| | |
|---|---|
| STATE OF SOUTH CAROLINA<br><br>COUNTY OF HORRY<br><br>Karl & Terri Hager, Robert Singleton, Jay & Susan Welborn, Erik Arnold, and Bowers Caravelle, LLC, derivatively and on behalf of Caravelle Resort Association, Inc. and on behalf of themselves and those similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>McCabe, Trotter & Beverly, P.C. and Gold Crown Management Company, Inc.,<br><br>Defendants. | IN THE COURT OF COMMON PLEAS<br><br>FIFTEENTH JUDICIAL CIRCUIT<br><br>C/A NO.: 2018-CP-26-2974<br><br>**ORDER ON PLAINTIFFS' MOTION TO RECONSIDER AND WRITTEN ORDER GRANTING MTB'S MOTION TO DISMISS THE AMENDED COMPLAINT** |



This matter came before me on Plaintiffs' SCRCP 59(e) Motion to Reconsider filed regarding the Form 4 Order granting Defendant McCabe, Trotter & Beverly, P.C.'s ("MTB") Motion to Dismiss (filed August 1, 2018). The Court grants Plaintiffs' Motion to Reconsider to the extent it seeks an explanation of the dismissal and includes the basis for the ruling below. The Court denies the Motion to the extent it asks the Court to change its decision on MTB's Motion to Dismiss. For the reasons set forth below, this Court GRANTS MTB's Motion to Dismiss with prejudice.

## Procedure

Plaintiffs filed the Complaint on May 14, 2018. MTB filed an Answer and Motion to Dismiss pursuant to SCRCP 12(b)(6) on June 6, 2018. The Court set a hearing for the Motion to Dismiss to take place on June 20, 2018. On June 18, 2018, Plaintiffs filed an Amended Complaint, which made the original Motion to Dismiss moot.

On June 20, 2018, MTB filed an Answer and Motion to Dismiss the Amended Complaint under SCRCP 12(b)(6). A hearing took place in Conway, South Carolina on July 31, 2018. Counsel for MTB and Plaintiffs presented oral argument. On August 1, 2018, the Court issued a Form 4 Order granting MTB's Motion to Dismiss the Amended Complaint.[1] On August 9, 2018, Plaintiffs filed the subject Motion to Reconsider. A hearing took place on January 22, 2018 in Conway, and counsel for MTB and Plaintiffs presented oral argument.

Plaintiffs request a formal Order setting forth the basis of the dismissal of their claims against MTB under SCRCP 52(a) and ask the Court to reconsider its decision to grant the Motion to Dismiss under SCRCP 59(e). Under SCRCP 59(e), a party may file a motion asking the court to alter or amend a judgment no more than ten days following the receipt of the written order on the judgment. SCRCP 52(a), in actions tried without a jury, the court shall set forth findings of facts and conclusions of law. Plaintiffs moved within ten days after the Court issued the Form 4 Order granting MTB's Motion to Dismiss. Therefore, the Court, in its discretion, amends its ruling to include the findings of fact and conclusions of law below.

**Facts**

Plaintiffs are owners of certain units in the Caravelle Resort ("Caravelle") condominium complex in Myrtle Beach, South Carolina. Plaintiffs filed this action as individuals and derivatively on behalf of the Caravelle Resort Association, Inc. ("HOA"). The Amended Complaint also contains class action allegations for claims brought on behalf of all owners of units at Caravelle.

[1] The Form 4 Order also denied Plaintiff's Motion for a Temporary Injunction, but that is not at issue with respect to this Order.

Caravelle is subject to a Master Deed and Bylaws (collectively, "governing documents"), filed as Exhibits 1 and 2, respectively, to the Amended Complaint. Among other things, the governing documents establish the HOA and provide that every owner of units in Caravelle is a member of the it subject to the governing documents. The owners collectively purchased an HO-6 insurance policy through Lloyd's of London as the governing documents require. Ex. 3 to the Am. Compl. The policy covers all 346 units separately, and each owner is a named insured under the policy.

