STATE OF SOUTH CAROLINA)) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
James Spencer, individually and on behalf of the Estate of Doris Holt and on behalf of Southern Holdings, Inc.; and Irene Santacroce; Plaintiffs, v. John R. Rakowsky; Adrian L. Falgione; and The Law Offices of Adrian Falgione, LLC; Defendants.	C/A No: 2011-CP-40-5384 **MEMORANDUM IN SUPPORT OF DEFENDANTS ADRIAN L. FALGIONE AND THE LAW OFFICES OF ADRIAN FALGIONE, LLC'S MOTION TO DISMISS**

Defendants Adrian L Falgione ("Falgione") and The Law Offices of Adrian L. Falgione, LLC (collectively, "Falgione Defendants"), offer this memorandum for the Court's consideration in support of their Motion to Dismiss filed November 4, 2011 and amended December 22, 2011. The Defendants seek dismissal based upon the Plaintiffs' failure to file an expert affidavit, failure to timely commence this action, failure to timely serve the Complaint, and failure to properly serve the Complaint.

FACTUAL/PROCEDURAL BACKGROUND[1]

This is a legal malpractice action arising out of a case in which John Rakowsky and Falgione represented the Plaintiffs. Rakowsky and Falgione are licensed attorneys whose practices are in Lexington, South Carolina. The underlying case was filed in federal court for the District of South Carolina, Florence Division, and assigned Civil Action No.: 4:02-cv-1859-RBH ("Underlying Case"). The complaint in the Underlying Case was filed on May 29, 2002

[1] For the limited purposes of this Motion, the pertinent facts are set forth herein construing the well-pleaded allegations in the Complaint in accordance with the standard for a motion to dismiss under Rule 12(b)(6), SCRCP.

(by two attorneys not named as defendants herein). (Compl. ¶ 8.) Plaintiffs' alleged a wide array of claims against former business partners, the Horry County Sherriff's Department, and the Myrtle Beach Police Department, as well as various officials, deputies, and officers in those agencies, all of whom took some part in an attempt to take over Southern Holdings, Inc. Rakowsky became involved in the case relatively, early; however, Falgione did not appear in the case until over four years later, on December 3, 2006, when the Plaintiffs were preparing for the trial. (Compl. ¶¶ 11, 16.)

On May 8, 2007, the day before trial, the Court conducted a pretrial hearing, at which it heard arguments on evidentiary motions. (Compl. ¶ 23.) After the hearing, the presiding judge held a conference in chambers with the attorneys. (Compl. ¶ 24.) Following that conference, the Plaintiffs were lead to believe that the judge had ruled a majority of the Plaintiffs' evidence was inadmissible, including all evidence of damages. (Compl. ¶¶ 26-27.) Rakowsky and Falgione attempted to coerce the Plaintiffs to accept a settlement offer of $55,000. However, the Plaintiffs would not agree. (Compl. ¶¶ 28-32, 37, 44.)

On the following day, May 9, 2007, immediately prior to trial, the Plaintiffs attended a hearing at which the settlement terms were placed on the record. The Court announced the settlement and dismissed the jury pool. (Compl. ¶ 49.) Contrary to Rakowsky's and Falgione's representations, the Court did not poll the Plaintiffs about whether they agreed to accept the settlement. Id. In a subsequent letter dated May 17, 2007, Rakowsky blamed the evidentiary problems on two other attorneys who had previously represented the Plaintiffs in the case, and suggested the best course of action was a malpractice claim against those other attorneys. (Compl. ¶ 51.)

In late May 2007, several plaintiffs in the Underlying Case began inundating the Court

with letters "pointing out inconsistencies in Rakowsky's letters, the transcript of the [pretrial] evidentiary hearing, and why the Judge made the evidentiary rulings he did, as reported by Rakowsky and Falgione behind closed doors." (Compl. ¶ 54.) The Court construed those letters as motions, and on July 3, 2007, issued an Order denying the motions. (Compl. ¶ 55.)

More than three years later, on August 15, 2011, the Plaintiffs filed this *pro se* malpractice suit against Rakowsky and Falgione. The Plaintiffs base their allegations on events that occurred leading up to and during the settlement on May 9, 2007. The Plaintiffs attempted to serve the Summons and Complaint on the Falgione Defendants on December 15, 2011, and on Rakowsky on December 16, 2011. To date, the Plaintiffs have not filed an expert affidavit.

