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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Horry County Circuit Court
Benjamin H. Culbertson, Circuit Court Judge

Appellate No. 2019-000413

Karl & Terri Hager; Robert Singleton & Teresa Singleton; Jay & Susan Welborn; Erik Arnold; and Bowers Caravelle LLC; derivatively on behalf of Caravelle Resort Association, Inc and on behalf of themselves and those similarly situated.....Appellants

v.

McCabe Trotter & Beverly, PC and Gold Crown Management.....Defendants

of whom

McCabe Trotter & Beverly, PC is.....Respondents

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

Appellants filed the initial complaint on May 14, 2018. (Compl.) Respondent filed a motion to dismiss on June 6, 2018. (First Motion to Dismiss) Appellants filed an amended complaint on June 18, 2018. (Am. Compl.) Respondents withdrew their initial motion to dismiss on June 19, 2018 at hearing on their first filed motion to dismiss. (June 19, 2018 Form 4) Respondent then refiled its motion to dismiss and answer to amended complaint on June 20, 2018. (Second Mtn. to Dismiss; Answer to Amended Compl.) The trial court held a hearing on July 31, 2018 on Respondent's motion to dismiss, and issued a simple Form 4 order granting the motion to dismiss on August 31, 2018. (July 31, 2018 hearing transcript; August 31, 2018 Form 4) Appellants then filed a Rule 59(e) motion on August 9, 2018. (Rule 59e Motion) A hearing was held on January 22, 2019 in which the trial court directed Respondent's counsel to submit an order denying Appellants' Rule 59(e) motion and granting the motion to dismiss. Appellants' counsel requested permission to amend the complaint in order to clarify the allegations which the trial court thought insufficient. (January 22, 2019 hearing transcript) The trial court denied the request and ordered the dismissal to be done with prejudice. (January 22, 2019 hearing transcript.) Respondent's counsel submitted a prospered order via email to the trial court via email on January 28, 2019. (January 22, 2019 Countryman Email) Respondents' counsel submitted a proposed order on February 22, 2019 in light of the trial court's denial of a co-Defendant's motion to dismiss the same complaint on nearly the same identical grounds as Respondent. (February 22, 2019 proposed order) Instead, the trial court modified Respondent's proposed order and filed it on March 6, 2019. (March 6, 2019 Order). Appellants filed this instant appeal on March 12, 2019. This appeal follows.

STATEMENT OF THE FACTS

The Appellants in the above-captioned action have brought suit against Defendants McCabe Trotter & Beverly PC ("Respondent") for acts of professional negligence, conversion and fraud. Respondent was the attorney Caravelle Resort Association, Inc. (hereinafter "Association") at the time of the events alleged herein. (Am Compl. ¶ 7.)

Hurricane Matthew struck South Carolina on or about October 8, 2016 and caused significant damage to the Association's property as well as damage to some—but not all—of the individual units. (Am Compl. ¶ 36.) Gold Crown, the management company for the Association, communicated to the Owners on October 16, 2016 that the Caravelle was being shut down for renovations. (Am Compl. ¶ 37.) Respondent provided the advice to the Board that the Board had the unilateral authority to gut the entire building including each Owner's unit. (Am Compl. ¶ 49.) This advice was contrary to several different provisions with the Association's Master Deed. (Am Compl. ¶ 51.) Workers then entered the Owners' units without the permission or authorization of the Owners for the purposes of packing and moving the Owners' belongings into the Association's garage. (Am Compl. ¶ 38.)

The Owners, including Appellants, were not informed that their personal belongings had been removed from their units until after it was done. (Am. Compl. ¶ 44, 51-52.) The Owners were not allowed to enter the premises to inspect their own units or retrieve their personal belongings. (Am. Compl. ¶¶ 47-48, 94) The Owners' belongings were lost, stolen, and/or contaminated while in storage. (Am. Compl. ¶¶ 56, 57) The loss and destruction of personal belongings was then used to justify the sale of a "soft goods package" to the Owners. (Am. Compl. ¶¶ 76, 77) The Association was also advised to assert a charge against the Owners for the cost of the storage of

the Owners' belongings. This charge was characterized as a "content manipulation fee" and was pursued against the Owners by Defendants including Respondent. (Am. Compl. ¶¶ 72-75)