At all times pertinent to this case, MTB served as counsel for the HOA, and Defendant Gold Crown Management Company, Inc. ("Gold Crown") served as the HOA's property manager. Hurricane Matthew struck South Carolina on October 8, 2016, causing significant damage to many units at Caravelle. Plaintiffs allege that following the storm, the HOA's Board ("Board") decided, without appropriate authority or permission, to remove owners' personal property from their units and store them in the parking garage of the HOA as part of the damage control and repair process. The HOA also entered into a contract with Commercial Disaster Recovery, LLC f/d/a Delta Restoration, LLC ("Delta") to handle the process of removing the owners' items from their units and perform other repair/restoration work related to damage Caravelle suffered in the Hurricane. Various problems ensued with respect to the storage and handling of the removed personal property.

Plaintiffs take issue with the removal of their personal property from certain units and with various elements of the handling of the restoration process. They allege the entering of certain units and removal of owners' personal property was improper and contrary to the governing documents. Plaintiffs also say owners were not properly notified of the decision to enter their units and remove property and that they were wrongfully also prevented from entering their units and inspecting their

property following its removal. According to Plaintiffs, various elements of the personal property removed from their units was lost, damaged, stolen or otherwise destroyed.

In or about February 2017, the Board made the decision to gut the entire building, remove owners' belongings, and hire third parties to remodel and remediate damaged units. During the remediation process, personal property removed from owners' units was stored in the development's parking garage across the street, which was turned into a make-shift storage unit. Plaintiffs say the Board did not consult with owners as the governing documents required prior to making these decisions and take issue with the decisions. The Amended Complaint says "MTB and/or Gold Crown" failed to take adequate steps to protect owners' personal belongings, which were not secure from environmental hazards or theft.

Other issues in the Amended Complaint relate to problems with the claims made on an HO-6 insurance Policy Lloyd's of London issued insuring each owner for dwelling, personal property and loss of use with limits of $25,000 per unit. Plaintiffs cite letter(s) from MTB sent as counsel for the HOA to Lloyd's taken in the course of trying to assist in the handling of the insurance issues.

Plaintiffs also take issue with certain charges the HOA levied to recover costs incurred as a result of storing the owners' belongings and otherwise taking steps in the repair/remediation process. According to Plaintiffs, the HOA charged owners with a "content manipulation fee" that was improper, unlawful and not in accordance with the governing documents. Similarly, Plaintiffs take issue with charges by the HOA for a "soft goods package." This related to replacement of certain items lost or destroyed by the Hurricane and/or while in storage by Delta. The HOA charged owners for the soft goods package, and Plaintiffs allege "Gold Crown and/or MTB" misrepresented the damage to certain units in order to justify this charge. Plaintiffs also say "Gold Crown and/or MTB"

wrongfully asserted claims against owners in order to strongarm them into paying the contents manipulation fee and soft goods package.

The Amended Complaint alleges the following causes of action against MTB: (1) professional negligence (personally and derivatively); (2) breach of fiduciary duty (derivatively); (3) aiding and abetting breach of fiduciary duty (derivatively); (4) fraud (personally); and (5) conversion (personally). Plaintiffs submitted the (Amended) Affidavit of Thomas Pendarvis with the Amended Complaint in an effort to comply with S.C. Code § 15-36-100.

**Motion to Dismiss Standard**

SCRCP 12(b)(6) provides that a defendant may move for dismissal based on the plaintiff's failure to state facts sufficient to constitute a cause of action. *See also* Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). In considering a 12(b)(6) motion, "the trial court must base its ruling *solely* upon allegations set forth on the face of the complaint." Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007) (emphasis added); *see also* Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987); and Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). A copy of any plat, photograph, diagram, document or other paper which is an exhibit to a pleading is part thereof for all purposes if a copy is attached to such pleading. SCRCP 10(c).

