THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Special Circuit Court Judge

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

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

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 . . . . . Respondents.

INITIAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

STATEMENT OF ISSUES

I. Whether Appellants' Verified Complaint states facts sufficient to constitute a cause of action based on Respondents'[1] unauthorized use of Appellants' names as "class member - objectors" in a nationwide class-action lawsuit pending in Tennessee without consulting with Appellants and without their knowledge, consent, or permission.

II. Whether Appellants' Verified Complaint states facts sufficient to constitute a cause of action for Wrongful Appropriation of Personality when it alleged Respondents appropriated Appellants' names to obtain legal fees that were allocated between Respondents without consulting with Appellants and without their knowledge, consent, or permission.

III. Whether it was error for the trial court to dismiss Appellants' Verified Complaint on the grounds that it did not properly allege facts establishing damages to Appellants when the Wrongful Appropriation of Personality tort in South Carolina does not require proof of actual damages because of the presumption of damages if someone infringes another's right to control their identity.

IV. Whether it was error for the trial court to dismiss Appellants' Verified Complaint on the grounds that it did not properly allege facts establishing damages to Appellants when the Verified Complaint did, in fact, contain specific allegations of damages.

V. Whether the commercial value to Respondents that was associated with the

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[1] Except for Respondent Kassel who was not alleged to have been involved directly in the nationwide class-action activities, but who was alleged to have violated other duties to Appellants.

Appellants' names and personal information did not come from a certain notoriety or popularity attached to the DeLoache name, but instead came from the value of having names and personal information as alleged owners of a home with Dryvit EIFS, which was required in order for the Respondents to appear as counsel for parties with Dryvit EIFS allegedly on their home providing standing to allow them to participate as alleged class members the *Posey* nationwide class action that was pending in Tennessee.

VI. Whether it was error for the trial court to grant Respondents' motions to dismiss on the grounds that Appellants' Verified Complaint did not contain an expert affidavit pursuant to S.C. CODE ANN. §15-36-100 when the Verified Complaint did not state facts in support or assert any causes of action for professional negligence; did not allege that any of the Respondents were negligent, made a mistake, or other accidental error; but did specifically allege facts supporting *intentional* torts.

VII. Whether it was error for the trial court to grant Respondents' motions to dismiss on the grounds that Appellants' Verified Complaint did not contain an expert affidavit pursuant to S.C. CODE ANN. §15-36-100 when the claims asserted in the Verified Complaint were within the "common knowledge and experience" such that no special learning is needed to evaluate the conduct of the Respondents.

VIII. Whether it is common knowledge that lawyers such as Respondent Kassel are not allowed to disclose prospective clients' confidential information.

IX. Whether it is common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get fees unless that person has hired the lawyer and given permission for such use.

X. Whether it was error for the trial court to grant Respondents' motions to dismiss on the grounds that Appellants' Verified Complaint did not contain an expert affidavit pursuant to S.C. CODE ANN. §15-36-100 when the claims asserted in the Verified Complaint against Respondents arose prior to the July 1, 2005, the effective date of S.C. CODE ANN. §15-36-100.

XI. Whether Appellants owned an interest in the property rights associated with their personality, including the use of their surname in legal proceedings.

XII. Whether the factual allegations in the Verified Complaint support a claim that the Respondent class action lawyers and law firms converted Appellants' intangible property rights.

XIII. Whether the facts pled in the Verified Complaint, taken as true, were sufficient to maintain Appellants' causes of action for wrongful appropriation personality, conversion, civil conspiracy, constructive trust, breach of fiduciary duty, breach of duty of confidentiality, and injunctive relief.

XIV. Whether the Verified Complaint states facts sufficient to assert a cause of action against Respondent Kassel for an independent tort for breach of the duty of confidentiality.

XV. Whether it was error for the trial court to refuse to allow Appellants to file an Amended Complaint when it granted Respondents' motion to dismiss pursuant to Rule 12(b)(6), SCRCP.

XVI. Whether it was error for the trial court to grant the Leath Respondents' motion to strike the "Summary of the Case" allegations in ¶¶ 1 - 3 in the Verified Complaint when those allegations included for the convenience of the reader simply

"summarized" the remaining allegations, independently stated causes of action against all Respondents, and were not "redundant, immaterial, impertinent or scandalous."

XVII. Whether it was error for the trial court to delay–for more than 18 months–issuing its Orders ruling on Respondents' motions to dismiss and to strike.

STATEMENT OF THE CASE

On November 1, 2011, Appellants filed their twenty-four (24) page Verified Complaint against Respondents containing eight (8) pages of factual allegations and asserting claims for 1) Wrongful Appropriation of Personality, 2) Conversion, 3) Civil Conspiracy, 4) Constructive Trust; 5) Breach of Fiduciary Duty, 6) Breach of Duty of Confidentiality, and 7) Injunctive Relief. (Complaint; R___). Respondents accepted service between November 15, 2011 and January 13, 2012. Respondent Kassel filed a Motion to Dismiss on December 15, 2012. On January 17, 2012, Respondent Robertson filed an Answer and served Appellants with discovery requests. On January 18, 2012, Respondent Bowen and WILLIAM M. BOWEN, PA (collectively "Bowen") filed an Answer and served Appellants with discovery requests. On January 20, 2012, Respondents Leath, Seekings and LEATH BOUCH AND CRAWFORD, LLP (collectively "LEATH") filed a Motion to Dismiss and/or Motion to Strike Pleadings. On January 23, 2012, Respondent Bowen filed an Amended Answer and a Motion to Dismiss. Two days later, on January 25, 2012, Respondent Bowen served discovery requests on Appellants. On February 16, 2012, Respondent Robertson filed a Motion to Dismiss. On March 13, 2012, Respondents Grimball and MULLEN WYLIE, LLC also filed a Motion to Dismiss.

On May 1, 2012, Appellants served discovery requests on Respondents and shortly

thereafter, on May 16, 2012, Respondent Kassel filed a Motion to Stay Discovery. On May 31, 2012, Respondents LEATH filed a Motion to Stay Discovery.

On June 6, 2013, the first of two hearing was held in the Richland County Judicial Center before The Honorable Joseph M. Strickland. During the hearing, Appellants provided the court and counsel for Respondents with a "Memorandum in Opposition to Defendants' Motions to Dismiss. " (Memorandum in Opposition to Motions to Dismiss, dated June 5, 2012, R ___). During the hearing counsel for Respondents provided the trial court and counsel for Appellants with a document entitled "Selected Documents for Reference During Hearing on Defendants' Motions to Dismiss." During the hearing the trial court questioned counsel for Respondents several times as to whether the positions raised by their motions would be more appropriate for summary judgment rather than motions to dismiss. (Pendarvis letter to Judge Strickland, dated February 15, 2013, R ___). At the conclusion of the first hearing the trial court indicated that he was taking under advisement the Respondents' motions and Appellants' arguments in opposition and also requesting counsel for the parties to submit proposed Orders. (Pendarvis letter to Judge Strickland, dated February 15, 2013, R ___). Counsel for Appellants agreed to stay discovery while the trial court had the motions under advisement. (Pendarvis letter to Judge Strickland, dated February 15, 2013, R ___). Counsel for the respective parties submitted proposed Orders during July 2012.

By February 2013, approximately eight months had gone by without any ruling on Respondents motions and without any discovery taking place to prepare the matter for trial. Given the trial court's statements about summary judgment possibly being more appropriate than motions to dismiss, it appeared the trial court was not inclined to grant

Respondents' motions. On February 12, 2013, Appellants served Notices of Depositions on Respondents and Subpoenas for documents, which was followed shortly thereafter with Respondents' Motions for Protective Orders and Motions to Quash the Subpoenas.

On April 5, 2013, Appellants filed a Motion to Compel Discovery. (Motion to Compel Discovery, R ___).

On June 10, 2013, the second hearing was held before the trial court ostensibly on the discovery motions. (Hearing Transcript, June 10, 2013, R ___). Early on in the second hearing it was acknowledged by counsel for all parties that the basis for the discovery motions was the trial court's delay for over one year on issuing a ruling on Respondents' motions to dismiss and strike. (Hearing Transcript, June 10, 2013, R ___). At the conclusion of the very short hearing on June 10, 2013, the trial court indicated that it would be issuing its ruling on Respondents' motions to dismiss and strike by the end of the week. (Hearing Transcript, June 10, 2013, R ___).

