THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY COURT OF COMMON PLEAS

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-000413

Karl & Terri Hager, Robert Singleton & Teresa 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.. Appellants,

v.

McCabe, Trotter & Beverly, PC and Gold Crown Management Company, Inc.,

Of which McCabe, Trotter & Beverly, PC is .... The Respondent.

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RESPONDENT'S FINAL BRIEF

ROGERS, TOWNSEND & THOMAS, P.C.
Robert P. Wood
1221 Main St., 14th Floor
P.O. Box 100200
Columbia, SC 29202-3200
803-771-7900
Lawyer for Respondent

COUNTRYMAN LAW FIRM
Andrew W. Countryman
State Bar No.: 72700
321 Wingo Way, Ste. 102
Mt. Pleasant, SC 29464
843-253-4477
Lawyer for Respondent

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STATEMENT OF ISSUE ON APPEAL

DID JUDGE CULBERTSON ERR IN DISMISSING APPELLANTS' CLAIMS AGAINST MTB'S WITH PREJUDICE?

STATEMENT OF THE CASE

I. Brief Summary of Facts

Appellants are owners of certain units in a high-rise condominium complex in Myrtle Beach called the Caravelle Resort. The Caravelle Resort has an owners' association, Caravelle Resort Owners Association, Inc. (the "Association") and is subject to certain recorded covenants and restrictions. Respondent McCabe, Trotter & Beverly, P.C. ("MTB") served as counsel for the Association, and Gold Crown Management Company, Inc. ("Gold Crown") was the property manager for the Association at all times at issue in this case. This claim arises out of the handling of damage Hurricane Matthew caused to the Caravelle Resort in Myrtle Beach in 2016.

MTB is a law firm based in Columbia, South Carolina and served as counsel for the Association. Hurricane Matthew struck the east coast in October 2016, causing significant damage to the Myrtle Beach area and the Caravelle Resort in particular. The storm blew out a number of windows and exposed various units at the Caravelle to the elements. Many units suffered water damage, and the storm caused significant harm to personal property inside the units.

Shortly after the storm, the Association hired a company called Delta Restoration, LLC ("Delta") to perform restoration services at the damaged Caravelle Resort. Of particular concern in this lawsuit is Delta's decision to remove owners' personal property from damaged units and store it in the Resort's parking garage across the street. Appellants allege, *inter alia*, that the contents were not properly protected while in storage, resulting in loss and damage to their personal property.

Appellants also say the association wrongfully assessed certain charges associated with the restoration process.

After hiring Delta, the Association contacted MTB for general advice across a range of topics, including insurance claim(s), owner complaints and contract negotiations with service providers. The Association then implemented assessments to help finance the restoration effort. This included a plan to replace certain "soft goods" that were damaged in the storm. Appellants take issue with the handling of the restoration process.

Appellants sued MTB and Gold Crown in this case primarily seeking to recover for their personal property that was allegedly damaged, lost or stolen during the restoration efforts. They blame MTB for the Association's decision to hire Delta and other actions the Association and Gold Crown, as agent for the Association, took during the process. Appellants also filed a separate lawsuit against Delta and Lloyd's of London which is currently pending in the Horry County Court of Common Pleas (C/A No. 2018-CP-26-2871).

II. Procedural Posture

Appellants/Plaintiffs filed the Complaint on May 14, 2018, in the Horry County Court of Common Pleas. (R. pp. 27 – 60) According to the Complaint, they own units at the Caravelle Resort. Appellants sued on behalf of themselves and derivatively as shareholders of the Association. (Id.) The Complaint also made class action allegation and named MTB and Gold Crown as Defendants. As to MTB, the Complaint alleged the following causes of action: (1) legal malpractice (derivatively and personally); (2) breach of fiduciary duty; (3) fraud (derivatively and personally); and (4) conversion (derivatively and personally).

MTB filed an Answer and Motion to Dismiss in response. (R. 61 – 85) The Answer denied liability and raised affirmative defenses. The Motion alleged the Complaint failed under SCRCP 12(b)(6) for various reasons. MTB filed a Supplement to its Motion to Dismiss further explaining the basis of the request to dismiss the Complaint. (R. pp. 370 – 373) On the eve of the scheduled hearing for the Motion to Dismiss, Appellants filed an Amended Complaint. (R. pp. 86 – 112) Since the new pleading made the initial Complaint moot, MTB withdrew the Motion to Dismiss. (R. pp. 24 – 25)

The Amended Complaint contained causes of action against MTB for: (1) professional negligence (derivatively and personally); (2) breach of fiduciary duty (derivatively); (3) aiding and abetting breach of fiduciary duty (derivatively); (4) fraud (individually); and (5) conversion (individually). Like the Complaint, the Amended Complaint contained class action allegations. (R. pp. 89 – 94) MTB timely filed an Answer and Motion to Dismiss in response to the Amended Complaint. (R. pp. 498 – 508) The Motion alleged the Amended Complaint failed under SCRCP 12(b)(6) because:

(1) It never alleged MTB represented the individual owners. Thus, they have no basis to bring a claim for legal malpractice against MTB. The allegation that the "owners could reasonably believe" MTB represented them is insufficient to state the element of a lawyer-client relationship necessary to support a legal malpractice claim.

(2) Appellants' claim as a derivative class of members failed because the Amended Complaint only alleged damages as to the individual owners, not the Association. To bring a derivative claim on behalf of a corporation, one must seek recovery of damages the corporation incurred.

(3) Appellants' derivative cause of action for legal malpractice fails because it is akin to an assignment of a legal malpractice claim, which South Carolina law precludes.

(4) Appellants' expert Affidavit filed with the Amended Complaint failed to comply with the requirements of S.C. Code § 15-36-100.

(5) The causes of action for fraud and conversion are inappropriate attacks on MTB that are not supported by the facts alleged.

(6) The other causes of action alleged fail as pled. (R. pp. 366 – 369)

The Motion to Dismiss asked the Court to dismiss the Amended Complaint with prejudice. (Id.)

