

④

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 27 2014

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

William E. DeLoache, III
and Allison H. DeLoache. Appellants,

vs.

William Dixon Robertson, III; W. Jefferson Leath, Jr.;
Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP;
Francis E. Grimbail; MULLEN WYLIE, LLC formerly
MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen;
WILLIAM M. BOWEN, PA; and John D. Kassel Respondents.

RECORD ON APPEAL

Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
PENDARVIS LAW OFFICES, P.C.
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Counsel for Appellants, William E.
DeLoache, III and Allison H. DeLoache

James E. Lady, J.D. (SC Bar # 15135)
MULLEN WYLIE, LLC
171 Church Street, Suite 370
Charleston, SC 29401
843.853.6200 Tel.
jlady@mullenwylie.com

Counsel for Respondents, Francis E.
Grimball and MULLEN WYLIE, LLC
formerly MULLEN WYLIE & SEEKINGS, LLC

James L. Bruner, J.D. (SC Bar # 969)
BRUNER POWELL WALL & MULLINS, LLC
PO Box 61110
Columbia, SC 29260
803.252.7693 Tel.
803.254.5719 Fax.
jbruner@brunerpowell.com

Counsel for Respondents William M.
Bowen and WILLIAM M. BOWEN, PA

Steven W. Ouzts (SC Bar # 4298)
Joshua D. Shaw, J.D. (SC Bar # 77835)
TURNER, PADGET GRAHAM & LANEY, PA
PO Box 1473
Columbia, SC 29202
803.227.4310 Tel.
803.400.1554 Fax.
souzts@turnerpadget.com
jshaw@turnerpadget.com

Counsel for Respondent, William Dixon
Robertson, III

Amy L.B. Hill, J.D.
SOWELL GRAY STEPP & LAFFITTE, LLC
PO Box 11449
Columbia, SC 29211
803.929.1400 Tel.
803.231.7878 Fax
ahill@sowellgray.com

Counsel for Respondent, John D.
Kassel

Kent Stair, J.D. (SC Bar # 14029)
CARLOCK COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
843.727.0307 Tel.
843.727.2995 Fax.
kstair@carlockcopeland.com
twinton@carlockcopeland.com
wjones@carlockcopeland.com

Counsel for LEATH, BOUCH &
CRAWFORD, LLP, W. Jefferson Leath,
Jr. And Michael S. Seekings.

INDEX

ORDERS, JUDGMENTS DECREES AND DECISIONS

Order Granting Kassel's Motion to Dismiss	1
Order Granting Motions to Dismiss all Claims and/or Strike Pleadings	13
Order Denying Plaintiffs' Motion to Alter or Amend Judgment	29

PLEADINGS

Verified Complaint	31

TRANSCRIPTS

Hearing Transcript (June 6, 2012)	55
Hearing Transcript (June 10, 2013)	160

OTHER MATERIALS AND DOCUMENTS

Kassel's Motion to Dismiss	169
Leath & Seeking's Motion to Dismiss	171
Bowen's Motion to Dismiss	180
Robertson's Motion to Dismiss	183
Grimball's Motion to Dismiss	187
Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss ...	195
Pendarvis letter to Judge Strickland dated February 15, 2013	219
Plaintiffs' Motion to Compel Discovery	221
Judge Strickland letter to counsel dated June 14, 2013	224
Pendarvis letter to Judge Strickland June 17, 2013	226

Pendarvis letter to Judge Strickland dated June 20, 2013	239
Pendarvis letter to Judge Strickland dated September 4, 2013	245
Pendarvis letter to Judge Strickland dated September 11, 2013	247
Plaintiffs' Request to Transfer to the Jury Trial Roster	258
Plaintiffs' Amended Request to Transfer to the Jury Trial Roster	259
Plaintiffs' Motion to Alter or Amend	260
Return to Motion to Alter or Amend	371
Kassel's Memorandum in Opposition	376

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
	)	
William E. DeLoache, III and	)	Civil Action No.: 2011-CP-40-07432
Allison H. DeLoache,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
William Dixon Robertson, III; W.	)	ORDER GRANTING DEFENDANT JOHN
Jefferson Leath, Jr.; Michael S.	)	D. KASSEL'S MOTION TO DISMISS
Seekings; Leath, Bouch & Crawford,	)	
LLP; Francis E. Grimbail; Mullen	)	
Wylie, LLC; formerly Mullen, Wylie &	)	
Seekings, LLC; William M. Bowen, PA;	)	
and John D. Kassel,	)	
	)	
Defendants.	)	

RICHLAND COUNTY
 FILED
 2013 NOV -5 PM 3:26
 JEANETTE W. MCBRIDE
 C.C.P. & G.S.

This matter is before the Court on Defendant John D. Kassel's ("Kassel") Motion to Dismiss filed on December 15, 2011 and Kassel's Motion to Stay Discovery filed on May 16, 2012. This Court held a hearing on Kassel's two motions as well as motions to dismiss brought by other Defendants on June 6, 2012.

At the outset of the hearing, attorneys for both Plaintiffs and Kassel informed the Court that they had reached an agreement on the cause of action for Breach of Fiduciary Duty. Counsel informed the Court that Plaintiffs had agreed that they would not assert a Breach of Fiduciary Duty cause of action against Kassel and thus there was no need for this Court to hear the arguments for the dismissal of Kassel from this cause of action. The only remaining causes of action directed at Kassel are Plaintiffs' Sixth Cause of Action for Breach of the Duty of Confidentiality and the Seventh Cause of Action for Injunctive Relief Against All Defendants. This Court heard arguments from both counsel for Kassel and Plaintiffs regarding these two causes of action.

RECEIVED NOV 07 2013
SCANNED 1

In addition, Defendant Kassel filed a Motion to Stay Discovery served on Kassel by Plaintiffs. Counsel for Plaintiffs and Defendant Kassel reached an agreement that Kassel would not be required to respond to discovery until after Defendant Kassel's Motion to Dismiss was ruled upon. As this Court, for reasons set forth below, has determined to grant Defendant Kassel's Motion to Dismiss, the Motion to Stay Discovery is now moot.

After considering the arguments set forth by both Plaintiffs and Kassel in their respective legal memoranda, the Complaint, the applicable case law and applicable statutes, this Court finds that each of Plaintiffs' causes of action against Defendant Kassel fail as a matter of law. Accordingly, as more fully set forth below, the Court grants Defendant Kassel's Motion to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

STANDARD OF REVIEW

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 361 S.C. 463, 469, 645 S.E.2d 245, 247 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "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." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)).

Applying these principles to the present cases, the Court finds that the Complaint does not state valid claims for relief against Defendant Kassel, and therefore the Causes of Action against Defendant Kassel should be dismissed.

FACTS AS ALLEGED IN THE COMPLAINT

Plaintiffs allege that on or around July 2002 they contacted Defendant Kassel with regard to possibly retaining him as their lawyer to pursue claims related to stucco installation at their residence. Compl. ¶ 14. Plaintiffs communicated in confidence with Defendant Kassel regarding the merits of participating in a Tennessee class action involving stucco manufactured by Dryvit Systems. Compl. ¶¶ 14-15. Plaintiffs, after receiving Defendant Kassel's opinion and advice, retrieved their materials from Defendant Kassel and did not retain Kassel to represent them. Compl. ¶¶ 16-17. Plaintiffs allege they never authorized Defendant Kassel to engage or associate any other lawyer or to reveal to any other person their privileged communications or information about their potential case. Compl. ¶¶ 19-23.

Defendants William Dixon Robertson, III, W. Jefferson Leath, Jr., and Michael S. Seekings (collectively "Defendant Class Action Attorneys") are attorneys who appeared on behalf of purported Objector-Plaintiffs, the Plaintiffs, at a Fairness Hearing in the Tennessee stucco settlement. Compl. ¶¶ 36-38. As a result of representing Plaintiffs, Defendant Class Action Attorneys were able to make arguments objecting to the proposed settlement. Compl. ¶ 40. As a result of appearing in the Tennessee class action, Defendant Class Action attorneys received \$600,000 as attorneys fees as a portion of the amount approved to be paid to the Tennessee class counsel. Compl. ¶¶ 42-44. Plaintiffs have not alleged in their Complaint that Defendant Kassel participated in anyway in the Tennessee class action or that Kassel received any of the \$600,000 distributed to the Defendant Class Action Attorneys.

In late January or early February 2009, Plaintiffs were contacted by attorneys informing them that the Defendant Class Action Attorneys had appeared on their behalf in the Tennessee class action. Compl. ¶ 25-26. Plaintiffs allege that the Defendant Class Action Attorneys appeared and wrongfully used Plaintiffs' surname without Plaintiffs' authorization and without

ever consulting with Plaintiffs. Compl. ¶¶ 45-49. This is the basis of Plaintiffs' claims against Defendant Class Action Attorneys.

Plaintiffs claim that Defendant Kassel provided Defendant Robertson, one of the Defendant Class Action Attorneys with Plaintiffs' confidential information that Kassel obtained during his consultation with them and thus Kassel is liable for breach of the duty of confidentiality. Compl. ¶¶114-118. Plaintiffs have also alleged causes of action against Defendant Kassel for breach of fiduciary duty and injunction. Compl. ¶¶ 97-113 and ¶¶119-120.

A. FAILURE TO FILE AN EXPERT AFFIDAVIT IS FATAL TO PLAINTIFFS' COMPLAINT

Plaintiffs' entire Complaint as it relates to Defendant Kassel must be dismissed for failure by Plaintiffs to attach an expert affidavit to their Complaint as required by S.C. Code §15-36-100. Plaintiffs' claims against Defendant Kassel, namely the breach of the duty of confidentiality, arise by virtue of Kassel's position as an attorney with whom Plaintiffs consulted regarding legal concerns. But for the fact that Defendant Kassel is an attorney, there would be no duty of confidentiality. "...[P]laintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis of each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code § 15-36-100(B). Section 15-36-100 lists professions that require an expert affidavit and attorneys are a part of this list. If a plaintiff fails to file the requisite expert affidavit, the complaint is subject to dismissal for failure to state a claim. S.C. Code § 15-36-100(C).

Plaintiffs first claim that because they did not formally retain Defendant Kassel, there is no legal malpractice claim and thus no need to satisfy the affidavit requirements of § 15-36-100. This claim is without merit. Either, Defendant Kassel was acting in his role as an attorney and therefore there is an alleged duty of confidentiality or Defendant Kassel has no duty of

confidentiality owed to Plaintiffs, in which case Plaintiffs have no claim against Defendant Kassel. A lay person has no duty of confidentiality owed to another. The duty only arises in the context of an attorney/client relationship. To assert a breach of the duty of confidentiality, which is essentially a legal malpractice action, Plaintiffs will necessarily be required to present expert testimony as the duty of confidentiality is not a common knowledge duty but rather one particular to the attorney/client relationship.

Plaintiffs argue that because they have alleged intentional torts rather than negligence, their claims are not governed by §15-36-100 and thus there is no requirement that Plaintiffs file an expert affidavit. This argument is simply a ruse to get around the wording in the statute. First, there are no allegations that Defendant Kassel committed an intentional tort and Plaintiffs have not alleged any intentional torts. In his book *The South Carolina Law of Torts*, Professors Robert Felix and F. Patrick Hubbard devote an entire chapter to intentional torts recognized in South Carolina. See F. Patrick Hubbard & Robert L. Felix, *South Carolina Law of Torts* (4th ed. 2011) at 437-511. A breach of the duty of confidentiality is not included in this chapter, which includes torts such as battery, assault, trespass, and intentional infliction of emotional distress. Rather, in another chapter devoted to negligence and similar breaches of duty, the authors describe the spectrum of negligence which involves at one end strict liability where the duty arises from the occurrence of an injury from a particular risk to the other end of the spectrum involving intentional torts. *Id.* at 70-71. “In between are varying degrees of “faulty” conduct, including not only negligence but also other types of misconduct like malice, gross negligence, recklessness, willfulness, wantonness, lack of fairness and good faith and breach of duty of high or utmost care.” *Id.* at 70-71. Further, Hubbard defines “recklessness” (a specific description used against Defendant Kassel in the complaint) as “conduct where the actor is in fact consciously aware that he is acting negligently.” *Id.* at 72. . While Plaintiffs have alleged that

Defendant Kassel acted in a “highly reckless, wanton and irresponsible” manner, Plaintiffs have alleged no specific facts to support such an allegation.

Plaintiffs’ claims against Defendant Kassel all arise from a claim that Kassel breached his duty of confidentiality, which is in essence a claim of legal malpractice since there is no duty of confidentiality that arises except in the context of an attorney/client relationship or potential relationship. “Failure to exercise due care, not intent is the critical element in negligence.” *Snakenberg v. Hartford Casualty Insurance Company, Inc.*, 299 S.C. 164, 173 (Ct.App. 1989). Simply because an action is intentional does not make the tort an intentional tort. In its most narrow sense, “intent” denotes an actor’s specific desire to cause the consequences of his act. See *Restatement (Second) of Torts* §8A (1965). “Intent” is a state of mind about the consequences of the act. *Peay v. US Silica*, 313 S.C. 91 (1993). See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts*, § 8 (5th ed.1984 & Suppl. 1988). There is no allegation or indication that Defendant Kassel could have foreseen or in anyway intended the alleged consequences of his alleged action – namely that attorneys would allegedly travel to another state and represent Plaintiffs without Plaintiffs’ permission in a class action. As a result, there is no intent alleged on Defendant Kassel’s part. Plaintiffs have alleged a breach of the standard of care in that they have alleged that Defendant Kassel breached his duty of confidentiality. A defendants’ failure to exercise due care falls within a negligence cause of action. *Id.* Legal malpractice is the cause of action contemplated by §15-36-100 and the Plaintiffs’ claim against Defendant Kassel is in essence a legal malpractice claim. As a result, Plaintiffs’ claims should be dismissed for failure to submit an expert affidavit.

In addition, Plaintiffs claim that an expert affidavit is not required because the actions complained of occurred prior to the enactment of §15-36-100. However, Plaintiffs’ position ignores the language of § 15-36-100, which came into effect on July 1, 2005 and applies to all

claims *arising* after that date. See 2005 Act. No. 32, §4, eff July 1, 2005. South Carolina courts have held that a claim arises at the time a plaintiff's right to sue comes into existence. *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 597-598 (2003); citing *Stephens v. Draffin*, 327 S.C. 1 (1997). As will be discussed in further detail in this Order, Plaintiffs at this time do not have a right to sue as they have suffered no damages, which are a necessary element to any tort cause of action. Further, according to the allegations of the Complaint, Plaintiffs did not have notice of the alleged breach until sometime after 2005. In order for the claim to have arisen, Plaintiffs must have had notice of the claim. If they had notice prior to 2005, Plaintiffs likely have a statute of limitations problem. Even though the alleged breach of confidentiality by Defendant Kassel occurred prior to 2005, Plaintiffs' claims have not arisen at this time and thus in order to file a legal malpractice claim at some point in the future, Plaintiffs will necessarily have to comply with § 15-36-100.

Plaintiffs' failure to file the expert affidavit as required is fatal to Plaintiffs' claims against Defendant Kassel and Plaintiffs' Complaint as it relates to Kassel is dismissed.

B. PLAINTIFFS NEVER RETAINED KASSEL AND THUS KASSEL DOES NOT OWE PLAINTIFFS ANY DUTIES AS ALLEGED IN THE COMPLAINT

Plaintiffs allege in the Complaint that they never retained Defendant Kassel to represent them. If this is the case, Defendant Kassel did not owe Plaintiffs any duty of confidentiality or any other fiduciary duty. The rule regarding duties to potential clients is SCRAP Rule 407, Rule 1.18, which was not effective until October 1, 2005. The allegations against Defendant Kassel regarding his duties owed to Plaintiffs took place according to the Complaint in 2002, three years prior to the passage of Rule 1.18. No duties were owed to Plaintiffs as potential clients and thus the claims against Defendant Kassel are dismissed.

C. PLAINTIFFS' CLAIMS AGAINST DEFENDANT KASSEL FAIL BECAUSE PLAINTIFFS CANNOT ESTABLISH PROXIMATE CAUSE

Even accepting the allegations as asserted by Plaintiffs against Defendant Kassel in the light most favorable to Plaintiffs, it is not foreseeable that Plaintiffs would have suffered any harm as a proximate cause of Kassel's alleged actions. The crux of Plaintiffs' claims against Defendant Kassel is that he provided confidential information to Defendant Robertson about Plaintiffs' potential stucco claims and that Defendant Robertson and the other Defendant Class Action Attorneys used this information to proceed in the Tennessee class action as counsel for Plaintiffs without Plaintiffs' authorization.¹ Even if Defendant Kassel violated some duty of confidentiality and provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, it is not foreseeable that these attorneys would proceed in Tennessee without Plaintiffs' permission and authorization.

"The touchstone of proximate cause in South Carolina is foreseeability." *Mellen v. Lane*, 377 S.C. 261, 279 (Ct. App. 2009); citing *Young v. Tide Craft*, 270 S.C. 453, 462 (1978). The defendant may be held liable for anything which would be the natural and probable consequence of the defendant's actions. *Mellen*, 377 S.C. at 279; citing *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72 (1990). "A defendant cannot be held liable for unpredictable or unexpected consequences." *Mellen*, 377 S.C. at 280; citing *Young*, 270 S.C. at 463.

The Supreme Court held in *Hensley v. Heavrin*, that a doctor was not liable for the battery committed by a patient's husband after the doctor incorrectly diagnosed syphilis. 277 S.C. 86, 87-88 (1990). Similarly in this case, even if Defendant Kassel provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, he could not have foreseen that they would use the information without Plaintiffs' consent or authorization. Plaintiffs' Complaint does not include Defendant Kassel in the majority of the causes of action because there are no allegations that Kassel participated in the Tennessee representation, profited from it,

¹ The Complaint is not specific as to what confidential information was provided.

or even knew about it. Plaintiffs only complaint against Defendant Kassel is that he may have passed on confidential information (the exact terms of which is not clear from the Complaint) to another lawyer. This alone is not enough to meet the standards for foreseeability and proximate cause. For this reason, all claims against Defendant Kassel should be dismissed.

D. PLAINTIFFS HAVE FAILED TO ALLEGE ANY SPECIFIC DAMAGES

In order to succeed in any tort claim and specifically in a legal malpractice claim, Plaintiffs must plead the element of damages with some degree of specificity. In the Complaint, Plaintiffs have only alleged damages in such general terms as to state they have suffered damages in an amount to be proven at trial. Plaintiffs' claims all rest on the allegations that Defendant Class Action Attorneys represented Plaintiffs without Plaintiffs' authorization as objectors in the Tennessee class action and therefore received attorneys' fees for their efforts. Again, there are no allegations that Defendant Kassel was in anyway connected to the Tennessee class action or received any fees from that case. Regardless, there is no question but that Plaintiffs would not have received attorneys' fees from the Tennessee action as they are not attorneys.

Further, Plaintiffs allege that they did not have Dryvit on their house and could not have participated in the Tennessee class action in any event. Thus, none of the Defendants, Kassel included, could have done anything that hindered Plaintiffs from collecting any sum from Dryvit as they, by their own admissions, were not entitled to collect damages from Dryvit.

In Plaintiff's Memorandum in Opposition to the Motion to Dismiss, Plaintiffs assert that they suffered a presumption of nominal damages associated with the claims they have regarding the alleged misuse of their individual and collective identities. Thus, Plaintiffs claim that by "filing legal documents with the DeLoache surname, the Defendants have converted the DeLoaches' intangible property rights." See Plaintiffs Memorandum in Opposition p. 12.

Regardless of whether Plaintiffs are correct in their legal analysis of damages resulting from the misappropriation of their legal identity, Plaintiffs have not asserted any claims against Defendant Kassel regarding misappropriation of their identity. Therefore even if their claims of damages related to this cause of action are accurate, Plaintiffs have still failed to show that they suffered any damages as a result of any claims against Defendant Kassel.

In addition, Plaintiffs claim that they have suffered damages because they are now concerned that they are at risk for claims of contempt of court or fraud on the court. See Plaintiffs Memorandum in Opposition p. 13. This assertion by the Plaintiffs does not satisfy the required element of damages. Speculative future damages do not qualify as damages. While proof with mathematical certainty of the amount of loss or damage is not required, in order for damages to be recoverable, the evidence must show the amount of damages with reasonable certainty or accuracy and the existence, causation and amount of damages cannot be left to conjecture, guess or speculation. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13 (1981). There are no allegations that anyone is currently seeking (or has sought in the past) to hold Plaintiffs in contempt of court or fraud on the court much less that Plaintiffs have actually been held in contempt. Considering that Plaintiffs were apparently contacted regarding their involvement in the Tennessee stucco class action case in early 2009, it seems unlikely that anyone would try to hold Plaintiffs in contempt in the Tennessee class action or charge them with fraud on the court approximately three and a half years later. Plaintiffs' claims that a "risk" that Plaintiffs may be held in contempt of court or for fraud on the court are speculative at best and do not satisfy the required element of damages.

Plaintiffs also claim that they have suffered damages in that they have had to spend time and resources in "depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality...." See Plaintiffs' Memorandum in Opposition p. 13. There

are no allegations that Plaintiffs have done anything more than prepare an affidavit and give a deposition in the underlying case. Other than a witness fee, lay witnesses are generally not paid for the time they spend in a deposition. Further, there was no requirement that Plaintiffs prepare an affidavit. Plaintiffs did so of their own free will and to allege that they should be paid for their participation in the underlying case does not qualify as damages suffered by Plaintiffs.

Plaintiffs have not alleged with any specificity and cannot show that they suffered damages based on the allegations asserted in the Complaint. A client must have suffered damages as a result of a lawyer's negligence in order to maintain an action against a lawyer. *Hall v. Fedor*, 349 S.C. 169 (Ct.App. 2002); *Ellis v. Davidson*, 358 S. C. 509 (Ct.App. 2004). Because Plaintiffs cannot show that they suffered damages based on the allegations of the Complaint, their claims should be dismissed.

E. PLAINTIFFS LACK STANDING BECAUSE THEY HAVE NOT SUFFERED AN INJURY-IN-FACT

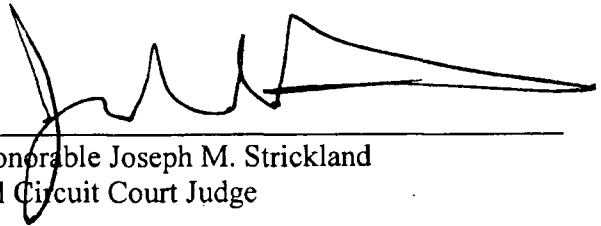
In order to establish standing, a party must meet three elements: 1) the plaintiff must have suffered an injury in fact, 2) the injury and the conduct complained of must be causally connected; and 3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Commander Health Cre Facilities, Inc. v. South Carolina Department of Health and Environmental Control*, 370 S.C. 296. 301 (Ct.App. 2006); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.ed.2d 351 (1992). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.*

As discussed in the previous section, Plaintiffs cannot demonstrate based on the allegations of the Complaint that they suffered any injury and thus cannot establish standing. A party must suffer an actually injury in fact and not a future concern in order to satisfy the standing requirements. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*,

346 S.C. 298, 589 (Ct.App. 2001). In this case, Plaintiffs have failed to allege any injury in fact and therefore their case must be dismissed for lack of standing.

WHEREFORE, for the reasons set forth above, the Court finds that Plaintiffs have failed to file an expert affidavit as required by S.C. Code § 15-36-100 and have failed to allege facts sufficient to assert claims for relief against Defendant Kassel. For these reasons, Plaintiffs' Complaint should be dismissed as to Defendant Kassel.

AND IT IS SO ORDERED.



The Honorable Joseph M. Strickland
Special Circuit Court Judge

Oct. 24, ~~2012~~ 2013
Richland County, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2011-CP-40-07432

William E. DeLoache, III and Allison H. DeLoache,)
)

Plaintiffs,)

vs.)

William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath, Bouch & Crawford, LLP; Francis E. Grimbball; Mullen Wylie, LLC formerly Mullen, Wylie & Seekings, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel,)
)

Defendants.)
)
)

**ORDER GRANTING MOTIONS OF
DEFENDANTS WILLIAM DIXON
ROBERTSON III, W. JEFFERSON LEATH
JR., MICHAEL S. SEEKINGS
DEFENDANT SUED AS LEATH BOUCH &
CRAWFORD, LLP, FRANCIS E.
GRIMBALL, MULLEN WYLIE, LLC F/K/A
MULLEN, WYLIE & SEEKINGS, LLC,
WILLIAM M. BOWEN, AND WILLIAM M.
BOWEN, PA TO DISMISS ALL CLAIMS
AND/OR STRIKE PLEADINGS**

RICHLAND COUNTY
FILED
2013 NOV -5 PM 3:29
JEANE C. HARRIS
CLERK OF COURT

This matter comes before the Court on the Motion to Dismiss of Defendant William Dixon Robertson III; the Motion to Dismiss and/or Motion to Strike Pleadings of Defendant Sued as Leath Bouch & Crawford, LLP and Defendants W. Jefferson Leath, Jr. and Michael S. Seekings; the Motion to Dismiss of Defendants Francis E. Grimbball and Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC; and the Motion to Dismiss of Defendants William M. Bowen and William M. Bowen, PA. On June 6, 2012, the Court conducted a hearing regarding these motions. Thomas A. Pendarvis of Pendarvis Law Offices, PC appeared for Plaintiffs. Joshua D. Shaw of Turner, Padgett, Graham & Laney PA appeared for Defendant William Dixon Robertson III. Kent T. Stair of Carlock Copeland & Stair, LLP appeared for Defendants Jefferson Leath, Jr., Michael S. Seekings, and the Defendant sued as Leath Bouch & Crawford, LLP. James E. Lady of Mullen Wylie, LLC appeared for Defendants Francis E. Grimbball and

Mullen Wylie, LLC f/k/a Mullen Wylie & Seekings. James L. Bruner of Bruner Powell Wall & Mullins, LLC appeared for Defendants William M. Bowen and William M. Bowen, PA. Amy B. Hill of Sowell Gray Stepp & Laffitte, LLC appeared for Defendant John D. Kassel.

After giving due consideration to the arguments and authorities presented at the hearing and in the motions and legal memoranda submitted by the parties, the Court finds that each of Plaintiffs' causes of action against William Dixon Robertson III, Michael S. Seekings, W. Jefferson Leath, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen and William M. Bowen, PA (collectively "Moving Defendants") fail as a matter of law based on the allegations of the Complaint. Accordingly, as more fully set forth below, the Court grants Moving Defendants' Motions to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on November 3, 2011, alleging six causes of action against Moving Defendants: (1) Wrongful Appropriation of Personality; (2) Conversion; (3) Civil Conspiracy; (4) Constructive Trust; (5) Breach of Fiduciary Duty; and (6) Injunctive Relief.

Defendant Robertson timely answered the Complaint, asserting numerous defenses, including failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRPC, and failure to file an Affidavit of a duly qualified expert contemporaneous with Plaintiffs' Complaint, as required by S.C. Code Ann. §15-36-100. Robertson thereafter filed a motion to dismiss and/or motion for judgment on the pleadings on the same grounds as those stated in his Answer. Defendants Leath, Seekings and the Defendant sued as Leath Bouch &

Seekings, LLP likewise timely filed a Motion to Dismiss and/or Motion to Strike Pleadings in which they seek dismissal on similar grounds and, or alternatively, seek to strike certain pleadings within the Complaint.¹ Defendants Francis E. Grimbball and Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, and William M. Bowen and William M. Bowen, PA also timely filed Motions to Dismiss on similar grounds.

STANDARD OF REVIEW

A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when the facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). When deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRPC, the Court may only consider the allegations set forth on the face of the complaint. Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 (Ct. App. 1995). “The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief.” McCormick, 328 S.C. at 633, 494 S.E.2d at 433-34.

ALLEGATIONS OF COMPLAINT

This action, brought against several attorneys (hereinafter “Defendant Attorneys”) arises out of Plaintiffs’ allegation that the Defendant Attorneys obtained a monetary benefit by claiming that they represented the Plaintiffs as objectors in a nationwide class action in the early 2000s. The complaint alleges that the DeLoaches approached Defendant Kassel in July of 2002 to possibly retain Mr. Kassel in connection with problems they were experiencing with the

¹ The Motion of Defendants Michael S. Seekings, W. Jefferson Leath, and the Defendant sued as Leath Bouch & Crawford, LLP, included a Motion to Dismiss for lack of venue. The Court recognizes that the venue motion essentially reserves the defense of venue under any circumstance where venue relies solely on the residence of those moving Defendants. Any consideration of that Motion is premature at this time, and the Court reserves judgment on that Motion if and until the circumstances of the Motion become ripe.

exterior cladding on their home, which was a type of synthetic stucco. (Compl. ¶ 14.)

According to the Complaint, one of the issues discussed was the possibility of the Plaintiffs participating in a nationwide class action lawsuit, *Posey v. Dryvit*, brought on behalf of owners of residential homes clad with a synthetic stucco product called “Dryvit Exterior Insulating and Finishing System”, or EIFS.² (*Id.*) The Complaint alleges that *Posey* was in the process of being settled during this time and that Mr. Kassel advised the DeLoaches that in his opinion it was not worth participating in the *Posey* class settlement. (Compl. ¶ 16.) The Plaintiffs allege that it was at that point that they retrieved their materials from Mr. Kassel and did not retain Mr. Kassel to represent them. (Compl. ¶ 17.)

According to the Complaint, the Defendant Attorneys (and their respective law firms), excluding Defendant Kassel, formed a joint venture to challenge the *Posey* class settlement. (Compl. ¶ 33.) The DeLoaches allege that in pursuit of their joint venture, certain of the Defendant Attorneys, without the permission of the DeLoaches, filed papers and appeared in *Posey* on behalf of the DeLoaches. (Compl. ¶ 34-36.) According to the Complaint, the purpose of the Defendant Attorneys’ appearance in *Posey* on behalf of the DeLoaches was to object to the terms of the proposed class settlement. (Compl. ¶ 36-39.) The Complaint further alleges that as a result of their objecting to the proposed settlement on behalf of the DeLoaches, the Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was paid to them by *Posey* class counsel. (Compl. ¶ 41-44.)

Based on the foregoing factual allegations, Plaintiffs seek recovery of “all funds Defendants’ obtained using the DeLoaches’ surname in *Posey*”, (Compl. ¶ 70), unspecified

² It is later alleged in the Complaint that “recent inspections and testing revealed no evidence that the DeLoaches’ home was ever clad with Dryvit EIFS”. (Compl. ¶ 37.) There is no allegation that any of the parties knew in 2002 that the Plaintiffs’ home was not clad with Dryvit EIFS.

actual, consequential, special, incidental, and punitive damages, as well as prejudgment interest, injunctive relief, and the costs of the action. (Compl., Prayer for Relief.)

LEGAL ANALYSIS

Viewing the factual allegations of the Complaint in the light most favorable to the Plaintiffs, the Complaint fails to state any valid claim for relief. All or parts of Plaintiffs' Complaint are deficient for the following reasons: (1) Plaintiffs have not alleged an injury-in-fact and therefore lack standing to maintain their claims; (2) Plaintiffs have failed to state facts sufficient to establish a cause of action for (a) wrongful appropriation of personality, (b) conversion, (c) civil conspiracy, (d) constructive trust, (e) breach of fiduciary duty, or (f) injunctive relief; and (3) Plaintiffs failed to file an Affidavit of a duly qualified expert contemporaneous with their Complaint.

I. Standing

"A party seeking to establish standing must prove the 'irreducible constitutional minimum of standing,' which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision." Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (quoting Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. Id. (citing Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291). Additionally, "An 'injury in fact' has been defined as 'an invasion of a legally protected

interest' which is 'concrete and particularized' and 'actual or imminent,' not 'conjectural or hypothetical'." Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992)).

The Court finds that Plaintiffs' Complaint fails to allege that Plaintiffs have suffered an injury-in-fact. Plaintiffs' allegations of wrongdoing as to the Defendant Attorneys, excluding Defendant Kassel, are primarily that the Defendant Attorneys asserted in various contexts that they represented the Plaintiffs. In the only concrete example identified in the Complaint, Plaintiffs allege that Defendant Attorneys filed an objection to the *Posey* class settlement on their behalf and, as a result, that Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was actually paid to them by *Posey* class counsel. (Compl. ¶ 41-44.) While Plaintiffs allege that this conduct was improper because Defendant Attorneys did not actually represent the Plaintiffs, Plaintiffs have failed to show that they have suffered any injury as a result of the Defendant Attorneys' actions.

According to the Complaint, the alleged payment to Defendant Attorneys was from "Class Counsel in *Posey* from the funds Dryvit Systems paid to Class Counsel for attorney's fees that the *Posey* court had approved" (Compl. ¶ 42.) Payment of attorneys' fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Conversely, there does not appear to be any recognized basis for payment to an objector – as opposed to an attorney fee to the objector's attorney(s) – where the objection is made in terms common to class members. Id. Nor would it make sense for there to be any recovery by the objector for this type of objection, as he/she is, by definition, a class member who is in line to receive the benefits of any improvement to the terms of the class settlement. See id. Once the fundamentals of the

objection process are understood, it is plain that the Plaintiffs herein would not have been entitled to any monetary recovery as a result of their status as objectors to the *Posey* class action. Accordingly, their claim of entitlement to amounts paid to their attorneys lacks merit.

The above analysis and conclusion are bolstered by the fact that Plaintiffs allege that “recent inspections and testing” show that they did not even own the product that was at issue in *Posey*. (Compl. ¶ 37.) Thus, based on the allegations of the Complaint, it is apparent that Plaintiffs could never have recovered money or any other benefit in connection with *Posey*. During the hearing on Defendant Attorneys’ motions to dismiss, Plaintiffs’ counsel argued that Plaintiffs had suffered damages insofar as they were at risk for facing a claim of “fraud on the court” because Defendant Attorneys represented to the *Posey* court that Plaintiffs had Dryvit EIFS, when in fact they did not. (See also Compl. ¶ 39.) Notwithstanding the fact that Plaintiffs do not allege that any party had knowledge of this fact at the time the Defendant Attorneys appeared in *Posey*,³ the Court finds that the possibility of facing a claim for “fraud on the court” falls squarely within the category of “conjectural” or “hypothetical” injuries that are insufficient to confer standing on Plaintiffs. Finally, Plaintiffs’ allegation that they have suffered damages in the form of “time, effort, and expenses” in connection with meeting with lawyers, signing an affidavit, and giving a deposition in another case lacks merit. (See Compl. ¶ 85.) The Court is not aware of any authority, and none has been presented by Plaintiffs, holding that such activities constitute compensable damages in a civil action.

³ In fact, the allegation that “recent inspections and testing revealed” that Plaintiffs did not have Dryvit EIFS, (Compl. ¶ 39), strongly suggests that all parties believed Plaintiffs did have Dryvit EIFS when the alleged representations were made.

For the foregoing reasons, the Court finds that Plaintiffs have not suffered any injury-in-fact and therefore lack standing at this time to bring the asserted claims against Defendant Attorneys.

II. Failure to State a Claim

Even assuming that Plaintiffs could establish the irreducible constitutional minimum of standing, the facts alleged in the Complaint fail to support any of the causes of action asserted in the Complaint.

A. Wrongful Appropriation of Personality

“In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs.” Sloan v. South Carolina Dep't of Pub. Safety, 355 S.C. 321, 325-26, 586 S.E.2d 108, 110 (2003). “Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity.” Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 458-459, 684 S.E.2d 756, 759 (2009) (quoting Sloan, 355 S.C. at 325-26, 586 S.E.2d at 110).

Plaintiffs' claim fails as a matter of law based on the allegations of the Complaint because any monetary benefit allegedly received by the Defendant Attorneys did not result from any value associated with the “DeLoache” name. “The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and

other aspects of personal identity.” Gignilliat, 385 S.C at 458-459, 684 S.E.2d at 759. The Complaint alleges that the funds paid to Defendant Attorneys were paid by “Class Counsel in *Posey*” from the *Posey* settlement funds. (Compl. ¶ 42.) First, Plaintiffs’ Complaint fails to assert any claim by Plaintiffs that there is any inherent commercial value in the use of their names by virtue of the *Posey* action or otherwise. Further, and as noted above, payment of attorneys’ fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Where such fees are paid, they are not paid as a result of any inherent or commercial value associated with the name of the objector(s), but rather to compensate the attorney(s) who presented the objection at the fairness hearing. There is no allegation to the contrary in the Plaintiffs’ Complaint. The Complaint fails to allege that Defendant Attorneys acted with any intent to misappropriate Plaintiffs’ “personality”, that the Defendant Attorneys received any payment as a result of any commercial value associated with the DeLoache name, or that the DeLoaches suffered any recoverable damage as a result of any alleged misappropriation of personality. Therefore, Plaintiffs’ Complaint fails to state facts sufficient to constitute a cause of action for wrongful appropriation of personality.

B. *Conversion*

Conversion is defined as “the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” Gignilliat, 385 S.C. at 465, 684 S.E.2d at 763 (quoting Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008)). As explained above, the Plaintiffs have failed to allege any factual basis entitling them to the amounts allegedly paid (or to be paid) to the Defendant Attorneys as part of the *Posey* class settlement. In other words,

Plaintiffs have not established through their Complaint that they have any right of ownership over any good or personal property at issue. It follows that Defendant Attorneys cannot be liable for the “unauthorized assumption” of a right that Plaintiffs do not themselves have. To the extent Plaintiffs may mean to claim conversion of an intangible property right – the right to use their name – the Court finds that Plaintiffs have failed to allege conversion of an “intangible property right that is merged in, or identified with, some document.” Gignilliat, 385 S.C. at 465-66, 684 S.E.2d at 763. (“We are reluctant to expand the tort of conversion as it relates to intangible property and conclude that it should be limited to intangible property rights that are identified with some document.”)

C. Civil Conspiracy

“A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff.” Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). Plaintiffs have not alleged that Defendant Attorneys joined together “for the purpose of injuring” Plaintiffs, nor have Plaintiffs alleged any conspiracy caused them “special damage”. Failure to plead these essential elements of a claim for civil conspiracy warrants dismissal of Plaintiffs’ civil conspiracy cause of action.

Additionally, dismissal of a civil conspiracy claim is proper if the civil conspiracy claim alleges the same acts for which damages are sought under other causes of action. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). The acts that Plaintiffs allege as the basis of their conspiracy cause of action are the same acts that form the basis of their other causes of

action. The alleged factual basis for each of Plaintiffs' causes of action is that the Defendant Attorneys used Plaintiffs' name without their permission to object to the *Posey* class settlement. Plaintiffs' civil conspiracy cause of action merely repeats these allegations and alleges that "Defendants combined together" to perform the alleged acts. (See Compl. ¶¶ 81-83.) Because Plaintiffs have failed to allege how any "separate and independent" act in furtherance of the alleged conspiracy has caused them damages, the Plaintiffs have failed to properly plead a claim for civil conspiracy and their cause of action should be dismissed. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011) ("To prove special damages, the [Plaintiffs] had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. Special damages must be properly pled, or the claim for civil conspiracy will be dismissed.") (internal citations omitted).

D. Constructive Trust

First and foremost, "a claim for imposition of a constructive trust is not an independent cause of action." Hale v Finn, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010) (internal citations omitted). Instead, a constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998) (quoting SSI Medical Servs., 301 S.C. at 500, 392 S.E.2d at 793-94).

As explained more thoroughly above, Plaintiffs have failed to allege they are entitled to any money or benefit which might be argued to have been conferred upon Moving Defendants. Plaintiffs further fail to plead facts that would entitle them to the money allegedly paid to Defendant Attorneys. Because Plaintiffs are not beneficially entitled to anything obtained by Defendant Attorneys, their cause of action seeking imposition of a constructive trust fails as a matter of law.

E. Breach of Fiduciary Duty

Plaintiffs allege in their Complaint that they “never engaged any of the Defendants as lawyers to represent the DeLoaches on any claims, including any claims related to stucco.” (Compl. ¶ 46.) Plaintiffs’ conclusory allegations concerning duties the Defendant Attorneys allegedly owed to them are contradicted by Plaintiffs’ factual allegations concerning their relationship with the Defendant Attorneys. “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Pitts v. Jackson Nat’l Life Ins. Co., 352 S.C. 319, 330 S.E.2d 502, 507 (Ct. App. 2002) (quoting Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)). Accepting as true “the facts alleged in the complaint, along with all reasonable inferences deducible therefrom,” the Court finds that the Plaintiffs have affirmatively denied having “impose[d] a special confidence” in Moving Defendants and, as a result, failed to plead any facts that would give rise to a fiduciary relationship between them and the Defendant Attorneys. Plaintiffs have likewise failed to allege that Moving Defendants acted in bad faith or that Plaintiffs incurred any recoverable damage as a result. Therefore, the Court finds that

Plaintiffs failed to plead facts sufficient to constitute a cause of action for Breach of Fiduciary Duty.

Even if the Court were to find that Plaintiffs had pled facts establishing the existence of a fiduciary relationship, Plaintiffs' claim for breach of fiduciary duty would be subject to dismissal pursuant to Section 15-36-100 of the South Carolina Code. Subsection B of this section states, in pertinent part, as follows: "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . the plaintiff must file as part of the complaint an affidavit of an expert witness 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. § 15-36-100.⁴ Although labeled as a claim for "breach of fiduciary duty" rather than "negligence", the Complaint alleges the existence and breach of numerous professional duties that allegedly derived from an attorney-client relationship between the Plaintiffs and Defendant Attorneys. (See Compl. ¶ 98-106) (repeating the phrase "Defendants, as the DeLoaches' lawyers, . . ."). Because Plaintiffs' allegations attempt to set forth "an action for damages alleging professional negligence" against attorneys, the affidavit requirement of Section 15-36-100 is triggered notwithstanding the label Plaintiffs' associate with their cause of action.⁵

Pursuant to Subsection (C)(1), "If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit

⁴ Subsection G identifies "attorneys at law" as a profession to which Section 15-36-100 applies.

⁵ This outcome is supported by the Supreme Court's recent decision in RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., in which the Court held that a breach of fiduciary duty claim was "duplicative" of a legal malpractice claim where it was based on the same underlying facts. 399 S.C. 322, 336-337, 732 S.E.2d 166, 173 (2012) ("Although RFT now argues a breach of fiduciary claim *could* be distinguishable from legal malpractice, RFT does not set forth any specific facts that demonstrate its breach of fiduciary duty claim *is* distinguishable because it arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts. Consequently, we hold the breach of fiduciary duty claim is duplicative.") (emphasis in original).

should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.” S.C. Code Ann. § 15-36-100(C)(1). Based on the foregoing, even if the Court disregarded Plaintiffs’ factual allegation that they did not engage Defendants to represent them, the Court finds that Plaintiffs’ claim for breach of fiduciary duty must be accompanied by an expert affidavit pursuant to Section 15-36-100 of the South Carolina Code. Finding no record of an expert affidavit contemporaneously filed with the Complaint, Plaintiffs’ claim for breach of fiduciary duty is properly dismissed.

F. Injunctive Relief

As a prerequisite for issuing an injunction, the moving party must show that without such relief “it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Invs. v. Century Builders of Piedmont, 387 S.C. 583, 586-87 694 S.E.2d 15, 17 (2010). As set out more thoroughly above, Plaintiffs’ Complaint fails to allege any special harm of any nature, including “irreparable” harm. Likewise, Plaintiffs have failed to allege any likelihood they will be successful on the merits of their claim or otherwise allege they have no other remedy available to them. Accordingly, the Court finds that Plaintiffs have failed to state a claim for injunctive relief.

III. Motion to Strike Pleadings

Also before the Court are Defendants’ Motions to Strike and/or Dismiss Plaintiffs’ “Summary of the Case”. SCRCP Rule 12(f) requires, “Upon motion pointing out the defects complained of, ... at any time the court may order stricken from any pleading any ... redundant, immaterial, impertinent or scandalous matter.” The Rules of Civil Procedure also dictate the

“General Rules of Pleading”, stating, “A pleading which sets forth a cause of action, ... shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court’s jurisdiction depends,... (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.” Rule 8(a), SCRCF. The Rules further require, “All averments of the facts of a cause of action... shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances;....” Rule 10(b), SCRCF.

The Defendants have objected to Plaintiffs’ inclusion of four paragraphs in their Complaint under the subtitle “Summary of the Case”, those paragraphs appearing on pages 1 through 3 of Plaintiffs’ Complaint. Defendants argue those paragraphs are violative of the Rules of Civil Procedure, and have further asked that the paragraphs be stricken as “redundant, immaterial, impertinent or scandalous.” SCRCF Rule 12(f). After review of the paragraphs, the Court finds that the paragraphs under Plaintiffs’ “Summary of the Case” do not comply with the Rules of Civil Procedure, do not state a claim upon which relief might be granted, and are unnecessary to the Complaint. Therefore, Plaintiffs’ paragraphs under the sub-title “Statement of the Case” are stricken from the pleading.

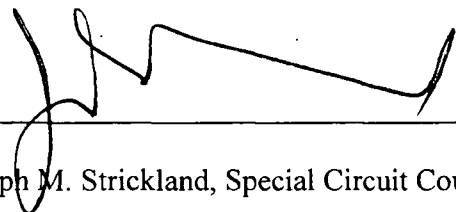
CONCLUSION

For the reasons stated above, the Court finds that each of Plaintiffs’ causes of action against William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen, and William M. Bowen, PA fail as a

matter of law based on the allegations of the Complaint. Further, the Court finds that Plaintiffs' paragraphs under the sub-title "Summary of the Case" are not proper under the Rules of Civil Procedure and shall be stricken from the pleading. All remaining allegations in Plaintiffs' Complaint are dismissed in their entirety pursuant to Moving Defendants' Motions.

AND IT IS SO ORDERED.

This 24th day of Oct., 2013



Joseph M. Strickland, Special Circuit Court Judge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**ORDER DENYING
PLAINTIFFS' MOTION TO ALTER
OR AMEND JUDGMENT**

JEANETTE W. MCGRIDE
C.C.P. & G.S.

2014 FEB 18 AM 10:45

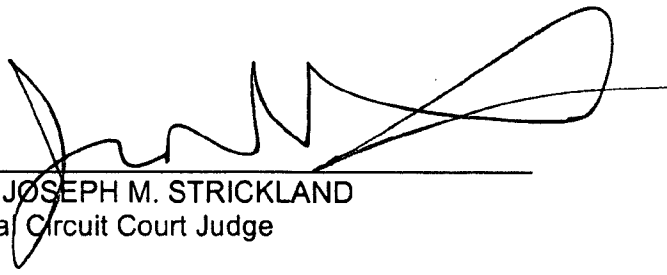
RICHLAND COUNTY
FILED

This matter comes before the Court on Plaintiffs' Rule 59(e) Motion to Alter or Amend.

The Court denies Plaintiffs' Motion to Alter or Amend Judgment for the Order Granting Motions of Defendants William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, Defendant Sued as Leath Bouch Crawford, LLP, Francis E. Grimbail, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen, and William M. Bowen, PA to Dismiss all Claims and/or Strike Pleadings and the Order Granting Defendant John D. Kassel's Motion to Dismiss.
AND IT IS SO ORDERED.

Page 2

This 1th day of February ²⁰¹⁴ 2013



HON. JOSEPH M. STRICKLAND
Special Circuit Court Judge

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40- 7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimball; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

VERIFIED COMPLAINT
(Jury Trial Demanded)

1. Wrongful Appropriation of
Personality;
2. Conversion;
3. Civil Conspiracy;
4. Constructive Trust;
5. Breach of Fiduciary Duty;
6. Breach of Duty of
Confidentiality; and
7. Injunctive Relief.

2011 NOV -3 AM 11:51
JANETTE W. McBRIDE
C.C.P. & G.S.
FILED
RICHLAND COUNTY

Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, complaining of Defendants, William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; George E. Mullen; Robert L. Wylie; Francis E. Grimball; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; WILLIAM M. BOWEN, PA; and John D. Kassel would respectfully show unto the Court as follows:

SUMMARY OF THE CASE

This Complaint centers upon the Defendant class action lawyers' and Defendant law firms' wrongful appropriation and unauthorized use of the DeLoaches' names – without their knowledge or consent – in a nationwide class action lawsuit in Tennessee called *Posey v. Dryvit*.

The Defendant class action lawyers did this without ever communicating with the DeLoaches in any manner on any subject at any time, much less seeking consent to use

their names and their "Dryvit stucco claim" as the sole Class Action Objectors from South Carolina who would submit to the jurisdiction of the Tennessee court. The Defendant class action lawyers did this while representing a certain class of all South Carolina plaintiffs with stucco claims against Dryvit Systems. The Defendant class action lawyers did this after obtaining class certification thereby opting South Carolina out of the *Posey* nationwide class action after showing how devastating the proposed *Posey* settlement would have been if imposed on South Carolina. The Defendant class action lawyers did this notwithstanding that they never communicated with the DeLoaches to report on their representation, or to advise that over \$600,000 in funds had been obtained as a result of their activities, or to seek to obtain their consent for the apportionment of "fees" between counsel in different firms.

The Defendant Class Action lawyers subjected the DeLoaches to the jurisdiction of the *Posey* court as Class Member Objectors to obtain financial gain, which later turned into secret payments and commitments to pay totaling \$825,000 that were never specifically acknowledged or authorized by the Tennessee court. The Defendant class action lawyers subjected the DeLoaches to the jurisdiction of the *Posey* court as Class Member Objectors without ever checking to find out if the DeLoaches' house contained Dryvit product. Because if they had – they would have learned there is no proof the DeLoaches' house was ever clad with Dryvit product. To make matters worse, the DeLoaches are now concerned they are at risk for claims of contempt of court or fraud on the court as counsel for Dryvit Systems recently took the deposition of Mrs. DeLoache about her knowledge of the objections the Defendant class action lawyers made on her and her husband's behalf in *Posey* and the recent revelation that there is no proof the DeLoaches' house was ever

clad with Dryvit product.

The genesis of all of the Defendant class action lawyers' tortious conduct was the Defendant non-class action lawyer's improper disclosure of the DeLoaches' privileged information to the joint venture formed by all of the other Defendant class action lawyers and Defendant law firms for the purpose of financial gains to be obtained by challenging the *Posey* settlement by getting a class certified in South Carolina.

The DeLoaches seek disgorgement from Defendants of all those funds and all other benefits wrongfully obtained, other actual damages, prejudgment interest, and punitive damages, as well as injunctive relief prohibiting Defendants from making representations to courts and any other entities that they ever represented the DeLoaches.

PARTIES- PLAINTIFF

1. Plaintiff, William E. DeLoache, III, is a citizen and resident of Richland County, South Carolina.
2. Plaintiff, Allison H. DeLoache, is a citizen and resident of Richland County, South Carolina.

PARTIES- DEFENDANT

3. Defendant, William Dixon Robertson, III, is, upon information and belief, a citizen and resident of Richland County, South Carolina, and is a lawyer licensed to practice law in South Carolina.
4. Defendant, W. Jefferson Leath, Jr., is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

5. Defendant, Michael S. Seekings, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

6. Defendant, LEATH, BOUCH & CRAWFORD, LLP, is, upon information and belief, a Limited Liability Partnership organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.

7. Defendant, Francis E. Grimball, is, upon information and belief, a citizen and resident of Charleston County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

8. Defendant, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC, is, upon information and belief, a Limited Liability Corporation organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.

9. Defendant, William M. Bowen, is, upon information and belief, a citizen and resident of Beaufort County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

10. Defendant, WILLIAM M. BOWEN, PA, is, upon information and belief, a Professional Association organized and existing under the laws of South Carolina, with its principal place of business in Charleston County, South Carolina.

11. Defendant, John D. Kassel, is, upon information and belief, a citizen and resident of Richland County, South Carolina, and is a lawyer licensed to practice law in South Carolina.

JURISDICTION

12. This Court has jurisdiction over these matters based upon Article V of the South Carolina Constitution, S.C. CODE ANN. §§ 36-2-802 and 36-2-803 (1976), and its plenary powers.

VENUE

13. Venue is proper in Richland County as Defendants, William Dixon Robertson, III, and John D. Kassel, are, upon information and belief, citizens and residents of Richland County, South Carolina.

FACTS

14. Sometime around or before July 2002, Plaintiffs, William E. DeLoache, III (Mr. DeLoache) and Allison H. DeLoache (Mrs. DeLoache) (collectively “the DeLoaches”) contacted Defendant, John D. Kassel (Kassel), with regard to possibly retaining him as their lawyer to pursue claims related to the problems they were experiencing with the stucco on their home located in Columbia, South Carolina, including possibly participating in a nationwide class action lawsuit brought on behalf of owners of residential homes clad with a synthetic stucco product called “Dryvit Exterior Insulating and Finishing Systems” (Dryvit EIFS). The nationwide class action suit pending in Tennessee was against a stucco manufacturer, DRYVIT SYSTEMS, INC., and styled *Posey v. Dryvit Systems, Inc. (Posey)*.

15. The DeLoaches communicated in confidence with Kassel regarding the merits of participating in a class settlement in *Posey* and also provided him with personal information, pictures, an inspection report, and other information concerning the stucco on the DeLoaches’ home.

16. After presumably reviewing the information, Kassel advised the DeLoaches that, in his opinion, given the risks involved it was not worth participating in the *Posey* class settlement and asked them to pick up their documents.

17. After receipt of Kassel's opinion and advice, the DeLoaches retrieved their materials from Kassel and did not retain Kassel to represent them.

18. The DeLoaches did not authorize Kassel to represent them in any legal matter.

19. The DeLoaches did not authorize Kassel to engage or associate any other lawyer on their behalf.

20. The DeLoaches did not authorize Kassel to reveal to anyone any of their privileged communications.

21. The DeLoaches did not authorize Kassel to reveal to anyone any information about their potential case.

22. The DeLoaches did not authorize Kassel to reveal to anyone any information about their consideration of whether to have any involvement in the *Posey* matter, *Posey* settlement, their stucco claims, or anything else disclosed to him.

23. The DeLoaches essentially closed the door on actively pursuing legal claims concerning the stucco or participating in the *Posey* matter after picking up their documents from Kassel in 2002, and did not hear anything more about the stucco or *Posey* matter for more than six and a half years until late January - February of 2009.

(How the DeLoaches Found Out)

24. In January or early February 2009, the DeLoaches were approached by certain lawyers who intervened in and were representing the plaintiffs in a South Carolina lawsuit

that had been certified as a class action originally styled *Cardamone, et al. v. Dryvit Systems, Inc., et al.*, Civil Action No. 2002-CP-07-1377, which will be referred to as *Cardamone*. The lawyers who approached the DeLoaches in 2009 will be referred to as Intervening Counsel. The *Cardamone* suit involved product liability claims against DRYVIT SYSTEMS, INC. by a class of owners of homes in South Carolina that were clad with Dryvit EIFS.

25. In late January or early February 2009, Intervening Counsel asked the DeLoaches if they had filed “an objection” to a proposed settlement in the *Posey* matter in Tennessee. The DeLoaches told Intervening Counsel that although they vaguely recalled the *Posey* Tennessee class action, but they did not take any action in that lawsuit. They told Intervening Counsel that they had not authorized any lawyers to take action on their behalf in that matter and that they were unaware of any action taken in the *Posey* lawsuit on their behalf.

26. In late January or early February 2009, Intervening Counsel provided the DeLoaches with information showing that Defendants, Francis E. Grimball (Grimball), Michael S. Seekings (Seekings), William Dixon Robertson, III (Robertson), W. Jefferson Leath, Jr. (Leath), and a Tennessee lawyer, had filed papers and/or appeared in *Posey* on behalf of the DeLoaches as “objectors” to a proposed nationwide class action settlement on product liability claims concerning Dryvit EIFS, which placed the DeLoaches within the jurisdiction of the Tennessee court.

27. The DeLoaches told Intervening Counsel that they did not know, had never spoken to, and never been represented by any of the Defendants, and had never received any

communication from the Defendants, with the exception of Kassel, about any matter whatsoever, including the *Posey* lawsuit or any other claims, objections, or settlements related to Dryvit EFIS.

28. After meeting with these attorneys Allison DeLoache signed an affidavit dated February 4, 2009, which was filed in the *Cardamone* case explaining generally the circumstances set forth in the foregoing paragraphs.

29. On or about February 27, 2009 and at the request of counsel for Robertson, the DeLoaches met with Robertson and his personal lawyer in the Columbia offices of Robertson's lawyer. Prior to the meeting, the DeLoaches were not advised of the subject of the meeting or that they may need their own lawyer to represent and protect their interests at this meeting.

30. During the meeting the DeLoaches got the clear impression that Robertson and his lawyer were trying to convince them that the statements in Mrs. DeLoache's affidavit were not true.

31. On or about April 15, 2009, Robertson signed an affidavit that was filed in the *Cardamone* case in response to Ms. DeLoache's affidavit, in which he describes his communications with Kassel and other events concerning the DeLoaches.

32. In Paragraph 9 of Robertson's affidavit he states that

After learning of Mrs. DeLoache's affidavit, I reviewed my file and found the following entries that refer or relate to the DeLoaches:

- a. a telephone record dated September 3, 2002, documenting a conversation I had with Mr. Kassel. It also reflects Mrs. DeLoache's social security number;

- b. a time entry dated September 30, 2002, reflecting a telephone call to Mr. DeLoache; and
- c. a time entry dated October 3, 2002, reflecting a meeting with Mrs. DeLoache.

(Defendants' Conduct Without Plaintiffs' Knowledge or Consent)

33. Robertson, Grimball, Seekings, and Leath (collectively "Defendant class action lawyers") and their law firms, Defendant, LEATH, BOUCH & CRAWFORD, LLP (LEATH BOUCH) and Defendant, MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC (MULLEN WYLIE) (collectively "Defendant law firms") formed a joint venture for the purpose of financial gains to be obtained as the result of challenging the *Posey* settlement by getting a class certified in South Carolina. Other lawyers from South Carolina may have been involved in other aspects of the joint venture.

34. On or about September 24, 2002, six days before the first date Robertson later contended he first spoke with Mr. DeLoache, Defendants, Grimball, Seekings, Wylie, and Mullen, signed a legal memorandum that was filed in *Posey* two days later on September 26, 2002, and styled, MOTION FOR PERMISSION TO APPEAR *PRO HAC VICE*, seeking to have Grimball, Seekings, Wylie, and Mullen, admitted in the *Posey* lawsuit "on behalf of the Plaintiffs Allison DeLoache and William DeLoache."

35. At no point relevant to the claims in this lawsuit did Robertson have any authority, including apparent authority, to represent the DeLoaches.

36. On or about October 1, 2002, Grimball, Robertson, and Wylie appeared on behalf of purported Objector-Plaintiffs, the DeLoaches, at a Fairness Hearing in *Posey*. Grimball made most of the arguments to the *Posey* court, including representations that he

represented the DeLoaches and that affidavits would be filed by or on behalf of the DeLoaches, which would satisfy all the criteria necessary to provide the DeLoaches with standing to object to the proposed settlement.-----

37. Upon information and belief, Defendant class action lawyers and Defendant law firms, never submitted all the necessary information and filed all of the forms required by the *Posey* court to qualify the DeLoaches as objectors to the settlement proposed in *Posey*, and could not have done so – even if the DeLoaches had been their clients – because recent inspections and testings revealed no evidence the DeLoaches' home was ever clad with Dryvit EIFS.

38. Proof that the claimant's or objector's residence either was clad or had been clad with Dryvit EIFS was a condition precedent to participating in *Posey* as either a claimant or an objector.

