THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Marvin H. Dukes, III, Circuit Court Judge

Appellate Case No. 2017-000242

Trial Court Case No. 2015-CP-07-01251

Robert E. Feldman and Louis J. Feldman ..... Appellants,

v.

Gary P. Coggin ..... Respondent.

FINAL BRIEF OF RESPONDENT

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Dated: August 28, 2017
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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment on the entire case where Appellants failed to advance any evidence or argument to show that Respondent's alleged failure to serve the defendant driver proximately caused Appellants any damages?

Suggested Answer: ***YES.***

2. Did the trial court properly grant summary judgment on the entire case despite Appellants' claim that Respondent's failure to prepare the underlying case serves a basis of their Complaint, when that theory was not in fact pleaded in the Complaint when Respondent moved for summary judgment?

Suggested Answer: ***YES.***

3. Was the trial court's grant of summary judgment procedurally appropriate?

Suggested Answer: ***YES.***

4. Did the trial court properly deny Plaintiff's Motion to Alter/Amend its Order granting summary judgment?

Suggested Answer: ***YES.***

COUNTERSTATEMENT OF THE CASE

A. Factual Background

The Respondent, Attorney Gary Coggin, represented the Appellants in an effort to recover for personal injuries that Appellant Robert Feldman sustained in an automobile accident allegedly caused by Sarah Dickenson on October 9, 2010. (R. p. 10; Verified Compl. ¶¶8-9). After successfully recovering $85,000 for Mr. Feldman from Ms. Dickenson's automobile liability insurance carrier without litigation, Attorney Coggin filed suit on behalf of both Appellants against Ms. Dickenson in an attempt to recover underinsured motorist (hereinafter "UIM") insurance benefits from Appellants' own automobile liability insurance carrier, Liberty Mutual Insurance Company. (R. p. 11; Verified Compl. ¶¶15-16). That case, styled Robert Feldman & Lois Feldman v. Sarah Dickenson, 2012-CP-07-3800 (hereinafter the "UIM Action") was filed on or around October 29, 2012. (R. p. 11; Verified Compl. ¶16).

After Attorney Coggin served the summons and complaint in the UIM Action on Liberty Mutual, as is required by S.C. Code Ann. §38-77-160, Liberty Mutual retained attorney Julian Allen to represent it in the UIM Action.[1] (R. pp. 12-13; Verified Compl. ¶¶17, 28). Liberty Mutual filed an answer to the UIM Action on January 7, 2013. The answer included only four affirmative defenses, the last of which read as follows:

> **FOR A FIFTH DEFENSE**
> **(Improper Service)**
>
> 10. FURTHER ANSWERING, this party alleges that Plaintiff has failed to effectuate proper service under Rule 12(b)(4) and Rule 12(b)(5).

[1] While Appellants claim that Attorney Allen represented Dickenson in the UIM Action, South Carolina law is clear that Attorney Allen actually represented Liberty Mutual and did not represent Dickenson. Crawford v. Henderson, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) ("[T]he attorney for the UIM carrier represents the carrier and not the named defendant.").

(R. p. 318; Liberty Mutual's Answer in the UIM Action at p. 2). Liberty Mutual's answer did not allege that the at-fault driver, Dickenson, was not served, nor did it raise the statute of limitations as an affirmative defense. Id. Liberty Mutual did not file any motions prior to the answer, nor did it amend its answer within 30 days of serving it as allowed by Rule 15(a), SCRCP.

For almost two years, Liberty Mutual defended the UIM Action by participating in written discovery, filing motions, taking both of the Appellants' depositions, and participating in mediation in May 2014. (R. p. 99, Lines 7-20; R. p. 105, Lines 18-20; Gary Coggin Deposition 65:7-20; 71:18-20). Liberty Mutual offered, and Attorney Coggin recommended Appellants accept, $25,000 at mediation, but the Appellants refused. (R. p. 108, Line 18-p. 109, Line 13; Coggin Depo. 74:18-75:13). Attorney Coggin's recommendation to accept this amount was based partially on the fact that he discovered that Appellant Robert Feldman had been playing golf regularly after the October 9, 2010 accident, something which both Appellants had represented to Attorney Coggin that Robert Feldman could not do because of the injuries he sustained in the accident. (R. p. 59, Lines 10-25; R. p. 123, Lines 4-7; R. p. 124, Line 9-p. 125, Line 3; Coggin Depo. 25:10-25; 89:4-7; 90:9-91:3). To Attorney Coggin, this newly discovered fact completely undermined Appellants' claim for damages in the UIM Action. (R. p. 123, Lines 4-7; Coggin Depo. 89:4-7).

After Appellants' refusal to accept Liberty Mutual's $25,000 settlement offer at mediation, Attorney Coggin began focusing on getting the UIM Action ready for trial. (R. p. 113, Line 23-p. 114, Line 1; Coggin Depo. 79:24-80:1). In order to present the Appellants' case at trial, Attorney Coggin would have to incur some rather large expenses, including those associated with taking video-taped *de bene esse* depositions of Appellant Robert Feldman's

treating physicians. (R. p. 120, Line 24-p. 121, Line 6; Coggin Depo. 86:24-87:6). However, Appellants refused to provide Attorney Coggin the funds to cover these expenses, despite having agreed to do so in the Contingency Fee Agreement. (R. p. 123, Lines 8-20; Coggin Depo. 89:8-20). After over nine months of attempting to get Appellants to commit to paying these expenses, on September 16, 2014 Attorney Coggin filed a Motion to Withdraw as Counsel and to Stay the Proceedings. The following day Attorney Coggin was contacted by Attorney Robert Metro with notice that his firm, Bauer & Metro, P.C, was taking over representation of the Appellants in the UIM Action. On September 23, 2014, Attorney Coggin provided Bauer & Metro his entire file from the UIM Action. The Consent Order to substitute counsel was filed on November 20, 2014.

Between January 7, 2013 when Liberty Mutual filed its Answer, and September 16, 2014, when Attorney Coggin filed his Motion to Withdraw, Liberty Mutual did not raise or argue that Dickenson was not served or was improperly served with process or that the statute of limitations had expired. Notably, the three-year statute of limitations for the UIM Action expired on October 9, 2013. Liberty Mutual continued actively defending the UIM Action after the expiration of the statute of limitation, including participation at mediation.

