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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Edgar W. Dickson, Circuit Court Judge
Civil Action No. 2021-CP-10-01343

Appellate Case No. 2023-001779

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

v.

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

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RESPONDENTS' FINAL BRIEF

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Statement of the Case

Appellants initiated this action on March 19, 2021, asserting causes of action for professional negligence, breach of fiduciary duty, and breach of contract related to legal services Respondents provided in two underlying lawsuits. [*See* Complaint, R. pp. 36-56]. That same day, Appellants filed a Motion to Proceed Anonymously Under Pseudonyms. [*See* Motion to Proceed Anonymously Under Pseudonyms, R. pp. 32-34]. Appellants amended their Complaint on April 30, 2021, and included an affidavit from Justin Dillon, Esq. [*See* Amended Complaint, R. pp. 58-78; *and* Expert Affidavit by Justin Dillon, Esq., R. pp. 79-87]. On May 9, 2021, and May 10, 2021, respectively, the Clawson Fargnoli Respondents and the Brewer Respondents filed motions to dismiss, asking the trial court to dismiss Appellants' Amended Complaint in its entirety.

[*See* Clawson Fargnoli Motion to Dismiss Amended Complaint, R. pp. 88-91; *and* Brewer Motion to Dismiss Amended Complaint, R. pp. 95-98]. On those same dates, Respondents also filed motions to prohibit Appellants from using pseudonyms. [*See* Clawson Fargnoli Motion to Prohibit Pseudonyms, R. pp. 92-94; *and* Brewer Motion to Prohibit Pseudonyms, R. pp. 99-102].

In response to Respondents' motions to dismiss, Appellants amended their complaint again on June 16, 2021. [*See* Second Amended Complaint, R. pp. 110-41]. Appellants' Second Amended Complaint remains the operative pleading in this action.

On June 28, 2021, and June 30, 2021, respectively, the Clawson Fargnoli Respondents and the Brewer Respondents answered the Second Amended Complaint and asserted counterclaims against Appellants for breach of contract and unjust enrichment related to fees owed to them for their work on one of the underlying lawsuits. [*See* Clawson Fargnoli Answer to Second Amended Complaint and Counterclaims, R. pp. 142-68; *and* Brewer Answer to Second Amended Complaint and Counterclaims, R. pp. 176-93]. On those same dates, Respondents filed motions to dismiss, asking the trial court to dismiss Appellants' Second Amended Complaint in its entirety. [*See* Brewer Motion to Dismiss Second Amended Complaint, R. pp. 194-97; *and* Clawson Fargnoli Motion to Dismiss Second Amended Complaint, R. pp. 169-72]. On July 28, 2021, Appellants replied to Respondents' respective counterclaims. [*See* Reply to Brewer Counterclaims, R. pp. 198-202; *and* Reply to Clawson Fargnoli Counterclaims, R. pp. 203-07]. On October 22, 2021, Respondents jointly submitted a memorandum in support of their motions to dismiss. [*See* Respondents' Joint Memorandum in Support of Motion to Dismiss Second Amended Complaint, R. pp. 241-63]. On December 15, 2021, Appellants submitted a response in opposition to Respondents' memorandum. [*See* Combined Memorandum in Opposition to Motions to Dismiss Second Amended Complaint, R. pp. 264-76].

On March 2, 2022, the trial court conducted a virtual hearing on Respondents' motions to dismiss and motions to prohibit use of pseudonyms. [*See* Transcript, R. pp. 285-337]. On March 4, 2022, the trial court issued an order granting Respondents' motions to prohibit use of pseudonyms. [*See* Order Granting Motions to Prohibit Pseudonyms, R. pp. 3-5]. On June 23, 2022, the trial court issued separate orders granting Respondents' respective motions to dismiss and dismissing Appellants' Second Amended Complaint in its entirety. [*See* Order Granting Brewer Motion to Dismiss, R. pp. 6-18; *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. pp. 19-30]. Thereafter, on July 5, 2022, Appellants filed a Motion for Reconsideration and to Alter or Amend the Orders Granting Defendants' Motions to Dismiss [*see* R. pp. 277-84]. On October 23, 2023, the trial court denied the motion. [*See* Order Denying Motion for Reconsideration, R. pp. 1-2].

On November 14, 2023, Appellants served a Notice of Appeal. Appellants seek to appeal three orders issue by the trial court: (1) June 23, 2022 Order Granting Motion to Dismiss for the Brewer Respondents, (2) June 23, 2022 Order Granting Motion to Dismiss for the Clawson Fargnoli Respondents, and (3) October 23, 2023 Order Denying Appellants' Motion for Reconsideration and to Alter and/or Amend the two aforementioned orders.

Standard of Review

I. Failure to State a Claim

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Doe v. Marion*, 373 S.C. 390, 393, 645 S.E.2d 245, 246 (2007)). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* (citing *Plyler v. Burns*, 373 S.C. 637, 643, 647 S.E.2d 188, 191 (2007)). "The trial court's grant of

a motion to dismiss will be sustained only if the facts alleged in the complaint do not support relief under any theory of law." *Id.* (citing *Ashley River Properties I, LLC v. Ashley River Properties II, LLC*, 374 S.C. 271, 277, 648 S.E.2d 295, 297 (Ct. App. 2007)).

II. Subject Matter Jurisdiction

"The question of subject matter jurisdiction is a question of law for the court." *Cap. City Ins. Co.*, 382 S.C. at 99, 674 S.E.2d at 528 (quoting *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993)). This Court is "free to decide questions of law with no deference to the trial court." *Id.* (citing *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 522, 642 S.E.2d 751, 752 (2007)).

Argument

I. Statement of Facts

This case stems from Appellants' allegations of legal professional negligence, breach of fiduciary duty, and breach of contract against Respondents Clawson Fargnoli, LLC, Samuel R. Clawson, Jr., Esq., and Christina R. Fargnoli, Esq. ("the Clawson Fargnoli Respondents") and Barrett R. Brewer, Esq. and Brewer Law Firm, LLC ("the Brewer Respondents") (collectively, "Respondents"). On November 2, 2017, Respondents agreed to represent Appellant Andrew Pampu in two preexisting lawsuits: one pending in the U.S. District Court for the District of South Carolina (the "Federal Case")[1] 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")[2] asserting defamation, civil conspiracy, and other tort claims against an accuser who

[1] *See John Doe v. Clemson University et. al.*, Case No. 8:16-cv-01957, in the United States District Court for the District of South Carolina, Anderson Division.

[2] *See Andrew Pampu v. Erin Wingo et al.*, Case No. 2017-CP-39-00709, in the Court of Common Pleas in Pickens County, South Carolina.

submitted to the University claims of sexual misconduct against Appellant Andrew Pampu. [*See* Second Amended Complaint, R. p. 113, ¶ 13]. Notably, neither Appellant Amanda Pampu nor Appellant John Pampu were parties to either the Federal Case or State Case, nor were they signatories to any settlement agreement.

