, Alternatively, Plaintiffs’ Motion to Strike Defendants’ Motion to Dismiss.”

8. On June 28, 2021, the Clawson Fagnoli Defendants filed their “Answer to the Second Amended Complaint and Counterclaim Against All Plaintiffs” and a “Motion to Dismiss Second Amended Complaint.”

9. On June 30, 2021, the Brewer Defendants filed their “Answer to the Second Amended Complaint and Counterclaims” and a “Motion to Dismiss Second Amended Complaint.”

STIPULATIONS

1. The Clawson Fagnoli Defendants agree to withdraw their Motion to Dismiss filed on May 9, 2021.

2. The Brewer Defendants agree to withdraw their Motion to Dismiss filed on May 10, 2021.

3. Plaintiffs agree to withdraw Plaintiffs' Motion for Default filed on June 16, 2021.

WE SO STIPULATE:

PENDARVIS LAW OFFICES, P.C.

s/ Thomas A. Pendarvis
Thomas A. Pendarvis (SC Bar # 064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary Street, Suite 1-A
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

NEXSEN PRUET, LLC

s/ Robert Bruce Wallace
Robert Bruce Wallace (SC Bar # 11653)
P.O. Box 486
Charleston, SC 29402
(843) 720-1760
BWallace@nexsenpruet.com

Counsel for Defendants Barrett R. Brewer and the law firm, BREWER LAW FIRM, LLC

GALLIVAN WHITE & BOYD, P.A.

s/ James M. Dedman, IV
James M. Dedman (SC Bar # 70664)
Meagan Lynn Allen (SC Bar # 103598)
6805 Morrison Blvd., Suite 200
Charlotte, NC 28211
(704) 227-1944
jdeman@GWBlawfirm.com
mallen@GWBlawfirm.com

Counsel for Defendants, Samuel R. Clawson, Jr., Esq., Christina R. Fagnoli, Esq.,

and the law firm, CLAWSON FARGNOLI, LLC

PENDARVIS LAW



August 17, 2021

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, SC 29401-2258

Re: *John Doe; Jane Doe Mother; and John Doe Father vs. CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fagnoli, Esq; Barrett R. Brewer, Esq.; and BREWER LAW FIRM, LLC*

Civil Action No.: 2021-CP-10-01343

Dear Ms. Armstrong:

On August 16, 2021 our office inadvertently filed an incorrect Stipulation Per Rule 43(k) which omitted the revisions from counsel.

Enclosed please find the correct Stipulation Per Rule 43(k) for filing.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in blue ink that reads "Tracy Lyn Landry". The signature is fluid and cursive.

Tracy Lyn Landry

Enclosures

cc: James M. Dedman, IV, Esq.
R. Bruce Wallace, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

John Doe; Jane Doe Mother; and
John Doe Father,

Case No. 2021-CP-10-01343

Plaintiffs,

vs.

CLAWSON FARGNOLI, LLC; Samuel R.
Clawson, Jr., Esq.; Christina R.
Fagnoli, Esq.; Barrett R. Brewer,
Esq., and BREWER LAW FIRM, LLC,
Defendants.

**STIPULATIONS
PER RULE 43(k), SCRPC**

Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father (collectively “the Plaintiffs”), and Defendants, CLAWSON FARGNOLI, LLC; Samuel R. Clawson, Jr., Esq.; Christina R. Fagnoli, Esq.(collectively “the Clawson Fagnoli Defendants”); BREWER LAW FIRM, LLC; and Barrett R. Brewer, Esq. (collectively “the Brewer Defendants”), through their respective counsel, stipulate to the following under Rule 43(k), SCRPC:

RELEVANT PROCEDURAL BACKGROUND

1. On March 19, 2021, Plaintiffs filed a “Summons and Complaint” to commence this lawsuit against the Clawson Fagnoli Defendants and Brewer Defendants. The Complaint asserts causes of action for professional negligence, breach of fiduciary duty, and breach of contract.

2. On April 30, 2021, Plaintiffs filed an “Amended Summons and Complaint” to include the affidavit of Justin Dillon, Esq., an expert witness and lawyer claiming to have experience in litigating Title IX matters.

3. On May 9, 2021, the Clawson Fagnoli Defendants filed a “Motion to Dismiss Complaint.”

4. On May 10, 2021, the Brewer Defendants filed a “Motion to Dismiss Complaint.”

5. On June 16, 2021, Plaintiffs filed “Plaintiffs’ Motion for Default Judgment Against All Defendants, Alternatively, Plaintiffs’ Motion to Strike Defendants’ Motion to Dismiss” (“Plaintiffs Motion for Default”).

6. On June 16, 2021, Plaintiffs filed a “Second Amended Summons and Complaint”.

7. On June 21, 2021, Plaintiffs filed “Rule 11(a) Certification concerning Plaintiffs’ Motion for Default Judgment Against All Defendants, Alternatively, Plaintiffs’ Motion to Strike Defendants’ Motion to Dismiss.”

8. On June 28, 2021, the Clawson Fagnoli Defendants filed their “Answer to the Second Amended Complaint and Counterclaim Against All Plaintiffs” and a “Motion to Dismiss Second Amended Complaint.”

9. On June 30, 2021, the Brewer Defendants filed their “Answer to the Second Amended Complaint and Counterclaims” and a “Motion to Dismiss Second Amended Complaint.”

STIPULATIONS

1. The Clawson Fagnoli Defendants agree to withdraw their Motion to Dismiss filed on May 9, 2021.

2. The Brewer Defendants agree to withdraw their Motion to Dismiss filed on May 10, 2021.

3. Plaintiffs agree to withdraw Plaintiffs’ Motion for Default Judgment filed on June 16, 2021.

4. The following motions remain pending and are scheduled for hearing on August 30, 2021:

- a. Plaintiffs' Motion to Proceed Anonymously under Pseudonyms, filed March 19, 2021;
- b. The Clawson Fagnoli Defendants' Motion to Prohibit Plaintiffs from Using Pseudonyms, filed May 9, 2021;
- c. The Brewer Defendants' Motion to Unmask Plaintiffs Using Pseudonyms, filed May 10, 2021;
- d. The Clawson Fagnoli Defendants' Motion to Prohibit Plaintiffs from Using Pseudonyms, filed June 28, 2021;
- e. The Clawson Fagnoli Defendants' Motion to Dismiss the Second Amended Complaint, filed June 28, 2021; and
- f. The Brewer Defendants' Motion to Dismiss the Second Amended Complaint, filed June 30, 2021.

WE SO STIPULATE:

PENDARVIS LAW OFFICES, P.C.

s/ Thomas A. Pendarvis
Thomas A. Pendarvis (SC Bar # 064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary Street, Suite 1-A
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com

Counsel for Plaintiffs

NEXSEN PRUET, LLC

s/ Robert Bruce Wallace

Robert Bruce Wallace (SC Bar # 11653)

P.O. Box 486

Charleston, SC 29402

(843) 720-1760

BWallace@nexsenpruet.com

Counsel for Defendants Barrett R. Brewer and the law firm, BREWER LAW FIRM, LLC

GALLIVAN WHITE & BOYD, P.A.

s/ James M. Dedman, IV

James M. Dedman (SC Bar # 70664)

Meagan Lynn Allen (SC Bar # 103598)

6805 Morrison Blvd., Suite 200

Charlotte, NC 28211

(704) 227-1944

jdeman@GWBlawfirm.com

mallen@GWBlawfirm.com

**Counsel for Defendants, Samuel R. Clawson, Jr., Esq., Christina R. Fagnoli, Esq.,
and the law firm, CLAWSON FARGNOLI, LLC**

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-10-01343

John Doe; Jane Doe Mother; and John Doe
Father,
Plaintiffs,

vs.

CLAWSON FARGNOLI, LLC; Samuel R.
Clawson, Jr., Esq.; Christina R. Fagnoli,
Esq.; Barrett R. Brewer, Esq., and BREWER
LAW FIRM, LLC,
Defendants.

**PLAINTIFFS' COMBINED
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS
SECOND AMENDED COMPLAINT**

TO: JAMES M. DEDMAN, IV, ESQ., COUNSEL FOR DEFENDANTS, CLAWSON FARGNOLI, LLC, SAMUEL R. CLAWSON, JR., ESQ., AND CHRISTINA R. FARGNOLI, ESQ.; AND R. BRUCE WALLACE, ESQ., COUNSEL FOR DEFENDANTS, BARRETT R. BREWER, ESQ. AND BREWER LAW FIRM, LLC:

Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father, respectfully submit this Combined Memorandum in Opposition to the Motions to Dismiss the Second Amended Complaint filed on behalf of Defendants' CLAWSON FARGNOLI, LLC, Samuel R. Clawson, Jr., Esq., and Christina R. Fagnoli, Esq. (collectively "the Clawson and Fagnoli Defendants"), and on behalf of Defendants, BREWER LAW FIRM, LLC, and Barrett R. Brewer, Esq. (collectively "the Brewer Defendants").

Summary of the Arguments

1. Plaintiffs Jane Doe Mother and John Doe Father have standing to assert claims against Defendants based on the allegations in the Second Amended Complaint alleging they were clients of Defendants concerning the "Federal Case" and the "State Case;" and the allegations Jane Doe Mother and John Doe Father entered into a contract of representation with the Defendants.

2. Mr. Dillon's expert affidavit was timely filed and satisfied all aspects of S.C. CODE ANN. § 15-36-100. On March 19, 2021, the Summons & Complaint was filed without an expert affidavit. March 19, 2021, was three days before the three-year anniversary of the date on which any reasonable person would know or should have known of a claim having accrued against Defendants. On April 30, 2021, which is within 45 days of March 19, 2021, an Amended Summons

& Amended Complaint was filed, along with Mr. Dillon's expert affidavit, which satisfied the requirements for timely filing the expert affidavit under S.C. CODE ANN. § 15-36-100(C)(1).

3. Mr. Dillon is well-qualified to serve as an expert in this matter based on his lengthy experience with Title IX disputes as shown on his curriculum vitae, which was included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint. Defendants' 12(b)(6) motion does not satisfy the requirements under S.C. CODE ANN. § 15-36-100(E) because their challenges only go to the weight of Mr. Dillon's experience, and not the lack thereof. Being licensed to practice law in South Carolina does not a requirement to serve as an expert on legal malpractice matters, especially when the underlying issues concern federal Title IX disputes. Mr. Dillon reviewed the materials available at the time of filing his expert affidavit, to the extent necessary to form his opinions. This is all that is required under S.C. CODE ANN. § 15-36-100. Nowhere in the Motions to Dismiss due Defendants contend this is a frivolous lawsuit.

4. Addition to Defendants' breach of their professional and fiduciary duties to Plaintiffs during the mediation in the underlying lawsuit, the Second Amended Complaint contains allegations of Defendants' tortious conduct causing financial injuries to Plaintiffs long after the mediation.

Legal Standard

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, 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).

Procedural Background

On March 19, 2021, Plaintiffs filed a Summons and Complaint to commence this lawsuit

against the Defendants generally alleging errors in Defendants' representation of Plaintiffs' in 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 John Doe's alleged nonconsensual sex with another student, and a state court lawsuit against the individuals and others who made false statements and gave false testimony supporting the University's investigation. The allegations focus on errors made during a mediation in the underlying lawsuits on March 21, 2018, which was 2 years and 262 days before this lawsuit was filed.

On March 19, 2021, Plaintiffs also filed a Motion to Proceed Anonymously Under Pseudonyms based on the sensitive nature of the allegations and evidence supporting the claims in this case; the likelihood public disclosure of Plaintiffs' identities will cause embarrassment and humiliation; and the lack of prejudice to Defendants.

On April 30, 2021, Plaintiffs filed an Amended Summons and Complaint, which included the affidavit of Justin Dillon, Esq., an expert witness and lawyer with experience in litigating Title IX matters. 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 filing the affidavit.

On May 9, 2021, the Clawson and Fagnoli Defendants filed a Motion to Dismiss Complaint and Amended Complaint, and a Motion to Prohibit Plaintiffs from using Pseudonyms.

On May 10, 2021, the Brewer Defendants filed Motion to Dismiss Complaint on the grounds, virtually identical to the Motion to Dismiss filed by the Clawson and Fagnoli Defendants; and also filed a Motion to Unmask Plaintiffs using Pseudonyms.

On June 16, 2021, Plaintiffs filed a Second Amended Summons and Complaint based on the arguments in the Defendants' respective Motions to Dismiss claiming Mr. Dillon's affidavit is defective because he is not licensed in South Carolina, even though there is no such requirement under S.C. CODE ANN. § 15-36-100.

On June 28, 2021, the Clawson and Fagnoli Defendants filed their Answer to the Second Amended Complaint and Counterclaim Against All Plaintiffs and contemporaneously filed a Motion to Dismiss Second Amended Complaint.

On June 28, 2021, the Brewer Defendants filed Motion to Prohibit Plaintiffs from using Pseudonyms.

On June 30, 2021, the Brewer Defendants filed their Answer to the Second Amended Complaint and Counterclaims, and contemporaneously filed a Motion to Dismiss Second Amended Complaint.

ARGUMENTS IN OPPOSITION

I. Plaintiffs Jane Doe Mother and John Doe Father have standing to assert claims against Defendants based on the allegations in the Second Amended Complaint alleging they were clients of Defendants.

If the South Carolina Supreme Court found SELECT INSURANCE COMPANY had standing to sue and assert legal malpractice claims against MAYBANK LAW FIRM, LLC, and Roy P. Maybank, Esq., then surely the allegations in the Second Amended Complaint stating Plaintiffs Jane Doe Mother and John Doe Father were clients of the Defendants in the “Federal Case” and the “State Case” and the allegations they entered into a contract of representation with the Defendants satisfies the standing requirements under South Carolina law. See e.g., (Second Amended Complaint, ¶¶ 1, 2, 13, 14, 28, 29, 36, 37, 40, 49, 56, 61, and 66). Standing alone, the allegations in Paragraph 13, provides standing for Plaintiffs Jane Doe Mother and John Doe Father:

13. On or around November 2, 2017, the ***Lawyers accepted the representation of the Does to provide legal advice, services, and representation of the Does*** 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 Does 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 John Doe, which led to a disciplinary action that was mishandled by the University. (Emphasis added).

The allegations in the Second Amended Complaint easily satisfy the requirements to state a legal malpractice claim and breach of fiduciary duty claim on behalf of Plaintiffs Jane Doe Mother and John Doe Father. See Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016) (“A claimant 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.”) (citing Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014)) (emphasis added); Turpin v. Lowther, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013) (“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, and (3) damages proximately resulting from the

wrongful conduct of the defendant.”) (citing RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012)) (emphasis added); “The existence of a fiduciary duty is a question of law for the court.” Turpin, 404 S.C. at 589, 745 S.E.2d at 401.

The Motions to Dismiss Plaintiffs Jane Doe Mother and John Doe Father on the grounds of lack of standing should be denied.

II. Mr. Dillon’s expert affidavit was timely filed and satisfied all aspects of S.C. CODE ANN. § 15-36-100.

The Summons & Complaint was filed without an expert affidavit three days before the three-year anniversary of the date on which any reasonable person would know or should have known of a claim having accrued against Defendants. Less than 45 days later, the Amended Summons & Amended Complaint was filed along with Mr. Dillon’s expert affidavit, which satisfied the requirements for timely filing the expert affidavit under S.C. CODE ANN. § 15-36-100(C)(1). Defendants’ Motions to Dismiss ignore the specific allegations in Paragraph 103 in the Second Amended Complaint, which must be taken as true for the purposes of these 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.

The Summons & Complaint, the Amended Summons & Amended Complaint with Mr. Dillon's expert affidavit, and the Second Amended Summons & Second Amended Complaint also filed with Mr. Dillon's expert affidavit as an exhibit, all satisfy the requirements under S.C. CODE ANN. § 15-36-100. Defendants' Motions to Dismiss on the grounds Mr. Dillon's expert affidavit was not timely filed should be denied.

III. Mr. Dillon is extraordinarily well-qualified to serve as an expert to file the affidavit of merit in this matter.

Defendants' Motions to Dismiss did not mention the portions of Mr. Dillon's expert affidavit and his curriculum vitae outlining his vast experience with Title IX disputes. In his affidavit, Mr. Dillon, who graduated DUKE UNIVERSITY and then from HARVARD LAW SCHOOL, recites his professional experience as follows:

11. I am a lawyer licensed to practice law in the Commonwealth of Virginia (since 2002) and the District of Columbia (since 2007). I have also been admitted to practice in the United States District Court for the Eastern District of Virginia, the United States District Court for the District of Columbia, the United States District Court for the Central District of Illinois, the United States District Court for the Eastern District of Michigan, the United States District Court for the Northern District of Ohio, the United States Court of Appeals for the District of

Columbia Circuit, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court.

12. I have gained nationwide attention for my work representing students and professors in Title IX and other campus misconduct cases, which my firm and I have handled at more than 100 schools across the country. I was the first lawyer in the country to win summary judgment against a university in a campus sexual misconduct case in modern era, which I did against GEORGE MASON UNIVERSITY in 2016. I have settled numerous lawsuits and potential lawsuits against colleges nationwide. Along with my partner Matt Kaiser, I am the author of *The KAISERDILLON PLLC Guide to Representing Yourself in a Campus Sexual Assault Case*. I have been published or quoted regarding campus sexual misconduct issues in more than a dozen national newspapers and magazines, including *The Wall Street Journal*, *The New York Times*, *The Washington Post*, *The Los Angeles Times*, *The Philadelphia Inquirer*, *National Review*, *The Nation*, and *The Weekly Standard*. I have also spoken on these issues before organizations such as the American Bar Association, the Association of Title IX Administrators, HARVARD LAW SCHOOL, the University of Kentucky's Center for Research on Violence Against Women, the Higher Education Consultants Association, the District of Columbia Bar, the Virginia State Bar, and the Colorado Bar Association. Immediately before joining KAISER DILLON, PLLC, I spent five and a half years as an Assistant United States Attorney in Washington, DC, where I led more than 100 Grand Jury investigations, tried more than 60 criminal cases, and handled more than a dozen appeals. Earlier in my career, I worked at the Civil Rights Division of the U.S. Department of Justice. I am a Georgia native and a graduate of Duke University and Harvard Law School.

See (Expert Affidavit by Justin Dillon, Esq., Ex. 1 to Amended Complaint and Ex. 1 to Second Amended Complaint).

There is no requirement for lawyer serving as an expert in legal malpractice case to be licensed in South Carolina. In Smith v. Haynsworth, Marion, McKay & Geurard, the South Carolina Supreme Court found the trial court had erred in disqualifying Dr. Gregory B. Adams as an expert in legal malpractice matter because he was not licensed to practice law in South Carolina. The South Carolina Supreme Court held:

Further, the fact that Adams is not licensed to practice law in this state does not disqualify him as an expert. See McMillan v. Durant, 312 S.C. 200, 439 S.E.2d 829 (1993) (practitioner's experience teaching in a particular specialty and his professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert. Defects in qualification go to weight rather than admissibility). Likewise, the fact that Adams is not a real estate lawyer does not prohibit his testimony concerning those ethical obligations which are relevant to appellants' claims.

Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 438, 472 S.E.2d 612, 614 (1996).

Defendants' Motions to Dismiss claiming Mr. Dillon's affidavit is defective, should be denied based on Mr. Dillon's substantial experience with Title IX disputes as shown in his Affidavit and on his curriculum vitae, which was included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint. South Carolina rejected the "locality rule" concerning expert testimony and expert affidavits. Mr. Dillon is more than qualified to provide the testimony in his affidavit. Defendants Motions to Dismiss should be denied.

