THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr.

Appellate Case No.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc., Plaintiffs,

Of whom James Spencer is the Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of Adrian Falgione, LLC, Defendants,

Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

INITIAL BRIEF OF RESPONDENT ADRIAN L. FALGIONE

Warren C. Powell, Jr.
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorneys for Respondent Adrian L. Falgione

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STATEMENT OF THE CASE

In this legal malpractice case, Appellant James Spencer ("Appellant" or "Spencer") seeks reversal of an Order dismissing his lawsuit based upon his failure to file an expert affidavit and based upon the statute of limitations.

Spencer and another plaintiff filed this action against their former lawyers, John R. Rakowsky ("Rakowksy"), Adrian L. Falgione ("Falgione") and The Law Offices of Adrian L. Falgione, LLC, on August 15, 2011. (Compl. p. 1.) Rakowsky and Falgione (collectively, "the Respondents") represented Spencer and others in a federal lawsuit in the United States District Court for the District of South Carolina, Florence Divison styled Southern Holdings, Inc. v. Horry County, et al., C/A No. 4:02-cv-1859 ("Underlying Case"). (Compl. p. 3.) The Underlying Case was settled in open court on the record on May 9, 2007, the morning trial was to begin. (Compl. pp. 5-9.) In his legal malpractice action, Spencer alleged the Respondents failed to properly prepare the case

for trial and settled the case against his emphatic protests and without his consent. (Compl. pp. 11-15.)

On November 2, 2011, counsel for Rakowsky filed a notice of appearance and a motion to dismiss. (Notice of Appearance, November 2, 2011; Mot. to Dismiss, November 2, 2011.) Two days later, counsel for Falgione appeared and filed a similar motion to dismiss. (Notice of Appearance, November 4, 2011; Mot. to Dismiss, November 4, 2011.) In both motions, the Respondents sought dismissal based upon Spencer's failure to file an expert affidavit as required by the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 to 100 (2005 & Supp. 2011), upon the three-year statute of limitations in S.C. Code Ann. § 15-3-530 (2005), and upon Spencer's failure to timely serve the summons and complaint pursuant to Rule 3(a)(2), SCRCP. (Mot. to Dismiss, November 4, 2011; Mot. to Dismiss, November 2, 2011.)

After the Respondents filed their motions to dismiss, Spencer filed a motion for entry of default. (Order Denying Motion for Entry of Default, signed June 14, 2012, and filed June 28, 2012.) Spencer's motion was support by a series of unsworn statements. Id. Judge Barber held the affidavits were fatally defective and denied the motion. Id. Spencer never sought review of that holding.

On May 17, 2012, Falgione moved to transfer venue to his resident county, Lexington County, which motion was granted. (Mot. to Transfer Venue, May 17, 2012; Order Granting Def.'s Mot. to Change Venue, August 15, 2012.)

After the case was transferred to Lexington County, the Chief Justice appointed Judge Eugene C. Griffith, Jr. to be Chief Judge for Administrative Purposes to administer the case and prepare it for trial. (Order of S.C. Supreme Court, June 11, 2013.) Judge

Griffith recused himself at Spencer's request after disclosing a distant family relationship with Falgione's counsel, and Judge Frank R. Addy, Jr. was assigned the case. (Ans. Regarding Waiver or Recusal, May 28, 2013; Letter from Court to Parties, May 30, 2013; Order of S.C. Supreme Court, June 11, 2013; Order Nunc Pro Tunc, June 25, 2013.)

On June 5, 2013, Judge Addy heard arguments on the Respondents' motions to dismiss. After taking the matter under advisement and allowing Spencer to supplement the record, Judge Addy granted the Respondents' motions and entered an order dismissing the complaint based upon S.C. Code Ann. § 15-36-100 and the statute of limitations. (Order of Dismissal, signed August 19, 2013 and filed August 23, 2013.)

Spencer filed a Rule 59 motion, which the Circuit Court denied. (Order Denying Rule 59(e) Motion, December 6, 2013.) This appeal followed.

STATEMENT OF FACTS

Rakowsky and Falgione are South Carolina attorneys whose practices are based in Lexington, South Carolina. The Underlying Case was filed by two other attorneys, who are not parties to this action, in the United States District Court for the District of South Carolina, Florence Division. (Compl. p.2.) The plaintiffs in the Underlying Case alleged a wide array of claims against former business partners, against the Horry County Sherriff's Department, and against the Myrtle Beach Police Department, as well as various officials, deputies, and officers in those agencies, all of whom allegedly took some part in an attempt to take over Southern Holdings, Inc. from Spencer and deprive Spencer of his civil rights. Rakowsky became involved in the case relatively, early; however, Falgione did not appear in the case until over four years later, on November 15, 2006, when the Plaintiffs were preparing for the trial. (Compl. pp.3-4.)