Prior to the institution of the Federal Case and the State Case, Appellant Andrew Pampu was accused of and ultimately found by the University at an administrative hearing to have engaged in "nonconsensual sexual activities" and punished with suspension. [*See* Second Amended Complaint, R. pp. 114-15, ¶ 19]. Appellant Andrew Pampu thereafter appealed the University's administrative hearing decision. [*See* Second Amended Complaint, R. p. 115, ¶ 20]. The appeals process resulted in the imposition of heavier sanctions against Appellant Andrew Pampu, including increasing his suspension period. [*See* Second Amended Complaint, R. p. 115, ¶ 21]. Appellant Andrew Pampu 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 [Andrew Pampu] with procedural due process, breach of contract, breach of covenant of good faith and fair dealing, negligence, promissory estoppel, and for a declaratory judgment." [Second Amended Complaint, R. p. 114, ¶ 16].

As part of the Federal Case, Respondents represented Appellant Andrew Pampu at a court-ordered mediation on March 21, 2018. [*See* Second Amended Complaint, R. p. 117, ¶ 37]. Before the mediation, Respondents purportedly received an email from Appellants stating Appellant Andrew Pampu'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 [Andrew Pampu], which by implication would have limited the University's future treatment of [Andrew Pampu's] academic records; (b) The State Case remain separate and unaffected by any settlement of the Federal Case; (c) There be no confidentiality or silencing provisions restricting sharing of the settlement terms;

> and (d) [Andrew Pampu's] arguments regarding lack of due process afforded by the University during the investigation and adjudicatory process be buttressed by reference to the cases listed in the email.

[Second Amended Complaint, R. p. 117, ¶ 36]. At the conclusion of the mediation session, "[Appellant Andrew Pampu] signed the 'Settlement Agreement.'" [Second Amended Complaint, R. p. 118, ¶ 39; *see also* Joint Memorandum in Support of Motion to Dismiss Second Amended Complaint, Exhibit A, R. pp. 226-]. There are no allegations that Mr. Pampu was subject to duress or was otherwise forced to sign the settlement agreement.

Appellants 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 Amended Complaint, R. p. 118, ¶ 41]. After the settlement agreement was reached on mutually agreeable terms at the mediation in the Federal Case, however, Appellant Andrew Pampu developed "buyer's remorse" and attempted to abandon the settlement. [*See* Second Amended Complaint, R. pp. 118, 120-21, ¶¶ 40, 54-57]. On or about May 8, 2018, Appellants terminated their attorney-client relationship with Respondents and sought new counsel. [*See* Second Amended Complaint, R. p. 119, ¶¶ 47-48]. The University filed a motion to enforce the settlement, which was ultimately granted by the Court. [*See* Second Amended Complaint, R. pp. 120-21, ¶¶ 55-57].

Approximately one year after filing the Federal Case, Appellant Andrew Pampu sued his accuser in the State Case, asserting claims for defamation, abuse of process, intentional infliction of emotional distress, and civil conspiracy. [*See* Second Amended Complaint, R. p. 115, ¶ 24]. While the Federal Case resolved at mediation, the State Case remained pending at the time Appellants filed their Second Amended Complaint. On March 25, 2022, following a jury trial, a jury returned a verdict in favor of Appellant Andrew Pampu in the State Case and awarded him a

total of $5.3 million. After post-trial motions, the court entered judgment in favor of Mr. Pampu in the amount of $2.3 million on July 11, 2022. [*See Andrew Pampu v. Erin Wingo et al.*, Case No. 2017-CP-39-00709, in the Court of Common Pleas in Pickens County, South Carolina]. All parties have filed notices of appeal in the State Case, and that appeal remains pending. [*Id.*].[3] This Court may take judicial notice of the filings in the Federal Case and the State Case (including the appeal). *See Wise v. Wise*, 394 S.C. 591, 601, 716 S.E.2d 117, 122 (Ct. App. 2011) ("A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records.") (quoting *Freeman v. McBee*, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984) (alteration in original).

Counsel for Appellants sent a letter of representation on September 19, 2019 (approximately 18 months prior to the filing of their initial Complaint) and an additional letter of representation on February 26, 2021 (approximately three weeks prior to the filing of their initial Complaint). However, when Appellants filed their initial Complaint on March 19, 2021, they did not include the required expert witness affidavit. [*See generally* Complaint, R. pp. 36-56]. Instead, Appellants alleged that pursuant to S.C. Code Ann. § 15-36-100(C)(1), the Complaint was being filed without the required affidavit because there was "a good faith basis to believe the expiration of the statute of limitations is imminent or that the Lawyers may argue that the expiration of the statute of limitations may expire." [Complaint, R. p. 55, ¶ 013]. Appellants then amended their Complaint 42 days later to include an expert witness affidavit. [*See* Amended Complaint, R. pp. 58-87]. In response to Respondents' respective motions to dismiss, which raised Appellants'

[3] *See Andrew Pampu v. Erin Wingo et al.*, South Carolina Appellate Case No. 2022-001332. Respondents direct the Court to the Record on Appeal in the State Case—specifically, the verdict and judgment.

untimely expert affidavit as one of several grounds for dismissal, Appellants amended their Complaint a second time to add further allegations related to the expert affidavit issue. [*See* Second Amended Complaint, R. pp. 129-30, ¶ 103]. Specifically, Appellants claimed that the statute of limitations expired on March 21, 2021 (two days after the filing of the initial Complaint) and alleged—for the first time—that because of time constraints, the expert affidavit could not be prepared in time to file it before that date. [Second Amended Complaint, R. pp. 129-30, ¶ 103]. Appellants further claimed that they were filing their Second Amended Complaint under S.C. Code Ann. § 15-36-100(E), which they contend permitted them to file an amended pleading to cure the alleged defects. [Second Amended Complaint, R. p. 130, ¶ 103].

In the instant action, Appellants have asserted claims for legal professional negligence, breach of fiduciary duty, and breach of contract. They allege:

> The Lawyers failed to meet the minimum standard of care thereby breaching professional duties to the [Pampus] 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 [Pampus]; meet the goals of the Federal Case mediation; the goals of the Federal Case litigation; and the goals of the State Case.

[Second Amended Complaint, R. p. 126, ¶ 83]. Appellants initially filed this action under pseudonyms. [*See* Complaint, R. pp. 36-56; *and* Motion to Proceed Anonymously Under Pseudonyms, R. pp. 32-34]. However, on March 4, 2022, the trial court granted Respondents' respective motions seeking to prohibit Appellants from using pseudonyms. [*See* Order Granting Motions to Prohibit Pseudonyms, R. pp. 3-5]. Appellants did not appeal this decision.[4]

[4] *See Doe v. Howe*, 362 S.C. 212, 217, 607 S.E.2d 354, 356 (Ct. App. 2004) (holding that the denial of a motion to proceed anonymously is immediately appealable).