39. The fact that Defendant class action lawyers and Defendant law firms filed papers and made arguments in *Posey* objecting to the proposed settlement on product liability claims concerning Dryvit EIFS when the DeLoaches do not have Dryvit EIFS on their house exposes the DeLoaches to risks that DRYVIT SYSTEMS or the Tennessee court will seek to hold them in contempt of court or claim that they committed fraud on the court.

40. As a direct result of using the DeLoaches' name as objectors in the *Posey* matter, Defendant class action lawyers and Defendant law firms were able to make arguments to the *Posey* court.

41. As a direct result of using the DeLoaches' name as objectors in the *Posey* matter, Defendant class action lawyers and Defendant law firms reached an agreement with

DRYVIT SYSTEMS and Plaintiffs' Class Counsel in *Posey* whereby they were to be paid a total of \$825,000.

42. The first \$600,000 of the \$825,000 was to be paid by Class Counsel in *Posey* from the funds DRYVIT SYSTEMS paid to Class Counsel for attorney's fees that the *Posey* court had approved to be paid to the *Posey* Class Counsel, even though the *Posey* court never specifically approved of or acknowledged the payments to Defendant class action lawyers and Defendant law firms.

43. The second \$225,000 of the \$825,000 is to be paid by DRYVIT SYSTEMS, INC. to Defendant class action lawyers and Defendant law firms in two installments. The first payment of \$125,000 to be paid 90 days after the final dismissal of *Cardamone* and the second payment of \$100,000 to be paid 9 months thereafter.

44. The first \$600,000 has already been paid to the Defendant class action lawyers and Defendant law firms.

45. The Defendant class action lawyers and Defendant law firms argued many times to the South Carolina court in *Cardamone* that they represented the DeLoaches in the proceedings in *Posey*.

46. The DeLoaches never engaged any of the Defendants as lawyers to represent the DeLoaches on any claims, including any claims related to stucco.

47. The DeLoaches never signed or otherwise entered into a fee agreement with any of the Defendants.

48. The DeLoaches never agreed to or signed any document authorizing a fee allocation between the different Defendant class action lawyers and/or Defendant law

firms.

49. Other than the limited communications from Kassel in 2002, none of the Defendant class action lawyers and Defendant law-firms-ever-communicated with the DeLoaches anything about the substance of the proceedings in *Posey*, the \$600,000 payments they received, or the remaining \$225,000 they are to receive as a result of using the DeLoaches' name in the *Posey* proceedings, until after the affidavit signed by Mrs. DeLoache was filed in February 2009, and only then in an effort to convince Mrs. DeLoache that the testimony in her affidavit was not true.

(Relationships Between Defendants)

50. Grimball, Mullen, Seekings, and Wylie, are lawyers and are or were Members of MULLEN WYLIE.

51. Leath and Seekings, are lawyers and are or were Members of LEATH BOUCH.

52. Defendant, William M. Bowen (Bowen), is a lawyer and is a Member of Defendant, William M. Bowen, PA (BOWEN PA).

53. At all times relevant hereto, Grimball, Mullen, Seekings, and Wylie, were acting as agents for MULLEN WYLIE.

54. At all times relevant hereto, Leath, Robertson, and Seekings, were acting as agents for LEATH BOUCH.

55. At all times relevant hereto, Bowen was acting as an agent for BOWEN PA.

56. At all times relevant hereto, Grimball, Mullen, Seekings, Wylie, Leath, Robertson, Bowen, MULLEN WYLIE, BOWEN PA, and LEATH BOUCH were acting as agents for their joint venture formed for the purpose of financial gains to be obtained by challenging the *Posey*

settlement, including getting a class certified in South Carolina.

57. The acts, omissions, and liability of MULLEN WYLIE, BOWEN PA, and LEATH BOUCH, and their joint venture, includes the acts and/or omissions of their agents, principals, employees and/or servants, including but not limited to those by Grimbball, Mullen, Seekings, Wylie, Robertson, Bowen, and Leath, both directly and vicariously, as well as jointly and severally, pursuant to principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior.

58. Upon information and belief, at all times relevant hereto, MULLEN WYLIE, BOWEN PA, and LEATH BOUCH, and the joint venture herein acted by and through their employees and agents, including but not limited to Grimbball, Mullen, Seekings, Wylie, Robertson, Bowen, and Leath, who acted within the course and scope of their employment and/or agency with all implied, inherent, apparent and express authority to so bind their masters and principals, including the joint venture, by their collective or individual willful, wanton and reckless actions and/or omissions making MULLEN WYLIE, BOWEN PA, and LEATH BOUCH, and the joint venture, vicariously liable for same under the principles and doctrines of non-delegable duty, corporate liability, apparent authority, agency, ostensible agency and/or respondeat superior.

FOR A FIRST CAUSE OF ACTION
(Wrongful Appropriation of Personality)
(Against All Defendants Except Kassel)

59. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

60. The DeLoaches own and owned at all times relevant to this claim an enforceable right in their individual and collective identity, including without limitation the use of their surname, DeLoache, as part of any legal proceeding.

61. Defendants appropriated and used the DeLoaches' surname.
62. Defendants appropriated and used the DeLoaches' surname in *Posey*.
63. Defendants appropriated ~~and used the~~ DeLoaches' surname without the DeLoaches' knowledge, permission, or consent.
64. Defendants appropriated and used the DeLoaches' surname in *Posey* without the DeLoaches' knowledge, permission, or consent.
65. Defendants used the DeLoaches' surname to obtain financial, commercial, or professional benefit.
66. Defendants used the DeLoaches' surname in *Posey* to obtain financial, commercial, or professional benefit.
67. Defendants had no written fee agreement with the DeLoaches.
68. Defendants had no oral fee agreement with the DeLoaches.
69. Because there was no written or oral fee agreement with the DeLoaches, Defendants had no right to any funds obtained as a result of using the DeLoaches' name in the *Posey* proceedings.
70. As a direct and proximate result of Defendants' wrongful appropriation of Plaintiffs' personality, Plaintiffs have been damaged in an amount to be proven at the trial of this case, including all funds Defendants' obtained using the DeLoaches' surname in *Posey*.
71. In addition to the actual, consequential, and/or incidental damages suffered, Defendants' intentional, highly reckless, wanton, and irresponsible conduct as specified herein entitles the DeLoaches to an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(Conversion)
(Against All Defendants Except Kassel)

72. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

73. The DeLoaches owned an interest in the property rights associated with their personality, including the use of their surname in legal proceedings.

74. The DeLoaches had a right to possess the rights associated with their personality, including the use of their surname in legal proceedings.

75. These Defendants were paid and obtained at least \$600,000 as a direct and proximate result of using the DeLoaches' names in the *Posey* proceedings.

76. These Defendants exercised dominion and control over the \$625,000 and have wrongfully and unlawfully detained such property, *i.e.*, the \$600,000, from the DeLoaches.

77. The DeLoaches made a demand for the return of their property, *i.e.*, the \$600,000, which these Defendants refused and continue to refuse to return such property.

78. As a direct and proximate result of these Defendants' wrongful exercise of dominion and control over the DeLoaches' money, the DeLoaches have suffered actual, consequential, and incidental damages in an amount to be determined at the trial of this case.

79. In addition to the actual, consequential, and/or incidental damages suffered, these Defendants' intentional, highly reckless, wanton, and irresponsible conduct as specified herein entitles the DeLoaches to an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(Civil Conspiracy)
(Against All Defendants Except Kassel)

80. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

81. These Defendants combined together to injure the DeLoaches by participating in and obtaining financial benefits from *Posey* by asserting objections to the proposed settlement in *Posey* on behalf of the DeLoaches without obtaining the permission or consent of the DeLoaches.

82. These Defendants combined together to injure the DeLoaches by participating in and obtaining financial benefits from *Posey* without telling the DeLoaches once the financial benefits were actually received.

83. These Defendants combined together to injure the DeLoaches by participating in and obtaining financial benefits from *Posey* without delivering to the DeLoaches the \$600,00 funds Defendants received by participating in and obtaining financial benefits from *Posey* by asserting objections to the proposed settlement in *Posey* on behalf of the DeLoaches and through the use of the DeLoaches' surname.

84. As a direct and proximate result of specific overt acts by these Defendants in furtherance of their civil conspiracy, the DeLoaches suffered actual damages that include the \$600,00 funds Defendants received and the additional \$225,000 Defendants have a right to receive.

85. These Defendants' overt actions proximately caused special damages to the DeLoaches, including but not necessarily limited to, the time, effort, and expenses suffered by the DeLoaches in conferences with the lawyers in the *Cardamone* lawsuit, signing an

affidavit in the *Cardamone* lawsuit, and having to give a deposition in the *Cardamone* lawsuit.

86. The special damages caused by these Defendants' civil conspiracy also include the substantial risk that DRYVIT SYSTEMS, INC. or the *Posey* court *sua sponte* may seek to impose sanctions against the DeLoaches for contempt of court or fraud upon the court based on the fact that papers were filed and arguments were made on their behalf in *Posey* objecting to the proposed settlement on product liability claims concerning Dryvit EIFS when the DeLoaches did not have and never did have Dryvit EIFS on their house.

87. As a direct and proximate result of these Defendants' civil conspiracy by the actions and omissions as specified herein, the DeLoaches sustained actual, consequential, incidental, and special damages in an amount to be determined by the jury at the trial of this case.

88. In addition to the actual, consequential, and/or incidental damages suffered, these Defendants' intentional, highly reckless, wanton, and irresponsible conduct as specified herein entitles the DeLoaches to an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(Constructive Trust)
(Against All Defendants Except Kassel)

89. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

90. To the extent that the these Defendants received \$600,000 from their unauthorized use of the DeLoaches' name in *Posey*, or should in the future receive the remaining \$225,000 from their use of the DeLoaches' name in *Posey*, these Defendants have, or will be, unjustly enriched.

91. These Defendants should not in equity and good conscience be allowed to retain any funds from their use of the DeLoaches' name in *Posey*.

92. A constructive trust may be imposed when parties – such as these Defendants – obtain a benefit which does not equitably belong to them and which they cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by mistake of fact or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty.

93. These Defendants' fraudulent statements and/or grossly reckless misrepresentations to the *Posey* court and litigants concerning their alleged representation of the DeLoaches caused substantial funds to be paid to these Defendants.

94. These Defendants should not in equity be allowed to reap the benefits of their fraudulent statements and/or grossly reckless misrepresentations concerning their alleged representation of the DeLoaches.

95. To the extent that these Defendants obtained, or may in the future obtain, any funds resulting from their unauthorized use of the DeLoaches' name in *Posey*, this Court should impose a constructive trust in equity to vindicate the DeLoaches' rights, to serve the ends of justice and/or to frustrate the actual and/or constructive fraud arising from Defendants' tortious conduct.

96. The DeLoaches are entitled to an Order of this Honorable Court establishing a constructive trust to their benefit, the corpus of which should consist of the full amount of all funds these Defendants received or will receive resulting from their unauthorized use of the DeLoaches' name in *Posey*.

FOR A FIFTH CAUSE OF ACTION
(Breach of Fiduciary Duty)
(Against All Defendants)

97. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

98. When Defendants assumed the representation of the DeLoaches, Defendants were charged to act as the DeLoaches' fiduciaries and their agents as it pertained to the objections to the settlement proposed in *Posey*.

99. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.

100. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to represent the DeLoaches with undivided loyalty.

101. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to fully disclose to the DeLoaches any material matters relating to the representation, including the fact that they filed papers submitting the DeLoaches to the jurisdiction of the *Posey* court in Tennessee.

102. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to fully disclose to the DeLoaches any material matters relating to the representation, including the fact that they

obtained a substantial financial recovery for their activities in *Posey* while representing the DeLoaches.

103. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to never use their position as lawyers to take advantage of the DeLoaches.

104. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to never use information learned during the representation to benefit themselves or other parties at the detriment of the DeLoaches, unless the DeLoaches consented after consultation.

105. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty never to take advantage of situations presented during the representation to benefit for themselves or other parties at the detriment of the DeLoaches.

106. Defendants, as the DeLoaches' lawyers, had a fiduciary relationship with the DeLoaches consisting of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith, and which included a duty to meet the standards of fiduciary conduct required of an ordinary lawyer practicing law in South Carolina under the same or similar circumstances.

107. The DeLoaches were at all times relevant hereto the Defendants' principals as it pertained to the objections Defendants made on behalf of the DeLoaches to the settlement

proposed in *Posey*.

108. Defendants breached their fiduciary duties to the DeLoaches, among other things, by failing to communicate promptly with the DeLoaches' and keep them reasonably informed about the matter; by failing to obtain from the DeLoaches a written fee agreement; and by failing to obtain the DeLoaches' informed consent to any fee split.

109. Agents cannot profit in derogation of their duties to their principals.

110. Defendants obtained payments of at least \$600,000 and have a right to obtain an additional \$225,000 as a direct result of their activities taken in *Posey* on behalf of their principals, the DeLoaches.

111. As a direct and proximate result of Defendants' breach of their fiduciary duties the DeLoaches sustained damaged in an amount to be proven at the trial of this case.

112. As a direct and proximate result of Defendants' breach of their fiduciary duties the DeLoaches are entitled to and pray for an order directing the Defendants to disgorge to the DeLoaches any and all fees, payments, or other benefits realized by Defendants from their activities in *Posey*.

113. In addition to the actual, consequential, and incidental damages suffered, Defendants' highly reckless, wanton, and irresponsible conduct as specified herein entitles the DeLoaches to an award of punitive damages.

FOR A SIXTH CAUSE OF ACTION
(Breach of Duty of Confidentiality)
(Against Kassel Only)

114. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

115. Kassel had a duty to keep confidential and not disclose any of the information

disclosed to him in confidence by the DeLoaches during the time when Kassel and the DeLoaches were considering whether to form a lawyer-client relationship to pursue the DeLoaches' product liability claims arising from the artificial stucco on their house.

116. Kassel breached his duty to keep confidential and not disclose any of the information disclosed to him in confidence by the DeLoaches.

117. As a direct and proximate result of Kassel's breach of his duty to keep confidential and not disclose any of the information disclosed to him in confidence, the DeLoaches sustained actual, consequential, and incidental in an amount to be determined by the jury at the trial of this case.

118. In addition to the actual, consequential, and incidental damages suffered, Kassel's highly reckless, wanton, and irresponsible conduct in breach of his duty of confidentiality as specified herein entitles the DeLoaches to an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(For Injunctive Relief)
(Against All Defendants)

119. The foregoing Paragraphs are reiterated and realleged as though set forth verbatim.

120. The DeLoaches pray this Honorable Court issue an Order enjoining Defendants from using the DeLoaches' name in any manner in the future and from making any claim in any court that they ever represented the DeLoaches in any proceedings or on any claim.

TRIAL BY JURY

121. The DeLoaches demand a jury trial on all claims and issues so triable.

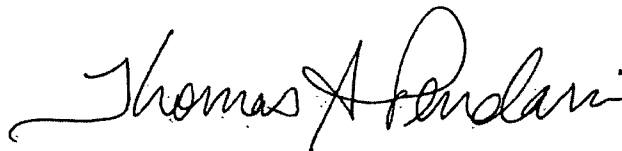
PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, pray

for judgment against Defendants, William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; George E. Mullen; Robert L. Wylie; Francis E. Grimball; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel, *jointly and severally*, and against John D. Kassel for all actual damages, consequential damages, special damages, and incidental damages, for prejudgment interest, and for punitive damages, all in an amount to be more specifically proven at trial, and for injunctive relief to prevent Defendants from using the DeLoaches' name in any manner in the future, and for the costs of this action, and for such other and further relief as this Honorable Court may deem just and proper.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with a large, stylized initial "T".

Thomas A. Pendarvis (SC Bar # 064918)
500 Carteret St Ste A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com

Attorney for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

Beaufort, South Carolina

November 1, 2011

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon-Robertson, III; Francis E.
Grimball; George E. Mullen; Michael S.
Seekings; Robert L. Wylie; W. Jefferson
Leath, Jr.; LEATH, BOUCH & CRAWFORD,
LLP; MULLEN WYLIE, LLC formerly
MULLEN, WYLIE & SEEKINGS, LLC; and
John D. Kassel,

Defendants.

**VERIFICATION
OF COMPLAINT**

JEANETTE W. McBRIDE
C.C.P. & G.S.

2011 NOV -3 AM 11:51

RICHLAND COUNTY
FILED

PERSONALLY appeared before me Allison H. DeLoache, who, first being duly sworn, says: that he is one of the Plaintiffs in the foregoing action; that she has read the foregoing Verified Complaint; that the statements contained therein are true to the best of her knowledge except as to those stated to be based upon information and belief, as to which, she believes such matters to be true.

Karen M. McLeod Allison H. DeLoache
SWORN to before me this Allison H. DeLoache

1st day of November, 2011

NOTARY PUBLIC FOR SOUTH CAROLINA (L.S.)
My commission expires My Commission Expires June 21, 2015

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF RICHLAND) COURT OF COMMON PLEAS
3) 2011-CP-40-07432

4 William E. DeLoache, III, et)
5 al.,)

6 Plaintiff,)

7 vs.)

8 William Dixon Robertson, III,)
9 et al.,)

10 Defendant.)

TRANSCRIPT OF RECORD

June 6, 2012
Columbia, South Carolina

11
12
13
14 B E F O R E:

15 THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.
16 THE HONORABLE JOSEPH M. STRICKLAND, SPECIAL JUDGE.

17
18
19 A P P E A R A N C E S:

20 THOMAS A. PENDARVIS, ESQ.
Attorney for the Plaintiff

21 AMY L.B. HILL, ESQ.
Attorney for Defendant John Kassel

22 KENT T. STAIR, ESQ.
23 Attorney for Defendants Jeff Leath, Mike
24 Seekings and Leath, Bouch & Crawford

25 JOSHUA D. SHAW, ESQ.
Attorney for Defendant William Dixon Robertson, III

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JAMES E. LADY, ESQ.
Attorney for Defendants Frank Grimball
and Mullen Wylie

JAMES L. BRUNER, ESQ.
Attorney for Defendant William Bowen
and William Bowen, P.A.

DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

1 JUNE 6, 2012

2 (WHEREUPON, the following was heard by
3 Judge Benjamin.)_____

4 THE COURT: William DeLoache versus William
5 Dixon Robertson, 2011-CP-40-7432.

6 If I can just have somebody -- so I can get an
7 idea as to who represents who, let me ask you for
8 appearances.

9 Yes, sir?

10 MR. PENDARVIS: May it please the Court?
11 Thomas Pendarvis, for the Plaintiffs.

12 THE COURT: All right. Yes, ma'am?

13 MS. HILL: Amy Hill. I represent John Kassel,
14 one of the Defendants.

15 THE COURT: Yes, sir?

16 MR. STAIR: My name is Kent Stair, and I am
17 with Carlock, Copeland & Stair, and I represent the
18 Defendants, Jeff Leath, who is here with us today
19 in the glasses; and I guess the darker glasses
20 beside him is Mike Seekings, my other client. And
21 I also represent their firm, Leath, Bouch &
22 Seekings -- Crawford.

23 THE COURT: All right. Yes, sir?

24 MR. SHAW: Good afternoon. Josh Shaw, for
25 William Dixon Robertson.

1 THE COURT: You said Shaw?

2 MR. SHAW: Shaw, S-H-A-W.

3 MR. LADY: Jim Lady, for Frank Grimball and
4 Mullen Wylie.

5 THE COURT: Yes, sir?

6 MR. BRUNER: Thank you, Your Honor. I'm Jim
7 Bruner. I represent William Bowen and his firm,
8 William Bowen, P.A.

9 THE COURT: All right. Is this -- have y'all
10 met with Judge Barber regarding this?

11 MR. PENDARVIS: No, Your Honor.

12 THE COURT: Give me one second. I need to
13 speak to him:

14 MR. PENDARVIS: Let me add one thing. This
15 hearing was set before Judge Kinard and Judge
16 Kinard has a conflict, so I think Judge Barber
17 knows about the matter, but we have not met with
18 him.

19 THE COURT: Is this the -- and I was just
20 going through the names, because he asked me about
21 hearing -- he was trying to find somebody to hear I
22 guess these motions. Is this the case involving
23 Judge Mullen's husband?

24 MR. LADY: Yes, Your Honor. I represent --

25 MR. PENDARVIS: Well, he is in it, but not --

1 MR. LADY: Mullen Wylie, George Mullen is one
2 of the principals of that firm. He is married --

3 THE COURT: He had talked to me about it. Let
4 me speak to him, because I want to make sure it is
5 the same -- because he had asked me about some --
6 mentioned it to me, and I told him at the time I
7 wasn't going to hear it, so I need to ask him. If
8 y'all will give me one second.

9 (WHEREUPON, a break was taken.)

10 THE COURT: I told him I didn't feel
11 comfortable hearing it at that time. So I am going
12 to recuse myself from hearing it. But I just spoke
13 with him and he asked me to speak with Judge
14 Strickland, the master, who also has jurisdiction
15 regarding hearing it. And Judge Strickland said --
16 because all of you are up here, some from
17 Charleston, some from Beaufort, instead of making
18 you go back home, he said that Judge Strickland
19 could hear it. And Judge Strickland has agreed to
20 hear it. So he said if y'all will give him about
21 10 or 15 minutes, he was reviewing the file and
22 will be down here shortly.

23 All right, thank you. I'm sorry about that.
24 He said he apologizes. He said when he asked he
25 didn't realize it was on the docket today. Keep

1 your seat.

2 (WHEREUPON, a break was taken.)

3 (WHEREUPON, the following was heard by
4 Judge Strickland.)

5 THE COURT: Is everyone here?

6 This is Civil Action 2011-CP-40-7432,
7 DeLoache, and others, versus Robertson, and others.

8 My notes indicate this is a motion to dismiss
9 or in the alternative some other relief.

10 To protect the record, my name is Joseph M.
11 Strickland. I am the Master-in-Equity for Richland
12 County, South Carolina. Pursuant to a standing
13 order from the Chief Justice, I serve also as a
14 Special Circuit Court Judge in Richland County, and
15 I can hear non-jury matters. And I was drafted
16 just a few minutes ago to hear this, because
17 apparently every judge within a hundred mile radius
18 of Columbia has a conflict. I don't think I do.
19 However, I have been working in this courthouse for
20 quite a few years, and I don't think I have a
21 conflict, but people obviously know who I am.

22 I am going to ask you to bear with me and
23 educate me a little bit. If everyone in the
24 courtroom can identify themselves and explain their
25 role in this litigation.

1 MR. PENDARVIS: We did it once before. Good
2 to see you again, Your Honor. May it please the
3 Court? Thomas Pendarvis, and I represent William
4 DeLoache and Allison DeLoache, as Plaintiffs in
5 this case.

6 MS. HILL: Yes, Your Honor. My name is Amy
7 Hill, and I'm here representing John Kassel, a
8 Defendant in this case.

9 THE COURT: All right.

10 MR. STAIR: And I'm Kent Stair, and I
11 represent Jeff Leath and Mike Seekings and Leath,
12 Bouch & Crawford. And with me here today are
13 Mr. Leath and Mr. Seekings.

14 THE COURT: All right.

15 MR. SHAW: Your Honor, I'm Josh Shaw. I
16 represent the Defendant, William Dixon Robertson.

17 MR. LADY: Your Honor, Jim Lady. I represent
18 Frank Grimball and Mullen Wylie.

19 MR. BRUNER: Your Honor, I'm Jim Bruner. I
20 represent William Bowen and his firm, William
21 Bowen, P.A.

22 THE COURT: All right. Thank you very much.

23 Okay. Tell me what the case is about. Who is
24 suing who for what? Why are you suing?

25 MR. PENDARVIS: I will give you a brief

1 summary, Your Honor. It is in the pleadings.
2 These are all -- my understanding is these are all
3 12(b) motions -- 12(b)(6) motions to dismiss.
4 There are some 12(b) -- 12(f) motions to strike,
5 but that is the essence of what the motions are.

6 This complaint is based on some events where
7 clients went to Mr. Kassel about a stucco lawsuit
8 that was a nationwide class action. And they went
9 to Mr. Kassel to get advice about whether they
10 should participate or not.

11 A decision was made it wasn't worth going
12 into, it wasn't worth the risk, and they decided
13 not to proceed. They closed their file and did
14 nothing more. And that was in the summer of 2002.

15 In the later part of January-February of 2009,
16 they got a phone call from some lawyers that were
17 involved in a class action here in South Carolina
18 asking the DeLoaches did they get any money, what
19 did they get out of the nationwide class action up
20 in Tennessee.

21 And they said, what are you talking about.

22 The DeLoaches have learned since that phone
23 call that the lawyers have been named as Defendants
24 and their law firms.

25 Mr. Kassel apparently gave their names to some

1 of these lawyers basically from Charleston,
2 Mr. Dixon Robertson.

3 MR. STAIR: Your Honor --

4 MR. PENDARVIS: This is all in the complaint,
5 Your Honor. So anyway --

6 MR. STAIR: At the risk of sounding too
7 argumentative, I really think the Court just needs
8 the background. It does not require his argument
9 of his case. I would ask that it either be stated
10 more bluntly, simply, or I'd be happy to do it.

11 MR. PENDARVIS: I'll move to it swiftly. The
12 bottom line is, Your Honor, the DeLoaches learned
13 these lawyers got paid upwards of \$600,000 and were
14 promised another \$225,000 from some proceedings in
15 Tennessee that the lawyers filed motions to appear
16 to object to this nationwide settlement on behalf
17 of the DeLoaches without the DeLoaches' permission
18 or consent and got a lot of money.

19 And that is the essence of it.

20 THE COURT: Ms. Hill?

21 MS. HILL: Yes, Your Honor. If you are ready
22 to go ahead and start. I believe I filed the first
23 motion in this case. I filed a motion to dismiss
24 on behalf of my client, John Kassel. And I have a
25 memorandum for the Court, which I'm sure you don't

1 have a copy of, and I'll provide one to you.

2 (Memorandum handed up.)

3 MS. HILL: There you go, Your Honor.

4 THE COURT: Thank you so much. Give me one
5 second, please.

6 MS. HILL: Sure. Absolutely.

7 (Pause.)

8 THE COURT: Proceed.

9 MS. HILL: I'll start off with -- and
10 Mr. Pendarvis basically summarized the case, but
11 I'd like to point out one thing which he said, but
12 I want to make it very clear. The only involvement
13 my client has in this case is he met with the
14 DeLoaches in 2002 briefly, looked over whether or
15 not they wanted to bring a claim based on the
16 installation of stucco on their house. For
17 whatever reason, they decided not to. They picked
18 up their file. They left. That's it.

19 They allege that he somehow told I believe
20 Dixon Robertson their name or some confidential
21 information. I don't agree that their name is
22 confidential, but told Dixon Robertson some
23 confidential information which he then used with a
24 group of attorneys and went to Tennessee and
25 represented the DeLoaches as objectors in a class

1 action.

2 There is no allegation in this complaint that
3 my client had anything to do with Tennessee, that
4 my client appeared in Tennessee, that my client
5 even knew about Tennessee.

6 Certainly there is no allegation in the
7 complaint that my client received any dime of the
8 attorney's fees.

9 So, you know, I want to establish that first
10 and foremost, that there is nothing in this
11 complaint really other than a breach of the duty of
12 confidentiality against my client.

13 Now, before this hearing started today, I
14 talked to Mr. Pendarvis. There was one other cause
15 of action which was asserted against my client,
16 which was a breach of the fiduciary duty.

17 THE COURT: Uh-huh.

18 MS. HILL: When I spoke to Thomas about -- or
19 Mr. Pendarvis about that, he agreed that he would
20 concede that my client was not a part of that cause
21 of action, because when you read the cause of
22 action, there is no -- my client's name doesn't
23 appear and there is no allegation related to my
24 client.

25 So that is off the table, am I correct?

1 MR. PENDARVIS: And I agree to that, Your
2 Honor.

3 MS. HILL: Okay. So now today all we are
4 talking about as far as Mr. Kassel is concerned is
5 the breach of the duty of confidentiality, and I
6 believe he also included him in an injunction,
7 which I can promise you there is no way my client
8 is ever going to use the name DeLoache in any way
9 possible.

10 So, that being said, going forward, here are
11 the bases for my motion to dismiss.

12 THE COURT: Uh-huh.

13 MS. HILL: First, I ask that the complaint be
14 dismissed because Mr. Pendarvis has not filed an
15 expert affidavit pursuant to Statute 15-36-100,
16 which requires an expert affidavit and specifically
17 lists attorneys in the list of professionals.

18 Now, Mr. Pendarvis goes back and forth on
19 whether it is negligence, I believe, in his
20 memorandum and whether or not his client's claim
21 arose or had arisen prior to 2005.

22 I would state that, you know, you can't have
23 it both ways. I mean, they didn't bring this case
24 until 2011, so clearly they didn't believe that
25 they had damages in which to bring this case until

1 2009, January, late January, late February -- early
2 February 2009. So it had to have arisen after
3 2005.

4 I believe the statute makes it clear that when
5 you bring a claim related to the conduct of a
6 professional, specifically an attorney, that
7 complaint must attach and make a part of that
8 complaint an expert affidavit. It just didn't
9 happen in this case. I actually discussed this
10 with Mr. Pendarvis prior to filing my motion
11 because I know he has been around the block. He
12 does a lot of legal malpractice cases. I know he
13 knows about expert affidavits. And so, you know, I
14 discussed it with him. He didn't file it. He to
15 this date has not filed one.

16 And so, for that reason alone, I think this
17 case should be dismissed.

18 However, moving on, even if we get past that,
19 Your Honor, there are a number of reasons why the
20 claims against my client should be dismissed.

21 THE COURT: Now, let's focus on the affidavit.

22 MS. HILL: Sure.

23 THE COURT: Mr. Pendarvis?

24 MR. PENDARVIS: Certainly, Your Honor.

25 First of all, the way the Defendants would

1 have the Court review the statute would be that if
2 a lawyer is involved in a car wreck and runs into
3 the back of you, you have got to have an affidavit.
4 These are intentional torts.

5 I have done quite a bit of legal malpractice
6 cases. And as the Court may know, element number
7 one of a legal malpractice case, element number one
8 is the existence of an attorney-client
9 relationship.

10 The circumstances with regard -- I'm going to
11 parse this into several -- two groups of
12 Defendants. Mr. Kassel is separate and apart from
13 the others.

14 Mr. -- the DeLoaches were prospective clients
15 within the purview of Rule 1.18 of the Rules of
16 Professional Conduct. And Rule 1.18 says -- and it
17 first identifies who is a prospective client. If
18 someone just says something to you as a lawyer at a
19 party, that may not get them to that status, but
20 the Rule 1.18(a) says:

21 A person with whom a lawyer discusses the
22 possibility of forming a client-lawyer relationship
23 with respect to a matter is a prospective client
24 only when there is a reasonable expectation the
25 lawyer is likely to form a relationship.

1 Evidence in the case -- it is not for this
2 12(b) motion, but that these folks, it is alleged,
3 went to see Mr. Kassel. The complaint alleges that
4 after some investigation Mr. Kassel and the clients
5 agreed they weren't going to pursue the matter.

6 Then we now get to 1.18(b), which establishes
7 the duty in this case. Now, keep in mind, there is
8 no attorney-client relationship, just as 1.18(a)
9 says it is matters involving the lawyer's inquiry
10 and the client's inquiry into whether there is
11 going to be an attorney-client relationship.

12 Now we get to 1.18(b):

13 Even when no client-lawyer relationship
14 ensues, a lawyer who has had discussions with a
15 prospective client shall not use or reveal
16 information learned in the consultation except as
17 Rule 1.19 would permit with respect to information
18 of a former client.

19 So there is the duty. And the point we're
20 making here is, there never was an attorney-client
21 relationship. So without an attorney-client
22 relationship, there can be no negligence. And,
23 more importantly, really, Your Honor, in terms of
24 whether even an affidavit would be required, there
25 is no negligent acts here.

1 The complaint alleges that Mr. Kassel
2 communicated to Mr. Robertson confidential
3 information. It is referenced in the paragraph.
4 That isn't an accident. It didn't -- he didn't not
5 file something on time. He didn't sue a party in
6 the wrong court. This was an intentional act. And
7 for -- it would be prohibited by an expert under
8 Rule 11 and me as an officer of the court to submit
9 an affidavit and make a contention that a lawyer
10 was negligent when the facts and the investigation
11 doesn't reveal that kind of conduct.

12 But, really, just in terms of the pure statute
13 question, the very easiest way to resolve this
14 argument is the statute itself.

15 It was part of the Tort Reform Act that was
16 enacted effective July 1, 2005. And if the Court
17 would look at the language in the statute, it
18 relates to claims that accrue on or after July 1,
19 2005.

20 Now, I've got a memorandum that I'd like to
21 hand up to the Court. And I've addressed this
22 issue in this memorandum, Your Honor.

23 (Memorandum handed up.)

24 MR. PENDARVIS: But the complaint alleges --
25 the complaint alleges that in Paragraph 34, in

1 September of 2002, papers were filed in Tennessee
2 with the DeLoaches' names on them. At that moment
3 a claim accrued.

4 Our Supreme Court has recognized in the
5 Gignilliat versus Gignilliat, Savitz & Bettis case
6 a claim for wrongful appropriation of personality.
7 There was a breach of fiduciary -- I mean, excuse
8 me, a breach of the duty of confidentiality imposed
9 by 1.18 at the moment in time in 2002 when
10 Mr. Kassel disclosed this confidential information.

11 And if you look at Paragraph 32, there is a
12 reference in Mr. -- this is an excerpt from
13 Mr. Robertson's affidavit that has been filed in
14 another matter that he cites after a telephone
15 conversation I had with Mr. Kassel, it also
16 reflects Ms. DeLoache's social security number. I
17 can't think of anything much more confidential.

18 So we have clear argument that in -- an event
19 in 2002 of a breach of the duty of confidentiality.
20 That claim accrued in September of 2002.

21 Now, the complaint also alleges that it was
22 not until January or February of 2009 that the
23 DeLoaches discovered this. So our discovery rule,
24 the claim accrued in 2002, they discovered it in
25 2009, and timely brought this lawsuit in 2011.

1 So we know that the claim they had, if they
2 had known, if these lawyers had ever called the
3 DeLoaches and told them, they would have known in
4 2002 that they had a claim. They could have filed
5 a lawsuit. The statute wasn't even in existence,
6 so it couldn't apply. It just couldn't be a
7 requirement that there be an affidavit.

8 And even if there was, as I said, Your Honor,
9 before, the other argument is there are no
10 negligent acts here. These were intentional acts,
11 intentional breaches of duties of confidentiality.
12 It wasn't a negligent act. So we contend there is
13 no statute -- or, excuse me, no affidavit necessary
14 to support these claims. And there is no cause of
15 action in here for negligence anywhere. And the
16 word negligent or mistake is not one place in this
17 entire complaint.

18 THE COURT: Ms. Hill?

19 MS. HILL: Well, I'll get back to -- I don't
20 know how -- you know, a negligent act, it can still
21 be accidental. I mean, a non-negligent act can
22 still be accidental. And this clearly arose from
23 the conduct of Mr. Kassel as an attorney for the
24 DeLoaches, according to Mr. Pendarvis. Otherwise,
25 how can he have a cause of action that states a

1 breach of the duty of confidentiality. I mean, we
2 all know two lay people don't have a duty of
3 confidentiality towards each other. That is
4 something that arises in the attorney-client
5 relationship. So I don't see how you get past that
6 there wasn't an attorney-client relationship.
7 Either there is or there isn't. And if there
8 isn't, then we don't have a duty of
9 confidentiality. I mean, you can't have it both
10 ways.

11 And as far as arising, a claim does not arise
12 until you have suffered damages. I mean, what were
13 the damages in 2002. Even assuming all their
14 allegations are true, there are no damages in 2002.

15 So, you know, I can't -- I mean, there are a
16 bunch of issues here, and I can expand further
17 beyond the affidavit at this point if the Court is
18 ready to hear more argument, but as far as the
19 affidavit is concerned, this matter did not arise
20 or it did not accrue, whichever word you want to
21 use, until January-February 2009 when the DeLoaches
22 realized, according to them, that they had been
23 named in a Tennessee action. Though statutes
24 passed in 2005, they have got to have an affidavit.
25 To have been aware that an affidavit was not filed

1 I specifically discussed with Mr. Pendarvis back in
2 December, late November of 2011. There is no
3 affidavit. He is suing my client based on my
4 client's profession and the fact he is an attorney
5 and had some type of relationship with the
6 DeLoaches, which we disagree. But that is the
7 basis of this allegation. He's got to have an
8 affidavit. Otherwise, the complaint should be
9 dismissed.

10 Do you want me to move on further, Your Honor?

11 THE COURT: One moment.

12 MS. HILL: Okay.

13 THE COURT: I want to make a note here.

14 MS. HILL: All right.

15 (Pause.)

16 THE COURT: There was a case some years ago,
17 True versus Monteith. You made me think about it
18 when you talked about when the statute was actually
19 enacted. Is that briefed in your memorandum of
20 law?

21 MR. PENDARVIS: No, Your Honor. I'm familiar
22 with the case, though. It had to do with a
23 conflict of interest where the lawyer didn't
24 disclose his sister-in-law was involved about --
25 with a lease. I'm familiar with it, but the real

1 point is that that Court made and any Court would
2 make is the accrual is when a cause of action when
3 you can bring a lawsuit. The Gignilliat case
4 itself says it is established -- the Gignilliat
5 case was a case where our Supreme Court said it
6 recognized the wrongful appropriation of
7 personality claim. It is in Prosser and Keeton on
8 Torts, but our courts specifically recognized it in
9 the Gignilliat case.

10 And the Court says, and I am going to quote:
11 A claimant alleging misappropriation of identity
12 need not prove actual damages because the Court
13 will presume damages if someone infringes on
14 another's right to control his identity.

15 So that is just a specious argument. It is
16 just a -- there is no place. The whole point is
17 the claim accrued the minute they disclosed -- he
18 breached this confidentiality imposed by 1.18.
19 And, again, 1.18 clearly recognized there is no
20 attorney-client relationship.

21 So the fact that they could have sued in
22 September of 2002 had they known means that there
23 couldn't be a requirement for an affidavit because
24 the affidavit only applies to claims that accrue on
25 or after July 1, 2007. And no damages are

1 necessary per Gignilliat.

2 THE COURT: In True versus Monteith, I think
3 the claim had accrued some 25 years before the
4 lawsuit was filed.

5 MR. PENDARVIS: That was exactly right. And
6 she didn't know until she tried -- there was
7 another event that led her to find out that her
8 lawyer had a prior relationship with the adverse
9 party, which is a conflict.

10 MS. HILL: Let me refer the Court -- and I did
11 brief this. All right, actually I did not include
12 it in my brief, but --

13 THE COURT: I'm sorry, go ahead.

14 MS. HILL: Murphy versus Owens-Corning
15 Fiberglass Corporation. That is the case. And
16 that case specifically talks acts whether a case
17 has arisen or accrued. And it discusses that until
18 the exposure to asbestos resulted in an injury or
19 damages, Janet's tort cause of action did not
20 accrue.

21 So, again, until they have suffered damages,
22 there is no accrual.

23 And let me go back to -- I'd like to expand
24 for a minute. He keeps referring to Rule 1.18.

25 THE COURT: Yes, ma'am.

1 MS. HILL: Which, as I will go into in a
2 minute, doesn't create a cause of action. However,
3 even if it did, that rule did not become effective
4 until October 1st, 2005. So, you know, either --
5 you know, 2005 apparently was a big year, but
6 apparently -- you know, Mr. Kassel's breach of
7 confidentiality, according to the complaint,
8 occurred -- I mean, if we believe that it arose or
9 accrued in 2002, well, he didn't have a duty in
10 2002. I mean, there was no breach of duty of
11 confidentiality as to prospective clients in 2002.
12 That didn't become effective until October 1st,
13 2005. I mean, we have a lot of issues because of
14 how old this situation is.

15 THE COURT: Now, but it is before me now on a
16 Rule 12(b)(6) motion.

17 MS. HILL: That's right.

18 THE COURT: So in effect you are saying it is
19 a slam dunk, you don't even have to answer their
20 complaint because their claim is deficient?

21 MS. HILL: On a number of grounds. You know,
22 one, no expert affidavit. Two, my client doesn't
23 have -- I mean, first and foremost, a duty of the
24 breach of confidentiality based on the Rules of
25 Professional Conduct, Rule 1.18, cannot serve as a

1 cause of action.

2 The scope that -- the Court discusses the
3 scope of the Professional Conduct Rules. In .7 of
4 the scope it says, violation of the rule should not
5 itself give rise to a cause of action against a
6 lawyer, nor should it create any presumption in
7 such a case that a legal duty has been breached.

8 Now, I think the courts have found that you
9 can consider a breach of the duty when considering
10 a legal malpractice action. However, the breach of
11 duty itself is not the basis of a cause of action.

12 And in this case specifically my client has
13 been sued for the breach of the duty of
14 confidentiality. That is another ground. So we
15 have got expert affidavits. We've got -- there is
16 no breach of the duty of confidentiality. And even
17 if there is, under the Rule 1.18, that didn't come
18 into being until October 1st, 2005, three years
19 after the alleged breach occurred. So you've got
20 that issue as well.

21 In addition, I mean, you know, along those
22 lines, nowhere in this case, in this complaint does
23 it state what the confidential information is. I
24 mean, is it their name? I mean, I don't think
25 their name in and of itself is confidential. You

1 know, it mentions that there is some reference to
2 their social security number. However, there is no
3 allegation that their social security number was
4 ever used in Tennessee. So it is not real clear
5 what is this confidential information.

6 However, what is truly fatal to their case is
7 there are no damages. I mean, what are the damages
8 here? And I was briefly looking through this
9 memorandum that Mr. Pendarvis provided, and on
10 Page 13 of 24 he says, the DeLoaches have suffered
11 damages and that they are now at risk -- at risk --
12 for claims of contempt of court or fraud on the
13 court.

14 But, I mean, nobody -- there is no allegation
15 that they had been sued by anybody, that anybody
16 has filed a complaint against them, that there has
17 been any contempt of court.

18 You know, this is some possible future
19 speculative idea that somebody might come after
20 them.

21 And then further, the DeLoaches have spent
22 time and resources in depositions, drafting
23 affidavits, and otherwise engaging in legal
24 matters.

25 Well, I mean, that is not damages. So the

1 DeLoaches have no damages in this case.

2 Now, you know, I know Mr. Pendarvis is going
3 to talk about using their name and somehow that --
4 I believe he has got a cause of action against some
5 of the other Defendants for taking their
6 personality. Well, that is not against Mr. Kassel.
7 So that is not against my client. We didn't use
8 their name in any way.

9 So the fact that they don't have any damages
10 against Mr. Kassel is fatal to their complaint
11 against Mr. Kassel.

12 Further, I would say that they don't even have
13 standing because they haven't suffered an injury in
14 fact. And, again, that goes hand in hand with my
15 argument over -- regarding damages, so I won't go
16 into a lot of detail on that, but they have not
17 suffered any damages and they don't have an injury,
18 in fact, and they don't have standing and they
19 can't bring this case.

20 THE COURT: Well, the more y'all talk about
21 this, the more interesting the case becomes. And
22 in the beginning under 12(b)(6) I can't really go
23 outside the pleadings and look at that.

24 MS. HILL: Absolutely, Your Honor.

25 THE COURT: I would say, okay, you can't get

1 past the complaint. But I don't feel that as of
2 yet. Wouldn't it be better to go ahead and answer
3 and go ahead and conduct discovery, and then maybe
4 renew this motion in the form of a motion for
5 summary judgment later on after the fact that you
6 have pretty much completed discovery? Wouldn't
7 that be better? Because, I mean, again, under this
8 Rule 12(b)(6) motion, I have to read the complaint
9 and say, oh, well, there is nothing here and
10 dismiss it right away. I don't think I can do that
11 unless there is something else you had.

12 MS. HILL: Your Honor?

13 THE COURT: Yes, ma'am?

14 MS. HILL: I don't mean to interrupt you, but
15 I'll add to that, I mean, I don't typically file
16 motions to dismiss. I think it is a rare day. You
17 know, it is hard -- it is a hard motion to win,
18 obviously. But if you read this complaint, Your
19 Honor, there is no cause of action against
20 Mr. Kassel. And is it fair for Mr. Kassel to go
21 through -- and, by the way, he has already been
22 served with two sets of discovery, one for each
23 Plaintiff, with significant requests of every
24 conversation he has ever had and going back through
25 all his records and, you know, any time he talked

1 to Mr. Robertson in the past umpteen years. He
2 wants to record all of that, all of which is going
3 to take significant time and money. And all for a
4 case that -- I mean, if you read the complaint,
5 there is no stated cause of action for Mr. Kassel.
6 There just simply isn't. There is no expert
7 affidavit, which is fatal. There is no breach of
8 the duty of confidentiality cause of action. I
9 mean, just throwing something up on the wall --
10 there are no damages.

11 So, I mean, you know, in all fairness to my
12 client, why should he have to incur all these
13 expenses, thousands of dollars, to answer discovery
14 when just on its face Mr. Pendarvis's client can't
15 even establish that they suffered any damages.

16 THE COURT: Okay.

17 MR. PENDARVIS: Very brief rebuttal, Your
18 Honor. Very brief rebuttal.

19 THE COURT: Two minutes.

20 MR. PENDARVIS: No, less than that.

21 Your Honor, the complaint alleges they had --
22 after all this came out, Paragraph 29 of the
23 complaint alleges they had -- they were requested
24 to meet with counsel for Mr. Robertson.
25 Mr. William Dixon -- excuse me, Mr. William

1 DeLoache is a businessman. He had to take time off
2 from work. His wife has been deposed. That is not
3 in the complaint. His wife has been deposed.
4 Their name has been used.

5 None of this would have happened if Mr. Kassel
6 had maintained his confidential communication.
7 And, by the way, Your Honor, the complaint doesn't
8 reference Rule 1.18. So that is just really
9 abstract and off the point. The point is that
10 these -- in the light most favorable to the
11 DeLoaches, they conveyed information to Mr. Kassel
12 in confidence. Mr. Kassel breached that
13 confidence. They have had -- they have attended
14 meetings. That is alleged in the complaint. They
15 have taken time off from work. And we believe they
16 suffered damages.

17 MS. HILL: Can I say one more thing, Your
18 Honor?

19 THE COURT: Yes, ma'am.

20 MS. HILL: Just briefly. I want to note that
21 throughout the complaint he references the
22 Defendants as the DeLoaches' lawyers. So just to
23 establish that.

24 And furthermore, you know, this is -- his
25 client filed a grievance against my client on

1 the -- all right, on the breach of duty of
2 confidentiality.

3 MR. PENDARVIS: Your Honor --

4 MS. HILL: And it has been dismissed.

5 MR. PENDARVIS: Your Honor --

6 MS. HILL: Thrown out by the ODC.

7 MR. PENDARVIS: -- under Rule 4.5 she can't --

8 THE COURT: Hold on, the court reporter can't
9 take it down if both of you are talking at the same
10 time.

11 MR. PENDARVIS: We can't get into stuff like
12 that.

13 THE COURT: Hold on a second. Restate what
14 you just said and you can object and I'll deal with
15 that.

16 Yes, ma'am?

17 MS. HILL: I said, in addition, his client on
18 the same facts have filed a grievance against my
19 client with the Office of Disciplinary Counsel
20 alleging breach of the duty of confidentiality and
21 Rule 1.18. It was dismissed.

22 MR. PENDARVIS: Your Honor --

23 MS. HILL: So, you know --

24 THE COURT: Hold on. Are you finished, Ms.
25 Hill?

1 MS. HILL: So, my point, again, is my client
2 shouldn't have to be drug through this all over
3 again in civil court incurring thousands of dollars
4 in legal fees to answer discovery and go through
5 this when it has -- there are no allegations
6 against my client that state facts sufficient to
7 set forth a cause of action.

8 THE COURT: All right. Mr. Pendarvis, do you
9 want to respond?

10 MR. PENDARVIS: Rule 4.5 of the Rules of
11 Professional Conduct prohibits referencing any
12 ethical action in any civil matter to gain
13 advantage. And I believe counsel for Mr. Kassel is
14 trying to gain advantage with this Court in
15 violation of 4.5. This is temple -- it is just off
16 limits for this case. And it has no -- it is not
17 alleged in the complaint. It has no bearing on the
18 motion. It shouldn't be considered.

19 MS. HILL: I'm sorry, what rule is that?

20 MR. PENDARVIS: 4.5.

21 MS. HILL: 4.5 is threatening criminal
22 prosecution.

23 MR. PENDARVIS: Read the rule.

24 MS. HILL: A lawyer shall not present,
25 participate in presenting, or threatening to

1 present criminal and professional disciplinary
2 charges solely to obtain an advantage.

3 I don't see how I did that, Your Honor. I am
4 referencing my client's own grievance filed by
5 Mr. Pendarvis.

6 MR. STAIR: Judge, might I say something?

7 THE COURT: Yes, sir.

8 MR. STAIR: I'm not involved in their motion,
9 but you asked the open-ended question wouldn't it
10 be better if we just let discovery proceed. And I
11 feel compelled to say, no, that would not be
12 better.

13 And I will tell you that there are a couple of
14 things going on here. One is there is a
15 generalized approach to this, which they have been
16 talking about, and then there is a specific
17 approach, and that is going through each count.

18 And I'm ready to go through and would ask the
19 Court to go through each count, and I think you
20 will see as to each count, the count fails to state
21 a claim and should be dismissed. And when the
22 analysis is concluded, I think the Court will find
23 that all of us will be spared the unnecessary
24 expense of discovery. So I would ask that the
25 Court hear our motion, and I do think there is

1 merit in it. And I think the resources of the
2 judiciary and all the lawyers in this courthouse
3 will be safe.

4 I will say that having listened to these
5 people talk, and Mr. Pendarvis particularly, I'm
6 intrigued by Paragraph 106 of his paragraph of his
7 complaint, and it reads as follows, quote:

8 Defendants, as the DeLoaches' lawyers, had a
9 fiduciary relationship with the DeLoaches
10 consisting of a very delicate exacting confidential
11 character requiring a high degree of fidelity and
12 good faith and which included a duty to meet the
13 standards of fiduciary conduct required of an
14 ordinary lawyer practicing law in South Carolina
15 under the same or similar circumstances. End
16 quote.

17 That is as close as one can come to arguing
18 negligence without saying negligence. And I think
19 for him to say there is no attorney-client
20 relationship and then to say, as the DeLoaches'
21 lawyers, they had a duty of care, which is akin to
22 the standard of care, and then to say negligence
23 isn't involved, the lawyers are not involved, to
24 use his word, is disingenuous. But if you don't
25 mind, I would like to have my motion heard because

1 I do think it would serve the Court well.

2 THE COURT: All right. Ms. Hill, anything
3 further?

4 MS. HILL: I have nothing further, Your Honor.

5 THE COURT: Mr. Pendarvis, anything further on
6 that one?

7 MR. PENDARVIS: With regard to Ms. Hill's
8 arguments for Mr. Kassel, I think I have made the
9 statements I need to make.

10 THE COURT: Okay. All right.

11 You may proceed with regard to the other
12 Defendants.

13 MR. STAIR: Thank you, Your Honor.

14 MR. PENDARVIS: Well, can I add one thing,
15 Your Honor?

16 THE COURT: Yes, sir?

17 MR. PENDARVIS: Your Honor, I would like to
18 make a statement on the first -- Mr. Kassel's
19 request that in the event the Court in the most
20 bizarre circumstances decided to grant anyone's
21 motion to amend -- motion to dismiss, we would like
22 the leave to file an amended complaint per the
23 rulings in Dockside Association versus Detyens,
24 Simmons, et al. It is 374 S.E.2d 907, a Court of
25 Appeals case from 1988, that says: Where a

1 complaint is dismissed under Rule 12(b)(6), the
2 Plaintiff should be granted leave to file an
3 amended complaint.

4 So in the event the Court in its wildest
5 dreams were inclined to grant it, we would like
6 leave to amend the complaint to proceed because the
7 facts allege we believe are sufficient to sustain
8 claims against every one of the Defendants.

9 MR. STAIR: Your Honor, before I start, I
10 might say, it seems presumptuous for Mr. Pendarvis
11 to say that the Court's granting the motion would
12 be bizarre. I think the Court needs to hear it and
13 not be basically insulted by the accusation that it
14 would be bizarre if you grant our motion, but we
15 don't think it would be bizarre.

16 I have prepared a document that really
17 actually was made for this situation. I'll hand it
18 up to you. And I have given it to counsel for all
19 the parties. If you don't mind, I am going to
20 stand over here simply because the podium allows me
21 to be closer to my eyes and I can see it better.

22 THE COURT: Yes, sir.

23 MR. STAIR: What this represents, Your Honor,
24 is a handout that we can follow step-by-step, and
25 it is done because I recognize Court's don't have

1 the background of the case that we all have coming
2 in, and you having been drafted five minutes before
3 you walked in certainly is a good application of
4 this. So what I have done is I have put together
5 documents as I call them reference, and I have
6 numbered them down at the bottom right-hand of my
7 handwritten writing, and you'll see Pages 1 through
8 9 are our motion to dismiss. Pages 10 through 34
9 is Mr. Pendarvis's complaint. And then after
10 Page 34 we have a variety of documents that I think
11 are resource materials that the Court might find
12 helpful.

13 And so what I'm going to do is kind of bounce
14 back and forth, and if you'll go with the pages,
15 that will be very helpful.

16 We have a motion that really consists I think
17 of nine different things. And I'd be happy to take
18 them all in order or get all through, however you
19 want to do it. But the first one is, we move to
20 dismiss -- and I represent Leath, Seekings and the
21 firm of Leath, Bouch & Crawford, and on behalf of
22 them we would move for dismissal of the complaint
23 as to the entirety of the complaint and each count
24 for the reasons that I am about to state.

25 The first one is, they have -- and this is on

1 my Page 1. They set forth a summary of the case.
2 And that starts on Page 10 of the handout, which is
3 their ~~verified complaint~~, and it goes for two
4 pages. And I will tell you, I have practiced law
5 from the defensive side for 34 years. I spent a
6 couple of years on the dark side before that. But
7 I have never seen anything like this. I literally
8 have not seen -- when I picked this complaint up I
9 said, what -- I didn't say exactly what the heck is
10 this, but I said something to that effect. And it
11 basically is Mr. Pendarvis's verbalized rendition
12 of his view of the world, and it does not comply
13 with pleading requirements.

14 And I think probably the best example of that
15 is Rule 10(b), which I have included as Page --
16 let's see, that is Page 36 of my handout. It talks
17 about form of pleadings. And it says paragraphs
18 and separate statements. All averments of the
19 facts of a cause of action shall be made in
20 consecutive numbered paragraphs, the contents of
21 each of which shall be limited as far as
22 practicable to a statement of a single set of
23 circumstances, and so forth. Each cause of action
24 shall be stated in separate cause of action.

25 What it doesn't really envision is someone

1 sitting down with a dictaphone and giving their
2 state of mind and thought about a situation, and so
3 I just don't think that this statement gives any
4 benefit to the case, nor does it form a cause of
5 action. And so we move to strike it on that basis.

6 The next argument that I have deals with his
7 requirement for an affidavit. And we're not in the
8 situation that Ms. Hill is in. As I understand it,
9 the concern he has with her is the disclosure of
10 confidential information. Leath, Seekings and
11 Leath, Bouch & Crawford were not involved in that.
12 And so we have a different cause of action. And as
13 far as we understand, the cause of action arose
14 sometime after 2005. I think I heard him today say
15 he felt that his cause of action against us arose
16 in 2002 when some action was taken in Tennessee and
17 that gave them a claim for relief.

18 That is news to me as to his contention. And,
19 frankly, I have not had the chance to research
20 that. But before I do so, can I confirm that you
21 say the cause of action -- how the cause of action
22 arose?

23 MR. PENDARVIS: Your Honor, the complaint
24 speaks for itself.

25 MR. STAIR: But, I mean, it is important that

1 we know what it is because I have worked under the
2 assumption that it arose sometime within three
3 years or one year or whenever the statute is of the
4 time of filing.

5 But, anyway, we don't understand his
6 contention concerning it and, instead, we see the
7 multiple references to actions taken as the lawyer
8 for the DeLoaches.

9 And he says that they are intentional acts,
10 not negligent acts. I looked at the fiduciary duty
11 complaint, which is the fifth cause of action. It
12 starts on Page 28. And this is where he really
13 gets on a roll about the variety of things that
14 were all done, quote, as DeLoaches' lawyers, end
15 quote. And it is alleged breaches of fiduciary
16 duty, and it does not appear that any one of them
17 is alleged to have been intentional. I mean, it
18 says they should have done something, they should
19 have not done something, but it doesn't say they
20 intentionally did anything that was a breach of a
21 fiduciary duty.

22 And so, again, I think when you bring an
23 action against lawyers as he has done post-2005,
24 the legislature envisioned you giving an affidavit.
25 He didn't do it. And I think his cause of action

1 and his complaint is subject to dismissal across
2 the board.

3 THE COURT: Now, maybe I missed something, I
4 haven't read what has been handed up. Is there a
5 case that says that, that says what you just said?
6 A Supreme Court decision or --

7 MR. STAIR: I don't know if there is one that
8 says that because I'm not sure if what he is trying
9 to do has happened. I think what he has done is he
10 has definitely alleged a multi-count complaint
11 against lawyers, all of which arose out of his
12 contention that the lawyers were his client's
13 lawyers and as a result of that they are liable to
14 him. So I can't give you a case that says under
15 those precise circumstances you require an
16 affidavit, but I think the legislature says you do.

17 THE COURT: Please proceed.

18 MR. STAIR: The next thing is -- our motion is
19 that there is no damage in this case. And Ms. Hill
20 spoke briefly about that. And it is kind of
21 interesting, if you read the complaint, and I ask
22 that you do so, the complaint they are alleging is
23 a \$600,000 amount of money they contend apparently
24 they were entitled to.

25 As I read his 24-page brief a few moments ago,

1 which is when I got it, I didn't see any reference,
2 to that as their damage, and so I am not certain
3 what their damage is, but in their complaint it is
4 alleged to be \$600,000, and there really isn't any
5 other damage.

6 Now, it is important that you understand what
7 that damage is. And what they claim it to be is
8 \$600,000 that these lawyers were paid as a result
9 of work that they did in the Posey case, the one in
10 Tennessee.

11 And what is really interesting about it -- and
12 it is important to read the complaint. And let me
13 see if I can find the portion that is most
14 enlightening. If you'll look on Page 19 of my
15 handout, starting with Paragraph 37 of their
16 complaint, I'm going to read some allegations. And
17 they are important because I think that they
18 demonstrate what their beef has been, at least
19 until today.

20 And it says, 37, quote: Upon information and
21 belief, the Defendant class action lawyers and the
22 Defendant law firms never submitted all the
23 necessary information, filed all the forms required
24 by the Posey Court to qualify the DeLoaches as
25 objectors to the settlement proposed in Posey and

1 could not have done so even if the DeLoaches had
2 been their clients, because recent inspections and
3 testing revealed no evidence the DeLoaches' home
4 was ever clad with Dryvit EIFS.

5 And then it goes on to say: Proof that the
6 the claimant's or objector's residence either was
7 clad or had been clad with Dryvit EIFS was a
8 condition preceding to participate in Posey as
9 either a claimant or objector. End quote.