On October 14, 2014, after Bauer & Metro took over representation of the Appellants but before the Consent Order to substitute counsel was filed, Liberty Mutual filed a motion to dismiss, claiming for the first time that *Dickenson* was not served with the summons and complaint in the UIM Action within the statute of limitations.[2] (R. p. 320; Liberty Mutual's Mtn. to Dismiss the UIM Action). The motion to dismiss was filed almost two years after the UIM

[2] A Memorandum in Support of Liberty Mutual's Motion to Dismiss was filed on December 2, 2014. The Memorandum in Support does not advance any substantive arguments that are not contained in the Motion to Dismiss. (R. pp. 322-323; Memo in Support of Liberty Mutual's Mtn. to Dismiss the UIM Action).

Action.[3]

While Liberty Mutual's motion to dismiss was pending, Appellants, now represented by Bauer & Metro, voluntarily accepted Liberty Mutual's $25,000 settlement offer that was made at mediation while they were under Attorney Coggin's representation. Importantly, Appellants did not allow Liberty Mutual's motion to dismiss to be adjudicated, as they now claim they were "certain" that it would have been granted. (R. p. 14-15; Verified Compl. ¶38). A stipulation of dismissal with prejudice of the UIM Action with prejudice was filed on March 4, 2015.

B. Procedural History

This legal malpractice action was filed just over two months later, on May 19, 2015. In the Verified Complaint, Appellants allege that Attorney Coggin breached the standard of care by failing to serve Dickenson with the summons and complaint in the UIM Action (R. p. 15; Verified Compl. ¶39), which forced them to accept Liberty Mutual's $25,000 settlement offer instead of the $500,000 maximum UIM benefits that Appellants claim they "more likely than not" would have recovered from Liberty Mutual in the UIM Action. (R. pp. 14-15; Verified Compl. ¶¶38, 40). The Verified Complaint includes no other claims of negligence. This is evident in the first numbered paragraph of the Verified Complaint, the "Summary of the Case," which reads:

> [Attorney Coggin's] "acts and omissions, including failure to perfect service of process on [Dickenson], allowed the statute of limitations to expire on his clients' claims. Allowing the statute of limitations to expire resulted in their inability to recover all of the $500,000 in available underinsurance proceeds that, but for [Attorney Coggin's] acts and omissions, would have been paid by their carrier to compensate them for personal injuries, medical expenses, lost wages, and loss of consortium claims arising from their injuries caused by [Dickenson].

[3] Appellants argue that Liberty Mutual's attorney advised Attorney Coggin of his plan to file the motion to dismiss in September 2014 and that this advance-notice prompted Attorney Coggin to urge Appellants to accept a compromised $25,000 settlement offer and then move to withdraw from the case. (Final Brief of Respondent at pp.10-11; R. p. 13-14; Verified Compl. At ¶¶31-32). Attorney Coggin disputes these allegations and Appellants have offered no evidence to support it.

(R. p. 9; Verified Compl. ¶1).

Similarly, the expert affidavit that Appellants were required to file with their Verified Complaint specifies only one alleged negligent act or omission: Attorney Coggin's alleged failure to serve Dickenson with the Summons and Complaint in the UIM Action. (R. pp. 21-22; Expert Merit Affidavit by Samuel C. Bauer at ¶¶8-14, attached as Exhibit 1 to Appellants' Verified Complaint). Notably, Appellants' expert affidavit was issued by Samuel Bauer, one of the attorneys with Bauer & Metro who replaced Attorney Coggin as Appellants' counsel of record in the UIM Action and voluntarily consummated the $25,000 settlement of the UIM Action.

On February 29, 2016, just barely nine months after filing the Verified Summons and Complaint, Appellants requested that the case be transferred to the Jury Trial Roster, indicating that they were ready to try the case. (R. p. 324; Request to Transfer to the Jury Trial Roster filed Feb. 29, 2016).

After participating in discovery and an unsuccessful early mediation, Attorney Coggin filed a Motion for Summary Judgment on May 16, 2016. (R. pp. 353-354; Motion for Summ. J.). Attorney Coggin argued that even if Appellants could establish that he had failed to serve Dickenson, that theory of liability - - the only one presented by the Verified Complaint and expert affidavit - - could not support this legal malpractice action because Liberty Mutual failed to timely assert lack of service upon Dickenson as an affirmative defense and could therefore not defend the UIM Action on that basis. (R. pp. 355-370; Memo in Support of Motion for Summ. J.). As will be discussed in detail in this brief, Attorney Coggin argued that his alleged failure to serve Dickenson in the UIM Action had absolutely no effect on the UIM Action and did not proximately cause Appellants any damages because Liberty Mutual waived its right to challenge

service on Dickenson by not specifically raising that issue in its answer and by actively litigating the UIM Action as if service on Dickenson was appropriate, only to later move to dismiss after the statute of limitations had expired. See Unisun Inc. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

On June 27, 2016, Appellants filed a Memorandum in Opposition but, instead of addressing Attorney Coggin's arguments, they maintained that Attorney Coggin could be found liable to Appellants under a new and distinct theory of liability: that Attorney Coggin failed to adequately prepare the UIM Action for settlement or trial. More specifically, Appellants argued that Attorney Coggin failed to secure expert witnesses in the areas of future medical damages and lost wages, as well as an economist to quantify those damages, and that such failures reduced the settlement value of the UIM Action. (R. p. 386; Memo in Opposition to Motion for Summ. J. at p.7). In spite of the fact that that Appellants requested that the case be transferred to the jury trial roster four months earlier, they now argued that they needed more time to complete discovery regarding their new "failure to prepare" theory. (R. pp. 386-387; Id. at pp.7-8) (R. pp. 458-460; Rule 56(f) Affidavit of Thomas Pendarvis at ¶¶11-15).

