

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

William E. DeLoache, III and  
Allison H. DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.  
Jefferson Leath, Jr.; Michael S.  
Seekings; Leath, Bouch & Crawford,  
LLP; Francis E. Grimball; Mullen  
Wylie, LLC; formerly Mullen, Wylie &  
Seekings, LLC; William M. Bowen, PA;  
and John D. Kassel,

Defendants.

IN THE COURT OF COMMON PLEAS

IN THE FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2011-CP-40-07432

**RECEIVED**

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**SC Court of Appeals**

**ORDER GRANTING DEFENDANT JOHN  
D. KASSEL'S MOTION TO DISMISS**

RICHLAND COUNTY  
FILED  
2013 NOV - 5 PM 3:26  
JEANETTE M. W. BRINDLEY  
C. J. P. & C. S.

This matter is before the Court on Defendant John D. Kassel's ("Kassel") Motion to Dismiss filed on December 15, 2011 and Kassel's Motion to Stay Discovery filed on May 16, 2012. This Court held a hearing on Kassel's two motions as well as motions to dismiss brought by other Defendants on June 6, 2012.

At the outset of the hearing, attorneys for both Plaintiffs and Kassel informed the Court that they had reached an agreement on the cause of action for Breach of Fiduciary Duty. Counsel informed the Court that Plaintiffs had agreed that they would not assert a Breach of Fiduciary Duty cause of action against Kassel and thus there was no need for this Court to hear the arguments for the dismissal of Kassel from this cause of action. The only remaining causes of action directed at Kassel are Plaintiffs' Sixth Cause of Action for Breach of the Duty of Confidentiality and the Seventh Cause of Action for Injunctive Relief Against All Defendants. This Court heard arguments from both counsel for Kassel and Plaintiffs regarding these two causes of action.

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**SCANNED**

In addition, Defendant Kassel filed a Motion to Stay Discovery served on Kassel by Plaintiffs. Counsel for Plaintiffs and Defendant Kassel reached an agreement that Kassel would not be required to respond to discovery until after Defendant Kassel's Motion to Dismiss was ruled upon. As this Court, for reasons set forth below, has determined to grant Defendant Kassel's Motion to Dismiss, the Motion to Stay Discovery is now moot.

After considering the arguments set forth by both Plaintiffs and Kassel in their respective legal memoranda, the Complaint, the applicable case law and applicable statutes, this Court finds that each of Plaintiffs' causes of action against Defendant Kassel fail as a matter of law. Accordingly, as more fully set forth below, the Court grants Defendant Kassel's Motion to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

#### **STANDARD OF REVIEW**

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 361 S.C. 463, 469, 645 S.E.2d 245, 247 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "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." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)).

Applying these principles to the present cases, the Court finds that the Complaint does not state valid claims for relief against Defendant Kassel, and therefore the Causes of Action against Defendant Kassel should be dismissed.

## FACTS AS ALLEGED IN THE COMPLAINT

Plaintiffs allege that on or around July 2002 they contacted Defendant Kassel with regard to possibly retaining him as their lawyer to pursue claims related to stucco installation at their residence. Compl. ¶ 14. Plaintiffs communicated in confidence with Defendant Kassel regarding the merits of participating in a Tennessee class action involving stucco manufactured by Dryvit Systems. Compl. ¶¶ 14-15. Plaintiffs, after receiving Defendant Kassel's opinion and advice, retrieved their materials from Defendant Kassel and did not retain Kassel to represent them. Compl. ¶¶ 16-17. Plaintiffs allege they never authorized Defendant Kassel to engage or associate any other lawyer or to reveal to any other person their privileged communications or information about their potential case. Compl. ¶¶ 19-23.

Defendants William Dixon Robertson, III, W. Jefferson Leath, Jr., and Michael S. Seekings (collectively "Defendant Class Action Attorneys") are attorneys who appeared on behalf of purported Objector-Plaintiffs, the Plaintiffs, at a Fairness Hearing in the Tennessee stucco settlement. Compl. ¶¶ 36-38. As a result of representing Plaintiffs, Defendant Class Action Attorneys were able to make arguments objecting to the proposed settlement. Compl. ¶ 40. As a result of appearing in the Tennessee class action, Defendant Class Action attorneys received \$600,000 as attorneys fees as a portion of the amount approved to be paid to the Tennessee class counsel. Compl. ¶¶ 42-44. Plaintiffs have not alleged in their Complaint that Defendant Kassel participated in anyway in the Tennessee class action or that Kassel received any of the \$600,000 distributed to the Defendant Class Action Attorneys.

In late January or early February 2009, Plaintiffs were contacted by attorneys informing them that the Defendant Class Action Attorneys had appeared on their behalf in the Tennessee class action. Compl. ¶ 25-26. Plaintiffs allege that the Defendant Class Action Attorneys appeared and wrongfully used Plaintiffs' surname without Plaintiffs' authorization and without

ever consulting with Plaintiffs. Compl. ¶¶ 45-49. This is the basis of Plaintiffs' claims against Defendant Class Action Attorneys.

Plaintiffs claim that Defendant Kassel provided Defendant Robertson, one of the Defendant Class Action Attorneys with Plaintiffs' confidential information that Kassel obtained during his consultation with them and thus Kassel is liable for breach of the duty of confidentiality. Compl. ¶¶114-118. Plaintiffs have also alleged causes of action against Defendant Kassel for breach of fiduciary duty and injunction. Compl. ¶¶ 97-113 and ¶¶119-120.