On May 8, 2007, the day before trial in the Underlying Case, the Federal Court conducted a pretrial hearing, during which it heard arguments on evidentiary motions. (Compl. p.5.) After the hearing, the Court held a conference in chambers with the attorneys. Id. According to the complaint, the Respondents told the plaintiffs after the conference that the Court had ruled a majority of the plaintiffs' evidence was inadmissible, including all evidence of damages. Id. Spencer alleged that Rakowsky and Falgione tried to coerce the plaintiffs into settling the case for $55,000; however, the plaintiffs, including Spencer, emphatically opposed the settlement. (Compl. pp. 5-8.)

The following day, May 9, 2007, immediately prior to trial, Spencer and the other plaintiffs appeared in court. Rather than proceed with trial, however, a settlement was announced and placed on the record as Spencer and the other plaintiffs watched. The Federal Court informed the jury of the settlement and dismissed the jury pool. (Compl. p. 9.) Spencer and the other plaintiffs had been told they would be given a chance to object to the settlement on the record, and they planned to voice their objections; however, the Federal Court did not poll them. Id.

Following the settlement, Rakowsky wrote a letter blaming the evidentiary problems on two other attorneys who had previously represented the plaintiffs in the Underlying Case, and he suggested the best course of action was a malpractice claim against those other attorneys. (Compl. p.9; Letter from Rakowsky, May 17, 2007.) After obtaining a copy of the transcript from the May 8th pretrial hearing, the plaintiffs began inundating the Federal Court with letters criticizing the Respondents about "inconsistencies in Rakowsky's letters, the transcript of the [pretrial] evidentiary hearing,

and why Judge Harwell made the evidentiary rulings he did, as reported by Rakowsky and Falgione behind closed doors." (Compl. p.9.)

The Federal Court construed those letters as motions to set aside the settlement and on July 3, 2007, issued an Order denying the motions. (Compl. p. 10.) In that order, the Federal Court wrote,

> In the event there was any breach of the standard of care owed by plaintiffs' attorneys to the plaintiffs as a result of the alleged coercion, improper inducement, fraud, or inadequate representation, plaintiffs have an available remedy for damages against their own attorneys.

(Order Denying Motions to Set Aside Settlement in Southern Holdings, Inc. v. Horry County, et al., C/A No. 4:02-cv-1859, 2000 WL 1960590, at * 1 (July 3, 2007).)[1]

More than four years later, on August 15, 2011, Spencer filed this legal malpractice suit against the Respondents. (Compl. p. 1.) Among other allegations, Spencer alleged the Respondents failed to properly prepare the case and settled the case without his consent through the use of fraud and coercion. (Compl. pp. 1-15.)

After learning about the action, Falgione moved to dismiss it based upon the absence of an expert affidavit, the statute of limitations, failure to serve the summons and complaint within 120 days of the date of filing, and failure to properly serve the summons and complaint on Falgione. (Mot. to Dismiss, November 4, 2011; Am. Mot. to Dismiss, January 3, 2012; Memorandum in Support of Mot. to Dismiss, January 27, 2012.) The Court scheduled a hearing on the motion to dismiss for January 31, 2012, but the hearing was continued at Spencer's request. (Order Continuing Motions, signed June 14, 2012 and filed June 28, 2012, pp. 1-2.) The Court rescheduled the hearing for February 28,

[1] The Complaint incorporated this Order from the Underlying Case, and the Order is a matter of public record of which a court may take judicial notice.

2012. Id. at 2. However, the hearing was moved to April 3, 2012, after Spencer submitted a doctor's letter to the Court. Id.

On March 29, 2012, the Court held a status conference by telephone during which it notified Spencer that the Respondents' motions to dismiss would be heard on April 3rd as scheduled. Id. at 2-3. The day before the hearing, however, Spencer claimed he could not attend the hearing due to a doctor's appointment. Id. at 3. On April 3, 2012, the Respondents and their attorneys appeared for the hearing, but neither of the plaintiffs appeared. Id. After speaking with Spencer, the Court continued the hearing on the motions to dismiss but admonished the plaintiffs from missing another hearing. Id. at 3-4.