Each Owner was also individually insured through a separate policy, called a "HO-6 policy," that provided coverage for the contents, fixtures, and loss of use for that Owner's unit. (Am Compl. ¶ 30-32.) Only unit owners are the named insured of the HO-6 policies. (Am Compl. ¶ 32, Am. Compl. Ex. 3.) Neither the Master Deed of the Association, the Bylaws of the Association, nor the policy language of the HO-6 policy authorizes or appoints the Association or its agents to act as an "insurance trustee" for the Owners for the HO-6 policy. (Am Compl. ¶ 34.) Respondent began negotiating with the Owners' HO-6 carrier on the Owners' behalf regarding the cost and the manner of the storage of the Owners' personal belongings. (Am Compl. ¶ 40-41, 55-58, Am Compl. Ex. 5.) Respondent also sent numerous letters to the Owners and Owners' HO-6 carrier regarding the condition of the Owners' belongings while in storage. (Am. Compl. ¶¶ 55-58, Ex. 6-8) Respondent committed the Owners to a storage arrangement with Delta—paid in part by the Owners' HO-6 policies—without the Owners' permission. (Am Compl. ¶ 44.)

LEGAL STANDARD

A complaint must contain "a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 8, SCRCP. A circuit court must deny a motion to dismiss under Rule 12(b)(6) "if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 415 (Ct. App. 2003). "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." Plyler v. Burns,

373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). On appeal, this Court is required to apply the same standard. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)

Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007); Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). A Rule 12(b)(6) motion is addressed solely to the sufficiency of the allegations in the complaint. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). "A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading." Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009).

A motion to dismiss pursuant to Rule 12(b)(6) must presume all well-pled facts to be true. Gressette v. S.C. Elec. & Gas Co., 370 S.C. 377, 379, 635 S.E.2d 538, 538-39 (2006); Overcash v. South Carolina Elec. and Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005). The pleader's likely success at trial is irrelevant to deciding whether he has properly stated a claim. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247-48 (2007). South Carolina Rules of Civil Procedure do not necessarily require the technical or restrictive requirements of Code Pleading. Solley v. Navy Fed. Credit Union, Inc., 397 S.C. 192, 205, 723 S.E.2d 597, 604 (Ct.App.2012) "[U]nder our current pleading rules only ultimate facts are required to be stated in pleadings. Ultimate facts are those which the evidence upon trial will prove, and not the evidence which will be required to prove those facts." Brown v. Inv. Mgmt. & Research, Inc., 323 S.C. 395, 400 n. 3, 475 S.E.2d 754, 756 n. 3 (1996). ("[A] complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to **any relief** whatsoever." Russell v. City of Columbia, 305 S.C. 86, 89, 406

S.E.2d 338, 339 (1991)(Emphasis added.) The purpose of a pleading is fair notice to the opponent and the court. Overcash, *supra*. The sufficiency of a pleading does not depend on talismanic words or ritual incantations in the original pleading. To do so would be to elevate form over substance. Stevenson v. City of Seat Pleasant, Md., 743 F.3d 411, 418 (4th Cir. 2014); Sansotta v. Town of Nags Head, 724 F.3d 533, 548 (4th Cir.2013); United States v. Davis, 261 F.3d 1, 45 n. 40 (1st Cir.2001).

If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Clearwater Tr. v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006); Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). "Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Spence v. Spence, 368 S.C. 106, 116–17, 628 S.E.2d 869, 874 (2006). "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." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Further, dismissal under Rule 12(b)(6) is inappropriate if the pleadings raise a novel question of law. Chestnut v. AVX Corp., 413 S.C. 224, 228, 776 S.E.2d 82, 84 (2015); Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). Madison v. Am. Home Prod. Corp., 358 S.C. 449, 451, 595 S.E.2d 493, 494 (2004). Additionally, a trial court should give the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal when a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action"

under Rule 12(b)(6), Skydive Myrtle Beach, Inc. v. Horry Cty., No. 2017-001382, 2019 WL 1146068, at *7–8 (S.C. Mar. 13, 2019).

ARGUMENT

I. APPELLANTS HAVE PROPERLY ALLEGED A DERIVATIVE CAUSE OF ACTION

Appellants have properly alleged a derivative action against Respondent. "An action seeking to remedy a loss to the corporation is generally a derivative one." Patterson v. Witter, 425 S.C. 213, 231–32, 821 S.E.2d 677, 687 (2018); Brown v. Stewart, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." Brown, supra.

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." Patterson, supra; 19 Am. Jur. 2d Corporations § 1923 (2015). Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d Corporations § 1922 (2015). "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." Patterson; supra. A shareholder may pursue both direct and derivative claims in a single action. Id.