10 Now, what is important about all of that is
11 what he is saying is that -- and please do read the
12 complaint. I know it is long and burdensome, but
13 it is important that you understand the complaint.
14 What he is saying is that the lawyers went to
15 Tennessee and did something there. And the bone of
16 contention that they have here is that they entered
17 the DeLoaches as objectors in that lawsuit. And
18 then they were paid \$600,000 at some time
19 thereafter for something that occurred in the
20 thing. And as a result, surely the DeLoaches must
21 be entitled to the \$600,000, is the complaint.

22 But you have to understand what they also say
23 in their complaint is, we never could have been
24 objectors there because we didn't have Dryvit, so
25 we had no standing to be there. And because they

1 had no standing to be there, by their own
2 complaint, they had no entitlement to anything that
3 was coming out of that court.

4 And yet what they say down in Paragraph 41 and
5 40 is that, quote: As a direct result of using the
6 DeLoaches' name as objectors in the Posey matter,
7 the Defendant class action lawyers and the
8 Defendant law firms were able to make arguments to
9 the Posey Court as a direct result of using the
10 DeLoaches' name as objectors in the Posey matter,
11 the Defendant's class action lawyers and the
12 Defendant law firm reached an agreement with Dryvit
13 Systems, the Plaintiff's class counsel in Posey
14 whereby they were to be paid a total of \$825,000.
15 End quote.

16 And then when you read the complaint what you
17 say is the DeLoaches are entitled to that. So what
18 you have to understand is in one paragraph they
19 say, we weren't even entitled to be in the lawsuit
20 from whence the money came, and then they say, but
21 these guys sometime later got \$825,000 and surely
22 it must have been for the use of our name.

23 If I might say bizarre, that is bizarre.
24 Because they are saying, we don't have any standing
25 to be in the lawsuit, we have no entitlement to

1 recover anything, but some lawyers got paid
2 \$825,000 for something they did there, and we ought
3 to get it.

4 That is bizarre. There is no damage in this
5 case. They may be mad they didn't get a windfall
6 of money that they had no right to, but that is not
7 a damage.

8 And so our point is that nothing they have
9 suffered here amounts to a damage that is
10 recoverable by law. And that is as to each and all
11 the complaints, causes of action.

12 All right, now if we might, let's look at the
13 individual causes of action.

14 MR. PENDARVIS: Your Honor, I hate to
15 interrupt. It is getting late. Do you want to do
16 a response to the arguments as we go through them
17 or how would you like to do that?

18 THE COURT: One moment, please. I apologize.
19 This is a call from my wife. I need to take a
20 break for about five minutes.

21 MR. STAIR: Judge, I will allow you time to do
22 that.

23 THE COURT: Thank you.

24 MR. STAIR: Thank you.

25 (WHEREUPON, a break was taken.)

1 THE COURT: In this case let me hear the whole
2 argument first then have you respond, Mr. Stair.

3 MR. STAIR: We appreciate you being called in
4 late and indulging us. We traveled far for this
5 and we appreciate your indulgence.

6 THE COURT: You are welcome.

7 MR. STAIR: What I'd like to do now is do what
8 I promised I would do, is walk through each of the
9 six complaints and show you why, forgetting for the
10 moment that they fall as a group, they fall
11 individually additionally.

12 And the first one is their first cause of
13 action, which is denominated wrongful appropriation
14 of personality.

15 And Mr. Pendarvis cited the Gignilliat case,
16 and I would too cite the Gignilliat case. And if
17 you will look on Page 43 of my handout, I have
18 bracketed certain areas for consideration.

19 And, as you know, the Gignilliat case involved
20 a woman who was suing because her husband's name
21 was continued to be used in the law firm and she
22 says they are deriving financial benefit for the
23 use of his name and I should have that financial
24 benefit because it is my name and they are not
25 entitled to use it.

1 THE COURT: Now, let me interrupt you.
2 Further, an indication of how small our community
3 is, I actually performed the wedding.

4 MR. STAIR: Is that right?

5 THE COURT: Yes, I did. And it was in the
6 hospital right after he'd been diagnosed. So if
7 that causes anybody any problem I guess I can --

8 MR. STAIR: Of all the recusal issues we have
9 dealt with in this case, Your Honor, that certainly
10 doesn't seem like that is --

11 THE COURT: Please proceed.

12 MR. STAIR: All right. And the point is, is
13 there is a commercial element that is involved in
14 the Gignilliat case and in the cause of action.

15 And the case says in South Carolina there are
16 three separate and distinct causes of action for
17 invasion of privacy, and the one that we are
18 talking about here is the first one, wrongful
19 appropriation of personality.

20 Then it goes on to say: Wrongful
21 appropriation of personality involves the
22 intentional unconsented use of the Plaintiff's
23 name, likeness, or identity by the Defendant for
24 his own benefit. The gist of the cause of action
25 is the violation of the Plaintiff's exclusive right

1 at common law to publicize and profit from his
2 name, likeness, and other aspects of personal
3 identity.

4 It goes on down and says: Encompassed in
5 these three recognized torts is infringement of the
6 right of publicity; it is denominated wrongful
7 appropriation of personality. It addresses the
8 Plaintiff's right to the commercial protection of
9 his name, likeness, or identity (stating wrongful
10 appropriation of personality concerns the
11 Plaintiff's right at common law to publicize and
12 profit from his name or identity).

13 It is commercial and profit is what this is
14 going to. And in the Gignilliat case the question
15 was should other people be entitled to profit from
16 something that the lady was arguing had commercial
17 benefit, which was her husband's name as a lawyer.

18 With due respect to the DeLoaches, the
19 DeLoaches' name has no commercial benefit. If I
20 told you that I have something here of the
21 DeLoaches, that would have no commercial benefit.
22 And that is what is lacking here.

23 And what they do not do in their complaint,
24 which is why it does not set forth a cause of
25 action, is they do not allege any inherent

1 commercial value attached to the use of their name.
2 They don't allege it. And that is critical to
3 their failure to state a claim because it is not
4 enough to have a name. The name has to have a
5 commercial benefit that goes with it. And so if I
6 want to say that someone has stolen my personality,
7 or whatever the thing is, for purposes of causes of
8 action that require damage, I have to have a
9 commercial benefit to my name. And Mr. Gignilliat
10 may or may not have had it. The DeLoaches simply
11 don't have it. They don't allege they have it.
12 And because of that, they don't set forth a cause
13 of action for that.

14 They fail to allege that the Defendants acted
15 with intent to misappropriate the commercial nature
16 of their name.

17 They fail to allege the Defendants
18 misappropriated the name for a purpose of
19 benefiting the Defendants. That would be a
20 critical element.

21 The law firm uses Mr. Gignilliat's name to
22 make money. The lawyers, whatever they did or did
23 not do, and I will tell you that the subterfuge and
24 the ill motive here that might be circling in the
25 air did not exist. We'll get into that later if we

1 have to. But the point is whatever they did or
2 didn't do. They did not go to Tennessee and say,
3 stop, wait, we represent the DeLoaches. This name
4 has value and we're here and we should be paid
5 something.

6 And then say, oh, you represent the DeLoaches?
7 Well, here is \$825,000 because you represent the
8 DeLoaches. That's bizarre. That didn't happen.

9 And the point is, is they don't set forth a
10 claim under Gignilliat or under the statute or
11 under the law of South Carolina.

12 They fail to allege the Defendants benefited
13 from the alleged use of the name. There is no
14 allegation, nor could there be, that because they
15 represented the DeLoaches by name, the DeLoaches,
16 that \$825,000 was thereafter forthcoming and
17 therefore the DeLoaches, because their name was
18 used as a commercial reason to get the money they
19 get it. Bizarre. Bizarre.

20 And the Plaintiffs fail to allege they
21 suffered any recoverable damage from the alleged
22 misappropriation.

23 And the point is, is let's say that it had
24 commercial benefit, which it does not. They failed
25 to allege that they were entitled to anything

1 because of that, because, frankly, what they do
2 allege is because I'm DeLoache and because I don't
3 have Dryvit on my house, I have got to leave.

4 So in that setting, they had no benefit. And
5 nothing about what happened thereafter could be a
6 damage that they suffered because they absolutely,
7 as the DeLoaches, were not entitled to a penny. So
8 they couldn't have suffered a damage.

9 And they don't otherwise state anything in
10 here that would entitle them to state a cause of
11 action. They may have a complaint that their name
12 showed up on a piece of paper in another place, but
13 they don't have a cause of action for wrongful
14 appropriation of personality recognized by the
15 State of South Carolina.

16 Also, we've got in here the fact that to the
17 extent they complain, they complain these guys did
18 it as lawyers. They were our lawyers and they took
19 our name and they took it to a place and as the
20 lawyers they used our name and as the lawyers they
21 got our money. Getting back again to the affidavit
22 rule.

23 So it circles all around, but where it goes is
24 out the door because they simply don't state a
25 cause of action for that claim.

1 The second cause of action they attempt to
2 state is for conversion. And they say there was a
3 conversion here.

4 Conversion, if you will look at Page 46, and I
5 think that is again the Gignilliat case, and it
6 says down there, I bracketed: This Court has
7 defined conversion as the unauthorized assumption
8 in the exercise of the right of ownership over
9 goods or personal chattels belonging to another to
10 the exclusion of the owner's rights. To establish
11 the tort of conversion the Plaintiff must establish
12 either title to or right to the possession of the
13 personal property. Our courts have previously held
14 that intangible rights are normally not the proper
15 substance of a conversion claim.

16 So what they have got to say is basically they
17 stole something. They took something that was mine
18 and they kept it as theirs, therefore they have
19 converted it.

20 Again, they premise this on the fact that they
21 are entitled to something because of their name.
22 They never were entitled to anything because of
23 their name. So whatever was given in reference to
24 that action could not have been given because of
25 the name, and so it was never theirs, which is kind

1 of an extension of the argument I made a second
2 ago.

3 And because the conversion is premised upon
4 the first cause of action, they can't get it by way
5 of conversion.

6 But, beyond that, what they don't allege and
7 they can't allege is the right to ownership or
8 control of any tangible object or thing over which
9 these Defendants would have alleged to have been
10 wrongfully in possession of and kept.

11 They don't allege that -- well, they do --
12 actually they do allege that they got \$600,000 and
13 they have converted the \$600,000.

14 Well, the premise of that is that the \$600,000
15 was the DeLoaches. And I, as the DeLoaches, don't
16 have it. That lawyer over there has got it. He
17 converted it from me. But the lawyer over there
18 can't convert from them something that is not
19 theirs in the first place.

20 And so, again, the conversion action fails.
21 So they have no recoverable damages. You ain't got
22 nothing, you ain't got nothing to lose, as the
23 saying goes. So they don't get to recover on
24 conversion.

25 And, again, they say these folks as my lawyers

1 took the money and ran. Again, the affidavit rule
2 I think has no application there.

3 The third cause of action they allege is for
4 civil conspiracy. And if you will go to Page 51 of
5 my handout you will find civil conspiracy.

6 The Court says here, quote: In the tort of
7 civil conspiracy it contains three elements. One,
8 the combination of two or more people. Two, for
9 the purpose of injuring the Plaintiff. Three,
10 which causes special damage.

11 And then they go on and say: It is well
12 settled in South Carolina that the tort of civil
13 conspiracy contains three elements. And I think
14 they repeat those again.

15 Up on the top of Page 51: The gravamen of the
16 tort of civil conspiracy is the damage resulting to
17 the Plaintiff from an overt act done pursuant to
18 combination, not the agreement of combination per
19 se. Because the quiddity -- if that is a word --
20 of a civil conspiracy claim is the damage resulting
21 to the Plaintiff, the damages alleged must go
22 beyond the damages alleged in other causes of
23 action.

24 And in Page 53, to continue that, it says
25 that: The civil conspiracy requires the Plaintiff

1 claim under special damages, in this case the
2 Gordons' amended complaint fails to allege any
3 special damages incurred resulting in conspiracy.
4 They allege the same damages as they do under this
5 other cause of action. This is insufficient to
6 establish special damage. If a Plaintiff merely
7 repeats the damages from another claim instead of
8 specifically listing special damages as part of the
9 civil conspiracy claim, the conspiracy claim should
10 be dismissed.

11 Well, if we might get back to the elements.
12 There needs to be in a conspiracy a joinder of
13 people for the purpose of injuring somebody. And
14 that is the essence of the conspiracy. It is not
15 that we got together and thought up something that
16 winded up hurting, if it did, it is that we set out
17 for the purpose of hurting. That is critical in
18 the language of the cause of action. It is for the
19 purpose of hurting. And us intending to cause
20 damage to you, purposefully so, do cause a special
21 damage to you, other than everything else you are
22 complaining about.

23 In this case they failed to allege, and for
24 good reason, that there was an intentional
25 conspiracy for the purpose of causing injury to the

1 Plaintiff.

2 They failed to allege that there was an
3 intentional purpose to do something for the benefit
4 of the Defendants.

5 And they failed to allege a recoverable damage
6 or any other kind of special damage that the law
7 would recognize.

8 Now, I will tell you, I think they do say as
9 their special damage, and apparently Mr. Pendarvis
10 understood the requirement of special damage, he
11 says as a special damage they had to talk to the
12 lawyers in the cardinal case and they had to give
13 an affidavit and they had to give a deposition.

14 As Ms. Hill says, that is not a special
15 damage. That sounds to me, frankly, as a voluntary
16 undertaking on their part that ultimately led to
17 their becoming involved in the litigation that we
18 have now got. But that is not a special damage.

19 And so when they have to go to that level to
20 allege a special damage, what that tells you is
21 they have no special damage. But beyond that they
22 have no basis of alleging it anyway because there
23 is not alleged to be nor was there a conspiracy for
24 the purpose of harming the DeLoaches. They don't
25 allege it. It is not there. And that complaint

1 should go too.

2 The fourth cause of action is for constructive
3 trust. If you'll go to Page 54 of the handout,
4 we've got something on constructive trust.

5 And it says that: In general a constructive
6 trust may be imposed when a party obtains a benefit
7 which does not equitably belong to him and which he
8 cannot in good conscious retain or withhold from
9 another who is beneficially entitled to it.

10 So we've got two things going on here for
11 constructive trust. One, the guy that has got the
12 money. Somehow it would just be inequitable for
13 him to keep the money. But more than that, if I
14 want a constructive trust on something I think is
15 unfair that they got, I have to be the one who is
16 entitled to it. And therein lies the problem.

17 The DeLoaches simply, according to their own
18 allegations, are not entitled to one dollar,
19 \$600,000, \$825,000. And speaking of inequitable
20 and unjust enrichment would be folks sitting in
21 Columbia, South Carolina, who, unbeknownst to them,
22 as they say, their name is put somewhere on a court
23 pleading where it doesn't belong, they say, in the
24 State of Tennessee in a case they have no claim
25 for, and then years later wake up and realize that

1 some lawyers in another place and time earned some
2 money, \$825,000, \$600,000, whatever it is, and,
3 hey, that ought to be mine.

4 If one could ever define unjust enrichment
5 more precisely than that, I'll be interested to see
6 how that can occur.

7 What they don't do in their complaint for the
8 purposes of 12(b)(6), which is why you and I are
9 here at this late hour badgering back and forth --
10 I'm going more badgering than you are, and I
11 appreciate it, Your Honor -- is that they do not
12 allege that they are properly entitled to have a
13 recovery amount which they seek to have this Court
14 impose constructive trust for. But they do say
15 they'd like to have it and they would feel good if
16 you would give it to them, but they don't allege an
17 entitlement, nor could they allege an entitlement.
18 To the contrary, they allege that they are not
19 entitled to it. And they don't allege that we are
20 not entitled to it, but if you read the
21 allegations, it is clear they are not.

22 And, again, they don't allege recoverable
23 damages for the reasons that we have fairly well
24 beaten into the ground.

25 And then finally the affidavit rule once again

1 arises because all of this they say they went over
2 in another far away place, took my name as my
3 lawyers, came back with some money that ought to be
4 mine because my lawyers ought not be able to keep
5 it. Again, the affidavit.

6 The next complaint is their breach of
7 fiduciary duty, which is Count Five. And, again,
8 it is a remarkable piece of literature. If you go
9 to Page 28 of their -- of my handout, which is
10 their complaint, they start out every paragraph
11 with -- well, actually they don't start out the
12 first two, the first one starts out the foregoing
13 paragraphs are reiterated -- but they start the
14 essence of every paragraph with, quote: The
15 Defendants, as the DeLoaches' lawyers, dot, dot,
16 dot, had a duty. And then Mr. Pendarvis fills in
17 what he thinks the duty is.

18 And the next one is, the DeLoaches -- excuse
19 me, the Defendants, as the DeLoaches' lawyer, had a
20 duty. And then Mr. Pendarvis fills in what the
21 duty is. And, again, I have been doing this a long
22 time myself. And I must say, he has conjured up
23 some alleged duties that I would not know to be
24 alleged duties, and this is why you need a lawyer
25 with a professional background giving an affidavit

1 to state what duties someone has if they were the
2 lawyer. And this is why it screams out for the
3 need of an affidavit. This is why the legislature
4 said, let's don't let Mr. Pendarvis decide in his
5 unsupported-by-affidavit ideas of what duties ought
6 to be, let's get an expert who gives an opinion.

7 THE COURT: Now, does the legislature say that
8 a complaint has to be dismissed if there is no
9 affidavit filed?

10 MR. STAIR: Yes, sir.

11 MS. HILL: Yes, sir.

12 MR. STAIR: That is in the affidavit -- I
13 mean, that is in the legislature, yes, sir.

14 MS. HILL: And, Your Honor, I have extra
15 copies of the statute.

16 THE COURT: Okay, thank you.

17 MS. HILL: We have been talking about the
18 statute the whole time.

19 THE COURT: I am not going to rule tonight. I
20 am going to go back and read all this. But I think
21 certainly there is no case on point.

22 MR. STAIR: Well, actually, Your Honor, if you
23 will look at Page 56 of my handout, I was
24 anticipating perhaps that question, and you will
25 see in Subparagraph (c)(1), the right-hand, it

1 says, quote: If an affidavit is not filed within
2 the period as specified in the subsection or
3 extended by the trial court, then the Defendant
4 against whom an affidavit should have been filed
5 alleges by a motion to dismiss filed
6 contemporaneously with his initial responsive
7 pleading, the Plaintiff has failed to file the
8 requisite affidavit, the complaint is subject to
9 dismissal for failure to state a claim. And the
10 filing of the motion to dismiss pursuant to this
11 allows folks to not file answers we have not done.

12 And so, yes, it says if an affidavit is
13 required, as we say it is, and I think if you'll
14 read their breach of fiduciary duty and all the
15 allegations they make, that you'll agree that this
16 is a complaint that cries out for an affidavit. It
17 is not here. Yes, sir, it should be dismissed.

18 And, again, there are no damages. Let's just
19 say that we breached every fiduciary duty that Mr.
20 Pendarvis can go through the books and conjure up
21 in his mind, there is no damage. Because, again,
22 it is sort of like a lawyer failed to file a
23 complaint within the period of time, and I lost my
24 thing by statute of limitations, but it doesn't
25 really matter because I didn't really have a claim,

1 but I would still like to have some money because
2 the lawyer was negligent.

3 Here what he is saying is they breached a
4 fiduciary duty, they are bad people. We deny that.
5 But beyond that, there is no damage that they have
6 suffered. And that is yet another reason why the
7 no damage situation here is just overriding and
8 compelling, but for all those reasons, Your Honor,
9 we think that that count should be dismissed.

10 The last claim that really deals with us is --
11 there are seven causes of action. There is a sixth
12 cause of action that somehow mercifully we were not
13 involved in. There is a seventh cause of action
14 that is for injunctive relief. And it is not real
15 clear. If you go to Page 31 of the complaint --
16 excuse me, of my handout -- you'll find their
17 allegation of injunctive relief.

18 And after reincorporating or reiterating
19 everything they said in Paragraph 119, Paragraph
20 120 is the statement of the claim to the extent it
21 is attempted for injunctive relief.

22 And it says, quote: The DeLoaches pray this
23 Honorable Court issue an order enjoining Defendants
24 from using the DeLoaches' name in any manner in the
25 future and from making any claim in any court that

1 they have ever represented the DeLoaches in any
2 proceeding or on any claim. End quote.

3 So like Ms. Hill, I don't think anyone is
4 going to go around screaming and bragging about
5 representing the DeLoaches, but the point is, is
6 that when you ask for injunctive relief, it too is
7 a cause of action that you have to state.

8 If you will look at Page 59 of my handout,
9 you'll see what I think is Hornbook law. I found
10 it somewhere and decided to stick it on Page 59.
11 And it says, quote: Generally speaking, an
12 injunction should be granted only where some
13 irreparable injury is threatened for which the
14 parties have no adequate remedy at law. End quote.

15 The Plaintiffs do not allege that there is
16 some irreparable injury threatened here. The
17 Plaintiffs do not allege that they have no adequate
18 remedy at law. They have just spent multitudes of
19 pages attempting to tell what their remedy at law
20 is, but they don't allege in the paragraph for
21 injunction they don't have one. And the failure on
22 their part to allege that they had irreparable harm
23 and a failure to allege that they had no adequate
24 remedy at law is fatal to their claim for
25 injunctive relief.

1 And, Your Honor, the last two things we have
2 as motions, one was jurisdiction. They alleged
3 something of specificity in their jurisdictional
4 claim. I don't think it really applies, but I'm
5 not here to suggest you don't have jurisdiction to
6 do what we are doing here today, so I'll waive and
7 forget the jurisdiction.

8 As it relates to venue, my folks are not from
9 Richland County, but we recognize as long as there
10 are folks who are here are, then we might be
11 subject to a claim of this venue. So I will hold
12 and reserve the venue complaint until a later time
13 it turns out.

14 With those thoughts, Your Honor, and we do
15 urge you to read the complaint. It is critically
16 important that this lawsuit be ended now rather
17 than drag these good lawyers through more mud when
18 there is not a claim here. The DeLoaches don't
19 have a civil action. They may be unhappy for
20 whatever reason. They may have found a lawyer who
21 will pursue a claim for them. But they don't have
22 a claim to pursue. And we ask the Court to look at
23 it very closely and to dismiss it for the variety
24 of reasons I have asked.

25 THE COURT: Now, before you sit down.

1 MR. STAIR: Yes, sir.

2 THE COURT: And I hate to keep harping on this
3 affidavit.

4 MR. STAIR: Yes, sir.

5 THE COURT: But can I just give them an
6 extension of time to file it?

7 MR. STAIR: Excuse me?

8 THE COURT: Can I just give them an extension
9 of time to file?

10 MR. STAIR: I don't think you can. I have
11 dealt with a number of judges on this, and I think
12 they have all concluded they couldn't. And I don't
13 have as I stand here a case. I will be happy to
14 look for one if I do, but I have never had a judge
15 who concluded that one should be filed decide they
16 could extend it. As a matter of fact, I very
17 recently had one specifically say, I don't have
18 that as an option.

19 THE COURT: I know sometimes legislation comes
20 from a model act. Is there any other state that
21 has similar --

22 MR. STAIR: I practiced law in Georgia, and in
23 Georgia this lawsuit -- I wouldn't be standing
24 here. I mean, it would be gone. So those are the
25 only two places I know of.

1 But that is -- you know, the affidavit is just
2 one part of it. Please don't lose sight of the
3 underlying what is going on here. And, understand,
4 we've got people who most critically -- and this is
5 so critical -- they allege we don't have any right
6 to be in Tennessee. And we weren't entitled to be
7 there. Stop the music. If you are not entitled to
8 be there, whatever came from there cannot be yours,
9 because the only thing that could ever come of your
10 claim is that it goes out the door. Money would
11 not flow. \$825,000, \$600,000. Those folks just
12 didn't show up in Tennessee. And the judge said,
13 well, I see you represent the DeLoaches out of
14 South Carolina. That's us. Well, let's cut you
15 \$600 or \$825,000 for that. That is a valuable
16 thing. That is bizarre. I mean, these guys went
17 to that state and they earned money and they have
18 been paid, and now we have got somebody who says,
19 I'd like a piece of the pie. As a matter of fact,
20 they want the whole thing. And that is not right.
21 And they are just not entitled to it.

22 So please look at all the circumstances and
23 don't get bogged down on the affidavit, although we
24 wouldn't mind you doing that because I think it
25 throws the whole thing out the door.

1 So please look at everything.

2 THE COURT: I hope this doesn't sound totally
3 out in left field. Tell me about the Tennessee
4 case. I mean, who was suing who for what.

5 MR. STAIR: All right. It was a class action
6 brought by the class of people who owned Dryvit
7 houses. And they were suing Dryvit. That EIFS,
8 the paint stucco stuff. And Dryvit was a primary
9 manufacturer of it. And they were getting sued and
10 sued and sued. And so a combination of people got
11 together and put together a class action against
12 Dryvit for their product. And it worked its way to
13 a national class or what they were attempting to do
14 in the State of Tennessee.

15 When the judge there says, let's have a
16 fairness hearing, in the fairness hearing people
17 can come object to the fairness of it. These
18 lawyers that you have been hearing about showed up
19 in Tennessee and they objected to the fairness of
20 it basically. And they then became involved with
21 that Court and the Court's recognition that it
22 wasn't fair. And that really Dryvit wasn't paying
23 enough. And through the recognized efforts by that
24 Court of these lawyers, the ante against Dryvit
25 went up. And when that happened, the Court

1 recognized that the South Carolina lawyers we have
2 been badmouthing here played a significant role for
3 that class of people and allowed the lawyer who was
4 there to give part of his fee to them if that
5 lawyer chose to do so. That lawyer. So you have
6 got a national class lawyer. His name is Everette
7 Doffermyre. And he is sitting there and he is
8 getting benefit from what these guys who we have
9 been badmouthing all day are helping him with the
10 class.

11 And when the ante goes up because of their
12 activities, he recognizes they brought value to the
13 table and it was not the name DeLoache. They
14 brought horsepower to the table that raised the
15 value of that class.

16 And he gave them parts of his fee. He got
17 paid 11 and some million dollars for a fee. Good
18 work if you can get it. And he gave these guys
19 \$600,000 of that fee. And he didn't give it to
20 them because they represented the Gignilliats or
21 the DeLoaches, he gave it to them because they
22 brought value to the table.

23 And the DeLoaches, who were the named objector
24 in the beginning, say, well, you wouldn't have been
25 here without me. Therefore, everything you got

1 depends upon me, and therefore you owe it all to
2 me. That is bizarre. They don't owe it. They
3 didn't get it because of the DeLoaches. They got
4 it because they are hard working. You don't get
5 \$600,000 because you represent the DeLoaches.

6 And that is the lawsuit they have going on
7 here. And it shouldn't be permitted.

8 THE COURT: Please bear with me.

9 MR. STAIR: Yes, sir.

10 THE COURT: And it may be choice of words.
11 You may assume I know more about this area of law
12 than I actually do. You said they showed up in
13 Tennessee? I mean, they had clients?

14 MR. STAIR: Well, they showed up. They were
15 there. They had made an initial appearance on
16 behalf of the DeLoaches, yes, sir. And I must tell
17 you, my fellows had a very clear understanding they
18 were entitled to do that. Now, it may be there is
19 a misunderstanding. And if there is a real
20 complaint here, I think it is between Dixon
21 Robertson, one of the local lawyers here, and the
22 DeLoaches, who had the relationship. And there is
23 actually affidavits to that effect. Our guys were
24 a step removed. And our guys understand that they
25 are enabled to proceed in Tennessee on behalf of

1 the DeLoaches.

2 But once they get to Tennessee and they
3 introduce themselves and say we are here to object
4 and show the fairness, the Court got interested in
5 what they were saying not because they represented
6 the DeLoaches, the Court got interested because
7 they had substance to add to the discussion. And
8 they then got involved in what became a betterment
9 of the decision and the ante for everybody there
10 went up.

11 And so the Court in his order recognized the
12 good work of the group from South Carolina who
13 came. The DeLoaches aren't mentioned. They didn't
14 say, we are going to give those guys a lot of money
15 because they represented the DeLoaches.

16 The DeLoaches really played no role in that
17 respect. And the money that we're talking about
18 was given to the group of South Carolina lawyers by
19 the Tennessee class action lawyer from his fee for
20 what they added to the value of the case.

21 And, again, unjust enrichment for the
22 DeLoaches to come in and say, somebody used my
23 name, my name has value, they got \$825,000, I want
24 to ask you, Judge, to grab it from them because it
25 is unjust if they have it, give it to me because it

1 is just that I have it. That is beyond bizarre.

2 THE COURT: Now, did the DeLoaches have any
3 type of contract with these lawyers, any fee
4 agreement?

5 MR. STAIR: Again, my clients are two or three
6 people removed. I think -- if you will follow
7 this, I think -- apparently the DeLoaches had
8 contact with Kassel, and then Mr. Kassel I think
9 had some relationship with Mr. Robertson. And so
10 whatever happened, DeLoache sort of got to that
11 point.

12 And then Robertson then comes to our fellows,
13 Leath, Seekings, Leath, Bouch & Crawford, and the
14 rest of the folks here, and gave the go-ahead to
15 proceed. So our folks are under the belief and
16 understanding that they are entitled to do what
17 they are doing.

18 And we didn't pick the phone book out and find
19 DELOACHE and say, let's try that name and go to
20 Tennessee. That is not what happened.. I mean,
21 these are good lawyers, Judge, who practice across
22 the state doing a high quality practice. And that
23 is why it is important that this claim be looked at
24 critically and not just say, well, let's just pass
25 on and let these guys be subjected to this kind of

1 abuse for the the next few years and then come back
2 on summary judgment. It is critical that we come
3 to grips with this case right now. And we ask that
4 you do that.

5 Thank you very much.

6 MS. HILL: Can I add one thing?

7 THE COURT: Yes, ma'am.

8 MS. HILL: Just to be clear with what he just
9 said, Mr. Kassel did not go to Tennessee. I mean,
10 I'm not saying there is anything wrong with
11 Tennessee, but he met with them here, gave them
12 their file back. They came and picked it up and
13 left. That was it.

14 MR. STAIR: If what I said was contrary to
15 that, it was unintentional.

16 MS. HILL: No, you didn't. I just wanted to
17 make that clear.

18 THE COURT: All right.

19 MR. BRUNER: Your Honor, I'm here. I'm Jim
20 Bruner, and I'm not going to argue my motion now,
21 but you have asked some good questions. And
22 apparently there is some context missing here. And
23 since I have been deeply involved with these
24 synthetic stucco cases for years mediating, let me
25 give you -- why would these guys want to go to

1 Tennessee to get involved in that Posey case?

2 The lawyers who were the Defendants in this
3 case were some of the first string lawyers in this
4 state bringing suits on behalf of homeowners who
5 had synthetic stucco on their homes and were being
6 damaged.

7 They have been doing this for years, and
8 Dryvit was one of the principal Defendants because
9 almost a third of Dryvit's product had been sold in
10 South Carolina.

11 So, when these lawyers heard that they were
12 going to turn the Posey case in Tennessee into a
13 national class action which threatened to be
14 binding on all residents in South Carolina,
15 including their current and future clients, they
16 became alarmed. That is why they were looking for
17 a means to argue that Posey was not fair. I don't
18 think it was. But be that as it may, the reason,
19 the value these gentlemen brought to Posey and to
20 the Court up there was that they had an intimate
21 working knowledge of these kind of claims and of
22 the damages that homeowners were suffering across
23 the nation and in South Carolina from this product.

24 And that is what the Court recognized. And
25 that is what Mr. Doffermyre in Atlanta, who was the

1 class counsel recognized, and that is why he agreed
2 to give \$600,000 of his fee to these lawyers for
3 having improved the settlement in that class
4 action.

5 I think what was missing was why would these
6 fellows go up to Tennessee anyway and get involved
7 in that.

8 THE COURT: Did the DeLoaches opt out of
9 settlement?

10 MR. BRUNER: The DeLoaches -- no, they went to
11 see Mr. Kassel for advice on should they try to
12 participate in the settlement.

13 THE COURT: Uh-huh.

14 MR. BRUNER: And after some consultation,
15 apparently he said he didn't think so, and there
16 was no formal attorney-client relationship formed
17 between Mr. Kassel and the DeLoaches.

18 MR. LADY: Judge, if I can?

19 THE COURT: Yes, sir.

20 MR. LADY: I am sitting, my clients, almost in
21 an identical position to Mr. Stair. If I can be
22 briefly heard. I won't reargue everything you have
23 heard, but I think it makes much sense for
24 Mr. Pendarvis to sort of respond to this side
25 rather than go back and forth.

1 My name is Jim Lady. I represent Frank
2 Grimball and Mullen and Wylie. And one of the
3 things that I think needs to be outlined is sort of
4 the relationships of the DeLoaches.

5 And as has been previously discussed, the
6 DeLoaches apparently went to Mr. Kassel about their
7 stucco claim. Mr. Kassel communicated with
8 Mr. Robertson.

9 What is important to my clients is that
10 Mr. Robertson is under oath. In fact, the
11 affidavit that he has signed is quoted in the
12 complaint of the Plaintiff in this case.

13 And Mr. Robertson affirmatively states that he
14 had a relationship with the DeLoaches, and that is
15 what he communicated to our clients was that we
16 have -- I have a client relationship with the
17 DeLoaches that will allow us to go to Tennessee and
18 object to the settlement.

19 Mike Seekings, Jeff Leath, Frank Grimball,
20 Mullen Wylie, Leath Bouch, I believe Mr. Bruner's
21 client, all were under the belief, and good faith
22 belief, and there is no counter evidence, and, in
23 fact, like I say, the complaint -- the affidavit of
24 Mr. Robertson is quoted in the complaint.

25 MR. PENDARVIS: Can I insert an objection

1 here, Your Honor? We are hearing summary judgment
2 arguments. There is a portion of the complaint
3 that is included. It is alleged in the complaint.
4 And that part is for the Court's consideration.
5 But as to all we've been hearing about
6 relationships and who was doing what and why, it is
7 not in the complaint. It is not relevant to the
8 Court's consideration. I would object that some of
9 this is getting into summary judgment territory and
10 it is improper, and we certainly would object to
11 anything outside of the allegations in the
12 complaint.

13 And I understand they want to put some things
14 in context, but I want to make sure that the Court
15 is clear that these arguments are just that, and
16 they are not allegations in the complaint, and they
17 are not part of what the Court needs to consider
18 for the 12(b)(6) motion.

19 MR. LADY: Like I say, the Plaintiff decided
20 to quote the affidavit in his complaint. I did
21 not.

22 THE COURT: The objection is overruled.

23 MR. LADY: So in that context, Your Honor, it
24 should be clearly understood that when my clients,
25 whey they went to Tennessee, the absolute

1 undisputed facts in the case are they understood
2 that there was a client relationship between
3 Mr. Robertson and the DeLoaches that would permit
4 us to enter an objection and do what was done in
5 Tennessee.

6 Very briefly I would just say for the record,
7 I echo all of the arguments Mr. Stair laid out. I
8 don't want to replot all that ground. I would say
9 very briefly, the wrongful appropriation of
10 personality, as one of the first things
11 Mr. Pendarvis said was it is an intentional tort.

12 Well, if my client was under the good faith
13 belief there was a relationship, that couldn't have
14 been intentional. So that has to fail.

15 The conversion clearly is for goods and
16 chattal, not for name, as Mr. Stair said. So that
17 cause of action has to fail.

18 The civil conspiracy, it takes two or more
19 people to conspire to injury somebody. There is
20 absolutely given the relationship there was no
21 conspiracy by two or more people to injure the
22 DeLoaches.

23 The constructive trust, they, as Mr. Stair
24 said, allege they knew nothing of Posey. They
25 can't possibly be entitled to a constructive trust

1 of something they didn't know anything about.

2 The breach of fiduciary duty absolutely
3 requires an affidavit. There is no question, and I
4 have to get affidavits routinely for my practice
5 from architects in order to sue architects for
6 construction defect litigation, and there is no
7 wiggle room on that. If you don't have an
8 affidavit and you are suing on professional
9 negligence, which is exactly what that cause of
10 action is, an affidavit is required. And without
11 one it is fatal to that cause of action..

12 And then the joint venture, I'll just be
13 blunt. Joint venture is an attempt because of the
14 weakness of all the other causes of action to try
15 to wiggle into something that has no relationship
16 to the facts of this case.

17 With that said, Your Honor, I'm going to try
18 to move on.

19 THE COURT: Thank you. Yes, sir?

20 MR. SHAW: Your Honor, I just want to get your
21 input as to what you would like to do. I'm Josh
22 Shaw. I represent Dixon Robertson. Given the
23 hour, we also have a motion to dismiss. Like
24 Mr. Lady, a lot of our grounds we would adopt some
25 of the arguments that have been stated today and

1 don't have to plow through it all, but I just want
2 to get your thoughts on how to proceed given
3 that -- I think you probably want to hear from
4 Mr. Pendarvis.

5 THE COURT: Yes. And I'm not going to rule
6 tonight. In fact, I was thinking of asking for
7 proposed orders from the respective parties and
8 those of you who appear before me know that I don't
9 want a brief in this instance, I want something
10 that if I have my druthers I will just read and
11 sign it as is, a non-argumentative proposed order.
12 So I am going to ask for that from both sides.
13 And, you know, understand that is signed by me as
14 Special Circuit Court Judge. Make it clear, if it
15 goes on appeal, they'll know what is coming or
16 where it came from, I guess, is the best way to put
17 it.

18 Yes, sir?

19 MR. BRUNER: May it please the Court, Your
20 Honor? I have a motion to dismiss as well.

21 THE COURT: Yes, sir.

22 MR. BRUNER: I have got one more thing that is
23 different I would say about my Defendant,
24 Mr. William Bowen, that is a little bit different
25 than the other lawyers who have been sued.

1 I echo everything they have said about all the
2 different causes of action and why the complaint is
3 defective.

4 How my client is different is, and
5 Mr. Pendarvis knows it, and this is how he tried to
6 deal with it, is Mr. Bowen never went to Tennessee.
7 He knows that. He doesn't say he did. Mr. Bowen
8 never signed a piece of paper to anyone that said
9 he represented the DeLoaches. Mr. Pendarvis knows
10 that. The thrust of Mr. Pendarvis's claim is that
11 these lawyers formed some sort of joint venture to
12 go up to Tennessee and profit from the DeLoaches'
13 name.

14 In his complaint he does not say that Mr.
15 Bowen was a member of that joint venture, because
16 in Paragraph 33, which is Mr. Stair's Page 18 of
17 his exhibits, he says who the members of the joint
18 venture were. And he doesn't name Mr. Bowen. He
19 knows Mr. Bowen never went up there.

20 So my client is in a way similar to
21 Mr. Kassel. The difference is Mr. Kassel at one
22 point met with the Plaintiff. The Plaintiffs don't
23 know my client from Sam Hill. He doesn't know who
24 they are. They have never met. They have never
25 communicated.

1 So, to include Mr. Bowen in his shrimp net
2 that he had cast out into the sea to collect
3 lawyers up is just simply wrong. And I think -- I
4 think Ms. Hill made a very good point. These
5 lawyers who are defending these other lawyers don't
6 normally make a motion to dismiss a 12(b)(6). But
7 in this case to require all of these lawyers to go
8 through the expensive and extensive discovery
9 process to get to a summary judgment stage when
10 what he has got right now can't survive is just not
11 fair to these parties.

12 I think it is fair to put him to the test and
13 to say, if you can't do it, you can't allege it, if
14 you can't come up with an affidavit, then you are
15 out. I don't think that is wrong.

16 Thank you, sir.

17 THE COURT: All right. Are you done?

18 MR. SHAW: Your Honor, briefly, if this is the
19 way you would like to proceed.

20 THE COURT: Yes, sir.

21 MR. SHAW: As I mentioned earlier,
22 Mr. Robertson's motions incorporates some of the
23 grounds stated by other Defendants' motions.
24 Again, I would like to adopt the majority of the
25 arguments that have been presented by Mr. Stair.

1 To the extent he suggests -- or any of the other
2 attorneys suggest that their clients are distinct
3 or should be treated differently from
4 Mr. Robertson, I would submit to the Court that
5 based on the allegations of the complaint, with the
6 exception of Mr. Kassel, the complaint alleges a
7 joint venture and alleges that these Defendants in
8 a variety of places within the complaint,
9 Paragraphs 33 and 56, Paragraph 34 and Paragraph 36
10 identify, it says where other Defendants, not
11 Mr. Robertson, were acting in furtherance to that,
12 to that extent Mr. Robertson -- the motions to
13 dismiss stand or fall together.

14 That said, I echo and adopt the arguments of
15 Mr. Stair and the other defense lawyers today who
16 have explained that there are no damages in this
17 case.

18 And, furthermore, with respect into your
19 inquiry into what the Posey class action was, these
20 attorneys allegedly represented the DeLoaches for a
21 very limited purpose. That is in the complaint.
22 Is to represent them as objectors. An objector to
23 a class action is by definition, an objector is a
24 member of the class who has not opted out. That
25 is -- the citation for that -- my citation for that

1 would be Mayo Complex Litigation. That is the only
2 place I know of it. That is where I found it.

3 In that instance, if an objector is
4 successful, the result of that act is an
5 improvement of the entire class settled because you
6 are dealing with a fairness settlement hearing as
7 part of that. An expert can be presented,
8 witnesses can be presented, other evidence can be
9 taken. And an integral part of that is allowing
10 class members to object.

11 If that effort is successful, the class
12 settlement improves. And that is what we have
13 here. We don't -- there is no provision -- and,
14 again, I cite to you Mayo Complex Litigation Fourth
15 Edition -- there is no provision for money damages
16 to a successful objector. It doesn't exist. That
17 is not what happens.

18 And Mr. Stair has articulated, as has I think
19 as Mr. Lady and Mr. Bruner have articulated, the
20 reason that these lawyers were paid an attorney
21 fee. And that is not something that the DeLoaches
22 have any entitlement to.

23 So I wanted to add that as well to the general
24 position of the Defendants.

25 Thank you.

1 THE COURT: Mr. Pendarvis, did your client get
2 anything at all out of the Posey case?

3 MR. PENDARVIS: Excuse me?

4 THE COURT: Did your client get anything at
5 all out of the Posey case?

6 MR. PENDARVIS: They got not \$1, but they
7 stand today subject to a claim for fraud on the
8 court that has no statute of limitations.

9 Just as you heard, an objector has to be a
10 member of the class. The DeLoaches didn't have
11 Dryvit on their house. And there was a suggestion,
12 well, that means they didn't have entitlement to
13 the money. I am going to get to that in a moment.
14 But what we are right now, and I am -- for the
15 allegations of the complaint, the DeLoaches allege
16 that because they didn't have Dryvit, and Dryvit
17 knows that right now, has taken Allison DeLoache's
18 deposition, that is referenced in the complaint --
19 Dryvit and sua sponte the Court in Dandridge,
20 Tennessee, the Posey Court, had the power to bring
21 that party before the Court for fraud on the Court.
22 They were never members of the class.

23 Now, the point that I'd like the Court to
24 focus on, and we need to kind of revisit the
25 standard of review here, everything in the light

1 most favorable to the Plaintiffs, not the
2 Defendants.

3 In the light most favorable to the Plaintiff,
4 John Kassel, the Defendant Kassel had the key. The
5 Defendant Kassel had information from clients that
6 believed -- clients believed they had stucco on
7 their house. It was manufactured by Dryvit. They
8 went to a lawyer. The lawyer gave them ideas about
9 whether he could represent them, whether they
10 were -- he was going to represent them. That
11 didn't happen. That lawyer gave confidential
12 information.

13 The DeLoaches have a claim against Dryvit for
14 Dryvit EIFS. No one goes out to the house and does
15 samples, verifies things to see whether they truly
16 have Dryvit to make them a class member of the
17 Posey class.

18 The key that got the lawyers that are named as
19 Defendants in this lawsuit outside Mr. Kassel, all
20 the other lawyers that were participating in this
21 joint venture had the ability to walk into that
22 courtroom all conditioned on representing an
23 objector.

24 These lawyers didn't contend in the papers
25 they filed in Posey that is argued in the complaint

1 complaint that they had Dryvit on their house and
2 they were class members and they were entitled to
3 object on their own standing. They got in the
4 front door with the key being the DeLoaches' name.

5 Now, I agree with the arguments you heard from
6 counsel for Leath and Bouch and Crawford that it
7 wasn't the DeLoaches' name that got anybody
8 anything. It wasn't the fact that it was the
9 DeLoaches. It was the fact that these lawyers were
10 standing with capacity to argue on behalf of an
11 alleged objector. That is the value. That is the
12 commercial value.

13 You can't -- there is not a T-shirt stand and
14 people aren't buying T-shirts that say DeLoache.
15 That is not the commercial aspect. That is a red
16 herring. But the commercial value is having the
17 ability to stand in front of a judge and a court
18 representing an objector is the commercial value to
19 DeLoaches' name.

20 They arguably, at least according to what
21 these lawyers represented under Rule 11 to a
22 Tennessee Court, that these DeLoache people had
23 Dryvit on their home and that qualified them to
24 object to the settlement. That is the commercial
25 value.

1 And as a result of the use of that aspect of
2 the DeLoache personality, it allowed these lawyers
3 to argue, do whatever they did, and earn this
4 money. And they would not have been able to make
5 that argument without a Plaintiff. And the name
6 they chose to use was the DeLoaches.

7 Now, these are joint venturers. They have
8 claims among each other. If one of them said, I
9 represent the DeLoaches and the other ones say, it
10 turns out you didn't, that is not alleged in the
11 complaint.

12 Now, there is a -- and I am going to bounce
13 around a little bit because I know everyone is --
14 it is late in the evening, but I do want to make a
15 particular comment. I heard an argument that Mr.
16 Bowen is not named as a joint venturer in the
17 lawsuit, and that is simply not true. Because if
18 you look at Paragraphs 56, 57 and 58 of the
19 complaint they specifically allege at all times
20 relevant hereto, Grimball, Mullen, Seekings, Wylie
21 Leath, Robertson, Bowen, and it goes on and names
22 the law firms, were acting as agents for their
23 joint venture formed for the purpose of financial
24 gain. It goes on. I am not going to read the rest
25 of it.

1 But each of these three paragraphs, as
2 Mr. Bowen's counsel knows, specifically alleges
3 that he was a member of the joint -- he and his
4 P.A., Bowen, P.A. were members of the joint
5 venture.

6 And there is evidence to support that. It is
7 not alleged in the complaint, but that is a
8 different day. So there is an allegation that Mr.
9 Bowen was definitely in the -- as a member of the
10 joint venture.

11 Your Honor, again, I am trying to piece
12 through this argument. I will put all this into a
13 proposed order. But the motion to strike or
14 dismiss the summary of the case is a motion that is
15 really made pursuant to Rule 12(f), motion to
16 strike, and unless it is redundant, immaterial,
17 scandalous, and there are some standards on the
18 standard of review for Rule 12(f), and I submitted
19 that to the Court in a section called standard of
20 review in the memorandum I handed up, but there
21 simply is nothing that is within the purview of
22 Rule 12(f), motion to strike that would suggest
23 that the summary of the case needs to be stricken
24 from the complaint or the complaint dismissed
25 because it has got it.

1 As Your Honor knows -- well, I know you don't
2 preside on juries, but juries don't get copies of
3 complaints. This summary of the case was meant to
4 help educate a judge like yourself who is trying to
5 have to evaluate what is going on and what the
6 complaints are.

7 And, again, the whole idea that there were no
8 damages, the DeLoaches have suffered damages.
9 There is a presumption of damages in the Gignilliat
10 case on the wrongful appropriation of personality.

11 The idea that the DeLoaches are subject to a
12 claim for fraud on the Court is a real damage. The
13 DeLoaches have three years from the day they knew
14 or should have known of these issues to bring their
15 claim.

16 In January-February of 2009 they got a call
17 from this lawyer that is in the South Carolina
18 class action that let them know about these events.
19 So they had three years to bring that claim.

20 But as the Court will know or look at, the law
21 on fraud on the court has no statute of
22 limitations. So at any time in the future, Dryvit
23 or the Court in Tennessee can bring the DeLoaches
24 under a rule to show cause or a motion for contempt
25 of court for fraud on the Court because their names

1 were used and they didn't have Dryvit on their
2 house. So to the extent we have an argument, we
3 just couldn't wait until that happened because then
4 there would be an argument that we waited too long
5 on the statute of limitations on these claims.

6 THE COURT: Where would the allegation of
7 fraud on the court come from?

8 MR. PENDARVIS: Well, Dryvit Systems
9 Incorporated paid a lot of money, and they paid
10 specifically money to these lawyers. And this is
11 not alleged in the complaint so I don't really want
12 to go too far. But to answer your question, Your
13 Honor, the company itself paid millions of dollars
14 as you heard arguments on for this nationwide class
15 action and paid millions of dollars just in
16 attorney's fees would have a claim that they paid
17 attorney's fees to attorneys that were representing
18 an objector that really had no standing. So there
19 is a representation made to the court by purported
20 apparent agents of these principals, the DeLoaches,
21 that they had stucco on their -- I mean, Dryvit
22 EIFS on their house, and that just simply wasn't
23 true.

24 THE COURT: I know you are asking for a jury
25 trial, but exactly how much money do you think your

1 clients are entitled to?

2 MR. PENDARVIS: Your Honor, the use of the
3 DeLoaches' name to get the lawyers into position to
4 make arguments that they are entitled to attorney's
5 fees is the claim for wrongful appropriation of
6 personality. They got \$600,000 using the client's
7 name. So that is one.

8 They have incurred other costs that will be
9 alleged at a jury trial. That is alleged
10 specifically in the complaint.

11 The other thing too that is important, Your
12 Honor, it is not alleged in the complaint, it is
13 for the Court's background, you heard arguments
14 that they were negotiating settlement. They
15 objected. And they were there to argue to improve
16 the settlement.

17 When lawyers are arguing on settlements of
18 claims, you have to have consent of the client.
19 And the complaint alleges that these lawyers in
20 breach of their duties, their assumed role as
21 attorneys, didn't communicate about the settlement.

22 I do want to -- there was a lot of focus, Your
23 Honor, on the breach of fiduciary duty allegation.
24 I do want to focus the Court in on one important
25 key.

1 All through this complaint, the DeLoaches
2 contended there never was an attorney-client
3 relationship, which, as I said, Your Honor, earlier
4 limits our abilities to go get an expert to say
5 they were negligent so that means there was a
6 relationship. And there wasn't one.

7 Well, what is argued in Paragraph 98 that was
8 carefully skipped over when that was read to you --
9 carefully skipped over -- when the Defendants
10 assumed the representation of the DeLoaches, the
11 Defendants were charged to act as fiduciaries and
12 their agents pertaining to the objections to the
13 settlement. So these lawyers -- you can't create
14 an attorney-client relationship without consent.
15 Clients can't do it to a lawyer. Lawyers can't do
16 it for a client. And all the allegations of
17 fiduciary duty are intentional acts.

18 Your Honor, there are two threads of claims
19 that are often brought in what are called legal
20 malpractice cases. There is professional
21 negligence and there is a breach of fiduciary duty.

22 A lawyer might be honest, diligent,
23 communicates frequently, accounts fully to
24 everything, but fails to file a lawsuit on time.
25 And that is negligent.

1 At the same time, in another matter, a lawyer
2 might file everything perfectly, not be negligent
3 in one slight little bit, but take the client's
4 money out of a trust account. And that is a breach
5 of fiduciary duty. Or disclose client's
6 confidences to third parties. That is a breach of
7 fiduciary duty. And that is an intentional act.

8 So the point I'm making is there are two very
9 specific threads of what are called legal
10 malpractice claims. And these breach of fiduciary
11 duty claims are not negligence. And even if this
12 claim had accrued after July of 2005 that would
13 subject this claim to an affidavit, if it were a
14 claim of negligence, there is no claim of
15 negligence and these are intentional breaches of
16 fiduciary duties, but as I said at the very --
17 earlier part of the day, the easier part on that
18 for the Court is that when the Court looks at the
19 language on the effective date of this act, it is
20 for claims that accrue on or after July 1, 2005.

21 And as the court recognized in the True versus
22 Monteith case, claims may accrue and be available
23 to a party and not be known, and once they are
24 known, the statute of limitations begins to apply.

25 Bear with me, Your Honor.

1 THE COURT: Yes, sir.

2 (Pause.)

3 MR. PENDARVIS: Now, there were some arguments
4 on the various different causes of action. As to
5 the arguments that were made on the conversion
6 cause of action, Your Honor, the DeLoaches'
7 position in the complaint alleges that that money
8 belonged to the DeLoaches. It was money earned
9 these lawyers got without the DeLoaches' permission
10 in this court.

11 And according to the civil conspiracy claim,
12 Your Honor -- again, I'm trying to move swiftly
13 here.

14 THE COURT: Take your time.

15 MR. PENDARVIS: Paragraph 82 and Paragraph 86
16 it explains why there is a civil conspiracy claim.
17 The complaint does not allege that these lawyers
18 got together and said, y'all, what are we going to
19 do to hurt the DeLoaches. Let's figure out a plan
20 to go hurt the DeLoaches.

21 What the complaint alleges is that they
22 combined together -- I'm reading Paragraph 52 --
23 these Defendants combined together to injury the
24 DeLoaches by participating and obtaining financial
25 benefits from Posey without telling the DeLoaches

1 once the financial benefits were actually received.

2 These lawyers never -- the allegations in the
3 complaint allege the lawyers never communicated
4 with the DeLoaches. So the conspiracy allegations
5 are that the conspiracy was, we got this, let's
6 never tell the DeLoaches.

7 The complaint also alleges another fundamental
8 problem with what happened between these lawyers
9 and these various law firms.

10 As the Court may be aware, Rule 1.5(e) has --
11 of the Rules of Professional Conduct deals with
12 allocating funds among lawyers in different -- from
13 settlement or recovery for a client among lawyers
14 in different firms.

15 And the bottom line is, at the time these
16 monies were recovered by the lawyers, the rules
17 require the lawyers to obtain informed consent on
18 the division of the fee. And the complaint alleges
19 that never happened.

20 The argument that the DeLoaches, the use of
21 their name entitled these lawyers to come into
22 court and make their arguments and do whatever they
23 did for the same reason that these clients claim
24 that that is their -- the money they are entitled
25 to because there was no fee agreement, no

1 agreement, you know, for percentages or hourly
2 rates or anything, that money is theirs. And for
3 that same reason, monies gained through the use of
4 their names is the race that -- the thing that the
5 DeLoaches seek to have the constructive trust
6 imposed upon.

7 Your Honor, somewhere in the arguments I made
8 a note. Your Honor, any cases where expert
9 testimony against a professional is necessary.
10 Plaintiffs have all -- unless there is what is
11 called a general knowledge exception, some general
12 knowledge that you don't need an expert in the
13 field to explain. Other -- if it is some
14 complicated professional matter, the Plaintiffs
15 have always needed an expert to establish duty and
16 the breach of the duty by the professional. Always
17 been the case.

18 When the statute was imposed in 2005, the
19 purpose behind requiring an affidavit at the outset
20 is to weed out frivolous claims. And we
21 respectfully submit to the Court, this case is
22 anything but frivolous.

23 If it is okay for a group of lawyers to take
24 someone's name without their permission, without
25 ever so much as making a phone call or any

1 communication, and run off to a court, put those
2 clients' names in front of that court, submit them
3 to the jurisdiction of a court in a foreign state,
4 Tennessee, and then obtain \$600,000, maybe even
5 \$825,000 by the use of their name, and that doesn't
6 state a claim, it just seems like that equity and
7 fairness, the cases -- the arguments made here
8 should allow the DeLoaches to come back and go in
9 front of a jury with that.

10 And, again, to the extent that the Court
11 believes any part of this complaint should be
12 dismissed, we ask for leave to file an amended
13 complaint.

14 In fact, Your Honor, we have some information
15 from a United States District Court case applying
16 the law in South Carolina. It is cited on Page 10
17 of our memorandum that I submitted. It is in a
18 case called Cooper versus Hawkins, District of
19 South Carolina, June 23, 2008. And we have quoted
20 that the District Court, and I believe this is
21 Judge Duffy, Your Honor, I'm pretty sure it is
22 Judge Duffy, it is undisputed that 15-36-100 only
23 applies to causes of action arising after July 1,
24 2005. And this goes on to cite that the claim
25 arose before July 1, 2005, and therefore the

1 affidavit wasn't required.

2 And as I understand, Your Honor, that counsel
3 for one of the Defendants was representing the
4 Defendant in that very action, so these lawyers
5 here today, one of them, knows very well the ruling
6 in that proceeding.

7 MR. STAIR: If I can object. He knows good
8 and well I was not involved in that case, and I
9 take extreme offense to him saying that, what he
10 just said. I was not involved in that case, had
11 nothing to do with it, don't know about the case.
12 And for him to suggest that I'm standing here
13 having been involved in that case and arguing this
14 with you, I'm offended by that, Your Honor.

15 MR. PENDARVIS: I'll rephrase that. Carlock
16 Copeland firm. I wasn't going to name the firm,
17 but it is Carlock Copeland firm that was definitely
18 involved in that case.

19 MR. STAIR: You said one of these lawyers
20 sitting here, and I was not involved, and I have no
21 knowledge of it.

22 MR. PENDARVIS: And my apologies. Mr. Stair,
23 I do apologize. I am correcting that, the Carlock
24 Copeland firm was counsel for one of the parties in
25 that very action.

1 Your Honor, I think that is enough for me.

2 THE COURT: Let me ask you the same question I
3 asked Mr. Stair. Mr. Stair said at the outset that
4 he had never heard of anything like this before.
5 Is that an accurate characterization of what you
6 said?

7 MR. STAIR: On what now? I have dealt with
8 the affidavit statute.

9 THE COURT: No, I meant the whole scenario.

10 MR. STAIR: Oh, on the summary of the case?

11 THE COURT: Yes.

12 MR. STAIR: Yes, I have never seen it. I
13 would invite the Court to suggest how many times it
14 has either.

15 THE COURT: Well, I am not going to say that,
16 but I was going to ask if there was a case where
17 the facts are similar. I'll put it like that.

18 MR. PENDARVIS: Your Honor, I was looking for
19 some law on cases where lawyers had assumed a role
20 as an attorney when they didn't have permission.
21 And I found three. And all those were in
22 circumstances where a lawyer was representing a
23 client and the lawyer sought to be relieved for
24 some reason and then sort of without permission of
25 the client sent it over to another lawyer and, for

1 whatever -- the objection was, the original client
2 was not happy, didn't agree to the representation
3 by the second lawyer. But I couldn't find a case
4 where lawyers assumed an attorney-client
5 relationship and just ran -- took someone's name
6 and went to court and did things. There are just
7 so many things that lawyers have to do with
8 clients: Communicate, you know, get approval on
9 settlements, just all kind of things. So I
10 couldn't find a case like that.

11 But, again, I think everyone is clear, and I
12 even heard arguments today that suggested that
13 there was no attorney-client relationship ever.
14 The DeLoaches consulted with Mr. Kassel. They
15 didn't hire him. He didn't accept the
16 representation. The DeLoaches dispute whether
17 there ever -- they disagree. And they allege in
18 the complaint they had no relationship with
19 Mr. Robertson. In fact, the complaint specifically
20 alleges that once all this came to light,
21 Mr. Robertson and his counsel -- not here today --
22 invited -- Paragraph 30, 29 and 30, after the
23 DeLoaches found out about all this -- and I'm
24 reading it. On or about February 27th, 2009, at
25 the request of counsel for Robertson, the DeLoaches

1 met with Robertson and his personal lawyer in the
2 Columbia offices of Robertson's lawyer. Prior to
3 to the meeting -- typo -- prior to the meeting the
4 DeLoaches were not advised of the subject matter or
5 that they may need to have their own lawyer
6 represent them and protect their own interest.