Rakowsky and the Falgione Defendants have moved to dismiss the Complaint for the following reasons: (i) Plaintiffs have failed to file an expert affidavit pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to 100; (ii) Plaintiffs claims are barred by the three-year statute of limitations established in S.C. Code § 15-3-530; and (iii) Plaintiffs failed to serve the Summons & Complaint within the 120-day deadline in Rule 3(a)(2), SCRCP. In addition, Falgione and his law firm seek dismissal based upon the Plaintiffs' failure to properly serve the Summons and Complaint pursuant to Rule 4, SCRCP.

STANDARD

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). Documents incorporated into or attached to the complaint are considered part of the pleading. Rule 10(c), SCRCP; Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

"If the facts alleged and inferences reasonably deducible therefrom, viewed in the light

most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper." Doe, 373 S.C. at 395; 645 S.E.2d at 247. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id.

DISCUSSION

I. The Plaintiffs failed to timely file an Failure to File Expert Affidavit

In South Carolina, a plaintiff in a legal malpractice action is required to file an expert affidavit 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* Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656-57 (Ct. App. 2002) (plaintiff must generally establish standard of care by expert testimony). 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.

There can be little doubt that the expert affidavit requirement applies to this action. The Plaintiffs acknowledge as much in Paragraph 7 of the complaint, which purports to be filed "pursuant to S.C. Code § 15-36-100(c)(1). . . ." Since the Complaint alleges the statute of limitations was about to expire, § 15-36-100(C)(1) required the Plaintiffs to file an expert affidavit no later than September 29, 2011, forty-five days after the Complaint was filed. To date, more than five months after filing the Complaint, the Plaintiffs have still failed to file an expert affidavit. Accordingly, for their continuing disregard of the expert affidavit requirement,

it is only proper that the Falgione Defendants' Motion be granted and the Complaint be dismissed with prejudice for failure to state a claim.

II. Statute of Limitations

"The statute of limitations in a legal malpractice case is three years." S.C. Code § 15-3-530; Kimmer v. Wright, ___ S.C. ___, 719 S.E.2d 265 (Ct. App. 2011), *reh'g denied* (Dec. 19, 2011). "Under the discovery rule, the three-year clock 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." Id. (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. **The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery developed.**

363 S.C. at 376, 610 S.E.2d at 818 (emphasis in original). Applying that understanding of the discovery rule to the facts of this case, it is apparent the Plaintiffs failed to commence their action within the statute of limitations.

In the Complaint, the Plaintiffs allege various acts of misconduct by Rakowsky and Falgione that culminated in the May 9, 2007 settlement. Perhaps most importantly, the Plaintiffs allege they refused to settle the case, despite their attorneys' attempts to coerce them. That the Plaintiffs were present in the courtroom on May 9, 2007, and saw there attorneys settling their case on the record cannot be ignored. If the Plaintiffs did refuse to settle, as they allege, then surely they were on notice that day of a malpractice claim.

To the extent the Plaintiffs contend they did not believe the settlement was final at that time, certainly they understood the finality of the settlement weeks later, when they began

inundating the Court with letters requesting to vacate the settlement and reopen the case. According to Judge Harwell's July 3, 2007, Order,[2] many of the grounds for relief in those letters are the same ones the Plaintiffs allege in this action: (i) fraud designed to coerce the Plaintiffs to settle; (ii) misrepresentation of evidentiary rulings the court had made or was going to make; (iii) poor legal advice concerning an Offer of Judgment; and (iv) the Plaintiffs' disagreement with the settlement. S. Holdings, Inc. v. Horry County, 4:02-cv-1859-RBH, 2007 WL 1960590 at *2 (D.S.C. July 3, 2007).

Importantly, with respect to the evidentiary rulings, the Court clearly stated in that Order that he reserved ruling on those issues until the next day, at which time the court was advised the case had settled. S. Holdings, Inc., 2007 WL 1960590 at *1 n.3. Furthermore, the 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 alleged coercion, improper inducement, fraud, or inadequate representation, Plaintiffs have an available remedy for damages against their own attorneys." 2007 WL 1960590 at *4. Considering these facts, it strains credulity for the Plaintiffs to contend they had no notice of their claims until August of 2008.