**A. FAILURE TO FILE AN EXPERT AFFIDAVIT IS FATAL TO PLAINTIFFS' COMPLAINT**

Plaintiffs' entire Complaint as it relates to Defendant Kassel must be dismissed for failure by Plaintiffs to attach an expert affidavit to their Complaint as required by S.C. Code §15-36-100. Plaintiffs' claims against Defendant Kassel, namely the breach of the duty of confidentiality, arise by virtue of Kassel's position as an attorney with whom Plaintiffs consulted regarding legal concerns. But for the fact that Defendant Kassel is an attorney, there would be no duty of confidentiality. "...[P]laintiff 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 of each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code § 15-36-100(B). Section 15-36-100 lists professions that require an expert affidavit and attorneys are a part of this list. If a plaintiff fails to file the requisite expert affidavit, the complaint is subject to dismissal for failure to state a claim. S.C. Code § 15-36-100(C).

Plaintiffs first claim that because they did not formally retain Defendant Kassel, there is no legal malpractice claim and thus no need to satisfy the affidavit requirements of § 15-36-100. This claim is without merit. Either, Defendant Kassel was acting in his role as an attorney and therefore there is an alleged duty of confidentiality or Defendant Kassel has no duty of

confidentiality owed to Plaintiffs, in which case Plaintiffs have no claim against Defendant Kassel. A lay person has no duty of confidentiality owed to another. The duty only arises in the context of an attorney/client relationship. To assert a breach of the duty of confidentiality, which is essentially a legal malpractice action, Plaintiffs will necessarily be required to present expert testimony as the duty of confidentiality is not a common knowledge duty but rather one particular to the attorney/client relationship.

Plaintiffs argue that because they have alleged intentional torts rather than negligence, their claims are not governed by §15-36-100 and thus there is no requirement that Plaintiffs file an expert affidavit. This argument is simply a ruse to get around the wording in the statute. First, there are no allegations that Defendant Kassel committed an intentional tort and Plaintiffs have not alleged any intentional torts. In his book *The South Carolina Law of Torts*, Professors Robert Felix and F. Patrick Hubbard devote an entire chapter to intentional torts recognized in South Carolina. See F. Patrick Hubbard & Robert L. Felix, *South Carolina Law of Torts* (4<sup>th</sup> ed. 2011) at 437-511. A breach of the duty of confidentiality is not included in this chapter, which includes torts such as battery, assault, trespass, and intentional infliction of emotional distress. Rather, in another chapter devoted to negligence and similar breaches of duty, the authors describe the spectrum of negligence which involves at one end strict liability where the duty arises from the occurrence of an injury from a particular risk to the other end of the spectrum involving intentional torts. *Id.* at 70-71. "In between are varying degrees of "faulty" conduct, including not only negligence but also other types of misconduct like malice, gross negligence, recklessness, willfulness, wantonness, lack of fairness and good faith and breach of duty of high or utmost care." *Id.* at 70-71. Further, Hubbard defines "recklessness" (a specific description used against Defendant Kassel in the complaint) as "conduct where the actor is in fact consciously aware that he is acting negligently." *Id.* at 72. . While Plaintiffs have alleged that

Defendant Kassel acted in a “highly reckless, wanton and irresponsible” manner, Plaintiffs have alleged no specific facts to support such an allegation.

Plaintiffs’ claims against Defendant Kassel all arise from a claim that Kassel breached his duty of confidentiality, which is in essence a claim of legal malpractice since there is no duty of confidentiality that arises except in the context of an attorney/client relationship or potential relationship. “Failure to exercise due care, not intent is the critical element in negligence.” *Snakenberg v. Hartford Casualty Insurance Company, Inc.*, 299 S.C. 164, 173 (Ct.App. 1989). Simply because an action is intentional does not make the tort an intentional tort. In its most narrow sense, “intent” denotes an actor’s specific desire to cause the consequences of his act. See *Restatement (Second) of Torts* §8A (1965). “Intent” is a state of mind about the consequences of the act. *Peay v. US Silica*, 313 S.C. 91 (1993). See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts*, § 8 (5<sup>th</sup> ed.1984 & Suppl. 1988). There is no allegation or indication that Defendant Kassel could have foreseen or in anyway intended the alleged consequences of his alleged action – namely that attorneys would allegedly travel to another state and represent Plaintiffs without Plaintiffs’ permission in a class action. As a result, there is no intent alleged on Defendant Kassel’s part. Plaintiffs have alleged a breach of the standard of care in that they have alleged that Defendant Kassel breached his duty of confidentiality. A defendants’ failure to exercise due care falls within a negligence cause of action. *Id.* Legal malpractice is the cause of action contemplated by §15-36-100 and the Plaintiffs’ claim against Defendant Kassel is in essence a legal malpractice claim. As a result, Plaintiffs’ claims should be dismissed for failure to submit an expert affidavit.

In addition, Plaintiffs claim that an expert affidavit is not required because the actions complained of occurred prior to the enactment of §15-36-100. However, Plaintiffs’ position ignores the language of § 15-36-100, which came into effect on July 1, 2005 and applies to all

claims *arising* after that date. See 2005 Act. No. 32, §4, eff July 1, 2005. South Carolina courts have held that a claim arises at the time a plaintiff's right to sue comes into existence. *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 597-598 (2003); citing *Stephens v. Draffin*, 327 S.C. 1 (1997). As will be discussed in further detail in this Order, Plaintiffs at this time do not have a right to sue as they have suffered no damages, which are a necessary element to any tort cause of action. Further, according to the allegations of the Complaint, Plaintiffs did not have notice of the alleged breach until sometime after 2005. In order for the claim to have arisen, Plaintiffs must have had notice of the claim. If they had notice prior to 2005, Plaintiffs likely have a statute of limitations problem. Even though the alleged breach of confidentiality by Defendant Kassel occurred prior to 2005, Plaintiffs' claims have not arisen at this time and thus in order to file a legal malpractice claim at some point in the future, Plaintiffs will necessarily have to comply with § 15-36-100.