On May 7, 2012, the Court held a joint status conference ("the Status Conference") for this lawsuit and for a related lawsuit that had been pending since 2008 involving disbursement of the settlement funds, styled Rakowsky v. The Law Offices of Adrian Falgione, LLC, et al., C/A No. 2008-CP-40-6656 ("the Interpleader Case"). Rakowsky filed the Interpleader Case to determine how to pay out the settlement proceeds from the Underlying Case since Spencer and the other plaintiffs refused to accept the money.

After the Status Conference, the Court entered an Order denying Spencer's motion for entry of default (Order Denying Motion for Entry of Default, signed June 14, 2012, and filed June 28, 2012), as well as an Order related to the plaintiffs' failure to appear at the April 3, 2012 motions hearing. (Order Continuing Motions, signed June 14, 2012 and filed June 28, 2012.) Spencer insists the Court entered verbal orders that the motions would be held in abeyance until he received money from the Interpleader Case

and hired an expert and an attorney, but no such written orders were ever set forth or entered in the record. When Spencer pressed the issue, the Court replied, "I have signed the orders I intended to sign and they will stand." (Letter from Court to Parties, July 31, 2012.)

After the case was transferred to Lexington County and Judge Griffith appointed to the case, the motions to dismiss were scheduled for a hearing on May 7, 2013. Two hours before hearing, however, Brian Headley, Esquire contacted the Court on Spencer's behalf. (E-mail from Headley to Court, May 7, 2013.) Mr. Headley stated he had been contacted about representing Spencer and requested a continuance. Id. The Court continued the hearing as to Spencer's claims and rescheduled the motions hearing for June 5, 2013. (Order, May 8, 2013.) Santacroce was dismissed pursuant to the Court's June 14, 2012 Order based upon her failure to appear without good cause. Id.

On June 5, 2013, the parties appeared before Judge Addy for the motions hearing. Spencer appeared pro se. All parties stipulated to Judge Addy's jurisdiction to hear the pending motions. (Tr. of Hearing, June 5, 2013, Page 5, line 2 to page 7, line 4.) The Court heard arguments on Spencer's Motion to Disqualify Rakowsky's Counsel and denied that motion. Next, the Court heard arguments on the Respondents' Motions to Dismiss, and it took those motions under advisement. (Tr. of Hearing, June 5, 2013, Page 64, lines 1 to 19.)

After allowing Spencer an opportunity to supplement his arguments, the Court granted Respondents' motions and dismissed Spencer's claims based upon the his failure to comply with S.C. Code Ann. § 15-36-100 and failure to commence suit within the statute of limitations. (Order of Dismissal, signed August 19, 2013 and filed August 23,

2013.) Spencer moved the Court to reconsider, but the Court declined. (Order Denying Rule 59(e) Motion, December 6, 2013.)

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009); see also, Brouwer v. Sisters of Charity Providence Hospitals, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde at 646 (internal quotations omitted). "The Court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law." Brouwer at 519 (internal quotations omitted).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD SPENCER FAILED TO COMMENCE HIS LEGAL MALPRACTICE SUIT WITHIN THE THREE-YEAR STATUTE OF LIMITATIONS.

Spencer argues the Circuit Court erred when it held his claims were barred by S.C. Code Ann. § 15-3-530 (2005). The facts alleged in the complaint, however, show the three-year statute of limitations expired long before Spencer filed suit.

A. SPENCER WAS ON NOTICE OF THE CLAIMS HE ASSERTED ON OR BEFORE JULY 3, 2007.

Under the discovery rule, the three-year clock for a legal malpractice claim "starts ticking on the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct" Martin v. Companion Healthcare Corp., 357 S.C. 570, 575–76, 593 S.E.2d 624, 627 (Ct. App. 2004) (internal quotations omitted).

In Epstein v. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005), the Supreme Court explained that reasonable diligence means,

> an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.

363 S.C. at 376, 610 S.E.2d at 818.

The primary thrust of Spencer's complaint was that his attorneys settled his case against his protests and without his consent. That settlement occurred on May 9, 2007, after Spencer had emphatically opposed the Respondents' recommendations that he settle. (Compl. p. 5.) Spencer watched as his attorneys settled his case in open court without his permission. (Tr. June 5, 2013, Page 52, lines 16 to 21.) As the Circuit Court recognized, "If, as they allege, the Plaintiffs emphatically refused to settle and intended to state their objections on the record, then there is little doubt they knew they had suffered an actionable injury when they left the courthouse that day." (Order of Dismissal p. 6.)

