STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Robert Chimento, Plaintiff, v. Lawrence E. Richter, Jr., David K. Haller, Richter and Haller, LLC, The Bishop of Charleston, A Corporation Sole; and Robert E. Gugliemone, Bishop of Charleston, Defendants.	C/A No.: 2018-CP-10-5802 **ORDER ON LAWYER DEFENDANTS' MOTIONS TO DISMISS**

THESE MATTERS CAME BEFORE THE COURT for an in-person hearing at the Charleston County Courthouse on October 7, 2025, on motions of Defendants Lawrence E. Richter, Jr., David A. Haller and Richter and Haller, LLC ("the Lawyer Defendants") to dismiss pursuant to Rule 12, SCRCP. At the hearing, Gregg E. Meyers, Esquire appeared on behalf of the Plaintiff. Benjamin C. Bruner, Esquire appeared on behalf of Defendants Lawrence E. Richter and Richter & Haller, LLC. John E. Cuttino, Esquire appeared on behalf of Defendant David K. Haller. After careful consideration of the materials filed and the arguments of the parties, the Court finds the Lawyer Defendants' Motions to Dismiss should be GRANTED.

FACTUAL & PROCEDURAL BACKGROUND

This action is the ninth one filed in Charleston County against the Lawyer Defendants arising out of a 2007 class action settlement in which the Lawyer Defendants served as class counsel involving sexual abuse claims against the Bishop of Charleston, a Corporation Sole, and The Bishop of the Diocese of Charleston, in his official capacity ("the Diocese"). In this case, the Plaintiff does not allege any claim against the Diocese related to the sexual abuse he alleges to have suffered. Instead, he alleges a claim against the Lawyer Defendants for professional negligence and breach

of fiduciary duty in connection with their handling of the class action cases. Against the Diocese, the Plaintiff alleges only aiding and abetting breach of fiduciary duty.

In his Complaint, Chimento alleges he was a non-resident of South Carolina and an absent class member in the underlying class action ("Underlying Case") who was sexually abused by a priest of the Diocese of Charleston between 1973 and 1975. (Compl. ¶¶ 1, 11, and 12.) He alleges the Lawyer Defendants "(a) pled a class action in 2005, (b) settled that class action in 2006, and (c) sought, and obtained, class certification in 2007 by a South Carolina court as part of that class action. The classes defined in that action included a class of individuals who were sexually abused by persons employed by the Bishop of Charleston." (Compl. ¶ 13.)

Plaintiff was not one of the named parties in the underlying class action. Rather, he was an absent class member to whom the Lawyer Defendants "assumed" fiduciary duties "[i]n pleading the class action, as a matter of law[.]" (Compl. ¶ 15.) Plaintiff further alleges, "Presently an order from a trial court maintains that no fiduciary duty was imposed by law on the [Lawyer Defendants] as to the plaintiff or any other absent class member, so to that extent this complaint overtly depends on the outcome of an appeal presently pending in the South Carolina Court of Appeals. However, this complaint also alleges that the [Lawyer Defendants] voluntarily assumed a fiduciary duty as to the plaintiff, which was breached." (Compl. ¶ 15.)

The Order to which the Plaintiff refers is an August 11, 2017 Order by Judge Nicholson granting the Lawyer Defendants summary judgment in eight consolidated cases brought by Plaintiff's counsel on behalf of ten other individuals.[1] The parties all acknowledge the appeal to

[1] C/A Nos. 2010-CP-10-5520, 2010-CP-10-7233, 2012-CP-10-5559, 2013-CP-10-3733, 2013-CP-10-4175, 2013-CP-10-4176, 2015-CP-10-5486, and 2016-CP-10-1632.

which the Plaintiff refers is Appellate Case No. 2017-001996, in which the Court of Appeals affirmed Judge Nicholson's 2017 Order.[2]

Plaintiff filed his Complaint on December 6, 2018. (Compl. at 1.) Attached to the Complaint was the Affidavit of Michael J. Virzi dated December 5, 2018.

On May 1, 2019, Haller moved to dismiss based upon Judge Nicholson's Order and the Plaintiff's failure to satisfy the expert affidavit requirement in S.C. Code Ann. 15-36-100. (Haller Motion to Dismiss served May 1, 2019, and filed May 6, 2019, at 1-2.) Haller attached Judge Nicholson's August 11, 2017 Order and the notice of appeal to the motion as exhibits.