A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). The court should not grant a 12(b)(6) motion if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Id. The question is whether, in the light most

favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

The Court notes that Plaintiffs' Amended Complaint is at issue here. Plaintiffs initially filed an original Complaint, which MTB moved to dismiss. Rule 15 allowed Plaintiffs to amend the Complaint once as a matter of right within thirty days. They did so two days before the hearing for the Motion to Dismiss the Complaint by filing the subject Amended Complaint in an apparent attempt to address alleged deficiencies in the original Complaint (as noted in MTB's Motion to Dismiss the Complaint). Even on this second try, Plaintiffs fail to allege facts sufficient to state a claim for any of the causes of action alleged against MTB in the Amended Complaint.

**Conclusions of Law**

Plaintiffs bring claims against MTB individually and derivatively on behalf of the HOA. All the claims are based on activities MTB took as lawyers for the HOA. Plaintiffs have not alleged that MTB took any action outside the scope of its representation of the HOA. Plaintiffs just take issue with MTB's representation of the HOA.

However, Plaintiffs (individual owners of units) have no standing to bring a legal malpractice claim against MTB because the firm did not represent them. Further, MTB is not liable to Plaintiffs, who are third parties MTB did not represent, for actions the firm took within the course and scope of its representation of the HOA. Plaintiffs' individual claims against MTB fail as a result.

The gravamen of Plaintiffs' claims is the loss of their personal property and other damages the individual owners incurred. While the Amended Complaint references damages the HOA incurred, the pleading contains only conclusory language in this regard. It lacks any facts showing how the HOA has been damaged by anything MTB did or failed to do. Without facts showing how

the HOA has been damaged, there is no basis for any derivative cause of action against MTB by the Plaintiffs on behalf of the HOA.

**1. Claims Against MTB Personally**

**a. Legal Malpractice**

To survive a Rule 12(b)(6) motion, a plaintiff in a legal malpractice action must allege the following elements: (1) existence of a lawyer-client relationship; (2) a breach of duty by the lawyer; (3) damage to the client and (4) proximate causation of the client's damage by the breach. Stokes - Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016). A plaintiff asserting a legal malpractice claim against a lawyer must first establish the existence of an attorney-client relationship between the lawyer defendant and the plaintiff. The Law of Legal Malpractice in South Carolina (S.C. Bar- CLE Division 2017). The failure to allege the existence of a lawyer-client relationship is fatal to a complaint alleging legal malpractice. Id.

The Amended Complaint plainly states MTB represented the HOA. Am. Compl., para. 7. The pleading goes to great lengths in attempts to craft language supporting a claim by individual owners for legal malpractice against MTB. This includes allegations that MTB "provided legal advice to owners such that owners could reasonably believe MTB was representing them as well." Am. Compl., para. 8. However, this is not sufficient to allege the first fundamental element of a legal malpractice claim, the existence of a lawyer-client relationship, to establish a cause of action by the individual Plaintiffs against MTB.

As is clear from the factual allegations in the Amended Complaint and material filed with it, MTB represented the HOA, not the individual owners, and the individual owners claim they have been damaged as a result. While MTB interacted with the owners and took other action as counsel

for the HOA, there is no allegation or support for one in anything filed with the Amended Complaint, that MTB represented the individual owners. In fact, it is clear MTB did not, as it acted only as counsel for the HOA. The failure to allege the existence of an attorney-client relationship between MTB and the Plaintiffs is fatal to their legal malpractice claim against MTB.

Additionally, South Carolina law provides that lawyers are immune from liability to third parties arising from the performance of professional activities as a lawyer on behalf of and with the knowledge of the client. Stiles v. Ontario, 318 S.C. 297, 458 S.E.2d 601 (1995). *See also* Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986). The purpose of this is to encourage zealous representation of client without fear of lawsuits by disgruntled opposing parties. Gaar v. NMB Realty Co., 287 S.C. 525 (Ct. App. 1986). The only exception to these generally recognized principles is the context of a beneficiary of a will. Rydde v. Morris, 318 S.C. 643, 675 S.E.2d 431 (2009); *see also* Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 875 (2009) discussed in detail below.

