THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph F. Strickland, Circuit Court Judge

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SC Court of Appeals

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.

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STATEMENT OF ISSUES ON APPEAL

I. Did Appellants fail to preserve an objection to the trial court's dismissal of the Complaint for lack of standing where Appellants did not raise standing in their statement of issues on appeal or cite a single authority in their brief addressing the constitutional requirement of standing?

II. If the issue of standing was preserved for review, did the trial court correctly find that Appellants lacked standing because they did not allege an injury-in-fact?

III. Did the trial court properly dismiss Appellants' cause of action for wrongful appropriation of personality where Appellants failed to allege any commercial value associated with their name, failed to allege that Respondents received any benefit as a result of value associated with their name, and failed to allege that Respondents acted with the intent to misappropriate?

IV. Did the trial court properly dismiss Appellants' cause of action for conversion where Appellants did not allege facts supporting the right to ownership over any goods or personal property at issue, and did not allege any intangible property right identified with a document?

V. Did the trial court properly dismiss Appellants' cause of action for civil conspiracy where Appellants failed to allege acts in furtherance of the alleged conspiracy that were separate and independent from other wrongful acts alleged in the Complaint?

VI Did the trial court properly dismiss Appellants' cause of action for constructive trust where it found that Appellants had not pled facts showing they were beneficially entitled to any money or benefit obtained by Respondents?

VII. Did Appellants fail to preserve an objection to the trial court's dismissal of their cause of action for breach of fiduciary duty where Appellants did not challenge the trial court's finding that they failed to allege a fiduciary relationship and did not cite any

authority to support their conclusory statement that Respondents unilaterally assumed fiduciary obligations?

VIII. If the issue of fiduciary duty was preserved for review, did the trial court properly dismiss Appellants' cause of action for breach of fiduciary duty where Appellants expressly alleged they had no relationship with Respondents and did not file an expert affidavit with their Complaint?

IX. Did Appellants fail to preserve an objection to the trial court's dismissal of their cause of action for injunctive relief where their brief does not contain any argument or authority on this issue?

X. Did the trial court properly deny Appellants' motion to alter or amend the judgment without granting leave to file an amended complaint where the request to file an amended complaint was not accompanied by any additional factual allegations or theory of recovery?

XI. Did the trial court properly strike the "Summary of the Case" section of the Complaint because the summary violated the Rules of Civil Procedure and was unnecessary?

XII. Does the passage of time between the filing of the Respondents' motions to dismiss and the entry of the Order granting the motions constitute reversible error?

STATEMENT OF THE CASE

This appeal arises from the dismissal of a Complaint in which Appellants allege that Respondents[1], who are licensed attorneys in South Carolina, misappropriated their personality by

[1] As used in this brief, "Respondents" refers to the Defendants, collectively, except John Kassel, who will be filing a separate Respondent's Brief because the claims asserted against him in the Complaint are distinct from the claims against these Respondents and were dismissed in separate Orders

purporting to represent Appellants in a court proceeding without their permission. On the same set of alleged facts, Appellants filed a Complaint on November 3, 2011, alleging six causes of action against Respondents: (1) Wrongful Appropriation of Personality; (2) Conversion; (3) Civil Conspiracy; (4) Constructive Trust; (5) Breach of Fiduciary Duty; and (6) Injunctive Relief. (Complaint.)

The Respondents all filed timely motions to dismiss the Complaint, and the motions came before the Honorable Joseph M. Strickland on June 6, 2012. Judge Strickland heard arguments of counsel and took the matter under advisement. During the hearing, counsel for Plaintiffs stipulated on the record to suspend or stay certain discovery until such time as the Court had issued a ruling on the motions to dismiss. (Transcript of June 6, 2012 Hearing p. 104:5-16.)

In an Order dated October 24, 2013, Judge Strickland granted Respondents' motions to dismiss Judge Strickland found that Appellants had not alleged an injury-in-fact and therefore lacked standing to bring the alleged claims against Respondents. (Order p. 6-7.) Additionally, Judge Strickland concluded that the facts alleged in the Complaint were not sufficient to support any of the causes of action asserted. (Order p. 8-14.) He further found that the Appellants' cause of action for "breach of fiduciary duty" purported to set forth "an action for damages alleging professional negligence" against attorneys, and found dismissal appropriate based on the failure of Appellants to comply with the expert affidavit requirement of Section 15-36-100 of the South Carolina Code. (Order p. 13-14.)

On November 18, 2013, Appellants filed a motion to alter or amend the Order granting Respondents' motions to dismiss. (Motion to Alter or Amend Judgments). Respondents filed a return to the motion to alter or amend on December 9, 2013. (Return to the Plaintiffs' Motion to

Alter or Amend.) Judge Strickland issued an Order denying Appellants' motion to alter or amend on February 11, 2014. (Order Denying Motion to Alter/Amend.) The Appellants responded to the Order by filing a Notice of Appeal on February 26, 2014. (Notice of Appeal.)

Appellants' initial brief was served April 28, 2014. Appellants assert seventeen issues in their Statement of Issues on Appeal. (Appellants' Initial Brief p. 1-4.) However, the Appellants' brief is not "divided into as many parts as there are issues to be argued", as required by Rule 208(b)(1)(D), SCACR. The excessive number of issues on appeal, coupled with the absence of a direct connection between Appellants' statement of issues and argument section, creates confusion and difficulty in fashioning a response to the issues raised by Appellants. Therefore, Respondents have included their own statement of issues (corresponding to section headings in their argument); Respondents' brief addresses all issues and arguments raised in Appellants' Initial Brief.

STATEMENT OF FACTS

The Complaint alleges that the Appellants approached attorney John Kassel in July of 2002 to possibly retain Mr. Kassel in connection with problems they were experiencing with the 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 Appellants participating in a nationwide class action lawsuit, *Posey v Dryvit*, (Case No. 17,715, Jefferson County, Tennessee), brought on behalf of owners of residential homes clad with a synthetic stucco product called "Dryvit Exterior Insulating and Finishing System", or EIFS. (*Id*.) The Complaint alleges that *Posey* was in the process of being settled during this time and that Mr. Kassel advised the Appellants that in his opinion it was not worth participating in the *Posey* class

settlement. (Compl. ¶ 16.) The Appellants 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 Respondent attorneys (and their respective law firms), excluding Mr. Kassel, formed a joint venture to challenge the *Posey* class settlement. (Compl. ¶ 33.) The Appellants allege that in pursuit of their joint venture, certain of the Respondent attorneys, without the permission of the Appellants, filed papers and appeared in *Posey* on behalf of the Appellants. (Compl. ¶ 34-36.) According to the Complaint, the purpose of the appearance in *Posey* was to object to the terms of the proposed class settlement (Compl. ¶ 36-39.) The Complaint further alleges that as a result of their objections to the proposed settlement on behalf of the Appellants, the Respondents reached an agreement with *Posey* Class Counsel pursuant to which Respondents were paid the sum of $600,000 from Class Counsel's fee award. (Compl. ¶ 41-42.) The Complaint also alleges an agreement with Dryvit whereby Dryvit was to pay Respondents $225,000 in relation to the dismissal of the South Carolina *Cardamone* class action[2], but the Complaint does not allege that the payment of $225,000 was ever made. (Compl. ¶ 43-44.)

