

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No.: 2014-CP-26-7264
Appellant Case No.: 2017-000471

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SC Court of Appeals

Gregory Duerk, Donald L. Duerk and Deborah Duerk Tiller,.....Appellants

vs.

Geoffrey Duerk, Kristen Duerk and James M. Stewart,.....Respondents

RESPONDENT JAMES STEWART'S INITIAL BRIEF

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Murrells Inlet, South Carolina
December 18, 2016

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court erred by granting Stewart's Motion to Dismiss for lack of personal jurisdiction?

- II. Whether Appellants' failure to sufficiently state a claim under Rule 8(a) and Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provide an additional sustaining ground to affirm the Circuit Court's dismissal of Appellants' claims against Stewart?

STATEMENT OF THE CASE

This action involves a dispute between siblings over assets from the Estate of their cousin, Eileen Ryan and the alleged conversion of funds from Ryan's Estate by Respondents Geoffrey and Kristen Duerk. Geoffrey Duerk, as personal representative of Eileen Ryan's Estate, hired James Stewart, a Florida attorney, to probate Ryan's Estate in Florida. On October 31, 2014, Gregory Duerk, Donald L. Duerk, Jr. and Deborah Duerk Tiller, ("Appellants"), filed a Complaint against Geoffrey and Kristen Duerk. On March 28, 2016, Appellants filed an Amended Complaint asserting a single cause of action, identified as "Conflict of Interest/Misrepresentation/Breach of Fiduciary Duty," against James M. Stewart (hereinafter "Stewart or "Respondent Stewart"). (Am. Compl.).

On June 15, 2016, Stewart filed a Motion to Dismiss and Supporting Memorandum of Law pursuant to Rules 12(b)(2) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Stewart asserted (1) the Circuit Court lacked personal jurisdiction over him; (2) the Amended Complaint failed to state facts sufficient to constitute a cause of action under Rules 8(a) and 12(b)(6), SCRPC; and (3) Plaintiffs failed to provide an expert affidavit as required by South Carolina Code §15-36-100.

Appellants filed a Memorandum in Opposition to Stewart's Motion on July 12, 2016. Appellants' Memorandum was accompanied by an affidavit of Clifford H. Tall offered to satisfy the requirements of South Carolina Code § 15-36-100. The Tall affidavit does not address Mr. Stewart's contacts with South Carolina and, therefore, does not support Appellants' opposition to Mr. Stewart's personal jurisdiction argument.

A hearing on Stewart's Motion to Dismiss was held on November 8, 2016. The Court took the matter under advisement and subsequently entered a Form 4 Order Granting Stewart's

Motion to Dismiss on November 10, 2016. Dismissal was granted on the basis of lack of personal jurisdiction over Stewart. (Nov. 10, 2016 Order).

On November 22, 2016, Appellants filed a Motion to Reconsider Order of Dismissal as to Defendant James M. Stewart pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (Pls' Mot. to Reconsider). The trial court subsequently entered an Order denying Appellant's Motion on January 10, 2017. (Jan. 10, 2017 Order).

Subsequent to the Circuit Court's denial of Appellants' Rule 59(e) Motion to Reconsider, Appellants served and filed their Notice of Appeal. Appellants filed an Initial Brief and Designation of Matter dated June 28, 2017.

On July 28, 2017, Respondent Stewart filed a Motion to Strike Appellants' Initial Brief and Designation of Matter on the grounds that the Brief contained no citations to the record and included contested assertions within the Statement of the Case. Respondent further challenged Appellants' Designation of Matter on the grounds that Appellants included material that was irrelevant as well as material that was not presented to the trial court. After Appellants filed a response to the Motion to Strike, the Court of Appeals granted, in part, Respondent's motion based on Appellants' failure to provide citations pursuant to Rule 208(b)(4), SCACR. Appellants were granted leave to file an initial brief that included "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." (October 5, 2017 Order) (quoting Rule 208(b)(4), SCACR). Appellants filed an Amended Initial Brief dated October 17, 2017.

STATEMENT OF THE FACTS

This case involves a dispute between siblings regarding assets from the Estate of their cousin, Eileen Ryan. Appellants and Respondent Geoffrey Duerk are siblings (collectively referred to as the “Duerk siblings”). Respondent Kristen Duerk is Geoffrey Duerk’s daughter. Appellants allege they were beneficiaries under the Last Will and Testament of Eileen Ryan and, along with Respondent Geoffrey Duerk, should have received the proceeds from the sale of Ryan’s home at 215 Inlet Way in Palm Beach Shores, Florida. (Am. Compl., ¶¶ 10, 12, 33).