7 And Paragraph 30 is, during the meeting the
8 DeLoaches got the impression that Robertson and
9 his lawyer were trying to convince them that the
10 statements of Ms. DeLoache's affidavit were not
11 true.

12 So the point being is, there never was an
13 attorney-client relationship and DeLoaches disputed
14 that there ever was.

15 So I'll be glad to provide the Court with just
16 a few cases I found. They are really not on point,
17 but they are close. But it basically says this:
18 That an attorney-client relationship is a
19 consensual relationship on both sides. A client
20 can't impose an attorney-client relationship on a
21 lawyer without consent. The lawyer has got to
22 agree to accept the representation unless there is
23 some court appointment or something like that.
24 Vice versa. A lawyer can't create an
25 attorney-client relationship and say, hey, I am

1 going to represent you. I've got your case. I'm
2 going to go do this for you.

3 You can't do that. . And so that is sort of the
4 unusual nature of where we are and why there is
5 really not a lot of authority on that.

6 MR. STAIR: Your Honor, if I might respond.
7 I'll be very brief. You have been most patient,
8 and for that I will exercise restraint that at the
9 moment is difficult for me to do.

10 He says that the purpose of the affidavit rule
11 is to avoid frivolous litigation. This case is the
12 poster child for frivolity. It absolutely ignores
13 the concept of statement of causes of action
14 recognized by law, and it totally is devoid of
15 damages. And now we're told that they, quote,
16 stand subject to a claim for fraud on the Court,
17 end quote, for something that happened ten years
18 ago that has not occurred.

19 My suggestion is, is when that does occur, and
20 it is not going to occur, but when that does occur,
21 the cause of action then might be complete because
22 we would then at least have an allegation of some
23 damage that occurred.

24 Until we get there, we don't have any damage.
25 And the threat that somebody might come from afar

1 and do something is not the reason to have all of
2 these lawyers in this courtroom and this Court
3 spend thousands or hundreds of thousands of dollars
4 it will take to make the way through this mess.
5 This case needs to be dismissed.

6 With that, Your Honor, I will sit down, but
7 thank you so much for your time.

8 THE COURT: All right. Anything further?

9 MR. PENDARVIS: Thank you, Your Honor. I want
10 to say that too.

11 THE COURT: You are welcome. You got my
12 suggestions regarding proposed orders. How much
13 time do y'all need to submit that?

14 MR. LADY: Your Honor, if I can just speak for
15 myself, I am going on family vacation next week.
16 Mr. Grimbball, who I represent, who I will need his
17 assistance in proposing any order, his oldest son
18 is getting married this weekend, he left today, so
19 if I can have at least till a week after next
20 before it would be due. For my own personal
21 situation I request at least that much time.

22 THE COURT: Well, today is June 6th, 2012.
23 And say by July 9th? That will give everybody
24 roughly 30 days or more. Is that okay?

25 MR. STAIR: Yes, sir.

1 MR. BRUNER: Yes, Your Honor.

2 MS. HILL: Yes, Your Honor.

3 MR. PENDARVIS: Your Honor, one other thing.

4 I am going to do some work for my co-counsel.

5 There are some motions to stay discovery. I have
6 served discovery, Your Honor. And I think in
7 fairness while we are all doing these orders I'll
8 stipulate that the Plaintiffs won't be seeking
9 discovery responses until the Court rules, but I
10 would like an understanding of the Court and
11 counsel that these things were served in April, and
12 if we are going to be in July for this ruling, that
13 assuming the Court rules in the Plaintiff's favor,
14 which would be the only way the discovery will be
15 alive, if that is the case, that we have discovery
16 response within 30 days of the Court's order.

17 MR. STAIR: That will be fine. We appreciate
18 that consent.

19 MS. HILL: My only one concern is I am having
20 a baby in September. And the discovery he has sent
21 is extensive. And so, you know, I may need an
22 extension for 30 days. Just putting that out there
23 knowing how those things tend to happen.

24 THE COURT: Okay. Also, let me -- I know with
25 the attorneys involved I think when we get sued,

1 there is no other way but to take it personally,
2 and I will just admonish everyone to remember our
3 civility code. And, like I say, try not to take it
4 personally, but I know when you get sued you do.
5 And some people say attorneys are the worst clients
6 sometimes. But I just remind everyone of the
7 civility code.

8 MS. HILL: No, that is not true.

9 MR. STAIR: Since one of mine is here, I will
10 tell you they are great clients, Your Honor.

11 THE COURT: Anything further today? All
12 right, thank you very much.

13 MR. PENDARVIS: Thank you, Your Honor.

14 MR. SHAW: Thank you, Your Honor.

15 MR. BRUNER: Thank you, Your Honor.

16 MS. HILL: Thank you, Your Honor.

17 MR. LADY: We appreciate your time.

18 MR. STAIR: Thank you, Judge.

19 (WHEREUPON, the proceedings were concluded.)
20
21
22
23
24
25

(END OF TRANSCRIPT)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF RICHLAND) CASE #: 2011-CP-40-7432

William E. DeLoache, III and)
 Allison H. DeLoache,)
)
 Plaintiffs,)
 v.)
)
 William Dixon Robertson, III;)
 W. Jefferson Leath, Jr.; Michael)
 S. Seekings; Leath, Bouch &)
 Crawford, LLP; Francis E.)
 Grimbail; Mullen Wylie, LLC)
 formerly Mullen, Wylie & Seekings,)
 LLC; William M. Bowen; William)
 M. Bowen, PA; and John D. Kassel,)
)
 Defendants.)

MOTION HEARING

Monday, June 10, 2013
 3:34 p.m. to 3:40 p.m.

The hearing before the Honorable Joseph M. Strickland, Special Circuit Court Judge for the Fifth Circuit, was taken in Courtroom 2D of the Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina, on the 10th day of June, 2013, before Robin K. Reibold, Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES

Thomas A. Pendarvis, Esquire

Pendarvis Law Offices, PC
500 Carteret Street, Ste. A
Beaufort, South Carolina 29902
Attorney for the Plaintiffs

Amy L.B. Hill, Esquire

Sowell, Gray, Stepp & Laffitte
Post Office Box 11449
Columbia, South Carolina 29211
Attorney for Defendant John D. Kassel

James L. Bruner, Esquire

Bruner Powell Wall & Mullins, LLC
Post Office Box 61110
Columbia, South Carolina 29260
Attorney for Defendants William M. Bowen and William M.
Bowen, PA

Kent T. Stair, Esquire

Carlock Copeland & Stair, LLP
40 Calhoun Street, Ste. 400
Charleston, South Carolina 29401
Attorney for Defendants Leath, Bouch & Crawford, Jefferson
Leath and Michael Seekings

James E. Lady, Esquire

Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, South Carolina 29401
Attorney for Francis Grimball and Mullen, Wylie & Seekings

Charles E. Hill, Esquire

Turner Padget Graham & Laney, PA
1901 Main Street, 17th Floor
Columbia, South Carolina 29201
Attorney for Defendant William Dixon Robertson, III

1 **THE COURT:** My name is Joseph Strickland. You know me as
2 the Master-in-Equity for Richland County. Today I'm
3 sitting as a special circuit court judge to resolve
4 these motions. Seated to my right is Mr. Jordan
5 Johnson. He's a student at Charleston Law School.
6 He's going to be helping me out this summer. Before
7 we get started, let's identify every single person
8 in the courtroom.

9 **MR. PENDARVIS:** Your Honor, Thomas Pendarvis. I'm counsel
10 for the plaintiffs, Bill and Allison DeLoache.

11 **THE COURT:** Okay.

12 **MS. HILL:** Yes, Your Honor. Amy Hill, and I'm the counsel
13 for Defendant John Kassel.

14 **THE COURT:** Okay.

15 **MR. HILL:** I'm Charles Hill, and I represent Dixon
16 Robertson, a defendant.

17 **MR. LADY** Jim Lady, Your Honor. I represent Frank
18 Grimball and Mullen Wylie Seekings.

19 **MR. STAIR** Kent Stair. I represent Leath, Bouch and
20 Crawford, and Jeff Leath and Mike Seekings.

21 **THE COURT:** Okay.

22 **MR. BRUNER:** And I'm Jim Bruner, and I represent the
23 Defendant Bill Bowen.

24 **THE COURT:** All right, those in the back. Members of the
25 bar?

1 **MS. McWILLIAMS:** Yes, sir. Susan McWilliams. I'm with
2 Nexsen Pruet, with my partner Dan Leonardi. We
3 represent Dixon Robertson in another matter filed
4 before this one.

5 **THE COURT:** Okay.

6 **MS. McDANIEL:** I'm Theile McDaniel with Kassel McVey.

7 **THE COURT:** Okay. Thank you very much. I wanted to ask
8 the lawyers to be here a little early to marshal the
9 motions to make sure we don't miss anything today.
10 Who wants to do the honors? Mr. Pendarvis?

11 **MR. PENDARVIS** Your Honor, I have a suggestion that may
12 resolve a lot of the motions, and it's more of a
13 summary overview of sort of the circumstances of
14 this case.

15 **THE COURT:** Okay.

16 **MR. PENDARVIS:** There was, November 2011, a Verified
17 Complaint was filed on behalf of the DeLoaches. One
18 year and four days ago, Your Honor heard multiple
19 motions to dismiss and motions to strike the
20 Complaint. The time that's passed, there were some
21 discussions after the hearing, about staying
22 discovery. In February we wrote Your Honor,
23 advising that we would need to proceed with
24 discovery and issue discovery depositions, and with
25 that series of discovery requests came a flurry of

1 motions, both Plaintiff motion to compel and
2 multiple motions by the defendants to stay,
3 basically stay discovery and quash the subpoenas and
4 not go forward with the discovery. So the real crux
5 of all of this is Your Honor's ruling on the motions
6 to dismiss. I believe proposed orders were
7 submitted and ... and that's the thrust of really
8 what's in front of the Court today. And if the
9 Court's inclined to grant or deny the motions, I
10 think a lot of ... if the Court obviously grants the
11 motions, there will be no discovery and the matter
12 will be up on appeal. If the Court denies the
13 motions, then we need to get the game plan for
14 discovery. And that's just the plaintiff's position
15 about the big picture. We can certainly deal with
16 the details, but that's my assessment of sort of the
17 circumstance we find ourselves in.

18 **THE COURT:** Okay.

19 **MR. PENDARVIS** Thank you, Your Honor.

20 **THE COURT:** Anybody else have anything to add?

21 **MR. STAIR:** Your Honor, Kent Stair. It's not an
22 occurrence that happens often, but I agree with Mr.
23 Pendarvis that I think the motion to dismiss is the
24 thing that you need to be looking at primarily.
25 And, frankly, I think the case should be dismissed.

1 And, as he says, then the discovery issues take care
2 of themselves. So I think they do fall in that
3 order.

4 **THE COURT:** All right. Anything else to add? And please
5 bear in mind, I realize it's been a long time. My
6 suggestion is, I'll do something most judges don't
7 do, I'll impose a deadline on myself I guess. I'm
8 willing to rule on all the motions, I guess the ones
9 that I guess logically that I can rule on, by the
10 end of this week. Today is Monday. I can rule
11 before close of business on Friday. And if we need
12 to get back together after that, we can. Does that
13 cause anybody any heartburn? I know it's a lot to
14 get everybody's schedule on the same page, to get
15 here for today. But I can, with your suggestion,
16 I'm willing to obviously take a little less time
17 than I've taken so far and have a decision by this
18 Friday, which is June 14th. Now, I understand that
19 there's a memorial service at noon and some of you
20 will be at that memorial service. But I'll ...
21 matter of fact, I plan to be there myself. So I'll
22 make a decision no later than the close of business
23 Friday, maybe sooner. If I make a decision sooner,
24 I'll certainly make sure and let everybody know. Is
25 there any objection to that, that tactic?

1 **MR. PENDARVIS:** Your Honor, on behalf of the plaintiff, no
2 objection. And I've got some other copies of the
3 proposed orders we submitted if that will make it
4 convenient for the Court.

5 **THE COURT:** I think we have everything. I think ... if we
6 don't, we'll get in touch with you.

7 **MR. PENDARVIS:** We're fine with that, Your Honor.

8 **THE COURT:** All right.

9 **MS. HILL:** That was going to be my question, was whether
10 or not we can help the Court by sending up the
11 proposed orders and ...

12 **THE COURT:** We didn't lose them. We just took them under
13 advisement and, which some of the older judges tell
14 me never to take anything under advisement on the
15 non-jury roster. But this is obviously a very, very
16 serious matter. And I did, you know, I'd reviewed
17 everything once, but I'll make a decision within a
18 few days. Anything further?

19 **MR. PENDARVIS:** Thank you, Your Honor.

20 **THE COURT:** Now, do y'all want to come back to court on
21 Friday, or do you just want to hear from me one way
22 or the other?

23 **MR. LADY:** Speaking only for myself, I'd prefer not to
24 come back, Your Honor, unless you see the need for
25 us to meet here.

1 **MR. PENDARVIS:** Well, the plaintiffs agree.

2 **THE COURT:** Okay. I am not as savvy as I should be with
3 regard to technology, but I think we may use the
4 miracle of email I guess to notify everybody. All
5 right. Well, thank you very much.

6

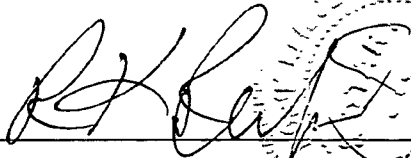
7 **(There being nothing further, the hearing was concluded**
8 **at 3:40 p.m.)**

CERTIFICATE

I certify that the foregoing transcript, consisting of 8 pages, is a true, accurate and complete transcript of the hearing taken before me, Robin K. Reibold, the undersigned Court Reporter. This hearing was held without a jury before The Honorable Joseph M. Strickland, Master in Equity for Richland County, on June 10, 2013, in the within-captioned case.

Said hearing was reported using the method of Stenomask with backup and was transcribed by me.

December 18, 2013


ROBIN K. REIBOLD

MY COMMISSION EXPIRES: 4-28-2021

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
	)	
William E. DeLoache, III and	)	Civil Action No.: 2011-CP-40-07432
Allison H. DeLoache,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
William Dixon Robertson, III; W.	)	<u>DEFENDANT JOHN D. KASSEL'S</u>
Jefferson Leath, Jr.; Michael S.	)	<u>MOTION TO DISMISS</u>
Seekings; Leath, Bouch & Crawford,	)	
LLP; Francis E. Grimbail; Mullen	)	
Wylie, LLC; formerly Mullen, Wylie &	)	
Seekings, LLC; William M. Bowen, PA;	)	
and John D. Kassel,	)	
	)	
Defendants.	)	
	)	

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant John D. Kassel ("Kassel") moves this Court for an Order dismissing Plaintiffs' William E. DeLoache, III and Allison H. DeLoache ("Plaintiffs") Complaint as to Kassel on the grounds that 1) Kassel did not owe Plaintiffs a duty as complained of in the Complaint; 2) it is not foreseeable that Kassel's alleged breach of the duty of confidentiality would have proximately caused the Plaintiffs to suffer the harm as alleged in the Complaint, 3) Plaintiffs do not have standing to bring a lawsuit against Kassel because they have not set forth facts sufficient to constitute finding that they have suffered an injury-in-fact, 4) that Plaintiffs have failed to comply with S.C. Code Ann. § 15-36-100, 5) the facts plead in the Breach of Fiduciary Duty Cause of Action do not apply to Kassel and contradict other allegations in the Complaint, and 6) the allegation of damages is not plead with enough specificity to avoid surprise because it is not clear from the allegations of the Complaint how Plaintiffs were damaged.

This motion is based upon the South Carolina Rules of Civil Procedure, applicable South Carolina case and statutory law, and all other materials and memoranda which Kassel may submit to the Court.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: 

Amy L. Hill

William H. Jordan

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400

Attorneys for Defendant John D. Kassel

Columbia, South Carolina

Dec. 15, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	CASE NO.: 2011-CP-40-7432
	)	
WILLIAM E. DELOACHE AND ALISON	)	
H. DELOACHE,	)	
	)	
Plaintiffs,	)	DEFENDANT SUED AS
	)	LEATH BOUCH & CRAWFORD, LLP,
	)	AND DEFENDANTS
vs.	)	W. JEFFERSON LEATH, JR.,
	)	AND MICHAEL S. SEEKINGS'
	)	MOTION TO DISMISS
WILLIAM DIXON ROBERTSON, III, W.	)	AND/OR MOTION TO STRIKE
JEFFERSON LEATH, JR., MICHAEL S.	)	PLEADINGS
SEEKINGS, LEATH BOUCH &	)	
CRAWFORD, LLP, FRANK E.	)	
GRIMBALL, MULLEN WYLIE, LLC	)	
formerly MULLEN WYLIE & SEEKINGS,	)	
LLC, WILLIAM M. BOWEN, WILLIAM	)	
M. BOWEN, PA AND JOHN D. KASSEL,	)	
	)	
	)	
Defendants.	)	
	)	

COME NOW the Defendants W. Jefferson Leath, Jr. and Michael S. Seekings, and the Defendant sued as Leath Bouch & Crawford, LLP (collectively referred to herein as "These Defendants"), pursuant to Rules 8 (e), 10(b), 12(b), and 12(f) of the South Carolina Rules of Civil Procedure as well as S.C. CODE ANN. § 15-36-100, and move to dismiss the Plaintiffs' Complaint and each Count applicable to These Defendants, all as set forth more thoroughly herein below.

MOTION TO STRIKE AND/OR DISMISS
PLAINTIFFS' "SUMMARY OF THE CASE"

These Defendants seek to strike or dismiss those portions of Plaintiffs' Complaint which contain a recitation of argumentative statements entitled "Summary of the Case" for failure to comply with SCRCF Rule 8(e) and failure otherwise to state a claim for relief upon which any

recovery could be granted. Plaintiffs fail to comply with the requirement that each averment of a pleading be simple, concise, and direct. See Rule 8(3), SCRC. The Paragraph further fails to satisfy the requirement that any averments be made in consecutive-numbered paragraphs, the contents of each being limited to a statement of a single set of circumstances. See Rule 10(b), SCRC.

MOTION TO DISMISS ALL CLAIMS

(FAILURE TO ATTACH REQUIRED AFFIDAVIT)

All of Plaintiffs' claims against These Defendants are alleged to have arisen out of some alleged breach of a duty or obligation which allegedly arose by virtue of the role of These Defendants in their capacity as attorneys. See generally Compl. As such, Plaintiffs were required, but failed, to file an Affidavit of a duly qualified expert contemporaneous with their Complaint. S.C. CODE ANN. §15-36-100 (2011). Therefore, These Defendants move before this Court, pursuant to S.C. CODE ANN. §15-36-100(F), and request Plaintiffs' Complaint against These Defendants be dismissed.

MOTION TO DISMISS ALL CAUSES OF ACTION

(NO DAMAGE PROXIMATELY CAUSED BY THESE DEFENDANTS)

Plaintiffs, by own pleadings, state and demonstrate they were not entitled to recover any damage or other monetary relief in the *Posey* case because there was no Dryvit product on Plaintiffs' house. As a result, Plaintiffs could not have suffered any monetary loss by whatever occurred in the *Posey* case, nor could they have been entitled to anything that was recovered by, or paid to, anybody for any reason in connection with the *Posey* case. Given these circumstances and the Plaintiffs' failure to otherwise properly allege a claim for recoverable damages against These Defendants in any of their separate Counts in the present action, all claims which Plaintiffs are attempting to set forth in their Complaint against These Defendants should be dismissed.

MOTION TO DISMISS PLAINTIFFS' FIRST CAUSE OF ACTION
(FAILURE TO STATE A CLAIM FOR "WRONGFUL APPROPRIATION OF
PERSONALITY" UPON WHICH RELIEF MIGHT BE GRANTED)

Plaintiffs fail to state a claim for relief under the theory that their names were wrongfully appropriated by These Defendants. Plaintiffs' attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs fail to allege the existence of any inherent commercial value attached to the use of their names, as would be required for the statement of a claim based upon this alleged tort.
2. Plaintiffs fail to allege that These Defendants acted with the intent to misappropriate the personality of either Plaintiff, as would be required for the statement of a claim based upon this alleged tort.
3. Plaintiffs fail to allege that These Defendants misappropriated the name of either Plaintiff for the purpose of benefitting any of These Defendants, as would be required for the statement of a claim based upon this alleged tort.
4. Plaintiffs fail to allege that These Defendants benefitted from the alleged misappropriated use of the Plaintiffs' names, as would be required for the statement of a claim based upon this alleged tort.
5. Plaintiffs fail to allege that they suffered any recoverable damages from These Defendants' alleged misappropriation of the use their names, as would be required for the statement of a claim based upon this alleged tort.
6. Plaintiffs otherwise fail to allege facts that would support a claim for relief against These Defendants under the theory of "Wrongful Appropriation of Personality", and as a result, their First Cause of Action should be dismissed.

7. Plaintiffs' claims of "Wrongful Appropriation of Personality" are premised upon the alleged wrongful activities of These Defendants in their capacity as attorneys for the Plaintiffs. Plaintiffs have failed to provide the affidavit of a duly qualified expert as required under SC CODE ANN. §15-36-100 (2011). Therefore, Plaintiffs' claims fail and should be dismissed pursuant to SC. CODE ANN. §15-36-100(F).

MOTION TO DISMISS PLAINTIFFS' SECOND CAUSE OF ACTION

(FAILURE TO STATE A CLAIM FOR "CONVERSION"
UPON WHICH RELIEF MIGHT BE GRANTED)

Plaintiffs fail to state a claim for relief against These Defendants under the theory of "Conversion". Plaintiffs' attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs claims for "Conversion" are premised upon an entitlement to recovery based upon the theory of "Wrongful Appropriation of Personality", and Plaintiffs' fail to assert a claim for relief for the same reasons as are set forth above in relation to Plaintiffs' First Cause of Action (such reasons being incorporated herein).
2. Plaintiffs fail to allege rights to the ownership or control of any tangible object or thing over which These Defendants would be alleged to have wrongfully assumed ownership or control, as would be required for the statement of a claim based upon this alleged tort.
3. Plaintiffs fail to allege rights to the ownership or control of any contractual right to any intangible item or object over which These Defendants would be alleged to have wrongfully assumed ownership or control, as would be required for the statement of a claim based upon this alleged tort.
4. Plaintiffs fail to allege that they suffered any recoverable damages from These Defendants' alleged conversion, as would be required for the statement of a claim based upon this alleged tort.

5. Plaintiffs otherwise fail to allege facts that would support a claim for relief against These Defendants under the theory of "Conversion", and as a result, their Second Cause of Action should be dismissed.

6. Plaintiffs' claims of "Conversion" are premised upon the alleged wrongful activities of These Defendants in their capacity as attorneys for the Plaintiffs. Plaintiffs have failed to provide the affidavit of a duly qualified expert as required under SC CODE ANN. §15-36-100 (2011). Therefore, Plaintiffs' claims fail and should be dismissed pursuant to SC. CODE ANN. §15-36-100(F).

MOTION TO DISMISS PLAINTIFFS' THIRD CAUSE OF ACTION

(FAILURE TO STATE A CLAIM FOR "CIVIL CONSPIRACY"
UPON WHICH RELIEF MIGHT BE GRANTED)

Plaintiffs fail to state a claim for relief against These Defendants under the theory of "Civil Conspiracy". Plaintiffs' attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs fail to allege that These Defendants conspired intentionally for the purpose of causing injury to either Plaintiff, as would be required for the statement of a claim based upon this alleged tort.

2. Plaintiffs fail to allege that any alleged conspiratory act allegedly performed by These Defendants was intentionally performed for the benefit of any of These Defendants, as would be required for the statement of a claim based upon this alleged tort.

3. Plaintiffs fail to allege that they suffered any recoverable damages from These Defendants' alleged conspiracy, as would be required for the statement of a claim based upon this alleged tort.

4. Plaintiffs otherwise fail to allege facts that would support a claim for relief against These Defendants under the theory of "Civil Conspiracy", and as a result, their Third Cause of Action should be dismissed.

5. Plaintiffs' claims of "Civil Conspiracy" are premised upon the alleged wrongful activities of These Defendants in their capacity as attorneys for the Plaintiffs. Plaintiffs have failed to provide the affidavit of a duly qualified expert as required under SC CODE ANN. §15-36-100 (2011). Therefore, Plaintiffs' claims fail and should be dismissed pursuant to SC. CODE ANN. §15-36-100(F).

MOTION TO DISMISS PLAINTIFFS' FOURTH CAUSE OF ACTION
(FAILURE TO STATE A CLAIM FOR "CONSTRUCTIVE TRUST"
UPON WHICH RELIEF MIGHT BE GRANTED)

Plaintiffs fail to state a claim for relief against These Defendants under the theory of "Constructive Trust." Plaintiffs' attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs' claims for "Constructive Trust" are premised upon an entitlement to recovery based upon the theory of "Wrongful Appropriation of Personality" and fail to assert a claim for relief for the same reasons set forth above in relation to the First Cause of Action (such reasons being incorporated herein).

2. Plaintiffs fail to allege that they are properly entitled to have or recover any amount upon which they seek to have this Court impose a constructive trust, as would be required for the statement of a claim based upon this alleged tort.

3. Plaintiffs fail to allege that they suffered any recoverable damages in connection with the facts and circumstances they allege in support of their claim for a constructive trust, as would be required for the statement of a claim based upon this alleged tort.

4. Plaintiffs otherwise fail to allege facts that would support a claim for relief against These Defendants under the theory of "Constructive Trust", and as a result, their Fourth Cause of Action should be dismissed.

5. Plaintiffs' claims for "Constructive Trust" are premised upon the alleged wrongful activities of These Defendants in their capacity as attorneys for the Plaintiffs. Plaintiffs have failed to provide the affidavit of a duly qualified expert as required under SC CODE ANN. §15-36-100 (2011). Therefore, Plaintiffs' claims fail and should be dismissed pursuant to SC. CODE ANN. §15-36-100(F).

MOTION TO DISMISS PLAINTIFFS' FIFTH CAUSE OF ACTION
(FAILURE TO STATE A CLAIM FOR "BREACH OF FIDUCIARY DUTY"
UPON WHICH RELIEF MIGHT BE GRANTED)

Plaintiffs fail to state a claim for relief against These Defendants under the theory of "Breach of Fiduciary Duty". Plaintiffs' attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs' claims of "Breach of Fiduciary Duty" are premised upon the alleged wrongful performance of alleged duties of These Defendants in their capacity attorneys for the Plaintiffs. Plaintiffs have failed to provide the affidavit of a duly qualified expert as required under SC CODE ANN. §15-36-100 (2011). Therefore, Plaintiffs' claims fail and should be dismissed pursuant to SC. CODE ANN. §15-36-100(F).

2. Plaintiffs fail to allege that they suffered any recoverable damages in connection with the facts and circumstances they allege in support of their claims for "Breach of Fiduciary Duty", as would be required for the statement of a claim based upon this alleged tort.

3. Plaintiffs fail to allege that These Defendants acted in bad faith, as would be required for the statement of a claim based on this alleged tort.

4. Plaintiffs otherwise fail to allege facts that would support a claim for relief against These Defendants under the theory of "Breach of Fiduciary Duty", and as a result, their Fifth Cause of Action should be dismissed.

MOTION TO DISMISS PLAINTIFFS' SEVENTH CAUSE OF ACTION

**(FAILURE TO STATE A CLAIM FOR "INJUNCTIVE RELIEF"
UPON WHICH RELIEF MIGHT BE GRANTED)**

Plaintiffs fail to state a claim for "Injunctive Relief" against These Defendants, and their attempted claims in that regard should be dismissed for one or more of the following reasons:

1. Plaintiffs fail to allege that they are suffering, or will suffer, any irreparable harm in connection with their request for injunctive relief, as would be required for the statement of a claim seeking injunctive relief.
2. Plaintiffs fail to allege that they have no adequate remedy at law in connection with their request for injunctive relief, as would be required for the statement of a claim seeking injunctive relief.
3. Plaintiffs otherwise fail to allege any facts or circumstances that would support a claim for "Injunctive Relief" against These Defendants, and as a result, their Seventh Cause of Action should be dismissed.

MOTION TO DISMISS:

(JURISDICTION)

This Court does not have jurisdiction over These Defendants, based upon the constitutional and statutory provisions set forth in Paragraph 12 of their Complaint and, as a result, this Complaint should be dismissed. Venue is likewise inappropriate as to These Defendants.

MOTION TO DISMISS:

(VENUE)

None of These Defendants are residents of this County, and to the extent the venue of this Court is dependent upon These Defendants and/or is not otherwise proper as to These Defendants, this action should be dismissed as to them.

CONCLUSION

For the various reasons set forth above and to be more fully shown by a review of the pleadings and any affidavits, exhibits and/or memoranda that may be presented to the Court before the hearing on this matter, the Plaintiffs' Complaint, and each Cause of Action directed against these Defendants, should be dismissed.

WHEREFORE, Defendant sued as Leath Bouch & Crawford, LLP and Defendants W. Jefferson Leath, Jr. and Michael S. Seekings move that the Court dismiss all claims against These Defendants.

Respectfully submitted,

CARLOCK, COPELAND & STAIR, LLP

By:


KENT T. STAIR
State Bar No.: 14029

M. ELIZABETH JOWERS
State Bar No.: 68288

Attorneys for Defendants Leath Bouch &
Crawford, LLP, W. Jefferson Leath, Jr., and
Michael S. Seekings

40 Calhoun Street, Suite 400
Charleston, SC 29401-3531

.....
843.727.0307

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

William E. DeLoache, III and)
Allison H. DeLoache,)
)
Plaintiffs,)

Case No. 2011-CP-40-7432

v.)

NOTICE OF MOTION AND MOTION
TO DISMISS OF DEFENDANTS

William Dixon Robertson, III; W.)
Jefferson Leath, Jr.; Michael S.)
Seekings; Leath, Bouch &)
Crawford, LLP; Francis E.)
Grimball; Mullen, Wylie, LLC)
formerly Mullen, Wylie &)
Seekings, LLC; William M.)
Bowen; William M. Bowen, PA;)
and John D. Kassel,)
)
Defendants.)

WILLIAM M. BOWEN
AND WILLIAM M. BOWEN, PA

TO: THE PLAINTIFFS AND THOMAS PENDARVIS, ESQUIRE THEIR COUNSEL.

YOU WILL PLEASE TAKE NOTICE that the Defendants William M. Bowen and William M. Bowen, PA ("Bowen"), by and through their undersigned duly authorized counsel, will move before the Presiding Judge, Fifth Judicial Circuit, at the Richland County Judicial Center, 1701 Main Street, Columbia, SC, on the tenth day following service hereof, or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 12(b)(6), SCRCF, dismissing the Plaintiffs' Complaint herein on the grounds that the Complaint fails to state facts sufficient to constitute a cause of against Bowen in that:

1. Plaintiffs were required to file and serve an affidavit of a qualified expert pursuant to S.C. Code Ann. §15-36-100 (1976, as amended) contemporaneously with their Complaint but failed to do so. Consequently, their claims against Bowen must be dismissed.
2. The Plaintiffs have failed to allege a legally cognizable claim for any damages recoverable against Bowen. As such, their claims against Bowen must be dismissed.

3. The Plaintiffs allege that their damages arose from the actions a joint venture of the certain defendants. The Complaint specifically fails to allege that Bowen was a member of that joint venture. Consequently, their claims against Bowen must be dismissed.
4. With respect to their claim for wrongful misappropriation of personality, the Plaintiffs have not alleged (a.) the existence of any inherent commercial value associated with the use of their names, (b.) that Bowen acted with the intent to misappropriate the personality of either Plaintiff, (c.) that Bowen acted for the purpose of benefitting himself through any such alleged misappropriation, (d.) that Bowen benefitted through any such alleged misappropriation, or (e.) that they suffered any legally cognizable damages from the alleged misappropriation of their names. Consequently, their claim against Bowen for wrongful misappropriation of personality must be dismissed.
5. With respect to their claim for conversion, the Plaintiffs have not alleged (a.) their right to ownership of or control over any property, thing or right wrongfully assumed and converted by Bowen, or (b.) that they suffered any legally cognizable damages from the alleged conversion by Bowen. Consequently, their claim against Bowen for conversion must be dismissed.
6. With respect to their claim for civil conspiracy, the Plaintiffs have not alleged (a.) any overt act by Bowen, or any act at all, overt or otherwise, which would make him liable to the Plaintiffs under such theory, (b.) that they suffered any legally cognizable damages from the alleged civil conspiracy by Bowen. Consequently, their claim against Bowen for civil conspiracy must be dismissed.
7. With respect to their claim for constructive trust, the Plaintiffs have not alleged (a.) that they are properly entitled to have or recover any amount upon which they seek to impose a constructive trust, or (b.) that they have suffered any legally cognizable damages from Bowen's alleged conduct. Consequently, their claim against Bowen for constructive trust must be dismissed.
8. With respect to their claim for breach of fiduciary duty, the Plaintiffs have not alleged (a.) any special relationship with Bowen, or (b.) that Bowen was their lawyer. Consequently, their claim for breach of fiduciary duty against Bowen must be dismissed.
9. With respect to their claim for an injunction, the Plaintiffs have not alleged (a.) that they are suffering or will suffer irreparable harm, or (b.) that they have no adequate remedy at law. Consequently, their claim for an injunction against Bowen must be dismissed.

This motion will also be based on those grounds appearing in any memoranda hereafter filed and served and the law in such cases as have been made and provided. You are invited to attend and take part as you may deem proper.



James L. Bruner
Bruner Powell Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
P. O. Box 61110
Columbia, SC 29260
(803) 252-7693
JBruner@BrunerPowell.com
*Attorneys for William M. Bowen and
William M. Bowen, PA*

January 23, 2012

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
Civil Action No. 2011-CP-40-07432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W. Jefferson
Leath, Jr.; Michael S. Seekings; Leath,
Bouch & Crawford, LLP; Francis E.
Grimball; Mullen Wylie, LLC formerly
Mullen, Wylie & Seekings, LLC; William
M. Bowen; William M. Bowen, PA; and
John D. Kassel,

Defendants.

**DEFENDANT WILLIAM DIXON
ROBERTSON III'S MOTION TO DISMISS**

The defendant William Dixon Robertson III moves to dismiss plaintiff's complaint, and/or for judgment on the pleadings, on the following grounds:

1. Defendant Robertson joins in and incorporates by reference the Motion to Dismiss of "Defendants sued as Leath, Bouch & Crawford, LLP and Defendants W. Jefferson Leath, Jr., and Michael S. Seekings" (hereinafter "Leath Motion to Dismiss"), filed January 23, 2012, as follows:

- a. Defendant Robertson joins in the Leath Motion to Dismiss as to all causes of action based on plaintiffs' failure to file an Affidavit of a duly qualified expert contemporaneous with their Complaint pursuant to Section 15-36-100 of the South Carolina Code. (See Leath Motion to Dismiss at 2.)

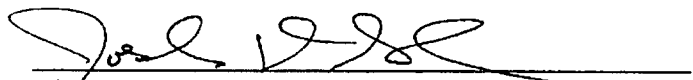
- b. Defendant Robertson joins in the Leath Motion to Dismiss as to all causes of action based on plaintiffs' failure to plead a claim for recoverable damages. (See Leath Motion to Dismiss at 2.)
- c. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' first cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "wrongful appropriation of personality". (See Leath Motion to Dismiss at 3.)
- d. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' second cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "conversion". (See Leath Motion to Dismiss at 4.)
- e. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' third cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "civil conspiracy". (See Leath Motion to Dismiss at 5.)
- f. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' fourth cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "constructive trust". (See Leath Motion to Dismiss at 6.)
- g. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' fifth cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "breach of fiduciary duty". (See Leath Motion to Dismiss at 7.)

- h. Defendant Robertson joins in the Leath Motion to Dismiss as to plaintiffs' seventh cause of action based on plaintiffs' failure to state facts sufficient to constitute a cause of action for "injunctive relief". (See Leath Motion to Dismiss at 8.)
2. Defendant Robertson joins in and incorporates by reference paragraphs 1, 2, 4, 5, 6, 7, 8, and 9 of the Motion to Dismiss of Defendants William M. Bowen and William M. Bowen, PA, filed January 24, 2011, and seeks dismissal of all causes of action asserted against defendant Robertson for the reasons stated therein.
3. Defendant Robertson joins in and incorporates by reference points 3, 4, and 6 of the Motion to Dismiss of Defendant John D. Kassel, filed December 15, 2011, and seeks dismissal of all causes of action asserted against defendant Robertson for the reasons stated therein.

This motion is based upon the South Carolina Rules of Civil Procedure, applicable statutory and common law of South Carolina, and all other materials and/or memoranda which may be submitted at a later date.

TURNER PADGET GRAHAM & LANEY P.A.

By:



Charles E. Hill
Joshua D. Shaw
P.O. Box 1473
Columbia, South Carolina 29202
Telephone: (803) 254-2200

ATTORNEYS FOR DEFENDANT WILLIAM
DIXON ROBERTSON III

February 16, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF THE COMMON PLEAS
	)	FIFTH JUDICIAL COURT
COUNTY OF RICHLAND	)	CASE NO.: 2011-CP-40-7432
	)	
WILLIAM E. DELOACHE, III AND	)	
ALLISON H. DELOACHE,	)	
	)	
Plaintiffs,	)	
vs.	)	
	)	
WILLIAM DIXSON ROBERTSON, III;	)	
W. JEFFERSON LEATH, JR.; MICHAEL	)	
S. SEEKINGS; HEATH, BOUCH &	)	DEFENDANT FRANCIS E. GRIMBALL
CRAWFORD, LLP; FRANCIS E.	)	AND DEFENDANT MULLEN WYLIE, LLC
GRIMBALL; MULLEN WYLIE, LLC	)	f/k/a MULLEN, WYLIE & SEEKINGS,
Formerly MULLEN, WYLIE & SEEKINGS,)	)	LLC'S MOTION TO DISMISS
LLC; WILLIAM M. BOWEN; WILLIAM	)	
A. BOWEN, PA; and JOHN D. KASSEL,	)	
Defendants.	)	

TO: PLAINTIFFS AND THEIR COUNSEL OF RECORD:

COMES NOW the Defendants Francis E. Grimbball and Defendant Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC (collectively referred to as "These Defendants"), pursuant to Rules 8(e), 10(b), 12(a), 12(b), and 12(f) of the South Carolina Rules of Civil Procedure as well as S.C. Code Ann. §15-36-100, and move to dismiss the Plaintiffs' Complaint and each Count applicable to These Defendants, all as set forth more thoroughly herein below.

I. MOTION TO DISMISS ALL CLAIMS PURSUANT TO SCRCP RULE 12(b)(6) and S.C. Code Ann. 15-36-100.

All of the claims that Plaintiffs assert against These Defendants arise out of an alleged breach of a duty or obligation which allegedly arose by virtue of the role of These Defendants in their capacity as attorneys. Because all of the allegations and causes of action arise out of the alleged actions of the Defendants in their capacity as attorneys, an affidavit of professional

negligence must be filed with the Complaint pursuant to Rule 12(b)(6) and S.C. Code Ann. § 15-36-100. All of the causes of action veil allegations of negligence or have components of negligence. Because all of the causes of action contain an element of negligence, allegedly arise out of the Defendants acting in their role as an attorney, and/or require an affidavit of professional negligence, all causes of action and the Complaint in its entirety must be dismissed pursuant to SCRPC Rule 12(b)(6) and because of non-compliance with S.C. Code Ann. § 15-36-100.

II. MOTION TO DISMISS

The Plaintiffs have not suffered and have not alleged any damages for which they can recover, and, therefore, there are no justiciable controversies for any of the causes of action. In addition to non-compliance with S.C. Code Ann. § 15-36-100, some of Plaintiffs causes of action are moot and other causes of action are not ripe. Plaintiffs claim they are entitled to the money recovered in the Tennessee action, but that recovery is an attorney's fee for bettering the class action in the Tennessee action; none of those funds are or were ever intended to be a damages settlement for the Deloaches or any other members of the class. Most importantly, Plaintiffs have further alleged in the Complaint that they are not members of the Tennessee class action and alleged that they do not have Dryvit on their home. Therefore, they can not be entitled to any money from the class action settlement, or any money arising out of the class action settlement by virtue of their own allegations.

III. MOTION TO DISMISS SCRPC Rule 12(f) or in the alternative Motion for More Definite Statement pursuant to SCRPC Rule 12(e) and Motion to Strike Allegations

These Defendants move to strike or dismiss those portions of Plaintiffs' Complaint entitled "Summary of the Case" (See Complaint, pp 1-3), "How the Deloaches Found Out" (See

Complaint pp.6-9, “Defendants’ Conduct Without Plaintiffs’ Knowledge or Consent” (See Complaint pp. 9-12, and “Relationships Between Defendants” (Complaint pp. 12-13) and the “Wherefore” Clause (See Complaint p. 24). These portions of the Complaint contain recitations of argumentative statements and fail to comply with SCRCF Rule 8 which requires simple, concise and direct pleading. These portions of the Complaint fail to otherwise state a claim for relief upon which the Plaintiffs are entitled and which could be granted as to the Plaintiffs. These Defendants also move to strike or dismiss the portions of Plaintiffs’ Complaint which contain recitations of argumentative statements because they fail to satisfy the requirements that “any averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each being limited to a statement of a single set of circumstances.” SCRCF Rule 10.

Pursuant to SCRCF Rule 12(b) and 12(f), These Defendants move to strike those portions of Plaintiffs’ Complaint which refer to either Robert L. Wylie or George E. Mullen, individually. Neither Mr. Wylie nor Mr. Mullen are parties to the action and any allegations against or references to Mr. Wylie or Mr. Mullen should be stricken and removed from the Complaint.

The Plaintiffs’ Complaint should be stricken and/or dismissed in its entirety pursuant to SCRCF Rule 12(b)(6). In the alternative, These Defendants request that the Court grant a Motion for More Definite Statement pursuant to Rule 12(e).

IV. MOTION TO DISMISS CLAIMS FOR WRONGFUL APPROPRIATION OF PERSONALITY

These Defendants move to dismiss the Cause of Action for Wrongful Appropriation of Personality pursuant to SCRCF Rule 12(b)(6) because it fails to state a claim for which Plaintiffs can recover. “Wrongful appropriation of personality involves the intentional, unconsented use of the Plaintiff’s name, likeness, or identity by the defendant for his own benefit. The gist of the

action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity." Gignilliat v. Gignilliat, Savitz & Bettis, LLP, 385 S.C. 452, 466, 684 S.E.2d 756, 764 (2009) (citing Snakenberg v. Hartford Cas. Ins. Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989)). There are no allegations that These Defendants intentionally misappropriated the DeLoaches' name. Furthermore, the Plaintiffs fail to allege any inherent commercial value attached to the use of their names based upon this alleged tort. Plaintiffs fail to allege that the specific use of Plaintiffs name, benefitted the Defendants. The Plaintiffs fail to allege that Defendants profited specifically and solely from the use of the DeLoache name. The Plaintiffs fail to allege any specific harm to them as a result of the use of their name. The Plaintiffs fail to allege that they suffered any damages from the alleged misrepresentation of the use of their names. The claim fails on its face and should be dismissed in its entirety pursuant to SCRPC Rule 12(b)(6).

V. MOTION TO DISMISS CLAIMS FOR CONVERSION

These Defendants move to dismiss the Cause of Action for Conversion pursuant to SCRPC 12(b)(6) because it fails to state a claim for which Plaintiffs can recover. Conversion is the unauthorized assumption and exercise of the right or ownership over goods or personal chattel belonging to another, the alteration of their condition, or the exclusion of the owner's rights. Two elements must be satisfied. First, tangible property must be identified and be capable of conversion. Second, the Plaintiff must show either title or right to possession at the time of conversion. One must have a right of ownership before another may exercise that right. See Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (1984); Peters v. K-Mart Corp., 318 S.C. 164, 456 S.E.2d 425 (1995). The Plaintiffs allege in their conversion cause of action that "they owned an interest in the property rights associated with their personality including the use of their

surname in legal proceedings.” The Plaintiffs’ name is not a good or chattel and is not tangible property that can be converted. The Plaintiffs’ never owned or held title or the right to possess the \$600,000.00 mentioned in the Complaint as provided above. The Plaintiffs do not allege and cannot show a right of ownership in any tangible property that could be converted as the Plaintiffs allege there were not party of the Dryvit class settlement and did not have Dryvit on their home. The claim fails on its face and should be dismissed in its entirety pursuant to Rule 12(b)(6).

This cause of action also depends upon the underlying allegations that These Defendants were negligent in their professional duties as attorneys and is therefore subject to S.C. Code Ann. 15-36-100 which requires an affidavit of professional negligence. Because the Plaintiffs did not submit the required affidavit, their causes of action must be dismissed.

VI. MOTION TO DISMISS CLAIMS FOR CIVIL CONSPIRACY

These Defendants move to dismiss the Cause of Action for Civil Conspiracy pursuant to SCRCP Rule 12(b)(6) because it fails to state a claim for which Plaintiffs can recover. Civil conspiracy consists of three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff, (3) which causes him special damage.” Charles v. Texas Co., 192 S.C. 82, 5 S.E.2d 464 (1939). Where the acts alleged as a conspiracy are the same as those alleged to be the tort committed in furtherance thereof, plaintiff may not recover damages for both. Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) *rev’d on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985); Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989) (holding that because no special damages were alleged aside from the breach of contract damages, the conspiracy action was barred); Pye v. Estate of Fox, 369

S.C. 555, 567, 633 S.E.2d 505 (2006) (holding that the damages alleged in a civil conspiracy action must go beyond the damages alleged in other causes of action).

There are no allegations that These Defendants joined with any of the other parties with the intended purpose of injuring the Plaintiffs. Furthermore, the Plaintiffs have not alleged any type of special damages and, in fact, have not alleged any damages separate and apart from the other causes of action. The claim fails on its face and should be dismissed in its entirety pursuant to SCRCP Rule 12(b)(6).

VII. MOTION TO DISMISS CLAIMS FOR BREACH OF FIDUCIARY DUTY

These Defendants move to dismiss the Cause of Action for Breach of Fiduciary Duty pursuant to SCRCP Rule 12(b)(6) and S.C. Code Ann. §15-36-100. A cause of action for breach of fiduciary duty clearly must be supported by an affidavit of professional negligence pursuant to S.C. Code Ann. 15-36-100. No such affidavit was ever filed and, therefore, this claim must be dismissed pursuant to SCRCP Rule 12(b)(6). Plaintiffs allege that These Defendants were not their lawyers, and had no relationship or communication with These Defendants in the Complaint. Such a relationship is a pre-requisite for fiduciary duty to exist. It is axiomatic that there can be no breach of duty which does not exist and, therefore, the cause of action for breach of fiduciary duty should be dismissed in its entirety pursuant to SCRCP Rule 12(b)(6).

This cause of action is subject to S.C. Code Ann. 15-36-100 which requires an affidavit of professional negligence. Because the Plaintiffs did not submit the required affidavit, their causes of action must be dismissed pursuant to SCRCP 12(b)(6).

VIII. MOTION TO DISMISS CLAIMS FOR CONSTRUCTIVE TRUST

These Defendants move to dismiss the Cause of Action for Constructive Trust pursuant to SCRCP 12(b)(6) because it fails to state a claim for which Plaintiffs can recover. "The law may

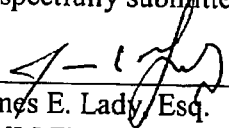
impose a constructive trust when a party obtains a benefit that 'does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it". McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). One must have a right of ownership before another may exercise that right. See Green v. Waidner, 284 S.C. 35, 324 S.E.2d 331 (1984); Peters v. K-Mart Corp., 318 S.C. 164, 456 S.E.2d 425 (1995). The Plaintiffs allege in their constructive trust cause of action that they "are entitled to an Order of this Honorable Court establishing a constructive trust to their benefit . . ." The Plaintiffs' have provided no allegations that they are legally entitled or even could be entitled to this money. Indeed, the Plaintiffs allegations specifically state that their home was not clad with Dryvit EIFS, which means they would not be entitled to any funds from the Dryvit class action settlement. In fact, the Plaintiffs are not beneficially entitled to and have no ownership or right to possess any of this money. The claim fails on its face and should be dismissed in its entirety pursuant to Rule 12(b)(6).

This cause of action also depends upon the underlying allegations that These Defendants were negligent in their professional duties as attorneys and is therefore subject to S.C. Code Ann. 15-36-100 which requires an affidavit of professional negligence. Because the Plaintiffs did not submit the required affidavit, their causes of action must be dismissed.

CONCLUSION

Based on the foregoing, all of Plaintiffs claims should be dismissed in their entirety.

Respectfully submitted,


James E. Lady Esq.

MULLEN WYLIE, LLC

171 Church Street, Ste. 370

Charleston, SC 29401

Tel: 843-853-6200

March 13, 2012
Charleston, South Carolina

Fax: 843-853-8994

Email: jlady@mullenwylie.com

*Attorney for Francis E. Grimboll and
Mullen Wylie, LLC f/k/a Mullen Wylie &
Seekings, LLC*

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimball; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTIONS TO DISMISS AND/OR
MOTIONS TO STRIKE PLEADINGS**

RICHLAND COUNTY
FILED
2012 JUN 12 AM 9:26
JEANETTE W. MCBRIDE
C.P. & C.S.

COME NOW William E. DeLoache III and Alison H. Deloache, Plaintiffs in the
above-styled action, and file this Memorandum in Opposition to Defendants' Motion to
Dismiss and/or Motion to Strike Pleadings as follows¹:

I. STANDARD OF REVIEW.

A. Rule 12(b)(6), SCRPC, Motion to Dismiss.

A Rule 12(b)(6) motion is used to "test the legal sufficiency of a complaint or other

¹ This Memorandum is in response and in opposition to (1) Defendant John D. Kassel's Motion to Dismiss, dated December 15, 2011; (2) Defendants Jefferson Leath, Jr.; Michael S. Seekings; and LEATH, BOUCH & CRAWFORD, LLP's Motion to Dismiss and/or Motion to Strike Pleadings, dated January 23, 2012; (3) Defendants William M. Bowen and WILLIAM M. BOWEN, P.A.'s Motion to Dismiss, dated January 24, 2012; (4) Defendant William Dixon Robertson III's Motion to Dismiss, dated February 16, 2012; and (5); Defendant Francis E. Grimball and Defendant MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC's Motion to Dismiss, March 13, 2012. Unless otherwise specified, "Defendants" as used in this Memorandum refers to each and every of the above-referenced Defendants and/or each and every of the named Defendants in this action.

pleading seeking affirmative relief." James F. Flanagan, *SOUTH CAROLINA CIVIL PROCEDURE* 92 (2d ed. 1996). A motion to dismiss based on Rule 12(b)(6) should be granted only when it appears the plaintiff can prove no set of facts in support of a cause of action that would entitle plaintiffs to relief based on that cause of action. See *Murrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 373 S. E.2d 701 (Ct. App. 1988). "The motion [Rule 12(b)(6) motion] cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Brown v. Leverette*, 291 S.C. 364, 353 S.E. 2d 697 (1987).

To determine whether to grant a Rule 12(b)(6) motion, the Court must rely solely on matters appearing on the face of the complaint. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988). A court ruling on a Rule 12(b)(6) motion must construe the Complaint in the light most favorable to the nonmoving party and it must consider all of the facts alleged in the Complaint as true. *Woodell, Allen v. Marion School District One*, 307 S.C. 297, 414 S.E.2d 794 (Ct.App. 1992); *Carolina Wind Owners' Assn. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S. E.2d 897 (Ct. App. 1988). Defendants' motions to dismiss must be denied if the facts and inferences reasonably deducible from them show that Plaintiffs could prevail on any of the causes of action pled. *Murrow Crane Co. v. T.R. Tucker Construction Co.*, 296 S.C. 427, 373 S.E.2d 701 (Ct.App. 1992). Should any allegations of the Complaint give rise to competing inferences on any issues material to the claims asserted, then the motion must be denied. *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 414 S.E.2d 784 (Ct.App. 1992), *aff'd*, 310 S.C. 514, 426 S.E.2d 304 (1993).

Even though Defendants have moved to dismiss under Rule 12(b)(6), SCRCP,

Defendants are largely silent as to their legal burden – and for good reason. Defendants simply cannot meet their burden under Rule 12(b)(6), SCRCP. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts.” *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338, 339 (1991).

Under these established legal precepts, some key truths emerge:

- a. Every fact in the Complaint, for purposes of this motion, is true;
- b. Every adverse inference from those facts is construed against the Defendants;
- c. Every favorable inference from the facts is construed for the Plaintiffs; and
- d. Only if it is beyond all doubt that the Plaintiffs have no claim is dismissal appropriate.

Under the legal standard for dismissal, the Complaint in this case should not be dismissed.

B. Rule 12(f), SCRCP, Motion to Strike.

Rule 12(f), SCRCP, provides that upon proper motion “the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.”

II. ARGUMENT AND CITATION TO AUTHORITIES.

A. Defendants’ Motion to Strike and/or Dismiss Plaintiffs’ “Summary of the Case” Should be Denied.

In their Motions, Defendants Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Frances E. Grimbail; and MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC seek this Court to strike or dismiss the DeLoaches’ Summary of

the Case. In support, these Defendants allege that the DeLoaches' Statement of the Case is violative of Rules 8(e) and 10(b), SCRCP. The Defendants' request is without merit and should be denied.

Rule 8(e)(1), SCRCP states "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Rule 8(a), SCRCP states that "[a] pleading which sets forth a cause of action . . . shall contain . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 10(b), SCRCP states "[a]ll averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances" Review of these rules demonstrates the DeLoaches' Complaint is in compliance.

The DeLoaches' Summary of the Case provides this Court with a short and plain statement of the facts showing the DeLoaches are entitled to relief. See SCRCP 8(a), SCRCP. This summary serves as a preface to the subsequent averments and is in accordance with South Carolina law. Following this summary, the DeLoaches' Complaint provides simple, concise, and direct averments of the facts of the cause of action and relief sought by the DeLoaches. See SCRCP 8(e), SCRCP; and 10(b), SCRCP. These averments are made in consecutive numbered paragraphs as required by the Rules of Civil Procedure. SCRCP 10(b), SCRCP.

The Defendants request that this Court strike the DeLoaches' Summary of the Case is unwarranted and unnecessarily argumentative. It demonstrates the Defendants' insistent proclivity to sidetrack this Court from addressing the substantive issue at hand:

the Defendants reprehensible, illegal, and tortious conduct and the justice that is due the DeLoaches. This Court should deny the Defendants request that the Court strike and/or dismiss the DeLoaches' Summary of the Case.

B. The Grimball/Mullen Wylie Defendants Motion to Strike Portions of the DeLoaches' Complaint which Refer to Either Robert L. Wylie or George E. Mullen Individually Should be Denied.

The Grimball/Mullen Wylie Defendants moved this Court to strike those portions of the DeLoaches' Complaint which refers to either Robert L. Wylie ("Wylie") or George E. Mullen ("Mullen") individually. In support, these Defendants argue neither Mr. Wylie nor Mr. Mullen are parties to this action. These Defendants' Motion should be denied.

Defendants' motion to strike does not claim that the allegations concerning contain "any redundant, immaterial, impertinent or scandalous matter[s]," and therefore Defendants' motion to strike must fail. *See, Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854, 857 (Ct. App. 1996) (objections to impertinent or scandalous matters were properly raised by party and a motion to strike); *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993) ("If a motion to strike raises merely a doubtful question or the case is such that justice may be promoted by a trial on the merits, the court should exercise a fair, judicial discretion to that end. However, this rule is followed only in cases where there is either real cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits."). With a Rule 12(f), SCRPC motion, "a court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Witenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

Though neither Mr. Wylie nor Mr. Mullen are individually named in this action, they have both acted as agents for the above-referenced Defendants. Any allegations or statements in regards to Mr. Wylie and Mr. Mullen have been alleged or stated in reference to these individuals capacities as agents to the above-named Defendants. As such, Defendants' Motion to Strike these references is unwarranted by law. This Court should deny this Motion.

C. The Defendants' Motion to Dismiss All Claims for Failure to Attach an Expert Affidavit Should be Denied.

The Defendants allege that the DeLoaches were required but failed to file an affidavit of a duly qualified expert contemporaneously with their Complaint. However, the statute referenced as authority for this contention requires an expert affidavit only for "an action alleging professional negligence." See S.C. Code § 15-36-100. Not a single one of the Counts alleged in the DeLoaches' Complaint is a cause of action alleging professional negligence or even alleges that any of the Defendants were negligent, made a mistake, or other error. Causes of Action 1 (Wrongful Appropriation of Personalty); 2 (Conversion); 3 (Civil Conspiracy); 4 (Constructive Trust) and 7 (Injunctive Relief) not only fail to allege professional negligence but are in no way even premised in allegations of professional negligence. The underlying actions to each of these Counts are intentional torts that are in no way connected to the Defendants' actions in their professional capacities. Though Causes of Action 5 (Breach of Fiduciary Duty) and 6 (Breach of Duty of Confidentiality) allege malfeasance connected to the Defendants' actions in their professional capacities, these too are based on allegations of intentional – not negligent – conduct and thus do not fall within the parameters of professional *negligence*. Regardless of the foregoing, § 15-

36-100 took effect July 1, 2005 and thus is inapplicable to all causes of action arising before that date. See § 15-36-100. See also 2005 Act No. 21, §§ 4, 21(b); *Cooper v. Hawkins*, 2008 U.S. Dist. Lexis 48975 (D.S.C. 2008). Although not discovered until years later, the causes of action alleged in the DeLoaches' Complaint arose beginning in 2002, *three years before the enactment and effective date of § 15-36-100*. § 15-36-100 is incontestably inapplicable and the Defendants' attempts to argue its relevance should be denied.

S.C. Code § 15-36-100 is entitled "Complaint in actions for damages *alleging professional negligence*; contemporaneous affidavit of expert specifying negligent act or admission." (emphasis added). In pertinent part, the statute states as follows:

(B) . . . [I]n an action *alleging professional negligence* against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . , the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or admission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

. . .

(C)(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Id. (emphasis added). Subsection G specifically lists attorneys at law as professionals covered by § 15-36-100. *Id.* at § (G)(2).

"A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill

involved is predominantly mental or intellectual, rather than physical or manual." *South Carolina Medical Malpractice Liability Insurance v. Ferry*, 291 S.C. 460, 464-65, 354 S.E.2d 378 (1987). South Carolina law is clear that "[i]n determining whether a particular act is of a professional nature or a "professional service" we must look not to the title or character of the party performing the act, but to the act itself."

Applied to the case at bar, Counts 1 – 4 & 7 are in no way allegations against the Defendants for acts done in their professional capacities. Just as allegations of assault and battery would not implicate legal malpractice solely because an alleged tortfeasor is an attorney, neither do the Counts listed above implicate malpractice in the case at bar. Thus, § 15-36-100 is inapplicable to these causes of action.

Further, an action for professional negligence presupposes an attorney-client relationship. The essential elements of legal malpractice are (1) the existence of an attorney-client relationship; (2) breach of duty; (3) damages; and (4) proximate cause. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742 (2010). Without an attorney-client relationship, there can be no legal malpractice.