Attorney Coggin's Motion for Summary Judgment was argued on June 29, 2016. Again, Appellants failed to present any response to Attorney Coggin's argument that his alleged failure to serve Dickenson could not support this legal malpractice action, and instead again argued that Attorney Coggin could be held liable on the separate, distinct, and unpled theory that Attorney Coggin failed to adequately prepare the UIM Action. (R. p. 307, Lines 15-16; Transcript of Hearing held June 29, 2016 at 15:15-16) ("And so the real essence of the malpractice was failure to prepare the case.").

The Court took the matter under advisement, and allowed Appellants to submit a supplemental memorandum. In their Supplemental Memorandum in Opposition, Appellants continued to argue only that Attorney Coggin could be found liable for failing to prepare the UIM Action, and still failed to address the argument that the only pled theory of liability was meritless. (R. pp. 462-468; Supp. Memo in Opposition). Attorney Coggin filed a Reply arguing that the "failure-to-prepare" theory was not pled and was not properly before the Court and that Appellants still had not made any arguments to support their "failure-to-serve" theory. (R. pp. 487-496; Reply to Supp. Memo in Opposition). Appellants filed a Sur-Reply, still arguing only that Attorney Coggin could be found liable under this new failure-to-prepare theory of liability without any argument to support the merits of their failure-to-serve theory. (R. pp. 497-498; Sur-Reply to Supp. Memo in Opposition).

After the June 29 hearing, but before the supplemental briefing was closed, Appellants requested that Attorney Coggin consent to the filing of an Amended Verified Complaint, which proposed to add the new failure-to-prepare theory of liability. Attorney Coggin responded by inquiring as to whether Appellants intended to use the same affidavit of Samuel Bauer to support the proposed Amended Verified Complaint. Appellants responded that they intend to use Mr. Bauer's original affidavit. Attorney Coggin replied by pointing out that Mr. Bauer's affidavit alleges only that Attorney Coggin breached the standard of care by failing to serve Dickenson, and does not allege that Attorney Coggin breached the standard of care by failing to adequately prepare the UIM Action. Attorney Coggin reminded Appellants that they still had not advanced any argument that would allow the Court to let the failure-to-serve theory survive summary judgment. Attorney Coggin declined to consent to the proposed Amended Verified Complaint until Appellants present a qualifying expert affidavit stating that Attorney Coggin breached the

standard of care by failing to adequately prepare the UIM Action. (R. pp. 508-511; Email chain between counsel for Appellants and Respondent sent July 8 and July 11, 2016). Appellants did not submit an additional or revised expert affidavit, and instead filed a Motion for Leave to Amend their Verified Complaint (R. pp. 469-486; Motion for Leave to File Amended Verified Complaint) which Attorney Coggin opposed (R. pp. 499-519; Memorandum in Opposition to Motion for Leave). That motion was heard, but not ruled on, before the Court granted Attorney Coggin's Motion for Summary Judgment by Order filed September 9, 2016 (R. p. 5), which rendered the Motion for Leave moot.

On September 19, 2016, Appellants filed a Motion to Alter or Amend Judgment, arguing again that the case should have survived summary judgment on the unpled failure-to-prepare theory but advancing no arguments to support the only properly-pled theory before the Court – failure to serve. (R. pp. 524-535; Motion to Alter or Amend Judgment). Attorney Coggin filed his Opposition to Appellants' Motion to Alter or Amend on October 3, 2016, reminding the Court that this legal malpractice action was based on one and only one theory of liability - - Attorney Coggin's alleged failure to serve Dickenson - - and that theory of liability was meritless as a matter of law. (R. pp. 665-668). After a hearing, Appellants submitted to the court a proposed order granting their Motion to Alter or Amend. Attorney Coggin filed a Supplemental Memorandum in Opposition to address the proposed order. (R. pp. 669-674). On January 27, 2017, the court denied Appellants' Motion to Alter or Amend. (R. p. 6).

C. Summary of the Arguments

Attorney Coggin's arguments now are the same as they were during the Motion for Summary Judgment and Motion to Alter or Amend proceedings: (1) Appellants pled only one theory of liability to support this legal malpractice claim - - failure to serve Dickenson; (2)

Appellants' expert affidavit supports only that theory; (3) that theory cannot, as a matter of law, support this legal malpractice action; and (4) Appellants' new failure-to-prepare theory has never been a part of this case.

Attorney Coggin asks this Court to focus on the true issue that is before it: whether Attorney Coggin's failure to serve Dickenson with the summons and complaint in the UIM Action, if proven to be true, can support a claim that Attorney Coggin committed legal malpractice. Attorney Coggin maintains that it cannot. As will be shown more fully below, clearly-established South Carolina case law explains that, in a UIM action, if the UIM carrier wants to claim as a defense that the plaintiff failed to serve the at-fault driver (which service is required by statute), then the UIM carrier must specifically plead such failure of service as an affirmative defense in its answer. If the UIM carrier fails to so plead, or fails to do so with the necessary specificity, that defense is deemed waived and the UIM action cannot be defended on any alleged failure to serve.

Here, Liberty Mutual did not specifically plead that Dickenson was not served, or not properly served, with the summons and complaint in the UIM Action. Accordingly, Liberty Mutual waived its right to later claim that the UIM Action should be dismissed for failure to serve Dickenson, which is exactly what Liberty Mutual attempted to do in its motion to dismiss. Therefore, Liberty Mutual's motion to dismiss was at worst frivolous and at best meritless, but certainly would have been denied if Appellants allowed it to be adjudicated. The baseless motion to dismiss could not have had any effect on the UIM Action and could not have diminished the settlement value of that case, as Appellants Verified Complaint and expert affidavit claim that it did.

For reasons that will be shown, the trial court properly refused to consider Appellants' belated claim that Attorney Coggin negligently failed to prepare the UIM Action.