Immediately following the settlement, the plaintiffs ordered a copy of the transcript from the pretrial evidentiary hearing and began inundating the federal court with letters criticizing the Respondents and asking that the settlement be set aside. (Compl. pp. 9-10.) The Federal Court construed the letters as motions to set aside the

settlement and, on July 3, 2007, denied the motions. (Order Denying Motions to Set Aside Settlement in Southern Holdings, Inc. v. Horry County, et al., C/A No. 4:02-cv-1859, 2000 WL 1960590 (July 3, 2007).) In the order denying the plaintiffs' motions,[2] the Federal Court wrote,

> In the event there was any breach of the standard of care owed by plaintiffs' attorneys to the plaintiffs as a result of the alleged coercion, improper inducement, fraud, or inadequate representation, plaintiffs have an available remedy for damages against their own attorneys.

Id. at * 1.

There is no question, therefore, that Spencer was on notice of the claims by July 3, 2007. The complaint in this case alleged the same wrongful conduct as the letters to the Federal Court: coercion, improper inducement, fraud, and inadequate representation. Not only do the letters show actual knowledge of the claims, any person of common knowledge and experience who has witnessed his attorney settle a case without his consent, who has unsuccessfully sought an order setting aside the settlement, and who has been told by a court that his remedy lay against his attorney would be on notice that some right of his was invaded. It is evident, therefore, that the latest the statute of limitations began to run was July 3, 2007. See Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 633, 760 S.E.2d 399, 405 (2014) (holding statute of limitations began to run when client was openly critical of her attorneys).

B. NEITHER EQUITABLE ESTOPPEL NOR EQUITABLE TOLLING APPLIES.

While Spencer argues the Circuit Court should have invoked equitable estoppel or equitable tolling to overcome Falgione's statute of limitations defense, Spencer failed to

[2] The Complaint incorporated the July 3, 2007 Order from the Underlying Case. Furthermore, the Order is a matter of public record of which a Court may take judicial notice without converting a Rule 12 motion into a motion for summary judgment.

set forth a basis to apply either. Among other elements, equitable estoppel requires proof of a false representation or concealment of material facts. Dozier v. Am. Red Cross, 411 S.C. 274, 291, 768 S.E.2d 222, 231 (Ct. App. 2014), cert. denied (May 7, 2015). Similarly, equitable tolling has been applied in this State where one party has induced another party to delay filing suit or has impeded commencement of the suit. See Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 117, 687 S.E.2d 29, 33 (2009). The record contains no allegation supporting either doctrine. At no time has Spencer identified any false representation Falgione made to him or any conduct by Falgione that caused Spencer to delay filing suit. Nor can Spencer point to anything Falgione did to impede commencement of this action. Spencer's belief that Falgione agreed to continue representing him directly contradicts the record from the Underlying Case. One week after the Federal Court denied Spencer's request to set aside the settlement, Falgione moved to be relieved as counsel based upon the accusations in the plaintiffs' letters. (Mot. to be Relieved as Counsel, filed July 10, 2007 in Southern Holdings, Inc., et al. v. Horry County, et al., C/A No. 4:02-cv-1859, Docket Entry 516.)

Therefore, even taking the allegations in the complaint as true, the record shows Spencer was on notice of the claims he asserted in this lawsuit no later than July 3, 2007 and that he failed to filed within the three-year statute of limitations. Accordingly, the Circuit Court committed no error when it held the statute of limitations barred Spencer's claims.

II. THE CIRCUIT COURT COMMITTED NO ERROR WHEN IT HELD SPENCER FAILED TO FILE AN EXPERT AFFIDAVIT PURSUANT TO THE SOUTH CAROLINA FRIVOLOUS CIVIL PROCEEDINGS SANCTIONS ACT AND DISMISSED HIS COMPLAINT ACCORDINGLY.

Spencer also argues the Circuit Court erred when it dismissed his complaint based upon his failure to timely file an expert affidavit.

A plaintiff in a legal malpractice action is required to file an expert affidavit setting forth "at least one negligent act or omission" as part of his complaint. S.C. Code §§ 15-36-100(B), (G)(2). This requirement protects professionals licensed by the State of South Carolina from frivolous claims. See Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010) ("[G]enerally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony."); Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996) (same). While an exception to the contemporaneous filing requirement exists when the statute of limitations will expire within ten days of filing the complaint, the plaintiff must nevertheless supplement the complaint with an expert affidavit within forty-five days of the date of filing. S.C. Code § 15-36-100(C)(1). If the plaintiff fails to file an expert affidavit within the specified period, "the complaint is subject to dismissal for failure to state a claim." Id. See also, Holmes, 408 S.C. at 636, 760 S.E.2d at 407 ("With respect to a legal malpractice claim, a claimant must rely on expert testimony to establish both the standard of care and the deviation by the defendant from such standard.").