Also on May 1, 2019, Richter and Richter & Haller, LLC moved to dismiss on the same grounds as Haller's motion. (Richter Motion to Dismiss served May 1, 2019, and filed May 3, 2019.) They also attached Judge Nicholson's Order to their motion as an exhibit.

On September 24, 2019, the Court scheduled the Defendants' motions for a hearing to take place on October 30, 2019. On October 27, 2019, Plaintiff filed a memorandum opposing the Defendants' motions to dismiss. He also re-filed the December 2018 affidavit from Virzi along with the missing 2016 affidavit that had been omitted when the Complaint was filed. Plaintiff also filed an August 31, 2007 Order in the Underlying Case.

In his memorandum Plaintiff argued,

> Richter, Haller, and their firm were class counsel for a 2007 class action settlement. Complaint ¶ 12. The plaintiff was an absent member of that class, as he resided out of state, Complaint ¶ 1, where there was no advertising made of the class action. As noted above in Complaint ¶ 16, the lawyer defendants voluntarily assumed fiduciary duties to the plaintiff and other absent members of the class. See generally, Complaint ¶¶ 15 to 19.

(Pl. Memo. Opp. at 2, October 28, 2019.)

[2] The appeal did not reach the Supreme Court.

The October 30, 2019, hearing proceeded as scheduled. However, before the presiding judge ruled on the motions, the Supreme Court issued an Order appointing the Honorable J. Derham Cole to preside over the remaining of the proceedings in this case.[3]

On June 1, 2022, the Plaintiff submitted a twenty-three-page memorandum in opposition to the motions along with 275 pages of exhibits.[4] In his brief, the Plaintiff argued his claims "arise out of the conduct of a class action lawsuit" where "[t]he [Lawyer Defendants] and their firm were class counsel." (Pl.'s Consolidated Memorandum Opp. Defendants' Motions, June 1, 2022, at 2.)

On April 30, 2024, Plaintiff filed a Notice of Supplemental Authority in opposition to the Lawyer Defendants' motions together with fifty-nine pages of exhibits.

On September 10, 2025, the Supreme Court reassigned the case to the undersigned.[5] After being assigned to the case, the Court scheduled a hearing for October 7, 2025. Prior to the hearing, the Lawyer Defendants and the Plaintiff submitted additional briefing and other materials, including the record from the Underlying Case and the record from the appeal of Judge Nicholson's Order.

At the October 7th hearing, counsel for the parties appeared in person and argued the Lawyer Defendants' motions thoroughly. The Court noted the materials the Lawyer Defendants had provided (Tr. p. 5, lines 14 – p. 6, line 1, page 6, lines 7-10)), and both sides presented arguments based on the Complaint and additional materials they had submitted. For example, arguments on behalf of the Lawyer Defendants included the following,

- "I implore, your Honor, to read in detail the August 11, 2017 Order granting summary judgment to the lawyer defendants." (Tr. p. 11, lines 2-4);

[3] While the presiding judge entered an Order granting the defendants' motions, he vacated that Order upon Plaintiff's Motion to Alter or Amend after the Supreme Court's Order was brought to his attention.
[4] Plaintiff's Consolidated Memorandum Opposing Defendants' Motions, June 1, 2022.
[5] Order entered September 10, 2025 in Appellate Case 2020-001415.

- "We have transcripts of these [class action settlement] hearings. This was not done behind closed doors in the conference room. The transcripts of these hearings we've provided many of the transcripts to your Honor, and -- and I want your Honor to read those to see the work that Judge Goodstein put into this -- this settlement and approving it and ensuring it was fair." (Tr. p. 11, lines 18-23);

- "Judge Nicholson rejected that in his well-reasoned decision. And I will note that on appeal in a per curiam decision, the Court of Appeals rejected the arguments to -- to overturn Judge Nicholson's Order. In particular – in particular, the Court of Appeals affirmed that Order based on the lack of a proximate cause." (Tr. p. 13, lines 8-13);

- Facts surrounding the March 2009 Orders of the Supreme Court and of the Class Action Court (Tr. p. 43, line 18 – p.45, line 14.); and

- "With the Court's permission, I -- I may look back in that folder and make sure all these transcripts are, in fact, uploaded, if that's okay with plaintiff's counsel." (Tr. p. 57, lines 17-20).