On June 14, 2013, the trial court sent correspondence to counsel for all parties advising of its' intent to grant Respondents' motions to dismiss, directing counsel for Respondents to "submit SCRCP Form 4-C, Judgment in a Civil Case," and that it was "continuing to review proposed orders already submitted by the parties and will expedite formal orders." (Judge Strickland letter to counsel dated June 14, 2013, R ___).

On June 17, 2013, counsel for Appellants sent a letter to the trial court respectfully asking it to reconsider its ruling and providing for consideration a copy of an Order issued by another trial court in related litigation. (Pendarvis letter dated June 17, 2013, R ___). Also on June 17, 2013, Respondents submitted to the trial court the "SCRCP Form 4-C, Judgment in a Civil Case" forms as directed. On June 20, 2013, counsel for Appellants

sent a second letter to the trial court again respectfully asking it to reconsider its ruling and emphasizing that because no professional negligence claims were asserted in the Verified Complaint, no expert affidavit was required, and that even if professional negligence claims had been asserted, reminding the trial court of the applicability of the "common knowledge" exception to "S.C. CODE ANN. § 15-36-100, which governs the requirement for expert affidavits in professional *negligence* matters." (Pendarvis letter dated June 20, 2013, R ___).

On September 4, 2013, some three months after the second hearing, more than fifteen months after the first hearing, and more than twenty-two months after the Verified Complaint had been filed, counsel for Appellants sent a letter to the trial court respectfully asking about the status of the trial court's rulings on the pending motions. (Pendarvis letter dated September 4, 2013, R ___).

On September 11, 2013, counsel for Appellants sent a letter to the trial court again asking it to deny the motions and apprising the court of a significant development. Enclosed with the September 11 letter was

> a copy of a Complaint filed by the LEATH BOUCH Defendants offensively invoking Rule 1.5(e), RPC to support their claim that another lawyer is not entitled to his share of the fees because, in their words, the "Clients here never approved of the participation of [the other lawyer]." Their claim is virtually identical to what happened to DeLoaches as stated in their Verified Complaint in this matter. (Summary of the Case - "The Defendant class action lawyers . . . never communicated with the DeLoaches to report on their representation, or to advise that over $600,000 in funds had been obtained as a result of their activities, or to seek to obtain their consent for the apportionment of 'fees' between counsel in different firms.") It is remarkable that the LEATH BOUCH Defendants also did not include a lawyer's affidavit of merit with the Complaint even though they are suing a lawyer.

(Pendarvis letter dated September 11, 2013, R ___).

On September 24, 2013, again after more than three months after the second hearing, almost sixteen months after the first hearing, and almost twenty-three months after the Verified Complaint had been filed, Appellants filed a Request to Transfer to Jury Trial Roster. (Request to Transfer to Jury Trial Roster, R ___).

On October 24, 2013, The Honorable Judge Joseph M. Strickland signed–but did not issue–an Order granting Respondents' Motions to Dismiss (Order I) and an Order granting Respondent Kassel's Motion to Dismiss (Order II). (Order granting other Respondents' Motions to Dismiss, R ___); (Order granting Respondent Kassel's Motion to Dismiss, R ___). Order I dismissed all of Appellants' claims against all of the Respondents (except Respondent Kassel)in their entirety finding "(1) [Appellants] have not alleged an injury-in-fact and therefore lack standing to maintain their claims; (2) [Appellants] 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) [Appellants] failed to file an Affidavit of a duly qualified expert contemporaneous with their Complaint." (Order I at p. 5). Order I also granted the Leath Respondents' motion to strike the "Summary of the Case" allegations in ¶¶ 1-3 of the Verified Complaint. Order II dismissed all of Appellants' claims against Respondent Kassel, which were Plaintiffs' Sixth Cause of Action for Breach of the Duty of Confidentiality and the Seventh Cause of Action for Injunctive Relief, based on "for failure by [Appellants] to attach an expert affidavit to their Complaint as required by S.C. Code §15-36-100." (Order II at p. 4).

Prior to being served with the trial court's Orders, Appellants filed an Amended Request to Transfer to Jury Trial Roster on November 5, 2013. (Amended Request to Transfer to Jury Trial Roster, R ___). On November 7, 2013, counsel for Appellants received a copy of both Orders granting Respondents' motions to dismiss.

On November 18, 2013, Appellants filed a Motion to Alter or Amend Judgments Granting Defendants' Motions to Dismiss. (Motion to Alter or Amend Judgments, R ___). On December 9, 2013, all Respondents except for Respondent Kassel filed a Return to Plaintiffs' Motion to Amend. On February 11, 2014, The Honorable Judge Joseph M. Strickland issued an Order Denying Plaintiffs' Motion to Alter or Amend Judgment, which was received by counsel for Appellants on February 21, 2014. (Order Denying Motion to Alter or Amend, R ___). On February 18, 2014, Respondent Kassel filed a Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend. On February 26, 2014, notice of this Appeal was timely filed.

FACTS

In August 2002, a group of South Carolina lawyers formed a joint venture in an effort to represent a class of South Carolina clients whose homes were damaged by a synthetic stucco building material known as "Dryvit Exterior Insulating and Finishing Systems" (Dryvit EIFS). (Verified Complaint at ¶¶ 24, 33, R ___). These lawyers and law firms[2] filed a lawsuit and an expedited motion to certify the South Carolina class in order to protect South

[2] Respondents 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; and WILLIAM M. BOWEN, PA will be referred to collectively as the "Respondent class-action lawyers and law firms."

Carolinians from being included in what was viewed as an unfavorable settlement that had been preliminarily approved in nationwide class action pending in Tennessee. (Verified Complaint at ¶ 24, R ___). On August 30, 2002, a Beaufort County judge certified the South Carolina class in a case originally styled *Cardamone, et al. v. Dryvit Systems, Inc., et al.*, Civil Action No. 2002-CP-07-1377 (*Cardamone*).

The Respondent class action lawyers and law firms, notwithstanding the existence of the South Carolina certified class that they had caused to be created in *Cardamone*, decided to file an objection to the settlement in the Tennessee class action lawsuit styled as *Posey v. Dryvit Systems, Inc.* (*Posey*). In order to do so, the Respondent class action lawyers and law firms needed a South Carolina resident with Dryvit synthetic stucco materials on their residence with standing to serve as an objector.

Earlier, around or before July 2002, Appellants William E. DeLoache, III and Allison H. DeLoache (the DeLoaches) contacted Respondent John D. Kassel (Kassel) with regard to possibly retaining him as their lawyer to pursue claims related to problems they were experiencing with synthetic stucco, including the possibility of participating in the *Posey* settlement. (Verified Complaint at ¶ 14, R ___). The DeLoaches communicated confidential, personal information, pictures, an inspection report and similar information to Kassel. (Verified Complaint at ¶ 15, R ___). Kassel advised the DeLoaches against participating in the *Posey* class settlement and asked them to pick up their documents. (Verified Complaint at ¶ 16, R ___). The DeLoaches retrieved their documents and did not retain Kassel as their lawyer. (Verified Complaint at ¶ 17, R ___). The DeLoaches did not authorize Kassel to represent them in any legal matter, engage or associate any other lawyer on their behalf, to reveal to anyone any of their privileged communications, or to

reveal to anyone any information about their potential case or about their consideration of whether to have any involvement in the *Posey* matter, the *Posey* settlement, or their stucco claims. (Verified Complaint at ¶¶ 18-22, R ___).

According to an affidavit filed much later by Respondent William Dixon Robertson, III (Robertson), Kassel disclosed to Robertson the DeLoaches' names and confidential information during a telephone conversation on September 3, 2002. (Verified Complaint at ¶ 32, R ___). Notwithstanding having never having any communication with or being engaged by the DeLoaches to serve as their counsel, on September 24, 2002, the Respondent class action lawyers and law firms filed a motion to appear *pro hoc vice* and also filed an objection in the *Posey* case "on behalf of Allison DeLoache and William DeLoache." (Verified Complaint at ¶ 26, 34, R ___).