Plaintiffs' failure to file the expert affidavit as required is fatal to Plaintiffs' claims against Defendant Kassel and Plaintiffs' Complaint as it relates to Kassel is dismissed.

**B. PLAINTIFFS NEVER RETAINED KASSEL AND THUS KASSEL DOES NOT OWE PLAINTIFFS ANY DUTIES AS ALLEGED IN THE COMPLAINT**

Plaintiffs allege in the Complaint that they never retained Defendant Kassel to represent them. If this is the case, Defendant Kassel did not owe Plaintiffs any duty of confidentiality or any other fiduciary duty. The rule regarding duties to potential clients is SCRAP Rule 407, Rule 1.18, which was not effective until October 1, 2005. The allegations against Defendant Kassel regarding his duties owed to Plaintiffs took place according to the Complaint in 2002, three years prior to the passage of Rule 1.18. No duties were owed to Plaintiffs as potential clients and thus the claims against Defendant Kassel are dismissed.

**C. PLAINTIFFS' CLAIMS AGAINST DEFENDANT KASSEL FAIL BECAUSE PLAINTIFFS CANNOT ESTABLISH PROXIMATE CAUSE**

Even accepting the allegations as asserted by Plaintiffs against Defendant Kassel in the light most favorable to Plaintiffs, it is not foreseeable that Plaintiffs would have suffered any harm as a proximate cause of Kassel's alleged actions. The crux of Plaintiffs' claims against Defendant Kassel is that he provided confidential information to Defendant Robertson about Plaintiffs' potential stucco claims and that Defendant Robertson and the other Defendant Class Action Attorneys used this information to proceed in the Tennessee class action as counsel for Plaintiffs without Plaintiffs' authorization.<sup>1</sup> Even if Defendant Kassel violated some duty of confidentiality and provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, it is not foreseeable that these attorneys would proceed in Tennessee without Plaintiffs' permission and authorization.

"The touchstone of proximate cause in South Carolina is foreseeability." *Mellen v. Lane*, 377 S.C. 261, 279 (Ct. App. 2009); citing *Young v. Tide Craft*, 270 S.C. 453, 462 (1978). The defendant may be held liable for anything which would be the natural and probable consequence of the defendant's actions. *Mellen*, 377 S.C. at 279; citing *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72 (1990). "A defendant cannot be held liable for unpredictable or unexpected consequences." *Mellen*, 377 S.C. at 280; citing *Young*, 270 S.C. at 463.

The Supreme Court held in *Hensley v. Heavrin*, that a doctor was not liable for the battery committed by a patient's husband after the doctor incorrectly diagnosed syphilis. 277 S.C. 86, 87-88 (1990). Similarly in this case, even if Defendant Kassel provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, he could not have foreseen that they would use the information without Plaintiffs' consent or authorization. Plaintiffs' Complaint does not include Defendant Kassel in the majority of the causes of action because there are no allegations that Kassel participated in the Tennessee representation, profited from it,

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<sup>1</sup> The Complaint is not specific as to what confidential information was provided.

or even knew about it. Plaintiffs only complaint against Defendant Kassel is that he may have passed on confidential information (the exact terms of which is not clear from the Complaint) to another lawyer. This alone is not enough to meet the standards for foreseeability and proximate cause. For this reason, all claims against Defendant Kassel should be dismissed.

**D. PLAINTIFFS HAVE FAILED TO ALLEGE ANY SPECIFIC DAMAGES**

In order to succeed in any tort claim and specifically in a legal malpractice claim, Plaintiffs must plead the element of damages with some degree of specificity. In the Complaint, Plaintiffs have only alleged damages in such general terms as to state they have suffered damages in an amount to be proven at trial. Plaintiffs' claims all rest on the allegations that Defendant Class Action Attorneys represented Plaintiffs without Plaintiffs' authorization as objectors in the Tennessee class action and therefore received attorneys' fees for their efforts. Again, there are no allegations that Defendant Kassel was in anyway connected to the Tennessee class action or received any fees from that case. Regardless, there is no question but that Plaintiffs would not have received attorneys' fees from the Tennessee action as they are not attorneys.

Further, Plaintiffs allege that they did not have Dryvit on their house and could not have participated in the Tennessee class action in any event. Thus, none of the Defendants, Kassel included, could have done anything that hindered Plaintiffs from collecting any sum from Dryvit as they, by their own admissions, were not entitled to collect damages from Dryvit.

In Plaintiff's Memorandum in Opposition to the Motion to Dismiss, Plaintiffs assert that they suffered a presumption of nominal damages associated with the claims they have regarding the alleged misuse of their individual and collective identities. Thus, Plaintiffs claim that by "filing legal documents with the DeLoache surname, the Defendants have converted the DeLoaches' intangible property rights." See Plaintiffs Memorandum in Opposition p. 12.

Regardless of whether Plaintiffs are correct in their legal analysis of damages resulting from the misappropriation of their legal identity, Plaintiffs have not asserted any claims against Defendant Kassel regarding misappropriation of their identity. Therefore even if their claims of damages related to this cause of action are accurate, Plaintiffs have still failed to show that they suffered any damages as a result of any claims against Defendant Kassel.