According to the Complaint, "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 that the Appellants' home was not clad with Dryvit EIFS at the time of the *Posey* fairness hearing in 2002.

Based on the foregoing allegations, Appellants seek recovery of "all funds Defendants' obtained using the DeLoaches' surname in *Posey*", (Compl. ¶ 70), unspecified actual,

[2] *Cardamone et al v Dryvit Systems, Inc , et al* , Civil Action No 2002-CP-07-1377.

consequential, special, incidental, and punitive damages, as well as prejudgment interest, injunctive relief, and the costs of the action. (Compl., Prayer for Relief p. 22-23.)

STANDARD OF REVIEW

In reviewing a decision on a motion to dismiss, the appellate court applies the same standard of review as the trial court. *Doe v Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). 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), SCRCP, 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.

ARGUMENT

I. **The circuit court correctly found that Appellants have not alleged an injury-in-fact and therefore lack standing to pursue their claims.**

(A) Appellants have not preserved their objection to the circuit court's finding that they lacked standing.

Appellants have failed to state an issue on appeal concerning the circuit court's finding that Appellants lack standing to assert their claims.

Rule 208(b)(1)(B) of the South Carolina Appellate Court Rules provides as follows:

> A statement of each of the issues presented for review. The statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.

Rule 208(b)(1)(B), SCACR (emphasis added). *See State v Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003)("No point will be considered which is not set forth in the statement of issues on appeal.") "Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to 'grope in the dark' to ascertain the precise point at issue." *Jones v Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (quoting *Forest Dunes Assoc v Club Carib, Inc* , 301 S.C. 87, 89, 390 S.E.2d 368, 370 (Ct. App. 1990)).

After several pages of analysis, the circuit court held "that Plaintiffs have not suffered any injury-in-fact and therefore lack standing at this time to bring the asserted claims against Defendant Attorneys." (Order p. 8.) Appellants state seventeen issues in their Statement of Issues on Appeal; not one challenges the circuit court's finding that they lacked standing. Furthermore, throughout their forty-two page brief, Appellants do not challenge the authorities cited by the circuit court or cite a single authority addressing the constitutional requirement of standing.

Under these circumstances, Appellants have not preserved an objection to the circuit court's ruling on standing. This scenario is analogous to *Jones v Lott*, where the Supreme Court affirmed the Court of Appeals under the "two issue rule" because the petitioner failed to preserve its challenge to one of two alternative grounds for the circuit court's ruling. Petitioner in *Jones* argued that his appeal of the trial court's grant of immunity was "subsumed" in a central issue of

the case notwithstanding the petitioner's failure to identify the issue in his Statement of Issues on Appeal. The Supreme Court held as follows:

> Petitioner's second issue on appeal to the court of appeals states, "Did the trial court err in finding the use of deadly force by the Richland County deputies was objectively reasonable, as a matter of law, and that the officers were not negligent, as a matter of law?" **There was no mention of section 15-78-60(6) or Tort Claims Act immunity.** Moreover, the second issue does not reference a "gross negligence" standard. This left the court of appeals to "grope in the dark" to ascertain the precise point at issue. The issue raised by Petitioner was not concise and direct, but rather a broad general statement that ought to be disregarded by this Court. Hence, because **Petitioner failed to preserve the issue for review**, it became the law of the case under the two issue rule. Therefore, the court of appeals was correct in holding Respondent was entitled to immunity under section 15-78-60(6).

Jones v Lott, 387 S.C. 339, 347-48, 692 S.E.2d 900, 904 (2010)(emphasis added). *See also Narruhn v Alea London Ltd* , 404 S.C. 337, 341, 745 S.E.2d 90, 92 (2013)(questioning whether insurer preserved objection to circuit court's ruling on standing where "Insurer did not specifically set forth any challenge to this independent basis for the circuit court's denial of the Rule 60(b) motion in its Statement of Issues on Appeal and, although it made an implied reference to standing in the conclusion of its brief, it cited none of the authorities that it belatedly advanced during the oral argument of this matter.")

Similarly, Appellants have not mentioned the issue of standing in their Statement of Issues on Appeal. Several of Appellants' issues raise the question of whether they alleged any recoverable damages, (*e g* , Issue IV[3]), but as in *Jones*, such "a broad general statement . . . ought to be disregarded" by the Court because it leaves the Court "to grope in the dark to ascertain the precise point at issue". *Jones*, 387 S.C. at 347-48, 692 S.E.2d at 904. The circuit court's Order

[3] Appellants' Issue IV states, "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 " (Appellants' Initial Brief p 1)

contains an express finding that Appellants lack standing, and it is accompanied by several pages of reasoning and analysis. Appellants' Statement of Issues on Appeal does not reference standing and leave the Court and Respondents to guess as to what they believe was objectionable about the circuit court's ruling. Accordingly, Appellants have not preserved this issue for review, and the Order of the circuit court should be affirmed because Appellants' lack of standing was one of multiple bases for dismissal of the Complaint.

B. Even if the standing issue is preserved, the circuit court correctly found that Appellants have not alleged an injury-in-fact and therefore lack standing to pursue their claims.

It is the plaintiff's burden to establish the "irreducible constitutional minimum of standing" as a prerequisite to maintaining a civil action. *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). This burden requires a plaintiff to demonstrate 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." *Id* (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)). Critically, "Prospective concern falls far short of the standard of 'concrete and particularized and . . . actual or imminent' harm set forth in *Lujan*." *Beaufort Realty Co v Beaufort County*, 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001) (quoting *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Appellants rely upon general, conclusory allegations that they have been injured as a result of Respondents' conduct, but fail to allege any *facts* which demonstrate they have suffered

an injury-in-fact. First, Appellants acknowledge that there is "no evidence that [their] home was ever clad with Dryvit EIFS". (Compl. ¶ 37.) Therefore, it is without question that they would never have any lawful claim to any benefit, monetary or otherwise, related to the *Posey* class action settlement.