Ms. Ryan’s Last Will and Testament included two bequests that are material to the present matter. In Paragraph Five, Ms. Ryan “[gave] any interest in any home I may own at 215 Inlet Way, Palm Beach Shores, Florida . . . to Donald Duerk, Jr., Deborah Duerk Collins, Gregory Duerk and Geoffrey Duerk, as joint tenants with right of survivorship.” (Am. Compl., ¶ 10). In Paragraph Six of Ryan’s Will, she “[gave] all the rest, residue and remainder of my Estate, or whatsoever kind and wheresoever situate, which I may own or have the right to dispose of at the time of my death” to Respondents Geoffrey Duerk and Kristen Duerk, in equal parts. (Stewart’s Memo in Support., p. 2).

Before Ryan’s Will was executed, she deeded the Palm Beach Shores home to the Duerk siblings, reserving a life estate for herself. (Am. Compl., ¶ 9). On April 17, 2012, Eileen Ryan and each of the Duerk siblings sold the Palm Beach Shores home by jointly signing a Warranty Deed transferring the property to Jason and Mindi Paruta who were represented by Respondent Stewart. (Am. Compl., ¶¶ 11 and 12). The Parutas entered into an interest only Mortgage and Promissory Note with Ryan as the Mortgagee where the Parutas agreed to make monthly payments of \$1,000.00 from July 1, 2012 to June 1, 2014 at which time the remaining \$286,200.00 balance would become due. (Am. Compl., ¶13.) Eileen Ryan died on August 23,

2013. (Am. Compl. ¶14). At the time of her death, Ryan's estate was the holder of the mortgage and Promissory Note but no longer possessed an interest in the Palm Beach Shores home. (Am. Compl. ¶¶11 and 12). Subsequent to Ryan's death, the Parutas made full and final payment of the balance owed on the mortgage, which then became part of Ryan's Estate. (Am. Compl., ¶ 25).

After Ryan's death, Mr. Stewart called Gregory Duerk, Ryan's attorney-in-fact, to obtain information necessary to refinance the Parutas' mortgage including information for a payoff. (Am. Compl. ¶¶11 and 15). At that time, Stewart discovered Ryan was deceased. The Parutas' payoff would therefore need to be made to Ryan's Estate which would first need to be opened. Gregory Duerk sent Stewart a copy of Ryan's Last Will and Testament which listed Geoffrey Duerk as the Personal Representative. (Am. Compl., ¶ 19; Stewart Aff. ¶ 9). From that time forward, Respondent Stewart had no further contact with Gregory Duerk or any other Appellant. (Am. Compl. ¶ 20).

Stewart, licensed exclusively in Florida, was hired by Geoffrey Duerk, acting as the Personal Representative, to probate Ryan's Estate. (Stewart Aff. ¶¶ 2 and 9). Ryan's Estate was opened and probated in Palm Beach County, Florida. (Stewart Aff. ¶10).

Ryan's Estate did not include the Palm Beach Shores home because it had already been sold by Ryan and the Duerk siblings in April 2012. (Am. Compl., ¶¶ 11 and 12). The remaining assets in Ryan's Estate, including the proceeds from the sale of the home to the Parutas, passed under Paragraph 6 of Ryan's Will to Geoffrey Duerk and Kristen Duerk. (Stewart's Memo in Support, p. 3). Appellants allege Ryan's Estate was improperly administered because the proceeds from the sale of the home were supposed to be distributed equally among the four

Duerk siblings instead of being distributed pursuant to the remainder provision of Ryan's Will.

(Am. Compl. ¶ 25).

STANDARD OF REVIEW

A. Motion to Dismiss for Lack of Personal Jurisdiction

In South Carolina, it is well established that the question of personal jurisdiction of a nonresident must be decided on a case by case basis. Cribb v. Spatholt, 382 S.C. 490, 496, 676 S.E.2d 714, 717 (Ct. App. 2009). See also State v. NV Sumatra Tobacco Trading, Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). Further, the party seeking to invoke personal jurisdiction over a non-resident through the state's long-arm statute bears the burden of establishing personal jurisdiction. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992); South Carolina Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 551 S.E.2d 247 (Ct. App. 2001).