Judge Culbertson heard the Motion to Dismiss the Amended Complaint on July 31, 2018. (*See* R. p. 429) On August 1, 2018, he entered a Form Order granting the Motion to Dismiss the Amended Complaint. (R. p. 1) On August 9, 2018, Appellants filed a Motion to Reconsider asking the Court to reconsider its decision, or in the alternative, set forth a basis for the dismissal.[1] (R. pp. 384 – 385) Judge Culbertson heard that Motion on January 22, 2019. (*See* R. p. 470) The judge indicated from the bench he was denying the Motion to Reconsider and dismissing the Amended Complaint as to MTB with prejudice. (R. p. 494) Appellants' counsel did not move or request leave to amend the Complaint a second time at the hearing. (*See* R. pp. 470 – 495)

The Court entered a Form Order instructing counsel for MTB to submit a proposed formal Order. (Form 4, Jan. 22, 2019[2]) Counsel then submitted proposed Order(s) on the Motion to Dismiss and Motion to Reconsider. (R. pp. 427 – 428) Judge Culbertson entered a formal Order denying the Motion to Reconsider and granting the Motion to Dismiss (with prejudice) on March 6, 2019. (R. pp. 2 – 21). Plaintiffs filed a Notice of Appeal on March 12, 2019. This Court should affirm Judge Culbertson's Order and deny the appeal.

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[1] The Motion to Reconsider did not ask for leave to amend the Complaint.

[2] Designated by Respondent to be included in Record on Appeal, but not included.

STANDARD OF REVIEW

A complaint must contain a "short and plain statement of facts showing that the pleader is entitled to relief." Rule 8, SCRCP. Rule 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. 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 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. Id.). 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, 357 S.E.2d 8 (1987). The appellate court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. Flateau v. Harrelson, *supra*.

Further, when a trial court finds a complaint fails "to state facts sufficient to constitute a cause of action" under SCRCP 12(b)(6), the court should give the plaintiff an opportunity to amend the complaint before filing the final order of dismissal. SkyDive Myrtle Beach, Inc. v. Horry County, *et al.*, Appellate Case. No. 2017-001382 (S.C. 2019) *referencing* Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962). If the trial court rules there has been a failure to state facts sufficient to constitute

a cause of action, then the question may become whether plaintiff wishes to challenge the ruling by filing a Rule 59(e) motion. SkyDive Myrtle Beach, Inc. v. Horry County, *et al.*, *supra*.

Finally, "[A]n issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review." West v. Newberry Elec. Coop., 357 S.C. 537, 543, 593 S.E.2d 500 (Ct. App. 2004) (stating that where the trial court did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e) motion to alter or amend the judgment, the issue was not preserved).

ARGUMENT

I. Bottom Line

Judge Culbertson correctly granted the Motion to Dismiss with prejudice. This case is about issues between the individual owners of units at Caravelle and the Association. Plaintiffs' attempt to turn this into a claim against MTB, the law firm that represented the Association, fails as pled. Appellants cannot maintain claims based in legal malpractice against MTB because the firm did not represent them. There was no client-lawyer relationship between them, nor do the Appellants allege the existence of such a relationship. Further, they cannot succeed on claims based on a derivative theory (on behalf of the Association) because the damages on which their claim is based are to them individually, not the Association. Perhaps the Appellants have a claim against the Association or Gold Crown, but they do not have one against MTB.

Appellants' fraud claim fails as pled because the Association and Gold Crown made the statements at issue, not MTB. Without a factual allegation that MTB made a false representation to Plaintiffs, there can be no basis for a fraud cause of action. Moreover, there is no dispute that the allegedly converted personal property at issue was lost or converted at the hands of Delta, not MTB.

There is no allegation MTB ever exercised dominion or control over the converted items. Thus, the Amended Complaint fails to contain facts sufficient to support a conversion cause of action.

Finally, Judge Culbertson correctly dismissed the Amended Complaint with prejudice. Appellants had the opportunity to address alleged deficiencies in their initial pleading and attempted to do so in the Amended Complaint. However, they failed, as the pleading was deficient in effectively the same manners as the original Complaint. Appellants filed a Rule 59(e) Motion to Reconsider and did not ask for leave to amend the Complaint again in the Motion or at the hearing for it. This Court should affirm the lower court's ruling.

II. Relevant Facts

The Appellants own units in the Caravelle Resort condominium complex in Myrtle Beach. (R. p. 88) The complex is subject to certain recorded governing documents, including a Master Deed and Bylaws, both of which are referenced in and part of the Amended Complaint. (R. p. 30 and pp. 132 – 283) Under SCRCP 10(c), the governing documents (and other exhibits to the Amended Complaint) are part of the pleading and therefore appropriate for consideration with respect to the Motion to Dismiss.

A. Master Deed

The Master Deed has a number of provisions pertinent to the allegations in the Amended Complaint, including the following:

> Article 1: establishes the existence of the Association and provides that all units in the complex are subject to the Master Deed. (R. pp. 157 – 161)
>
> Sect. 6.2, Assessments: establishes regular assessments paid by each unit owner, as well as the right of the Board to implement special assessments and discusses the collection process in the event of the failure to pay. (R. pp. 181 – 185)

Sect. 6.4, Right to Terminate Service: gives the Association the right to terminate utility services to delinquent owners' units. (R. p. 183)

7.3, Incorporation: establishes the Association and makes all owners members of it. (R. p. 186 – 187)

Section 7.5, Responsibility of Association: gives the Association the responsibility of maintaining and keeping the common elements of the regime in good repair. (R. p. 187)

Sect. 9.6, Right of Access: gives the Association the right to enter units on reasonable notice, as well as the right of immediate access to make emergency repairs within the unit to prevent damage to the common elements or another unit. This power may be exercised by the Board, its agents and employees or property manager. (R. p. 193)

Sect. 11.2, Insurance by Property Owners: each owner must obtain an HO-6 policy covering personal property, fixtures, decorations, and furnishings within each unit.[3] (R. p. 199)

Sect. 11.1 provides that the Association's Board of Director's is the "Insurance Trustee" appointed as authorized agent for all of the owners of all units for the purpose of negotiating and agreeing to a settlement as to the value and extent of any loss which may be covered under any casualty insurance policy. The Section gives the Board full right and authority to execute in favor of any insurer a release arising out of any covered occurrence covered. (R. p. 198 – 199)