Appellants nevertheless allege that they are entitled to fees paid to Respondents stemming from Respondents' presentation of an objection to the *Posey* class settlement.[4] (Compl. ¶ 70.) The circuit court correctly identified and applied basic class action principles to arrive at the conclusion that based on the allegations of the Complaint, Appellants had no right to claim entitlement to any fees associated with the Respondents' presentation of an objection to the class settlement, even if the objection was made on Appellants' behalf.

According to the Complaint, the alleged payment to Respondents 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.) The circuit court correctly recognized that payment of attorneys' fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. (*See* Order p. 6) (citing Manual for Complex Litigation, Fourth § 21.643)("An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the 'common-fund' theory.") The circuit court went on to observe, "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 – where the objection is made in terms common to class members." *Id* This finding is

[4] Appellants claim on the one hand that they were not – and could not have been – class members in *Posey* based on the subsequent discovery that they did not have any Dryvit products installed on their home, but at the same time they seek to recover fees allegedly paid to the Respondents for asserting an objection to the *Posey* settlement on their behalf as members of the *Posey* class

directly in line with class action procedure outlined in the Manual for Complex Litigation. As pointed out by the circuit court, it would be illogical for there to be a financial recovery by the objector because an objector is, by definition, a class member who is in line to receive the benefits of any improvement to the terms of the class settlement.[5] *See* Manual for Complex Litigation, Fourth § 21.643 ("Any class member who does not opt out may object to a settlement, voluntary dismissal, or compromise that would bind the class."). Thus, by reference to well-established procedural rules applicable to class actions, the circuit court reached the sound conclusion that, based on Appellants' own allegations, they were not entitled to any monetary recovery as a result of their status as objectors to the *Posey* class action.

Appellants argue that the circuit court's reasoning was flawed because "[t]he 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*." (Appellants' Initial Brief at 20.) This observation does not demonstrate that the circuit court erred. The court's class action analysis and citation to the Manual for Complex Litigation was directed to the issue of the Appellants' lack of any basis to claim entitlement to fees allegedly paid to Respondents. Pointing out that all involved were apparently mistaken about the identification of the EIFS on Appellants' residence[6] does not demonstrate that Appellants were entitled to the alleged fees. Besides, any issue there may have been about the standing of the Appellants to raise an objection to settlement as members of the *Posey* class was a matter for the Tennessee court, not this one.

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[5] Of course, a class member who is dissatisfied with the terms of a proposed settlement could instead choose to opt-out and pursue his/her claim individually, but one who has opted out may not assert an objection at a settlement fairness hearing

[6] The Complaint alleges that "*recent* inspections and testing *revealed*" that Plaintiffs did not have Dryvit EIFS, (Compl ¶ 39), which strongly suggests that all parties believed Appellants did have Dryvit EIFS when the alleged representations were made

Appellants' next argument appears to be that Respondents' role as class counsel in the *Cardamone* class action had the effect of making their objection improper. In support of this argument, Appellants stray far beyond the boundaries of the Complaint, speculating as to the strategic reasons for Respondents' objection to the *Posey* proposed settlement. This argument culminates in the conclusion, "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 (sic) 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." (Appellants' Initial Brief p. 21.) This argument misconstrues the circuit court's Order, which did not make any determination as to whether the objection to the *Posey* class action settlement was meritorious or whether the Respondents' successful effort to improve the *Posey* settlement warranted compensation from *Posey* class counsel. Rather, the circuit court was concerned with whether Appellants had alleged the requisite injury-in-fact to establish standing. An essential consideration in making that determination was whether a successful objector is entitled to any special benefit where his/her objection is made in terms common to class members and improves the settlement for all. The circuit court's order did nothing more than articulate a proper understanding of class action procedure in connection with finding that Appellants had no claim to the alleged fees paid by *Posey* Class Counsel to Respondents.

Once the court correctly concluded Appellants could never have recovered money or any other benefit in connection with *Posey*, it turned to Appellants' argument that they were injured by being at risk for facing a claim of "fraud on the court" as a result of Respondents'

representation to the *Posey* court that Appellants owned Dyvit EIFS, when in fact they did not.[7] (Compl ¶ 39.) Appellants have not cited any cases – either to the circuit court or in their appellate brief – supporting the notion that fear of possible future claims is anything other than a "conjectural" or "hypothetical" injury that is insufficient to confer standing. *See Beaufort Realty Co v. Beaufort County*, 346 S.C. 298, 303, 551 S.E.2d 588, 590 (Ct. App. 2001) (quoting *Lujan v Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). ("**Prospective concern** falls far short of the standard of 'concrete and particularized and . . . actual or imminent' harm set forth in *Lujan.*")(emphasis added).[8]

In the absence of any conceivable injury stemming from Respondents' alleged conduct, Appellants are left with the argument that they have standing because they pled a cause of action for wrongful appropriation of personality, which does not require proof of any actual damages. (Appellants' Initial Brief p. 16-17.) This argument is flawed first and foremost because Appellants have likewise failed to allege facts sufficient to constitute a cause of action for wrongful appropriation of personality. (*See* Section II.A., *infra*) Even if this were not the case, however, Appellants cite no authority for the proposition that merely pleading a cause of action that permits recovery of nominal damages excuses the requirement of establishing standing.

While Respondents are not aware of case law addressing this argument in a factually similar context, in the context of alleged constitutional deprivations of freedom of speech, a

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[7] The fact that Appellants have brought a lawsuit seeking to recover the funds that they allege were improperly obtained in *Posey* casts serious doubt on their alleged fear of being subject to a claim for "fraud on the court" If they were truly fearful of this consequence, it would be illogical to take steps to gain financially from the alleged improper conduct Regardless, alleged subjective fear of a future injury is speculative and does not confer standing

[8] Plaintiffs also alleged they were injured by virtue of "time, effort, and expenses suffered" in connection with meeting with lawyers, signing an affidavit, and giving a deposition in another case (*See* Compl ¶ 85) The circuit court found that Appellants undertaking these activities did not confer standing (Order p 7.) Appellants do not take exception with this finding in their brief

plaintiff must demonstrate an actual injury-in-fact notwithstanding the availability of nominal damages. *E g , Rock for Life-UMBC v Hrabowski*, 411 Fed. Appx. 541, 549 (4th Cir. 2010)(acknowledging availability of nominal damages for chilling of protected speech and observing, "In order to establish their standing to challenge UMBC's code of conduct, the plaintiffs must first demonstrate an injury-in-fact through the application of that provision.")(internal citations and marks omitted); *Chapin Furniture Outlet Inc v Town of Chapin*, 252 Fed. Appx. 566, 571-73 (4th Cir. 2007) ("Absent a constitutional deprivation, Chapin's claim for nominal damages fails to present a case or controversy sufficient to avoid mootness.") The same reasoning would apply in the instant scenario – absent an allegation of injury-in-fact, the mere assertion of a claim for wrongful appropriation of personality does not confer standing on Appellants.