On June 28, 2021 and June 30, 2021, respectively, the Clawson Fargnoli Respondents and the Brewer Respondents filed counterclaims against Appellants related to fees owed to them for their work on the Federal Case. [*See* Brewer Counterclaims, R. pp. 188-93; *and* Clawson Fargnoli Counterclaims, R. pp. 163-70]. On those same dates, Respondents also filed motions to dismiss, asking the trial court to dismiss Appellants' Second Amended Complaint in its entirety. Respondents asserted the following grounds for their motions:

1. Appellants' claims failed to state a claim upon which relief could be granted;
2. Appellants John Pampu and Amanda Pampu lacked standing;
3. Appellants failed to timely provide an expert witness affidavit as required by S.C. Code Ann. § 15-36-100, and the exceptions found in § 15-36-100(C)(1) were inapplicable;
4. The credentials of Appellants' purported expert were insufficient under § 15-36-100(A)(3);
5. The gravamen of Appellants' Second Amended Complaint was simply post-mediation "buyer's remorse"; and
6. Appellants' cause of action for breach of fiduciary duty was duplicative of its cause of action for legal malpractice.

[*See* Brewer Motion to Dismiss Second Amended Complaint, R. pp. 194-97; *and* Clawson Fargnoli Motion to Dismiss Second Amended Complaint, R. pp. 169-72]. On July 28, 2021, Appellants replied to Respondents' respective counterclaims. [*See* Reply to Brewer Counterclaims, R. pp. 198-202; *and* Reply to Clawson Fargnoli Counterclaims, R. pp. 203-07].

The trial court held a virtual hearing on Respondents' respective motions to dismiss and motions to prohibit use of pseudonyms on March 2, 2022. [*See* Transcript, R. pp. 285-337].

Thereafter, the trial court granted Respondents' motions to prohibit use of pseudonyms. [Order Granting Motions to Prohibit Pseudonyms, R. pp. 3-5]. The trial court further granted Respondents' motions to dismiss and dismissed all Appellants' causes of action. [*See* Order Granting Brewer Motion to Dismiss, R. pp. 6-18; *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. pp. 19-33]. Appellants thereafter filed a motion for reconsideration and to alter or amend the orders granting Respondents' motions to dismiss. [*See* Motion for Reconsideration, R. pp. 277-84]. Appellants concluded their motion by making troubling allegations that the trial judge did not recuse himself when his impartiality might be questioned. Specifically, Appellants alleged that the trial judge had a personal bias in favor of Respondent Samuel R. Clawson, Jr., Esq. based on an alleged long-term law partnership with Respondent Clawson's father. [Motion for Reconsideration, R. p. 282, ¶ 17]. However, those allegations were categorically false, as Respondent Clawson's father had never had a professional or personal association with the trial judge, aside from perhaps appearing before the judge, as had many attorneys in this state. When confronted with this fact, counsel for Appellants stated, "[Appellants] will accept your statement and will withdraw the statements contained in Paragraph 17 of the motion and will make that known to the judge at the outset of the hearing on the motion." However, the trial court ruled on the motion without a hearing, and, to date, the statements have not been withdrawn. Appellants have failed to correct the record, which is now pending before this Court.

Following the denial of their motion for reconsideration [*see* Order Denying Motion for Reconsideration, R. pp. 1-2], Appellants filed this appeal. Respondents' counterclaims remain pending.

II. The trial court orders from which Appellants attempt to appeal are not immediately appealable, and, therefore, this Court lacks jurisdiction.

As an initial matter, the trial court orders from which Appellants attempt to appeal are not immediately appealable. Appellate jurisdiction is governed by S.C. Code Ann. § 14-3-330. This Court has explained:

> Section 14-3-330 provides that only final judgments and certain interlocutory orders are immediately appealable. If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. An interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.

Richardson v. Halcyon Real Est. Servs., LLP, 439 S.C. 419, 425, 887 S.E.2d 153, 156 (Ct. App. 2023) (internal quotation marks and citations omitted). "The provisions of section 14-3-330 are narrowly construed and serve the underlying policy favoring judicial economy by avoiding 'piecemeal appeals.'" *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019) (citing *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 708 (2005)).

Here, Appellants seek to appeal three orders issued by the trial court: (1) Order Granting Motion to Dismiss for the Brewer Respondents, (2) Order Granting Motion to Dismiss for the Clawson Fargnoli Respondents, and (3) Order Denying Appellants' Motion for Reconsideration and to Alter and/or Amend the two aforementioned orders. While these orders effectively dismissed all Appellants' causes of action, Appellants fail to consider the fact that Respondents' counterclaims remain pending. Notably, Appellants do not address the jurisdiction issue or mention Respondents' counterclaims in their initial brief. [*See generally* Appellants' Initial Brief]. As noted above, on June 28, 2021 and June 30, 2021, respectively, the Clawson Fargnoli Respondents and the Brewer Respondents filed counterclaims against Appellants related to fees

owed to them for their work on the Federal Case. [Brewer Counterclaims, R. pp. 188-93; Clawson Fargnoli Counterclaims, R. pp. 163-70]. Those counterclaims should be litigated to a final conclusion before any appeal is ripe. Appellants' counsel takes the unsupported position that the counterclaim portion of the case is stayed pending appeal.[5]

Because Respondents' counterclaims remain pending, Appellants' attempt to make a "piecemeal" appeal is improper. Therefore, this Court lacks jurisdiction, and this appeal should be dismissed.

III. The trial court correctly held that Appellants failed to state a claim for legal malpractice.

The trial court correctly held that Appellants failed to state a claim for legal malpractice. A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012) (citing *Rydde v. Morris*, 381 S.C. 643, 645, 675 S.E.2d 431, 432 (2009)).

Appellants first argue that the trial court erred in dismissing their claim for legal malpractice by "ignoring the specific allegations in the Second Amended Complaint . . . clearly supporting [their] professional negligence claims." [Appellants' Initial Brief, p. 18]. Specifically, Appellants point to paragraph 1 of the Second Amended Complaint, in which Appellants allege

[5] There are no South Carolina cases specifically addressing whether an order dismissing a plaintiff's claims is immediately appealable where counterclaims remain pending. While not binding on this Court, in the absence of South Carolina authority regarding immediate appealability where counterclaims remain pending, North Carolina law is instructive. *See, e.g.*, *Pawlik v. Fortunati*, 183 N.C. App. 490, 645 S.E.2d 231 (2007) ("Because defendants' counterclaims are still pending, and plaintiff has failed to demonstrate that this interlocutory appeal is properly before the Court, we dismiss the appeal.").

that Respondents were negligent in (1) allowing Appellant Andrew Pampu to sign the settlement agreement, (2) failing to explain to Appellant Andrew Pampu the full implications of signing the settlement agreement, (3) the manner in which they prosecuted the State Case, and (4) the manner in which they concluded the representation. [Second Amended Complaint, R. pp. 110-11, ¶ 1]. Appellants further argue that the trial court erred in dismissing their claim for legal malpractice by "ignoring the specific allegations in the Second Amended Complaint that were contained in Mr. Dillon's expert affidavit." [Appellants' Initial Brief, p. 18]. Appellants argue that the court failed to accept these allegations as true and view them in the light most favorable to them. [Appellants' Initial Brief, p. 20]. Appellants contend that, taken as true, these allegations establish a claim for legal malpractice. Finally, Appellants argue that the trial court "create[ed] its own 'fact' allegations" by stating that Appellant Andrew Pampu "developed buyer's remorse in the days after the mediation and attempted to abandon the mediation." [Appellants' Initial Brief, p. 20; *see also* Order Granting Brewer Motion to Dismiss, R. p. 8 *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 21].