Sect. 12.2, Insurance Proceeds: provides that in the event of a casualty loss, all insurance proceeds indemnifying the loss shall be paid to the Board as Insurance Trustee. (R. pp. 201 – 202)

Sect. 7 establishes the existence of a Board of Directors and defines the Board's powers and responsibilities. The Board is specifically authorized to retain a managing agent. (R. pp. 186 – 187)

B. Bylaws

The Bylaws establish a Board of Directors of the Association and give it the power and ability to function and specifically provide the authority and power to retain and use a managing agent and

[3]Lloyd's of London issued policies to comply with this requirement, and Exhibit 3 to the Amended Complaint is a representative example of these policies. It provides for $25,000 limits. According to the Amended Complaint, Lloyd's issued policies like this one for each of the 346 units/unit owners. (R. pp. 94 and 285 – 330)

hire other professionals (including lawyers) necessary to carry out the Board's functions and enforce the covenants in the Master Deed. (R. pp. 137 – 141 and 143) The Bylaws also give the Board the power and authority to impose special assessments and collect money owed to the Association from the owners. (R. pp. 143 – 146) The Bylaws specifically provide that delinquent owners are responsible for the reasonable costs of collection including attorney's fees. (R. p. 144) The Bylaws contain a specific provision regarding expenses caused by certain losses, including storms:

> **Section 6.4 Expenses. The expenses of all maintenance, repair, and replacement provided by the Manager or the Board of Directors, including losses by storm, fire, or other casualty insured by the Association, shall be Common Expenses, except that when such expenses are not fully reimbursed by insurance proceeds and when they are necessitated by (1) the failure of a Property Owner to perform the maintenance required by these Bylaws or by any lawful Regulation or (2) the willful act, neglect, or abuse of a Property Owner, they shall be charged to such Property Owner as an Individual Assessment.**

(R. p. 1146)

MTB represented the Association, not any individual owner. (R. p. 88) However, the Amended Complaint alleges MTB provided legal advice to the owners "such that [O]wners *could reasonably believe* that MTB was representing them as well" (emphasis added). (Id.) The Amended Complaint does not allege MTB actually represented the owners or even that the owners believed MTB represented them. Gold Crown served as the property manager for the Association pursuant to the Caravelle governing documents. (R. p. 89)

C. Hurricane Matthew

Appellants take issue with action the Association took after the Caravelle suffered severe damage in Hurricane Matthew in October 2016. (R. p. 95) They allege the Board decided, without appropriate authority or permission, to remove owners' personal property from their units and store them in the parking garage of the Association. (Id.) The Board then contracted with Delta to handle

the process of removing property from the units. (Id.) Appellants maintain the Board then wrongfully obligated the owners to a contract with Delta to store their belongings in the Association's parking garage without the owners' consent or authority. (Id.)

According to the Appellants, MTB, while acting as lawyers for the Association, advised the Board to take such action and prevented owners from inspecting their belongings or making their own arrangements for the protection of the belongings. (Id.) Appellants also allege they were not allowed to inspect or remove their belongings or make their own arrangements to store them. (R. p. 96) Further, the Appellants allege owners were not given sufficient time to inspect their belongings to determine what could be salvaged once Delta determined certain belongings were unsalvageable, and that Delta then disposed of certain items without the owners' permission. Specifically, Appellants say:

> **68. Upon information and belief, Delta returned some items to certain Owners' units. 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.**

(R. p. 100)

Appellants also maintain the Association wrongfully forced them to use proceeds from the HO-6 policy coverage to replace their lost or stolen belongings. (Id.) The gravamen of Appellants' complaint is the loss of their personal property. The Amended Complaint repeatedly says these issues were the fault of "Gold Crown and/or MTB." It does not specifically state how or why.

D. Content Manipulation Fee and Soft Goods Package

The Association was the insurance trustee for the owners under the governing documents (R. pp. 198 – 199) Nonetheless, Lloyd's began issuing checks to individual owners (instead of the

Association) on the HO-6 policy in late January 2017. The money included allotments for loss of use, contents manipulation and soft goods.[4] (R. pp. 332 – 334) However, as the insurance trustee, the Association had already organized a soft goods replacement package designed to maintain uniformity and save money during the recovery and replacement process. (Id.) Lloyd's payment to individual owners thus put the Association in a pickle. (Id.) The Association, via the letter of April 20, 2017, notified the owners they had two choices with respect to the soft goods package: (1) give the Association the money received from Lloyd's on the HO-6 policy and allow the Association to handle the soft goods replacement or (2) keep the Lloyd's money and pay for their own soft goods replacement. (Id.).

In that same letter, the Association indicated owners who had received checks from Lloyd's with allotments for content manipulation were responsible for returning that money ($2,000) to the Association. (Id.) The Association owed Delta that money. The letter was on Association letterhead and included a return address of "C/o Gold Crown Management" at Gold Crown's mailing address. (Id.) The letter indicated the Association had consulted with its counsel in coming to the solutions detailed in the letter:

> **The Board of Directors, along with the Association's legal counsel, has been evaluating the unfavorable position the HO6 carrier has put the membership in and has worked diligently to present the membership with an option to still ensure the delivery of the soft goods package to each unit.**

(Id.)

[4] Soft goods include mattresses, drapery panels, wooden headboards, murphy beds, sofas, arm chairs, decorative pillows and artwork. (R. pp. 332 – 334)

On April 28, 2017, MTB, *as counsel for the Association*, wrote counsel for Lloyd's regarding problems with the storage situation:

> **Dear Ms. Byrd,**
>
> **As you know, my firm represents the Caravelle Resort Owners' Association, Inc. ("the Association") in connection with the damage sustained to the resort as a result of Hurricane Matthew. As you may know, subsequent to the storm, the possessions of Certain Underwriters**

(R. p. 336) The process was taking longer than anticipated, and there were significant concerns about the status of the goods being stored in the parking garage in the approaching summer months. (*See* Id.)