In the case at bar, an attorney-client relationship *never* existed between the DeLoaches and any of the Defendants. In fact, the closest circumstance to an attorney-client relationship is the relationship between the DeLoaches and Defendant Kassel, a Defendant not named in Counts 1 – 4. This provides further support that § 15-36-100 does not govern. The DeLoaches were prospective clients to Kassel within the purview of Rule 1.18, RPC, Rule 407, SCACR. As alleged in the Verified Complaint, the DeLoaches were people with whom Kassel discussed the possibility of forming a client-lawyer relationship

with respect to the DeLoaches' possible participation in *Posey*. Rule 1.18(b), RPC governs that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of the former client."

The foregoing arguments are fatal to the Defendants' contentions that § 15-36-100 governs Counts 1 – 4 & 7. However, a further flaw to the Defendants' reasoning establishes that § 15-36-100 is inapplicable to the DeLoaches' entire Complaint: each Count alleged is based on an intentional tort and thus § 15-36-100, which governs professional *negligence*, is inapplicable. South Carolina is consistent and clear in distinguishing intentional torts from negligence, and case law is plush with examples of courts distinguishing between and refusing to conflate the two. *See, e.g., Prior v. South Carolina Medical Malpractice Liability Insurance Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655 (Ct. App. 1991) ("In the case before us, despite the label of negligence, the act the Patient complained of was . . . an intentional tort"); *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 634 n.15, 611 S.E.2d 305 (Ct. App. 2005) ("Negligence, while itself a tort, does not encompass all torts, particularly intentional torts."); *Edens v. Bellini*, 359 S.C. 433, 445, 597 S.E.2d 863 (Ct. App. 2004) ("The Estate contends it can pursue a negligence cause of action in this case based upon the intentional tort exception to the Act. We disagree."); *State Farm Fire and Casualty Co. v. Barrett*, 340 S.C. 1, 15, 530 S.E.2d 132 (Ct. App. 2000) ("in the context of a cause of action alleging an intentional tort, which by definition cannot be committed in a negligent manner, the allegation of negligence is surplusage"); *USAA Property and Casualty Insurance Co. v.*

Rowland, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993) (reference that insured "negligently" pursued wife did not turn intentional tort into negligence action).

In the case at bar, the Verified Complaint contains allegations that the Defendants *intentionally* appropriated the DeLoaches' personalty, *intentionally* engaged in conversion, *intentionally* conspired, and *intentionally* breached fiduciary trust and duties of confidentiality. In addition to the independent remedies for these torts, the DeLoaches are entitled to injunctive relief and a constructive trust to remedy these intentional torts. This Court should not permit the Defendants to twist these intentional torts into claims of negligence in an attempt to implicate an inapplicable statute to the case at bar.

Regardless of the foregoing argument and citation to authority, the applicability *vel non* of § 15-36-100 can be summarily decided by the fact that the effective date of the statute postdates the actions underlying this Complaint by three years. Accordingly, the statute is inapplicable.

The South Carolina General Assembly enacted § 15-36-100 as 2005 Act No. 32, § 34. Section 21(B) of that act makes clear the effective date: "Upon approval by the Governor, *this act takes effect July 1, 2005, for causes of action arising after July 1, 2005*" The District of South Carolina's analysis in *Cooper v. Hawkins*, 2008 WL 2563148, 2008 U.S. Dist. Lexis 48975 (D.S.C. June 23, 2008), is illustrative of the issue at bar:

It is [] undisputed that § 15-36-100 only applies to "causes of action arising after July 1, 2005." It *is* disputed whether § 15-36-100 was in effect at the time the plaintiff's causes of action arose. Therefore, this Court must determine whether § 15-36-100 was the law in effect when the plaintiff's causes of action arose or accrued.

In South Carolina, the law in effect at the time the cause

of action arose controls the parties legal relationships and rights. For purposes of determining the law in effect at the time an action arose, an action arises at the moment when the plaintiff has a legal right to sue on it, because the law presupposes at least nominal damages at that point. This moment coincides with the moment the underlying facts occur.

Id. at *2-3.

In the case at bar, the actions arose on or before October 1, 2002, when the class action Defendants appeared at the Posey Fairness Hearing purporting to represent the DeLoaches. It is at this time that the DeLoaches suffered at least nominal damages and had a right to sue the Defendants for the Counts alleged in this Complaint. The class action Defendants' conspiracy and Defendant Kassel's breach of confidence necessarily occurred even earlier in time. As § 15-36-100 was not in effect when these causes of action arose, the Defendants cannot lean on the statute in their attempts to thwart the DeLoaches' attempts at recompense.

The Defendants' attempts to use § 15-36-100 as a roadblock is disingenuous to the DeLoaches and to this Court. The Defendants counsel are well aware of the effective date of § 15-36-100 and are well aware of *Cooper's* analysis because Defendants' counsel Carlock Copeland Semler and Stair were counsel of record in that case. The Defendant's counsel attempted to misconstrue § 15-36-100's applicability in that case and the court struck them down. Now the Defendants' counsel attempts the same in the case at bar. This Court should deny Defendants' Motions to Dismiss based upon § 15-36-100.

D. The Defendants' Allegations That They Proximately Caused No Damages Should be Denied.

The Defendants claim that the DeLoaches have suffered no damages because the DeLoaches were not parties to Posey and have not otherwise alleged a claim for recoverable damages. The Defendants' contentions are without merit and should be denied.

The DeLoaches have specifically alleged numerous actual damages suffered as a result of the Defendants' tortious behavior. The DeLoaches own and owned at all times relevant to this claim an enforceable right in their individual and collective identity, including without limitation the use of their surname, DeLoache, as part of any legal proceeding. The Defendants misappropriated the DeLoache's rights in their name, and thus caused the DeLoaches' damages. This is a valid and recognized cause of action in South Carolina with a presumption of nominal damages. See *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452, 684 S.E.2d 756 (2009). See also *Insurance Products Marketing, Inc. v. Conseco Life Insurance Company*, 2011 WL 3841269 (D.S.C. Aug. 29, 2011) (Duffy, J.) ("A cause of action for wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. To plead misappropriation of identity, the plaintiff must claim an appropriation without consent, of one's name or likeness for another's use or benefit. The Court finds that based on the facts presented in the Complaint, Plaintiffs' second cause of action states sufficient facts to state a claim for relief that is plausible on its face.") (Citations omitted).

Further, the DeLoaches owned an interest in the property rights associated with their personalty, including the use of their surname in legal proceedings. By filing legal documents with the DeLoache surname, the Defendants converted the DeLoaches intangible property rights. See W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim "has been discarded to some extent by all of the courts" but noting "the process of expansion has stopped with the kind

of intangible rights which are customarily merged in, or identified with, some document") (cited in *Gignilliat* (emphasis added)). The causes of action alleged in the remaining Counts of the DeLoaches' Verified Complaint facilitated and enabled the damages alleged in the misappropriation and conversion Counts.

Moreover, the DeLoaches have suffered damages in that they are now concerned they are at risk for claims of contempt of court or fraud on the court. The use of the DeLoache name in connection with the *Posey* matter puts the DeLoaches at risk of litigation and legal expenses, thus creating tangible financial damages. Further, the DeLoaches have spent time and resources in depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality, all creating damages for which the DeLoaches are entitled compensation. Thus, the Defendants arguments regarding the absence of damages is wholly erroneous and should be denied.

E. The Defendants' Arguments Against the DeLoaches' First Cause of Action Should be Denied.

The Defendants allege that the DeLoaches fail to state a claim for relief under the theory of Wrongful Appropriation of Personality. This allegation is without merit.

The Defendants allege that the DeLoaches' Verified Complaint fails to specifically allege an intent and purpose to misappropriate and benefit from the misappropriation. However, the DeLoaches' Verified Complaint specifically notes that the Defendants "formed a joint venture for the purpose of financial gains to be obtained as the result of challenging the *Posey* settlement by getting a class certified in South Carolina." (Compl. ¶ 33). The Defendants misappropriation of the DeLoaches' name was not an accident;

rather, it is abundantly clear from the facts and the Complaint that the Defendants took these actions to further their joint venture of fraud on the Posey Court. As a result of these actions, the Defendants benefitted handsomely, with illegitimate profits of \$600,000.00 already received. Thus, the Defendants' allegations to the contrary are without merit.

The Defendants also argue that the DeLoaches' alleged failure to specify inherent commercial value and recoverable damages from the appropriation of their name is somehow fatal to their claim. The issue of damages has been disposed of in Part II.D, *supra*. Regarding the remaining issue, the South Carolina Supreme Court's opinion in *Gignilliat* is illustrative of the flaw in the Defendants' arguments.

In *Gignilliat*, Mrs. Gignilliat sued her late husband's former law firm, arguing that the firm had infringed upon her right of publicity in the Gignilliat name. *Id.* at 457. Upon review of the lower court's grant of summary judgment in favor of the firm, the Supreme Court expounded upon and affirmed the validity of the tort of misappropriation of personality.

The court noted that "[j]urisdictions have recognized a right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it is encompassed within the four classic privacy torts, specifically wrongful appropriation." *Id.* at 458 (citing *Pooley v. National Hole-in-One Ass'n*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) for the proposition that "the common law right of privacy provides protection against . . . appropriation, for the defendant's advantage, of the plaintiff's name or likeness [and this] is commonly referred to as appropriation . . . or the right of publicity" and citing *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (D. Ill. 1981) for the proposition that "[o]ne of the species of the right of privacy recognized by the cases and

the commentators is the right of publicity. Violation of this right constitutes the tort of appropriation of a plaintiff's name or likeness for [the] defendant's benefit.").

Gignilliat then went on to state South Carolina law on the subject:

In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs. Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity. Encompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff's right to the commercial protection of his name, likeness, or identity.

Id. at 458-459. See also *Holloman v. Life Insurance Co. Of Virginia*, 192 S.C. 454, 458, 7 S.E.2d 169 (1940) (discussing invasion of privacy by a commercial use and stating "The right of privacy is correctly defined . . . as the right to be left alone; the right of a person to be free from unwarranted publicity. Or more specifically but less accurately, the right to live without one's name, picture or statue, or that of a relative, made public against his will."). Based on the foregoing, *Gignilliat* stated, "We hold South Carolina does recognize the tort of infringement on the right of publicity." *Gignilliat*, 385 S.C. at 459.

Gignilliat went on to note that the use of one's name without compensation is a distinguishable property right. *Id.* at 463. Further, there is a presumption of damages in cases regarding infringement of a person's right to control his or her likeness:

Misappropriation of identity is a tort arising from the right to privacy and is designed to prevent the commercial use of one's name or image without consent. To plead misappropriation of identity, the plaintiff must claim "an appropriation without consent, of one's name or likeness for another's use or benefit." A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.

Id. at 463 (quoting *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815 (2003); citing *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644 (1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Appellate Court of Illinois held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages exist for every infringement of a right."); also citing *James v. Bob Ross Buick, Inc.*, 167 Ohio App. 3d 338 (2006) (concluding the trial court erred in granting summary judgment on the plaintiff's claim of misappropriation of his name, stating, "a plaintiff need not establish actual damages in order to prevail on a misappropriation-of-name claim" and that "a plaintiff may seek to recover nominal damages for claims of misappropriation of the plaintiff's name or likeness"))).

Applied to the case at bar, it is clear that the Defendants' arguments against the DeLoaches' first cause of action must fail. The Defendants have engaged in the "intentional, unconsented use of the plaintiff's name, likeness, or identity [for] defendant[s'] . . . own benefit." *Gignilliat*, 385 S.C. at 59. The use of the DeLoaches' name without compensation is a distinguishable property right. *Id.* at 463. Further, there is a presumption of damages; i.e., the DeLoaches "need not prove actual damages, because the court will presume

damages if someone infringes another's right to control his identity.” *Id.* at 463. Based on the foregoing precedent and its application to the case at bar, this Court should deny the Defendants’ Motion to Dismiss Count 1 of Plaintiffs’ Complaint.

F. The Defendants’ Arguments Against the DeLoaches’ Second Cause of Action Should be Denied.

The Defendants allege that the DeLoaches fail to state a claim for relief under the theory of Conversion. This allegation is without merit.

The Defendants state that “Plaintiffs fail to assert a claim for relief for the same reasons as are set forth . . . in relation to Plaintiff’s First Cause of Action.” This argument is wholly without merit. The DeLoaches adopt the argument presented in Part II.E, above, as demonstrative of the flaws in the Defendants’ logic.

Further, the Defendants allege the DeLoaches have not “allege[d] rights to the ownership or control of any tangible object” or “contractual right[s] to any intangible item or object over which [] Defendants would be alleged to have wrongfully assumed ownership or control.” Leath Defendants’ Brief at 4. This is without merit.

In *Gignilliat*, court noted that “an action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document.” *Gignilliat*, 385 S.C. at 465 (emphasis added) quoting 18 AM. JUR. 2d Conversion § 7 (2004). Where courts recognizing intangible property rights as the basis for conversion, they are doing so “where the rights have some documented basis to support to them.” *Id.* By filing legal documents with the DeLoache surname, the Defendants converted the DeLoaches’ intangible property rights. See W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the

rule that only personal property may be the subject of a conversion claim “has been discarded to some extent by all of the courts” but noting “the process of expansion has stopped with the kind of intangible rights which are customarily-merged in, or identified with, some document”) (cited in *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452 (2009) (emphasis added)). Based on the foregoing, it is clear that the Defendants’ arguments against the DeLoaches’ second cause of action are without merit. This Court should deny the Defendants’ Motion.

G. The Defendants’ Arguments Against the DeLoaches’ Third Cause of Action Should be Denied.

The Defendants allege that the DeLoaches fail to state a claim for relief under the theory of Civil Conspiracy. This allegation is without merit and should be denied.

Civil conspiracy consists of the following elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes him special damage. *Charles v. Texas Co.*, 190 S.C. 82, 1 S.E.2d 912 (1939); *Vaught v. Waites*, 300 S. C. 201, 387 S.E.2d 91 (Ct. App. 1989); *Island Car Wash v. Norris*, 292 S.C. 595, 358 S.E.2d 150, 152-53 (Ct. App. 1987). The conspiracy may be established by showing that the Defendants had shared the objective to deprive the Plaintiff of certain rights. *E.g.*, *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Hull v. Cuyahoga Valley Board of Education*, 926 F.2d 505 (6th Cir.), *cert. denied*, 111 S.Ct. 2917 (1991); *Lenard v. Argenta*, 699 F.2d 874 (7th Cir. 1983); *Bond v. IMFS, Inc.*, 727 F.2d 770 (8th Cir. 1984).

In the case at bar, it is clear that the conspiracy involved two or more persons. The conspiracy involved each of the class action Defendants and the individuals that comprise the corporate class action Defendants. Further the Defendants’ actions were for

the purpose and with the intent to misappropriate and convert the DeLoaches' personalty to the DeLoaches' detriment. The Defendant class action lawyers subjected the DeLoaches to the jurisdiction of the *Posey* court as Class Member Objectors to obtain financial gain, which later turned into secret payments and commitments to pay totaling \$825,000.00. One of the overt acts in further furtherance of the conspiracy was the Defendants collective failure to communicate to Plaintiffs, the DeLoaches, anything about the status of the arguments in *Posey* or the recovery of the \$600,000/\$825,000. This caused special damages to the DeLoaches. The DeLoaches have suffered damages in that they are now concerned they are at risk for claims of contempt of court or fraud on the court. The use of the DeLoache name in connection with the *Posey* matter puts the DeLoaches at risk of litigation and legal expenses, thus creating tangible financial damages. Further, the DeLoaches have spent time and resources in depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personalty, all creating damages for which the DeLoaches are entitled compensation.

As such, the DeLoaches have sufficiently pleaded facts sufficient to establish civil conspiracy and the Defendants' Motion to Dismiss this Court should be denied.

H. The Defendants' Arguments Against the DeLoaches' Fourth Cause of Action Should be Denied.

The Defendants allege that the DeLoaches fail to state a claim for relief under the theory of Constructive Trust. This allegation is without merit and should be denied.

The Defendants state that "Plaintiffs fail to assert a claim for relief for the same reasons as are set forth . . . in relation to Plaintiff's First Cause of Action. This argument is wholly without merit. The DeLoaches adopt the argument presented in Part II.E, above,

as demonstrative of the flaws in the Defendants' logic.

Further, "the law may impose a constructive trust when a party obtains a benefit that does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *McNair v. Rainsford*, 330 S.C. 332499 S.E.2d 488 (Ct. App. 1998). "It is resorted to by equity to vindicate right and justice or frustrate fraud." *Id.* See also *Lollis v. Lollis*, 291 S.C. 525 (1987) ("constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title").

The Defendants' fraudulent statements and grossly reckless misrepresentations to the Posey Court and litigants concerning their alleged representation of the DeLoaches caused substantial funds to be paid to the Defendants. The Defendants should not in equity be allowed to reap the benefits of their fraudulent statements and gross misrepresentations concerning their alleged representation of the DeLoaches. The Defendants reaped these benefits in bad conscious and through improper means and this Court should impose a constructive trust to vindicate right and justice or frustrate fraud. See *id.*

I. The Defendants' Arguments Against the DeLoaches' Fifth Cause of Action Should be Denied.

The Defendants allege that the DeLoaches fail to state a claim for relief under a theory of breach of fiduciary duty. This allegation is without merit and should be denied.

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due

regard to the interests of the one reposing confidence." *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011). Further, South Carolina courts "have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship." *Id. quoting Hendricks v. Clemson University*, 353 S.C. 449 (2003). Moreover, "The relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.'" *Id. quoting Weatherford v. Price*, 340 S.C. 572 (2000).

When the Defendants assumed the representations of the DeLoaches, the Defendants were charged to act as the DeLoaches' fiduciaries and agents as it pertained to the objections to the settlement of *Posey*. Further, the DeLoaches specifically sought and entered into a fiduciary relationship as prospective clients with Defendant John D. Kassel. The genesis of all of the Defendant class action lawyers' tortious conduct was the Defendant non-class action lawyer's improper disclosure of the DeLoaches' privileged information. Defendant Kassel explicitly entered into a fiduciary relationship with the DeLoaches and then violated that trust. Class action Defendants assumed without authorization a fiduciary relationship in regards to settlement of the *Posey* action. As such, each Defendant breached duties to the DeLoaches and this Court should deny the Defendants' Motions to Dismiss.

J. The Defendants' Arguments Against the DeLoaches' Sixth Cause of Action Should be Denied.

The foregoing analysis in Part II.I, above, likewise demonstrates why Defendant Kassel's Motion to Dismiss Plaintiffs' Sixth Cause of Action should be denied. Defendant Kassel had a duty to keep confidential and not disclose any of the information disclosed to

him in confidence by the DeLoaches during the time Defendant Kassel represented the DeLoaches in his professional capacity. Further, it was readily foreseeable that Defendant Kassel's breach of the duty of confidentiality would proximately cause the DeLoaches to suffer harm.

"The duty of confidentiality, where it exists, generally arises out of broadly applicable societal norms and public policy concerning the kind of relationship at issue. It does not arise out of specific agreement or particularized circumstances. Moreover, the object of the law when this duty is violated is compensation for the resulting injuries, not fulfillment of expectation. Therefore, liability should be grounded in tort law." See *McCormick v. England*, 328 S.C. 627, 640 n.7, 494 S.E.2d 431 (1998).

In the case at bar, Defendant Kassel had a duty of confidence based on the attorney-client relation he formed with the DeLoaches. "The relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.'" *Spence v. Wingate*, 395 S.C. 148 (2011) quoting *Weatherford v. Price*, 340 S.C. 572 (2000). This rule of law applies to Defendant Kassel's breach of confidence just as it applies with the breach addressed in Count Five, above. Accordingly, this Court should dismiss Defendant Kassel's Motion to Dismiss Count Six and should allow this issue to proceed to adjudication at trial.

K. The Defendants' Arguments Against the DeLoaches' Seventh Cause of Action Should be Denied.

The DeLoaches have demonstrated that without an injunction, they are likely to suffer irreparable harm. *Roach v. Combined Utility Commission*, 290 S.C. 437, 442, 351 S.E.2d 168 (Ct. App. 1986). Further, the DeLoaches have demonstrated a high likelihood

of success on the merits and an inadequate remedy at law. *Id.* The Defendants have demonstrated through their deplorable behavior their willingness to compromise the personality of others for their own financial gain and no remedy short of injunctive relief will remedy the DeLoaches' damages and prevent further harm. These issues are not moot; rather, the Defendants' actions threaten continued harm to the DeLoaches' personality and other rights as discussed herein. Further, these issues are certainly ripe for adjudication, as the harms caused by the Defendants' actions are present and ongoing.

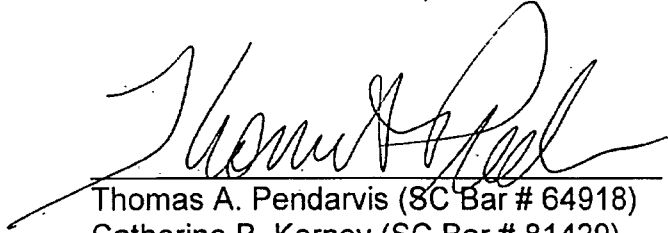
Thus, Defendants' Motion to Dismiss Count 7 of the DeLoaches' Complaint should be denied.

III. CONCLUSION.

WHEREFORE, for the foregoing reasons, this Court should DENY Defendant John D. Kassel's December 15, 2011 Motion to Dismiss; DENY Defendants Jefferson Leath, Jr.; Michael S. Seekings; and LEATH, BOUCH & CRAWFORD, LLP's January 23, 2012 Motion to Dismiss and/or Motion to Strike Pleadings; DENY Defendants William M. Bowen and WILLIAM M. BOWEN, P.A.'s January 24, 2012 Motion to Dismiss; DENY Defendant William Dixon Robertson III's February 16, 2012 Motion to Dismiss; and DENY Defendant Francis E. Grimball and Defendant MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC's March 13, 2012 Motion to Dismiss.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, appearing to read 'Thomas A. Pendarvis', is written over a horizontal line.

Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

500 Carteret Street, Suite A

Beaufort, SC 29902-5066

843.524.9500 Tel.

843.524.9501 Fax.

Thomas@PendarvisLaw.com

Carey@PendarvisLaw.com

Attorney for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

Beaufort, South Carolina

June 5, 2012

PENDARVIS LAW OFFICES, PC



February 15, 2013

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al***
Case No. 2011-CP-40-7432

Dear Judge Strickland:

This concerns the taking of depositions and preparing the foregoing matter for trial. I represent the DeLoaches, the Plaintiffs in this matter, which was filed back in 2011.

Your Honor may recall the allegations in the DeLoaches' Verified Complaint are that the Defendant lawyers¹ obtained over \$600,000 by using the DeLoaches' names as "objectors" in a class action lawsuit in Tennessee without the DeLoaches' knowledge or consent and then split those funds among the Defendant lawyers who practice in different firms also without the DeLoaches' knowledge, consent, or written authorization.

Your Honor may recall a hearing on several motions to dismiss (and other motions) filed by Defendants was held on June 6, 2012, before Your Honor. During the hearing Your Honor questioned defense counsel several times as to whether the positions raised by Defendants' motions would be more appropriate for summary judgment rather than motions to dismiss. At the end of that hearing counsel for the parties discussed putting discovery on hold while Your Honor considered those motions. No Order staying discovery has been entered in this case.

Given the age of this case, earlier this week we served deposition notices for the depositions of the Defendants in April 2013. After the deposition notices were served, Mr. Bruner, counsel for Defendant Bowen, kindly reminded me of the discussions at the end of the hearing about staying discovery. With Mr. Bruner's reminder in mind, the purpose of this letter is to let Your Honor know that as part of counsel's ethical obligations to expedite this litigation and my clients' objectives, we have ended any agreement with defense counsel to suspend discovery.

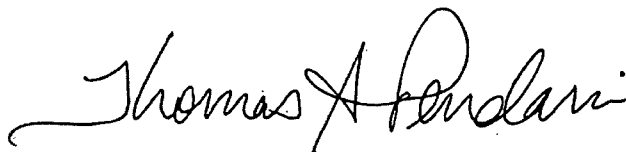
As always, I remain available for any questions or concerns.

¹ Except for Mr. Kassel.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis

TAP/cbk

cc: William & Allison DeLoache (via e-mail)
James L. Bruner, J.D.
James E. Lady, J.D.
Amy L.B. Hill, J.D.
Charles E. Hill, J.D. / Joshua D. Shaw, J.D.
Kent T. Stair, J.D.

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**NOTICE OF MOTION
AND
MOTION TO COMPEL
DISCOVERY**

2013 APR -9 AM 11:31

TO: AMY L.B. HILL, J.D. AND WILLIAM H. JORDAN, J.D., COUNSEL FOR JOHN D. KASSEL; KENT STAIR, J.D., TYLER P. WINTON, J.D. and JAMES. P. JONES, J.D., COUNSEL FOR W. JEFFERSON LEATH, JR., MICHAEL S. SEEKINGS and LEATH, BOUCH & CRAWFORD, LLP; JAMES L. BRUNER, J.D., COUNSEL FOR WILLIAM M. BOWEN AND WILLIAM M. BOWEN, PA; CHARLES E. HILL, J.D. AND JOSHUA D. SHAW, J.D., COUNSEL FOR WILLIAM DIXON ROBERTSON, III; JAMES E. LADY, J.D., COUNSEL FOR FRANCIS E. GRIMBALL AND MULLEN WYLIE, LLC :

NOTICE

YOU WILL PLEASE TAKE NOTICE THAT Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, hereby move the Court for an Order compelling Defendants, William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Francis E. Grimbail; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; WILLIAM M. BOWEN, PA; and John D. Kassel, to respond fully and completely to Plaintiffs' discovery requests served on January 5, 2011 and compelling Defendants to appear for deposition in this matter.

MOTION

This motion is made pursuant to Rules 30, 34 and 37, SCRPC, and involves Defendants William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Francis E. Grimbail; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; WILLIAM M. BOWEN, PA; and John D. Kassel's failure to produce responsive documents in response to PLAINTIFFS' DISCOVERY REQUESTS served on May 1, 2012 and Defendants' refusal to appear for depositions noticed on February 12, 2013.

As of the date of this Motion, Defendants have not responded to Plaintiffs' Discovery Requests and Defendants refused to appear for properly noticed deposition dates.

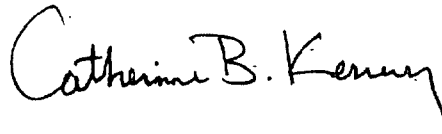
CONCLUSION

Based on the foregoing, Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, seek an Order from this Court ordering Defendants William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Francis E. Grimbail; MULLEN WYLIE, LLC formerly MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen; WILLIAM M. BOWEN, PA; and John D. Kassel to produce documents responsive to PLAINTIFFS' DISCOVERY REQUESTS and to appear for depositions in this matter.

The undersigned affirms pursuant to Rule 11 of the South Carolina Rules of Civil Procedure that consultation with opposing counsel would serve no useful purpose.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Attorney for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

Beaufort, South Carolina

April 5, 2013

OFFICE OF
Master In Equity
FOR RICHLAND COUNTY
JUDICIAL CENTER
1701 MAIN STREET
COLUMBIA, SOUTH CAROLINA 29201



TELEPHONE (803) 576-1900
FACSIMILE (803) 576-1865
JOSEPH M. STRICKLAND
MASTER IN EQUITY

June 14, 2013

RE: William E. DeLoache, III., and Allison H. DeLoache vs. William Dixon Robertson, III., W. Jefferson Leath, Jr., Michael S. Seekings, Leath, Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC, formerly Mullen, Wylie & Seekings, LLC, William M. Bowen, PA, and John D. Kassel
CA# 2011-CP-40-7432

Dear Ladies and Gentlemen:

Thank you for your patience in this matter. With regard to John D. Kassel's Motion to Dismiss, the motion is granted. Likewise, with regard to the other Defendants' Motion to Dismiss, the motion is granted.

Ms. Hill and Mr. Shaw shall prepare and submit SCRCP Form 4-C, Judgment in a Civil Case in accord with Chief Justice Toal's order of March 26, 2013. I am continuing to review proposed orders already submitted by the parties and will expedite formal orders.

Sincerely,

Joseph M. Strickland
Master-in-Equity and
Special Circuit Court Judge

Enclosure
/fc

Court News

2013-03-26-01

The Supreme Court of South Carolina

Re: Judgment in a Civil Case Form (SCRCP Form 4C)

ORDER

Pursuant to the provisions of S. C. CONST. Art. V, § 4,

IT IS ORDERED that Form **SCRCP Form 4C, Judgment in a Civil Case**, bearing a revision date of March 2013, is approved for use in the Circuit Courts of South Carolina and replaces SCRCP Form 4C bearing a revision date of December 2011. The form has been revised to include on Page 2 lines for additional information regarding the judgment of the Court and also on Page 1 a reference to the additional information.

This form is available on the South Carolina Judicial Department website at <http://www.sccourts.org/forms>.

IT IS SO ORDERED.

s/Jean Hoefer Toal
Jean Hoefer Toal, Chief Justice

March 26, 2013
Columbia, South Carolina

PENDARVIS LAW OFFICES, PC



June 17, 2013

VIA E-MAIL AND U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al***; Case No. 2011-CP-40-7432

Dear Judge Strickland:

We are in receipt of your letter dated June 14, 2013, indicating an intent to grant Defendants' Motions to Dismiss the above matter. While we appreciate Your Honor's time and attention to this matter, we respectfully disagree with any ruling dismissing the Complaint.

Notwithstanding our disagreement, we trust Your Honor is aware that "where a complaint is dismissed under [Rule] 12(b)(6), plaintiff should be granted leave to file an amended complaint." *Dockside Ass'n v. Detyens, Simmons, & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (*citing Foman v. Davis*, 371 U.S. 178 (1962)) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)). Because Your Honor's letter did not indicate an intent to deviate from the Rule 12(b) standard of the dismissal being without prejudice, we respectfully request Your Honor include language in any Order that is issued expressly providing the DeLoaches leave to file an Amended Complaint. *See Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 881 (2006) ("When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice.")

Ultimately, we find it very difficult to believe that Your Honor would sign an Order dismissing with prejudice all claims arising from the group of defendant lawyers' unauthorized use of the DeLoaches' identities to file suit and recover hundreds of thousand of dollars using their names without the knowledge or consent of those "clients" and from a lawyer's violation of the DeLoaches' confidences to keep their matter confidential. In the event Your Honor were to issue an Order granting Defendants' Motions to Dismiss the DeLoaches' Complaint with prejudice, such a ruling will be seen by the DeLoaches and by the public as a court *approving this behavior and providing blanket civil immunity for such conduct*. Surely the law provides a civil remedy when lawyers use the names and identities of unknowing South Carolinians to obtain hundreds of thousands of dollars and also provides civil remedies when a lawyer violates prospective clients' confidences. Any ruling to the contrary will be viewed as the proverbial fox guarding the hen house.

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

Your Honor mentioned during the hearing last week that the claims against these defendants were "serious." We agree and to appreciate the gravity of the defendants' conduct, it may be helpful to consider developments that occurred after this Complaint was filed that were not presented during either of the hearings in this case. The defendant "class action" lawyers' acts and omissions set forth in the Complaint took place as part of their involvement in stucco claims against Dryvit Systems, Inc. in the underlying 2002-CP-40-1377 class action lawsuit and in the Posey lawsuit referenced in the Complaint. As Your Honor may be aware, on June 5, 2012, the Honorable J. Mark Hayes, II issued a RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING in the #1377 matter ordering that the majority of these defendant lawyers appear before the Court to explain their conduct, a copy of which is enclosed for your convenience. Of particular interest are the findings concerning the DeLoaches found on pages 8 - 9 of the RULE TO SHOW CAUSE.

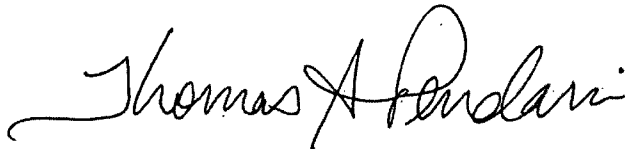
In summary, we respectfully request Your Honor reconsider signing any Order dismissing the DeLoaches' Complaint. In the event Your Honor signs an Order dismissing the Complaint, we respectfully request language be included providing leave to file an Amended Complaint as is the general rule recognized by the Supreme Court.

In advance, thank you for your consideration of this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis

TAP/lat
Enclosure

ec: James L. Bruner, J.D. (w/ enclosure)
James E. Lady, J.D. (w/ enclosure)
Amy L.B. Hill, J.D. (w/ enclosure)
Charles E. Hill, J.D. / Joshua D. Shaw, J.D. (w/ enclosure)
Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D. (w/ enclosure)
William & Allison DeLoache (w/ enclosure)

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TIMOTHY TREON and his wife,)
JANE TREON, P. JENNINGS)
SCEARCE and STEVEN CHRISTAIN)
individually and on behalf of others)
similarly situated in the State of South)
Carolina,)

Plaintiffs,)

V.)

DRYVIT SYSTEMS, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2002-CP-07-1377

**RULE TO SHOW CAUSE
and
ORDER FOR ACCOUNTING**

2012 JUN -5 PM 1:42
J. T. ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter is before the Court on Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court. A hearing on the motion was conducted on March 31, 2010 and the Court's initial decision to grant the Plaintiffs' motion was announced at that time. After being appointed as the judge assigned with the responsibility of cases 2008-CP-07-3145 and 0774,¹ the Court delayed further action in this matter so that a global resolution of all three cases could be explored. No global resolution has occurred and this Court's present belief is that at this time proceeding with this Rule to Show Cause is proper.

The Plaintiffs seek an accounting of any attorneys' fees paid to or otherwise received by Original Class Counsel because of their status as Class Counsel in the present matter. Plaintiffs also seek an accounting of any benefits paid to or otherwise received by

¹ These two cases involve claims of professional malpractice and breach of fiduciaries arising from the present litigation.

gm

Original Class Representatives because of their status as Class Representatives. The Plaintiffs also seek to have any fees and/or benefits received by Original Class Counsel and Original Class Representatives placed in a constructive trust for the benefit of the class.

The record of this case is substantial in its size. The vast majority of the record in this case, however, does not relate to the substantive product liability claim asserted in this lawsuit against the Defendant. But rather, the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister state's attempt to finalize a nationwide class action settlement and the subsequent conduct of Original Class Counsel and Original Class Representatives.

Based on the record of this case, this Court believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its inherent judicial powers to issue this Rule to Show Cause and Order for Accounting.

Background²

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimbali; W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L. Wylie, IV originally served as class counsel in this matter (hereinafter they will be collectively and individually referred to as "Original Class Counsel"). Original Class Counsel and Original Class Representatives moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by

² The factual basis of this order includes and is hereby incorporated by reference, the facts found in this Court's prior order dated January 7, 2009.



the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System³ manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). This Court's opinion is that Judge Kimmerlin's Order placed Original Class Counsel and the Original Class Representatives in a representative capacity for absent class members and imposed upon them the fiduciary duties and Rule 23 obligations. Also, the September 2003 Order expressly required that a notice plan be submitted within 30 days. No notice plan was ever submitted by Original Class Counsel or Original Class Representatives.

Even though no notice plan was ever pursued by Original Class Counsel, on October 1, 2002, members of Original Class Counsel attended a hearing the Posey court conducted to consider the fairness of the purported nationwide settlement.⁴ The Tennessee Court (The Posey Court) was made aware of the South Carolina's court decision to certify South Carolina class action when the Original Class Counsel spoke in opposition to the proposed settlement during the fairness hearing.⁵ After participating in

³ Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation layer that traditional stucco does not have.

⁴ Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.

⁵ Frank Grimbail, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Alison DeLoache, Frank Grimbail argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

certain negotiations with the lawyers in Tennessee, members of the Original Class Counsel attended a second fairness hearing on December 18, 2002, where their support for the final approval of the national settlement was reported to the Posey court. See Dryvit Systems, Inc.'s Evidence in Support of Motion to Dismiss at Tab 4. The Posey Court was also told that with the modifications to the settlement, the Cardamone class was withdrawing its objections to Posey settlement. Hr'g Trans. Dated 12/18/2002 at p. 28, lines 8-18.⁶

The Posey Court issued an order granting final approval to the Posey settlement on January 14, 2003. In that Order, the judge specifically noted the contribution of the South Carolina class counsel in reaching a settlement:

[Posey] Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness hearing with Counsel for the Settling Defendant.⁷

The Tennessee Order specifically approved an attorney fee and expense award of \$11,600,000.00 to be distributed "among counsel for the Class." January 14th Order at p. 10. That "counsel" included the Order's earlier reference to "counsel ... representing a proposed litigation class in South Carolina." Id. at pp. 8,10. The Order also specifically prohibited class members from participating in other class actions, such as the Cardamone action. Id. at pp. 6, 9.

2002 at p.16, lines 15-17; p.17, lines 6-10. He also argued that "opt-outs are really objectors, but they just had sense enough to go ahead and remove themselves from this situation, avoid this class so that they could effect a full recovery." Id. at p.115, lines 7-11.

⁶ Attorney Robert Phillips, who represented the South Carolina objectors Harry and Trudy Creasy was also present at the Second Fairness Hearing. He responded to the claim that the Cardamone class no longer sought to opt-out of the Settlement by informing Judge Slone that his clients were intervening in the South Carolina class action. We filed that motion approximately a month ago, and it is not our position that the changes cure the fundamental legal defects that keep this class from being certified, much less a settlement. So I just wanted to correct that representation.

⁷ Posey Order dated January 14, 2003 at p.5, ¶15.

910

Following the issuance of the January 14th Order, Original Class Counsel presented the proposition of the attempted compromise of the Cardamone action to Judge Kemmerlin. During a hearing on February 5, 2003, Michael Seekings of the Mullen, Wylie and Seekings firm, informed the court that:

[Original Class Counsel] came – we opted out after we came to your Honor and asked for certification of a class in South Carolina. We then went to Tennessee and opted our class out. Participated in additional negotiations with both Dryvit and counsel for the plaintiffs at the direction of the court. The settlement changed. We as our certified class then went to a hearing and told the judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The Cardamone case underlined has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

In the present litigation, Dryvit was ordered to produce numerous documents including e-mails, letters, settlement agreements and other documents. The Court has reviewed these materials and is satisfied that they are authentic and reflect the ongoing dialogue between Original Class Counsel, Posey Class Counsel and Dryvit Counsel. The Court has also reviewed transcripts of the hearings in Posey and a hearing in front of the Honorable Thomas Kemmerlin, Jr., on February 26, 2003. After such review, it appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee. See Dryvit Documents Numbers Card 092-094, Dry 0970, CARD 00088, CARD 00072-73, Dry 0277, 0379, 0103, CARD 06727-29, 06739.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Original Class Counsel, it appears that the present case was allowed to



lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel finalized individual settlements with each of Cardamone's named class representatives.⁸

In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Original Class Counsel a total of \$825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. Dryvit Documents Number CARD 0128-0129. One of the Original Class Counsel also referenced an agreement between Cardamone and Posey counsel in an email dated April 22, 2004:

"Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding." Dry0970.

After learning that Dryvit was attempting to decertify and dismiss the Cardamone action, Timothy and Frances Treon, and P. Jennings Searce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M.

⁸ In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously listed."



Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

By order dated January 18, 2006, this Court allowed Intervening Class Counsel and Mistrs Mullen and Grimball to act as Class Counsel. (the "January 18, 2006 Order").

The existence of the agreement referenced above regarding the terms of the settlements and the attorneys' fees to be paid to Original Class Counsel were not disclosed to the Court by Original Class Counsel at the February 26, 2003 or December 2005 hearing. However, after Dryvit produced documents, the record reflects that Original Class Counsel have received the \$600,000.00 payment promised by the April 22nd email.⁹

Plaintiffs' have asked the court for an accounting of the attorneys' fees promised and/or paid to Original Class Counsel while they were representing the Cardamone class along with the fees related to individual settlements they negotiated for certain class members. At this time, this Court is not requiring disclosure of fees related to individual cases of Class members who were not also named Class Representatives. Nevertheless, this Court is compelled to ascertain why fees of \$825,000 were promised to Original Class Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case.

⁹ The following checks were provided to the Court: Check issued by Doffermyre, Shields, Canfield, Knowles, & Devine, LLC ("Doffermyre, LLC") to Leath, Bouch & Crawford, LLP ("Leath Bouch") and Mullen Wylie & Seekings on 11/15/2005 for \$310,345.00 with notation "Leath and Seekings share of attorney fees"; check issued by Doffermyre, LLC to Leath Bouch on 6/21/2006 for \$93,103.00; check issued by Doffermyre, LLC to Leath Bouch for \$196,552.00 on 9/18/2006 with notation "Attorneys Fees for Objectors."



Again, none of the payments or arrangements were disclosed to the Court. Further, the different reasons or justifications given by different members of Original Class Counsel made in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach.¹⁰ Another theory is that it was for work done for the Posey class.¹¹ However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRPC Rule 23(c) and (d).

Law/Analysis

This Court finds it has jurisdiction over the Original Class Counsel and the Original Class Representatives sufficient to require them to appear before me to answer the questions raised by the documents produced by Dryvit and the monies they received while they had fiduciary obligations to this Court and the Class. This Court's belief is that the present Order is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained.

In this matter, there is evidence that Original Class Counsel participated in the Posey action while representing this Class to which they owed a fiduciary duty. See Premium Investment Corp, 282 S.C. 464, 324 S.E.2d 72. It appears that Original Class

¹⁰ Mrs. Deloach has testified in her deposition that she and her husband had no attorney- client relationship with any of Original Class Counsel.

¹¹ The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.



Counsel may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval by the Court for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives.

The Court therefore finds it necessary to require each member of Original Class Counsel and the Original Class Representatives to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRPC and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Furthermore, as officers of the court, Original Class Counsel have an obligation to appear before a circuit court judge seeking their testimony on a pending matter for which their input is required. See State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) (holding trial court could order sheriff from adjoining county, as an officer of the court, to appear without issuing a subpoena), cf. Rule 3.4(c), RPC, Rule 407, SCACR (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 1.15(d), RPC, Rule 407, SCACR (a lawyer shall promptly render a full accounting regarding contested property). The exercise of this power is enhanced by the operation of Rule 23, SCRPC which grants each trial court broad powers to oversee the conduct of a class action lawsuit and protect the interests of unnamed class members.

Accordingly, this Court finds the issuance and service of an Order and/or Rule to Show Cause appropriate in order to allow the Class to properly account for the benefits, if any, promised and/or paid to Original Class Counsel and the Original Class



Representatives. Additionally, the appearance of Original Class Counsel in this matter allows this court to examine and, if necessary, to correct conduct that is calculated to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006).

From the information provided to the Court, there appears to be no dispute that Original Class Counsel aided in the settlement of the individual cases of the Original Class Representatives. Those settlements create an appearance of being in violation of South Carolina law.¹² The U.S. Supreme Court has stated: due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985):

This Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action. Rule 23 of the South Carolina Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRC. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRC. See Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E.2d 72 (Ct.App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and imposing a constructive trust on any benefits obtained as a

¹² Class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. [*Prem. Investment Corp. v. Green*, 324 S.E.2d at 77; *See In re Green*, 354 S.E.2d 557 (S.C. 1987); *Rogers v. U.S. Steel Corp.*, 70 F.R.D. 639 (1976)]



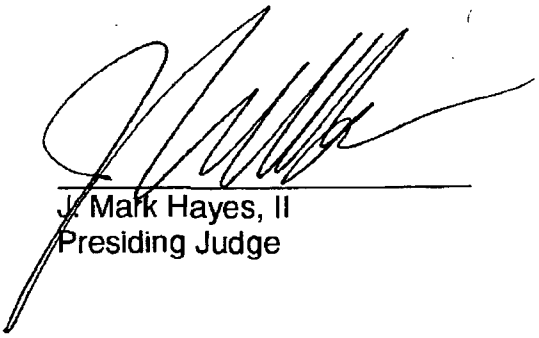
result of a breach of that duty). These obligations are merely specific applications of, and possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it.

It is therefore Ordered that Original Class Counsel and Original Class Representatives appear before this Court on October 1, 2012 at the Spartanburg County Court House at 9:30 am in Courtroom West-B to be examined and account to this Court for all fees and benefits, if any, received and or promised in connection with this action, specifically as follows:

- 1) An accounting for the \$825,000 referenced herein;
- 2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;
- 3) An accounting of all benefits received by the Original Class Representatives;
- 4) To show why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class.

This Order is to be served upon the Original Class Counsel and the Original Class Representatives in accordance with Rule 4 of the SCRCP.

AND IT IS SO ORDERED.



J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012

PENDARVIS LAW OFFICES, PC



June 20, 2013

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

We beg the Your Honor's indulgence with one further point in response to the myriad of emails / letters from counsel for the various Defendants commenting and objecting to our most recent correspondence.

Enclosed and attached please find a copy of the statute, S.C. CODE ANN. § 15-36-100, which governs the requirement for expert affidavits in professional *negligence* matters. Plaintiffs continue to respectfully maintain that an expert affidavit was not required in this matter because Plaintiffs have not made a claim of professional negligence. However, if the Court were to conclude that Plaintiffs made claims of professional negligence such that the statute governs their claims, we respectfully suggest Your Honor consider the following section of the statute:

The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

S.C. CODE ANN. § 15-36-100(C)(2) (emphasis added).

Taking the facts in the Complaint as true and viewed in the light most favorable to the DeLoaches, there should be no "special learning is needed to evaluate the conduct" of the Defendants. As for the claims against Mr. Kassel, it is common knowledge that a lawyer is not allowed to disclose prospective clients' confidential information to other lawyers, and certainly not for use in a national class action lawsuit, unless the lawyer had the prospective clients' permission. As for the claims against the remaining Defendants, it is common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get fees unless that person has hired the lawyer and gave permission for such use. The allegations in the Complaint establish that none of the defendant-lawyers had a fee

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

The Honorable Joseph M. Strickland
Page 2
June 20, 2013

agreement with the DeLoaches; none of the Defendants (except for Mr. Kassel) ever once communicated with the DeLoaches; none of the Defendants had the DeLoaches' permission to use their names in the Tennessee lawsuit; none of the Defendants ever called or contacted the DeLoaches to report on the status of the lawsuit; and none of the Defendants ever told them that hundreds of thousands of dollars of fees had been recovered. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things.

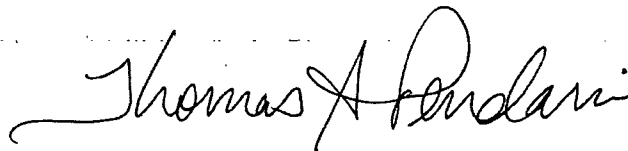
Therefore, an expert affidavit is not necessary per S.C. CODE ANN. § 15-36-100(C)(2) even if Your Honor were to conclude that Complaint effectively includes a claim for professional negligence. In sum, we respectfully request Your Honor reconsider signing any Order dismissing the DeLoaches' Complaint.

In advance, thank you for your consideration of this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" being larger and more prominent than the last name "Pendarvis".

Thomas A. Pendarvis

TAP/lat
Enclosure
cc w/encl:

James L. Bruner, J.D.
James E. Lady, J.D.
Amy L.B. Hill, J.D.
Charles E. Hill, J.D. / Joshua D. Shaw, J.D.
Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.
William & Allison DeLoache (via e-mail only)

Code of Laws of South Carolina 1976 Annotated

Title 15. Civil Remedies and Procedures

Chapter 36. South Carolina Frivolous Civil Proceedings Sanctions Act

Code 1976 § 15-36-100

§ 15-36-100. Complaint in actions for damages alleging professional negligence;
contemporaneous affidavit of expert specifying negligent act or omission.

Currentness

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility

alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness 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.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

(1) architects;

- (2) attorneys at law;
- (3) certified public accountants;
- (4) chiropractors;
- (5) dentists;
- (6) land surveyors;
- (7) medical doctors;
- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;

(20) radiological technicians;

(21) respiratory therapists; and

(22) veterinarians.

Credits

HISTORY: 2005 Act No. 32, § 4, eff July 1, 2005, for causes of action arising after that date.

Notes of Decisions (4)

COPYRIGHT (C) 2012 BY THE STATE OF SOUTH CAROLINA

Code 1976 § 15-36-100, SC ST § 15-36-100

Current through End of 2012 Reg. Sess.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

PENDARVIS LAW OFFICES, PC



September 4, 2013

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

This is a request for the status of Your Honor's ruling on Defendants' pending motions to dismiss. The last communication from Your Honor was almost 3 months ago in a letter dated June 14, 2013, indicating the Court's intent to sign an Order resolving the motions. We have not received any notice, written or otherwise, indicating that an Order has been signed or entered. Please let us know if an Order has been signed or entered.

Plaintiffs maintain that their Verified Complaint states a claim against all Defendants and that none of the Defendants' motions to dismiss should be granted. For example, contrary to the Defendants' positions, an expert affidavit is not required in this case because the Verified Complaint does not assert a claim for professional negligence: The Plaintiffs never retained any of the Defendants as their lawyer. Even if the Court were to conclude that Plaintiffs did allege a claim for professional negligence the governing statute does not require an affidavit when the alleged negligence "***lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.***" S.C. CODE ANN. § 15-36-100(C)(2) (emphasis added).

No "*special learning* is needed to evaluate the conduct" of the Defendants as alleged in the Verified Complaint. It is common knowledge that lawyers are not allowed to disclose prospective clients' confidential information to other lawyers. It is also common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get legal fees unless that person actually hired the lawyer and gave permission for the representation. None of the Defendants disagreed with these same points that were mentioned in the correspondence to you dated June 20, 2013.

It is worth repeating that none of the Defendants had a fee agreement with the DeLoaches; none of the Defendants (except for Mr. Kassel) ever once communicated with the DeLoaches; none of the Defendants had the DeLoaches' permission to use their names in the Tennessee lawsuit; none of the Defendants ever called or contacted the DeLoaches

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

The Honorable Joseph M. Strickland

Page 2

September 4, 2013

to report on the status of the lawsuit; and none of the Defendants ever told them that hundreds of thousands of dollars of legal fees had been recovered. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things.

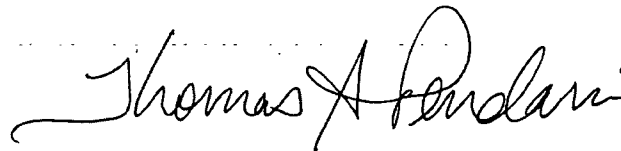
This case is getting very old and needs to proceed. The DeLoaches' Verified Complaint was filed almost 2 years ago on November 3, 2011. Defendants filed motions to dismiss between January 23, 2012 and March 13, 2012, the last of which was almost 18 months ago. The first hearing on Defendants' motions was held on June 6, 2012, which is almost 16 months ago.

We again respectfully request Your Honor sign an Order denying all of the Defendants' motions to dismiss the DeLoaches' Verified Complaint and allow this case to proceed and give the Defendants an opportunity to explain their conduct to a jury.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" being larger and more prominent than the last name "Pendarvis".

Thomas A. Pendarvis

TAP/lat

cc : James L. Bruner, J.D.
James E. Lady, J.D.
Amy L.B. Hill, J.D.
Joshua D. Shaw, J.D.
Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.
William & Allison DeLoache (via e-mail only)

PENDARVIS LAW OFFICES, PC



September 11, 2013

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

Begging the Court's indulgence, today we learned of a very significant development with regard to LEATH BOUCH Defendants that may influence the Court's ruling on Defendants' motions to dismiss in this matter that remain under the Court's consideration.

Enclosed please find a copy of a Complaint filed by the LEATH BOUCH Defendants offensively invoking Rule 1.5(e), RPC to support their claim that another lawyer is not entitled to his share of the fees because, in their words, the "Clients here never approved of the participation of [the other lawyer]." Their claim is virtually identical to what happened to DeLoaches as stated in their Verified Complaint in this matter. (Summary of the Case - "The Defendant class action lawyers . . . never communicated with the DeLoaches to report on their representation, or to advise that over \$600,000 in funds had been obtained as a result of their activities, or to seek to obtain their consent for the apportionment of 'fees' between counsel in different firms.") It is remarkable that the LEATH BOUCH Defendants also did not include a lawyer's affidavit of merit with the Complaint even though they are suing a lawyer.

If the LEATH BOUCH Defendants' Complaint in their lawsuit states a claim under Rule 12(b)(6), then so does the DeLoaches' Verified Complaint, and the motions to dismiss should be denied.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in cursive script that reads "Thomas A. Pendarvis".

Thomas A. Pendarvis

TAP/lat
Enclosures
cc w/ enclosures: James L. Bruner, J.D.

James E. Lady, J.D.

Amy L.B. Hill, J.D.

Joshua D. Shaw, J.D.

Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.

William & Allison DeLoache (via e-mail only)

Lawrence E. Richter, Jr. (via e-mail only)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEATH, BOUCH & SEEKINGS, LLP

Plaintiff(s)

vs.

JOSEPH K. QUALEY,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013 - CP - 10 - 1662

(Please Print)

Submitted By: Timothy W. Bouch, Esq.

Address: Leath, Bouch & Seekings, LLP
92 Broad Street, P.O. Box 59,
Charleston, SC 29402

SC Bar #: 782

Telephone #: (843) 937-8811

Fax #: (843) 937-0606

Other:

E-mail: tbouch@leathbouchlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☒ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

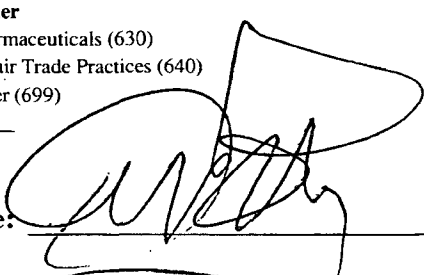
- Inmate Petitions**
☐ PCR (500)
☐ Sexual Predator (510)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Other (799)

- Administrative Law/Relief**
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture (840)
☐ Other (899)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Administrative Law Judge (980)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Other (699)

Submitting Party Signature: 

Date: March 20, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NUMBER: 13-CP-10-1662

LEATH, BOUCH & SEEKINGS, LLP,)

Plaintiff,)

vs.)

JOSEPH K. QUALEY,)

Defendant.)

SUMMONS

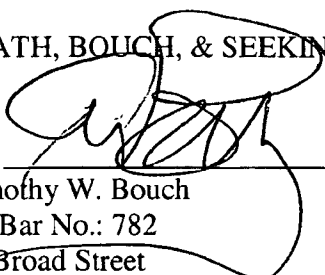
(Declaratory Judgment)
(Non-Jury Trial)

FILED
2013 MAR 20 AM 9:49
JULIE ARMSTRONG
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers, at their offices, 92 Broad Street, Charleston, South Carolina, 29401, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

LEATH, BOUCH, & SEEKINGS, LLP

By: 

Timothy W. Bouch

SC Bar No.: 782

92 Broad Street

Post Office Box 59

Charleston, South Carolina 29402

(843) 937-8811

Attorneys for the Plaintiff

Charleston, South Carolina

Dated: March 20, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NUMBER: 13-CP-10-1662

LEATH, BOUCH & SEEKINGS, LLP,)

Plaintiff,)

vs.)

JOSEPH K. QUALEY,)

Defendant.)

COMPLAINT

(Declaratory Judgment)
(Non-Jury Trial)

FILED
2013 MAR 20 AM 9:49
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff, Leath, Bouch & Seekings, LLP, files this Complaint for Declaratory Judgment pursuant to S.C. Code Ann. §15-53-10, et seq. and Rule 57 S.C.R.C.P. against the above- named Defendant and respectfully shows unto the Court as follows:

PARTIES

1. Leath, Bouch & Seekings, LLP (hereinafter "LBS") is a Limited Liability Partnership organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina.

2. Defendant Joseph K. Qualey (hereinafter "Qualey") is an attorney licensed to practice under the laws of the State of South Carolina and resides in Charleston County, South Carolina.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to S.C. Code Ann. §15-53-10, et seq.

4. Venue is proper in Charleston County as the events giving rise to the claims asserted below occurred within the County and the parties live and reside there.

5. This is an action for Declaratory Judgment pursuant to S.C. Code Ann. §15-53-10, et seq. for the purpose of constructing and interpreting the terms, if any, for the division of a legal fee.

DECLARATORY JUDGMENT

6. Plaintiff, as counsel, has filed two civil actions: (*The Highlands of Legend Oaks Property Owners Association, Inc. v. Alison Dailey Properties, Inc., et al*, Case No.: 2010-CP-18-2169; *Elizabeth O'Donnell, et al v. Northland Madison At Park West, LLC, et al*, Case No.: 2010-CP-10-9095). The *Madison* matter is ongoing, Plaintiff has been certified by this Court as Class Counsel. The *Highlands* matter is in the process of finalizing settlement agreements between the parties.

7. At no time during the prosecution of either of the above civil actions has Joseph K. Qualey had any connection with those civil actions. Mr. Qualey has not participated as counsel in any way. His name does not appear on any pleading, he has taken no part in any discovery, he has made no court appearances, he has advanced no funds for the prosecution of either matter, and is in fact a complete stranger as to either of these matters. In the *Madison* matter, Mr. Qualey has not been approved as Class Counsel as has the Plaintiff.

8. Nevertheless, in spite of the complete lack of any connection with these two matters, Mr. Qualey has retained counsel, and has made demand on the Plaintiff for an amount of one-half of the legal fees which the Plaintiff either have earned or may earn (Demand Letter attached hereto as Exhibit 1).

9. Pursuant to Rule 407 and Rule 1.5 thereof, fee divisions are to be made in proportion to the services performed by each lawyer, and the clients must agree in writing as to

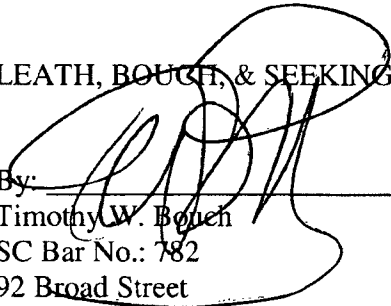
the share each lawyer will receive. Clients here have never approved the participation of Joseph Qualey, nor has he performed any services nor advanced any funds. He is a total stranger to either of these matters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. That this Court inquire into the matters as set forth above pursuant to SC Code Section 15-53-10 *et. seq.*, to determine the rights of the parties, and in that connection,
2. Issue its order finding that Joseph K. Qualey has no rights to any attorney fees earned or to be earned by the Plaintiff in the two civil matters set forth above.
3. And any further relief to this court shall deem fit and proper.

LEATH, BOUCH, & SEEKINGS, LLP

By: 

Timothy W. Bouch

SC Bar No.: 782

92 Broad Street

Post Office Box 59

Charleston, South Carolina 29402

(843) 937-8811

Attorneys for the Plaintiff

Charleston, South Carolina

Dated: March 20, 2013

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464

Lawrence E. Richter, Jr.
Alice Anne Richter Lehrman
Aaron E. Edwards
Patrick T. Napolski*

Telephone: (843) 849-6000
Telefax: (843) 881-1400

*Licensed in IL only

March 15, 2013

**VIA EMAIL tbouch@leathbouchlaw.com,
FACSIMILE 937-0606, and U.S. MAIL**

Timothy W. Bouch
Leath Bouch & Seekings, LLP
92 Broad Street
P.O. Box 59
Charleston, SC 29402

In Re: Highlands and Madison matters

Dear Tim:

Responding to your letter of today's date, please be advised that I have been asked to represent the interests of Joe Qualey and/or his firm in all matters relating to legal fees to which he is entitled, such fees arising out of the matters referenced above.