In addition, Plaintiffs claim that they have suffered damages because they are now concerned that they are at risk for claims of contempt of court or fraud on the court. See Plaintiffs Memorandum in Opposition p. 13. This assertion by the Plaintiffs does not satisfy the required element of damages. Speculative future damages do not qualify as damages. While proof with mathematical certainty of the amount of loss or damage is not required, in order for damages to be recoverable, the evidence must show the amount of damages with reasonable certainty or accuracy and the existence, causation and amount of damages cannot be left to conjecture, guess or speculation. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13 (1981). There are no allegations that anyone is currently seeking (or has sought in the past) to hold Plaintiffs in contempt of court or fraud on the court much less that Plaintiffs have actually been held in contempt. Considering that Plaintiffs were apparently contacted regarding their involvement in the Tennessee stucco class action case in early 2009, it seems unlikely that anyone would try to hold Plaintiffs in contempt in the Tennessee class action or charge them with fraud on the court approximately three and a half years later. Plaintiffs' claims that a "risk" that Plaintiffs may be held in contempt of court or for fraud on the court are speculative at best and do not satisfy the required element of damages.

Plaintiffs also claim that they have suffered damages in that they have had to spend time and resources in "depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality...." See Plaintiffs' Memorandum in Opposition p. 13. There

are no allegations that Plaintiffs have done anything more than prepare an affidavit and give a deposition in the underlying case. Other than a witness fee, lay witnesses are generally not paid for the time they spend in a deposition. Further, there was no requirement that Plaintiffs prepare an affidavit. Plaintiffs did so of their own free will and to allege that they should be paid for their participation in the underlying case does not qualify as damages suffered by Plaintiffs.

Plaintiffs have not alleged with any specificity and cannot show that they suffered damages based on the allegations asserted in the Complaint. A client must have suffered damages as a result of a lawyer's negligence in order to maintain an action against a lawyer. *Hall v. Fedor*, 349 S.C. 169 (Ct.App. 2002); *Ellis v. Davidson*, 358 S. C. 509 (Ct.App. 2004). Because Plaintiffs cannot show that they suffered damages based on the allegations of the Complaint, their claims should be dismissed.

**E. PLAINTIFFS LACK STANDING BECAUSE THEY HAVE NOT SUFFERED AN INJURY-IN-FACT**

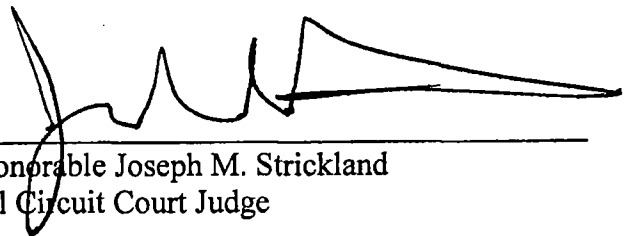
In order to establish standing, a party must meet three elements: 1) the plaintiff must have suffered an injury in fact, 2) the injury and the conduct complained of must be causally connected; and 3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Commander Health Cre Facilities, Inc. v. South Carolina Department of Health and Environmental Control*, 370 S.C. 296. 301 (Ct.App. 2006); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.ed.2d 351 (1992). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.*

As discussed in the previous section, Plaintiffs cannot demonstrate based on the allegations of the Complaint that they suffered any injury and thus cannot establish standing. A party must suffer an actually injury in fact and not a future concern in order to satisfy the standing requirements. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*,

346 S.C. 298, 589 (Ct.App. 2001). In this case, Plaintiffs have failed to allege any injury in fact and therefore their case must be dismissed for lack of standing.

WHEREFORE, for the reasons set forth above, the Court finds that Plaintiffs have failed to file an expert affidavit as required by S.C. Code § 15-36-100 and have failed to allege facts sufficient to assert claims for relief against Defendant Kassel. For these reasons, Plaintiffs' Complaint should be dismissed as to Defendant Kassel.

AND IT IS SO ORDERED.



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The Honorable Joseph M. Strickland  
Special Circuit Court Judge

Oct. 24, 2012 2013  
Richland County, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT  
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H. DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Francis E. Grimball; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; WILLIAM M. BOWEN, PA; and John D. Kassel,

Defendants.

**ORDER DENYING  
PLAINTIFFS' MOTION TO ALTER  
OR AMEND JUDGMENT**

JEANETTE W. MORRIS  
C.C.P. & G.S.

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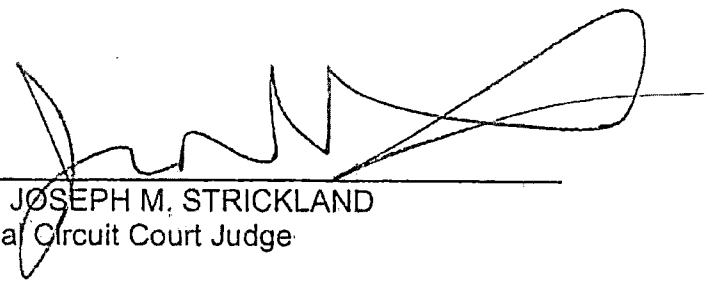
This matter comes before the Court on Plaintiffs' Rule 59(e) Motion to Alter or Amend.

The Court denies Plaintiffs' Motion to Alter or Amend Judgment for the Order Granting Motions of Defendants William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, Defendant Sued as Leath Bouch Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen, and William M. Bowen, PA to Dismiss all Claims and/or Strike Pleadings and the Order Granting Defendant John D. Kassel's Motion to Dismiss.

AND IT IS SO ORDERED.

Page 2

This 11<sup>th</sup> day of February, <sup>2014</sup> 2013



HON. JOSEPH M. STRICKLAND  
Special Circuit Court Judge



FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-07432

William E. DeLoache, III and Allison H. DeLoache,

William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath, Bouch & Crawford, LLP; Francis E. Grimball; Mullen Wylie, LLC formerly Mullen, Wylie & Seekings, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Joshua D. Shaw Turner Padget Graham & Laney P.A. P.O. Box 1473 Columbia, South Carolina 29202 Telephone: (803) 254-4310	Attorney for : <input type="checkbox"/> Plaintiff or <input checked="" type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
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RICHLAND COUNTY  
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20 NOV -5  
PM 3:29  
JEANETTE M. HARRISON  
CLERK  
JENNIFER R. G.S.