In support of their arguments, Appellants cite *Doe v. Howe* for the proposition that loss of settlement value can form the basis for a legal malpractice claim. [Appellants' Initial Brief, p. 17 (citing 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005))]. However, while this Court contemplated in *Howe* that such a claim might be viable under certain circumstances, this Court affirmed the trial court's grant of summary judgment in favor of the respondents on the appellant's legal malpractice claim. *Howe*, 367 S.C. at 437, 626 S.E.2d at 27. In doing so, this Court referenced the trial court's holding that appellant's expert "never explicitly stated [appellant] most probably would have recovered more than the $88,000 he received in his settlement . . . ." *Id.*, 367 S.C. at 445, 626 S.E.2d at 31. While this Court acknowledged that the trial court "was not imposing an

additional requirement for [appellant's] *prima facie* case," it confirmed that a legal malpractice plaintiff must "prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care." *Id.*, 367 S.C. at 446, 626 S.E.2d at 32. In affirming the trial court's grant of summary judgment as to the legal malpractice claim, this court explained, "Notably absent from the record in this case, however, is any mention of settlement value from [any expert] that was brought to the trial judge's attention." *Id.*

While the present case involves motions to dismiss and a motion for reconsideration rather than a motion for summary judgment, Appellants still must allege facts in their complaint that, if true, could support that they "would have obtained a better result in the underlying matter if [Respondents] had exercised reasonable care." *See id.* Instead, the Second Amended Complaint contains merely conclusory allegations that Respondents were negligent in allowing Appellant Andrew Pampu to sign the settlement agreement and purportedly failing to explain to him the implications of it. [*See* Second Amended Complaint, R. pp. 110-11, ¶ 1]. Other jurisdictions have recognized that a former client simply alleging that his former attorney failed to clearly explain settlement documents before the former client signed them and that the former client expected to receive more than the settlement documents identified is insufficient as a matter of law to state a claim for legal malpractice. *See, e.g., Tarrant v. Ramunno*, 171 A.3d 138 (Del. 2017) ("Even if we accept [appellant/former client's] allegation that [respondent/former attorney] failed in his duties to her by failing to adequately explain the terms of the settlement documents that she signed, her complaint failed to allege any resulting loss.").[6]

[6] The elements of a legal malpractice claim in Delaware are substantially similar to those in South Carolina. *See id.* ("To state a claim for legal malpractice, a plaintiff must allege and prove the following elements: (a) the employment of a lawyer, (b) the lawyer's neglect of a professional obligation, and (c) resulting loss. To prove a resulting loss, the plaintiff must show that the underlying lawsuit would have been successful but for the lawyer's negligence.").

The Second Amended Complaint further contains merely conclusory allegations that Respondents were negligent in the manner in which they prosecuted the State Case. [*See* Second Amended Complaint, R. pp. 110-11, ¶ 1]. In fact, at the time the Second Amended Complaint was filed, the State Case remained pending. [*See generally Andrew Pampu v. Erin Wingo et al.*, Case No. 2017-CP-39-00709, in the Court of Common Pleas in Pickens County, South Carolina]. Appellants cannot bring legal malpractice claims for alleged conduct related to a pending lawsuit, as they cannot reasonably allege that any purported conduct resulted in a loss of settlement and/or claim value.[7] The Supreme Court of South Carolina has held that in "a legal malpractice cause of action that is 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 cause of action without an adverse verdict, judgment, or ruling." *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 534, 787 S.E.2d 485, 494 (2016). Because there was no verdict, judgment, or ruling—adverse or not—in the State Case at the time Appellants filed their Second Amended Complaint, there are no allegations in the Second Amended Complaint that could give rise to a legal malpractice claim based on any alleged conduct of Respondents in the State Case. Further, even if the $5.3 million judgment had been obtained at that time, Appellants could not reasonably argue that a more favorable judgement could have been obtained but for Respondents' alleged professional negligence. Accordingly, the trial court correctly dismissed these claims.

The Second Amended Complaint also contains merely conclusory allegations that Respondents were negligent in the manner in which they concluded the representation. [*See*

[7] Notably, on March 25, 2022, following a jury trial, a jury returned a verdict in favor of Appellant Andrew Pampu in the State Case and awarded him a total of $5.3 million. After post-trial motions, the court entered judgment in favor of Mr. Pampu in the amount of $2.3 million on July 11, 2022. [*See Andrew Pampu v. Erin Wingo et al.*, Case No. 2017-CP-39-00709, in the Court of Common Pleas in Pickens County, South Carolina].

Second Amended Complaint, R. pp. 110-11, ¶ 1]. Again, Appellants did not articulate in their Second Amended Complaint how Respondents were negligent in concluding their representation or what alleged loss resulted. Moreover, Appellants terminated Respondents, which forced Respondents to conclude the representation. [*See* Second Amended Complaint, R. pp. 119, 122, ¶¶ 48-49, 66]. Appellants cannot now argue that Respondents were negligent in doing so. Accordingly, the trial court correctly dismissed these claims.

Moreover, the trial court correctly ruled that Appellants' expert witness affidavit was both untimely and insufficient as a matter of law.[8] Notwithstanding the same, the affidavit is simply a rehash of Appellants' allegations in their Second Amended Complaint that they were unhappy with the settlement agreement that Appellant Andrew Pampu signed. Therefore, the allegations in the expert witness affidavit did not give rise to a cause of action against Respondents for professional negligence.[9]

Finally, the trial court correctly recognized that Appellants' allegations are largely premised on Appellant Andrew Pampu not getting everything Appellants wanted at mediation, and they only alleged legal malpractice once they realized the settlement could not be undone. The trial court did not create facts by referring to these allegations as "buyer's remorse." Rather, the trial court merely acknowledged that Appellants did not identify any acts or omissions on the part

[8] This argument is discussed in depth in Section VIII, *infra*.

[9] Moreover, the expert affidavit contains no allegations whatsoever regarding Respondents' conduct in the State Case or any other post-mediation conduct. Accordingly, for that reason alone, this Court should affirm the trial court's dismissal of Appellants' professional negligence claim as it relates to the State Case and/or any other post-mediation conduct pursuant to S.C. Code Ann. § 15-36-100 ("[T]he 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.").

of Respondents other than that Appellant Andrew Pampu did not get everything Appellants wanted at mediation.

The trial court correctly ruled that no allegations in the Second Amended Complaint give rise to a colorable claim that Respondents could be liable for legal malpractice. Accordingly, this Court should affirm the trial court's holding that Appellants failed to state a claim for legal malpractice.

IV. The trial court correctly held that Appellants failed to state a claim for breach of fiduciary duty.

The trial court correctly held that Appellants failed to state a claim for breach of fiduciary duty. "To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012) (citing *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004)).