Mr. Qualey hereby demands that no disbursement of any attorneys' fees from any of the above referenced matters be made until the issue of division of attorneys' fees is resolved. Mr. Qualey further demands that any and all attorneys' fees from any of the above referenced matters' settlement disbursements remain in trust pending a resolution of the fee dispute between you and your firm and Mr. Qualey and his firm pursuant to Rule 1.15 and that any disbursement to any clients specifically exclude any statement regarding your agreement on division of fees, including the share each will receive, until this matter is resolved. Mr. Qualey and his firm claim a lien on the attorneys' fees heretofore referenced and an entitlement to one-half (1/2) of the total amount of attorneys' fees, and demands that those funds be kept separate and in trust by you until this dispute is resolved.

You have specifically agreed that Mr. Qualey/his firm are co-counsel with you in the referenced matters and if you are not prepared to honor that agreement it will be necessary that this controversy be resolved in the appropriate forum as soon as is reasonably possible.

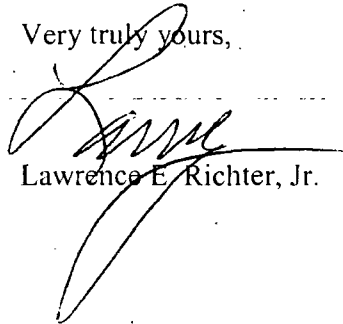
We understand that you are in possession of settlement proceeds in at least one or more of the matters referenced above as of this date. In addition to demanding that the attorneys' fees referenced above be kept separate by you until the dispute over division of the fee is resolved,

Mr. Qualey also demands, as co-counsel, that no settlement funds be disbursed without his knowledge or written consent and that he be provided with a full accounting regarding such funds at or prior to any disbursement time. Mr. Qualey wishes to be present at any distribution, execution of release, and/or any other meeting with the clients. Please notify him should such a meeting be set.

Please let me earnestly state to you that I have known Joe Qualey very closely for many years. I have never seen him hurt by anyone's actions to the degree that he has been by what he views as a complete betrayal, both personally and professionally, on the part of you all and your firm. Additionally, I have never seen him as resolved and committed to pursuit of an issue as he is concerning this one. It is inconceivable to me that there could possibly be any misunderstanding, and I hope that we can sit down together and make everything as it should be; short of that this matter is certainly headed to resolution at the hands of the appropriate authority.

Please let me hear from you without delay. I believe that Mike Seekings has thus far been the spokesman from your side. Whoever is to handle this, please contact me right away and let me know whether you wish to voluntarily resolve this controversy by payment to Mr. Qualey of those sums to which he is entitled. If not, please place your liability carrier on notice immediately and have its representative contact me without delay.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Lawrence E. Richter, Jr.", is written over a horizontal dashed line.

Lawrence E. Richter, Jr.

LER/lwh

cc: W. Jefferson Leath, Jr.
Michael S. Seekings
Joseph K. Qualey



LEATH, BOUCH & SEEKINGS, LLP

COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

March 20, 2013

VIA HAND DELIVERY

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Leath, Bouch & Seekings, LLP v. Joseph K. Qualey
Case No.: 2013-CP-10-

Dear Ms. Armstrong:

Please find enclosed for filing the original and two (2) Civil Action Cover Sheets, Summons and Complaints, as well as the filing fee of \$150.00 for the above referenced matter. Please return filed, stamped copies to our office via courier.

Thank you and with best regards, I am

Very truly yours,

LEATH, BOUCH & SEEKINGS, LLP

Timothy W. Bouch

TWB/lf
Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**PLAINTIFFS' REQUEST TO
TRANSFER TO THE JURY
TRIAL ROSTER**

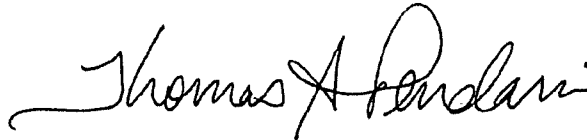
2013 SEP 26 AM 11:44
FILED
RICHLAND CO. S.C.
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: AMY L.B. HILL, J.D. AND WILLIAM H. JORDAN, J.D., COUNSEL FOR JOHN D. KASSEL; KENT STAIR, J.D., TERRY P. WINTON, J.D. and WILLIAM P. JONES, J.D., COUNSEL FOR W. JEFFERSON LEATH, JR., MICHAEL S. SEEKINGS and LEATH, BOUCH & CRAWFORD, LLP; JAMES L. BRUNER, J.D., COUNSEL FOR WILLIAM M. BOWEN AND WILLIAM M. BOWEN, PA; JOSHUA D. SHAW, J.D., COUNSEL FOR WILLIAM DIXON ROBERTSON, III; JAMES E. LADY, J.D. COUNSEL FOR MULLEN WYLIE, LLC

Pursuant to Rule 40(d), SCRCP, Plaintiffs make this Request to Transfer to the Jury Trial Roster. More than 180 days have passed since the filing of Plaintiffs' Complaint on November 1, 2011, making this case eligible for transfer to the Jury Trial Roster.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
Thomas@PendarvisLaw.com

September 24, 2013
Beaufort, South Carolina

Lawyer for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

RICHLAND COUNTY
FILED
2013 NOV -7 AM 10:45
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

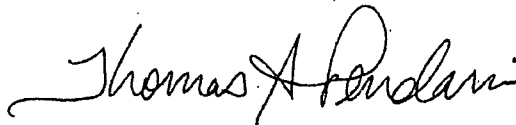
**PLAINTIFFS' AMENDED
REQUEST TO TRANSFER TO
THE JURY TRIAL ROSTER**

TO: AMY L.B. HILL, J.D. AND WILLIAM H. JORDAN, J.D., COUNSEL FOR JOHN D. KASSEL; KENT STAIR, J.D., TYLER P. WINTON, J.D. and WILLIAM P. JONES, J.D., COUNSEL FOR W. JEFFERSON LEATH, JR., MICHAEL S. SEEKINGS and LEATH, BOUCH & CRAWFORD, LLP; JAMES L. BRUNER, J.D., COUNSEL FOR WILLIAM M. BOWEN AND WILLIAM M. BOWEN, PA; JOSHUA D. SHAW, J.D., COUNSEL FOR WILLIAM DIXON ROBERTSON, III; JAMES E. LADY, J.D. COUNSEL FOR MULLEN WYLIE, LLC

Plaintiffs amend their Request to Transfer to the Jury Trial Roster filed on September 26, 2013 and make this Amended Request to Transfer to the Jury Trial Roster pursuant to Rule 40(e), SCRCP. The Plaintiffs' Complaint was filed on November 1, 2011, over 9 months ago, making this case eligible for transfer to the Jury Trial Roster.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
Thomas@PendarvisLaw.com

November 5, 2013
Beaufort, South Carolina

Lawyers for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

259
RECEIVED NOV 13 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**PLAINTIFFS' NOTICE AND MOTION
TO ALTER OR AMEND
JUDGMENTS IN GRANTING
DEFENDANTS' MOTIONS TO
DISMISS**

2013 NOV 20 PM 1:31
JOSEPH M. STRICKLAND
C.C.P. & G.S.

To: Amy L.B. Hill, J.D. and William H. Jordan, J.D., Counsel for John D. Kassel; Kent Stair, J.D., Tyler P. Winton, J.D. and James P. Jones, J.D., Counsel for W. Jefferson Leath, Jr., Michael S. Seekings and LEATH, BOUCH & CRAWFORD, LLP; James L. Bruner, J.D., Counsel for William M. Bowen and WILLIAM M. BOWEN, PA; Joshua D. Shaw, J.D., Counsel for William Dixon Robertson, III; James E. Lady, J.D., Counsel For Francis E. Grimbail and MULLEN WYLIE, LLC;

NOTICE

PLEASE TAKE NOTICE THAT Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, through their undersigned counsel, will move ten days after service of this motion or as soon thereafter as counsel can be heard at the Richland County Judicial Center, Charleston, South Carolina, for an Order pursuant to Rule 52(a) and Rule 59(e), SCRCP, altering or amending the Orders ("the Orders") issued by the Honorable Joseph M. Strickland, dated October 24, 2013, filed with the clerk on November 5, 2013, and received by counsel for the Plaintiff via e-mail¹ on November 7, 2013, granting Defendant

¹ Plaintiffs have not been served with a copy of the Order per Rule 5, SCRCP, by counsel for Defendants.

John D. Kassel's Motion to Dismiss and granting Motions of Defendants William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, Defendant Sued As LEATH BOUCH AND CRAWFORD, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a/ Mullen Wylie & Seekings, LLC, William M. Bowen, and WILLIAM M. BOWEN, PA to Dismiss All Claims and/or Strike Pleadings.

MOTION

The motion filed on behalf of Plaintiffs, William E. DeLoache, III and Allison H. DeLoache, seeking an order altering or amending the Orders pursuant to Rule 52(a) and Rule 59(e), SCRPC, is based on mistakes and omissions identified in the factual findings and errors and omissions contained in the conclusions of law set forth in the Orders. A copy of the Orders are attached and incorporated herein by reference as **Exhibit 1** and **Exhibit 2**.

ARGUMENTS

Plaintiffs respectfully request that the Court alter or amend its Orders and deny Defendants' motions to dismiss because the Orders contain errors or omissions or fail to rule on the following issues of law and fact. Plaintiffs submitted a proposed Order denying Defendants' motions as requested by the trial court in June 2012 – which was more than 18 months before the trial court issued its Orders granting Defendants' motions to dismiss and strike. The proposed Order submitted on or about July 6, 2012, a copy which is incorporated herein by reference as **Exhibit 3**, contains findings of fact and conclusions of law that should be incorporated into this Court's Order granting the instant motion to alter or amend.

1. **Plaintiffs Were Not Required to File an Expert Affidavit Contemporaneous with Their Complaint under S.C. CODE ANN. §15-36-100.**

a. **Verified Complaint does not allege claims for professional negligence.**

The thrust of the entire Verified Complaint is that the Defendants never were counsel for the DeLoaches but instead misappropriated their name without their knowledge or permission for use as putative class members with standing to assert objections in order the Defendants to participate “as counsel” to earn legal fees as counsel in a class-action. S.C. CODE ANN. §15-36-100 is the statute governing “Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or omission.” *Id.* Under the statute, the complaint must allege professional negligence. The statute does not extend to any other types of torts, negligent or intentional, to which the listed professionals may be accused of committing. Causes of action for Breach of Confidentiality, Wrongful Appropriation of Personalty, Conversion, Civil Conspiracy, Constructive Trust, Breach of Fiduciary Duty, and Injunctive Relief do not fall within the guidelines of the statute requiring the contemporaneous filing of an expert affidavit. To extend the scope of this statute to these torts would require a contemporaneous filing of an expert affidavit virtually any time a lawyer is sued.

b. **Affidavit not required because claims arose before statute requiring affidavit became effective.** Claims arise at the time a plaintiff’s right to sue comes into existence. In 2002, when Kassel disclosed the Deloaches’

confidential information, the Deloaches' confidentiality and privacy was breached and the Deloaches had a right to sue. The fact that the Deloaches did not learn about the breach of confidentiality until years later does not extend the date that their claim arose. See *Williamson v. S.C. Insurance Reserve Fund*, 355 S.C. 420, 426, 586, S.E.2d 115, 118 (2003) (holding that the statutory caps of the Tort Claims Act did not apply to the plaintiff's claims because the claims accrued or arose prior to the effect date of the caps and to hold otherwise would violate the separation of powers). Because the Deloaches' claims arose prior to the enactment of S.C. Code §15-36-100, but were discovered and filed later, the expert affidavit requirements do not attach to the Deloaches' claims.

- c. **Common knowledge exception.** "The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." S.C. CODE ANN. § 15-36-100(C)(2). Taking the facts in the Verified Complaint as true and viewed in the light most favorable to the DeLoaches, there should be no "special learning is needed to evaluate the conduct" of the Defendants. As for the claims against Mr. Kassel, it is common knowledge that a lawyer is not allowed to disclose prospective clients' confidential information to other lawyers, and certainly not for use in a national class action lawsuit, unless the lawyer had the prospective clients' permission. As for the claims against the remaining

Defendants, it is common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get fees unless that person has hired the lawyer and given permission for such use. The allegations in the Complaint establish that none of the defendant-lawyers had a fee agreement with the DeLoaches; none of the Defendants (except for Mr. Kassel) ever once communicated with the DeLoaches; none of the Defendants had the DeLoaches' permission to use their names in the Tennessee lawsuit; none of the Defendants ever called or contacted the DeLoaches to report on the status of the lawsuit; and none of the Defendants ever told them that hundreds of thousands of dollars of fees had been recovered. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things. See Letter dated June 20, 2013, and September 4, 2013, attached and incorporated by reference as **Exhibit 4** and **Exhibit 5**.

2. The Verified Complaint States Claims Against the Defendants.

- a. The Wrongful Appropriation of Personality tort does not have as an element a requirement of damages. See *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452, 684 S.E.2d 756 (2009). See also *Insurance Products Marketing, Inc. v. Conseco Life Insurance Company*, 2011 WL 3841269 (D.S.C. Aug. 29, 2011) (Duffy, J.) ("A cause of action for wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. It was error for the

court to conclude that Plaintiffs' Verified Complaint should be dismissed because – according to the Court and contrary to the actual allegations in the Verified Complaint – it did not allege damages.

- b. To plead misappropriation of identity, the plaintiff must claim an appropriation without consent, of one's name or likeness for another's use or benefit. The Court should have concluded that based on the facts alleged in the Verified Complaint, Plaintiffs' second cause of action states sufficient facts to state a claim for relief that is plausible on its face.
- c. In the light most favorable to Plaintiffs, the Verified Complaint does allege damages proximately caused by the Defendant class action lawyers and law firms. Therefore, Defendant class action lawyers and law firms' motions to dismiss on this ground should have been denied. The Verified Complaint alleges the DeLoaches suffered actual damages as a result of the Defendant class action lawyers and law firms' tortious behavior. The DeLoaches own and owned at all times relevant to this claim an enforceable right in their individual and collective identity, including without limitation the use of their surname, DeLoache, as part of any legal proceeding. The Verified Complaint alleges the Defendant class action lawyers and law firms misappropriated the DeLoaches' rights in their name, recovered monies as a result of being able to appear in the *Posey* court purportedly as counsel for the DeLoaches, and that Defendant class action lawyers and law firms' recovery of fees under the guise of serving as their counsel caused the DeLoaches' damages. This is a valid and recognized cause of action in

South Carolina with a presumption of nominal damages.

- d. Plaintiffs have suffered an injury in fact and therefore have standing to bring claims against the Defendants. To show an injury in fact, a plaintiff must suffer "an invasion of a legally protected interest which is (a) concrete and particularize, and (b) 'actual or imminent not conjectural or hypothetical.'" *Smiley v. South Carolina Dept. Of Health and Environmental Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32 (2007).
- e. "Wrongful appropriation of personality involves the intentional, but consented use of plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right, law to publicize and profit from his own name, likeness, and other aspects of personal identity." *Snakenberg v. Hartford Casually Insurance Company, Inc.*, 299 S.C. 164, 170, 383 S.E.2d 2, 5-6 (Ct. App. 1989). Defendants' use of the plaintiffs' names and identity for their own benefit was the injury in fact. Taking the Plaintiffs' allegations in their Complaint as true pursuant to 12(b), SCRPC, Plaintiffs have suffered an injury in fact and have standing to bring the claim stated in their Complaint.
- f. Plaintiffs do not make claim that they were entitled to a monetary recovery simply as a result of the Defendants' use of their names as objectors in the Posey class action. Instead, Plaintiffs claim that Defendants cannot be unjustly enriched by being paid hundreds of thousands of dollars in the wrongful appropriation of the Plaintiffs' personality.
- g. The commercial value associated with the Plaintiffs' names and personal

information does not come from a certain notoriety or popularity attached to the DeLoache name, but instead comes from the value of having names and personal information as alleged owners of a home with Dryvit EIFS, which was required in order for the Defendants to serve as counsel for parties with standing to object in the *Posey* class action.

- h. Construed in the light most favorable to the DeLoaches, they owned an interest in the property rights associated with their personality, including the use of their surname in legal proceedings. By filing legal documents with the DeLoache surname, the factual allegations in the Verified Complaint support a claim that the Defendant class action lawyers and law firms converted the DeLoaches intangible property rights. See W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim “has been discarded to some extent by all of the courts” but noting “the process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with, some document”) (cited in *Gignilliat* (emphasis added)). The causes of action alleged in the remaining causes of action in the DeLoaches’ Verified Complaint facilitated and enabled the damages alleged in the misappropriation and conversion Counts.
- i. The facts pled in the Complaint, taken as true, are sufficient to maintain Plaintiffs’ causes of action for wrongful appropriation personality, conversion, civil conspiracy, constructive trust, breach of fiduciary duty, and injunctive

relief.

- j. The content of the Orders is not consistent with the standard of review as applied to the allegations in the Verified Complaint and as a result, the Defendants' motions should have been denied and the instant Motion to Alter or Amend should be granted.
- k. The Verified Complaint also alleges that Defendants improperly allocated funds among lawyers in different firms without the DeLoaches' authorization and approval in violation of Rule 1.5(e), RPC. The Order should be altered or amended to reflect this allegation. The Court was apprised of certain of the Defendants taking this exact same position. A copy of the correspondence to the Court dated September 11, 2013, containing this information and arguments is attached hereto and incorporated herein by reference as **Exhibit 6**.

3. **The Verified Complaint States Claims Against Kassel.**

- a. There is an independent tort for breach of the duty of confidentiality. See *McCormick v. , England*, 328 S.C. 627, 639, 494 S.E.2d 431, 437(Ct. App. 1997) (recognizing breach of physician's duty of confidentiality as independent tort). The Court misapprehended the nature of this separate and independent cause of action when it found that this cause of action was a "ruse to get around the wording of the statute [requiring a contemporaneous filing of an expert affidavit]." The tort of breach of confidentiality is independent of the tort of professional negligence or legal

malpractice.

- b. Kassel had a duty of confidentiality to the Deloaches despite the facts that Rule 1.18, Duties to Prospective Clients, was not enacted until 2005. A majority of the Rules of Professional conduct were enacted in 1990 and, prior to that, South Carolina lawyers were required to act within the Model Code. It is absolutely not the law that prior to 2005, lawyers in South Carolina owed no duties whatsoever to their prospective clients. The duty of confidentiality is a fundamental duty to all client-lawyer relationships: prospective, current and former clients alike. Prior to the adoption of Rule 1.18, the duty to prospective clients was subsumed within the other Rules of Professional Conduct such as Rule 1.1, Competence, Rule 1.7, Conflict of Interest and Rule 1.6, Confidentiality. Prospective clients, like current clients, often disclose confidential information to a lawyer in an effort to retain him, placed documents or other property in the lawyer's custody, even if only temporarily, and may even rely on his advice. *See Westinghouse Elec. Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1319 (7th Cir. 1978) (holding as early as 1978 that a lawyer has duties to prospective clients.) For example, they may rely on the lawyer's advice that the statute of limitations has run in deciding not to retain that lawyer and file suit - exactly what happened in this matter.
- c. Because the allegations in the Complaint must be taken as true when deciding a Motion to Dismiss, the allegations themselves prove the foreseeability or proximate cause. Plaintiffs' pleadings state that Mr. Kassel

received confidential client information concerning the Plaintiffs and concerning their artificial stucco defects. Mr. Kassel advised them about the statute of limitations on their stucco claims and Plaintiffs decided not to bring a lawsuit. Mr. Kassel shared the Plaintiffs' confidential information with Mr. Robertson in order to allow Mr. Robertson (and the other Defendants) to have class members with standing to serve as objectors in the *Posey* case without using one of his own client's as an objector and risk reducing the higher proceeds that client would get in the South Carolina class-action case.

- d. Plaintiffs are not required to plead specific damages in their Verified Complaint in order to state facts sufficient to support a cause of action. In addition, damages in a breach of confidentiality claim can be likened to invasion of privacy and can include reputational as well as more tangible harm. *See generally, MacDonald v. Clinger*, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982). The South Carolina Supreme Court has observed in dicta "... It is irrelevant in a breach of confidentiality claim, whether the disclosure of information would bring shame to a person of ordinary sensibilities." *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 483, 514 S.E.2d 126, 133 n.14 (1999).

4. **Defendants' Rule 12(f), SCRPC, Motion to Strike Should Have Been Denied.**
"[W]here a complaint is dismissed under [Rule] 12(b)(6), plaintiff should be granted leave to file an amended complaint." *Dockside Ass'n v. Detyens, Simmons, & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (citing *Foman v.*

Davis, 371 U.S. 178 (1962)) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)). Because Your Honor's letter did not indicate an intent to deviate from the Rule 12(b) standard of the dismissal being without prejudice, we respectfully request Your Honor include language in any Order that is issued expressly providing the DeLoaches leave to file an Amended Complaint. See *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 881 (2006) ("When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice."). See Letter dated June 17, 2013, attached and incorporated by reference as **Exhibit 7**.

- a. Rule 12(f), SCRCP, provides that upon proper motion "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." When reviewing a motion to strike, the trial court must view the pleading under attack in the light most favorable to the pleader. See *Clark v. Milam*, 152 F.R.D. 66, 71 (S.D. W. Va. 1993). The allegations in the pleading should not be struck unless the allegations' insufficiency is clearly apparent, it does not present relevant questions of law or fact, and its retention is prejudicial to the moving party. See *id.* at 70; see also *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986), *rev'd on other grounds*, 505 U.S. 504 (1992); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *2 (W.D. Va. June 24, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009).

- b. Rule 12(f) motions to strike are generally disfavored, and courts frequently characterize them as “time wasters” that potentially serve only to delay a proceeding. See *Greenheck—Fan—Corp.—v.—Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) (“[A] motion to strike pleadings or affirmative defenses is generally disfavored because it consumes scarce judicial resources, and potentially serve[s] to delay . . .” (citation omitted) (internal quotation marks omitted)); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *1 (S.D. Fla. May 29, 2008) (listing many decisions to so describe). Moreover, a motion to strike is a drastic remedy and should not be used frequently, in part because of the difficulty of deciding cases without a factual record, (see *Brown & Williamson Tobacco Corp.*, 201 F.2d 819, 822 (6th Cir. 1953) (“Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice.” (citation omitted)); *Knit With v. Knitting Fever, Inc.*, Civil Action Nos. 08-4221, 08-4775, 2009 WL 973492, at *6 (E.D. Pa. Apr. 8, 2009)), as well as the strong policy favoring resolution on the merits.
- c. Accordingly, a plaintiff whose claims have been stricken is normally granted leave to amend. *Dockside Ass’n v. Detyens, Simmons*, 297 S.C 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1984). It was legal error for the Court to not allow

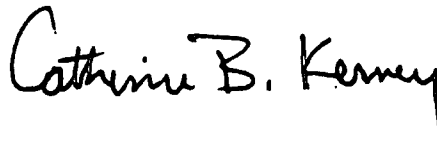
Plaintiffs to amend their Verified Complaint.

CONCLUSION

Based on the foregoing arguments and exhibits, and the allegations in the Complaint taken as true, the Orders should be altered or amend to find that Defendants' motions to dismiss should be denied.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Lawyers for Plaintiffs, William E. DeLoache, III
and Allison H. DeLoache

Beaufort, South Carolina

November 18, 2013

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2011 CP-40-07432

EXHIBIT

1

William E. DeLoache, III and Allison H. DeLoache

William Dixon Robertson, III; W. Jefferson Leath, Jr.;
Michael S. Seekings; Leath, Bouch & Crawford, LLP;
Francis E. Grimbail; Mullen Wylie, LLO formerly
Mullen, Wylie & Seekings, LLC; William M. Bowen;
William M. Bowen, PA; and John D. Kassel.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Amy L.B. Hill

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: **This matter is dismissed as to Defendant John D. Kassel and a formal order will follow.**

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

SCRPC Form 4C (03/2013)

RECEIVED NOV 07 2013

SCANNED

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of Nov, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

SEE ATTACHED LIST

SEE ATTACHED LIST

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON
PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

SCRCP Form 4C (03/2013)

CONTACT SHEET

Re: William E. DeLoache, III and Allison H. DeLoache vs. William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath Bouch & Crawford, LLP; George E. Mullen; Robert L. Wylie; Francis E. Grimbail; Mullen Wylie, LLC formerly Mullen Wylie & Seekings, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel
Case No.: 2011-CP-40-07432
SGSL File No.: 6348/1500
MLM Claim No.: 09-803

Plaintiffs' Attorney:

Thomas A. Pendarvis, Esquire
Pendarvis Law Offices, P.C.
500 Carteret Street, Suite A
Beaufort, South Carolina 29902-5066
Telephone: (843) 524-9500
Facsimile: (843) 524-9501
Email: Thomas@PendarvisLaw.com

Attorney for Defendants W. Jefferson Leath, Jr.; Michael S. Seekings; and Leath Bouch & Crawford, LLP:

Kent T. Stair, Esquire
William P. Jones, Esquire
Carlock Copeland Semler & Stair, LLP
191 Peachtree Street, Suite 3600
Atlanta, Georgia 30303
Telephone: (404) 522-8220
Stair Direct: (404) 221-2244
Jones Direct: (404) 221-2232
Facsimile: (404) 222-9482
Email: kstair@carlockcopeland.com
wjones@carlockcopeland.com

Tyler P. Winton, Esquire
Carlock Copeland Semler & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
Telephone: (843) 727-0307
Direct: (843) 266-8237
Facsimile: (843) 727-2995
Email: twinton@carlockcopeland.com

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	IN THE FIFTH JUDICIAL CIRCUIT
	)	
William E. DeLoache, III and	)	Civil Action No.: 2011-CP-40-07432
Allison H. DeLoache,	)	
	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
William Dixon Robertson, III; W.	)	ORDER GRANTING DEFENDANT JOHN
Jefferson Leath, Jr.; Michael S.	)	D. KASSEL'S MOTION TO DISMISS
Seekings; Leath, Bouch & Crawford,	)	
LLP; Francis E. Grimball; Mullen	)	
Wylie, LLC; formerly Mullen, Wylie &	)	
Seekings, LLC; William M. Bowen, PA;	)	
and John D. Kassel,	)	
	)	
Defendants.	)	

**ORDER GRANTING DEFENDANT JOHN
D. KASSEL'S MOTION TO DISMISS**

RICHLAND COUNTY
FILED
2013 NOV -5 PM 3:26
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter is before the Court on Defendant John D. Kassel's ("Kassel") Motion to Dismiss filed on December 15, 2011 and Kassel's Motion to Stay Discovery filed on May 16, 2012. This Court held a hearing on Kassel's two motions as well as motions to dismiss brought by other Defendants on June 6, 2012.

At the outset of the hearing, attorneys for both Plaintiffs and Kassel informed the Court that they had reached an agreement on the cause of action for Breach of Fiduciary Duty. Counsel informed the Court that Plaintiffs had agreed that they would not assert a Breach of Fiduciary Duty cause of action against Kassel and thus there was no need for this Court to hear the arguments for the dismissal of Kassel from this cause of action. The only remaining causes of action directed at Kassel are Plaintiffs' Sixth Cause of Action for Breach of the Duty of Confidentiality and the Seventh Cause of Action for Injunctive Relief Against All Defendants. This Court heard arguments from both counsel for Kassel and Plaintiffs regarding these two causes of action.

RECEIVED NOV 07 2013

SCANNED 277

In addition, Defendant Kassel filed a Motion to Stay Discovery served on Kassel by Plaintiffs. Counsel for Plaintiffs and Defendant Kassel reached an agreement that Kassel would not be required to respond to discovery until after Defendant Kassel's Motion to Dismiss was ruled upon. As this Court, for reasons set forth below, has determined to grant Defendant Kassel's Motion to Dismiss, the Motion to Stay Discovery is now moot.

After considering the arguments set forth by both Plaintiffs and Kassel in their respective legal memoranda, the Complaint, the applicable case law and applicable statutes, this Court finds that each of Plaintiffs' causes of action against Defendant Kassel fail as a matter of law. Accordingly, as more fully set forth below, the Court grants Defendant Kassel's Motion to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

STANDARD OF REVIEW

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRPC must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 361 S.C. 463, 469, 645 S.E.2d 245, 247 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "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." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009) (citing *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)).

Applying these principles to the present cases, the Court finds that the Complaint does not state valid claims for relief against Defendant Kassel, and therefore the Causes of Action against Defendant Kassel should be dismissed.

FACTS AS ALLEGED IN THE COMPLAINT

Plaintiffs allege that on or around July 2002 they contacted Defendant Kassel with regard to possibly retaining him as their lawyer to pursue claims related to stucco installation at their residence. Compl. ¶ 14. Plaintiffs communicated in confidence with Defendant Kassel regarding the merits of participating in a Tennessee class action involving stucco manufactured by Dryvit Systems. Compl. ¶¶ 14-15. Plaintiffs, after receiving Defendant Kassel's opinion and advice, retrieved their materials from Defendant Kassel and did not retain Kassel to represent them. Compl. ¶¶ 16-17. Plaintiffs allege they never authorized Defendant Kassel to engage or associate any other lawyer or to reveal to any other person their privileged communications or information about their potential case. Compl. ¶¶ 19-23.

Defendants William Dixon Robertson, III, W. Jefferson Leath, Jr., and Michael S. Seekings (collectively "Defendant Class Action Attorneys") are attorneys who appeared on behalf of purported Objector-Plaintiffs, the Plaintiffs, at a Fairness Hearing in the Tennessee stucco settlement. Compl. ¶¶ 36-38. As a result of representing Plaintiffs, Defendant Class Action Attorneys were able to make arguments objecting to the proposed settlement. Compl. ¶ 40. As a result of appearing in the Tennessee class action, Defendant Class Action attorneys received \$600,000 as attorneys fees as a portion of the amount approved to be paid to the Tennessee class counsel. Compl. ¶¶ 42-44. Plaintiffs have not alleged in their Complaint that Defendant Kassel participated in anyway in the Tennessee class action or that Kassel received any of the \$600,000 distributed to the Defendant Class Action Attorneys.

In late January or early February 2009, Plaintiffs were contacted by attorneys informing them that the Defendant Class Action Attorneys had appeared on their behalf in the Tennessee class action. Compl. ¶ 25-26. Plaintiffs allege that the Defendant Class Action Attorneys appeared and wrongfully used Plaintiffs' surname without Plaintiffs' authorization and without

ever consulting with Plaintiffs. Compl. ¶¶ 45-49. This is the basis of Plaintiffs' claims against Defendant Class Action Attorneys.

Plaintiffs claim that Defendant Kassel provided Defendant Robertson, one of the Defendant Class Action Attorneys with Plaintiffs' confidential information that Kassel obtained during his consultation with them and thus Kassel is liable for breach of the duty of confidentiality. Compl. ¶¶114-118. Plaintiffs have also alleged causes of action against Defendant Kassel for breach of fiduciary duty and injunction. Compl. ¶¶ 97-113 and ¶¶119-120.

A. FAILURE TO FILE AN EXPERT AFFIDAVIT IS FATAL TO PLAINTIFFS' COMPLAINT

Plaintiffs' entire Complaint as it relates to Defendant Kassel must be dismissed for failure by Plaintiffs to attach an expert affidavit to their Complaint as required by S.C. Code §15-36-100. Plaintiffs' claims against Defendant Kassel, namely the breach of the duty of confidentiality, arise by virtue of Kassel's position as an attorney with whom Plaintiffs consulted regarding legal concerns. But for the fact that Defendant Kassel is an attorney, there would be no duty of confidentiality. "...[P]laintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis of each claim based on the available evidence at the time of the filing of the affidavit." S.C. Code § 15-36-100(B). Section 15-36-100 lists professions that require an expert affidavit and attorneys are a part of this list. If a plaintiff fails to file the requisite expert affidavit, the complaint is subject to dismissal for failure to state a claim. S.C. Code § 15-36-100(C).

Plaintiffs first claim that because they did not formally retain Defendant Kassel, there is no legal malpractice claim and thus no need to satisfy the affidavit requirements of § 15-36-100. This claim is without merit. Either, Defendant Kassel was acting in his role as an attorney and therefore there is an alleged duty of confidentiality or Defendant Kassel has no duty of

confidentiality owed to Plaintiffs, in which case Plaintiffs have no claim against Defendant Kassel. A lay person has no duty of confidentiality owed to another. The duty only arises in the context of an attorney/client relationship. To assert a breach of the duty of confidentiality, which is essentially a legal malpractice action, Plaintiffs will necessarily be required to present expert testimony as the duty of confidentiality is not a common knowledge duty but rather one particular to the attorney/client relationship.

Plaintiffs argue that because they have alleged intentional torts rather than negligence, their claims are not governed by §15-36-100 and thus there is no requirement that Plaintiffs file an expert affidavit. This argument is simply a ruse to get around the wording in the statute. First, there are no allegations that Defendant Kassel committed an intentional tort and Plaintiffs have not alleged any intentional torts. In his book *The South Carolina Law of Torts*, Professors Robert Felix and F. Patrick Hubbard devote an entire chapter to intentional torts recognized in South Carolina. See F. Patrick Hubbard & Robert L. Felix, *South Carolina Law of Torts* (4th ed. 2011) at 437-511. A breach of the duty of confidentiality is not included in this chapter, which includes torts such as battery, assault, trespass, and intentional infliction of emotional distress. Rather, in another chapter devoted to negligence and similar breaches of duty, the authors describe the spectrum of negligence which involves at one end strict liability where the duty arises from the occurrence of an injury from a particular risk to the other end of the spectrum involving intentional torts. *Id.* at 70-71. “In between are varying degrees of “faulty” conduct, including not only negligence but also other types of misconduct like malice, gross negligence, recklessness, willfulness, wantonness, lack of fairness and good faith and breach of duty of high or utmost care.” *Id.* at 70-71. Further, Hubbard defines “recklessness” (a specific description used against Defendant Kassel in the complaint) as “conduct where the actor is in fact consciously aware that he is acting negligently.” *Id.* at 72. . While Plaintiffs have alleged that

Defendant Kassel acted in a “highly reckless, wanton and irresponsible” manner, Plaintiffs have alleged no specific facts to support such an allegation.

Plaintiffs’ claims against Defendant Kassel all arise from a claim that Kassel breached his duty of confidentiality, which is in essence a claim of legal malpractice since there is no duty of confidentiality that arises except in the context of an attorney/client relationship or potential relationship. “Failure to exercise due care, not intent is the critical element in negligence.” *Snakenberg v. Hartford Casualty Insurance Company, Inc.*, 299 S.C. 164, 173 (Ct.App. 1989). Simply because an action is intentional does not make the tort an intentional tort. In its most narrow sense, “intent” denotes an actor’s specific desire to cause the consequences of his act. See *Restatement (Second) of Torts* §8A (1965). “Intent” is a state of mind about the consequences of the act. *Peay v. US Silica*, 313 S.C. 91 (1993). See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts*, § 8 (5th ed.1984 & Suppl. 1988). There is no allegation or indication that Defendant Kassel could have foreseen or in anyway intended the alleged consequences of his alleged action – namely that attorneys would allegedly travel to another state and represent Plaintiffs without Plaintiffs’ permission in a class action. As a result, there is no intent alleged on Defendant Kassel’s part. Plaintiffs have alleged a breach of the standard of care in that they have alleged that Defendant Kassel breached his duty of confidentiality. A defendants’ failure to exercise due care falls within a negligence cause of action. *Id.* Legal malpractice is the cause of action contemplated by §15-36-100 and the Plaintiffs’ claim against Defendant Kassel is in essence a legal malpractice claim. As a result, Plaintiffs’ claims should be dismissed for failure to submit an expert affidavit.

In addition, Plaintiffs claim that an expert affidavit is not required because the actions complained of occurred prior to the enactment of §15-36-100. However, Plaintiffs’ position ignores the language of § 15-36-100, which came into effect on July 1, 2005 and applies to all

claims *arising* after that date. See 2005 Act. No. 32, §4, eff July 1, 2005. South Carolina courts have held that a claim arises at the time a plaintiff's right to sue comes into existence. *Murphy v. Owens-Corning Fiberglas Corp.*, 356 S.C. 592, 597-598 (2003); citing *Stephens v. Draffin*, 327 S.C. 1 (1997). As will be discussed in further detail in this Order, Plaintiffs at this time do not have a right to sue as they have suffered no damages, which are a necessary element to any tort cause of action. Further, according to the allegations of the Complaint, Plaintiffs did not have notice of the alleged breach until sometime after 2005. In order for the claim to have arisen, Plaintiffs must have had notice of the claim. If they had notice prior to 2005, Plaintiffs likely have a statute of limitations problem. Even though the alleged breach of confidentiality by Defendant Kassel occurred prior to 2005, Plaintiffs' claims have not arisen at this time and thus in order to file a legal malpractice claim at some point in the future, Plaintiffs will necessarily have to comply with § 15-36-100.

Plaintiffs' failure to file the expert affidavit as required is fatal to Plaintiffs' claims against Defendant Kassel and Plaintiffs' Complaint as it relates to Kassel is dismissed.

B. PLAINTIFFS NEVER RETAINED KASSEL AND THUS KASSEL DOES NOT OWE PLAINTIFFS ANY DUTIES AS ALLEGED IN THE COMPLAINT

Plaintiffs allege in the Complaint that they never retained Defendant Kassel to represent them. If this is the case, Defendant Kassel did not owe Plaintiffs any duty of confidentiality or any other fiduciary duty. The rule regarding duties to potential clients is SCRAP Rule 407, Rule 1.18, which was not effective until October 1, 2005. The allegations against Defendant Kassel regarding his duties owed to Plaintiffs took place according to the Complaint in 2002, three years prior to the passage of Rule 1.18. No duties were owed to Plaintiffs as potential clients and thus the claims against Defendant Kassel are dismissed.

C. PLAINTIFFS' CLAIMS AGAINST DEFENDANT KASSEL FAIL BECAUSE PLAINTIFFS CANNOT ESTABLISH PROXIMATE CAUSE

Even accepting the allegations as asserted by Plaintiffs against Defendant Kassel in the light most favorable to Plaintiffs, it is not foreseeable that Plaintiffs would have suffered any harm as a proximate cause of Kassel's alleged actions. The crux of Plaintiffs' claims against Defendant Kassel is that he provided confidential information to Defendant Robertson about Plaintiffs' potential stucco claims and that Defendant Robertson and the other Defendant Class Action Attorneys used this information to proceed in the Tennessee class action as counsel for Plaintiffs without Plaintiffs' authorization.¹ Even if Defendant Kassel violated some duty of confidentiality and provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, it is not foreseeable that these attorneys would proceed in Tennessee without Plaintiffs' permission and authorization.

"The touchstone of proximate cause in South Carolina is foreseeability." *Mellen v. Lane*, 377 S.C. 261, 279 (Ct. App. 2009); citing *Young v. Tide Craft*, 270 S.C. 453, 462 (1978). The defendant may be held liable for anything which would be the natural and probable consequence of the defendant's actions. *Mellen*, 377 S.C. at 279; citing *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 72 (1990). "A defendant cannot be held liable for unpredictable or unexpected consequences." *Mellen*, 377 S.C. at 280; citing *Young*, 270 S.C. at 463.

The Supreme Court held in *Hensley v. Heavrin*, that a doctor was not liable for the battery committed by a patient's husband after the doctor incorrectly diagnosed syphilis. 277 S.C. 86, 87-88 (1990). Similarly in this case, even if Defendant Kassel provided Plaintiffs' confidential information to the Defendant Class Action Attorneys, he could not have foreseen that they would use the information without Plaintiffs' consent or authorization. Plaintiffs' Complaint does not include Defendant Kassel in the majority of the causes of action because there are no allegations that Kassel participated in the Tennessee representation, profited from it,

¹ The Complaint is not specific as to what confidential information was provided.

or even knew about it. Plaintiffs only complaint against Defendant Kassel is that he may have passed on confidential information (the exact terms of which is not clear from the Complaint) to another lawyer. This alone is not enough to meet the standards for foreseeability and proximate cause. For this reason, all claims against Defendant Kassel should be dismissed.

D. PLAINTIFFS HAVE FAILED TO ALLEGE ANY SPECIFIC DAMAGES

In order to succeed in any tort claim and specifically in a legal malpractice claim, Plaintiffs must plead the element of damages with some degree of specificity. In the Complaint, Plaintiffs have only alleged damages in such general terms as to state they have suffered damages in an amount to be proven at trial. Plaintiffs' claims all rest on the allegations that Defendant Class Action Attorneys represented Plaintiffs without Plaintiffs' authorization as objectors in the Tennessee class action and therefore received attorneys' fees for their efforts. Again, there are no allegations that Defendant Kassel was in anyway connected to the Tennessee class action or received any fees from that case. Regardless, there is no question but that Plaintiffs would not have received attorneys' fees from the Tennessee action as they are not attorneys.

Further, Plaintiffs allege that they did not have Dryvit on their house and could not have participated in the Tennessee class action in any event. Thus, none of the Defendants, Kassel included, could have done anything that hindered Plaintiffs from collecting any sum from Dryvit as they, by their own admissions, were not entitled to collect damages from Dryvit.

In Plaintiff's Memorandum in Opposition to the Motion to Dismiss, Plaintiffs assert that they suffered a presumption of nominal damages associated with the claims they have regarding the alleged misuse of their individual and collective identities. Thus, Plaintiffs claim that by "filing legal documents with the DeLoache surname, the Defendants have converted the DeLoaches' intangible property rights." See Plaintiffs Memorandum in Opposition p. 12.

Regardless of whether Plaintiffs are correct in their legal analysis of damages resulting from the misappropriation of their legal identity, Plaintiffs have not asserted any claims against Defendant Kassel regarding misappropriation of their identity. Therefore even if their claims of damages related to this cause of action are accurate, Plaintiffs have still failed to show that they suffered any damages as a result of any claims against Defendant Kassel.

In addition, Plaintiffs claim that they have suffered damages because they are now concerned that they are at risk for claims of contempt of court or fraud on the court. See Plaintiffs Memorandum in Opposition p. 13. This assertion by the Plaintiffs does not satisfy the required element of damages. Speculative future damages do not qualify as damages. While proof with mathematical certainty of the amount of loss or damage is not required, in order for damages to be recoverable, the evidence must show the amount of damages with reasonable certainty or accuracy and the existence, causation and amount of damages cannot be left to conjecture, guess or speculation. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13 (1981). There are no allegations that anyone is currently seeking (or has sought in the past) to hold Plaintiffs in contempt of court or fraud on the court much less that Plaintiffs have actually been held in contempt. Considering that Plaintiffs were apparently contacted regarding their involvement in the Tennessee stucco class action case in early 2009, it seems unlikely that anyone would try to hold Plaintiffs in contempt in the Tennessee class action or charge them with fraud on the court approximately three and a half years later. Plaintiffs' claims that a "risk" that Plaintiffs may be held in contempt of court or for fraud on the court are speculative at best and do not satisfy the required element of damages.

Plaintiffs also claim that they have suffered damages in that they have had to spend time and resources in "depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality...." See Plaintiffs' Memorandum in Opposition p. 13. There

are no allegations that Plaintiffs have done anything more than prepare an affidavit and give a deposition in the underlying case. Other than a witness fee, lay witnesses are generally not paid for the time they spend in a deposition. Further, there was no requirement that Plaintiffs prepare an affidavit. Plaintiffs did so of their own free will and to allege that they should be paid for their participation in the underlying case does not qualify as damages suffered by Plaintiffs.

Plaintiffs have not alleged with any specificity and cannot show that they suffered damages based on the allegations asserted in the Complaint. A client must have suffered damages as a result of a lawyer's negligence in order to maintain an action against a lawyer. *Hall v. Fedor*, 349 S.C. 169 (Ct.App. 2002); *Ellis v. Davidson*, 358 S. C. 509 (Ct.App. 2004). Because Plaintiffs cannot show that they suffered damages based on the allegations of the Complaint, their claims should be dismissed.

E. PLAINTIFFS LACK STANDING BECAUSE THEY HAVE NOT SUFFERED AN INJURY-IN-FACT

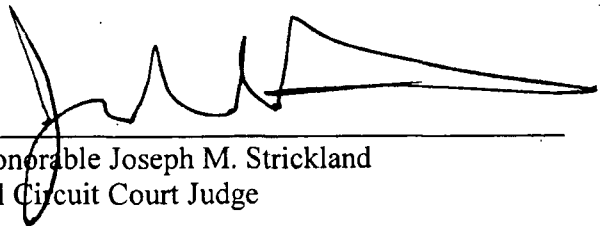
In order to establish standing, a party must meet three elements: 1) the plaintiff must have suffered an injury in fact, 2) the injury and the conduct complained of must be causally connected; and 3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *Commander Health Cre Facilities, Inc. v. South Carolina Department of Health and Environmental Control*, 370 S.C. 296. 301 (Ct.App. 2006); citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.ed.2d 351 (1992). The party seeking to establish standing carries the burden of demonstrating each of the three elements. *Id.*

As discussed in the previous section, Plaintiffs cannot demonstrate based on the allegations of the Complaint that they suffered any injury and thus cannot establish standing. A party must suffer an actually injury in fact and not a future concern in order to satisfy the standing requirements. *Beaufort Realty Co. v. South Carolina Coastal Conservation League*,

346 S.C. 298, 589 (Ct.App. 2001). In this case, Plaintiffs have failed to allege any injury in fact and therefore their case must be dismissed for lack of standing.

WHEREFORE, for the reasons set forth above, the Court finds that Plaintiffs have failed to file an expert affidavit as required by S.C. Code § 15-36-100 and have failed to allege facts sufficient to assert claims for relief against Defendant Kassel. For these reasons, Plaintiffs' Complaint should be dismissed as to Defendant Kassel.

AND IT IS SO ORDERED.



The Honorable Joseph M. Strickland
Special Circuit Court Judge

Oct. 24, ~~2012~~ 2013
Richland County, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2011-CP-40-07432

William E. DeLoache, III and Allison H. DeLoache,

William Dixon Robertson, III; W. Jefferson
Leath, Jr.; Michael S. Seekings; Leath, Bouch
& Crawford, LLP; Francis E. Grimball;
Mullen Wylie, LLC formerly Mullen, Wylie &
Seekings, LLC; William M. Bowen; William
M. Bowen, PA; and John D. Kassel,

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Joshua D. Shaw
Turner Padgett Graham & Laney P.A.
P.O. Box 1473
Columbia, South Carolina 29202
Telephone: (803) 254-4310

Attorney for : ☐ Plaintiff
or
☐ Self-Represented Plaintiff

RICHLAND COUNTY
FILED
2011 NOV -5 PM 3:29
JENNIFER N. McBRIDE
C.P. & G.S.

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☒ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

clerk. Note: Title abstractors and researchers should refer to the

 Circuit Court Judge

Date _____

Supplementary materials: <http://www.nature.com/nature>

le, 20 and a copy m
day of Nov 20 13

ATTORNEY(S) FOR THE DEFENDANT(S)

ERK OF COURT
Janette W. Bride

[illegible][illegible]

Mullen Wylie, LLC f/k/a Mullen Wylie & Seekings. James L. Bruner of Bruner Powell Wall & Mullins, LLC appeared for Defendants William M. Bowen and William M. Bowen, PA. Amy B. Hill of Sowell Gray Stepp & Laffitte, LLC appeared for Defendant John D. Kassel.

After giving due consideration to the arguments and authorities presented at the hearing and in the motions and legal memoranda submitted by the parties, the Court finds that each of Plaintiffs' causes of action against William Dixon Robertson III, Michael S. Seekings, W. Jefferson Leath, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen and William M. Bowen, PA (collectively "Moving Defendants") fail as a matter of law based on the allegations of the Complaint. Accordingly, as more fully set forth below, the Court grants Moving Defendants' Motions to Dismiss and dismisses the Plaintiffs' Complaint in its entirety.

PROCEDURAL HISTORY

Plaintiffs filed their Complaint on November 3, 2011, alleging six causes of action against Moving Defendants: (1) Wrongful Appropriation of Personality; (2) Conversion; (3) Civil Conspiracy; (4) Constructive Trust; (5) Breach of Fiduciary Duty; and (6) Injunctive Relief.

Defendant Robertson timely answered the Complaint, asserting numerous defenses, including failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6), SCRCF, and failure to file an Affidavit of a duly qualified expert contemporaneous with Plaintiffs' Complaint, as required by S.C. Code Ann. §15-36-100. Robertson thereafter filed a motion to dismiss and/or motion for judgment on the pleadings on the same grounds as those stated in his Answer. Defendants Leath, Seekings and the Defendant sued as Leath Bouch &

Seekings, LLP likewise timely filed a Motion to Dismiss and/or Motion to Strike Pleadings in which they seek dismissal on similar grounds and, or alternatively, seek to strike certain pleadings within the Complaint.¹ Defendants Francis E. Grimbball and Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, and William M. Bowen and William M. Bowen, PA also timely filed Motions to Dismiss on similar grounds.

STANDARD OF REVIEW

A trial court may properly grant a motion to dismiss for failure to state facts sufficient to constitute a cause of action when the facts alleged in the complaint, along with all reasonable inferences deducible therefrom, do not entitle the plaintiff to recovery on any theory of the case. McCormick v. England, 328 S.C. 627, 632-33, 494 S.E.2d 431, 433 (Ct. App. 1997). When deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCp, the Court may only consider the allegations set forth on the face of the complaint. Dye v. Gainey, 320 S.C. 65, 67, 463 S.E.2d 97, 98 (Ct. App. 1995). “The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief.” McCormick, 328 S.C. at 633, 494 S.E.2d at 433-34.

ALLEGATIONS OF COMPLAINT

This action, brought against several attorneys (hereinafter “Defendant Attorneys”) arises out of Plaintiffs’ allegation that the Defendant Attorneys obtained a monetary benefit by claiming that they represented the Plaintiffs as objectors in a nationwide class action in the early 2000s. The complaint alleges that the DeLoaches approached Defendant Kassel in July of 2002 to possibly retain Mr. Kassel in connection with problems they were experiencing with the

¹ The Motion of Defendants Michael S. Seekings, W. Jefferson Leath, and the Defendant sued as Leath Bouch & Crawford, LLP, included a Motion to Dismiss for lack of venue. The Court recognizes that the venue motion essentially reserves the defense of venue under any circumstance where venue relies solely on the residence of those moving Defendants. Any consideration of that Motion is premature at this time, and the Court reserves judgment on that Motion if and until the circumstances of the Motion become ripe.

exterior cladding on their home, which was a type of synthetic stucco. (Compl. ¶ 14.)

According to the Complaint, one of the issues discussed was the possibility of the Plaintiffs participating in a nationwide class action lawsuit, *Posey v. Dryvit*, brought on behalf of owners of residential homes clad with a synthetic stucco product called “Dryvit Exterior Insulating and Finishing System”, or EIFS.² (*Id.*) The Complaint alleges that *Posey* was in the process of being settled during this time and that Mr. Kassel advised the DeLoaches that in his opinion it was not worth participating in the *Posey* class settlement. (Compl. ¶ 16.) The Plaintiffs allege that it was at that point that they retrieved their materials from Mr. Kassel and did not retain Mr. Kassel to represent them. (Compl. ¶ 17.)

According to the Complaint, the Defendant Attorneys (and their respective law firms), excluding Defendant Kassel, formed a joint venture to challenge the *Posey* class settlement. (Compl. ¶ 33.) The DeLoaches allege that in pursuit of their joint venture, certain of the Defendant Attorneys, without the permission of the DeLoaches, filed papers and appeared in *Posey* on behalf of the DeLoaches. (Compl. ¶ 34-36.) According to the Complaint, the purpose of the Defendant Attorneys’ appearance in *Posey* on behalf of the DeLoaches was to object to the terms of the proposed class settlement. (Compl. ¶ 36-39.) The Complaint further alleges that as a result of their objecting to the proposed settlement on behalf of the DeLoaches, the Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was paid to them by *Posey* class counsel. (Compl. ¶ 41-44.)

Based on the foregoing factual allegations, Plaintiffs seek recovery of “all funds Defendants’ obtained using the DeLoaches’ surname in *Posey*”, (Compl. ¶ 70), unspecified

² It is later alleged in the Complaint that “recent inspections and testing revealed no evidence that the DeLoaches’ home was ever clad with Dryvit EIFS”. (Compl. ¶ 37.) There is no allegation that any of the parties knew in 2002 that the Plaintiffs’ home was not clad with Dryvit EIFS.

actual, consequential, special, incidental, and punitive damages, as well as prejudgment interest, injunctive relief, and the costs of the action. (Compl., Prayer for Relief.)

LEGAL ANALYSIS

Viewing the factual allegations of the Complaint in the light most favorable to the Plaintiffs, the Complaint fails to state any valid claim for relief. All or parts of Plaintiffs' Complaint are deficient for the following reasons: (1) Plaintiffs have not alleged an injury-in-fact and therefore lack standing to maintain their claims; (2) Plaintiffs have failed to state facts sufficient to establish a cause of action for (a) wrongful appropriation of personality, (b) conversion, (c) civil conspiracy, (d) constructive trust, (e) breach of fiduciary duty, or (f) injunctive relief; and (3) Plaintiffs failed to file an Affidavit of a duly qualified expert contemporaneous with their Complaint.

I. Standing

"A party seeking to establish standing must prove the 'irreducible constitutional minimum of standing,' which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision." Commander Health Care Facilities, Inc. v. S.C. Dep't of Health & Envtl. Control, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006) (quoting Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)). The party seeking to establish standing carries the burden of demonstrating each of the three elements. Id. (citing Sea Pines, 345 S.C. at 601, 550 S.E.2d at 291). Additionally, "An 'injury in fact' has been defined as 'an invasion of a legally protected

interest' which is 'concrete and particularized' and 'actual or imminent,' not 'conjectural or hypothetical'." Id. (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130 (1992)).

The Court finds that Plaintiffs' Complaint fails to allege that Plaintiffs have suffered an injury-in-fact. Plaintiffs' allegations of wrongdoing as to the Defendant Attorneys, excluding Defendant Kassel, are primarily that the Defendant Attorneys asserted in various contexts that they represented the Plaintiffs. In the only concrete example identified in the Complaint, Plaintiffs allege that Defendant Attorneys filed an objection to the *Posey* class settlement on their behalf and, as a result, that Defendant Attorneys were to be paid the sum of \$825,000, \$600,000 of which was actually paid to them by *Posey* class counsel. (Compl. ¶ 41-44.) While Plaintiffs allege that this conduct was improper because Defendant Attorneys did not actually represent the Plaintiffs, Plaintiffs have failed to show that they have suffered any injury as a result of the Defendant Attorneys' actions.

According to the Complaint, the alleged payment to Defendant Attorneys was from "Class Counsel in *Posey* from the funds Dryvit Systems paid to Class Counsel for attorney's fees that the *Posey* court had approved" (Compl. ¶ 42.) Payment of attorneys' fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Conversely, there does not appear to be any recognized basis for payment to an objector – as opposed to an attorney fee to the objector's attorney(s) – where the objection is made in terms common to class members. Id. Nor would it make sense for there to be any recovery by the objector for this type of objection, as he/she is, by definition, a class member who is in line to receive the benefits of any improvement to the terms of the class settlement. See id. Once the fundamentals of the

objection process are understood, it is plain that the Plaintiffs herein would not have been entitled to any monetary recovery as a result of their status as objectors to the *Posey* class action. Accordingly, their claim of entitlement to amounts paid to their attorneys lacks merit.

The above analysis and conclusion are bolstered by the fact that Plaintiffs allege that “recent inspections and testing” show that they did not even own the product that was at issue in *Posey*. (Compl. ¶ 37.) Thus, based on the allegations of the Complaint, it is apparent that Plaintiffs could never have recovered money or any other benefit in connection with *Posey*. During the hearing on Defendant Attorneys’ motions to dismiss, Plaintiffs’ counsel argued that Plaintiffs had suffered damages insofar as they were at risk for facing a claim of “fraud on the court” because Defendant Attorneys represented to the *Posey* court that Plaintiffs had Dryvit EIFS, when in fact they did not. (See also Compl. ¶ 39.) Notwithstanding the fact that Plaintiffs do not allege that any party had knowledge of this fact at the time the Defendant Attorneys appeared in *Posey*,³ the Court finds that the possibility of facing a claim for “fraud on the court” falls squarely within the category of “conjectural” or “hypothetical” injuries that are insufficient to confer standing on Plaintiffs. Finally, Plaintiffs’ allegation that they have suffered damages in the form of “time, effort, and expenses” in connection with meeting with lawyers, signing an affidavit, and giving a deposition in another case lacks merit. (See Compl. ¶ 85.) The Court is not aware of any authority, and none has been presented by Plaintiffs, holding that such activities constitute compensable damages in a civil action.

³ In fact, the allegation that “recent inspections and testing revealed” that Plaintiffs did not have Dryvit EIFS, (Compl. ¶ 39), strongly suggests that all parties believed Plaintiffs did have Dryvit EIFS when the alleged representations were made.

For the foregoing reasons, the Court finds that Plaintiffs have not suffered any injury-in-fact and therefore lack standing at this time to bring the asserted claims against Defendant Attorneys.

II. Failure to State a Claim

Even assuming that Plaintiffs could establish the irreducible constitutional minimum of standing, the facts alleged in the Complaint fail to support any of the causes of action asserted in the Complaint.

A. Wrongful Appropriation of Personality

“In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs.” Sloan v. South Carolina Dep’t of Pub. Safety, 355 S.C. 321, 325-26, 586 S.E.2d 108, 110 (2003). “Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff’s name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff’s exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity.” Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 385 S.C. 452, 458-459, 684 S.E.2d 756, 759 (2009) (quoting Sloan, 355 S.C. at 325-26, 586 S.E.2d at 110).

Plaintiffs’ claim fails as a matter of law based on the allegations of the Complaint because any monetary benefit allegedly received by the Defendant Attorneys did not result from any value associated with the “DeLoache” name. “The gist of the action is the violation of the plaintiff’s exclusive right at common law to publicize and profit from his name, likeness, and

other aspects of personal identity.” Gignilliat, 385 S.C at 458-459, 684 S.E.2d at 759. The Complaint alleges that the funds paid to Defendant Attorneys were paid by “Class Counsel in *Posey*” from the *Posey* settlement funds. (Compl. ¶ 42.) First, Plaintiffs’ Complaint fails to assert any claim by Plaintiffs that there is any inherent commercial value in the use of their names by virtue of the *Posey* action or otherwise. Further, and as noted above, payment of attorneys’ fees in connection with an objection to the terms of a class settlement is appropriate under certain circumstances. See Manual for Complex Litigation, Fourth § 21.643. Where such fees are paid, they are not paid as a result of any inherent or commercial value associated with the name of the objector(s), but rather to compensate the attorney(s) who presented the objection at the fairness hearing. There is no allegation to the contrary in the Plaintiffs’ Complaint. The Complaint fails to allege that Defendant Attorneys acted with any intent to misappropriate Plaintiffs’ “personality”, that the Defendant Attorneys received any payment as a result of any commercial value associated with the DeLoache name, or that the DeLoaches suffered any recoverable damage as a result of any alleged misappropriation of personality. Therefore, Plaintiffs’ Complaint fails to state facts sufficient to constitute a cause of action for wrongful appropriation of personality.