The circuit court correctly concluded that there were simply no factual allegations in the Complaint setting forth any injury-in-fact suffered by Appellants as a result of Respondents' alleged conduct. Accordingly, to the extent Appellants have properly preserved their objection to this ruling, this Court should affirm the circuit court's dismissal of the action for lack of standing.

II. Appellants failed to plead facts sufficient to constitute a cause of action against Respondents.

As an alternative basis for dismissing Appellants' Complaint in its entirety, the circuit court found that the facts alleged in the Complaint did not support any of the causes of action asserted in the Complaint. (Order p. 8-14.) The circuit court addressed each of Appellants' causes of action individually, and Appellants argue the circuit court erred in each instance. For

the reasons stated in the subsections below, Appellants failed to plead facts that support any of their causes of action, and the Order of the circuit court should be affirmed.

A. Appellants failed to plead facts sufficient to constitute a cause of action for wrongful appropriation of personality.

The circuit court found numerous fatal flaws in the Appellants' pleading of their cause of action for wrongful appropriation of personality. Most notably, the court found that there was no inherent or commercial value associated with the "DeLoache" name and, more specifically, given the circumstances of the alleged "use" of the DeLoache name in the *Posey* action, the Respondents did not receive any benefit as a result of any value associated with the DeLoache name. (Order p. 8-9.) Additionally, the court found that Appellants had not alleged that Respondents acted with any intent to misappropriate Appellants' "personality" and that Appellants did not suffer any recoverable damage as a result of the any alleged misappropriation of personality. (*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." *Sloan v South Carolina Dep't of Pub. Safety*, 355 S.C. 321, 325-26, 586 S.E.2d 108, 110 (2003). The Appellants only alleged the first of these three intentional torts, "wrongful appropriation of personality". "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).

Based on the pleadings, it is clear that the Appellants do not claim any inherent or commercial value associated with their surname. It is equally clear that the alleged payments made to Respondents were disconnected from any value associated with their surname. The circuit court did not err in finding that Appellants have failed to state a claim for wrongful appropriation of personality.

1. There is no commercial value associated with Appellants' surname.

The circuit court correctly recognized that there must be some commercial value associated with Appellants' "personality" in order for them to maintain a cause of action for wrongful appropriation of personality. This is a foundational element of the tort, as recognized by the court in *Gignilliat*: "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." *Gignilliat*, 385 S.C. at 459, 684 S.E.2d at 760 (citing *Sloan*, 355 S.C. at 326, 586 S.E.2d at 110)(recognizing the common law right "to publicize and profit" from one's "name, likeness, and other aspects of personal identity")(emphasis added). Moreover, the analysis of the Supreme Court in *Gignilliat* underscores the requirement that the name, likeness, or identity being used must have some inherent commercial value to sustain a cause of action for wrongful appropriation: "Mrs. Gignilliat's claims concern the right to use of the Gignilliat name for **commercial** purposes, which is a recognized property right that is distinguishable from goodwill." *Gignilliat*, 385 S.C. at 463, 684 S.E.2d at 762 (emphasis added).

Citing *Gignilliat*, the United States Bankruptcy Court for the District of South Carolina has also emphasized the "commercial value" element of the cause of action: "wrongful appropriation of personality involves infringement on the right to the *commercial* protection of one's name, likeness, or identity." *Wiser v Rent-A-Center (In re Wiser)*, 2010 Bankr. LEXIS 1928, *18-19 (Bankr. D.S.C. 2010)(citing *Gignilliat, supra*)(emphasis in original). In granting judgment as a matter of law to the defendant, the court concluded, "It appears to the Court that RAC did not infringe on Debtors' right to either publicize or make a commercial use of and benefit from their names." *Id* at *20. The South Carolina District Court has gone even further in emphasizing the requirement of commercial value associated with the personality: "a plaintiff must establish celebrity status in order to sustain a wrongful appropriation of personality claim." *Uhlig LLC v Shirley*, 2011 U.S. Dist. LEXIS 31833, *21 (D.S.C. 2011)("[Plaintiff] has explicitly admitted that he is not a celebrity, and has instead alleged merely that he is a 'well-regarded' salesman, which, as a matter of law, does not rise to the level of celebrity status required to support an appropriation of personality claim.")

While Respondents are not aware of an opinion from a South Carolina appellate court requiring a showing of "celebrity status", it is clear that at a minimum a plaintiff must be able to identify some commercial value associated with his/her name or likeness in order to maintain a cause of action for wrongful appropriation of personality.[9] *E g , Gignilliat*, 385 S.C. at 463, 684 S.E.2d at 762.

[9] This requirement appears to be shared by jurisdictions that recognize an analogous tort *See, e g , Donchez v Coors Brewing Co* , 392 F 3d 1211, 1220 (10th Cir 2004)(observing plaintiff "would have to prove, in order to establish a violation of his right of publicity, that the defendant, without his consent, used his likeness to the defendant's commercial advantage and that defendant's actions in this regard injured him "), *Landham v Lewis Galoob Toys, Inc* , 227 F 3d 619, 624 (6th Cir 2000) ("[Plaintiff] correctly argues that he need not be a national celebrity to prevail But in order to assert the right of publicity, a plaintiff must demonstrate that there is value in associating an

Appellants' sole argument in their brief on this issue is as follows: "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." (Appellants' Initial Brief at 22.) Appellants do not cite any cases in support of this proposition, which is contrary to the very foundation of the tort of wrongful appropriation of personality, as discussed above.

Appellants make no claim to any commercial value associated with the DeLoache name in their brief, and none is alleged in their Complaint. In the absence of any factual allegation attributing any commercial value to the Appellants' name, the circuit court correctly dismissed Appellants' wrongful appropriation of personality cause of action for failure to state facts sufficient to constitution a cause of action.