Based on the allegations in the Amended Complaint and material filed with it, all actions MTB took of which Plaintiffs complain were taken as lawyers for the HOA in the scope of the firm's representation of the HOA. The Amended Complaint does not allege MTB took any action outside the scope of its representation of the HOA. MTB is therefore immune from liability to the individual owners for legal malpractice for such actions.

While no South Carolina appellate court has directly addressed the issue, a majority of jurisdictions adhere to the rule that a lawyer acting as counsel for a corporation owes a duty of care solely to the corporation and not its individual shareholders, officers or directors. The Law of Legal Malpractice in S.C., p. 60 (S.C. Bar- CLE Division 2017); *see also* Bovee v. Gravel, 174 Vt. 486, 811

A.2d 137 (Vt. 2002). To determine otherwise would create basically unlimited liability for corporate counsel to individual shareholders. Applying this principle, this Court holds that MTB did not owe a duty of care to individual unit owners for actions taken in its capacity as counsel for the HOA. Thus, Plaintiffs individual claims for legal malpractice against MTB fail as pled because Plaintiffs cannot show the existence of a lawyer-client relationship between MTB and the individual owners.

Finally, under S.C. Code § 15-36-100, *et seq.*, complaints alleging professional negligence against certain South Carolina professional defendants must include an affidavit of an expert witness setting forth the basis for at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. S.C. Code § 15-36-100(B). A complaint that does not include the contemporaneous filing of a sufficient expert affidavit is subject to dismissal for failure to state a claim. S.C. Code § 15-36-100(C)(1).

Plaintiffs' filed an Affidavit of Thomas Pendarvis (a South Carolina lawyer) with the Complaint and an Amended Affidavit with the Amended Complaint. The Amended Affidavit maintains that in Mr. Pendarvis' opinion, MTB was professionally negligent. However, Mr. Pendarvis' Affidavit states that MTB represented the HOA and recognizes that MTB did not represent the individual owners. The Affidavit takes issue with advice MTB gave the HOA and actions MTB took as counsel for the HOA. These actions and advice form the factual basis of Mr. Pendarvis' opinion that MTB was professionally negligent.

However, the Affidavit fails to state the existence of an attorney-client relationship between MTB and any of the individual owners, which is the first and necessary requirement to showing a cause of action for professional negligence by the individual Plaintiffs against MTB. Therefore, the Affidavit fails to meet the requirements of S.C. Code § 15-36-100 necessary to support a cause of

action of professional negligence by the individual Plaintiffs against MTB. The Amended Complaint is subject to dismissal under S.C. Code § 15-36-100(C)(1).

**b. Fraud**

In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery. Kahn Const. Co. v. S.C. Nat. Bank of Cha., 275 S.C. 381, 271 S.E.2d 414 (1980). Failure to allege any of these elements is fatal to recovery. Id. and Hooters of Am. v. Phillips, 39 F.Supp. 2d 582 (D.S.C. 2998); Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 527 S.E.2d 371 (Ct. App. 2000). Specifically, the complaint must set forth sufficient facts to show that each of the nine elements is present or the complaint will be "facially defective." Mutual Sav. & Loan Assoc. v. McKenzie, 274 S.C. 630, 266 S.E.2d 423 (1980).

The Amended Complaint recites the elements of a fraud cause of action. However, the pleading fails to state *facts* sufficient to support a cause of action of fraud versus MTB for various reasons. The majority representations of which Plaintiffs complain were made by "Gold Crown and/or MTB." The Amended Complaint references (and includes by way of exhibits) certain letters from MTB to individual Caravelle owners. However, the pleading does not state what in these letters was false, much less what false statement they contain that MTB *knew* was false or was made with reckless disregard for the truth.

The only representation in the Amended Complaint Plaintiffs allege "was patently false" was a statement in an April 20, 2017, letter from Gold Crown to individual owners. This letter is plainly from Gold Crown and is not from MTB. On its face, there is no indication MTB was in any way involved with the letter. The Amended Complaint fails to specify a material false statement MTB made with knowledge of the falsity or reckless disregard for the truth. Neither does the Amended Complaint specify a material false statement by MTB on which Plaintiffs detrimentally relied.