In response, Plaintiff's counsel argued, *inter alia*,

- "And we also [briefed] all the questions pretty extensively in the three different cases, and submitted a number of materials to the Court, particularly in the [Chimento and] 304 filings. They were filed jointly. So appear in each case." (Tr. p. 27, lines 1-5);

- "that issue could be addressed conceivable in the appeal that's going up now from the class action." (Tr. p. 29, lines 12-13);

- "they ignored the Supreme Court's Order in 2009 to close the class." (Tr. p. 29, lines 14-15);

- "and then they reach this agreement to not give any notice to people outside the state." (Tr. p. 30, lines 5-6);

- "This is what Judge Nicholson didn't talk. He decided he could ignore the two appellate decisions, Green and Premium Investment, and just focus on one paragraph in one of the complaints in Dorchester County." (Tr. p. 31, lines 7-10);

- "So the weakness of Judge Nicholson's theory if the Court adopts it and -- you throw me out, but the weakness of Judge Nicholson's theory is that he didn't work with what the -- how the class was defined, how it was approved by the Court." (Tr. p. 31, lines 11-15);

- "That is that in 2013, in response to a motion from class counsel, Judge Dixon, in Dorchester County, determined that the class action, in fact included people from out of state." (Tr. p. 31, lines 20-23)

- "But now we have a problem where the class counsels your right for part of the class, totally excluded everybody who lived out state by changing the notice provision from nationwide notice to state-only notice. (Tr. p. 33, lines 2-6);

- "I did not plead that in the earliest cases because you have to ignore a couple of Supreme Court cases that impose that as a matter of law. But those have been ignored and -- by Judge Nicholson [and the] Court of Appeals." (Tr. p. 36, lines 16-19.)

- "But listen, Judge, this is a very complicated record. These are pretty complicated civil procedure issues turning on very unusual questions of class action practice." (Tr. p. 54, lines 8-11.); and

- "Judge, do you want the transcript as a prelude to our sufficiency on the jurisdiction?" (Tr. p. 58, lines 3-4).

Following the hearing, the Court took the motions under advisement.

On November 6, 2025, the Court entered a Form 4 Order granting the motions and directing, "Defense counsel is to prepare a formal Order within 10 days." The Court subsequently extended defense counsel's time to provide the proposed Order to permit time for defense counsel to receive the transcript of the hearing.

Having carefully considered the motions, the supporting and opposing memoranda and additional materials submitted by the parties, the arguments of counsel, and applicable law, I find and conclude the Lawyer Defendants' motions should be granted.

STANDARD

"Under Rule 12(b)(6), SCRCP, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 148, 714 S.E.2d 537, 539 (2011) (citing *Spence v. Spence*, 368 S.C. 106, 116, 628

S.E.2d 869, 874 (2006)). "In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint." 394 S.C. at 148, 714 S.E.2d at 539 (citing *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007)). The court may also consider documents incorporated by reference or attached to the complaint when considering a Rule 12(b)(6) motion. *Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d, 824, 826 (2009) ("In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based."). "Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Hobbs*, 394 S.C. at 148-49, 714 S.E.2d at 539 (citing *Doe v. Marion, supra*). "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*.

"If, on a motion . . . to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12, SCRCP. Under Rule 56, SCRCP, "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." *Patterson v. Witter*, 425 S.C. 213, 226, 821 S.E.2d 677, 684 (2018) (quoting Rule 56(c), SCRCP). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to

the nonmoving party." *Patterson*, 425 S.C.at 226, 821 S.E.2d at 684 (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Patterson*, 425 S.C.at 226, 821 S.E.2d at 684 (quoting *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995))).

ANALYSIS

"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., L.L.C. 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, 646, 675 S.E.2d 431, 433 (2009); *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435 n.2, 472 S.E.2d 612, 613 n.2 (1996). Similarly, "[t]o establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co.*, 399 S.C. at 335-36, 732 S.E.2d at 173 (citing *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004), *and Spence v. Wingate*, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011) ("Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship.")

The Lawyer Defendants move for dismissal based upon Judge Nicholson's August 11, 2017 Order and deficiencies in the Plaintiff's expert affidavit. The Court finds the reasoning in Judge Nicholson's Order persuasive. In particular, the Plaintiff's allegations mirror those of other absent

class member plaintiffs who filed the prior cases which Judge Nicholson decided. Plaintiff even alleges his claim "overtly" depends on the outcome of the appeal of Judge Nicholson's Order. That appeal was decided in the Lawyer Defendants' favor.