2. Respondents did not receive any benefit as a result of any value associated with the Appellants' name.

The circumstances surrounding Respondents' alleged receipt of payment for their role in *Posey* further confirms that Appellants have failed to state a claim for wrongful appropriation of personality. As recognized by the circuit court and detailed in Section I, *supra*, the 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. This is precisely what Appellants allege to have happened in this instance. (Complaint ¶ 42.) The

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item of commerce with his identity "), *Allison v Vintage Sports Plaques*, 136 F 3d 1443, 1447 (11th Cir 1998)("We read Alabama law to permit a cause of action for invasion of privacy when the defendant appropriates without consent the 'plaintiff's name or likeness to advertise the defendant's business or product, or for some other similar commercial purpose ' The plaintiff must demonstrate that there is a 'unique quality or value in his likeness' that, if appropriated, would result in 'commercial profit' to the defendant ")(internal citation and marks omitted), *Vassiliades v Garfinckel's, Brooks Bros* , 492 A 2d 580, 592 (D C 1985) ("While the record clearly establishes that [defendants] used [plaintiff's] photographs for their own benefit, [plaintiff] has not shown there was a public interest or other value in her likeness.")

payment of a fee in this context is to compensate the attorney(s) who presented the objection at the fairness hearing which, if successful, would have the impact of improving the terms of the settlement for all class members. *See* Manual for Complex Litigation, Fourth § 21.643. Thus, a payment to an attorney in this context is not a settlement of the objector's claim, and it is not even connected to the value associated with the objector's specific claim. It most certainly does not result from value associated with the surname of the objector. To the contrary, it would have been improper for counsel to invoke, or for the *Posey* court to act on, bias or partiality stemming from the supposed value of a name rather than the merits of the objection

The circuit court correctly found that the Complaint fails to allege that Respondents received any payment as a result of any commercial value associated with the "DeLoache" name. By failing to allege this essential element of a cause of action for wrongful appropriation of personality, Appellants' Complaint was deficient as a matter of law and the circuit court's Order should be affirmed.

3. Appellants do not allege that Respondents acted with the requisite intent to state a cause of action for wrongful appropriation of personality.

The circuit court found that the Complaint did not allege that Respondents acted with intent to misappropriate Appellants' personality. Appellants argue on appeal that there is no requirement to allege "intent to misappropriate". (Appellants' Initial Brief p. 22.) The only authority that Appellants arguably assert for this proposition is an excerpt from *Gignilliat* providing that a cause of action for wrongful appropriation of personality requires proof of an "intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit." (Appellants' Initial Brief p. 22.) Appellants do not explain how the requirement that they allege and prove an "intentional" use of their name by Respondents for

Respondents' benefit leads to the conclusion that there is no requirement to allege an "intent to misappropriate". The circuit court held that Appellants failed to allege the element of "intent", and Appellants have not challenged this ruling on appeal with any authority or argument. Accordingly, the Order of the circuit court should be affirmed.

B. Appellants failed to plead facts sufficient to constitute a cause of action for conversion.

The circuit court correctly held that the Complaint does not state a claim for 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)). Appellants allege that Respondents "wrongfully and unlawfully detained . . . . $600,000 . . . from the DeLoaches". (Complaint ¶ 76.) However, as outlined in Section I, *supra*, Appellants have failed to allege any factual basis entitling them to the amounts allegedly paid to the Respondents as part of the *Posey* class settlement. It follows that Appellants have not established through their Complaint that they have any right of ownership over any good or personal property at issue. This recognition led the trial court to the inescapable conclusion that Respondents cannot be liable for the "unauthorized assumption" of a right that Appellants do not themselves have.

Furthermore, while the Court in *Gignilliat* recognized that a cause of action for conversion may be premised on conversion of intangible property rights, it placed an express limitation on such a cause of action: "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." *Gignilliat*, 385 S.C. at 465-66, 684 S.E.2d at 763

(emphasis added). *See also Weinberg v Wallace*, 314 S.C. 183, 188, 442 S.E.2d 211, 213 (Ct. App. 1994) (holding there was no right to conversion of intangible "good will" of a business separate from the conversion of the tangible assets of the business).

Appellants torture the Supreme Court's language by arguing that a legal document with their name on it constitutes intangible property "merged in, or identified with, some document." (Appellants' Initial Brief at 34.) This is undoubtedly not what the Court contemplated by requiring that the intangible property right be identified with a document. Examples of intangible property rights merged into a document would include a computer program, *National Surety Corp v Applied Systems, Inc* , 418 So. 2d 847, 849 (Ala. 1982), a copyrighted and trademarked website, *Astroworks, Inc v Astroexhibit, Inc* , 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003), or a patent right, *Miracle Boot Puller Co. v. Plastray Corp* , 57 Mich. App. 443, 451 (Mich. Ct. App. 1975).

This Court need look no further than the *Gignilliat* case itself to dispose of Appellants' argument that Respondents converted Appellants' intangible property rights by allegedly "filing legal documents with the DeLoache surname". (Appellants' Initial Brief p. 34.) Just as in the instant appeal, the intangible property right at issue in *Gignilliat* was the plaintiff's surname. After discussing the recognition of a limited claim for conversion of intangible rights "that have some documented basis to support them", the Supreme Court held, "the alleged property right Mrs. Gignilliat sought to enforce was intangible and there was no documentation evidencing this right. Thus, it is not properly subject to a claim for conversion . . . ." *Gignilliat*, 385 S.C. at 466, 684 S.E.2d at 764. *See also Dickerson v TLC Lasik Ctrs* , 2011 U.S. Dist. LEXIS 10883, *42-44 (D.S.C. 2011)(citing *Gignilliat* and dismissing plaintiff's cause of action for conversion

because a property interest in medical information is an intangible right that is not customarily merged in or identified with some document.)

The circuit court properly found that Appellants have failed to allege conversion of an "intangible property right that is merged in, or identified with, some document", and this Court should affirm the dismissal of Appellants' cause of action for conversion.

C. Appellants failed to plead facts sufficient to constitute a cause of action for civil conspiracy.

The trial court properly dismissed the Appellants' civil conspiracy claim because their civil conspiracy count alleges the same acts for which damages are sought under other causes of action. "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." *AJG Holdings LLC v Dunn*, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011) (internal citations omitted). *See also 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) (dismissing cause of action for civil conspiracy where the conspiracy count alleged the same acts as plaintiff's other causes of action).