ARGUMENTS

I. Standard of Review

Rule 56, SCRCP, provides the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

"In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Stewart v. State Farm Mut. Auto Ins. Co., 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). The appellate court "may affirm the grant of summary judgment on any ground found in the record." See Moore v. Weinberg, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), SCACR. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")); accord Rule 208(b)(2) SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE ATTORNEY COGGIN'S ALLEGED FAILURE TO SERVE DID NOT HAVE ANY EFFECT ON THE UIM ACTION AND, AS A MATTER OF LAW, COULD NOT HAVE PROXIMATELY CAUSED APPELLANTS ANY DAMAGES

As stated above, in this legal malpractice action, Appellants sued their former attorney alleging that he breached the standard of care during his representation of them by failing to serve the alleged at-fault driver with the summons and complaint in the UIM Action. While the question of whether Attorney Coggin did in fact serve the alleged at-fault driver with the summons and complaint would be a jury issue, that question was not pertinent to his Motion for Summary Judgment or to this appeal because, even if Attorney Coggin did breach the standard of care by failing to serve the at-fault driver, that breach did not proximately cause the Appellants to suffer any damages. If Attorney Coggin did in fact fail to serve the at-fault driver, such failure would not have affected the UIM Action in any way, because under clearly established law the defendant in that case waived its right to use failure to effect service and the statute of limitations as defenses by failing to allege in what way service was improper or even who was not properly served. The law was very clear that a defendant could not vaguely assert improper service in his answer and hope that the plaintiff would not figure out what the claimed defect was until after

the statute of limitations had run, as Liberty Mutual did in the UIM Action. Unisun Ins. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559.

In order to prevail in an action for legal malpractice, a plaintiff must prove: (1) the existence of any attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the plaintiff; and (4) proximate causation of the plaintiff's damages by the breach. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010); Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000).

The proximate causation element requires the plaintiffs to prove that they "most probably" would have realized a better result in the underlying case if not for the defendant's breach of the standard of care. "[A] plaintiff must show she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). "The question of the success of the underlying claim, if suit had been brought, is a question of law." Doe v. Howe, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005).

Here, to prove causation based on Attorney Coggin's alleged failure to serve Dickenson within the statute of limitations, the Appellants were required to prove that Liberty Mutual's motion to dismiss the UIM Action was meritorious, which would have then made the Appellants acceptance of Liberty Mutual's diminished $25,000 settlement offer reasonable. Despite seven separate submissions, including their Appellate Brief, and two oral arguments, Appellants have not argued that Liberty Mutual's motion to dismiss had any merit or any real effect on the UIM Action or its settlement value.

Even if Attorney Coggin never served Ms. Dickenson, which Attorney Coggin denies, the motion to dismiss the UIM Action had absolutely no merit and would have had to have been

denied had the Appellants allowed it to be decided. The motion to dismiss was doomed because Liberty Mutual waived the right to challenge the service of process on Dickenson and the right to raise a statute of limitations defense by not properly including them in its Answer to the UIM Action and by actively defending the UIM Action for almost two years while staying silent as to the service issue. Accordingly, Appellants cannot prove the proximate cause element of a legal malpractice case, as a matter of law, and the trial court properly granted Attorney Coggin summary judgment.

A. The Motion to Dismiss the UIM Action was Meritless Because Liberty Mutual Failed to Properly Include a Rule 12(b)(4) Affirmative Defense for Insufficiency of Process or a Rule 12(b)(5) Affirmative Defense for Insufficiency of Service of Process

Rule 12(b) of the South Carolina Rules of Civil Procedure requires a defendant to assert an affirmative defense for "insufficiency of process" (Rule 12(b)(4)) and "insufficiency of service of process" (Rule 12(b)(5)) in its initial responsive pleading or motion. Rule 12(h) states that the Rule 12(b)(4) insufficiency of process defense and the Rule 12(b)(5) insufficiency of service of process defense are waived unless they are so pled. See also Garner v. Houck, 312 S.C. 481, 487, 435 S.E. 2d 847, 850 (1993) (holding that a defendant must raise issues regarding service of process in its initial responsive pleading/motion, or else defendant cannot later claim that any alleged improper or insufficient process or service supports a dispositive motion).

The Court of Appeals of South Carolina clarified the pleading requirement for insufficiency of service of process in its opinion in Unisun Ins. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559. In Unisun, the plaintiffs failed to make proper service on the defendant Bruce Hawkins, but the defendant's answer stated by way of affirmative defense only that "Plaintiffs have failed to serve defendant Bruce Hawkins within the three-year statute of limitations." Id. at 539, 435 S.E.2d at 560. Defendant Bruce Hawkins later moved for summary judgment, arguing

that he was never properly served with the summons and complaint. The circuit court granted the motion, finding that plaintiffs failed to properly serve him. Id. at 539-40, 435 S.E.2d at 561-61. The Court of Appeals reversed, finding that the language defendant Bruce Hawkins included in his affirmative defense was insufficient to raise the Rule 12(b)(5) affirmative defense of insufficiency of service of process, because the pleading "failed to specify any defects in the service of process." Id. at 542-43, 435 S.E.2d at 562. The Court of Appeals found that defendant Bruce Hawkins "failed to allege process with even a minimal amount of specificity in his responsive pleading" and, thus, he waived the defense as well as a statute of limitations defense premised on the insufficient service. Id. See also Poston v. Davis, 2009 WL 9528768 (Ct. App. March 30, 2009) (finding that the defenses of insufficiency of service of process and statute of limitations are affirmative defenses which are waived if not properly plead in the responsive pleading); H. Lightsey, Jr. & J. Flanagan, South Carolina Civil Procedure 100 ("Challenges to the method of service of process [must] assert that service was not accomplished according to the rules or statutes. Any objection under these rules should specify why the rule was not satisfied.").

The reasoning of courts interpreting the analogous Federal Rules of Civil Procedure are also instructive, as Federal Rules 12(b)(4), 12(b)(5), and 12(h) are substantively identical to their South Carolina counterparts.[4] Various federal courts across the country have analyzed this issue and concluded that, in order to challenge service of process, a defendant's initial answer or motion must not merely raise the 12(b)(4) and/or 12(b)(5) affirmative defense, but must do so with such specificity to point out in what manner the process was flawed or how plaintiff failed to properly serve process. O'Brien v. R.J. O'Brien & Assocs. 998 F.2d 1394, 1400 (7th Cir.