Appellants have complied with SCRCP 23(b)(1) and the requirements set out in Patterson. Appellants allege that they are owners and shareholders within the Association. (Am. Compl. ¶ 2.) The Appellants detail in their verified compliant what steps were taken to cause the Association to bring this action. (Am. Compl. ¶ 26.) Appellants make detailed allegations against Respondent in numerous paragraphs of the Amended Complaint, *inter alia*: 38, 40, 41, 53, 82, 83, 93, 103, 104,

106, and 107. Appellants allege the Association has suffered damages. (Am Compl. ¶¶ 88, 109, 115, 125.) Appellants also allege that the Owners have suffered separate damages. (Am. Compl. ¶¶ 60, 61, 64, 65, 67, 71, 75, 76, 96, 105, 106, 110, 134, 135, 148, and 149.)

A. Derivative claim for malpractice is proper.

South Carolina courts have not yet ruled on whether a legal malpractice action may be pursued through a derivative action. Other states have allowed a legal malpractice action to be pursued through a derivative action. Deep Photonics Corp. v. LaChapelle, 385 P.3d 1126, 1139 (Oregon 2016); Gefre v. Davis Wright Tremaine, LLP, 306 P.3d 1264, 1274 (Alaska 2013); Klingelhoefer v. Parker, Grossart, Bahensky & Beucke, L.L.P., 834 N.W.2d 249, 256–57 (Nebraska 2013); Little v. Cooke, 652 S.E.2d 129, 144 (Virginia. 2007); Janssen v. Best & Flanagan, 662 N.W.2d 876, 889–90 (Minnesota 2003); Chang v. Chang, 226 A.D.2d 316, (New York 1996); Karris v. Water Tower Tr. & Sav. Bank, 389 N.E.2d 1359, 1370 (Illinois 1979.) There is little reason to doubt that this Court should join the other states that have allowed a derivative suit for attorney malpractice.

The only state that has rejected a derivative action for legal malpractice is California. In McDermott, Will & Emery v. Superior Court, 83 Cal. App. 4th 378, 385, 99 Cal. Rptr. 2d 622, 627 (2000), the California Court of Appeals rejected a derivative action for legal malpractice because the attorney would be unable to mount an effective defense because of the attorney-client privilege. However, the California Court of Appeals has also held that the rule in McDermott is not an iron-clad defense, and that the corporate attorney-client privilege can be waived. Favila v. Katten Muchin Rosenman LLP, 188 Cal. App. 4th 189, 221, 115 Cal. Rptr. 3d 274, 300 (2010), *as*

modified on denial of reh'g (Sept. 22, 2010) The corporate attorney-client privilege is also subject to the crime/fraud exception to the attorney-client privilege. Id.

The trial court agreed that the Association has the right to sue Respondents for attorney malpractice. In fact, the order takes great pains to decide the factual issue that Respondent's client was the Association. As a derivative action, Appellants step into the shoes of the Association to bring this suit. There is no reason under current South Carolina law that Appellants cannot assert a claim that the Association refuses or declines to assert for itself.

B. A derivative action is not an assignment.

The trial court erred when it held the Appellants are asserting a claim that is "akin" to an "assigned" claim for malpractice. The trial court's order cites no cases for this proposition, and it clearly confuses two very different legal concepts. A derivative action is one "in which the right claimed by the shareholder is one the corporation could itself have enforced in court." Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 529 (1984). In other words, an action is derivative if it seeks damages arising from an injury to the corporation. Howard v. Haddad, 916 F.2d 167, 169 (4th Cir. 1990). Any recovery in a derivative suit redounds to the benefit of the corporation. Rivers v. Wachovia Corp., 665 F.3d 610, 615 (4th Cir. 2011). The shareholder is the nominal plaintiff and the corporation is the real party in interest. Ward v. Atlas Const. Co., 276 S.C. 346, 347–48, 278 S.E.2d 621, 622 (1981); Johnson v. Baldwin, 221 S.C. 141, 69 S.E.2d 585 (1952).

An "assignment" is defined as "[t]he transfer of rights or property." BLACK'S LAW DICTIONARY 136 (9th Ed. 2004); Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007), *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). An assignment transfers the right of both suit and recovery to a third party. An assignee stands in the shoes of the assignor and can

claim no higher rights than the assignor possessed at the time of the assignment. Bank of Am., NA v. Draper, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013); Trancik v. USAA Ins. Co., 354 S.C. 549, 555, 581 S.E.2d 858, 861 (Ct. App. 2003). Even the California Court of Appeals in McDermott rejected the notion that a derivative action is some sort of assignment. McDermott, supra.