The alleged factual basis for each of Plaintiffs' causes of action is that the Respondents used Appellants' name without their permission to object to the *Posey* class settlement. The trial court correctly observed that Appellants' civil conspiracy cause of action merely repeats these allegations and alleges that "Defendants combined together" to perform the alleged acts. (*See* Order p. 10-11; Compl. ¶¶ 81-83.) Appellants argue on appeal that "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 " (Appellants' Initial Brief p. 36) This argument ignores that a nearly identical allegation is pled in support of Appellants' cause of action for breach of fiduciary duty. (Compl. ¶ 101-102.) Appellants have failed to allege how any "separate and independent" act in furtherance of the alleged conspiracy has caused them damages. Consequently, the Appellants have failed to properly plead a claim for civil conspiracy and their cause of action was properly dismissed.

D. Appellants failed to plead facts sufficient to constitute a cause of action for imposition of a constructive trust.

Appellants' claim for imposition of a constructive trust in their favor fails for the same reason all of their claims fail – they have not alleged any facts supporting a right to any benefit, including the attorney's fee allegedly paid to Respondents, in connection with *Posey*

"[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) (citing *Morrison v Morrison*, 284 Ga. 112, 663 S.E.2d 714, 717 (Ga. 2008)). "A constructive trust does not . . . arise because of a manifestation of an intention to create it, but it is imposed as a remedy to prevent unjust enrichment." *Id* at 89, 694 S.E.2d at 57 (citing RESTATEMENT (FIRST) OF RESTITUTION § 160 cmt. a (1937)). "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 , Inc v. Cox, 301 S.C. 493, 500, 392 S.E.2d 789, 793-94 (1990)). "Generally, fraud is an essential element giving rise to a constructive trust, although it need not be actual fraud." *Id.* at 357, 499 S.E.2d at 501 (citing *Lollis v Lollis*, 291 S.C. 525, 354 S.E.2d 559 (1987)) Furthermore, "In order to establish a constructive trust, the evidence must be clear and convincing." *Id* at 357, 499 S.E.2d at 501.

Appellants have expressly alleged and argued that they are not (and could not be) members of the *Posey* class because they do not have Dryvit EIFS. (*E g*, Appellants' Initial Brief p. 20.) Appellants have failed to allege they are entitled to any money or benefit stemming from *Posey* A requirement of a constructive trust is that the defendant retains or withholds money "**from another who is beneficially entitled to it**". *McNair*, 330 S.C.at 356, 499 S.E.2d at 501 (emphasis added). The Appellants are not beneficially entitled to fees paid to Respondents by *Posey* class counsel for appearing at the fairness hearing and helping to improve the terms of the class action settlement. The circuit court correctly held that "Because [Appellants] are not beneficially entitled to anything obtained by [Respondents], their cause of action seeking imposition of a constructive trust fails as a matter of law." (Order p. 12.)

E. Appellants failed to plead facts sufficient to constitute a cause of action for breach of fiduciary duty.

The circuit court dismissed Appellants' cause of action for breach of fiduciary duty because Appellants repeatedly allege 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); consequently, accepting Appellants' factual allegations as true, there was no confidential or fiduciary relationship established. Alternatively, the court observed that even if Appellants' factual allegations were trumped by their conclusory assertion that a fiduciary relationship

existed, the Complaint should still be dismissed because Appellants did not file an expert affidavit with their Complaint. The reasoning and conclusions of the trial court were correct, and this Court should affirm the trial court's Order.

1. Appellants have not preserved their objection to the trial court's finding that no fiduciary relationship existed.

"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, 330 574 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)). "[T]o determine whether a fiduciary relationship existed, this court must look to the particulars of the relationship between the parties." *Armstrong v Collins*, 366 S.C 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005)(citing *Pitts*, *supra*).

As noted above, Appellants expressly allege they did not retain the Respondents. (Compl. ¶ 46.) In their brief, Appellants state, "The thrust of the entire verified Complaint is that the Respondents never were counsel for the DeLoaches . . . ." (Appellants Initial Brief p. 22-23.) Elsewhere, they state, "The DeLoaches specifically denied any professional relationship with any of the Respondents . . .", and "[b]ecause 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". (Appellants Initial Brief p. 23-24.)

Based on these allegations and arguments, it is abundantly clear that the trial court correctly found that no fiduciary relationship ever existed between Appellants and Respondents.

(Order p. 12-13.) Appellants' brief does not directly argue that the circuit court erred in this finding, and therefore Respondents submit that the issue is not preserved for appellate review. The only portion of Appellants' brief in which this ruling is arguably addressed is in the section addressing the expert affidavit requirement, wherein Appellants make the statement, "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." (Appellants' Initial Brief p. 25.) Appellants cite to their Complaint for this assertion.

"South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. United States Fid & Guar Co* , 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001). Although Appellants generally challenge the trial court's Order in their Issue XIII[10], "[a]n issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Fields v Melrose P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993). The absence of a fiduciary relationship between Appellants and Respondents was plainly the trial court's primary basis for dismissing Appellants' breach of fiduciary duty cause of action. (Order p. 12-13.) To the extent Appellants assert any objection to this ruling in their brief, they do so in short, conclusory fashion without citation to any authority. Accordingly, this Court should find that Appellants have not preserved this issue on appeal and affirm the trial court's dismissal of Appellants' breach of fiduciary duty claim.

[10] Issue XIII states, "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" (Appellants' Initial Brief p 3)

2. Appellants do not plead facts which show the existence of a fiduciary relationship, which is a requirement of alleging a claim for breach of fiduciary duty

To the extent they have properly preserved an objection to the circuit court's finding that no fiduciary relationship existed, the argument that Respondents unilaterally created a fiduciary obligation to the Appellants should be rejected. Appellants do not cite any authority to support this assertion, which is contradicted by South Carolina law: "[A]s a general rule, a fiduciary relationship cannot be established by the unilateral action of one party." *Steele v Victory Sav Bank*, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Ct. App. 1989). Indeed, Appellants' assertion of a claim for breach of fiduciary duty – while simultaneously denying the existence of any relationship at all – runs directly counter to the multitude of case law in which a claim for breach of fiduciary duty rises or falls based upon the existence of a fiduciary relationship. *See, e g*, *Armstrong v Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005)(analyzing relationship between employer and employee with respect to creation of new business venture to determine if a fiduciary relationship existed); *Regions Bank v Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003)(analyzing whether relationship between depositor and bank rose to level of fiduciary relationship); *Pitts v. Jackson Nat'l Life Ins Co* , 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002)(analyzing whether relationship between insurer and insured was a fiduciary relationship); *Island Car Wash, Inc v. Norris*, 292 S.C. 595, 598 (Ct. App. 1987)(analyzing whether relationship between owners and general manager of start-up business was a fiduciary relationship).