Appellants first argue the trial court ignored their allegations that Respondents "breached their duties of loyalty and confidentiality by disclosing information related to the representation to third parties without [Appellants'] knowledge or consent that caused financial losses." [Appellants' Initial Brief, p. 20]. Specifically, Appellants point to paragraphs 2, 61, and 62 of their Second Amended Complaint, which generally allege that (1) after the conclusion of the representation, Respondents disclosed information related to the representation to counsel for the opposing parties without Appellants' consent, (2) Respondents sent a letter to the mediator and counsel for all parties in the State Case and other third parties asserting a lien on any settlement proceeds, and (3) Appellants' successor counsel sent a letter to Respondents stating that the lien letter interfered with the mediation process, disrupted negotiations, and disadvantaged Appellant

Andrew Pampu's position in the mediation, which caused damages to Mr. Pampu. [Second Amended Complaint, R. pp. 111, 121-22, ¶¶ 2, 61-62]. Appellants further argue that Respondents' lien letter "wreaked havoc on [Appellants'] attempts to resolve their claims against the University defendants in the Federal Lawsuit." [Appellants' Initial Brief, p. 23].

As an initial matter, Appellants alleged in their Second Amended Complaint that Respondents sent the lien letter on February 28, 2019—after the mediation in the Federal Case. [Second Amended Complaint, pp. 12-13, ¶ 61]. Indeed, Appellants alleged that the lien letter was based, in part, on the fees Respondents allege they are owed due to the outcome of the Federal Case. [*Id.*]. A lien letter sent after the Federal Case settled at mediation could not have "wreaked havoc on [Appellants'] attempts to resolve their claims against the University defendants in the Federal Lawsuit" as Appellants allege. [*See* Appellants' Initial Brief, p. 23].

Moreover, to the extent that Appellants contend that Respondents' lien letter disadvantaged Appellant Andrew Pampu's position in the State Case, such an allegation is both baseless and premature. As discussed above in the context of Appellants' legal malpractice claims related to the State Case, because there was no verdict, judgment, or ruling—adverse or not—in the State Case at the time Appellants filed their Second Amended Complaint, there are no allegations in the Second Amended Complaint that could give rise to a legal malpractice claim based on any alleged conduct of Respondents in the State Case. *See Stokes-Craven Holding Corp.*, 416 S.C. at 534, 787 S.E.2d at 494. For the same reason, Appellants cannot reasonably claim that Respondents' lien letter disadvantaged Mr. Pampu's position in the State Case. Appellants cannot articulate—and, in fact, have not articulated—what damages they allegedly suffered related to the State Case, because the State Case remained pending at the time they filed their Second Amended Complaint. Accordingly, the trial court correctly held that "[t]o the extent [Appellants] claim that [Appellant]

Andrew Pampu's position in the Federal Lawsuit and/or State Lawsuit was damaged due to the assertion of the lien, the Second Amended Complaint lacks proper allegations demonstrating proximate cause for such harm." [Order Granting Brewer Motion to Dismiss, R. pp. 10-11; Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 24]. Therefore, the trial court correctly dismissed Appellants' breach of fiduciary duty claim, and this Court should affirm that ruling.

V. The trial court correctly held that Appellant John Pampu and Appellant Amanda Pampu lack standing.

The trial court correctly held that Appellant John Pampu and Appellant Amanda Pampu ("the Pampu Parents") lack standing.

Appellants argue that the trial court ignored allegations establishing a client-lawyer relationship between the Pampu Parents and Respondents related to the Federal Case and the State Case. [Appellant's Initial Brief, p. 24]. Specifically, Appellants point to several paragraphs in their Second Amended Complaint generally alleging that Respondents represented "the [Pampus]" in the Federal Case and caused financial losses to "the [Pampus]." [Appellant's Initial Brief, pp. 24-25]. The trial court held that "because Andrew Pampu was the only named party in either lawsuit and the only party to sign the settlement agreement, only he has standing to assert the alleged claims." [Order Granting Brewer Motion to Dismiss, R. p. 11; Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 24].

Appellants contend that the trial court erred because "[t]he existence of a client-lawyer relationship is not dependent on whether the client is a party to a lawsuit or later becomes a party to a lawsuit." [Appellants' Initial Brief, p. 25]. However, regardless of whether the Pampu Parents and Respondents had an attorney-client relationship, they lack standing to assert the claims they allege, as they had no legal interest in the State Case or the Federal Case. As discussed above, in support of their legal malpractice claim, Appellants allege that Respondents were negligent in

(1) allowing Appellant Andrew Pampu to sign the settlement agreement, (2) failing to explain to Appellant Andrew Pampu the full implications of signing the settlement agreement, (3) the manner in which they prosecuted the State Case, and (4) the manner in which they concluded the representation. [Second Amended Complaint, R. pp. 110-11, ¶ 1]. Further, in support of their breach of fiduciary duty claim, Appellants generally allege that (1) after the conclusion of the representation, Respondents disclosed information related to the representation to counsel for the opposing parties without Appellants' consent, (2) Respondents sent a letter to the mediator and counsel for all parties in the State Case and other third parties asserting a lien on any settlement proceeds, and (3) Appellants' successor counsel sent a letter to Respondents stating that the lien letter interfered with the mediation process, disrupted negotiations, and disadvantaged Appellant Andrew Pampu's position in the mediation, which caused damages to Mr. Pampu. [Second Amended Complaint, R. pp. 111, 121-22, ¶¶ 2, 61-62]. Finally, in support of their breach of contract claim, Appellants allege that Respondents "entered into a Contract with the [Pampus] agreeing and contracting to provide legal services to represent the [Pampus] in the Federal Case, the State Case, and 'any other claims or causes of action arising from the facts, incidents, and allegations referenced in these lawsuits'" and that Respondents breached this agreement by "failing to provide such services." [Second Amended Complaint, R. pp. 128-29, ¶¶ 98-99]. In sum, the damages Appellants allege resulted from all their causes of action are a loss of settlement value in the Federal Case and a disadvantaged position in the State Case. Because the Pampu Parents were not parties to either case and had no legal interest in either case, they cannot reasonably claim that they were somehow damaged by any loss of settlement value in the Federal Case or disadvantaged position in the State Case.

Further, to the extent that the trial court erred in holding that the Pampu Parents lacked standing to assert their claims, such error was harmless, as those claims still fail as a matter of law for the reasons discussed herein. Accordingly, this Court should affirm the trial court's holding. *See Judy v. Judy*, 384 S.C. 634, 646, 682 S.E.2d 836, 842 (Ct. App. 2009) ("Error is harmless where it could not reasonably have affected the result of the trial.").

VI. The trial court correctly held that Appellants failed to state a claim for breach of contract.

The trial court correctly held that Appellants failed to state a claim for breach of contract. "The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *Johnson v. Little*, 426 S.C. 423, 428, 827 S.E.2d 207, 210 (Ct. App. 2019) (quoting *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015).

Appellants argue that the trial court "summarily dismissed the Pampus' claims for breach of contract without making or identifying any findings of fact or specific conclusions of law." [Appellants' Initial Brief, p. 25]. Appellants further argue that the trial court failed to consider their allegations purportedly establishing a contractional relationship between the Pampu Parents and Respondents to provide legal services related to the Federal Case and the State Case. [Appellants' Initial Brief, p. 26]. Specifically, Appellants point to paragraphs 14 and 98 through 101 of their Second Amended Complaint, which generally allege that Respondents entered a contract with Appellants to provide legal services related to the Federal Case and the State Case and that Respondents breached this agreement by failing to provide such services. [Second Amended Complaint, R. pp. 113, 128-29, ¶¶ 14, 98-101]. Appellants contend that these allegations establish that the Pampu Parents have standing to assert the breach of contract claim. [Appellants' Initial Brief, p. 26].