An assignment and a derivative action are not "kin" to each other. They are not related. Instead, the Appellants assert claims "owned" by the Association against Respondent. There are separate allegations of damages against the Association and the Appellants. There is no assignment. Appellants do not allege there is an assignment.

Even if the action is considered to be an assignment, the Association and the Appellants are not "adversaries." The rule preventing the assignment of legal malpractice actions is limited to assignments between adversaries. Skipper v. ACE Prop. & Cas. Ins. Co., 413 S.C. 33, 37, 775 S.E.2d 37, 39–55 (2015). The assignment in Skipper involved an assignment between two adversaries in a motor vehicle accident of the rights to pursue a legal malpractice action against the at-fault driver's attorneys. Unlike Skipper, there is no risk of collusion in the instant action. The putative plaintiff class consists of all of the owners of the Association. This putative class must share all expenses associated with the operation of the Association. Appellants had to bring this case derivatively because the current board has refused to bring this action for itself. Therefore, Skipper or any other case regarding assignment simply does not apply.

II. APPELLANTS HAVE PROPERLY ALLEGED A CLAIM OF ATTORNEY MALPRACTICE

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and

(4) proximate causation of the client's damages by the breach. Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). All of these elements have been alleged in detail in Appellants' amended complaint. (Am. Complaint ¶¶ 18, 34, 42, 43, 44, 46, 47, 48, 49, 53, 54, 55, 56, 57, 58, 62, 63, 72, 73, 74, 84, 85, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111). Appellants all have a question of common fact of whether Respondent established an attorney-client relationship with the Owners. (Am Compl. ¶ 18j, 18l, 92, 95, 98, 99, 100.)

An attorney is required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession. Johnson v. Alexander, 413 S.C. 196, 201, 775 S.E.2d 697, 700 (2015); Holy Loch Distribs., Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000)

A. Existence of Attorney-Client Relationship is a question of fact.

Whether an attorney-client relationship exists is a question of fact, and a question of fact precludes a motion to dismiss. Ellis v. Davidson, 358 S.C. 509, 523, 595 S.E.2d 817, 824 (Ct. App. 2004); McNair v. Rainsford, 330 S.C. 332, 343, 499 S.E.2d 488, 494 (Ct. App. 1998). In Ethics Advisory Opinion 91-03, the South Carolina Ethics Advisory Committee stated that "[i]n determining whether an attorney-client relationship existed . . . , the focus must be on the subjective expectations of the would-be clients, 'such that their individual belief and reliance are safeguarded.'" Glover v. Lieberman, 578 F. Supp 748 (N.D. Ga. 1983). B) An attorney-client relationship does not depend on the existence of a formal agreement or the payment of a legal fee. Ethics Adv. Op. 2006-11, North Carolina State Bar v. Sheffield, 326 S.E. 2d 320 (N.C. App. 1985). Specific examples of conduct that may give rise to an attorney-client relationship even in the

absence of express agreement are "the giving of advice or assistance, or ... failing to negate the relationship when the advice or assistance is sought if the attorney is aware of the reliance on the relationship." Chavez v. State, 604 P.2d 1341 (Wyo. 1980).

B. Appellants have properly alleged an Attorney-Client relationship.

Appellants have alleged two avenues by which Respondent established an attorney-client relationship: directly and indirectly. As a matter of law, the allegation of either of these two methods are sufficient to survive a motion to dismiss.

1. Direct allegations

Appellants have alleged Respondent provided direct legal representation advice to the Owners. (Am Compl. ¶ 8.) Respondent represented the Owners' personal interest to third parties. (Am Compl. ¶ 9.) Appellants have alleged that lawyers for Respondent have undertaken representation of them in regards to their individual HO-6 policies. (Am. Compl. ¶¶ 53, 55, 56, 57, 62, 63) Respondent mailed a letter to the HO-6 insurance carrier's attorney stating the storage solution for the Owners' belongings—belongings which are not owned by the Association—was unacceptable. (Am Compl. ¶ 55, Am. Compl. Ex. 5.) Additionally, this letter also inquired as to coverages available under the HO-6 policy on behalf of the Homeowners. (Am Compl. ¶ 55, Am. Compl. Ex. 5.) Appellants have also alleged Respondent provided legal advice in the form of direct letters to Appellants advising them of several different courses of action. (Am. Compl. ¶¶ 8, 9, 55, 56, 58, 62, 63) Appellants have alleged that the HO-6 policies were not within the scope of Respondent's representation of the Association. (Am. Compl. ¶¶ 30, 31, 32, 33, 34, 35).