Again writing as counsel for the Association, MTB next sent a letter to all unit owners on June 27, 2017, regarding issues with the replacement and repair process. (R. p. 338 – 341) The letter detailed what the Association had done to date, planned to do moving forward, and what it required from owners. (Id.) Nowhere in the letter did MTB act or purport to act as counsel for the owners. To the contrary, the letter made it clear MTB could potentially be adverse to them, as counsel for the Association in the event the owners failed to pay the Association certain amounts due. (Id.) There is simply no way any reasonable person could read the letter and think MTB was acting in any capacity other than as the Association's lawyers.

The Amended Complaint also includes an August 2, 2017, letter from MTB to counsel for Lloyd's about the issues. (R. pp. 343 – 344) Like the prior letter, this one also indicated "this firm represents the Caravelle Resort Owners' Association, Inc." (Id.) In the letter, MTB discussed the need for Lloyd's to take measures to protect the owners' goods being stored in the parking garage.

On August 9, 2017, MTB, as counsel for the Association, sent a letter to owners who had not provided the Association authority to dispose of their soft goods being stored in the parking

garage. (R. pp. 346 – 349) MTB wrote this as counsel for the Association as well. The letter discussed the Association's plan and position with respect to contaminated soft goods that remained in the parking garage. It closed with the following statement:

> I hope this letter is sufficient to inform you all of the Association's position relative to the soft goods replacement, moving and storage; however, please do not hesitate to contact me should you have any questions regarding same.

(Id.)

The Association wrote the owners to update them on December 13, 2017. (R. pp. 351 – 352) The letter, on Association letterhead, discussed the upcoming annual meeting and addressed some problems in the restoration process. (Id.) Here are some highlights:

(a) Fire and water intrusion issues caused delay;

(b) Lack of direction from the HO-6 adjusters regarding return of soft goods and hard goods to units caused delay;

(c) Items stored in the parking garage over the summer months (on decisions by the HO-6 carrier) ruined various items kept in storage;

(d) The Association must move forward with clearing remaining items from the garage so the garage can be used for cars;

(e) The Association will remove and dispose of all items being stored in the garage owners do not retrieve. "Importantly, if any owner does not respond by the deadline above [January 5, 2018], Delta will remove and dispose of the items associated with the Owners' [sic] unit."

(f) Members should seek recovery for the items under their HO-6 policies or come get their items;

(g) Items deemed contaminated by experts the Association hired not allowed to be returned to units. (Id.)

The letter was signed, "[T]he Board of Directors of the Caravelle Resort Owners' Association." (Id.)

On January 25, 2018, the Association again wrote the owners, this time about problems with moving contaminated items from the parking garage. (R. p. 354) The letter said the Association would begin disposing of certain items stored there unless the owners instructed Gold Crown they intended to personally pick up their items by February 2, 2018. (Id.) The Association would remove all items remaining in the garage by March 1, 2018 (at the owner's expense). (Id.)

Appellants allege "Gold Crown and/or MTB" improperly advised the Association to charge owners a "content manipulation fee" to cover costs the Association incurred related to the storage of owners' property in the parking garage. (R. pp. 100 – 101) Appellants next complain "Gold Crown and/or MTB" improperly pursued payment of these amounts from owners. (R. p. 101)

Further, Appellants say "Gold Crown and/or MTB" charged and/or advised the HOA to charge owners for a package of goods called "soft goods" to replace certain items damaged in the hurricane. (Id.) According to Appellants, "Gold Crown and/or MTB" misrepresented the amount of damage to the owners' soft goods to justify the sale of the "soft goods" package to the owners. (Id.) Appellants go on to allege "Gold Crown and/or MTB" wrongfully asserted claims against owners to strongarm them into paying the content manipulation fee and soft goods package. (Id.) They also say "Gold Crown and/or MTB" threatened to terminate the utilities of the owners who refused to pay the content manipulation fee or soft goods package. (R. pp. 101 – 102)

Appellants also maintain "Gold Crown and/or MTB" paid for services during the restoration period that were unused or unnecessary. (R. p. 102) These include "the Association paid a $50,000 fee" for HO-6 administration, $52,030.04 for cable television and $17,149.86 for internet service. (Id.) The Amended Complaint goes on to say "Gold Crown and/or MTB" received over $500,000

from the owners for content manipulation and over $1 million for soft goods. (Id.) Appellants never allege MTB acted in any capacity other than as counsel for the Association.

This process aggravated some owners, and at least one voiced frustration online. (Id., para. 86) MTB wrote an owner an "cease and desist" letter asking the owner to stop making unfounded criminal accusations regarding Gold Crown online. (R. pp. 102 – 103 and 356 – 357) Appellants allege they, as individual owners of units at the Caravelle, have suffered damages because of the loss of their personal property and money they wrongfully were forced to pay.

The Amended Complaint also says "Gold Crown and/or MTB's actions have caused the Association to be exposed to liability to the Owners." (R. p. 103) However, the owners have not sued the Association, nor does the Amended Complaint specify for what the Association are allegedly liable to the owners. (*See* R. pp. 87 - 112) The pleading only says "the damages owned [sic] by the Association to the owners is a 'common expense' essentially causing the owners to owe money to themselves." (R. p. 103) The Amended Complaint does not say what these alleged damages might be or specify any actual claim causing the owners to owe money to themselves. The Amended Complaint also fails to state how the owners allegedly owing money to themselves is a damage to the owners.

III. Application of Law

A. Claims Against MTB Personally.

1. Legal Malpractice

a. No attorney-client relationship between the owners and MTB.

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 never says MTB represented any owner or that any owner believed MTB represented him/her. To the contrary, the Amended Complaint plainly says MTB represented the Association. Further, all the actions MTB took about which Appellants complain, the firm indisputably took as counsel for the Association. This was a basis for the Motion to Dismiss the initial Complaint. Even on the second try, the Amended Complaint fails to provide any factual basis to support the first required element required for the owners to bring a legal malpractice action against MTB – the existence of an attorney-client relationship.

The Amended Complaint does not allege MTB represented the owners. Instead, it acknowledges that "MTB had an attorney-client relationship with the Association at all times relevant." (R. p. 103) It also says MTB "represented to third parties that it had an attorney-client relationship with the owners" (Id.) It never says MTB represented the owners or even that they thought the firm did.