IV. The Second Amended Complaint contains allegations of Defendants' tortious conduct causing financial injuries to Plaintiffs long after the mediation.

Defendants' arguments, the Second Amended Complaint should be dismissed under Rule 12(b)(6), SCRCp, because the "gravamen of Plaintiffs' Second Amended Complaint is simply post-mediation 'buyer's remorse,'" ignores the allegations in Plaintiffs' pleadings about Defendants conduct long after the mediation. In Paragraphs 61-63, Plaintiffs allege:

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 John Doe's position in the mediation, all of which added and continued to cause damages to John Doe.

63. The February 28, 2019, letter from the Lawyers interfered with the mediation process, disrupting and negotiations and disadvantaging John Doe's position in the mediation.

See (Second Amended Complaint, ¶¶ 61-63).

The mediation in the underlying matter took place in March 2018. Defendants' conduct stated in these 3 paragraphs took place almost a year later.

CONCLUSION

The Motions to Dismiss should be denied for all of the reasons stated in this memorandum in opposition.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

/s/ Thomas A. Pendarvis

Thomas A. Pendarvis (SC Bar # 064918)

Christopher W. Lempesis, Jr. (SC Bar # 77012)

710 Boundary Street, Unit A-1

Beaufort, SC 29902-4188

843.524.9500

Thomas@PendarvisLaw.com

Chris@PendarvisLaw.com

Beaufort, South Carolina

October 20, 2021

STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-10-01343

John Doe; Jane Doe Mother; and
John Doe Father,

Plaintiffs,

v.

Clawson Fagnoli, LLC;
Samuel R. Clawson, Jr., Esq.;
Christina R. Fagnoli, Esq.;
Barret R. Brewer, Esq.; and
Brewer Law Firm, LLC,

Defendants.

**JOINT MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTIONS TO
PROHIBIT PLAINTIFFS FROM USING
PSEUDONYMS**

Pursuant to South Carolina Rules of Civil Procedure 10(a) and 17(a), Defendants Clawson Fagnoli, LLC, Samuel R. Clawson, Jr., Esq., Christina R. Fagnoli, Esq., Barret R. Brewer, Esq., and Brewer Law Firm, LLC ("Defendants")¹ submit this Memorandum in Support of their Motions to Prohibit Plaintiffs John Doe, Jane Doe Mother, and John Doe Father ("Plaintiffs") from using pseudonyms in this litigation.² Defendants request that the Court enter an order prohibiting Plaintiffs from using Pseudonyms.³

¹ Defendants Barrett R. Brewer and the Brewer Law Firm LLC filed a motion to Unmask Plaintiffs Using Pseudonyms on May 10, 2021, and they join in this Memorandum.

² Of note, on March 19, 2021, Plaintiffs filed a Motion to Proceed Anonymously Under Pseudonyms in this matter. This brief is submitted both in opposition to Plaintiffs' Motion to Proceed Anonymously Under Pseudonyms and in support of Defendants' own Motion to Prohibit Plaintiffs From Using Pseudonyms.

³ Defendants previously filed a Motion to Prohibit Plaintiffs From Using Pseudonyms on May 9, 2021. Thereafter, on June 16, 2021, Plaintiffs filed their Second Amended Complaint. Out of an abundance of caution, Defendants updated and re-filed their Motion to Prohibit Plaintiffs From Using Pseudonyms on June 28, 2021.

FACTUAL AND PROCEDURAL BACKGROUND

This case stems from Plaintiffs’ allegations of legal professional negligence and breach of fiduciary duty against Defendants. On November 2, 2017, Defendants agreed to represent Plaintiff John Doe in two pre-existing lawsuits – one pending in the U.S. District Court for the District of South Carolina (the “Federal Case”) asserting Title IX and other claims against his university (the “University”) and another pending in a Court of Common Pleas in South Carolina (the “State Case”) asserting defamation, civil conspiracy, and other tort claims against an accuser who submitted to the University claims of sexual misconduct against Plaintiff John Doe. (*See* Second Am. Compl. at ¶ 13).

Prior to the institution of the Federal Case and the State Case, Plaintiff John Doe was accused of and ultimately found by the University to have engaged in “nonconsensual sexual activities” at an administrative hearing and punished with suspension. (*See* Second Am. Compl. at ¶ 19). Plaintiff John Doe appealed the University’s administrative hearing decision. (*See* Second Am. Compl. at ¶ 20). The appeals process resulted in the imposition of heavier sanctions against Plaintiff John Doe, including an additional suspension. (*See* Second Am. Compl. at ¶ 21). Plaintiff John Doe thereafter sued the University in the Federal Case, “alleging, among other things, violation of Title IX of the Education Amendments of 1972, failure to provide John Doe with procedural due process, breach of contract, breach of covenant of good faith and fair dealing, negligence, promissory estoppel, and for a declaratory judgment. (Second Am. Compl. at ¶ 16).

After a successful mediation in the Federal Case, Plaintiff John Doe developed “buyer’s remorse” and attempted to abandon the settlement. In response to Plaintiff John Doe’s change of heart after settlement, the University moved to enforce the settlement, which the District Court ultimately granted. (*See* Second Am. Compl. at ¶ 55-57).

Approximately one year after filing the Federal Case, Plaintiff John Doe sued his accuser in the State Case, asserting claims for defamation, abuse of process, intentional infliction of emotional distress, and civil conspiracy. (See Second Am. Compl. at ¶ 24). While the Federal Case resolved at mediation, the State Case remains pending. Notably, and perhaps most importantly, **Plaintiff John Doe is litigating the State Case under his own name.**⁴ Plaintiff John Doe initially attempted to litigate the State Case under a pseudonym and a Motion to Proceed Under Pseudonym and For Protective Order. However, that Court denied those motions and specifically found that “[Plaintiff John Doe] failed to establish any of the factors which would support proceeding in this matter under pseudonyms.” A redacted version of this order is attached as **Exhibit A.**⁵

Here, Plaintiffs assert claims for legal professional negligence and breach of fiduciary duty. They allege “[t]he Lawyers failed to meet the minimum standard of care thereby breaching professional duties to the Does⁶ to adequately and competently provide legal services, counsel and advice regarding all claims and causes of action asserted in the Federal Case and in the State Case, and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner to protect, preserve and advanced the rights and interests of the Does; meet the goals of the Federal

⁴ Of note, Plaintiff John Doe recently filed a 35-page memorandum in opposition to his accuser’s Motion for Summary Judgment in the State Case. Over the course of thirty-five pages, this memorandum offers substantial detail about the allegations levied against Plaintiff John Doe, as well as personal details about his life, relationships, education, and sexual history. This memorandum uses Plaintiff John Doe’s real name, as well as the real names of all other parties involved in the underlying allegations of sexual misconduct. If the true identities of the parties can be used in the underlying State Case which is actually litigating the allegations of sexual misconduct, there is no reason why the true identities of the Plaintiffs cannot be used in the instant case, which is litigating allegations of legal malpractice that are ancillary, at best, to the “sensitive,” “embarrassing,” and “humiliating” allegations at issue in the State Case. Upon request, Defendants are willing to submit copies of that summary judgment briefing to the Court in camera until such time as the pseudonym issue is resolved.

⁵ Notably, Plaintiffs never appealed the subject Order and, thus, whatever public policy concerns Plaintiffs attempt to now raise, they were apparently not important enough to appeal the subject Order when it was issued.

⁶ Both Jane Doe Mother and John Doe Father have sought to litigate this matter under pseudonyms, although neither were parties to the underlying State Case or Federal Case. Moreover, there are no allegations against either Jane Doe Mother or John Doe Father that are “sensitive in nature” or that would cause them embarrassment and humiliation. In fact, there is no reason why either Jane Doe Mother or John Doe Father would need to conceal their identities.

Case mediation; the goals of the Federal Case litigation; and the goals of the State Case.” (Second Am. Compl. at ¶ 83). Despite the fact that Plaintiff John Doe is litigating the underlying sexual misconduct allegations in another state court proceeding, Plaintiffs seek to use pseudonyms in this case “based on the sensitive nature of the allegations and evidence supporting the claims in this case; the likelihood public disclosure of Plaintiffs’ identities will cause embarrassment and humiliation; and the lack of prejudice to Defendants.”

ARGUMENT

To use a pseudonym, a party’s stated interest in anonymity must be balanced against and outweigh the public’s interest in openness and any prejudice that anonymity would pose to an opposing party. *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 274 (4th Cir. 2014). The trial court must balance the plaintiff’s interest in maintaining anonymity against the “customary and constitutionally-embedded presumption of openness in judicial proceedings.” *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). In the civil context, a plaintiff instigates the action, and, except in the most exceptional cases, must be prepared to proceed on the public record. *Doe v. Bell Atl. Bus. Sys. Servs.*, 162 F.R.D. 418, 422 (D. Mass. 1995). Trial courts have a “judicial duty to inquire into the circumstances of particular cases to determine whether the dispensation [of anonymity] is warranted.” *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993). “[C]ourts have generally been reluctant to provide anonymity based on a plaintiff’s potential embarrassment, even if the case involves sexual assault.” *Doe v. North Carolina Cent. Univ.*, No. 1:98CV01095, 1999 U.S. Dist. LEXIS 9804 (M.D. N.C. April 15, 1999).

A. Pseudonyms are not justified in this litigation.

The nature of the allegations and underlying facts in this case do not justify allowing Plaintiffs to proceed anonymously (especially since Plaintiff John Doe is litigating the underlying sexual misconduct allegations in a related state court proceeding without the use of a pseudonym).

The fact that the underlying State Case and Federal Case involve allegations of sexual misconduct does not justify discarding the “customary and constitutionally-embedded presumption of openness in judicial proceedings.” *Stegall*, 653 F.2d at 186. As noted above, on March 19, 2021, Plaintiffs filed this litigation under pseudonymous names but elected to identify each of the five defendants by their true names. In footnote one to the Second Amended Complaint, Plaintiffs note that “[d]ue to the subject matter of these underlying cases, information in this Complaint will refer only to John Doe, Jane Doe Mother, and John Doe Father by those pseudonyms or will be otherwise redacted to preserve John Doe’s anonymity.” However, as noted above, Plaintiff John Doe is currently litigating his claims under his own true name in one of those “underlying cases” (i.e., the State Case). In fact, he has been doing so for nearly two years. Further, as noted above, the trial court in the underlying State Case specifically rejected Plaintiff John Doe’s request to proceed under a pseudonym based upon the very same set of operative facts at issue here. The Court specifically found that “[Plaintiff John Doe] failed to establish any of the factors which would support proceeding in this matter under pseudonyms.” *See* Exhibit A.

Plaintiffs purport that pseudonyms are necessary here “based on the sensitive nature of the allegations and evidence supporting the claims in this case; the likelihood public disclosure of Plaintiffs’ identities will cause embarrassment and humiliation; and the lack of prejudice to Defendants.” However, as noted above, this is a legal malpractice case, not a sexual misconduct case and, moreover, Plaintiff John Doe’s identity has already been disclosed in the underlying State Case, which is directly litigating the sexual misconduct allegations. Moreover, as noted above in footnote 3, Plaintiff John Doe recently filed a 35-page memorandum in opposition to his accuser’s Motion for Summary Judgment in the State Case. The memorandum offers significant detail about the allegations levied against Plaintiff John Doe, as well as personal details about his

life, relationships, education, and sexual history, all while using his real name. Lastly, Plaintiffs took no issue in publicly naming the defendants in this lawsuit – a legal malpractice case where the reputations of the defendant lawyers are at issue. The allegations levied by Plaintiffs against Defendants may very well be embarrassing or harmful to their professional reputations in the legal community, yet Defendants are not litigating under pseudonyms.

For these reasons, there is no basis here for any party to litigate this case under fictitious, anonymous, or pseudonymous names. This Court should disallow them.

B. The law compels Plaintiffs to litigate their claims under their own names.

When taken as a whole, the South Carolina Rules of Civil Procedure, relevant case law (including the case cited by Plaintiffs), public policy, and fairness compel Plaintiffs to proceed under their actual names. In South Carolina, there is a presumption of openness in judicial proceedings. South Carolina Rule of Civil Procedure 10(a) mandates that the summons and complaint “shall include the names of all parties” Further, South Carolina Rule of Civil Procedure 17(a) requires that “[e]very action shall be prosecuted in the name of the real party in interest.” “There is no litmus test in South Carolina to determine whether a litigant in a civil proceeding should be allowed to proceed anonymously.” *Doe v. Howe*, 362 S.C. 212, 217, 607 S.E.2d 354, 356 (Ct. App. 2004). Both the South Carolina Court of Appeals and the Fourth Circuit Court of Appeals have utilized the following factors to determine whether a litigant should be allowed to proceed anonymously: “(1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is it to preserve privacy in a matter of sensitive and highly personal nature; (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; (3) the ages of the persons whose privacy interests are sought to be protected; (4)

whether the action is against a government or private party; (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.” *Id.*

While Plaintiffs attempt to rely on the *Doe v. Howe* case, analysis of the factors enumerated above simply do not apply to permit Plaintiffs to conceal their identities from the public in this matter. As to the first and second factors, Plaintiff John Doe is simultaneously litigating the underlying facts under his own name in another county in this state. Moreover, the claims and defenses at issue in this case are related to the legal representation of Plaintiffs (particularly at mediation of the federal case), rather than the underlying allegations of sexual misconduct levied against Plaintiff John Doe. As to the third factor, all Plaintiffs are legal, competent adults. As to the fourth factor, all parties involved in this lawsuit are private parties. As to the fifth factor, Defendants will suffer great prejudice if Plaintiffs are permitted to litigate under pseudonyms. Defendants anticipate issuing subpoenas to third parties and taking a number of depositions of third parties in this litigation.⁷ It will be incredibly difficult to conduct the type of discovery necessary for this case without using Plaintiffs’ real names. It is unclear how Defendants would be expected to issue subpoenas to key witnesses, such as the University and others, for records and documents related to “John Doe” if disclosure of Plaintiffs’ true names was prohibited. Defendants’ ability to defend themselves will be substantially prejudiced if they are unable to issue proper subpoenas because of the pseudonymous names utilized by Plaintiffs in this matter.

Moreover, Plaintiffs attempt to equate this case with the *Doe v. Howe* case is misplaced. While *Doe v. Howe* is a legal malpractice case, the underlying allegations of sexual misconduct are distinguishable from those at issue here. *See id.* First, the large majority of the underlying

⁷ Of note, Plaintiffs have already identified approximately 200 individuals and entities in discovery to date. Given the context of the immense scope of anticipated discovery in this case, Defendants would be substantially prejudiced if they are not able to issue subpoenas which identify Plaintiff John Doe by his true name.

sexual misconduct allegations at issue in *Doe v. Howe* occurred when the victim was a minor student at Porter Gaud School. *See id.* The victim, his brother, and a number of other minor students alleged years of sexual abuse by an employee of the school. *See id.*

As to the underlying sexual misconduct allegations at issue here, neither Plaintiff John Doe nor his accuser are minors, nor were they at the time of the alleged incident. Moreover, there are no allegations of an imbalance of power here, such as with the student-teacher relationship at issue in *Doe v. Howe*. Nor are there multiple minor accusers or years of alleged abuse at issue here, as in the *Doe v. Howe* case. Notably, the *Doe* court specifically pointed out the need to protect the names of *child victims* of sexual abuse, and the prohibition on public disclosure of the names of *victims* of criminal sexual conduct in news media. *See id.* at 217, 607 S.E.2d at 356. Here, Plaintiff John Doe is neither a minor, nor an alleged victim of sexual abuse. Rather, Plaintiff John Doe is the alleged perpetrator of a sexual assault on a fellow student at the University.

Moreover, as noted above, Plaintiff John Doe has already fought this exact same battle in the State Case and lost. If Plaintiff John Doe is participating in the underlying State Case which directly litigates the underlying sexual misconduct allegations using his real name, then he should also be required to litigate the instant malpractice case using his real name. It seems obvious that the State Case would concern matters that were more “highly sensitive and personal nature and highly inflammatory and prejudicial if repeated,” as compared to the allegations at issue in this legal malpractice action. (*See* Plaintiffs’ Motion to Proceed Anonymously at 2-3). Yet, Plaintiff John Doe continues to litigate the State Case using his true identity and real name.

For these reasons, Plaintiffs have failed to show why they should be permitted to proceed under pseudonyms and, as such, the Court should grant Defendants’ motion.

C. Plaintiffs have already disclosed their identity in this litigation.

Despite the foregoing, Plaintiffs have already disclosed their identity in this litigation because their own expert, Justin Dillon, revealed sufficient information to identify Plaintiffs in his publicly filed expert affidavit (including Plaintiffs' surname). On April 30, 2021, Plaintiffs filed their First Amended Complaint along with an affidavit of their purported expert, Mr. Dillon. On page seven of that affidavit, Mr. Dillon thrice disclosed the surname of Plaintiffs and also provided the case number of the underlying litigation in which Plaintiff John Doe is litigating the underlying claims under his own true name. As such, by filing this expert affidavit, Plaintiffs have already disclosed their own surnames and sufficient information to enable any individual to locate the underlying litigation in which Plaintiff John Doe is litigating under his own name.

Defendants filed a Motion to Dismiss the First Amended Complaint and, therein, pointed out the fact that Mr. Dillon had disclosed the Plaintiffs' surname in his affidavit. On June 14, 2021, Plaintiffs filed the affidavit of Mr. Dillon a second time in conjunction with the Second Amended Complaint. However, even after Defendants raised the issue in their Motion to Dismiss, Plaintiffs failed to fix the issue, and the second affidavit again included the surname of Plaintiffs. Thus, there is no basis to permit Plaintiffs to continue using pseudonymous names, as two of their own filings include disclosure of their real surname and sufficient information to ascertain their true identities.

CONCLUSION

For the reasons stated above, Defendants respectfully requests that this Court grant its Motion to Prohibit Plaintiffs from Using Pseudonyms.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted this 22nd day of October, 2021.

/s/ James M. Dedman, IV

James M. Dedman, IV (S.C. Bar No. 70664)

Meagan L. Allen (S.C. Bar No. 103598)

GALLIVAN, WHITE, & BOYD, P.A.

6805 Morrison Blvd., Suite 200

Charlotte, NC 28211

Telephone: 704.552.1712

Facsimile: 704.362.4850

jdeman@gwblawfirm.com

mallen@gwblawfirm.com

*Attorneys for Defendants Clawson Fagnoli, LLC,
Samuel R. Clawson, Jr., Esq., and
Christina R. Fagnoli, Esq.*

/s/ R. Bruce Wallace

R. Bruce Wallace (S.C. Bar No. 11653)

NEXSEN PRUET, LLC

205 King Street, Suite 400 (29401)

P.O. Box 486

Charleston, SC 29402

Telephone: 843.577.9440

Facsimile: 843.720.1777

BWallace@nexsenpruet.com

*Attorneys for Defendants
Barrett R. Brewer and Brewer Law Firm, LLC*

EXHIBIT A

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF [REDACTED]

CIVIL ACTION NO: [REDACTED]

[REDACTED]

Plaintiff,

v.

[REDACTED]

[REDACTED]

Defendants.

**ORDER DISALLOWING PLAINTIFF
FROM USING PSEUDONYMS
FOR HIMSELF, JANE DOE,
AND RICHARD DOE**

This matter came before this Court on Defendant's Jane Doe ([REDACTED]) and Richard Doe ([REDACTED]) motion for an Order disallowing Plaintiff John Doe ([REDACTED]) from using pseudonyms in this action. A hearing was held on [REDACTED]. Appearing on behalf of the Plaintiff, John Doe, was [REDACTED] Esquire, and appearing for the Defendants Jane Doe and Richard Doe, was [REDACTED] Esquire, as well as [REDACTED] Esquire, appearing on behalf of behalf of Defendant Charles Doe.