"A person attains the status of 'client' when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice" Marshall

v. Marshall, 282 S.C. 534, 539, 320 S.E.2d 44, 47 (Ct.App.1984). The Supreme Court has held that communicating about settlement options, communicated on a person's behalf on more than one occasion, and referred to that person as "my client" on at least one occasion, are enough to create an attorney-client relationship. In re Broome, 356 S.C. 302, 316, 589 S.E.2d 188, 195–96 (2003). Moreover, a signed retainer agreement is not essential to create such a relationship. Broome, supra. (Citing 7 Am.Jur.2d Attorneys at Law § 136 (2003). And the existence of a retainer is not in and of itself dispositive of whether an attorney is representing a client. In re Carter, 400 S.C. 170, 176, 733 S.E.2d 897, 900 (2012). An attorney who gives gratuitous advice will be held to the same standard of care as if he were under formal retainer. R. Mallen and V. Levitt, Legal Malpractice § 101 at 173–74 (1981). An attorney-client relationship does not require the payment of a fee but may be implied from the parties' conduct. 7 Am.Jur.2d Attorneys at Law § 118 (1980); In re McGlothlen, 663 P.2d 1330, 1334 (Wash. 1983).

The trial court's acceptance of Respondent's self-serving denials is not sufficient to support a motion to dismiss. (Tr. Ct. Order, pg. 8) The trial court did not assume the facts alleged as true and construe all reasonable inferences and doubts in plaintiff's favor. Doe v. Marion, supra.

Appellants also alleged the existence of an attorney-client relationship by way voluntary assumption of duty. It is well established that South Carolina has adopted the voluntary assumption of duty doctrine as set forth in Restatement (Second) of Torts § 323. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 136, 638 S.E.2d 650, 657 (2006); Johnson v. Robert E. Lee Acad., Inc., 401 S.C. 500, 504–05, 737 S.E.2d 512, 513–14 (Ct. App. 2012) The Supreme Court of Idaho as allowed a voluntary assumption argument to be made in the context of a legal malpractice action. Taylor v. Riley, 336 P.3d 256, 272 (Idaho 2014) The content and meaning of

the letters raise the issue of whether Respondent has voluntarily assumed a duty of care towards the Owners in regards to their HO-6 policy and personal belongings.

2. Indirect allegations

Appellants have also alleged indirect allegations which sustain their allegations of the existence of an attorney-client relationship.

South Carolina has abandoned the strict privity requirement in attorney malpractice actions. This shift was first set out in Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct.App.1986), which held that an attorney can be liable to those in privity with his client "for injury allegedly arising out of the performance of his professional activities." An attorney may also be subject to liability for a breach of a duty to a third party even though there is no attorney-client relationship between them. Moore v. Weinberg, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009). The absence of an attorney-client relationship does not necessarily defeat a negligence action against an attorney. Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). An attorney may be liable to a third party if he or she attorney "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., Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995).

This move fully recognized by the Supreme Court in Fabian v. Lindsay, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014) and recently reaffirmed by the Supreme Court in Sentry Select Ins. Co., Plaintiff, v. Maybank Law Firm, LLC, & Roy P. Maybank, Defendants., No. 2016-001351, 2019 WL 1119977, at *2 (S.C. Mar. 6, 2019). Both Fabian and Select Sentry turn on the issue of whether the parties in question (a frustrated devisee and an insurance company) are the expected

third party beneficiaries of the attorney-client relationship. In Fabian, the Supreme Court explained the determination of whether an attorney may be liable in tort to a plaintiff not in privity "is a matter of policy and involves the balancing of" the following factors: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether the recognition of liability would impose an undue burden on the profession. Fabian 410 S.C. at 484-485.

The Fabian factors are clearly applicable here. The relationship between the Association and the Appellants is unquestionably contractual. Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). The existence of the attorney-client relationship between the Association and the Appellants was certainly meant to directly benefit Appellants as shareholders of the Association. Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct.App.2004). The direct benefit to Appellants is a well-run Association which competently enforces the "governing documents," keeps property values high, protects their investment, etc. Amberfield Homeowners Ass'n, Inc. v. Young, 813 S.E.2d 618, 623–24 fn. 15 (Ga. Ct. App. 2018); Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n, 205 S.W.3d 46, 62 (Tex. App. 2006). Respondent's advice to the Association in regards to the Owners' units and belongings—not just the Association's common elements—was intended to benefit the Owners as well.