At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction either in the complaint or in affidavits." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Accordingly, when personal jurisdiction is attacked by a nonresident defendant, the court is not confined to the allegations of the complaint and must also consider affidavits, exhibits, or other evidence to determine jurisdiction. See Power Prods & Servs. Co. v. Kozma, 379 S.C. 423, 430, 665 S.E.2d 660, 664 (Ct. App. 2008). The circuit court's decision should be upheld unless it is "unsupported by the evidence of influenced by an error of law." Cribb, 382 S.C. at 496, 676 S.E.2d at 717.

B. Motion to Dismiss under Rule 12(b)(6)

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a defendant may move to dismiss a complaint based upon "failure to state sufficient facts to constitute a cause of action." A motion to dismiss should be granted if the facts alleged and inferences reasonably deducible therefrom would not entitle the plaintiff to any relief on any theory of the

case. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995); Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009).

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCF, the appellate court applies the same standard of review as the trial court. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Accordingly, the question the court must consider is whether the allegations set forth on the face of the complaint, when viewed in the light most favorable to the plaintiff, entitle the plaintiff to relief on any theory of the case. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 659 S.E.2d 158 (2008); Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007). Therefore, an appellate court will uphold the trial court's dismissal pursuant to Rule 12(b)(6), SCRCF, if the plaintiff failed to state facts sufficient to constitute a cognizable cause of action in the pleadings filed with the court. Doe, 373 SC. 390, 645 S.E.2d 245.

DISCUSSION/ARGUMENT

I. The Circuit Court Lacked Personal Jurisdiction Over Respondent Stewart.

South Carolina courts employ a two-step analysis to determine whether personal jurisdiction can be exercised over a nonresident defendant. Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 423 S.E.2d 128 (1992). First, the court must determine whether the South Carolina long-arm statute is applicable. Then, the court must determine whether the nonresident's South Carolina contacts are sufficient to satisfy due process.

South Carolina's long-arm statute grants state courts personal jurisdiction over nonresident defendants in two separate instances. Specific jurisdiction is present when a nonresident defendant is subject to personal jurisdiction in a suit arising out of or relating to the nonresident's purposeful contacts with the forum state. Coggeshall v. Reproductive Endocrine Associates of Charlotte, 376 S.C. 12, 655 S.E.2d 476 (2007). Contrastingly, general jurisdiction exists when a nonresident defendant has an "enduring relationship" with the State. Cribb v. Spatholt, 382 S.C. 475, 676 S.E.2d 706 (Ct App. 2009).

a. The Trial Court Did Not Have Specific Jurisdiction Over Stewart.

For specific jurisdiction to exist, the court must find that the defendant "directed his activities to residents of South Carolina and that the cause of action arises out of or relates to those activities." Cribb, 676 S.E.2d at 719. In the present matter, Appellants have failed to establish that Stewart's contacts with South Carolina were sufficient to confer specific jurisdiction over Respondent Stewart. Stewart did not direct any of his business activities at South Carolina. (Stewart Aff. ¶ 4). He is not licensed to practice law in South Carolina or registered to do any business in the State. (Stewart Aff. ¶¶ 2, 4). He does not maintain a mailing address or telephone number in South Carolina. (Stewart Aff. ¶7). He does not solicit clients in

South Carolina and does not maintain a website or send out an email that targets potential clients in South Carolina. (Stewart Aff. ¶ 8). Stewart has never visited South Carolina for a business purpose or any purpose other than to purchase gasoline while travelling. (Stewart Aff. ¶¶ 10, 11).

Moreover, the actions that Stewart took that are relevant to this lawsuit were all directed towards the State of Florida. Ms. Ryan's Estate was probated in Florida. (Am. Compl. ¶ 32). All filings connected with the estate of Eileen Ryan were made in Palm Beach County, Florida. (Stewart Aff. ¶ 11). Mr. Stewart represented Jason and Mindi Paruta in their purchase of the subject property in Florida and in subsequent efforts to refinance their mortgage. (Am. Compl. ¶15).

Appellants have cited no evidence that was presented to the trial court showing Respondent Stewart purposefully availed himself of the protections of South Carolina law or that the claims against him arise out of or relate to Stewart's purposeful contacts with the State. Instead, the allegations show that Appellants' claims arise out of Stewart's involvement, on behalf of his Florida clients, in the purchase and subsequent refinancing of the subject home in Florida and Stewart's involvement in probating the Estate of Eileen Ryan which occurred entirely in Florida. (Am. Compl. ¶ ¶ 15, 32). Without evidence that Stewart directed his activities to South Carolina and that the claims against him arise out of his intentional activities in the State, the Circuit Court properly declined to exercise personal jurisdiction over Respondent Stewart.