FACTS

On, [REDACTED] the Plaintiff, [REDACTED] brought this action against [REDACTED] and [REDACTED] for Defamation and Civil Conspiracy. The legal claims in this suit and others relate to an [REDACTED] sexual encounter between [REDACTED] and [REDACTED] while [REDACTED] was incapacitated due to intoxication. At the time of the encounter, both [REDACTED] and [REDACTED] were students enrolled in [REDACTED] University ("[REDACTED]"). Shortly after the sexual encounter, a Title IX investigation was initiated and on [REDACTED] [REDACTED]'s five person Administrative Hearing Board conducted a formal hearing. Subsequent to the hearing, on [REDACTED] [REDACTED] issued a written determination that [REDACTED] was in violation of the student code of conduct by a

preponderance of the evidence, specifically for: (1) sexual misconduct, (2) harm to person, (3) disorderly conduct, and (4) alcohol. [REDACTED] filed two appeals both of which were denied by [REDACTED]'s administration.

When [REDACTED] brought this civil action in the [REDACTED] County Court of Common Pleas in [REDACTED] he filed an Ex Parte Motion to Proceed Under Pseudonym and For Protective Order. Even though he never obtained an Order from the Court granting that Motion, this matter has proceeded under the names, John Doe for [REDACTED] Jane Doe for [REDACTED] Richard Doe for [REDACTED] and Charles Doe for [REDACTED]

LAW

In Doe v. Howe, 362 S.C. 212, 607 S.E.2d 354 (Ct. App. 2004), the South Carolina Court of Appeals set forth the factors to be considered in determining whether a party should be allowed to proceed anonymously. In Howe, the Court of Appeals recognized that "there is a presumption of openness of judicial proceedings." Id. at 218, 357. When considering whether a party should be allowed to proceed anonymously, the court should consider the following factors:

- (1) Whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
- (2) Whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties;
- (3) The ages of the persons whose privacy interests are sought to be protected;
- (4) Whether the action is against a governmental or private party; and

- (5) The risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

Id., (quoting James v. Jacobson, 6 F.3d 233, 238 (4th Cir. 1993)). The Court of Appeals also pointed out in Howe that the better approach for a trial court to use when considering a motion to proceed anonymously is one which avoids a rigid, formulaic application of the listed factors, and instead allows the trial court a degree of flexibility in this fact-sensitive area. Id., at 217.

During the hearing, [REDACTED] argued that the Court should not focus on applying the factors set out in Howe and asked the Court to consider applying similar standards used by the Second Circuit Court of Appeals and the Ninth Circuit Court of Appeals. Both of the Plaintiff's suggested standards included substantially the same list of factors as those set out in Howe. Ultimately, [REDACTED] failed to establish any of the factors which would support proceeding in this matter under pseudonyms.

CONCLUSION

After hearing the arguments of both parties, and for the reasons stated above, it is therefore ORDERED, ADJUDGED, and DECREED that [REDACTED] Ex Parte Motion to Proceed Under Pseudonym and For Protective Order is DENIED and [REDACTED] and [REDACTED]'s Motion to Disallow Plaintiff from Using Pseudonyms is GRANTED.

IT IS SO ORDERED.

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED], South Carolina



Common Pleas

Case Caption: John Doe VS Jane Doe , defendant, et al

Case Number: [REDACTED]

Type: Order/Other

So Ordered

s/ [REDACTED]

Electronically signed on [REDACTED] 13:46:36 page 4 of 4

STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

IN THE COURT OF COMMONS PLEAS
NINTH JUDICIAL CIRCUIT
Civil Action No. 2021-CP-10-01343

John Doe; Jane Doe Mother; and
John Doe Father,

Plaintiffs,

v.

Clawson Fagnoli, LLC;
Samuel R. Clawson, Jr., Esq.;
Christina R. Fagnoli, Esq.;
Barret R. Brewer, Esq.; and
Brewer Law Firm, LLC,

Defendants.

**JOINT MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

Pursuant to South Carolina Rules of Civil Procedure 10(a) and 17(a), Defendants Clawson Fagnoli, LLC, Samuel R. Clawson, Jr., Esq., Christina R. Fagnoli, Esq., Barret R. Brewer, Esq., and Brewer Law Firm, LLC ("Defendants") submit this Joint Memorandum in Support of their Motions to Dismiss Second Amended Complaint.

FACTUAL AND PROCEDURAL BACKGROUND

This case stems from Plaintiffs' allegations of legal professional negligence and breach of fiduciary duty against Defendants. On November 2, 2017, Defendants agreed to represent Plaintiff John Doe in two preexisting lawsuits – one pending in the U.S. District Court for the District of South Carolina (the "Federal Case") asserting Title IX and other claims against his university (the "University") and another pending in a Court of Common Pleas in South Carolina (the "State Case") asserting defamation, civil conspiracy, and other tort claims against an accuser who submitted to the University claims of sexual misconduct against Plaintiff John Doe. (*See* Second

Am. Compl. at ¶ 13). Notably, Plaintiff Jane Doe Mother and Plaintiff John Doe Father were not parties to either the Federal Case or State Case.¹

Prior to the institution of the Federal Case and the State Case, Plaintiff John Doe was accused of and ultimately found by the University to have engaged in “nonconsensual sexual activities” at an administrative hearing and punished with suspension. (*See* Second Am. Compl. at ¶ 19). Plaintiff John Doe thereafter appealed the University’s administrative hearing decision. (*See* Second Am. Compl. at ¶ 20). The appeals process resulted in the imposition of heavier sanctions against Plaintiff John Doe, including an additional suspension. (*See* Second Am. Compl. at ¶ 21). Plaintiff John Doe thereafter sued the University in the Federal Case, “alleging, among other things, violation of Title IX of the Education Amendments of 1972, failure to provide John Doe with procedural due process, breach of contract, breach of covenant of good faith and fair dealing, negligence, promissory estoppel, and for a declaratory judgment. (Second Am. Compl. at ¶ 16).

As part of the Federal Case, Defendants represented Plaintiff John Doe at a court-ordered mediation on March 21, 2018. (*See* Second Am. Compl. at ¶ 37). Before the mediation, Defendants purportedly received an email from Plaintiffs stating Plaintiff John Doe’s 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 John Doe, which by implication would have limited the University’s future treatment of John Doe’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) John Doe’s arguments regarding lack of due process afforded by the University during the

¹ Upon information and belief, Plaintiff Jane Doe Mother and Plaintiff John Doe Father helped Plaintiff John Doe pay for Defendants’ legal services; however, Plaintiff Jane Doe Mother and Plaintiff John Doe Father were not parties to the underlying lawsuits. Additionally, while they attended the court-ordered mediation in the Federal Case, they were not signatories to the Settlement Agreement. (*See* Second Am. Compl. at ¶ 39).

investigation and adjudicatory process be buttressed by reference to the cases listed in the email.” (Second Am. Compl. at ¶ 36). At the conclusion of the mediation session, “Plaintiff John Doe signed the ‘Settlement Agreement.’” (Second Am. Compl. at ¶ 39). A redacted version of the settlement agreement is attached hereto as **Exhibit A**. Plaintiffs contend that “[t]he 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. (Second Am. Compl. at ¶ 41). After the successful mediation in the Federal Case, however, Plaintiff John Doe developed “buyer’s remorse” and attempted to abandon the settlement. On or about May 8, 2018, Plaintiffs terminated their attorney-client relationship with Defendants and sought new counsel. (See Second Am. Compl. at ¶ 47-48). The University filed a motion to enforce the settlement, which was ultimately granted by the Court. (See Second Am. Compl. at ¶ 55-57). The Order enforcing settlement is attached hereto as **Exhibit B**.²

Approximately one year after filing the Federal Case, Plaintiff John Doe sued his accuser in the State Case, asserting claims for defamation, abuse of process, intentional infliction of emotional distress, and civil conspiracy. (See Second Am. Compl. at ¶ 24). While the Federal Case resolved at mediation, the State Case remains pending.

Here, Plaintiffs assert claims for legal professional negligence and breach of fiduciary duty. They allege “[t]he Lawyers failed to meet the minimum standard of care thereby breaching professional duties to the Does to adequately and competently provide legal services, counsel and advice regarding all claims and causes of action asserted in the Federal Case and in the State Case,

² A court’s reliance on transcripts and court orders does not convert a motion to dismiss to a motion for summary judgment. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, n.2, 754 S.E.2d 494, 497-98, n. 2 (2014). “A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.” *Wise v. Wise*, 394 S.C. 591, 716 S.E.2d 117 (Ct. App. 2011) (quoting *Freeman v. McBee*, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)); see also *Porter v. South Carolina Pub. Serv. Comm’n*, 327 S.C. 220, 223, 489 S.E.2d 467, 469 (1997) (holding the supreme court will take judicial notice of South Carolina statutes).

and otherwise acted in a negligent, grossly negligent, willful, wanton and reckless manner to protect, preserve and advanced the rights and interests of the Does; meet the goals of the Federal Case mediation; the goals of the Federal Case litigation; and the goals of the State Case.” (Second Am. Compl. at ¶ 83). However, Plaintiffs’ claims should be dismissed.

ARGUMENT

A. Plaintiffs fail to state a claim upon which relief can be granted.

Pursuant to South Carolina Rule of Civil Procedure 12(b)(6), Plaintiffs’ claims should be dismissed for failure to state a claim upon which relief can be granted because the gravamen of Plaintiffs’ Second Amended Complaint is simply post-mediation “buyer’s remorse.”

The mediation at issue took place in South Carolina federal court. Pursuant to Rule 16.04(A) of the Local Civil Rules for the U.S. District Court District of South Carolina, mediation is defined as “[a]n informal process in which a third-party mediator facilitates settlement discussions between parties.” This Rule further provides that “[a]ny settlement is voluntary.” However, Plaintiff John Doe, as an individual party to the Federal Case, was required to attend the Federal Case mediation. Plaintiff John Doe did in fact participate in a formal, court-ordered mediation in the Federal Case, just like every other party to a South Carolina federal case, all of which are subject to the mandatory mediation requirement.

Rule 16.08(D) of the Local Civil Rules for the United States District Court District of South Carolina states:

If agreement is reached, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign it along with their attorneys. If the agreement executed by the parties and their attorneys in mediation envisions the execution of a more formal agreement, the mediator shall assign one of the parties’ attorneys to prepare the formal agreement and such papers to be filed with the court as may be necessary. Such documents shall be executed by the

parties within fourteen (14) days of the date of the mediation conference. A copy shall be forwarded to the mediator.

Here, Plaintiff John Doe personally signed a memorandum of settlement, as contemplated by the Local Rules, agreeing to the terms of settlement reached at by the parties at mediation. After signing it, Plaintiff John Doe came to regret his agreement to the terms of settlement. However, post mediation regret or “buyer’s remorse” is not a proper ground for a legal malpractice claim.

In fact, based on the rules governing the confidentiality of the mediation process, it would be extraordinarily difficult for Defendants to combat Plaintiffs’ claims, further suggesting that such claims are not proper. Pursuant to Rule 16.08(C) of the Local Civil Rules for the U.S. District Court District of South Carolina, “[c]ommunications during the mediation conferences shall be confidential.” The Rule further provides that “[t]he parties, their attorneys, and other persons present shall maintain the confidentiality of the mediation and shall not rely on, introduce, or attempt to introduce as evidence in any arbitral, judicial, or other proceeding, any event, document, or communication relating in any way to the mediation.” Plaintiffs appear to have violated that rule by instituting this litigation, further establishing the impermissibility of such claims.

If Plaintiffs’ claims were somehow permissible, the mediator would be the key witness, as the mediator could testify objectively as to how Plaintiffs behaved and reacted during the mediation process. However, pursuant to Local Civil Rule 16.10(E), absent extraordinary circumstances, “the mediator shall not be listed or called as a witness or be compelled by subpoena or otherwise to divulge any records or to testify in regard to the mediation in any adversary proceeding or judicial forum.” That rule further provides that “[a]ll records, reports, and other documents received or created by the mediator while serving in that capacity shall be confidential.” Thus, while the mediator could almost certainly provide some insight as to Plaintiff John Doe’s execution of the memorandum of settlement, as well as the sufficiency of Defendants’

representation of Plaintiff John Doe at the mediation, the Rules prohibit him/her from providing any such insight, absent a Court order and exceptional circumstances. If a mediation buyer's remorse legal malpractice claim were permissible, mediators would often be witnesses in such cases, thereby eliminating the need for any such rule. However, the great limitations on securing testimony or evidence from a mediator confirms the notion that mediation buyer's remorse claims are not permissible in the legal malpractice arena. Thus, Plaintiffs fail to state a claim.

B. Plaintiffs Jane Doe Mother and Jane Doe Father lack standing.

Simply put, Plaintiffs Jane Doe Mother and Jane Doe Father lack standing, and thus, this Court does not have subject matter jurisdiction to entertain their claims. Neither were parties to the federal litigation brought by Plaintiff John Doe in the U.S. District Court for the District of South Carolina, nor the state court litigation brought by Plaintiff John Doe. Further, neither Plaintiff Jane Doe Mother nor Plaintiff John Doe Father signed the memorandum of understanding generated at the mediation in the federal litigation that serves as the primary basis for the claims asserted by Plaintiffs in this matter. Of course, they did not sign that memorandum of understanding because they were not parties to that litigation. Here, the centerpiece of Plaintiffs' claim is the conduct at the mediation in the Federal Case. Although Plaintiff John Doe was a party to that matter, his parents were not. As such, they cannot litigate claims that, by their very nature, would only belong to parties to the Federal Case. Thus, Plaintiff Jane Doe Mother and Plaintiff John Doe Father lack standing to pursue the claims asserted against Defendants in this matter. For these reasons, the claims of Plaintiffs Jane Doe Mother and John Doe Father should be dismissed for lack of subject matter jurisdiction, pursuant to South Carolina Rule of Civil Procedure 12(b)(1). For the same reasons, they fail to state a claim upon which relief can be granted in this matter and their claims should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6).

C. Plaintiffs' untimely expert witness affidavit justifies dismissal.

When Plaintiffs initially filed their Complaint, they did not include the required expert witness affidavit and their attempt to correct that deficiency was untimely. As such, pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100, Plaintiffs' claims should be dismissed because they failed to timely provide the required expert witness affidavit. South Carolina Code § 15-36-100(B) requires that "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) [...], the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." However, when Plaintiffs filed their original Complaint against Defendants, they failed to contemporaneously file an affidavit of an expert witness specifying at least one negligent act or omission claimed to exist and the factual basis for each claim on the available evidence at the time of the filing of the affidavit as required by South Carolina Code § 15-36-100(B). Accordingly, Plaintiffs' claims against Defendants should be dismissed for failure to state a claim pursuant to Rule 12(b)(6) and South Carolina Code § 15-36-100(C)(1).

To the extent that Plaintiffs have now filed a tardy affidavit following the filing of their original Complaint, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) and South Carolina Code § 15-36-100 because the exceptions to contemporaneously filing an expert witness affidavit found in § 15-36-100(C)(1) simply do not apply to the facts of this litigation.

South Carolina Code § 15-36-100(C)(1) states that "[t]he contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint,

within ten days of the date of filing and, because of time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared.” Here, Plaintiffs did not show that the statute of limitations would expire on the claims in the original Complaint within ten (10) days of filing, and Plaintiffs did not allege that an affidavit of an expert could not be prepared due to time constraints.³ Therefore, Plaintiffs’ claims against Defendants should be dismissed.

D. Plaintiff’s expert witness affidavit, even if timely, is insufficient as a matter of law.

The claims set forth in Plaintiffs’ Second Amended Complaint should be dismissed pursuant to South Carolina Rule of Civil Procedure 12(b)(6) and South Carolina Code § 15-36-100(A)(3) due to the insufficiency of the credentials of Plaintiffs’ purported expert, Justin Dillon.

South Carolina Code § 15-36-100 enumerates the requirements for an expert who files an affidavit in professional negligence lawsuits. Specifically, South Carolina Code § 15-36-100(A)(3) states that an expert witness “means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who: [...] (3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual’s study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert’s credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert’s credentials pursuant to subsection (E).”

³ If Plaintiffs now allege that they failed to file a timely affidavit due to concerns regarding the statute of limitations, then such delay on their part should not be imputed to Defendants. In *Bruce v. Smith*, the Fourth Circuit Court of Appeals addressed a statute of limitations issue in the context of amended pleadings and noted: “Plaintiff’s original complaint was filed only one day before the statute of limitations ran. It is unfortunate that the plaintiff left himself so slender a margin for error. However, that was his decision, and it was not affected by the conduct of the Defendant.” *Bruce v. Smith*, 581 F. Supp. 902 (1984). Here, in the event that Plaintiffs waited until the limitations period was about to expire to file suit, such is a strategic choice on their part and its consequences should not be imputed to Defendants.

Mr. Dillon is not a resident or practitioner in South Carolina but purports to be an expert in legal malpractice claims. Although he purports to offer opinions about the actions of South Carolina attorneys involved in litigation pending in federal court in South Carolina, Mr. Dillon is not, and apparently has never been, licensed to practice in the state and federal courts of South Carolina or the U.S. District Court for the Fourth Circuit Court of Appeals. Further, Mr. Dillon makes no claim in his affidavit that he has ever been specially admitted to practice *pro hac vice* in any state or federal court in South Carolina. In fact, Mr. Dillon does not appear to have ever litigated or mediated a case in the state or federal courts of South Carolina (and his affidavit certainly does not claim or suggest that he has ever done so). Further, in his affidavit, Mr. Dillon makes no claim of familiarity with the nature of federal practice in the U.S. District Court for the District of South Carolina, the Local Civil Rules for the U.S. District Court for the District of South Carolina, or the nature or manner of mediations conducted in South Carolina (including, but not limited to, the South Carolina state ADR Rules). Finally, Mr. Dillon notes in his affidavit that he has reviewed only scant materials related to the underlying federal and state litigation at issue (indicating that his review of materials is insufficient to render any opinions in this matter). It is telling that Plaintiffs were unable to secure the services of an expert with experience in the South Carolina state or federal courts. The fact that Plaintiffs rely on an out-of-state lawyer with no experience of any kind in the South Carolina state or federal courts clearly merits dismissal.

It is curious how Mr. Dillon can have an informed opinion as to what is or is not appropriate at a federal mediation in South Carolina, when he has no familiarity with the practice of law in South Carolina generally, nor the specific rules applicable to the subject mediation. As such, Mr. Dillon's credentials and affidavit are insufficient. For the same reasons, pursuant to

South Carolina Code § 15-36-100(E), Mr. Dillon's affidavit is defective, and as such, Plaintiffs' claims set forth in the Second Amended Complaint should be dismissed.

E. Plaintiffs' claims should be dismissed because they are averse to public policy.

Plaintiffs' claims should be dismissed because they violate the important public policy on the finality of mediation in civil cases. South Carolina courts "greatly favor the settlement of cases and allowing litigants to achieve their own resolution to disputes." *Riddle v. City of Anderson*, S.C., No. 8:12-CV-03480-TMC, 2015 WL 12830369, at *5 (D.S.C. Jan. 26, 2015). In fact, the public policy of South Carolina favors settlement of cases and early resolution to disputes so much so that mediation is required in every case in both the state and federal courts of South Carolina. *See, e.g.*, Local Civ. Rule 16.05 (D.S.C.); Rule 3 of the South Carolina ADR Rules.