In each of the foregoing examples, the existence of a fiduciary relationship was the critical inquiry in assessing the viability of a claim for breach of fiduciary duty. Appellants' assertion of a claim for breach of fiduciary duty where they expressly allege there was no

fiduciary relationship – or any relationship at all – fails as a matter of law, and the trial court did not err in dismissing this cause of action.

3. Even assuming the Complaint states a claim for breach of fiduciary duty, the Complaint was properly dismissed based on Appellants' failure to file an expert affidavit with the Complaint.

Although the trial court dismissed the breach of fiduciary duty cause of action for failure to plead the existence of a fiduciary relationship and other elements of the cause of action, the trial court also considered the applicability of the expert affidavit requirement of Section 15-36-100 of the South Carolina Code.[11] The court did not err in finding that Appellants' failure to file an expert affidavit with the Complaint constituted an alternative basis for dismissal of the Complaint.

Section 15-36-100(B) 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.[12]

Appellants admit that their breach of fiduciary duty cause of action alleges "malfeasance connected to the Respondents' actions in their professional capacity." (Appellants' Initial Brief p. 26.) Yet, Appellants argue that Section 15-36-100 is inapplicable because Appellants have

[11] The trial court clearly credited Appellants' factual allegation denying any relationship with Respondents However, the Appellants contradicted their factual allegations by repeating the phrase – "Defendants, as the DeLoaches' lawyers, " – in their breach of fiduciary duty cause of action This led the trial court to consider the expert affidavit issue assuming *arguendo* that Appellants had pled a fiduciary relationship

[12] Subsection G identifies "attorneys at law" as a profession to which Section 15-36-100 applies

not asserted a claim for "professional negligence". The trial court correctly disregarded the label associated with Appellants' cause of action in holding that Section 15-36-100 applied: "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." (Order p. 13.) This finding is in line with the Supreme Court's holding in *RFT Mgmt Co , L.L C v Tinsley & Adams L L.P* , in which the Supreme 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).

Notwithstanding their own characterization of their action as alleging "malfeasance connected to the Respondents' actions in their professional capacity," (Appellants' Initial Brief p. 26), Appellants analogize their action to that of a "personal injury lawsuit . . . where the alleged at-fault driver happens to be a lawyer or a doctor," (Appellants' Initial Brief p. 26). Appellants' car wreck analogy is plainly inapposite; here, Appellants allege that attorneys utilized the Appellants' identity to achieve status as objectors to a class action settlement and they seek disgorgement of an attorney's fee allegedly paid by class counsel to Respondents in connection with the assertion of their objection. This scenario is a far cry from the "common

knowledge" exception to the requirement for expert testimony. *See Holmes v Haynsworth, Sinkler & Boyd, P A* , 2014 S.C. LEXIS 182, *22 n. 13 (S.C. June 4, 2014) (citing *Pederson v Gould*, 288 S.C. 141, 142, 341 S.E.2d 633, 634 (1986)) ("Under the common knowledge exception, expert testimony is not required where the common knowledge or experience of laymen is extensive enough to recognize or infer negligence on the part of the professional and to determine the presence of the required causal link between the professional's performance and the alleged malpractice.") In this case, just as in *Holmes*, "Appellant misapprehends the 'common knowledge' exception to the requirement for expert testimony" and "overestimates the legal knowledge of a layperson to understand the complex issues of her case". *Id* The fact that Appellants allege a "breach of fiduciary duty" instead of professional negligence does not allow them to skirt the requirement of expert testimony to prove their claim, which is premised on complicated issues related to class action settlements.

Additionally, Appellants' argument that Section 15-36-100 does not apply because their claims arose before the statute became effective is also without merit. Even assuming *arguendo* that events occurring prior to July 1, 2005 do not give rise to a contemporaneous affidavit requirement, the Complaint is not limited to the pre-2005 time period. To the extent the Complaint alleges conduct occurring subsequent to July 1, 2005, the expert affidavit requirement of Section 15-36-100 would be triggered for Appellants' breach of fiduciary duty cause of action.

Moreover, a claim does not arise until a plaintiff has a right to sue. *Murphy v Owens-Corning Fiberglass Corp.*, 356 S.C. 592, 597-98, 590 S.E.2d 479, 482 (2003). At this point, for reasons explained above, Appellants have suffered no damages and thus have no right to sue for

breach of fiduciary duty. Therefore, the trial court did not err in finding Section 15-36-100 applicable to their claim for breach of fiduciary duty.

Thus, even assuming Appellants have stated facts supporting their cause of action for breach of fiduciary duty, this cause of action was properly dismissed for failure to comply with the expert affidavit requirement.

F. Appellants have not preserved their objection to the trial court's dismissal of their claim for injunctive relief.

As with their breach of fiduciary duty cause of action, Appellants have failed to preserve any objection to the trial court's dismissal of their claim for injunctive relief. In the Statement of Issues on Appeal, Appellants identify the dismissal of their claim for injunctive relief in Issue XIII.[13] However, Appellants' brief does not contain any argument on this issue. "An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court." *Fields v Melrose P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993). Appellants' objection to the trial court's dismissal of their claim for injunctive relief is therefore abandoned and not preserved for this Court's review.

Even if this issue were preserved, however, the issuance of an injunction requires the moving party to 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). The trial court did not err in dismissing Appellants' claim for injunctive relief for failure to allege any of these

[13] Issue XIII states, "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" (Appellants' Initial Brief p 3)

essential elements. (Order p. 14.) Therefore, even in the event this Court considers the merits of this issue, it should affirm the trial court's Order.

III. The trial court did not err in rejecting Appellants' "request" to file an amended complaint where Appellants did not identify any additional factual allegations or a different theory of recovery.

In the final section of their motion to alter or amend the trial court's Order, in a section entitled "Defendants' Rule 12(f), SCRCP, Motion to Strike Should Have Been Denied," Appellants make the following "request": "[w]e respectfully request Your Honor include language in any Order that is issued expressly providing the DeLoaches leave to file an Amended Complaint." (Motion to Alter or Amend Judgments p. 12.) The trial court issued an Order denying Appellants' motion to alter or amend without granting Appellants leave to file an amended complaint. (Order Denying Motion to Alter or Amend Judgments.)