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

CLERK





Mullen Wylie, LLC f/k/a Mullen Wylie & Seekings. James L. Bruner of Bruner Powell Wall & Mullins, LLC appeared for Defendants William M. Bowen and William M. Bowen, PA. Amy B. Hill of Sowell Gray Stepp & Laffitte, LLC appeared for Defendant John D. Kassel.

After giving due consideration to the arguments and authorities presented at the hearing and in the motions and legal memoranda submitted by the parties, the Court finds that each of Plaintiffs' causes of action against William Dixon Robertson III, Michael S. Seekings, W. Jefferson Leath, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen and William M. Bowen, PA (collectively "Moving Defendants") fail as a matter of law based on the allegations of the Complaint. Accordingly, as more fully set forth below, the Court grants Moving Defendants' Motions to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

### **PROCEDURAL HISTORY**

Plaintiffs filed their Complaint on November 3, 2011, alleging six causes of action against Moving Defendants: (1) Wrongful Appropriation of Personality; (2) Conversion; (3) Civil Conspiracy; (4) Constructive Trust; (5) Breach of Fiduciary Duty; and (6) Injunctive Relief.

Defendant Robertson timely answered the Complaint, asserting numerous defenses, including failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCF, and failure to file an Affidavit of a duly qualified expert contemporaneous with Plaintiffs' Complaint, as required by S.C. Code Ann. §15-36-100. Robertson thereafter filed a motion to dismiss and/or motion for judgment on the pleadings on the same grounds as those stated in his Answer. Defendants Leath, Seekings and the Defendant sued as Leath Bouch &

Seekings, LLP likewise timely filed a Motion to Dismiss and/or Motion to Strike Pleadings in which they seek dismissal on similar grounds and, or alternatively, seek to strike certain pleadings within the Complaint.<sup>1</sup> Defendants Francis E. Grimball and Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, and William M. Bowen and William M. Bowen, PA also timely filed Motions to Dismiss on similar grounds.

### **STANDARD OF REVIEW**

A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when the facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). When deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRPC, the Court may only consider the allegations set forth on the face of the complaint. Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 (Ct. App. 1995). “The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief.” McCormick, 328 S.C. at 633, 494 S.E.2d at 433-34.

### **ALLEGATIONS OF COMPLAINT**

This action, brought against several attorneys (hereinafter “Defendant Attorneys”) arises out of Plaintiffs’ allegation that the Defendant Attorneys obtained a monetary benefit by claiming that they represented the Plaintiffs as objectors in a nationwide class action in the early 2000s. The complaint alleges that the DeLoaches approached Defendant Kassel in July of 2002 to possibly retain Mr. Kassel in connection with problems they were experiencing with the

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<sup>1</sup> The Motion of Defendants Michael S. Seekings, W. Jefferson Leath, and the Defendant sued as Leath Bouch & Crawford, LLP, included a Motion to Dismiss for lack of venue. The Court recognizes that the venue motion essentially reserves the defense of venue under any circumstance where venue relies solely on the residence of those moving Defendants. Any consideration of that Motion is premature at this time, and the Court reserves judgment on that Motion if and until the circumstances of the Motion become ripe.

exterior cladding on their home, which was a type of synthetic stucco. (Compl. ¶ 14.)

According to the Complaint, one of the issues discussed was the possibility of the Plaintiffs participating in a nationwide class action lawsuit, *Posey v. Dryvit*, brought on behalf of owners of residential homes clad with a synthetic stucco product called “Dryvit Exterior Insulating and Finishing System”, or EIFS.<sup>2</sup> (*Id.*) The Complaint alleges that *Posey* was in the process of being settled during this time and that Mr. Kassel advised the DeLoaches that in his opinion it was not worth participating in the *Posey* class settlement. (Compl. ¶ 16.) The Plaintiffs allege that it was at that point that they retrieved their materials from Mr. Kassel and did not retain Mr. Kassel to represent them. (Compl. ¶ 17.)

According to the Complaint, the Defendant Attorneys (and their respective law firms), excluding Defendant Kassel, formed a joint venture to challenge the *Posey* class settlement. (Compl. ¶ 33.) The DeLoaches allege that in pursuit of their joint venture, certain of the Defendant Attorneys, without the permission of the DeLoaches, filed papers and appeared in *Posey* on behalf of the DeLoaches. (Compl. ¶ 34-36.) According to the Complaint, the purpose of the Defendant Attorneys’ appearance in *Posey* on behalf of the DeLoaches was to object to the terms of the proposed class settlement. (Compl. ¶ 36-39.) The Complaint further alleges that as a result of their objecting to the proposed settlement on behalf of the DeLoaches, the Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was paid to them by *Posey* class counsel. (Compl. ¶ 41-44.)

Based on the foregoing factual allegations, Plaintiffs seek recovery of “all funds Defendants’ obtained using the DeLoaches’ surname in *Posey*”, (Compl. ¶ 70), unspecified

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<sup>2</sup> It is later alleged in the Complaint that “recent inspections and testing revealed no evidence that the DeLoaches’ home was ever clad with Dryvit EIFS”. (Compl. ¶ 37.) There is no allegation that any of the parties knew in 2002 that the Plaintiffs’ home was not clad with Dryvit EIFS.

actual, consequential, special, incidental, and punitive damages, as well as prejudgment interest, injunctive relief, and the costs of the action. (Compl., Prayer for Relief.)