Here, the Lawyer Defendants argue:

I. The Court of Appeals' decision is fatal to the Plaintiff's claim because he alleges his "complaint overtly depends on the outcome of an appeal presently pending in the South Carolina Court of Appeals," which affirmed Judge Nicholson's August 11, 2017 Order granting the Lawyer Defendants summary judgment;

II. The Plaintiff has failed to allege facts establishing an attorney-client or other fiduciary relationship existed between the Lawyer Defendants and the Plaintiff, who was an unnamed class members; and

III. The Plaintiff has failed to allege any damages proximately caused by the Lawyer Defendants.

The Court will address each of these arguments in turn.

I. The Effect of the Outcome of the Appeal Referenced in the Complaint.

In his Complaint, the Plaintiff alleges his claim "overtly depends on the outcome of an appeal presently pending in the South Carolina Court of Appeals." (Compl. ¶ 15.)

"It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." *Charleston Cnty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) (quoting *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992)). "Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position." *Id.*

As noted by the record, the appeal which the Plaintiff references in his Complaint was the appeal of Judge Nicholson's August 11, 2017 Order granting the Lawyer Defendants summary judgment in eight lawsuits filed on behalf of ten other plaintiffs, nearly all of whom also alleged to

be absent members of the same classes involved in the class action litigation against the Diocese. That appeal concluded with a per curiam Order affirming Judge Nicholson's Order. (Opinion, March 3, 2021, Appellate Case Number 2017-001996.) While the Plaintiff presented argument against Judge Nicholson's Order and the Court of Appeals decision affirming it, he is bound by his pleadings. Because the Plaintiff alleges his claim depends on the outcome of appeal, which was resolved in favor of the Lawyer Defendants, by his own admission the Plaintiff has no claim.

II. Lack of Attorney-Client or Fiduciary Relationship

The Lawyer Defendants also contend Plaintiffs' claims are barred because there was no attorney-client or fiduciary relationship with the Plaintiffs. In response, the Plaintiff contends an attorney-client or fiduciary relationship arose between the Lawyer Defendants and the Plaintiff at the time the lawyers filed the class action complaints in the Underlying Case. Alternatively, the Plaintiff alleges the Lawyer Defendants assumed a fiduciary duty. I find the reasoning set forth in Judge Nicholson's Order persuasive.

A. The Majority Rule.

The majority rule in the United States appears to be that class counsel does not represent unnamed, absent class members unless and until the class is certified. *Bobryk v. Durand Glass Mfg. Co.*, No. 12-cv-5360 (NLH/JS), 2013 U.S. Dist. LEXIS 145758, at *29-31 (D.N.J. Oct. 9, 2013) (noting "the majority of case law that holds that the attorney-client relationship with putative class members 'does not begin until the class has been certified and the time for opting out by a potential member of the class has expired'."); *Palumbo v. Tele-Communications, Inc.*, 157 F.R.D. 129, 133 (D.D.C. 1994) (stating class certification confers status of litigant on absent class members and creates attorney-client relationship with class counsel); *Garret v. Metro Life Ins. Co.*, No. 95-CIV-2406, 1996 WL 325725, at *6 (S.D.N.Y. June 12, 1996) ("before class certification, the putative

class members are not 'represented' by the class counsel."); *Formento v. Joyce*, 168 Ill.App.3d 429, 522 N.E.2d 312 (Ill. App. Ct. 1988) (finding that defendant attorneys owed no duty to plaintiffs, the unnamed members of an uncertified class action); *Restatement (Third) of the Law Governing Lawyers* § 99 cmt. l ("prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients"); *Resnick v. Am. Dental Ass'n*, 95 F.R.D. 372, 376 (N.D. Ill. 1982) ("Without question the unnamed class members, once the class has been certified, are 'represented by' the class counsel."); *Gillespie v. Scherr*, 987 S.W.2d 129, 1998 Tex. App. LEXIS 8089 (Tex. App. 1998) ("[W]e have found no case finding an implied attorney-client relationship to exist before class certification between an attorney who files the class action and any unnamed class members").