The DeLoaches never engaged the Respondent class action lawyers and law firms on any matter or ever entered into a fee agreement with them. (Verified Complaint at ¶¶ 46-47, R ___).

Again with no authority to represent the DeLoaches, on October 1, 2002, Respondents Frances E. Grimball (Grimball) and Robertson, as well as another lawyer appeared at a Fairness Hearing in the *Posey* court and told that court that they represented the DeLoaches, would be filing affidavits on behalf of the DeLoaches, and that the DeLoaches could satisfy all criteria to have standing to object to the proposed settlement in *Posey*. (Verified Complaint at ¶ 26, 35-36, R ___).

As a direct result of using the DeLoaches' names as objectors in *Posey*, the Respondent class action lawyers and law firms later reached an agreement with Dryvit Systems and plaintiffs' class counsel in *Posey* whereby they would be paid a total of

$825,000 to make no further objections in the *Posey* matter and to obtain a final dismissal with prejudice of *Cardamone,* the South Carolina class action where they were class counsel. (Verified Complaint at Summary of the Case and ¶¶ 41-44, R ___). In fact, $600,000 of the $825,000 has already been paid. (Verified Complaint at Summary of the Case and ¶ 44, R ___).

None of the Respondent class action lawyers and law firms ever communicated with the DeLoaches anything about the substance of the proceedings in *Posey*, the $600,000 payments they received, or the remaining $225,000 they are to receive as a result of using the DeLoaches' name in the *Posey* proceedings, until after the affidavit signed by Mrs. DeLoache was filed in February 2009, and only then in an effort to convince Mrs. DeLoache that the testimony in her affidavit was not true. (Verified Complaint at ¶ 49, R ___).

ARGUMENTS

All of the trial court's conclusions of law in Order I and Order II were erroneous and need to be reversed as explained below.

Summary of the Arguments

A. Order I – Summary of the Errors In the Order Granting the Respondent Class Action Lawyers and Law Firms' Motions to Dismiss.

The first finding that "[the DeLoaches] have not alleged an injury-in-fact and therefore lack standing to maintain their claims" (Order I at p. 5) was in error because a) actual damages are not required to maintain a claim for wrongful appropriation of personality; b) without a fee agreement, all of the funds the Respondent class action lawyers and law firms obtained using the DeLoaches' names as objectors belong to the DeLoaches; c) because there is no Dryvit EIFS on the DeLoaches' residence, Respondent

class action lawyers and law firms' use of the DeLoaches' name as objectors did not meet the requirements in *Posey* and therefore subjects the DeLoaches to potential contempt and/or other court sanctions in Tennessee; and d) Ms. DeLoache lost valuable time and needed to retain counsel for the deposition taken of her by Dryvit in the *Cardamone* case.

The second finding that the "[DeLoaches] 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" (Order I at p. 5) were also erroneous based the facts alleged and existing South Carolina law as explained below.

The third finding in Order I dismissing the DeLoaches' claims because they did not "file an Affidavit of a duly qualified expert contemporaneous with their Complaint" (Order I at p. 5) was also erroneous because a) the Verified Complaint does not assert a cause of action for *professional negligence*, which is the only cause of action for which an expert affidavit is required per S.C. CODE ANN. § 15-36-100; b) the DeLoaches' causes of action is not subject to the statute requiring an expert affidavit because the claims arose in August 2002, which was almost 3 years before the "South Carolina Noneconomic Damages Awards Act of 2005" statute was enacted, a portion of which was codified at S.C. CODE ANN. § 15-36-100; and c) even if the DeLoaches had ever hired these lawyers and had a claim for professional negligence that arose after July 1, 2005, an expert affidavit was not necessary per S.C. CODE ANN. § 15-36-100(c)(2) because the subject matter of these claims, that is, that lawyers are not permitted to use people's names and file materials in court proceedings without permission, are "subject matters that lie[] within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the

conduct of the defendant."

The fourth finding in Order I granting the Leath Respondents' motion to strike the "Summary of the Case" allegations in the Verified Complaint was erroneous because those allegations were included for the convenience of the reader, independently stated causes of action against all Respondents, were material to the remaining allegations, and were not "redundant, immaterial, impertinent or scandalous" per Rule 12(f), SCRCP.

B. Order II – Summary of the Errors In the Order Granting Respondent Kassel's Motion to Dismiss.

The first finding in Order II dismissing the DeLoaches' causes of action against Respondent Kassel because the DeLoaches' did not "attach an expert affidavit to their Complaint as required by S.C. CODE ANN. § 15-36-100" (Order II at p. 4) was erroneous because a) again the Verified Complaint does not assert a cause of action for *professional negligence* against Respondent Kassel but instead claims for breach of duty of confidentiality and for injunctive relief; b) again the DeLoaches' causes of action arose in August 2002 (notwithstanding the trial court's wholly erroneous conclusions otherwise), which was almost 3 years before the "South Carolina Noneconomic Damages Awards Act of 2005" statute was enacted and S.C. CODE ANN. § 15-36-100 was codified; and c) even if the DeLoaches had hired Respondent Kassel and had a claim for professional negligence that arose after July 1, 2005, an expert affidavit was not necessary per S.C. CODE ANN. § 15-36-100(c)(2) because the subject matter of these claims, that is, that a lawyer discussing potential claims with potential clients is not permitted to disclose the potential clients' confidential information to third parties, is a "subject matter[] that lies within the ambit of common knowledge and experience, so that no special learning is needed to

evaluate the conduct of the defendant."

The second finding in Order II dismissing the DeLoaches' claims because Respondent Kassel was never actually retained as counsel and as a result "did not owe [the DeLoaches] any duty of confidentiality or any other fiduciary duty" (Order II at p. 7) was erroneous and contrary to the law governing lawyers, lawyers' ethical requirements, and Rules of Professional Conduct as they existed at the time of Respondent Kassel's breach of his duties in 2002, and prior to October 1, 2005 when Rule 1.18, RPC, Rule 407, SCACR was adopted.

The third finding in Order II dismissing the DeLoaches' claims because of an alleged lack of proximate cause finding that it was "not foreseeable that these attorneys would proceed in Tennessee without [the DeLoaches'] permission and authorization" (Order II at p. 8) was erroneous and contrary to the specific allegations in the Verified Complaint, which were supposed to be taken as true.

The fourth finding in Order II that the DeLoaches "have still failed to show they suffered any damages that result of any claims against [Respondent] Kassel" (Order II at p. 10-11) was erroneous because it is contrary to specific allegations in the DeLoaches' Verified Complaint alleging that they sustained damages and there is a legal presumption of nominal damages from the unauthorized use of their names which was enabled by Respondent Kassel's unauthorized disclosure of their confidential information. In other words, the foreseeability of damages arising from Respondent Kassel's unauthorized disclosure of the DeLoaches' confidential information is for the jury to determine and not a trial court on a motion to dismiss.

I. THE DELOACHES' VERIFIED COMPLAINT ALLEGES FACTS SUPPORTING A

CAUSE OF ACTION FOR WRONGFUL APPROPRIATION OF PERSONALITY.

A. The DeLoaches Have Standing to Sue Because They Suffered an Injury-In-Fact Based On Their Loss of Their Right to Control the Use of Their Identity.

It was clear error for the trial court to find as a matter of law in Order I and in Order II that the DeLoaches had not suffered an injury-in-fact when the DeLoaches' Verified Complaint clearly and repeatedly alleges financial losses stemming from their right to control their identity. *Compare*, (Verified Complaint, ¶¶ Summary of the Case, 26, 34-49; R ___) with *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d 756, 759-60 (2009). The Verified Complaint specifically states, among many other things, that the Respondent class action lawyers and law firms "used the DeLoaches' surname in *Posey* to obtain financial, commercial, or professional benefit"; "because there was no written or oral fee agreement with the DeLoaches, [the Respondent class action lawyers and law firms] had no right to any funds obtained as result of using the DeLoaches' name in the *Posey* proceedings"; and "as a direct and proximate result of [their] wrongful appropriation of . . . personality, [the DeLoaches] have been damaged in an amount to be proven at the trial of this case, including all funds [Respondent class action lawyers and law firms] obtained using the DeLoaches' surname in *Posey*." (Verified Complaint, ¶¶ 66, 69-70, R ___).

