STATE OF SOUTH CAROLINA
In the Cout of Appeals

Appeal from Richland County
Court of Common Pleas

The Honorable Patrick C. Fant, III, Circuit Court Judge

Appellate Case No. 2025-000614
Civil Action No. 2024-CP-40-00827

Kellum W. Allen..... Respondent,

v.

Ann Marie Watson..... Appellant.

INITIAL BRIEF OF RESPONDENT

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Statement of the Case

On February 7, 2024 Respondent filed a Lis Pendens, Summons and Complaint in the Court of Common Pleas of Richland County, South Carolina seeking specific performance on an option real estate contract. The Summons and Complaint were served on Appellant on February 12, 2024.

On April 15, 2024, Appellant filed an Answer and Counterclaims. On May 14, 2024, Respondent filed a Motion to Refer to a Master in Equity, a Motion to Strike, and a Motion Pursuant to Rule 12(b)(6) in lieu of an Answer to the Counterclaims. Appellant filed a Reply to Motion Pursuant to SCRCP Rule 39(a) on May 28, 2024.

On June 12, 2024, Appellant filed an Amended Answer and Amended Counterclaims alleging general denial, contract illegal and against public policy, lack of consideration, inadequate consideration under the circumstances, unclean hands, transaction unfair, transaction unconscionable and estoppel; Counterclaims of breach of fiduciary duties of good faith, loyalty,

and confidentiality, misappropriation of confidential information, professional negligence, and violation of the South Carolina Unfair Trade Practices Act. The South Carolina Unfair Trade Practices Counterclaim was not included in the original Answer and Counterclaims but was subsequently added as the Fourth Counterclaim of the four Counterclaims. Respondent filed a Motion/for Protective Order Rule 26(c)(1) & (2) on June 24, 2024.

On June 27, 2024, Respondent filed a Motion to Dismiss the Counterclaims filed by the Plaintiff alleging that Defendant is attempting to utilize alleged violations of the South Carolina Professional Code Act as a basis for civil liability, there was no breach of confidence cause of action recognized in South Carolina based on the allegations in the Second Counterclaim; Respondent failed to submit an Affidavit as required on the Professional Negligence cause of action, namely *SC Code Ann.* 15-36-100; in addition, the Appellant's allegations in the Fourth Counterclaim are duplicate to the allegations in the Third Counterclaim and since the Third Counterclaim does not state a cause of action as to the reasons set forth in the Third Counterclaim, there is no cause of action in the Fourth Counterclaim. Also, as to the Fourth Counterclaim, Appellant has failed to properly plead the necessary allegations for the elements of public harm and repetitive action which are mandatory elements of an action for Unfair Trade Practice Act. Further, the allegations in the Fourth Counterclaim are void of the allegations required by the definition of trade and commerce in SC Code Ann. §39-5-10(b). Appellant also filed a Motion for Protective Order.

On September 6, 2024, Respondent filed a Motion for Partial Summary Judgment. On September 19, 2024 Appellant filed a Memo in Support of its Motion for Partial Summary Judgment as well as a Memo in Opposition to Respondent's Motions. On December 11, 2024 Respondent filed a Brief in Opposition to Motion for Summary Judgment as well as a Brief in Support of Motion to Dismiss Counterclaims.

On December 13, 2024 Appellant filed a Memo in Support of Motion for Partial Summary Judgment. Respondent filed a Motion to Strike Certain Pleadings in the Amended Answer of Defendant on December 20, 2024.