Based solely on the allegations in the Complaint, the Plaintiffs were aware on May 9, 2007, of facts giving rise to their claims. Even assuming a person of common knowledge would not have been on notice of a malpractice claim after watching his attorneys settle his case without consent, the Plaintiffs' cannot deny that Federal Court issued its July 3, 2007 Order only because the Plaintiffs voiced serious concerns about the manner in which their attorneys handled the Underlying Case. At the absolute latest, the three-year clock began to run in July of 2007.

[2] While this Court need not rely on this document to dispose of this Motion, the Court may consider the orders of the District Court for the Underlying Case because they are incorporated into the Complaint and they are public records.

Accordingly, since the Plaintiffs filed the Complaint on August 15, 2011, more than three years later, their claims are barred, and the Complaint should be dismissed with prejudice.

III. Untimely Service of Process

In addition to the grounds discussed above, this Court should dismiss the Plaintiffs' case because they failed to serve the Summons and Complaint within the period set forth in Rule 3(a), SCRCP. This rule provides, "A civil action is commenced when the summons and complaint are filed with the clerk of court . . . if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." Rule 3(a)(2), SCRCP. This time limitation is consistent with S.C. Code § 15-3-20, which provides:

> (A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.
>
> (B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

"If a plaintiff files but fails to make actual service upon the defendant the action has not yet commenced." Blyth v. Marcus, 322 S.C. 150, 154, 470 S.E.2d 389, 391 (Ct. App. 1996). "Therefore, because the statute of limitations period continues to run, unless the plaintiff can correct this 'failed' commencement before expiration of the limitations period, the claim will normally be time barred." Id. (citing McLain v. Ingram, 314 S.C. 359, 360, 444 S.E.2d 512, 513 (1994)).

The Plaintiffs in this case filed the complaint on August 15, 2011. On December 15, 2011, more than one hundred twenty days after the complaint was filed, a process server walked into Falgione's office and gave a temporary employee, Julie Owens, a copy of the summons, which bore no file stamp, and a copy of the complaint, which bore a file stamp. *See* Rule 5(d),

SCRCP (summons and complaint must be filed, and then served). By rule, the deadline for service was December 13, 2011. Thus, the Plaintiffs failed to timely serve the summons and complaint, and this action should be dismissed with prejudice.

IV. Insufficient Service of Process

Finally, the complaint should be dismissed because the Plaintiffs have not yet properly served the Summons and Complaint. Instead, the Plaintiffs attempted to serve Falgione and the Law Firm by delivering a copy of the Summons and Complaint to a temporary employee, who had no authority—actual, implied, or apparent—to accept service of process. In a recent decision, the Supreme Court of South Carolina recognized,

> The class of persons authorized to sign on behalf of defendants is narrow: "Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer.

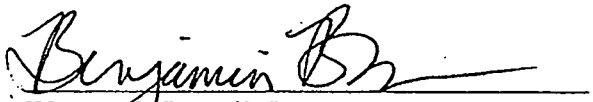
Graham Law Firm, P.A. v. Makawi, Op. No. 27086, 2012 WL 130671 (S.C. Jan. 17, 2012) (quoting Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct.App.1996)). The Makawi court relied in part on Roberson v. S. Fin. of S. C., Inc., 365 S.C. 6, 615 S.E.2d 112 (2005), a case in which the plaintiff attempted service by certified mail. In Roberson, a clerical employee of the defendant signed the return receipt, and the defendant failed to answer and the trial court entered a default judgment. 365 S.C. at 8-9, 615 S.E.2d at 114. The defendant/employer moved to set aside the judgment under Rule 60(b), but the court denied the motion. 365 S.C. at 9, 615 S.E.2d at 114. On appeal, the Court noted that the employee testified she was never authorized to accept service of process. Id. ("[A]n agent has no implied authority unless she herself believed she had such authority."). Reversing the trial court, the Supreme Court held there was no evidence on the record that the defendant/employer had manifested that the employee was its

agent for service of process, nor was there any evidence that the employee had actual or implied authority to act as the defendant's registered agent. 365 S.C. at 11, 615 S.E.2d at 115.

Similarly in this case, there is no evidence that Julie Owens, the temporary clerical employee who received the Summons and Complaint, was authorized to accept service of process for either Falgione or his law firm. To the contrary, the Affidavits of record demonstrate that Ms. Owens never had authority to accept service of process. Therefore, the Plaintiffs have failed to properly serve the Falgione Defendants in accordance with the South Carolina Rules of Civil Procedure, and the Complaint should be dismissed pursuant to Rule 12(b)(5), SCRCP.