In this case, Spencer acknowledged the need for an expert affidavit in the complaint: "This Complaint is filed pursuant to S.C. Code § 15-36-100(C)(1) in anticipation of the possible need for the contemporaneous filing of an Affidavit by expert, as the limitations on claims will likely expire within ten days of this filing and prior to the

Plaintiffs obtaining such an Affidavit." (Compl. p. 2). It is undisputed that he failed to file an expert affidavit in the year-and-a-half after the date of filing. By statute, therefore, the complaint was subject to dismissal.

A. THE RESPONDENTS NEVER ADMITTED LIABILITY.

In an effort to avoid dismissal, Spencer claims he was not required to file an expert affidavit because Rakowsky admitted liability. The basis for that argument is a May 17, 2007 letter from Rakowsky stating, "So we need to drop the claims against Dave Smith and Ancil Garvin as part of the settlement. . . Now that this case is behind us, we can go after Goldberg for not filing the evidence in a timely manner, which caused these problems in the first place, along with Goldberg's flawed initial pleadings." (Tr., June 5, 2013, page 39, lines 18 to 24.) Clearly, that letter falls short of an admission of the Respondents' liability. Spencer conceded as much during the June 5, 2013 hearing:

> The letter that John Rakowsky issued to us claims that our attorneys did, in fact, commit malpractice. But he was pointing to the other attorneys. Okay? The other attorneys that had been on the case, that's who he's referring to.

(Tr. June 5, 2013, page 58, line 24 to page 59, line 3.) Rakowsky's letter clearly was not directed at himself or Falgione but rather at other attorneys who represented Spencer and the other plaintiffs prior to the Respondents.

B. THE COMMON KNOWLEDGE EXCEPTION DOES NOT APPLY.

Spencer also argues he was not required to file an expert affidavit because the common knowledge exception applies. See S.C. Code Ann. § 15-36-100(C)(2). "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." Holmes, 408 S.C. at 637, 760 S.E.2d at 408 n.13.

The allegations Spencer levied against Falgione, however, were not based on subject-matter within the ambit of common knowledge. In the complaint, Spencer alleged,

> 69. In particular, the Defendants were negligent in the following:
>
> a. failure to properly represent the Plaintiffs;
>
> b. failure to adequately prepare the case;
>
> c. failure to adequately advise the clients of the status of the representation;
>
> d. failure to adequately communicate with the clients regarding the representation;
>
> e. failure to perform the contract of employment of legal services;
>
> f. failure to provide competent legal representation of the Plaintiffs;
>
> g. failure to act diligently in the interest of the Plaintiffs;
>
> h. failure to communicate with the Plaintiffs properly and timely and in order for them to make an informed decisions [sic] about the case;
>
> 1. failure to use independent judgment when representing a client and violating their duty of loyalty;
>
> j. failure to act with commitment und dedication to the interest of the clients;
>
> k. investigation and litigation of the case and acting in direct contravention of the South Carolina Rules of Professional Conduct and as such other particulars as the evidence in this case may demonstrate[.]

(Compl. pp. 11-12.)

Here, Spencer "overestimates the legal knowledge of a layperson to understand the complex issues of [his] case, including the intricacies of civil procedure," the standard for litigating the claims he asserted for violations of 42 U.S.C. § 1983 and 18 U.S.C. § 1961 (RICO), and how to successfully pursue those federal claims. Holmes, 408 S.C. at 637, 760 S.E.2d at 408 n.13. Thus, the common knowledge exception does not apply. See Harris Teeter, 390 S.C. at 282, 701 S.E.2d at 745 ("[G]enerally, a plaintiff in a legal malpractice action must establish this standard of care by expert testimony.").

For these reasons, the Circuit Court committed no error when it dismissed the complaint based upon Spencer's failure to timely file an expert affidavit.

III. THE CIRCUIT COURT DID NOT OVERRULE ANY PRIOR ORDER FROM ANOTHER CIRCUIT JUDGE.

Spencer argues throughout his brief that the Circuit Court erred when it overruled the standing orders of Judge Barber. However, Spencer's argument is premised upon a misconception of what transpired during the Status Conference.