### **LEGAL ANALYSIS**

Viewing the factual allegations of the Complaint in the light most favorable to the Plaintiffs, the Complaint fails to states any valid claim for relief. All or parts of Plaintiffs' Complaint are deficient for the following reasons: (1) Plaintiffs have not alleged an injury-in-fact and therefore lack standing to maintain their claims; (2) Plaintiffs have failed to state facts sufficient to establish a cause of action for (a) wrongful appropriation of personality, (b) conversion, (c) civil conspiracy, (d) constructive trust, (e) breach of fiduciary duty, or (f) injunctive relief; and (3) Plaintiffs failed to file an Affidavit of a duly qualified expert contemporaneous with their Complaint.

#### **I. Standing**

“A party seeking to establish standing must prove the ‘irreducible constitutional minimum of standing,’ which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision.” Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (quoting Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. Id. (citing Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291). Additionally, “An ‘injury in fact’ has been defined as ‘an invasion of a legally protected

interest' which is 'concrete and particularized' and 'actual or imminent,' not 'conjectural or hypothetical'." Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992)).

The Court finds that Plaintiffs' Complaint fails to allege that Plaintiffs have suffered an injury-in-fact. Plaintiffs' allegations of wrongdoing as to the Defendant Attorneys, excluding Defendant Kassel, are primarily that the Defendant Attorneys asserted in various contexts that they represented the Plaintiffs. In the only concrete example identified in the Complaint, Plaintiffs allege that Defendant Attorneys filed an objection to the *Posey* class settlement on their behalf and, as a result, that Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was actually paid to them by *Posey* class counsel. (Compl. ¶ 41-44.) While Plaintiffs allege that this conduct was improper because Defendant Attorneys did not actually represent the Plaintiffs, Plaintiffs have failed to show that they have suffered any injury as a result of the Defendant Attorneys' actions.

According to the Complaint, the alleged payment to Defendant Attorneys was from "Class Counsel in *Posey* from the funds Dryvit Systems paid to Class Counsel for attorney's fees that the *Posey* court had approved . . . ." (Compl. ¶ 42.) Payment of attorneys' fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Conversely, there does not appear to be any recognized basis for payment to an objector – as opposed to an attorney fee to the objector's attorney(s) – where the objection is made in terms common to class members. Id. Nor would it make sense for there to be any recovery by the objector for this type of objection, as he/she is, by definition, a class member who is in line to receive the benefits of any improvement to the terms of the class settlement. See id. Once the fundamentals of the

objection process are understood, it is plain that the Plaintiffs herein would not have been entitled to any monetary recovery as a result of their status as objectors to the *Posey* class action. Accordingly, their claim of entitlement to amounts paid to their attorneys lacks merit.

The above analysis and conclusion are bolstered by the fact that Plaintiffs allege that “recent inspections and testing” show that they did not even own the product that was at issue in *Posey*. (Compl. ¶ 37.) Thus, based on the allegations of the Complaint, it is apparent that Plaintiffs could never have recovered money or any other benefit in connection with *Posey*. During the hearing on Defendant Attorneys’ motions to dismiss, Plaintiffs’ counsel argued that Plaintiffs had suffered damages insofar as they were at risk for facing a claim of “fraud on the court” because Defendant Attorneys represented to the *Posey* court that Plaintiffs had Dryvit EIFS, when in fact they did not. (See also Compl. ¶ 39.) Notwithstanding the fact that Plaintiffs do not allege that any party had knowledge of this fact at the time the Defendant Attorneys appeared in *Posey*,<sup>3</sup> the Court finds that the possibility of facing a claim for “fraud on the court” falls squarely within the category of “conjectural” or “hypothetical” injuries that are insufficient to confer standing on Plaintiffs. Finally, Plaintiffs’ allegation that they have suffered damages in the form of “time, effort, and expenses” in connection with meeting with lawyers, signing an affidavit, and giving a deposition in another case lacks merit. (See Compl. ¶ 85.) The Court is not aware of any authority, and none has been presented by Plaintiffs, holding that such activities constitute compensable damages in a civil action.

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<sup>3</sup> In fact, the allegation that “recent inspections and testing revealed” that Plaintiffs did not have Dryvit EIFS, (Compl. ¶ 39), strongly suggests that all parties believed Plaintiffs did have Dryvit EIFS when the alleged representations were made.

For the foregoing reasons, the Court finds that Plaintiffs have not suffered any injury-in-fact and therefore lack standing at this time to bring the asserted claims against Defendant Attorneys.

## **II. Failure to State a Claim**

Even assuming that Plaintiffs could establish the irreducible constitutional minimum of standing, the facts alleged in the Complaint fail to support any of the causes of action asserted in the Complaint.

### *A. Wrongful Appropriation of Personality*

“In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs.” Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 325-26, 586 S.E.2d 108, 110 (2003). “Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity.” Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 458-459, 684 S.E.2d 756, 759 (2009) (quoting Sloan, 355 S.C. at 325-26, 586 S.E.2d at 110).

Plaintiffs' claim fails as a matter of law based on the allegations of the Complaint because any monetary benefit allegedly received by the Defendant Attorneys did not result from any value associated with the “DeLoache” name. “The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and

other aspects of personal identity.” Gignilliat, 385 S.C at 458-459, 684 S.E.2d at 759. The Complaint alleges that the funds paid to Defendant Attorneys were paid by “Class Counsel in *Posey*” from the *Posey* settlement funds. (Compl. ¶ 42.) First, Plaintiffs’ Complaint fails to assert any claim by Plaintiffs that there is any inherent commercial value in the use of their names by virtue of the *Posey* action or otherwise. Further, and as noted above, payment of attorneys’ fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Where such fees are paid, they are not paid as a result of any inherent or commercial value associated with the name of the objector(s), but rather to compensate the attorney(s) who presented the objection at the fairness hearing. There is no allegation to the contrary in the Plaintiffs’ Complaint. The Complaint fails to allege that Defendant Attorneys acted with any intent to misappropriate Plaintiffs’ “personality”, that the Defendant Attorneys received any payment as a result of any commercial value associated with the DeLoache name, or that the DeLoaches suffered any recoverable damage as a result of any alleged misappropriation of personality. Therefore, Plaintiffs’ Complaint fails to state facts sufficient to constitute a cause of action for wrongful appropriation of personality.