Most civil cases settle before trial. This is likely due in large part to the fact that every case in South Carolina is subject to mediation. Mediation gives the parties in a lawsuit a real chance to resolve their disputes and, often, results in the avoidance of unnecessary costs associated with prolonged litigation. Mediation serves to help litigants identify the strengths and weaknesses of the claims and defenses at issue and agree on a mutually satisfactory solution. While mediation is an invaluable tool for South Carolina litigants, participants rarely, if ever, leave mediation completely satisfied with the outcome and having had all of their desires met. Mediation is about compromising to reach a solution that all parties can tolerate.

Here, Plaintiff John Doe was satisfied with the solution reached at the subject mediation. He only began to develop buyer's remorse in the days after mediation and started looking for a means by which to escape the settlement he agreed to in writing. As noted above, the Court issued an order enforcing the settlement. Rather than accepting the Court's ruling, Plaintiffs then began searching out other potential paths by which they could call the settlement into question.

Apparently, Plaintiffs saw the instant malpractice suit as a method by which they could attack the settlement to which Plaintiff John Doe agreed. However, Plaintiffs do not appear to realize the gravity of what they allege in this case. If this Court were to permit Plaintiffs' malpractice claims to continue against Defendants, it would essentially open the flood gates to frivolous claims made by unhappy litigants who were not completely satisfied with the outcome of mediation. Plaintiffs' claims are little more than a thinly veiled attempt to relitigate the validity of the underlying settlement – an issue that has already been litigated and ruled on by the federal courts of South Carolina. Plaintiff John Doe signed the memorandum of settlement on his own volition and only later had second thoughts about the agreed upon terms. As noted above, compromise is a cornerstone of mediation and parties rarely leave mediation completely satisfied with all of their desires having been met. A litigant having second thoughts about the outcome of mediation simply does not and cannot amount to legal malpractice on the part of his attorneys. Here, Plaintiffs' buyer's remorse simply does not warrant allegations of legal malpractice against Defendants.

CONCLUSION

Defendants respectfully requests that this Court grant its Motion to Dismiss.

[SIGNATURES ON FOLLOWING PAGE]

Respectfully submitted this 22nd day of October, 2021.

/s/ James M. Dedman, IV

James M. Dedman, IV (S.C. Bar No. 70664)

Meagan L. Allen (S.C. Bar No. 103598)

GALLIVAN, WHITE, & BOYD, P.A.

6805 Morrison Blvd., Suite 200

Charlotte, NC 28211

Telephone: 704.552.1712

Facsimile: 704.362.4850

jdeman@gwblawfirm.com

mallen@gwblawfirm.com

*Attorneys for Defendants Clawson Fargnoli, LLC,
Samuel R. Clawson, Jr., Esq., and
Christina R. Fargnoli, Esq.*

/s/ R. Bruce Wallace

R. Bruce Wallace (S.C. Bar No. 11653)

NEXSEN PRUET, LLC

205 King Street, Suite 400 (29401)

P.O. Box 486

Charleston, SC 29402

Telephone: 843.577.9440

Facsimile: 843.720.1777

BWallace@nexsenpruet.com

*Attorneys for Defendants
Barrett R. Brewer and Brewer Law Firm, LLC*

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
[REDACTED] DIVISION

John Doe,

Plaintiff,

vs

Civil Action No: [REDACTED]

SETTLEMENT AGREEMENT

Defendants.

WHEREAS, the parties have resolved this action between them, it is agreed by the parties and counsel that in exchange for payment of [REDACTED] which involves all costs, disbursements, attorneys fees and any damages of any sort arising from this action.

plaintiff will execute a binding release, which document (and accompanying court order, if applicable) shall be prepared by counsel for the Defendant [REDACTED].

That further conditions of settlement are 1) [REDACTED] will reinstate the hearing Board's decision of [REDACTED] as upheld by the University vice president of Student Affairs 2) [REDACTED] will comply with the student code of ~~conduct~~ conduct (i) regarding student conduct records 3) plaintiff will

This Agreement is binding upon all parties to this matter, and is enforceable in any Court of

law.

not seek to enroll at [REDACTED] 4) the parties will contemporaneously exchange [REDACTED] documents upon receipt of a valid subpoena of [REDACTED] and satisfaction of notice requirements 5) [REDACTED] to comply with notification requirements of CLERY Act VAWA & Title 9.

ROA_00254



Attorneys for the Defendants



Attorneys for the Plaintiff

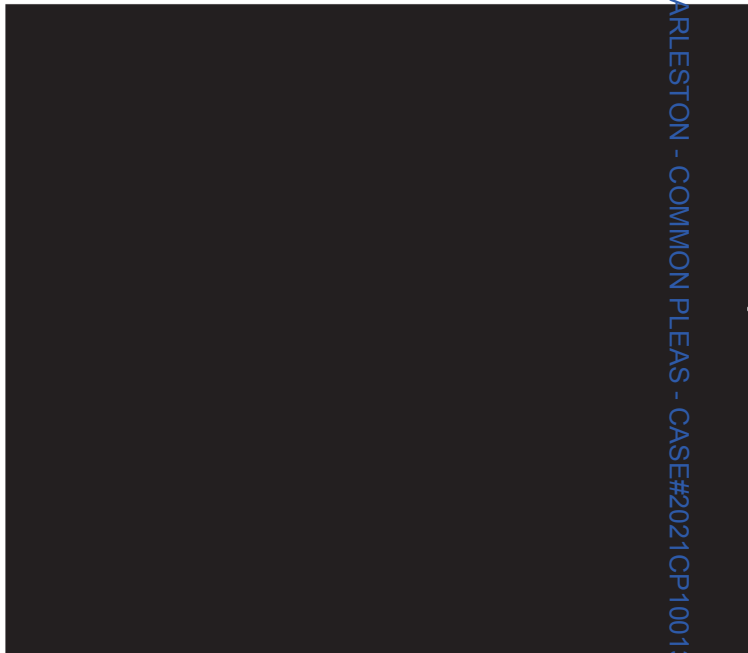


EXHIBIT B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
DIVISION

John Doe,

Plaintiff,

v.

C/A No.

OPINION AND ORDER

Defendants.

This matter is before the Court on Defendants' Motion to Enforce Settlement Agreement. ECF No. Plaintiff filed a Response in Opposition and Cross-Motion to Void Settlement in Principle and Reopen the Instant Action. ECF No. .

BACKGROUND

On Plaintiff filed a Complaint alleging several causes of action related to Defendants' handling of allegations of nonconsensual sexual activity against Plaintiff. ECF No. . On the parties participated in mediation and

resolved the case. At mediation, the terms of the agreement were reduced to writing in a Settlement Agreement. ECF No. [REDACTED]. The Settlement Agreement states:¹

[REDACTED]

[REDACTED]

The Settlement Agreement was signed by the Plaintiff, Plaintiff's counsel,² the General Counsel for [REDACTED] University, and counsel for Defendants. ECF No. [REDACTED]. On [REDACTED] this Court entered an Order of Dismissal, which dismissed the case without costs and without prejudice, permitting the parties to petition the Court within sixty days to reopen the case if settlement is not consummated or, alternatively, to enforce the settlement agreement. ECF No. [REDACTED].

On [REDACTED] Plaintiff terminated his relationship with his former attorneys and sought new counsel. ECF No. [REDACTED] at 10. On [REDACTED] Defendants sent Plaintiff a "Settlement Agreement and Mutual Release which [they had] drafted for [his] review and execution." ECF No. [REDACTED] at 2. The Settlement Agreement and Mutual Release

¹ Much of the Settlement Agreement was handwritten. Therefore, the Court will recite the exact language, punctuation, and capitalization used by the parties.

² Plaintiff has subsequently retained new counsel.

memorialized the terms of the Settlement Agreement reached during the mediation. *Id.* at 4–9. Defendants' letter acknowledged Plaintiff's termination of his attorneys and also forwarded a Stipulation of Dismissal with Prejudice for Plaintiff to sign, noting that a check would be sent as soon as the documents were received. *Id.* at 2–3. Defendants' letter requested signed copies of these documents within five days of receipt of the letter. *Id.* at 3.

Thereafter, Plaintiff retained new counsel who called counsel for Defendants. ECF No. [REDACTED] at 10. According to Plaintiff, "during that call, counsel for Defendants could not articulate: (1) how [REDACTED] would treat [his] disciplinary records internally; (2) how [REDACTED] would respond to third-party requests inquiring about [his] disciplinary records; or (3) whether [REDACTED] would disclose any settlement agreement when confronted with a public records information request for same and, if so, whether [his] identity would be safeguarded." *Id.* Following the call, Plaintiff's new counsel submitted redlined changes to the Settlement Agreement and Mutual Release to Defendants. *Id.* In response, Defendants filed a Motion to Enforce the Settlement Agreement, and Plaintiff filed a Response in Opposition and Cross-Motion to Void Settlement in Principle and Reopen the Instant Action. ECF Nos. [REDACTED] Since that time, the Court has held several telephone conferences and hearings and has permitted the parties to engage in prolonged mediation to attempt to resolve the outstanding Motions. On [REDACTED] the Court was informed that the parties have reached an impasse.

LEGAL STANDARD

District Courts "have inherent authority, deriving from their equity power, to enforce settlement agreements. *Hensley v. Alcon Laboratories, Inc.*, 277 F.3d 535, 540 (4th Cir. 2002) (citing *Millner v. Norfolk & W. Ry. Co.*, 643 F.2d 1005, 1009 (4th Cir. 1981)). "[T]o exercise its inherent power to enforce a settlement agreement, a district court (1) must find that the parties reached a complete agreement and (2) must be able to determine its terms and conditions." *Id.* at 540–41 (citation omitted). "If there is a factual dispute over the existence of an agreement, over the authority of attorneys to enter into the agreement, or over the agreements terms, the district court may not enforce a settlement agreement *summarily*." *Id.* at 541 (citation omitted). "Instead, when such factual disputes arise, the court must conduct a plenary evidentiary hearing in order to resolve that dispute and make findings on the issues in dispute." *Id.* (internal citations and quotations omitted). "If a district court concludes that no settlement agreement was reached or that agreement was not reached on all the material terms, then it must deny enforcement." *Id.*

DISCUSSION

Throughout the filings in this case, Plaintiff contends that he was told "more is coming" at the mediation. However, it is uncontested that Plaintiff signed the Settlement Agreement drafted during the mediation, which does not include any of the terms Plaintiff now claims he expects to be addressed, such as "how [REDACTED] will treat Plaintiff's disciplinary record, as opposed to Plaintiff's transcript; how Plaintiff's transcript will reflect the parties' proposed agreement; how [REDACTED] will respond to third-party requests for Plaintiff's disciplinary record; and how [REDACTED] would handle a public records request concerning the proposed settlement agreement." ECF No. [REDACTED] at 5. While those concerns

are legitimate, it appears from the plain language of the Settlement Agreement that they were not addressed during mediation.

After reviewing the filings in this case and the arguments of counsel, the Court finds that the parties unambiguously reached a settlement during the mediation. The plain terms of that settlement are set forth in the signed Settlement Agreement:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ECF No. [REDACTED] at 2–3.

In an effort to minimize the legal effect of this signed agreement, Plaintiff points out that the proposed lengthier Settlement Agreement and Mutual Release, which was sent to Plaintiff on [REDACTED] contains the following language:

[REDACTED]

ECF No. [REDACTED] at 7. According to Plaintiff, the lack of any merger or integration clause in

this recital indicates that the parties understood the March 21, 2018 handwritten document to not be a binding settlement agreement. The Court rejects Plaintiff's argument, as the [REDACTED] Settlement Agreement and Mutual Release was simply a proposed agreement with standard, boilerplate language to complement the agreed upon terms in the [REDACTED] Settlement Agreement. Regardless of the substance of the proposed [REDACTED] agreement, Defendants have only moved to enforce the [REDACTED] Settlement Agreement that was signed at mediation.

While the Court finds that the terms of the [REDACTED] Settlement Agreement are clear and unambiguous, the Court held a hearing on the Motions and accepted evidence from the parties out of an abundance of caution. To that end, the Court reviewed the Affidavits of (1) [REDACTED] General Counsel for [REDACTED] University, (2) John Doe; (3) John Doe's Mother; (4) and John Doe's Father. ECF Nos. [REDACTED]. The representations of John Doe and his parents regarding more being promised during the settlement negotiations are simply unsupported by the plain and unambiguous language of the Settlement Agreement, as signed by the parties at the mediation immediately after an agreement was reached. Accordingly, the Court enforces the Settlement Agreement as executed on [REDACTED]. Defendants are directed to provide Plaintiff with a check for [REDACTED] in consideration for Plaintiff's release of his claims against the Defendants.

That said, the Court understands that this is a difficult case for all parties involved. The events underlying this lawsuit have changed the course of young peoples' lives. In every interaction with the Court, Defendants have shown a willingness to try to accommodate Plaintiff's needs in preserving his reputation. However, the subject matter

of student educational and disciplinary records are governed by a variety of laws, which may constrain what Defendants are able to do to accommodate Plaintiff above and beyond what the Settlement Agreement requires. The Court strongly encourages Defendants to continue in their efforts to help Plaintiff and his accuser move past this incident. Unfortunately, given the plain and unambiguous terms of the Settlement Agreement—which Plaintiff signed—strong encouragement is all the Court can provide.

CONCLUSION

For the reasons set forth above, Defendants' Motion to Enforce Settlement Agreement, ECF No. [REDACTED], is **GRANTED**, and Plaintiff's Cross-Motion to Void Settlement in Principle and Reopen the Instant Action, ECF No. [REDACTED] is **DENIED**.

IT IS SO ORDERED.

[REDACTED]

[REDACTED]

, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2021-CP-10-01343

John Doe; Jane Doe Mother; and John Doe
Father,
Plaintiffs,

vs.

CLAWSON FARGNOLI, LLC; Samuel R.
Clawson, Jr., Esq.; Christina R. Fagnoli,
Esq.; Barrett R. Brewer, Esq., and BREWER
LAW FIRM, LLC,
Defendants.

**PLAINTIFFS' COMBINED
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTIONS TO DISMISS
SECOND AMENDED COMPLAINT**

TO: JAMES M. DEDMAN, IV, ESQ., COUNSEL FOR DEFENDANTS, CLAWSON FARGNOLI, LLC, SAMUEL R. CLAWSON, JR., ESQ., AND CHRISTINA R. FARGNOLI, ESQ.; AND R. BRUCE WALLACE, ESQ., COUNSEL FOR DEFENDANTS, BARRETT R. BREWER, ESQ. AND BREWER LAW FIRM, LLC:

Plaintiffs, John Doe, Jane Doe Mother, and John Doe Father, respectfully submit this Combined Memorandum in Opposition to the Motions to Dismiss the Second Amended Complaint filed on behalf of Defendants' CLAWSON FARGNOLI, LLC, Samuel R. Clawson, Jr., Esq., and Christina R. Fagnoli, Esq. (collectively "the Clawson and Fagnoli Defendants"), and on behalf of Defendants, BREWER LAW FIRM, LLC, and Barrett R. Brewer, Esq. (collectively "the Brewer Defendants") The Clawson and Fagnoli Defendants and Brewer Defendants will be referred to collectively as "the Defendants."

Summary of the Arguments

1. Plaintiffs' Second Amended Complaint states facts sufficient to support a cause of action against Defendants because under established South Carolina law former clients are permitted to bring legal malpractice claims against their former lawyers based on errors leading to an insufficient settlement.

2. Plaintiffs Jane Doe Mother and John Doe Father have standing to assert claims against Defendants based on the allegations in the Second Amended Complaint alleging they were clients of Defendants concerning the "Federal Case" and the "State Case;" and the allegations Jane Doe Mother and John Doe Father entered into a contract of representation with the Defendants.

3. Mr. Dillon's expert affidavit was timely filed and satisfied all aspects of S.C. CODE ANN. § 15-36-100. On March 19, 2021, the Summons & Complaint was filed without an expert affidavit. March 19, 2021 was three days before the three-year anniversary of the date on which any reasonable person would know or should have known of a claim having accrued against Defendants. On April 30, 2021, which is within 45 days of March 19, 2021, an Amended Summons & Amended Complaint was filed, along with Mr. Dillon's expert affidavit, which satisfied the requirements for timely filing the expert affidavit under S.C. CODE ANN. § 15-36-100(C)(1).

4. Mr. Dillon is well-qualified to serve as an expert in this matter based on his lengthy experience with Title IX disputes as shown on his curriculum vitae, which was included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint. Defendants' 12(b)(6) motion does not satisfy the requirements under S.C. CODE ANN. § 15-36-100(E) because their challenges only go to the weight of Mr. Dillon's experience, and not the lack thereof. Being licensed to practice law in South Carolina does not a requirement to serve as an expert on legal malpractice matters, especially when the underlying issues concern federal Title IX disputes. Mr. Dillon reviewed the materials available at the time of filing his expert affidavit, to the extent necessary to form his opinions. This is all that is required under S.C. CODE ANN. § 15-36-100. Nowhere in the Motions to Dismiss due Defendants contend this is a frivolous lawsuit.

5. Addition to Defendants' breach of their professional and fiduciary duties to Plaintiffs during the mediation in the underlying lawsuit, the Second Amended Complaint contains allegations of Defendants' tortious conduct causing financial injuries to Plaintiffs long after the mediation.

Legal Standard

"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)).

Procedural Background

On March 19, 2021, Plaintiffs filed a Summons and Complaint to commence this lawsuit against the Defendants generally alleging errors in Defendants’ representation of Plaintiffs’ in 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 John Doe’s alleged nonconsensual sex with another student, and a state court lawsuit against the individuals and others who made false statements and gave false testimony supporting the University’s investigation. The allegations focus on errors made during a mediation in the underlying lawsuits on March 21, 2018, which was 2 years and 262 days before this lawsuit was filed.

On March 19, 2021, Plaintiffs also filed a Motion to Proceed Anonymously Under Pseudonyms based on the sensitive nature of the allegations and evidence supporting the claims in this case; the likelihood public disclosure of Plaintiffs’ identities will cause embarrassment and humiliation; and the lack of prejudice to Defendants.

On April 30, 2021, Plaintiffs filed an Amended Summons and Complaint, which included the affidavit of Justin Dillon, Esq., an expert witness and lawyer with experience in litigating Title IX matters. 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 filing the affidavit.

On May 9, 2021, the Clawson and Fagnoli Defendants filed a Motion to Dismiss Complaint and Amended Complaint, and a Motion to Prohibit Plaintiffs from using Pseudonyms.

On May 10, 2021, the Brewer Defendants filed Motion to Dismiss Complaint on the grounds, virtually identical to the Motion to Dismiss filed by the Clawson and Fagnoli Defendants; and also filed a Motion to Unmask Plaintiffs using Pseudonyms.

On June 16, 2021, Plaintiffs filed a Second Amended Summons and Complaint based on the arguments in the Defendants’ respective Motions to Dismiss claiming Mr. Dillon’s affidavit is defective because he is not licensed in South Carolina, even though there is no such requirement under S.C. CODE ANN. § 15-36-100.

On June 28, 2021, the Clawson and Fagnoli Defendants filed their Answer to the Second Amended Complaint and Counterclaim Against All Plaintiffs and contemporaneously filed a Motion to Dismiss Second Amended Complaint.

On June 28, 2021, the Brewer Defendants filed Motion to Prohibit Plaintiffs from using Pseudonyms.

On June 30, 2021, the Brewer Defendants filed their Answer to the Second Amended Complaint and Counterclaims, and contemporaneously filed a Motion to Dismiss Second Amended Complaint.