[4] See Roberts v. Peterson, 292 S.C. 149, 355 S.E. 2d 280 (Ct. App.1987) (where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

1993) ("Objections to the sufficiency of process must be specific and must point out in what manner the plaintiff has failed to satisfy the service provision utilized."); Photolab Corp. v. Simplex Specialty Co., 806 F.2d 807, 810 (8th Cir. 1993) (same); Sassower v. City of White Plains, 1993 WL 378862 (S.D.N.Y. 1993) ("Objections to service must be specific and point out in what manner the utilized service of process rules were not satisfied; once done, the burden of proof as to effectiveness of service shifts to plaintiff."); King v. Best Western Country Inn, 138 F.R.D. 39 (S.D.N.Y. 1993) (same); Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2nd, 1353 (1990) ("The objection to insufficiency of process or its service should point out specifically in what manner plaintiff has failed to satisfy the requirements of the service provision he utilized.").

One federal case that is particularly instructive is Zisman v. Sieger, 106 F.R.D. 194 (N.D.Ill. 1985). There, after plaintiff's first attempt at service of a summons and complaint on defendant, a Japanese corporation, the defendant filed a motion to dismiss, arguing that service of process was improper under Illinois law's provisions for service on foreign corporations. Id. at 197. After obtaining leave of court, plaintiff attempted service a second time. Id. at 196. Defendant responded with a second motion to dismiss, but this time argued that service was improper not under Illinois law, but under the terms of the Hague Convention. Id. at 197. The court found as follows:

> The only objection to the first attempted service was that it did not comply with the relevant provisions of Illinois law for service of process on a foreign corporation. [Defendant] could have, but did not raise the issue of compliance with the Hague Convention. If the Hague Convention applies at all, it applied then. If the Hague Convention applies, that first attempted service was insufficient on that basis as well. Failure to raise the objection in the first Rule 12(b) motion constitutes a waiver of the issue under Rule 12(h) and (g). . . .

> Rule 12 requires a defendant who wishes to raise jurisdictional defenses to raise them all when he makes his first defensive move. The Rule . . . is intended to eliminate unnecessary delays at the pleading stage of a case by avoiding the piecemeal consideration of pretrial motions. The failure to raise an objection which could have been raised in a previous 12(b) motion constitutes a waiver of that issue.
>
> . . . [B]y failing to raise its objection to service based on the Hague Convention in the previous motion, when that objection was clearly available to it, [defendant] has waived that objection to the sufficiency of service of process. If [defendant] had raised the issue, even generally, in its prior motion, and the second attempted service failed to comply with some particular of the Convention, then [defendant] would not now be barred from asserting that as a defense to the second attempted service.

Id. at 197-98 (internal quotations and citations omitted). The important takeaway from Zisman is that, in order to preserve a defense for insufficient service of process, a defendant must not only raise the defense in its first responsive pleading, but also explain with specificity each reason why service was improper. If a defendant does not include any specific reason, or includes one reason in its initial responsive pleading, but later claims service was improper for a different reason, the argument as to that second reason will be considered waived.

Another federal case, Bobo v. Umoh, 2008 WL 4911222 (W.D. Ark. Nov. 13, 2008), is instructive. There, the defendant answered the plaintiff's complaint and included blanket and unspecific affirmative defenses that the complaint should be dismissed pursuant to Rule 12(b)(4) and 12(b)(5). Defendant then actively litigated the case for nearly two years before filing a motion to dismiss under Rules 12(b)(4) and 12(b)(5), arguing he was never served with the summons and complaint. The court denied the motion, finding that defendant's "generic assertion of the defenses available under Rule 12(b) was insufficient to preserve his objection to plaintiffs' failure to perfect service of process." The court further found that, even if the

defendant "had properly asserted the objection in his answer, his failure to raise the issue by formal motion for nearly two years would serve as a waiver of the issue."

Here, while Liberty Mutual's answer in the UIM Action did include the words "improper service," "Rule 12(b)(4)," and "Rule 12(b)(5)" in an affirmative defense, the answer merely named the defense, to wit, "Plaintiff has failed to effectuate proper service under Rule 12(b)(4) and Rule 12(b)(5)." (R. p. 318). The affirmative defense said no more. It was not specific and did not point out in what manner the rules of service of process were not satisfied, or even *who* was not properly served. Liberty Mutual's affirmative defense was less specific than the affirmative defense that the South Carolina Court of Appeals deemed invalid in Unisun. There, the affirmative defense at least identified that it was Bruce Hawkins who was not served. Liberty Mutual's affirmative defense, on the other hand, did not properly raise defenses under Rule 12(b)(4) or 12(b)(5) because it failed to specifically state the reason or reasons the service was flawed, or even on whom service was not accomplished (Ms. Dickenson or Liberty Mutual). (R. p. 318). The answer was filed by Liberty Mutual, not Dickenson, so the natural inference from a defense of "failure to effect proper service" was that Liberty Mutual was not properly served. The pleading did not reasonably put the Appellants or Attorney Coggin on notice that the defense referred to Dickenson or that she was not only not properly served, but she was not served at all. Liberty Mutual's motion to dismiss argued that it was Dickenson, not Liberty Mutual, who was not served. (R. pp. 320-323). Since the Answer did not properly raise this defense, it was waived and could not be argued in a later dispositive motion. Rule 12(h), SCRCP; Houck, 312 S.C. at 487, 435 S.E. 2d at 850; Unisun, 342 S.C. at 542-43, 537 S.E.2d at 562; Zisman, 106 F.R.D. at 197-98.

This case presents a perfect example of why courts require that Rule 12(b)(4) and 12(b)(5) affirmative defense be pled with specificity in the initial answer. Had Liberty Mutual's answer specified the particular alleged defects with the service of process and who was allegedly not served, Attorney Coggin would have been on notice of those alleged defects and could have timely corrected any problems. Attorney Coggin testified as such in his deposition, by stating that if Liberty Mutual's affirmative defense had at least identified that it was Ms. Dickenson who was allegedly not properly served, he would have further investigated that issue at the time, and had an opportunity to correct any errors in service that he may have discovered. (R. p. 187, Line 3-p.189, Line 2; R. p. 199, Lines 18-22; Gary Coggin Deposition 153:3-155:3; 165:18-22) ("If it said further answering, alleges the Plaintiff had failed to effect proper service under Rule 12(b)(4) and 12(b)(5) on Ms. Dickenson, you're doggone right I would have looked very closely at that."). However, the Answer did not put Attorney Coggin on notice of the actual alleged defect in service, or even who was not served, and those specifics were not raised for over two years, when Liberty Mutual filed the motion to dismiss the UIM Action and after the statute of limitations had run.