#### B. *Conversion*

Conversion is defined as “the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” Gignilliat, 385 S.C. at 465, 684 S.E.2d at 763 (quoting Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008)). As explained above, the Plaintiffs have failed to allege any factual basis entitling them to the amounts allegedly paid (or to be paid) to the Defendant Attorneys as part of the *Posey* class settlement. In other words,

Plaintiffs have not established through their Complaint that they have any right of ownership over any good or personal property at issue. It follows that Defendant Attorneys cannot be liable for the “unauthorized assumption” of a right that Plaintiffs do not themselves have. To the extent Plaintiffs may mean to claim conversion of an intangible property right – the right to use their name – the Court finds that Plaintiffs have failed to allege conversion of an “intangible property right that is merged in, or identified with, some document.” Gignilliat, 385 S.C. at 465-66, 684 S.E.2d at 763. (“We are reluctant to expand the tort of conversion as it relates to intangible property and conclude that it should be limited to intangible property rights that are identified with some document.”)

### *C. Civil Conspiracy*

“A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff.” Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). Plaintiffs have not alleged that Defendant Attorneys joined together “for the purpose of injuring” Plaintiffs, nor have Plaintiffs alleged any conspiracy caused them “special damage”. Failure to plead these essential elements of a claim for civil conspiracy warrants dismissal of Plaintiffs’ civil conspiracy cause of action.

Additionally, dismissal of a civil conspiracy claim is proper if the civil conspiracy claim alleges the same acts for which damages are sought under other causes of action. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). The acts that Plaintiffs allege as the basis of their conspiracy cause of action are the same acts that form the basis of their other causes of

action. The alleged factual basis for each of Plaintiffs' causes of action is that the Defendant Attorneys used Plaintiffs' name without their permission to object to the *Posey* class settlement. Plaintiffs' civil conspiracy cause of action merely repeats these allegations and alleges that "Defendants combined together" to perform the alleged acts. (See Compl. ¶¶ 81-83.) Because Plaintiffs have failed to allege how any "separate and independent" act in furtherance of the alleged conspiracy has caused them damages, the Plaintiffs have failed to properly plead a claim for civil conspiracy and their cause of action should be dismissed. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011) ("To prove special damages, the [Plaintiffs] had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. Special damages must be properly pled, or the claim for civil conspiracy will be dismissed.") (internal citations omitted).

#### D. *Constructive Trust*

First and foremost, "a claim for imposition of a constructive trust is not an independent cause of action." Hale v Finn, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010) (internal citations omitted). Instead, a constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998) (quoting SSI Medical Servs., 301 S.C. at 500, 392 S.E.2d at 793-94).

As explained more thoroughly above, Plaintiffs have failed to allege they are entitled to any money or benefit which might be argued to have been conferred upon Moving Defendants. Plaintiffs further fail to plead facts that would entitle them to the money allegedly paid to Defendant Attorneys. Because Plaintiffs are not beneficially entitled to anything obtained by Defendant Attorneys, their cause of action seeking imposition of a constructive trust fails as a matter of law.

*E. Breach of Fiduciary Duty*

Plaintiffs allege in their Complaint that they “never engaged any of the Defendants as lawyers to represent the DeLoaches on any claims, including any claims related to stucco.” (Compl. ¶ 46.) Plaintiffs’ conclusory allegations concerning duties the Defendant Attorneys allegedly owed to them are contradicted by Plaintiffs’ factual allegations concerning their relationship with the Defendant Attorneys. “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.” Pitts v. Jackson Nat’l Life Ins. Co., 352 S.C. 319, 330 S.E.2d 502, 507 (Ct. App. 2002) (quoting Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). Accepting as true “the facts alleged in the complaint, along with all reasonable inferences deducible therefrom,” the Court finds that the Plaintiffs have affirmatively denied having “impose[d] a special confidence” in Moving Defendants and, as a result, failed to plead any facts that would give rise to a fiduciary relationship between them and the Defendant Attorneys. Plaintiffs have likewise failed to allege that Moving Defendants acted in bad faith or that Plaintiffs incurred any recoverable damage as a result. Therefore, the Court finds that

Plaintiffs failed to plead facts sufficient to constitute a cause of action for Breach of Fiduciary Duty.

Even if the Court were to find that Plaintiffs had pled facts establishing the existence of a fiduciary relationship, Plaintiffs' claim for breach of fiduciary duty would be subject to dismissal pursuant to Section 15-36-100 of the South Carolina Code. Subsection B of this section states, in pertinent part, as follows: "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100.<sup>4</sup> Although labeled as a claim for "breach of fiduciary duty" rather than "negligence", the Complaint alleges the existence and breach of numerous professional duties that allegedly derived from an attorney-client relationship between the Plaintiffs and Defendant Attorneys. (See Compl. ¶ 98-106) (repeating the phrase "Defendants, as the DeLoaches' lawyers, . . ."). Because Plaintiffs' allegations attempt to set forth "an action for damages alleging professional negligence" against attorneys, the affidavit requirement of Section 15-36-100 is triggered notwithstanding the label Plaintiffs' associate with their cause of action.<sup>5</sup>

Pursuant to Subsection (C)(1), "If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit

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<sup>4</sup> Subsection G identifies "attorneys at law" as a profession to which Section 15-36-100 applies.