Instead, Appellants allege the owners *could have* reasonably believed MTB represented them. (*See* R. p. 99) Appellants cite no authority providing that an actual or potential belief that a lawyer-client relationship existed creates a basis for a legal malpractice claim. A mere potential (but not actual) belief is insufficient 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.

Similarly, lawyers in South Carolina 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). This policy encourages lawyers' zealous representation of clients without fear of lawsuits by disgruntled opposing parties. Gaar v. NMB Realty Co., 287 S.C. 525 (Ct. App. 1986). The only limited exceptions to these generally recognized principles are: (1) the context of a beneficiary of a will; *see* 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); and (2) the insurance defense context; *see* Sentry Select v. Maybank, Opinion No. 27806 (S.C. 2018). Neither is the case here. MTB is therefore immune to the individual owners for actions taken in the course and scope of its representation of the Association.

Appellants argue that the existence of an attorney-client relationship is an issue of fact precluding dismissal at this stage. That might be true if they had actually alleged the existence of an attorney-client relationship between the owners and MTB. The Amended Complaint does not do that. Instead, it alleges that: (a) MTB represented the Association and (b) owners could have believed MTB represented them. The pleading fails to allege any owner actually believed MTB represented him/her. Thus, under the facts as pled, there is zero basis for a malpractice claim by the owners against MTB, since there was plainly no attorney-client relationship between them.

b. Amended Expert Affidavit fails to state a negligent act or omission of MTB.

S.C. Code § 15-36-100, *se seq*. provides that all actions for malpractice against South Carolina lawyers must be accompanied by an affidavit of an expert witness specifying at least one negligent act or omission of the lawyer defendant 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).

Like the Amended Complaint, Appellants' Amended Expert Affidavit also plainly states that MTB represented the Association, not the owners:

> **3. The McCabe Trotter lawyers represented CARAVELLE RESORT ASSOCIATION, INC. ("Caravelle Resorts"), which is a horizontal property regime charged with the management of property known as "The Caravelle Resort" located 6900 N. Ocean Blvd., Myrtle Beach, South Carolina.**

(R. p. 114) The Affidavit fails to allege the existence of an attorney-client relationship between MTB and the individual owners required under South Carolina law to sustain a cause of action for legal malpractice. (*See* R. pp. 113 – 121)

The Amended Affidavit contains a list of things MTB allegedly did wrong. This advice forms the factual basis of Mr. Pendarvis' opinion that MTB was professionally negligent. All involve MTB "advising the Board" about various things during the restoration process. (R. pp. 114 - 116) In fact, one of the criticisms in the Affidavit is that MTB took positions supporting Gold Crown that were *adverse* to the owners' interests, including threatening lawsuits. (R. p. 115) How can the owners say

in the same breath that MTB represented them while complaining that the firm threatened to take legal action against them on behalf of the Association? They cannot.

The Amended Expert Affidavit fails to state or identify facts showing the existence of an attorney-client relationship between MTB and any individual owner, which is the first and required element to maintaining a cause of action for professional negligence against MTB. Therefore, the Affidavit fails to meet the requirements of S.C. Code § 15-36-100 and is subject to dismissal under § 15-36-100(C)(1).

c. Lawyer for corporation owes no duty of care to shareholders of company.

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. Judge Culbertson therefore correctly held that MTB did not owe a duty of care to individual unit owners for actions taken in its capacity as counsel for the Association. Thus, Appellants' individual claims for legal malpractice against MTB fail as pled because they did not allege facts sufficient to create a duty of care MTB owed to the individual owners, which is required to maintain a cause of action for malpractice. Their claim for legal malpractice against the firm therefore fails, and Judge Culbertson correctly dismissed it.

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2. Fraud

Appellants allege a cause of action against MTB for fraud individually (not derivatively on behalf of the Association). 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. 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 but does not identify or state *facts* sufficient to support such a claim versus MTB. First, "Gold Crown and/or MTB" allegedly made the representations of which Appellants complain. These include paragraphs of the Amended Complaint referenced in their Final Brief (paragraphs 64, 65 and 66). (R. pp. 99 – 100) None of those identifies a single false statement MTB made. The best Appellants can do is collectively refer to "Gold Crown and/or MTB" or action "MTB/Gold Crown" took. This is not sufficient to identify a false statement MTB made such that could support a fraud cause of action.

Appellants are correct that the Amended Complaint recites the elements of fraud. If that were all required under Rule 12(b)(6), a party could simply avoid dismissal by reciting the elements of a

cause of action. Of course, doing so is not all that is required. Instead, the pleading must contain *facts* that, if true, support the recitation of the elements of a cause of action. Reciting the elements of fraud in paragraphs 127 – 135 of the Amended Complaint does not state *facts* sufficient to form a basis for such a claim against MTB. (R. pp. 107 – 108)

Moreover, the Amended Complaint references (and includes by way of exhibits) certain letters from MTB to individual Caravelle owners that appear to be the source of "statements" underlying Appellants' fraud cause of action. 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 Appellants identify as "patently false" is a statement in an April 20, 2017, letter *from the Association* saying it was the insurance trustee for the owners' HO-6 policy. (R. pp. 332 – 334):

> 53. **On April 20, 2017, Gold Crown sent a letter to the Owners wherein Gold Crown represented to the Owners that the Board and/or the Association was the "insurance trustee" for Owners' HO-6 policy. This statement is patently false. This letter incorporated by reference and is attached hereto as Exhibit 4.**

(R. p. 97)

The Amended Complaint says this letter was from Gold Crown. However, while perhaps written by Gold Crown, it was actually from the Association. It was on Association letterhead and purports to be from the Association. Regardless, the letter is plainly not from MTB, nor does the Amended Complaint say it is. On its face, there is no indication MTB was in any way involved with the letter.

The Appellants own pleading even contradicts the assertion that the Association made a false statement by telling them it was the insurance trustee under the governing documents. Section 11.1 of the Master Deed, which is incorporated as part of the Complaint, clearly makes the Association the insurance trustee for the owners in just this situation. Also, the letter discusses decisions the Association made. It says the Board had been evaluating the situation, "along with the Association's legal counsel."