On December 16, 2024, the Court held a hearing on the motions of Appellant and Respondent. By Order dated January 24, 2025 the Court denied Respondent's Motion to Refer to a Master in Equity. The Court further denied Appellant's Motion for Partial Summary Judgment. The Court granted Respondent's Motion to Dismiss as to Appellant's Counterclaim of Misappropriation of Confidential Information on the ground "the claim does not exist or is otherwise duplicative of Defendant's First Counterclaim for Breach of Fiduciary Duties of Good Faith, Loyalty, and Confidentiality." The Court granted Respondent's Motion to Strike the Pleadings as to the second counterclaim of Misappropriation of Confidential Information. The Court further granted Respondent's Motion for Protective Order dated January 24, 2025, p.2. By Supplemental Order dated January 24, 2025 and filed on January 27, 2025 the Court amended its prior Order, dismissing Appellant's claim under the South Carolina Unfair Trade Practices Act on the "this case concerns a private transaction that does not affect the public interest." The Court's prior Order was otherwise unchanged. Supplemental Order of January 24, 2025 (filed 1/27/25), p.2.

On February 3, 2025, Appellant filed a Motion to Reconsider the Court's decision dismissing her fourth counterclaim alleging a violation of the South Carolina Unfair Trade Practices Act. On the same date Respondent filed a Motion to Reconsider on Court's decision on the first and third counterclaims.

On February 10, 2025 Respondent filed a Reply to the Appellant's Motion to Reconsider and Appellant filed a Memo in Opposition to Respondent's Motion to Reconsider. On February 13, 2025, Respondent filed a Brief in Response to Motion to Reconsider.

By Order dated March 24, 2025 the Court denied Appellant's and Respondents motions to reconsider. On March 31, 2025, Appellant filed a Notice of Appeal.

Standard of Review

"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 trial court... In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint.... If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory then dismissal under Rule 12(b)(6) is improper... Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (S.C. 1999). "A court may take judicial notice of 'matters of public record' without converting a motion to dismiss into a motion for summary judgment." Lee v. City of Los Angeles, 250 F. 3d 668, 689 (9th Cir. 2001). *See also* Mayer v. Belichick, 605 F.3d 223, 230 (3rd Cir. 2010).

Argument

I. The Trial Court Correctly Found That Respondent's Alleged Wrongs Did Not Affect The Public Interest Because There Was No Likelihood Of Repetition Where Plaintiff's Allegations Concerned Real Property In A Very Specific Location And Where An Alleged Prior Incident Was Over Twenty Years Ago And Involved A Dissimilar Breach Of Contract Action In Which No Judgment Was Ever Rendered.

The South Carolina Unfair Trade Practices Act generally prohibits unfair or deceptive acts or practices in business but does not define or describe what is "an unfair or deceptive act or practice." Section 39-5-20 of the South Carolina Code provides:

> (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
> (b) It is the intent of the legislature that in construing paragraph (a) of this section the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission

Act (15 U.S.C. 45(a)(1)), as from time to time amended. S.C. Code Ann. § 39-5-20 (2025)

Not all private wrongs are actionable under the South Carolina Unfair Trade Practices Act; only those which affect the "public interest" are cognizable. DeBondt v. Carlton Motorcars, Inc., 342 S.C. 254, 270, 536 SE 2d 399, 407 (S.C. Ct. App. 2000). "An unfair or deceptive act or practice has an impact upon the public interest if the act or practice has the potential for repetition." Id. at 270, 536 SE 2d at 407 (*quoting* Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (S.C. 1989)). However, our courts have recognized that not every repetition creates a cause of action for Unfair Trade Practice. In Turner v. Kellett, 426 S.C. 42, 49, 824 S.E.2d 466, 469-70 (Ct. App. 2019) the Court stated "In the course of human endeavor, every action has some potential for repetition".

The "potential for repetition" may be proved in several ways. As stated in DeBondt:

> There are two general ways to demonstrate the potential for repetition: (1) by showing the same kind of actions occurred in the past, thus making it likely the actions will continue absent some deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (S.C. 1998). These are not the only means of showing the potential for repetition, however, and each case must be evaluated on its own merits. Daisy Outdoor Adver. Co. v. Abbott, 322 S.C. 489, 497, 473 S.E.2d 47, 51 (S.C. 1996). DeBondt, 342 S.C. at 270, 536 SE 2d at 407.