B. *Conversion*

Conversion is defined as “the unauthorized assumption in the exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner’s rights.” Gignilliat, 385 S.C. at 465, 684 S.E.2d at 763 (quoting Am. Credit of Sumter, Inc. v. Nationwide Mut. Ins. Co., 378 S.C. 623, 629, 663 S.E.2d 492, 495 (2008)). As explained above, the Plaintiffs have failed to allege any factual basis entitling them to the amounts allegedly paid (or to be paid) to the Defendant Attorneys as part of the *Posey* class settlement. In other words,

Plaintiffs have not established through their Complaint that they have any right of ownership over any good or personal property at issue. It follows that Defendant Attorneys cannot be liable for the “unauthorized assumption” of a right that Plaintiffs do not themselves have. To the extent Plaintiffs may mean to claim conversion of an intangible property right – the right to use their name – the Court finds that Plaintiffs have failed to allege conversion of an “intangible property right that is merged in, or identified with, some document.” Gignilliat, 385 S.C. at 465-66, 684 S.E.2d at 763. (“We are reluctant to expand the tort of conversion as it relates to intangible property and conclude that it should be limited to intangible property rights that are identified with some document.”)

C. Civil Conspiracy

“A civil conspiracy is a combination of two or more persons joining for the purpose of injuring the plaintiff and causing special damage to the plaintiff.” Lawson v. South Carolina Dep't of Corrections, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). Plaintiffs have not alleged that Defendant Attorneys joined together “for the purpose of injuring” Plaintiffs, nor have Plaintiffs alleged any conspiracy caused them “special damage”. Failure to plead these essential elements of a claim for civil conspiracy warrants dismissal of Plaintiffs’ civil conspiracy cause of action.

Additionally, dismissal of a civil conspiracy claim is proper if the civil conspiracy claim alleges the same acts for which damages are sought under other causes of action. Todd v. South Carolina Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981), rev'd on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). The acts that Plaintiffs allege as the basis of their conspiracy cause of action are the same acts that form the basis of their other causes of

action. The alleged factual basis for each of Plaintiffs' causes of action is that the Defendant Attorneys used Plaintiffs' name without their permission to object to the *Posey* class settlement. Plaintiffs' civil conspiracy cause of action merely repeats these allegations and alleges that "Defendants combined together" to perform the alleged acts. (See Compl. ¶¶ 81-83.) Because Plaintiffs have failed to allege how any "separate and independent" act in furtherance of the alleged conspiracy has caused them damages, the Plaintiffs have failed to properly plead a claim for civil conspiracy and their cause of action should be dismissed. AJG Holdings LLC v. Dunn, 392 S.C. 160, 167-68, 708 S.E.2d 218, 222-23 (Ct. App. 2011) ("To prove special damages, the [Plaintiffs] had to show that the acts in furtherance of the conspiracy were separate and independent from other wrongful acts alleged in the complaint. Special damages must be properly pled, or the claim for civil conspiracy will be dismissed.") (internal citations omitted).

D. *Constructive Trust*

First and foremost, "a claim for imposition of a constructive trust is not an independent cause of action." Hale v Finn, 388 S.C. 79, 89, 694 S.E.2d 51, 57 (Ct. App. 2010) (internal citations omitted). Instead, a constructive trust arises entirely by operation of law without reference to any actual or supposed intentions of creating a trust. SSI Medical Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990). "A constructive trust arises whenever a party has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it as where money has been paid by accident, mistake of fact, or fraud, or has been acquired through a breach of trust or the violation of a fiduciary duty." McNair v. Rainsford, 330 S.C. 332, 356, 499 S.E.2d 488, 501 (Ct. App. 1998) (quoting SSI Medical Servs., 301 S.C. at 500, 392 S.E.2d at 793-94).

As explained more thoroughly above, Plaintiffs have failed to allege they are entitled to any money or benefit which might be argued to have been conferred upon Moving Defendants. Plaintiffs further fail to plead facts that would entitle them to the money allegedly paid to Defendant Attorneys. Because Plaintiffs are not beneficially entitled to anything obtained by Defendant Attorneys, their cause of action seeking imposition of a constructive trust fails as a matter of law.

E. *Breach of Fiduciary Duty*

Plaintiffs allege in their Complaint that they “never engaged any of the Defendants as lawyers to represent the DeLoaches on any claims, including any claims related to stucco.” (Compl. ¶ 46.) Plaintiffs’ conclusory allegations concerning duties the Defendant Attorneys allegedly owed to them are contradicted by Plaintiffs’ factual allegations concerning their relationship with the Defendant Attorneys. “A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.” Pitts v. Jackson Nat’l Life Ins. Co., 352 S.C. 319, 330 S.E.2d 502, 507 (Ct. App. 2002) (quoting Island Car Wash, Inc. v. Norris, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). Accepting as true “the facts alleged in the complaint, along with all reasonable inferences deducible therefrom,” the Court finds that the Plaintiffs have affirmatively denied having “impose[d] a special confidence” in Moving Defendants and, as a result, failed to plead any facts that would give rise to a fiduciary relationship between them and the Defendant Attorneys. Plaintiffs have likewise failed to allege that Moving Defendants acted in bad faith or that Plaintiffs incurred any recoverable damage as a result. Therefore, the Court finds that

Plaintiffs failed to plead facts sufficient to constitute a cause of action for Breach of Fiduciary Duty.

Even if the Court were to find that Plaintiffs had pled facts establishing the existence of a fiduciary relationship, Plaintiffs' claim for breach of fiduciary duty would be subject to dismissal pursuant to Section 15-36-100 of the South Carolina Code. Subsection B of this section states, in pertinent part, as follows: "in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . the plaintiff must file as part of the complaint an affidavit of an expert witness 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. § 15-36-100.⁴ Although labeled as a claim for "breach of fiduciary duty" rather than "negligence", the Complaint alleges the existence and breach of numerous professional duties that allegedly derived from an attorney-client relationship between the Plaintiffs and Defendant Attorneys. (See Compl. ¶ 98-106) (repeating the phrase "Defendants, as the DeLoaches' lawyers, . . ."). Because Plaintiffs' allegations attempt to set forth "an action for damages alleging professional negligence" against attorneys, the affidavit requirement of Section 15-36-100 is triggered notwithstanding the label Plaintiffs' associate with their cause of action.⁵

Pursuant to Subsection (C)(1), "If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit

⁴ Subsection G identifies "attorneys at law" as a profession to which Section 15-36-100 applies.

⁵ This outcome is supported by the Supreme Court's recent decision in RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P., in which the Court held that a breach of fiduciary duty claim was "duplicative" of a legal malpractice claim where it was based on the same underlying facts. 399 S.C. 322, 336-337, 732 S.E.2d 166, 173 (2012) ("Although RFT now argues a breach of fiduciary claim *could* be distinguishable from legal malpractice, RFT does not set forth any specific facts that demonstrate its breach of fiduciary duty claim *is* distinguishable because it arises out of a duty *other than* one created by the attorney-client relationship or because it is based on different material facts. Consequently, we hold the breach of fiduciary duty claim is duplicative.") (emphasis in original).

should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim.” S.C. Code Ann. §15-36-100(C)(1). Based on the foregoing, even if the Court disregarded Plaintiffs’ factual allegation that they did not engage Defendants to represent them, the Court finds that Plaintiffs’ claim for breach of fiduciary duty must be accompanied by an expert affidavit pursuant to Section 15-36-100 of the South Carolina Code. Finding no record of an expert affidavit contemporaneously filed with the Complaint, Plaintiffs’ claim for breach of fiduciary duty is properly dismissed.

F. Injunctive Relief

As a prerequisite for issuing an injunction, the moving party must show that without such relief “it will suffer irreparable harm; that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” Poynter Invs. v. Century Builders of Piedmont, 387 S.C. 583, 586-87 694 S.E.2d 15, 17 (2010). As set out more thoroughly above, Plaintiffs’ Complaint fails to allege any special harm of any nature, including “irreparable” harm. Likewise, Plaintiffs have failed to allege any likelihood they will be successful on the merits of their claim or otherwise allege they have no other remedy available to them. Accordingly, the Court finds that Plaintiffs have failed to state a claim for injunctive relief.

III. Motion to Strike Pleadings

Also before the Court are Defendants’ Motions to Strike and/or Dismiss Plaintiffs’ “Summary of the Case”. SCRCR Rule 12(f) requires, “Upon motion pointing out the defects complained of, ... at any time the court may order stricken from any pleading any ... redundant, immaterial, impertinent or scandalous matter.” The Rules of Civil Procedure also dictate the

“General Rules of Pleading”, stating, “A pleading which sets forth a cause of action, ... shall contain (1) a short and plain statement of the grounds including facts and statutes upon which the court’s jurisdiction depends,... (2) a short and plain statement of the facts showing that the pleader is entitled to relief, and (3) a prayer or demand for judgment for the relief to which he deems himself entitled.” Rule 8(a), SCRPC. The Rules further require, “All averments of the facts of a cause of action... shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances;....” Rule 10(b), SCRPC.

The Defendants have objected to Plaintiffs’ inclusion of four paragraphs in their Complaint under the subtitle “Summary of the Case”, those paragraphs appearing on pages 1 through 3 of Plaintiffs’ Complaint. Defendants argue those paragraphs are violative of the Rules of Civil Procedure, and have further asked that the paragraphs be stricken as “redundant, immaterial, impertinent or scandalous.” SCRPC Rule 12(f). After review of the paragraphs, the Court finds that the paragraphs under Plaintiffs’ “Summary of the Case” do not comply with the Rules of Civil Procedure, do not state a claim upon which relief might be granted, and are unnecessary to the Complaint. Therefore, Plaintiffs’ paragraphs under the sub-title “Statement of the Case” are stricken from the pleading.

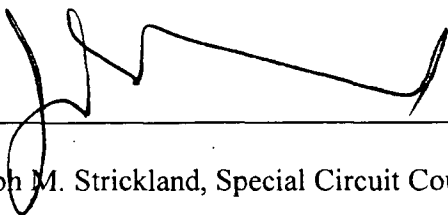
CONCLUSION

For the reasons stated above, the Court finds that each of Plaintiffs’ causes of action against William Dixon Robertson III, W. Jefferson Leath, Jr., Michael S. Seekings, the Defendant sued as Leath Bouch & Crawford, LLP, Francis E. Grimball, Mullen Wylie, LLC f/k/a Mullen, Wylie & Seekings, LLC, William M. Bowen, and William M. Bowen, PA fail as a

matter of law based on the allegations of the Complaint. Further, the Court finds that Plaintiffs' paragraphs under the sub-title "Summary of the Case" are not proper under the Rules of Civil Procedure and shall be stricken from the pleading. All remaining allegations in Plaintiffs' Complaint are dismissed in their entirety pursuant to Moving Defendants' Motions.

AND IT IS SO ORDERED.

This 24th day of Oct., 2013



Joseph M. Strickland, Special Circuit Court Judge

PENDARVIS LAW OFFICES, PC



July 6, 2012

EXHIBIT

3

Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER IN EQUITY
PO Box 192
Columbia SC 29202

Re: DeLoache v. Robertson, et al
Case No. 2011-CP-40-7432

Dear Judge Strickland:

As requested during the June 6, 2012 hearing on Defendants' Motions to Dismiss and Strike Pleadings, enclosed please find two proposed ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS AND MOTIONS TO STRIKE PLEADINGS (a short and long version). Plaintiffs believe that these motions should be denied and would be happy with a Form 4 Order being issued. In the alternative, we have enclosed the above two proposed Orders for your consideration.

It was an honor and a pleasure to have the opportunity to appear before Your Honor again.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis

TAP/jac
Enclosures

cc: William & Allison DeLoache (via e-mail w/enclosures)
James E. Lady, J.D. (w/enclosures)
Kent T. Stair, J.D. (w/enclosures)
James L. Bruner, J.D. (w/enclosures)
Amy L.B. Hill, J.D. (w/enclosures)
Charles E. Hill, J.D. / Joshua D. Shaw, J.D. (w/enclosures)

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**ORDER DENYING DEFENDANTS'
MOTIONS TO DISMISS AND
MOTIONS TO STRIKE PLEADINGS**

THIS MATTER IS BEFORE THE COURT for a hearing on June 6, 2012, before the undersigned Special Circuit Judge for the Fifth Judicial Circuit in the Court of Common Pleas for Richland County, on Defendants' Motions to Dismiss and Defendants' Motions to Strike Pleadings.¹ Counsel of record for all parties were in attendance. Having considered the motions, memoranda submitted in support and in opposition to the motions, arguments of counsel, and considering the allegations contained in the VERIFIED COMPLAINT

¹ The motions resolved by this Order are as follows: (1) Defendant John D. Kassel's Motion to Dismiss, dated December 15, 2011; (2) Defendants Jefferson Leath, Jr.; Michael S. Seekings; and LEATH, BOUCH & CRAWFORD, LLP's Motion to Dismiss and/or Motion to Strike Pleadings, dated January 23, 2012; (3) Defendants William M. Bowen and WILLIAM M. BOWEN, P.A.'s Motion to Dismiss, dated January 24, 2012; (4) Defendant William Dixon Robertson III's Motion to Dismiss, dated February 16, 2012; and (5); Defendant Francis E. Grimbail and Defendant MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC's Motion to Dismiss, dated March 13, 2012. Unless otherwise specified, "Defendants" as used in this Order refers to each of the above-referenced Defendants and each of the named Defendants in this action.

in the light most favorable to the Plaintiffs as the non-moving parties, this Court finds that Plaintiffs have stated facts sufficient to constitute a cause of action against each of the Defendants and therefore the MOTIONS ARE DENIED.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master-In-Equity and
Special Circuit Court Judge

July ___, 2012

Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-40-7432

William E. DeLoache, III and Allison H.
DeLoache,

Plaintiffs,

vs.

William Dixon Robertson, III; W.
Jefferson Leath, Jr.; Michael S.
Seekings; LEATH, BOUCH & CRAWFORD,
LLP; Francis E. Grimbail; MULLEN WYLIE,
LLC formerly MULLEN, WYLIE & SEEKINGS,
LLC; William M. Bowen; WILLIAM M.
BOWEN, PA; and John D. Kassel,

Defendants.

**ORDER DENYING DEFENDANTS'
MOTIONS TO DISMISS AND
MOTIONS TO STRIKE PLEADINGS**

THIS MATTER IS BEFORE THE COURT for a hearing on June 6, 2012, before the undersigned Special Circuit Judge for the Fifth Judicial Circuit in the Court of Common Pleas for Richland County, on Defendants' Motions to Dismiss and Defendants' Motions to Strike Pleadings.¹ Counsel of record for all parties were in attendance. Having considered the motions, memoranda submitted in support and in opposition to the motions, arguments of counsel, and considering the allegations contained in the VERIFIED COMPLAINT

¹ The motions resolved by this Order are as follows: (1) Defendant John D. Kassel's Motion to Dismiss, dated December 15, 2011; (2) Defendants Jefferson Leath, Jr.; Michael S. Seekings; and LEATH, BOUCH & CRAWFORD, LLP's Motion to Dismiss and/or Motion to Strike Pleadings, dated January 23, 2012; (3) Defendants William M. Bowen and WILLIAM M. BOWEN, P.A.'s Motion to Dismiss, dated January 24, 2012; (4) Defendant William Dixon Robertson III's Motion to Dismiss, dated February 16, 2012; and (5); Defendant Francis E. Grimbail and Defendant MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC's Motion to Dismiss, dated March 13, 2012. Unless otherwise specified, "Defendants" as used in this Order refers to each of the above-referenced Defendants and each of the named Defendants in this action.

in the light most favorable to the Plaintiffs as the non-moving parties, this Court finds that Plaintiffs have stated facts sufficient to constitute a cause of action against each of the Defendants and therefore the MOTIONS ARE DENIED.

STANDARD OF REVIEW.

An overview of the standards of review for the subject motions is appropriate here.

A. Rule 12(b)(6), SCRPC, Motion to Dismiss.

A Rule 12(b)(6) motion is used to “test the legal sufficiency of a complaint or other pleading seeking affirmative relief.” James F. Flanagan, *SOUTH CAROLINA CIVIL PROCEDURE* 92 (2d ed. 1996). A motion to dismiss based on Rule 12(b)(6) should be granted only when it appears the plaintiff can prove no set of facts in support of a cause of action that would entitle plaintiffs to relief based on that cause of action. See *Murrow Crane Co. v. T.R. Tucker Constr. Co.*, 296 S.C. 427, 373 S. E.2d 701 (Ct. App. 1988). “The motion [Rule 12(b)(6) motion] cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case.” *Brown v. Leverette*, 291 S.C. 364, 353 S.E. 2d 697 (1987).

To determine whether to grant a Rule 12(b)(6) motion, the trial court must rely solely on matters appearing on the face of the complaint. *Crocker v. Barr*, 295 S.C. 195, 367 S.E.2d 471 (Ct. App. 1988). A court ruling on a Rule 12(b)(6) motion must construe the complaint in the light most favorable to the nonmoving party and it must consider all of the facts alleged in the complaint as true. *Woodell, Allen v. Marion School District One*, 307 S.C. 297, 414 S.E.2d 794 (Ct.App. 1992); *Carolina Wind Owners’ Assn. v. Joe Harden Builder, Inc.*, 297 S.C. 74, 374 S. E.2d 897 (Ct. App. 1988). Defendants’ motions to

dismiss must be denied if the facts and inferences reasonably deducible from them show that plaintiffs could prevail on any of the causes of action pled. *Murrow Crane Co. v. T.R. Tucker Construction Co.*, 296 S.C. 427, 373 S.E.2d 701 (Ct.App. 1992). Should any allegations of the complaint give rise to competing inferences on any issues material to the claims asserted, then the motion must be denied. *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 414 S.E.2d 784 (Ct.App. 1992), *aff'd*, 310 S.C. 514, 426 S.E.2d 304 (1993). Furthermore, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338, 339 (1991).

Applying the legal standard of review, the Verified Complaint in this case should not be dismissed as will be explained later in this Order.

B. Rule 12(f), SCRPC, Motion to Strike.

Rule 12(f), SCRPC, provides that upon proper motion "the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter." When reviewing a motion to strike, the trial court must view the pleading under attack in the light most favorable to the pleader. See *Clark v. Milam*, 152 F.R.D. 66, 71 (S.D. W. Va. 1993). The allegations in the pleading should not be struck unless the allegations' insufficiency is clearly apparent, it does not present relevant questions of law or fact, and its retention is prejudicial to the moving party. See *id.* at 70; see also *Cipollone v. Liggett Grp., Inc.*, 789 F.2d 181, 188 (3d Cir. 1986), *rev'd on other grounds*, 505 U.S. 504 (1992); *Palmer v. Oakland Farms, Inc.*, No. 5:10cv00029, 2010 WL 2605179, at *2 (W.D. Va. June 24, 2010); *Hayne v. Green Ford Sales, Inc.*, 263 F.R.D. 647, 649 (D. Kan. 2009).

Rule 12(f) motions to strike are generally disfavored, and courts frequently characterize them as “time wasters” that potentially serve only to delay a proceeding. See *Greenheck Fan Corp. v. Loren Cook Co.*, No. 08-cv-335-jps, 2008 WL 4443805, at *1 (W.D. Wis. Sept. 25, 2008) (“[A] motion to strike pleadings or affirmative defenses is generally disfavored because it consumes scarce judicial resources, and potentially serve[s] to delay . . .” (citation omitted) (internal quotation marks omitted)); *Holtzman v. B/E Aerospace, Inc.*, No. 07-80551-CIV, 2008 WL 2225668, at *1 (S.D. Fla. May 29, 2008) (listing many decisions to so describe). Moreover, a motion to strike is a drastic remedy and should not be used frequently, in part because of the difficulty of deciding cases without a factual record, (see *Brown & Williamson Tobacco Corp.*, 201 F.2d 819, 822 (6th Cir. 1953) (“Partly because of the practical difficulty of deciding cases without a factual record it is well established that the action of striking a pleading should be sparingly used by the courts. It is a drastic remedy to be resorted to only when required for the purposes of justice.” (citation omitted)); *Knit With v. Knitting Fever, Inc.*, Civil Action Nos. 08-4221, 08-4775, 2009 WL 973492, at *6 (E.D. Pa. Apr. 8, 2009)), as well as the strong policy favoring resolution on the merits. Accordingly, a plaintiff whose claims have been stricken is normally granted leave to amend. *Dockside Ass’n v. Detyens, Simmons*, 297 S.C 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1984).

FINDINGS OF FACT

Because of the nature of motions, all of the factual allegations set forth in the Verified Complaint are adopted herein as the findings of fact by this court.

CONCLUSIONS OF LAW

A. Defendants' Motion to Strike and/or Dismiss Plaintiffs' "Summary of the Case" is Denied.

In their Motions, Defendants Jefferson Leath, Jr.; Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP; Frances E. Grimball; and MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC seek this Court to strike or dismiss the DeLoaches' Summary of the Case. In support, these Defendants allege that the DeLoaches' Statement of the Case is violative of Rules 8(e) and 10(b), SCRCP. The Defendants' request is without merit and is denied.

Rule 8(e)(1), SCRCP states "[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Rule 8(a), SCRCP states that "[a] pleading which sets forth a cause of action . . . shall contain . . . (2) a short and plain statement of the facts showing that the pleader is entitled to relief." Rule 10(b), SCRCP states "[a]ll averments of the facts of a cause of action or defense and demands for relief shall be made in consecutive numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances" Review of these rules demonstrates the DeLoaches' Verified Complaint is in compliance.

Rule 12(f), SCRCP, governing and controlling motions to strike provides a trial court discretion to strike "any redundant, immaterial, impertinent or scandalous matter." See, *Mayes v. Paxton*, 313 S.C. 109, 437 S.E.2d 66 (1993). Defendants' motion to strike does not claim that the allegations set forth in the Verified Complaint contain "any redundant, immaterial, impertinent or scandalous matter[s]", and therefore Defendants' motion to strike

must fail. See *Doe v. Doe*, 324 S.C. 492, 478 S.E.2d 854, 857 (Ct. App. 1996) (objections to impertinent or scandalous matters were properly raised by party and a motion to strike); *Mayes v. Paxton*, 313 S.C. 109, 115, 437 S.E.2d 66, 69 (1993) (“If a motion to strike raises merely a doubtful question or the case is such that justice may be promoted by a trial on the merits, the court should exercise a fair, judicial discretion to that end. However, this rule is followed only in cases where there is either real cause for doubt, or it is clear that the ends of justice may well be promoted by a trial on the merits.”).

The DeLoaches’ Summary of the Case provides this Court with a short and plain statement of the facts showing the DeLoaches are entitled to relief. See SCRCP 8(a), SCRCP. This summary serves as a preface to the subsequent averments and is in accordance with South Carolina law. Following this summary, the DeLoaches’ Verified Complaint provides simple, concise, and direct averments of the facts of the cause of action and relief sought by the DeLoaches. See SCRCP 8(e), SCRCP; and 10(b), SCRCP. These averments are made in consecutive numbered paragraphs as required by the Rules of Civil Procedure. SCRCP 10(b), SCRCP.

The Defendants’ motion that this Court strike the DeLoaches’ Summary of the Case is denied.

B. The Grimball/Mullen Wylie Defendants Motion to Strike Portions of the DeLoaches’ Complaint which Refer to Either Robert L. Wylie or George E. Mullen Individually Is Denied.

The Grimball/Mullen Wylie Defendants moved this Court to strike those portions of the DeLoaches’ Verified Complaint which refers to either Robert L. Wylie (“Wylie”) or George E. Mullen (“Mullen”) individually. In support, these Defendants argue neither Mr.

Wylie nor Mr. Mullen are parties to this action. These Defendants' motion to strike is denied on the same basis as the Defendants' motion to strike the "Summary of the Case."

These Defendants' motion to strike references to Mullen-or-Wylie does not claim that the allegations concerning contain "any redundant, immaterial, impertinent or scandalous matter[s]," and therefore Defendants' motion to strike must fail. See, *Doe v. Doe*, 324 S.C. at 478 S.E.2d at 857; *Mayes v. Paxton*, 313 S.C. at 115, 437 S.E.2d at 69. With a Rule 12(f), SCRCP motion, "a court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded." *Alladin Plastics, Inc. v. Witenna, Inc.*, 301 S.C. 90, 93, 390 S.E.2d 370, 372 (Ct. App. 1990).

Though neither Mr. Wylie nor Mr. Mullen are individually named in this action, based on the standard of review they are both deemed to have acted as agents for the Defendant class action lawyers and law firms. Any allegations or statements in regards to Mr. Wylie and Mr. Mullen have been alleged or stated in reference to these individuals capacities as agents for the Defendant class action lawyers and law firms. As such, these Defendants' Motion to Strike the references to Mullen and/or Wylie does not meet the requirements of Rule 12(f), SCRCP, and is therefore denied.

C. The Defendants' Motion to Dismiss All Claims for Failure to Attach an Expert Affidavit Should Is Denied.

1. The Verified Complaint contains no allegations of professional negligence.

The Defendants allege that the DeLoaches were required but failed to file an affidavit of a duly qualified expert contemporaneously with their Complaint. However, the

statute referenced as authority for this contention requires an expert affidavit only for “an action alleging professional negligence.” See S.C. CODE ANN. § 15-36-100. There are no allegations in the DeLoaches’ Verified Complaint alleging any of the Defendants were professionally negligent, made a mistake, or other professional error; but instead alleges various causes of action for intentional torts. The factual allegations in support of causes of action for Wrongful Appropriation of Personalty; Conversion; Civil Conspiracy; Constructive Trust, and Injunctive Relief are not premised on allegations of professional negligence. The underlying actions to each of these Counts are intentional torts that are in no way connected to the Defendants’ actions in their professional capacities. Though the causes of action for Breach of Fiduciary Duty and Breach of Duty of Confidentiality allege malfeasance connected to the Defendants’ actions in their professional capacities, these too are based on allegations of intentional – not negligent – conduct and thus do not fall within the parameters of professional negligence.

S.C. CODE ANN. § 15-36-100 is entitled “Complaint in actions for damages alleging professional negligence; contemporaneous affidavit of expert specifying negligent act or admission.” In pertinent part, the statute states as follows:

(B) . . . [I]n an action alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) . . . , the plaintiff must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or admission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit.

...

(C)(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of

common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

Id.

Subsection G specifically lists attorneys at law as professionals covered by § 15-36-100. *Id.* at § (G)(2).

“A ‘professional’ act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual.” *South Carolina Medical Malpractice Liability Insurance v. Ferry*, 291 S.C. 460, 464-65, 354 S.E.2d 378 (1987). South Carolina law is clear that “[i]n determining whether a particular act is of a professional nature or a “professional service” we must look not to the title or character of the party performing the act, but to the act itself.”

Applied to the allegations in the Verified Complaint, causes of action for Wrongful Appropriation of Personalty; Conversion; Civil Conspiracy; Constructive Trust, and Injunctive Relief do not contain allegations against the Defendants for acts done in their professional capacities. Just as allegations of assault and battery would not implicate legal professional negligence solely because an alleged tortfeasor is a lawyer, neither do the causes of action in the Verified Complaint implicate professional negligence in this case. Thus, S.C. CODE ANN. § 15-36-100 is inapplicable to these causes of action.

Further, an action for professional negligence presupposes a client-lawyer relationship. The essential elements of legal malpractice are (1) the existence of an client-lawyer relationship; (2) breach of duty; (3) damages; and (4) proximate cause. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742 (2010).

Without an attorney-client relationship, there can be no legal professional negligence claim.

In this case, the Verified Complaint expressly avers for example in ¶¶ 17, 19, 27, 35, 46, and 47 that no client-lawyer relationship ever existed between the DeLoaches and any of the Defendants. In fact, the closest circumstance to a client-lawyer relationship is the relationship between the DeLoaches, as prospective clients, and Defendant Kassel, as a lawyer considering accepting the representation. Defendant Kassel was not named in the causes of action for Wrongful Appropriation of Personalty; Conversion; Civil Conspiracy; Constructive Trust, Breach of Fiduciary Duty, and Injunctive Relief.² This provides further support that S.C. CODE ANN. § 15-36-100 does not govern. The DeLoaches were prospective clients to Defendant Kassel within the purview of Rule 1.18, RPC, Rule 407, SCACR. As alleged in the Verified Complaint, the DeLoaches were people with whom Defendant Kassel discussed the possibility of forming a client-lawyer relationship with respect to the DeLoaches' possible participation in *Posey*. Rule 1.18(b), RPC governs that "[e]ven when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of the former client."

The foregoing arguments are fatal to the Defendants' contentions that S.C. CODE ANN. § 15-36-100 governs the DeLoaches' causes of action for Wrongful Appropriation of Personalty; Conversion; Civil Conspiracy; Constructive Trust, and Injunctive Relief.

² By stipulation at the hearing on these motions, counsel for Plaintiffs acknowledged Plaintiffs were not making a claim against Defendant Kassel on the breach of fiduciary duty claim set forth as cause of action number 5 in the Verified Complaint.

However, a further flaw to the Defendants' reasoning establishes that S.C. CODE ANN. § 15-36-100 is inapplicable to the DeLoaches' entire Complaint: each cause of action alleged is based on an intentional tort and thus S.C. CODE ANN. § 15-36-100, which governs professional negligence, is inapplicable. South Carolina is consistent and clear in distinguishing intentional torts from negligence, and case law is replete with examples of courts distinguishing between and refusing to conflate the two. *See, e.g., Prior v. South Carolina Medical Malpractice Liability Insurance Joint Underwriting Ass'n*, 305 S.C. 247, 249, 407 S.E.2d 655 (Ct. App. 1991) ("In the case before us, despite the label of negligence, the act the Patient complained of was . . . an intentional tort . . ."); *Chassereau v. Global-Sun Pools, Inc.*, 363 S.C. 628, 634 n.15, 611 S.E.2d 305 (Ct. App. 2005) ("Negligence, while itself a tort, does not encompass all torts, particularly intentional torts."); *Edens v. Bellini*, 359 S.C. 433, 445, 597 S.E.2d 863 (Ct. App. 2004) ("The Estate contends it can pursue a negligence cause of action in this case based upon the intentional tort exception to the Act. We disagree."); *State Farm Fire and Casualty Co. v. Barrett*, 340 S.C. 1, 15, 530 S.E.2d 132 (Ct. App. 2000) ("in the context of a cause of action alleging an intentional tort, which by definition cannot be committed in a negligent manner, the allegation of negligence is surplusage"); *USAA Property and Casualty Insurance Co. v. Rowland*, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993) (reference that insured "negligently" pursued wife did not turn intentional tort into negligence action).

The Verified Complaint contains allegations that the Defendants intentionally appropriated the DeLoaches' personalty, intentionally engaged in conversion, intentionally conspired, and intentionally breached fiduciary trust and duties of confidentiality. Because

S.C. CODE ANN. §15-5-100 is not applicable to the claims alleged in the Verified Complaint, Defendants' motions to dismiss on these grounds is denied.

2. The claims alleged in the Verified Complaint arose before S.C. Code Ann. § 15-5-100 took effect.

Notwithstanding the foregoing analysis of the nature of the causes of action alleged, S.C. CODE ANN. § 15-36-100 took effect July 1, 2005 for all causes of action arising after that date. See also 2005 Act No. 21, §§ 4, 21(b); *Cooper v. Hawkins*, 2008 WL 2563148 (D.S.C. June 23, 2008).

Although the Verified Complaint alleges Defendants' conduct was not discovered until 2009, the causes of action alleged in the DeLoaches' Verified Complaint arose beginning in 2002, three years before the enactment and effective date of S.C. CODE ANN. § 15-36-100. Therefore, S.C. CODE ANN. § 15-36-100 is inapplicable and not relevant. Defendants' motion to dismiss based on alleged failure to include an expert affidavit is denied.

The South Carolina General Assembly enacted S.C. CODE ANN. § 15-36-100 as 2005 Act No. 32, § 34. Section 21(B) of that act makes clear the effective date: "Upon approval by the Governor, this act takes effect July 1, 2005, for causes of action arising after July 1, 2005" The District of South Carolina's analysis in *Cooper v. Hawkins*, 2008 WL 2563148, 2008 U.S. Dist. Lexis 48975 (D.S.C. June 23, 2008), illustrates application of this statute to the claims based on the date the claims arises or accrues:

It is [] undisputed that § 15-36-100 only applies to 'causes of action arising after July 1, 2005.' It is disputed whether § 15-36-100 was in effect at the time the plaintiff's causes of action arose. Therefore, this Court must determine whether § 15-36-100 was the law in effect when the plaintiff's

causes of action arose or accrued.¹

In South Carolina, the law in effect at the time the cause of action arose controls the parties legal relationships and rights. For purposes of determining the law in-effect at the time an action arose, an action arises at the moment when the plaintiff has a legal right to sue on it, because the law presupposes at least nominal damages at that point. This moment coincides with the moment the underlying facts occur.

Id. at *2-3 (footnote 1 states, "In South Carolina, courts use the verbs 'arise' and 'accrue' interchangeably when determining the moment a plaintiff's right to sue came into existence. *Stephens v. Draffin, M.D.*, 327 S.C. 1, 488 S.E.2d 307, 309 n. 4 (S.C. 1997). This Court will use the word 'arise' throughout this Order.")

The allegations in the Verified Complaint allege that Plaintiffs' claims arose on or before October 1, 2002, when the Defendant class action lawyers and law firms appeared at the Posey Fairness Hearing purporting to represent the DeLoaches. See Verified Complaint, ¶¶ 34 and 36. In the light most favorable to the DeLoaches, it is in or during September - October, 2002, that the DeLoaches first suffered at least nominal damages and therefore first had a right to sue the Defendants for the causes of action alleged in the Verified Complaint. Because S.C. CODE ANN. § 15-36-100 was not in effect when these causes of action arose, the Defendants' motion based on this statute must be denied.

D. The Defendant Class Action Lawyers and Law Firms' Motion that the Verified Complaint Does Not Allege Defendants Proximately Caused Damages to Plaintiffs Is Denied.

The Defendant class action lawyers and law firms' motions claim that the Verified Complaint does not allege DeLoaches have suffered damages because the DeLoaches were not parties to the proceedings in Posey and have not otherwise alleged a claim for

recoverable damages. In the light most favorable to Plaintiffs, the Verified Complaint does allege damages proximately caused by the Defendant class action lawyers and law firms. Therefore, Defendant class action lawyers and law firms' motions to dismiss on this ground is denied.

The Verified Complaint alleges the DeLoaches suffered actual damages as a result of the Defendant class action lawyers and law firms' tortious behavior. The DeLoaches own and owned at all times relevant to this claim an enforceable right in their individual and collective identity, including without limitation the use of their surname, DeLoache, as part of any legal proceeding. The Verified Complaint alleges the Defendant class action lawyers and law firms misappropriated the DeLoaches' rights in their name, recovered monies as a result of being able to appear in the *Posey* court purportedly as counsel for the DeLoaches, and that Defendant class action lawyers and law firms' recovery of fees under the guise of serving as their counsel caused the DeLoaches' damages. This is a valid and recognized cause of action in South Carolina with a presumption of nominal damages. See *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452, 684 S.E.2d 756 (2009). See also *Insurance Products Marketing, Inc. v. Conseco Life Insurance Company*, 2011 WL 3841269 (D.S.C. Aug. 29, 2011) (Duffy, J.) ("A cause of action for wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. To plead misappropriation of identity, the plaintiff must claim an appropriation without consent, of one's name or likeness for another's use or benefit. The Court finds that based on the facts alleged in the Verified Complaint, Plaintiffs' second cause of action states sufficient facts to state a claim for relief that is plausible on its face.") (citations omitted).

Construed in the light most favorable to the DeLoaches, they owned an interest in the property rights associated with their personalty, including the use of their surname in legal proceedings. By filing legal documents with the DeLoache surname, the factual allegations in the Verified Complaint support a claim that the Defendant class action lawyers and law firms converted the DeLoaches intangible property rights. See W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim “has been discarded to some extent by all of the courts” but noting “the process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with, some document”) (cited in *Gignilliat* (emphasis added)). The causes of action alleged in the remaining causes of action in the DeLoaches’ Verified Complaint facilitated and enabled the damages alleged in the misappropriation and conversion Counts.

In addition, the Verified Complaint alleges that the DeLoaches have suffered damages in that they are now concerned they are at risk for claims of contempt of court or fraud on the court. The use of the DeLoache name in connection with the *Posey* matter puts the DeLoaches at risk of litigation and legal expenses, thus creating tangible financial damages. Further, the DeLoaches have spent time and resources in depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personalty, all creating damages for which the DeLoaches claim they are entitled to compensation. Thus, the Defendant class action lawyers and law firms’ arguments regarding the absence of damages is not consistent with the standard of review as applied to the allegations in the Verified Complaint and as a result, their motion is denied.

E. The Defendants' Defendant Class Action Lawyers and Law Firms' Motions to Dismiss the DeLoaches' First Cause of Action For Wrongful Appropriation of Personalty Are Denied.

The Defendant class action lawyers and law firms allege that the DeLoaches failed to state a claim for relief under the theory of Wrongful Appropriation of Personalty. Because of the facts alleged in the Verified Complaint are taken in the light most favorable to Plaintiffs, Defendant class action lawyers and law firms' motions are denied.

The Defendant class action lawyers and law firms' motions contend that the DeLoaches' Verified Complaint fails to specifically allege an intent and purpose to misappropriate and benefit from the misappropriation. However, the DeLoaches' Verified Complaint specifically notes that the Defendant class action lawyers and law firms "formed a joint venture for the purpose of financial gains to be obtained as the result of challenging the *Posey* settlement by getting a class certified in South Carolina." (Compl. ¶ 33). The Verified Complaint alleges that the Defendant class action lawyers and law firms' misappropriation of the DeLoaches' name was not an accident; rather, it is clear from the facts alleged in the Verified Complaint that the Defendant class action lawyers and law firms took these actions to further their joint venture to obtain financial benefits from the *Posey* matter. As a result of these actions, the Verified Complaint alleges the Defendant class action lawyers and law firms benefitted by obtaining payment of \$600,000.00. Thus, the Defendant class action lawyers and law firms' motions to the contrary are without merit.

The Defendant class action lawyers and law firms also argue that the DeLoaches' alleged failure to specify inherent commercial value and recoverable damages from the appropriation of their name is somehow fatal to their claim. At oral arguments, counsel for

the DeLoaches acknowledged that the DeLoaches' surname, in and of itself, does not have specific commercial value, but instead reiterated the allegations in the Verified Complaint where it was the Defendant class action lawyers and law firms'-use of the DeLoaches' surname as clients-objectors in *Posey* that had commercial value to the Defendant class action lawyers and law firms so they could recover fees.

The South Carolina Supreme Court's opinion in *Gignilliat* supports Plaintiffs' position and defeats those contra arguments by Defendant class action lawyers and law firms in support of their motion.

In *Gignilliat*, Mrs. Gignilliat sued her late husband's former law firm, arguing that the firm had infringed upon her right of publicity in the Gignilliat name. *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452, 457, 684 S.E.2d 756 (2009). Upon review of the lower court's grant of summary judgment in favor of the firm, the Supreme Court expounded upon and affirmed the validity of the tort of misappropriation of personalty. The court noted that "[j]urisdictions have recognized a right of publicity either by expressly acknowledging a separate tort for the right of publicity or by finding it is encompassed within the four classic privacy torts, specifically wrongful appropriation." *Id.* at 458 (citing *Pooley v. National Hole-in-One Ass'n*, 89 F. Supp. 2d 1108, 1111 (D. Ariz. 2000) for the proposition that "the common law right of privacy provides protection against . . . appropriation, for the defendant's advantage, of the plaintiff's name or likeness [and this] is commonly referred to as appropriation . . . or the right of publicity" and citing *Winterland Concessions Co. v. Sileo*, 528 F. Supp. 1201, 1213 (D. Ill. 1981) for the proposition that "[o]ne of the species of the right of privacy recognized by the cases and the commentators is the right of

publicity. Violation of this right constitutes the tort of appropriation of a plaintiff's name or likeness for [the] defendant's benefit.").

The *Gignilliat* Court then went on to state South Carolina law on the subject:

In South Carolina, there are three separate and distinct causes of action for invasion of privacy: 1) wrongful appropriation of personality; 2) wrongful publicizing of private affairs; and 3) wrongful intrusion into private affairs. Wrongful appropriation of personality involves the intentional, unconsented use of the plaintiff's name, likeness, or identity by the defendant for his own benefit. The gist of the action is the violation of the plaintiff's exclusive right at common law to publicize and profit from his name, likeness, and other aspects of personal identity. Encompassed in these three recognized torts is the infringement on the right of publicity; it is denominated wrongful appropriation of personality. It addresses the plaintiff's right to the commercial protection of his name, likeness, or identity.

Id. at 458-459. See also *Holloman v. Life Insurance Co. Of Virginia*, 192 S.C. 454, 458, 7 S.E.2d 169 (1940) (discussing invasion of privacy by a commercial use and stating "The right of privacy is correctly defined . . . as the right to be left alone; the right of a person to be free from unwarranted publicity. Or more specifically but less accurately, the right to live without one's name, picture or statue, or that of a relative, made public against his will.>"). Based on the foregoing, *Gignilliat* stated, "We hold South Carolina does recognize the tort of infringement on the right of publicity." *Gignilliat*, 385 S.C. at 459.

The Supreme Court in *Gignilliat* went on to note that the use of one's name without compensation is a distinguishable property right. *Id.* at 463. Further, there is a presumption of damages in cases regarding infringement of a person's right to control his or her likeness:

Misappropriation of identity is a tort arising from the right to

privacy and is designed to prevent the commercial use of one's name or image without consent. To plead misappropriation of identity, the plaintiff must claim "an appropriation without consent, of one's name or likeness for another's use or benefit." A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity.

Id. at 463 (quoting *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815 (2003); citing *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644 (1998) (holding the trial court erred in granting summary judgment to the defendant on the basis the plaintiff could not establish actual damages for his claim of misappropriation of his likeness; the Appellate Court of Illinois held the law presumes nominal damages in such an instance and noted that to hold otherwise "overlooks . . . the venerable principle that the law will presume that damages exist for every infringement of a right."); also citing *James v. Bob Ross Buick, Inc.*, 167 Ohio App. 3d 338 (2006) (concluding the trial court erred in granting summary judgment on the plaintiff's claim of misappropriation of his name, stating, "a plaintiff need not establish actual damages in order to prevail on a misappropriation-of-name claim" and that "a plaintiff may seek to recover nominal damages for claims of misappropriation of the plaintiff's name or likeness"))).

Applied to the facts alleged in the Verified Complaint, the Defendant class action lawyers and law firms' motions to dismiss the DeLoaches' first cause of action must fail. The Verified Complaint alleges the Defendant class action lawyers and law firms engaged in the "intentional, unconsented use of the plaintiff's name, likeness, or identity [for] defendant[s] . . . own benefit." *Gignilliat*, 385 S.C. at 59. The use of the DeLoaches' name without compensation is a distinguishable property right. *Id.* at 463. Further, there is a

presumption of damages; *i.e.*, the DeLoaches “need not prove actual damages, because the court will presume damages if someone infringes another’s right to control his identity.” *Id.* at 463. Based on the foregoing precedent and its application to the allegations in the Verified Complaint, Defendant class action lawyers and law firms’ Motions to Dismiss the first cause of action in Plaintiffs’ Verified Complaint for Wrongful Appropriation of Personalty are denied.

F. The Defendant Class Action Lawyers and Law Firms’ Motions to Dismiss the DeLoaches’ Second Cause of Action For Conversion Are Denied.

The Defendant class action lawyers and law firms motions contend that the DeLoaches failed to state a claim for relief under the theory of Conversion. This contention is without merit.

The Defendant class action lawyers and law firms’ motions contend that “Plaintiffs fail to assert a claim for relief for the same reasons as are set forth . . . in relation to Plaintiff’s First Cause of Action.” Further, the Defendant class action lawyers and law firms contend that the DeLoaches have not “allege[d] rights to the ownership or control of any tangible object” or “contractual right[s] to any intangible item or object over which [] Defendants would be alleged to have wrongfully assumed ownership or control.” Based on the allegations in the Verified Complaint taken in the light most favorable to the DeLoaches, these arguments are without merit.

In *Gignilliat*, court noted that “an action for conversion ordinarily lies only for personal property that is tangible, or to intangible property that is merged in, or identified with, some document. *Gignilliat*, 385 S.C. at 465 (quoting 18 AM. JUR. 2d Conversion § 7

(2004)). Where courts recognizing intangible property rights as the basis for conversion, they are doing so “where the rights have some documented basis to support to them.” *Id.* By filing legal documents with the DeLoache surname, the allegations in the Verified Complaint state a claim that the class action Defendant lawyers converted the DeLoaches’ intangible property rights. See W. Keeton, W. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON THE LAW OF TORTS, § 15, at 91-92 (5th ed. 1984) (observing the rule that only personal property may be the subject of a conversion claim “has been discarded to some extent by all of the courts” but noting “the process of expansion has stopped with the kind of intangible rights which are customarily merged in, or identified with, some document”) (cited in *Gignilliat v. Gignilliat, Savitz & Bettis*, 385 S.C. 452 (2009) (emphasis added)). Based on the foregoing, Defendant class action lawyers and law firms’ motions to dismiss the DeLoaches’ second cause of action for conversion are denied.

G. The Defendant Class Action Lawyers and Law Firms’ Motions to Dismiss the DeLoaches’ Third Cause of Action For Civil Conspiracy Are Denied.

The Defendant class action lawyers and law firms’ motions contend that the DeLoaches’ Verified Complaint fails to state a claim for relief under the theory of Civil Conspiracy. This contention is without merit.

_____ Civil conspiracy consists of the following elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) which causes him special damage. *Charles v. Texas Co.*, 190 S.C. 82, 1 S.E.2d 912 (1939); *Vaught v. Waites*, 300 S. C. 201, 387 S.E.2d 91 (Ct. App. 1989); *Island Car Wash v. Norris*, 292 S.C. 595, 358 S.E.2d 150, 152-53 (Ct. App. 1987). The conspiracy may be established by showing that the

Defendants had shared the objective to deprive the Plaintiff of certain rights. *E.g.*, *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979); *Hull v. Cuyahoga Valley Board of Education*, 926 F.2d 505 (6th Cir.), *cert. denied*, 111 S.Ct. 2917 (1991); *Lenard v. Argenta*, 699 F.2d 874 (7th Cir. 1983); *Bond v. IMFS, Inc.*, 727 F.2d 770 (8th Cir. 1984).

The allegations in the Verified Complaint alleges a conspiracy involving two or more persons. The conspiracy involved each of the Defendant class action lawyers and law firms and the individuals that comprise the corporate class action Defendants. Further, allegations in the Verified Complaint allege the Defendant class action lawyers and law firms' actions were for the purpose and with the intent to misappropriate and convert the DeLoaches' personality to the DeLoaches' detriment. The Defendant class action lawyers and law firms subjected the DeLoaches to the jurisdiction of the *Posey* court as Class Member Objectors to obtain financial gain, which later turned into secret payments and commitments to pay totaling \$825,000.00. One of the overt acts in further furtherance of the conspiracy was the Defendant class action lawyers and law firms' collective failure to communicate to Plaintiffs, the DeLoaches, anything about the status of the arguments in *Posey* or the recovery of the \$600,000/\$825,000. This caused special damages to the DeLoaches. The DeLoaches have suffered damages in that they are now concerned they are at risk for claims of contempt of court or fraud on the court. The use of the DeLoache name in connection with the *Posey* matter puts the DeLoaches at risk of litigation and legal expenses, thus creating tangible financial damages. Further, the DeLoaches have spent time and resources in depositions, drafting affidavits, and otherwise engaging in legal matters to protect their name and personality, all creating damages for which the

DeLoaches are entitled compensation, if after discovery, the DeLoaches are able to convince a jury of these allegations.

As such, the DeLoaches have sufficiently pleaded facts sufficient to establish civil conspiracy and the Defendant class action lawyers and law firms' Motions to Dismiss this cause of action for Civil Conspiracy are denied.

H. The Defendant Class Action Lawyers and Law Firms' Motions to Dismiss the DeLoaches' Fourth Cause of Action For A Constructive Trust Are Denied.

The Defendant class action lawyers and law firms' motions contend that the DeLoaches' Verified Complaint fails to state a claim for relief under the theory of Constructive Trust. This contention is without merit.

The Defendant class action lawyers and law firms' motion contend that "Plaintiffs fail to assert a claim for relief for the same reasons as are set forth . . . in relation to Plaintiff's First Cause of Action. This argument is without merit. "The law may impose a constructive trust when a party obtains a benefit that does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it." *McNair v. Rainsford*, 330 S.C. 332499 S.E.2d 488 (Ct. App. 1998). "It is resorted to by equity to vindicate right and justice or frustrate fraud." *Id.* See also *Lollis v. Lollis*, 291 S.C. 525 (1987) ("constructive trust will arise whenever circumstances under which property was acquired make it inequitable that property should be retained by one holding legal title").

The allegations in the Verified Complaint that Defendant class action lawyers and law firms' allegedly fraudulent statements and grossly reckless misrepresentations to the

Posey Court and litigants concerning their alleged representation of the DeLoaches caused substantial funds to be paid to the Defendant class action lawyers and law firms based on their assertions that they were lawyers retained to represent the DeLoaches as objectors in *Posey*. If those facts are established at the trial of this case, the Defendant class action lawyers and law firms should not in equity be allowed to reap the benefits of their fraudulent statements and gross misrepresentations concerning their alleged representation of the DeLoaches. The Defendant class action lawyers and law firms' motions to dismiss the DeLoaches' fourth cause of action for a Constructive Trust are denied.

I. The Defendant Class Action Lawyers and Law Firms' Motions to Dismiss the DeLoaches' Fifth Cause of Action For Breach of Fiduciary Duty Are Denied.

The Defendant class action lawyers and law firms' motions contend that the DeLoaches failed to state a claim for relief under a theory of breach of fiduciary duty. This contention is without merit.

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011). Further, South Carolina courts "have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship." *Id. quoting Hendricks v. Clemson University*, 353 S.C. 449 (2003). Moreover, "The relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.'" *Id. quoting*

Weatherford v. Price, 340 S.C. 572 (2000).

The Verified Complaint alleges that when the Defendant class action lawyers and law firms assumed the representations of the DeLoaches, the Defendant class action lawyers and law firms were charged to act as the DeLoaches' fiduciaries and agents as it pertained to the objections to the settlement of *Posey*. The Verified Complaint alleges that the Defendant class action lawyers and law firms assumed – without authorization – a fiduciary relationship with the DeLoaches concerning the *Posey* action. As such, the allegations in the Verified Complaint contend that each of the Defendant class action lawyers and law firms breached their duties to the DeLoaches. If those facts are established at the trial of this case, the DeLoaches would have a claim for breach of fiduciary duty against the Defendant class action lawyers and law firms.

The Defendant class action lawyers and law firms' motions to dismiss the DeLoaches' fifth cause of action for breach of fiduciary duty are denied.

J. Defendant Kassel's Motion to Dismiss the DeLoaches' Sixth Cause of Action For Breach of Duty of Confidentiality Is Denied.

_____ Defendant Kassel contends that the DeLoaches fail to state a claim for relief against him under a theory of breach of duty of confidentiality. This contention is without merit.

The Verified Complaint alleges Defendant Kassel had a duty to keep confidential and not disclose any of the information disclosed to him in confidence by the DeLoaches during the time Defendant Kassel represented the DeLoaches in his professional capacity. See ¶ 117 of the Verified Complaint.

The duty of confidentiality, where it exists, generally arises out of broadly applicable societal norms and public policy concerning the kind of relationship at issue. It does not arise

out of specific agreement or particularized circumstances. Moreover, the object of the law when this duty is violated is compensation for the resulting injuries, not fulfillment of expectation. Therefore, liability should be grounded in tort law.

McCormick v. England, 328 S.C. 627, 640 n.7, 494 S.E.2d 431 (1998).

The Verified Complaint alleges that Defendant Kassel had a duty of confidence based on the communications with the DeLoaches in anticipation of forming a lawyer-client relation with the DeLoaches. A lawyer's communications with prospective clients are privileged. *Clary v. Blackwell*, 160 S.C. 142, 158 S.E. 223 (1931). In addition, Rule 1.18, RPC, Rule 407, SCACR, protects the confidentiality of prospective client communications. Rule 1.18(b), RPC, Rule 407, SCACR. If a discussion with a prospective client has occurred, Rule 1.18(b), RPC, Rule 407, SCACR, prohibits use or disclosure of information learned during such a discussion absent the prospective client's informed consent. Rule 1.18(b), RPC, Rule 407, SCACR, allows disclosure or use if permitted by Rule 1.9, RPC, Rule 407, SCACR. Rule 1.9(c)(2), RPC, Rule 407, SCACR, and its Comment 7 in turn link disclosure to Rule 1.6, RPC, Rule 407, SCACR, the general confidentiality rule, which requires client informed consent to disclosure. In the event no formal client-lawyer relationship is formed, the lawyer cannot disclose the information received from the clients without the informed consent of the prospective client. Rule 1.18 cmt. 3, RPC, Rule 407, SCACR. See *also*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 70 cmt. c at 537 (1998) ("The privilege protects prospective clients – persons who communicate with a lawyer in an initial consultation but whom the lawyer does not thereafter represent – as well as persons with whom a client-lawyer relationship is established."); *In re Auclair*, 951 F.2d 65, 69 (5th Cir. 1992) ("communications made in the course of preliminary discussions

with a view to employing the lawyer are privileged though employment is not . . . accepted. No person could ever safely consult an attorney for the first time . . . if the privilege depended on the chance of whether the attorney after hearing the statement of facts decided not to accept employment or decline it.”). Such communications deserve the privilege because both parties are exploring the possibility of establishing a formal client-lawyer relationship.

“The relationship of an attorney with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.” *Spence v. Wingate*, 395 S.C. 148 (2011) quoting *Weatherford v. Price*, 340 S.C. 572 (2000). This rule of law applies to Defendant Kassel’s breach of confidence just as it applies with the breach addressed in cause of action for breach of fiduciary duty discussed above.

The Verified Complaint alleges that Defendant Kassel had and breached a duty of confidentiality, which caused damages to the DeLoaches. If those facts are established at the trial of this case, the DeLoaches would have a claim for breach of the duty of confidentiality against Defendant Kassel. Defendant Kassel’s motion to dismiss the DeLoaches’ sixth cause of action for breach of duty of confidentiality is denied. __

_____ K. _____ The Defendants’ Motions to Dismiss the DeLoaches’ Seventh Cause of Action For Injunctive Relief Are Denied.

_____ The DeLoaches’ Verified Complaint sets forth facts in support of their motion for injunctive relief, which if proven at trial, would demonstrate that without an injunction, they are likely to suffer irreparable harm. *Roach v. Combined Utility Commission*, 290 S.C. 437, 442, 351 S.E.2d 168 (Ct. App. 1986). Further, the DeLoaches’ Verified Complaint sets

forth facts, which if proven at trial, would demonstrate a high likelihood of success on the merits and an inadequate remedy at law. *Id.* The DeLoaches' Verified Complaint sets forth facts, which if proven at trial, would support a finding that the Defendant class action lawyers and law firms have demonstrated a willingness to compromise the personality of others for their own financial gain and no remedy short of injunctive relief will remedy the DeLoaches' damages and prevent further harm. The Verified Complaint alleges that these concerns are not moot; rather, the Verified Complaint sets forth facts, which taken in the light most favorable to the DeLoaches, shows that the Defendant class action lawyers and law firms' actions threaten continued harm to the DeLoaches' personality and other rights as discussed herein. Further, these issues are certainly ripe for adjudication, as the harms caused by the Defendant class action lawyers and law firms' actions are present and ongoing.

The Defendant class action lawyers and law firms' motions to dismiss the DeLoaches' seventh cause of action for an injunction are denied.

CONCLUSION.

WHEREFORE, based upon the foregoing, the Court DENIES Defendant John D. Kassel's Motion to Dismiss, dated December 15, 2011; DENIES Defendants Jefferson Leath, Jr.; Michael S. Seekings; and LEATH, BOUCH & CRAWFORD, LLP's Motion to Dismiss and/or Motion to Strike Pleadings, dated January 23, 2012; DENIES Defendants William M. Bowen and WILLIAM M. BOWEN, P.A.'s Motion to Dismiss, dated January 24, 2012; DENIES Defendant William Dixon Robertson III's Motion to Dismiss, dated February 16, 2012; and DENIES Defendant Francis E. Grimbail and Defendant MULLEN WYLIE, LLC f/k/a MULLEN, WYLIE & SEEKINGS, LLC's Motion to Dismiss, dated March 13, 2012.

AND IT IS SO ORDERED.

Joseph M. Strickland
Master-In-Equity and
Special Circuit Court Judge

July __, 2012

Columbia, South Carolina

PENDARVIS LAW OFFICES, PC



June 20, 2013

EXHIBIT

4

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

We beg the Your Honor's indulgence with one further point in response to the myriad of emails / letters from counsel for the various Defendants commenting and objecting to our most recent correspondence.

Enclosed and attached please find a copy of the statute, S.C. CODE ANN. § 15-36-100, which governs the requirement for expert affidavits in professional *negligence* matters. Plaintiffs continue to respectfully maintain that an expert affidavit was not required in this matter because Plaintiffs have not made a claim of professional negligence. However, if the Court were to conclude that Plaintiffs made claims of professional negligence such that the statute governs their claims, we respectfully suggest Your Honor consider the following section of the statute:

The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

S.C. CODE ANN. § 15-36-100(C)(2) (emphasis added).

Taking the facts in the Complaint as true and viewed in the light most favorable to the DeLoaches, there should be no "special learning is needed to evaluate the conduct" of the Defendants. As for the claims against Mr. Kassel, it is common knowledge that a lawyer is not allowed to disclose prospective clients' confidential information to other lawyers, and certainly not for use in a national class action lawsuit, unless the lawyer had the prospective clients' permission. As for the claims against the remaining Defendants, it is common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get fees unless that person has hired the lawyer and gave permission for such use. The allegations in the Complaint establish that none of the defendant-lawyers had a fee

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

The Honorable Joseph M. Strickland

Page 2

June 20, 2013

agreement with the DeLoaches; none of the Defendants (except for Mr. Kassel) ever once communicated with the DeLoaches; none of the Defendants had the DeLoaches' permission to use their names in the Tennessee lawsuit; none of the Defendants ever called or contacted the DeLoaches to report on the status of the lawsuit; and none of the Defendants ever told them that hundreds of thousands of dollars of fees had been recovered. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things.

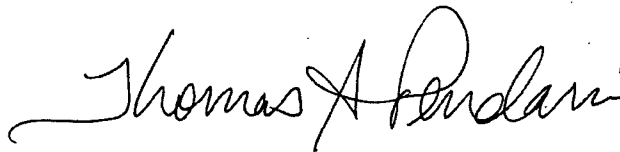
Therefore, an expert affidavit is not necessary per S.C. CODE ANN. § 15-36-100(C)(2) even if Your Honor were to conclude that Complaint effectively includes a claim for professional negligence. In sum, we respectfully request Your Honor reconsider signing any Order dismissing the DeLoaches' Complaint.

In advance, thank you for your consideration of this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" being more prominent and the last name "Pendarvis" written in a continuous script.

Thomas A. Pendarvis

TAP/lat

Enclosure

cc w/encl:

James L. Bruner, J.D.

James E. Lady, J.D.