Like the insurance company in Sentry Select, the Association's owners have a stake in the outcome of any litigation involving the Association. Any losses suffered by the Association is a

shared common expense for all the owners pursuant to Article 6.1 of the Association's Master Deed. Rule 1.13 of the South Carolina Rules of Professional Conduct recognizes that an attorney for an organization—like the HOA—also has duties to the organization's constituents like the shareholder Appellants. Appellants have also alleged that the Association has suffered damages separate and apart—to the extent that is possible under the Master Deed—from the damages suffered by the Owners. (Am. Compl. ¶ 109.) The members are responsible for the sharing of all expenses of running the Association. S.C. Code § 27-31-190. This would also involve the sharing of any losses suffered as well.

Appellants are not, contrary to Respondent's inevitable "parade of horribles" argument, advocating for a broad finding of a general duty owed by corporate counsel to its shareholders. The facts in this particular action do not necessitate a sweeping or broad ruling. The corporation involved is a non-profit homeowners association. The Association does not deal or sell in securities available to the general public. Instead, the "shares" are residential real estate. Queen's Grant, supra. Appellants' counsel is not arguing that there is a general duty owed by a corporation's counsel to its shareholders. The facts presented in this action, however, show that a corporation's attorney can create duties to shareholders. And that attorney cannot hide behind privity if he or she acts negligently and breaches the duties it has assumed either directly or indirectly.

C. Attorney-client privilege does not belong to Respondent.

Likewise, Respondent's assertion it is unable to defend itself because of the "attorney client privilege" is specious. The attorney-client privilege belongs to the client and not the attorney, and may be waived only by the client. Wilson v. Preston, 378 S.C. 348, 359, 662 S.E.2d 580, 585 (2008). Appellants have also alleged fraud, and the attorney-client privilege does not extend to

fraud. United States v. Under Seal, 102 F.3d 748, 750–51 (4th Cir.1996); In re Grand Jury Subpoena, 884 F.2d 124, 127 (4th Cir.1989).

D. Expert opinion complies with S.C. Code Ann. § 15-36-100

The affidavit of Thomas Pendarvis, Plaintiffs' expert, complies with S.C. Code Ann. § 15-36-100. Mr. Pendarvis sets out his professional qualifications in paragraph 10 of his affidavit which clearly satisfies the requirement under S.C. Code Ann. § 15-36-100(A)(1) and (2). His curriculum vitae and the South Carolina Bar Member Directory website show that Mr. Pendarvis has practiced law for three of the last five years preceding the opinion. Mr. Pendarvis expresses his opinion as to the various breaches of the standard of care in paragraph seven of his affidavit.

However, the trial court rejected Mr. Pendarvis' affidavit on the grounds that the affidavit—not the Amended Complaint—did not allege that the Association suffered damages. This finding is entirely specious because S.C. Code Ann. § 15-36-100(B) the affidavit does not contain an allegation of separate or specific damages. Instead, it merely requires the affidavit "contain which must specify 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 Ann. § 15-36-100(B). The statute itself is unambiguous. Grier v. AMISUB of S.C., Inc., 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012) The affidavit of Mr. Pendarvis sets out 13 such negligent acts or omissions. (Amended Affidavit of Thomas A. Pendarvis, ¶ 5). The affidavit also sets out the 19 separate documents and evidence Mr. Pendarvis relied upon to formulate his opinion. (Amended Affidavit of Thomas A. Pendarvis, ¶ 12.)

Additionally, Respondent's motion to dismiss failed to state "with specificity" how Mr. Pendarvis' affidavit is defective pursuant to S.C. Code Ann. § 15-36-100(E). Respondent vaguely

alleged Mr. Perdarvis' "affidavit filed to support the Amended Complaint under S.C. Code 15-26-100[sic] is deficient and fails to satisfy the statutory requirements." This clearly does not meet the "with specificity" requirement set out in the statute. S.C. Code Ann. § 15-36-100(E) allows Respondent to file a corrected affidavit if a motion alleges a defect "with specificity." Appellants have not been given an opportunity to file a corrected affidavit to cure the deficiencies stated for the first time with specificity at the hearing. (Trans. Motion Dismiss Hearing.)