A plaintiff cannot rely on generalized allegations to prove that "past actions" are "the same kind of actions" as those complained of by plaintiff and that therefore there is "likelihood" those actions will "continue." In Ameristone Tile, LLC v. Ceramic Consulting Corp., 966 F. Supp. 2d 604 (D.S.C. 2013) for example, the Court held that the generalized allegation "Defendants' acts have the potential for harmful effects to the public interest because they are capable of repetition" was insufficient to withstand a motion to dismiss under Rule 12(b)(6). Id. at 621-22. *See also* Skywaves I Corp. v. Branch Banking & Trust Co., 423 S.C. 432, 455, 814 S.E.2d 643, 655-56

(S.C. Ct. App. 2018)("Skywaves relied on its pleadings, which stated 'unfair acts and practices of [BB&T and Edahl] have an impact on the public interest, have potential for repetition.' Because Skywaves relied solely on the mere allegations in its complaint and did not provide further evidentiary support, BB&T and Edahl were entitled to summary judgment on the SCUTPA claim.")

A plaintiff must plead facts in sufficient detail to demonstrate that prior acts are the "same kind" of acts that are involved in plaintiff's current complaint; failure to do so will result in dismissal. For example, in PTA-FLA, Inc. v. ZTE Corp., 715 Fed. Appx. 237 (4th Cir. 2017), plaintiff contended "that it properly pleaded the third element of a SCUTPA claim—adverse public impact—by alleging that ZTE Corp.'s faulty shipment of base stations delayed PTA-FLA's attempts to bring affordable wireless service to South Carolina residents and that ZTE Corp.'s actions had the potential for repetition based on the company's procedures and five examples of similar acts." Id. at 242-43. The lower court "found that the other acts alleged by PTA-FLA to show potential for repetition did not involve deceptive shipments and thus were not similar in kind to the deceptive practice at issue." Id. at 243. The Court of Appeals affirmed the dismissal pursuant to Rule 12(b)(6), holding "although PTA- FLA alleges five other instances of deceptive practices by ZTE Corp., none is similar to the one on which PTA-FLA bases its SCUTPA claim." Id.

Similarly, in Miller v. Fairfield Communities, Inc., 299 S.C. 23, 382 SE 2d 16 (S.C. Ct. App. 1989), plaintiffs "argue[d]... the public interest involved... is the fair and competitive marketing of real estate on Edisto Island. They further argue[d] a reasonable inference can be drawn that Fairfield intended to injure the Lyons Company from the fact that another Fairfield employee was fired because his wife too worked for a competitor." Id. at 29, 382 SE 2d at 20. The Court held "[s]ince the firing of the other employee was apparently justified under the

circumstances, Mr. Miller's alleged constructive firing was simply an isolated incident." Id. at 29, 382 SE 2d at 20.

In contrast, detailed allegations by plaintiff of ***actual judgments*** for the ***same*** wrongful acts in the past are sufficient to survive motion to dismiss. In Burbach v. Investors Management Corp., 326 S.C. 492, 484 S.E.2d 119 (S.C. Ct. App. 1997), for example, plaintiff alleged that defendant landlord wrongfully refused to return his deposit. He alleged that the landlord had wrongfully refused to return other tenants' deposits in the past and that therefore there was a likelihood these actions would continue into the future. Finding the fact that other tenants had obtained judgments against the landlord to be persuasive, the Court held:

> [t]he problems experienced by the Burbachs are not isolated events. At least several other tenants experienced similar problems. The other tenants not only complained, ***but also received judgments.*** At least one case involved unfair trade practices. Clearly, the landlords' behavior is capable of repetition. Id. at 497, 484 S.E.2d at 121 (*Italics* in original).