While the orders granting Respondents' motions to dismiss did not explicitly address Appellants' breach of contract claim, the trial court correctly dismissed the claim. Appellants' breach of contract claim fails for the same reasons that their legal malpractice and breach of fiduciary duty claims fail—namely, because Appellants failed to articulate in their Second Amended Complaint how Respondents allegedly breached any agreement (other than a conclusory allegation that Respondents "fail[ed] to provide such services," which is clearly not the case) or how any alleged breach proximately caused damages to Appellants (and in particular, the Pampu Parents). Moreover, Appellants' breach of contract claim is simply a recharacterization of their legal malpractice and breach of fiduciary duty claims and is, therefore, duplicative of those claims. *See, e.g., Gen. Sec. Ins. Co. v. Jordan, Coyne & Savits, LLP*, 357 F. Supp. 2d 951, 961 (E.D. Va. 2005) (holding that because the plaintiffs' legal malpractice claim was barred, their breach of fiduciary duty and breach of contract claims were also barred because "they are mere disguises for plaintiffs' legal malpractice claims," as "[t]he breach alleged in both the breach of contract and breach of fiduciary duty claims is the same failure to provide adequate legal services that is the crux of the legal malpractice claims."). Accordingly, the trial court properly dismissed this claim.[10]

The trial court correctly dismissed Appellants' breach of contract claim. Accordingly, this Court should affirm the trial court's ruling as to Appellants' breach of contract claim.

VII. The trial court correctly held that Appellants' breach of fiduciary duty claim is duplicative of their legal malpractice claim.

The trial court correctly held that Appellants' breach of fiduciary duty claim is duplicative of their legal malpractice claim.

[10] To the extent that the trial court erred by not explicitly addressing Appellants' breach of contract claim in the orders granting Respondents' motions to dismiss, such error was harmless. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842.

Appellants argue that they should be able to pursue both claims pursuant to South Carolina Rule of Civil Procedure 8(a), which provides that "[r]elief in the alternative or of several different types may be demanded." [Appellants' Initial Brief, p. 27; S.C. R. CIV. P. 8(a)]. Appellants further argue that the trial court's reliance on *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.* and *Gibson v. Epting* do not support its ruling, as those cases dealt with a motion made at later stages in litigation. [Appellants' Initial Brief, p. 27 (citing *RFT Mgmt. Co.*, 399 S.C. 322, 732 S.E.2d 166 (2012); *and Gibson*, 426 S.C. 346, 827 S.E.2d 178 (Ct. App. 2019))].

In *RFT Management Co.*, RFT sued its former attorney and his law firm based on their representation of RFT in a transaction involving two real estate investment properties. 399 S.C. at 327, 732 S.E.2d at 168. RFT alleged multiple claims against the respondents, including legal malpractice and breach of fiduciary duty. *Id.* At trial, at the close of evidence, the trial court merged RFT's breach of fiduciary duty claim into its legal malpractice claim and granted the respondents' motion for a directed verdict as to RFT's other claims; therefore, only the legal malpractice claim went to the jury. *Id.*, 399 S.C. at 330, 732 S.E.2d at 170. The jury returned a verdict in favor of the respondents, and the trial court denied RFT's post-trial motions. *Id.* On appeal, RFT argued, in part, that the trial court erred in "failing to charge the jury on breach of fiduciary duty and merging this cause of action with its first cause of action for legal malpractice." *Id.* In affirming the trial court's decision to merge the two causes of action, the Supreme Court of South Carolina explained:

> A claim for breach of fiduciary duty, as a general matter, is distinguishable from a claim for legal malpractice because it can arise in contexts other than one involving an attorney-client relationship. . . . In the current matter, however, RFT's claim for breach of fiduciary duty arose out of the duty inherent in the attorney-client relationship and it arose out of the same factual allegations. Thus, RFT's claim for legal malpractice necessarily encompassed a breach of the fiduciary duty an attorney has to his or her client. . . . Although RFT now argues a breach of fiduciary claim *could* be distinguishable from legal malpractice, RFT does not set forth any specific facts that demonstrate its breach of fiduciary duty claim *is* distinguishable because it arises out of a duty *other than* one created by the attorney-client

> relationship or because it is based on different material facts. Consequently, we hold the breach of fiduciary duty claim is duplicative.

Id., 399 S.C. at 336–37, 732 S.E.2d at 173 (internal citation omitted) (emphasis in original).

Similarly, in *Gibson*, the appellants (an individual and several of her companies) sued the respondents (several attorneys and their respective law firms) for multiple claims, including legal malpractice and breach of fiduciary duty, related to the attorneys' representation of them in a real estate matter. 426 S.C. at 350, 827 S.E.2d at 180. The trial court granted summary judgment in favor of the respondents. *Id.* In affirming the trial court's decision, this Court noted, "[Appellant] asserts Respondents breached their fiduciary duty to her in numerous ways, all of which duplicate her legal malpractice claim because the duties arose out of the attorney-client relationship and she alleges the same facts as to both claims. . . . Accordingly, we only address [Appellant's] claim for legal malpractice." *Id.*, 426 S.C. at 353, 827 S.E.2d at 182 (citing *RFT Mgmt. Co.*, 399 S.C. at 336–37, 732 S.E.2d at 173).

Here, Appellants allege that Respondents breached the fiduciary duties of confidentiality and loyalty. [*See* Second Amended Complaint, pp. 18-19, ¶¶ 87-96]. Those duties are inherent in the attorney-client relationship. Moreover, Appellants' breach of fiduciary duty claim is premised on the same factual allegations as their legal malpractice claim. [*See* Second Amended Complaint, R. pp. 125-28, ¶¶ 79-96]. Therefore, Appellants' claim for legal malpractice necessarily encompasses an alleged breach of the fiduciary duty that attorneys have to their clients. *See RFT Mgmt. Co.*, 399 S.C. at 336–37, 732 S.E.2d at 173; *and Gibson*, 426 S.C. at 353, 827 S.E.2d at 182. Therefore, Appellants' breach of fiduciary duty claim is duplicative, and the trial court's reliance on *RFT Management Co.* and *Gibson* was not in error.

Instead, Appellants contend that *Smith v. Hastie* is more applicable to the present case. [Appellants' Initial Brief, p. 27 (citing *Smith*, 367 S.C. 410, 626 S.E.2d 13 (Ct. App. 2005))].