<sup>5</sup> This outcome is supported by the Supreme Court's recent decision in RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., in which the Court held that a breach of fiduciary duty claim was "duplicative" of a legal malpractice claim where it was based on the same underlying facts. 399 S.C. 322, 336-337, 732 S.E.2d 166, 173 (2012) ("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.") (emphasis in original).

should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.” S.C. Code Ann. § 15-36-100(C)(1). Based on the foregoing, even if the Court disregarded Plaintiffs’ factual allegation that they did not engage Defendants to represent them, the Court finds that Plaintiffs’ claim for breach of fiduciary duty must be accompanied by an expert affidavit pursuant to Section 15-36-100 of the South Carolina Code. Finding no record of an expert affidavit contemporaneously filed with the Complaint, Plaintiffs’ claim for breach of fiduciary duty is properly dismissed.

#### *F. Injunctive Relief*

As a prerequisite for issuing an injunction, the moving party must show that without such relief “it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Invs. v. Century Builders of Piedmont, 387 S.C. 583, 586-87 694 S.E.2d 15, 17 (2010). As set out more thoroughly above, Plaintiffs’ Complaint fails to allege any special harm of any nature, including “irreparable” harm. Likewise, Plaintiffs have failed to allege any likelihood they will be successful on the merits of their claim or otherwise allege they have no other remedy available to them. Accordingly, the Court finds that Plaintiffs have failed to state a claim for injunctive relief.

### **III. Motion to Strike Pleadings**

Also before the Court are Defendants’ Motions to Strike and/or Dismiss Plaintiffs’ “Summary of the Case”. SCRCP Rule 12(f) requires, “Upon motion pointing out the defects complained of, ... at any time the court may order stricken from any pleading any ... redundant, immaterial, impertinent or scandalous matter.” The Rules of Civil Procedure also dictate the

“General Rules of Pleading”, stating, “A pleading which sets forth a cause of action, ... shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court’s jurisdiction depends,... (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.” Rule 8(a), SCRC. The Rules further require, “All averments of the facts of a cause of action... shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances;...” Rule 10(b), SCRC.

The Defendants have objected to Plaintiffs’ inclusion of four paragraphs in their Complaint under the subtitle “Summary of the Case”, those paragraphs appearing on pages 1 through 3 of Plaintiffs’ Complaint. Defendants argue those paragraphs are violative of the Rules of Civil Procedure, and have further asked that the paragraphs be stricken as “redundant, immaterial, impertinent or scandalous.” SCRC Rule 12(f). After review of the paragraphs, the Court finds that the paragraphs under Plaintiffs’ “Summary of the Case” do not comply with the Rules of Civil Procedure, do not state a claim upon which relief might be granted, and are unnecessary to the Complaint. Therefore, Plaintiffs’ paragraphs under the sub-title “Statement of the Case” are stricken from the pleading.

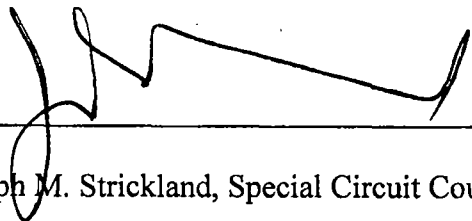
### **CONCLUSION**

For the reasons stated above, the Court finds that each of Plaintiffs’ causes of action against William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen, and William M. Bowen, PA fail as a

matter of law based on the allegations of the Complaint. Further, the Court finds that Plaintiffs' paragraphs under the sub-title "Summary of the Case" are not proper under the Rules of Civil Procedure and shall be stricken from the pleading. All remaining allegations in Plaintiffs' Complaint are dismissed in their entirety pursuant to Moving Defendants' Motions.

AND IT IS SO ORDERED.

This 24<sup>th</sup> day of Oct., 2013



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Joseph M. Strickland, Special Circuit Court Judge

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

JUDGMENT ... A CIVIL CASE

CASE NO. 2011 CP-40-07432

William E. DeLoache, III and Allison H. DeLoache

William Dixon Robertson, III; W. Jefferson Leath, Jr.;  
Michael S. Seekings; Leath, Bouch & Crawford, LLP;  
Francis E. Grimball; Mullen Wylie, LLO formerly  
Mullen, Wylie & Seekings, LLC; William M. Bowen;  
William M. Bowen, PA; and John D. Kassel.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Amy L.B. Hill	Attorney for: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)  
 Affirmed;  Reversed;  Remanded;  Other

2013 NOV -5 PM 3:26  
 JEFFERSON LEATH, JR.  
 CLERK OF COURT  
 RICHLAND COUNTY

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

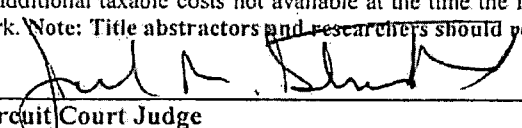
IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court: This matter is dismissed as to Defendant John D. Kassel and a formal order will follow.

ORDER INFORMATION

This order  ends  does not end the case.  
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
 Circuit Court Judge 2097 Judge Code Oct. 24, 2013 Date



## CONTACT SHEET

Re: William E. DeLoache, III and Allison H. DeLoache vs. William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath Bouch & Crawford, LLP; George E. Mullen; Robert L. Wylie; Francis E. Grimball; Mullen Wylie, LLC formerly Mullen Wylie & Seekings, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel  
Case No.: 2011-CP-40-07432  
SGSL File No.: 6348/1500  
MLM Claim No.: 09-803

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