V. Conclusion

Based upon these several grounds, the Falgione Defendants seek dismissal of the claims against them. Not only have the Plaintiffs have failed to file the required expert affidavit, they also failed to commence their action within three years of the May 9, 2007, hearing, at which they watched their case being settled without their consent. Furthermore, dismissal is appropriate because the Plaintiffs' failed to timely and properly serve the summons and complaint pursuant to the South Carolina Rules of Civil Procedure. Although the Plaintiffs are appearing in this action *pro se*, these Rules and statutes still apply with full force.



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Attorneys for Adrian L Falgione and The Law Offices of Adrian L. Falgione, LLC

January 25, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on January 25, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

Documents served: **MEMORANDUM IN SUPPORT OF DEFENDANTS ADRIAN L. FALGIONE; AND THE LAW OFFICES OF ADRIAN FALGIONE, LLC'S MOTION TO DISMISS**

Parties served:

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Benjamin C. Bruner

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	
	RECEIVED
James Spencer, individually and on behalf) of the Estate of Doris Holt and on behalf of) Southern Holdings, Inc; and Irene) Santacroce;)	C/A No. 2011-CP-40-5384
	JUN 06 2016
	SC Court of Appeals
Plaintiffs,)	
v.)	**NOTICE OF MOTION AND MOTION TO CHANGE VENUE**
John R. Rakowsky; Adrian L. Falgione; and) The Law Offices of Adrian Falgione, LLC;)	
Defendants.)	

TO: ALL PARTIES, AND THEIR COUNSEL

You will please take notice that Defendants Adrian L. Falgione and The Law Offices of Adrian Falgione, LLC, by and through their undersigned counsel, will move before the Presiding Judge of the Court of Common Pleas for the Fifth Judicial Circuit at 1701 Main Street in Columbia, South Carolina, on the tenth (10^{th}) day after service hereof, or at such time as the Court may schedule, for and Order changing venue of this action to Lexington County, South Carolina pursuant to S.C. Code §§ 15-7-30 and 100 and the following grounds:

(1) Both the individual Defendants have been residents of Lexington County at all times relevant to this action;

(2) The Defendant limited liability company held its principal place of business in Lexington County at all times relevant to this action; and

(3) The most substantial part of the alleged acts or omissions giving rise to the Plaintiffs' claims did not occur in Richland County.

Accordingly, the Defendants move for an Order changing venue of this action to Lexington County because Richland County is not the proper venue pursuant to statute. This Motion may be further supported by the record in the case, by affidavit, and by such cases as

have been made and provided. Pursuant to Rule 11, SCRCP, the undersigned has no duty to consult with the *pro se* Plaintiffs before filing this Motion.

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May 16, 2012

Columbia, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 16, 2012, the document(s) described below was(were) served on all parties of record in this case by mailing a copy, first class mail, postage prepaid and addressed as set forth below.

Documents served: **NOTICE OF MOTION AND MOTION TO CHANGE VENUE**

Parties served:

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Nancy Y. Stagg
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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 *Falgione's Motion to Change Venue filed May 17, 2012, and Falgione's Memorandum in Support of Motion to Dismiss, dated January 27, 2012* by depositing a copy of it in the United States Mail, postage prepaid, on June 3, 2016, 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.

June 3, 2016

Bridget Steele
Bridget Steele

BRUNER, POWELL, WALL & MULLINS, LLC

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

June 3, 2016

James B. Spencer
7001 Saint Andrews Rd. Box 183
Columbia, SC 29212

Re: ***Rakowsky v. Spencer, et al.***
Appellate Case No.: 2014-000091
BPWM File No.: 3-1742-108

Mr. Spencer:

Please find enclosed Falgione's Motion to Change Venue, filed May 17, 2012, and Falgione's Memorandum in Support of Motion to Dismiss, dated January 27, 2012, in the above-referenced matter. I have searched my file and cannot find a copy of Court's Exhibit 2 from the June 5, 2013 hearing, which as best I can tell was a letter you submitted to the Court when you were arguing your motion to disqualify Carlock Copeland as defense counsel.

Sincerely,

Benjamin C. Bruner

BCB/gh
Enclosures

cc: The Honorable Jenny Abbott Kitchings
David W. Overstreet, Esq.
Michael B. McCall, Esq.
(with encl.)

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RECEIVED
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SC Court of Appeals

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