However, the letter does not identify MTB, purport to be from MTB or state anything on behalf of the firm. Nothing in it can be in any way derived to be a statement from MTB. The Amended Complaint fails to specify a material false statement MTB made with knowledge of the falsity or reckless disregard for the truth. Nor does the Amended Complaint specify a material false statement by MTB on which Appellants detrimentally relied. The fraud claim fails for this reason alone.

Additionally, nothing in the Amended Complaint alleges MTB took any action outside the scope of its representation of the Association, 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. As third-parties whom MTB did not represent, South Carolina law bars Appellants from making a claim against MTB for acts taken on behalf of its client in the course and scope of its representation of its client, the Association. *See* Stiles v. Ontario, 318 S.C. 297, 458 S.E.2d 601 (1995) and Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 339 S.E.2d 887 (Ct. App. 1986).

Appellants also say the Amended Complaint alleges MTB took action outside the scope of its representation of the Association because the firm had no authority to deal with Lloyd's on behalf of the owners. (Appellants' Final Brief, p. 20 *citing* Am. Compl., paras. 30 – 35 and 55 – 58) However, paragraphs 30 -35 of the Amended Complaint do not even mention MTB or anything it did or failed

to do. (*See* R. pp. 94 – 95 and 96 – 97) They only contain Appellants' interpretation of the language in the Caravelle governing documents.

Paragraphs 55 – 58 complain about actions Ryan Oates of MTB took as counsel for the Association. (R. pp. 97 – 98) This includes: (1) a letter Mr. Oates sent to a lawyer for Lloyd's regarding the storage of goods in the parking garage; (2) a letter he sent to owners concerning the situation and the HO-6 policy; (3) another letter to Lloyd's lawyer regarding the situation; and (4) a letter to the owners regarding the situation. The letters referenced in these paragraphs are incorporated into the Amended Complaints as exhibits. Nothing in the language of the paragraphs or the letters themselves comes close to making an allegation or stating a fact supporting the position that MTB acted outside the scope of its employment as lawyers for the Association. To the contrary, it is very clear that, despite the owners' displeasure with the actions, everything MTB did of which Appellants complaint, the firm did in the course and scope of representing the Association.

Finally, Appellants confuse the application of agency principles and argue that MTB may somehow be responsible for statements the Association made. The only false statements Appellants identify were statements the Association and/or Gold Crown made. Not one of these statements was purportedly made on behalf of MTB.

Applying agency principles, the Association (principal) could theoretically be liable to owners for actions taken by MTB (Association's agent) on behalf of the Association if that action injured the owners. But that is not what Appellants allege. Instead, the owners try to hold MTB responsible for actions the Association took that these owners do not like. Even if the Association was acting on advice from MTB, it was not acting *on behalf* of the law firm. The Association could not, even theoretically, make MTB liable for actions the Association took. Therefore, the Amended Complaint

fails to state facts sufficient to constitute a cause of action for fraud against MTB, and Judge Culbertson correctly dismissed it.

3. 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).

Appellants base the cause of action for conversion 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* R. p. 109), 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." (R. p. 100)

Appellants allege MTB advised the Association to improperly remove Appellants' belongings, and that this constitutes conversion by MTB. It does not. The Amended Complaint only says that the *Association* improperly removed Appellants' personal property. Even if the Association took such action, and such action was wrongful, that does not provide a basis to claim that *MTB* converted anything.

Similarly, Appellants claim MTB is liable for conversion because others than MTB wrongfully altered or destroyed their personal property. They cite paragraphs 77, 134 and 146 of the Amended Complaint. Paragraph 76 specifically says items were "lost and/or destroyed while in storage by Delta." (R. p. 101) Paragraph 134 only contains a conclusory statement that the owners are entitled to recovery for the loss of their property. (R, p. 108) Paragraph 146 says "Gold Crown and/or MTB" denied owners access to the property of the owners and prevented them from removing and securing their own belongings. (R. p. 109) Notwithstanding the fact that MTB had zero control or ability to control any of Appellants' personal property regardless of where it was stored, this language is insufficient to support a claim that MTB converted the owners' personal property.

Appellants also refer to Exhibit 8 to the Amended Complaint, an August 9, 2017, letter from MTB to the owners. (R. pp. 346 – 349) MTB clearly wrote that on behalf of the Association as its lawyers. Again, there is no fact supporting the claim that MTB controlled, stole, destroyed or otherwise did anything to or with Appellants' personal property.

Further and again, the Amended Complaint does not maintain MTB acted outside its scope as lawyers for the HOA. To the contrary, Appellants recognize MTB was acting as lawyers for the Association. As with the other individual causes of action against MTB, the firm is immune from liability for these actions to the Appellants who MTB did not represent.

Appellants refer to Stiles v. Onorato to support their claim that MTB can be liable for conversion and affirmative misrepresentations done on behalf of a client. 318 S.C. 297, 457 S.E.2d 601 (1995). That is not what Stiles says. The Court held in that case that a lawyer "may be held 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. at p. 602.

Here, there is no cause of action for conspiracy. Further, there is no identification of an independent duty MTB owed to the owners or an allegation that MTB took any action outside the course and scope of its representation of its client, the Association. Even if Stiles relates to a cause of action for conversion, which it does not, its holding is inapplicable here. All of MTB's actions were taken in the course of representing the Association. Therefore, the firm is immune from liability to persons it did not represent for damages arising out of MTB's representation of the Association.

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 Appellants owned. The facts alleged in the Amended Complaint, in the light most favorable to the Appellants, show only that the Association 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 Appellants fail to allege the firm, ever possessed, controlled or retained the benefit of any of the owners' personal property. Even if taken as true, the only facts alleged supporting conversion are that the Association and/or Delta (not MTB) disposed of Appellants' personal property. The cause of action for conversion against MTB fails as pled, and Judge Culbertson correctly dismissed it.

B. Derivative Claims

The Amended Complaint also contains 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. Id. 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).

1. No damages to the Association to support derivative cause of action.

The crux of Appellants' complaint is their loss of personal property. Their 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 Association and Gold Crown took. Appellants do not seek recovery for losses the Association incurred, but for losses they individually suffered. The Amended Complaint attempts to plead around these problems but fails.