Further, nothing in the Amended Complaint alleges MTB took any action outside the scope of its representation of the HOA, even with respect to the fraud cause of action. No South Carolina authority provides for such a claim against MTB under the facts as alleged. Therefore, the Amended Complaint fails to state facts sufficient to constitute a cause of action for fraud against MTB.

**c. Conversion**

Conversion is the unauthorized assumption and exercise of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Austin v. Independent Life and Acc. Ins. Co., 296 S.C. 156, 370 S.E.2d 918 (Ct. App. 1988) *citing* Steele v. Victory Savings Bank, 368 SE.2d 91 Ct. App. 1998). A cause of action for conversion is comprised of the following elements: (1) an interest by the plaintiff by the thing converted; (2) the defendant converted the property to his or her own use and (3) the use was without plaintiff's permission. The Elements Civil Causes of Action, 5th Ed., S.C. Bar, p. 121 (2015).

The Amended Complaint does not plead facts supporting a conversion cause of action against MTB. Plaintiffs base this claim on the theory that "Gold Crown and/or MTB" directed Delta to remove owners' belongings from their units and that "Gold Crown and/or MTB" denied owners access to the property. They also say "Gold Crown and/or MTB," exercised dominion and control

over owners' belongings (*see* Am. Compl. paras. 144 – 147) and that "Gold Crown or MTB, without the permission of the owners, required Delta to remove the items from these Owners' units to either throw away, recycle or re-sell the items." Am. Compl., para. 68.

However, alleging that "Gold Crown or MTB" took certain action that forms the basis of a claim for conversion is insufficient to allege that *MTB* converted any property Plaintiffs owned. The facts alleged in the Amended Complaint, in the light most favorable to the Plaintiffs, show only that the HOA and/or Delta handled the property at issue. Even if it was at MTB's direction, this does not amount to a claim for conversion by MTB because the firm, as alleged, never possessed, controlled or retained the benefit of any of Plaintiffs' personal property. Even if taken as true, the only facts alleged supporting conversion are that the HOA and/or Delta (not MTB) disposed of Plaintiffs' personal property.

Further, there is no allegation that MTB was acting outside its scope as lawyers for the HOA, and thus it is immune from liability for these actions to the Plaintiffs who MTB did not represent. Plaintiffs cite Stiles v. Ontario for the proposition that MTB may be liable to Plaintiffs for conversion. 318 S.C. 297, 457 S.E.2d 601 (1995). Plaintiffs' reliance on Stiles is misplaced. That case stands for the proposition that lawyer may be liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client. Id. Plaintiffs here have not alleged conspiracy against MTB.

Moreover, Plaintiffs have not alleged or stated facts showing that MTB breached an independent duty to the individual owners, or did anything outside the scope of its representation of the HOA. Even if Stiles relates to a cause of action for conversion, which it does not, its principle is inapplicable here. All of MTB's actions were taken in the course of representing the HOA, and

therefore the firm is immune from liability to persons it did not represent for damages arising out of MTB's representation of the HOA. The cause of action for conversion against MTB therefore fails as pled.

**2. Derivative Causes of Action**

Plaintiffs also bring causes of action under a derivative theory pursuant to SCRCP 23(b)(1), for legal malpractice, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. "In South Carolina, the authority to direct the business affairs of a corporation is delegated to the board of directors, not the shareholders." Carolina First Corp. v. Whittle, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Individual shareholders may not directly sue corporate directors for losses suffered by the corporation. Babb v. Rothrock, 303 S.C. 462, 410 S.E.2d 418 (1991). "An action seeking to remedy a loss to the corporation is generally a derivative one." Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001).

Rule 23(b)(1) provides for derivative actions by shareholders to enforce a right of a corporation where the corporation has failed to enforce a right which it may properly assert. A derivative claim is where a plaintiff, who is a member of the company, brings a claim in the right of the company when the company will not bring the claim for itself. Johnson v. Baldwin, 221 S.C. 141, 69 S.E.2d 585 (1952) and Gary v. Matthews, 148 S.C. 125, 145 S.E. 702. (1928). The stockholder in a derivative action is only a nominal plaintiff, the company being the real party interest. Id. and Ward v. Atlas Constr. Co. Inc., 276 S.C. 346, 278 S.E.2d 621 (1981).