In *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 684 S.E.2d at 761, our Supreme Court held that the use of someone's name "is a distinguishable property right" and that "there is a presumption of nominal damages in similar cases involving the infringement on the right to control the use of one's identity." The Court in *Gignilliat* went

on to specifically note that a "*claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.*" *Id.* (emphasis in original). The obvious conclusion is that allegations in the Verified Complaint concerning the DeLoaches' loss of their right to control the use of their identity are and should have been sufficient to establish injury-in-fact providing constitutional standing.

Taken in the light most favorable to the DeLoaches, the Verified Complaint easily establishes the "constitutional minimum of standing" to assert the host of claims arising from the Respondent class action lawyers and law firms' unauthorized use of the DeLoaches' surname in the *Posey* proceedings and for the claims against Respondent Kassel's unauthorized disclosure and breach of his duty of confidentiality. The trial court's rulings to the contrary were in error and should be reversed.

B. South Carolina's Wrongful Appropriation of Personality Tort Does Not Require Proof of Damages.

Even though the DeLoaches' Verified Complaint specifically alleges at least $600,000 in actual damages based on the amount of money Respondent lawyers and law firms obtained through the unauthorized use of the DeLoaches' surname (Verified Complaint, ¶¶ Summary of the Case, 42, 44, 49, 75-77, 83-84, 90, and 110, R. ___), it was clear error for the trial court to conclude that the DeLoaches' Verified Complaint failed to state a claim for relief under the theory of Wrongful Appropriation of Personality because nominal damages are presumed for this cause of action under South Carolina law.

South Carolina recognizes the tort of misappropriation of personality. In *Gignilliat*, Mrs. Gignilliat sued her late husband's former law firm, arguing that the firm had infringed

upon her right of publicity in the commercial use of the Gignilliat name. 684 S.E.2d at 759. Upon review of the lower court's grant of summary judgment in favor of the firm, the Supreme Court expounded upon and affirmed the validity of the tort of misappropriation of personality.

The court noted that "[j]urisdictions have recognized a right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it is encompassed within the four classic privacy torts, specifically wrongful appropriation." *Id.* (*citing Pooley v. National Hole-in-One Ass'n*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) for the proposition that "the common law right of privacy provides protection against . . . appropriation, for the defendant's advantage, of the plaintiff's name or likeness [and this] is commonly referred to as appropriation . . . or the right of publicity" and citing *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (D. Ill. 1981) for the proposition that "[o]ne of the species of the right of privacy recognized by the cases and the commentators is the right of publicity. Violation of this right constitutes the tort of appropriation of a plaintiff's name or likeness for [the] defendant's benefit.").

Our Supreme Court in *Gignilliat* confirmed the existence of three distinct causes of action for invasion of privacy and also set forth the elements for the wrongful appropriation of personality tort designed to protect a "plaintiff's right to the commercial protection of his name, likeness, or identity." *Id.*

> 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. **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. Encompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff's right to the commercial protection of his name, likeness, or identity.

Id. (emphasis added and internal citations omitted).

The use of one's name without compensation is a distinguishable property right and there is a presumption of damages in cases where a person's right to control his or her likeness has been compromised:

> Misappropriation of identity is a tort arising from the right to privacy and is designed to prevent the commercial use of one's name or image without consent. To plead misappropriation of identity, the plaintiff must claim "an appropriation without consent, of one's name or likeness for another's use or benefit." A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.

Id. at 762 (*quoting Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815 (2003); citing *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644 (1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Appellate Court of Illinois held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages exist for every infringement of a right."); *also citing James v. Bob Ross Buick, Inc.*, 167 Ohio App. 3d 338 (2006) (concluding the trial court erred in granting summary judgment on the plaintiff's claim of misappropriation of his name, stating, "a plaintiff need not establish actual

damages in order to prevail on a misappropriation-of-name claim" and that "a plaintiff may seek to recover nominal damages for claims of misappropriation of the plaintiff's name or likeness")).

The trial court's Order I and Order II essentially conclude that 1) the DeLoaches suffered no out-of-pocket losses and 2) any funds paid to the Respondent lawyers and law firms were in the nature of "an attorney fee [paid] to the objector's attorney(s) – where the objection is made in terms common to class members." Order I at p. 6 (citing MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.643 (West 2011)). Both of those conclusions are legally flawed. First, as noted above allegations of out-of-pocket losses are not required for the DeLoaches to maintain a claim for wrongful appropriation of personality. Next, the DeLoaches never had Dryvit EIFS on their house and therefore never were members of the class and did not have standing to object to the settlement terms in *Posey*. Furthermore, the trial court's citation to the MANUAL FOR COMPLEX LITIGATION, FOURTH § 21.643 as the basis on which the Respondent class action lawyers and law firms were entitled to fees as counsel for objectors in *Posey* is fundamentally flawed considering the allegations in the Verified Complaint and the specific provisions in the Manual.

The Verified Complaint alleges that these lawyers improperly used the DeLoaches' name "while representing a certain class of all South Carolina plaintiffs was stucco claims against Dryvit systems." (Verified Complaint, Summary of the Case, R. ___). Notwithstanding the absence of any client-lawyer relationship with a valid objector, the Respondent class action lawyers and law firms' use of the DeLoaches' name as objectors in *Posey* was "to obtain financial gain" to obtain additional leverage in negotiations with Dryvit in addition to the leverage created by their simultaneous role as class counsel in the

Cardamone class-action in South Carolina. (Verified Complaint, Summary of the Case and ¶¶ 24, 33, R ___). The Respondent class action lawyers and law firms, as class counsel for the class members in the *Cardamone* class-action in South Carolina, were in an antagonistic position to all of the members of the *Posey* class and antagonistic to the position all of the members of their own class-action, the *Cardamone* class. (Verified Complaint, ¶ 43, R ___) ("The second $225,000 of the $825,000 is to be paid by DRYVIT SYSTEMS, INC. to [Respondent] class action lawyers and [] law firms in two installments. The first payment of $125,000 to be paid 90 days after the final dismissal of *Cardamone* and the second payment of $100,000 to be paid 9 months thereafter."). The MANUAL in § 21.643 specifically notes that "[i]n order to guard against an objector who is using the strategic power of objecting for private advantage, the court should examine and consider disapproving the proposed withdrawal of an objection if the objector is receiving payment or other benefits more favorable than those available to other similar situated class members." *Id.* at p. 503. In other words, the allegations in the Verified Complaint do not support the trial court's conclusions that the Respondent class action lawyers and law firm were entitled to any legal fees based upon their actions in *Posey* and the *Cardamone* lawsuits, and certainly when construed in the light most favorable to the DeLoaches.

Based on the foregoing precedent and its application to the trial court's Order I and Order II, this Court should reverse these Orders and remand this case for a trial on the merits.

C. South Carolina's Wrongful Appropriation of Personality Tort Does Not Require Proof of Value Associated with the DeLoache Name Or Specific Intent to Misappropriate.

It was error for the trial court to find in Order I that the DeLoaches' Verified

Complaint failed to allege facts supporting a claim for wrongful appropriation of personality because it does not allege "any value associated with the 'DeLoache' name." (Order I at p. 8, R. ___). Also, it was error for the trial court to dismiss the wrongful appropriation claim because the Verified Complaint failed to allege "any intent to misappropriate [the DeLoaches]' 'personality' [and] that the [Respondent class action lawyers and law firms] received any payment as a result of any commercial value associated with the DeLoache name." (Order I at p. 9, R. ___).