In determining whether there is a likelihood of repetition, the Court considers whether the facts as alleged by plaintiff are so unique or rare that they are unlikely that they will recur. In FV-I, Inc. v. Dolan, No. 2017-UP-031, 2017 S.C. App. Unpub. LEXIS 36 (S.C. Ct. App. January 11, 2017), for example, the Court held:

> Here, the Dolans failed to show FV-I's alleged wrongful misrepresentation of the amount required to bring their mortgage current occurred prior to the Dolans working with FV-I, and they failed to show it was likely to occur again in the future... ***the circumstances underpinning the Dolans' efforts to bring their mortgage current by selling a portion of their property were rare and are unlikely to repeat.*** Therefore, we find the Dolans failed to show FV-I's actions affected the public interest... Id. at *9-10 (motion for directed verdict – emphasis added).

Similarly, where plaintiff's allegations focus on real property, the court considers whether the unique qualities of the real property affect the likelihood that the misrepresentation or action will be repeated and thereby affect the public interest. As in this real estate case, the relationship

of Allen and Watson affected only those two parties and specific real estate but did not affect any other member of the public and, therefore, no public interest would be involved. Carolina Real Est. Holdings, LLC v. Brilin Elec., LLC, 919 S.E.2d 918 (Ct. App. 2025). In Zeeman v. Black, 156 Ga. App. 82, 273 SE 2d 910 (Ga. Ct. App. 1980), plaintiff alleged that defendant had represented that the property being purchased had 2.78 acres when in reality it only had 1.65 acres. The Court found "The misrepresentation related to a unique, nonfungible item, real property, and was specifically addressed to the inherent nature of that nonfungible property, the area encompassed within boundaries known to the Zeemans, and not a matter which was hidden, altered or otherwise unapparent on its face." Id. at 86, 273 SE 2d at 916. The Court held "[a] single oral misrepresentation made in the context of an isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on the consumer marketplace." Id.

Likewise, where a plaintiff's allegations focus on the actions of an attorney, a plaintiff must do more than simply allege that defendant is still in practice and therefore his actions are likely to repeat; plaintiff must make specific allegations of the ***same*** conduct in the past. In Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (S.C. Ct. App. 1999), Judge Connor, in a concurring opinion, held:

> Cowart alleges Poore's actions were "unfair and deceptive trade practices" and "subject to repetition as [Poore] was in the business of practicing law at the time . . . this action arose and is still in business." Cowart has not alleged any facts indicating the potential for repetition. Id. at 367-68, 523 S.E.2d at 186-87.

This Court should deny the Appeal and affirm the finding of the Circuit Court that Respondent Kellum Allen's actions were unlikely to repeat and therefore did not affect the public interest. Appellant alleges Respondent's actions are "capable of repetition because he continues to practice law in South Carolina, represents naïve, uninformed, and trusting clients, owns property with other relatives in Richland County, and remains willing to conduct business with those

relatives and clients." Under Cowart, Ameristone, and Skywaves I, this vague and conclusory allegation is insufficient to withstand a motion to dismiss and the Court has indicated the same. See *Turner v. Kellett,* 426 S.C. 42, 49, 824 S.E.2d 466, 469-70 (Ct. App. 2019) which indicates that "The mere proof that the actor is still alive and engaged in the same business is not sufficient to establish this element."

Appellant has alleged a very unique and rare set of facts that are unlikely to recur. In her Amended Complaint, she has alleged that the Respondent was aware that her property was going to be used for a new school. In paragraphs 8(f) and 61 she alleges Respondent had superior knowledge of "public interest in the lands in light of public comments made by officials of Richland School District Two regarding the possible construction of a $140 million high school on lands adjoining those of the Plaintiff and his siblings." She alleges that this knowledge was the reason for Respondent's interest in the property. She further alleges that Appellant had represented her in a domestic action, knew her vulnerable, naive state. In order for this situation to repeat, Respondent will need to have a client or former client[1] who: (1) owns land in the area where the Richland School District is planning to build a school; (2) is particularly vulnerable or naive; (3) is unaware of public statements of the School District of interest in the property. This set of facts is so rare, involving real property with qualities so unique that it is unlikely to repeat. The circuit court clearly did not err.