Rule 23(b)(1) has heightened and particularized pleading requirements intended to allow the court to perform a gatekeeping function to prevent the unrestrained use of derivative actions. Patterson v. Witter, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). "A derivative action that does

not meet the pleading requirements of Rule 23(b)(1) is properly dismissed under Rule 12(b)(6)." Clearwater Tr. v. Bunting, 367 S.C. 340, 626 S.E.2d 334 (2006). The authority to direct business and affairs of a corporation is delegated to the board of directors, not the shareholders. Carolina First Corp. v. Whittle, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000).

A derivative action is, in essence, a challenge to the board's managerial authority. Whittle, 343 S.C. 176 (2000). It is a suit where shareholders attempt to recover for losses the corporation has suffered. Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676 (Ct. App. 2001). A shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder. Id. and Hite v. Thomas & Howard Co., 305 S.C. 358, 409 S.E.2d 340 (1991). A derivative action is not the proper means for recovery of damages by an individual member of a company. A shareholder's derivative suit is an action in equity, and a party is not entitled to a jury trial as a matter of right for derivative causes of action. Pelfrey v. Bank of Greer, 270 S.C. 691, 244 S.E.2d 315 (1978) *quoting* Collier v. Green, 244 S.C. 367, 137 S.E.2d 277 and Lucken v. Wichman, 5 S.C. 411 (1874).

**a. No Damages to the HOA**

Plaintiffs claims, at their core, relate to and arise out of their loss of personal property and other damages the individual owners incurred resulting from actions the HOA and Gold Crown took. Plaintiffs do not seek recovery for losses the HOA has incurred, but for losses they individually suffered. The Amended Complaint attempts to plead around these problems.

First, it lumps the actions of Gold Crown and MTB together with allegations such as "Gold Crown and/or MTB's actions have caused the Association to be exposed to liability of the Owners" (para. 88), and "the damages owned [sic] to the association to the Owners is a 'common expense'

essentially causing the Owners to owe money to themselves (para. 89). However, this does not state facts sufficient to show what MTB actually is alleged to have wrongly done. As pled, Gold Crown *or* MTB is responsible for the bad act(s) at issue.

Next, the Amended Complaint alleges the HOA incurred damages as a result of this negligence. These include attorney's fees charged to the Association, additional fees charged by Gold Crown to the Association and an HO-6 Management Fee charged to the Association. *See* Am. Compl., para 109. This Court is unsure how these amounts could be "damages" caused by MTB's alleged acts/omissions. This listing of alleged damages is merely the use of conclusory statements that the HOA was damaged, and the pleading lacks actual facts supporting a claim that the HOA was damaged by anything MTB did or failed to do. In short, the Amended Complaint contains no *facts* showing how the HOA has been damaged by MTB's alleged acts/omissions.

It is clear the only real damages alleged are damages to the individual owners for the loss of their personal property and various charges they have been assessed by the HOA. The Plaintiffs' individual losses are the only possible damages existing under the facts and allegations as pled. In order to prevail on any of the Plaintiffs' derivative causes of action alleged (negligence, breach of fiduciary duty and aiding and abetting breach of fiduciary duty), Plaintiffs must allege that they, as members of the HOA, are seeking recovery for damages the HOA has incurred when the HOA refuses to pursue the claim itself.

Despite using certain key words, Plaintiffs' claims here all arise out of their loss of personal property, not any loss the HOA incurred. Plaintiffs' derivative causes of action therefore fails to meet the heightened pleading requirements of SCRCP 23(b)(1). Their derivative causes of action alleged in the Amended Complaint all fail as pled as a result.