First, Appellants lump the actions of Gold Crown and MTB in together with allegations such as "Gold Crown and/or MTB's actions have caused the Association to be exposed to liability of the Owners" (*See, e.g*, R. p. 103), and "the damages owned [sic] to the association to the Owners is a 'common expense' essentially causing the Owners to owe money to themselves." (*see*, *e.g*, R. p. 103) However, this does not state *facts* sufficient to show what MTB, as opposed to Gold Crown, allegedly did wrong. As pled, Gold Crown *or* MTB is responsible for the bad act(s) at issue. Gold Crown is the agent for the Association and acts on the Association's behalf. MTB is the Association's lawyer. It provided the Association with legal advice. All acts of the Association (or Gold Crown) are not acts of MTB. Simply saying Gold Crown or MTB is responsible is inadequate to state facts supporting a claim against MTB.

Perhaps most importantly, the Amended Complaint fails to properly state facts showing anything MTB did or failed to do proximately caused the Association damage. Appellants' derivative claims against MTB fail for this reason, as the damage they seek to recover is for the individual owners' loss of money and personal property, not any loss of the Association.

The pleading blanketly states the Association incurred damages as a result of MTB's wrongful actions/inactions. The Amended Complaint says these damages 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* R. p. 105) However, the pleading fails to state facts sufficient to support the claim that the Association suffered damages. In fact, it is unclear how the "damages" to the Association listed in the Amended Complaint could actually be an injury to the Association caused by MTB's alleged acts/omissions.

This listing of alleged damages is merely the use of conclusory statements that the Association was damaged in an effort to get around the plain fac that the damages at issue here are the owners' lost personal property. The pleading lacks actual facts supporting a claim that the Association was damaged by anything MTB did or failed to do. In short, the Amended Complaint contains no *facts* showing how the Association has been damaged by MTB's alleged acts/omissions.

An action is derivative in nature if it seeks damages arising from an injury to a corporation. Howard v. Hadadd, 916 F.2d 167, 169 (4th Cir. 1990). Any recovery in a derivative action redounds to the benefit of the corporation. Rivers v. Wachovia Corp., 665 F.3d 610 (4th Cir. 2011). That is not the situation here.

Recovery on the theories alleged in the Amended Complaint would compensate the individual owners for the loss of their personal property and monies they allegedly wrongfully paid

to the Association. Thus, recovery awarded on Appellants' claim would actually damage the Association, not reward it. In order to prevail on any of the derivative causes of action alleged (negligence, breach of fiduciary duty and aiding and abetting breach of fiduciary duty), the Amended Complaint must allege facts showing that the owners, as members of the Association, are seeking recovery for damages the Association incurred when it refused to pursue a claim against MTB. The Amended Complaint does not do this.

Despite using certain key words, Appellants' claims all arise out of their loss of personal property, not any loss the Association suffered. Their derivative causes of action fail to meet the heightened pleading requirements of SCRCP 23(b)(1). Therefore, the derivative causes of action *all* fail as pled, and Judge Culbertson appropriately dismissed them.

2. Expert affidavit fails to meet the requirements of S.C. Code § 15-36-100.

The Amended Complaint includes a derivative cause of action for legal malpractice as well, which means the Plaintiffs are seeking recovery for the Association for damages it incurred which were proximately caused by MTB's negligence in the course of its representation of the Association. This also means the cause of action must be supported by an expert affidavit sufficient under S.C. Code § 15-36-100. However, Appellants' 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.

The Amended expert Affidavit filed with the Amended Complaint the Affidavit refers to generic "damages" MTB's actions caused the Association. However, it does not state what these damages are. Under Grier v. AMISUB of S.C., Inc., Appellants argue the affidavit does not have to specify damages, and must only identify a breach in the standard of care to comport with the statute.

397 S.C. 532, 725 S.E.2d 693 (2012). The Court in Grier held that in a medical malpractice case, the expert affidavit only had to state a breach in the standard of care, not proximate cause.

This reasoning may apply to an expert affidavit supporting direct claims of negligence against a lawyer,[5] but a derivative claim is different. It is based entirely on the corporation's suffering of damages for which the company refuses to seek recovery on its own. Thus, the expert affidavit must identify a negligent act or omission of MTB that caused the Association to incur damages. The Amended Expert Affidavit only further clarifies that the damages at issue are the individual Appellants' loss of their personal property and other damages the individual owners incurred. The Affidavit does not state what "financial losses" the Association has suffered. This falls well short of setting forth a negligent act or omission of MTB on a derivative theory. 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)(1), and Judge Culbertson correctly dismissed it.

3. The derivative claim is akin to an assignment of a legal malpractice claim, which the law precludes.

South Carolina law precludes the assignment of legal malpractice claims as a matter of public policy designed to protect the unique, personal and confidential nature of the relationship between a lawyer and client. Skipper v. Ace Prop. & Cas. Ins. Co., 413 S.C. 33, 775 S.E.2d 37 (2015); *see also* The Law of Legal Malpractice in S.C., S.C. Bar (2017). Appellants derivative claims against MTB are akin to an assignment of assignment of a malpractice claim to the individual owners, which South Carolina law precludes.

[5] As discussed in detail earlier, the Affidavit fails in this regard because it does not allege an attorney-client relationship between the individual Appellants and MTB.

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), *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*.

Likewise, allowing 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. *See, e.g.*, NFL Properties, Inc. v. Superior Court, 65 Cal.App.4th 100, 75 Cal.Rptr.2d 893 (1998); Pacific Tel. & Tel. Co. v. Fink, 141 Cal.App.2d 332, 296 P.2d 843 (1956); and Kracht v. Perrin, Gartland & Doyle, 219 Cal.App.3d 1019, 268 Cal.Rptr. 673 (1990). Its courts have based this on the same reasoning as the South Carolina courts that have precluded the assignment of legal malpractice claims.

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 Appellants' claims against MTB are all based on alleged advice the firm provided its client, the Association. Thus, in order to defend itself against any of Appellants causes of action, MTB would have to disclose

communications with its client, the Association. However, it has not waived the attorney-client privilege.

Allowing a derivative claim against MTB here would be akin to allowing the assignment of the Association's legal malpractice claim (if it has one, which it does not). Judge Culbertson appropriately applied the same principle and precluded Appellants' attempt to bring a legal malpractice action as a derivative claim against MTB on behalf of the Association. He correctly determined that as a result, the pleading fails to state facts sufficient to constitute a derivative claim on behalf of the Association against MTB for any of the causes of action alleged.