The majority rule is persuasive to this Court for several reasons. The identity of absent class members and the exact nature of their interests in the action is not known until class certification. 3 H. Newberg, *Class Actions* § 5050 (1977); *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 415, 100 S.Ct. 1202, 1218, 63 L Ed.2d 479, 502, 1980 U.S. LEXIS 12, *49, 29 Fed. R. Serv. 2d (Callaghan) 20 (U.S. Mar. 19, 1980). Similarly, in federal court, class counsel is appointed by the class action court when the class is certified. Fed. R. Civ. P. 23(c)(1)(B) ("An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)"). Under Rule 23(a), SCRCP, the heading specifies that there is no class action until the Court finds certain "Prerequisites".'[6] Only after class certification can the absent class members be bound to the outcome of the case.

[6] When the Underlying Case was filed and adjudicated, South Carolina had enacted Rule 23, SCRCP, drawn principally from Federal Rule 23.

In his Complaint, the Plaintiff alleges, "In pleading that class action, as a matter of law the Richter defendants assumed fiduciary duties to the Plaintiff[.]" (Compl. ¶ 15.) He later alleges fiduciary obligations "imposed by law on the Richter Defendants when they (a) pleaded a class defined so as to include the Plaintiff, and then (b) when the Richter defendants chose to reach a class settlement with a class defined so as to include the Plaintiff." He also argues he was intentionally omitted from the class notice procedure. Notably, the Plaintiff does not allege the Lawyer Defendants failed to follow the court-approved notice procedure or to follow the class action court's Orders. He alleges simply that the class as presented, and the notice plan, as designed, was "known to be under-inclusive."

At the time the class definitions and notice plan were presented to the class action court, the class had not been certified. It appears from the parties' submissions that in the Underlying Case, the Primary and Consortium Classes were not certified until January 19, 2007, when Judge Goodstein entered the Order Certifying Classes and Giving Preliminary Approval to Settlement. Prior to that, a decision was made between October 2006 and January 2007 to change the scope of the notice and that decision was made before Judge Goodstein signed the Order Certifying Classes and Giving Preliminary Approval to Settlement. Therefore, the very basis of Plaintiff's Complaint took place *before* the classes in the Underlying Case were certified – at a point in time when an attorney-client relationship did not exist between the Plaintiff and the Lawyer Defendants.

Applying the majority rule to the facts of the Underlying Case, there was no attorney-client relationship between the Lawyer Defendants and the Plaintiffs at the time the alleged duties were allegedly breached. Absent an attorney-client relationship, the Plaintiffs' claims for professional negligence must fail.

B. *Premium Investment Corp. v. Green*

Plaintiff posits that *Premium Investment Corp. v. Green*, *supra*, supports his contention that the attorney-client relationship and its attendant duties arose by operation of law when the Lawyer Defendants filed the class action complaints in the Underlying Cases. Plaintiff's counsel presented this same argument in the prior eight cases to no avail. The Court sees no reason to adopt a different approach here. *Premium Investment Corp.* was a constructive class certification case that predated Rule 23, SCRCP. In contrast, the Underlying Case at issue here was an actual certification case under Rule 23.

In *Premium Investment Corp.*, a lawyer filed a complaint on behalf of a homeowner "individually and as a representative of a class of property owners" against the developer of a subdivision. After a hearing, the trial court entered an order finding that the homeowner brought two class actions: (i) as a member of a class owning property adjoining the lake, and (ii) as a member of a class owning property in the subdivision. The court found in favor of the plaintiffs and enjoined the developer. The developer appealed, and the case settled while on appeal.

Years later, Premium Investment Corp., a property owner in the subdivision, sued the homeowner and the lawyer to recover the proceeds of the two settlements. The Court of Appeals affirmed the trial court's order granting relief to Premium Investment. In considering whether the underlying case was a class action the Court of Appeals agreed that "court certification of the class is an important step in a class action," observing:

> It represents a judicial finding that injured parties other than the named plaintiff exist. It also provides a definition by which they can be identified. Certification identifies and sharpens the interests of unnamed class members in the outcome; only thereafter will they be bound by the outcome. After certification, class members can be certain that the action will not be settled or dismissed without appropriate notice. *United States Parole Commission v. Geraghty,*

> *445 U.S. 388, 415 n. 8, 100 S. Ct. 1202, 1218 n. 8, 63 L. Ed. (2d) 479 (1980)* (Powell, J., dissenting).