**b. Expert Affidavit Fails to Support Derivative Claim**

The Amended Complaint includes a derivative cause of action for legal malpractice as well, which means the Plaintiffs are seeking recovery for the HOA for damages the HOA incurred proximately caused by MTB's negligence in the course of its representation of the HOA. However, Plaintiffs' expert Affidavit fails to state a negligent act or omission of MTB to support a cause of action for professional malpractice on a derivative theory.

While the Affidavit refers to generic "damages" MTB's actions caused the HOA, it is clear the real damages at issue are the individual Plaintiffs' loss of their personal property and other damges the individual owners allegedlyincurred. The Affidavit does not state what "financial losses" the HOA has suffered. This is not sufficient to set forth a negligent act or omission of MTB on a derivative theory, as damages are a necessary element of a negligence cause of action. The Amended Complaint is therefore subject to dismissal under SCRCP 12(b)(6) for failure to file a sufficient expert affidavit under S.C. Code § 15-36-100.

**c. No Derivative Malpractice Claim**

MHC

Plaintiffs' derivative claims against MTB are also akin to an assignment of ~~assignment of~~ a malpractice claim to the individual Plaintiffs, which South Carolina law precludes. Skipper v. Ace Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37 (2015). This is a matter of public policy in light of the unique and confidential personal nature of the relationship between a lawyer and her client. The Law of Legal Malpractice in S.C., S.C. Bar (2017); ~~*see also* Goodley v. Wank & Wank, Inc., 133 Cal. Rptr. 83 (Cal. Ct. App. 1976). Generally, the filing of a legal malpractice action results in the waiver of the attorney-client privilege.~~ SCRPC 1.6(b)(6); The Law of Legal Malpractice in S.C., ~~S.C. Bar (2017); *see also* Picadilly, Inc. v. Raikos, 582 N.E.2d 338, (Ind. 1991).~~

MHC

Assigning a legal malpractice claim places the defendant lawyer in the untenable position of having to defend claims resulting from its communications with its client without being able to discuss those communications (which the client has not waived). Once the case is assigned, the client loses control over the disclosure of confidential information, which the lawyer may reveal as necessary to establish the defense. The Law of Legal Malpractice in S.C. (2017) ~~citing Picadilly, *supra*.~~ The client is relegated to observing from the sidelines as the assignee pursues the lawyer. This erodes the principles fostered by the duty of confidentiality. Id. This is a primary reason legal malpractice claims in South Carolina are not assignable. Skipper v. Ace, *supra*.

Filing a malpractice action as a derivative claim similarly places the defendant lawyer in a precarious and untenable position because the lawyer must defend herself, but the client has not waived the privilege. California precludes derivative legal malpractice claims. Its courts have based this on the same reasoning as the South Carolina courts that have precluded the assignment legal malpractice claims.

~~The primary issue relates to the attorney-client relationship in the context of a derivative action by shareholders against a company's lawyers. The corporation, not the shareholder, holds the attorney-client privilege in a situation where a lawyer represents a company. NFL Properties, Inc. v. Superior Court, 65 Cal.App.4th 100, 75 Cal.Rptr.2d 893 (1998). Shareholders do not enjoy access to privileged information merely cause the lawyers' actions also benefit them, nor do shareholders own the right~~ to waive the attorney-client privilege ~~simply by filing an action on the company's behalf. Id. Thus, the filing of a derivative action does not result in the corporation's waiver of the privilege. Id., *see also* Pacific Tel. & Tel. Co. v. Fink, 141 Cal.App.2d 332, 296 P.2d 843 (1956). Because of this, a derivative lawsuit against a corporation's outside counsel has the dangerous~~

~~potential for robbing the lawyer-defendant of the only means he or she may have to mount a meaningful defense, as the lawyer must preserve the attorney-client privilege while trying to show that her representation of the client was not negligent. Kracht v. Perrin, Gartland & Doyle, 219 Cal.App.3d 1019, 268 Cal.Rptr. 673 (1990).~~

It is impossible for a lawyer to mount a defense in a shareholder derivative action alleging a breach of duty to a corporate client, where, by the very nature of the action, the lawyer is foreclosed (in the absence of any waiver by the corporation client) from disclosing the communications which are alleges to constitute a breach of that duty. That is exactly the case here, where the Plaintiffs' claims against MTB are all based on alleged advice the firm provided its client, the HOA. Thus, in order to defend itself at all, MTB must disclose correspondence with its client, the HOA. However, the HOA has not waived the attorney-client privilege.