Procedural Objections

Plaintiffs object to the Court's consideration of Exhibit A or Exhibit B to "Defendants Join Memorandum in Support of Defendants' Motion to Dismiss Second Amended Complaint" ("Defendants' Memorandum") as Exhibit A and Exhibit B are not part of the Second Amended Complaint. See Farmer v. CAGC Ins. Co., 424 S.C. 579, 588, 819 S.E.2d 142, 147 (Ct. App. 2018), reh'g denied (2018), cert. dismissed (2019) ("In deciding a Rule 12(b)(6) motion, the court looks only at the complaint and, taking the facts alleged as true and construing all reasonable inferences and doubts in plaintiff's favor, asks whether the complaint would entitle the plaintiff to relief under any theory."). Defendants' Exhibit A and Exhibit B are not a transcript of proceedings before *this* Court or an Order issued by *this* Court subject to judicial notice along the lines of the cases cited in Footnote 2 in Defendants' Memorandum. See Defendants' Memorandum (quoting "Doe v. Bishop of Charleston, 407 S.C. 128, 134, n.2, 754 S.E.2d 494, 497-98, n. 2 (2014). 'A court can take judicial notice of *its own* records, files[,] and proceedings for all proper purposes including facts established in its records.'") (bold and italic emphasis added). Exhibit A is a copy of a private settlement agreement, which is clearly not a transcript or an order. When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, [SCRCP,] and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 452, 814 S.E.2d 643, 654 (Ct. App. 2018), reh'g denied (2018), cert. denied (2018). Plaintiff respectfully requests the Court delay ruling on Defendants' Motion until discovery is completed if the Court considers Defendants' Exhibit A as part of this Motion.

ARGUMENTS IN OPPOSITION

I. Plaintiffs' Second Amended Complaint states facts sufficient to support a cause of action against Defendants.

A. South Carolina law permits former clients to bring legal malpractice claims against their former lawyers based on errors leading to an insufficient settlement.

Defendants' "post-mediation 'buyer's remorse'" argument should be rejected. Defendants cite no authority for their incredible proposition lawyers are immune to professional liability claims from professional errors made leading to their clients signing a settlement agreement. The South Carolina Supreme Court permits pursuing legal malpractice claims based on errors by the former client's lawyer leading to a settlement. "[W]here where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney." Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334, 335 (1997) (citing Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833 (1993)). Other jurisdictions are in accord. See e.g., Kay v. McGuirewoods, LLP, 240 W. Va. 54, 807 S.E.2d 302 (2017) (former clients' settlement of tax liability dispute with IRS did not bar legal malpractice claims against law firm); Miller v. Finizio & Finizio, P.A., 226 So. 3d 979 (Fla. Dist. Ct. App. 2017) (former client's voluntary acceptance of marital settlement agreement in underlying case did not bar her legal malpractice action); and Angeles v. Aronsky, 109 A.D.3d 720, 974 N.Y.S.2d 329 (1st Dep't 2013) (former client can proceed with legal malpractice action against former counsel on allegations settlement of underlying action was effectively compelled by mistakes of counsel).

B. South Carolina law provides there is no confidentiality on matters involved in a mediation to prove a professional liability claim.

The Court should reject Defendants' arguments concerning the application of mediation rules concerning the confidentiality terms of mediation because they contradict provisions in the

South Carolina Rules of Evidence, which govern the admissibility of evidence in this lawsuit. See Rule 101, SCRE (“Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101.”); Rule 1101(b), SCRE (“(b) Proceedings Generally. These rules apply generally to civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court may act summarily.”). Cf. State v. Weinberg, 229 S.C. 286, 92 S.E.2d 842 (1956).

Defendants’ Memorandum avoided citation to Rule 8(c)(3), SCADR, which provides:

(c) Limited Exceptions to Confidentiality. There is no confidentiality attached to information that is disclosed during a mediation:

(3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding[.]

Rule 8(c)(3), SCADR.

Finally, evidentiary concerns do not affect whether Plaintiffs’ Second Amended Complaint states facts sufficient to support causes of action against Defendants. The Court should reject Defendants’ arguments on this point and deny their Motions to Dismiss.

II. Jane Doe Mother and John Doe Father have standing to assert claims against Defendants based on the allegations in the Second Amended Complaint alleging they were clients of Defendants.

If the South Carolina Supreme Court found SELECT INSURANCE COMPANY had standing to sue and assert legal malpractice claims against MAYBANK LAW FIRM, LLC, and Roy P. Maybank, Esq., then surely the allegations in the Second Amended Complaint stating Plaintiffs Jane Doe Mother and John Doe Father were clients of the Defendants in the “Federal Case” and the “State Case” and the allegations they entered into a contract of representation with the Defendants satisfies the standing requirements under South Carolina law. See e.g., (Second Amended Complaint, ¶¶ 1, 2, 13, 14, 28, 29, 36, 37, 40, 49, 56, 61, and 66). Standing alone, the allegations in Paragraph 13, provides standing for Plaintiffs Jane Doe Mother and John Doe Father:

13. On or around November 2, 2017, the *Lawyers accepted the representation of the Does to provide legal advice, services, and representation of the Does* 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 Does 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 John Doe, which led to a disciplinary action that was mishandled by the University. (Emphasis added).

The allegations in the Second Amended Complaint easily satisfy the requirements to state a legal malpractice claim and breach of fiduciary duty claim on behalf of Plaintiffs Jane Doe Mother and John Doe Father. See Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016) (“A claimant 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.”) (citing Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014)) (emphasis added); Turpin v. Lowther, 404 S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013) (“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, and (3) damages proximately resulting from the wrongful conduct of the defendant.”) (citing RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012)) (emphasis added); “The existence of a fiduciary duty is a question of law for the court.” Turpin, 404 S.C. at 589, 745 S.E.2d at 401.

The Court should deny Defendants’ Motions to Dismiss Plaintiffs Jane Doe Mother and John Doe Father on the grounds of lack of standing.

II. Mr. Dillon’s expert affidavit was timely filed and satisfied all aspects of S.C. CODE ANN. § 15-36-100.

The Summons & Complaint was filed without an expert affidavit three days before the three-year anniversary of the date on which any reasonable person would know or should have known of a claim having accrued against Defendants.¹ Less than 45 days later, the Amended

¹ Legal malpractice claims are subject to the three-year statute of limitations provided in S.C. CODE ANN. § 15-3-530 and the statutory “discovery rule” set forth in S.C. CODE ANN. § 15-3-535. See Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016) (In a “legal malpractice cause of action ... predicated on an injury or damage caused by the failure of an underlying suit due to an attorney’s alleged malpractice ... there can be no legal malpractice

Summons & Amended Complaint was filed along with Mr. Dillon's expert affidavit, which satisfied the requirements for timely filing the expert affidavit under S.C. CODE ANN. § 15-36-100(C)(1). Defendants' Motions to Dismiss ignore the specific allegations in Paragraph 103 in the Second Amended Complaint, which must be taken as true for the purposes of these 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.

cause of action without an adverse verdict, judgment, or ruling.”); Pers. Care, Inc. v. Theos, 426 S.C. 78, 89, 825 S.E.2d 281, 286 (Ct. App. 2019) (applying discovery rule in a legal malpractice case).

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.

The Summons & Complaint, the Amended Summons & Amended Complaint with Mr. Dillon's expert affidavit, and the Second Amended Summons & Second Amended Complaint also filed with Mr. Dillon's expert affidavit as an exhibit, all satisfy the requirements under S.C. CODE ANN. § 15-36-100. The Court should deny Defendants' Motions to Dismiss on the grounds Mr. Dillon's expert affidavit was not timely filed.

III. Mr. Dillon is extraordinarily well-qualified to serve as an expert to file the affidavit of merit in this matter.

The Court should deny Defendants' Motions to Dismiss claiming Mr. Dillon's credentials are insufficient under S.C. CODE ANN. § 15-36-100(A)(3). Mr. Dillion's expert affidavit comports with this Statute. See Eades v. Palmetto Cardiovascular & Thoracic, PA, 422 S.C. 196, 203, 810 S.E.2d 848, 851–52 (2018) ("Thus, [S.C. CODE ANN. § 15-36-100(A)(3)] contemplates the production of an expert affidavit from a doctor who is not certified in or does not practice in the same area of medicine as the defendant doctor, but otherwise possesses specialized knowledge to assist the trier of fact.")

Defendants' Motions to Dismiss and their Memorandum did not mention the portions of Mr. Dillon's expert affidavit and his curriculum vitae outlining his vast experience with Title IX disputes, which like the expert in Eades, identifies his specialized, technical knowledge regarding the Title IX and related matters at issue in the underlying lawsuits. In his affidavit, Mr. Dillon, who graduated DUKE UNIVERSITY and then from HARVARD LAW SCHOOL, recites his professional experience as follows:

11. I am a lawyer licensed to practice law in the Commonwealth of Virginia

(since 2002) and the District of Columbia (since 2007). I have also been admitted to practice in the United States District Court for the Eastern District of Virginia, the United States District Court for the District of Columbia, the United States District Court for the Central District of Illinois, the United States District Court for the Eastern District of Michigan, the United States District Court for the Northern District of Ohio, the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Tenth Circuit, and the United States Supreme Court.

12. I have gained nationwide attention for my work representing students and professors in Title IX and other campus misconduct cases, which my firm and I have handled at more than 100 schools across the country. I was the first lawyer in the country to win summary judgment against a university in a campus sexual misconduct case in modern era, which I did against GEORGE MASON UNIVERSITY in 2016. I have settled numerous lawsuits and potential lawsuits against colleges nationwide. Along with my partner Matt Kaiser, I am the author of *The KAISERDILLON PLLC Guide to Representing Yourself in a Campus Sexual Assault Case*. I have been published or quoted regarding campus sexual misconduct issues in more than a dozen national newspapers and magazines, including *The Wall Street Journal*, *The New York Times*, *The Washington Post*, *The Los Angeles Times*, *The Philadelphia Inquirer*, *National Review*, *The Nation*, and *The Weekly Standard*. I have also spoken on these issues before organizations such as the American Bar Association, the Association of Title IX Administrators, HARVARD LAW SCHOOL, the University of Kentucky's Center for Research on Violence Against Women, the Higher Education Consultants Association, the District of Columbia Bar, the Virginia State Bar, and the Colorado Bar Association. Immediately before joining KAISER DILLON, PLLC, I spent five and a half years as an Assistant United States Attorney in Washington, DC, where I led more than 100 Grand Jury investigations, tried more than 60 criminal cases, and handled more than a dozen appeals. Earlier in my career, I worked at the Civil Rights Division of the U.S. Department of Justice. I am a Georgia native and a graduate of Duke University and Harvard Law School.

See (Expert Affidavit by Justin Dillon, Esq., Ex. 1 to Amended Complaint and Ex. 1 to Second Amended Complaint).

Lawyers serving as experts in legal malpractice case are not required to be licensed in South Carolina. In Smith v. Haynsworth, Marion, McKay & Geurard, the South Carolina Supreme Court found the trial court had erred in disqualifying Dr. Gregory B. Adams as an expert in legal malpractice matter because he was not licensed to practice law in South Carolina. The South Carolina Supreme Court held:

Further, the fact that Adams is not licensed to practice law in this state does not disqualify him as an expert. See McMillan v. Durant, 312 S.C. 200, 439 S.E.2d 829 (1993) (practitioner's experience teaching in a particular specialty and his

professional interaction with practitioners of that specialty are facts sufficient to support his qualification as an expert. Defects in qualification go to weight rather than admissibility). Likewise, the fact that Adams is not a real estate lawyer does not prohibit his testimony concerning those ethical obligations which are relevant to appellants' claims.

Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 438, 472 S.E.2d 612, 614 (1996).

Defendants' Motions to Dismiss claiming Mr. Dillon's affidavit is defective, should be denied based on Mr. Dillon's substantial experience with Title IX disputes as shown in his Affidavit and on his curriculum vitae, which was included with his expert affidavit filed with the Amended Complaint and the Second Amended Complaint. South Carolina rejected the "locality rule" concerning expert testimony and expert affidavits. Mr. Dillon is more than qualified to provide the testimony in his affidavit. Mr. Dillon's affidavit "demonstrate[s] he possesses the specialized knowledge and training that may assist the trier of fact in this case, and he explained why his credentials qualify him to identify a negligent act or omission committed by [Defendant]s ... [and] his affidavit comports with the more general requirements of subsection (A)(3)." Eades, 422 S.C. at 204, 810 S.E.2d at 852. The Court should deny Defendants' Motions to Dismiss on the grounds Mr. Dillon is not qualified to provide expert testimony.

If this Court is inclined to grant Defendants' Motion on these grounds, Plaintiffs would respectfully request additional time to provide a supplement to Mr. Dillon's expert affidavit under the provisions in S.C. CODE ANN. § 15-36-100(E).

IV. The Second Amended Complaint alleges Defendants' tortious conduct caused financial injuries to Plaintiffs long after the mediation.

Defendants' arguments the Second Amended Complaint should be dismissed because the "gravamen of Plaintiffs' Second Amended Complaint is simply post-mediation 'buyer's remorse,'" does not change the fact that the rest of the allegations state claims against Defendants and ignores the allegations in Plaintiffs' pleadings about Defendants conduct long after the mediation. In Paragraphs 61-63, Plaintiffs allege:

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 John Doe's position in the mediation, all of which added and continued to cause damages to John Doe.

63. The February 28, 2019, letter from the Lawyers interfered with the mediation process, disrupting and negotiations and disadvantaging John Doe's position in the mediation.

See (Second Amended Complaint, ¶¶ 61-63).

The mediation in the underlying matter took place in March 2018. Defendants' conduct stated in these 3 paragraphs took place almost a year later.

V. Defendants' "public policy" arguments for dismissal are contrary to established South Carolina law.

Defendants' Memorandum cites no controlling South Carolina authority on their "public policy" arguments about the finality of mediation. The sole case cited by Defendants was in the context of "settlements in collective actions under the FLSA" where "the district court has broad discretion in approving a settlement of a collective action case, [and] there is a strong presumption in favor of finding a settlement fair." See Riddle v. City of Anderson, S.C., No. 8:12-CV-03480-TMC, 2015 WL 12830369, at *5 (D.S.C. Jan. 26, 2015) (internal quotes and citations omitted). Because settlements in collective actions under the FLSA are judicially supervised, there is a counter check on the equity and fairness of the settlement terms, which underlies the "public policy" objectives in enforcing FLSA settlements. Unlike those circumstances, however, the South Carolina Supreme Court's opinions in Crowley v. Harvey & Battey, P.A., 327 S.C. 68, 70, 488 S.E.2d 334, 335 (1997) and Shelton v. Bressant, 312 S.C. 183, 439 S.E.2d 833 (1993) permit legal malpractice lawsuits based on allegations the lawyer's acts or omissions in leading to the client into signing a private settlement agreement on complex legal matters, where the client's objectives were not satisfied.

The deterrent purpose of tort law is also served by our decision. One reason for making a defendant liable in tort for injuries resulting from a breach of his duty is to prevent such injuries from occurring. Underlying this justification is the assumption that potential wrongdoers will avoid wrongful behavior if the benefits of that behavior are outweighed by the costs imposed by the payment of damages...."

Sentry Select Ins. Co. v. Maybank Law Firm, LLC, 426 S.C. 154, 159, 826 S.E.2d 270, 272 (2019) (quoting F. Patrick Hubbard and Robert L. Felix, THE SOUTH CAROLINA LAW OF TORTS 7 (4th ed.

2011). “A basic purpose of the common law is to preserve the community’s security and liberty by enforcing a reciprocal system of rights and duties among its members.” Snakenberg v. Hartford Cas. Ins. Co., Inc., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989).

CONCLUSION

The Court should deny Defendants’ Motions to Dismiss based on the allegations in Plaintiffs’ Second Amended Complaint and the statements in Mr. Dillon’s expert affidavit, controlling South Carolina law, the South Carolina Rules of Civil Procedure, the South Carolina Rules of Evidence, the South Carolina Rules of Alternative Dispute Resolution, and for all of the reasons stated in this memorandum in opposition. Defendants will have ample opportunity to defend themselves on the merits of these claims.

Respectfully submitted,

/s/ Thomas A. Pendarvis
Thomas A. Pendarvis (SC Bar # 064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary Street, Unit A-1
Beaufort, SC 29902-4188
843.524.9500
Thomas@PendarvisLaw.com

Beaufort, South Carolina

December 15, 2021

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2021-CP-10-01343

Andrew Pampu, Amanda Pampu, and John Pampu,

Plaintiffs,

vs.

CLAWSON FARGNOLI, LLC; SAMUEL R. Clawson, Jr., Esq.; Christina R. Fagnoli, Esq.; Barrett R. Brewer, Esq.; and BREWER LAW FIRM, LLC,

Defendants.

**PLAINTIFFS' MOTION FOR
RECONSIDERATION AND TO ALTER
OR AMEND THE ORDERS GRANTING
DEFENDANTS' MOTIONS TO DISMISS**

Plaintiffs, Andrew Pampu ("Drew Pampu"), Amanda Pampu ("Ms. Pampu"), and John Pampu ("Mr. Pampu") (collectively "the Pampus"), move the Court under Rule 59(e), SCRCF, to reconsider and alter or amend its two Orders ("the Orders") entered on June 23, 2022, dismissing the Pampus' Second Amended Complaint. The first Order was entered at 11:12 am granting the Motion to Dismiss filed under Rule 12, SCRCF, on behalf of Barrett R. Brewer, Esq. and BREWER LAW FIRM, LLC ("the Brewer Defendants"). The second Order as entered at 11:13 am granting the Motion to Dismiss filed under Rule 12, SCRCF, on behalf of CLAWSON FARGNOLI, LLC, SAMUEL R. Clawson, Jr., Esq., and Christina R. Fagnoli, Esq. ("the Clawson Fagnoli Defendants"). The Defendants are referred to in this Motion collectively as "the Lawyers."

The Pampus respectfully move the Court reconsider its decision and alter or amend the Orders by denying both Motions to effectively reinstate the Second Amended Complaint, or issue an Order or Orders addressing the following:

MATTERS FOR RECONSIDERATION AND ALTERING/AMENDING ORDER

1. The Orders ignore established South Carolina law permitting former clients to bring legal malpractice claims against their former lawyers based on errors alleged in the Second Amended Complaint leading to an insufficient settlement.

2. The Orders ignore specific allegations in the Second Amended Complaint establishing for the purposes of the Motions to Dismiss these facts clearly supporting the Pampus' professional negligence claims:

¶2. 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.

¶3. 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.

3. The Orders ignore 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 these facts 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.

4. The Orders ignore specific allegations in the Complaint establishing for the purposes of a motion to dismiss a client-lawyer relationship between Mr. Pampu and Ms. Pampu, on one hand as clients, and the Defendants, on the other as the lawyers. These allegations include allegations establishing they were clients of Defendants concerning the "Federal Case" and the "State Case;" and the allegations Mr. Pampu and Ms. Pampu entered into a contract of representation with the Defendants, any and all of which provide standing for Mr. Pampu and Ms. Pampu to assert the professional negligence claims stated in the Second Amended Complaint. See Second Amended Complaint, ¶¶ 1, 2, 13-14, 28-29, 36-37, 40, 49, 56, 61, and 66.

5. The Orders ignore 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).

6. The Orders ignore 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.

7. The Orders should be amended to reject Defendants' 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.

8. The Orders should be amended to reject Defendants' arguments 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 Defendants' underlying representation of the Pampus and ignores Mr. Dillon's vast experience handling Title IX litigation.