The alleged contacts cited in Appellants' Initial Brief that include no corresponding reference to the Record violate Rule 208(b)(4), SCACR and should not be considered. References to James Stewart's deposition should be similarly disregarded because the deposition

transcript was not before the trial court during the pendency of Respondent's Motion to Dismiss and is therefore not properly part of the Record on Appeal. See Rule 210(c), SCACR.

b. The Trial Court Did Not Have General Jurisdiction Over Stewart.

Similarly, Appellants failed to present evidence establishing general jurisdiction over Respondent Stewart. General jurisdiction is present when a defendant has an "enduring relationship" with the forum state. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 495, 611 S.E.2d 505, 510 (2005). To satisfy the "enduring relationship" requirement, the defendant's contacts with the forum state must be "continuous and systematic." Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 413-14 nn. 8-9, 104 S.Ct. 1868 (1984).

Appellants have cited no evidence of "continuous and systematic" contacts sufficient to satisfy general jurisdiction. The Affidavit of Respondent Stewart, which has not been contradicted, reinforces the absence of continuous and systematic contacts between Respondent and South Carolina. Mr. Stewart is not a resident of South Carolina. (Stewart Aff. ¶ 1.) Stewart owns no property in South Carolina. He is not licensed to practice in South Carolina or registered to do any business in South Carolina and has no offices, employees or agents in South Carolina. (Stewart Aff. ¶¶ 2, 4, 5). Nothing in the Amended Complaint suggests continuous or enduring contacts with the forum state. In fact, the Amended Complaint acknowledges the absence of any contact between Stewart and Appellants Donald Duerk and Deborak Duerk. (Am. Compl. ¶ 20). Communication between Stewart and Gregory Duerk was not of an enduring nature inasmuch as the contact ceased after Stewart received a copy of Ryan's Last Will and Testament identifying Geoffrey Duerk as Personal Representative. (Am. Compl. ¶¶15 and 20; Stewart Aff. ¶ 9). Because Appellants failed to present evidence to the trial court establishing an

enduring relationship between Stewart and the State of South Carolina, the Circuit Court properly declined to exercise general jurisdiction over Respondent Stewart.

The alleged contacts cited in Appellants' Initial Brief that include no corresponding reference to the Record violate Rule 208(b)(4), SCACR and should not be considered. References to James Stewart's deposition should be similarly disregarded because the deposition transcript was not before the trial court during the pendency of Respondent's Motion to Dismiss and is therefore not properly part of the Record on Appeal. See Rule 210(c), SCACR.

c. Exercising Jurisdiction Over Respondent Stewart Offends Traditional Notions of Fair Play and Substantial Justice.

Due process requires that the defendant have minimum contacts with the forum state so that maintenance of a suit does not offend traditional notions of fair play and substantial justice. Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508. See Walden v. Fiore, 134 S. Ct. 1115, 1121 (2014); NV Sumatra Tobacco Trading Co., 379 S.C. at 89, 666 S.E.2d at 222; Cribb v. Spathold, 382 S.C. at 499, 676 S.E.2d at 719.

To determine whether the exercise of jurisdiction complies with traditional notions of fair play and substantial justice, the court analyzes the following elements: (1) the duration of the defendant's activity in this State; (2) the character and circumstances of the defendant's acts; (3) the inconvenience to the parties; and (4) the State's interest in exercising jurisdiction. Cribb, 382 S.C. at 500, 676 S.E.2d at 719; see also NV Sumatra Tobacco Trading, Co., 379 S.C. at 91, 666 S.E.2d at 223.

Here, Appellants have failed to show that invoking personal jurisdiction over Mr. Stewart would comport with traditional notions of fair play and substantial justice. First, Appellants have presented no evidence showing ongoing activity in South Carolina. As discussed previously, Stewart is not a resident of South Carolina and is not licensed to practice law in South Carolina.