Allowing a derivative claim against MTB here would be akin to allowing the assignment of the HOA's legal malpractice claim. This Court applies the same principle and precludes Plaintiffs' attempt to bring a legal malpractice action as a derivative claim against MTB on behalf of the HOA. The Amended Complaint therefore fails to state facts sufficient to constitute a derivative claim on behalf of the HOA against MTB for any of the causes of action alleged.

**3. Third-Party Beneficiaries**

Plaintiffs maintain MTB is liable to them as individual owners because they are third-party beneficiaries to MTB's contract to represent the HOA. Plaintiffs cite Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) and Sentry Select v. Maybank, Opinion No. 27806 (S.C. 2018) to support their claim in this regard. Plaintiffs' reliance on these cases is misplaced. Fabian stands for the proposition that South Carolina recognizes a cause of action against a lawyer by a third-party

beneficiary of a will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent. 410 S.C. 475, 765 S.E.2d 132 (2014). The Court reasoned that where the client is deceased, imposing an avenue for recourse in the beneficiary of a will is effectively enforcing the client's intent.

That is not the situation here. First, Fabian only extended a cause of action to a third-party beneficiary in the estate planning and will context. It did not extend lawyer immunity to third-parties for any other purpose. Further, MTB's client here is the HOA. The HOA is not deceased and is certainly able to pursue recourse against MTB if the HOA believes MTB provided it negligent advice.

Sentry v. Maybank dealt with an insurance carrier's ability to pursue a claim for legal malpractice a lawyer committed while representing the carrier's insured. The facts in that case were that a law firm the insurer hired to represent its insured failed to respond to Requests to Admit, essentially admitting to liability of the insured. The Court's limited holding in that case was: (1) an insurer may maintain a direct malpractice action against counsel hired to represent its insured where the insurance company has a duty to defend and (2) the insurer may only recover for the attorney's breach of duty to his client when the insurer proves the breach is the proximate cause of damage to the insurer. If the interests of the client are the slightest bit inconsistent with the insurer's interest, there can be no liability of the attorney to the insurer. Sentry v. Maybank, *supra*. The Court in Sentry expressly limited the scope of its ruling to situations dealing with insurers and law firms they retain on behalf of their insureds.

This case does not involve allegations by an insurer against a law firm hired to represent its insured. Thus, Sentry does not apply to create any potential cause of action by the individual Plaintiffs against MTB for actions MTB took during the course of representing the HOA. Further, under the

reasoning of Fabian and Sentry, the proper method for Plaintiffs to pursue this sort of claim against MTB would be through a derivative action. As detailed above, Plaintiffs' derivative claims against the firm fail as pled.

**4. Real Parties at Interest**

The Court notes Plaintiffs have filed a separate action seeking recovery for damages arising out of the same facts and circumstances at issue here against Lloyd's of London and Delta, Hager, et al. v. Lloyd's of London, et al., C/A 2018-CP-26-2871. Plaintiffs have not sued the HOA. There are avenues for Plaintiffs to pursue if they believe they have been wronged, but the Amended Complaint fails to plead facts sufficient to state facts to support and claim alleged against MTB, individually or derivatively.

**Conclusion**

For the reasons stated above, the Amended Complaint fails to state facts sufficient to constitute any cause of action alleged against MTB, individually and/or derivatively, and therefore, the Court grants MTB's Motion to Dismiss the Amended Complaint. Plaintiffs' claims against MTB are therefore DISMISSED WITH PREJUDICE pursuant to SCRCP 12(b)(6).

IT IS SO ORDERED.

March 6, 2019

Conway, South Carolina

Benjamin H. Culbertson
Circuit Court Judge