The cause of action for wrongful appropriation of personality as stated in *Gignilliat* requires proof of an "intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit." *Gignilliat*, 684 S.E.2d at 762. The Verified Complaint satisfies those requirements. To allege facts supporting a claim for wrongful appropriation of personality in South Carolina there is no requirement to allege any specific value, or commercial value, associated with the misappropriated surname as erroneously held by the trial court. (Order I at p. 8, R. ___). Nor is there any requirement to allege an "intent to misappropriate" as erroneously held by the trial court. (Order I at p. 9, R. ___).

The Verified Complaint is replete the factual allegations that the Respondent lawyers and law firms intentionally used the DeLoache name and identity for their own benefit and without the DeLoaches' knowledge, permission, or consent. *See e.g.,* (Verified Complaint, ¶¶ Summary of the Case, 59-69, R. ___). Nothing more is required. The trial court's rulings to the contrary were in error and should be reversed.

II. NONE OF THE CLAIMS ALLEGED IN THE VERIFIED COMPLAINT REQUIRED AN EXPERT AFFIDAVIT UNDER S.C. CODE ANN. §15-36-100.

The thrust of the entire Verified Complaint is that the Respondents never were

counsel for the DeLoaches but instead misappropriated their name without their knowledge or permission for use as putative class members with standing to assert objections in order the Respondent class action lawyers and law firms to participate "as counsel" to further leverage their negotiating position with Dryvit. Is simply incongruous for the trial court to force the "expert affidavit" square peg into the "lack of any client-lawyer relationship" round hole alleged in the Verified Complaint.

A. No Expert Affidavit Was Required By S.C. CODE ANN. § 15-36-100 Because the DeLoaches Did Not Assert Any Professional Negligence Allegations Against Respondents.

Because the DeLoaches never hired any of the Respondents as their lawyer, it was impossible for them to allege any of the Respondents, as their counsel, owed them professional duties of care or were negligent. It was clear error therefore for Order I and Order II both to find that the DeLoaches were required–but failed–to file an affidavit of a duly qualified expert contemporaneously with their Complaint. (Order I at pp. 5, 13-14, R. ___); (Order II at pp. 4-7, R. ___).

The section set forth in S.C. CODE ANN. § 15-36-100 is entitled "Complaint in actions for damages *alleging professional negligence*; contemporaneous affidavit of expert specifying negligent act or admission." (emphasis added). In pertinent part and with emphasis added, the statute states as follows:

> (B) . . . [I]n an action *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 admission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

Not a single one of the causes of action alleged in the DeLoaches' Verified

Complaint asserts a claim for professional negligence or even alleges that any of the Respondents were ever retained as their lawyers, were professionally negligent, made a mistake, or other error as their counsel. The DeLoaches specifically denied any professional relationship with any of the Respondents, including Respondent Kassel. Under existing South Carolina law the DeLoaches could not have alleged a professional negligence claim against any of the defendants because there never was a client-lawyer relationship, which is required in a long-standing South Carolina law. *See Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 n.2 (1996) (all holding that the elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach"); *Am. Fed. Bank, FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship."); *Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282,701 S.E.2d 742, 745 (2010).

Under the trial court's reasoning an expert affidavit would be required for example any time a personal injury lawsuit is filed where the alleged at-fault driver happens to be a lawyer or a doctor. Just because Respondents are lawyers (and law firms) and some of the activities alleged in the Verified Complaint took place in a court does not mean that a client-lawyer relationship existed between Respondents and the DeLoaches giving rise to professional duties of care. As Charles Martin said in *Chasing Fireflies: A Novel of Discovery*, "You can put your boots in the oven, but that doesn't make them biscuits."

Just as allegations of assault and battery would not implicate legal malpractice solely because an alleged tortfeasor is a lawyer, neither do any of the causes of action alleged in the DeLoaches' Verified Complaint. Thus, § 15-36-100 is inapplicable to these causes of action.

By their affirmative acts Respondent class action lawyers and law firms themselves assumed the representation of the DeLoaches, and therefore assumed commensurate fiduciary duties to the DeLoaches. *See* (Verified Complaint, ¶ 98, R. ___). Under South Carolina law facts supporting claims for breach of a fiduciary duty can also support claims for constructive fraud, and such claims have no similarity to a professional negligence claim. *Compare, Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005) (discussing breach of fiduciary duty claims and constructive fraud claims) with *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010).

A claim for breach of fiduciary duty is separate and distinct from a claim for professional negligence / legal malpractice. *See Crowley v. Harvey & Battey*, 327 S.C. 68, 488 S.E.2d 334 (1997) (discussing the difference between claims for professional negligence and breach of fiduciary duty). Lawyers have duties to provide competent representation to their client. A deviation from the *standard of care* requiring the lawyer to possess the knowledge and exercise the skill of a reasonably diligent lawyer may result in the lawyer's liability to the client for proximately resulting damages. *See Harris Teeter, supra*. Similarly, the lawyer has an independent obligation to comply with the fiduciary duties of loyalty, confidentiality, disclosure, and honesty. A violation of these *standards of professional conduct* may likewise lead to liability for an injury sustained by the client and also allow the court to invoke the equitable remedy of disgorgement. *See e.g., Verenes v.*

Alvanos, 387 S.C. 11, 690 S.E.2d 771 (2010). Therefore, both the theory of recovery supporting the breach of fiduciary duty claim and the damages sought or remedies available are different from those in a legal malpractice case.

Although a fiduciary relationship exists as a matter of law between a lawyer and the client, every wrong committed by a lawyer does not constitute a fiduciary breach. Conversely, negligence on the part of a lawyer does not automatically rise to the level of breach of fiduciary duty, and "mere negligence is a far cry from a breach of fiduciary duty." *Metrick v. Chatz,* 266 Ill.App.3d 649, 639 N.E.2d 198, 203, 203 Ill.Dec. 159 (1st Dist. 1994).

The Respondent lawyers and law firms placed themselves in a fiduciary relationship with the DeLoaches, albeit unbeknownst to the DeLoaches. Having assumed those fiduciary duties, the Verified Complaint alleges facts supporting claims for breach of fiduciary duties, none of which alleged the Respondent lawyers–as the DeLoaches' retained counsel–were negligent or deviated from the standard of care proximately causing damages.

The causes of actions asserted are intentional torts that are in no way articulated as negligent acts by the Respondents lawyers and law firms' actions in their professional capacities, and certainly not as the DeLoaches' lawyers. Though the Causes of Action for Breach of Fiduciary Duty and Breach of Duty of Confidentiality (against Respondent Kassel) allege malfeasance connected to the Respondents' actions in their professional capacities, these too are based on allegations of intentional – not negligent – conduct and thus do not fall within the parameters of professional *negligence*.

The conclusions by the trial court in Order I and Order II to the contrary were and are erroneous and should be reversed.

B. The DeLoaches' Claims Arose Long Before the Law Requiring Expert Affidavits Was Enacted.

Even if the DeLoaches had hired any of the Respondents as their lawyers and even if the Verified Complaint made claims for professional negligence, no affidavit would of been required to be attached to their pleading because the DeLoaches' claims arose in 2002 and S.C. CODE ANN. § 15-36-100 did not take effect until July 1, 2005; by statutory definition this code section is inapplicable to all causes of action arising before that date. *See* S.C. CODE ANN. § 15-36-100. *See also* 2005 Act No. 21, §§ 4, 21(b); *Cooper v. Hawkins*, 2008 WL 2563148 (D.S.C. June 23, 2008). Although not discovered until years later, the causes of action alleged in the DeLoaches' Verified Complaint arose beginning in 2002, *three years before the enactment and effective date of § 15-36-100.* Section 15-36-100 is simply inapplicable to the claims asserted in the DeLoaches' Verified Complaint.

The South Carolina General Assembly enacted § 15-36-100 as 2005 Act No. 32, § 34. Section 21(B) of that act makes clear the effective date: "Upon approval by the Governor, *this act takes effect July 1, 2005, for causes of action arising after July 1, 2005* . . . ." (Emphasis added). The United States District Court for the District of South Carolina's analysis in *Cooper v. Hawkins*, 2008 WL 2563148 (D.S.C. June 23, 2008) (Anderson, J.), is illustrative of the issue at bar:

> It is [] undisputed that § 15-36-100 only applies to "causes of action arising after July 1, 2005." It *is* disputed whether § 15-36-100 was in effect at the time the plaintiff's causes of action arose. Therefore, this Court must determine whether § 15-36-100 was the law in effect when the plaintiff's causes of action arose or accrued.
>
> In South Carolina, the law in effect at the time the cause of action arose controls the parties legal relationships and rights. For purposes of determining the law in effect at the time

> an action arose, an action arises at the moment when the plaintiff has a legal right to sue on it, because the law presupposes at least nominal damages at that point. This moment coincides with the moment the underlying facts occur.