Since the motion to dismiss the UIM Action was meritless, because the defenses asserted therein were waived, any breach of the standard of care that Attorney Coggin may have committed if he failed to properly serve Ms. Dickenson with the summons and complaint in the UIM Action did not proximately cause any damages to Appellants. Stated another way, because the motion to dismiss in the UIM Action was completely meritless, the Appellants as a matter of law cannot prove that they "most probably" would have realized a better outcome in the UIM Action had Attorney Coggin not breached the standard of care by allegedly failing to serve Dickenson. Summer v. Carpenter, 328 S.C. at 42, 492 S.E.2d at 58. Since proximate cause is a

matter of law and an essential element of Appellants' legal malpractice claim, this Court should affirm the trial court's granting of Attorney Coggin's Motion for Summary Judgment. Harris Teeter, 390 S.C. at 282, 701 S.E.2d at 745; Howe, 367 S.C. 442, 626 S.E.2d at 30.

B. Even if the Motion to Dismiss the UIM Action was Granted, the UIM Action Still Would Have Survived Because Attorney Coggin Could have Re-served Dickenson, Since the Statute of Limitations Defense had Been Waived in the UIM Action

A critical and necessary component to the Appellants' case against Attorney Coggin is proving that the statute of limitations in the UIM Action had expired when Liberty Mutual's motion to dismiss was filed, such that if the motion to dismiss was granted, Attorney Coggin would have been precluded from simply re-serving Dickenson with the summons and complaint in the UIM Action and starting the UIM Action anew. Attorney Coggin concedes that the three-year statute of limitations for the UIM Action began to run on October 9, 2010 and expired on or around October 9, 2013.

A party can waive a statute of limitations defense. RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 197, 644 S.E.2d 730, 734 (2007). "Waiver of [the statute of] limitations may be shown by words or conduct. Thus, waiver may result from express agreement, . . . from failure to claim the defense, or by any action or inaction manifestly inconsistent with an intention to insist on the statute." Mende v. Conway Hosp., Inc., 304 S.C. 313, 314, 404 S.E.2d 33, 34 (1991), quoting 54 C.J.S. Limitation of Actions § 22 at 52 (1987).

Here, Liberty Mutual waived any statute of limitations defense it had in the UIM Action by (1) failing to raise it at all in its answer; (2) actively defending the UIM Action for over ten (10) months before the statute of limitations expired; (3) continuing to defend the UIM Action for over one year after the statute of limitations expired; and (4) not raising the statute of limitations defense until after it expired. Because Liberty Mutual actively defended the UIM

Action without raising the statute of limitations or any issues with service of process, Attorney Coggin was lulled into believing that Liberty Mutual took no issue with the service of process or the timeliness thereof. It was only after the statute of limitations expired that Liberty Mutual, through its motion to dismiss, first argued that service was never made on Dickenson and that it could not later be made because the statute of limitations had expired. This was certainly gamesmanship on behalf of Liberty Mutual, as it could have raised its service of process arguments in ample time such that Attorney Coggin could have corrected any alleged problems with the service before the statute of limitations expired. See Mende, 304 S.C. 314, 404 S.E.2d 34 (finding that defendant waived its statute of limitations after it participated in discovery for over two years, agreed to a voluntary non-suit after the statute of limitations expired, and then raised the expired statute of limitations as a defense when plaintiff re-filed the suit); Parker v. Parker, 313 S.C. 482, 487-88, 443 S.E.2d 388, 391 (1994) (finding that a party waived it right to claim that a statute of limitations applied, when the party did not raise the defense immediately and instead waiting until long after the statue expired to first raise the defense for the first time, which "lulled" the other party into a position where she could not assert her rights).

Unisun is just as instructive on the statute of limitations issue as it is on the service of process issue. In Unisun, defendant Hawkins claimed that since he was not served within the statute of limitations, the case against him must be dismissed. After finding that Defendant Hawkins failed to properly raise, and thus waived, his service of process defense, the Court of Appeals then found that because he "failed to challenge the service of process properly, he also waived his statute of limitations defense . . . ."

Since Liberty Mutual waived the statute of limitations defense, Liberty Mutual's motion to dismiss the UIM Action, even if granted, would have had no effect on the UIM Action

because Attorney Coggin could have later re-served Dickenson with process. Therefore, Attorney Coggin's alleged failure to serve Dickenson with process in the UIM Action could not have proximately caused any damages to the Appellants here, and this legal malpractice case must fail. Harris Teeter, 390 S.C. at 282, 701 S.E.2d at 745; Howe, 367 S.C. 442, 626 S.E.2d at 30.

III. APPELLANTS' FAILURE-TO-PREPARE THEORY OF LIBAILITY IS NOT AND HAS NEVER BEEN A PART OF THIS CASE AND CANNOT SERVE AS A BASIS TO OVERTURN SUMMARY JUDGMENT

After Attorney Coggin filed his Memorandum in Support of his Motion for Summary Judgment exposing the fatal flaw in Appellants' failure-to-serve theory, Appellants responded with a Rule 56(f) Affidavit of their attorney, Thomas Pendarvis, and a Memorandum in Opposition to Motion for Summary Judgment. (R. pp. 380-468). These filings did not contain a single argument in support of the failure-to-serve theory, but instead, for the very first time, argued that this case should survive based on a new and distinct theory of liability against Attorney Coggin: that he breached the standard of care by failing to properly prepare the UIM Action for settlement, mediation, and trial.

Appellants filed two additional briefs and made arguments at one hearing in response to Attorney Coggin's Motion for Summary Judgment. Appellants then filed a Motion to Alter or Amend the Order granting summary judgment, argued at a hearing on that motion, and submitted a proposed order/supplemental brief on that motion. Finally, Appellants filed a 35-page Initial Appellate Brief. What is missing from Appellants' hundreds of pages of briefing and oral arguments is anything to support the sole theory of liability that is espoused in their Verified Complaint and supported by their expert affidavit: Attorney Coggin's alleged failure to serve Dickenson. Apparently accepting Attorney Coggin's position that the failure-to-serve theory

cannot support this case, Appellants pivoted to the failure-to-prepare theory that is certainly not included in their Verified Complaint and not supported by their expert affidavit.