Finally, Appellant alleges that the actions were capable of repetition because "the Plaintiff and three of his law partners entered into a business transaction with a client named Dial Rawl and

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[1] Appellant and Respondent dispute whether the Appellant was an actual client or a former client at the time of the execution of the option. It is a matter of public record, however, that the final entry of divorce was entered prior to the execution of the option. Shannon v. Shannon, 292 S.C. 112, 117, 355 S.E.2d 4, 6 (S.C. Ct. App. 1 987). Divorce representation ends when a final decree of divorce is entered. *See* 7 Am Jur 2d *Attorneys at Law* § 170 (2017).

tried to enforce the contract despite the fact that the Plaintiff and his law partners had breached their fiduciary duties to him in entering into that contract without full disclosure and written, informed consent. Appellant in her pleadings concedes that there was no judgment in Mr. Rawl's case as in Burbach; the case was settled or withdrawn for reasons only known to the parties. The strengths and weaknesses of the cases of each party's case are unknown. There are many types of contracts involving many different facts and issues. Appellant's allegations regarding this case are far too generalized and vague to withstand a motion to dismiss.

Finally, and perhaps most significantly, the one case Appellant cites as evidence that Respondents actions are likely to recur took place in 2000, ***over twenty years ago***. Assuming, without conceding, that the circumstances surrounding the 2000 complaint were similar to the circumstances of this case, the recurrence is incredibly infrequent and rare; they are not "likely to repeat" for purposes of the South Carolina Unfair Trade Practices Act. The Court of Appeals should affirm the ruling of the Circuit Court.

II. The Trial Court Properly Held That There Was No Cause of Action For Misappropriation Of Confidential Information In Either A Former Or Present Attorney-Client Relationship.

South Carolina does not recognize a tort of Misappropriation of Confidential Information. Appellant has not cited a single South Carolina case recognizing a tort of Misappropriation of Confidential Information in the attorney-client relationship. Nor has Appellant cited a single case from another state recognizing this tort.

In the context of the attorney-client relationship, the Court has only considered misappropriation of ***client funds*** in the context of disciplinary proceedings. *See* In re Ruffin, 363 S.C. 347, 610 SE 2d 803(S.C. 200); In re Thompson, 343 S.C. 1, 539 SE 2d 396 (S.C. 2000). A client can recover converted funds under other legal theories.

Courts in general recognize a tort of misappropriation in the context of ***intellectual property.*** The elements of this tort include:

> (i) the plaintiff generates or collects information at some cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened. Richard A. Posner, "Misappropriation: A Dirge," 40 Houston L.Rev. 621 (2003)(*citing* NBA v. Motorola, Inc., 105 F.3d 841, 852 (2d Cir. 1997)).

Courts have also recognized misappropriation in the context of "insider trading." Aldave, Barbara Bader, "Misappropriation: A General Theory of Liability for Trading on Nonpublic Information," 13 Hofstra L. Rev. 101 (1984). Corporate securities are a heavily regulated field and should not serve as the basis for the recognition of a new tort.

This Court should not recognize a tort of misappropriation of confidential information in the attorney client relationship. No court in this state has recognized the tort.

Even were this Court inclined to be the first court in the country to recognize such a tort, this case does not present facts that are conducive to recognizing a new tort. Appellant contends that Respondent learned of her property through representing her, yet ownership of property is a matter of public record and not confidential information. She also contends that Respondent learned of her fragile emotional state through representing her and took advantage of this knowledge in obtaining the option, but such information was hardly generated through Appellant's effort or expense; it is not the type of information that is protected by the Court.

This case also is not appropriate to recognize a new tort because it is based on a faulty factual premise. Appellant contends that Respondent represented her in a domestic matter from May 1, 2016 through October 2022, yet it is a matter of public record that the final entry of the divorce decree was in 2017 and the option was executed on August 15. 2022.