283 S.C. 470, 324 S.E.2d at 76.

The Court of Appeals struggled to determine what constituted class certification where there was no formal or actual class certification and concluded that in the case at hand, where there was no formal certification order, the trial court had "constructively certified" the class when it identified "those persons with an interest in and entitled to benefit" from the action. 283 S.C. 471, 324 S.E.2d at 76. It found that certification had occurred simultaneously with the judgment on the merits.

Thus, *Premium Investment Corp*. stands for the proposition that where there is a class that has not been formally certified (like the formal certification contemplated in Rule 23, SCRCP), a lawyer's and a class representative's duties to absent class members arise with the constructive certification of the class. *Premium Investment Corp*. is in line with the majority rule that an attorney-client relationship does not arise between absent class members and class counsel until class certification. Since its adoption in 1985, Rule 23(a) has required specific prerequisites to certification and pursuit of a class action, while *Premium Investment Corp.*, which predates Rule 23, allows for constructive certification.

The materials referenced in the Complaint and submission of the parties leave no question that Judge Goodstein observed and adhered to Rule 23, SCRCP, during the Underlying Case, and nowhere does the Plaintiff allege or suggest the Underlying Case involved constructive certification. Therefore, constructive certification is not at issue before me, and *Premium Investment Corp.* does not apply.

C. Assumption of Fiduciary Duties

In an effort to save his claim, the Plaintiff alleges the Lawyer Defendants assumed fiduciary

duties by filing the class action complaints. That argument fails as a matter of law.

The question of whether a duty exists is an issue of law. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010); *see also RFT Mgmt. Co., supra.*

1. Fiduciary Duty

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335, 732 S.E.2d 166, 173 (2012). The Complaint contains no indication the Plaintiff imposed any degree of confidence in the Lawyer Defendants—or that he has ever corresponded with them at all. Rather, the Plaintiff alleges the alleged fiduciary duties derive from the Lawyer Defendants filing the class action complaints and making certain decisions prior to class certification. As discussed above, those filings did not create any attorney-client relationship. The Plaintiff does not allege any fact or circumstance outside of an attorney-client relationship giving rise to his fiduciary duty claim. Therefore, while he labels the duties as "fiduciary" and "assumed," they are duplicative of the attorney-client duties he alleges. *See RFT Mgmt, supra*. As stated above, the Lawyer Defendants had no attorney-client relationship with the Plaintiff and therefore owed him no duty as his attorney.

2. Voluntary Assumption of Fiduciary Duties to Absent Class Members

In an effort to circumvent the impact of there being no attorney-client relationship, the Plaintiff alleges the Lawyer Defendants assumed fiduciary duties toward him. While creative, that argument is not persuasive.

The question of whether a duty exists is an issue of law. *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols.*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010); *see also RFT Mgmt. Co., supra.* When a defendant—here, an attorney—is alleged to have assumed a duty, the issue is a mixed one of law and fact. *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007). "First, the court must determine, as a matter of law, whether the law recognizes a particular duty…If there is no duty, the defendant is entitled to a judgment as a matter of law." *Id*. (citing *Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996)).

In support of his argument, Plaintiff cites *Roundtree Villas Assn. v. 4701 Kings Corp.* and *Sherer v. James.* In *Roundtree Villas*, a property owners association sued six different defendants for construction defects. One of the defendants was a lender that had accepted deeds from the builder of the condominium building in lieu of foreclosure. The lender formed a limited liability company to take title to the units the builder had not sold, as well as the rights and common elements of the condominium project. *Roundtree Villas Assn. v. 4701 Kings Corp.*, 282 S.C. 415, 420, 321 S.E.2d 46, 49 (1984). The jury entered a general verdict of $300,000 against two of the defendants, including the lender, and the lender appealed. 282 S.C. at 419, 321 S.E.2d 46, 49. The Supreme Court held that while the lender was not liable for negligence on the part of any of the other defendants, it assumed a duty of care when it took over the project: "[W]hen the Lender, in effect, took over the project and undertook to market the units through a corporation it had created and when it undertook to repair defects which existed to promote sales, a common law duty to use due care arose." *Id*. at 423, 321 S.E.2d at 51 (citing Restatement (Second) of Torts § 323).