In their brief, Appellants assert that the failure to afford them leave to amend their complaint was "in error" and "should be reversed". (Appellants' Initial Brief p. 38.) Beyond their request for "reversal", the Appellants' brief does not specify the relief Appellants seek from this Court as a result of this alleged "error". Respondents submit that the Court would only reach this issue upon affirming the trial court's dismissal of the action. Accordingly, the only available relief would be to allow Appellants the opportunity to file an amended complaint to attempt to cure the deficiencies in their Complaint. This Court should not grant this relief (1) because it has not been requested, *see* Rule 208(b)(1)(e), SCACR, and (2) because Appellants have not identified any additional facts or theories of recovery that state a claim for relief against Respondents.

Although not cited in their brief, there is authority supporting an appellate court's modification of a lower court's order to provide that a dismissal is without prejudice and to allow a plaintiff an opportunity to amend their complaint. *See Spence v Spence*, 368 S.C. 106, 128-31, 628 S.E.2d 869, 880-82 (2006). However, assuming this is what Appellants seek and that Appellants have preserved this issue on appeal, there is an insurmountable obstacle to this Court providing such relief, as illustrated by the following excerpt from *Spence*:

> When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. . . . **An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted.**

Spence, 368 S.C. at 130, 628 S.E.2d at 881-82 (emphasis added).

In their motion to alter or amend the trial court's Order, Appellants did not present any additional factual allegations or a different theory of recovery in support of their "request" to amend the complaint. (*See* Motion to Alter or Amend Judgments p. 11-12.) Under these circumstances, the trial court did not err by not granting Appellants leave to file an amended complaint. Similarly, on appeal, Appellants continue to rely on the same factual allegations in arguing that they have stated a claim upon which relief may be granted. The Supreme Court in *Spence* was confronted with an analogous scenario and affirmed the dismissal of the complaint, reasoning as follows:

> Owner 2's complaint was dismissed with prejudice pursuant to Rule 12(b)(6) when ordinarily the dismissal would have been without prejudice. However, **Owner 2 has failed to present any**

> **additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against Owner 4.** Owner 2 in her Rule 59(e) motion and on appeal merely reiterates the same allegations originally pleaded in her complaint. Those factual allegations are insufficient to state a cause of action against Owner 4, as previously discussed.

Spence, 368 S.C. at 131, 628 S.E.2d at 882 (emphasis added).

Similarly, Appellants' factual allegations are insufficient to state a cause of action against Respondents, and Appellants have not offered any additional factual allegations or theories that would even arguably alter that result. Accordingly, this Court should affirm the trial court's Orders.

IV. The trial court properly ruled that the "Summary of the Case" should be stricken.

Respondents submit that the Court need not reach the issue of the trial court granting Respondents' motion to strike unless it reverses the trial court's dismissal of the entire Complaint. In that event, the Court should affirm the portion of the trial court's Order striking the section of the Complaint titled "Summary of the Case". (Order p. 14-15.)

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), SCRCP. 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), SCRCP.

The trial court was correct in its conclusion that the "Summary of the Case" does not comply with the rules of Civil Procedure because it does not set forth a short and plain statement of the facts showing that the pleader is entitled to relief in consecutive numbered paragraphs limited to a single set of circumstances. The "allegations" contained in the unnumbered, argumentative "summary" are either duplicative of the allegations set forth in numbered paragraphs or impertinent. Thus, the trial court did not err in striking the section pursuant to Rule 12(f), SCRCP. Moreover, this "summary" is unnecessary to the Complaint, as the Appellants acknowledge in their brief: "This summary serves as a preface to the subsequent averments . . . ." (Appellants' Initial Brief p. 39.) To the extent the Court reaches this issue, it should affirm the portion of the trial court's Order striking the "Summary of the Case".

V. **Delay in issuing a ruling does not constitute a valid ground for appeal.**

Appellants include a section in their brief complaining of the passage of time between the filing of Respondents' motions to dismiss and the Order granting the same motions. (Appellants' Initial Brief p. 41-42.) Appellants conclude the trial court "erred" in delaying its decision, but do not assert that the delay is a basis for reversal or otherwise cite any authority in support of their "argument". There were numerous and complicated legal issues presented to the trial court in motions to dismiss filed by multiple defendants, and the passage of time between the filing of the motions, the hearing on the motions, and the well-reasoned Order granting the motions does not constitute a basis for reversal.

CONCLUSION

As the circuit court correctly perceived, the Appellants' Complaint, no matter how liberally construed, does not state any claim against the Respondents. Therefore, this Court should affirm the circuit court's Order granting Respondents' motions to dismiss.

Respectfully submitted,

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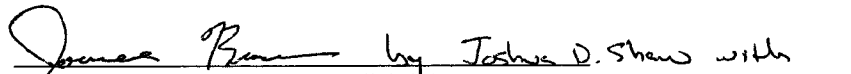

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph F. Strickland, Circuit Court Judge

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, the undersigned employee of Turner, Padget, Graham & Laney, P.A., attorneys for defendant William Dixon Robertson, III do hereby certify that I have this day served a copy of the foregoing **Initial Respondents' Brief Of 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** in connection with the above-referenced case by placing a copy of the same in the United States Mail, postage prepaid, and via electronic mail, to the following address(es).

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Danya B. Friedman

Columbia, South Carolina
June 26, 2014

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June 26, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court – Court of Appeals
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Columbia, SC 29211

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, Francis E. Grimball, Mullen Wylie, LLC formerly Mullen, Wylie & Seekings, LLC, William M. Bowen, William M. Bowen, PA and John D. Kassel
Appellate Case No.: 2014-000398
TPGL No.: 612.149

Dear Ms. Kitchings:

Please find enclosed the following: (1) Initial Respondents' Brief of 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; and (2) Designation Of Matter To Be Included in the Record on Appeal by 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; William M. Bowen, PA. Please note that several Respondents are joining together to submit this brief pursuant to Rule 208(b)(6), SCACR. Please file the originals in your office and return the clocked copies to us in the self-addressed stamped envelope provided. Thank you for your assistance in this matter, and please do not hesitate to contact me should you have any questions.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A

Joshua D. Shaw

JDS:dbf
Enclosures

cc: All Counsel of Record