(Stewart Aff. ¶¶ 1 and 2). He does not have an office or own other property in South Carolina and is not registered to do business in the state. (Stewart's Aff. ¶¶ 4, 5, 6). Stewart had no contact at all with Appellants Donald Duerk and Deborah Duerk. (Am. Compl. ¶ 20). Stewart's communication with Gregory Duerk ceased after Stewart received a copy of Eileen Ryan's Last Will and Testament naming Geoffrey Duerk Personal Representative of Eileen Ryan's estate. (Am. Compl. ¶ 20).

Regarding the character and circumstances of Respondent Stewart's contacts with South Carolina, there is no evidence that Stewart transacted business in South Carolina. Rather, all of Stewart's alleged tortious conduct involve actions he took in Florida related to the Parutas' purchase of the Palm Beach Shores home and their subsequent efforts to refinance the mortgage on the Florida property and Stewart's role probating Ryan's Estate in Florida. Stewart's contacts in South Carolina were merely incidental to the principal transactions in Florida.

Invoking jurisdiction over Stewart, whose entire practice, personnel, and documents are in Florida, would be burdensome and inconvenient. Geographic distance, coupled with the lack of any connection to South Carolina, add to the hardship associated with the litigation in South Carolina. South Carolina's interest in providing redress for its citizens is diminished in circumstances, like the present case, where no business was transacted in South Carolina. See Aviation Assocs. & Consultants, Inc. v. Jet Time, 303 S.C. 502, 509 402 S.E.2d 177, 181 (1991).

This is not a case where "the defendant's conduct and connections with the forum state are such that [the defendant] should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). Under the circumstances here, exercising personal jurisdiction over Stewart would offend traditional notions of fair play and

substantial justice. The Circuit Court’s dismissal of Appellants’ claims against Respondent Stewart was therefore supported by the evidence.

II. Appellants’ Complaint Failed to State a Cognizable Claim Against Respondent Stewart.

Rule 8(a) of the South Carolina Rules of Civil Procedure states that a complaint must contain a “short and plain statement of the facts showing the pleader is entitled to relief.” See South Carolina Nat’l Bank v. Joyner, 289 S.C. 382, 346 S.E.2d 329 (Ct. App. 1986) (“[T]he principal purpose of pleadings is to inform the pleader’s adversary of legal and factual positions which he will be required to meet on trial.”). “This requires a litigant to plead the ultimate facts which will be proved at trial....” Clark v. Clark, 293 S.C. 415, 416, 361 S.E.2d 328, 328 (1987). Conclusory allegations in a complaint are insufficient to survive a judgment on the pleadings. Jones v. Gilstrap, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986); cf. Moore v. City of Columbia, 284 S.C. 278, 326 S.E.2d 157 (Ct. App. 1985) (“In our State, the complaint is sufficient if it informs the defendant of the ultimate facts supporting each element of the cause of action....”).

Rule 12(b)(6) of the South Carolina Rules of Procedure provides that a defendant may make a motion to dismiss on failure to state facts sufficient to constitute a cause of action. SCRCP 12(b)(6). See Biard v Charleston Cnty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). A motion to dismiss serves to test the legal sufficiency of the allegations in the pleading.” When reviewing a motion to dismiss, the court must base its ruling solely on the allegations contained in the complaint. See Jarrell v. Petoseed Co., Inc., 331 S.C. 207, 500 S.E.2d 793, 794 (Ct. App. 1998); O’Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689, 691 (Ct. App. 1998). A motion to dismiss should be granted if the facts alleged and inferences reasonably deducible therefrom would not entitle the plaintiff to any relief on any theory of the case. Stiles v. Onorato, 318 S.C.

297, 300, 457 S.E.2d 601, 602 (1995); see also Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009); Evans v. Gunter, 294 S.C. 525, 527, 366 S.E.2d 44, 46 (1988); Toussaint v. Ham, 292 SC. 415, 416, 357 S.E.2d 8, 9 (1987).

In the present matter, the Amended Complaint purports to assert a second cause of action labeled “Conflict of Interest/Misrepresentation/Breach of Fiduciary Duty.” The hybrid cause of action, however, does not adequately state a claim for conflict of interest, misrepresentation, or breach of fiduciary duty under Rule 8(a) or Rule 12(b)(6), SCRPC. The claims, as stated in the Amended Complaint, do not set forth facts sufficient to constitute a cause of action or provide sufficient facts establishing Appellants’ entitlement to the requested relief. As an additional sustaining ground, the Circuit Court’s dismissal should be affirmed based on Appellants’ failure to sufficiently plead the causes of action against Respondent Stewart.

a. The Amended Complaint Failed to State a Claim for Conflict of Interest or Legal Malpractice.