In South Carolina divorce representation ends when a final decree of divorce is entered. *See* 7 Am Jur 2d *Attorneys at Law* § 170 (2017). "The attorney-client relationship terminates after the judgment of divorce is entered." Shannon v. Shannon, 292 S.C. 112, 117, 355 S.E.2d 4, 6 (S.C. Ct. App. 1987). *Compare* Floyd v. Kosko, 285 S.C. 390, 393, 329 S.E.2d 459, 460 (S.C. Ct. 1985)

Appellant has argued in its brief that Respondent owed her a fiduciary duty based on the fact that he was ***currently*** serving as her attorney at the time the option was executed. In her brief, she discusses various duties owed by attorneys to their ***current*** clients, such as Rule 1:8 of the Rules of Professional Conduct,[2] yet the duties owed by Respondent to Appellant were those of attorney to ***former*** client; Appellant's lengthy argument is based on a standard that does not apply to Respondent. This Court should deny the appeal and affirm the lower court's determination that there is no tort of misappropriation of confidential information.

III. The Trial Court Properly Held That The Second Counterclaim For Misappropriation of Confidential Information Was Duplicative Of The First Cause of Action For Breach Of The Fiduciary Duty Of Confidentiality.

A claim of breach of the fiduciary duty of good faith and a claim for attorney negligence cannot be raised in the same action. In Hood v. United Servs. Auto Ass'n, 445 S.C. 1, 910 S.E.2d 767 (S.C. 2025), an insurance company was sued for both negligence in representing its insured in an auto accident case as well as for breach of its fiduciary duty of good faith. The Court found that both actions could not be maintained simultaneously, holding:

> South Carolina's case law contemplates negligence as merely evidence for a bad faith claim. *See* Nichols, 279 S.C. at 342, 306 S.E.2d at 620 (holding the jury was entitled to consider negligence on the issue of unreasonable refusal to pay benefits). At its core, negligence law is grounded in reasonableness. *See* Hart v. Doe, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973) (defining negligence as "the failure to use due care," i.e., "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances" (emphasis

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2 Rule 1:8 of the Rules of Professional do not establish a standard of care and cannot be the basis of civil liability, but they can provide interpretive guidance. Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (S.C. 2011).

> added)). We have also stated that an insured can show a breach of the duty of good faith and fair dealing through evidence of "bad faith or unreasonable action." Nichols, 279 S.C. at 340, 306 S.E.2d at 619. ***However, our invoking reasonableness when establishing the duty of good faith and fair dealing only sets the evidence available to prove that duty's breach, not that negligence is another claim parties may use to enforce it.*** Id.; *see* Cock-N-Bull Steak House, Inc. v. Generali Ins., 321 S.C. 1, 6, 466 S.E.2d 727, 730 (1996) ("An insured may recover damages for a bad faith denial of coverage if he or she proves there was no reasonable basis to support the insurer's decision to deny benefits under a mutually binding insurance contract." (*quoting* Dowling v. Home Buyers Warranty Corp., II, 303 S.C. 295, 297, 400 S.E.2d 143, 144 (1991))).
>
> Here, all of Hood's claims focus on (1) how USAA represented Hood in the Kuck Action against Hood and how it represented its own interests against Hood in the UIM Action; (2) how USAA's representatives treated Hood during mediation of the UIM Action; and (3) whether USAA breached its internal policies for litigation and mediation. All of these acts stem from the insurance contract. ***Thus, all these arguments fall under Hood's contract's scope and lead to one viable tort claim: bad faith. A negligence action would be entirely duplicative of that claim.*** Corp., II, 303 S.C. 295, 297, 400 S.E.2d 143, 144 (1991))). *See* RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012) (holding a ***breach of fiduciary duty claim was duplicative of a legal malpractice claim because a client's claim for breach of fiduciary duty arose out of the duty inherent in the attorney-client relationship and the same factual allegations*** and therefore failed as a matter of law). Id. at 10-11, 910 S.E.2d at 772 (emphasis added).