Judge Barber never entered the orders as Spencer claims. An order is effective only after it is set forth and entered in the record. Rule 58(a), SCRCP; Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001) ("The written order is the trial judge's final order and as such constitutes the final judgment of the court."); Serowski v. Serowski, 381 S.C. 306, 315, 672 S.E.2d 589, 594 (Ct. App. 2009) ("Until written and entered, a court has discretion to modify or amend a ruling."); Hilton Head Resort Four Seasons Ctr. Horizontal Prop. Regime Council of Co-Owners, Inc. v. Resort Inv. Corp., 311 S.C. 394, 398, 429 S.E.2d 459, 462 (Ct. App. 1993) ("Without an order for arbitration set forth and entered in the record during the pendency of the action, the parties were not properly required to proceed with arbitration because a final order

compelling arbitration never materialized."); First Union Nat'l. Bank v. Hitman, Inc., 306 S.C. 327, 329, 411 S.E.2d 681, 682 (Ct. App. 1991), aff'd, 308 S.C. 421, 418 S.E.2d 545 (1992) ("No order is final until it is written and entered."); Bayne v. Bass, 302 S.C. 208, 210, 394 S.E.2d 726, 727 (Ct. App. 1990) (an "'[oral] pronouncement is not a final ruling on the merits' " and it " '[is not] binding upon the parties until it has been reduced to writing, signed by the Judge and delivered for recordation.'").

Spencer argues, "Judge Barber ruled that the remaining litigation funds were to be turned over to the Pro Se litigants prior to a hearing on the motions to dismiss so they could hire a lawyer and an expert to represent them." (App.'s Br. p. 25). However, no such order was set forth and entered in the record. The only factual support Spencer cites are verbal remarks Judge Barber made during the Status Conference. And the only legal support Spencer offers for his argument is from the dissenting opinion in Hilton Head Resort, a case in which the majority held precisely the opposite of what Spencer argues to be the law. Hilton Head Resort, 311 S.C. at 398, 429 S.E.2d at 462 (holding no order materialized where record showed no order set forth and entered in record.)

While Judge Barber issued two orders following the Status Conference,[3] neither directed Falgione to pay any money, nor did either determine the Respondents' motions to dismiss would be held in abeyance until after Spencer hired an attorney and an expert. When Spencer pressed the issue, Judge Barber responded with a letter to all parties plainly stating, "I have signed the orders I intended to sign and they will stand." (Letter from Court to Parties, July 31, 2012.) See also, Serowski, 381 S.C. at 315, 672 S.E.2d at 594 ("Until written and entered, a court has discretion to modify or amend a ruling."). It

[3] See Order Denying Motion for Entry of Default, signed June 14, 2012 and filed June 28, 2012; Order of Continuance signed June 14, 2012 and filed June 28, 2012.

is evident, therefore, that the orders which Spencer claims the Circuit Court overruled never existed.

At the June 5, 2013, motions hearing, the Circuit Court held a copy of the transcript from the Status Conference and asked that Spencer point out the orders he claimed Judge Barber had issued:

> THE COURT: Well, we're -- we're -- we're dealing with a very limited type of an issue here. If you're looking at the law, it says: "If an affidavit is not filed within the period specified in this subsection, or as extended by the trial court, and the defendant against him an affidavit should have been filed alleges by motion to dismiss filed contemporaneously with its initial responsive pleadings, that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim." That's what the law says.
>
> MR. SPENCER: Right.
>
> THE COURT: And, I mean, I -- I ---
>
> MR. SPENCER: Judge Barber ---
>
> THE COURT: --- I -- I -- I didn't write that. I just ---
>
> MR. SPENCER: Oh, I understand ---
>
> THE COURT: --- read it.
>
> MR. SPENCER: --- that, sir. But Judge Barber, in his hearing, was quite clear that we didn't have the money to get it. They're to release that uncontested money, and then we can get our expert.
>
> THE COURT: Okay. Can you point to a part in the transcript -- you say you have the transcript. Can you show me what you are referring to, please ---
>
> MR. SPENCER: Yes. Just ---
>
> THE COURT: --- which -- which page and which line?
>
> MR. SPENCER: All right.

(Tr. p. 44, line 21 to p. 45, line 24.)

> THE COURT: All right. We need to move this along. Have you located in the transcript that part where you say Judge Barber gives you additional time to locate an expert?
>
> MR. SPENCER: Yeah.
>
> (Whereupon, Mr. Spencer and his assistant conferred.)
>
> (Off the record briefly.)
>
> THE COURT: Would it be around pages 48 on through ---
>
> MR. SPENCER: That's what I'm looking for. Page 50, I believe.