In the Amended Complaint, Appellants assert “[A] conflict of interest existed in representing all interested parties to this mortgage.” (Am. Compl. ¶ 42). In South Carolina, however, there is no civil cause of action for conflict of interest. The South Carolina Rules of Professional Conduct address conflict of interest and identify circumstances when a client representation is prohibited due to such a conflict. However, it is well settled that violation of the Rules of Professional Conduct does not give rise to a cause of action against a lawyer. S.C. Rules of Prof’l Conduct R. 407, cmt. 7 (2013) (the Rules “are not designed to be a basis for civil liability”). The Rules are designed to provide guidance to lawyers and provide a structure for regulating attorney conduct. See Spence v. Wingate, 395 S.C. 148, 161, 716 S.E.2d 920, 927 (2011) (“A review of the Scope of Rule 407, SCACR clearly indicates that the rules are intended

for guidance and disciplinary purposes, not to form the basis for civil litigation.”). Accordingly, a violation of the Rules of Professional Conduct do not provide a basis for civil liability.

To the extent that the Appellant’s conflict of interest claim is construed as a legal malpractice claim, it fails to meet the standard set forth in Rule 8 or Rule 12 of the South Carolina Rules of Civil Procedure. The elements of a legal malpractice claim include: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client’s damages by the breach. See Brown v. Theos, 345 S.C. 626, 629, 550 S.E.2d 304, 306 (2001); Hall v. Fedor, 349 S.C. 169, 174, 561 S.E.2d 654, 656 (Ct. App. 2002).

Appellants’ claim for legal malpractice is deficient because they failed to allege an attorney-client relationship between Appellants and Mr. Stewart. Throughout the Amended Complaint, Appellants repeatedly assert that an attorney-client relationship existed between Mr. Stewart and the Parutas. (Am. Compl. ¶¶ 15, 20). As part of the conflict of interest theory, Appellants also allege that Stewart undertook to represent the Estate of Eileen Ryan, as mortgagor, disregarding his concurrent representation of the Parutas, as mortgagees. (Am. Compl. ¶ 44). The Amended Complaint fails to allege that Stewart undertook an attorney-client relationship with respect to Appellants. Accordingly, the circuit court’s dismissal was supported by the evidence.

b. The Amended Complaint Failed to State a Cognizable Claim for Negligent Misrepresentation.

The South Carolina Rules of Civil Procedure require that facts be pled to support each element of a cause of action. Moore v. City of Columbia, 284 S.C. 278, 283, 326 S.E.2d 157, 160 (Ct. App. 1985) (finding complaint adequate when “it informs the defendant of the ultimate facts supporting each element of the cause of action.”). Accordingly, to plead a cognizable cause

of action, a complaint must assert facts establishing the existence of all elements. See Rule 8(a), SCRPC.

To state a valid claim for negligent misrepresentation, a plaintiff must plead the following six elements:

(1) The defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Allegro, Inc. v. Scully, 409 S.C. 392, 418, 762 S.E.2d 54, 68 (Ct. App. 2014) (reversed on other grounds by Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016)). See also Rickborn v. Liberty Life Ins. Co., 321 S.C. 291, 468 S.E.2d 292 (1996); AMA Management Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992).

“The failure to prove any element of fraud or misrepresentation is fatal to the claim.” Austin v. Stokes-Craven Holding Cor., 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010) (quoting Schnellmann v. Roettger, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007)).

In support of the cause of action for misrepresentation, Appellants assert:

That Defendant Stewart negligently misrepresented himself to Plaintiff Gregory when he volunteered to handle the opening of the Estate of Eileen Ryan[,] . . . [and] misrepresented to Plaintiff Gregory his interest in opening the Estate of Eileen Ryan and intentionally misled Plaintiff Gregory into believing that Defendant Stewart would be acting in the best interest of the Plaintiffs[,] . . .

(Am. Compl. ¶¶ 41 and 44).

Even when read in the light most favorable to Appellants, these allegations fail to identify facts establishing the elements needed to state a claim for negligent misrepresentation.

Appellants fail to assert that Stewart made a false statement. Moreover, to the extent Appellants claim that Stewart failed to disclose information and thereby misled them, these allegations will not withstand scrutiny under Rule 12(b)(6) because a false representation cannot be premised on an omission or silence of a party. See Allegro, Inc., 409 S.C. at 419, 762 S.E.2d at 68 (“Therefore, the element of ‘false misrepresentation’ cannot be premised upon an omission or silence of a party.”).