In *Sherer*, a plaintiff filed a medical malpractice claim alleging an amputation could have been avoided had the pediatrician, who was called on the phone, not failed to accurately diagnose the patient's condition. The Court recognized, "At common law, when there is no duty to act but

an act is voluntarily undertaken, the actor assumes a duty to use due care." *Sherer v. James*, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) (citing *Roundtree Villas, supra.*). The Court explicated on the history of the assumed duty theory and its roots in Section 323(a) of the Restatement. The Court held that under that section, an assumed duty is "a duty on one who undertakes to render services for the protection of another *to use due care* to avoid increasing the risk of harm." 290 S.C. at 407-08, 351 S.E.2d at 150 (emphasis in provided) (citing *Curry v. Summer*, 136 Ill. App. 468, 91, Ill. Dec. 365, 371, 483 N.E.2d 711, 717 (1985)). The Court emphasized that an assumed duty argument does not relax the burden of proof for a plaintiff in a professional malpractice case. 290 S.C. at 408, 351 S.E.2d at 151 ("We are unwilling to relax the plaintiff's burden of proof in a medical malpractice case. *See Hanselmann v. McCardle, supra*. A defendant physician is entitled to put the medical malpractice plaintiff to proof equally as stringent as that required of plaintiffs in other negligence actions.").

In a more recent opinion, the Supreme Court explained,

> "The recognition of a voluntarily assumed duty in South Carolina jurisprudence is rooted in section 323 of the Restatement (Second) of Torts (1965),[2] which provides:
>
> > One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
> >
> > (a) his failure to exercise such care increases the risk of such harm, or
> >
> > (b) the harm is suffered because of the other's reliance upon the undertaking.
>
> Under section 323, the voluntary undertaking does not create a duty of care unless (a) the undertaker's failure to exercise reasonable care in performing the undertaking increased the risk of harm to the plaintiff, or (b) the plaintiff suffered harm because she relied upon the undertaking.

Wright v. PRG Real Estate Mgmt., 426 S.C. 202, 213, 826 S.E.2d 285, 290-91 (2019) (citing *Roundtree Villas, supra* (holding a common law duty of care arose under section 323 when a lender undertook to market condominium units and to repair defects in those units); *and Sherer, supra* ("Section 323(a) simply establishes a duty on one who undertakes to render services for the protection of another to use due care to avoid increasing the risk of harm. We agree with this rationale.").

Applying these cases to the action at bar, the Court finds the Plaintiff's assumed duty theory is contrary to South Carolina law. Plaintiff alleges the Lawyer Defendants voluntarily assumed fiduciary duties by pleading the class action, by choosing how to define the classes, and by negotiating the class settlement. (Compl. ¶¶ 15, 17.) First, under the test set forth in section 323 of the Restatement, the Plaintiff has failed to allege any "physical harm." He alleges only monetary damages. Second, the Plaintiff does not allege or indicated in any way that he relied on the Lawyer Defendants' alleged undertaking, another key component of the test under section 323. Third, the authority in which Plaintiff relies is not for fiduciary duties but rather a duty of due care not to cause physical injury. Furthermore, as noted above, the fiduciary obligations which Plaintiff alleges the Lawyer Defendants assumed are duplicative of the duties "inherent in the attorney-client relationship," and they arise out of the same facts as his professional negligence theory. *See RFT Mgmt, supra*. Plaintiff has provided no authority supporting his argument that it is even possible for an attorney to "assume" fiduciary obligations to absent members of a purported class prior to class certification. Indeed, Plaintiff's argument appears to be based on a misapprehension of *Premium Investment* and Rule 23.

For these reasons, the Court finds the Plaintiff's argument that the Lawyer Defendants assumed fiduciary duties toward him fails as a matter of law.

III. Lack of Proximate Cause

In addition to other elements, the cause of action Plaintiff alleges requires proof of proximate cause. *RFT Mgmt. Co., supra.*

The crux of the Plaintiff's claim is that he was omitted from the class action settlement, which now precludes him from recovering for abuse he alleges he suffered at the hands of the Diocese. Even viewing the parties' submissions in the light most favorable to him, the Plaintiff has failed to articulate damages sustained due to the alleged legal malpractice. While the Plaintiff alleges the Lawyer Defendants "omitted" him from the settlement, his arguments and submissions in opposition to the Lawyer Defendants' motions to dismiss attempting to clarify his position show his claim depends on him being precluded from recovering from the Diocese. Those submissions and argument highlight the fundamental flaw in the Plaintiff's claim. During the hearing, Plaintiff's counsel argued,