(Tr. p. 49, line 22 to p. 50, line 5.)

> THE COURT: I've reviewed the portion of the transcript. The transcript speaks for itself; the order speaks for itself. Let's move along.

(Tr. p. 51, lines 13 to 15.) After taking the matter under advisement and allowing Spencer additional time to supplement the record, the Circuit Court rejected Spencer's argument and granted the motions to dismiss.

Thus, Spencer's adamancy notwithstanding, the record contains no order that the motions to dismiss would not be heard until after Spencer hired an attorney and an expert.[4]

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[4] Spencer's claim that Rakowsky or Falgione prevented him from hiring an attorney or an expert witness is questionable at best. Spencer indicated during the May 7, 2012 status conference that the plaintiffs were hiring James T. Young, Esquire to represent them. (Tr. page 39, lines 1 to 25). On May 7, 2013, Brian Headley, Esquire contacted the Circuit Court immediately prior to a motions hearing, represented that he had been contacted about representing Spencer and requested a continuance. (E-mail from Headley to Court, May 7, 2013; Order, May 8, 2013.) During that same time, Spencer was represented by two other attorneys, John P. Batson and Joyce Farr Cheeks, in another federal lawsuit he and other plaintiffs filed against the Federal Bureau of Investigation in connection with the Underlying Case. (See Lail, et al. v. U.S., et al., C/A No.: 3:11-cv-00977, 2012 WL 3779386 (D.S.C. August 10, 2012).)

IV. THE CIRCUIT COURT COMMITTED NO REVERSIBLE ERROR WHEN IT DECIDED THE RESPONDENTS' MOTIONS TO DISMISS WITHOUT HEARING OTHER PENDING MOTIONS.

Spencer also argues the Order of Dismissal should be reversed because the Circuit Court decided the motions to dismiss without first hearing other pending motions. He claims the Circuit Court should have decided his discovery motions and the motions to amend the complaint to remove Southern Holdings, Inc. and the Estate of Doris Holt as plaintiffs.

The argument related to the discovery motions is not preserved for review because Spencer never raised it prior to his initial brief. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 660, 661 S.E.2d 791, 800 (2008); Pope v. Heritage Communities, Inc., 395 S.C. 404, 419, 717 S.E.2d 765, 773 (Ct. App. 2011) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (stating an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review)). Furthermore, Spencer's argument is comprised of nothing more than a conclusory statement and a list of the motions he believes the Circuit Court should have decided prior to granting the Respondents' motions to dismiss. Spencer's failure to cite to any authority, coupled with his failure to set forth any substantive argument on the issue, is fatal to his argument. Rule 208(b)(1)(D) (requiring discussion and citation to authority for each issue raised on appeal); Ellie, Inc. v. Miccichi, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal.").

As for the motions to amend, neither Southern Holdings nor the Estate of Doris Holt was ever named as a party in the caption of the complaint. Rather, Spencer

identified himself as a plaintiff "individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc." (Compl. p. 1) Thus, neither of those entities could be dismissed from the lawsuit. Furthermore, according to the Notice of Appeal, Spencer filed this appeal solely in his individual capacity and, therefore, he is the sole appellant in this matter. Any decision related to the motions to amend, which pertained to the rights of two other entities, had no impact on Spencer's individual claims, nor can he show any prejudice he suffered as a result.

Finally, the dismissal of the complaint rendered all of the other pending motions moot. Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (holding an issue becomes moot when a decision, if rendered, will have no practical legal effect upon the existing controversy).

Therefore, Spencer can point to no reversible error the Circuit Court committed in granting the Respondents' motions to dismiss without first hearing the other pending motions.

V. THE CIRCUIT COURT CORRECTLY DISMISSED SPENCER'S COMPLAINT IN ITS ENTIRETY BECAUSE HIS BREACH OF FIDUCIARY DUTY AND BREACH OF CONTRACT CLAIMS WERE DUPLICATIVE.

Lastly, Spencer contends the Circuit Court erred in dismissing the complaint in its entirety, rather than dismissing only his legal malpractice claim and allowing him to pursue the breach of fiduciary duty and breach of contract claims. That issue, too, is not preserved for review because Spencer never raised it prior to his initial brief. See Clegg, 377 S.C. at 660, 661 S.E.2d at 800; Pope, 395 S.C. at 419, 717 S.E.2d at 773.