A. Appellants' Failure to Prepare Theory is Not and Never Has Been a Part of this Case

It is elementary that a complaint must set forth "a short and plain statement of the facts showing that the pleader is entitled to relief," SCRCP 8(a) (emphasis added). No facts supporting Appellants' failure-to-prepare theory are set forth in the Verified Complaint, which is the Appellants' governing pleading in this case. (R. pp. 9-19). Neither is this theory of liability alleged in Mr. Bauer's expert affidavit, despite the fact that Mr. Bauer replaced Attorney Coggin as the Appellants' attorney in the UIM Action and consummated the settlement of that matter. (R. pp. 20-23). Mr. Bauer has unique personal knowledge of the UIM Action and could have included this allegation of negligence in his affidavit, if he believed it to be valid.

On February 29, 2016, Appellants were so confident in the posture of their case that they asked the trial court to place it on the jury trial roster. (R. p. 324; Request to Transfer to Jury Trial Roster). This was months before Attorney Coggin filed his Motion for Summary Judgment and before Appellants completely attempted to change their theory of liability from failure-to-serve to failure-to-prepare.

Seemingly in recognition of their Verified Complaint's conspicuous omission, Appellants filed a Motion to for Leave to Amend their Complaint on July 19, 2016 to assert this new theory of legal malpractice against Attorney Coggin. Notably, the expert affidavit that Appellants intended to use to support their proposed Amended Complaint was the exact same affidavit of Mr. Bauer that they used to support their pending Verified Complaint. (R. pp. 508-511; Email chain sent July 8 and July 11, 2016). Mr. Bauer's affidavit does not contain any allegation that Attorney Coggin breached the standard of care by failing to prepare the UIM Action for

settlement, mediation, or trial. Attorney Coggin requested an expert affidavit that affirmed the new failure-to-prepare theory and, to this date, Appellants have not delivered. Id. The trial court granted Attorney Coggin's Motion for Summary Judgment before Appellants' Motion for Leave to File an Amended Complaint was decided, leaving the original Verified Complaint as the operative pleading in this case.

The trial court acted within its discretion in granting Attorney Coggin's Motion for Summary Judgment based on the failure-to-serve pleading that governed this case. The trial court also acted within its discretion in not ruling on Appellants' Motion to Alter or Amend at the hearing and, once summary judgment was granted, that motion was rendered moot. A motion to amend a pleading is addressed to the sound discretion of the trial court. Duncan v. CRS Sirrine Engineers, Inc., 337 S.C. 524, S.E.2d 115 (Ct. App. 1999). Despite Rule 15(a) of the South Carolina Rules of Civil Procedure's directive that leave to amend "shall be freely given when justice so requires and does not prejudice any other party," the trial court refused to grant Appellants' motion before summary judgment was granted. This refusal was within the trial court's discretion and is not challenged in this appeal.

In their brief to this Court, Appellants have attempted to blur the line between their failure-to-serve theory and their failure-to-prepare theory, instead referring to the case as one of generic diminished settlement value. Attorney Coggin agrees that if an attorney's actions or inactions in representing his client caused the settlement value of his client's meritorious case to be diminished, the attorney may be subject to a claim for legal malpractice. However, the alleged failure to serve did not, as a matter of law, diminish the settlement value of the UIM Action because Liberty Mutual waived the right to assert it as a defense. It is that theory alone that the Appellants' Verified Complaint and expert affidavit contend reduced the settlement

value of the UIM Action, not any alleged failure to prepare the UIM Action. In an attempt to convince this Court that Mr. Bauer's expert affidavit supports more than just a failure-to-serve case, Appellants take an incredible liberty in quoting Mr. Bauer's affidavit in their brief: "[h]ad Coggin met the standard of care by performing his professional duties to . . . protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or most of the $500,000 UIM policy coverage." (Appellant's Final Brief at p. 31). While Appellants did not misquote Mr. Bauer's affidavit, they utilized ellipses to remove the portion of the affidavit that does not help them now. The complete sentence of Mr. Bauer's affidavit reads "[h]ad Coggin met the standard of care by performing his professional duties *to ensure the (sic) Dickenson was timely served with process to commence a lawsuit and* protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or most of the $500,000 UIM policy coverage." (R. p. 22) (emphasis added). For Appellants to now attempt to pass that sentence off as supporting anything other than a failure-to-serve case is extremely disingenuous.

Attorney Coggin recognizes that S.C. Code Ann. § 15-36-100(B) only requires an expert affidavit to support one act of negligence, not every act of negligence. However, based on the trial court's summary judgment ruling that failure-to-serve cannot support this legal malpractice action, Mr. Bauer's affidavit does not allege a single act of negligence. Attorney Coggin alerted Appellants to this flaw in July 2016, two months before summary judgment was granted. Although Mr. Bauer possesses unique knowledge allowing him to opine as to whether Attorney Coggin failed to prepare the UIM Action, or that such failure was a breach of the standard of care and diminished the settlement value of the UIM Action, Mr. Bauer, and no other expert, has done so.

It is important to note now, as was pointed out to Appellants in the summary judgment stage, that Appellants still can file a new, separate suit against Attorney Coggin for his alleged failure to prepare the UIM Action. Mr. Bauer substituted for Attorney Coggin as counsel of record for the Appellants in the UIM Action of November 20, 2014 and settled the UIM Action in February or March 2015. Accordingly, the statute of limitations for Appellants to file a brand new failure-to-prepare action against Attorney Coggin has not expired. Assuming they can procure an expert affidavit stating that Attorney Coggin breached the standard of care by failing to properly prepare the UIM Action, Appellants are free to file that case against Attorney Coggin. Instead, Appellants have tried to improperly shoehorn the failure-to-prepare case into their defeated failure-to-serve case, presumably in an attempt to avoid having to procure a failure-to-prepare expert affidavit.