Id. at *2-3 (Emphasis in original).

Claims arise at the time a plaintiff's right to sue comes into existence. In 2002, when Respondent Kassel disclosed the DeLoaches' confidential information, the DeLoaches' confidentiality and privacy was breached and the DeLoaches had a right to sue. The fact that the DeLoaches did not learn about the breach of confidentiality until years later does not extend the date that their claim arose. *See Williamson v. S.C. Insurance Reserve Fund*, 355 S.C. 420, 426, 586, S.E.2d 115, 118 (2003) (holding that the statutory caps of the Tort Claims Act did not apply to the plaintiff's claims because the claims accrued or arose prior to the effect date of the caps and to hold otherwise would violate the separation of powers).

Because the DeLoache's claims arose prior to the enactment of S.C. CODE ANN. §15-36-100, but were discovered and filed later, the expert affidavit requirements do not attach to the DeLoaches' claims. In this case, the claims arose on or before October 1, 2002, when Respondent Kassel disclosed the DeLoaches' confidential information to the Respondent class action lawyers and law firms and when those lawyers filed papers using DeLoaches' names and appeared at a hearing in *Posey* purporting to represent the DeLoaches. It is at this time that the DeLoaches suffered at least nominal damages and had a right to sue the Respondents for the claims alleged in the Verified Complaint. As S.C. CODE ANN. § 15-36-100 was not in effect when these causes of action arose, the trial court's ruling to the contrary was in error and should be reversed.

C. An expert affidavit was not required because it is common knowledge that lawyers are not allowed to use people's names in court proceedings without permission.

Even if the DeLoaches had retained the Respondents as their counsel and had a claim for professional negligence that arose after July 1, 2005, an expert affidavit was not necessary per S.C. CODE ANN. § 15-36-100(c)(2) because the subject matter of these claims, that is, that lawyers are not permitted to disclose confidential information or to use people's names and file materials in court proceedings without permission, are matters of common knowledge and experience.

The subject code provision, S.C. CODE ANN. § 15-36-100(c)(2) states as follows:

> The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Id. (emphasis added).

Is self-evident that no special learning is needed to explained that lawyers are not allowed to disclose confidential information or file papers in a court on behalf of people who have not consented or allowed the lawyers to use their names. Clearly the allegations in the Verified Complaint meet the common knowledge exception. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things.

It was reversible error for the trial court not to apply S.C. CODE ANN. § 15-36-100(c)(2) to the claims asserted in the DeLoaches' Verified Complaint, even if those pleadings could somehow be construed to show that claims arose after July 1, 2005 and that there was somehow a client-lawyer relationship between the DeLoaches and any of

the Respondents, notwithstanding specific allegations in the Verified Complaint to the contrary.

III. THE VERIFIED COMPLAINT STATED FACTS SUPPORTING CLAIMS AGAINST RESPONDENT KASSEL.

The trial court found that the DeLoaches failed to state a claim for relief under the theory of Breach of Duty of Confidentiality. (Order II at p. 7). This finding was in error and needs to be reversed.

Respondent Kassel had a duty to keep confidential and not disclose any of the information disclosed to him in confidence by the DeLoaches during the time Respondent Kassel was evaluating undertaking representation of the DeLoaches.

"The duty of confidentiality, where it exists, generally arises out of broadly applicable societal norms and public policy concerning the kind of relationship at issue. It does not arise out of specific agreement or particularized circumstances. Moreover, the object of the law when this duty is violated is compensation for the resulting injuries, not fulfillment of expectation. Therefore, liability should be grounded in tort law." *See McCormick v. England*, 328 S.C. 627, 640 n.7, 494 S.E.2d 431 (1998). There is an independent tort for breach of the duty of confidentiality. *See McCormick v. , England*, 328 S.C. 627, 639, 494 S.E.2d 431, 437 (Ct. App. 1997) (recognizing breach of physician's duty of confidentiality as independent tort). The trial court misapprehended the nature of this separate and independent cause of action when it found that this cause of action was a "ruse to get around the wording of the statute [requiring a contemporaneous filing of an expert affidavit]." (Order II at p. 5, R. ___). The tort of breach of confidentiality is independent of the tort of professional negligence or legal malpractice.

During the summer of 2002, the DeLoaches were prospective clients to Respondent Kassel within the purview of Rule 1.1, RPC, Rule 407, SCACR (Competence), as it existed at that time and prior to the adoption of Rule 1.18, RPC, Rule 407, SCACR (Duties to Prospective Client). Lawyers have always owed a duty of competence to prospective clients, even before the adoption of Rule 1.18, RPC. Long before the adoption of Rule 1.18, RPC, when a lawyer told a perspective client that the lawyer would look into the client's rights, the lawyer undertook an obligation to perform that task competently and the communications with the lawyer were confidential and privileged notwithstanding the nonexistence of a formal client-lawyer relationship. *See Clary v. Blackwell*, 160 S.C. 142, 158 S.E. 223 (1931) (conversation between lawyer and prospective client discussing matters necessary to place lawyer in position to give advice or set a fee were held to be confidential and privileged). *See also,* Margaret Colgate Love, *Duties to Prospective Clients*, 87 ABA J. 59 (May 2001).

Respondent Kassel had a duty of confidentiality to the DeLoaches despite the fact that Rule 1.18, Duties to Prospective Clients, was not enacted until 2005. A majority of the Rules of Professional conduct were enacted in 1990 and, prior to that, South Carolina lawyers were required to act within the Model Code. It is absolutely <u>not</u> the law that prior to 2005, lawyers in South Carolina owed <u>no</u> duties whatsoever to their prospective clients. The duty of confidentiality is a fundamental duty to all client-lawyer relationships: prospective, current, and former clients alike. Prior to the adoption of Rule 1.18, RPC, the duty to prospective clients was subsumed within the other Rules of Professional Conduct such as Rule 1.1, RPC, (Competence), Rule 1.7, RPC, (Conflict of Interest), and Rule 1.6, RPC, (Confidentiality). Prospective clients, like current clients, often disclose confidential

information to a lawyer in an effort to retain him, placed documents or other property in the lawyer's custody, even if only temporarily, and may even rely on his advice. *See Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (holding as early as 1978 that a lawyer has duties to prospective clients). For example, they may rely on the lawyer's advice that the statute of limitations has run in deciding not to retain that lawyer and file suit - exactly what happened in this matter.

Because the allegations in the Complaint must be taken as true when deciding a Motion to Dismiss, the allegations themselves prove the foreseeability or proximate cause. The DeLoaches' pleadings state that Respondent Kassel received confidential client information concerning them and their artificial stucco defects. Respondent Kassel advised them about the statute of limitations on their stucco claims and the DeLoaches decided not to bring a lawsuit or participate in *Posey*. Respondent Kassel shared the DeLoaches' confidential information with Respondent Robertson in order to allow Respondent Robertson (and the other Respondent class action lawyers and law firms) to have "class members" with standing to serve as objectors in the *Posey* case.

Contrary to the findings buy the trial court (Order II at p. 9, R. ___), the DeLoaches were not required to plead specific damages in their Verified Complaint in order to state facts sufficient to support a cause of action against Respondent Kassel. In addition, damages in a breach of confidentiality claim can be likened to invasion of privacy and can include reputational as well as more tangible harm. *See generally, MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982). The South Carolina Supreme Court has observed in dicta ". . . It is irrelevant in a breach of confidentiality claim, whether the disclosure of information would bring shame to a person of ordinary sensibilities." *Swinton*

Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 483, 514 S.E.2d 126, 133 n.14 (1999).