9. The Orders incorrectly state "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.

10. The Orders incorrectly imposes 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.

11. The Orders do not explain the basis for the Court considering Exhibit A or Exhibit B to "Defendants Joint Memorandum in Support of Defendants' Motion to Dismiss Second Amended Complaint" ("Defendants' Memorandum") as Exhibit A and Exhibit B are not part of the Second Amended Complaint.

12. The Orders do not explain the basis for the Court accepting the Lawyers' public policy arguments concerning the "finality" of mediation given the controlling provisions in Rule 101, SCRE ("Except as otherwise provided by rule or by statute, these rules govern proceedings in the courts of South Carolina to the extent and with the exceptions stated in Rule 1101."); Rule 1101(b), SCRE ("(b) Proceedings Generally. These rules apply generally to civil actions and proceedings, to criminal cases and proceedings, and to contempt proceedings except those in which the court may act summarily."). Cf. State v. Weinberg, 229 S.C. 286, 92 S.E.2d 842 (1956).

13. The Orders make incorrect finds of fact when they conclude the Pampus "developed buyer's remorse" concerning the settlement in the underlying matter. There are no

such allegations in the Second Amended Complaint.

14. The Orders ignore 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.

15. The Orders should be amended to allow the Pampus to proceed with their breach of fiduciary duty claim because 1) the facts supporting their breach of fiduciary duty claim concerning the Lawyers' *post*-mediation conduct and therefore did not arise of the same factual allegations concerning the Lawyers' mediation conduct, which support their professional negligence claims, 2) Rule 8(a), SCRCP permits filing alternative claims, and 3) the sole South Carolina authority on this point, RFT Mgmt. Co. v. Tinsley & Adams, LLC, 732 S.E.2d 166, 173 (S.C. 2012), dealt with a motion made at trial, and not before trial under Rule 12, SCRCP.

16. The Orders summarily dismiss all claims asserted by the Pampus making no findings dismissing the Pampus' claims for breach of contract.

17. The Orders do not reflect why the trial judge did not disqualify himself when the trial judge's impartiality might reasonably be questioned, including circumstances where the trial court would reasonably appear to have a personal bias in favor Defendant, Samuel R. Clawson, Jr., Esq., based on the trial judge's long-term law partnership with Samuel R. Clawson, Sr., Esq. This was not discovered by the Pampus until after the Court's email advising of the rulings on the Lawyers' motions with no instructions on the trial court's findings of fact or the basis of the trial court's conclusions of law.

LEGAL STANDARD

A. 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 court to reconsider its decision, even if it means rehashing all or part of an argument previously presented. Elam v. Dept. of Transp., 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), SCRCF. 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).

B. Motions to Dismiss.

“In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF, 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).

CONCLUSION

The Pampus respectfully request the Court reconsider its decision and alter or amend the Orders to deny the Clawson Fargnoli Defendants’ and the Brewer Defendants’ Motions to Dismiss or issue an Order or Orders revising and making specific findings on its rulings in the two Orders

granting the Clawson Fagnoli Defendants' and the Brewer Defendants' Motions to Dismiss.

Respectfully submitted,

/s/ Thomas A. Pendarvis

Thomas A. Pendarvis (SC Bar # 064918)

PENDARVIS LAW OFFICES, P.C.

710 Boundary Street, Suite 1-A

Beaufort, SC 29902

843.524.9500 Tel.

Thomas@PendarvisLaw.Com

Counsel for Plaintiffs, Andrew Pampu, Amanda
Pampu, and John Pampu

Beaufort, South Carolina

July 5, 2022

STATE OF SOUTH CAROLINA **TRANSCRIPT OF RECORD**
COUNTY OF CHARLESTON CASE NO.:2021-CP-10-01343

March 2, 2022

BEFORE: The Honorable Edgar W. Dickson

ANDREW PAMPU, AMANDA PAMPU, and JOHN PAMPU,
Plaintiffs,
vs.

CLAWSON FARGNOLI, LLC; SAMUEL R. CLAWSON, JR.,
ESQ.; CHRISTINA R. FARGNOLIC, ESQ.; BARRETT R.
BREWER, ESQ.; and BREWER LAW FIRM, LLC,
Defendants.

APPEARANCES:

Thomas Pendarvis, Esq.
Appearing for the Plaintiffs.

Bruce Wallace, Esq.
Appearing for Defendant Brewer Law Firm,
Barrett R. Brewer, Esq.

Jim Dedman, Esq.
Appearing for Defendant Clawson Fargnoli,
LLC and individual Defendants,

Also Present: Christy Fargnoli, Esq.;
Barrett Brewer, Esq.; Bert Utsey, Esq.,
Samuel Clawson, Jr., Esq.

Recorded by: WebEx Courtroom

Transcriber: Natalie Dahl, RPR
SC Official Court Reporter

NOTE: Pursuant to Rule 607 (H)(1)(B), SCACR "A Court REPORTER SHALL RECEIVE THE FEE OF \$1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." All requests for a copy of the enclosed transcript shall be sent to: Natalie Dahl, RPR, P.O. Box 762, Conway, SC 29526

INDEX

Description	Page
-------------	------

EXHIBITS

(None)

Transcript Legend

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
Phonetic (ph)	Indicates a phonetic word
(Inaudible)	Indicates word(s) are not discernable due to audio recording quality

P R O C E E D I N G S

THE COURT: Let's see. Okay. You all have a bunch of motions on this thing, right? A motion to seal, a motion to prohibit using pseudonyms, motion to dismiss the second complaint -- second amended complaint.

Nobody wants to use pseudonyms? I got like three of those, right?

MR. PENDARVIS: Yes, Your Honor. Thomas Pendarvis for the plaintiffs: John Doe, Mother Doe, and Father Doe. There are several motions, and I think we've had an agreement by counsel, and maybe a better way to proceed -- when the initial summons and complaint were filed, contemporaneous with that was a motion to proceed anonymously, there were motions to not proceed anonymously, and motions to dismiss. Counsel can correct me, but I believe we have agreed to go forward allowing the plaintiff to argue the motion to proceed anonymously, and then defense counsel will respond in support of their motion and opposing plaintiffs' motion. And then we can proceed, if it's okay with the Court, with the motions to dismiss.

THE COURT: We have motions to dismiss, too? Oh, I've got one, yeah. Yeah. Okay. Well, I do.

1 I see them now.

2 All right. So, Mr. Pendarvis is -- this is
3 your motion? If everyone is in agreement with
4 that, that's fine with me.

5 MR. WALLACE: Your Honor, Bruce Wallace for
6 Barrett Brewer and the Brewer Law Firm. I
7 approached Mr. Pendarvis yesterday with that very
8 idea to try to speed this up for the Court's
9 processing and understanding, and we're prepared to
10 proceed that way.

11 THE COURT: Okay. Any objection to that from
12 anybody?

13 You are muted -- oh, I'm muted.

14 MR. PENDARVIS: No -- Mr. Dedman is muted.

15 THE COURT: Oh, okay.

16 MR. PENDARVIS: It's still not coming
17 through.

18 THE COURT: Mr. Dedman, are you trying?
19 Well, Mr. Dedman, you want to shake your head that
20 either you are in agreement or not?

21 Let the record reflect that he's in
22 agreement. All right. All right.

23 Mr. Pendarvis, you want to keep everyone
24 anonymous?

25 MR. PENDARVIS: Yes, Your Honor. The basis

1 for that is the underlying matter. This is a
2 professional liability claim against lawyers who
3 were representing the plaintiffs in matters related
4 to John Doe and some alleged sexual misconducts at
5 a university.

6 The underlying cases were filed under --
7 anonymously, and there were some other motion
8 practices in the materials that were submitted
9 before the Court. There are serious implications
10 from this type of -- the allegations by these
11 people involved at the university were claimed to
12 be false and defamatory. Allowing that
13 continuation of the false and defamatory statements
14 about Plaintiff John Doe is extremely prejudicial
15 to his coming out of college, trying to get a job,
16 possibly graduate work in med schools and dental
17 schools, having these allegations just out there in
18 the public with his name attached to it, it would
19 be contrary to his interest.

20 The really key to this entire thing, Your
21 Honor, is the defendants have argued there is no
22 prejudice to the defendants at all. Everyone
23 involved in the litigation knows exactly who the
24 identification of the plaintiffs are. There was an
25 accidental -- what the expert affidavit has one

1 reference to the plaintiff's name, and I'll be glad
2 to redact that or submit a redacted affidavit.
3 That was inadvertent. But the point being is there
4 is no prejudice to anyone.

5 There are -- this circumstance was before the
6 court of appeals in a case called *Doe v. Howe*. It
7 is cited in everyone's materials, and it was -- the
8 court of appeals felt it was improper under the
9 record before the Court to deny allowing that
10 plaintiff to go forward anonymously. So in sum
11 total, no prejudice to anyone.

12 These are very serious allegations that are
13 involved in the underlying matter that the
14 defendants were litigating on behalf of plaintiff
15 under an anonymous heading. So we feel the case
16 should continue that way. There is no prejudice to
17 anyone, and that is the thrust of the argument set
18 forth in our motion. We respectfully would ask the
19 Court to allow us to proceed anonymously until
20 trial, and that can be addressed by the trial court
21 when and if it gets to that point.

22 THE COURT: Any objections to that request
23 until trial?

24 Mr. Dedman, you look like you are trying to
25 tell me, but, again, I can't hear you.

1 (A difficulty in video and/or audio.)

2 THE COURT: No, I can read your lips
3 occasionally.

4 (A difficulty in video and/or audio.)

5 THE COURT: Well, let me go to somebody else.

6 MR. WALLACE: Bruce Wallace for Barrett
7 Brewer and the Brewer Law Firm.

8 Mr. Dedman and I had originally agreed for
9 him to take this part of the motion. The
10 defendants filed sort of mirror motions asking the
11 Court to unmask or prohibit the plaintiffs from
12 proceeding anonymously.

13 I see Mr. Dedman is gone, so I'll proceed for
14 the moment with the hope and understanding that if
15 he comes back, he can be heard, that he'll take
16 over.

17 A couple of things, Your Honor. First of
18 all, the underlying action that Mr. Pendarvis
19 mentioned is against -- it is by this plaintiff
20 against the female student involved in the alleged
21 sexual intercourse for defamation.

22 In that case, the plaintiff filed a motion to
23 proceed anonymously. The Court denied the motion
24 to proceed anonymously, and the plaintiff did not
25 appeal that motion's denial, which is -- if you

1 read *Doe v. Howe*, it is immediately appealable,
2 Your Honor.

3 So for the last year-and-a-half, the
4 plaintiff has been pursuing the female student
5 against whom he's alleging all of these defamatory
6 statements in the public realm. The record up in
7 the county where it is filed is clear. The case is
8 going to trial later this month, and for whatever
9 reason, the plaintiff chose not to appeal these
10 very important failure to disclose issues. And we
11 think that because the underlying case is not
12 anonymous, there is absolutely no reason to proceed
13 anonymously in this case.

14 Moreover, the default rule -- the default
15 rule in this state is all proceedings are public.
16 All proceedings are supposed to be prosecuted in
17 the real name of the parties.

18 With regard to prejudice, the defendant's
19 position is absolutely we're prejudiced. The
20 plaintiff in the complaint has alleged a variety of
21 personal injury, most of it centered around mental
22 and emotional harm. We have to issue subpoenas to
23 a variety of parties. We have to be able to use
24 his identification name. We have to be able to
25 identify him by name. We have to use his identity

1 in order to get basic discovery from third parties.

2 With regard to *Doe v. Howe*, Your Honor, which
3 Mr. Pendarvis rests his entire argument, it is
4 completely distinguishable from the case at hand.
5 *Doe v. Howe* involved a young man who was abused by
6 a teacher, and he was the victim.

7 I see Mr. Dedman is back, Your Honor. I'll
8 let him take over at that point.

9 Jim, I was distinguishing *Doe v. Howe*.

10 THE COURT: Okay.

11 MR. DEDMAN: Can you all hear me now?

12 THE COURT: Yeah, I can hear you.

13 MR. DEDMAN: Okay. Excellent.

14 *Doe v. Howe* is very distinguishable here.
15 The cases that have been cited by the plaintiff
16 involve victims of sexual assault. *Doe v. Howe*
17 involved a plaintiff whose underlying case involved
18 molestation charges from his school when he was
19 underage. This is not the case where we are
20 (inaudible) the identity of a victim of sexual
21 assault. It is not a case involving someone who
22 was a victim of a crime. This is a case involving
23 a perpetrator.

24 Mr. Doe was accused of sexually assaulting a
25 female university student behind a dumpster at a

1 restaurant in the late hours of the night.

2 *Doe v. Howe* is not designed to protect this
3 situation, and this is not a case where you have a
4 (inaudible) imbalance where a teacher has assaulted
5 a student. This is not a case where a minor is
6 involved. This is a case involving an adult
7 accused of sexual assault while he was an
8 (inaudible).

9 THE COURT: While he was a what?

10 MR. DEDMAN: In light of that, we don't
11 believe that *Doe v. Howe* is --

12 THE COURT: Mr. Dedman, you said something,
13 and I couldn't hear you. This is a case where an
14 adult is doing what?

15 MR. DEDMAN: An adult was accused of sexual
16 assault while he was an adult. There's no minors
17 here.

18 I think that, you know, Mr. Wallace may have
19 gotten into it, but the -- Mr. Doe did attempt to
20 make this argument in the underlying case, in the
21 state court case, and it was rejected. He filed a
22 motion to proceed anonymously in that case, and he
23 was denied that relief.

24 One of the interesting things about *Doe v.*
25 *Howe* is that it allows an immediate appeal of a

1 denial of a motion to proceed anonymously, and
2 despite being denied that relief, Mr. Doe did not
3 appeal that ruling, and as such, in the underlying
4 state court case, he has been proceeding under his
5 own name for two-and-a-half years.

6 He has filed a very detailed motion for
7 summary judgment in that case in which he sets
8 forth a host of personal background facts. And
9 that case is actually set for trial at the end of
10 this month, on March 21st. And so in light of
11 that, essentially, Mr. Doe has waived his right, if
12 any, to proceed anonymously. Because the very
13 sexual conduct that is at issue in this case, in
14 which he argues for relief, is being litigated
15 under his own name and will be tried under his own
16 name.

17 THE COURT: And, Mr. Dedman, where is that
18 case being tried?

19 MR. DEDMAN: Well, we filed the order as an
20 exhibit. We had redacted the county just because,
21 but it's in the upstate, Your Honor.

22 THE COURT: Oh, okay. All right. But it is
23 set for trial March 21st in whatever county, and
24 he's not going by "John Doe" there, right?

25 MR. DEDMAN: That's correct. He's proceeding

1 under his own name.

2 THE COURT: Okay. Mr. Wallace, Mr. Dedman,
3 anything else to add?

4 MR. DEDMAN: No, sir.

5 THE COURT: Anybody else?

6 I'm sorry, what?

7 MR. PENDARVIS: Nothing.

8 MR. WALLACE: Nothing from me, Your Honor.

9 THE COURT: If anyone wants to say anything,
10 waive or something.

11 Well, I'm going to let you respond.

12 MR. PENDARVIS: Oh, okay. Thank you.

13 THE COURT: I'm trying to find out if any of
14 the defendants want to say anything?

15 Nobody?

16 All right. All right. Mr. Pendarvis.

17 MR. PENDARVIS: Your Honor, brief rebuttal.
18 The one thing I didn't hear -- again, there was an
19 argument on lack of prejudice, but where -- where's
20 the problem? What happened in another court, in
21 another proceeding, not today. I'm not counsel for
22 the plaintiffs in the other matter. We, like the
23 rest of the folks on this video, are just watching
24 from the sidelines on how that proceeds. This is a
25 separate matter.

1 Again, there's the -- the -- I'm happy to
2 accept, if defense counsel will stipulate today,
3 that emotional distress damages are available in a
4 malpractice case, we may reconsider that. I heard
5 that argument earlier, to evaluate the emotional
6 claims here, we need discovery. If there is going
7 to be a stipulation of emotional distress, we may
8 withdraw the motion. If there's not a claim of
9 emotional distress damages available in this
10 malpractice case, then there's no prejudice to the
11 defendants.

12 So they got to pick their horse they are
13 riding. They either are going to say that
14 emotional damages are available and we'll proceed
15 under that process, and that they need to do
16 discovery on that, especially in light of the
17 underlying case, we may withdraw the motion. But
18 without that stipulation, Your Honor, there's no
19 argu -- there's no harm. There's no problem with
20 this case proceeding anonymously up until the trial
21 time.

22 If the trial judge decides to allow the
23 parties to proceed with their real names, then so
24 be it. But for the purposes of this case, there's
25 no need to reveal the names and identity of this

1 plaintiff and his parents to make it worse than it
2 already is on the problems with the way this matter
3 was handled by the university, and then compounded
4 by the problems that was handed by the defendants
5 in this case as counsel.

6 THE COURT: And, Mr. Pendarvis, you know,
7 what doesn't make sense to me here is how in the --
8 in the case in chief, as I'm going to call it, he
9 is using his real name, and, yet, here he doesn't
10 want to use his real name. That just doesn't make
11 sense to me, I'm sorry. And that's why I'm trying
12 to -- can you just explain that to me?

13 MR. PENDARVIS: Your Honor, he intended to
14 proceed anonymously in the underlying case.

15 THE COURT: Right.

16 MR. PENDARVIS: There were motions filed and
17 opposed. It wasn't a -- you know, they didn't
18 consent to begin using their real names. It was by
19 motion and by a court order. The reality of some
20 things about the decision not to appeal, you know,
21 obviously relates to timing issues. I mean, this
22 case -- the Court is not aware of all of the
23 allegations in the complaint, but this has been
24 proceeding for quite some time.

25 And whether, you know -- again, I wasn't --

1 I'm not counsel for the plaintiffs in the
2 underlying case.

3 THE COURT: I understand.

4 MR. PENDARVIS: Decisions about whether or
5 not to appeal, the erroneous ruling -- they contend
6 the erroneous ruling, the name is, you know, just
7 the way it happened. But I certainly was not going
8 to be accused of going into this case and not try
9 to proceed in the same fashion. It is terribly
10 damaging to his professional reputation and his
11 ability to seek employment or, you know, get into a
12 graduate school with the improper things that are
13 on his transcript from college and the results from
14 the proceedings that are at issue in the underlying
15 matter, and in this matter.

16 THE COURT: And -- and -- and those things
17 that are -- that are -- are things that you are
18 seeking, he's seeking damages from in this case,
19 right?

20 MR. PENDARVIS: Yes, sir. A large part of it
21 are the legal fees that are being incurred,
22 substantial legal fees that are being incurred in
23 prosecuting the underlying case.

24 But, you know, we heard arguments that he's
25 not a victim of sexual misconduct. Agreed, he's

1 not. He's a victim of defamatory statements and
2 improper proceedings by the university that didn't
3 follow their own rules allowing a false record to
4 be attached to his name and his resume and his
5 transcript and everything else. So he is a victim,
6 no question about it.

7 And there's -- the idea that, you know, the
8 last item -- the big one -- on the list that was
9 considered by the court of appeals is the risk of
10 unfairness to the opposing party. Again, if
11 they're not going to seek emotional distress
12 damages, then they don't need this discovery that
13 they are saying.

14 If they are going to concede emotional
15 distress damages are a material point of damages
16 that can be claimed in this case, I think I can say
17 we would withdraw the motion, but I need to have
18 that stipulation as part of the withdrawal and the
19 dismissal.