See also RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (S.C. 2012); Skinner v. Horace Mann Ins. Co., 369 F. Supp. 3d 649 (D.S.C. 2019) ("the amended complaint fails to state plausible claims for negligence/gross negligence and negligence per se. As for negligence/gross negligence, the crux of this cause of action is that Defendant was negligent in processing, handling, and adjusting Plaintiff's claim against Poston and that Defendant's conduct was a 'breach of the covenant of good faith and fair dealing.' See Am. Compl. at ¶¶ 47-53. The negligence/gross negligence claim is duplicative of the bad faith claim, and as other judges in this District have recognized, a freestanding claim of negligence is improper.")

Courts in other jurisdictions have followed this logic and reasoning. In Cox-Ott v. Barnes & Thornburg, LLP, 321 Ga. 688, 915 S.E.2d 894 (Ga.2025), plaintiff claimed that her attorney was

negligent in his representation of her. The trial court discussed the nature of the duty in a legal malpractice action. The Georgia Supreme Court found:

> Before turning to the particulars of the judgmental immunity doctrine, it is helpful to contextualize our discussion with a consideration of the broader framework applicable to legal malpractice claims. An action for legal malpractice is a species of professional malpractice, and as we have explained, "[a] professional malpractice action is merely a professional negligence action and calls into question the conduct of a professional in his area of expertise." Lutz v. Foran, 262 Ga. 819, 820 (2) (427 SE2d 248) (1993) (citation and punctuation omitted) (superseded by statute on other grounds). ***As a general matter, a claim for legal malpractice arises from "the breach of a duty imposed by the contract of employment between the attorney and the client[.]"*** Villanueva v. First American Title Ins. Co., 292 Ga. 630, 631-632 (740 S.E.2d 108) (2013); Lewis v. Foy, 189 Ga. 596, 600 (6 S.E.2d 788) (1940) (an attorney's duty to act in accordance with the standard of care arises from the attorney-client relationship). Id. at 689-90; 915 S.E.2d at 897 (emphasis added)

This Court should affirm the finding of the lower court that the second cause of action for misappropriation of confidential information is duplicative of the first cause of action for professional negligence based on an alleged breach of "the fiduciary duties of good faith, loyalty, and confidentiality." This case presents an even stronger case than Hood, RFT Mgmt. Co., and Cox-Ott. Unlike Hood and RFT Mgmt. Co., where the courts examined the nature of the duty in an action for breach of good faith and the duty in a cause of action for professional negligence, finding that both duties are rooted in contract and the ***same*** contract based duty, in this case there is a specific fiduciary duty of ***confidentiality*** which serves as the basis for ***both*** a cause of action for professional negligence and a cause of action for "misappropriation of confidential information." Ordinarily a person owes no duty of confidentiality to another person; the duty in this case was created by the contract-based fiduciary duties of an attorney-client relationship.

Further, both claims for breach of the fiduciary duty of confidentiality and the claim for misappropriation of confidential information are based on the ***exact same facts.*** Given the fact that both claims are based on the same set of facts and arise out of the same legal duty, this Court

should find that the trial court did not err in dismissing the second cause of action for misappropriation of confidential information as duplicative of the negligence cause of action.

IV. Appellant Has Not Preserved Any Public Policy Grounds For Proving A Public Interest Because They Were Not Ruled Upon By The Trial Court And Not Raised in Petitioner's Motion for Reconsideration, And Any Public Policy Grounds Are To Vague To Be Cognizable By The Court.

"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. A party ***must file*** such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 SE 2d 772, 780 (S.C. 2004). *See also* Metts v. Mims, 384 S.C. 491, 499, 682 S.E.2d 813, 817-18 (S.C. 2009). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." Elam, 361 S.C. at 23, 602 SE 2d at 779-780.