As alleged in the Verified Complaint, the DeLoaches were people with whom Respondent Kassel discussed the possibility of forming a client-lawyer relationship with respect to the DeLoaches' possible participation in *Posey*. Under South Carolina law those communications were privileged, Respondent Kassel undertook a duty to competently evaluate the DeLoaches' potential claims, and notwithstanding the fact that a client-lawyer relationship never developed, Respondent Kassel had a duty to maintain the confidentiality of those communications; he did not and the DeLoaches sustained damages as alleged in the Verified Complaint. The trial court's rulings to the contrary were in error and should be reversed.

IV. THE VERIFIED COMPLAINT ALLEGED FACTS SUFFICIENT TO STATE A CLAIM FOR THE CAUSES OF ACTION FOR CONVERSION, CIVIL CONSPIRACY, CONSTRUCTIVE TRUST, BREACH OF FIDUCIARY DUTY, AND INJUNCTIVE RELIEF.

The facts pled in the Complaint, taken as true, are sufficient to maintain the DeLoaches' causes of action for wrongful appropriation personality, conversion, civil conspiracy, constructive trust, breach of fiduciary duty, and injunctive relief.

A. The Trial Court Erred in Dismissing the DeLoaches' Claim for Conversion.

Trial court found in Order I that Verified Complaint failed to state a claim for relief under the theory of Conversion. (Order I at p. 9, R. ___). This finding was in error.

The lower court found that the DeLoaches "failed to allege any factual basis entitling them to the amounts allegedly paid (or to be paid) to [Respondent class action lawyers and law firms] as part of the *Posey* class settlement" or that the DeLoaches " have any right of

ownership over any goods or personal property at issue." (Order I at pp. 9 - 10, R. ___). This finding ignores the host of allegations in the Verified Complaint establishing that but for the use of the DeLoaches' names the Respondent class action lawyers and law firms would have never obtained any funds from *Posey*. (Verified Complaint, ¶¶ 33-34, 41, 45, 47, 69, 73-79, R. ___). Further, Order I concludes that "[t]o the extent [the DeLoaches] may mean to claim conversion of and intangible property right – the right to use their name – the Court finds that [the DeLoaches] have failed to allege conversion of an 'intangible property right that is merged in, or identified with, some document.'" (Order I at p. 10) (citing *Gignilliat*, 684 S.E.2d at 763).

In *Gignilliat,* court noted that "an action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document. *Gignilliat*, 385 S.C. at 465 (emphasis added) quoting 18 AM. JUR. 2d Conversion § 7 (2004). Where courts recognizing intangible property rights as the basis for conversion, they are doing so "where the rights have some documented basis to support to them." *Id.* By filing legal documents with the DeLoache surname, the Respondent class action lawyers and law firms converted the DeLoaches' intangible property rights. *See* W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim "has been discarded to some extent by all of the courts" but noting "the process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with, some document") (cited in *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452 (2009) (emphasis added)). Based on the foregoing, it is clear that the trial court's findings and Order I were erroneous and should be reversed.

B. The Trial Court Erred in Dismissing the DeLoaches' Claim for Civil Conspiracy.

The trial court found in Order I that the DeLoaches failed to state a claim for relief under the theory of Civil Conspiracy claiming there were no allegations that the Respondents joined together "for the purposes of injuring" the DeLoaches and that there were no allegations that the conspiracy caused them "special damage." (Order I at pp. 10-11, R. ___). Those findings are contrary to the specific allegations in the Verified Complaint and therefore the trial court's findings were in error. (Verified Complaint, ¶¶ Summary of the Case, 33-36, 45, 49, 81-87, R. ___).

Civil conspiracy consists of the following elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes him special damage. *Charles v. Texas Co.*, 190 S.C. 82, 1 S.E.2d 912 (1939); *Vaught v. Waites*, 300 S. C. 201, 387 S.E.2d 91 (Ct. App. 1989); *Island Car Wash v. Norris*, 292 S.C. 595, 358 S.E.2d 150, 152-53 (Ct. App. 1987). The conspiracy may be established by showing that the Respondents had shared the objective to deprive the Plaintiff of certain rights. *E.g., Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Hull v. Cuyahoga Valley Board of Education*, 926 F.2d 505 (6th Cir.), *cert. denied*, 111 S.Ct. 2917 (1991); *Lenard v. Argenta*, 699 F.2d 874 (7th Cir. 1983); *Bond v. IMFS, Inc.*, 727 F.2d 770 (8th Cir. 1984).

The DeLoaches' Verified Complaint alleges that the conspiracy involved two or more persons, including each Respondent class action lawyers and the individuals that comprise the Respondent law firms. Further the Respondents class action lawyers and law firms' actions were for the purpose and with the intent to misappropriate and convert the DeLoaches' personality to the DeLoaches' detriment. The Respondent class action

lawyers and law firms subjected the DeLoaches to the jurisdiction of the *Posey* court as Class Member Objectors to obtain financial gain, which later turned into secret payments and commitments to pay totaling $825,000.00. One of the overt acts in further furtherance of the conspiracy was the Respondent lawyers and law firms collective failure to communicate to the DeLoaches anything about the status of the arguments in *Posey* or the recovery of the $600,000/$825,000. This was alleged to have caused special damages to the DeLoaches. The DeLoaches have suffered damages in that they are now concerned they are at risk for claims of contempt of court or fraud on the court. The use of the DeLoache name in connection with the *Posey* matter puts the DeLoaches at risk of litigation and additional legal expenses, thus creating tangible financial damages. Further, the DeLoaches have spent time and resources in depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality, all creating special damages for which the DeLoaches are entitled compensation.

As such, the DeLoaches have sufficiently pleaded facts sufficient to establish civil conspiracy and the trial court's Order I to the contrary was erroneous and should be reversed.

C. The Trial Court Erred in Dismissing the DeLoaches' Claim for a Constructive Trust.

The lower court found that the DeLoaches fail to state a claim for relief under the theory of Constructive Trust based on its erroneous conclusion that the DeLoaches "failed to allege they are entitled to any money or benefit which might be argued to have been conferred upon [the Respondent class action lawyers and law firms];" that they "failed to plead facts that would entitle them to the money allegedly paid to [the Respondent class

action lawyers and law firms];" and that "[the DeLoaches] are not beneficially entitled to anything obtained by [the Respondent class action lawyers and law firms], ..." (Order I at p. 12, R. ___). These findings were in error and should be reversed.

"[T]he law may impose a constructive trust when a party obtains a benefit that does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). "It is resorted to by equity to vindicate right and justice or frustrate fraud." *Id. See also Lollis v. Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987) ("constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title").

The Respondent lawyers and law firms' allegedly fraudulent statements and grossly reckless misrepresentations to the *Posey* court and litigants concerning their alleged representation of the DeLoaches caused substantial funds to be paid to the Respondent class action lawyers and law firms. Those Respondents, therefore, should not in equity be allowed to reap the benefits of their fraudulent statements and gross misrepresentations concerning their alleged representation of the DeLoaches. The Respondents reaped these benefits through improper means and it was error for the trial court to dismiss the DeLoaches' plea for an equitable remedy for the imposition of a constructive trust.

The DeLoaches have sufficiently pleaded facts sufficient to establish their entitlement to the equitable remedy for the imposition of a constructive trust and the trial court's Order I to the contrary was erroneous and should be reversed.

V. THE TRIAL COURT ERRED WHEN IT DID NOT ALLOW THE DELOACHES TO FILE AN AMENDED COMPLAINT.

"[W]here a complaint is dismissed under [Rule] 12(b)(6), plaintiff should be granted leave to file an amended complaint." *Dockside Ass'n v. Detyens, Simmons, & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (*citing Foman v. Davis*, 371 U.S. 178 (1962)) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b), SCRCP).

The DeLoaches' specifically requested the trial court provide leave for them to file an Amended Verified Complaint, but their request was denied without comment. Such a ruling or absence of a ruling was contrary to South Carolina's preference to try claims on their merits rather than on alleged procedural defects, was in error, and should be reversed.

VI. THE TRIAL COURT'S RULING GRANTING THE LEATH RESPONDENTS' MOTION TO STRIKE AND/OR DISMISS THE DELOACHES' "SUMMARY OF THE CASE" ALLEGATIONS WAS ERRONEOUS.