III. APPELLANTS HAVE PROPERLY ALLEGED FRAUD

Appellants have also adequately and specifically alleged fraud. A cause of action for fraud requires: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of the falsity of the representation or reckless disregard of its truth or falsity; (5) the intent that the representation be acted on; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely on the representation; and (9) the hearer's consequent and proximate injury. Schnellmann v. Roettger, 373 S.C. 379, 645 S.E.2d 239 (2007). The Amended Complaint extensively alleged the various actions taken by Respondent which constitute fraud. Paragraphs 37, 40, 42, 49-54 allege actions taken by Respondent towards the Association and its members. The following paragraphs make even more specific allegations of fraudulent conduct:

> 64. Delta and/or Delta's employees were allowed by Gold Crown and/or MTB to sort through Owners' belongings to take what they wanted instead of returning the items to the Owners. The items unwanted by Delta and/or Delta's employees were then disposed of by Delta without the permission of Owners.
>
> 65. Gold Crown and/or MTB concealed from the Owners the true condition of Owners' belongings.

66. Neither Gold Crown nor MTB performed testing to determine whether Owners' belongings were contaminated despite numerous representations by Gold Crown and/or Respondent that the Owners' belongings were unsafe due to contamination.

Paragraphs 127-135 of the Amended Complaint specifically alleges the elements of fraud. Appellants allege the Respondent made the following representations:

a. regarding the necessity of the removal of Owners' personal belongings;
b. the method of testing and/or storage of Owners' personal belongings;
c. the protection of Owners' personal belongings from environmental damage and/or theft; and/or
d. the necessity of disposal of alleged contamination of Owners' personal belongings.

Appellants allege Respondent knew the representations it had made were materially false. (Am. Compl. ¶ 128) Appellants allege Respondent knew or should have known these representations were false. (Am. Compl. ¶ 129) Appellants allege Respondent knew or had a reckless disregard for the truth or falsity of their representations. (Am. Compl. ¶ 130) Appellants allege Respondent intended Appellants rely upon Respondent's representations. (Am. Compl. ¶ 131) Appellants allege that they were ignorant of the falsity of the representations made by Respondent. (Am. Compl. ¶ 132) Appellants allege they were forced to rely on Respondent's representations. (Am. Compl. ¶ 133) Appellants also allege they suffered damages as a result. (Am. Compl. ¶ 134.)

Respondent will—incorrectly—argue that the signature of the communication on behalf of the Board alters this analysis. Appellants have specifically alleged that these statements were false, and that Respondent knew they were false. Examples of these allegations include paragraphs 53, 128, and 129 of the Amended Complaint. (Am. Complaint ¶¶ 53, 128, 129.) The existence and scope of an agency relationship are questions of fact. Holmes v. McKay, 334 S.C. 433, 439, 513

S.E.2d 851, 854 (Ct.App.1999). The extent of an agent's authority is also a question of fact. Hiott v. Guaranty Nat'l Ins. Co., 329 S.C. 522, 530, 496 S.E.2d 417, 421 (Ct.App.1997). It is also a question of fact as to whether an agent exceeded the scope of his or her authority. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 86, 124 S.E.2d 602, 608 (1962). This is also a derivative action wherein these Appellants are suing on behalf of the Association. The principal can always sue an agent for torts or breaches done by the agent in the principal's name. S.C. Ins. Co. v. James C. Greene & Co., 290 S.C. 171, 187, 348 S.E.2d 617, 626 (Ct. App. 1986). A factual dispute has been pled and exists as to whether these communications on behalf of the Board were truthful and authorized. It is also legally irrelevant that the letters were signed "on behalf of the board." "An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity." Thomas v. Delta Enterprises, Inc., 302 S.C. 351, 352, 396 S.E.2d 122, 123 (Ct. App. 1990); Lawlor v. Scheper, 232 S.C. 94, 101 S.E.2d 269, 271 (1957); Gilbert v. Mid-South Machinery Co., Inc., 267 S.C. 211, 227 S.E.2d 189 (1976).

Under the 12(b)(6) standard, this Court is required to presume the truth of Appellants' allegations. The trial court did the opposite. It adopted Respondent's position that all of its actions were done within the scope of its representation of the Association. (Tr. Ct. Order, pg. 8, 12) This is contrary to the factual assertion made in the Amended Complaint that Respondent had no authority to deal with Lloyds on behalf of the Owners, but in fact did so without authority. (Am. Compl, ¶¶ 30-35, 55-58) Thus, the trial court erred when it determined a question of fact as a matter of law on a motion to dismiss under Rule 12(b)(6).