Amy L.B. Hill, J.D.

Charles E. Hill, J.D. / Joshua D. Shaw, J.D.

Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.

William & Allison DeLoache (via e-mail only)

Code of Laws of South Carolina 1976 Annotated

Title 15. Civil Remedies and Procedures

Chapter 36. South Carolina Frivolous Civil Proceedings Sanctions Act

Code 1976 § 15-36-100

§ 15-36-100. Complaint in actions for damages alleging professional negligence;
contemporaneous affidavit of expert specifying negligent act or omission.

Currentness

(A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:

(1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and

(2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or

(b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:

(i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;

(ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or

(iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion;

(3) is an individual not covered by subsections (A)(1) or (2), that has scientific, technical, or other specialized knowledge which may assist the trier of fact in understanding the evidence and determining a fact or issue in the case, by reason of the individual's study, experience, or both. However, an affidavit filed pursuant to subsection (B) by an expert qualified under this subsection must contain an explanation of the expert's credentials and why the expert is qualified to conduct the review required by subsection (B). The defendant is entitled to challenge the sufficiency of the expert's credentials pursuant to subsection (E).

(B) Except as provided in Section 15-79-125, in an action for damages alleging professional negligence against a professional licensed by or registered with the State of South Carolina and listed in subsection (G) or against any licensed health care facility

alleged to be liable based upon the action or inaction of a health care professional licensed by the State of South Carolina and listed in subsection (G), the plaintiff must file as part of the complaint an affidavit of an expert witness 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.

(C)(1) The contemporaneous filing requirement of subsection (B) does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing and, because of the time constraints, the plaintiff alleges that an affidavit of an expert could not be prepared. In such a case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Upon motion, the trial court, after hearing and for good cause, may extend the time as the court determines justice requires. If an affidavit is not filed within the period specified in this subsection or as extended by the trial court and the defendant against whom an affidavit should have been filed alleges, by motion to dismiss filed contemporaneously with its initial responsive pleading that the plaintiff has failed to file the requisite affidavit, the complaint is subject to dismissal for failure to state a claim. The filing of a motion to dismiss pursuant to this section, shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(2) The contemporaneous filing requirement of subsection (B) is not required to support a pleaded specification of negligence involving subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.

(D) This section does not extend an applicable period of limitation, except that, if the affidavit is filed within the period specified in this section, the filing of the affidavit after the expiration of the statute of limitations is considered timely and provides no basis for a statute of limitations defense.

(E) If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed contemporaneously with its initial responsive pleading, that the affidavit is defective, the plaintiff's complaint is subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment within thirty days of service of the motion alleging that the affidavit is defective. The trial court may, in the exercise of its discretion, extend the time for filing an amendment or response to the motion, or both, as the trial court determines justice requires. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(F) If a plaintiff fails to file an affidavit as required by this section, and the defendant raises the failure to file an affidavit by motion to dismiss filed contemporaneously with its initial responsive pleading, the complaint is not subject to renewal after the expiration of the applicable period of limitation unless a court determines that the plaintiff had the requisite affidavit within the time required pursuant to this section and the failure to file the affidavit is the result of a mistake. The filing of a motion to dismiss pursuant to this section shall alter the period for filing an answer to the complaint in accordance with Rule 12(a), South Carolina Rules of Civil Procedure.

(G) This section applies to the following professions:

(1) architects;

- (2) attorneys at law;
- (3) certified public accountants;
- (4) chiropractors;
- (5) dentists;
- (6) land surveyors;
- (7) medical doctors;
- (8) marriage and family therapists;
- (9) nurses;
- (10) occupational therapists;
- (11) optometrists;
- (12) osteopathic physicians;
- (13) pharmacists;
- (14) physical therapists;
- (15) physicians' assistants;
- (16) professional counselors;
- (17) professional engineers;
- (18) podiatrists;
- (19) psychologists;

(20) radiological technicians;

(21) respiratory therapists; and

(22) veterinarians.

Credits

HISTORY: 2005 Act No. 32, § 4, eff July 1, 2005, for causes of action arising after that date.

Notes of Decisions (4)

COPYRIGHT (C) 2012 BY THE STATE OF SOUTH CAROLINA

Code 1976 § 15-36-100, SC ST § 15-36-100

Current through End of 2012 Reg. Sess.

End of Document

© 2013 Thomson Reuters. No claim to original U.S. Government Works.

PENDARVIS LAW OFFICES, PC



September 4, 2013

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

This is a request for the status of Your Honor's ruling on Defendants' pending motions to dismiss. The last communication from Your Honor was almost 3 months ago in a letter dated June 14, 2013, indicating the Court's intent to sign an Order resolving the motions. We have not received any notice, written or otherwise, indicating that an Order has been signed or entered. Please let us know if an Order has been signed or entered.

Plaintiffs maintain that their Verified Complaint states a claim against all Defendants and that none of the Defendants' motions to dismiss should be granted. For example, contrary to the Defendants' positions, an expert affidavit is not required in this case because the Verified Complaint does not assert a claim for professional negligence: The Plaintiffs never retained any of the Defendants as their lawyer. Even if the Court were to conclude that Plaintiffs did allege a claim for professional negligence the governing statute does not require an affidavit when the alleged negligence "***lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant.***" S.C. CODE ANN. § 15-36-100(C)(2) (emphasis added).

No "*special learning* is needed to evaluate the conduct" of the Defendants as alleged in the Verified Complaint. It is common knowledge that lawyers are not allowed to disclose prospective clients' confidential information to other lawyers. It is also common knowledge that lawyers are not allowed to use someone's name in any lawsuit to get legal fees unless that person actually hired the lawyer and gave permission for the representation. None of the Defendants disagreed with these same points that were mentioned in the correspondence to you dated June 20, 2013.

It is worth repeating that none of the Defendants had a fee agreement with the DeLoaches; none of the Defendants (except for Mr. Kassel) ever once communicated with the DeLoaches; none of the Defendants had the DeLoaches' permission to use their names in the Tennessee lawsuit; none of the Defendants ever called or contacted the DeLoaches

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

The Honorable Joseph M. Strickland
Page 2
September 4, 2013

to report on the status of the lawsuit; and none of the Defendants ever told them that hundreds of thousands of dollars of legal fees had been recovered. Any person of common knowledge will know, without needing an expert to tell them, that lawyers simply cannot do these things.

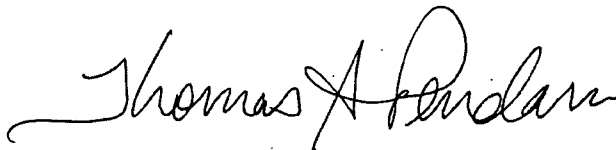
This case is getting very old and needs to proceed. The DeLoaches' Verified Complaint was filed almost 2 years ago on November 3, 2011. Defendants filed motions to dismiss between January 23, 2012 and March 13, 2012, the last of which was almost 18 months ago. The first hearing on Defendants' motions was held on June 6, 2012, which is almost 16 months ago.

We again respectfully request Your Honor sign an Order denying all of the Defendants' motions to dismiss the DeLoaches' Verified Complaint and allow this case to proceed and give the Defendants an opportunity to explain their conduct to a jury.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in black ink, reading "Thomas A. Pendarvis". The signature is fluid and cursive, with the first name "Thomas" being more prominent and the last name "Pendarvis" written in a continuous script.

Thomas A. Pendarvis

TAP/lat

cc : James L. Bruner, J.D.
James E. Lady, J.D.
Amy L.B. Hill, J.D.
Joshua D. Shaw, J.D.
Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.
William & Allison DeLoache (via e-mail only)

PENDARVIS LAW OFFICES, PC



September 11, 2013

EXHIBIT

6

VIA U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

Begging the Court's indulgence, today we learned of a very significant development with regard to LEATH BOUCH Defendants that may influence the Court's ruling on Defendants' motions to dismiss in this matter that remain under the Court's consideration.

Enclosed please find a copy of a Complaint filed by the LEATH BOUCH Defendants offensively invoking Rule 1.5(e), RPC to support their claim that another lawyer is not entitled to his share of the fees because, in their words, the "Clients here never approved of the participation of [the other lawyer]." Their claim is virtually identical to what happened to DeLoaches as stated in their Verified Complaint in this matter. (Summary of the Case - "The Defendant class action lawyers . . . never communicated with the DeLoaches to report on their representation, or to advise that over \$600,000 in funds had been obtained as a result of their activities, or to seek to obtain their consent for the apportionment of 'fees' between counsel in different firms.") It is remarkable that the LEATH BOUCH Defendants also did not include a lawyer's affidavit of merit with the Complaint even though they are suing a lawyer.

If the LEATH BOUCH Defendants' Complaint in their lawsuit states a claim under Rule 12(b)(6), then so does the DeLoaches' Verified Complaint, and the motions to dismiss should be denied.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

A handwritten signature in cursive script that reads "Thomas A. Pendarvis".

Thomas A. Pendarvis

TAP/lat
Enclosures
cc w/ enclosures: James L. Bruner, J.D.

The Honorable Joseph M. Strickland

Page 2

September 11, 2013

James E. Lady, J.D.

Amy L.B. Hill, J.D.

Joshua D. Shaw, J.D.

Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D.

William & Allison DeLoache (via e-mail only)

Lawrence E. Richter, Jr. (via e-mail only)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

LEATH, BOUCH & SEEKINGS, LLP

Plaintiff(s)

vs.

JOSEPH K. QUALEY,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2013 - CP - 10 - 1662

(Please Print)

Submitted By: Timothy W. Bouch, Esq.

Address: Leath, Bouch & Seekings, LLP
92 Broad Street, P.O. Box 59,
Charleston, SC 29402

SC Bar #: 782

Telephone #: (843) 937-8811

Fax #: (843) 937-0606

Other:

E-mail: tbouch@leathbouchlaw.com

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

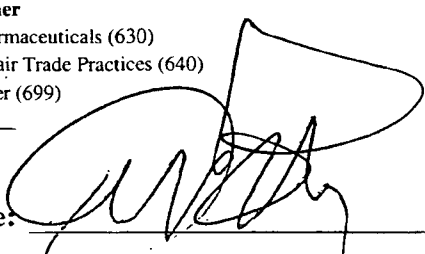
DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ Employment (120) ☐ General (130) ☒ Breach of Contract (140) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) ☐ Other (299)	Torts - Personal Injury ☐ Assault/Slander/Libel (300) ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Sexual Predator (510) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Other (799)	Administrative Law/Relief ☐ Reinstate Driver's License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture (840) ☐ Other (899)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Administrative Law Judge (980) ☐ Public Service Commission (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex /Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620)	☐ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Other (699)		

Submitting Party Signature: 

Date: March 20, 2013

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT
CASE NUMBER: 13-CP-10-1662

LEATH, BOUCH & SEEKINGS, LLP,)

Plaintiff,)

vs.)

JOSEPH K. QUALEY,)

Defendant.)

SUMMONS

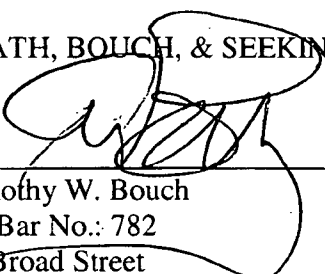
(Declaratory Judgment)
(Non-Jury Trial)

FILED
2013 MAR 20 AM 9:49
JULIE J. ARMSTRONG
CLERK OF COURT

TO: THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers, at their offices, 92 Broad Street, Charleston, South Carolina, 29401, within thirty (30) days after the service hereof, exclusive of the day of such service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

LEATH, BOUCH, & SEEKINGS, LLP

By: 

Timothy W. Bouch
SC Bar No.: 782
92 Broad Street
Post Office Box 59
Charleston, South Carolina 29402
(843) 937-8811

Attorneys for the Plaintiff

Charleston, South Carolina

Dated: March 20, 2013

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON) CASE NUMBER: 13-CP-10-1662

LEATH, BOUCH & SEEKINGS, LLP,)
)
 Plaintiff,)
)
vs.)
)
JOSEPH K. QUALEY,)
)
 Defendant.)
)

COMPLAINT
BY
(Declaratory Judgment)
(Non-Jury Trial)

FILED
2013 MAR 20 AM 9:49
JULIE J. ARMSTRONG
CLERK OF COURT

The Plaintiff, Leath, Bouch & Seekings, LLP, files this Complaint for Declaratory Judgment pursuant to S.C. Code Ann. §15-53-10, et seq. and Rule 57 S.C.R.C.P. against the above- named Defendant and respectfully shows unto the Court as follows:

PARTIES

1. Leath, Bouch & Seekings, LLP (hereinafter "LBS") is a Limited Liability Partnership organized and existing under the laws of the State of South Carolina with its principal place of business in Charleston County, South Carolina.

2. Defendant Joseph K. Qualey (hereinafter "Qualey") is an attorney licensed to practice under the laws of the State of South Carolina and resides in Charleston County, South Carolina.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this matter pursuant to S.C. Code Ann. §15-53-10, et seq.

4. Venue is proper in Charleston County as the events giving rise to the claims asserted below occurred within the County and the parties live and reside there.

5. This is an action for Declaratory Judgment pursuant to S.C. Code Ann. §15-53-10, et seq. for the purpose of constructing and interpreting the terms, if any, for the division of a legal fee.

DECLARATORY JUDGMENT

6. Plaintiff, as counsel, has filed two civil actions: (*The Highlands of Legend Oaks Property Owners Association, Inc. v. Alison Dailey Properties, Inc., et al*, Case No.: 2010-CP-18-2169; *Elizabeth O'Donnell, et al v. Northland Madison At Park West, LLC, et al*, Case No.: 2010-CP-10-9095). The *Madison* matter is ongoing, Plaintiff has been certified by this Court as Class Counsel. The *Highlands* matter is in the process of finalizing settlement agreements between the parties.

7. At no time during the prosecution of either of the above civil actions has Joseph K. Qualey had any connection with those civil actions. Mr. Qualey has not participated as counsel in any way. His name does not appear on any pleading, he has taken no part in any discovery, he has made no court appearances, he has advanced no funds for the prosecution of either matter, and is in fact a complete stranger as to either of these matters. In the *Madison* matter, Mr. Qualey has not been approved as Class Counsel as has the Plaintiff.

8. Nevertheless, in spite of the complete lack of any connection with these two matters, Mr. Qualey has retained counsel, and has made demand on the Plaintiff for an amount of one-half of the legal fees which the Plaintiff either have earned or may earn (Demand Letter attached hereto as Exhibit 1).

9. Pursuant to Rule 407 and Rule 1.5 thereof, fee divisions are to be made in proportion to the services performed by each lawyer, and the clients must agree in writing as to

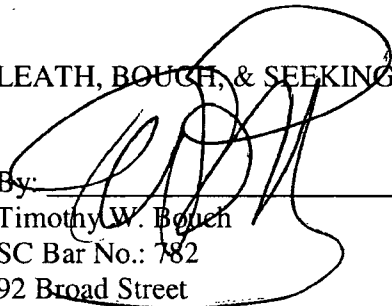
the share each lawyer will receive. Clients here have never approved the participation of Joseph Qualey, nor has he performed any services nor advanced any funds. He is a total stranger to either of these matters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays as follows:

1. That this Court inquire into the matters as set forth above pursuant to SC Code Section 15-53-10 *et. seq.*, to determine the rights of the parties, and in that connection,
2. Issue its order finding that Joseph K. Qualey has no rights to any attorney fees earned or to be earned by the Plaintiff in the two civil matters set forth above.
3. And any further relief to this court shall deem fit and proper.

LEATH, BOUCH, & SEEKINGS, LLP

By: 

Timothy W. Bouch

SC Bar No.: 782

92 Broad Street

Post Office Box 59

Charleston, South Carolina 29402

(843) 937-8811

Attorneys for the Plaintiff

Charleston, South Carolina

Dated: March 20, 2013

/

THE RICHTER FIRM, LLC

Attorneys & Counselors at Law
622 Johnnie Dodds Boulevard
Mount Pleasant, South Carolina 29464

Lawrence E. Richter, Jr.
Alice Anne Richter Lehrman
Aaron E. Edwards
Patrick T. Napolski*

Telephone: (843) 849-6000
Telefax: (843) 881-1400

*Licensed in IL only

March 15, 2013

VIA EMAIL tbouch@leathbouchlaw.com,
FACSIMILE 937-0606, and U.S. MAIL

Timothy W. Bouch
Leath Bouch & Seekings, LLP
92 Broad Street
P.O. Box 59
Charleston, SC 29402

In Re: Highlands and Madison matters

Dear Tim:

Responding to your letter of today's date, please be advised that I have been asked to represent the interests of Joe Qualey and/or his firm in all matters relating to legal fees to which he is entitled, such fees arising out of the matters referenced above.

Mr. Qualey hereby demands that no disbursement of any attorneys' fees from any of the above referenced matters be made until the issue of division of attorneys' fees is resolved. Mr. Qualey further demands that any and all attorneys' fees from any of the above referenced matters' settlement disbursements remain in trust pending a resolution of the fee dispute between you and your firm and Mr. Qualey and his firm pursuant to Rule 1.15 and that any disbursement to any clients specifically exclude any statement regarding your agreement on division of fees, including the share each will receive, until this matter is resolved. Mr. Qualey and his firm claim a lien on the attorneys' fees heretofore referenced and an entitlement to one-half (1/2) of the total amount of attorneys' fees, and demands that those funds be kept separate and in trust by you until this dispute is resolved.

You have specifically agreed that Mr. Qualey/his firm are co-counsel with you in the referenced matters and if you are not prepared to honor that agreement it will be necessary that this controversy be resolved in the appropriate forum as soon as is reasonably possible.

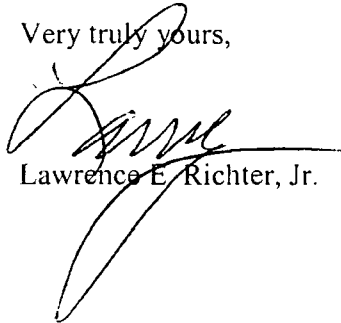
We understand that you are in possession of settlement proceeds in at least one or more of the matters referenced above as of this date. In addition to demanding that the attorneys' fees referenced above be kept separate by you until the dispute over division of the fee is resolved,

Mr. Qualey also demands, as co-counsel, that no settlement funds be disbursed without his knowledge or written consent and that he be provided with a full accounting regarding such funds at or prior to any disbursement time. Mr. Qualey wishes to be present at any distribution, execution of release, and/or any other meeting with the clients. Please notify him should such a meeting be set.

Please let me earnestly state to you that I have known Joe Qualey very closely for many years. I have never seen him hurt by anyone's actions to the degree that he has been by what he views as a complete betrayal, both personally and professionally, on the part of you all and your firm. Additionally, I have never seen him as resolved and committed to pursuit of an issue as he is concerning this one. It is inconceivable to me that there could possibly be any misunderstanding, and I hope that we can sit down together and make everything as it should be; short of that this matter is certainly headed to resolution at the hands of the appropriate authority.

Please let me hear from you without delay. I believe that Mike Seekings has thus far been the spokesman from your side. Whoever is to handle this, please contact me right away and let me know whether you wish to voluntarily resolve this controversy by payment to Mr. Qualey of those sums to which he is entitled. If not, please place your liability carrier on notice immediately and have its representative contact me without delay.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lawrence E. Richter, Jr.", with a long, sweeping underline.

Lawrence E. Richter, Jr.

LER/lwh

cc: W. Jefferson Leath, Jr.
Michael S. Seekings
Joseph K. Qualey



LEATH, BOUCH & SEEKINGS, LLP
COMMERCIAL LITIGATION • CONSTRUCTION • ENVIRONMENTAL

March 20, 2013

VIA HAND DELIVERY

Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad Street, Suite 106
Charleston, SC 29401

RE: Leath, Bouch & Seekings, LLP v. Joseph K. Qualey
Case No.: 2013-CP-10-

Dear Ms. Armstrong:

Please find enclosed for filing the original and two (2) Civil Action Cover Sheets, Summons and Complaints, as well as the filing fee of \$150.00 for the above referenced matter. Please return filed, stamped copies to our office via courier.

Thank you and with best regards, I am

Very truly yours,

LEATH, BOUCH & SEEKINGS, LLP

Timothy W. Bouch

TWB/lf
Enclosures

PENDARVIS LAW OFFICES, PC



June 17, 2013

EXHIBIT

7

VIA E-MAIL AND U.S. MAIL

The Honorable Joseph M. Strickland
RICHLAND COUNTY MASTER-IN-EQUITY AND SPECIAL CIRCUIT COURT JUDGE
PO Box 192
Columbia SC 29202

Re: ***DeLoache v. Robertson, et al; Case No. 2011-CP-40-7432***

Dear Judge Strickland:

We are in receipt of your letter dated June 14, 2013, indicating an intent to grant Defendants' Motions to Dismiss the above matter. While we appreciate Your Honor's time and attention to this matter, we respectfully disagree with any ruling dismissing the Complaint.

Notwithstanding our disagreement, we trust Your Honor is aware that "where a complaint is dismissed under [Rule] 12(b)(6), plaintiff should be granted leave to file an amended complaint." *Dockside Ass'n v. Detyens, Simmons, & Carlisle*, 297 S.C. 91, 95, 374 S.E.2d 907, 909 (Ct. App. 1988) (citing *Foman v. Davis*, 371 U.S. 178 (1962)) (plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal under provisions of Rule 12(b)). Because Your Honor's letter did not indicate an intent to deviate from the Rule 12(b) standard of the dismissal being without prejudice, we respectfully request Your Honor include language in any Order that is issued expressly providing the DeLoaches leave to file an Amended Complaint. See *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869, 881 (2006) ("When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice.")

Ultimately, we find it very difficult to believe that Your Honor would sign an Order dismissing with prejudice all claims arising from the group of defendant lawyers' unauthorized use of the DeLoaches' identities to file suit and recover hundreds of thousand of dollars using their names without the knowledge or consent of those "clients" and from a lawyer's violation of the DeLoaches' confidences to keep their matter confidential. In the event Your Honor were to issue an Order granting Defendants' Motions to Dismiss the DeLoaches' Complaint with prejudice, such a ruling will be seen by the DeLoaches and by the public as a court *approving this behavior and providing blanket civil immunity for such conduct*. Surely the law provides a civil remedy when lawyers use the names and identities of unknowing South Carolinians to obtain hundreds of thousands of dollars and also provides civil remedies when a lawyer violates prospective clients' confidences. Any ruling to the contrary will be viewed as the proverbial fox guarding the hen house.

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

June 17, 2013

Your Honor mentioned during the hearing last week that the claims against these defendants were "serious." We agree and to appreciate the gravity of the defendants' conduct, it may be helpful to consider developments that occurred after this Complaint was filed that were not presented during either of the hearings in this case. The defendant "class action" lawyers' acts and omissions set forth in the Complaint took place as part of their involvement in stucco claims against Dryvit Systems, Inc. in the underlying 2002-CP-40-1377 class action lawsuit and in the Posey lawsuit referenced in the Complaint. As Your Honor may be aware, on June 5, 2012, the Honorable J. Mark Hayes, II issued a RULE TO SHOW CAUSE AND ORDER FOR ACCOUNTING in the #1377 matter ordering that the majority of these defendant lawyers appear before the Court to explain their conduct, a copy of which is enclosed for your convenience. Of particular interest are the findings concerning the DeLoaches found on pages 8 - 9 of the RULE TO SHOW CAUSE.

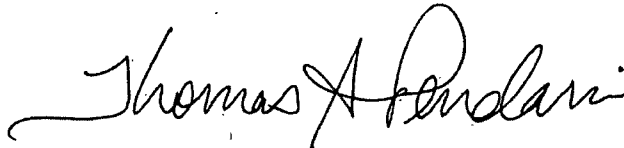
In summary, we respectfully request Your Honor reconsider signing any Order dismissing the DeLoaches' Complaint. In the event Your Honor signs an Order dismissing the Complaint, we respectfully request language be included providing leave to file an Amended Complaint as is the general rule recognized by the Supreme Court.

In advance, thank you for your consideration of this matter.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis

TAP/lat
Enclosure

ec: James L. Bruner, J.D. (w/ enclosure)
James E. Lady, J.D. (w/ enclosure)
Amy L.B. Hill, J.D. (w/ enclosure)
Charles E. Hill, J.D. / Joshua D. Shaw, J.D. (w/ enclosure)
Kent T. Stair, J.D. / Tyler P. Winton, J.D. / William P. Jones, J.D. (w/ enclosure)
William & Allison DeLoache (w/ enclosure)

THOMAS A. PENDARVIS, J.D.
ADMITTED IN SC AND GA
Thomas@PendarvisLaw.com
Board Certified by the American Board of
Professional Liability Attorneys in
Legal Malpractice

500 CARTERET ST., SUITE A
BEAUFORT, SC 29902-5066
www.PendarvisLaw.com
T 843.524.9500
F 843.524.9501

CATHERINE B. KERNEY, J.D.
ADMITTED IN SC, VA AND DC
Carey@PendarvisLaw.com

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

TIMOTHY TREON and his wife,)
JANE TREON, P. JENNINGS)
SCEARCE and STEVEN CHRISTAIN)
individually and on behalf of others)
similarly situated in the State of South)
Carolina,)

Plaintiffs,)

V.)

DRYVIT SYSTEMS, INC.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2002-CP-07-1377

**RULE TO SHOW CAUSE
and
ORDER FOR ACCOUNTING**

2012 JUN -5 PM 1:42
JENNIFER ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter is before the Court on Plaintiffs' Motion for an Accounting of attorney fees allegedly received by certain Class Counsels and for benefits paid to prior Class Representatives which were never disclosed to or approved by this Court. A hearing on the motion was conducted on March 31, 2010 and the Court's initial decision to grant the Plaintiffs' motion was announced at that time. After being appointed as the judge assigned with the responsibility of cases 2008-CP-07-3145 and 0774,¹ the Court delayed further action in this matter so that a global resolution of all three cases could be explored. No global resolution has occurred and this Court's present belief is that at this time proceeding with this Rule to Show Cause is proper.

The Plaintiffs seek an accounting of any attorneys' fees paid to or otherwise received by Original Class Counsel because of their status as Class Counsel in the present matter. Plaintiffs also seek an accounting of any benefits paid to or otherwise received by

¹ These two cases involve claims of professional malpractice and breach of fiduciaries arising from the present litigation.

gm

Original Class Representatives because of their status as Class Representatives. The Plaintiffs also seek to have any fees and/or benefits received by Original Class Counsel and Original Class Representatives placed in a constructive trust for the benefit of the class.

The record of this case is substantial in its size. The vast majority of the record in this case, however, does not relate to the substantive product liability claim asserted in this lawsuit against the Defendant. But rather, the vast majority of the record relates to the use of a South Carolina Circuit Court judge's order granting class certification as a sword against a sister state's attempt to finalize a nationwide class action settlement and the subsequent conduct of Original Class Counsel and Original Class Representatives.

Based on the record of this case, this Court believes a sufficient showing has been made for it to invoke its powers under SCRCP Rule 23 and its inherent judicial powers to issue this Rule to Show Cause and Order for Accounting.

Background²

This class action lawsuit was commenced with the filing of a summons and complaint on August 12, 2002. It was originally captioned John and Sally Cardamone, et al. v. Dryvit Systems, Inc., et al. Attorneys Timothy W. Bouch; William M. Bowen; Francis E. Grimbail; W. Jefferson Leath, Jr.; George E. Mullen; W. Dixon Robertson, III; Michael S. Seekings; and Robert L. Wylie, IV originally served as class counsel in this matter (hereinafter they will be collectively and individually referred to as "Original Class Counsel"). Original Class Counsel and Original Class Representatives moved for an order from the Honorable Thomas Kemmerlin, Jr. certifying a class in this action. As defined by

² The factual basis of this order includes and is hereby incorporated by reference, the facts found in this Court's prior order dated January 7, 2009.



the complaint, the Cardamone Class consisted of current and former owners of certain residential property in South Carolina clad with an Exterior Insulation and Finish System³ manufactured by Defendant Dryvit Systems, Inc. who were also "members" of a purported nationwide class action settlement in a Tennessee action known as Posey, et al. v. Dryvit Systems, Inc., Tennessee Case No. 17,715.

After hearing the certification motion, Judge Kemmerlin certified the Cardamone class and specifically opted it out of the Posey action in Tennessee by Order dated September 3, 2002. (the "September 2003 Order"). This Court's opinion is that Judge Kimmerlin's Order placed Original Class Counsel and the Original Class Representatives in a representative capacity for absent class members and imposed upon them the fiduciary duties and Rule 23 obligations. Also, the September 2003 Order expressly required that a notice plan be submitted within 30 days. No notice plan was ever submitted by Original Class Counsel or Original Class Representatives.

Even though no notice plan was ever pursued by Original Class Counsel, on October 1, 2002, members of Original Class Counsel attended a hearing the Posey court conducted to consider the fairness of the purported nationwide settlement.⁴ The Tennessee Court (The Posey Court) was made aware of the South Carolina's court decision to certify South Carolina class action when the Original Class Counsel spoke in opposition to the proposed settlement during the fairness hearing.⁵ After participating in

³ Exterior Insulation Finish Systems are commonly known as "synthetic stucco" or by their acronym EIFS. EIFS is a relatively new building product that looks very similar to traditional concrete-based stucco, but incorporates an insulation layer that traditional stucco does not have.

⁴ Posey's purported nationwide settlement sought jurisdiction over EIFS homeowners in every state except for North Carolina due to a state-wide class action settlement Dryvit had entered into earlier.

⁵ Frank Grimbail, Robert Wylie, and Dixon Robertson - attended that Hearing in Tennessee. Although ostensibly appearing on behalf of two individual objectors, William and Alison DeLoache, Frank Grimbail argued against the Posey Settlement on a variety of grounds and he explained that "the entire state of South Carolina at this point, Your Honor, has opted out [of the Posey Settlement]." Posey Hr'g Tr. dated October 1,

certain negotiations with the lawyers in Tennessee, members of the Original Class Counsel attended a second fairness hearing on December 18, 2002, where their support for the final approval of the national settlement was reported to the Posey court. See Dryvit Systems, Inc.'s Evidence in Support of Motion to Dismiss at Tab 4. The Posey Court was also told that with the modifications to the settlement, the Cardamone class was withdrawing its objections to Posey settlement. Hr'g Trans. Dated 12/18/2002 at p. 28, lines 8-18.⁶

The Posey Court issued an order granting final approval to the Posey settlement on January 14, 2003. In that Order, the judge specifically noted the contribution of the South Carolina class counsel in reaching a settlement:

[Posey] Class Counsel, together with counsel for certain objectors, including those representing a proposed litigation class in South Carolina, have been engaged in numerous substantial discussions and negotiations since the Fairness hearing with Counsel for the Settling Defendant.⁷

The Tennessee Order specifically approved an attorney fee and expense award of \$11,600,000.00 to be distributed "among counsel for the Class." January 14th Order at p. 10. That "counsel" included the Order's earlier reference to "counsel ... representing a proposed litigation class in South Carolina." Id. at pp. 8,10. The Order also specifically prohibited class members from participating in other class actions, such as the Cardamone action. Id. at pp. 6, 9.

2002 at p.16, lines 15-17; p.17, lines 6-10. He also argued that "opt-outs are really objectors, but they just had sense enough to go ahead and remove themselves from this situation, avoid this class so that they could effect a full recovery." Id. at p.115, lines 7-11.

⁶ Attorney Robert Phillips, who represented the South Carolina objectors Harry and Trudy Creasy was also present at the Second Fairness Hearing. He responded to the claim that the Cardamone class no longer sought to opt-out of the Settlement by informing Judge Slone that his clients were intervening in the South Carolina class action. We filed that motion approximately a month ago, and it is not our position that the changes cure the fundamental legal defects that keep this class from being certified, much less a settlement. So I just wanted to correct that representation.

⁷ Posey Order dated January 14, 2003 at p.5, ¶15.

910

Following the issuance of the January 14th Order, Original Class Counsel presented the proposition of the attempted compromise of the Cardamone action to Judge Kemmerlin. During a hearing on February 5, 2003, Michael Seekings of the Mullen, Wylie and Seekings firm, informed the court that:

[Original Class Counsel] came – we opted out after we came to your Honor and asked for certification of a class in South Carolina. We then went to Tennessee and opted our class out. Participated in additional negotiations with both Dryvit and counsel for the plaintiffs at the direction of the court. The settlement changed. We as our certified class then went to a hearing and told the judge we thought now it is fair. ... Now this class de facto doesn't exist anymore. The Cardamone case underlined has been settled. The Dryvit settlement [in Tennessee] has been changed to the satisfaction of all involved.

In the present litigation, Dryvit was ordered to produce numerous documents including e-mails, letters, settlement agreements and other documents. The Court has reviewed these materials and is satisfied that they are authentic and reflect the ongoing dialogue between Original Class Counsel, Posey Class Counsel and Dryvit Counsel. The Court has also reviewed transcripts of the hearings in Posey and a hearing in front of the Honorable Thomas Kemmerlin, Jr., on February 26, 2003. After such review, it appears to this Court that following the Posey fairness hearing, Original Class Counsel and Dryvit's attorneys and Posey Class Counsel agreed to settle the individual lawsuits of certain Cardamone class members who were represented by Original Class Counsel and pay Original Class Counsel a significant attorneys' fee. See Dryvit Documents Numbers Card 092-094, Dry 0970, CARD 00088, CARD 00072-73; Dry 0277, 0379, 0103, CARD 06727-29, 06739.

After the agreement to settle the Class Representatives' cases and to pay the attorneys' fees to Original Class Counsel, it appears that the present case was allowed to



lie dormant until December 2005. During the nearly three (3) intervening years, Dryvit and Original Class Counsel finalized individual settlements with each of Cardamone's named class representatives.⁸

In an email dated September 29, 2005, Dryvit's counsel reaffirmed the agreement to pay Original Class Counsel a total of \$825,000 as an attorneys' fee upon the ultimate dismissal of the Cardamone action. Shortly thereafter, Dryvit moved to Dismiss and Decertify the Cardamone action in South Carolina. Dryvit Documents Number CARD 0128-0129. One of the Original Class Counsel also referenced an agreement between Cardamone and Posey counsel in an email dated April 22, 2004:

"Subject: SC Class. Hi to both of you. We are preparing to attend and agree to the motion to decertify the [Cardamone] class which will take place Monday in Beaufort, S.C. Some of my SC lawyers are concerned about not having any memorialization of the agreement Frank Grimball and I reached with the 2 of you in Tennessee about class counsel compensation, and I agree we should at least have an e-mail writing of it prior to Monday at 1 pm. Here is my understanding of it: Class counsel will earmark 600K of its national class fees for SC counsel and in addition Dryvit will contribute 225K which can be distributed by class counsel to the SC group. I would appreciate confirmation of this understanding." Dry0970.

After learning that Dryvit was attempting to decertify and dismiss the Cardamone action, Timothy and Frances Treon, and P. Jennings Searce successfully moved to intervene in the action and became the named class representatives (hereinafter collectively and individually referred to as "Intervening Class Representatives"). Additionally, their attorneys, Richard R. Gleissner, Robert B. (Sam) Phillips, Gregory M.

⁸ In correspondence dated February 5, 2003, Dryvit's counsel confirmed the individual settlement it had reached with class representatives John and Sally Cardamone and acknowledged that the amount "Dryvit has agreed to pay [the Cardamones] includes a bonus reflecting Mr. Cardamone's status as a named plaintiff in the South Carolina class action. This settlement, of course, ends his participation in that class action, which it is anticipated will be entirely dismissed following resolution of the limited number of cases previously listed."



Alford, Thomas J. Finn, Thomas E. Williams, and Donald E. Jonas successfully moved to intervene as class counsel (hereinafter collectively referred to as "Intervening Class Counsel"). Although most members of Original Class Counsel chose to voluntarily withdraw from this action at that time, attorneys George Mullen and Frank Grimball remained in the action.

By order dated January 18, 2006, this Court allowed Intervening Class Counsel and Mistrs Mullen and Grimball to act as Class Counsel. (the "January 18, 2006 Order").

The existence of the agreement referenced above regarding the terms of the settlements and the attorneys' fees to be paid to Original Class Counsel were not disclosed to the Court by Original Class Counsel at the February 26, 2003 or December 2005 hearing. However, after Dryvit produced documents, the record reflects that Original Class Counsel have received the \$600,000.00 payment promised by the April 22nd email.⁹

Plaintiffs' have asked the court for an accounting of the attorneys' fees promised and/or paid to Original Class Counsel while they were representing the Cardamone class along with the fees related to individual settlements they negotiated for certain class members. At this time, this Court is not requiring disclosure of fees related to individual cases of Class members who were not also named Class Representatives. Nevertheless, this Court is compelled to ascertain why fees of \$825,000 were promised to Original Class Counsel which the e-mails and other documents in the record say are conditioned upon the dismissal of this case.

⁹ The following checks were provided to the Court: Check issued by Doffermyre, Shields, Canfield, Knowles, & Devine, LLC ("Doffermyre, LLC") to Leath, Bouch & Crawford, LLP ("Leath Bouch") and Mullen Wylie & Seekings on 11/15/2005 for \$310,345.00 with notation "Leath and Seekings share of attorney fees"; check issued by Doffermyre, LLC to Leath Bouch on 6/21/2006 for \$93,103.00; check issued by Doffermyre, LLC to Leath Bouch for \$196,552.00 on 9/18/2006 with notation "Attorneys Fees for Objectors."



Again, none of the payments or arrangements were disclosed to the Court. Further, the different reasons or justifications given by different members of Original Class Counsel made in statements and testimony before this Court compels the Court to inquire further. One theory proffered by Original Class Counsel is that the monies were paid solely for the representation of Posey Objectors William and Allison Deloach.¹⁰ Another theory is that it was for work done for the Posey class.¹¹ However, from the documents in the record in this case, one can reasonably conclude that the payments were based on Original Class Counsel's status as being named "Class Counsel" and the agreement to compromise and ultimately dismiss this case; again, the substance of which was never presented to Court in accordance with SCRPC Rule 23(c) and (d).

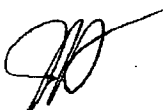
Law/Analysis

This Court finds it has jurisdiction over the Original Class Counsel and the Original Class Representatives sufficient to require them to appear before me to answer the questions raised by the documents produced by Dryvit and the monies they received while they had fiduciary obligations to this Court and the Class. This Court's belief is that the present Order is needed, if for no other reason than to clarify for the record of this case that the South Carolina class action rules have been complied with, so that the integrity of the class action process is maintained.

In this matter, there is evidence that Original Class Counsel participated in the Posey action while representing this Class to which they owed a fiduciary duty. See Premium Investment Corp., 282 S.C. 464, 324 S.E.2d 72. It appears that Original Class

¹⁰ Mrs. Deloach has testified in her deposition that she and her husband had no attorney-client relationship with any of Original Class Counsel.

¹¹ The final Order in Posey, does not designate any of Original Class Counsel as "Class Counsel" in Posey.



Counsel may have negotiated attorneys' fees for themselves based on a willingness to compromise the prosecution of this action. Original Class Counsel did not disclose to nor have they sought approval by the Court for the payment of any attorneys' fees or for approval of the settlement of the claims of the Original Class Representatives.

The Court therefore finds it necessary to require each member of Original Class Counsel and the Original Class Representatives to appear before it and account for the funds and or benefits, if any, they received as a result of their representation of this Class. Original Class Representatives and Original Class Counsel invoked the jurisdiction of this Court to make themselves the fiduciaries of this Court and the Class under Rule 23 SCRPC and therefore this Court feels it appropriate to exercise its jurisdiction over them.

Furthermore, as officers of the court, Original Class Counsel have an obligation to appear before a circuit court judge seeking their testimony on a pending matter for which their input is required. See State v. Brantley, 279 S.C. 215, 305 S.E.2d 234 (1983) (holding trial court could order sheriff from adjoining county, as an officer of the court, to appear without issuing a subpoena), cf. Rule 3.4(c), RPC, Rule 407, SCACR (a lawyer shall not knowingly disobey an obligation under the rules of a tribunal); Rule 1.15(d), RPC, Rule 407, SCACR (a lawyer shall promptly render a full accounting regarding contested property). The exercise of this power is enhanced by the operation of Rule 23, SCRPC which grants each trial court broad powers to oversee the conduct of a class action lawsuit and protect the interests of unnamed class members.

Accordingly, this Court finds the issuance and service of an Order and/or Rule to Show Cause appropriate in order to allow the Class to properly account for the benefits, if any, promised and/or paid to Original Class Counsel and the Original Class



Representatives. Additionally, the appearance of Original Class Counsel in this matter allows this court to examine and, if necessary, to correct conduct that is calculated to obstruct, degrade, and undermine the administration of justice. Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006).

From the information provided to the Court, there appears to be no dispute that Original Class Counsel aided in the settlement of the individual cases of the Original Class Representatives. Those settlements create an appearance of being in violation of South Carolina law.¹² The U.S. Supreme Court has stated: due process requires adequate representation "at all times." *Shutts*, 472 U.S. at 812 (1985):

This Court's responsibility to unnamed class members and to the integrity of the judicial process requires that this Court exercise its authority and duty to inquire of the issues contained in this Rule to Show Cause and to account for all funds paid, or promised to be paid, in connection with this action. Rule 23 of the South Carolina Rules of Civil Procedure "specifically permits the trial court to maintain continual control over class action proceedings." Salmonsens v. CGD, Inc., 377 S.C. 442, 454, 661 S.E.2d 81, 88 (2008). This allows the trial court, "at any time, [to] impose such terms as shall fairly and adequately protect the interest of the person on whose behalf the action is brought." Rule 23(d)(2), SCRPC. A trial court has a specific responsibility to account for the benefits derived by Class Representatives and Class Counsel in this action in accordance with Rule 23, SCRPC. See Premium Investment Corp. v. Green, 282 S.C. 464, 324 S.E.2d 72 (Ct.App. 1984) (recognizing the fiduciary duty owed by class representatives and their lawyers to unnamed class members and imposing a constructive trust on any benefits obtained as a

¹² Class representatives may not enter into settlements of their individual claims because of their fiduciary duty to the class. [*Prem. Investment Corp. v. Green*, 324 S.E.2d at 77; *See In re Green*, 354 S.E.2d 557 (S.C. 1987); *Rogers v. U.S. Steel Corp.*, 70 F.R.D. 639 (1976)]



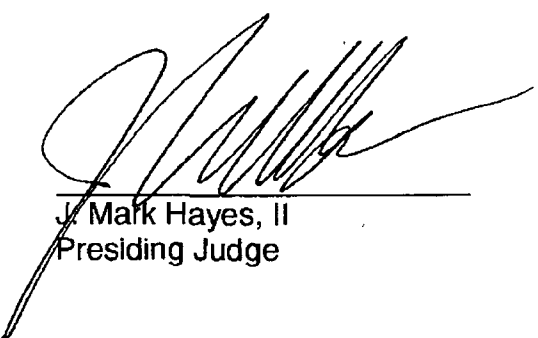
result of a breach of that duty). These obligations are merely specific applications of, and possibly enhancements to, a court's inherent power to protect the legal process in all matters that come before it.

It is therefore Ordered that Original Class Counsel and Original Class Representatives appear before this Court on October 1, 2012 at the Spartanburg County Court House at 9:30 am in Courtroom West-B to be examined and account to this Court for all fees and benefits, if any, received and or promised in connection with this action, specifically as follows:

- 1) An accounting for the \$825,000 referenced herein;
- 2) An Accounting of all fees received from the settlement of the individual cases of the Original Class Representatives;
- 3) An accounting of all benefits received by the Original Class Representatives;
- 4) To show why the court should not require that all fees and/or benefits, if any, be paid into the court to be held in a constructive trust for the class.

This Order is to be served upon the Original Class Counsel and the Original Class Representatives in accordance with Rule 4 of the SCRCP.

AND IT IS SO ORDERED.



J. Mark Hayes, II
Presiding Judge

This 1st day of June 2012

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

William E. DeLoache, III and Allison H. DeLoache,

Case No. 2011-CP-40-7432

Plaintiffs,)

v.)

William Dixon Robertson, III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath, Bouch & Crawford, LLP; Francis E. Grimball; Mullen, Wylie, LLC formerly Mullen, Wylie & Seekings, LLC; William M. Bowen; William M. Bowen, PA; and John D. Kassel,

Defendants.)

RETURN BY DEFENDANTS WILLIAM DIXON ROBERTSON III; W. JEFFERSON LEATH, JR.; MICHAEL S. SEEKINGS; LEATH, BOUCH & CRAWFORD, LLP; FRANCIS E. GRIMBALL; MULLEN, WYLIE, LLC FORMERLY MULLEN, WYLIE & SEEKINGS, LLC; WILLIAM M. BOWEN AND WILLIAM M. BOWEN, PA TO THE PLAINTIFFS' MOTION TO ALTER OR AMEND

Defendants William Dixon Robertson III; W. Jefferson Leath, Jr.; Michael S. Seekings; Leath, Bouch & Crawford, LLP; Francis E. Grimball; Mullen, Wylie, LLC formerly Mullen, Wylie & Seekings, LLC; William M. Bowen and William M. Bowen, PA (collectively, "Defendants") submit this Return in opposition to the Plaintiffs' Motion to Alter or Amend served November 18, 2013. The Plaintiffs argue this Court should reconsider its Order of Dismissal because: (i) they were not required to file an expert affidavit, (ii) they are not required to prove damages, (iii) they have a separate claim for breach of the duty of confidentiality, and (iv) their "Statement of the Case" should not have been stricken. The Defendants will address only the first, second and fourth points because the third relates only to Defendant Kassel. As discussed in more detail below, the Plaintiffs' Rule 59 motion should be denied because this Court committed no mistake, error or omission in dismissing the Plaintiffs' claims.

The Plaintiffs first contend this Court erred in holding they were required to file an expert affidavit pursuant to S.C. Code Ann. § 15-36-100. However, the only allegations the Plaintiffs

make in support of their breach of fiduciary duty claim relate to the Defendants acting as the Plaintiffs' lawyers. (See Compl. ¶ 98-106) (repeating the phrase "Defendants, as the DeLoaches' lawyers, . . .") The label the Plaintiffs place on the claim does not relieve them from their statutory obligations. See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P., 399 S.C. 322, 336-337; 732 S.E.2d 166, 173 (2012). Moreover, the Plaintiffs' argument overlooks this Court's holding that "the Plaintiffs have affirmatively denied having 'impose[d] a special confidence' in Moving Defendants and, as a result, failed to plead any facts that would give rise to a fiduciary relationship between them and the Defendant Attorneys." (Order of Dismissal at 12.) The Court properly dismissed Plaintiffs' claim for breach of fiduciary duty, and the Court's Order should not be altered or amended.

Second, the Plaintiffs contend their wrongful appropriation claim does not require them to plead damages. The failure to plead damages, however, was one of many reasons this Court gave for dismissing the Plaintiffs' claim. The Plaintiffs also failed to allege (i) that their names had any inherent commercial value, (ii) that the Defendants acted with any intent to misappropriate Plaintiffs' 'personality', or (iii) that the Defendants received any payment as a result of any commercial value associated with their names. (Order of Dismissal at 9.) Therefore, the Plaintiffs' assertion that they properly pled a claim for wrongful appropriation is without merit.

Plaintiffs' third argument relates solely to Defendant Kassel and not to the remaining Defendants submitting this Return.

Finally, the Plaintiffs argue the Court erred in striking the "Summary of the Case" allegations from the complaint. In support of their argument, the Plaintiffs claim the practice of striking allegations pursuant to Rule 12(f), SCRCP, is "generally disfavored." However, they

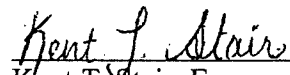
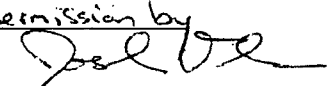
cite no South Carolina law in support of that assertion. The only South Carolina case they offer is Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle, 297 S.C. 91, 93, 374 S.E.2d 907, 908 (Ct. App. 1988), for the proposition that “a plaintiff whose claims have been stricken is normally granted leave to amend.” (Pl. Mot. to Alter or Amend at 13.) That case, however, makes no mention of Rule 12(f).

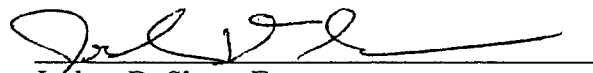
Contrary to the Plaintiffs’ argument, appellate decisions in South Carolina support this Court’s decision to strike allegations from the complaint pursuant to Rule 12(f). See, e.g., Robinson v. Code, 384 S.C. 582, 588, 682 S.E.2d 495, 498 (Ct. App. 2009) (affirming trial court order striking defenses unsupported by allegations); RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) (affirming trial court’s order striking allegations that failed to comply with Rule 8, SCRCF). In the Order of Dismissal, this Court held, “After review of the paragraphs, the Court finds that the paragraphs under Plaintiffs’ ‘Summary of the Case’ do not comply with the Rules of Civil Procedure, do not state a claim upon which relief might be granted, and are unnecessary to the Complaint.” (Order of Dismissal at 15.) The Plaintiffs offer no explanation of why they believe their “Statement of the Case” complies with the Rules of Civil Procedure, nor do they argue that those allegations are necessary. Instead, they argue they should be granted leave to amend their Complaint. Even if the Plaintiffs requested leave to amend, which they have not, any amendment under these circumstances would be futile. See Higgins v. Med. Univ. of S. Carolina, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997) (leave to amend may be properly denied where it would be futile).

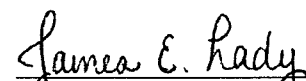
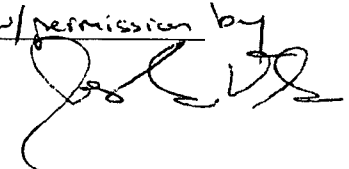
Therefore, the Court did not err in striking the Plaintiffs’ “Statement of the Case,” and the Plaintiffs’ Motion to Alter or Amend should be denied.

CONCLUSION

The Court's Order of Dismissal is not based on any mistake, error, or omission in the Court's findings of fact or conclusions of law. The Court properly considered and decided, *inter alia*, that (i) the Plaintiffs were required to file an expert affidavit pursuant to S.C. Code Ann. §§ 15-36-10 to 100, and (ii) the Plaintiffs failed to plead facts sufficient to state a claim for wrongful appropriation. Additionally, the Court properly struck the "Statement of the Case". Accordingly, the Plaintiffs' Motion to Alter or Amend should be denied.

 w/permission by 
Kent T. Stair, Esq.
Tyler P. Winton, Esq.
Carlock Copeland Semler & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
843-727-0307
*Attorneys for Leath, Bouch & Crawford,
LLP, W. Jefferson Leath, Jr. and Michael S.
Seekings*


Joshua D. Shaw, Esq.
Turner Padgett Graham & Laney P.A.
PO Box 1473
Columbia, SC 29202
803-254-2200
Attorney for William Dixon Robertson III

 w/permission by 
James E. Lady, Esq.
Mullen Wylie, LLC
171 Church Street, Ste. 370
Charleston, SC 29401
843-853-6200
*Attorneys for Francis E. Grimball; Mullen,
Wylie, LLC formerly Mullen, Wylie &
Seekings, LLC*

James L. Bruner w/permission by
James L. Bruner
Bruner Powell Wall & Mullins, LLC
P. O. Box 61110
Columbia, SC 29260
(803) 252-7693
*Attorneys for William M. Bowen and
William M. Bowen, PA*

376

these arguments in its November 5, 2013 Order. The crux of Plaintiffs' claim against Kassel is that Kassel violated the duty of confidentiality by disclosing confidential information about Plaintiffs to other attorneys. That duty arises—if at all—only because Kassel is an attorney. Therefore, Plaintiffs' claim against Kassel is a claim relating to Kassel's actions and duties in the course of his profession as a practicing attorney. As such, Section 15-36-100 requires an expert affidavit.

Plaintiffs' claim that Section 15-36-100 does not apply because the claims arose before the statute became effective is also without merit. The statute plainly applies to all claims arising after July 1, 2005. A claim does not arise until a plaintiff has a right to sue. *Murphy v. Owens-Corning Fiberglass Corp.*, 356 S.C. 592, 597-98 (2003). At this point, Plaintiffs have suffered no damages and thus have no right to sue. Moreover, Plaintiffs allege they did not have notice of the claim until sometime after 2005. In order for a claim to arise, the plaintiff must have notice of it.

Plaintiffs also argue that they are exempt from the expert affidavit requirement of Section 15-36-100 because "it is common knowledge that a lawyer is not allowed to disclose prospective clients' confidential information to other lawyers." (Pl. Mot. 4.) A lawyer's duty to a potential client is governed by South Carolina's Rules of Professional Conduct. The application of the Rules of Professional Conduct plainly is not a matter of "common knowledge."

2. The Complaint Fails to State a Cause of Action for Breach of Confidentiality.

Plaintiffs argue that they have a valid cause of action against Kassel for breach of confidentiality. First, Plaintiffs contend that—despite the fact that the South Carolina Rules of Professional Conduct did not contain provisions concerning duties to prospective clients until 2005—"the duty was subsumed within the other Rules of Professional Conduct." (Pl. Mot. 10.) Plaintiffs cite absolutely no South Carolina legal authority for their argument. The Court

correctly ruled that “[n]o duties were owed to Plaintiffs as potential clients” at the time Kassel participated in the alleged conduct about which Plaintiffs complain.

Second, Plaintiffs argue that the Court erred in ruling that Plaintiffs cannot establish proximate cause due to a lack of foreseeability. According to Plaintiffs, it was foreseeable to Kassel that an attorney to whom he allegedly provided confidential information concerning Plaintiffs would use that information to proceed in a class action lawsuit as counsel for Plaintiffs without Plaintiffs’ knowledge or authorization. To the contrary, such conduct is the epitome of an unpredictable and unexpected consequence for which Kassel cannot, as a matter of law, be held liable. *See Mellen v. Lane*, 377 S.C. 261, 279 (Ct. App. 2009).

Plaintiffs also argue that they are not required to plead specific damages. Just like the Complaint, however, Plaintiffs’ Motion to Alter or Amend does not identify the damages Plaintiffs claim to have suffered as a result of Kassel’s alleged wrongful disclosure of Plaintiffs’ confidential information. Plaintiffs, for the first time, argue that a breach of confidentiality can be likened to an invasion of privacy and thus can include reputational as well as more tangible harm. Such a claim is not supported by any South Carolina law¹ and does not answer the question of damages relevant to Plaintiffs’ allegations. Plaintiffs cannot proceed with a claim against Kassel if they cannot identify the specific ways in which Kassel’s alleged conduct caused them damage. Accordingly, the Court correctly dismissed Plaintiffs’ causes of action as to Kassel.

Finally, Plaintiffs raise for the first time an allegation that Kassel shared Plaintiffs’ information with Mr. Robertson so that he would not have to risk using one of his own clients

¹ Plaintiffs cite the case *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 483, 514 S.E.2d 126, 133 n.14 (1999) as dicta to support their claim that a breach of confidentiality can be likened to an invasion of privacy. A close reading of the citation and surrounding discussion make it clear that the Supreme Court was actually discussing the differences between a breach of confidentiality and an invasion of privacy rather than the similarities.

and potentially reducing the proceeds that client would receive in the South Carolina class-action case. This allegation is contained nowhere in the Complaint or in any of the submissions made to the Court prior to Plaintiffs' Motion to Alter or Amend. This information is not properly before the Court and should not be considered. However, even if this allegation were properly before the Court, it does not resolve the failings of Plaintiffs' legal theories against Kassel.

3. Plaintiffs Lack Standing Because They Have Not Suffered an Injury-in-Fact.

While Plaintiffs, in their Motion to Alter or Amend, address their standing to sue the other defendants, Plaintiffs do not address the Court's finding that Plaintiffs lack standing to sue Kassel. The absence of an injury-in-fact and the resulting lack of standing are fatal to Plaintiffs' claims against Kassel. Plaintiffs cannot identify any actual injury they have suffered as a result of Kassel allegedly disclosing their confidential information to another lawyer. The Court was therefore correct in finding that Plaintiffs lack standing to sue Kassel.

4. Plaintiffs Have Not Filed a Motion to Amend the Complaint.

Plaintiffs request that the Court "include language in any Order that is issued expressly providing [Plaintiffs] leave to file an Amended Complaint." (Pl. Mot. 12.) Plaintiffs should not be granted leave to amend the complaint. First, in the two years since this matter was filed, Plaintiffs have never filed a motion to amend. Thus, Plaintiffs' attempt to seek permission to amend the complaint is not properly before the Court. Second, the dismissal of Plaintiffs' causes of action is based upon the facts alleged by Plaintiffs and the well-settled law of South Carolina. As one example, Plaintiffs have had ample opportunity to name their specific damages, yet more than two years after filing the Complaint, Plaintiffs are still unable to articulate with any specificity their alleged damages caused by Kassel. Plaintiffs cannot change the law or the facts of this case by amending the complaint and, as such, any amendment would be futile.

For the reasons set forth above, the Court's Order of November 5, 2013 was correct in all respects and Plaintiffs' motion to alter or amend should be denied.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

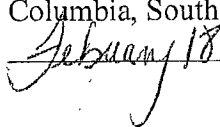
By: _____


Amy L. B. Hill

William H. Jordan
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211
(803) 929-1400

Attorneys for Defendant John D. Kassel

Columbia, South Carolina

 February 18, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

William E. DeLoache, III
and Allison H. DeLoache. Appellants,

vs.

William Dixon Robertson, III; W. Jefferson Leath, Jr.;
Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP;
Francis E. Grimball; MULLEN WYLIE, LLC formerly
MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen;
WILLIAM M. BOWEN, PA; and John D. Kassel Respondents.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellants, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

Catherine B. Kerney

Thomas A. Pendarvis (SC Bar # 64918)
Catherine B. Kerney (SC Bar # 81429)
500 Carteret Street, Suite A
Beaufort, SC 29902-5066
843.524.9500 Tel.
843.524.9501 Fax.
Thomas@PendarvisLaw.com
Carey@PendarvisLaw.com

Counsel for Appellants, William E. DeLoache, III
and Allison H. DeLoache

August 5, 2014

Beaufort, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Joseph M. Strickland, Circuit Court Judge

Lower Case No. 2011-CP-40-07432
Appellate Case No. 2014-000398

William E. DeLoache, III
and Allison H. DeLoache. Appellants,

vs.

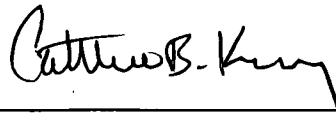
William Dixon Robertson, III; W. Jefferson Leath, Jr.;
Michael S. Seekings; LEATH, BOUCH & CRAWFORD, LLP;
Francis E. Grimball; MULLEN WYLIE, LLC formerly
MULLEN, WYLIE & SEEKINGS, LLC; William M. Bowen;
WILLIAM M. BOWEN, PA; and John D. Kassel Respondents.

Certificate of Counsel

Pursuant to Rule 210(g) of the South Carolina Appellate Court Rules, the undersigned, as counsel for Appellants, hereby certifies that, to the best of my knowledge and belief, the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 64918)

Catherine B. Kerney (SC Bar # 81429)

500 Carteret Street, Suite A

Beaufort, SC 29902-5066

843.524.9500 Tel.

843.524.9501 Fax.

Thomas@PendarvisLaw.com

Carey@PendarvisLaw.com

Counsel for Appellants, William E. DeLoache, III
and Allison H. DeLoache

August 5, 2014

Beaufort, South Carolina