20 THE COURT: Okay. I don't think I see anyone
21 jumping up and down -- oh, well, Mr. Dedman, yes.
22 You had -- okay, Mr. Dedman.

23 MR. DEDMAN: I think the only thing we would
24 add is that there is prejudice here. Number one is
25 the courts are supposed to be open, and there's

1 lots of litigants who do not want to expose their
2 plaintiff to the public, but courts are
3 presumptively open. And there is discovery we need
4 to do, and I think the fact that we're having to
5 dance around so many of the core facts -- I mean,
6 we can't name the university. We're concerned
7 about naming the county of the suit. That's going
8 to make this litigation very difficult for
9 everybody if we can't use any proper nouns in the
10 case, so I think that's incredulous.

11 THE COURT: Okay. All right.

12 Mr. Pendarvis -- the feedback is bothering
13 me.

14 Mr. Pendarvis, let me just tell you, I think
15 since -- from my standpoint, since the basic case
16 is going forward in his name and like that, it just
17 does not make any sense to me to make this an
18 anonymous hearing. So I'm going to note your
19 objection to my ruling, but that is going to be my
20 ruling.

21 And, I mean, to me, when you are going to
22 court, unless there is a really good reason for it,
23 everybody should be identified. The university
24 should be identified, the dates and where it is,
25 and all like that. I mean, it's all stuff that is

1 factual and should be said.

2 I think when we try to hide stuff in a
3 courtroom situation it -- it -- it leads to just
4 all kinds of problems, and so I think courts are
5 supposed to be open. I have in -- I've had to
6 listen to too many things in court that I thought
7 were embarrassing that -- that I didn't even want
8 to hear when I was an attorney. And certainly now
9 that I've been a judge I've heard more stuff than I
10 want to hear. But, you know, once you decide to go
11 to court, it's open, and we are going to deal with
12 it in court.

13 So -- but I'm going to note your objection to
14 my ruling so that can be preserved, if you wish to
15 take it up, okay?

16 I'm sorry, Mr. Pendarvis, can you unmute
17 yourself?

18 Yeah. Okay.

19 MR. PENDARVIS: Sorry. I didn't know I muted
20 myself.

21 Thank you, Your Honor. I understand your
22 ruling.

23 THE COURT: Okay. Thank you, sir.

24 All right. So now we need to move into these
25 different motions, right? Did you all have an idea

1 how you wanted to handle those?

2 MR. WALLACE: Bruce Wallace again. I can
3 tell you the rough outline of how we would like to
4 proceed, if it's okay with Your Honor.

5 THE COURT: Okay.

6 MR. WALLACE: So Jim Dedman represents
7 Clawson Fargnoli and the individual lawyers for
8 that firm. I represent Barrett Brewer and his law
9 firm. And, by the way, Mr. Brewer has been here
10 the whole time, but he was unable to be seen by
11 Your Honor until about ten minutes ago, so I just
12 wanted the Court to note that he's been present for
13 the entire hearing.

14 THE COURT: Okay.

15 MR. WALLACE: What Mr. Dedman and I proposed
16 to do is I'll give a factual recitation based on
17 the second amended complaint, and I'll argue very
18 generally the 12(b)(6) motion to dismiss, and the
19 timings of the plaintiffs' expert affidavit, and
20 then Mr. Dedman will take over at that point and
21 get into more detailed arguments related to the
22 sufficiency of the expert's affidavit and a couple
23 other arguments that we raised in our memorandum.

24 THE COURT: Okay. And that will cover all of
25 the motions to dismiss?

1 MR. WALLACE: Yes, Your Honor.

2 THE COURT: Okay.

3 MR. WALLACE: Yes, Your Honor.

4 MR. PENDARVIS: And, Your Honor, plaintiffs
5 agree. That was a good part of our discussion
6 yesterday, and we agree that this is probably the
7 most efficient way to proceed.

8 THE COURT: Okay. Thank you.

9 Mr. Wallace, again, I'll be glad to hear from
10 you.

11 MR. WALLACE: Thank you, Your Honor. I
12 apologize, Your Honor, I prepared my argument in
13 the event that the Court had denied the motion to
14 unmask, so I may at times slip in and say --

15 THE COURT: I mean, if that's what you want
16 to do, Mr. Wallace, I'll reconsider your argument.

17 MR. WALLACE: Your Honor, briefly, as the
18 facts alleged in the complaint, plaintiff was a
19 student at Clemson University, and everyone agrees
20 he had sex with a female student from the
21 university. The salacious details you heard a
22 little bit about, but I'm not going to bring them
23 into court at this time. They are, frankly, rather
24 shocking as a father of a young girl and a father
25 of college-aged boys.

1 So suffice it to say, the young lady in
2 question was drunk at the time of the incident.
3 She accused the plaintiff of non-consensual sexual
4 assault, and the university -- Clemson University
5 convened disciplinary proceedings, and after a
6 hearing found the plaintiff guilty, for lack of a
7 better word, for engaging in non-consensual sexual
8 intercourse with the young female student in
9 question.

10 Initially, the punishment handed down was a
11 one-semester suspension. Both the female student
12 and the plaintiff appealed that determination, and
13 on appeal, also a Clemson University panel, they
14 actually increased the penalty to a one-year
15 suspension.

16 Thereafter, plaintiff sued Clemson University
17 alleging -- among other things -- violation of
18 Title 9 and due process, and he also sued the
19 female student in state court along with several
20 other parties alleging defamation and the like, as
21 you heard Mr. Pendarvis mention. That state court
22 case is the one that continues and is set for trial
23 up in Pickens County for March 21st.

24 After both of these lawsuits were filed, that
25 is when the plaintiff sort of changed courses in

1 mid-stream and hired Clawson Fagnoli and the
2 Brewer Law Firm to represent him in both the
3 federal lawsuit against Clemson University and the
4 state lawsuit against the female student and the
5 other defendants in that state court case. So it
6 came in a little late, but undertook representation
7 in both cases. Clawson Fagnoli and Brewer Law
8 Firm working in tandem to represent the plaintiff
9 in both lawsuits.

10 After orders of substitution, the plaintiff
11 and Clemson University went to mediation in federal
12 court. And as Your Honor no doubt recalls, federal
13 mediation has certain rules just like state court
14 mediation.

15 It's important that the complaint gets to
16 this level of detail, so forgive me, Your Honor,
17 for being a little detailed here, but Paragraph 36
18 in the second amended complaint alleges they sent a
19 written e-mail to the lawyers -- meaning my clients
20 and Mr. Dedman's clients -- with various specific
21 mediation goals. All right. That is Paragraph 36
22 set forth the mediation goals.

23 Paragraph 37, mediation take place on
24 March 21 of 2018. Important to remember that date
25 for reasons I'll get to in a minute.

1 Following mediation, plaintiff signed a
2 written mediation agreement. That's Paragraph 39.

3 Thereafter, plaintiff and his parents
4 informed the lawyers that the written mediation
5 agreement conflicted with the written goals set
6 forth in the e-mails. So Paragraph 31 alleges that
7 the settlement agreement violates the directives of
8 Paragraph 36. All in writing.

9 The settlement agreement itself we've
10 attached as Exhibit A to our motions.

11 The allegations of the complaint under
12 Paragraph 42 is that the written settlement
13 agreement lacked the necessary language and terms.
14 Again, it's a written settlement agreement signed
15 by the plaintiff.

16 They allege also that in Paragraph 58, for
17 reasons best known to the plaintiffs, they
18 repudiated the settlement agreement and they
19 attempted to get out of it.

20 Clemson University filed a motion for
21 settlement, which the plaintiffs opposed. They
22 hired new counsel to oppose it. They filed various
23 memoranda, and a hearing was conducted wherein -- I
24 think it was Judge Cogin (phonetic) enforced the
25 settlement agreement. We've attached the order

1 enforcing -- the redacted order enforcing the
2 settlement agreement. The redacted order is
3 described in Paragraphs 55 and 56 and 57.

4 As we stated, the case against the female
5 student remains pending in state court.

6 Now, the mediation and settlement agreement
7 took place March 21st, 2018. The first complaint
8 in this action, the first legal malpractice claim,
9 was filed March 19, 2021, just two days shy of the
10 three-year statute of limitations going back to the
11 date of the settlement agreement.

12 First complaint contains no affidavit of an
13 expert as required by South Carolina 15-36-100. It
14 does not allege that an expert affidavit cannot be
15 timely prepared. It simply says we're going to
16 file an affidavit in 45 days.

17 So where we're left, Your Honor,
18 procedurally, the big picture is the case against
19 the female student proceeds to trial later this
20 month. The federal case has ended fully because
21 the settlement agreement was enforced. And the
22 plaintiff has referenced and discussed the terms of
23 the settlement agreement and the order in his
24 complaint, but for some reasons best known to
25 Mr. Pendarvis, they object to the Court

1 consideration the order and the settlement
2 agreement as part of this motion to dismiss.
3 Mr. Dedman will address that specific issue.

4 So those are the basic complaints -- basic
5 facts as alleged in the complaint: Mediation,
6 written settlement agreement, and violation of
7 written directives.

8 We filed the motion to dismiss the complaint
9 at each stage, both when -- the first complaint was
10 filed, it was amended in April, and we filed a
11 motion to dismiss at that point. It was amended
12 again, and we filed another motion to dismiss,
13 which is why the Court's E-docket probably shows so
14 many dang motions pending.

15 THE COURT: It shows plenty.

16 MR. WALLACE: Yes. Yes, Your Honor. But
17 there is really only one motion to dismiss filed by
18 each group of defendants, and they are almost
19 identical grounds.

20 THE COURT: Okay.

21 MR. WALLACE: The basis -- the overall basis
22 for why this complaint failed to state a cause of
23 action and should be dismissed pursuant to 12(b)(6)
24 is because the settlement agreement itself is
25 signed by the plaintiff. The plaintiff cut off any

1 potential proximate cause the plaintiff may have
2 been able to allege by signing this settlement
3 agreement. For instance, the plaintiff goes to at
4 length in his second amended complaint to allege
5 that the settlement agreement violates the specific
6 written directives of the plaintiff to the defense
7 lawyers, to my clients and Mr. Dedman's clients.
8 But the plaintiff signed the agreement.

9 The second amended complaint says, yeah, he
10 conceded to the pressure of the lawyers, and he
11 signed it. It says his parents conceded to the
12 pressure of the lawyers. There is no indication or
13 allegation that the pressure was improper.

14 More importantly, Your Honor, the complaint
15 alleges that the agreement itself violates the
16 plaintiff's own instructions and that, Your Honor,
17 as a matter of law, demonstrates plaintiff's
18 damages are not proximately caused by any alleged
19 negligence of the defendant or the defendants, but
20 by the plaintiff's own agreement to a settlement
21 agreement.

22 THE COURT: Okay.

23 MR. WALLACE: Where the facts are susceptible
24 to only one inference, as they are here, Your
25 Honor, it is absolutely appropriate for the Court

1 to consider and to rule and to dismiss this case on
2 proximate causation. We recognize proximate cause
3 is usually a (inaudible), but the plaintiff's own
4 second amended complaint demonstrates the facts
5 clearly. *Tuten v. Joel*, 410 S.C 104, it's a 2014
6 case, speaks directly to these kinds of things.
7 Here, the plaintiff's signing of the settlement
8 agreement is the sole cause of his complaint today.

9 I think Mr. Pendarvis went to great lengths
10 to talk about how you can readily sue people
11 post-settlement. You can sue lawyers
12 post-settlement, but here the facts are so clear,
13 and so clearly pled in such detail, that it
14 demonstrates that it's nothing that the lawyers
15 did, but it's the plaintiff's own actions in
16 accepting an agreement that's in derogation of his
17 own instructions that demonstrates the cause of any
18 alleged loss.

19 So that's -- that's the overarching 12(b)(6)
20 argument. Mr. Dedman will get into some more of
21 the detail in a minute. I want to address the
22 timeliness under 15-36-100 of the expert's
23 affidavit.

24 15-36-100, Subsection C-1, talks about when a
25 contemporaneous expert affidavit does not have to

1 be filed with the complaint, and the circumstances
2 are this -- and I'm quoting from 15-36-100(c)(1).
3 I apologize for quoting to the Court, Your Honor,
4 but I think it's telling. "Contemporaneous filing
5 requirement does not apply to any case in which the
6 period of limitations will expire, or there is good
7 faith basis to believe it will expire on a claim
8 stated in the complaint, within ten days of the
9 date of filing, and because of the time
10 constraints, the plaintiff alleges that an
11 affidavit of an expert cannot be prepared."

12 The statute sets forth exactly what the
13 plaintiff has to do to be excused from filing a
14 late affidavit in this case. The plaintiff did not
15 do that. The first complaint filed herein simply
16 says because the lawyers may contend the statute of
17 limitations are about to expire, we're going to
18 file an affidavit in 45 days. It doesn't allege
19 that an affidavit could not be timely filed. We
20 think that's a critical problem in the plaintiff's
21 case, and it's one that would categorically subject
22 the plaintiff to dismissal. It cannot be cured by
23 filing an affidavit later.

24 If you look at Paragraph 103 of the original
25 complaint, Your Honor, you'll see what I'm talking

1 about. That's the only place where they address an
2 expert affidavit, and they do not allege that an
3 expert affidavit cannot be done.

4 THE COURT: All right. Is that it, Mr.
5 Wallace?

6 MR. WALLACE: Yes, sir, that's it.

7 THE COURT: Okay. And Mr. Dedman has decided
8 to leave us again.

9 MR. DEDMAN: I'm here. Can you hear me?

10 THE COURT: Oh, yeah, I can hear you. There
11 you go. I can hear you, Mr. Dedman.

12 MR. DEDMAN: Okay. Great.

13 THE COURT: Wait. Hold on.

14 Mr. Pendarvis?

15 MR. PENDARVIS: Yes, Your Honor.

16 THE COURT: Can you hear everybody?

17 MR. PENDARVIS: I sure can.

18 THE COURT: Okay. I just -- there you are.
19 Okay. I just couldn't -- you all are going in and
20 out. As long as I can hear you, we'll be okay. I
21 just wanted to double check.

22 All right, Mr. Dedman.

23 MR. DEDMAN: I feel free now that I'm able to
24 communicate through Webex. I'm glad we got that
25 figured out. I apologize for the audio issues

1 before.

2 Building on what Mr. Wallace said about the
3 expert affidavit, as he mentioned, to initiate
4 federal liability, you have got to have an expert
5 affidavit. It is well contended, and we also
6 contend that that affidavit was timely and the case
7 should be dismissed for that reason alone.

8 However, our statutes also grant defendants
9 the right to challenge the sufficiency of the
10 expert affidavit, and that is what we're doing
11 here. This ground is based on the fact that
12 Mr. Dillon, the lawyer who has executed the
13 affidavit accompanying the second amended
14 complaint, simply does not have the right
15 credentials to offer expert opinions in this legal
16 malpractice case.

17 And here's sort of the crux of the argument.
18 We're not saying that Mr. Dillon has to be licensed
19 in South Carolina as a lawyer to offer opinions in
20 this case. He's not licensed in South Carolina,
21 but that alone does not necessarily preclude him
22 from being an expert; however, that is part of the
23 picture. If you look at his affidavit in this
24 case, he does represent that he has experience in
25 other parts of the country litigating Title 9

1 cases. However, he also goes so far as to offer
2 opinions about the duties of the lawyer defendants
3 in this case, and those duties are South Carolina
4 specific, South Carolina law. Despite the fact
5 that he's not licensed in South Carolina, has never
6 represented that he's practiced in South Carolina
7 in our state or federal courts, he's offering his
8 opinions about what the lawyer defendants did at
9 the South Carolina mediation.

10 As we understand it, based on his affidavit,
11 Mr. Dillon is licensed in Virginia and DC. He
12 represents that he's been appearing in the federal
13 courts in Virginia and DC and also pro hac vice in
14 Illinois and Ohio, but he makes no representation
15 that he has familiarized himself with our rules and
16 our practice here in South Carolina, no pro hac
17 vice admission in state or federal court. I think
18 it's important that he makes no representations
19 that he's familiar with the federal court local
20 rules, which would have governed this mediation,
21 and he makes no claim that he has familiarized
22 himself with the South Carolina state ADR rules,
23 which are incorporated by reference into the
24 federal and local rules as well.

25 He doesn't make a representation that he's

1 ever provided as an expert or consulted in a case
2 involving South Carolina (inaudible). You know, it
3 kind of makes you wonder if the reason that
4 Mr. Dillon with his lack of experience in
5 testifying is because there's not a South Carolina
6 lawyer that would have offered these opinions, and
7 certainly the plaintiffs could have offered an
8 expert who is familiar with our practices here in
9 South Carolina, or to the extent that he's a
10 Title 9 expert, they could have retained a separate
11 expert about the duties of South Carolina lawyers
12 under our South Carolina law. But without that
13 kind of experience, we do not believe that
14 Mr. Dillon has the credentials to be able to offer
15 testimony about what South Carolina lawyers should
16 have or should not have done at a mediation in
17 South Carolina Federal Court governed by South
18 Carolina local rules and South Carolina ADR rules.

19 So that is our challenge to the sufficiency
20 of the expert affidavit of Mr. Dillon.

21 The two remaining portions of my argument are
22 going to relate to standing and then public policy.
23 And so as Your Honor may have noticed, it's not
24 just the student plaintiff who is bringing causes
25 of action here, it is his parents as well. And we

1 do not believe that the parents have standing to
2 bring these claims in this case because the damages
3 that are alleged relate to a student.

4 You heard Mr. Pendarvis talk about how the
5 student is not going to be able to find a job
6 because of these allegations, he's not going to be
7 able to participate in society as he hoped to be
8 able to because of these allegations and the like.
9 Those damages are his; they are not his parents'.
10 His parents were not parties to the federal case
11 against the university. His parents were not
12 parties to the state court case that is being tried
13 in a couple of weeks. They have asserted no claims
14 of their own against the accuser or anyone at the
15 university. They did attend the mediation in the
16 federal case, but they did not sign the memorandum
17 of understanding or settlement that was reached
18 that day. At best, they are fact witnesses who,
19 obviously, care a lot about their son, who does
20 happen to be the plaintiff.

21 And so the complaint shows that the
22 defendants took advantage of the student while his
23 parents were out of the room and the mediation
24 (inaudible), but they are really fact witnesses at
25 the end of the day. Damages that the student has

1 are not damages that the parents can claim.

2 And so to the extent that there are claims
3 which can be brought arising from this dispute, the
4 parents do not have standing to bring them.

5 And, lastly, I will address the public policy
6 argument here. Mr. Wallace indicated in his
7 presentation what we have here is a litigant who
8 signed a memorandum of understanding and formal
9 settlement agreement at the mediation, as is
10 required by the federal local rules, which says if
11 you reach a settlement and mediation, you have to
12 memorialize it in writing. And so he signed it,
13 and to the extent that that is inconsistent with
14 his goals prior to the mediation itself, I mean,
15 that's kind of how mediation works. Most
16 mediators, at least the ones I know, start with the
17 old adage that if both parties are not happy in
18 some way, then the mediation did work.

19 So, I mean, I'm trying to find an example of
20 a plaintiff or defendant who recited a bunch of
21 (inaudible) and was able to meet all of them. Part
22 of mediation is giving up what you want to buy your
23 peace and to end the litigation.

24 But two months or so after the mediation --
25 and it's important to remember this was pre-Covid,

1 so the mediation was in person. Everyone was
2 there. So about two months after the mediation
3 takes place, an informal settlement agreement is
4 circulated among the parties, and that is the first
5 time, really, that the student begins to have
6 second thoughts, you know, buyer's remorse about
7 the agreement he signed at the mediation.