Appellants also failed to allege Stewart’s pecuniary interest in making the alleged misrepresentation. Accordingly, the dismissal of Appellants’ claim for misrepresentation was supported by the evidence.

c. The Amended Complaint Failed to State a Claim for Breach of Fiduciary Duty.

To establish a claim for breach of fiduciary duty, plaintiff must prove: (1) the existence of a fiduciary duty by defendant to plaintiff, (2) a breach of that duty; and (3) damages proximately resulting from the defendant’s wrongful conduct. RFT Management Co., LLC v. Tinsley & Adams, L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012). See also Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004).

It is well settled that “[a] confidential or fiduciary relationship exists when one imposes special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). A fiduciary relationship is not a casual one. Moreover, it cannot be created unilaterally. Instead, it requires that the fiduciary have actually accepted or induced the confidence placed in him or her. Steele v. Victory Savings Bank, 295 S.C. 290, 368 S.E.2d 91 (Ct. App. 1988).

Here, even if you construe the Amended Complaint in a light most favorable to Appellants, the allegations do not support a cause of action for breach of fiduciary duty. While an attorney-client relationship encompasses a fiduciary component, the second cause of action does not allege that Stewart undertook to represent the Appellants. Paragraph 44 instead states that Stewart “volunteered to represent the Estate of Eileen Ryan.” (Am. Compl. ¶ 44). Even if Appellants were beneficiaries under Ryan’s Will, their interest in Ryan’s Estate does not give rise to a fiduciary relationship with Stewart as the probating attorney. See Spence v. Wingate, 395 S.C. 148, 157, 716 S.E.2d 920, 925 (2011) (finding the attorney of an Estate owed no duty to the spouse of the decedent based upon her status as a person interested in the Estate.) Accordingly, Appellants’ claim for breach of fiduciary duty fails to meet the pleading standard set forth in Rule 8 and Rule 12 of the South Carolina Rules of Civil Procedure and should be dismissed.

CONCLUSION

For the foregoing reasons, Respondent Stewart requests this Court uphold the Circuit Court's dismissal based on Appellants' failure to establish personal jurisdiction. Respondent further submits that Appellants' failure to satisfy the pleading standard set forth in Rule 8(a) and 12(b)(6), SCRCF supports dismissal as an additional sustaining ground. This Court should carefully view the Appellants' Brief and consider only such issues and arguments as are properly raised to the Court as required by Rule 208(b)(1) and (b)(4), SCACR.

Respectfully submitted,

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Murrells Inlet, South Carolina
December 18, 2017

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

Case No.: 2014-CP-26-7264
Appellant Case No.: 2017-000471

Gregory Duerk, Donald L. Duerk and Deborah Duerk Tiller,.....Appellants

vs.

Geoffrey Duerk, Kristen Duerk and James M. Stewart,.....Respondents

PROOF OF SERVICE

I hereby certify that I served Respondent's Initial Brief upon all parties, by placing a copy in the United States mail, postage prepaid, to all counsel of record on December 18, 2017, addressed to the following:

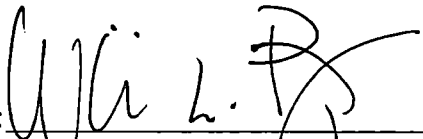
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December 18, 2017

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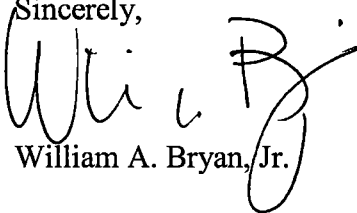
Re: Gregory Duerk, Donald L. Duerk, Jr. and Deborah Duerk Tiller v. Geoffrey Duerk, Kristen Duerk and James M. Stewart
Appellate Case No. 2017-000471
C&L File No. 001326-00127

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy each of Respondent Stewart's Initial Brief and Respondent's Designation of Matter with Proof of Service in the above-referenced matter. Please file the originals and return clocked copies in the enclosed stamped, self-addressed envelope.

By copy of this letter and enclosures, I am serving same on counsel of record.

With kind regards,

Sincerely,

William A. Bryan, Jr.

WABJR:ljc
Enclosures
cc: Thomas C. Brittain, Esquire
Jay M. Bultz, Esquire

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