> What we now know is that the Court interprets the orders of the class action to say "You don't get the relief of the class action, and here's the damage to you and to the absent class members. You now don't get the waiver of defense to your claim against the diocese. You got that benefit in class action to limitations charitable immunity." These are considerable defenses the diocese has. So, if I can make a claim against the diocese now -- which is questionable for each of my 304, and 305, and [Chimento] plaintiffs, I may encounter a defense that is fatal to my claim.
>
> When we get in the weeds on those claims, we'll know that -- but they -- I now have to confront those defenses only because the lawyers chose not to give them notice when they wanted to make sure they got paid first, and in full, and changed the class settlement to provide that for themselves.

(Tr. p. 35, line 22 – p. 36, line 6.) Contrary to Plaintiff's argument, the defense of charitable immunity does not apply to intentional torts like the sexual abuse claim Plaintiff alleges to have against the Diocese, *Doe v. Charleston*, 445 S.C. 31, 34, 911 S.E.2d 323, 324 (2025), and the Court is not required to accept as true Plaintiff's inaccurate legal conclusions. If anything, the Plaintiff's allegations, submissions, and arguments demonstrate that he is in the same position as he would be

in had there been no class action case at all. Absent damages, the Plaintiff has no claim against the Lawyer Defendants. *RFT Mgmt. Co., supra.*

IV. Law of the Case

In an April 30, 2024 filing, Plaintiff also argues that a December 17, 2013 Order from Judge Dickson is now the law of the case. The Order Plaintiff references was entered in the Underlying Case, not the case at bar. The Lawyer Defendants were not parties to the Underlying Case. Therefore, the law of the case doctrine does not apply. *Builders Mut. Ins. Co. v. Bob Wire Elec.*, Inc., 424 S.C. 161, 165, 817 S.E.2d 807, 809 (Ct. App. 2018) ("[T]he doctrine of 'law of the case' is just that—the law of the case in which it was made[.]") (citing *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96-97 (1999) (law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision"); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571-72, 776 S.E.2d 397, 403 (Ct. App. 2015) (collecting cases and noting law of case doctrine prohibits matters decided on appeal from being relitigated in the trial court in the same case). *See also Messenger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 56 L. Ed. 1152 (1912) ("[T]he phrase, 'law of the case,' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."); Wright & Miller, Fed. Prac. & Proc. § 4478 (2d. ed.) (law of the case rules "do not apply between separate actions").

CONCLUSION

Having considered the motions made and filed by the Lawyer Defendants, the supporting and opposing memoranda submitted by the parties, the arguments of counsel, and applicable law, I find and conclude the Lawyer Defendants' motions should be granted.

NOW, THEREFORE, IT IS ORDERED that all claims alleged against Defendants Lawrence E. Richter, Jr., David A. Haller and Richter and Haller, LLC should be, and hereby are, dismissed with prejudice.

IT IS SO ORDERED.

[JUDGE'S SIGNATURE ON FOLLOWING PAGE]

Charleston Common Pleas

Case Caption: Robert Chimento VS Lawrence E Richter Jr , defendant, et al

Case Number: 2018CP1005802

Type: Order/Dismissal

So Ordered

William C. McMaster, III

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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order Granting Lawyer Defnts Motion to Dismiss

CASE NO: 2022CP1004031
John Doe 305 , plaintiff, et al VS Lawrence E Richter Jr , defendant, et al

This judgment was entered on the 05th day of December, 2025, and notice mailed first class on Monday, December 08, 2025, to all counsel of record and/or all parties entitled to receive notice.

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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order Granting Lawyer Deftns Motion to Dismiss w/Prejudice

CASE NO: 2018CP1005802
Robert Chimento VS Lawrence E Richter Jr , defendant, et al

This judgment was entered on the 05th day of December, 2025, and notice mailed first class on Monday, December 08, 2025, to all counsel of record and/or all parties entitled to receive notice.

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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCP

Order Granting Lawyer Defnts Motion to Dismiss w/Prejudice

CASE NO: 2019CP1005892
Jane Doe 304 , plaintiff, et al VS Lawrence E Richter Jr , defendant, et al

This judgment was entered on the 05th day of December, 2025, and notice mailed first class on Monday, December 08, 2025, to all counsel of record and/or all parties entitled to receive notice.

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