Appellants should not be allowed to continue the present action under a new legal theory that is not contained in their Verified Complaint and not supported by their expert affidavit, when the one theory that the affidavit does support has been dismissed by summary judgment. That would circumvent the mandate of §15-36-100(B) that Appellants must file with their complaint an expert affidavit specifying at least one negligent act or omission. Appellants have apparently conceded, by not submitting any argument to the contrary, that the only negligent act or omission contained in their expert affidavit cannot continue to serve as the basis of this case. To allow them to continue the instant action under this flawed affidavit would run afoul of §15-36-100(B). Accordingly, the Court should affirm summary judgment in full, which would still allow the Appellants to file a new "failure to prepare" case with an expert affidavit supporting that theory.

B. Even if it Were a Part of this Case, Summary Judgment is Still Appropriate on Appellants' Failure-to-Prepare Theory of Liability

As discussed above, Appellants do not have an expert affidavit swearing that Attorney Coggin's alleged failure to prepare the UIM Action rose to the level of legal malpractice. This absence is telling since Mr. Bauer, who signed the expert affidavit to support the Verified Complaint, replaced Attorney Coggin as Appellants' counsel in the UIM Action and consummated the settlement. Mr. Bauer is in a unique position to opine whether he believes that Attorney Coggin failed to prepare the UIM Action and if that failure diminished the settlement value of that case, yet he has not done so.

Further, Appellants make numerous references to the expected testimony of Julian Allen, Liberty Mutual's attorney in the UIM Action. Mr. Allen has not been deposed nor has he issued an affidavit stating that he believes the settlement value of the UIM Action was decreased because it was not properly prepared or that Mr. Coggin had some duty to prepare it more than he did prior to being relieved as counsel.

Appellants have also made unsupported statements in their brief to this Court that Attorney Coggin turned over the UIM Action to Mr. Bauer in an unprepared state and that it would be called for trial before Mr. Bauer would have been able to prepare it. While there is no evidence on the record to support this position, it also ignores the provisions of Rule 40(j) of the South Carolina Rules of Civil Procedure, which allowed Appellants to strike the UIM Action from the docket "one time as a matter of right" and then restore it within one year, giving the opportunity for additional preparation. Rule 40(j), SCRCP. Instead of utilizing Rule 40(j), the Appellants voluntarily accepted $25,000 to settle the case and then filed this suit against Attorney Coggin first claiming that his failure to serve Dickenson forced them to accept this diminished settlement offer and now claiming that his failure to prepare the case forced them to accept it. If Attorney Coggin did fail to prepare the UIM Action as Appellants now claim,

Appellants new attorneys could have completed whatever preparation was necessary before accepting any settlement offer. The fact is that neither of Mr. Coggin's alleged failures forced the Appellants to accept this settlement - - they did so voluntarily.

Finally, the evidence that is on the record shows that Appellants refused to authorize Attorney Coggin to make the financial investment necessary to prepare the UIM Action in the manner which Appellants now claim that he should have. Appellants would not pay to preserve the testimony of Mr. Feldman's treating physician, let alone hire expert witnesses. On December 7, 2013, Attorney Coggin wrote to Appellant Robert Feldman asking him to commit to pay the fee to have his treating physician testify at trial. (R. pp. 512-513; December 7, 2013 letter). On May 9, 2014, Attorney Coggin again wrote to Mr. Feldman requesting that he commit to paying expenses necessary to try the case. (R. pp. 514-515; May 9, 2014 letter). Finally, on September 15, 2014, Attorney Coggin wrote to Appellant Robert Feldman recounting Mr. Feldman's "refusal to fund the depositions and other expenses necessary to moving this case to trial." (R. p. 516; September 15, 2014 letter). Attorney Coggin did not commit legal malpractice by failing to prepare the UIM Action for settlement or trial where he attempted to do so and the Appellants would not agree to fund the expenses of the preparation.

IV. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT WAS PROCEDURALLY APPROPRIATE, THE ORDER IS ADEQUATE, AND NO FURTHER DISCOVERY IS NECESSARY

Appellants claim that the trial court's order granting summary judgment (and its order denying Appellant's Motion to Alter or Amend) are inadequate because they do not include specific findings of fact or conclusions of law. Appellants cite to Rule 52(a) of the South Carolina Rules of Civil Procedure to support this argument.

The language of Rule 52(a) that is controlling in this instance, which Appellants excluded from their brief, states that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)." Rule 41(b) requires the court make findings of fact and conclusions of law when it renders judgment against the plaintiff at trial. The rules are clear that the trial court was not required to specifically set forth findings of fact or conclusions of law in either its order granting Attorney Coggin's Motion for Summary Judgment or denying Appellants' Motion to Alter or Amend.

As to additional discovery, Appellants contend that they need to conduct additional discovery to survive summary judgment on the failure-to-prepare theory only. They have not identified any additional discovery necessary to combat summary judgment on the failure-to-serve theory, which as stated above is the only theory pending in this case. In fact, Appellants represented to the trial court that they were ready to try this case when they asked that it be transferred to the jury trial roster on February 29, 2016. Appellants did not believe they needed to conduct more discovery then and should not be able to survive summary judgment by claiming that they need to do so now.

V. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION TO ALTER OR AMEND THE ORDER GRANTING SUMMARY JUDGMENT

As is hopefully evident from the preceding arguments, Attorney Coggin believes that the trial court's order granting his Motion for Summary Judgment was appropriate and resulted in a correct application of the controlling law to the facts of this case. For those same reasons set forth above, Attorney Coggin believes that the trial court properly denied Appellants' Motion to Alter or Amend the order granting summary judgment.

CONCLUSION

Respondent asks that the judgment below be affirmed for the foregoing reasons.

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Dated: August 28, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Honorable Marvin H. Dukes, III, Circuit Court Judge

RECEIVED
AUG 31 2017
SC Court of Appeals

Appellate Case No. 2017-000242

Trial Court Case No. 2015-CP-07-01251

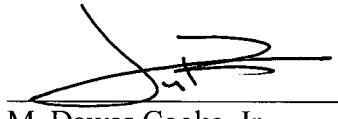
Robert E. Feldman and Louis J. Feldman ..... Appellants,

v.

Gary P. Coggin .....Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent, Gary P. Coggin, complies with Rule 211(b), SCACR.



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