Even if it had been raised to and ruled upon by the Circuit Court, that argument is meritless because Spencer's breach of fiduciary duty and breach of contract claims were

duplicative of his legal malpractice claim. See RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 337, 732 S.E.2d 166, 173 (2012) (holding breach of fiduciary claim was duplicative of legal malpractice claim where fiduciary relationship arose solely from attorney-client relationship). The fiduciary duty was based solely on the attorney-client relationship (Compl. p. 13), as was the breach of contract claim. (Compl. p. 14.) Moreover, both claims were barred by the same three-year statute of limitations.

The Circuit Court committed no error, therefore, when it dismissed all claims in the complaint.

CONCLUSION

For these reasons, as well as any other grounds this Court finds in the record pursuant to Rule 220(c), SCACR, this Court should affirm the Circuit Court's Order of Dismissal and Order.

Warren C. Powell, Jr.
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorneys for Adrian L. Falgione

July 27, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE LEXINGTON COUNTY
Court Of Common Pleas

Frank R. Addy, Jr. Circuit Court Judge

C/A NO.: 2012-CP-32-3428
APPELLATE CASE NO.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc., Plaintiffs,

Of whom James Spencer is the Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of Adrian Falgione, LLC, Defendants,

Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Initial Brief of Respondent Adrian L. Falgione is in substantial compliance with Rule 208(b), SCACR.

July 27, 2015

Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, South Carolina 29260
803-252-7693
Attorney for Respondent Adrian L Falgione

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr.

Case No.: 2014-000091

James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc., Plaintiffs,

of whom James Spencer is the Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of Adrian Falgione, LLC, Defendants,

of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I hereby certify that I served the *Initial Brief of Respondent Adrian L. Falgione* by depositing a copy of it in the United States Mail, postage prepaid, on July 27, 2015, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent John R. Rakowsky's attorneys of record, David W. Overstreet, Esquire and Michael B. McCall, Esquire at Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401.

July 27, 2015

Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260
(803) 252-7693
Attorney for Adrian L. Falgione

BRUNER, POWELL, WALL & MULLINS, LLC

ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110
TELEPHONE 803-252-7693
FAX 803-254-5719
WWW.BRUNERPOWELL.COM

JAMES L. BRUNER, P.A.*
WARREN C. POWELL, JR., P.A.**
HENRY P. WALL
E. WADE MULLINS, III, P.A.
BRIAN P. ROBINSON, P.A.

WESLEY D. PEEL, P.A.
JOEY R. FLOYD, P.A.
BENJAMIN C. BRUNER, P.A.

ANN ALLISON LEE
CAITLIN C. HEYWARD

* Of Counsel
** Also Admitted in District of Columbia

AUTHOR'S E-MAIL: BBRUNER@BRUNERPOWELL.COM

July 27, 2015

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: James Spencer, et al. v. John Rakowsky, et al.
Case No.: 2014-00091
BPWM File No.: 3-1742.108

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the Initial Brief, Designation of Matter and Certification of Counsel by Respondent Adrian L. Falgione in the above referenced action. Please file the original, clock-in the copy and return them to me in the envelope provided.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

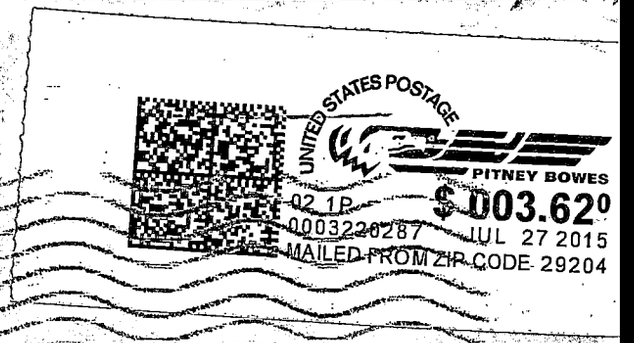
With my kindest regards, I am,

Very truly yours,

Benjamin C. Bruner

Enclosure

CC: James B. Spencer
David W. Overstreet, Esq.
Michael B. McCall, Esq.



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BRUNER, POWELL, WALL & MULLINS, LLC
A Professional Limited Liability Company
ATTORNEYS AND COUNSELORS AT LAW
1735 ST. JULIAN PLACE, SUITE 200
POST OFFICE BOX 61110
COLUMBIA, SOUTH CAROLINA 29260-1110

3-1742-108

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, SC 29201