There, Smith sued her former attorney for several claims, including breach of fiduciary duty and professional negligence, arising from the attorney's creation of a family limited partnership for the appellant and her family. *Smith*, 367 S.C. at 413, 626 S.E.2d at 14. The trial court granted summary judgment in favor of the lawyer and dismissed all of Smith's claims with prejudice, holding that "(1) Smith failed to commence her lawsuit within the applicable limitations period; (2) Smith's malpractice claims failed for lack of evidence; and (3) Smith's claims were barred by the doctrine of collateral estoppel." *Id.*, 367 S.C. at 415, 626 S.E.2d at 16. While this Court disagreed with the trial court's grant of summary judgment on Smith's claims for negligence and breach of fiduciary duty, the opinion contains no discussion about duplicity or merger of these claims, as that was not an issue before this Court. *See id.*, 367 S.C. at 417–21, 626 S.E.2d at 16–18. Accordingly, *Smith* is not relevant in determining whether the trial court here erred in holding that Appellants' breach of fiduciary duty claim is duplicative of their legal malpractice claim. For the reasons discussed above, it did not.[11]

The trial court correctly dismissed Appellants' breach of fiduciary duty claim. Accordingly, this Court should affirm the trial court's ruling as to Appellants' breach of fiduciary duty claim.

VIII. The trial court correctly held that the affidavit of Justin Dillon was both untimely and insufficient as a matter of law.

The trial court correctly held that the affidavit of Justin Dillon was both untimely and insufficient as a matter of law. Pursuant to S.C. Code Ann. § 15-36-100, the plaintiff in a professional negligence action "must file as part of the complaint an affidavit of an expert witness

[11] To the extent that the trial court did err in holding that Appellants' breach of fiduciary duty claim is duplicative of their legal malpractice claim, such error is harmless, as Appellants failed to state a claim for either cause of action for the reasons discussed herein. *See Judy*, 384 S.C. at 646, 682 S.E.2d at 842.

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." S.C. Code Ann. § 15-36-100(B).

A. Timeliness

The trial court correctly held that the affidavit of Justin Dillon was untimely as a matter of law. "If a plaintiff fails to file an affidavit as required by [§ 15-36-100], and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake." S.C. Code Ann. § 15-36-100(F).

When Appellants filed their initial Complaint on March 19, 2021, they did not include the required expert witness affidavit. [*See generally* Complaint, R. pp. 36-56]. Instead, Appellants alleged that pursuant to § 15-36-100(C)(1), the Complaint was being filed without the required affidavit because there was "a good faith basis to believe the expiration of the statute of limitations is imminent or that the Lawyers may argue that the expiration of the statute of limitations may expire." [Complaint, R. p. 55, ¶ 103]. Appellants then amended their Complaint 42 days later to include an expert witness affidavit. [*See* Amended Complaint, R. pp. 58-86]. In response to Respondents' respective motions to dismiss, which raised Appellants' untimely expert affidavit as one of several grounds for dismissal, Appellants amended their Complaint a second time to add further allegations related to expert affidavit issue. [*See* Second Amended Complaint, R. pp. 129-30, ¶ 103]. Specifically, Appellants claimed that the statute of limitations expired on March 21, 2021 (two days after the filing of the initial Complaint) and alleged—for the first time—

that because of time constraints, the expert affidavit could not be prepared in time to file it before that date. [Second Amended Complaint, R. pp. 129-30, ¶ 103]. Appellants further claimed that they were filing their Second Amended Complaint under § 15-36-100(E), which they contend permitted them to file an amended pleading to cure the alleged defects. [Second Amended Complaint, R. p. 130, ¶ 103]. Appellants now argue that the trial court ignored these allegations, which they contend establish that the expert affidavit was timely filed. [Appellants' Initial Brief, pp. 28-29].

As an initial matter, by its plain language, § 15-36-100(E) only applies where a plaintiff has filed an expert affidavit that is alleged to be insufficient, not where a plaintiff has failed to file any expert affidavit. *See* S.C. Code Ann. § 15-36-100(E).[12] Stated differently, this section allows a plaintiff to cure an alleged defect *in the affidavit* by amending *the affidavit* within a certain amount of time. *See id.* It does not permit a plaintiff to cure his failure to file any affidavit at all by amending *the pleadings* to include an affidavit. *See id.* Accordingly, Appellants' reliance on § 15-36-100(E) is misplaced.

Next, § 15-36-100(C)(1) provides, in part, that the contemporaneous filing requirement "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 the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared**." § 15-36-100(C)(1) (emphasis added). Simply put, Appellants made no

[12] "**If a plaintiff files an affidavit which is allegedly defective**, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective." *Id.* (emphasis added).

such allegation in their initial Complaint. [*See generally* Complaint, R. pp. 36-56].[13] Further, allowing plaintiffs to circumvent the requirements of § 15-36-100 would effectively extend the statute of limitations for professional negligence claims, contrary to the public policy behind the statute. Accordingly, the trial court correctly held that Appellants' expert affidavit was untimely as a matter of law, which provided an independent basis to dismiss Appellants' legal malpractice claims. *See* S.C. Code Ann. § 15-36-100(F) ("If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation . . . .").

B. Sufficiency

Further, regardless of whether the expert affidavit was timely filed, the trial court correctly held that that the affidavit of Justin Dillon was insufficient as a matter of law. Section 15-36-100(A) requires that the expert be "qualified as to the acceptable conduct of the professional whose conduct is at issue" and lists several additional requirements. *See* S.C. Code Ann. § 15-36-100(A). "The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E)." *Id.*

The trial court made the following findings regarding Mr. Dillon's credentials:

- Mr. Dillon has never been licensed (or admitted pro hac vice) to practice law in the state or federal courts or South Carolina, nor is he licensed in the Fourth Circuit Court of Appeals;

[13] Moreover, Respondents note that counsel for Appellants sent a letter of representation on September 19, 2019 (approximately 18 months prior to the filing of their initial Complaint) and an additional letter of representation on February 26, 2021 (approximately three weeks prior to the filing of their initial Complaint). Accordingly, Respondents could not have reasonably alleged that an affidavit could not be prepared due to time constraints.

- Mr. Dillon does not claim to be familiar with the nature of federal practice in the U.S. District Court for the District of South Carolina, its Local Civil Rules, or the nature or manner of mediations conducted in South Carolina; and
- Mr. Dillon reviewed few of the voluminous materials related to the underlying facts at issue.[14]

[*See* Order Granting Brewer Motion to Dismiss, R. pp. 13-14; *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 27]. The trial court explained that the crux of Appellants' legal malpractice claim is Respondents' advice to Appellant Andrew Pampu during the mediation of the Federal Case and that because Mr. Dillon's purported experience related mainly to Title IX claims but not South Carolina federal or state court procedures or litigation, his experience was not sufficiently related to Appellants' legal malpractice claims as pled in their Second Amended Complaint. [Order Granting Brewer Motion to Dismiss, R. 14; Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 27].

Appellants argue that the trial court erred by not accepting as true Mr. Dillon's qualifications as stated in his curriculum vitae, which was included with his affidavit. [Appellants' Initial Brief, p. 30]. Specifically, Appellants contend that Mr. Dillon's CV "identifies his specialized, technical knowledge regarding the Title IX and related matter at issue in the underlying lawsuits." [Appellants' Initial Brief, p. 30]. However, while Mr. Dillon's CV listed his purported experience related to Title IX claims, it indicated no such experience with South Carolina federal or state court statutes, rules, procedures, or standards of care.

[14] Mr. Dillon stated in his affidavit that he only reviewed 13 documents in rendering his opinion, which primarily consisted of the pleadings in the underlying lawsuits. [*See* Second Amended Complaint, Exhibit 1, R. pp. 133-41].