As discussed more fully above, a Plaintiff cannot rely on generalized allegations to support a likelihood of repetition. *See* Skywaves I Corp. v. Branch Banking & Trust Co., 423 S.C. 432, 455, 814 S.E.2d 643, 655-56 (S.C. Ct. App. 2018); Ameristone Tile, LLC v. Ceramic Consulting Corp., 966 F. Supp. 2d 604 (D.S.C. 2013). A plaintiff must make specific allegations.

A violation of an ethical rule will not support, in and of itself, civil liability for damages. The South Carolina Rules of Professional Conduct cannot be used to bar an action in equity. The Scope section of the Rules provides, in part:

> [7] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. ***They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules***

> ***can be subverted when they are invoked by opposing parties as procedural weapons.*** Scope, RPC, Rule 407, SCACR (2024) (emphasis added)

Courts in other jurisdictions have directly held that a violations of ethical rules will not support civil liability. *See* In In re Estate of Pedrick, 505 Pa. 530, 482 A.2d 215 (Pa. 1984)(will case); M.A. Mills, P.C. v. Kotts, 640 S.W.3d 323, 331 (Tex. Ct, App. 2022)("These rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached.

This Court should find that Appellant's allegations that the "public interest" is affected on public policy grounds was not preserved for appeal because it was not ruled upon in the lower court and not raised in Appellant's Motion for Reconsideration. Appellant has alleged "[t]he Plaintiff's actions affect the public interest in that they have reduced the public's confidence in the South Carolina justice system and the South Carolina Bar" and "[t]he Plaintiff's actions also affect the public interest in that they are violations of the South Carolina Rules of Professional Conduct and not merely violations of common law fiduciary duties." Amended Answer and Amended Counterclaims, ¶¶ 66, 67. Neither of these issues were addressed in the Court's Order of January 24, 2025 or its Supplemental Order of January 24, 2025. In Appellant's Motion to Reconsider, it asserted "[t]he public policy of the State of South Carolina requires a lawyer to obtain his client's informed consent before engaging in a business transaction with that client. Rule 1.8(a), SCRPC" Defendant's Motion to Reconsider, p. 5. Appellant did not raise the issue of the undermining of public confidence in the legal system in her Motion to Reconsider. This Court should find that this issue is not preserved for appeal because it was not raised before the lower court.

This Court should further find that the allegation of reduced public confidence in the legal system is far too broad to support a finding that public policy supports liability under the South

Carolina Unfair Trade Practices Act. In theory, ***ANY*** misunderstanding between an attorney and his client would support an action under the Act. This "public policy" would eviscerate the "public interest" requirement when it comes to attorneys.

Similarly, Appellant's claim that a violation of Rule 1.8 of the Rules of Professional Conduct violates public policy and therefore affects the "public interest" for purposes of the South Carolina Unfair Trade Practices Act is without merit. First, as discussed more fully above, Appellant is a ***former*** client of Respondent, NOT a current client. It is a matter of public record that the final decree of divorce was entered ***before*** the execution of the option. The court can consider matters of public record in deciding a motion to dismiss. Rule 1:8(a) applies only to ***current*** clients. The argument is not germane to the issues before this Court.

Second, it may be the public policy of the state to hold attorneys professionally accountable through a state board of ethics, but it is an ***entirely different*** thing to say it is the public policy of the state to create a ***private cause of action*** for monetary damages, punitive damages, and attorneys fees based upon a violation of a rule of ethics. The Rules themselves warn against such a dangerous leap. The Scope section specifically states the Rules of Professional Conduct ***"are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."*** The purpose of the Rules of Professional Conduct would be "subverted" if this court were to hold Rule 1:8 can support a claim for monetary damages.

Conclusion

For the reasons stated above, Respondent Kellum Allen respectfully requests this Court to affirm the decision of the trial court and dismiss Counterclaims 1 and 3 of the Amended Answer and Amended Counterclaim.

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