IV. APPELLANTS HAVE PROPERLY ALLEGED CONVERSION.

Appellants have properly alleged a cause of action for conversion. Moreover, the Supreme

Court has ruled that an attorney can be sued for conversion and affirmative misrepresentations done on behalf of a client. Stiles v. Onorato, 318 S.C. 297, 299–300, 457 S.E.2d 601, 602 (1995).

Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. Moore v. Weinberg, 383 S.C. 583, 589, 681 S.E.2d 875, 878 (2009); SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). "Conversion may arise by some illegal use or misuse, or by illegal detention of another's personal property." Jenkins v. Few, 391 S.C. 209, 218, 705 S.E.2d 457, 461 (Ct.App.2010); Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct.App.2003). A plaintiff may also prevail upon a claim for conversion by showing the unauthorized detention of the property, after a demand. Mackela v. Bentley, 365 S.C. 44, 48, 614 S.E.2d 648, 650 (Ct.App. 2005).

Appellants' complaint alleges in detail how Respondent advised the Association to remove the Appellants' belongings without authorization. (Am. Compl. ¶¶ 8, 9,44, 46, 47, 48, 54, 56, 58, 64, 65, 66, 67, 68, 69, 70, 136, 137, 138, 139, 140, 141, 152, 143, 144, 145, 146, 147, 148,149). Appellants' complaint also alleges how the Appellants' belongings were altered or destroyed. (Am. Compl. ¶¶ 76, 134, 146, Ex. 8) These detailed allegations should cause this Court to reverse the trial court.

V. APPELLANTS HAVE PROPERLY ALLEGED CAUSES OF ACTION RELATED TO FIDUCIARY DUTY.

The trial court clearly erred when it dismissed Appellants' causes of action for breach of fiduciary duty and aiding & abetting breach of fiduciary duty were asserted solely as derivative actions.

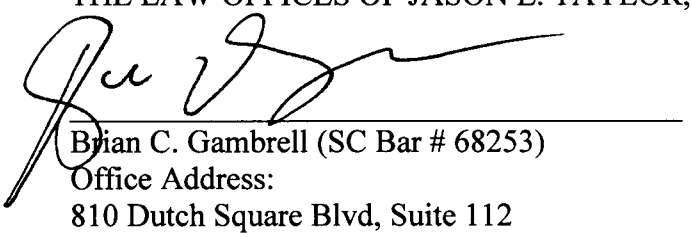
To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. See generally Moore v. Moore, 360 S.C. 241, 599 S.E.2d 467 (Ct.App.2004) The elements for the cause of action of aiding and abetting a breach of fiduciary duty are (1) a breach of a fiduciary duty owed to the plaintiff, (2) the defendant's knowing participation in the breach, and (3) damages." Vortex Sports & Entm't, Inc. v. Ware, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (Ct. App. 2008). "The gravamen of the claim is the defendant's knowing participation in the fiduciary's breach." Future Group, II v. Nationsbank, 324 S.C. 89, 99, 478 S.E.2d 45, 50 (1996).

All of the facts necessary to support these elements have been pled in the Amended Complaint. (Am. Compl. ¶¶ 112-115, 120-125.) "Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship." RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 336, 732 S.E.2d 166, 173 (2012); Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011). The trial court order offers no explanation as to why it dismissed these causes of action that been pled purely derivatively.

CONCLUSION

For the reasons set forth herein, this Court should REVERSE the decision of the trial court and remand for further proceedings.

THE LAW OFFICES OF JASON E. TAYLOR, P.C.



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PROOF OF SERVICE

I, Brian C. Gambrell, the attorney for Appellant, do hereby certify that I served First class Mail the Appellants' initial brief on Respondents' counsel on April 26, 2019.

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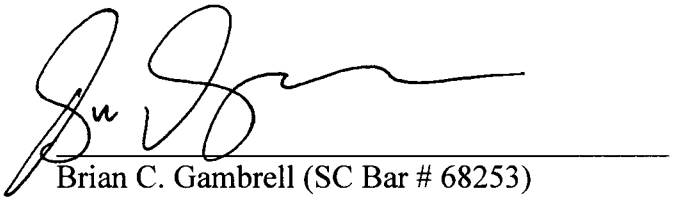

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