Appellants further argue that the affidavit is facially sufficient because it identifies a potentially meritorious legal malpractice claim and that § 15-36-100(E) does not permit the trial court to address the substance of those opinions. [Appellants' Initial Brief, p. 30]. However, the trial court did not address the substance of Mr. Dillon's opinions. Rather, the trial court addressed Mr. Dillon's credentials—specifically, his lack of relevant South Carolina legal expertise and, implicitly, his inability to offer expert opinions relating to the application of South Carolina standards of care for South Carolina attorneys (as distinguished from the substance of any such opinions). [*See* Order Granting Brewer Motion to Dismiss, R. pp. 13-14; *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 27]. Accordingly, Appellants' arguments regarding the substance of Mr. Dillon's opinions are not at issue on appeal.

Next, Appellants argue that the trial court improperly held that Mr. Dillon's credentials were inadequate "because he has not actually practiced in South Carolina federal or state court." [Appellants' Initial Brief, pp. 30-31]. However, the trial court made no such holding. In fact, the trial court acknowledged that there is no requirement that the expert witness in a legal malpractice action be a South Carolina-barred attorney. [*See* Order Granting Brewer Motion to Dismiss, R. p. 14; *and* Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 27]. Rather, the trial court explained that the crux of Appellants' legal malpractice claim is Respondents' advice to Appellant Andrew Pampu during the mediation of the Federal Case. [*Id.*]. Because Mr. Dillon's purported experience related mainly to Title IX claims, but not South Carolina federal or state court statutes, rules, procedures, or standards of care, the trial court determined that his experience was not sufficiently related to Appellants' legal malpractice claims as pled in their Second Amended Complaint. [*Id.*].

In support of their argument, Appellants cite *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996). However, Smith was decided in 1996, while § 15-56-100 became effective in 2005. Accordingly, Smith is irrelevant for purposes of assessing the sufficiency of an expert affidavit pursuant to § 15-56-100. Notably, while the court held that the expert's lack of a South Carolina law license did not disqualify him as an expert (in the context of a motion to exclude), the court also ruled regarding the "locality rule":

> In the context of legal malpractice, most courts which originally adopted a strict locality rule have expanded the relevant geographical region to create a **statewide** standard of care. The rationale for this development is that **attorneys are generally regulated on a statewide basis, with state rules of procedure and different substantive laws**. Accordingly, we adopt the majority view and rule that the standard to be applied in determining legal malpractice issues is **statewide**.

Smith, 322 S.C. at 437–38, 472 S.E.2d at 614 (emphasis added) (internal citations omitted). Accordingly, Appellants' references to the locality rule—and their implied contention that the trial court applied it—is inapposite. Rather, the trial court properly held that Mr. Dillon did not have the requisite qualifications regarding South Carolina federal or state court statutes, rules, procedures, or standards of care pursuant to § 15-56-100(A)(2).

Appellants also argue that the trial court erred in stating that "Mr. Dillon holds himself out to be an expert in legal malpractice claims in South Carolina district court litigation." [Appellants' Initial Brief, p. 31]. While Mr. Dillon may not have explicitly stated so in his affidavit, he purported to state opinions regarding alleged acts or omissions of South Carolina attorneys during a South Carolina federal court mediation, implicitly holding himself out as an expert in that area.

Finally, Appellants contend that the trial court incorrectly imposed a "sufficiently related" standard that is absent from § 15-56-100. [Appellants' Initial Brief, p. 31]. While the phrase "sufficiently related" is not present in the statute, it does require that the expert have "actual

professional knowledge and experience in the area of practice or specialty in which the opinion is to be given." S.C. Code Ann. § 15-56-100(A)(2)(b).

The trial court correctly determined that Mr. Dillon—who has never practiced or taught in South Carolina—does not have the requisite expertise to testify as to alleged acts or omissions of South Carolina attorneys during a South Carolina federal court mediation. Accordingly, the trial court properly dismissed Appellants' legal malpractice claim on this independent basis. *See* S.C. Code Ann. § 15-36-100(E) ("If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim . . . .").

IX. The trial court correctly found Appellants' claims against public policy.

The trial court correctly found that Appellants' claims were against public policy. The trial court properly held that Appellants' claims "violate the important public policy on the finality of mediation in civil cases." [Order Granting Brewer Motion to Dismiss, R. pp. 15-16; Order Granting Clawson Fargnoli Motion to Dismiss, R. p. 29]. The trial court further explained that Appellants' allegations "center almost exclusively on the fact that [Appellant] Andrew Pampu did not get everything that he wanted at mediation." [*Id.*].

Appellants argue that the trial courts' holding regarding public policy is contrary to South Carolina law. [Appellants' Initial Brief, pp. 31-32]. Specifically, Appellants point to Rule 8(c)(3) of the South Carolina Rules for Alternative Dispute Resolution, which provides that "[t]here is no confidentiality attached to information that is disclosed during a mediation . . . offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding." SCRADR 8(c)(3). Appellants contend that this rule

contemplates legal malpractice lawsuits based on lawyers' conduct at mediations. [Appellants' Initial Brief, p. 32]. However, Appellants ignore Rule 8(g), which explicitly states, "The mediator **shall not** 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. All records, reports and other documents received by the mediator while serving in that capacity shall be confidential." SCRADR 8(g) (emphasis added). Similarly, Rule 16.10(E) of the Local Civil Rules for the United States District Court for the District of South Carolina provides:

> Except when ordered by the court for exceptional circumstances shown, 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. All records, reports, and other documents received or created by the mediator while serving in that capacity shall be confidential.

LCvR 16.10 (emphasis added). These rules clearly suggest that these types of claims are against public policy because the mediator would be the key witness, as he could testify objectively to what occurred at the mediation. Therefore, the trial court properly dismissed these claims as against public policy, and this Court should affirm that holding.

X. Appellants have failed to correct the record relating to their recusal argument in their Motion for Reconsideration.

Appellants have failed to correct the record relating to their recusal argument in their Motion for Reconsideration. Appellants concluded their motion by making troubling allegations that the trial judge did not recuse himself when his impartiality might be questioned. Specifically, Appellants alleged that the trial judge had a personal bias in favor of Respondent Samuel R. Clawson, Jr., Esq. based on an alleged long-term law partnership with Respondent Clawson's father. [Motion for Reconsideration, R. p. 282, ¶ 17]. However, those allegations were categorically false, as Respondent Clawson's father had never had a professional or personal

association with the trial judge, aside from perhaps appearing before the judge, as had many attorneys in this state. When confronted with this fact, counsel for Appellants stated, "[Appellants] will accept your statement and will withdraw the statements contained in Paragraph 17 of the motion and will make that known to the judge at the outset of the hearing on the motion." However, the trial court ruled on the motion without a hearing, and, to date, the statements have not been withdrawn. Appellants have failed to correct the record, which is now pending before this Court, thereby perpetuating this falsehood. Accordingly, this Court should order that those statements be stricken from the record in this matter.

Conclusion

For these reasons, Respondents respectfully request that this Court affirm the trial court's orders in their entirety.

July 10, 2024

/s/ Emily E. Seaton

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