The trial court's ruling granting Respondents Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP's motion to strike the four paragraphs under the subtitle Summary of the Case was in error and contrary to Rules 8(e), 10(b), and 12(f), SCRCP. The trial court found that the DeLoaches' "Summary of the Case" violated Rules 8(e) and 10(b), SCRCP, on the alleged grounds that the "Summary of the Case" did not "comply with the Rules of Civil Procedure, [did] not state a claim upon which relief might be granted, and are unnecessary to the Complaint." (Order I at p. 15, R. ___).

Rule 8(a)(1), SCRCP states "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Rule 8(a), SCRCP

states that "[a] pleading which sets forth a cause of action . . . shall contain . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 10(b), SCRCP states "[a]ll averments of the facts of a cause of action or defense and demands for relief 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 . . . ." Review of these rules demonstrates the DeLoaches' Verified Complaint is and was in compliance.

The DeLoaches' Summary of the Case provides the reader with a short and plain statement of the facts showing the DeLoaches are entitled to relief. *See* SCRCP 8(a), SCRCP. This summary serves as a preface to the subsequent averments and is in accordance with South Carolina law. Following this summary, the DeLoaches' Verified Complaint provides simple, concise, and direct averments of the facts of the cause of action and relief sought by the DeLoaches. *See* Rule 8(a), SCRCP; and Rule 10(b), SCRCP. These averments are made in consecutive numbered paragraphs as required by the Rules of Civil Procedure. Rule 10(b), SCRCP.

Rule 12(f), SCRCP, provides that upon proper motion "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." When reviewing a motion to strike, the trial court must view the pleading under attack in the light most favorable to the pleader. *See Menezes v. WL Ross & Co. LLC*, 392 S.C. 584, 589, 709 S.E.2d 114, 117 (2011). The allegations in the pleading should not be struck unless the allegations' insufficiency is clearly apparent, it does not present relevant questions of law or fact, and its retention is prejudicial to the moving party. *See id.*; *see also Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986), *rev'd on*

other grounds, 505 U.S. 504 (1992); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *2 (W.D. Va. June 24, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009).

Rule 12(f) motions to strike are generally disfavored, and courts frequently characterize them as "time wasters" that potentially serve only to delay a proceeding. *See Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) ("[A] motion to strike pleadings or affirmative defenses is generally disfavored because it consumes scarce judicial resources, and potentially serve[s] to delay . . .." (citation omitted) (internal quotation marks omitted)); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *1 (S.D. Fla. May 29, 2008) (listing many decisions to so describe). Moreover, a motion to strike is a drastic remedy and should not be used frequently, in part because of the difficulty of deciding cases without a factual record, (*see Brown & Williamson Tobacco Corp.*, 201 F.2d 819, 822 (6th Cir. 1953) ("Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice." (citation omitted)); *Knit With v. Knitting Fever, Inc.*, Civil Action Nos. 08-4221, 08-4775, 2009 WL 973492, at *6 (E.D. Pa. Apr. 8, 2009)), as well as the strong policy favoring resolution on the merits.

Accordingly, a plaintiff whose claims have been stricken is normally granted leave to amend. *Dockside Ass'n v. Detyens, Simmons,* 297 S.C 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1984). The trial court should have recognized that the Respondents' motion to strike did not claim that the allegations in the Summary of Case paragraphs contained "any

redundant, immaterial, impertinent or scandalous matter[s]," and therefore should have denied the motion. *See, Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854, 857 (Ct. App. 1996) (objections to impertinent or scandalous matters were properly raised by party and a motion to strike); *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993) ("If a motion to strike raises merely a doubtful question or the case is such that justice may be promoted by a trial on the merits, the court should exercise a fair, judicial discretion to that end. However, this rule is followed only in cases where there is either real cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits."). With a Rule 12(f), SCRCP motion, "a court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Witenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

It was legal error for the trial court to strike the Summary of the Case paragraphs and also not allow the DeLoaches to amend their Verified Complaint. The trial court's granting of this Motion was in error and should be reversed.

VII. THE TRIAL COURT ERRED WHEN IT DELAYED ITS RULING ON THE MOTIONS TO DISMISS AND MOTION TO STRIKE FOR 18 MONTHS.

The trial court's 18 month delay in ruling on Respondents' motions is effectively a violation of the DeLoaches' due process rights and certainly a violation of Rule 1, SCRCP, which requires the Rules of Civil Procedure to "be construed to secure the just, *speedy*, and inexpensive determination of every action." (Emphasis added). The initial hearing on Respondents' motions was in June 2012. Counsel for the respective parties submit a proposed orders immediately thereafter. There is simply no legitimate reason for the 18

month delay in issuing an order on the pending motions.

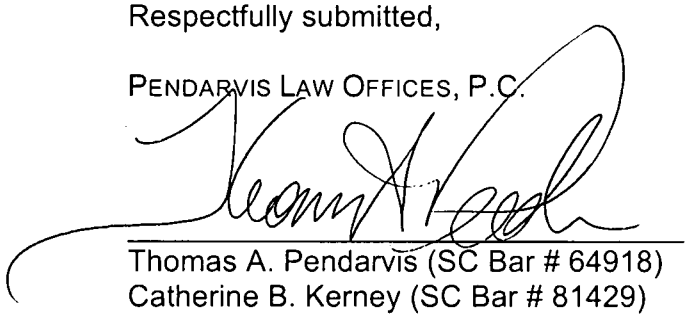
Delay obviously in enures to the Respondents' benefit by avoiding facing the merits of this action before a jury. An 18 month delay in ruling on Respondents motions in combination with a similar delay in prosecuting this appeal based on clearly erroneous rulings would leave many feeling that the trial court was the proverbial "fox guarding the hen house" with regard to the claims the DeLoaches asserted against the Respondent lawyers and law firms.

CONCLUSION

Based on the foregoing arguments and the allegations in the DeLoaches' Verified Complaint, all viewed in the light most favorable to the DeLoaches, the trial court's Orders granting Respondents' motions to dismiss and strike should be reversed and this matter remanded for a trial on the merits.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



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April 28, 2014
Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

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

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 . . . . . Respondents.

PROOF OF SERVICE

I, Thomas A. Pendarvis, an attorney with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the INITIAL BRIEF OF APPELLANTS and APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL on counsel for Respondents, by depositing a copy of the same in the United States Mail, postage prepaid, on the 28th day of April, 2014, addressed to:

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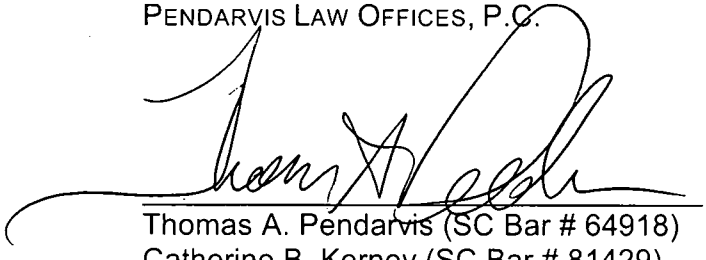

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April 28, 2014

Beaufort, South Carolina

PENDARVIS LAW OFFICES, PC

April 28, 2014

Jenny Abbott Kitchings, Clerk of Court
COURT OF APPEALS FOR THE STATE OF SOUTH CAROLINA
PO Box 11629
Columbia, SC 29211

Re: DeLoache v Robertson, et al
Richland County Civil Action No. 2011-CP-40-7432

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the INITIAL BRIEF OF APPELLANTS, APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL and PROOF OF SERVICE in regard to the above-referenced matter.

Please return clocked copies in the stamped, self-addressed return envelope enclosed for your convenience.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

Thomas A. Pendarvis

TAP/lat
Enclosures
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William P. Jones, J.D.
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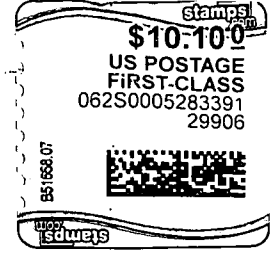

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