This specifically includes aiding and abetting breach of fiduciary duty, which Appellants address in their Initial Brief. Appellants misconstrue MTB's argument. The firm is not denying that it owed the Association certain fiduciary duties as its lawyers. That is not the issue. This question is whether the Amended Complaint sufficiently identifies damages the Association sustained as a result of MTB's alleged wrongdoing that could be the basis for a derivative claim (for any cause for any cause of action) against it. The Amended Complaint fails in this regard as described in detail above. Judge Culbertson correctly dismissed all of the derivative causes of action alleged against MTB accordingly.

C. Third-Party Beneficiaries

Plaintiffs say MTB is liable to them as individual owners because they are third-party beneficiaries to MTB's contract to represent the Association. They rely on 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. Appellants' 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 Association. It is not deceased and is certainly able to pursue recourse against MTB if the it believed MTB provided it negligent advice.

Also, under Stiles v. Ontario, lawyers are protected against claims by third parties they did not represent if the acts at issue were taken in the course and scope of their representation of the client. 318 S.C. 297, 457 S.E.2d 601 (1995). Here (and again), Appellants never allege MTB did anything outside its scope of acting as lawyers for the Association. Thus, there must be some independent basis for creating a duty of care between MTB and the owners. The Amended Complaint does not state facts establishing that.

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 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. So, Sentry does not apply to create any potential cause of action by the individual owners against MTB for actions MTB took during the course of representing the Association. Further, under the reasoning of Fabian and Sentry, the proper method for owners to pursue this sort of claim against MTB would be through a derivative action. As detailed above, Appellants' derivative claims against the firm fail as pled because the damages at issue were suffered by the individual owners, not the Association (as Judge Culbertson correctly determined).

D. Real Parties at Interest

Judge Culbertson correctly acknowledged the Appellants 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, Horry County Court of Common Pleas. There are avenues for Appellants to pursue if they believe they have been wronged, but the Amended Complaint in this case fails to plead facts sufficient to state facts to support the claims alleged against MTB, individually or derivatively.

E. Dismissal with prejudice was appropriate.

Judge Culbertson correctly dismissed Appellants' claim with prejudice. Since he issued the Order dismissing the claims against MTB, the South Carolina Supreme Court issued an opinion in Skydive Myrtle Beach, Inc. v. Horry County, *et al.*, Opinion No. 27867 (Mar. 13, 2019). That opinion in that case addressed the issue of dismissing a complaint with prejudice. The upshot of the

reasoning on this issue is that when the trial court finds a complaint fails to state facts sufficient to support a cause of action, the court should give the plaintiff an opportunity to amend the complaint pursuant to SCRCP 15(a) before filing a final order of dismissal. Id. *referencing* Forman v. Davis, 371 U.S. 178, 83 S.Ct. 227 (1962). The Supreme Court held the trial court erred by failing to consider allowing the plaintiff to amend the complaint prior to dismissing the action with prejudice. The Court in Skydive also discussed the application of SCRCP 59(e), which allows a party to challenge a ruling. "If the trial court rules there has been a failure to state facts sufficient to constitute a cause of action," then the question may become whether the plaintiff wishes to challenge the ruling by filing a motion under SCRCP 59(e). Id.

Here, the pleading at issue is the Amended Complaint. Appellants filed the original Complaint, and MTB filed a Motion to Dismiss. On the eve of the hearing, Appellants filed an Amended Complaint (under Rule 15(a)) in an effort to address the alleged deficiencies in the original pleading. MTB then moved to dismiss the Amended Complaint. Judge Culbertson, after a hearing, issued a form Order dismissing the Amended Complaint. Plaintiffs filed a 59(e) Motion to Reconsider. (Mot. to Rec.) That Motion asked the Court to reconsider the decision to dismiss the Amended Complaint and for an explanation of the Court's ruling. It did not ask the Court for leave to amend the pleading again. (Id.)

At the hearing for the Motion to Reconsider, Plaintiffs' counsel did not request leave to amend the Complaint again, despite the Court suggesting that course of action:

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15        THE COURT:  Well, he's going to have to seek a motion to
16   amend it a third time.  So we'll address it at that time.
17   Hold for a second.  Let me look at this.   Go ahead and make
18   it, make it with prejudice.
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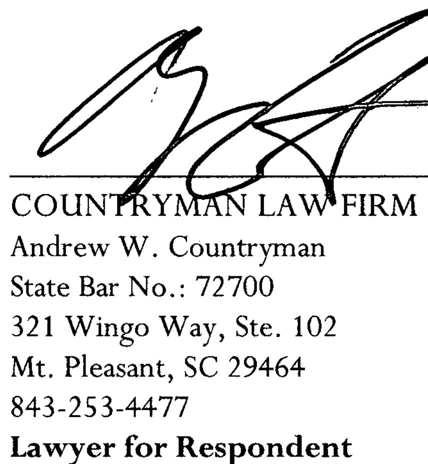
(R. p. 495)

Here, Appellants received a chance to amend (under Rule 15(a)) to address their deficient pleading and failed. Under Skydive Myrtle Beach, dismissal with prejudice was proper. Further, Appellants failed to ask for leave to amend again in connection with the Motion to Reconsider. Thus, whether Appellants can amend again is not before this Court, as they have failed to preserve this issue on appeal. *See* West v. Newberry Elec. Coop., 357 S.C. 537, 543, 593 S.E.2d 500 (Ct. App. 2004).

CONCLUSION

For these reasons, MTB asks this Court to affirm Judge Culbertson's dismissal of Appellants' claims against MTB with prejudice.

September 10, 2019.



ROGERS, TOWNSEND & THOMAS, P.C.
Robert P. Wood
1221 Main St., 14th Floor
P.O. Box 100200
Columbia, SC 29202-3200
803-771-7900
Lawyer for Respondent

COUNTRYMAN LAW FIRM
Andrew W. Countryman
State Bar No.: 72700
321 Wingo Way, Ste. 102
Mt. Pleasant, SC 29464
843-253-4477
Lawyer for Respondent