8 This leads to the university filing a motion
9 to enforce the settlement, which is granted by the
10 federal district court judge, and we have attached
11 a copy of the order granting the university's
12 motion to enforce the settlement. We did attach a
13 redacted version of that, but we can certainly
14 submit to the Court the un-redacted version since
15 the anonymity has been lifted.

16 But the federal district court judge makes a
17 number of statements in that order, which we think
18 are pretty important, and I'll quote (inaudible) on
19 a couple of these points.

20 It is uncontested that the plaintiff signed
21 the settlement agreement drafted during the
22 mediation, which does not include any of the terms
23 the plaintiff now claims he expects to be
24 addressed. (inaudible) the Court finds that the
25 parties unambiguously reached a settlement during

1 the mediation. The Court said the planned
2 (inaudible) as set forth and the plain terms of
3 that settlement are set forth in the signed
4 settlement agreement. The Court finds the terms of
5 the March 21st, 2018 settlement agreement are
6 clear and unambiguous and (inaudible). The Court
7 said the representation of John Doe and his parents
8 regarding being promised (inaudible) during the
9 settlement negotiations are simply unsupported by
10 the plain and unambiguous language of the
11 settlement agreement as signed by the parties at
12 mediation immediately after an agreement was
13 reached.

14 (Inaudible) is that the student has already
15 attempted to re-litigate this settlement by
16 challenging the motion to enforce brought by the
17 university. He lost on that, and that language
18 that I just read from the federal court's opinion
19 really sets forth in great detail why he lost. And
20 our concern is that our courts, whether they be
21 state or federal in South Carolina, have a public
22 policy of encouraging mediation. Mediation is not
23 mandatory as it was in the federal case, but we
24 want to encourage people to participate fully and
25 completely in mediations so that cases can be

1 resolved without clogging the courts, and that
2 public policy is simply not served if someone is
3 able to do a collateral attack on a settlement and
4 they have decided that it didn't go the way they
5 wanted two months after the fact.

6 You know, this is not a case where a lawyer
7 has missed the statute of limitations or misused
8 the money, you know, your typical malpractice legal
9 case. This is a case where the plaintiff simply
10 came to regret the deal he reached (inaudible), and
11 now wants to use a malpractice case in order to
12 address that buyer's remorse.

13 I think the other example of why we think the
14 public policy would prohibit this type of case is
15 our mediation rules themselves. You know, this was
16 an in-person mediation. Obviously, to the extent
17 that this case goes forward, we will be taking
18 depositions of everybody who was at that mediation
19 to talk about exactly what happened, but one
20 witness who is objective and neutral and who
21 observed and interacted with the plaintiff in this
22 case is the mediator, and we are prohibited by our
23 ADR rules from calling the mediator as a witness.
24 And, in fact, if we did try to do so, that mediator
25 would object and cite to our ADR Rule 8(g), which

1 says quite specifically that the mediator shall not
2 be compelled by subpoena or otherwise to divulge
3 any records or to testify in regards to the
4 mediation in any adversary proceeding or judicial
5 forum.

6 So if our mediation rules specifically
7 prohibit us from calling as a witness the one
8 objective party that could shed light on these
9 claims and defenses, then it clearly suggests that
10 this type of claim is against public policy.
11 Because why protect the mediator from testifying if
12 their testimony would be relevant and helpful to
13 the finder of fact in analyzing crimes like this
14 about what actually occurred at a mediation and who
15 said what?

16 So I think, based on those facts, that this
17 set of claims is against the South Carolina public
18 policy. That's all I have, Your Honor.

19 THE COURT: Thank you, sir.

20 Mr. Pendarvis.

21 MR. PENDARVIS: Thank you, Your Honor. I
22 think it might be -- Your Honor, I would like to
23 proceed backwards. It might be easiest to treat
24 the last arguments you heard first and the
25 response, if that's all right?

1 THE COURT: Mr. Pendarvis, you can do it
2 however you feel most comfortable.

3 MR. PENDARVIS: Thank you, Your Honor.

4 To begin with, on the idea of public policy,
5 totally absent from the arguments you just heard
6 was a quote that I'll read the Court from the South
7 Carolina Supreme Court. In 1997, a case called
8 *Crowley versus Harvey & Battey* where a client
9 alleges his former attorney was negligent in
10 advising him to accept the settlement, that allege
11 negligence is not grounds for attacking the
12 settlement itself, but rather is better left for
13 malpractice suit between the client and the
14 attorney, 327 S.C. 68, Page 7488, S.E.2d 334, Page
15 335. I can't imagine a better pronouncement of the
16 South Carolina Supreme Court's views on public
17 policies about a client being forced into a
18 settlement agreement than that statement.

19 THE COURT: I hate to interrupt you, but 327
20 South Carolina -- what page?

21 MR. PENDARVIS: I'm sorry. 327 S.C 68 is the
22 beginning of the opinion. Page 70 is from where
23 the quoted language I just read is found.

24 THE COURT: That's from the -- I'm sorry,
25 that is all I needed. Go ahead.

1 MR. PENDARVIS: Thank you, Your Honor.

2 So for matters of public policy, the South
3 Carolina Supreme Court has clearly stated South
4 Carolina policy on that point.

5 As for mediation and the arguments you're
6 hearing about the confidentiality and the mediator,
7 it's also dealt with in the rules. I noted that
8 defense completely skipped over South Carolina ADR
9 Rule C(5), which are incorporated into the federal
10 rules, and it's called -- entitled -- the rule
11 itself is called "Limited Exceptions to
12 Confidentiality." Subsection 5 states, "There is
13 no confidentiality attached to information that is
14 disclosed during mediation, colon, offered to
15 report, prove, or disprove professional misconduct
16 occurring during the mediation."

17 So the rule itself, ADR rule itself, permits
18 discovery and admissibility of matters related to
19 conduct, advice, allegations of professional
20 misconduct or professional negligence in a
21 mediation. So for two South Carolina specific
22 points, this case can proceed as a matter of public
23 policy.

24 Moving backwards to the preceding argument.
25 Right before that, you heard arguments that the

1 plaintiffs don't have standing and --

2 THE COURT: Well, the parents don't have
3 standing.

4 MR. PENDARVIS: I'm sorry. You're right.
5 The plaintiff's parents don't have standing. Your
6 Honor, on the 12(b) motion, the allegations in the
7 complaint are taken as true. The allegations in
8 the complaint state -- and I'm reading from
9 Paragraph 13 in the second amended complaint -- "on
10 or about November 2nd, 2017, the lawyers" --
11 referring to the defendants -- "accepted the
12 representation of the Does" -- and that is plural
13 -- "to provide legal advice, services, and
14 representation of the Does."

15 Earlier in the complaint, we grouped all
16 three plaintiffs and referred to them categorically
17 as "the Does." So the allegations in the complaint
18 state that there was an attorney/client
19 relationship between the parents and the defendant
20 lawyers and their law firms. So taken as true,
21 they've alleged they had an attorney/client
22 relationship. This is not in the complaint, and I
23 don't want to go outside for purposes of argument,
24 but there is evidence that we've submitted in the
25 case where these lawyers were taking privileged

1 positions on communication with the parents as to
2 Clemson University and the others that were sued in
3 the state court case.

4 So, you know, have your cake and eat it too,
5 but at the end of the day, the allegations in the
6 complaint have to be accepted as true state that
7 there was an attorney/client relationship.

8 The complaint also seeks recovery of
9 attorney's fees. Everyone is clear: The parents
10 paid the attorney's fees. So in terms of the
11 contractual relationship between the -- and there's
12 a cause of action -- third cause of action, Your
13 Honor, for breach of contract that no one said
14 anything about today, because they know better, but
15 there was a contract for services between the Doe
16 parents and the defendant law firms who the Doe
17 parents paid for legal services that they claim now
18 they didn't get sufficient services.

19 So the allegations in the complaint
20 definitely have claims or cert the basis for the
21 plaintiff parents to have standing to pursue claims
22 in this lawsuit.

23 And to the first argument Mr. Dedman started
24 on and Mr. Wallace stated about, Mr. -- the expert
25 affidavit.

1 THE COURT: Mr. Dillon?

2 MR. PENDARVIS: Mr. Dillon, Justin Dillon,
3 who teaches at places like Harvard and have spoken
4 at American University of George Washington and has
5 tried over a hundred Title 9 cases. And our
6 supreme court has said carefully in the *Smith*
7 *versus Haynsworth, Marion, McKay and Geurard* case,
8 Your Honor, is cited on Page 7 of plaintiffs'
9 memorandum in opposition. The court criticized --
10 the supreme court criticized the trial court
11 excluding Dr. Greg Adams, who is a professor at USC
12 law school, who is not licensed in South Carolina,
13 from giving an opinion as an ethics expert in a
14 real estate malpractice dispute, and the court said
15 that Dr. Adams had the sufficient skills to go in
16 front of a jury and explain the matters at issue in
17 the lawsuit. Obviously -- and I mean, obviously,
18 but this was a 1996 opinion before the statute was
19 -- the statute requiring expert affidavit was
20 created. But, nonetheless, as to his
21 qualifications, the affidavit of Mr. Dillon
22 attached as Exhibit 1 to the complaint contains his
23 curriculum vitae, and it states in lengthy detail
24 his experience in these matters.

25 It's interesting how the arguments on the

1 motion to dismiss were weaving through the reality
2 of the claims. These were federal claims that were
3 being related. The state court claims stem from
4 the federal allegations on Title 9 violations. It
5 is all blended together, and if anyone has the
6 experience necessary to give these kinds of
7 opinions, it is Mr. Dillon.

8 He states in his affidavit that he's -- he
9 and his firm have handled claims against more than
10 a hundred schools across the country. He's handled
11 Title 9 matters. He's spoken on these matters. I
12 think his CV and allegations in the complaint,
13 which are part of the complaint, must be taken as
14 true for the persons of this analysis clearly
15 qualify Mr. Dillon to give an expert opinion in
16 this case.

17 The other arguments about the timeliness of
18 the filing of the complaint without an affidavit,
19 the expert affidavit that was filed in the first
20 amended complaint and the second amended complaint,
21 same affidavit, Your Honor. But the allegations of
22 Paragraph 103 of the now operative pleading, which
23 is the second amended complaint, are cited --
24 quoted, on Page 5 of the memorandum in opposition,
25 but the key portion to respond to the arguments you

1 just heard, is it says -- Paragraph 103, last
2 sentence -- "because of time constraints, an
3 affidavit of an expert could not be prepared in
4 time to file the summons and complaint before
5 March 21, 2020."

6 It's hard to imagine a clearer statement that
7 satisfies the requirements of SC Code
8 15-36-100(c)(1) than that statement, which must be
9 taken as truth for purposes of this argument.

10 So -- also earlier in that paragraph, Your
11 Honor, there were efforts made to try to get a
12 statute of limitations tolling agreement with these
13 defendants that would have prevented this entire
14 lawsuit from being filed when it was filed, and
15 those proposals were rejected. So it wasn't so the
16 plaintiff just waites until the last minute. They
17 were hoping a lot of things would turn out
18 different, Your Honor. We were trying to hold this
19 claim in abeyance while the underlying matter was
20 being litigated. Those arguments were rejected,
21 and we were clear that the mediation date was a
22 trigger of some of the statute of limitations
23 issues.

24 I do want to talk about one other argument --
25 allegation in the complaint that's being skipped

1 over here. There is tortious conduct alleged long
2 after the mediation, and that was just kind of
3 brushed over, and no one has mentioned that to you.
4 And the defense knows better, I think, than to
5 argue this, but Paragraph 61, 62, and 63 talk about
6 post-mediation conduct by the defendants.

7 Paragraph 61 talks about a letter that the
8 lawyer sent to the mediator and third parties.

9 Paragraph 62 talks about a letter of
10 March 26, 2019 after the mediation, again, alleging
11 that these -- this letter interrupted with the
12 process and disrupted continuing negotiations
13 disadvantaging John Doe's position.

14 And then again, February -- another
15 February 28th letter is alleged in the complaint
16 saying that they continued to send letters
17 interfering with -- with the process. And this is
18 2019, not 2018.

19 So there's conduct by itself in those three
20 paragraphs that will support a claim regardless of
21 the date of the mediation. In that aspect, the
22 complaint is clearly timely filed, and the
23 affidavit was timely filed.

24 So we think, Your Honor, this case should go
25 forward. The arguments are -- this case should go

1 forward on the merits. These technical arguments
2 aren't satisfied by any of the arguments the
3 defense has made. The statute was complied with.
4 The affidavit was timely filed under the 45-day
5 exception to the -- in the statute on the filing an
6 amended complaint. The qualifications of this
7 expert are impeccable. So we believe this case
8 should go forward, and the defendants' motion to
9 dismiss the second amended complaint should be
10 denied.

11 THE COURT: Okay. Thank you, sir.

12 Mr. Dedman, you moved towards the screen like
13 you wanted to tell me something else. You can
14 briefly respond.

15 Mr. Dedman?

16 MR. DEDMAN: Yes. Thank you, Your Honor.
17 Very briefly. Mr. Pendarvis brings your attention
18 to the South Carolina mediation rules. It is
19 important to know that they specifically prohibit
20 the mediator from testifying. No matter what else
21 they say, the mediator cannot testify. And it's
22 actually stronger than the federal local rule,
23 which says that only under extraordinary
24 circumstances and it's ordered by the Court can a
25 mediator testify. So we're clearly deprived of

1 calling a very key fact witness in this case in
2 light of the rules.

3 THE COURT: Okay.

4 MR. DEDMAN: The other thing I would mention
5 is with respect to this sufficiency of the
6 credentials of Mr. Dillon, Mr. Pendarvis mentioned
7 a case involving Professor Adams. I think that's
8 the perfect example of our argument, because here
9 Mr. Dillon has no connection, whatsoever, to South
10 Carolina, but Professor Adams has been at the USC
11 law school since 1978 and has written extensively
12 about ethics and South Carolina law for decades.
13 And so even though he may not have been licensed in
14 South Carolina to practice law, he had the
15 requisite experience to testify about South
16 Carolina law because it was years and years of
17 study. Mr. Dillon has none of that. And if you
18 are going to execute an affidavit that says that
19 South Carolina lawyers violated their duties to a
20 South Carolina client, you got to know something
21 about South Carolina law, we think. And so I think
22 that's the important distinction there.

23 And Mr. Wallace has additional thoughts on
24 the other arguments. I'll turn it over to him.

25 THE COURT: All right. Mr. Wallace.

1 MR. WALLACE: Your Honor, there is very good
2 reason why we didn't raise anything related to
3 these letters. There is no testimony from any
4 affidavit that those letters violated any standard
5 of care, so they're not actionable. They make
6 great copy in the complaint, but they are not
7 actionable. Mr. Dillon's affidavit is very limited
8 in what he states the defendants allegedly did
9 wrong. So that's one point.

10 Second point with regards to the Crowley
11 case, that case is a Rule 43 (inaudible) settlement
12 case. It is not operative in a situation where the
13 plaintiff himself signs an agreement that is
14 allegedly a violation of plaintiff's own written
15 instruction.

16 So the Crowley case, for all of its good
17 holding, and it's still good South Carolina law,
18 simply doesn't apply here. Mr. Pendarvis knows
19 that. Those are the only two points I would make,
20 Your Honor.

21 There is one argument that I don't think has
22 been raised yet, and I'll briefly state it because
23 it's black letter law. When a plaintiff asserts
24 negligence and a breach of fiduciary duty in a
25 legal malpractice scenario, and the fiduciary duty

1 arises out of the same relationship of professional
2 negligence, as in this case, one of those cases
3 must be dismissed as duplicative.

4 Now, we think all of the cases should be
5 dismissed for the reasons we've stated, but I also
6 want to make sure that the Court was aware that
7 there is a duplicatable cause of action argument
8 related to fiduciary duty cause of action. It's
9 simply the second cause of action pled, but the
10 case law is quite clear. Whereas, here, the
11 fiduciary duties arise out of the same duties that
12 create the attorney/client relationship -- as
13 alleged here -- is duplicative and must be
14 dismissed.

15 MR. PENDARVIS: Your Honor, can I respond to
16 that?

17 THE COURT: Oh, yes, sir. He doesn't get to
18 say it and then you don't get to say something
19 back, so go ahead.

20 MR. PENDARVIS: That's not the law. The case
21 he was talking about was not a pretrial motion to
22 dismiss the duplicative.

23 The Manos case was at trial. Mr. Ballard
24 (phonetic) tried the case. I know -- anyway, the
25 motion -- the duplicative -- the ruling on the

1 duplicative motions happened at trial after
2 evidence was presented and before the matter was
3 sent to the jury. There is no authority in South
4 Carolina on a pretrial motion for duplicative
5 pleadings. In fact, the rules itself talk about
6 pleading in the alternative. The Manos case -- and
7 I can get Your Honor the cite. I can supplement
8 that later. That wasn't raised in the motion, but
9 I would be glad to give it to the Court. Parties
10 who have read that case know it was a trial,
11 multiple claims, and the Court, after hearing the
12 evidence by experts and fact witnesses, believed
13 that the cases should be -- those two claims should
14 be merged and did that before it sent the matter to
15 the jury. And maybe that happens in this case,
16 maybe not, but it's certainly not a pretrial motion
17 available on a 12(b) matter, especially when it
18 wasn't raised in the motion to dismiss.

19 Thank you, Your Honor.

20 THE COURT: Okay. And I appreciate it, you
21 all.

22 And, Mr. Wallace, you did not mention that in
23 your memorandum, anything like that, correct?

24 MR. WALLACE: Your Honor, I believe it's in
25 our motion to dismiss filed by the Brewer

1 defendants. I'll check, Your Honor. But if it's
2 not, I'll withdraw the argument.

3 THE COURT: Okay. All right. You all look
4 at that, and I've got to look at it myself. So
5 I'll get back to you all with my decision, okay.

6 Thank you, you all. It's been entertaining.

7 Mr. Utsey, you can give me a grade later on.
8 You all have a good day.

9 (whereupon, the hearing concluded.)
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF TRANSCRIBER

Case Name: Andrew Pampu, et.al v. Clawson

Fargnoli, LLC, et. al

Case No.: 2021-CP-10-01343

Date of Hearing: March 2, 2022

* * * * *

I, Natalie Dahl, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; **that said proceedings were transcribed to the best of my ability from the audio recording.**

I do further certify that I am neither of kin, counsel, nor have interest to any party hereto.

Natalie Dahl, RPR

Natalie Dahl, Registered Professional
Reporter and transcriber for the State of
South Carolina

RECEIVED

Jun 20 2024

SC Court of Appeals

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

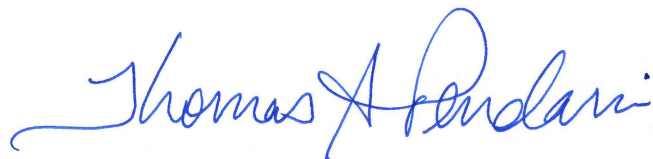
Appellate Case No. 2023-001779

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Volume I and Volume II of Appellants' Record on Appeal, filed on behalf of Appellants, Andrew Pampu; Amanda Pampu; and John Pampu, contain all material proposed to be included by any of the parties and not any other material.



Thomas A. Pendarvis (SC Bar # 064918)
PENDARVIS LAW OFFICES, P.C.
710 Boundary St., Ste. A1
Beaufort, SC 29902
843.524.9500
Thomas@PendarvisLaw.com

*Counsel for Appellants/Plaintiffs Andrew Pampu;
Amanda Pampu; and John Pampu*

June 20, 2024

Beaufort, South Carolina

ROA_00338